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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

Martin Mellish, *Petitioner*

v.

Frog Mountain Pet Care, et al., and  
Jefferson County, *Respondents*

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SUPREME COURT  
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF PRO SE AMICUS CURIAE  
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## **SUPPLEMENTAL BRIEF OF PRO SE AMICUS CURIAE**

### **INTRODUCTION**

Pro Se Amicus Curiae Hartinger submits this Supplemental Brief in support of Martin Mellish's Petition seeking reversal of *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439 (2010), review granted July 7, 2010. Amicus previously filed a *Memorandum in Support of Review* and a *Supplemental Brief Re: Chapter 59, Laws of 2010 (H.B. 2740)*.

Chapter 59, Laws of 2010, is hereafter referred to as H.B. 2740. The statutes and County Code sections cited in this brief are set out below in Appendices A and B, respectively.

#### **A. ISSUES ADDRESSED BY AMICUS**

Whether under a former version of the Land Use Petition Act the 21-day period for filing a land use petition was tolled by a motion for reconsideration of the land use decision, and if so, whether a 2010 amendment (H.B. 2740) to the act explicitly running the time limit from the date of the decision on a timely motion for reconsideration applies retroactively to Frog Mountain's pending appeal.

#### **B. STATEMENT OF THE CASE**

Frog Mountain applied for a conditional use permit to remodel and expand its Jefferson County dog and cat boarding facility, an existing *nonconforming but legal business use* of its owners' land. The business complied with all land use regulations at the time it was established, but it no longer meets current regulations. The owners' application sought to expand

the conflict with current regulation — not to reduce it. Martin Mellish owns property adjacent to the facility. He opposed the application.

In Jefferson County, a Hearing Examiner adjudicates land use disputes. It is the Examiner's final decision that is subject to judicial review under the Land Use Petition Act (LUPA). The Examiner hearing Frog Mountain's application filed a decision approving Frog Mountain's application on June 20, 2007. (CP 352-365) Mr. Mellish moved for reconsideration. The Examiner denied reconsideration. (CP 367) Mr. Mellish responded by seeking court review of the proceedings. He filed his LUPA appeal with the Clallam County Superior Court.<sup>1</sup>

At the initial hearing before the trial court, Frog Mountain filed a CR 12(b)(6) motion to dismiss the appeal as untimely. Mr. Mellish and Jefferson County opposed the motion. They argued that the LUPA 21-day statute of limitations ran from the date of the Hearing Examiner's denial of reconsideration.

The trial court ruled Mr. Mellish's motion for reconsideration tolled the 21-day filing requirement, denied Frog Mountain's motion, and directed the parties to "perfect the record and note the matter for hearing pursuant to the LUPA statute." *Memorandum Opinion on Motion to Dismiss* filed September 24, 2007 (CP 204-12).

The trial court, after the later LUPA hearing, overruled the Hearing Examiner's decision and remanded the case to Jefferson County with

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<sup>1</sup> The Clallam County action was commenced 21 days after the County mailed the Hearing Examiner's denial of reconsideration to Mr. Mellish, and 50 days after the County mailed him the Hearing Examiner's original decision.

directions to deny Frog Mountain's application for expansion of its nonconforming business use. *Memorandum Decision* filed March 12, 2008 (CP 35-53).

Frog Mountain appealed the trial court's decisions to Division II of the Court of Appeals, but restricted its appeal to the denial of its CR 12(b)(6) motion to dismiss; *i.e.*, it did not perfect an appeal from the trial court's decision overruling the Hearing Examiner, nor did it request a stay of the trial court's decision on the merits.

The Court of Appeals on December 15, 2009, filed an opinion reversing the trial judge's denial of Frog Mountain's motion to dismiss. House Bill 2740 was filed on January 18, 2010, with a committee of the House of Representatives in response to the Court of Appeals anti-tolling decision. The Bill as proposed and enacted without a dissenting vote amended RCW 36.70C.020(2)(c) by adding the following paragraph:

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 Court of Appeals withdrew its December opinion on February 2, 2010, in response to Mr. Mellish's motion that it be reconsidered in light of two appellate court decisions that the Court opinion cited with approval: *Hall v. Seattle Sch. Dist. 1*, 66 Wn. App. 308, 831 P.2d 1128 (1992), and *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008) (*subsequently affirmed by the Supreme Court's decision in Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010)).

