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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LOUISE LAUER and DARRELL deTIENNE

Respondents,

v.

PIERCE COUNTY and MIKE AND SHIMA GARRISON,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY,
STATE OF WASHINGTON
Cause No. 08-2-06665-2

SUPPLEMENTAL BRIEF OF RESPONDENTS LOUISE LAUER
AND DARRELL deTIENNE RE: MELLISH V. FROG MOUNTAIN PET CARE,
Case no. 37583-4-II (2/3/2010)

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I. INTRODUCTION

This Land Use Petition Act (LUPA) appeal was fully litigated before the superior court and fully briefed for this Court. Based on this Court's decision in *Mellish v. Frog Mountain Pet Care*, No. 37583-4-II (February 3, 2010), appellants Garrison filed a Motion for Supplemental Briefing to assert, for the first time, that respondents Lauer and deTienne did not timely file their LUPA petition, since the petition was filed 21 days after the Pierce County Hearing Examiner decided a motion for reconsideration, rather than 21 days after the Examiner's initial decision. The Garrisons did not raise the issue in the superior court proceeding below.

That the issue was not raised below is significant. In *Mellish*, the applicant raised the issue through a CR 12(b)(6) motion before the appeal was briefed and argued on the merits. The novel argument was timely raised as a preliminary matter early in the LUPA proceeding. Though under common law subject matter jurisdiction may be raised at any time, the legislature expressly altered this rule for LUPA appeals. The legislature expressly requires parties to a LUPA appeal to raise any and all jurisdictional issues at the Initial Hearing before the hearing on the merits. This includes the defense that the petition was not timely filed and served. RCW 36.70C.080(2). The legislature further

provided that “[t]he defense[] of ... untimely filing or service of the petition ... [is] waived if not raised by a timely motion noted to be heard at the initial hearing.” RCW 36.70C.080(3).

Unlike in *Mellish*, the Garrisons’ failed to preserve the issue at the Initial Hearing. This salient fact distinguishes this appeal from *Mellish*. This appeal should be decided on its merits.

II. RELEVANT LUPA PROVISIONS

This Court acknowledged an important purpose of LUPA: “In enacting LUPA, our legislature expressed an intention to ‘establish[] uniform expedited appeal procedures . . . in order to provide consistent, predictable, and timely judicial review.’” *Mellish* at p. 4, quoting RCW 36.70C.010 (emphasis added). Included in the uniform rules is the requirement to file and serve a LUPA petition within 21 days following issuance of a final land use decision. RCW 36.70C.040. Further clarification or limitation on this “uniform” rule, however, is set forth in another provision of LUPA.

RCW 36.70C.080(1) requires that an Initial Hearing be held on all LUPA petitions no sooner than thirty-five days and no later than fifty days after the petition is served. The purpose of the Initial Hearing is to address all jurisdictional and preliminary matters. RCW 36.70C.080. Toward that objective, the legislature made it mandatory

to present all jurisdictional issues at the Initial Hearing and failure to do so will serve to bar parties from raising the issues after the Initial Hearing. The legislature's mandate in this regard is set forth in subsections 2 and 3 of RCW 36.70C.080:

(2) The parties shall note all motions on jurisdiction and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.¹ (Emphasis added.)

The plain and unambiguous language in the statute precludes a challenge to the timeliness of the LUPA petition at this late juncture.

III. RELEVANT FACTS

Respondents Lauer and deTienne filed and served a petition commencing this LUPA appeal on March 27, 2008. (CP 1-34.) Lauer and deTienne's LUPA petition challenges the Report and Decision issued by the Pierce County Hearing Examiner dated December 13,

¹ The Initial Hearing is mandatory unless the parties waive the hearing by filing a stipulated order that "resolves all jurisdictional and procedural issues raised by the petition, including the issues raised in subsections (3) and (4) of [RCW 36.70C.080]." RCW 36.70C.080(5).

2007 (CP 14-26) and the Examiner's Decision on Reconsideration issued on March 4, 2008 (CP 28-32).

Pursuant to RCW 36.70C.080(1), the Initial Hearing was set for May 9, 2008. (CP 134.) The Garrisons filed a motion to be heard at the Initial Hearing. (CP 35.) The Garrisons' motion, however, raised only two issues for determination at the initial hearing:

Whether the Court should strike certain claims alleged in the Petitioner under Chapter 36.70C, when such claims are not established in the record?

Whether the Court should dismiss the Petitioner for Review under Chapter 36.70C RCW, when Petitioners do not have standing?

