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DIVISION II

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No. 37583-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARTIN MELLISH, Petitioner
(Respondent in Court of Appeals)

v.

FROG MOUNTAIN PET CARE, HAROLD AND JANE ELYEA, Respondents
(Appellants in Court of Appeals)

and

JEFFERSON COUNTY, Respondent
(Respondent in Court of Appeals)

PETITION FOR REVIEW
BY SUPREME COURT

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Samuel's Furniture, 147 Wn. 2d 440 (2002), 54 P.3d 1194 (2002), *amended on denial of reconsideration* by 63 P.3d 764 (2003)

Simonson v. Veit, 37 Wn. App. 761, 683 P.2d 611, *review denied*, 102 Wn.2d 1013 (1984)

Skinner v. Civil Service Commission of the City of Medina, 146 Wn. App. 171, 188 P 3d (2008) (*review granted*: currently under deliberation by the Supreme Court)

Harlan Claire Stientjes Family Trust v. Via-Fourre, COA No. 63865-3-I (Oct. 12, 2009)

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Jefferson County Code

JCC 18.40.310: Motions for Reconsideration

JCC 18.40.230: Notice of Public Hearing

Proposed Legislation

Bill Analysis, HB 2740

A. IDENTITY OF PETITIONER

Martin Mellish, pro se petitioner, asks the Court to accept review of the published Court of Appeals decision terminating review in Part B of this Petition.

B. COURT OF APPEALS DECISION

An opinion in this case was first issued on December 15th 2009. A Motion for Reconsideration was filed on January 4th 2010, the initial opinion was withdrawn, and a second opinion issued on February 3rd 2010.

The only difference between the February 3rd decision and the withdrawn December 15th opinion appears to be the removal of a paragraph on page 7 claiming the opinion to be consistent with the Division I rulings in *Skinner v. Civil Service Commission of the City of Medina*, 146 Wn. App. 171, 188 P 3d (2008) and *Hall v. Seattle Sch. Dist. No. 1*, 66 Wn. App. 308, 314, 831 P.2d 1128 (1992).

Here are the relevant dates in tabular form:

December 15 th 2009	Initial Court of Appeals decision issued
January 4 th 2010	Motion for Reconsideration filed by Petitioner Mellish
February 2 nd 2010	Initial decision withdrawn
February 3 rd 2010	New decision issued.

In accordance with RAP 13.4 (c)(9), copies of the two opinions and of the Order on Motion to Reconsider are attached as Appendix A-1 through A-3. The first opinion having been withdrawn, it is the second opinion of which review is sought.

C. ISSUE PRESENTED FOR REVIEW

The sole issue presented for review is whether a timely-filed Motion for Reconsideration tolls the time for filing a judicial appeal:

- a. Under Washington State law in general, where the issue is not specifically addressed in the underlying legislation
- b. More particularly, in the case of petitions filed under the Land Use Petition Act (LUPA).

D. STATEMENT OF THE CASE

The facts of the case relevant to the issue presented for review are simple and not in dispute. Petitioner Mellish filed a timely Motion for Reconsideration of a decision by the Jefferson County Hearing Examiner in a land use case. The Motion was denied, and Mr Mellish filed a LUPA appeal within twenty-one days of the denial of his Motion for Reconsideration, but not within twenty-one days of the decision of which reconsideration was requested.

Thus, if the timely filing of a Motion for Reconsideration tolled the relevant appeals deadline, his appeal was timely; otherwise, it was not.

The detailed timeline is given in the 'Facts' section of the Court of Appeals opinion (Appendix A-3), starting on page 2.

E. ARGUMENT

Conflict with Another Decision of the Court of Appeals

The Division I Court of Appeals found in *Skinner v. Civil Service Commission of the City of Medina*, 146 Wn. App. 171, 188 P 3d (2008) (review granted)¹ that:

Where an order of a quasi-judicial body provides a timeline within which a party may file a motion for reconsideration of its order, and a motion for reconsideration is filed and denied, the time for an appeal runs from the date of the denial of reconsideration and not from the date of the initial order.

(*Skinner* at 550).

The Division II ruling in *Mellish* conflicts with the above Division I ruling. While its final version withdraws both the cite to *Skinner* and the claim to be consistent with it, it does not provide any clear reason why LUPA cases should be an exception to the rule laid down in *Skinner*².

More generally, there is a conflict between the underlying judicial philosophies of the Division I *Skinner* ruling and the Division II *Mellish* ruling. The Division I *Skinner* ruling found a general legal background, at both the state and the federal level, in which Motions for Reconsideration extend appeals deadlines unless otherwise specified. The *Skinner* ruling is based on precedents including *Hall v. Seattle Sch. Dist. No. 1*, 66 Wn. App. 308, 314, 831 P.2d 1128 (1992)³, *Simonson v. Veit*, 37 Wn. App. 761, 683 P.2d 611, review denied, 102 Wn.2d 1013 (1984), public policy arguments, and federal law.

¹ Attached as Appendix A-4.

² The opinion appropriately cites on Page 5 to the criteria in *Samuel's Furniture*, 147 Wn. 2d 440, 63 P.3d 764 (2003) that the LUPA appeals deadline is triggered by the decision that 'sets at rest the cause of action between the parties' (etc), but the following discussion on page 6 does not coherently explain how a cause of action may be deemed to be 'set at rest' when a Motion for Reconsideration has been filed and thus "a local authority may still provide the requested relief." (see *Harlan Claire Stientjes Family Trust v. Via-Fourre*, COA No. 63865-3-I (Oct. 12, 2009))

³ Attached as Appendix A-5.

The Division II *Mellish* ruling, on the other hand, ignores *Skinner* and all the precedents and arguments on which it is based, and finds a general legal background in which Motions for Reconsideration do not extend appeals deadlines unless the underlying legislation contains an explicit statement to that effect.

Unless the Supreme Court provides appropriate guidance, inconsistent and conflicting rulings between appeals courts, based on these differing legal philosophies, may be expected to recur.

Possible Conflict with a Decision of the Supreme Court

Skinner was argued before the Supreme Court on Jan 19, 2010. Should the Supreme Court uphold the Division 1 ruling in *Skinner* dealing with timeliness and Motions for Reconsideration⁴, the Division II ruling in *Mellish* will be in conflict with that decision of the Supreme Court as well.

An Issue of Substantial Public Interest

All administrative jurisdictions, including but limited to those hearing land use cases, and any parties affected by the decisions they make, have a strong shared interest in having a process for judicial appeals of such decisions that:

- is orderly and predictable
- respects all parties' due process rights
- is economical of judicial resources.

This is true for judicial appeals of all administrative decisions, and even more true for appeals under LUPA, since the stated purpose of LUPA is "to reform the process for

⁴ *Skinner* raises two issues, one regarding the effect of Motions for Reconsideration on judicial appeals timelines, the other on issues of strict and/or substantial compliance with service requirements in the context of small jurisdictions, such as the city of Medina, that lack full-time on-site office staff available for service.

judicial review of land use decisions made by local jurisdictions... in order to provide consistent, predictable, and timely judicial review” (RCW 36.70C.010)

Any interpretation of the law in which the ‘clock’ for judicial appeal of an administrative decision starts to tick (and may expire) while that decision is under active consideration at the administrative level and may still be modified or reversed, will lead to much costly, confusing, and unnecessary litigation, and also leaves the door open to multiple types of due process violations.

Substantial Public Interest in Judicial Economy

Some of the adverse consequences of the Division II interpretation from the point of view of judicial economy are pointed out in the Division I ruling in *Skinner*:

Filing an appeal before awaiting an order on a motion for reconsideration subjects parties to potential costs that may prove to be unnecessary. Further, reconsideration may remove the need for the superior court to address the issue. (*Skinner* at 552).

Some of the potential for costly, confusing, and unnecessary litigation is also clear from the Division II *Mellish* ruling itself (page 8, citation omitted):

This omission creates an odd result. “[A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal.” ... As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue.

The contrast between the complete lack of clarity in the scenarios referred to above by the Division II *Mellish* opinion and the ‘consistent, predictable, and timely judicial review’ that is the stated purpose of LUPA (RCW 36.70C.010) (and that should be the aim of any judicial appeals process) could not be clearer. If even the Division II Appeals Court themselves are uncertain how the appeals process would play itself out in the eventualities they mention, how are the parties supposed to know?

And a judicial appeal of a decision that may still be changed at the administrative level is clearly not a timely one – see, for example, *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002) (“We conclude that the most reasonable meaning to give to this legislative choice is to conclude that courts should generally defer review of decisions involving the use of land until such decisions are final - that is when the highest body or officer has finally acted”), and *Harlan Claire Stientjes Family Trust v. Via-Fourre*, COA No. 63865-3-I (Oct. 12, 2009) (“In tandem with LUPA’s exhaustion of administrative remedies requirement, RCW 36.70C.060(2)(d), the finality requirement prevents a party from needlessly turning to a court for judicial relief when a local authority may still provide the requested relief.”)⁵.

There is a substantial public interest in judicially resolving the numerous types of uncertainty introduced into the process of judicial appeal of administrative decisions (including but not limited to land use decisions) by the Division II *Mellish* opinion.

Potential for Due Process Violations

Substantial as the public interest is in having a judicial review process that is ‘consistent, predictable, and timely’, the public interest in ensuring that the process

⁵ See also *Ward v. Board of Skagit County Commissioners*, 86 Wn. App. 266, 936 P.2d 42 (1997), for the rationale for requiring the administrative process to fully play itself out before filing a judicial appeal, and for the ‘exhaustion of administrative remedies’ requirement..

respects due process rights is if anything even more substantial. Let us examine the due process consequences of the Division II *Mellish* opinion in three different scenarios.

Before we begin our examination, it should be noted that local jurisdictions have the right to establish their own timelines for ruling on Motions for Reconsideration, and that they may take longer to rule on such motions than the time allowed for a judicial appeal, either because their code allows them to or simply because for one reason or another their decision is delayed⁶.

