

FILED
MAY 14 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 84246-9

SUPREME COURT OF THE STATE OF WASHINGTON

Martin Mellish, *Petitioner*,

v.

Frog Mountain Pet Care, Harold Elyea, Jane Elyea, *Respondents*
and Jefferson County, *Respondent*.

ANSWER TO MEMORANDUM OF AMICUS CURIAE HAROLD
HARTINGER IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Amicus only briefly addresses the issue currently before this Court – whether it should accept review. Amicus concludes that the issues presented implicate a substantial public interest. But he does not explain in any detail why. He then argues two points. First, he argues that the legislative fix enacted to prevent this case from reoccurring should be applied retroactively. Second he argues the merits of the appeal. He posits that under LUPA an appellant must exhaust his administrative remedies. He then argues that Mr. Mellish was required to file his motion for reconsideration, and the motion should therefore stay the time to appeal indefinitely.¹

Because neither of these arguments has merit, along with the arguments made in respondents' Answer, this court should not accept review.

¹ Motion for Leave to File Memorandum in Support of Petition for Review at 2.

II. Argument

A. BECAUSE FROG MOUNTAIN'S PERMIT VESTED UPON APPLICATION, CHAPTER 59, LAWS OF 2010, CANNOT BE APPLIED RETROSPECTIVELY.

Generally a newly enacted statute operates prospectively.² But when a statute or rule not explicitly made retroactive is remedial in nature, it can operate retrospectively.³ A statute is only remedial if it relates to practice, procedure or remedies and does not affect a substantive or vested right.⁴

Amicus argues that “Chapter 59, Laws of 2010, addresses a procedural matter, and it does not affect substantive or vested rights.”⁵

Amicus is wrong. Frog Mountain's permit application vested at the time it was filed with the County. In Washington, under the vested rights doctrine, a land use application generally will be considered only under the land use statutes in effect at the time of the application's

² *State v. Ladiges*, 63 Wash.2d 230, 386 P.2d 416 (1963)

³ *Yellam v. Woerner*, 77 Wash.2d 604, 607-608, 464 P.2d 947, 949 (1970).

⁴ *Id*, *Tellier v. Edwards*, 56 Wash.2d 652, 354 P.2d 925 (1960).

⁵ Memorandum of Amicus Curiae Harold T. Hartinger In Support of Petition for Review at 4.

submission.⁶ The statement that vested rights are not involved is not correct.

Because the court of appeals' decision was correct, the legislature enacted the statute at issue to prevent the issue from reoccurring. But Frog Mountain's permit vested upon filing of its application. The new land use statute cannot apply to this case.

B. FILING A MOTION FOR RECONSIDERATION IS NOT A REQUIREMENT OF EXHAUSTION

Amicus argues that Mellish was required to file a motion for reconsideration to exhaust his administrative remedies. As such, he argues, Mellish's compliance with that requirement cannot act as a bar to his appeal. This is not correct.

Under Jefferson County's code reconsideration is not a predicate to an appeal. Like every other reconsideration rule, ordinance and statute of which Frog Mountain is aware, reconsideration is permissive.⁷ An appellant is not required to first file a motion for reconsideration.

⁶*Friends of the Law v. King County*, 123 Wash.2d 518, 522, 869 P.2d 1056 (1994); *Vashon Island Comm. for Self-Government v. Washington State Boundary Review Bd.*, 127 Wash.2d 759, 767-68, 903 P.2d 953 (1995); *Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 275, 943 P.2d 1378, 1381 (1997).

⁷ See Reply Brief of Appellants.

Jefferson County's code provides that the hearing examiner's decision was directly appealable to the superior court under RCW 36.70C.⁸

This was in the notice provided the parties by Jefferson County when the permit issued. It said:⁹

Appeals:

Pursuant to RCW 36.70C, the applicant or any aggrieved party may appeal this final decision to Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision. For more information related to judicial appeals see JCC 18.40.340.

The argument that Mellish had to file a motion for reconsideration is not supported by the record, or the Jefferson County Code.

C. FROG MOUNTAIN DID NOT WAIVE OR ABANDON PROCEDURAL ISSUES.

Amicus incorrectly states that Frog Mountain did not preserve procedural questions for review. The two abandoned questions relate to Mr. Mellish's failure to give notice of his motion for reconsideration to Frog Mountain, and the hearing examiner's delay (exceeding the time permitted by the ordinance) in deciding the motion.

Neither issue was waived as they were raised in both the trial court,¹⁰ and the court of appeals.¹¹

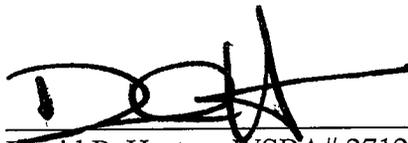
⁸ JCC 18.40.320.

⁹ CP 349.

III. Conclusion

The petition for review should not be granted.

Respectfully submitted this 13th day of May, 2010.



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¹⁰ CP 264, 268.

¹¹ Brief of Appellants at 8, 15-17.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on May 13, 2010, I sent via mail through the U.S. Postal Service, a copy of the Answer To Memorandum Of Amicus Curiae Harold Hartinger In Support Of Petition For Review.

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