

37583-4-II
No. ~~35783-4-II~~

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Martin Mellish, *Respondent*,

v.

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

Clallam County Superior Court
Cause No. 07-2-00791-4

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DIVISION II
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STATE OF WASHINGTON
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IDENTITY

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I. ASSIGNMENT OF ERROR

A. The superior court erred by not dismissing the Land Use Petition that was filed more than twenty one days after the permit's issuance.

ISSUE: A Land Use Petition is barred if it is not filed within 21 days after a final decision is issued. The Conditional Use Permit says: "Date Issued: June 20, 2007." The land use petition appealing the permit was not filed until August 10, 2007 – over fifty days later. Was the petition timely filed?

II. STATEMENT OF THE CASE

A. INTRODUCTION.

The Jefferson County Department of Community Development issued Frog Mountain Pet Care¹ a Conditional Use Permit.² The permit says:

DATE ISSUED: June 20, 2007.

On the last page, the permit states:

APPEALS:

Pursuant to RCW 36.70C, the applicant or any aggrieved party may appeal *this final decision* to Jefferson County Superior Court

¹ Harold Elyea is the owner of Frog Mountain Pet Care, and the permit's applicant.

² CP 347, attached hereto as Appendix A.

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 18.40.340.³

Over fifty days later, respondent filed a Land Use Petition, challenging the conditional use permit. The trial court denied Frog Mountain's motion to dismiss the Land Use Petition as untimely.

B. FACTS.

Because the only issue on this appeal is whether the LUPA petition was timely filed, the underlying facts are briefly stated for background.

Frog Mountain sought to improve their pet boarding facility. The facility is a legal non-conforming use.⁴ The County required them to obtain a conditional use permit to enlarge the structure.⁵ Because the structure is closer to the property line than is required by the current code for a kennel (100 feet), the Department of Community Development also required them to apply for a minor variance from the setback requirement.⁶

In the current and planned facilities the animals are housed, fed, and kept indoors. They are let out into the play yards at times during the day.

³ CP 349. (Emphasis Added).

⁴ CP 169; 357.

⁵ JCC 18.20.260.

⁶ CP 353.

Currently there is no limit on the number of dogs the facility can house because no permit is required for its current use.⁷

The New Facility

As found by the hearing examiner the project will improve the care Frog Mountain provides to the community's pets without increasing its impacts. The noise will not increase. If anything, it will decrease.⁸

Under the permit the facility will be limited to 45 dogs. The new facility will boast many upgrades and improvements over the old. The building will be more modern and efficient. The improvements will be noticeable. The architect testified that the noise issue was specifically addressed in the plans.⁹

- Additional exit doors: This will allow them to use two play yards that were previously unusable, giving them more flexibility in moving dogs to control their barking.¹⁰
- The kitchen will be moved indoors where the dogs will not be able to see food preparation. This significant cause of noise will be greatly mitigated by this change.¹¹

⁷ CP 352-367.

⁸ Id.

⁹ CP 354.

¹⁰ Id.

¹¹ Id.

- The facility will be better insulated. It will have upgraded windows that will decrease noise. It will have a far superior ventilation system allowing them to keep windows closed in warmer months – keeping the noise from leaving.¹²
- The facility will be roomier allowing more flexibility in containing the dogs and moving them to minimize noise.¹³

C. PROCEDURE

Jefferson County's hearing examiner granted the request.¹⁴ On June 20, 2007 the Jefferson County Department of Community Development issued and mailed Frog Mountain a Type III Conditional Use Permit.¹⁵ A copy was mailed to Mr. Mellish.¹⁶

Unbeknownst to Frog Mountain, on June 28, 2007, petitioner submitted a motion for reconsideration to the County hearing examiner.¹⁷ The motion for reconsideration was never served on the applicant. Jefferson County's Code provides:

¹² Id.

¹³ Id.

¹⁴ CP 352-365.

¹⁵ CP 347-349; Appendix A.

¹⁶ CP 226.

¹⁷ CP 366. The record is devoid of any notice of the motion for reconsideration on the Elyeas, their attorney, or Frog Mountain. The Elyeas never received notice of this reconsideration (until it was denied), and only learned of it later.

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....¹⁸

Under the ordinance, the hearing examiner had until July 13, 2007 to make a decision regarding the request. This did not occur. A week later, on July 20, 2007, a month after the permit was issued, the reconsideration was denied.¹⁹

Over fifty days after the permit was issued, on August 10, 2007, Mr. Mellish filed his land use petition.²⁰ Frog Mountain moved to dismiss the petition at the initial hearing.²¹ The superior court found the petition was

¹⁸ JCC 18.40.310 (Emphasis Added).

¹⁹ CP 367.

²⁰ CP 335.

²¹ CP 262.

timely filed.²² Later, on the merits the court found the hearing examiner erred by granting the variance.²³ This appeal followed.²⁴

TIMELINE

Date	Event	Comment
June 20, 2007	Permit Issued	A final decision under JCC 18.40.320.
June 28, 2007	Reconsideration filed (but not served on applicant)	JCC 18.40.310 gave five business days to file the motion. This was timely.
July 13, 2007	Decision on reconsideration due.	JCC 18.40.310 allows ten working days for reconsideration.
July 16, 2007	LUPA deadline	24 days after permit issued (allowing 3 days for mail).
July 20, 2007	Reconsideration denied	
August 10, 2007	LUPA Petition filed	

III. ARGUMENT

A. SUMMARY

The Land Use Petition Act (LUPA)²⁵ has a stringent deadline for timely review of land use decisions. The legislative intent for a short certain deadline is to give finality to landowners in a timely manner.²⁶

²² CP 204.