Violation 1: Granting of a Motion for Reconsideration Would Not Be Appealable

Suppose an administrative jurisdiction grants a permit to John Doe. Richard Roe files a Motion for Reconsideration of that decision, and (after the deadline for a direct judicial appeal of the initial decision has expired) the Motion is granted and the permit denied.

John Doe wishes to challenge the granting of the Motion for Reconsideration and the denial of his permit. What has happened to his due process right to a judicial appeal of that decision? He cannot appeal the initial decision because it was in his favor, and according the Division II ruling in *Mellish*, since the filing of a Motion for Reconsideration does not toll the appeals deadline, he cannot file a timely appeal of the granting of the Motion for Reconsideration either⁷.

⁶ Jefferson County's code for processing Motions for Reconsideration, for example, has two branches. One branch in principle takes up to fifteen business days (five to file a Motion, ten to render a decision) – which is less than LUPA's twenty-one calendar days if the period includes no public holidays, but more than twenty-one days if it includes even one holiday. There is no specified penalty for failing to render a decision in a timely fashion – as happened in the case in question. The other branch, in which a closed record hearing is convened, will take fifteen business days, plus ten calendar days' notice of the hearing, plus whatever time is required to come to a decision – i.e. substantially longer than the twenty-one days allowed by LUPA. For the code in question, see Appendix A-4.

⁷ This point was made in oral argument before the Supreme Court in *Skinner* by counsel for Skinner, and un rebutted.

Violation 2: A Jurisdiction Could Render a Decision Unappealable by Delaying It

Suppose an administrative jurisdiction grants a permit to John Doe. Richard Roe files a Motion for Reconsideration, having noted that the time allotted for ruling on such a motion would still leave time for the filing of a judicial appeal. However, the jurisdiction fails to follow its own code, and issues its decision (a denial) after the judicial appeals deadline has expired.

The local jurisdiction has rendered its decision unappealable by delaying it. Not even its failure to follow its own code can be judicially appealed, according to the Division II *Mellish* standard.

Violation 3: Filing While an MFR is Pending Fails to Exhaust Administrative Remedies

As Violation II, except that Roe files a timely judicial appeal (while his Motion for Reconsideration is still pending). However, Doe successfully moves for dismissal on the ground that Roe has a motion under active consideration at the administrative level that may provide him with the relief he seeks, and thus has not exhausted his administrative remedies.

There are many other types of due process violation that might arise from this decision. It is no exaggeration to state that, if allowed to stand, it would throw the whole process for judicial appeals of land use decisions (and potentially other kinds of administrative decisions as well) into chaos.

Substantial Public Interest Shown By Attempted Legislative Clarification

Since the original decision in the case was issued, a bill, HB 2740, has been introduced in the Washington State House. The Bill Analysis is attached (Appendix A-7).

The Bill Analysis points out (on page 2) the inconsistency between the Division II *Mellish* and Division I *Skinner* decisions, and states that its purpose is to “clarify when the 21-day time limit for the filing of judicial appeals to local land use decisions begins to run.” The Bill Analysis refers twice to ‘clarifying’ rather than ‘changing’ the existing law, on page 1 and again on page 2.

The fact that this bill has been introduced (and, at the time of writing, passed the House by 97 to 0) is testimony to the substantial public interest in having the issue resolved. While, if and when HB 2740 passed and went into effect, it might play some role in reducing the uncertainty created by the *Mellish* ruling going forward, the timeliness of LUPA appeals pending before it goes into effect would still be in doubt, and the fundamental differences in philosophy between the Division I *Skinner* and Division II *Mellish* rulings might be expected to persist and to show themselves in other contexts and cases, unless and until the Supreme Court provides appropriate guidance.

F. CONCLUSION

The Division II opinion in *Mellish* leaves the law relating to judicial appeals of administrative decisions, where a Motion for Reconsideration has been filed, in a confused and highly unstable state. Division I and Division II of the Court of Appeals have ruled differently on the question, which is of substantial public interest.

This court should accept review, reverse the decision of the Court of Appeals Division II in this case, and rule that Mr Mellish’s LUPA petition was thus timely filed.

Dated this 24th day of February 2010,

Respectfully submitted,

By: D. S. Mellish

Martin Mellish, pro se

Appendix A-1

December 15th, 2009 opinion

FILED
COURT OF APPEALS
DIVISION II

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BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARTIN MELLISH,

Respondent,

v.

FROG MOUNTAIN PET CARE, HAROLD
and JANE ELYEA,

Appellants,

JEFFERSON COUNTY,

Respondent.

No. 37583-4-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — This Land Use Petition Act (LUPA), ch. 36.70C RCW, appeal raises novel issues of law—whether a county hearing examiner’s decision is a “final determination” under former RCW 36.70C.020(1)(a) (1995)¹ when a motion for reconsideration is pending with the county and, if not, whether the reconsideration motion tolls the time for appeal. If the decision was final before the county denied reconsideration, as Frog Mountain Pet Care argues, then Martin Mellish’s appeal to the superior court was untimely and the court erred when it denied Frog Mountain’s motion to dismiss. We reverse because a local government’s

¹ The Washington State Legislature amended RCW 36.70C.020 in 2009, recodifying the definition of “[l]and use decision” to RCW 36.70C.020(2). The legislature made no substantive changes to the definition. Compare RCW 36.70C.020(2) with former RCW 36.70C.020(1)(a).

unique reconsideration motion procedure does do not toll the strict LUPA filing deadline. RCW 36.70C.040(2), (3).

FACTS

Frog Mountain applied for a conditional use permit and minor variance in order to remodel and expand its Jefferson County (County) dog and cat boarding facility. Mellish owns property adjacent to the facility. He opposed the application because he thought the proposed expansion was too large and would increase the facility's noise, interfering with his enjoyment of his property.

On June 20, 2007, the deputy hearing examiner filed his decision granting Frog Mountain's request. The next day, the County mailed a notice of the decision to all the interested parties and adjacent property owners. Mellish moved for reconsideration on June 28, but did not notify Frog Mountain of the motion.² The County denied the motion on July 20 and mailed a notice of decision on July 21. It issued Frog Mountain's requested permit on July 21 when it denied the motion.

On August 10, 2007, Mellish filed a land use petition at the Clallam County Superior Court challenging the County's decision. This was 20 days after the County mailed the order denying reconsideration and issued the permit, but 50 days after the County mailed the deputy hearings examiner's June 20 decision granting Frog Mountain's permit.

² The Jefferson County Code apparently does not require a party who moves for reconsideration or the County to notify the adverse party of the motion until the hearing examiner enters the decision. See JCC 18.40.310, .330. But due process requires notice reasonably calculated to apprise parties of the nature and character of proceedings which will affect them. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985); *Duffy v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 673, 678-79, 585 P.2d 470 (1978). We are concerned that the Code may invite due process violations, but Frog Mountain did not appeal on this ground.

Frog Mountain moved, under CR 12(b)(6), to dismiss the LUPA action as untimely because Mellish did not file his petition within 21 days of the June 20 decision. Both Mellish and the County, although on opposite sides of the lawsuit, opposed the motion and argued that the LUPA statute of limitations ran from the July 20 order denying reconsideration, not the June 20 decision. The superior court agreed that the motion for reconsideration tolled the 21-day filing requirement and, accordingly, denied the motion to dismiss. The superior court then reversed the County's decision on the merits. Frog Mountain appeals only the denial of its motion to dismiss.

ANALYSIS

FINAL DETERMINATION

We first determine whether the June 20 decision was a "final decision" and, thus, a "land use decision" that must be appealed within 21 days. Former RCW 36.70C.020(1)(a). The June 20 decision was a final determination, notwithstanding the motion for reconsideration.

In reviewing an administrative decision, we stand in the same position as the superior court. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). We review conclusions of law de novo. *Wenatchee Sportsmen*, 141 Wn.2d at 176.

LUPA requires that a party file a petition for review within 21 days of the date a land use decision is issued.³ RCW 36.70C.040(2), (3). This 21-day statute of limitations is strict; the doctrine of substantial compliance does not apply to it. RCW 36.70C.040(2); *Asche v.*

³ As relevant here, a land use decision is "issued" three days after the local jurisdiction mails a written decision. RCW 36.70C.040(4)(a). In this appeal, there is no dispute that Mellish filed the land use petition within 21 days of the denial of reconsideration but more than 21 days from the original hearing examiner's decision.

Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005 (2007); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 599, 972 P.2d 470 (1999); *see also Spice v. Pierce County*, 149 Wn. App. 461, 466-67, 204 P.3d 254 (2009). LUPA defines a "land use decision" as "a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals" on particular types of actions, including the action at issue here. Former RCW 36.70C.020(1) (emphasis added).

The County argues that because LUPA is silent on what constitutes a "final determination," the legislature has implicitly delegated the designation of finality to the discretion of each county and, thus, in this case, we must apply the Jefferson County Code definition of a "final determination." The Clallam County Superior Court followed this approach. But the County cites no law for the proposition that each county's local definition of finality controls and our legislature and Supreme Court have indicated a contrary rule.

In enacting LUPA, our legislature expressed an intention to "establish[] uniform, expedited appeal procedures . . . in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. An appeal procedure that varies based on each local government's definition of "final determination" would not be "uniform." RCW 36.70C.010. Instead of deferring to local ordinances, our Supreme Court has supplied common law and dictionary definitions to explain what is a "final determination" under LUPA with uniformity across Washington State. *See, e.g., Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002). The County's suggested local approach would essentially give counties power to determine whether a court has jurisdiction over a land use petition. In theory, accepting the County's argument would also allow a county to delay a LUPA appeal

indefinitely. We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates. Instead, we apply the following case law to determine whether the June 20 decision at issue here was "final" under LUPA.

