

No. 84246-9

SUPREME COURT OF THE STATE OF WASHINGTON

Martin Mellish, *Petitioner,*

v.

Frog Mountain Pet Care, et al, *Respondents*
and Jefferson County, *Respondent.*

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FROG MOUNTAIN PET CARE'S ANSWER TO SUPPLEMENTAL
BRIEF OF PRO SE AMICUS CURIAE HAROLD T. HARTINGER

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
Attorneys for Respondents
Frog Mountain Pet Care,
Harold Elyea, Jane Elyea

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ORIGINAL

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I. INTRODUCTION

Amicus argues the exhaustion rule required Mr. Mellish to file for reconsideration. In order to do so he replaces the Land Use Petition Act's jurisprudence with general administrative law principals. His exhaustion argument fails to take into account that once a jurisdiction issues a final determination, no further exhaustion is required. Here, Jefferson County issued a permit – a final determination. But Amicus posits that the permit could not be a final determination because it was issued before a motion for reconsideration was filed. This logic is backward. And more importantly, it is not supported by the cases interpreting LUPA.

Amicus' arguments regarding House Bill 2740 fail for similar reasons. LUPA's timeline is not a statute of limitation. It is substantive law providing that a land use decision is unassailable twenty one days after it is issued. After this time has passed the superior court loses jurisdiction. The land use decision can then be relied upon by a landowner. This substantive regulation is just the type of regulation protected by the vested rights doctrine.

Further, the statute cannot retroactively confer jurisdiction on the superior court. On the date that the Land Use Petition was filed, the superior court lacked jurisdiction to hear the case. Several years later, a

legislative enactment cannot retroactively confer jurisdiction on the court and effectively revoke a permit.

II. ARGUMENT

A. UNDER THE JEFFERSON COUNTY CODE, A MOTION FOR RECONSIDERATION IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

Amicus cites to *Ward v. Board of Skagit County Com'rs*¹ for the requirement that one must exhaust administrative remedies in order to bring a LUPA appeal. But he misapplies and misinterprets the holding. Exhaustion is required to obtain a final determination that is appealable under LUPA. Here, there was a final determination. No further exhaustion is required. The *Ward* court stated that "...exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as a "land use decision."²

As the Court of Appeals determined, the hearing examiner's decision and permit issued by the County to Frog Mountain were a final determination that qualified as a land use decision. Because a land use decision had issued, no further administrative action was required to perfect an appeal. The court of appeals was correct in their analysis. "By uniformly applying LUPA's plain text...we conclude that Mellish's reconsideration motion did not render the ... decision non-final while that

¹ 86 Wash.App. 266, 275, 936 P.2d 42 (1997).

² *Id.*

motion was pending with the hearings examiner.”³ In coming to its conclusion the court analyzed the nature of the decision at issue under LUPA, the Jefferson County Code, and the general procedural concept that a motion for reconsideration is a reconsideration of a final decision.⁴

Under LUPA the decision was final because it “conclude[d] the action by resolving the [Frog Mountain’s] entitlement to the requested relief.”⁵ Under the Jefferson County Code, a motion for reconsideration is not mandatory, it is permissive.⁶

In enacting HB 2740 the legislature recognized that motions for reconsideration of land use decisions can be permissive stating “[w]here a local jurisdiction *allows or requires* a motion for reconsideration...” Here, the local jurisdiction *allowed* for a motion for reconsideration. A motion for reconsideration was not required to exhaust administrative remedies.⁷

³ *Mellish v. Frog Mountain Pet Care*, 154 Wash.App. 395, 403, 225 P.3d 439, 443 (2010).

⁴ *Id.*

⁵ *Id.* quoting *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wash.2d 440, 452, 54 P.3d 1194 (2002).

⁶ JCC 18.40.310 Reconsideration. “A party of record at a public hearing *may seek reconsideration...*” (Emphasis added).

⁷ (See also Brief of Appellants at 11-15; Reply of Appellants at 2-5; Answer to Amicus at 3-4).

