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STATE OF WASHINGTON

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No. 84246-9
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SUPREME COURT OF THE STATE OF WASHINGTON

Martin Mellish, *Petitioner*,

v.

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

FILED
MAR 29 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Jefferson County issued a permit to Frog Mountain Pet Care. The permit's face indicated it was a "final decision." The Land Use Petition Act (RCW 36.70C) ("LUPA") barred any appeal filed more than 21 days from the permit's issuance. Mr. Mellish, after filing a motion for reconsideration, appealed the permit more than 21 days later.

Mr. Mellish tries to frame the issue, and the appellate court's decision, as a broad statement regarding a motion for reconsideration's effect on an appeal's timeliness. But the appellate court's decision merely applied the operative statute. That statute, RCW 36.70C.020 defines when a use decision is final, and bars an appeal more than 21 days after that date.

The issues in this case resulted from Jefferson County's poorly drafted ordinances, which led to confusion. But these issues' resolution have no future import because the legislature's amendment to RCW 36.70C.020 removes any confusion. This Court should not accept review.

II. FACTS

On June 20, 2007 the Jefferson County Department of Community Development issued Frog Mountain Pet Care¹ a Conditional Use Permit.²

The permit says:

DATE ISSUED: June 20, 2007.

The permit also informs that “[p]ursuant to RCW 36.70C, the applicant or any aggrieved party may appeal *this final decision...*” within 21 days.³ Over fifty days later Mr. Mellish filed his Land Use Petition.

The first issue the appellate court resolved was whether the permit issued was a “final determination” under LUPA. Mr. Mellish and the County argued that the permit was not final. But the appellate court determined that the decision issued on June 20, 2007 was a “final determination” under LUPA.⁴

This issue only arose because Jefferson County’s ordinance was ambiguous, contradictory, and confusing. The ordinance, JCC 18.40.310,⁵ provided that only a “final decision” was subject to reconsideration. But it

¹ The Elyeas own the facility.

² CP 347.

³ Id (Emphasis Added).

⁴ *Mellish v. Frog Mountain Pet Care*, ____ Wash. App. ____ 225 P. 3d 435 (2010).

⁵ See Appendix.

goes on to state that if reconsideration is denied “the previous action shall become final....”⁶ The ordinance provided that a final decision later became final. The ordinance is poorly written and makes no sense. Further confusing Jefferson County’s land use appeal scheme, another ordinance provided that an appeal under LUPA was required within 21 days.⁷ The appellate court determined correctly that Frog Mountain’s permit vested when it was issued.

Next, the court determined that based on: LUPA; the importance of finality embodied in its text; and the Supreme Court’s interpretation of its limitation period; that Mr. Mellish’s reconsideration motion did not toll the statutory limitations period.

III. ARGUMENT

A. THE LEGISLATURE HAS RESOLVED THE ISSUE.

This issue no longer implicates a substantial public interest. The various nightmare scenarios described in Mr. Mellish’s Petition will not occur.⁸ The legislature amended RCW 36.70C.020⁹ to provide that LUPA’s limitations period is tolled upon filing a timely motion for reconsideration until a decision is made on the motion for

⁶ JCC 18.40.310. (See Appendix).

⁷ JCC 18.40.330. (See Appendix).

⁸ There are a litany of other reasons why Mr. Mellish’s scenarios are not cause for concern, but they are rendered moot by the legislature’s actions.

⁹ Laws of 2010, Chapter 59.

reconsideration.¹⁰ If this statute had been effective in June, 2007 Frog Mountain would have had no basis to bring its motion to dismiss. The legislative clarification renders *Mellish* unimportant.

B. THE COURT OF APPEALS DECISION DOES NOT
CONFLICT WITH *SKINNER V. CIVIL SERVICE
COMMISSION OF MEDINA*.

The *Mellish* decision and *Skinner v. Civil Service Commission of the City of Medina*¹¹ are not in conflict. They are different on both the facts and the law. They address two very different statutory appeal processes, with different administrative rules.