Our Supreme Court expressly defined "final determination" and "final decision" (terms it uses interchangeably) in the LUPA context. It held that Washington courts should apply the term "final decision" uniformly in the context of appellate jurisdiction, including a superior court's appellate jurisdiction over a LUPA case. *See Samuel's Furniture*, 147 Wn.2d at 452. In all appellate contexts, "[a] 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.'" *Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology*, 162 Wn.2d 825, 858, 175 P.3d 1050 (2008) (first two alterations in original) (quoting *Samuel's Furniture*, 147 Wn.2d at 452). "A judgment is considered final on appeal if it concludes the action by resolving the [petitioner's] entitlement to the requested relief." *Samuel's Furniture*, 147 Wn.2d at 452 (quoting *Purse Seine Vessel Owners v. State*, 92 Wn. App. 381, 387, 966 P.2d 928 (1998), *review denied*, 137 Wn.2d 1030 (1999)).

Here, there is no question that the June 20, 2007 decision was a final determination *before* Mellish moved for reconsideration. First, the hearing examiner wrote the decision and he was the "local jurisdiction's . . . officer with the highest level of authority to . . . hear appeals." Former RCW 36.70C.020(1). The County incorrectly characterizes the reconsideration motion as an "appeal." But an "appeal" is "[a] proceeding undertaken to have a decision reconsidered *by a higher authority*." BLACK'S LAW DICTIONARY 112 (9th ed. 2009) (emphasis added). In this case, the same hearing examiner who issued the original decision adjudicated the reconsideration motion; he is not a higher authority than himself. Thus, a motion to reconsider is

not an appeal to a higher authority and this portion of LUPA's definition of a "land use decision" is satisfied as to the June 20 decision.

Second, the June 20 decision was a final determination. It left "nothing open to further dispute and . . . set[] at rest [the] cause of action between parties" because it conclusively resolved every issue in the petition. *Twin Bridge Marine Park*, 162 Wn.2d at 858 (quoting *Samuel's Furniture*, 147 Wn.2d at 452). There was technically a further dispute over whether the hearings examiner should reconsider the June 20 decision, but the applicant was unaware of it and the June 20 decision "conclude[d] the action by resolving the [petitioner's] entitlement to the requested relief." *Samuel's Furniture*, 147 Wn.2d at 452 (quoting *Purse Seine Vessel Owners*, 92 Wn. App. at 387). The reconsideration motion concerned whether the June 20 decision should be reconsidered, not whether the petitioner was entitled to relief.

Indeed, legislators and courts have consistently treated reconsideration motions as motions made after an adjudicator rendered a final decision. The Jefferson County Code, Civil Rules, the Rules of Appellate Procedure, to name but a few, clarify that a party may move to reconsider only a final decision, as defined by those rules. JCC 18.40.310; CR 59; RAP 12.4; *see also* Fed. R. Civ. P. 59(e) (reconsideration available only of final decision). We find only two Washington laws that mandate that a decision becomes non-final when pending reconsideration—one is the Industrial Insurance Act, Title 51 RCW, and the other is an outdated section of the Administrative Procedures Act (APA), former ch. 34.04 RCW, that the legislature revoked in 1988. Former RCW 51.52.050(1) (2004); former RCW 34.04.130(1) (1959)⁴; LAWS

⁴ That statute provided, in relevant part: "Where the agency's rules provide a procedure for rehearing or reconsideration, and that procedure has been invoked, the agency decision shall not be final until the agency shall have acted thereon." Former RCW 34.04.130(1).

OF 1989, ch. 175; *see also* RCW 34.05.470(3), .542(2) (current APA, ch. 34.05 RCW, requires filing within 30 days after service of the final order, but tolls filing deadline when reconsideration is pending). Both acts explicitly specify that a timely⁵ motion for reconsideration renders the prior decision non-final. LUPA contains no provision that explicitly or implicitly tolls the finality of the hearings examiner's decision. Former RCW 51.52.050(1); ch. 36.70C RCW; former RCW 34.04.130(1).

In addition, outside the context of the Industrial Insurance Act and the former version of the APA, courts that have examined the effect of reconsideration on the timeliness of an appeal have consistently treated reconsideration motions as motions that follow final decisions and do not affect the finality of a prior decision. *See, e.g., Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 173, 188 P.3d 550 (2008), *review granted*, 165 Wn.2d 1040 (2009); *Hall v. Seattle Sch. Dist. 1*, 66 Wn. App. 308, 315-16, 831 P.2d 1128 (1992). The context of these laws and rulings is consistent with holding that the June 20 decision was, and remained, final.

In short, the June 20 decision was final. By uniformly applying principles of appealability and LUPA's plain text, as we must,⁶ we conclude that Mellish's reconsideration

⁵ It is not clear here whether Mellish's motion for reconsideration was timely under the Jefferson County Code, but the parties have never litigated this issue.

⁶ *Samuel's Furniture*, 147 Wn.2d at 452.

motion did not render the June 20 decision non-final while that motion was pending with the hearings examiner.⁷

STATUTORY TOLLING

A remaining question implied but not explicitly raised by this case is whether a reconsideration motion tolls the deadline to file a LUPA appeal. We hold that reconsideration does not toll the filing deadline.

Other than LUPA, every Washington law we have examined expressly provides that a reconsideration motion either renders an otherwise final decision non-final or tolls the deadline for filing an appeal. *See* RCW 34.05.470(3), .542(2) (APA); former RCW 51.52.050 (Industrial Insurance Act); RAP 5.2(e)(2); former RCW 34.04.130(1); *see also* Fed. R. App. P. 4(a)(4)(A)(iv) (same). LUPA contains no similar provision. Ch. 36.70C RCW.

This omission creates an odd result. “[A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal.” KARL B. TEGLAND, 2A WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.4, at 178 (6th ed. 2004). As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if

⁷ We note that the County apparently contemplated this result when it crafted its Code. If the time limits set out in the Jefferson County Code were followed, the hearings examiner would have timely denied or granted reconsideration several days before Mellish was required to file his LUPA petition under the 21-day filing requirement. The hearings examiner was late in issuing his reconsideration decision, but Mellish was nevertheless strictly required to file his land use petition before the statutory deadline.

the local government provides a method for reconsideration that he has declined to pursue. RCW 36.70C.060; *see* RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE §§ 15.1-15.17, at 965-1106 (4th ed. 2002).

“When statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” *Stroh Brewery Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 239, 15 P.3d 692 (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)), *review denied*, 144 Wn.2d 1002 (2001). *See also Waste Mgmt. of Seattle v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) (if statute is unambiguous, reviewing court determines legislative intent from the statutory language alone). As noted, RCW 36.70C.040 provides that “[a] land use petition is barred, and the [superior] court may not grant review, unless the petition is timely filed with the court.” RCW 36.70C.040(2). “The petition is timely if it is filed . . . within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). Moreover, LUPA “shall be the exclusive means of judicial review of land use decisions,” subject to exceptions not applicable here. RCW 36.70C.030(1). Finally, while LUPA incorporates the superior court civil rules as to procedural matters, it does so only “to the extent that the rules are consistent with [LUPA].” RCW 36.70C.030(2). Here, the plain language of the noted LUPA provisions governs.

Notably, in other contexts, where the legislature has desired to alter the effect of unambiguous statutory provisions, such as by tolling a statute of limitations, the legislature has done so expressly. For example, RCW 4.16.170 provides that “[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.” LUPA contains no similar tolling provision for motions for reconsideration. Accordingly, we are required to apply LUPA’s unambiguous

review provisions. *Cf. Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (despite other administrative laws to the contrary, in deportation cases, congress intended strict filing deadline that is not affected by motions to reconsider).

EQUITABLE TOLLING

We also note that the facts of this case implicate the doctrine of equitable tolling. A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997), *review denied*, 134 Wn.2d 1012 (1998); *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161, *review denied*, 127 Wn.2d 1002 (1995). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein*, 76 Wn. App. at 739-40). The party asserting that equitable tolling should apply bears the burden of proof. *Benjaminov v. City of Bellevue*, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), *review denied*, 165 Wn.2d 1020 (2009).

Mellish did not argue below that the statute of limitations should be equitably tolled. The trial court, however, examined communications that the County made to Mellish regarding when to file his land use petition. The correspondence is inconsistent. In some communications, the County attorney suggested that Mellish was required to await the ruling on reconsideration before he filed his land use petition, while another communication stated that the deadline ran from the June 20 decision.

These facts do not mandate equitable tolling. Mellish did not demonstrate that he relied on the false explanations of the law and equitable tolling does not apply when a nonparty attorney, who did not represent the petitioner, supplied the false assurance. *See Millay*, 135

Wn.2d at 206. On the other hand, the County did become the defendant in the superior court appeal and it is possible that Mellish could prove equitable tolling. We have the authority, and perhaps a duty, to remand for a ruling on equitable principles that a case clearly invokes. *Pardee v. Jolly*, 163 Wn.2d 558, 575-76, 182 P.3d 967 (2008). But this case does not clearly invoke the doctrine of equitable tolling. From the record before us, Frog Mountain was never served with notice that Mellish had filed a motion for reconsideration and after the LUPA filing deadline passed and the County issued the permit on July 21, it had every right to proceed with its then-vested right to modify its dog kennel. It is not unfair to disallow equitable tolling in this situation. For these reasons, we do not take the extraordinary step of remanding on equitable grounds that the parties have not raised.

TIMELINESS

Mellish's petition is time barred. LUPA provides an extremely strict command regarding the filing deadline: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court." RCW 36.70C.040(2). Either Mellish complied with the deadline of filing his petition 21 days after the County issued the June 20 decision or his petition is barred. As the County mailed the decision on June 21 and it is deemed "issued" three days later, the 21-day time bar runs from June 24, 2007. RCW 36.70C.040(2), (4)(a). Mellish filed his land use petition on August 10. This was more than 21 days after the hearings examiner issued the final decision that informed Frog Mountain that its application for a permit to modify its kennel was approved. This petition is barred.

We are aware that this result may seem inequitable. In nearly every legal context, a timely reconsideration motion tolls the statute for appealing a matter. No case law stated the contrary in the LUPA context until we addressed the question today and, until we filed this

No. 37583-4-II

opinion, reasonable practitioners and pro se litigants may have concluded that filing a reconsideration motion gave them more time to file a LUPA appeal. Although we are concerned for those who did not have the benefit of a reviewing court's analysis of this issue, the law is clear and the facts on record do not give rise to relief through equitable tolling. Accordingly, we must reverse the superior court's ruling in which it denied Frog Mountain's motion to dismiss the action as untimely.