²³ CP 35.

²⁴ CP 5.

²⁵ RCW 36.70C. *et. seq.*

Here, the Conditional Use Permit was issued on June 20, 2007. The permit correctly states that it must be appealed within 21 days of issuance.

In response to Frog Mountain's motion to dismiss, Mr. Mellish and the County argued that Mr. Mellish's request for reconsideration changed the nature of the final permit to a non-final decision – and therefore the 21 days did not begin to run until after the hearing examiner ruled on reconsideration. This view is erroneous for many reasons.

First, this “would be inconsistent with the general legislative policy recognized by [the Washington Supreme Court] that land use decisions should reach finality quickly.”²⁷ The Supreme Court stated that LUPA's limitation period acts to prevent long periods of reconsideration after a decision is final:

To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. *Leaving land use decisions open to reconsideration long after the decisions are finalized* places property owners in a precarious position and undermines the Legislature's intent to provide expedited

²⁶ *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *1000 Friends of Washington v. McFarland*, 159 Wash.2d 165, 180, 149 P.3d 616, 624 - 625 (2006).

²⁷ *1000 Friends of Washington*, 159 Wash.2d 180.

appeal procedures in a consistent, predictable and timely manner.²⁸

Under Jefferson County's code, the permit issued on June 20, 2007 was a final decision – and therefore the Land Use Petition Act's limitation period began to run. Under the code, the fifteen days the County has to reconsider its decision runs concurrently with LUPA's twenty-one days.

Second, Jefferson County's reconsideration ordinance only allows fifteen days for reconsideration. So, even if the period is consecutive – after reconsideration, the petition was filed late.

Third, Frog Mountain had a right to act upon the permit 21 days after it was issued as a final decision. Because they did not receive notice of reconsideration they should be entitled to rely on the permit.

Finally, to the extent Jefferson County's representations to Mr. Mellish regarding reconsideration misled or gave him incorrect information regarding filing deadlines, the Supreme Court and this Court have recently held that even when notice is lacking, or there is an error in procedural due process, LUPA's twenty-one day deadline controls.²⁹

²⁸ *Nykreim*, 146 Wn.2d 933. (Emphasis added).

²⁹ *Habitat Watch v. Skagit County*, 155 Wash. 2d 397, 120 P.3d 56 (2005); *Asche v. Bloomquist*, 132 Wash.App. 784, 133 P.3d 475 (2006).

B. STANDARD OF REVIEW

To seek judicial review of a land use decision, a land use petition must be filed within 21 days of its issuance.³⁰ Unless the petition is timely filed and served review is barred.³¹ Courts give strict enforcement to LUPA appeal procedures to honor strong policies favoring finality in land use decisions and security for landowners proceeding with property development.³²

The only issue in this appeal is whether the petition was timely filed giving the superior court subject matter jurisdiction. The determination of whether a court has subject matter jurisdiction is a question of law reviewed de novo.³³

C. LUPA'S LIMITATIONS PERIOD

The Land Use Petition Act (LUPA) is the exclusive means for judicial review of land use decisions.³⁴ The superior court acts in its

³⁰ RCW 36.70C.040(3).

³¹ RCW 36.70C.040(2).

³² *Samuel's Furniture, Inc. v. Dep't. of Ecology*, 147 Wn.2d 440, 458, 54 P.3d 1194 (2002); *Nykreim*, 146 Wn.2d 931; *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001).

³³ *Bour v. Johnson*, 80 Wn.App. 643, 647, 910 P.2d 548 (1996).

³⁴ RCW 36.70C.030.

limited appellate capacity.³⁵ All statutory procedural requirements must be met before this appellate jurisdiction is properly invoked.³⁶

Courts must give effect to a statute's plain meaning and should assume the Legislature meant exactly what it said. Courts are "obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh."³⁷

RCW 36.70C.040 sets forth the procedure for commencing review of land use petitions (LUPA). 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."³⁸

Because LUPA provides unequivocal directives, the doctrine of substantial compliance does not apply.³⁹

³⁵ *Overhulse Neighborhood Association v. Thurston County*, 94 Wn.App. 593, 597, 972 P.2d 470 (1999); citing *Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995).

³⁶ *Overhulse*, 94 Wn.App. at 597; *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 467, 24 P.3d 1079 (2001); *Skagit Surveyors and Eng'r, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998) (citing *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990)).

³⁷ *Nykreim*, 146 Wn.2d, 926; quoting *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985); *State v. Chapman*, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) (citing *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)). *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993) (citing *State v. Pike*, 118 Wn.2d 585, 591, 826 P.2d 152 (1992)).

³⁸ RCW 36.70C.040(2) (Emphasis added).

³⁹ *Overhulse*, 94 Wn.App. at 599.

D. BECAUSE THE CONDITIONAL USE PERMIT WAS ISSUED ON JUNE 20, 2007 THE LAND USE PETITION FILED ON AUGUST 10, 2007 IS BARRED.

The first inquiry needs to be when LUPA's 21 day limitation period started running – that is – when the decision was issued. Here, the inquiry is simple. The face of the permit states its date of issuance – June 20, 2007. The permit also states that the deadline to appeal is 21 days from that date.⁴⁰ LUPA states that the date on which a land use decision is issued is defined as three days after a written decision is mailed, the date on which the County provides notice that written decision is available, the date of an ordinance or resolution, or, if none of these apply, on the date the decision is entered into the public record.⁴¹ When a land use decision is written, as here, it is issued either three days after it is mailed or on the date that the local jurisdiction provides notice that the decision is publicly available.⁴² Therefore, the latest the 21 days began to run is June 23, 2007.

