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No. 84246-9

SUPREME COURT OF THE STATE OF WASHINGTON

Martin Mellish, *Petitioner,*

v.

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

FROG MOUNTAIN PET CARE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Martin Mellish appeals the decision dismissing his land use appeal. Reversing the trial court the Court of Appeals held the land use appeal was time barred under RCW 36.70C.40 because the petition was not filed until over 21 days after the decision's issuance.

Mr. Mellish asserts that because he filed his land use appeal within 21 days of a decision on his motion for reconsideration, his land use appeal is not time barred. Additionally, since the Court of Appeals decided this case, the legislature enacted House Bill 2740, Chapter 59, Laws of 2010. Mr. Mellish claims that this statute should be applied retroactively (thus making his petition timely) and the Court of Appeals should be reversed.

The Court of Appeals' decision should be affirmed for at least three reasons. First, because the local ordinances' reconsideration mandates were not complied with, a motion for reconsideration did not affect the Land Use Petition Act's (LUPA's)¹ limitation period. Second, because the permit at issue was a "land use decision" under LUPA, and the strong policy underlying the act for timely and predictable resolution of land use appeals, Mr. Mellish's petition was untimely. Finally, because it affects a vested right – a properly filed permit application – House Bill 2740 cannot be applied retroactively in this case. Accordingly, the Court of Appeals should be affirmed.

¹ RCW chapter 36.70C.

II. SUPPLEMENTAL STATEMENT OF FACTS

Frog Mountain Pet Care is a kennel and cattery facility in Jefferson County. They sought to upgrade the facility and thus, sought the necessary permits from the County to do so.

The facility is a legal non-conforming use.² The County Code requires a conditional use permit to enlarge the structure.³ Because the structure is closer to the property line than is required by the current code for a kennel, the County also required them to apply for a minor variance from the setback requirement.⁴

In the current and planned facilities the animals are housed, fed, and kept indoors. They are let out into play yards at times during the day. There is no limit on the number of dogs the facility can house because no permit is required for its current use.⁵

It is undisputed that the project will improve the care Frog Mountain provides to the community's pets. This will be done without increasing its impacts. Significantly, the noise will not increase. If anything, it will decrease.⁶

And as opposed to the unlimited number of dogs that can be boarded now, under the permit the facility will be limited to 45 dogs.⁷

² CP 169; 357.

³ JCC 18.20.260.

⁴ CP 353.

⁵ CP 352-367.

⁶ Id.

⁷ CP 365.

On August 4, 2006 Frog Mountain submitted a complete permit application.⁸ A hearing was held before the Jefferson County hearing examiner. Many spoke in favor of the application.⁹ The hearing examiner granted the request and issued a decision on June 20, 2007.¹⁰ On that same day, based on the hearing examiner's decision, the Jefferson County Department of Community Development issued and mailed Frog Mountain a Conditional Use Permit.¹¹ A copy was mailed to Mr. Mellish.¹²

On the last page, the permit explicitly states the deadline for appeal:

APPEALS:

Pursuant to RCW 36.70C, the applicant or any aggrieved party may appeal this final decision to Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision. For more information related to judicial appeals see JCC 18.40.340.¹³

On June 28, 2007, Mr. Mellish submitted a motion for reconsideration to the County hearing examiner.¹⁴ There is nothing in the record showing Mr. Mellish gave notice of the motion for reconsideration to the Elyeas, their attorney, or Frog Mountain. The Elyeas never received notice of this

⁸ CP 144.

⁹ CP 353-355. (There was, of course, also opposition).

¹⁰ CP 352-365.

¹¹ CP 347-349.

¹² CP 226.

¹³ CP 349.