Mellish is governed by LUPA. And, as Division Two noted, LUPA has “unambiguous review provisions” which did not, at the time, provide for tolling, or “render[] an otherwise final decision non-final.”¹²

Further, Frog Mountain was issued a permit by Jefferson County. The County’s Code provided that “[a]ll ...permit decisions...shall be final unless appealed pursuant to [LUPA].”¹³ And the permit issued by the County expressly stated any appeal must be taken within 21 days under LUPA.

¹⁰ Id.

¹¹ 146 Wash.App. 171, 188 P.3d 550 (2008).

¹² *Mellish*.

¹³ See JCC 18.40.330; JCC Article V.

Contrast these facts to *Skinner*. In *Skinner* the operative civil service rules provided that any appeal to the superior court had to comply with RCW Chapter 41.12 *only in the absence of a motion for reconsideration*.¹⁴ And the Commission's order in *Skinner* expressly provided that the appeal deadline "applied only *absent* a motion for reconsideration."¹⁵ Here the Jefferson County Code had no such provision (LUPA, of course, had no such provision). And the permit did not state the appeal deadline applied only absent a motion for reconsideration. It stated the contrary. Further, timely determination of appeals under RCW 41.12 does not have the same underlying policy considerations present as is the case with LUPA. As noted by the appellate court, this Court has repeatedly expressed this policy.

The end result in *Skinner* and *Mellish* are different. But their outcomes depend not on different judicial philosophies or, one court's misapplication of relevant case and statutory law. The different outcomes result from different statutory and regulatory schemes, as well as the different nature of the decisions appealed.

So, regardless of this Court's ultimate decision in *Skinner*, the two cases can co-exist without conflict.

¹⁴ *Skinner* at 551.

¹⁵ *Id* (emphasis in original).

IV. CONCLUSION

The issues raised by this petition have been resolved by the legislature. Any issue of substantial public interest has been addressed by the amendment to RCW 36.70C.020. Division Two's decision in this case does not conflict with Division One's decision in *Skinner* because each court was dealing with a different statutory, regulatory and policy scheme. Further, the decisions were fundamentally different. A permit brings with it a right to use the applicants land in a certain manner. It vests upon issuance. The order in *Skinner*, while carrying important implications for the parties, is not of the same character as a land use permit.

This Court should not grant review.

Respectfully submitted this 26th day of March, 2010.



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JEFFERSON COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
UNIFIED DEVELOPMENT CODE
TYPE III LAND USE PERMIT

APPLICANT: HAROLD S ELYEA
870 MARTIN RD
PORT TOWNSEND WA 983689379

DATE ISSUED: June 20, 2007
DATE EXPIRES: June 20, 2012

MLA NUMBER: MLA06-00397

PROJECT PLANNER: David Wayne Johnson

PROJECT DESCRIPTION:

A Conditional Use Permit to expand a legal non-conforming dog and cat boarding facility in a Rural Residential zone.
A Minor Variance reducing the required property line setback from 100 feet to 70 feet for a legal non-conforming structure.

PROJECT LOCATION:

Parcel Number 001 291 015, in Section 29, Township 30, Range 01 West, MW, located at 870 Martin Rd, Port Townsend Wa 98368

CONDITIONS:

- 1.)
 1. No building permit shall be issued for any use involved in an application for approval for a conditional use permit until the conditional use permit is approved and becomes effective.
 2. A conditional use permit automatically expires and becomes void if the applicant fails to file for a building permit or other necessary development permit within three (3) years of the effective date (the date of the decision granting the permit) of the permit unless the permit approval provides for a greater period of time.
 3. Extensions to the duration of the original permit approval are prohibited.
 4. The Department of Community Development shall not be responsible for notifying the applicant of an impending expiration.
 5. The county may modify an approved conditional use permit as follows: the county may delete, modify or impose additional conditions upon finding that the use for which the approval was granted has been intensified, changed or modified by the property owner or by person(s) who control the property without approval so as to significantly impact surrounding land uses. A modification will be processed as a Type II land use decision pursuant to JCC 18.40.270 of this Code.
 6. A conditional use permit granted under this JCC 18.40 shall continue to be valid upon a change of ownership of the site, business, service, use or structure that was the subject of the permit application. No other use is allowed without approval of an additional conditional use permit.
 7. The county may suspend or revoke an approved conditional use permit pursuant to JCC 18.50 of this Code only upon finding that:
 - 1) The use for which the approval was granted has been abandoned for a period of at least one (1) year;
 - 2) Approval of the permit was obtained by misrepresentation of material fact; or
 - 3) The permit is being exercised contrary to the terms of approval.
 8. In appropriate circumstances, the Administrator may require a reasonable performance or maintenance assurance device, in a form acceptable to the county prosecutor, to assure compliance with the provisions of this Code and the conditional use permit as approved.
 9. Should a legal existing nonconforming use of a property or structure be discontinued for more than two (2) years, the use of the property and structure shall be deemed abandoned and shall conform to a use permitted in