ATTORNEY FEES

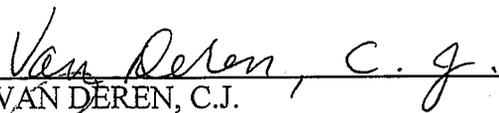
Respondent County requests attorney fees if it prevails. It has not prevailed and is not entitled to fees.

We reverse and remand to the trial court with directions that it dismiss this LUPA appeal with prejudice.

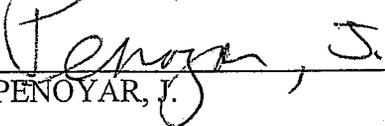


QUINN-BRINTNALL, J.

We concur:



VAN DEREN, C.J.



PENOYAR, J.

Appendix A-2

Order on Motion to Reconsider

FILED
COURT OF APPEALS
DIVISION II

10 FEB -2 AM 9:26

STATE OF WASHINGTON

BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 37583-4-II

MARTIN MELLISH,
Respondent,

v.

FROG MOUNTAIN PET CARE, HAROLD
and JANE ELYEA,

Appellants,

JEFFERSON COUNTY,

Respondent.

ORDER ON MOTION TO RECONSIDER
AND WITHDRAWING OPINION

The published opinion in this case was filed on December 15, 2009. The respondent filed a motion for reconsideration on January 4, 2010.

Upon reconsideration, the court has decided to withdraw the published opinion filed on December 15, 2009. It is, therefore,

ORDERED:

The published opinion filed in this case on December 15, 2009, is hereby withdrawn. The court will issue a new opinion in due course.

DATED this 2nd day of FEBRUARY, 2010.

[Signature]
QUINN-BRINTNALL, J.

We concur:

[Signature]
VAN DEREN, C.J.

[Signature]
PENYAR, J.

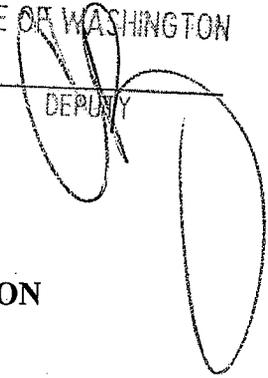
Appendix A-3

February 3rd, 2010 opinion

FILED
COURT OF APPEALS
DIVISION II

10 FEB -3 AM 11:57

STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MARTIN MELLISH,
Respondent,

v.

FROG MOUNTAIN PET CARE, HAROLD
and JANE ELYEA,
Appellants,

JEFFERSON COUNTY,
Respondent.

No. 37583-4-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — This Land Use Petition Act (LUPA), ch. 36.70C RCW, appeal raises novel issues of law—whether a county hearing examiner’s decision is a “final determination” under former RCW 36.70C.020(1)(a) (1995)¹ when a motion for reconsideration is pending with the county and, if not, whether the reconsideration motion tolls the time for appeal. If the decision was final before the county denied reconsideration, as Frog Mountain Pet Care argues, then Martin Mellish’s appeal to the superior court was untimely and the court erred when it denied Frog Mountain’s motion to dismiss. We reverse because a local government’s

¹ The Washington State Legislature amended RCW 36.70C.020 in 2009, recodifying the definition of “[l]and use decision” to RCW 36.70C.020(2). The legislature made no substantive changes to the definition. *Compare* RCW 36.70C.020(2) *with* former RCW 36.70C.020(1)(a).

unique reconsideration motion procedure does not toll the strict LUPA filing deadline. RCW 36.70C.040(2), (3).

FACTS

Frog Mountain applied for a conditional use permit and minor variance in order to remodel and expand its Jefferson County (County) dog and cat boarding facility. Mellish owns property adjacent to the facility. He opposed the application because he thought the proposed expansion was too large and would increase the facility's noise, interfering with his enjoyment of his property.

On June 20, 2007, the deputy hearing examiner filed his decision granting Frog Mountain's request. The next day, the County mailed a notice of the decision to all the interested parties and adjacent property owners. Mellish moved for reconsideration on June 28, but did not notify Frog Mountain of the motion.² The County denied the motion on July 20 and mailed a notice of decision on July 21. It issued Frog Mountain's requested permit on July 21 when it denied the motion.

On August 10, 2007, Mellish filed a land use petition at the Clallam County Superior Court challenging the County's decision. This was 20 days after the County mailed the order denying reconsideration and issued the permit, but 50 days after the County mailed the deputy hearings examiner's June 20 decision granting Frog Mountain's permit.

² The Jefferson County Code apparently does not require a party who moves for reconsideration or the County to notify the adverse party of the motion until the hearing examiner enters the decision. See JCC 18.40.310, .330. But due process requires notice reasonably calculated to apprise parties of the nature and character of proceedings which will affect them. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985); *Duffy v. Dep't of Soc. & Health Servs.*, 90 Wn.2d 673, 678-79, 585 P.2d 470 (1978). We are concerned that the Code may invite due process violations, but Frog Mountain did not appeal on this ground.

Frog Mountain moved, under CR 12(b)(6), to dismiss the LUPA action as untimely because Mellish did not file his petition within 21 days of the June 20 decision. Both Mellish and the County, although on opposite sides of the lawsuit, opposed the motion and argued that the LUPA statute of limitations ran from the July 20 order denying reconsideration, not the June 20 decision. The superior court agreed that the motion for reconsideration tolled the 21-day filing requirement and, accordingly, denied the motion to dismiss. The superior court then reversed the County's decision on the merits. Frog Mountain appeals only the denial of its motion to dismiss.

ANALYSIS

FINAL DETERMINATION

We first determine whether the June 20 decision was a "final decision" and, thus, a "land use decision" that must be appealed within 21 days. Former RCW 36.70C.020(1)(a). The June 20 decision was a final determination, notwithstanding the motion for reconsideration.

In reviewing an administrative decision, we stand in the same position as the superior court. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 405-06, 120 P.3d 56 (2005) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). We review conclusions of law de novo. *Wenatchee Sportsmen*, 141 Wn.2d at 176.

LUPA requires that a party file a petition for review within 21 days of the date a land use decision is issued.³ RCW 36.70C.040(2), (3). This 21-day statute of limitations is strict; the doctrine of substantial compliance does not apply to it. RCW 36.70C.040(2); *Asche v.*

³ As relevant here, a land use decision is "issued" three days after the local jurisdiction mails a written decision. RCW 36.70C.040(4)(a). In this appeal, there is no dispute that Mellish filed the land use petition within 21 days of the denial of reconsideration but more than 21 days from the original hearing examiner's decision.

Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005 (2007); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 599, 972 P.2d 470 (1999); *see also Spice v. Pierce County*, 149 Wn. App. 461, 466-67, 204 P.3d 254 (2009). LUPA defines a "land use decision" as "a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals" on particular types of actions, including the action at issue here. Former RCW 36.70C.020(1) (emphasis added).

The County argues that because LUPA is silent on what constitutes a "final determination," the legislature has implicitly delegated the designation of finality to the discretion of each county and, thus, in this case, we must apply the Jefferson County Code definition of a "final determination." The Clallam County Superior Court followed this approach. But the County cites no law for the proposition that each county's local definition of finality controls and our legislature and Supreme Court have indicated a contrary rule.

In enacting LUPA, our legislature expressed an intention to "establish[] uniform, expedited appeal procedures . . . in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. An appeal procedure that varies based on each local government's definition of "final determination" would not be "uniform." RCW 36.70C.010. Instead of deferring to local ordinances, our Supreme Court has supplied common law and dictionary definitions to explain what is a "final determination" under LUPA with uniformity across Washington State. *See, e.g., Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002). The County's suggested local approach would essentially give counties power to determine whether a court has jurisdiction over a land use petition. In theory, accepting the County's argument would also allow a county to delay a LUPA appeal

indefinitely. We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates. Instead, we apply the following case law to determine whether the June 20 decision at issue here was "final" under LUPA.

Our Supreme Court expressly defined "final determination" and "final decision" (terms it uses interchangeably) in the LUPA context. It held that Washington courts should apply the term "final decision" uniformly in the context of appellate jurisdiction, including a superior court's appellate jurisdiction over a LUPA case. *See Samuel's Furniture*, 147 Wn.2d at 452. In all appellate contexts, "[a] 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.'" *Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology*, 162 Wn.2d 825, 858, 175 P.3d 1050 (2008) (first two alterations in original) (quoting *Samuel's Furniture*, 147 Wn.2d at 452). "A judgment is considered final on appeal if it concludes the action by resolving the [petitioner's] entitlement to the requested relief." *Samuel's Furniture*, 147 Wn.2d at 452 (quoting *Purse Seine Vessel Owners v. State*, 92 Wn. App. 381, 387, 966 P.2d 928 (1998), *review denied*, 137 Wn.2d 1030 (1999)).

Here, there is no question that the June 20, 2007 decision was a final determination *before* Mellish moved for reconsideration. First, the hearing examiner wrote the decision and he was the "local jurisdiction's . . . officer with the highest level of authority to . . . hear appeals." Former RCW 36.70C.020(1). The County incorrectly characterizes the reconsideration motion as an "appeal." But an "appeal" is "[a] proceeding undertaken to have a decision reconsidered *by a higher authority*." BLACK'S LAW DICTIONARY 112 (9th ed. 2009) (emphasis added). In this case, the same hearing examiner who issued the original decision adjudicated the reconsideration motion; he is not a higher authority than himself. Thus, a motion to reconsider is

not an appeal to a higher authority and this portion of LUPA's definition of a "land use decision" is satisfied as to the June 20 decision.