¹⁴ CP 366.

reconsideration (until it was denied), and only learned of it later. On July 20, 2007 reconsideration was denied.¹⁵ On August 10, 2007, Mr. Mellish filed his land use petition.¹⁶ Frog Mountain moved to dismiss the petition at the initial hearing.¹⁷ The superior court found the petition was timely.¹⁸ The Court of Appeals reversed.¹⁹

III. SUPPLEMENTAL ARGUMENT

A. STANDARD OF REVIEW

The Supreme Court reviews a trial court's decision to dismiss a case on statute of limitations grounds de novo.²⁰ Additionally, to seek judicial review of a land use decision, the petition must be filed within 21 days of the decision's issuance.²¹ An untimely petition is barred, depriving a court of jurisdiction.²² The determination of whether a court has subject matter jurisdiction is a question reviewed de novo.²³

¹⁵ CP 367.

¹⁶ CP 335.

¹⁷ CP 262.

¹⁸ CP 204.

¹⁹ *Mellish v. Frog Mountain Pet Care*, 154 Wash.App. 395, 225 P.3d 439 (2010).

²⁰ *Ellis v. Barto*, 82 Wash.App. 454, 457, 918 P.2d 540 (1996) (citing *Syrovoy v. Alpine Res., Inc.*, 122 Wash.2d 544, 548 n. 3, 859 P.2d 51 (1993)), review denied, 130 Wash.2d 1026, 930 P.2d 1229 (1997).

²¹ RCW 36.70C.040 (3).

²² RCW 36.70C.040(2); *Chelan County v. Nykreim*, 146 Wash.2d 904, 52 P.3d 1 (2002).

²³ *Bour v. Johnson*, 80 Wash.App. 643, 647, 910 P.2d 548 (1996).

B. THE LAND USE PETITION'S TIMELINESS.

The only issue in this appeal is whether Mr. Mellish filed his land use petition in a timely manner. LUPA is the exclusive means for judicial review of land use decisions.²⁴ The superior court acts in its limited appellate capacity.²⁵ All statutory procedural requirements must be met before this appellate jurisdiction is properly invoked.²⁶ This Court has repeatedly stated the general legislative policy behind LUPA is to ensure land use decision "reach finality quickly."²⁷

RCW 36.70C.040 sets forth the procedures for commencing review of land use petitions. RCW 36.70C.040(2) provides: "A land use petition is barred, and the court *may not* grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition."²⁸

To be timely a land use petition must be filed and served within twenty one (21) days of the land-use decision's issuance.²⁹ Here, Mr.

²⁴ RCW 36.70C.030.

²⁵ *Overhulse Neighborhood Association v. Thurston County*, 94 Wash.App. 593, 597, 972 P.2d 470 (1999); citing *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wash.2d 614, 617, 902 P.2d 1247 (1995).

²⁶ *Overhulse*, 94 Wash.App. at 597; *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wash. App. 461, 467, 24 P.3d 1079 (2001); *Skagit Surveyors and Eng'r, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 555, 958 P.2d 962 (1998) (citing *Fay v. Northwest Airlines, Inc.*, 115.2d 194, 197, 796 P.2d 412 (1990)).

²⁷ RCW 36.70C.010; *Nykreim* supra; *1000 Friends of Washington v. McFarland*, 159 Wash. 2d 165, 180, 149 P.3d 616, 624-625 (2006).

²⁸ RCW 36.70C.040(2) (Emphasis added).

²⁹ RCW 36.70C.040.

Mellish did not file his reconsideration motion, or his land use petition, in a timely manner.³⁰

We first analyze whether reconsideration was filed and decided in a timely manner under Jefferson County's ordinances. If it was not, the analysis can end here. But if it was, we look at whether the petition was timely under LUPA.

1. Timeliness under the local ordinance.

There is no need to apply LUPA or House Bill 2740 because under Jefferson County's Code Mr. Mellish's motion for reconsideration did not stay the time for appeal for two reasons. First, the reconsideration motion's filing was not timely. Second, the hearing examiner did not make a decision on reconsideration within the timeframe allowed under the ordinance. Because compliance with local codes is required for the superior court to acquire jurisdiction,³¹ Mr. Mellish and the County's failure to comply deprives the court of jurisdiction.