However, the Court of Appeals did not reverse its earlier decision. On February 3, 2010, it filed the opinion that is now before the Supreme Court for review; *i.e.*, *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439 (2010). The new opinion is substantially the same as the prior opinion, but for the unexplained deletion of all reference to *Hall* and *Skinner*.

**C. ARGUMENT**

Frog Mountain's appeal to Division II of the Court of Appeals presented only one issue: Did the trial court have appellate jurisdiction to hear Mr. Mellish's LUPA appeal? (As noted above, Frog Mountain neither perfected an appeal from the trial court's final decision nor sought to stay its enforcement pending appeal.)

The Court Appeals reversed the trial court on the grounds that Mr. Mellish's reconsideration motion before the Jefferson County Hearing Examiner did not toll the 21-day limitation for filing a LUPA appeal. By so ruling, the Court overlooked, or misunderstood, or rejected without comment three objections that call for a reversal of its decision, a result that H.B. 2740 mandates, as explained below.

The objections to the Court of Appeals decision are these: (1) LUPA appellate jurisdiction is limited by the exhaustion of remedies doctrine. (2) LUPA gives an aggrieved party a full 21 days for preparing, serving, and filing an appeal from an administrative land use decision. (3) The foregoing principles have governed every LUPA appeal since its enactment.

## I. The Exhaustion of Remedies Doctrine

Under the Jefferson County Code, a motion for reconsideration is a mandatory pre-condition to confer standing for an aggrieved party's LUPA appeal. *See*, County Code § 18.40.310 *Reconsideration*, § 18.40.340 *Judicial Appeals*, and § 18.40.360 *Judicial Appeal*. LUPA by its terms also requires exhaustion of administrative remedies as a pre-condition to confer standing for the judicial review. *See*, RCW 36.70C.060 *Standing*.

The statutes admit of no ambiguity, but if they did they must be read as confirmation of an inherent *judicial* mandate that parties seeking appellate review of administrative proceedings are obliged to exhaust administrative remedies. *Wright v. Woodard*, 83 Wn.2d 378, 518 P.2d 718 (1974); *cf.* *Kreager v. Washington State University*, 76 Wn. App. 661, 886 P.2d 1136 (1994).

Tolling the commencement of LUPA's 21-day appeal period preserves LUPA appeal rights. Consider the situation if Mr. Mellish had not requested reconsideration — his LUPA appeal would have been subject to Frog Mountain's motion to dismiss. *See Ward v. Board of Skagit County Com'rs*, 86 Wn. App. 266, 275, 936 P.2d 42 (1997), where the court had this to say:

In order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, by necessity, exhaust his or her administrative remedies. Thus, exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as a "land use decision" subject to judicial review under LUPA, whether the party seeking review is an owner, applicant, or other aggrieved party.

To put the *Ward* decision in plain language, Mr. Mellish's motion for reconsideration tolled the start of the 21-day LUPA appeal period.

## II. The Statutory LUPA 21-Day Appeal Period

As noted above, Mr. Mellish as an aggrieved party had a statutory right to a *full* 21-day period for filing his LUPA appeal with the Clallam County Superior Court. RCW 36.70C.040(3). Without any explanation or citation of authority, the Court of Appeals ruling vested the Hearings Examiner with authority to shorten the appeal period. Indeed it did more, it allowed the Examiner to extinguish all of Mr. Mellish's appeal rights.

It is plain that the Court of Appeals erred by rejecting the *Hall* and *Skinner* decisions and overlooking *Ward* and the Supreme Court's decision in *Martin v. Dayton School Dist. No. 2*, 85 Wn.2d 411, 536 P.2d 169 (1975). Each of these cases rejects the notion that administrative agencies can frustrate statutory appeal rights. *Martin v. Dayton School* explains why this is so, 85 Wn.2d at 413:

It is the general rule that the jurisdiction of an administrative agency over a particular matter ends when its decision is appealed to the court. The reason is that the court's jurisdiction 'must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.' *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965).

The Court of Appeals regretted its decision that nullified a judicial ruling on the merits that sustained Mr. Mellish's objections to Frog Mountain's application to expand its existing nonconforming pet care business:

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.

*Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 407, 225 P.3d 439 (2010). The Court of Appeal's "it's the law" defense deserves respect, but it does not curtail the Supreme Court's appellate jurisdiction to address the same tolling issue.