Second, the June 20 decision was a final determination. It left "nothing open to further dispute and . . . set[] at rest [the] cause of action between parties" because it conclusively resolved every issue in the petition. *Twin Bridge Marine Park*, 162 Wn.2d at 858 (quoting *Samuel's Furniture*, 147 Wn.2d at 452). There was technically a further dispute over whether the hearings examiner should reconsider the June 20 decision, but the applicant was unaware of it and the June 20 decision "conclude[d] the action by resolving the [petitioner's] entitlement to the requested relief." *Samuel's Furniture*, 147 Wn.2d at 452 (quoting *Purse Seine Vessel Owners*, 92 Wn. App. at 387). The reconsideration motion concerned whether the June 20 decision should be reconsidered, not whether the petitioner was entitled to relief.

Indeed, legislation and court rules have consistently treated reconsideration motions as motions made after an adjudicator rendered a final decision. The Jefferson County Code, Civil Rules, the Rules of Appellate Procedure, to name but a few, clarify that a party may move to reconsider only a final decision, as defined by those rules. JCC 18.40.310; CR 59; RAP 12.4; *see also* Fed. R. Civ. P. 59(e) (reconsideration available only of final decision). We find only two Washington laws that mandate that a decision becomes non-final when pending reconsideration—one is the Industrial Insurance Act, Title 51 RCW, and the other is an outdated section of the Administrative Procedures Act (APA), former ch. 34.04 RCW, that the legislature revoked in 1988. Former RCW 51.52.050(1) (2004); former RCW 34.04.130(1) (1959)⁴; LAWS

⁴ That statute provided, in relevant part: "Where the agency's rules provide a procedure for rehearing or reconsideration, and that procedure has been invoked, the agency decision shall not be final until the agency shall have acted thereon." Former RCW 34.04.130(1).

OF 1989, ch. 175; *see also* RCW 34.05.470(3), .542(2) (current APA, ch. 34.05 RCW, requires filing within 30 days after service of the final order, but tolls filing deadline when reconsideration is pending). Both acts explicitly specify that a timely⁵ motion for reconsideration renders the prior decision non-final. LUPA contains no provision that explicitly or implicitly tolls the finality of the hearings examiner's decision. Former RCW 51.52.050(1); ch. 36.70C RCW; former RCW 34.04.130(1).

In short, the June 20 decision was final. By uniformly applying LUPA's plain text, as we must,⁶ we conclude that Mellish's reconsideration motion did not render the June 20 decision non-final while that motion was pending with the hearings examiner.⁷

STATUTORY TOLLING

A remaining question implied but not explicitly raised by this case is whether a reconsideration motion tolls the deadline to file a LUPA appeal. We hold that reconsideration does not toll the filing deadline.

Other than LUPA, every Washington law we have examined expressly provides that a reconsideration motion either renders an otherwise final decision non-final or tolls the deadline for filing an appeal. *See* RCW 34.05.470(3), .542(2) (APA); former RCW 51.52.050 (Industrial

⁵ It is not clear here whether Mellish's motion for reconsideration was timely under the Jefferson County Code, but the parties have never litigated this issue.

⁶ *Samuel's Furniture*, 147 Wn.2d at 452.

⁷ We note that the County apparently contemplated this result when it crafted its Code. If the time limits set out in the Jefferson County Code were followed, the hearings examiner would have timely denied or granted reconsideration several days before Mellish was required to file his LUPA petition under the 21-day filing requirement. The hearings examiner was late in issuing his reconsideration decision, but Mellish was nevertheless strictly required to file his land use petition before the statutory deadline.

Insurance Act); RAP 5.2(e)(2); former RCW 34.04.130(1); *see also* Fed. R. App. P. 4(a)(4)(A)(iv) (same). LUPA contains no similar provision. Ch. 36.70C RCW.

This omission creates an odd result. “[A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal.” KARL B. TEGLAND, 2A WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.4, at 178 (6th ed. 2004). As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue. RCW 36.70C.060; *see* RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE §§ 15.1-15.17, at 965-1106 (4th ed. 2002).

“When statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” *Stroh Brewery Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 239, 15 P.3d 692 (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)), *review denied*, 144 Wn.2d 1002 (2001). *See also Waste Mgmt. of Seattle v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994) (if statute is unambiguous, reviewing court determines legislative intent from the statutory language alone). As noted, RCW 36.70C.040 provides that “[a] land use petition is barred, and the [superior] court may not grant review, unless the petition is timely filed with the court.” RCW 36.70C.040(2). “The petition is timely if it is filed . . . within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). Moreover, LUPA “shall be the exclusive means of judicial review of land use

decisions,” subject to exceptions not applicable here. RCW 36.70C.030(1). Finally, while LUPA incorporates the superior court civil rules as to procedural matters, it does so only “to the extent that the rules are consistent with [LUPA].” RCW 36.70C.030(2). Here, the plain language of the noted LUPA provisions governs.

Notably, in other contexts, where the legislature has desired to alter the effect of unambiguous statutory provisions, such as by tolling a statute of limitations, the legislature has done so expressly. For example, RCW 4.16.170 provides that “[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.” LUPA contains no similar tolling provision for motions for reconsideration. Accordingly, we are required to apply LUPA’s unambiguous review provisions. *Cf. Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (despite other administrative laws to the contrary, in deportation cases, congress intended strict filing deadline that is not affected by motions to reconsider).

EQUITABLE TOLLING

We also note that the facts of this case implicate the doctrine of equitable tolling. A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997), *review denied*, 134 Wn.2d 1012 (1998); *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161, *review denied*, 127 Wn.2d 1002 (1995). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein*, 76 Wn. App. at 739-40). The party asserting that equitable tolling should apply bears the burden of proof. *Benyaminov v. City*

of Bellevue, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008), *review denied*, 165 Wn.2d 1020 (2009).

Mellish did not argue below that the statute of limitations should be equitably tolled. The trial court, however, examined communications that the County made to Mellish regarding when to file his land use petition. The correspondence is inconsistent. In some communications, the County attorney suggested that Mellish was required to await the ruling on reconsideration before he filed his land use petition, while another communication stated that the deadline ran from the June 20 decision.

These facts do not mandate equitable tolling. Mellish did not demonstrate that he relied on the false explanations of the law and equitable tolling does not apply when a nonparty attorney, who did not represent the petitioner, supplied the false assurance. *See Millay*, 135 Wn.2d at 206. On the other hand, the County did become the defendant in the superior court appeal and it is possible that Mellish could prove equitable tolling. We have the authority, and perhaps a duty, to remand for a ruling on equitable principles that a case clearly invokes. *Pardee v. Jolly*, 163 Wn.2d 558, 575-76, 182 P.3d 967 (2008). But this case does not clearly invoke the doctrine of equitable tolling. From the record before us, Frog Mountain was never served with notice that Mellish had filed a motion for reconsideration and after the LUPA filing deadline passed and the County issued the permit on July 21, it had every right to proceed with its then-vested right to modify its dog kennel. It is not unfair to disallow equitable tolling in this situation. For these reasons, we do not take the extraordinary step of remanding on equitable grounds that the parties have not raised.

TIMELINESS

Mellish's petition is time barred. LUPA provides an extremely strict command regarding the filing deadline: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court." RCW 36.70C.040(2). Either Mellish complied with the deadline of filing his petition 21 days after the County issued the June 20 decision or his petition is barred. As the County mailed the decision on June 21 and it is deemed "issued" three days later, the 21-day time bar runs from June 24, 2007. RCW 36.70C.040(2), (4)(a). Mellish filed his land use petition on August 10. This was more than 21 days after the hearings examiner issued the final decision that informed Frog Mountain that its application for a permit to modify its kennel was approved. This petition is barred.

We are aware that this result may seem inequitable. In nearly every legal context, a timely reconsideration motion tolls the statute for appealing a matter. No case law stated the contrary in the LUPA context until we addressed the question today and, until we filed this opinion, reasonable practitioners and pro se litigants may have concluded that filing a reconsideration motion gave them more time to file a LUPA appeal. Although we are concerned for those who did not have the benefit of a reviewing court's analysis of this issue, the law is clear and the facts on record do not give rise to relief through equitable tolling. Accordingly, we must reverse the superior court's ruling in which it denied Frog Mountain's motion to dismiss the action as untimely.

ATTORNEY FEES

Respondent County requests attorney fees if it prevails. It has not prevailed and is not entitled to fees.

No. 37583-4-II

We reverse and remand to the trial court with directions that it dismiss this LUPA appeal with prejudice.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

We concur:

Van Deren, C.J.
VANDEREN, C.J.

Penoyar, J.
PENOYAR, J.

Appendix A-4

Skinner v. Civil Service Commission of the City of Medina,
146 Wn. App. 171, 188 P 3d (2008)

146 Wn. App. 171, SKINNER V. CIVIL SERV. COMM'N OF CITY OF MEDINA

[No. 60868-1-I. Division One. July 28, 2008.]

ROGER L. SKINNER, *Appellant*, v. CIVIL SERVICE COMMISSION OF THE CITY OF MEDINA ET AL., *Respondents*.

William J. Murphy, for appellant.

Greg A. Rubstello; and *P. Stephen DiJulio* (of *Foster Pepper, PLLC*), for respondents.

Authored by C. Kenneth Grosse.

Concurring: Mary Kay Becker, Ronald Cox.C.

¶1 GROSSE, J. -- Where an order of a quasi-judicial body provides a timeline within which a party may file a motion for reconsideration of its order, and a motion for reconsideration is filed and denied, the time for an appeal runs from the date of the denial of reconsideration and not from the date of the initial order. A motion for reconsideration tolls the 30-day statute of limitations on appealing a final order. Here, it is undisputed that Roger Skinner appealed within 30 days of the court's denial of his motion for reconsideration. Thus, we reverse and remand.

FACTS

¶2 Roger Skinner appealed his dismissal from the city of Medina (City) police force to the Medina Civil Service Commission (Commission). By order dated September 1, 2006, the Commission upheld his dismissal. On September 18, 2006, the Commission denied Skinner's motion for reconsideration. On October 17, 2006, Skinner filed a writ of review in King County Superior Court of both the Commission's September 1 order and the September 18 order denying reconsideration. The trial court granted the City summary judgment dismissal, holding that Skinner had failed to timely serve and file his appeal of the September 1, 2006 order within 30 days of its entry as required by statute. «1» Skinner appeals.