³⁰ Amicus has argued that the timeliness of the filing of the motion for reconsideration, and the due process concerns raised by the fact that the Jefferson County Code has no provision for notice to the applicant if a motion for reconsideration is filed are not properly before this Court because they were not raised below. However, as pointed out in Answer to Amicus Curie these issues were raised, if briefly, previously. Further, because the enactment of HB 2740 has raised new issues raised for the first time before this Court, Frog Mountain would be substantially prejudiced by such a limitation.

³¹ *KSLW by Wells v. City of Renton*, 47 Wash.App. 587, 595, 736 P.2d 664, 669 (1986). (Internal citations omitted).

The first issue is whether Mr. Mellish filed his motion for reconsideration in a timely manner. The Jefferson County Code provides for reconsideration of final decisions:

18.40.310 Reconsideration.

A party of record at a public hearing may seek reconsideration only of a final decision by filing a written request for reconsideration with the hearing examiner within five business days of the date of the final written decision. The request shall comply with JCC 18.40.330 (5)(b). The hearing examiner shall consider the request without public comment or argument by the party filing the request, and shall issue a decision within 10 working days of the request....³²

The final written decision's date was June 20, 2010. Five business days from June 20, 2010 is June 27, 2010. Mr. Mellish's motion for reconsideration was not filed until June 28, 2010. Further, it was not served on Frog Mountain. Because the motion for reconsideration was not timely filed or served, it deprived the hearing examiner of jurisdiction to hear the motion.³³

In *Schaefer, Inc. v. Columbia River Gorge Comm'n* a party timely filed a motion for reconsideration but did not timely serve it on the opposing party. This Court held that the motion for reconsideration was

³² JCC 18.40.310.

³³ *Schaefer, Inc. v. Columbia River Gorge Comm'n*, 121 Wash.2d 366, 368, 849 P.2d 1225 (1993).

therefore untimely and did not toll the time limit to appeal. Here the reconsideration motion was not filed timely and, as in *Shaefco*, it did not toll the limitations period.

Schaefer also raises another issue that is fatal to Mr. Mellish's petition. The appellate court noted that the LUPA incorporates the superior court's civil rules only where they are consistent with LUPA.³⁴ The court determined that LUPA's limitation period was inconsistent with the civil rules, and therefore Mr. Mellish's appeal was untimely. But, if the civil rules regarding reconsideration should apply to his land use appeal under LUPA, then the rules regarding service of a motion for reconsideration would apply as well. Mr. Mellish's failure to timely serve the motion would prevent it from tolling the limitation's period as it did in *Shaefco*.

Even if the motion for reconsideration was filed in a timely manner, the County's hearing examiner's delay in violation of the ordinance prevents tolling. Jefferson County's Code requires the hearing examiner to decide a motion for reconsideration within ten days. The language – that the hearing examiner “shall issue a decision within 10 working days of the request”³⁵ is mandatory.³⁶ The hearing examiner did not do so.

³⁴ *Mellish* at 405.

³⁵ JCC 18.40.310 (Emphasis Added).

³⁶ The word “shall” in a statute is presumptively imperative and operates to create a duty and thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Crown Cascade, Inc. v. O'Neal*, 100 Wash.2d 256, 261, 668 P.2d 585 (1983); *State v. Q.D.*, 102 Wash.2d 19,

Under the rule advocated by Mr. Mellish, a hearing examiner could not issue a decision for months. This is directly contrary to LUPA's purpose – to prevent “[l]eaving land use decisions open to reconsideration long after the decisions are finalized.”³⁷

These errors deprived the court of jurisdiction:

When a municipal ordinance provides a definite time within which review must be taken, compliance with that time limit is essential for the court to acquire jurisdiction... A court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal.³⁸

As such, under Jefferson County's Code, the appeal was untimely. Should the Court agree that the petition was untimely under the Jefferson County Code, the analysis is at an end. But even under LUPA the petition was not timely.