(CP 38-39.) Both issues related exclusively to the question of respondents Lauer and deTienne's standing to file the LUPA appeal. More specifically, the Garrisons asserted that the administrative record did not contain facts that support the allegations of standing set forth in the LUPA petition (CP 41-42), that these respondents did not have standing to challenge the vested status of the variance application and that they did not qualify as aggrieved persons because they failed to exhaust administrative remedies (CP 43-47.) The trial court denied the Garrisons' motion to strike and to dismiss the appeal. (CP 134-36.)

Significantly, unlike in *Mellish*, the Garrisons did not argue at the Initial Hearing that the LUPA petition was untimely because it was

filed 21 days after the Hearing Examiner issued a decision on reconsideration rather than after the Examiner's initial ruling.² (See CP 36-48, 134-136.) In fact, the issue was not raised at all in the trial court proceeding. Likewise, the issue was not raised in the regular briefing to this Court, which of course is why the Garrisons requested supplemental briefing. LUPA expressly prohibits the Garrisons from raising the issue at this late juncture in the appeal process.

IV. ARGUMENT

A. Failure To Raise The Issue At The Initial Hearing Precludes Application of *Mellish* To This Appeal.

The *Mellish* decision is founded on the principle that, when reviewing an administrative decision, a superior court is acting in its appellate capacity. When acting in this capacity, all statutory procedural requirements must be met before the court's appellate jurisdictional capacity is invoked. *Union Bay Preservation Coalition v. Cosmos Development & Administrative Corp.*, 127 Wn. 2d 614, 618, 902 P.2d 1247 (1995). *Skagit Surveyors & Engineering LLC v. Friends*

² The Garrisons did claim that respondents Lauer and deTienne's challenge to the vested status of the variance application was an untimely collateral attack on the building permit issued in 2004. They claimed that the County's determination regarding the completeness of the application should have been appealed to the Examiner and, as such, Lauer and deTienne did not satisfy the standing requirement to exhaust administrative remedies. This is a wholly different issue than the issue presented in *Mellish*. The vesting issue is the primary issue on appeal and is the focal point of the briefing to this Court. That the Garrisons had to request permission to submit supplemental briefing on *Mellish* is proof certain that the Garrisons are seeking to insert a wholly new issue into this appeal.

of Skagit County, 135 Wn.2d 542, 958 P.2d 962 (1998). This Court followed the well established rule that “[w]hen statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” *Mellish* at p. 8, quoting, *Stroh Brewery Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 239, 15 P.3d 692, rev. denied, 144 Wn.2d 1002 (2001). Thus, this Court concluded under the facts in *Mellish*: “we are required to apply LUPA’s unambiguous review provisions.” *Mellish* at p. 9.

This Court also acknowledged, however, that “in other contexts, where the legislature has desired to alter the effect of unambiguous statutory provisions, such as by tolling the statute of limitations, the legislature had expressly done so.” *Id.* Two examples given by this Court in *Mellish* were the tolling provisions in the Industrial Insurance Act, Title 51 RCW, and the former Administrative Procedure Act (APA), Title 34.05. *Mellish* at p. 6. Another example of legislatively altering the effect of statutory jurisdictional requirements was the 1998 APA amendments. Though the APA expressly requires that the Attorney General be served with a petition for review within 30 days of issuance of the administrative decision, the legislature separately provided that failure to serve the Attorney General is not grounds for dismissal. RCW

34.05.542. The legislature similarly altered the effect of the service requirement in LUPA by requiring timely assertion of defenses.

The same statute that creates the “jurisdictional requirements” at issue has also legislatively provided for waiver of the jurisdictional requirements. The express language in RCW 36.70C.080(3) provides that the specific defense of “untimely filing and service of the petition” is “waived if not raised by a timely motion noted to be heard at the initial hearing.” The legislature has provided that a petition that is not strictly perfected will effectively self-perfect if a timely jurisdictional challenge is not raised. This provision is wholly consistent with the legislature’s intent to provide “uniform expedited appeal procedures . . . in order to provide consistent, predictable, and timely judicial review.” *Mellish* at p. 4, quoting RCW 36.70C.010 (emphasis added). LUPA contemplates timely and orderly assertion of defenses as well.

