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

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Frog Mountain Pet Care, Harold Elyea, Jane Elyea, Appellants

v.

Martin Mellish, Respondent

and

Jefferson County, Respondent

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BRIEF OF RESPONDENT MARTIN MELLISH

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## A. FACTS

Jefferson County approved a Conditional Use Permit as a Type III Permit for Frog Mountain Pet Care, a business operated by Harold and Jane Elyea (henceforth referred to as “Frog Mountain” or “FMPC”). Mr. Mellish filed a timely Motion for Reconsideration, which was denied. He then filed a LUPA petition pursuant to Chapter 36.70C RCW contesting the decision. The LUPA petition was filed within 21 days of the decision on the Motion for Reconsideration, but not within 21 days of the original approval of the Conditional Use Permit.<sup>1</sup>

Frog Mountain filed a Motion to Dismiss the LUPA petition on grounds of timeliness.<sup>2</sup> This motion was, of course, opposed by Mr. Mellish.<sup>3</sup> It was also, and more notably, opposed by Frog Mountain’s fellow respondent, Jefferson County.<sup>4</sup> Jefferson County’s position was that, while like Frog Mountain they believed the issuance of the permit to be valid, they also wished to affirm that Mr. Mellish’s petition was timely filed, and therefore they opposed the Motion to Dismiss the LUPA petition<sup>5</sup>. After hearing oral arguments from all parties, the trial court agreed with Mr. Mellish and Jefferson County’s position on the issue of timeliness and dismissed the Motion.<sup>6</sup> On the merits, the trial

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<sup>1</sup> For a full account of the timeline see Declaration of David Johnson, Appendix A-6 through A-8 of this document, paragraphs 11 through 24. CP 218-220.

<sup>2</sup> CP 262-332, Motion to Dismiss

<sup>3</sup> CP 241-261, Petitioner’s Response to Motion to Dismiss

<sup>4</sup> CP 237-239, Memorandum of Authorities on Behalf of Jefferson County, and CP 213-236, Declaration of David W. Johnson. These are attached to this brief in the Appendix, A-1 to 4 and A-5 to 28 respectively.

<sup>5</sup> CP 237-239, Appendix A-1 and A-2.

<sup>6</sup> CP 204-212, Memorandum Opinion on Motion to Dismiss, attached to this brief in the Appendix as A-29 to A-37.

court subsequently found in favor of Mr. Mellish's petition, on the grounds that the required variance had been improperly granted.<sup>7</sup> The relevant dates are as follows:

<b>Date</b>	<b>Event</b>
June 21, 2007	Permit and decision mailed
June 28, 2007	Motion for Reconsideration filed
July 21, 2007	Denial of Motion for Reconsideration mailed
August 10, 2007	LUPA petition filed

All these dates are attested to in the Declaration of David Johnson submitted by Jefferson County in opposition to the Motion to Dismiss.<sup>8</sup> Mr. Johnson is the Jefferson County land use planner who handled the case.<sup>9</sup>

Frog Mountain mentions two other dates in its timeline on page 6 of the Brief of Appellants. The 'LUPA deadline' in particular is inappropriately included in the 'Facts' section. See Brief of Appellants at 6. Neither Mr. Mellish nor Jefferson County agrees that this was in fact the LUPA deadline.<sup>10</sup> The trial court also does not agree that this is the LUPA deadline.<sup>11</sup> If Frog Mountain believes that this is the deadline, it needs to make this case in its 'Argument' section.

In its Facts section, Frog Mountain goes into some detail about its view of the underlying case. Brief of Appellants at 2 through 4. It is unclear why they do so, since they do not appeal any aspect of the trial court's decision on the merits.

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<sup>7</sup> CP 35-53, Memorandum Opinion

<sup>8</sup> Declaration of David Johnson, Appendix, A-6 to A-8. CP 218-220

<sup>9</sup> Appendix, A-5 to A-6, Declaration of David Johnson, paragraphs 3 through 5. CP 213-214

<sup>10</sup> Appendix A-1 to A-4, Memorandum of Authorities, CP 237-240, Petitioner's Response to Motion to Dismiss, CP 241-262

<sup>11</sup> Appendix A-36 to A-37, Memorandum Opinion on Motion to Dismiss, CP 211-212

## B. ARGUMENT

In many respects this brief simply expands upon the excellent Memorandum of Authorities submitted by Jefferson County opposing the Motion to Dismiss, and the accompanying Declaration of David Johnson.<sup>12</sup> The County's succinct Memorandum covers virtually all the main points brought up by Frog Mountain on appeal. The County's action in filing the Memorandum – which says that while it disagrees on the merits of the LUPA petition filed against it, the petition is nevertheless timely in accordance with its interpretation of LUPA and its own code, and should be allowed to go forward - is remarkable and praiseworthy.