APPENDIX A

the land use classification in which it is located, unless the property owner demonstrates through property maintenance a bona fide intention to sell or lease the property. If the property is adequately maintained, the property shall not be deemed abandoned and be allowed to remain vacant for up to three (3) years. The parcel owner shall maintain records verifying the ongoing use of this parcel in order to maintain status as a legal existing nonconforming use.

10. Animals being kept on the premises shall be allowed outside only between the hours of 7:00 am and 10:00 pm, except when accompanied by an attendant.

11. The proposal shall comply with noise standards outlined by WAC 173-60-040, which were adopted by Jefferson County by Resolution 67-85.

12. Once the expansion is complete, the Applicant/Landowner shall retain and pay for a professional competent in the field to provide a noise level analysis to the Department of Community Development. A representative from the Department of Community Development will contact this professional and arrange for the noise level analysis to take place on a day of the representatives' choosing. This noise level analysis is intended to verify compliance with WAC 173-60-040 which relates to maximum permissible noise levels. If the noise level analysis shows that noise levels are in compliance with the Code, then no further noise level analysis are required. If it is shown that the use is not complying with the permissible noise levels, then further mitigation measures are going to have to be undertaken by the applicant. These mitigation measures will have to be agreed upon by the Department of Community Development to ensure future noise levels are at permissible levels. Another noise level analysis would have to be conducted after the mitigation measures are undertaken to ensure that permissible noise levels are not being violated. If there are any issues relating to appropriate mitigation measures, then the Examiner retains jurisdiction to make decisions on that issue.

13. No use shall be made of equipment or material which produces unreasonable vibration, noise, dust, smoke, odor, or electrical interference to the detriment of adjoining property.

14. Signs shall comply with the provisions set forth in JCC 18.30.150 of the UDC.

15. Lighting shall be required to conform to JCC 18.30.140 standards. Lighting shall not exceed thirty (30) feet in height from finished grade. In addition, lighting shall not be directed towards adjacent properties and shall be shielded in a manner to mitigate glare.

16. The applicant/landowner is limited to housing a maximum of forty-five (45) dogs at any given time.

FINDINGS:

- 1.) The Administrator finds that this application complies with applicable provisions of the Unified Development Code, all other applicable ordinances and regulations, and is consistent with the Jefferson County Comprehensive Plan and Land Use map.
- 2.) See Staff Report dated May 4, 2007 and Hearing Examiner Decision dated received June 20, 2007 for Findings.

NOTICE: This permit does not excuse the proponent from complying with other local, state, and federal ordinances, regulations, or statutes applicable to the proposed development.

Development pursuant to this permit shall be undertaken subject to the applicable development and performance standards of the Jefferson County Unified Development Code.

If during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate area shall be halted, and the Administrator shall be notified at once.

