

FILED

MAY 03 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 84246-9
Court of Appeals No. 27583-4
Clallam County No. 07-2-00791-4

**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

Martin Mellish, *Petitioner*

v.

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

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2010 APR 22 PM 12:08

W. DONALD R. CARPENTER

CLERK

**MEMORANDUM OF AMICUS CURIAE HAROLD T. HARTINGER
IN SUPPORT OF PETITION FOR REVIEW**

HAROLD T. HARTINGER
WSBA 1578
Pro Se Amicus Curiae

906 6th Ave., Apt. C
Tacoma, WA 98405-4513

Phone: 253-627-4280
hthartinger@harbournet.com

TABLE OF CONTENTS

A. Identity of Submitting Party	1
B. Court of Appeals Decision	1
C. Issue Presented for Review	1
Whether Clallam County Superior Court, Judge Kenneth Williams presiding, committed reversible error by denying Frog Mountain’s motion to dismiss Mr. Mellish’s Land Use Petition Act (LUPA) appeal as untimely?	
D. Statement of the Case	2
Events Chronology	2
Legislative Relief (H.B. 2740)	4
E. Argument for Supreme Court Review	4
Legislative Relief (H.B. 2740): Chapter 59, Laws of 2010, is a procedural law retrospective in operation that applies to all pending LUPA proceedings including Mr. Mellish’s appeal decided by Judge Williams	4
Judge Williams’ final judgment overturning and remanding this case to Jefferson County with directions to “deny [Frog Mountain’s] requested nonconforming use expansion” should be affirmed on its merits without regard to Chapter 59, Laws of 2010	5
F. Conclusion	10
 Appendix A - <i>Mellish v. Frog Mountain Pet Care</i> , 154 Wn. App. 395, 225 P.3d 439 (2010)	A-1
<i>Millish v. Frog Mountain Pet Care</i> (December 15, 2009, withdrawn opinion of Division II, Court of Appeals)	A-11
<i>Memorandum Opinion</i> , September 24, 2007, Judge Williams, Clallam County Superior Court	A-21
Chapter 59 (H.B. No. 2740), Laws of 2010 – An Act Relating to the definition of land use decision in the land use petition act; and amending RCW 36.70C.020	A-29
House Bill Report (H.B. 2740) As Passed Legislature	A-31

Appendix B - REVISED CODE OF WASHINGTON – Related Provisions	B-1
RCW 35.63.130. Hearing examiner system--Adoption authorized—Alternative--Functions--Procedures	B-1
RCW 36.70.970. Hearing examiner system--Adoption authorized--Alternative—Functions--Procedures.....	B-2
RCW 36.70C.060. Standing	B-3
Appendix C - Jefferson County Code Provisions Creating the Office of the Jefferson County Hearing Examiner and Assigning Its Authority	C-1
18.05.080 Hearing examiner	C-1
18.05.085 Hearing examiner rules of procedure	C-4
18.40.280 Hearing examiner review and decision (Type III decisions and appeals of Type II decisions)	10
18.40.290 Board of county commissioners action (Type IV decisions)	C-13
18.40.300 Procedures for public hearings	C-13
18.40.310 Reconsideration	C-14
18.40.320 Final decision	C-14
18.40.330 Administrative appeals	C-16
18.40.340 Judicial appeals	C-18

TABLE OF CASES

<i>Application of Santore</i> , 28 Wn. App. 319, 332, 623 P.2d 702 (1981) ...	7
<i>Fischback & Moore of Alaska, Inc. v. Lynn</i> , 407 P.2d 174, 176 (Alaska 1965)	6
<i>Haddenham v. State</i> , 87 Wn.2d 145, 148, 550 P.2d 9 (1976)	4
<i>Hall v. Seattle Sch. Dist. 1</i> , 66 Wn. App. 308, 831 P.2d 1128 (1992) ...	5
<i>Macumber v. Shafer</i> , 96 Wn.2d 568, 570, 637 P.2d 645 (1981)	4
<i>Martin v. Dayton School Dist. No. 2</i> , 85 Wn.2d 411, 413, 536 P.2d 169 (1975)	6
<i>Simonson v. Veit</i> , 37 Wn. App. 761, 683 P.2d 611, review denied, 102 Wn.2d 1013 (1984)	5
<i>Sitko v. Rowe</i> , 195 Wash. 81, 79 P.2d 688 (1938)	5
<i>Skinner v. Civil Serv. Comm'n of City of Medina</i> , 146 Wn. App. 171, 188 P.3d 550 (2008), review granted, 165 Wn.2d 1040 (2009)	5
<i>Tomlinson v. Clarke</i> , 118 Wn.2d 498, 511, 825 P.2d 706, 713 (1992) ..	5
<i>Yellam v. Woerner</i> , 77 Wn.2d 604, 606-607, 464 P.2d 947, 948 (1970)	4

STATUTES

Laws of 1995, Chapter 347, §§ 423 and 424	10
Laws of 1995, Chapter 347, §§ 702-715	10
Laws of 2010, Chapter 59 (H.B. 2740)	4, 5
RCW 35.63.130	9, 10
RCW 36.70.970	9, 10

RCW 36.70C.020(2)(c)	4
RCW 36.70C.060	8
RCW 36.70C.060(d)	6
RCW ch. 35.70C.....	10
RCW ch. 36.70	9

OTHER AUTHORITIES

Appendix C: Jefferson County Code Provisions Creating the Office of the Jefferson County Hearing Examiner and Assigning Its Authority

**MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF
PETITION FOR REVIEW**

A. IDENTITY OF SUBMITTING PARTY

Harold T. Hartinger, WSBA 1578, as Pro Se Amicus Curiae, asks that the Supreme Court grant the Petition for Review in *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 225 P.3d 439 (2010), filed March 15, 2010, by Martin Mellish.

Amicus is now and since 1954 has been a member of the Washington State Bar Association. Shortly after his discharge from active duty with the United States Army, he accepted an appointment as an Assistant Attorney General, an office he held from January 1957 until March 1968 when he entered private practice in Tacoma, Washington. He retired from the firm of Vandenberg, Johnson & Gandara in 2008.

This Memorandum expresses the personal views of Amicus. He does not represent a party to this case or a related person or entity.

No person or entity other than Amicus prepared any part of this Memorandum or contributed funding to defray the cost of its preparation, distribution, or filing.

B. COURT OF APPEALS DECISION

The Court of Appeals decision, filed in response to Mr. Mellish's motion for reconsideration, is attached as pages A-1 to A-10 of Appendix A. The Court's earlier opinion is attached as pages A-11 to A-20.

C. ISSUE PRESENTED FOR REVIEW

Whether Clallam County Superior Court, Judge Kenneth Williams presiding, committed reversible error by denying Frog Mountain's motion

to dismiss Mr. Mellish's Land Use Petition Act (LUPA) appeal as untimely?

D. STATEMENT OF THE CASE

I. Events Chronology

On June 20, 2007, the Jefferson County Deputy Hearings Examiner filed a decision granting Frog Mountain Pet Care's application for a conditional use permit. On June 28, 2007, Petitioner Martin Mellish filed a *Motion for Reconsideration* of that decision. The Examiner denied the motion on July 20, 2007. Mr. Mellish filed his LUPA appeal with the Clallam County Superior Court on August 10, 2007.

NOTE: Mr. Mellish's filings were timely. He responded in each case to service by mailing and therefore had the benefit of CR 6(a) *[Time] Computation*, and 6(e) *Additional Time After Service by Mail*. For example, the initial decision of the Examiner was filed on June 20, 2007. It was mailed to interested parties on June 21, 2007. The 24th day after mailing was July 15, 2007, a Sunday, which extended a 21-day period of time an additional day, to Monday, July 16, 2007, the 25th day after mailing.

On September 24, 2007, Judge Williams filed a *Memorandum Opinion on Motion to Dismiss* (APP A-21 to A-28) denying the dismissal of Mr. Mellish's LUPA appeal, relief sought by Frog Mountain. On March 12, 2008, Judge Williams filed a *Memorandum Opinion* reversing on the merits the decision of the Jefferson County Hearing Examiner. The *Opinion* remanded the case to Jefferson County with directions that the

County deny Frog Mountain's application for expansion of a nonconforming business use.

Frog Mountain's *Notice of Appeal to Court of Appeals Division II*, was filed April 9, 2008. The *Notice* sought review of "1) the Court's Memorandum Opinion Remanding the matter to Jefferson County; and 2) the Court's Memorandum Opinion on Motion to Dismiss." Copies of Judge William's *Memorandum Opinions* were attached to the *Notice of Appeal*.

III.

Frog Mountain's Appeal

Frog Mountain's single Assignment of Error reads as follows, *Brief of Appellants*, at page 1:

- 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 with 21 days after a final decision is issued. The Conditional Use Permit says: "Date Issued: June 20, 2007." The land use petition appeal the permit was not filed until August 10, 2007 – over fifty days later. Was the petition timely filed?

Frog Mountain did not preserve procedural questions for appellate review. The two abandoned questions are these: Was Frog Mountain prejudiced by the Mr. Mellish's failure to give notice of his June 28, 2007, motion for reconsideration by the hearing examiner? Was the examiner's delay in denying reconsideration grounds for dismissing Mr. Mellish's LUPA appeal?

IV.

Legislative Relief (H.B. 2740)

On March 15, 2010, the Governor approved Chapter 59, Laws of 2010 (H.B. 2740) (App A-29 to A-30), a measure that amended RCW 36.70C.020(2)(c) by adding the following new 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 of 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.

E. ARGUMENT FOR SUPREME COURT REVIEW

I.

Legislative Relief (H.B. 2740)

Chapter 59, Laws of 2010, is a procedural law retrospective in operation that applies to all pending LUPA proceedings, including Mr. Mellish's appeal decided by Judge Williams.

Chapter 59, Laws of 2010, addresses a procedural matter,¹ and it does not affect substantive or vested rights. The statute is remedial, and therefore it applies retroactively to all pending LUPA appeals, even those initiated prior the Act's enactment. *Yellam v. Woerner*, 77 Wn.2d 604, 606-607, 464 P.2d 947, 948 (1970); *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976); *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637

¹ A copy of the "House Bill Report (H.B. 2740) As Passed Legislature" is attached as APP A-31 to A-35.

P.2d 645 (1981); *Tomlinson v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706, 713 (1992).

The legislative rejection of the Court of Appeals decision in Mr. Millish's case expresses a strong preference for a public policy first developed to governed court appellate proceedings; see *Sitko v. Rowe*, 195 Wash. 81, 79 P.2d 688 (1938), and *Simonson v. Veit*, 37 Wn. App. 761, 683 P.2d 611, review denied, 102 Wn.2d 1013 (1984), and then applied without exception to administrative quasi-judicial proceedings; see *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), review granted, 165 Wn.2d 1040 (2009).

At least two pending other appellate cases (there may, of course, be more) will benefit from enactment of Chapter 59, Laws of Washington. The cases are *Lauer v. Garrison*, Court of Appeals Division II, No. 38321-7 (not yet set for hearing); and *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 188 P.3d 550 (2008), review granted, 165 Wn.2d 1040 (2009) (heard by the Supreme Court on January 19, 2010).

II.

Judge William's final judgment overturning and remanding this case to Jefferson County with directions to "deny [Frog Mountain's] requested nonconforming use expansion" should be affirmed on its merits without regard to Chapter 59, Laws of 2010.