B. THE MOTION FOR RECONSIDERATION DID NOT TOLL THE TIME TO APPEAL.

As previously briefed, the cases cited by amicus⁸ for the proposition that, as a matter of law, a motion for reconsideration tolls the time to appeal, are not on point.⁹ This is because those cases all deal with superior court appeals of administrative decisions governed by other statutory schemes which differ from LUPA in one significant respect – the 21 day limitations for filing and service under LUPA are jurisdictional prerequisites.¹⁰

This is in contrast to a statutory limitations period which can be tolled. Speaking on this issue Division II recently stated:

The LUPA deadline controls access to the trial court's jurisdiction over LUPA appeals, unlike the 14 day administrative statute of limitations previously discussed with respect to standing, and, thus, cannot be equitably tolled..... RCW 36.70C.040(2) clearly states that “[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.” Although the statute does not use the word “jurisdiction,” the legislature's use of the phrases “is barred” and “may not grant review” demonstrate the legislature's intent to prevent a court from considering untimely filings.¹¹

⁸ Supplemental Brief of Pro Se Amicus Curiae Harold T. Hartinger at 7.

⁹ See Answer to Petition for Review at 4-6; Frog Mountain Pet Care's Supplemental Brief at 13-17.

¹⁰ *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wash.App. 31, 37, 184 P.3d 1278, 1280 (2008).

¹¹ *Nickum v. City of Bainbridge Island*, 153 Wash.App. 366, 223 P.3d 1172 (2009).

The fact that the limitations period is jurisdictional is important because it emphasizes the point made in previous briefing¹² that HB 2740 cannot be applied here because the regulation at issue affects a vested right.

C. HB 2740 CANNOT BE APPLIED RETROACTIVELY.

A review of LUPA case law regarding the time to file reveals at least two points. First, the deadline is absolute. Second, the deadline is absolute to provide certainty to owners.¹³ This certainty is not procedural certainty, but substantive certainty. An owner can be certain 21 days after a permit is issued it can be relied upon.

This case law demonstrates the flaw in Amicus' reasoning. Amicus states, without citation to authority, that "[a]ppellate court procedures that govern LUPA appeals are not 'real estate development rights' subject to the land use doctrine."¹⁴ But the time to file a land use appeal of a land use decision is not an "appellate court procedure." It is a

¹² See Answer to Memorandum of Amicus Curiae Harold T. Hartinger in Support of Petition for Review at 5-6; Supplemental Answer of Respondent Frog Mountain Pet Care Re: House Bill 2740, Ch 59, Laws of 2010 at 2-6; Frog Mountain Pet Care's Supplemental Brief at 10-12.

¹³ *Chelan County v. Nykreim*, 146 Wash.2d 904, 932-33, 52 P.3d 1 (2002); *Spice v. Pierce County*, 149 Wash.App. 461, 467, 204 P.3d 254 (2009); *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wash.App. 31, 37-38, 184 P.3d 1278 (2008), *review denied*, 165 Wash.2d 1013, 199 P.3d 410 (2009).

¹⁴ Supplemental Brief of Pro Se Amicus Curiae Harold T. Hartinger at 7.

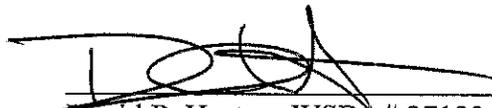
point in time where a landowner can rely on a jurisdiction's land use decision because a superior court no longer has jurisdiction.

HB 2470 cannot be applied to a land use decision issued years before its enactment. In August, 2007 when the land use appeal was filed the superior court lacked jurisdiction to modify or reverse the land use decision. HB 2470 cannot, retroactively, confer jurisdiction to modify or reverse that same land use decision.

III. CONCLUSION.

Amicus argues that the legislature, in enacting HB 2470, made clear that a timely motion for reconsideration tolls the period for filing a LUPA appeal. The inference from this enactment, though, is that the legislature recognized that the appellate court was correct – LUPA as it existed commanded the result they reached. HB 2470 does nothing to change this result because it affects a vested right and cannot be applied retroactively.

Respectfully submitted this 8th day of November, 2010.



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 Respondents Frog Mountain Pet Care
Harold Elyea and Jane Elyea