29, 685 P.2d 557 (1984) (citing *State v. Bryan*, 93 Wash.2d 177, 183, 606 P.2d 1228 (1980)).

³⁷ *Nykriem*, supra.

³⁸ *KSLW by Wells v. City of Renton*, 47 Wash.App. 587, 595, 736 P.2d 664, 669 (1986). (Internal citations omitted).

2. Timeliness under LUPA.

Assuming, for the sake of argument, that under Jefferson County's Code the motion for reconsideration was timely, the next inquiry is whether the petition was timely under LUPA.

a. Application of House Bill 2740

House Bill 2740 provides unequivocally that a motion for reconsideration stays LUPA's limitation period. But the Court must determine whether that statute can be applied retroactively to affect a vested permit application. Amicus argues that the statute is remedial, and remedial statutes may be applied retroactively. While this is a correct statement, the statute cannot be applied retroactively here because House Bill 2740's retroactive application would affect Frog Mountain's vested rights in its land use application.

Vesting is a fundamental concept in Washington land use law, providing protection for property owners to ensure that subsequently enacted regulations will not impair a project.³⁹ The doctrine is rooted in our constitution's due process protections. By promoting a date certain vesting point, the doctrine insures "that new land-use ordinances do not

³⁹ Overstreet and Kirchheim: *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 Seattle U.L.Rev. 1043, 1043-1044 (2000).

unduly oppress development rights, thereby denying a property owner's right to due process under the law."⁴⁰

Vested rights accrue when a developer files a "sufficiently complete" land use application. When this occurs, the project becomes "vested" to the laws in effect at the time the application is filed.⁴¹ The project is vested regardless of whether a permit issues or not. The statutes and ordinances in effect at the time the application is filed guide the permit's issuance.

The issue is whether Frog Mountain's vested right can be affected by a remedial statute's retroactive application. While "[a] statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right"⁴², "statutes affecting vested rights will be construed as operating prospectively only."⁴³

This Court's decision in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*⁴⁴ is analogous. In that case Vertecs argued that a newly enacted statute, RCW 4.16.326 was remedial; should be applied retroactively; and thus barred certain claims. The statute created an affirmative defense

⁴⁰ *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 637, 733 P.2d 182 (1987).

⁴¹ *West Main Associates v. City of Bellevue* 106 Wash.2d 47, 51, 720 P.2d 782, 784 (1986) citing, *Allenbach v. Tukwila*, 101 Wash.2d 193, 676 P.2d 473 (1984). [Emphasis Added.]. See also, *Victoria Tower Partnership v. City of Seattle*, 49 Wash.App. 755, 760, 745 P.2d 1328 (1987).

⁴² *Miebach v. Colasurdo*, 102 Wash.2d 170, 181, 685 P.2d 1074 (1984).

⁴³ *O'Donoghue v. State*, 66 Wash.2d 787, 790, 405 P.2d 258, 260 (1965).

⁴⁴ 158 Wash.2d 566, 586-587, 146 P.3d 423, 434 (2006).

precluding the discovery rule's application to construction contract claims. The Court held that the statute's retroactive application would affect 1000 Virginia's vested rights in its accrued, filed cause of action. Thus the affirmative defense to the discovery rule pled by Vertecs pursuant to the remedial statute could not be applied retroactively.

Here, House Bill 2740 cannot be applied retroactively as a remedial statute because such application would affect Frog Mountain's vested rights in their accrued permit application.⁴⁵ Because House Bill 2740 does not apply, this court should affirm the Court of Appeals' decision. That decision – that the motion for reconsideration was not a land use decision that tolled LUPA's limitation period – was correct.

b. Was the hearing examiner's decision (and accompanying permit) a "land use decision"?

