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BY RONALD R. CARPENTER Supreme Court No 84246-9
Court of Appeals No. 37583-4
CLERK Clallam County No. 07-2-00791-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

FILED
JUN 17 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Martin Mellish, *Petitioner*
v.
Frog Mountain Pet Care, et al., and
Jefferson County, *Respondents*

BRIEF OF PRO SE AMICUS CURIAE HAROLD T. HARTINGER
RE: CHAPTER 59, LAWS OF 2010 (H.B. 2740)

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**Brief of Pro Se Amicus Curiae Harold T. Hartinger
Re: Chapter 59, Laws of 2010 (H.B. 2740)**

**PART I. INTRODUCTION: ISSUES STATED AND THE RESPONSES OF
AMICUS TO THE STATED ISSUES.**

Pro Se Amicus Curiae¹ briefly addressed the applicability and effect of House Bill 2740 (Chapter 59, Laws of 2010) in his *Memorandum in Support of Review* dated April 20, 2010 (accepted for filing on May 3, 2010). This *Brief of Amicus* supplements his prior *Memorandum* to address issues in response to the Supreme Court's order of June 2, 2010, by Department II directing "the parties to submit supplemental briefs on the applicability and effect of House Bill 2740 (Laws of 2010, Ch 59) by not later than June 18, 2010."

Issues Addressed by Amicus

First Issue: Is House Bill 2740 applicable to Mr. Mellish's Land Use Petition Act (LUPA) appeal now on direct review from a Superior

¹ Amicus is a member of the Washington State Bar Association. This Brief expresses his personal views; he does not represent a party to this case or a related person or entity. No person or entity other than Amicus prepared any part of this Memorandum or contributed funding to defray the cost of its preparation, distribution, or filing.

Court judgment filed prior to the Bill's enactment as law on March of 10, 2010, with an effective date of June 10, 2010?²

Second Issue: Does the land use "vested rights doctrine" constitute a bar against enforcement of the new law in Mr. Mellish's pending case, as asserted by Respondent Frog Mountain Pet Care?

Chapter 59, Laws of 2010 (House Bill 2740), amended RCW 36.70C.020(2)(c) by adding this paragraph to the subsection:

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

The Response of Amicus on the Issues: House Bill 2740 as enacted by the Legislature is applicable to all non-final LUPA appeals, including Mr. Mellish's direct appeal now pending in Division II of the Court of Appeals.

The "vested rights doctrine" asserted by Frog Mountain in its *Answer to Memorandum of Amicus Curiae* (May 13, 2010) provides no grounds for limiting the Legislature's authority to enact House Bill 2740 or denying its application to Mr. Mellish's LUPA appeal.³

² Mr. Mellish's LUPA appeal was filed on August 10, 2007, in Clallam County.

³ Frog Mountain's *Answer* provides no argument or authority to explain how the doctrine purportedly limits the scope of Supreme Court's review of enacted House Bill 2740 or precludes its application in Mr. Mellish's case.

PART II. STATEMENT OF THE CASE

Amicus accepts the Court of Appeals' statement of facts as supplemented by the Points of References to the Record that answer questions raised and inferences made by the Court of Appeals in its analysis justifying its final decisions.

A. MELLISH V. FROG MOUNTAIN PET CARE, 154 Wn. App. 395, 398-399, 225 P.3d 439, 441 (2010):

¶ 2 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.

[1] ¶ 3 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 *399 interested parties and adjacent property owners. Mellish moved for reconsideration on June 28, but did not notify Frog Mountain of the motion.^{FN2} 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.

FN2. 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 Wash.2d 720, 727, 696 P.2d 1222 (1985); *Duffy v. Dep't of Soc. & Health Servs.*, 90 Wash.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.

¶ 4 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.

¶ 5 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.

B. Points of Reference to the Record: House Bill 2740 Resolves the Only Issue Presented by Frog Mountain's CR 12(b)(6) Motion.

Point 1: Mr. Mellish motion for reconsideration of the Hearing Examiner's decision was timely filed on June 28, 2007. The Examiner filed his decision filed on June 20, 2007; the County mailed it Mr. Mellish and others on Thursday, June 21, 2007.