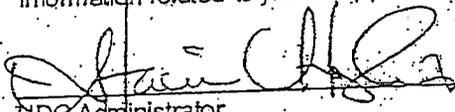
The Federal Endangered Species Act rules to protect threatened Chinook and Summer-run Chum salmon became effective on January 8, 2001. Bull trout have been listed as threatened since early 2000. Under the ESA, any person may bring lawsuit against any individual or agency that "takes" listed species (defined as causing harm, harassing, or damaging habitat for the listed species). In addition, the National Marine Fisheries Service can levy penalties. All areas in Jefferson County are included as "critical habitat" for a listed species. Development of property along any marine shoreline, freshwater shoreline, or floodplains could harm habitat if protective measures are not taken. To minimize the potential to damage habitat, all property owners developing adjacent to marine shoreline, freshwater shoreline, or floodplains are advised to do the following:

- Set back buildings, utilities and roads as far as possible from surface waters (streams, rivers, lakes, marine waters), or at least 150 feet from the edge of the water
- All development activities should avoid unstable slopes, wetlands, and forested areas near surface waters
- Remove minimal vegetation for site development, especially large trees
- Allow trees that have fallen into surface waters to remain there
- Infiltrate stormwater from buildings and driveways onsite through drywells rather than discharging directly into surface waters or roadside ditches

Any individual, group, or agency can bring suit for a listed species "taking", even if you are in compliance with Jefferson County development codes. The risk of a lawsuit against you can be reduced by consulting with a professional fisheries habitat biologist, and following the recommendations for site development provided by the biologist. For more information, contact the National Marine Fisheries Service in Seattle at (206) 526-6613, or the U.S. Fish and Wildlife Service at (503) 231-6121.

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.

 6/20/2007
UDC Administrator

section.

- (2) Nonconforming structures are those that are out of compliance with the development standards set forth through this code or other applicable federal, state or local regulation.
- (a) Any legally established nonconforming structure is permitted to remain in the form and location in which it existed on the effective date of the nonconformance.
- (b) Nonconforming structures may be structurally altered or enlarged only if all applicable environmental and development standards are met.
- (c) Repairs to existing nonconforming structures including ordinary maintenance or replacement of walls, fixtures, or plumbing shall be permissible so long as the exterior dimensions of the structure are not increased.
- (d) Nonconforming structures under the jurisdiction of the Shoreline Master Program shall be subject to the nonconforming provisions stipulated through WAC 173-27-080.
- (e) A legal existing nonconforming structure damaged or destroyed by fire, earthquake, explosion, wind, flood, or other calamity may be completely restored or reconstructed. A structure shall be considered destroyed for purposes of this section if the restoration costs exceed 75 percent of the assessed value of record when the damage occurred. A structure can be completely restored or reconstructed if all the following criteria are met:
- (i) The restoration and reconstruction shall not serve to extend or increase the nonconformance of the original structure or use with existing regulations; and
 - (ii) The reconstruction or restoration shall, to the extent reasonably possible, retain the same general architectural style as the original destroyed structure, or an architectural style that more closely reflects the character of the surrounding area; and
 - (iii) Permits shall be applied for within one year of damage, an extension for permit application may be requested from the administrator. Restoration or reconstruction must be substantially completed within two years of permit issuance; and
 - (iv) Any modifications shall comply with all current regulations and codes (other than use restrictions) including, but not limited to, lot coverage, yard, height, open space, density provisions, or parking requirements unless waived by the appropriate county official through the granting of a variance.
- (f) A legal existing nonconforming structure can be expanded up to 10 percent subject to a Type I permit approval process.
- (g) A legal existing nonconforming structure may be expanded beyond 10 percent through the approval of a Type II C(d) discretionary conditional use permit. The expansion shall not increase the structure by more than 100 percent of total square footage calculated from the effective date of the nonconformance. Proposals for expanding structures which house or contain a nonconforming use are subject to subsection (3) of this section.

18.20.260 Nonconforming uses and structures.

A legal nonconforming use or structure is one that conformed to all applicable codes in effect on the date of its creation, but no longer complies due to subsequent changes in the code. Nonconformity is different than and is not to be confused with illegality (see the definitions of "nonconforming," "nonconforming use," and "illegal use" in Chapter 18.10 JCC). Legal nonconforming uses and structures are commonly referred to as "grandfathered."