The Court of Appeals determined that the hearing examiner's decision was a "land use decision" under LUPA. Under LUPA Mr. Mellish had to file his petition within 21 days of the date the land use decision was issued.⁴⁶ A "land use decision" is "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."⁴⁷ The doctrine of substantial compliance does not apply.⁴⁸

⁴⁵ Id.

⁴⁶ RCW 36.70C.040(2), (3).

⁴⁷ RCW 36.70C.020

⁴⁸ *Asche v. Bloomquist*, 132 Wash.App. 784, 795-96, 133 P.3d 475 (2006), review denied, 159 Wash.2d 1005, 153 P.3d 195 (2007)

Mr. Mellish argues that the motion for reconsideration rendered the hearing examiner's final decision non-final. Basing its decision on, among other things, *Samuel's Furniture, Inc. v. Dep't of Ecology*⁴⁹ the appellate court determined that the hearing examiner's June 20 decision was final. The court explained that because the hearing examiner was the local jurisdiction's officer with the highest level of authority to hear appeals, and because his decision left "nothing open to further dispute..." it was a final decision. The court noted that legislation and court rules treat motions for reconsideration as motions made after a final decision.⁵⁰ The appellate court's analysis was correct.

c. Did the motion for reconsideration toll the time to file the LUPA petition?

Although this court should consider the policy underlying LUPA's limitations period – the speedy, uniform determination of land use appeals, there is no need for this analysis. The relevant statutory language in effect at the time is unambiguous. 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).

⁴⁹ 147 Wash.2d 440, 452, 54 P.3d 1194 (2002).

⁵⁰ *Mellish v. Frog Mountain Pet Care*, 154 Wash.App. at 402-403.

As the appellate court noted -- "When statutory language is clear" courts should assume that the legislature 'meant exactly what it said' and apply the plain language of the statute."⁵¹ Courts are "obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh."⁵²

Finally, the appellate court concluded that because "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]."⁵³ As such, LUPA's limitation period had no tolling provision. Note that if the converse is true, the civil rules for the superior court apply, and Mr. Mellish's failure to serve his motion of Frog Mountain is fatal to his claim.⁵⁴

Because LUPA is clear, this Court's decision in *Skinner v. Civil Service Com'n of City of Medina*⁵⁵ does not change the analysis. *Skinner* deals with a wholly different statutory scheme. And each case involves

⁵¹ *Id* at 405, citing *Stroh Brewery Co. v. Dep't of Revenue*, 104 Wash.App. 235, 239, 15 P.3d 692 (quoting *Duke v. Boyd*, 133 Wash.2d 80, 87, 942 P.2d 351 (1997)), *review denied*, 144 Wash.2d 1002, 29 P.3d 718 (2001). See also 405 *Waste Mgmt. of Seattle v. Utils. & Transp. Comm'n*, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994).

⁵² *Chelan County v. Nykreim*, 146 Wash.2d 904, 926, 52 P.3d 1 (2002); quoting *State v. Johnson*, 104 Wash.2d 179, 181, 703 P.2d 1052 (1985); *State v. Chapman*, 140 Wash.2d 436, 450, 998 P.2d 282 (2000) (citing *State v. Chester*, 133 Wash.2d 15, 21, 940 P.2d 1374 (1997)). *Geschwind v. Flanagan*, 121 Wash.2d 833, 841, 854 P.2d 1061 (1993) (citing *State v. Pike*, 118 Wash.2d 585, 591, 826 P.2d 152 (1992)).

⁵³ *Mellish* at 405 citing RCW 36.70C.030(2).

⁵⁴ *Schaeferco, Inc. v. Columbia River Gorge Comm'n*, 121 Wash.2d 366, 368, 849 P.2d 1225 (1993).

⁵⁵ 168 Wash.2d 845, 232 P.3d 558 (2010)

different statutory appeal processes, with different administrative rules at the local level.