The five business days following the mailing commenced on Monday, June 25, 2007 (the third day after mailing being a Sunday).⁴

⁴ All time calculations in this *Brief* are based on CR 5(b)-(d) and CR 6 as applied to time limits and service of papers imposed by LUPA and those imposed by Jefferson County Code § 18.40.310: (a) five business days for filing a written

Therefore, the fifth business day after June 25, and the last day for filing the motion, was Monday, July 2, 2007.

Point 2: The Hearing Examiner's denial of reconsideration by a decision filed July 20, 2007, was not timely. A timely decision was due Monday, July 16, 2007, 25 days after his original decision filed on June 20, 2007, the same date Mr. Mellish's LUPA appeal rights expired under the decision of the Court of Appeals. Mr. Mellish filed his LUPA appeal with the Clallam County Superior Court on August 10, 2007, well within the LUPA 21-day appeal time prescribed by House Bill 2740.

Point 3: Frog Mountain challenged the timeliness of Mr. Mellish's Superior Court action by filing by a CR 12(b)(6) motion to dismiss that did not address the merits of its application for a condition use permit. On September 24, 2007, Judge Kenneth Williams denied the motion by a *Memorandum Opinion on Motion to Dismiss* (CP 204-212) that directed the parties to perfect the record and note the matter "for hearing pursuant to the LUPA statute."

Point 4: On March 12, 2008, after the perfection of the record and the LUPA hearing, Judge Williams filed a *Memorandum Opinion* (CP 35-53) reversing the Hearing Examiner's decision and remanding the case to Jefferson County with directions to the County to deny Frog Mountain's application for expansion of a its nonconforming business use.

request for reconsideration by a hearing examiner; and (b) ten business days for issuance of the examiner's decision.

Point 5: Frog Mountain’s “Notice of Appeal to Court of Appeals Division II,” was filed April 9, 2008. The *Notice* sought review of “1) the Court’s *Memorandum Opinion Remanding* the matter to Jefferson County; and 2) the Court’s *Memorandum Opinion on Motion to Dismiss*.” (Italics added for emphasis.) Copies of both *Opinions* by Judge Williams were attached to the *Notice of Appeal*.

Point 7: Frog Mountain invoked appellate court jurisdiction by appealing Judge Williams’ final decision on the merits (filed March 12, 2008), solely as a vehicle for appellate review of Judge Williams’ *Memorandum Opinion on Motion to Dismiss* (CP 204-212), filed over five months earlier (on September 24, 2007). Frog Mountain did not perfect its appeal from the March 12, 2007, *Memorandum Opinion* (CP 35-53), reversing the Hearing Examiner’s decision on the merits.

Point 8: House Bill 2740 was drafted, filed, and received its first reading in the House of Representatives on January 13, 2010, and on January 28, 2010, the Bill passed without a dissenting vote. On February 1, the House Bill received its first reading in the Senate, and on March 3, 2010, the Bill passed without a dissenting vote.⁵

⁵ The House Bill Report for H.B. 2740 upon its passage by the Legislature is attached as Appendix A.

PART II. THE SUPREME COURT SHOULD REVERSE THE COURT OF APPEALS DECISION IN *MELLISH V. FROG MOUNTAIN PET CARE* BY GIVING EFFECT TO HOUSE BILL 2740 (LAWS OF 2010, CHAPTER 59).

The Court of Appeals decision in *Mellish v. Frog Mountain Pet Care* is plainly at odds with legislative intent as expressed in House Bill Report, H.B. 2740; see, *infra*, attached Appendix A. The Bill by its terms amended RCW 36.70C.020(2)(c) by adding this paragraph to the subsection at a time after competing Court of Appeals decisions⁶ had been brought to the attention of the Legislature:

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

The purpose of House Bill 2740 is beyond dispute. The Legislature enacted the Bill as a procedural amendment of LUPA that established the time when an administrative proceeding was ripe for judicial review. There is no question about the nature of the proposed amendment — it was remedial; it provides a remedy that had not previously been defined by judicial decision. It was curative — it clarified the law governing the timing of LUPA appeals that had not previously been defined by statute.

⁶ *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008), *aff'd* on appeal, --- Wn.2d. ---, --- P.3d ---, 2010 WL 1909580 (2010), held a timely motion for reconsideration delayed the time for judicial review, whereas the same ruling by Judge Williams in Mr. Mellish's case was reversed on appeal to Division II of the Court of Appeals.

Such an amendment, especially one enacted during a controversy over the interpretation of the law, is to be given retroactive effect.