Under *Chelan County v. Nykreim*, an attack on a land use decision after 21 days is barred.⁴³ Even if the land use decision was erroneous, the decision will become valid after the time has lapsed and the decision

⁴⁰ CP 347-349.

⁴¹ RCW 36.70C.040(4); *Asche*, 132 Wash.App. 795-796.

⁴² *Habitat Watch*, 155 Wash.2d 408.

⁴³ *Nykreim*, 146 Wn. 2d at 939.

maker will be barred from revoking the previously issued decision.⁴⁴ The Court's holding in *Nykreim* is based upon the strong public policy of ensuring finality to land use decisions:

Applying LUPA and following this court's decision in *Wenatchee Sportsmen* in this case is consistent with this court's stringent adherence to statutory time limits. This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit."⁴⁵

Allowing a challenge to a land use decision beyond the twenty-one days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.⁴⁶

⁴⁴ *Nykreim*, 146 Wn.2d 932-933, and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181-182 (2001).

⁴⁵ *Nykreim*, 146 Wn.2d 931-932, 52 P.3d 1, quoting *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d at 49, 26 P.3d 241, (alterations in original) (quoting *Deschenes v. King County*, 83 Wn.2d at 716-17, 521 P.2d 1181).

⁴⁶ *Nykreim*, 146 Wn.2d 933.

E. THE PERMIT ISSUED ON JUNE 20, 2007 WAS A FINAL DECISION. RECONSIDERATION DID NOT STAY THE TIME TO FILE THE LUPA PETITION.

To circumvent LUPA's 21 day limitation period, Mr. Mellish and the County argued (and the trial court agreed) that filing a motion for reconsideration stayed the time to file the LUPA petition. This is incorrect under the Jefferson County code and Washington law.

First, the Jefferson County Code does not have any provision that states or infers that filing a motion for reconsideration changes or reverses the finality of a decision. The opposite is true:

JCC 18.40.320 Final decision.

(1) Finality. All...Type II and III project permit decisions under this code shall be final unless appealed pursuant to Article V of this chapter.

Under JCC Article V, an appeal of a Type III project permit is directly to the superior court under LUPA.

Under our court rules, reconsideration stays the time to appeal a final judgment. RAP 5.1(e). But the Jefferson County Code does not have any provision analogous to RAP 5.1(e) staying the time to appeal pending reconsideration.

RAP 5.1 prevents a party from having to appeal pending reconsideration and then having to withdraw the appeal. Here that is not a

problem because, as will be shown below, reconsideration and the LUPA timeline run concurrently – effecting the Legislative intent that appeals are timely processed. Nevertheless, the superior court interpreted language in Jefferson County’s reconsideration ordinance to mean that if a motion for reconsideration of a final decision is filed, the decision becomes “non-final” until reconsideration is decided. The superior court found that this second “finality” triggers the LUPA clock to start running. This interpretation is inconsistent with the Jefferson County Code’s plain text, quoted above, that provides a Type III permit decision is final unless appealed. This interpretation also runs counter to the policy behind LUPA’s limitation period – to provide predictable, consistent appeals which give a landowner a sense of finality.

This interpretation is also inconsistent with the face of the permit;⁴⁷ the notice regarding judicial appeals sent to Mr. Mellish with the permit;⁴⁸ and an email (upon which Mr. Mellish was copied) with the County’s original interpretation that the appeal deadline was July 16, 2007.⁴⁹

⁴⁷ CP 349.

⁴⁸ CP 346.

⁴⁹ CP 252.

F. EVEN IF RECONSIDERATION STAYS THE APPEAL PERIOD, THE LIMITATION PERIOD EXPIRED PRIOR TO FILING THE PETITION.

Jefferson County's code provides for a fifteen (15) day reconsideration period. Because reconsideration does not stay the time to appeal LUPA under the code the 15 day reconsideration period occurs simultaneously within LUPA's 21 days.

But even if under the Jefferson County Code reconsideration stays the time to file under LUPA, the petition was filed too late because only fifteen days is allowed for reconsideration. The code requires a motion for reconsideration to be filed within five "business days" of the decision.⁵⁰ Mr. Mellish filed his motion for reconsideration on June 28, 2007.

The hearing examiner then has ten working days to act on the motion. The hearing examiner "shall issue a decision within 10 working days of the request."⁵¹ Thus the hearing examiner was required to issue a decision -- making the decision final -- no later than July 13, 2007.⁵² This mandatory directive to the hearing examiner for a timely, short, and certain reconsideration period is in line with the Legislature's intent to

⁵⁰ JCC 18.40.310.

⁵¹ JCC 18.40.310.

⁵² While the term "shall" is presumptively mandatory, its meaning depends on the legislative intent of the statute as a whole. *State v. Krall*, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994); *Frank v. Washington State Dept. of Licensing* 94 Wash.App. 306, 311, 972 P.2d 491, 494 (1999).

provide timely, predictable appeals of land use decisions. As such, even under the superior court's interpretation of the reconsideration ordinance, the Land Use Petition needed to be filed no later than August 3, 2007 because a decision on reconsideration was due no later than July 13, 2007.