Most notably, where the civil service statute was broad regarding what decisions were subject to appeal, LUPA is specific. This case is governed by LUPA. As Division Two noted, LUPA has “unambiguous review provisions” which did not, at the time, provide for tolling, or “render[] an otherwise final decision non-final.”⁵⁶

In *Skinner* the issue dealt with a civil service rule that provided for reconsideration – explicitly providing that RCW 41.12’s limitation period applied to a decision “only in the absence of a motion for reconsideration.”⁵⁷ After the commission issued a decision, the police officer moved for reconsideration. After reconsideration was denied, the officer appealed. But his appeal was only timely if the reconsideration motion tolled the time to appeal. The Court held it was.

There are several differences between the case at bar and *Skinner*. First, the civil service statutes’ purpose is to protect the integrity of the civil service system for police officers:

...[T]o establish a civil service system to (1) provide for promotion on the basis of merit, (2) give police officers tenure, and (3) provide for a civil service commission to administer the system and to investigate, by public hearing, removals, suspensions, demotions, and discharges by the appointing power to determine whether such action was

⁵⁶ *Mellish* at 403.

⁵⁷ *Skinner* at 848.

or was not made for political or religious reasons and whether it was or was not made in good faith for cause...⁵⁸

Compare this with LUPA's explicit purpose, which places heavy weight on a decision's timeliness:

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.⁵⁹

In short, LUPA is as much concerned with an expedited process as with the ultimate result. See *Nykriem* (An erroneous land use decision is not reviewable if not appealed within LUPA's time period).

Second, the *Skinner* court analyzed the statutory language which required an appeal within "30 days of such judgment or order..." The Court noted that the statute did not define that term further. As such the statutory scheme "was broad enough to encompass both such orders..." – the underlying order and the order on reconsideration.

Mr. Mellish makes an identical argument – that his motion for reconsideration was a land use decision. And thus, he had 21 days from then to appeal. But as found by the Court of Appeals, and discussed above, LUPA clearly defines what can be appealed and the timeline for it.

⁵⁸ *Seattle Police Officers' Guild v. City of Seattle*, 121 Wash.App. 453, 456-457, 89 P.3d 287, 289 (2004).

⁵⁹RCW 36.70C.010.

Because LUPA applies to land use decisions – a well-defined term – and the hearing examiner’s initial decision was a land use decision, LUPA’s limitation period applied to that decision.

Finally, the civil service rule in *Skinner* was different than the ordinance at issue here. Frog Mountain was issued a permit by Jefferson County. The County’s Code provided that “[a]ll ...permit decisions...shall be final unless appealed pursuant to [LUPA].”⁶⁰ And the permit issued by the County expressly stated any appeal must be taken within 21 days under LUPA.

In *Skinner* the operative civil service rules provided that any appeal to the superior court had to comply with RCW Chapter 41.12 *only in the absence of a motion for reconsideration.*⁶¹ And the Commission’s order in *Skinner* expressly provided that the appeal deadline “applied only *absent* a motion for reconsideration.”⁶² Here the Jefferson County Code had no such provision. And LUPA, of course, had no such provision. The permit did not state the appeal deadline applied only absent a motion for reconsideration. It stated the contrary. *Skinner* is inapplicable because LUPA is more explicit than the civil service statute as to its filing deadlines.

⁶⁰ See JCC 18.40.330; JCC Article V.

⁶¹ *Skinner* at 551.

⁶² *Id* (emphasis in original).

IV. CONCLUSION

The Court of Appeals recognized the “odd result” their decision produced – a result required by LUPA. LUPA has now been amended to resolve the odd result created here. But Frog Mountain was entitled to rely on the permit issued by Jefferson County 21 days after it was issued – absent an appeal. No appeal was filed within 21 days. The appellate court’s decision should be affirmed.

Respectfully submitted this 8th day of September, 2010.



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