«1» See RCW [41.12.090](#).»

ANALYSIS

¶3 Paragraph 7.3 of the Commission's September 1 order states as follows:

Further Proceedings. Under Commission Rule 18.31 a party may move for reconsideration within 10 days of the date of this decision. *In the absence of a motion for reconsideration*, any appeal from this decision to King County Superior Court shall comply with chapter [41.12](#) RCW. «[2]»

City of Medina Civil Service Rule (MCSR) 18.31 provides:

RECONSIDERATION. A party may move for reconsideration by the Commission only on the basis of fraud, mistake, or misconception of facts. Such motion must be filed with the Commission within ten (10) days of the decision of the Commission. Such motion for reconsideration shall be decided on affidavits, absent special showing that testimony is necessary.

RCW 41.12.090 provides in pertinent part:

If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. Such appeal shall be taken by serving the commission, *within thirty days after the entry of such judgment or order*, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court. «[3]»

«2» (Emphasis added.)»

«3» (Emphasis added.)»

¶4 The City argues that Skinner is barred from pursuing this appeal because he served and filed it 46 days after the entry of the September 1 order. Relying on *State ex rel. Worsham v. Brown*, «4» the City contends the Commission lacked authority to reconsider its order and therefore the 30 days started running on the date of its initial order. *Brown* held that a civil service commission has limited jurisdiction and when acting in its quasi-judicial capacity, it has no inherent power, irrespective of statute, to grant a rehearing or to review or annul its own order. But the facts in *Brown* are markedly different than those here.

«4» 126 Wash. 175, 218 P. 9 (1923).»

[1] ¶5 In *Brown*, the Seattle Civil Service Commission sustained the removal of a Seattle police officer on May 23, 1922. Approximately five months later, the officer sought a new trial before the commission. By that time, one of the commission's members had been replaced. On appeal, the commission's decision to reconsider its order was overturned. More recent case law implies that administrative agencies retain jurisdiction to reverse their orders/decisions until jurisdiction is lost by appeal or until a reasonable time has run that is coextensive with the time required by statute for review.

«5»

«5» *Hall v. Seattle Sch. Dist. No. 1*, 66 Wn. App. 308, 314, 831 P.2d 1128 (1992).»

[2, 3] ¶6 More importantly, however, here, the Commission's own rules provide for a party to move for reconsideration within 10 days after entry of its decisions. In addition, the Commission's September 1 order expressly stated that the rules of chapter 41.12 RCW (allowing 30 days to appeal) applied only *absent* a motion for reconsideration.

¶7 In *Hall v. Seattle School District No. 1*, «6» the pertinent statute, like the one here, neither authorized nor prohibited reconsideration. The *Hall* court held that absent a statute or rule prohibiting reconsideration, the Seattle Civil Service Commission had limited inherent power to reconsider its decisions. In holding that the time for appeal runs from the entry date of the ruling on reconsideration and not that of the initial decision, this court stated in *Hall*:

[Previously], this court followed the general federal rule in holding that under the Rules of Appellate Procedure, when a timely motion for reconsideration has been made, the time for notice of appeal does not run until the lower court has entered an order on the motion. RAP 5.2(e) specifically provides that a notice of appeal may be filed within 30 days of entry of the order denying the motion for reconsideration. The Administrative Procedure Act[, chapter 34.05

RCW,] likewise provides that the time for filing a petition for judicial review commences when the petition for reconsideration is decided.

Contrary to Hall's contention, *there is no firmly established common law rule that a motion for reconsideration does not toll the time for appeal from the original decision.* «[7]»

Thus, although the Administrative Procedure Act and its timelines do not directly apply to the Commission, they are instructive.

«6» 66 Wn. App. 308, 831 P.2d 1128 (1992).»

«7» *Hall*, 66 Wn. App. at 315-16 (emphasis added) (footnotes omitted).»

¶8 Here, as in *Hall*, there are compelling policy reasons to hold that the Commission has the authority to reconsider its decision. Filing an appeal before awaiting an order on a motion for reconsideration subjects parties to potential costs that may prove to be unnecessary. Further, reconsideration may remove the need for the superior court to address the issue. Because both the order and the Commission's own rules allow a party to seek reconsideration, such reconsideration was proper here and the 30 days did not begin to run until entry of the Commission's September 18 order denying reconsideration.

Adequate Notice

[4] ¶9 The City argues that Skinner failed to serve the Commission with the notice of appeal as required by RCW 41.12.090, which provides that the appealing party serve the Commission within 30 days after entry of the decision. In the superior court, the Commission appeared and joined in the City's motion to dismiss the action on the basis that Skinner did not serve either the Commission members or its secretary. «8» He did, however, serve the Medina City Clerk and argues that such service is sufficient. We agree.

«8» The Commission did not file a brief in this court and noted that it remained a party of record for purposes of receipt of notice and pleadings. Because the issue is before this court, we do not deem the Commission's failure to brief the issue precludes our considering the merits.»

¶10 Interestingly, procedures for serving an appeal with the Commission are not articulated by statute. RCW 41.12.090 provides in pertinent part:

All investigations made by the commission pursuant to the provisions of this section shall be had by public hearing, after reasonable notice to the accused of the time and place of such hearing, at which hearing the accused shall be afforded an opportunity of appearing in person and by counsel, and presenting his or her defense. If such judgment or order be concurred in by the commission or a majority thereof, the accused may appeal therefrom to the court of original and unlimited jurisdiction in civil suits of the county wherein he or she resides. *Such appeal shall be taken by serving the commission, within thirty days after the entry of such judgment or order, a written notice of appeal, stating the grounds thereof, and demanding that a certified transcript of the record and of all papers on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court.* The commission shall, within ten days after the filing of such notice, make, certify and file such transcript with such court. The court of original and unlimited jurisdiction in civil suits shall thereupon proceed to hear and determine such appeal in a summary manner.

¶11 Skinner relies upon MCSR 18.15(d), which provides:

Papers required to be filed with the Commission shall be deemed filed upon actual receipt of the papers by the Commission staff at the Commission office.

Skinner asserts that because the Commission actually received his appeal, it is precluded from arguing that it did not receive proper notice. Further, Skinner notes that the Commission's address is stated in its rules and it is the same as the City's. «9» That same rule designates regular hours of work for the commission secretary. MCSR 3.01 designates Medina's city manager as the commission's secretary. «10»

«9» MCSR 2.13.»

«10» MCSR 3.01.»

¶12 For its position, the City relies on *Nitardy v. Snohomish County*. «11» There a disgruntled Snohomish County employee sued the county but served the wrong government agent (serving the secretary of the county executive when the statute specifically required service on the county auditor). Unlike the Snohomish County Auditor, the commissioners here are not full-time employees of the City and substantial compliance is sufficient under these circumstances.

«11» 105 Wn.2d 133, 712 P.2d 296 (1986).»

¶13 In *Hall*, this court held notice to the full-time employee at the same address was sufficient where the person required to be served (the chairman of a school board) was in a part-time, unpaid position. The *Hall* court based its decision in part on *In re Saltis*, «12» which involved service of a notice of appeal under the Industrial Insurance Act, «13» stating:

As in *Saltis*, the District in the case at bar timely received actual notice, so there is no prejudice. Service on the chair's secretary was calculated to give notice to her and to the District. Undoubtedly, service on the secretary achieved the same result as if Ms. Smith, the chair, had been in her office and served personally. The defect in service is purely formal, without practical importance, and not a proper basis to deny Hall's access to the courts. «[14]»

«12» 94 Wn.2d 889, 621 P.2d 716 (1980).»

«13» Title 51 RCW.»

«14» *Hall*, 66 Wn. App. at 313.»

¶14 We do not believe the part-time status of the chair in *Hall* is a sufficient distinction to obviate application of the policy and rationale of *Hall* here. The record reveals that the Commission had actual notice of the appeal in a timely manner and thus there is no prejudice.

¶15 We reverse and remand.

BECKER and COX, JJ., concur.

Appendix A-5

Hall v. Seattle Sch. Dist. No. 1,
66 Wn. App. 308, 314, 831 P.2d 1128 (1992)

66 Wn. App. 308, 831 P.2d 1128, HALL v. SEATTLE SCHOOL DISTRICT 1

July 1992

[No. 27777-4-I. Division One. July 6, 1992.]**HALL v. SEATTLE SCHOOL DISTRICT 1****HAYWARD HALL, Appellant, v. SEATTLE SCHOOL DISTRICT NO. 1, Respondent.**

[1] Civil Procedure – Statutory Provisions – Degree of Compliance. As a general rule, substantial compliance with statutory provisions governing civil procedure is sufficient. Lawsuits should not be dismissed because of unnecessarily complex legal technicalities.

[2] Schools – Employment Relations – Judicial Review – Notice of Appeal – Service on Chair of School Board – Degree of Compliance. A teacher aggrieved by a decision or action of a school board must substantially comply with the requirement of RCW 28A.405.320 that the notice of appeal be served on the chair of the school board. Service on the secretary of the chair of the school board is satisfactory if it results in the district receiving timely notice and the district is not prejudiced thereby.

[3] Schools – Employment Relations – Adverse Change – Hearing – Motion for Reconsideration – Statutory Authority. A hearing officer conducting a hearing regarding an adverse change in the contract status of a certificated school district employee has authority under RCW 28A.405.310 to entertain a motion for reconsideration.

[4] Schools – Employment Relations – Judicial Review – Timeliness – Commencement of Period – Motion for Reconsideration. When a party has filed a timely motion for reconsideration of a decision by a hearing officer regarding an adverse change in the contract status of a certificated school district employee, the 30-day period for filing an appeal (RCW 28A.405.320) begins to run on the date of the hearing officer's decision on the motion for reconsideration.

Nature of Action: A public school teacher sought judicial review of his termination. Previously, the school district had prevailed in its superior court appeal of a hearing officer's decision that the district's second notice of probable cause was untimely.