The tolling of the appeal period to accommodate motions for consideration in administrative proceedings has been the unchallenged rule in this state since 1975 and the decision in *Martin v. Dayton School Dist. No. 2*, 85 Wn.2d 411, 536 P.2d 169 (1975), and *Hall v. Seattle Sch. Dist. 1*, 66 Wn. App. 308, 831 P.2d 1128 (1992), until this year when Medina challenged the *Hall* decision in *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008), and Frog Mountain challenged the rule in *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439 (2010).

The long acceptance of the tolling rule is not surprising: *Martin v. Dayton School Dist. No. 2*, 85 Wn.2d 411, 536 P.2d 169 (1975), and *Hall v. Seattle Sch. Dist. 1*, 66 Wn. App. 308, 831 P.2d 1128 (1992), constituted binding precedent for the state's trial courts, there being no conflicting decisions in Divisions II and III of the Court of Appeals. The *Skinner* Court of Appeals decision has been confirmed by the Supreme Court in *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 232 P.3d 558 (2010). The Court of Appeals decision in *Mellish* awaits the decision of the Supreme Court in this case.

### **III. There Are No Grounds for Denying Retroactive Application of the Supreme Court's Final Judgment**

Frog Mountain has appealed the trial court's denial of its motion to dismiss Mr. Mellish's LUPA appeal. It of course is seeking a decision from the Supreme Court that retroactively overrules the trial court.

Frog Mountain has overlooked the obvious — its appeal is before the state appellate courts on direct review. It is only in the most extraordinary case that an appellate court will, if ever, grant prospective application only of its decisions, but at the same time not make them applicable to the parties in the case before it. This is not a case where the Supreme Court will reach a decision that does not affect the parties. The case calls for affirming the existing rule of *Hall* and *Skinner*.

The Court's decision in this case will apply to Frog Mountain's appeal — and it will also apply to all other pending trial court and appellate court LUPA appeals:

*Once we have resolved the issue of retroactive application, whether by applying the new rule to the parties before this court or by announcing the new rule will apply prospectively only, the rule will be applied equally to all similarly situated litigants with no further balancing of the equities [ ] or any other test. We continue to agree with the United States Supreme Court that selective prospectivity violates the principle that all similarly situated litigants should be treated equally. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of ... law. [Internal citations and quotation marks omitted; italics added for emphasis.]*

*Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 279-280, 208 P.3d 1092 (2009).

#### **IV. The Land Use “Vested Rights Doctrine” Has No Relevance to the Case Before the Court**

Frog Mountain does not cite case law or offer legal argument to suggest why it can lose its case on appeal before the Supreme Court (just as it lost in the trial court) and yet have the benefit of the “no-tolling rule” of the Court of Appeals.

There is no mystery about the land use doctrine. Washington's vested rights doctrine entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations. *Erickson & Assocs., Inc.*, 123 Wn.2d 864, 867-868, 872 P.2d 1090 (1994). Appellate court procedures that govern LUPA appeals are not “real estate development rights” subject to the land use doctrine.

“Development rights” are those zoning and land use regulations that govern the use of real estate, its physical modification, the addition of buildings, and other on-the-ground structural additions or modifications, but not to other regulations affecting land. See, e.g., *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 208 P.3d 5 (2009) (park impact fees); *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 529-30, 94 P.3d 366 (2004) (traffic impact fees); *New Castle Inv. v. City of LaCenter*, 98 Wn. App. 224, 235-36, 989 P.2d 569 (1999) (traffic impact fees), *rev. denied*, 140 Wn.2d 1019, 5 P.3d 9 (2000); *City of Des Moines v. Grays Businesses, LLC*, 130 Wn. App. 600, 124 P.3d 324 (2005) (required site plan filing).

See also, *Vashon Island Comm. for Self-Gov't v. Boundary Review Bd.*, 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995), where the Supreme Court held

that the law governing the incorporation of a city did not create a “land use development right.” Thus an application to incorporate Vashon and Maury Islands as an island city could not be processed in accordance with the law as it existed at the time of the application — a subsequent change in the law barred the incorporation of the proposed city.

**V. The New Law, H.B. 2740, Governs the Outcome in This  
Case and in All Other Pending Cases**

The Legislature’s purpose for enacting H.B. 2740 is beyond dispute, as the legislative history makes clear. The Legislature intended that the appeal-tolling ruling of *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008), *affirmed* 168 Wn.2d 845, 232 P.3d 558 (2010), be extended to land use disputes subject to judicial review under LUPA.