The postponement of the deadline for a LUPA appeal to the termination of motions for reconsideration or rehearing is a statutory mandate of LUPA and the Jefferson County Code. Each requires the

exhaustion of administrative remedies as a precondition to judicial review. See, RCW 36.70C.060(d) and County Code § 18.40.340(1).² The statutory and County Code provisions are subject to only one interpretation:

Mr. Mellish had no right of judicial review until the County hearing examiner denied his motion for reconsideration. Only then did the time for appeal begin to run. Mr. Mellish met that deadline.

Judge Williams' judgment must be affirmed.

The interpretation that must be given to mutually consistent statutory and Code requirements is confirmed by the long-settled common law principles annunciated by the Supreme Court's opinion in *Martin v. Dayton School Dist. No. 2*, 85 Wn.2d 411, 413, 536 P.2d 169 (1975):

It is the general rule that the jurisdiction of an administrative agency over a particular matter ends when its decision is appeal 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).

A.

There are references in the opinion for the Court of Appeals to procedural shortcomings that Frog Mountain did not preserve for appellate review: First, that Frog Mountain had no notice of Mr. Mellish's Motion for Reconsideration by the Hearing Examiner; and secondly, that the

² These statutes and other sections of the Revised Code of Washington to which reference is made are collected in attached Appendix B.

Hearing Examiner's denial of the Motion was filed on July 20, 2007, four business days after it was due.

Neither procedural matter is significant. Absence of notice did not prejudice Frog Mountain's case; and in any event, the absence of a trial objection constitutes a waiver.

The tardy action by the Hearing Examiner also caused concern; however Judge Williams was unwilling to dismiss Mr. Mellish's case before he met the requirement that he exhaust his administrative remedies. Surely, that was no abuse of discretion.

The Court of Appeals' decision recognized (but did not exercise) equity's right to extend statutory time limits. It should have recognized its own precedent, *Application of Santore*, 28 Wn. App. 319, 332, 623 P.2d 702 (1981), when it declined to postpone the LUPA 21-day deadline:

"Omissions or failures by public officials should not prejudice the interests of those ... who have no direct and immediate control over such officials. 2A C. Sands, [*Statutes and Statutory Construction*] 57.15 [4th ed. 1973]; 73 Am. Jur. 2d *Statutes* 25 (1974); 67 C.J.S. *Officers* 200 (1978).

If an act is performed, but not in the time or in the precise manner directed by statute, the statutory provisions should not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized. 1A C. Sands, *supra* 25.03."

B.

The LUPA mandate requiring the exhaustion of administrative remedies is expressed subsection (2)(d) of the following statute:

RCW 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.* [Emphasis supplied.]

[1995 c 347 § 707]

C.

The Jefferson County Code's mandate for exhausting administration remedies stated in Code § 18.40.340(1), which reads as follows:

Code § 18.40.340(1) 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.* [Emphasis supplied.]

Mr. Mellish had but one administrative remedy under County Code to exhaust and that was his right to file a motion for reconsideration authorized by Code § 18.40.310. That was the right he exercised.

D.

The Code mandate to exhaust all administrative remedies is enforceable law. The section relates directly to the duties of the County's Office of Hearing Examiner created by Code § 18.05.080 pursuant to RCW 35.63.130 and 36.70.970.

RCW 35.63.130 authorizes the legislative authority of cities and towns to adopt a "hearing examiner system" to which duties of planning commissions can be assigned to hearing examiners. RCW 36.70.970 authorizes the legislative authority of counties to extend the hearing examiner system to planning commission functions governed by RCW ch. 36.70.

Both statutes provide that, "The legislative authority [of the county] shall prescribe procedures to be followed by a hearing examiner." Neither statute imposes uniformity on procedural or substantive matters beyond the final paragraph of each:

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city's or county's comprehensive plan and the city's or county's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be

rendered within ten working days following conclusion of all testimony and hearings.

E.

RCW 35.63.130 and 36.70.970 are the source law, the foundation, upon which Jefferson County's hearing examiner system is based. The statutes, enacted as Laws of 1995, Chapter 347, §§ 423 and 424 have never been modified. *The same legislation, – Laws of 1995, Chapter 347, §§ 702-715, created the Land Use Petition Act now codified in RCW ch. 35.70C. The sections have not been modified in any significant way.*

LUPA and the Jefferson County Hearing Examiner System stand *in pari materia* by reason of their common legislative source and must be interpreted in light of each other. The Hearing Examiner System governs proceedings prior to judicial review; LUPA governs proceedings once administrative remedies have been exhausted, and not before.

F. CONCLUSION

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

Respectfully submitted,


HAROLD T. HARTINGER, WSBA 1578
Pro Se Amicus Curiae

Date: April 20, 2010

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

Court of Appeals of Washington,
Division 2.

Martin MELLISH, Respondent,

v.

FROG MOUNTAIN PET CARE, Harold and Jane Elyea, Appellants,
Jefferson County, Respondent.

No. 37583-4-II.

Feb. 3, 2010.

Background: Neighboring landowner brought land use action challenging issuance of conditional use permit by county authorizing animal boarding facility to remodel and expand facility. The Clallam Superior Court, Kenneth Day Williams, J., denied facility's motion to dismiss. Facility appealed.

Holdings: The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) county's decision granting conditional use permit was a final determination;
- (2) in a matter of first impression, landowner's reconsideration motion did not toll 21-day filing deadline to appeal decision to grant permit; and
- (3) landowner was not entitled to equitable tolling of 21-day filing period to appeal grant of land use permit.

Reversed and remanded.

West Headnotes [omitted]

*441 David P. Horton, Law Office of David P. Horton Inc. PS, Silverdale, WA, for Appellants.

Martin Mellish, Port Townsend, WA, Pro se.

David W. Alvarez, Jefferson Co. Pros. Atty., Port Townsend, WA, for Respondent.

David P. Horton, Law Office of David P. Horton Inc. PS, Silverdale, WA, for Other Parties.

QUINN-BRINTNALL, J.

¶ 1 This Land Use Petition Act (LUPA), ch. 36.70C RCW, appeal raises novel issues of law-whether a county hearing examiner's decision is a "final determination" under former RCW 36.70C.020(l) (a) (1995) ^{FN1} when a motion for reconsideration is pending with the county and, if not, whether the reconsideration motion tolls the time for appeal. If the decision was final before the county denied reconsideration, as Frog Mountain Pet Care argues, then Martin Mellish's appeal to the superior court was untimely and the court erred when it denied Frog Mountain's motion to dismiss. We reverse because a local government's unique reconsideration motion procedure does not toll the strict LUPA filing deadline. RCW 36.70C.040(2), (3).

FN1. The Washington State Legislature amended RCW 36.70C.020 in 2009, recodifying the definition of "[l]and use decision" to RCW 36.70C.020(2). The legislature made no substantive changes to the definition. *Compare* RCW 36.70C.020(2) *with* former RCW 36.70C.020(l) (a).

FACTS

¶ 2 Frog Mountain applied for a conditional use permit and minor variance in order to remodel and expand its Jefferson County (County) dog and cat boarding facility. Mellish owns property adjacent to the facility. He opposed the application because he thought the proposed expansion was too large and would increase the facility's noise, interfering with his enjoyment of his property.

[1] ¶ 3 On June 20, 2007, the deputy hearing examiner filed his decision granting Frog Mountain's request. The next day, the County mailed a notice of the decision to all the interested parties and adjacent property owners. Mellish moved for reconsideration on June 28, but did not notify Frog Mountain of the motion. ^{FN2} The County denied the motion on July 20 and mailed a notice of decision on July 21. It issued Frog Mountain's requested permit on July 21 when it denied the motion.

FN2. The Jefferson County Code apparently does not require a party who moves for reconsideration or the County to notify the adverse party of the motion until the hearing examiner enters the decision.

See JCC 18.40.310, .330. But due process requires notice reasonably calculated to apprise parties of the nature and character of proceedings which will affect them. Nisqually Delta Ass'n v. City of DuPont, 103 Wash.2d 720, 727, 696 P.2d 1222 (1985); Duffy v. Dep't of Soc. & Health Servs., 90 Wash.2d 673, 678-79, 585 P.2d 470 (1978). We are concerned that the Code may invite due process violations, but Frog Mountain did not appeal on this ground.

¶ 4 On August 10, 2007, Mellish filed a land use petition at the Clallam County Superior Court challenging the County's decision. This was 20 days after the County mailed the order denying reconsideration and issued the permit, but 50 days after the County mailed the deputy hearings examiner's June 20 decision granting Frog Mountain's permit.

¶ 5 Frog Mountain moved, under CR 12(b)(6), to dismiss the LUPA action as untimely because Mellish did not file his petition within 21 days of the June 20 decision. Both Mellish and the County, although on opposite sides of the lawsuit, opposed the motion and argued that the LUPA statute of limitations ran from the July 20 order denying reconsideration, not the June 20 decision. The superior court agreed that the motion for reconsideration tolled the 21-day filing requirement and, accordingly, denied the motion to dismiss. The superior court then reversed the County's decision on the merits. Frog Mountain appeals only the denial of its motion to dismiss.

ANALYSIS

FINAL DETERMINATION

[2] ¶ 6 We first determine whether the June 20 decision was a “final decision” and, *442 thus, a “land use decision” that must be appealed within 21 days. Former RCW 36.70C.020(1)(a). The June 20 decision was a final determination, notwithstanding the motion for reconsideration.

¶ 7 In reviewing an administrative decision, we stand in the same position as the superior court. Habitat Watch v. Skagit County, 155 Wash.2d 397, 405-06, 120 P.3d 56 (2005) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 176, 4 P.3d 123 (2000)). We review conclusions of law de novo. Wenatchee Sportsmen, 141 Wash.2d at 176, 4 P.3d 123.

¶ 8 LUPA requires that a party file a petition for review within 21 days of the date a land use decision is issued.^{FN3} RCW 36.70C.040(2), (3). This 21-day statute of limitations is strict; the doctrine of substantial compliance does not apply to it. RCW 36.70C.040(2); Asche v. Bloomquist, 132 Wash.App. 784, 795-96, 133 P.3d 475 (2006), review denied, 159 Wash.2d 1005, 153 P.3d 195 (2007); Overhulse Neighborhood Ass'n v. Thurston County, 94 Wash.App. 593, 599, 972 P.2d 470 (1999); see also Spice v. Pierce County, 149 Wash.App. 461, 466-67, 204 P.3d 254 (2009). LUPA defines a “land use decision” as “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 particular types of actions, including the action at issue here. Former RCW 36.70C.020(1) (emphasis added).

FN3. As relevant here, a land use decision is “issued” three days after the local jurisdiction mails a written decision. RCW 36.70C.040(4)(a). In this appeal, there is no dispute that Mellish filed the land use petition within 21 days of the denial of reconsideration but more than 21 days from the original hearing examiner's decision.

¶ 9 The County argues that because LUPA is silent on what constitutes a “final determination,” the legislature has implicitly delegated the designation of finality to the discretion of each county and, thus, in this case, we must apply the Jefferson County Code definition of a “final determination.” The Clallam County Superior Court followed this approach. But the County cites no law for the proposition that each county's local definition of finality controls and our legislature and Supreme Court have indicated a contrary rule.

¶ 10 In enacting LUPA, our legislature expressed an intention to “establish [] uniform, expedited appeal procedures ... in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. An appeal procedure that varies based on each local government's definition of “final determination” would not be “uniform.” RCW 36.70C.010. Instead of deferring to local ordinances, our Supreme Court has supplied common law and dictionary definitions to explain what is a “final determination” under LUPA with uniformity across Washington State. See, e.g., Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wash.2d 440, 452, 54 P.3d 1194 (2002). The County's suggested local approach would essentially give

counties power to determine whether a court has jurisdiction over a land use petition. In theory, accepting the County's argument would also allow a county to delay a LUPA appeal indefinitely. We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates. Instead, we apply the following case law to determine whether the June 20 decision at issue here was "final" under LUPA.