The Legislature is well aware of the extent of its constitutional legislative authority as confirmed by the Supreme Court. For example:

When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.

Tomlinson v. Clarke, 118 Wn.2d 498, 510-511, 825 P.2d 706, 713 (1992).

In *Tomlinson* the Court reviewed a 1984 amendment to a recording statute, RCW 65.08.060, and gave it retroactive application to an unrecorded real estate contract entered into before the state was amended.

The amendment revised the statute to include real estate contracts within meaning of “conveyance,” and thereby bringing real estate contract purchasers within scope of the bona fide purchaser doctrine. The Court ruled that giving retroaction application of the amendment to the pre-amendment contract did not impair any vested contractual rights of the contract buyer that purchased the land prior to the amendment and failed to record his purchase before subsequent purchaser recorded his contract.

In *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74, 794 P.2d 508 (1990), the Court gave retroactive application to 1989 amendments to RCW 36.58.090, a statute that provided counties with alternative procedures for awarding solid waste contracts.

The amendments clarified earlier provisions of the law by deleting reference to a “resource recovery facility” to make it clear that counties may select vendors through an alternative procedure even if the proposals do not include a “resource recovery facility.” The statutory amendments clarified existing law, and for this reason they were deemed retroactive and were given retroactive application that confirmed a contract negotiated in accordance with the later enacted amendment. *Washington Waste Systems*, 115 Wn.2d at 78.

Part III. Frog Mountain Has No Claim Under the Land Use “Vested Rights Doctrine” that Bars the Supreme Court from Applying House Bill 2740 on Review of the Decision of the Court of Appeals.

Frog Mountain has asserted the land use “vested rights doctrine” in its *Answer to Memorandum of Amicus Curiae* (dated May 13, 2010), but it provided no argument and cited no authority to explain why the doctrine precludes application of House Bill 2740 to the procedural issue addressed by the Court of Appeals in *Mellish v. Frog Mountain*.

Nonetheless, Frog Mountain’s claim merits a response because its claim raises issues beyond the scope of its CR 12(b)(6) motion to dismiss Mr. Mellish’s LUPA appeal. The thrust of its claim was expressed in a single statement in its *Answer to Memorandum of Amicus Curiae Harold Hartinger in Support of Petition for Review*, at p. 2:

Because the Court of Appeals was correct, the legislature enacted the statute at issue to prevent the issue from reoccurring. But Frog

Mountain's permit vested upon filing of its application. The New land use statute cannot apply to this case.

Frog Mountain's premise for its land use "vested rights" claim is that its application for a land use application created vested rights in the permit issued in reliance on the Hearing Examiner's decision. See, the last paragraph on page 2 of its *Answer to Amicus*. But Frog Mountain has no permit. The issued Permit was cancelled by the final judgment of the Superior Court Judge Williams' March 12, 2007, *Memorandum Opinion* (CP 35-53).

Frog Mountain appealed the final judgment, but it did not perfect its appeal of that judgment — *but it did not seek a stay to preserve the status quo pending its perfected appeal from Judge William's denial of Frog Mountain's CR 12(b)(6) motion to dismiss.*

The more fundamental objection to Frog Mountain's assertion of vested rights under the land use "vested rights doctrine" is implicit in the doctrine itself. The doctrine has never been asserted for purposes beyond that for which it was created, *i.e.*, to establish the *land use statutes, ordinances, and regulations* that will govern land development in accordance with an approved application and permit program of the governmental entity overseeing the development. Once established, the development cannot be frustrated by changes in the governing *land use*

*statutes, ordinances, and regulations.*⁷ *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986).

There is no basis for Frog Mountain's implicit contention that the land use "vested rights doctrine" overrides the *Tomlinson* and *Washington Waste Systems* decisions discussed above, at pages 8-9. The two cases define the constitutional primacy of the Legislature as the source of statutory law. See, e.g., *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

Furthermore, Frog Mountain has no vested right in the 21-day statute of limitations that governs the timing of a LUPA appeal, *Herr v. Schwager*, 145 Wash. 101, 258 P. 1039 (1927); and the Supreme Court is obliged to give effect to House Bill 2740, a measure enacted by the Legislature to accommodate administrative motions for reconsideration:

Courts are not at liberty to speculate upon legislative intent when that body, having subsequent opportunity, has put its own construction upon its prior enactments.