To hold otherwise would negate the "Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner."⁵³ Frog Mountain received their permit dated June 20, 2007. The face of the permit says it is a final decision. The permit states that any appeal must be filed within 21 days. To allow the superior court's interpretation to stand would take away any requirement that appeals be predictable or timely. Frog Mountain did not receive any notice that the final decision was being reconsidered. Nor does the County's ordinance state that the time to appeal is extended by reconsideration. As such, as far as they were concerned, the appeals period ran 21 days from the date the permit was issued – around July 16, 2007. If the County can delay reconsideration indefinitely, the legislative intent is thwarted leaving applicants and owners in a "precarious position" that the *Nykreim* Court sought to prevent.⁵⁴

⁵³ *Nykreim*, 146 Wn.2d 933.

⁵⁴ *Id.*

Respondent may argue that a motion for reconsideration under the Jefferson County Code is analogous to one under CR 59, and thus the time to appeal is stayed pending reconsideration. But respondent and the County did not comply with the requirements for reconsideration. First, the motion should have been served on Frog Mountain. Failure to properly serve a motion for reconsideration renders it untimely and thus does not stay the appeal period.⁵⁵

Second, the hearing examiner's decision on reconsideration was a week late. This may not be long. However, under LUPA, substantial compliance does not apply.⁵⁶ And letting reconsideration drag on for a few days or weeks would leave open the question – how many days or weeks is too much? This would detract from the legislative goal – to give owners a predictable, timely and consistent appeal process.

G. THE LUPA DEADLINE IS NOT AFFECTED BY ANY MISREPRESENTATIONS BY THE COUNTY.

On the permit the County correctly noted the deadline for appeal – 21 days from the date the permit was issued. The County also sent Mr. Mellish a separate sheet that gave the correct information regarding

⁵⁵ *Schaeferco, Inc. v. Columbia River Gorge Com'n*, 121 Wash. 2d 366, 849 P.2d 1225 (1993).

⁵⁶ *Overhulse*, 94 Wn.App. at 599.

judicial appeals.⁵⁷ But the County sent contradictory emails to Mr. Mellish (to which Frog Mountain was not a party).⁵⁸ Two emails indicate reconsideration stays the time to file a LUPA petition. But one email from the County (not to Mr. Mellish, but of which he received a copy) correctly sets the deadline – even though reconsideration had already been filed:

...[H]e filed a motion for reconsideration.
Deadline for filing in superior court is July
16.⁵⁹

This is consistent with the notices that were sent out, the code, and state law. While the emails sent by the County may be misleading, our courts have held that lack of notice or defects in due process do not cause LUPA's limitation period to be extended. The confusion in Jefferson County's emails may be troubling, but they do not extend the period to appeal. The Supreme Court's decision in *Habitat Watch v. Skagit County* is determinative. As this Court explained in *Asche*, a due process argument in this context fails:

Our Supreme Court has established a bright-line rule in *Habitat Watch*; LUPA applies even when the litigant complains of lack of notice under the procedural due process clause. We note that *Habitat Watch* had been given notice and had participated in

⁵⁷ CP 346.

⁵⁸ CP 251-253.

⁵⁹ CP 252.

proceedings to oppose the special use permit. *Habitat Watch*, 155 Wash.2d at 402, 120 P.3d 56. Then, in two instances, Habitat Watch was not given notice required by the local ordinance and therefore did not have the opportunity to challenge the special use permit's extension. *Habitat Watch*, 155 Wash.2d at 403, 120 P.3d 56. The court held that despite the lack of notice, LUPA barred Habitat Watch's challenges. *Habitat Watch*, 155 Wash.2d at 401, 120 P.3d 56. The court stressed that LUPA's "statute of limitations begins to run on the date a land use decision is issued," *Habitat Watch*, 155 Wash.2d at 408, 120 P.3d 56, and that "even illegal decisions must be challenged in a timely, appropriate manner." *Habitat Watch*, 155 Wash.2d at 407, 120 P.3d 56. Given that position, we are constrained to hold that the Asches' due process challenge fails. Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity.⁶⁰

If petitioner misinterpreted the County Code in spite of the clear appeal directions on the permit and the notice accompanying the permit, it does not extend the time to appeal under LUPA. The stringent deadline, however harsh, has been upheld time after time.

IV. CONCLUSION

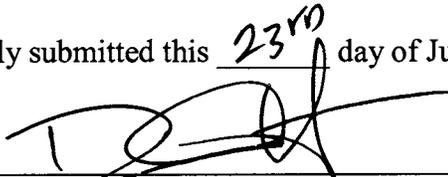
Frog Mountain's permit was issued on June 20, 2007. Under Jefferson County's code it was a final decision appealable only under

⁶⁰ *Asche v. Bloomquist*, 132 Wash.App. 784, 798-799, 133 P.3d 475,482 (2006).

LUPA to the superior court. Because the land use petition was not filed until over fifty days later, the inquiry should end and the petition be dismissed. But even if Jefferson County's reconsideration ordinance stayed the LUPA deadline for fifteen days, the petition was filed too late.

Frog Mountain has a right to rely on the permit issued by the County – and the representations made on the face of that permit regarding appeals. While the county may have misrepresented to Mr. Mellish the timelines he needed to follow to perfect his appeal, these representations should not affect the right of Frog Mountain to a predictable, timely and consistent appeals process. LUPA's deadline is intended to protect landowners, not those challenging a land use decision. The superior court's interpretation turns that intent on its head and protects the challenger of a land use decision to the prejudice of the owner. Because the superior court lacked jurisdiction, its order reversing the hearing examiner should be vacated and the petition dismissed with prejudice.