[3] ¶ 11 Our Supreme Court expressly defined "final determination" and "final decision" (terms it uses interchangeably) in the LUPA context. It held that Washington courts should apply the term "final decision" uniformly in the context of appellate jurisdiction, including a superior court's appellate jurisdiction over a LUPA case. See Samuel's Furniture, 147 Wash.2d at 452, 54 P.3d 1194. In all appellate contexts, "[a] 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.' " Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology, 162 Wash.2d 825, 858, 175 P.3d 1050 (2008) (first two alterations in original) (quoting Samuel's Furniture, 147 Wash.2d at 452, 54 P.3d 1194). " 'A judgment is considered final on appeal if it concludes the action by resolving the [petitioner's] entitlement to the requested relief.' " *443Samuel's Furniture, 147 Wash.2d at 452, 54 P.3d 1194 (quoting Purse Seine Vessel Owners v. State, 92 Wash.App. 381, 387, 966 P.2d 928 (1998), review denied, 137 Wash.2d 1030, 980 P.2d 1284 (1999)).

¶ 12 Here, there is no question that the June 20, 2007 decision was a final determination *before* Mellish moved for reconsideration. First, the hearing examiner wrote the decision and he was the "local jurisdiction's ... officer with the highest level of authority to ... hear appeals." Former RCW 36.70C.020(1). The County incorrectly characterizes the reconsideration motion as an "appeal." But an "appeal" is "[a] proceeding undertaken to have a decision reconsidered *by a higher authority*." BLACK'S LAW DICTIONARY 112 (9th ed.2009) (emphasis added). In this case, the same hearing examiner who issued the original decision adjudicated the reconsideration motion; he is not a higher authority than himself. Thus, a motion to reconsider is not an appeal to a higher authority and this portion of LUPA's definition of a "land use decision" is satisfied as to the June 20 decision.

¶ 13 Second, the June 20 decision was a final determination. It left " 'nothing open to further dispute and ... set[] at rest [the] cause of action between parties' " because it conclusively resolved every issue in the

petition. Twin Bridge Marine Park, 162 Wash.2d at 858, 175 P.3d 1050 (quoting Samuel's Furniture, 147 Wash.2d at 452, 54 P.3d 1194). There was technically a further dispute over whether the hearings examiner should reconsider the June 20 decision, but the applicant was unaware of it and the June 20 decision “ ‘conclude[d] the action by resolving the [petitioner's] entitlement to the requested relief.’ ” Samuel's Furniture, 147 Wash.2d at 452, 54 P.3d 1194 (quoting Purse Seine Vessel Owners, 92 Wash.App. at 387, 966 P.2d 928). The reconsideration motion concerned whether the June 20 decision should be reconsidered, not whether the petitioner was entitled to relief.

¶ 14 Indeed, legislation and court rules have consistently treated reconsideration motions as motions made after an adjudicator rendered a final decision. The Jefferson County Code, Civil Rules, the Rules of Appellate Procedure, to name but a few, clarify that a party may move to reconsider only a final decision, as defined by those rules. JCC 18.40.310; CR 59; RAP 12.4; *see also* Fed.R.Civ.P. 59(e) (reconsideration available only of final decision). We find only two Washington laws that mandate that a decision becomes non-final when pending reconsideration—one is the Industrial Insurance Act, Title 51 RCW, and the other is an outdated section of the Administrative Procedures Act (APA), former ch. 34.04 RCW, that the legislature revoked in 1988. Former RCW 51.52.050(1) (2004); former RCW 34.04.130(1) (1959) ^{FN4}; LAWS OF 1989, ch. 175; *see also* RCW 34.05.470(3), .542(2) (current APA, ch. 34.05 RCW, requires filing within 30 days after service of the final order, but tolls filing deadline when reconsideration is pending). Both acts explicitly specify that a timely ^{FN5} motion for reconsideration renders the prior decision non-final. LUPA contains no provision that explicitly or implicitly tolls the finality of the hearings examiner's decision. Former RCW 51.52.050(1); ch. 36.70C RCW; former RCW 34.04.130(1).

^{FN4}. That statute provided, in relevant part: “Where the agency's rules provide a procedure for rehearing or reconsideration, and that procedure has been invoked, the agency decision shall not be final until the agency shall have acted thereon.” Former RCW 34.04.130(1).

^{FN5}. It is not clear here whether Mellish's motion for reconsideration was timely under the Jefferson County Code, but the parties have never litigated this issue.

¶ 15 In short, the June 20 decision was final. By uniformly applying LUPA's plain text, as we must,^{FN6} we conclude that Mellish's reconsideration motion did not render the June 20 decision non-final while that motion was pending with the hearings examiner.^{FN7}

FN6. *Samuel's Furniture*, 147 Wash.2d at 452, 54 P.3d 1194.

FN7. We note that the County apparently contemplated this result when it crafted its Code. If the time limits set out in the Jefferson County Code were followed, the hearings examiner would have timely denied or granted reconsideration several days before Mellish was required to file his LUPA petition under the 21-day filing requirement. The hearings examiner was late in issuing his reconsideration decision, but Mellish was nevertheless strictly required to file his land use petition before the statutory deadline.

***444 STATUTORY TOLLING**

[4] ¶ 16 A remaining question implied but not explicitly raised by this case is whether a reconsideration motion tolls the deadline to file a LUPA appeal. We hold that reconsideration does not toll the filing deadline.

¶ 17 Other than LUPA, every Washington law we have examined expressly provides that a reconsideration motion either renders an otherwise final decision non-final or tolls the deadline for filing an appeal. See RCW 34.05.470(3), .542(2)(APA); former RCW 51.52.050 (Industrial Insurance Act); RAP 5.2(e)(2); former RCW 34.04.130(1); see also Fed. R.App. P. 4(a)(4)(A)(iv) (same). LUPA contains no similar provision. Ch. 36.70C RCW.

¶ 18 This omission creates an odd result. “[A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal.” KARL B. TEGLAND, 2A WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.4, at 178 (6th ed.2004). As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it

is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue. RCW 36.70C.060; see RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE §§ 15.1-15.17, at 965-1106 (4th ed.2002).

[5] ¶ 19 “When statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” Stroh Brewery Co. v. Dep’t of Revenue, 104 Wash.App. 235, 239, 15 P.3d 692 (quoting Duke v. Boyd, 133 Wash.2d 80, 87, 942 P.2d 351 (1997)), review denied, 144 Wash.2d 1002, 29 P.3d 718 (2001). See also Waste Mgmt. of Seattle v. Utils. & Transp. Comm’n, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994) (if statute is unambiguous, reviewing court determines legislative intent from the statutory language alone). As noted, RCW 36.70C.040 provides that “[a] land use petition is barred, and the [superior] court may not grant review, unless the petition is timely filed with the court.” RCW 36.70C.040(2). “The petition is timely if it is filed ... within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). Moreover, LUPA “shall be the exclusive means of judicial review of land use decisions,” subject to exceptions not applicable here. RCW 36.70C.030(1). Finally, while LUPA incorporates the superior court civil rules as to procedural matters, it does so only “to the extent that the rules are consistent with [LUPA].” RCW 36.70C.030(2). Here, the plain language of the noted LUPA provisions governs.

¶ 20 Notably, in other contexts, where the legislature has desired to alter the effect of unambiguous statutory provisions, such as by tolling a statute of limitations, the legislature has done so expressly. For example, RCW 4.16.170 provides that “[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.” LUPA contains no similar tolling provision for motions for reconsideration. Accordingly, we are required to apply LUPA’s unambiguous review provisions. Cf. Stone v. Immigration & Naturalization Serv., 514 U.S. 386, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (despite other administrative laws to the contrary, in deportation cases, congress intended strict filing deadline that is not affected by motions to reconsider).

EQUITABLE TOLLING

[6][7][8][9] ¶ 21 We also note that the facts of this case implicate the doctrine of equitable tolling. A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. *State v. Duvall*, 86 Wash.App. 871, 875, 940 P.2d 671 (1997), review denied, 134 Wash.2d 1012, 954 P.2d 276 (1998); *Finkelstein v. Sec. Props., Inc.*, 76 Wash.App. 733, 739, 888 P.2d 161, review denied, 127 Wash.2d 1002, 898 P.2d 307 (1995). “The predicates for equitable *445 tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam.*, 135 Wash.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein*, 76 Wash.App. at 739-40, 888 P.2d 161). The party asserting that equitable tolling should apply bears the burden of proof. *Benyaminov v. City of Bellevue*, 144 Wash.App. 755, 767, 183 P.3d 1127 (2008), review denied, 165 Wash.2d 1020, 203 P.3d 378 (2009).

¶ 22 Mellish did not argue below that the statute of limitations should be equitably tolled. The trial court, however, examined communications that the County made to Mellish regarding when to file his land use petition. The correspondence is inconsistent. In some communications, the County attorney suggested that Mellish was required to await the ruling on reconsideration before he filed his land use petition, while another communication stated that the deadline ran from the June 20 decision.

[10] ¶ 23 These facts do not mandate equitable tolling. Mellish did not demonstrate that he relied on the false explanations of the law and equitable tolling does not apply when a nonparty attorney, who did not represent the petitioner, supplied the false assurance. See *Millay*, 135 Wash.2d at 206, 955 P.2d 791. On the other hand, the County did become the defendant in the superior court appeal and it is possible that Mellish could prove equitable tolling. We have the authority, and perhaps a duty, to remand for a ruling on equitable principles that a case clearly invokes. *Pardee v. Jolly*, 163 Wash.2d 558, 575-76, 182 P.3d 967 (2008). But this case does not clearly invoke the doctrine of equitable tolling. From the record before us, Frog Mountain was never served with notice that Mellish had filed a motion for reconsideration and after the LUPA filing deadline passed and the County issued the permit on July 21, it had every right to proceed with its then-vested right to modify its dog kennel. It is not unfair to disallow equitable tolling in this situation. For these reasons, we do not take the extraordinary step of remanding on equitable grounds that the parties have not raised.

TIMELINESS

¶ 24 Mellish's petition is time barred. LUPA provides an extremely strict command regarding the filing deadline: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court." RCW 36.70C.040(2). Either Mellish complied with the deadline of filing his petition 21 days after the County issued the June 20 decision or his petition is barred. As the County mailed the decision on June 21 and it is deemed "issued" three days later, the 21-day time bar runs from June 24, 2007. RCW 36.70C.040(2), (4)(a). Mellish filed his land use petition on August 10. This was more than 21 days after the hearings examiner issued the final decision that informed Frog Mountain that its application for a permit to modify its kennel was approved. This petition is barred.

¶ 25 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.

ATTORNEY FEES

¶ 26 Respondent County requests attorney fees if it prevails. It has not prevailed and is not entitled to fees.

¶ 27 We reverse and remand to the trial court with directions that it dismiss this LUPA appeal with prejudice.

We concur: VAN DEREN, C.J., and PENYOYAR, J.

Millish v. Frog Mountain Pet Care (December 15, 2009, withdrawn opinion of Division II, Court of Appeals)

Court of Appeals of Washington,
Division 2.

Martin MELLISH, Respondent,

v.