The jurisdictional issue raised in *Mellish* revolved around jurisdictional requirements embodied in a statute. Because the *Mellish* decision is wholly derived from statutory requirements, all of the statutory requirements must be considered. The legislature chose to build into the statute a waiver of jurisdictional challenges that are not timely raised. Thus, when the entire statute is read together, it provides that the requirement to file and serve a LUPA petition within

21 days of the final decision is jurisdictional, provided that the defense of jurisdiction is timely raised at the Initial Hearing.

If the legislature is empowered to establish jurisdictional requirements, it is likewise empowered to establish preconditions to asserting the defense of lack of jurisdiction. The Garrisons certainly have cited no authority to suggest that the legislature is not empowered to limit or “alter the effect of” the same jurisdictional requirements that the legislature created. The common law rule that normally authorizes late-asserted jurisdictional defenses conflicts with the express statutory provision prohibiting late assertion.³

Just as this Court held it was constrained by the statutory language when it held the *Mellish* appeal must be dismissed, the Court is likewise constrained here by the plain statutory language requiring preservation of jurisdictional issues at the Initial Hearing. To hold otherwise would render RCW 36.70C.080(3) superfluous and without effect, which of course, is contrary to the well-established statutory construction rules to read all statutory provisions together and to give all words in a statute meaning. *Davis v. State Dept. of Transportation*,

³ The Garrisons cite several cases to assert that timely filing and service of a LUPA petition is jurisdictional and, as such, the issue may be raised any time. (See Brief at pp. 2-3.) None of these cases, however, address the express language set forth in RCW 36.70C.080(3) which provides that the specific defense of “untimely filing and service of the petition” is “waived if not raised by a timely motion noted to be heard

138 Wn. App. 811, 823-24, 159 P.3d 427 (2007). The Garrisons did not present this issue at the Initial Hearing. They have waived the right to raise the issue in this subsequent appeal.

B. If The Court Applies *Mellish*, The Matter Should Be Remanded So That The Parties May Create A Record On Equitable Tolling.

If this Court concludes that *Mellish* applies, then it should remand to the trial court so that a record may be made on the issue of equitable tolling. “Jurisdictional requirements embodied in statutes can be waived, but waiver should be found sparingly.” *In re Personal Restraint Petition of Dalluge*, 152 Wn.2d 772, 782, ftnt. 5, 784-85, 100 P.3d 279 (2004), *citing*, *Lewis County v. Western Washington Growth Management Hearings Board*, 113 Wn. App. 142, 155, 53 P.2d 44 (2002). See also, *Myers v. Harris*, 82 Wn.2d 152, 155, 509 P.2d 656 (1973) (under the circumstances of that specific case, waiving the jurisdictional requirement to timely appeal fee); *Scannell v. State*, 128 Wn.2d 829, 835-36, 912 P.2d 489 (1996).

This is a case in which equitable tolling or waiver should be applied. As the Garrisons stated in briefing below: “This matter has been pending in one form or another since 2004.” (CP 37. See also CP 170-71.) This case represents only one of three LUPA appeals on

at the initial hearing.” To the contrary, it appears that the question of jurisdiction was addressed by the trial court in all of the LUPA cases cited by the Garrisons.

the same project. The first was filed by the Garrisons under King County Cause No. 05-2-10657-3 SEA, not 21 days after the Examiner's "final decision" but, like this case, 21 days after the Examiner's decision denying reconsideration. There is not only a long-standing understanding in Pierce County that the Examiner's decision is not final if a timely reconsideration is filed, but also between these parties when the Garrisons filed the first LUPA appeal establishing the pattern.

Had this issue been presented at the Initial Hearing, the parties would have been afforded the opportunity to create a record to support equitable tolling or waiver. If this Court excuses the Garrisons' failure to timely raise the issue at the Initial Hearing, it should also afford Lauer and deTienne a fair opportunity to create a record for equitable tolling or waiver.

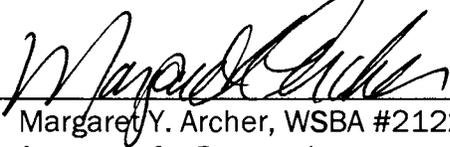
V. CONCLUSION

Based on the foregoing, this Court should conclude that *Mellish* does not apply and the appeal should be decided on the merits.

Dated this 22 day of February, 2010.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

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THIS IS TO CERTIFY that on this 22nd day of February, 2010, I did serve via ABC Legal Messengers (or other method indicated below), true and correct copies of the foregoing by addressing and directing for delivery to the following:

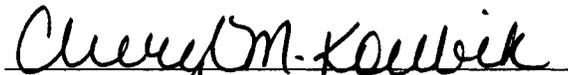
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