Respectfully submitted this 23rd day of July, 2008.



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JEFFERSON COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
UNIFIED DEVELOPMENT CODE
TYPE III LAND USE PERMIT

APPLICANT: HAROLD S ELYEA
870 MARTIN RD
PORT TOWNSEND WA 983689379

DATE ISSUED: June 20, 2007
DATE EXPIRES: June 20, 2012

MLA NUMBER: MLA06-00397

PROJECT PLANNER: David Wayne Johnson

PROJECT DESCRIPTION:

A Conditional Use Permit to expand a legal non-conforming dog and cat boarding facility in a Rural Residential zone. A Minor Variance reducing the required property line setback from 100 feet to 70 feet for a legal non-conforming structure.

PROJECT LOCATION:

Parcel Number 001 291 015, in Section 29, Township 30, Range 01 West, MW, located at 870 Martin Rd, Port Townsend Wa 98368

CONDITIONS:

- 1.) 1. No building permit shall be issued for any use involved in an application for approval for a conditional use permit until the conditional use permit is approved and becomes effective.
2. A conditional use permit automatically expires and becomes void if the applicant fails to file for a building permit or other necessary development permit within three (3) years of the effective date (the date of the decision granting the permit) of the permit unless the permit approval provides for a greater period of time.
3. Extensions to the duration of the original permit approval are prohibited.
4. The Department of Community Development shall not be responsible for notifying the applicant of an impending expiration.
5. The county may modify an approved conditional use permit as follows: the county may delete, modify or impose additional conditions upon finding that the use for which the approval was granted has been intensified, changed or modified by the property owner or by person(s) who control the property without approval so as to significantly impact surrounding land uses. A modification will be processed as a Type II land use decision pursuant to JCC 18.40.270 of this Code.
6. A conditional use permit granted under this JCC 18.40 shall continue to be valid upon a change of ownership of the site, business, service, use or structure that was the subject of the permit application. No other use is allowed without approval of an additional conditional use permit.
7. The county may suspend or revoke an approved conditional use permit pursuant to JCC 18.50 of this Code only upon finding that:
 - 1) The use for which the approval was granted has been abandoned for a period of at least one (1) year;
 - 2) Approval of the permit was obtained by misrepresentation of material fact; or
 - 3) The permit is being exercised contrary to the terms of approval.
8. In appropriate circumstances, the Administrator may require a reasonable performance or maintenance assurance device, in a form acceptable to the county prosecutor, to assure compliance with the provisions of this Code and the conditional use permit as approved.
9. Should a legal existing nonconforming use of a property or structure be discontinued for more than two (2) years, the use of the property and structure shall be deemed abandoned and shall conform to a use permitted in

APPENDIX A

the land use classification in which it is located, unless the property owner demonstrates through property maintenance a bona fide intention to sell or lease the property. If the property is adequately maintained, the property shall not be deemed abandoned and be allowed to remain vacant for up to three (3) years. The parcel owner shall maintain records verifying the ongoing use of this parcel in order to maintain status as a legal existing nonconforming use.

10. Animals being kept on the premises shall be allowed outside only between the hours of 7:00 am and 10:00 pm, except when accompanied by an attendant.

11. The proposal shall comply with noise standards outlined by WAC 173-60-040, which were adopted by Jefferson County by Resolution 67-85.

12. Once the expansion is complete, the Applicant/Landowner shall retain and pay for a professional competent in the field to provide a noise level analysis to the Department of Community Development. A representative from the Department of Community Development will contact this professional and arrange for the noise level analysis to take place on a day of the representatives' choosing. This noise level analysis is intended to verify compliance with WAC 173-60-040 which relates to maximum permissible noise levels. If the noise level analysis shows that noise levels are in compliance with the Code, then no further noise level analysis are required. If it is shown that the use is not complying with the permissible noise levels, then further mitigation measures are going to have to be undertaken by the applicant. These mitigation measures will have to be agreed upon by the Department of Community Development to ensure future noise levels are at permissible levels. Another noise level analysis would have to be conducted after the mitigation measures are undertaken to ensure that permissible noise levels are not being violated. If there are any issues relating to appropriate mitigation measures, then the Examiner retains jurisdiction to make decisions on that issue.

13. No use shall be made of equipment or material which produces unreasonable vibration, noise, dust, smoke, odor, or electrical interference to the detriment of adjoining property.

14. Signs shall comply with the provisions set forth in JCC 18.30.150 of the UDC.

15. Lighting shall be required to conform to JCC 18.30.140 standards. Lighting shall not exceed thirty (30) feet in height from finished grade. In addition, lighting shall not be directed towards adjacent properties and shall be shielded in a manner to mitigate glare.

16. The applicant/landowner is limited to housing a maximum of forty-five (45) dogs at any given time.

FINDINGS:

- 1.) The Administrator finds that this application complies with applicable provisions of the Unified Development Code, all other applicable ordinances and regulations, and is consistent with the Jefferson County Comprehensive Plan and Land Use map.
- 2.) See Staff Report dated May 4, 2007 and Hearing Examiner Decision dated received June 20, 2007 for Findings.

NOTICE: This permit does not excuse the proponent from complying with other local, state, and federal ordinances, regulations, or statutes applicable to the proposed development.