FROG MOUNTAIN PET CARE, Harold and Jane Elyea, Appellants,
Jefferson County, Respondent.

No. 37583-4-II.

Dec. 15, 2009.

Background: Neighboring landowner brought land use action challenging issuance of conditional use permit by county authorizing animal boarding facility to remodel and expand facility. The Clallam Superior Court, Kenneth Day Williams, J., denied county's motion to dismiss, and county appealed.

Holdings: The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) county's decision granting conditional use permit was a final determination;
- (2) in a matter of first impression, landowner's reconsideration motion did not toll 21-day filing deadline to appeal decision to grant permit; and
- (3) landowner was not entitled to equitable tolling of 21-day filing period to appeal grant of land use permit.

Reversed and remanded.

West Headnotes [omitted]

Appeal from Clallam Superior Court; Honorable Kenneth Day Williams, J.

David P. Horton, Law Office of David P. Horton Inc. PS, Silverdale, WA, for Appellants.

Martin Mellish, Port Townsend, WA, pro se.

David W. Alvarez, Jefferson Co Pros Aty, Port Townsend, WA, for Respondent.

PUBLISHED OPINION [LATER WITHDRAWN]

QUINN-BRINTNALL, J.

*1 ¶ 1 This Land Use Petition Act (LUPA), ch. 36.70C RCW, appeal raises novel issues of law-whether a county hearing examiner's decision is a "final determination" under former RCW 36.70C.020(1)(a) (1995) ^{FN1} when a motion for reconsideration is pending with the county and, if not, whether the reconsideration motion tolls the time for appeal. If the decision was final before the county denied reconsideration, as Frog Mountain Pet Care argues, then Martin Mellish's appeal to the superior court was untimely and the court erred when it denied Frog Mountain's motion to dismiss. We reverse because a local government's unique reconsideration motion procedure does not toll the strict LUPA filing deadline. RCW 36.70C.040(2), (3).

FACTS

¶ 2 Frog Mountain applied for a conditional use permit and minor variance in order to remodel and expand its Jefferson County (County) dog and cat boarding facility. Mellish owns property adjacent to the facility. He opposed the application because he thought the proposed expansion was too large and would increase the facility's noise, interfering with his enjoyment of his property.

¶ 3 On June 20, 2007, the deputy hearing examiner filed his decision granting Frog Mountain's request. The next day, the County mailed a notice of the decision to all the interested parties and adjacent property owners. Mellish moved for reconsideration on June 28, but did not notify Frog Mountain of the motion. ^{FN2} The County denied the motion on July 20 and mailed a notice of decision on July 21. It issued Frog Mountain's requested permit on July 21 when it denied the motion.

¶ 4 On August 10, 2007, Mellish filed a land use petition at the Clallam County Superior Court challenging the County's decision. This was 20 days after the County mailed the order denying reconsideration and issued the permit, but 50 days after the County mailed the deputy hearings examiner's June 20 decision granting Frog Mountain's permit.

¶ 5 Frog Mountain moved, under CR 12(b)(6), to dismiss the LUPA action as untimely because Mellish did not file his petition within 21 days of the June 20 decision. Both Mellish and the County, although on opposite sides of the lawsuit, opposed the motion and argued that the LUPA statute of limitations ran from the July 20 order denying reconsideration, not the June 20 decision. The superior court agreed that the motion for reconsideration tolled the 21-day filing requirement and, accordingly, denied the motion to dismiss. The superior court then reversed the County's decision on the merits. Frog Mountain appeals only the denial of its motion to dismiss.

ANALYSIS

Final Determination

[1] ¶ 6 We first determine whether the June 20 decision was a “final decision” and, thus, a “land use decision” that must be appealed within 21 days. Former RCW 36.70C.020(1)(a). The June 20 decision was a final determination, notwithstanding the motion for reconsideration.

*2 ¶ 7 In reviewing an administrative decision, we stand in the same position as the superior court. Habitat Watch v. Skagit County, 155 Wash.2d 397, 405-06, 120 P.3d 56 (2005) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 176, 4 P.3d 123 (2000)). We review conclusions of law de novo. Wenatchee Sportsmen, 141 Wash.2d at 176, 4 P.3d 123.

¶ 8 LUPA requires that a party file a petition for review within 21 days of the date a land use decision is issued.^{FN3} RCW 36.70C.040(2), (3). This 21-day statute of limitations is strict; the doctrine of substantial compliance does not apply to it. RCW 36.70C.040(2); Asche v. Bloomquist, 132 Wash.App. 784, 795-96, 133 P.3d 475 (2006), review denied, 159 Wash.2d 1005, 153 P.3d 195 (2007); Overhulse Neighborhood Ass'n v. Thurston County, 94 Wash.App. 593, 599, 972 P.2d 470 (1999); see also Spice v. Pierce County, 149 Wash.App. 461, 466-67, 204 P.3d 254 (2009). LUPA defines a “land use decision” as “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 particular types of actions, including the action at issue here. Former RCW 36.70C.020(1) (emphasis added).

¶ 9 The County argues that because LUPA is silent on what constitutes a “final determination,” the legislature has implicitly delegated the designation of finality to the discretion of each county and, thus, in this case, we must apply the Jefferson County Code definition of a “final determination.” The Clallam County Superior Court followed this approach. But the County cites no law for the proposition that each county's local definition of finality controls and our legislature and Supreme Court have indicated a contrary rule.

¶ 10 In enacting LUPA, our legislature expressed an intention to “establish [] uniform, expedited appeal procedures ... in order to provide consistent, predictable, and timely judicial review.” RCW 36.70C.010. An appeal procedure that varies based on each local government's definition of “final determination” would not be “uniform.” RCW 36.70C.010. Instead of deferring to local ordinances, our Supreme Court has supplied common law and dictionary definitions to explain what is a “final determination” under LUPA with uniformity across Washington State. *See, e.g., Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn .2d 440, 452, 54 P.3d 1194, 63 P.3d 764 (2002). The County's suggested local approach would essentially give counties power to determine whether a court has jurisdiction over a land use petition. In theory, accepting the County's argument would also allow a county to delay a LUPA appeal indefinitely. We avoid absurd results that contradict both our legislature's intent and our Supreme Court's mandates. Instead, we apply the following case law to determine whether the June 20 decision at issue here was “final” under LUPA.

*3 [2] ¶ 11 Our Supreme Court expressly defined “final determination” and “final decision” (terms it uses interchangeably) in the LUPA context. It held that Washington courts should apply the term “final decision” uniformly in the context of appellate jurisdiction, including a superior court's appellate jurisdiction over a LUPA case. *See Samuel's Furniture*, 147 Wash.2d at 452, 54 P.3d 1194. In all appellate contexts, “[a] ‘final decision’ is ‘[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties.’ “ *Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology*, 162 Wash.2d 825, 858, 175 P.3d 1050 (2008) (first two alterations in original) (quoting *Samuel's Furniture*, 147 Wash.2d at 452, 54 P.3d 1194). “A judgment is considered final on appeal if it concludes the action by resolving the [petitioner's] entitlement to the requested relief.” *Samuel's Furniture*, 147 Wash.2d at 452, 54 P.3d 1194 (quoting *Purse*

Seine Vessel Owners v. State, 92 Wash.App. 381, 387, 966 P.2d 928 (1998), review denied, 137 Wash.2d 1030, 980 P.2d 1284 (1999)).

¶ 12 Here, there is no question that the June 20, 2007 decision was a final determination *before* Mellish moved for reconsideration. First, the hearing examiner wrote the decision and he was the “local jurisdiction’s ... officer with the highest level of authority to ... hear appeals.” Former RCW 36.70C.020(1). The County incorrectly characterizes the reconsideration motion as an “appeal.” But an “appeal” is “[a] proceeding undertaken to have a decision reconsidered by a higher authority.” Black’s Law Dictionary 112 (9th ed.2009) (emphasis added). In this case, the same hearings examiner who issued the original decision adjudicated the reconsideration motion; he is not a higher authority than himself. Thus, a motion to reconsider is not an appeal to a higher authority and this portion of LUPA’s definition of a “land use decision” is satisfied as to the June 20 decision.

¶ 13 Second, the June 20 decision was a final determination. It left “nothing open to further dispute and ... set[] at rest [the] cause of action between parties” because it conclusively resolved every issue in the petition. Twin Bridge Marine Park, 162 Wash.2d at 858, 175 P.3d 1050 (quoting Samuel’s Furniture, 147 Wash.2d at 452, 54 P.3d 1194). There was technically a further dispute over whether the hearings examiner should reconsider the June 20 decision, but the applicant was unaware of it and the June 20 decision “ ‘conclude[d] the action by resolving the [petitioner’s] entitlement to the requested relief.’ ” Samuel’s Furniture, 147 Wash.2d at 452, 54 P.3d 1194 (quoting Purse Seine Vessel Owners, 92 Wash.App. at 387, 966 P.2d 928). The reconsideration motion concerned whether the June 20 decision should be reconsidered, not whether the petitioner was entitled to relief.

¶ 14 Indeed, legislators and courts have consistently treated reconsideration motions as motions made after an adjudicator rendered a final decision. The Jefferson County Code, Civil Rules, the Rules of Appellate Procedure, to name but a few, clarify that a party may move to reconsider only a final decision, as defined by those rules. JCC 18.40.310; CR 59; RAP 12.4; see also Fed.R.Civ.P. 59(e) (reconsideration available only of final decision). We find only two Washington laws that mandate that a decision becomes non-final when pending reconsideration—one is the Industrial Insurance Act, Title 51 RCW, and the other is an outdated section of the Administrative

Procedures Act (APA), former ch. 34.04 RCW, that the legislature revoked in 1988. Former RCW 51.52.050(1) (2004); former RCW 34.04.130(1) (1959) ^{FN4}, Laws of 1989, ch. 175; *see also* RCW 34.05.470(3), .542(2) (current APA, ch. 34.05 RCW, requires filing within 30 days after service of the final order, but tolls filing deadline when reconsideration is pending). Both acts explicitly specify that a timely ^{FN5} motion for reconsideration renders the prior decision non-final. LUPA contains no provision that explicitly or implicitly tolls the finality of the hearings examiner's decision. Former RCW 51.52.050(1); ch. 36.70C RCW; former RCW 34.04.130(1).

*4 ¶ 15 In addition, outside the context of the Industrial Insurance Act and the former version of the APA, courts that have examined the effect of reconsideration on the timeliness of an appeal have consistently treated reconsideration motions as motions that follow final decisions and do not affect the finality of a prior decision. *See, e.g., Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wash.App. 171, 173, 188 P.3d 550 (2008), *review granted*, 165 Wash.2d 1040, 204 P.3d 215 (2009); *Hall v. Seattle Sch. Dist. 1*, 66 Wash.App. 308, 315-16, 831 P.2d 1128 (1992). The context of these laws and rulings is consistent with holding that the June 20 decision was, and remained, final.

¶ 16 In short, the June 20 decision was final. By uniformly applying principles of appealability and LUPA's plain text, as we must, ^{FN6} we conclude that Mellish's reconsideration motion did not render the June 20 decision non-final while that motion was pending with the hearings examiner. ^{FN7}

Statutory Tolling

[3] ¶ 17 A remaining question implied but not explicitly raised by this case is whether a reconsideration motion tolls the deadline to file a LUPA appeal. We hold that reconsideration does not toll the filing deadline.