- (1) Nonconforming uses of land are uses which currently exist and were lawfully established prior to the enactment of this code. Legally established uses may continue as long as they remain otherwise lawful, provided:
 - (a) The nonconforming use of land is not discontinued or abandoned for a period more than two years. A property owner may be allowed three years if they demonstrate a bona fide intention to sell or lease the property. For purposes of calculating this time period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:
 - (i) On the date when the land was physically vacated;
 - (ii) On the date the use ceases to be actively involved in the sale of merchandise or the provision of services; or
 - (iii) On the date of termination of any lease or contract under which the nonconforming use has occupied the land.
 - (b) A legal existing nonconforming use can be expanded up to 10 percent subject to a Type I permit approval process.
 - (c) A nonconforming use may be expanded beyond 10 percent through the approval of a Type II C(d) discretionary conditional use permit process. In addition to meeting the criteria set forth through the conditional use permit process, the department shall determine the expansion proposal has met the following:
 - (i) The proposed area for expansion is contiguous to the nonconforming use;
 - (ii) The area for expansion of the use complies with all applicable bulk and dimensional standards, performance provisions, and environmental and shoreline (WAC 173-27-080) regulations;
 - (iii) The area for expansion shall not increase the land area devoted to the nonconforming use by more than 100 percent of that use at the effective date of the nonconformance;
 - (iv) The expansion shall not be granted if it would result in a significant increase in the intensity of the use of the nonconformity (e.g., hours of operation, traffic).
 - (d) A nonconforming use of land may be changed to another nonconforming use; provided, that the proposed use is equally or more appropriate to the district than the existing nonconforming use. Such change shall not be more intensive or have greater impacts than the existing use. The proposed change shall be required to undergo a Type III conditional use approval process. If the proposal encompasses structural or use expansion, refer to subsections (2) and (3) of this

- (3) Nonconforming uses of structures apply to structures, whether conforming or nonconforming, that house or contain nonconforming uses;
- (a) A structure which houses or contains a nonconforming use cannot be expanded or enlarged if the structure (in its enlarged or expanded state) does not meet all applicable performance and use standards, or environmentally sensitive area requirements for the land use district in which it is located.
 - (b) A structures housing an existing legal nonconforming uses can be expanded up to 10 percent or 200 square feet, whichever is greater, subject to a Type I permit approval process.
 - (c) Substantial expansions which exceed either 10 percent or 200 square feet shall be subject to a Type III conditional use permit approval process. The expansion cannot increase the structural portion of the nonconforming use by more than 3,999 square feet. The expansion is calculated from the effective date of the nonconformance.
 - (d) A legal existing structure containing a nonconforming use may be repaired or maintained subject to all applicable building and health codes.
 - (e) A nonconforming use contained within a nonconforming structure which is damaged or destroyed by fire, earthquake, explosion, wind, flood, or other calamity may be reestablished pursuant to subsection (2)(e) of this section.
 - (f) Nonconforming uses contained or housed in a structure cease to retain their legal nonconforming status if the use is discontinued or abandoned for any reason for a period more than two years. A property owner may be allowed three years if they demonstrate a bona fide intention to sell or lease the property. For purposes of calculating this time period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:
 - (i) On the date when the use was physically vacated;
 - (ii) On the date the use or activity ceases to be actively involved in the sale of merchandise or the provision of services; or
 - (iii) On the date of termination of any lease or contract under which the nonconforming use has occupied the structure.
- (4) A nonconforming use of a structure may be changed to another nonconforming use; provided, that the proposed use is equally or more appropriate to the district than the existing nonconforming use. Such change shall not be more intensive or have greater impacts than the existing use. The proposed change shall be required to undergo a Type III conditional use permit approval process. [Ord. 8-06 § 1]

18.40.310 Reconsideration.

A party of record at a public hearing may seek reconsideration only of a final decision by filing a written request for reconsideration with the hearing examiner within five business days of the date of the final written decision. The request shall comply with JCC 18.40.330(5)(b). The hearing examiner shall consider the request without public comment or argument by the party filing the request, and shall issue a decision within 10 working days of the request. If the request is denied, the previous action shall become final. If the request is granted, the hearing examiner may immediately revise and reissue his/her decision or may call for argument in accordance with the procedures for closed record appeals. Reconsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision. [Ord. 8-06 § 1]