Superior Court: The Superior Court for King County, No. 90-2-08532-5, Susan R. Agid, J., on December 31, 1990, entered a judgment in favor of the school district.

Court of Appeals: Holding that the teacher had substantially complied with statutory service requirements, that the hearing officer had authority to entertain a motion for reconsideration, and that the appeal from the hearing officer's order ran from the date of the denial of reconsideration, the court affirms the judgment.

William B. Knowles, for appellant.

Lawrence B. Ransom, Susan K. McClellan, and Karr Tuttle Campbell, for respondent.

FORREST, J. – Hayward Hall (hereinafter Hall) appeals the Superior Court's ruling that the Seattle School District (hereinafter District) timely appealed the hearing officer's decision. The District cross-appeals, asserting that the Superior Court erred in denying the District's motion to dismiss Hall's subsequent appeal to the Superior Court on the basis of insufficient service. We affirm.

The issues presented by this appeal are purely procedural. «1»

«1» There is no challenge to the hearing officer's findings and conclusion that termination is proper.

The torturous history of these proceedings is set forth in the appendix. Hall's appeal focuses on a September 26, 1989, decision of the Superior Court remanding the case for further proceedings before the hearing officer. Hall contends that since the District did not appeal the hearing officer's initial decision within 30 days, the Superior Court was without jurisdiction to hear the District's petition. It is undisputed

that the District appealed within 30 days of the hearing officer's denial of its motion for reconsideration. Hall argues that the petition to the Superior Court was untimely, and thus the hearing officer's initial decision of August 30, 1988, invalidating the second notice of probable cause, remains valid and precluded the hearing officer from considering the facts developed in the June 14 and 15, 1988, hearing in reaching his ultimate decision to affirm discharge on March 29, 1990. «2»

«2» The judgment could be affirmed on the basis that, assuming Hall's contentions as to the untimeliness of the District's petition are correct, the hearing officer nonetheless was entitled to consider any facts in ruling on the October 14, 1988, notice of probable cause to terminate. *Sargent v. Selah Sch. Dist.* 119, 23 Wn. App. 916, 923-24, 599 P.2d 25, review denied, 92 Wn.2d 1038 (1979). However, we choose to address the merits of Hall's appeal due to the absence of precedent regarding the hearing officer's authority.

Hall's appeal to this court involves two separate issues: (1) Does the hearing officer have authority to entertain a motion for reconsideration, and if so, (2) does the time for an appeal from his order run from the date of the order or from the date of denial of reconsideration?

We first address the District's cross appeal, which asserts that the Superior Court erred in failing to dismiss Hall's appeal for insufficient service. Former RCW 28A.58.460 «3»

«3» RCW 28A.58.460 has been recodified as RCW 28A.405.320.

provides:

Any teacher . . . desiring to appeal from any action or failure to act upon the part of a school board . . . may serve upon the chairman of the school board and file with the clerk of the superior court . . . a notice of appeal . . .

The notice of appeal was served on the secretary of the chair of the school board rather than on the chair. The District argues that this statute requires personal service upon the chair of the school board and that failure to do so mandates dismissal of the appeal. We disagree.

As a preliminary matter we note that former RCW 28A.58.460 does not specifically address decisions of the hearing officer, but refers only to board actions. In substituting proceedings before a hearing officer for proceedings before the board, the Legislature apparently neglected to amend this section to reflect the new procedure. «4»

«4» See RCWA 28A.58.455 Historical Note, at 242-43 (1982).

[1, 2] We find that the issue in this case is governed by *In re Saltis*, «5»

«5» 94 Wn.2d 889, 621 P.2d 716 (1980).

which held that substantial compliance with statutes that prescribe methods of service is sufficient. «6»

«6» *Saltis*, at 895-96.

The statute at issue in *Saltis* was RCW 51.52.110, «7»

«7» RCW 51.52.110 provides, in part, "Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director and on the board."

which provides that service for industrial insurance appeals is to be "on the director and on the board".
«8»

«8» In *Saltis* there was no evidence as to whether the Director had been served. However, the Department clearly had notice of the proceeding. *Saltis*, at 892.

We find that service under former RCW 28A.58.460 "upon the chairman" is directly analogous to the requirements of service under RCW 51.52.110 and that the following language from *Saltis* states the proper rule to be applied:

Even if we did not consider the cases of *Lidke* [v. *Brandt*, 21 Wn.2d 137, 150 P.2d 399 (1944)], *Rybarczyk* [v. *Department of Labor & Indus.*, 24 Wn. App. 591, 602 P.2d 724 (1979)], *MacVeigh* [v. *Division of Unemployment Comp.*, 19 Wn.2d 383, 142 P.2d 900 (1943)], and *Smith* [v. *Department of Labor & Indus.*, 23 Wn. App. 516, 596 P.2d 296 (1979)] distinguishable because of the clear evidence regarding actual notice to the Director, we would warn against slavish adherence to the precedent they represent. The requirement of notice contained in RCW 51.52.110 is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions.

As noted by the Court of Appeals in *In re Saltis*, *supra* at 219, "the test for legal sufficiency . . . is . . . whether the notice was reasonably calculated to reach the intended parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1949); *Thayer v. Edmonds*, 8 Wn. App. 36, 42, 503 P.2d 1110 (1972). In cases considering the court's general jurisdiction, we have stated that "substantial compliance" with procedural rules is sufficient, because "delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities":

[T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as "the sporting theory of justice."

Curtis Lumber Co. v. Sortor, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

In re Saltis, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980).

Hall's notice of appeal was delivered to the secretary of the chair of the school board in the office of the school board and delivered by her to the office of the general counsel pursuant to standard operating procedures. The chair of the school board is a part-time unpaid position. Thus, the person serving as chair is not available every day at the school board office for service. Indeed, the chair could easily be unavailable for service for long periods, by being out of state on vacation or by reason of business travel. After an adverse decision, a teacher may need some time to decide whether to appeal, leaving only a few days for service. It is incomprehensible that the Legislature intended that inability to serve a specific individual, particularly one with limited availability, should preclude an appeal. We are supported in this view by the provision in former RCW 28A.58.450 «9»

«9» RCW 28A.58.450 has been recodified as RCW 28A.405.300.

regarding a teacher's request for a hearing after receipt of a notice of probable cause. That statute provides:

Every such employee so notified, at his or her request made in writing and filed with the president, chairman of the board or secretary of the board of directors of the district . . . shall be granted opportunity for a hearing . . .

(Italics ours.) RCW 28A.58.450. There is no reason for the Legislature to provide more generous and practical means of service for a request for a hearing before a hearing officer than for a notice of appeal from the hearing officer's decision to the superior court.

As in *Saltis*, the District in the case at bar timely received actual notice, so there is no prejudice. Service on the chair's secretary was calculated to give notice to her and to the District. Undoubtedly, service on the secretary achieved the same result as if Ms. Smith, the chair, had been in her office and served personally. The defect in service is purely formal, without practical importance, and not a proper basis to deny Hall's access to the courts.

The District argues that *Nitardy v. Snohomish Cy.* «10»

«10» 105 Wn.2d 133, 712 P.2d 296 (1986).

and *Landreville v. Shoreline Comm'ty College Dist.* 7 «11»

«11» 53 Wn. App. 330, 766 P.2d 1107 (1988).

require a different result. In *Nitardy*, the statute required service on the county auditor. However, the plaintiff served the secretary of the county executive. «12»

«12» *Nitardy*, at 134.

The court held that such service was insufficient. «13»

«13» *Nitardy*, at 136.

In *Landreville*, the statute required that service be made on the Attorney General or an assistant attorney general. The plaintiff served an administrative assistant to the Attorney General. «14»

«14» *Landreville*, at 331.

That court also held such service to be insufficient. «15»

«15» *Landreville*, at 332.

Significantly, neither *Nitardy* nor *Landreville* cites to *Saltis*, or refutes the court's persuasive policy analysis. Moreover, both cases are factually distinguishable from the case at bar. The facts in *Nitardy* would be equivalent to service on the secretary to the superintendent of schools rather than on the secretary to the proper party, as in our case. In *Landreville*, the statute provided for service to a number of people, obviating some of our concerns about service on a specific individual with no alternative provided. The existence of alternatives makes the irregularity in *Landreville* less excusable than the alleged defect in service herein involved.

Where timely notice is in fact received by the District and there is absolutely no prejudice, we fail to see any reasonable policy basis for not holding substantial compliance sufficient. The Superior Court did not err in denying the motion to dismiss.

II

[3] Hall asserts that because former RCW 28A.58.455, «16»

«16» RCW 28A.58.455 has been recodified as RCW 28A.405.310.

prescribing the procedures to be followed by the hearing officer, does not explicitly authorize a hearing officer to entertain a motion for reconsideration, an officer has no such power. We disagree. The statute does not explicitly prohibit reconsideration. Nor does it purport to itemize every power of the hearing officer. On the contrary, it provides that the hearing officer "shall preside . . . and in connection therewith shall . . . (b) [m]ake other appropriate rulings of law and procedure." Former RCW 28A.58.455(7).

The hearing officer has the power to provide additional methods of discovery as may be authorized by the civil rules applicable in superior court. «17»

«17» Former RCW 28A.58.455(6)(c).

The officer also has the power to rule on the admissibility of evidence pursuant to the Rules of Evidence applicable in superior court. «18»

«18» Former RCW 28A.58.455(7)(a).

These provisions indicate that the hearing officer shall act substantially as a judge hearing a case without a jury. A judge has the authority to hear motions for reconsideration. Likewise, administrative law judges may entertain motions for reconsideration under the Administrative Procedure Act. «19»

«19» RCW 34.05.470.

The functions of a hearing officer are very similar to those of the administrative law judge. We see no good policy argument against the hearing officer having the same power. «20»

«20» See CR 59.

A contrary holding would require appeal to the superior court to correct any error in a hearing officer's decision, no matter how apparent. Common sense suggests that it is desirable to allow the hearing officer a chance to correct an error and possibly obviate the necessity for an appeal.