¶ 18 Other than LUPA, every Washington law we have examined expressly provides that a reconsideration motion either renders an otherwise final decision non-final or tolls the deadline for filing an appeal. *See* RCW 34.05.470(3), .542(2)(APA); former RCW 51.52.050 (Industrial Insurance Act); RAP 5.2(e)(2); former RCW 34.04.130(1); *see also* Fed. R.App. P. 4(a)(4)(A)(iv) (same). LUPA contains no similar provision. Ch. 36.70C RCW.

¶ 19 This omission creates an odd result. “[A] practitioner who is contemplating a challenge to a judgment may be tempted to use the relatively simple and inexpensive motion for reconsideration [as an] alternative to an appeal.” Karl B. Tegland, 2A Washington Practice: Rules Practice, RAP 2.4, at 178 (6th ed.2004). As written now, however, LUPA requires that an aggrieved party file a land use petition within 21 days of the final decision, regardless of whether reconsideration is pending. If the local government grants reconsideration, even in part, such a land use petition would probably become moot. And it is unclear whether a petitioner has exhausted his administrative remedies, a requirement for standing under LUPA, if the local government provides a method for reconsideration that he has declined to pursue. RCW 36.70C.060; see Richard J. Pierce, Jr., 2 Administrative Law Treatise §§ 15.1-15.17, at 965-1106 (4th ed.2002).

[4] ¶ 20 “When statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” Stroh Brewery Co. v. Dep’t of Revenue, 104 Wash.App. 235, 239, 15 P.3d 692 (quoting Duke v. Boyd, 133 Wash.2d 80, 87, 942 P.2d 351 (1997)), review denied, 144 Wn.2d 1002 (2001). See also Waste Mgmt. of Seattle v. Utils. & Transp. Comm’n, 123 Wash.2d 621, 629, 869 P.2d 1034 (1994) (if statute is unambiguous, reviewing court determines legislative intent from the statutory language alone). As noted, RCW 36.70C.040 provides that “[a] land use petition is barred, and the [superior] court may not grant review, unless the petition is timely filed with the court.” RCW 36.70C.040(2). “The petition is timely if it is filed ... within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3). Moreover, LUPA “shall be the exclusive means of judicial review of land use decisions,” subject to exceptions not applicable here. RCW 36.70C.030(1). Finally, while LUPA incorporates the superior court civil rules as to procedural matters, it does so only “to the extent that the rules are consistent with [LUPA].” RCW 36.70C.030(2). Here, the plain language of the noted LUPA provisions governs.

*5 ¶ 21 Notably, in other contexts, where the legislature has desired to alter the effect of unambiguous statutory provisions, such as by tolling a statute of limitations, the legislature has done so expressly. For example, RCW 4.16.170 provides that “[f]or the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first.” LUPA contains no similar

tolling provision for motions for reconsideration. Accordingly, we are required to apply LUPA's unambiguous review provisions. *Cf. Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (despite other administrative laws to the contrary, in deportation cases, congress intended strict filing deadline that is not affected by motions to reconsider).

Equitable Tolling

[5][6][7] ¶ 22 We also note that the facts of this case implicate the doctrine of equitable tolling. A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. *State v. Duvall*, 86 Wash.App. 871, 875, 940 P.2d 671 (1997), *review denied*, 134 Wash.2d 1012, 954 P.2d 276 (1998); *Finkelstein v. Sec. Props., Inc.*, 76 Wash.App. 733, 739, 888 P.2d 161, *review denied*, 127 Wash.2d 1002, 898 P.2d 307 (1995). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wash.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein*, 76 Wash.App. at 739-40, 888 P.2d 161). The party asserting that equitable tolling should apply bears the burden of proof. *Benyaminov v. City of Bellevue*, 144 Wash.App. 755, 767, 183 P.3d 1127 (2008), *review denied*, 165 Wash.2d 1020, 203 P.3d 378 (2009).

¶ 23 Mellish did not argue below that the statute of limitations should be equitably tolled. The trial court, however, examined communications that the County made to Mellish regarding when to file his land use petition. The correspondence is inconsistent. In some communications, the County attorney suggested that Mellish was required to await the ruling on reconsideration before he filed his land use petition, while another communication stated that the deadline ran from the June 20 decision.

¶ 24 These facts do not mandate equitable tolling. Mellish did not demonstrate that he relied on the false explanations of the law and equitable tolling does not apply when a nonparty attorney, who did not represent the petitioner, supplied the false assurance. *See Millay*, 135 Wash.2d at 206, 955 P.2d 791. On the other hand, the County did become the defendant in the superior court appeal and it is possible that Mellish could prove equitable tolling. We have the authority, and perhaps a duty, to remand for a ruling on equitable principles that a case clearly invokes. *Pardee v. Jolly*, 163 Wash.2d 558, 575-76, 182 P.3d 967 (2008). But this case does not

clearly invoke the doctrine of equitable tolling. From the record before us, Frog Mountain was never served with notice that Mellish had filed a motion for reconsideration and after the LUPA filing deadline passed and the County issued the permit on July 21, it had every right to proceed with its then-vested right to modify its dog kennel. It is not unfair to disallow equitable tolling in this situation. For these reasons, we do not take the extraordinary step of remanding on equitable grounds that the parties have not raised.

Timeliness

*6 ¶ 25 Mellish's petition is time barred. LUPA provides an extremely strict command regarding the filing deadline: "A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court." RCW 36.70C.040(2). Either Mellish complied with the deadline of filing his petition 21 days after the County issued the June 20 decision or his petition is barred. As the County mailed the decision on June 21 and it is deemed "issued" three days later, the 21-day time bar runs from June 24, 2007. RCW 36.70C.040(2), (4)(a). Mellish filed his land use petition on August 10. This was more than 21 days after the hearings examiner issued the final decision that informed Frog Mountain that its application for a permit to modify its kennel was approved. This petition is barred.

¶ 26 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.

Attorney Fees

¶ 27 Respondent County requests attorney fees if it prevails. It has not prevailed and is not entitled to fees.

¶ 28 We reverse and remand to the trial court with directions that it dismiss this LUPA appeal with prejudice.

We concur: VAN DEREN, C.J., and PENYOYAR, J.

FN1. The Washington State Legislature amended RCW 36.70C.020 in 2009, recodifying the definition of “[l]and use decision” to RCW 36.70C.020(2). The legislature made no substantive changes to the definition. *Compare RCW 36.70C.020(2) with former RCW 36.70C .020(1)(a).*

FN2. The Jefferson County Code apparently does not require a party who moves for reconsideration or the County to notify the adverse party of the motion until the hearing examiner enters the decision. *See JCC 18.40.310, .330.* But due process requires notice reasonably calculated to apprise parties of the nature and character of proceedings which will affect them. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wash.2d 720, 727, 696 P.2d 1222 (1985); *Duffv v. Dep't of Soc. & Health Servs.*, 90 Wash.2d 673, 678-79, 585 P.2d 470 (1978). We are concerned that the Code may invite due process violations, but Frog Mountain did not appeal on this ground.

FN3. As relevant here, a land use decision is “issued” three days after the local jurisdiction mails a written decision. RCW 36.70C.040(4)(a). In this appeal, there is no dispute that Mellish filed the land use petition within 21 days of the denial of reconsideration but more than 21 days from the original hearing examiner's decision.

FN4. That statute provided, in relevant part: “Where the agency's rules provide a procedure for rehearing or reconsideration, and that procedure has been invoked, the agency decision shall not be final until the agency shall have acted thereon.” Former RCW 34.04.130(1).

FN5. It is not clear here whether Mellish's motion for reconsideration was timely under the Jefferson County Code, but the parties have never litigated this issue.

FN6. *Samuel's Furniture*, 147 Wash.2d at 452, 54 P.3d 1194.

FN7. We note that the County apparently contemplated this result when it crafted its Code. If the time limits set out in the Jefferson County Code were followed, the hearings examiner would have timely denied or granted reconsideration several days before Mellish was required to file his LUPA petition under the 21-day filing requirement. The hearings examiner was late in issuing his reconsideration decision, but Mellish was nevertheless strictly required to file his land use petition before the statutory deadline.

**Memorandum Opinion, September 24, 2007, Judge Williams, Clallam
County Superior Court**

FILED
SEP 24 2007

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

NO. 07-2-00791-4

MARTIN MELLISH, Petitioner, vs. FROG MOUNTAIN
PET CARE, HAROLD and JANE ELYEA and
JEFFERSON COUNTY, Respondent.

MEMORANDUM OPINION ON
MOTION TO DISMISS

CLERK

BY RONALD R. CARPENIER

2010 APR 22 AM 7:59

RECEIVED
SUPERIOR COURT
STATE OF WASHINGTON

FACTS:

On June 20, 2007, Jefferson County issued a Conditional Use Permit to Frog Mountain Pet Care. The Plaintiff, Mr. Mellish, filed a Motion for Reconsideration of that decision within five days pursuant to Jefferson County ordinances. The reconsideration ultimately was denied by Jefferson County on July 18, 2007. This action was filed on August 10, 2007.

Defendant Frog Mountain Pet Care requests the Court dismiss the action on the basis that it is not timely filed pursuant to the provisions of the Land Use Petition Act (LUPA). The Plaintiff alleges that the filing was timely. Defendant Jefferson County concurs with the Plaintiffs position.

ANALYSIS:

The Land Use Petition Act is codified at RCW 36.70C and was enacted in 1995. The stated purpose of the Act is:

"To reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010.

In Subsection 40 of the Act it is stated that:

"A Land Use Petition is barred, and the Court may not grant review, unless the petition is timely filed with the Court . . . the petition is timely filed if it is filed ... within 21 days of the issuance of the land use decision."

The statute describes a "land use decision" at RCW 36.709C.020(1) and indicates that a 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 ... [applications] [enforcement of land use ordinances]"

Defendant Frog Mountain argues that the decision was final on June 20, 2007, notwithstanding the fact that a reconsideration can be applied for under the provisions of the Jefferson County land use ordinances. An attachment to the Jefferson County response indicates that notice of the decision was put in the mail on the 21st of July, 2007.

Defendants [sic] argue that until the reconsideration was denied, the permit which was issued was not a "final" permit, the appeal period therefore did not begin to run until July 18th, and the appeal is therefore timely filed under the LUPA statute.

The Jefferson County ordinances, in pertinent part, are as follows:

In code provision 18.40.310, titled "Reconsideration" it states:

"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 hearing examiner shall consider the request without public comment or argument by the party filing the

request and shall issue a decision within ten 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." (emphasis added)

Under code Section 18.40.320(8) entitled "effective date" the Jefferson County code states:

"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."

JCC 18.40.340 is entitled "Judicial Appeals" and in Subsection 1 states:

"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."

444 Exhibits attached to Mr. Mellish's response indicate that the County Planners Office emailed him specifically indicating that the time to appeal to Superior Court would not run until 21 days after the decision on the Motion for Reconsideration. At oral argument and in its responsive brief Jefferson County concurs with that interpretation of its ordinance. The County notes that RCW 36.70B allows a local government to establish a hearing and subsequent appeal process before a permit would become susceptible to an appeal to the Superior Court. Jefferson County argues that their ordinance allowing for a Motion for Reconsideration is therefore specifically authorized and lawful and creates a situation where it is the

decision on the Motion to Reconsideration that is the "final" land use decision beginning the LUPA timeliness clock.

All parties acknowledge that the language in the Jefferson County ordinance is not drafted with the clarity that might otherwise have been expected. The permit which was issued on June 20, 2007, states in the last paragraph under a heading "appeals":

"Pursuant to RCW 36.70(c), 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."