18.40.320 Final decision.

- (1) Finality. All administrative interpretations made pursuant to Article VI of this chapter and Type II and III project permit decisions under this code shall be final unless appealed pursuant to Article V of this chapter.
- (2) Finding and Conclusions. Each final decision of the hearing examiner and, in the case of certain Type V decisions, as more fully set forth in Chapter 18.45 JCC, the board of county commissioners shall be in writing and shall include findings and conclusions based on the record.
- (3) Notice of Final Decision.
 - (a) Except for those permits exempted under JCC 18.40.080, upon issuance of the final decision, the administrator shall provide a notice of decision that includes a statement of all determinations made under SEPA and the procedures for administrative appeal, if any, of the permit decision. The notice of decision may be a copy of the report or decision on the project permit application. It shall also state that affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation fully set forth in RCW 36.70B.130.
 - (b) A copy of the notice of decision shall be mailed or hand delivered to the applicant, any person who, prior to the rendering of the decision, requested notice of the decision, and to all persons who submitted substantive written comments on the application. The notice of decision shall be posted and published as set forth in JCC 18.40.210(1) and (2), and shall be provided to the Jefferson County assessor.
- (4) Timing of Notice of Final Decision. The final decision on a development proposal shall be made within 120 calendar days from the date of the determination of completeness unless:
 - (a) Certain days are excluded from the time calculation pursuant to subsection (5) of this section;
 - (b) The application involves a shoreline permit application for limited utility extensions (RCW 90.58.140(13)(b)) or construction of a bulkhead or other measures to protect a single-family residence and its appurtenant structures from shoreline erosion. In those cases, the decision to grant or deny the permit shall be issued within 21 calendar days of the last day of the comment period specified in JCC 18.40.220(2);
 - (c) The application involves a preliminary long plat application under Article IV of Chapter 18.35 JCC. In such cases, the application shall be approved, disapproved, or returned to the applicant for modification or correction within 90 days from the date of the determination of completeness; or
 - (d) The application involves a final short plat application under Article III of Chapter 18.35 JCC, or a final long plat application under Article IV of Chapter 18.35 JCC. In such cases, the application shall be approved, disapproved or returned to the applicant within 30 days from the date of the determination of completeness.
- (5) Calculation of Time Periods for Issuance of Notice of Final Decision. In determining the number of calendar days that have elapsed since the determination

of completeness, the following periods shall be excluded:

(a) Any period during which the applicant has been requested by the county to correct plans, perform studies, or provide additional information. The period shall be calculated as set forth in JCC 18.40.110(6)(b).

(b) If substantial project revisions are made or requested by an applicant, the 120 calendar days will be calculated from the time the county determines the revised application is complete and issues a new determination of completeness.

(c) All time required for the preparation of an environmental impact statement (EIS) following a determination of significance (DS) pursuant to Chapter 43.21C RCW.

(d) Any period for open record appeals of project permits under JCC 18.40.330; provided, however, that the time period for the hearing and decision shall not exceed a total of 90 calendar days.

(e) Any extension of time mutually agreed upon by the county and the applicant.

(f) Any time required for the preparation of an administrator's code interpretation pursuant to Article VI of this chapter.

(6) The time limits established in this chapter do not apply if a project permit application:

(a) Requires an amendment of the Jefferson County Comprehensive Plan or this Unified Development Code; or

(b) Requires approval of the siting of an essential public facility as provided in RCW 36.70A.200.

(7) Notice to Applicant. If the county is unable to issue its final decision on a project permit application within the time limits provided for in this chapter, it shall provide written notice of this fact to the project applicant. The notice shall include a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of decision.

(8) Effective Date. The final decision of the administrator, hearing examiner, or board of county commissioners shall be effective on the date stated in the decision, motion, resolution or ordinance; provided, however, that the appeal periods shall be calculated from the date of the decision, as further provided in JCC 18.40.330 and 18.40.340. [Ord. 8-06 § 1]

18.40.330 Administrative appeals.

In the absence of a specific right of appeal authorized under this UDC, there shall be no right to administrative appeals.