Development pursuant to this permit shall be undertaken subject to the applicable development and performance standards of the Jefferson County Unified Development Code.

If during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate area shall be halted, and the Administrator shall be notified at once.

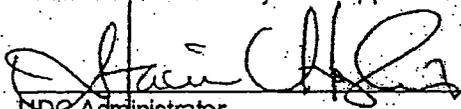
The Federal Endangered Species Act rules to protect threatened Chinook and Summer-run Chum salmon became effective on January 8, 2001. Bull trout have been listed as threatened since early 2000. Under the ESA, any person may bring lawsuit against any individual or agency that "takes" listed species (defined as causing harm, harassing, or damaging habitat for the listed species). In addition, the National Marine Fisheries Service can levy penalties. All areas in Jefferson County are included as "critical habitat" for a listed species. Development of property along any marine shoreline, freshwater shoreline, or floodplains could harm habitat if protective measures are not taken. To minimize the potential to damage habitat, all property owners developing adjacent to marine shoreline, freshwater shoreline, or floodplains are advised to do the following:

- Set back buildings, utilities and roads as far as possible from surface waters (streams, rivers, lakes, marine waters), or at least 150 feet from the edge of the water
- All development activities should avoid unstable slopes, wetlands, and forested areas near surface waters
- Remove minimal vegetation for site development, especially large trees
- Allow trees that have fallen into surface waters to remain there
- Infiltrate stormwater from buildings and driveways onsite through drywells rather than discharging directly into surface waters or roadside ditches

Any individual, group, or agency can bring suit for a listed species "taking", even if you are in compliance with Jefferson County development codes. The risk of a lawsuit against you can be reduced by consulting with a professional fisheries habitat biologist, and following the recommendations for site development provided by the biologist. For more information, contact the National Marine Fisheries Service in Seattle at (206)526-6613, or the U.S. Fish and Wildlife Service at (503) 231-6121.

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.


UDC Administrator

6/20/2007

18.20.260 Nonconforming uses and structures.

A legal nonconforming use or structure is one that conformed to all applicable codes in effect on the date of its creation, but no longer complies due to subsequent changes in the code. Nonconformity is different than and is not to be confused with illegality (see the definitions of "nonconforming," "nonconforming use," and "illegal use" in Chapter 18.10 JCC). Legal nonconforming uses and structures are commonly referred to as "grandfathered."

- (1) Nonconforming uses of land are uses which currently exist and were lawfully established prior to the enactment of this code. Legally established uses may continue as long as they remain otherwise lawful, provided:
 - (a) The nonconforming use of land is not discontinued or abandoned for a period more than two years. A property owner may be allowed three years if they demonstrate a bona fide intention to sell or lease the property. For purposes of calculating this time period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:
 - (i) On the date when the land was physically vacated;
 - (ii) On the date the use ceases to be actively involved in the sale of merchandise or the provision of services; or
 - (iii) On the date of termination of any lease or contract under which the nonconforming use has occupied the land.
 - (b) A legal existing nonconforming use can be expanded up to 10 percent subject to a Type I permit approval process.
 - (c) A nonconforming use may be expanded beyond 10 percent through the approval of a Type II C(d) discretionary conditional use permit process. In addition to meeting the criteria set forth through the conditional use permit process, the department shall determine the expansion proposal has met the following:
 - (i) The proposed area for expansion is contiguous to the nonconforming use;
 - (ii) The area for expansion of the use complies with all applicable bulk and dimensional standards, performance provisions, and environmental and shoreline (WAC 173-27-080) regulations;
 - (iii) The area for expansion shall not increase the land area devoted to the nonconforming use by more than 100 percent of that use at the effective date of the nonconformance;
 - (iv) The expansion shall not be granted if it would result in a significant increase in the intensity of the use of the nonconformity (e.g., hours of operation, traffic).
 - (d) A nonconforming use of land may be changed to another nonconforming use; provided, that the proposed use is equally or more appropriate to the district than the existing nonconforming use. Such change shall not be more intensive or have greater impacts than the existing use. The proposed change shall be required to undergo a Type III conditional use approval process. If the proposal encompasses structural or use expansion, refer to subsections (2) and (3) of this

section.

- (2) Nonconforming structures are those that are out of compliance with the development standards set forth through this code or other applicable federal, state or local regulation.
- (a) Any legally established nonconforming structure is permitted to remain in the form and location in which it existed on the effective date of the nonconformance.
 - (b) Nonconforming structures may be structurally altered or enlarged only if all applicable environmental and development standards are met.
 - (c) Repairs to existing nonconforming structures including ordinary maintenance or replacement of walls, fixtures, or plumbing shall be permissible so long as the exterior dimensions of the structure are not increased.
 - (d) Nonconforming structures under the jurisdiction of the Shoreline Master Program shall be subject to the nonconforming provisions stipulated through WAC 173-27-080.
 - (e) A legal existing nonconforming structure damaged or destroyed by fire, earthquake, explosion, wind, flood, or other calamity may be completely restored or reconstructed. A structure shall be considered destroyed for purposes of this section if the restoration costs exceed 75 percent of the assessed value of record when the damage occurred. A structure can be completely restored or reconstructed if all the following criteria are met:
 - (i) The restoration and reconstruction shall not serve to extend or increase the nonconformance of the original structure or use with existing regulations; and
 - (ii) The reconstruction or restoration shall, to the extent reasonably possible, retain the same general architectural style as the original destroyed structure, or an architectural style that more closely reflects the character of the surrounding area; and
 - (iii) Permits shall be applied for within one year of damage, an extension for permit application may be requested from the administrator. Restoration or reconstruction must be substantially completed within two years of permit issuance; and
 - (iv) Any modifications shall comply with all current regulations and codes (other than use restrictions) including, but not limited to, lot coverage, yard, height, open space, density provisions, or parking requirements unless waived by the appropriate county official through the granting of a variance.
 - (f) A legal existing nonconforming structure can be expanded up to 10 percent subject to a Type I permit approval process.
 - (g) A legal existing nonconforming structure may be expanded beyond 10 percent through the approval of a Type II C(d) discretionary conditional use permit. The expansion shall not increase the structure by more than 100 percent of total square footage calculated from the effective date of the nonconformance. Proposals for expanding structures which house or contain a nonconforming use are subject to subsection (3) of this section.