That language on the face of the permit is of course inconsistent with the County's position that, the "final" decision only occurs following a decision on a Motion to Reconsider should such a reconsideration be filed. The planning staff letters to Mr. Mellish are inconsistent with the language on the permit.

555 In some respects, this issue may well be viewed equitably from two various positions. The applicant would like a decision and pursuant to LUPA is entitled to have a decision which is resolved in a timely manner, including notice as to whether or not there will be further appeals from the decision made.

On the other hand, Mr. Mellish, an allegedly aggrieved party, is required by the Jefferson County ordinance to exhaust administrative remedies, and was specifically told that he should wait for the reconsideration decision to be issued before appealing to a court. One of the problems with the facts in this particular case is that Jefferson County did not meet the terms of its own ordinance and issue an opinion within ten days. Had they done so, arguably, Mr. Mellish would still have had time to

file an appeal after the Notice of Reconsideration and prior to the expiration of LUPAs (21) statutory limits.

Mr. Mellish points to the case of State v. Grays Harbor County, 122 Wn. 2d 244, 17 (1993) a case involving an appeal under the State Environmental Protection Act, for a logical analysis of the exhaustion requirement contained in SEPA. There the Court noted that under an exhaustion requirement in Grays Harbor County there were two ordinances; SEPA which required administrative exhaustion prior to initiating a court review, and another local ordinance in which the time lines would have required filing prior to the administrative exhaustion requirement. The Court noted that forcing compliance with both ordinances would be:

"... cumbersome and forces a litigant to draft pleadings to challenge a non-final administrative decision. If the administrative appeal decision changed anything in the previous administrative decision, the pleadings would have to be amended to reflect the later decision. In cases where the party seeking review of the SEPA issued prevailed in the administrative appeal, the Court action may have been totally unnecessary. We conclude that for the County to force a party to seek judicial review of a non-final administrative decision would be unfair and wasteful of judicial resources." See State v. Grays Harbor County at pages 255 - 256.

Jefferson County interprets its ordinance so that it would meet this particular objection. Under rules of construction courts are required to give some deference to the interpretation of an otherwise ambiguous ordinance by that particular entity's highest level decision maker. Here it would appear that the County Planner has interpreted the ordinance consistent with the view of Mr. Mellish, and so has the County attorney.

On the other hand, courts are required to give statutes their plain and ordinary meaning where there is no ambiguity. Defendant Frog Mountain alleges there is not ambiguity and that in fact a final decision was rendered

by the County on June 20, 2007, and that a request for reconsideration did not change that fact.

In Chelan County v. Nykreim, 146 Wn. 2d 904, 52 P. 3d 1 (2002), Chelan County filed an action seeking to revoke its prior approval of a boundary line adjustment which it had determined was issued erroneously and in contravention of its own ordinances. The Court in Nykreim ruled that the County had only 21 days from the issuance of the boundary line approval (BLA) to file a Petition for Review under LUP A. The County had not filed for such a petition for a number of months. The County had argued that the BLA was void as having been issued in violation of County ordinances. The Court held that nevertheless, LUPA made the BLA final and binding even if illegal. The Court held:

"If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with IUGA is no longer reviewable." Nykreim, *supra*, at page 925.

The Court noted that it was "obliged to give the plain language of the statutes its full effect, even when its results may seem unduly harsh."

Nykreim discussed several other cases in which the issue had been raised as to whether or not due process issues such as notice of the decision and the like would trump the clear language of the LUPA statute. Nykreim can be read as answering that question in the negative. It is not clear to this Court that the specific issue was fully argued. It is not an issue here.

LUPA is clear that an appeal must be filed within 21 days of a local jurisdiction's final decision on a land use request. The issue here is simply when did the decision become final. Did it become final when the Conditional Use Permit was issued, or as Jefferson County says did it "become final" only when the request for reconsideration was denied?

Here, LUPA is clear. It is the Jefferson County code that is not. The issue therefore becomes the interpretation of an ordinance. In Tahoma Audubon Society v. Park Junction, 128 Wn. App. 671, 116 P. 3d 1046 (2005), Division II reviewed a Superior Court decision made pursuant to LUPA. The Court noted the following general rules of construction. First reviewing courts are to interpret ordinances using statutory construction principles. Such statutes are interpreted de novo as a question of law. Courts have ultimate authority to determine a statute's meaning and purpose. When interpreting a statute a court must discern and implement the legislative body's intent. The Court is to give effect to a statute's plain meaning. A court derives plain meaning not only from the statute at hand, but also from related statutes disclosing legislative intent about the provision in question. Statutes are to be construed to avoid strained or absurd results. A term in a statute is ambiguous if it is amenable to different, yet reasonable interpretations. A statute is not ambiguous simply because different interpretations are conceivable. As indicated, when an agency is charged with the administration and interpretation of a statute the interpretation of an ambiguous statute by that agency is accorded great weight in determining the legislative intent. Absent an ambiguity, however, a court need not defer to an agency's expertise.

Here, upon reading all the provisions of the Jefferson County code which are applicable, the Court finds that the most reasonable interpretation of the somewhat contradictory provisions in the Jefferson County code mean that if a Motion for Reconsideration of a Conditional Use Permit is filed within the five day period, the permit is necessarily held in abeyance until a decision on the reconsideration is made by the appropriate county official. Then, as the Jefferson County code provision, states, the decision

"shall become final". It is this "second" finality when a reconsideration is filed that it is the triggering event for the clock to run on a LUPA appeal.

Therefore, the Court finds that this matter was timely appealed for judicial review. The parties should proceed to appropriately perfect the record and note the matter for hearing pursuant to the LUPA statute.

DATED this 24th day of September, 2007.

Respectfully submitted,

s/ Ken Williams
KEN WILLIAMS
JUDGE

Chapter 59 (H.B. No. 2740), Laws of 2010 – An Act Relating to the definition of land use decision in the land use petition act; and amending RCW 36.70C.020

WASHINGTON 2010 LEGISLATIVE SERVICE
61st Legislature, 2010 Regular Session

Additions are indicated by Text; deletions by
~~Text~~.

CHAPTER 59
H.B. No. 2740
COUNTIES--LAND USE DECISIONS

AN ACT Relating to the definition of land use decision in the land use petition act; and amending RCW 36.70C.020.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. RCW 36.70C.020 and 2009 c 419 s 1 are each amended to read as follows:

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 of 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.

(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.

Approved March 15, 2010. Effective June 10, 2010. WA LEGIS 59 (2010)

House Bill Report (H.B. 2740) As Passed Legislature

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE BILL REPORT

HB 2740

As Passed Legislature

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

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

Sponsors: Representatives Seaquist and Angel.

Brief History:

Committee Activity:

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

Floor Activity:

Passed House: 1/28/10, 97-0.

Passed Senate: 3/3/10, 47-0.

Passed Legislature.

Brief Summary of Bill

* Amends the Land Use Petition Act to clarify when the 21-day time limit for the filing of judicial appeals to local land use decisions begins.

HOUSE COMMITTEE ON LOCAL GOVERNMENT & HOUSING

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

Staff: Thamas Osborn (786-7129).

Background:

The Land Use Petition Act.

The Land Use Petition Act (LUPA) was enacted in 1995 to provide uniform, expedited judicial review of land use decisions made by counties, cities, and unincorporated towns. Land use decisions subject to judicial review under the LUPA are limited to:

- * applications for project permits or approvals that are required before real property can be improved, developed, modified, sold, transferred, or used;
- * interpretations regarding the application of specific requirements to specific property; and
- * enforcement by local jurisdictions of ordinances relating to particular real property.

Land use decisions that do not fall under the LUPA are approvals to use, vacate, or transfer streets, parks and other similar types of public property, approvals for area-wide rezones and annexations, and applications for business licenses. In addition, the LUPA does not apply to land use decisions that are subject to review by legislatively-created quasi-judicial bodies, such as the Shorelines Hearings Board, the Environmental and Land Use Hearings Board, and the Growth Management Hearings Board.

A person seeking review of a land use decision must file a petition in superior court and serve all parties within 21 days of the issuance of the land use decision. The parties must follow certain procedures within specified timeframes that are meant to expedite the judicial process.

"Land use decision" is defined to mean a final determination by a local jurisdiction's governing body or officer with the highest level of authority to make the decision, including those with the authority to hear appeals at the local, non-judicial level.

Generally, the court sets a hearing within a few months of the filing of the petition. The court may affirm or reverse the land use decision or remand it for modification or further proceedings.

Judicial relief may be granted based on any one of the following grounds:

- * the decision maker followed an unlawful procedure or failed to follow a required procedure;
- * the land use decision is erroneous in its interpretation or application of the law;
- * the land use decision is not supported by evidence;
- * the land use decision is outside the authority or jurisdiction of the decision maker; or
- * the land use decision violates the petitioner's constitutional rights.

Recent Court Cases Pertinent to LUPA Appeals.

In recent years there have been conflicting decisions by the courts of appeal in this state regarding when time limits for the filing of judicial appeals begins to run in cases involving motions for the reconsideration of local administrative decisions.

In *Skinner v. Civil Service Commission of the City of Medina (Skinner)*, Division I of the Washington State Court of Appeals ruled that where the law allows a local, non-judicial motion for reconsideration of an administrative decision, the time limit for the filing of a judicial appeal runs from the date of the final order on the motion for reconsideration rather than from the date of the original administrative decision. *Skinner*, 146 Wn. App. 171, 188 P 3d (2008). This ruling has been appealed to the Washington State Supreme Court, which has agreed to review the case.

Contrary to the ruling in *Skinner*, in 2009 Division II of the Washington State Court of Appeals ruled that under LUPA the 21-day limit for filing a judicial appeal begins to run on the date the order is entered on the original, administrative land use decision, regardless of whether a party has filed a local, non-judicial motion for reconsideration. *Mellish v. Frog Mountain Pet Care*, --- P. 3d ---, 2009 WL 4814955 (2009).

Summary of Bill:

The act clarifies that, under the LUPA, when a motion for reconsideration of a local land use decision has been filed with the local decision-making

authority, the date of the "land use decision" is the date of the entry of the decision on the reconsideration motion rather than the date of the original decision.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

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

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

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

(In support with concerns) Arthur West.

Persons Signed In To Testify But Not Testifying: None.

REVISED CODE OF WASHINGTON – RELATED PROVISIONS

RCW 35.63.130. Hearing examiner system--Adoption authorized-- Alternative--Functions--Procedures

(1) As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and report on any proposal to amend a zoning ordinance, the legislative body of a city or county may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and decide applications for amending the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner, including but not limited to:

(a) Applications for conditional uses, variances, subdivisions, shoreline permits, or any other class of applications for or pertaining to development of land or land use;

(b) Appeals of administrative decisions or determinations; and

(c) Appeals of administrative decisions or determinations pursuant to chapter 43.21C RCW.

The legislative body shall prescribe procedures to be followed by the hearing examiner.

(2) Each city or county legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

(a) The decision may be given the effect of a recommendation to the legislative body;

(b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or

(c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative body.

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in

which the decision would carry out and conform to the city's or county's comprehensive plan and the city's or county's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

[1995 c 347 § 423; 1994 c 257 § 8; 1977 ex.s. c 213 § 1.]

RCW 36.70.970. Hearing examiner system--Adoption authorized--Alternative--Functions--Procedures

(1) As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and issue recommendations on applications for plat approval and applications for amendments to the zoning ordinance, the county legislative authority may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and issue decisions on proposals for plat approval and for amendments to the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative authority may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner, including but not limited to:

(a) Applications for conditional uses, variances, shoreline permits, or any other class of applications for or pertaining to development of land or land use;

(b) Appeals of administrative decisions or determinations; and

(c) Appeals of administrative decisions or determinations pursuant to chapter 43.21C RCW.