(1) Type I Permits. Decisions of the Administrator on Type I permits and decisions regarding the appropriate permit process to be used for discretionary conditional use permit applications (i.e., "C(d)" uses listed in Table 3-1 in JCC 18.15.040) under JCC 18.40.520, are not appealable to the hearing examiner. However, administrative code interpretations may be appealed as set forth in Article VI of this chapter.

(2) Type II Permits.

(a) The administrator's final decision on a Type II permit application may be appealed by a party of record to the hearing examiner for an open record appeal hearing as further set forth in JCC 18.40.280. The responsible official's SEPA determination of nonsignificance (DNS) or mitigated determination of nonsignificance (MDNS) may also be appealed by a party of record to the hearing examiner for an open record appeal hearing. Administrative appeals of a DS or draft or final EIS are not allowed.

(b) All appeals of Type II permit decisions must be in writing, conform with the procedures for appeal set forth in subsection (5) of this section, and be filed within 14 calendar days after the notice of decision is issued. Appeals of environmental determinations under SEPA, except for a determination of significance (DS), shall be consolidated with any open record hearing on the project permit. (See RCW 36.70B.110(6)(d)).

(3) Type III Permits.

(a) The responsible official's DNS or MDNS may be appealed to the hearing examiner by the applicant or anyone commenting on the environmental impacts of the proposal (as further set forth in JCC 18.40.780). The appeal must be in writing, in conformance with subsection (5) of this section, and be filed within 14 calendar days after the threshold determination is issued as set forth in subsection (4) of this section. Appeals of environmental determinations under SEPA shall be consolidated with any open record hearing on the project permit. (See RCW 36.70B.110(6)(d)). Administrative appeals of a DS or draft or final EIS are not allowed.

(4) Calculation of Appeal Periods. The appeal periods shall be calculated as of the date the notice of decision is published or, for appeals involving a SEPA determination, from the date the decision is issued pursuant to WAC 197-11-340(2)(d).

(5) Procedure for Appeals.

(a) A notice of appeal shall be delivered to the administrator by mail or by personal delivery, and must be received by 4:00 p.m. on the last business day of the appeal period, with the required appeal fee pursuant to the Jefferson County fee ordinance.

(b) The notice of appeal shall contain a concise statement identifying:

(i) The decision being appealed and the identification of the application which is the subject of the appeal;

- (ii) The name, address, and phone number of the appellant and his/her interest in the matter;
 - (iii) Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);
 - (iv) The specific reasons why the appellant believes the decision to be wrong. The appellant shall bear the burden of proving the decision was wrong;
 - (v) The desired outcome or changes to the decision; and
 - (vi) A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.
- (c) Any notice of appeal not in full compliance with this section shall not be considered. [Ord. 8-06 § 1]

18.40.340

Judicial appeals.

- (1) Time to File Judicial Appeal. The applicant or any aggrieved party may appeal from the final decision of the administrator, hearing examiner, or to a court of competent jurisdiction in a manner consistent with state law. All appellants must timely exhaust all administrative remedies prior to filing a judicial appeal.
- (2) Service of Appeal. Notice of appeal and any other pleadings required to be filed with the court shall be served by delivery to the county auditor (see RCW 4.28.080), and all persons identified in RCW 36.70C.040, within the applicable time period. This requirement is jurisdictional.
- (3) Cost of Appeal. The appellant shall be responsible for the cost of transcribing and preparing all records ordered certified by the court or desired by the appellant for the appeal. Prior to the preparation of any records, the appellant shall post an advance fee deposit in an amount specified by the county auditor with the county auditor. Any overage will be promptly returned to the appellant. [Ord. 8-06 § 1]

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BY RONALD R. CARPENTER

CLERK

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on March 26, 2010, I sent via mail through the U.S. Postal Service, a copy of the Answer To Petition For Review:

Martin Mellish
930 Martin Road
Port Townsend, WA 98368

David W. Alvarez
Jefferson County Prosecutor's Office
P.O. Box 1220
Port Townsend, WA 98368

DATED this 26th day of March, 2010.

Debra R. Smith

DEBRA R. SMITH, Legal Assistant
David P. Horton, Inc., PS
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360)692-9444

CERTIFICATE OF SERVICE