(3) Nonconforming uses of structures apply to structures, whether conforming or nonconforming, that house or contain nonconforming uses;

(a) A structure which houses or contains a nonconforming use cannot be expanded or enlarged if the structure (in its enlarged or expanded state) does not meet all applicable performance and use standards, or environmentally sensitive area requirements for the land use district in which it is located.

(b) A structures housing an existing legal nonconforming uses can be expanded up to 10 percent or 200 square feet, whichever is greater, subject to a Type I permit approval process.

(c) Substantial expansions which exceed either 10 percent or 200 square feet shall be subject to a Type III conditional use permit approval process. The expansion cannot increase the structural portion of the nonconforming use by more than 3,999 square feet. The expansion is calculated from the effective date of the nonconformance.

(d) A legal existing structure containing a nonconforming use may be repaired or maintained subject to all applicable building and health codes.

(e) A nonconforming use contained within a nonconforming structure which is damaged or destroyed by fire, earthquake, explosion, wind, flood, or other calamity may be reestablished pursuant to subsection (2)(e) of this section.

(f) Nonconforming uses contained or housed in a structure cease to retain their legal nonconforming status if the use is discontinued or abandoned for any reason for a period more than two years. A property owner may be allowed three years if they demonstrate a bona fide intention to sell or lease the property. For purposes of calculating this time period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:

(i) On the date when the use was physically vacated;

(ii) On the date the use or activity ceases to be actively involved in the sale of merchandise or the provision of services; or

(iii) On the date of termination of any lease or contract under which the nonconforming use has occupied the structure.

(4) A nonconforming use of a structure may be changed to another nonconforming use; provided, that the proposed use is equally or more appropriate to the district than the existing nonconforming use. Such change shall not be more intensive or have greater impacts than the existing use. The proposed change shall be required to undergo a Type III conditional use permit approval process. [Ord. 8-06 § 1]

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]

18.40.320 Final decision.

- (1) **Finality.** All administrative interpretations made pursuant to Article VI of this chapter and Type II and III project permit decisions under this code shall be final unless appealed pursuant to Article V of this chapter.
- (2) **Finding and Conclusions.** Each final decision of the hearing examiner and, in the case of certain Type V decisions, as more fully set forth in Chapter 18.45 JCC, the board of county commissioners shall be in writing and shall include findings and conclusions based on the record.
- (3) **Notice of Final Decision.**
 - (a) Except for those permits exempted under JCC 18.40.080, upon issuance of the final decision, the administrator shall provide a notice of decision that includes a statement of all determinations made under SEPA and the procedures for administrative appeal, if any, of the permit decision. The notice of decision may be a copy of the report or decision on the project permit application. It shall also state that affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation fully set forth in RCW 36.70B.130.
 - (b) A copy of the notice of decision shall be mailed or hand delivered to the applicant, any person who, prior to the rendering of the decision, requested notice of the decision, and to all persons who submitted substantive written comments on the application. The notice of decision shall be posted and published as set forth in JCC 18.40.210(1) and (2), and shall be provided to the Jefferson County assessor.
- (4) **Timing of Notice of Final Decision.** The final decision on a development proposal shall be made within 120 calendar days from the date of the determination of completeness unless:
 - (a) Certain days are excluded from the time calculation pursuant to subsection (5) of this section;
 - (b) The application involves a shoreline permit application for limited utility extensions (RCW 90.58.140(13)(b)) or construction of a bulkhead or other measures to protect a single-family residence and its appurtenant structures from shoreline erosion. In those cases, the decision to grant or deny the permit shall be issued within 21 calendar days of the last day of the comment period specified in JCC 18.40.220(2);
 - (c) The application involves a preliminary long plat application under Article IV of Chapter 18.35 JCC. In such cases, the application shall be approved, disapproved, or returned to the applicant for modification or correction within 90 days from the date of the determination of completeness; or
 - (d) The application involves a final short plat application under Article III of Chapter 18.35 JCC, or a final long plat application under Article IV of Chapter 18.35 JCC. In such cases, the application shall be approved, disapproved or returned to the applicant within 30 days from the date of the determination of completeness.
- (5) **Calculation of Time Periods for Issuance of Notice of Final Decision.** In determining the number of calendar days that have elapsed since the determination

of completeness, the following periods shall be excluded:

- (a) Any period during which the applicant has been requested by the county to correct plans, perform studies, or provide additional information. The period shall be calculated as set forth in JCC 18.40.110(6)(b).
 - (b) If substantial project revisions are made or requested by an applicant, the 120 calendar days will be calculated from the time the county determines the revised application is complete and issues a new determination of completeness.
 - (c) All time required for the preparation of an environmental impact statement (EIS) following a determination of significance (DS) pursuant to Chapter 43.21C RCW.
 - (d) Any period for open record appeals of project permits under JCC 18.40.330; provided, however, that the time period for the hearing and decision shall not exceed a total of 90 calendar days.
 - (e) Any extension of time mutually agreed upon by the county and the applicant.
 - (f) Any time required for the preparation of an administrator's code interpretation pursuant to Article VI of this chapter.
- (6) The time limits established in this chapter do not apply if a project permit application:
- (a) Requires an amendment of the Jefferson County Comprehensive Plan or this Unified Development Code; or
 - (b) Requires approval of the siting of an essential public facility as provided in RCW 36.70A.200.
- (7) Notice to Applicant. If the county is unable to issue its final decision on a project permit application within the time limits provided for in this chapter, it shall provide written notice of this fact to the project applicant. The notice shall include a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of decision.
- (8) Effective Date. The final decision of the administrator, hearing examiner, or board of county commissioners shall be effective on the date stated in the decision, motion, resolution or ordinance; provided, however, that the appeal periods shall be calculated from the date of the decision, as further provided in JCC 18.40.330 and 18.40.340. [Ord. 8-06 § 1]

18.40.330 Administrative appeals.

In the absence of a specific right of appeal authorized under this UDC, there shall be no right to administrative appeals.

- (1) Type I Permits. Decisions of the Administrator on Type I permits and decisions regarding the appropriate permit process to be used for discretionary conditional use permit applications (i.e., "C(d)" uses listed in Table 3-1 in JCC 18.15.040) under JCC 18.40.520, are not appealable to the hearing examiner. However, administrative code interpretations may be appealed as set forth in Article VI of this chapter.
- (2) Type II Permits.
 - (a) The administrator's final decision on a Type II permit application may be appealed by a party of record to the hearing examiner for an open record appeal hearing as further set forth in JCC 18.40.280. The responsible official's SEPA determination of nonsignificance (DNS) or mitigated determination of nonsignificance (MDNS) may also be appealed by a party of record to the hearing examiner for an open record appeal hearing. Administrative appeals of a DS or draft or final EIS are not allowed.
 - (b) All appeals of Type II permit decisions must be in writing, conform with the procedures for appeal set forth in subsection (5) of this section, and be filed within 14 calendar days after the notice of decision is issued. Appeals of environmental determinations under SEPA, except for a determination of significance (DS), shall be consolidated with any open record hearing on the project permit. (See RCW 36.70B.110(6)(d)).
- (3) Type III Permits.
 - (a) The responsible official's DNS or MDNS may be appealed to the hearing examiner by the applicant or anyone commenting on the environmental impacts of the proposal (as further set forth in JCC 18.40.780). The appeal must be in writing, in conformance with subsection (5) of this section, and be filed within 14 calendar days after the threshold determination is issued as set forth in subsection (4) of this section. Appeals of environmental determinations under SEPA shall be consolidated with any open record hearing on the project permit. (See RCW 36.70B.110(6)(d)). Administrative appeals of a DS or draft or final EIS are not allowed.
- (4) Calculation of Appeal Periods. The appeal periods shall be calculated as of the date the notice of decision is published or, for appeals involving a SEPA determination, from the date the decision is issued pursuant to WAC 197-11-340(2)(d).
- (5) Procedure for Appeals.
 - (a) A notice of appeal shall be delivered to the administrator by mail or by personal delivery, and must be received by 4:00 p.m. on the last business day of the appeal period, with the required appeal fee pursuant to the Jefferson County fee ordinance.
 - (b) The notice of appeal shall contain a concise statement identifying:
 - (i) The decision being appealed and the identification of the application which is the subject of the appeal;

- (ii) The name, address, and phone number of the appellant and his/her interest in the matter;
 - (iii) Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);
 - (iv) The specific reasons why the appellant believes the decision to be wrong. The appellant shall bear the burden of proving the decision was wrong;
 - (v) The desired outcome or changes to the decision; and
 - (vi) A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.
- (c) Any notice of appeal not in full compliance with this section shall not be considered. [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.

(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]

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DIVISION II

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

MARTIN MELLISH,

Petitioner/Respondent.

v.

FROG MOUNTAIN PET CARE, HAROLD
ELYEA, JANE ELYEA, and JEFFERSON
COUNTY,

Respondents /Appellants,

WASHINGTON STATE COURT OF
APPEALS DIVISION II

No. 35783-4-II

Superior Court

No. 07-2-00791-4

DECLARATION OF SERVICE

On the 23rd day of July, 2008, and in the manner indicated below, I caused a copy of
the Appellant's Brief and a copy of this Declaration of Service, to be delivered to:

Court of Appeals Division II, Clerk
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

By Legal Messenger; and to

Martin Mellish
930 Martin Road
Port Townsend, WA 98368

David Alvarez
Jefferson County Prosecuting
Attorneys Office
PO Box 1220
Port Townsend, WA 98368

By US Mail

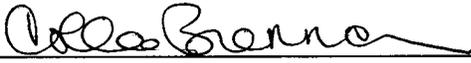
DECLARATION OF SERVICE -1

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LAW OFFICE OF DAVID P. HORTON, INC. PS
3212 NW Byron Street Suite 104
Silverdale, WA 98383
Tel (360) 692 9444
Fax (360) 692 1257

1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 Executed at Silverdale, Washington this 23rd day of July, 2008.

4 
5 Colleen E. Brennan