The legislative authority shall prescribe procedures to be followed by a hearing examiner.

Any county which vests in a hearing examiner the authority to hear and decide conditional uses and variances shall not be required to have a zoning adjuster or board of adjustment.

(2) Each county legislative authority electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect

of the decisions made by the examiner. Such legal effect may vary for the different classes of applications decided by the examiner but shall include one of the following:

(a) The decision may be given the effect of a recommendation to the legislative authority;

(b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative authority; or

(c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative authority.

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the county's comprehensive plan and the county's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

[1995 c 347 § 425; 1994 c 257 § 9; 1977 ex.s. c 213 § 3.]

RCW 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.

[1995 c 347 § 707.]

Jefferson County Code Provisions Creating the Office of the Jefferson County Hearing Examiner and Assigning Its Authority

18.05.080 Hearing examiner.

(1) Office Created.

(a) Pursuant to RCW 35.63.130 and 36.70.970, the separate office of the Jefferson County hearing examiner (hearing examiner) is created and established.

(b) The hearing examiner shall exercise the authority designated in Chapter 18.40 JCC for the land use matters set forth in this section.

(c) Hearings held by the hearing examiner shall constitute the hearings required by state law for such land use matters.

(d) Unless the context requires otherwise, the term "hearing examiner" used in this code shall include hearing examiners pro tempore.

(2) Appointment – Qualifications – Terms.

(a) The Jefferson County board of commissioners shall appoint the hearing examiner solely with regard to qualifications for the duties of such office and the persons so appointed shall have such training or experience as will qualify them to conduct administrative or quasi-judicial hearings on land use regulatory matters.

(b) The terms of appointment for the hearing examiner shall be pursuant to their respective contracts executed with the board of commissioners.

(c) The office of the hearing examiner shall be under the administrative supervision of the hearing examiner. The office shall be separate and distinct from any other county officer or department.

(d) The hearing examiner shall hold no other appointive or elective public office or position in county government except as provided in JCC 18.05.030 through 18.05.080.

(3) Appointment of Hearing Examiners Pro Tempore. The board of commissioners may appoint one or more hearing examiners pro tempore to act in the absence of the regular hearing examiner. Such appointment shall be from qualified applicants to be recommended by the hearing examiner as applicable. Hearing examiners pro tempore, when acting in such capacity, shall have all powers and duties of the hearing examiner as prescribed in this code or elsewhere.

(4) Hearing Examiner – Conflict of Interest and Freedom from Improper Influence.

(a) The hearing examiner shall not conduct or participate in any hearing or decision in which the hearing examiner has a direct or substantial financial interest.

(b) No member of the board of commissioners, county official or any other person shall attempt to influence or in any way interfere with the examiner in the performance of their designated duties.

(5) Hearing Examiner – Powers.

(a) Hearing Examiner. As more specifically set forth in Chapter 18.40 JCC, the hearing examiner shall have the authority to conduct open record predecision and open record appeal hearings and prepare a record thereof, and enter written findings and conclusions, and decisions for the following land use matters:

(i) Applications for reasonable economic use variances;

(ii) Applications for planned rural residential developments (PRRDs) ;

(iii) Applications for shoreline substantial development permits, and conditional and variance permits under the Jefferson County Shoreline Master Program;

(iv) Applications for plat alterations and vacations;

(v) Applications for long subdivisions;

(vi) Applications for conditional use permit;

(vii) Applications for variances;

(viii) Application for wireless telecommunications facilities;

(ix) Appeals of administrative decisions releasing six-year Forest Practices Act (FPA) moratoria;

(x) Appeals of administrative decisions regarding cottage industries;

(xi) Appeals of administrative short subdivision decisions;

(xii) Appeals of administrative binding site plan decisions;

(xiii) Appeals of administrative conditional use permit decisions;

(xiv) Appeals of administrative variance decisions;

(xv) Appeals of administrative decisions regarding substantial development permits under the Jefferson County Shoreline Master Program;

(xvi) Appeals of administrative decisions regarding permits for wireless telecommunications facilities;

(xvii) Appeals of formal Unified Development Code interpretations made by the administrator;

(xviii) Appeals of SEPA threshold determinations made by the responsible official; and

(xix) Any other matter designated by this code or other county ordinance.

(b) Criteria for Review. Conditions of Approval. As more specifically set forth in Chapter 18.40 JCC, the decisions of the hearing examiner shall be based upon the policies of the Jefferson County Comprehensive Plan, the Shorelines Management Act, the State Environmental Policy Act, the standards set forth in this code and any other applicable land use plans or ordinances adopted by the board of commissioners. The hearing examiner is empowered to attach reasonable conditions found necessary to make a project compatible with its environment and to carry out the goals and policies of the Comprehensive Plan, the Shoreline Master Program, or other applicable plan or program adopted by the board of commissioners. Such conditions may include but are not limited to the following:

(i) Exact location and nature of development, including additional building and parking area setbacks, screenings in the form of landscaped berms, landscaping, or fencing;

(ii) Impact of the development upon other lands;

(iii) Hours of use of operation or type and intensity of activities;

(iv) Sequence and scheduling of development;

(v) Maintenance of the development;

(vi) Duration of use and subsequent removal of structures;

(vii) Granting of easements for utilities or other purposes and dedication of land or other provisions for public facilities, the need for which the hearing examiner finds would be generated in whole or in significant part by the proposed development;

(viii) Mitigation of any adverse environmental impacts;

(ix) Provisions that would bring the proposal into compliance with a policy(ies) of the Comprehensive Plan; and

(x) Mitigating conditions authorized by any other provision of this code or other provision of local, state or federal law.

(c) Procedural Rules. The hearing examiner shall have the power to prescribe rules and regulations concerning procedures for hearings authorized herein, subject to confirmation by the board of commissioners, to issue summons for and compel the appearance of witnesses, to administer oaths and to preserve order. The privilege of cross-examination of witnesses in open record hearings shall be accorded all interested parties or their counsel in accordance with rules of the hearing examiner.

(6) Standards of Review – Hearing Examiner.

(a) Matters in which the hearing examiner is empowered to make a final decision on a project permit application (i.e., following an open record predecision hearing) or on an appeal of a formal Unified Development Code interpretation made by the administrator (i.e., following an open record appeal hearing) shall be subject to a de novo standard of review.

(b) Matters in which the hearing examiner is empowered to make a final decision on an appeal of a decision of the administrator on a project permit application or on an appeal of a decision of the SEPA responsible official (i.e., following an open record appeal hearing) shall be subject to a clearly erroneous standard of review. [Ord. 8-06 § 1]

18.05.085 Hearing examiner rules of procedure.

(1) Conflicts Among Authorities. These rules may conflict with other sources or authorities of law. The order of precedence applicable to such conflict situations shall be (from top to bottom) as follows:

- (a) State or federal constitution;
- (b) State or federal statutes;
- (c) State or federal regulations;
- (d) State or federal published case law;
- (e) UDC or other applicable duly enacted Jefferson County ordinance;
- (f) These rules.

Thus, for example, to the extent these rules conflict with the UDC, then the applicable UDC provision shall apply.

(2) Definitions. The following definitions apply for the purposes of this section:

(a) Aggrieved Person. A person or entity is deemed to be an "aggrieved person" only when all of the following conditions are present:

(i) The decision being challenged has prejudiced or is likely to prejudice that person or entity;

(ii) The person or entity's asserted interests are among those that the county was required to consider when it made the decision; and

(iii) A judgment or decision in favor of that person or entity would substantially eliminate or redress the prejudice to that person or entity caused or likely to be caused by the challenged decision.

(b) "BOCC" means the board of county commissioners for Jefferson County, the county legislature for the municipal corporation known as Jefferson County or any subsequently created or approved legislative body for Jefferson County.

(c) "Comprehensive Plan" means the 1998 Jefferson County Comprehensive Plan and Land Use Map as now adopted and as may be amended in the future.

(d) "Ex parte communication" means any written or oral communication between an aggrieved person or a government agency and a hearing examiner that was made outside of public hearing and was not included in the public record.

(e) "Hearing examiner" means the hearing examiner.

(f) "Hearing" means an open record predecision hearing before a hearing examiner. By way of example only, the term "hearing" includes appeals based upon the UDC, the State Environmental Policy Act (or "SEPA") and road vacation requests directed to and handled by the county's department of public works.

(g) "Interested citizen" means any person or entity that has:

(i) Asked for a copy of a written hearing examiner decision by either requesting (in writing) such documents from the Jefferson County department of community development or has signed a register provided for such purpose at an open record predecision hearing; or

(ii) Made comments (written, oral or otherwise) during an open record predecision hearing.

(h) "Party" means an aggrieved person (as defined above) who has filed the fee required by Jefferson County ordinance to initiate or generate the hearing process. The applicant and the Jefferson County agency that provided one or more reports to the hearing examiner shall be considered parties to the hearing. Those persons or entities meeting the definition of "interested citizen" above shall not be considered to be a "party" for the purposes of this section unless they also meet the definition of "aggrieved person" listed above. For the purposes of hearings relating to road vacations, the petitioner requesting the road vacation shall be considered a "party" as that term is defined in this section.

(i) Timely Submissions. Written submissions to the hearing examiner shall be considered timely if the submission is sent to the hearing examiner (via paper or electronically) seven days before the date of the hearing. A submission is deemed to be sent when it is either sent electronically or possession of the submission in paper form is transferred to the United States Postal Service or any private document carrier.

(j) "UDC" means the Unified Development Code, a set of development regulations derived from the Growth Management Act, the county's Comprehensive Plan that were made effective as of January 16, 2001, as they are now adopted and as they may be amended, replaced or revised in the future.

(3) Standing. Only an "aggrieved person," as that term is defined in this section, shall have the authority (legally known as "standing") to come before the hearing examiner and seek a remedy or resolution from the hearing examiner. A determination by the hearing examiner that a person or entity holds or lacks standing can be appealed pursuant to law.

(4) Powers of the Hearing Examiner. The hearing examiner shall have the following powers:

(a) To make all rulings, determinations or decisions he or she is permitted to make pursuant to the laws and regulations of this country and this state and the ordinances of Jefferson County and to enter, if necessary, any written or oral order that accomplishes or implements any act the hearing examiner is authorized to do. The authority granted by this section includes, but is not limited to, the authority to approve, deny or remand an application, proposal or decision before him or her or, in the alternative, combine one or more of the three alternatives listed, e.g., approve in part, remand in part.

(b) To enter, if necessary, a written or oral order, finding and ruling that a particular person or entity is not an "aggrieved party" as that term is

defined in this section and thus does not have standing (in the legal sense) to seek a resolution or remedy from the hearing examiner.

(c) To hold the power, while conducting any hearing, to administer oaths, preserve order, limit or not accept repetitious testimony, and to issue summons for and compel the appearance of witnesses and production of documents and/or materials.

(d) To have sole discretion to rule on all procedural disputes that arise during a hearing, subject to subsequent appeal if a party decides that decision of the hearing examiner was incorrect factually or legally.

(e) To inspect the site which is the subject of a matter before him or her prior to or subsequent to the hearing if he or she deems it necessary to obtain a full understanding of the case. The failure of the hearing examiner to view a site shall not nullify or injure the decision ultimately rendered by that hearing examiner.