The Supreme Court may properly take notice of this legislative intent and conform its decision in this case according to the new law. As the Supreme ruled many years ago: “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).

That the new law will be given retroactive application in this case and all other pending LUPA appeals can be justified on additional grounds.

(1) The measure was adopted to clarify a procedural matter; it did not create a new substantive right. Remedial laws such as H.B. 2740 have retroactive application. See, e.g., *Tomlinson v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706 (1992).

(2) In the absence of vested rights, as is the case here, it is a general rule that appellate courts must apply the law as it exists at the time of decision irrespective of what the law might have been at the time the lawsuit was commenced. *Coffel v. Clallam County*, 58 Wn. App. 517, 521, 794 P.2d 513 (1990).

(3) No one can acquire a vested interest in a statutory cause of action that bars its abolition. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 617-618, 146 P.3d 914 (2006). Since LUPA is a statutory cause of action, Frog Mountain has no vested right that precludes a change in LUPA's terms. Even if H.B. 2740 changed the meaning of existing LUPA provisions rather than confirming them, Frog Mountain would have no defense against a retroactive application of the law.

#### **D. CONCLUSION**

For reasons stated above, the decision of the Court of Appeals must be overruled and the judgment of the trial court affirmed.

Respectfully submitted,

*/s/ Harold T. Hartinger*

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Date: Sunday, October 3, 2010

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**WASHINGTON STATUTES**

**West's Revised Code of Washington Annotated**

**Title 36. Counties**

**Chapter 36.70C. Judicial Review of Land Use Decisions**

**RCWA 36.70C.020. Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means 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:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

*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. [Italics added for emphasis.]*

3 A

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW 19.280.020.

CREDIT(S)

[2010 c 59 § 1, eff. June 10, 2010; 2009 c 419 § 1, eff. July 26, 2009; 1995 c 347 § 703.]

END OF DOCUMENT

**West's Revised Code of Washington Annotated Currentness**

**Title 36. Counties**

**Chapter 36.70C. Judicial Review of Land Use Decisions**

**RCW 36.70C.040. Commencement of review--Land use petition--  
Procedure**

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) 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:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first-class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

3 A

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

CREDIT(S)

[1995 c 347 § 705.]

**RCWA 36.70C.060 West's Revised Code of Washington Annotated**  
**Title 36. Counties**  
**Chapter 36.70C. Judicial Review of Land Use Decisions**  
**RCWA 36.70C.060. Standing**

Standing to bring a land use petition under this chapter is limited to the following persons:

(1) The applicant and the owner of property to which the land use decision is directed;

(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

*(d) The petitioner has exhausted his or her administrative remedies to the extent required by law. [Italics added for emphasis.]*

CREDIT(S)

[1995 c 347 § 707.]

## JEFFERSON COUNTY CODE

### § 18.40.310 Reconsideration.

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

### § 18.40.340 Judicial appeals.

(1) Time to File Judicial Appeal. The applicant or any aggrieved party may appeal from the final decision of the administrator, hearing examiner, or to a court of competent jurisdiction in a manner consistent with state law. *All appellants must timely exhaust all administrative remedies prior to filing a judicial appeal.* [Italics added for emphasis.]

(2) Service of Appeal. Notice of appeal and any other pleadings required to be filed with the court shall be served by delivery to the county auditor (see RCW 4.28.080), and all persons identified in RCW 36.70C.040, within the applicable time period. This requirement is jurisdictional.

(3) Cost of Appeal. The appellant shall be responsible for the cost of transcribing and preparing all records ordered certified by the court or desired by the appellant for the appeal. Prior to the preparation of any records, the appellant shall post an advance fee deposit in an amount specified by the county auditor with the county auditor. Any overage will be promptly returned to the appellant. [Ord. 8-06 § 1]

**§ 18.40.400 Judicial appeal.**

Appeals from the final decision of the hearing examiner shall be made to the Jefferson County superior court within 21 calendar days of the date the decision or action becomes final, as set forth in JCC 18.40.340. *All appeals must conform to the provisions of JCC 18.40.340, and are subject to the requirements set forth in that section.* [Ord. 8-06 § 1] (Italics added for emphasis.)