III

Hall asserts that even if the hearing officer may entertain motions for reconsideration, the time for appeal runs from the date of the initial decision, not from his ruling on the motion for reconsideration. We disagree.

[4] In *Simonson v. Veit*, «21»

«21» 37 Wn. App. 761, 683 P.2d 611, review denied, 102 Wn.2d 1013 (1984).

this court followed the general federal rule in holding that under the Rules of Appellate Procedure, when a timely motion for reconsideration has been made, the time for notice of appeal does not run until the lower court has entered an order on the motion. «22»

«22» Simonson, at 765.

RAP 5.2(e) specifically provides that a notice of appeal may be filed within 30 days of entry of the order denying the motion for reconsideration. «23»

«23» It should be noted that an untimely motion will not extend the time for appeal. Griffin v. Draper, 32 Wn. App. 611, 613, 649 P.2d 123, review denied, 98 Wn.2d 1004 (1982).

The Administrative Procedure Act likewise provides that the time for filing a petition for judicial review commences when the petition for reconsideration is decided. «24»

«24» RCW 34.05.470.

Contrary to Hall's contention, there is no firmly established common law rule that a motion for reconsideration does not toll the time for appeal from the original decision. The only Washington authority cited by Hall, National Christian Ass'n v. Simpson, «25»

«25» 21 Wash. 16, 20, 56 P. 844 (1899).

was based on the previous rules of appeal, which have been changed to specifically address the issue, and consequently is no longer good authority. «26»

«26» Hall also points out that several states hold that a motion for reconsideration does not toll the time for notice of appeal. See Peay v. Peay, 607 P.2d 841, 843 (Utah 1980); In re Timothy N., 48 Cal. App. 3d 862, 867, 121 Cal. Rptr. 880 (1975); Whitehead v. Norman Kaye Real Estate Co., 80 Nev. 383, 385, 395 P.2d 329 (1964). To the extent that these cases are applicable to the case at bar we find them unpersuasive in view of our own firm rule to the contrary.

We hold that the District's petition for writ of review, filed within 30 days of the hearing officer's denial of the motion for reconsideration, was timely.

APPENDIX

May 20, 1987 – The District issues the first notice of probable cause to place Hall on suspension.

November 25, 1987 – The District issues the second notice of probable cause to add additional charges and to convert the suspension to termination. Hall requests a hearing.

June 14-15, 1988 – The statutory hearing is held.

August 30, 1988 – The hearing officer issues his decision, concluding that sufficient cause for the suspension was established but that the second notice of probable cause was untimely.

September 12, 1988 – The District files a motion for reconsideration of the hearing officer's decision.

October 12, 1988 – The hearing officer denies the District's motion for reconsideration.

October 14, 1988 – The District issues the third notice of probable cause to terminate, adding additional charges.

October 28, 1988 – Hall requests a hearing in regard to the third notice of probable cause.

November 10, 1988 – The District files a petition for writ of review in superior court challenging the hearing officer's August 30, 1988, ruling that the second notice of probable cause was untimely.

September 5, 1989 – The District's writ of review is heard.

September 26, 1989 – The Superior Court reverses the hearing officer's ruling regarding the second notice of probable cause and remands the case.

November 30, 1989 – The District moves for consolidation of the remanded proceedings and the third notice of probable cause.

December 7, 1989 – The motion to consolidate is granted.

February 15, 1990 – The remanded and consolidated hearing is held.

March 29, 1990 – The hearing officer issues his decision, ruling that sufficient cause for termination has been established.

April 27, 1990 – Hall files a petition for writ of review in superior court.

May 10, 1990 – The District files a motion to dismiss Hall's petition, asserting that the District was not properly served.

June 14, 1990 – The Superior Court denies the District's motion to dismiss.

December 31, 1990 – The Superior Court affirms the hearing officer's March 29, 1990, decision.

WEBSTER, A.C.J., and KENNEDY, J., concur.

Appendix A-6

Jefferson County Code
JCC 18.40.310 (Motions for Reconsideration) and
JCC 18.40.230 (Notice of Public Hearing)

JCC 18.40.310: (Motions for 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.

JCC 18.40.230: Notice of public hearing.

Notice of public hearing shall be provided not less than 10 calendar days prior to the hearing. If the notice of application does not specify a hearing date, a separate notice of public hearing shall be provided. For Type III projects, the notice of a threshold determination under SEPA may be combined with the notice of public hearing. Notice under this section shall be accomplished as follows:

- (1) Published Notice. The administrator shall publish a notice of public hearing in the official county newspaper at least one time. This notice shall include (and republish if necessary) the appropriate information from JCC 18.40.190.
- (2) Mailed Notice. The administrator shall send a notice of public hearing to all of the persons entitled to notice, as described in JCC 18.40.210(3), including any person who submits written or oral comments on the notice of application.
- (3) Posted Notice. Posted notice of the public hearing is required for all Type III project permit applications, which shall be posted as set forth in JCC 18.40.210(2). In addition, notice of Type III preliminary plat actions and proposed subdivisions must be given as set forth in JCC 18.40.240. [Ord. 8-06 § 1]

Appendix A-7

HB 2740, Bill Analysis

Local Government & Housing Committee

HB 2740

Brief Description: Regarding the definition of land use decision in the land use petition act.

Sponsors: Representatives Seaquist and Angel.

<p>Brief Summary of Bill</p> <ul style="list-style-type: none">• Amends the Land Use Petition Act to clarify when the 21-day time limit for the filing of judicial appeals to local land use decisions begins to run.
--

Hearing Date: 1/18/10

Staff: Thamas Osborn (786-7129).

Background:

The Land Use Petition Act

The Land Use Petition Act (LUPA) was enacted in 1995 to provide uniform, expedited judicial review of land use decisions made by counties, cities, and unincorporated towns. Land use decisions subject to judicial review under the LUPA are limited to:

- applications for project permits or approvals that are required before real property can be improved, developed, modified, sold, transferred, or used;
- interpretations regarding the application of specific requirements to specific property; and
- enforcement by local jurisdictions of ordinances relating to particular real property.

Land use decisions that do not fall under the LUPA are approvals to use, vacate, or transfer streets, parks and other similar types of public property, approvals for area-wide rezones and annexations, and applications for business licenses. In addition, the LUPA does not apply to land use decisions that are subject to review by legislatively-created quasi-judicial bodies, such as the Shorelines Hearings Board, the Environmental and Land Use Hearings Board, and the Growth Management Hearings Board.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

A person seeking review of a land use decision must file a petition in superior court and serve all parties within 21 days of the issuance of the land use decision. The parties must follow certain procedures within specified timeframes that are meant to expedite the judicial process.

"Land use decision" is defined to mean a final determination by a local jurisdiction's governing body or officer with the highest level of authority to make the decision, including those with the authority to hear appeals at the local, non-judicial level.

Generally, the court sets a hearing within a few months of the filing of the petition. The court may affirm or reverse the land use decision or remand it for modification or further proceedings.

Judicial relief may be granted based on any one of the following grounds:

- the decision maker followed an unlawful procedure or failed to follow a required procedure;
- the land use decision is erroneous in its interpretation or application of the law;
- the land use decision is not supported by evidence;
- the land use decision is outside the authority or jurisdiction of the decision maker; or
- the land use decision violates the petitioner's constitutional rights.

Recent Court Cases Pertinent to LUPA Appeals

In recent years there have been conflicting decisions by the courts of appeal in this state regarding when time limits for the filing of judicial appeals begins to run in cases involving motions for the reconsideration of local administrative decisions.

In *Skinner v. Civil Service Commission of the City of Medina*, Division I of the Washington State Court of Appeals ruled that where the law allows a local, non-judicial motion for reconsideration of an administrative decision, the time limit for the filing of a judicial appeal runs from the date of the final order on the motion for reconsideration rather than from the date of the original administrative decision. *Skinner v. Civil Service Commission of the City of Medina*, 146 Wn. App. 171, 188 P 3d (2008). This ruling has been appealed to the Washington State Supreme Court, which has agreed to review the case.

Contrary to the ruling in *Skinner*, in 2009 Division II of the Washington State Court of Appeals ruled that under LUPA the 21-day limit for filing a judicial appeal begins to run on the date the order is entered on the original, administrative land use decision, regardless of whether a party has filed a local, non-judicial motion for reconsideration. *Mellish v. Frog Mountain Pet Care*, --- P. 3d ---, 2009 WL 4814955 (2009).

Summary of Bill:

The act clarifies that, under LUPA, when a motion for reconsideration of a local land use decision has been filed with the local decision making authority, the date of the "land use decision" is the date of the entry of the decision on the reconsideration motion rather than the date of the original decision.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

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DIVISION II

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STATE OF WASHINGTON

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No. 37583-4

MARTIN MELLISH,

Appellant,

v.

FROG MOUNTAIN PET CARE and
HAROLD ELYEA,

Respondent,

and

JANE ELYEA and JEFFERSON
COUNTY,

Respondents.

DECLARATION OF SERVICE

I, **Steven Kimple**, under penalty of perjury under the laws of the State of Washington declare as follows:

I am now and at all times herein mentioned a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party in the

MARTIN MELLISH
930 Martin Road
Port Townsend, WA 98368
Phone: (360) 385-0082

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above entitled action, and competent to be a witness therein. On the date indicated below, by first class mail, with proper postage, I caused:

- 1. Petition for Discretionary Review by the Supreme Court, and
- 2. Declaration of Service,

to be served on:

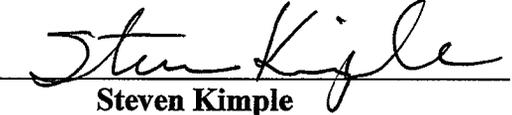
David P. Horton
Attorney at law
3212 NW Byron St. Ste. 104
Silverdale, WA 98383

David Alvarez, Civil Dep.
Jefferson County
1820 Jefferson St.
Port Townsend, WA 98368

and filed with:

Court of Appeals, Div. II
950 Broadway, Ste 300, MS TB-06
Tacoma WA 98402-4454

Dated this 24 day of February, 2010, at Port Hadlock, Washington.


Steven Kimple