(f) To review and consider in making his or her decision all "timely submissions," as that term is defined in this section. He or she shall have full discretion as to whether they will consider submissions that are not timely.

(g) To continue proceedings for any good cause he or she deems reasonable and appropriate provided they enter a written or oral order doing so before making their final decision or recommendation.

(h) To continue, upon an oral statement of good cause being shown, the current hearing to a specific time, place and date without further notice of that new date, time and place if he or she specifies on the record the time, date and place for the continuation of the hearing.

(i) To reopen a hearing after a written decision is rendered but before the applicable appeal period expires if he or she becomes aware that the decision rendered:

(i) Was based on fraudulent evidence, misrepresentation or other misconduct by a "party" (as that term is defined in this section) ; or

(ii) Was based upon mistake, misconception of facts, or erroneous application of the law.

(j) To set a date for the reopened hearing, but said date must be sufficiently in the future to provide not less than 10 days' written notice of the time, date and place for the reopened hearing in the official newspaper for Jefferson County and 10 days' written notice of the time, date and place

for the reopened hearing to all "parties" and "interested citizens" as those terms are defined within this section.

(k) To set a time and date when the public comment period for a particular matter before the hearing examiner closes or ceases.

(l) To dismiss the application or appeal for default if the applicant or appealing party (or their designated representative) fails to appear at the regularly scheduled hearing or the reopened hearing, subject to the applicant or appealing party (or their designated representative) filing a request within seven business days to vacate the default for good cause shown.

(m) To impose upon an applicant or appellant (or their designated representative) who is subject to a default but subsequently has that default vacated, the costs associated with providing written notice for the rescheduled hearing date and any costs associated with the initial hearing date that the applicant or appealing party missed or did not appear at.

(5) Disqualification or Recusal of Hearing Examiner. Any person acting as a hearing examiner for Jefferson County is subject to disqualification for bias, prejudice, conflict of interest or any other cause for which a judge can be disqualified under the Code of Judicial Conduct.

Any "party" or "interested citizen" (as those terms are defined in this section) may request the hearing examiner to disqualify himself or herself as soon as reasonably possible upon discovering potential grounds for disqualification. The hearing examiner shall determine whether to grant the request, stating facts and reasons for their decision. If the hearing examiner is requested to recuse himself or herself but does not, the making of the request by a "party" or "interested citizen" shall not be considered by the hearing examiner when they make their substantive decision.

If the hearing examiner believes that his or her relationship to the "parties" (as that term is defined in this section) or his or her financial interest in the subject of the hearing creates the appearance that the proceedings will not be fair, then the examiner must either (a) voluntarily step down from the case; or (b) disclose the relationship or interest on the record and state that he or she has a bona fide conviction that the interest or relationship will not interfere with the rendering of an impartial decision.

A hearing examiner's voluntary decision to recuse himself or herself shall be made as soon as the need for recusal becomes apparent or known to the hearing examiner.

Recusal or disqualification of a hearing examiner shall not be necessary or mandated simply because the hearing examiner has considered

the same or similar proposal in another hearing, has made a ruling adverse to the interest of a "party" (as that term is defined in this section) in the present or another hearing, or has considered and ruled upon the same or similar issue in the same or similar context.

(6) Evidence.

(a) Admissibility. The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any relevant evidence shall be admitted if it is the type which would tend to prove or disprove a material or relevant fact or assertion and would be commonly accepted by reasonably prudent persons in the conduct of their affairs. The rules of privilege shall be effective to the extent recognized by law. Relevant material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and repetitious evidence may be excluded at the sole discretion of the hearing examiner, who shall, during the hearing, have full discretion to make evidentiary rulings.

(b) Copies. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(c) Official Notice. The hearing examiner may take official notice of judicially cognizable facts and in addition may take notice of general, technical or scientific facts within his or her specialized knowledge. When a recommendation or decision of the hearing examiner rests, in whole or in part, upon the taking of official notice of a material fact not appearing in the evidence of the record, opportunity to disprove such facts so noted shall be granted any affected person making timely notice thereof.

(d) Evidence Received Subsequent to the Hearing. If additional evidence is submitted after the public hearing or after the date when public comment will no longer be accepted, such additional evidence will only be considered upon a showing that the evidence has significant relevance and there is good cause for the delay in its submission. All "parties" (as that term is defined herein) will be given notice of the consideration of such evidence and, at the discretion of the hearing examiner, granted an opportunity to review such evidence and file rebuttal arguments regarding that additional evidence.

(7) Recording the Hearing. Hearings shall be electronically or digitally recorded and such recordings shall be part of the official case record. Copies of the electronic recordings of a particular proceeding shall be made available to the public upon request and the reasonable cost of such copying shall be paid by the person or party requesting the recording.

(8) Obtaining Copies. Copies of any or all documents submitted during a hearing can be obtained by any person or party willing to pay for such copies.

(9) Testimony. All testimony before the hearing examiner shall be taken under oath.

(10) Rights of Parties. Every party (as that term is defined in this section) shall have the right of proper notice, cross-examination (rebuttal), presentation of evidence, objection and all other rights essential to a fair hearing. Cross-examination shall be permitted to the extent it is necessary for a full disclosure of the facts.

(11) Ex Parte Communications Prohibited (and Remedy) . No person or entity that is either a "party" or "interested citizen," as those terms are defined in this section, with respect to a particular petition or application which has been designated for an hearing before the hearing examiner shall communicate ex parte (outside of the record) , directly or indirectly, with the hearing examiner concerning the merits of that or a factually related petition or application. This rule shall not prohibit ex parte communications that purely concern procedural matters (e.g., what are the deadlines for a timely submission, where can I get a copy of the hearing examiner rules, what is the address for the county?) .

No hearing examiner shall communicate ex parte, directly or indirectly, with any person or entity that is either a "party" or "interested citizen," as those terms are defined in this section, with respect to a particular petition or application which has been designated for a hearing before the hearing examiner concerning the merits of that or a factually related petition or application. Communications about purely procedural matters do not fall within this prohibition.

If a substantial prohibited ex parte communication is made to or by the hearing examiner, then such communication shall be publicly disclosed and the hearing examiner shall, within his or her discretion, abstain from participating in any consideration of the matter that was discussed ex parte. [Ord. 8-06 § 1]

18.40.280 Hearing examiner review and decision (Type III decisions and appeals of Type II decisions).

(1) The hearing examiner shall review and make findings, conclusions and a decision on all Type III permit applications and appeals of Type II decisions.

(2) For Type III actions, the administrator shall prepare a staff report on the proposed development or action summarizing the comments and recommendations of county departments, affected agencies and special districts; and evaluating the development's consistency with this Unified Development Code, adopted plans and regulations. The staff report shall include proposed findings, conclusions and recommendations for disposition of the development application. The staff report shall include and consider all written public comments on the application.

(3) Upon receiving a recommendation from the administrator or notice of any other matter requiring the hearing examiner's attention (e.g., an appeal of a Type II administrative decision), the hearing examiner shall perform the following actions as appropriate:

(a) Hold an open record predecision hearing on a Type III permit application and make a decision after reviewing the recommendation of the administrator; or

(b) Hold an open record appeal hearing and make a decision on the following matters:

(i) Appeals of Type II administrative decisions;

(ii) Appeals of administrative interpretations made under Article VI of this chapter;

(iii) Appeals of SEPA threshold determinations made pursuant to Article X of this chapter (other than determinations of significance); and

(iv) Other matters not prohibited by law.

(4) The hearing examiner shall conduct a public hearing on all Type III development proposals and appeals of Type II administrative decisions for the purpose of taking testimony, hearing evidence, considering the facts germane to the proposal or appeal, and evaluating the proposal or appeal for consistency with this Unified Development Code, adopted plans and regulations. Notice of the hearing examiner hearing shall be in accordance with JCC 18.40.230. As applicable, all appeals of administrative interpretations made under Article VI of this chapter, and appeals of SEPA threshold determinations made under Article X of this chapter (other than determinations of significance (DS)) shall be considered together with the decision on the project application in a single, consolidated public hearing.

(5) In addition to the approval criteria listed elsewhere in this Unified Development Code, the hearing examiner shall not approve a

proposed development unless he/she first makes the following findings and conclusions:

(a) The development adequately mitigates impacts identified under Articles VI-D through VI-I of Chapter 18.15 JCC (i.e., environmentally sensitive areas) and Article X of this chapter (i.e., SEPA implementing provisions) ;

(b) The development is consistent with the Jefferson County Comprehensive Plan and meets the requirements and intent of this Unified Development Code;

(c) The development is not detrimental to the public health, safety and welfare;

(d) For subdivision applications, findings and conclusions shall be issued in conformance with Chapter 18.35 JCC and RCW 58.17.110.

(6) In the hearing examiner's decision regarding Type III actions and appeals of Type II administrative decisions, the hearing examiner shall adopt written findings and conclusions.

(a) The hearing examiner's decision following closure of an open record predecision public hearing on a Type III action shall include one of the following actions:

(i) Approve;

(ii) Approve with conditions;

(iii) Deny without prejudice (reapplication or resubmittal is permitted) ; or

(iv) Deny with prejudice (reapplication or resubmittal is not permitted for one year).

(b) A hearing examiner's decision following an open record appeal hearing on a Type II administrative decision, on a SEPA threshold determination on a Type II administrative decision, or on a SEPA threshold determination on a Type III permit decision shall include one of the following actions:

(i) Grant the appeal in whole or in part;

(ii) Deny the appeal in whole or in part; or

(iii) If appropriate, in a proceeding involving a SEPA appeal of a threshold determination consolidated with the hearing on a Type III permit

application, continue the open record public hearing pending SEPA compliance.

(c) The hearing examiner decision shall be issued within 10 working days unless the hearing examiner and the applicant agree upon a longer period. [Ord. 8-06 § 1]

18.40.290 Board of county commissioners action (Type IV decisions).

(1) The board of county commissioners shall make a decision after reviewing Type IV actions during a regularly scheduled meeting.

(2) In its decision, the board of county commissioners shall make its decision by motion, resolution or ordinance, as appropriate. [Ord. 8-06 § 1]

18.40.300 Procedures for public hearings.

Public hearings (including open record appeals of Type II decisions and open record predecision hearings on Type III permit applications) shall be conducted in accordance with the hearing examiner's rules of procedure and shall serve to create or supplement an evidentiary record upon which the hearing examiner will base his/her decision. In cases where scientific standards and criteria affecting project approval are at issue, the hearing examiner shall allow orderly cross-examination of expert witnesses presenting reports and/or scientific data and opinions. The hearing examiner may address questions to any party who testifies at a public hearing. The hearing examiner shall open the public hearing and, in general, observe the following sequence of events:

(1) Staff presentation, including submittal of any administrative reports. The hearing examiner may ask questions of the staff;

(2) Applicant presentation, including submittal of any materials. The hearing examiner may ask questions of the applicant;

(3) Testimony or comments by the public germane to the matter;

(4) Rebuttal, response or clarifying statements by the staff and the applicant;

(5) The evidentiary portion of the public hearing shall be closed and the hearing examiner shall deliberate on the matter before him/her;

(6) Pursuant to RCW 36.70.970, each final decision of the hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions

shall also set forth the manner in which the decision would carry out and conform to the Jefferson County Comprehensive Plan, this Unified Development Code and any other applicable county development regulations. Each final decision of the hearing examiner, unless the applicant and hearing examiner mutually agree to a longer period in writing, shall be rendered within 10 working days following conclusion of all testimony and hearings. [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]