State ex rel. Oregon R. & N. Co. v. Clausen, 63 Wash. 535, 541, 116 P. 7 (1911)

⁷ The "vested rights doctrine" is in itself a complex aspect of real estate development law. There are exceptions and qualifications and disagreements over the scope of the vested rights doctrine. See, e.g., Overstreet, Gregory and Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle U. L. Rev. 1043 (2000); and Wynne, Roger D., *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We can Reclaim It*, 24 Seattle U. L. Rev. 851 (2001).

CONCLUSION

For the reasons set out above, the Supreme Court should (1) accept review, (2) vacate the decision of the Court of Appeals, (3) affirm Judge Williams' decision, and (4) grant such other relief as may be appropriate.

Respectfully submitted,

Harold T.
Hartinger

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HAROLD T. HARTINGER, WSBA 1578
Pro Se Amicus Curiae

Dated: June 17, 2010

HOUSE BILL REPORT
HB 2740

As Passed Legislature

Title: An act relating to the definition of land use decision in the land use petition act.

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

Sponsors: Representatives Seaquist and Angel.

Brief History: Committee Activity:

Local Government & Housing: 1/18/10, 1/20/10 [DP].

Floor Activity:

Passed House: 1/28/10, 97-0. Passed Senate: 3/3/10, 47-0. Passed Legislature.

Brief Summary of Bill

- 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.

HOUSE COMMITTEE ON LOCAL GOVERNMENT & HOUSING

Majority Report: Do pass. Signed by 11 members: Representatives Simpson, Chair; Nelson, Vice Chair; Angel, Ranking Minority Member; DeBolt, Assistant Ranking Minority Member; Fagan, Miloscia, Short, Springer, Upthegrove, White and Williams.

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:

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.

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.

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 (Skinner)*, 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*, 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 the 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.

Staff Summary of Public Testimony:

(In support) The purpose of this bill is to reduce the number of the LUPA cases that go to court and to ensure that citizens have access to the LUPA remedies early on in the process without the involvement of courts and lawyers. Under current law a citizen has only 21 days from the date of the final administrative decision in the LUPA process in which to appeal the decision to the courts. This 21-day deadline is extraordinarily short and average citizens are often unable to meet this deadline. If passed, the bill would help eliminate frivolous lawsuits filed early in the process by citizens attempting to avoid the consequences of missing the 21 day deadline. However, some jurisdictions have a local, administrative, LUPA appeals process (i.e., a motion for reconsideration of the initial ruling) that citizens can use to appeal an initial decision without resorting to filing a court case, and can thus avoid the 21-day deadline "trap." This bill would clarify existing law so as to

ensure that the 21-day-court filing deadline begins to run after either the date of the initial ruling or 21 days after the final decision on a motion for consideration, whichever occurs later. In short, in LUPA cases, the bill would allow an administrative appeal to be finalized without the threat that the 21-day deadline imposes.

(In support with concerns) The passage of the LUPA was a mistake, insofar as it creates a process that is largely hidden from public view. Many citizens are effectively deprived of legal remedies due to its lack of public notice requirements. Furthermore, most citizens are altogether unaware of the LUPA process and the limited rights it confers. However, the bill is good insofar as it will ensure the right to a meaningful administrative appeal of an initial LUPA ruling.

(Opposed) None.

Persons Testifying: (In support) Representative Seaquist, prime sponsor; Jill Guernsey and David St. Pierre, Pierce County Prosecutors Office; and Scott Hildebrud, Master Builders of King and Snohomish Counties.

(In support with concerns) Arthur West.

Persons Signed In To Testify But Not Testifying: None.

OFFICE RECEPTIONIST, CLERK

To: Harold T. Hartinger
Cc: David P. Horton; Martin Mellish
Subject: RE: No. 84246-9 Mellish v. Frog Mountain Pet Care

Rec. 6-17-10

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To: OFFICE RECEPTIONIST, CLERK
Cc: David P. Horton; Martin Mellish
Subject: No. 84246-9 Mellish v. Frog Mountain Pet Care

Hon. Ronald R. Carpenter, Supreme Court Clerk:

Case No. 84246-9, Mellish v. Frog Mountain Pet Care

Please file my attached *Brief of Pro Se Amicus ... Re House Bill 2740*.

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