In common with many other local land use jurisdictions in Washington State, Jefferson County has a Hearing Examiner administrative review process for a Type III Permit that includes an open record administrative hearing, then issuance of a final decision which is subject to review and modification by the Hearing Examiner if there is a timely motion for reconsideration.<sup>13</sup> Once a timely motion for reconsideration is filed by a potential appellant, the appellant must wait for that motion to be decided in order to exhaust administrative remedies. LUPA requires administrative remedies to be exhausted before the resulting decision can be called a "land use decision."

*(1) "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,*

RCW 36.70C.020(1).

*The petitioner has exhausted his or her administrative remedies to the extent required by law.*

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<sup>12</sup> Appendix A-1 to A-4 and A-8 to A-28, CP 237-240 and CP 213-236, respectively.

<sup>13</sup> JCC 18.40.280 (Appendix at A-38); JCC 18.40.310 (Appendix at A-40).

RCW 36.70C.060(2)(d).<sup>14</sup>

A “land use decision” can be only a truly “final determination” by the local jurisdiction. RCW 36.70C.020(1). Because JCC 18.40.310 allows a timely motion for reconsideration to result in the revision of the initial final decision, the “final determination” by the local jurisdiction is not made until there is a decision on any timely motion for reconsideration. Only “land use decisions” may be appealed under LUPA.

*(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions*

RCW 36.70C.030(1).

Therefore, in the Jefferson County process for Type III permits the “final determination” would occur when the initial final decision is issued if there was no timely motion for reconsideration, but if there is a timely motion for reconsideration, it would occur when action is taken on that motion.

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<sup>14</sup> For a discussion of the exhaustion requirement see Ward v. County Commissioners, 86 Wn. App. 266, 270-71, 936 P.2d 42 (1997)

The issue of the relevance under state law of labels attached by local jurisdictions to their decisions (such as the term 'final decision' in JCC 18.40.310) was addressed by our own Supreme Court in Dep't of Ecology v. Kirkland, 84 Wn. 2d 25, 523 P.2d 1181 (1974), where it is stated:

*[I]t is noted that whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action.*

Dep't of Ecology at 29-30. Here the realistic consequences of filing a timely motion for reconsideration is that the date of the initial final decision is no longer the date of the "final determination" by the Hearing Examiner. The date of that "final determination" is the date of issuance of the decision on reconsideration. When there is a timely motion for reconsideration, the date of issuance of the "land use decision" that can be appealed under LUPA is the date of issuance of the decision on reconsideration, because only on that date is there a "final determination" and a "land use decision" that can be the subject of a judicial appeal.<sup>15</sup>

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<sup>15</sup> Jefferson County provided a more specific argument to the trial court in its Memorandum of Authorities (CP 237-240, provided herein in the Appendix at pages A-1 to A-4). The County argued that denial of the motion for reconsideration on July 21, 2007 "is the only decision made by a County representative that fits the definition of 'land use decision'" as listed in RCW 36.70C.020(1)(a). Appendix at page A-4, line 5. The County points out that "RCW 36.70B.060(6) allows a local government to create . . . a two-step process, i.e. 'one consolidated open record appeal,' and at the county's option 'a closed record appeal before a single decision-making body or officer.'" *Id.* The County argued that because Ch. 36.70B RCW approves of a local government establishing a "hearing and subsequent appeal" process before a disputed permit becomes susceptible to an appeal to superior court under LUPA, the County's decision to allow a motion for reconsideration is lawful and the date of the "land use decision" under LUPA is the date that the Order on Reconsideration is issued. *Id.* The County argues that to find otherwise would require an aggrieved person to file appeal papers with the County at the same time as filing a LUPA petition in superior court and that result defies logic. *Id.* The County's interpretation that its Type III administrative review process does not result in a "final determination" until the decision is issued on a timely motion for reconsideration is to be given considerable judicial deference. Mall, Inc. v. Seattle, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) ("considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement").

Frog Mountain's main contention is that LUPA's 21-day appeal period begins at the time of issuance of the initial final decision, not at the end of the local land use process as a whole, even when there is a timely reconsideration motion. They cite no precedent for their interpretation, which:

1. Is contrary to settled land use practice in Washington State<sup>16</sup>
2. Is contrary to the very clear language of the LUPA statute<sup>17</sup>
3. If adopted, would give rise to innumerable legal contradictions, due process violations, and unnecessary resort to the courts, violating the rule that statutes should be construed so as avoid strained and absurd consequences.<sup>18</sup>

We first examine the relevant sections of the LUPA statute (which is, of course, the controlling authority regarding the timeliness of LUPA petitions), then the items of Jefferson County code referred to by Frog Mountain, and finally their references to the wording on Jefferson County's forms. This examination is in order of diminishing relevance to the question at hand. We also point out some of the contradictions, potential due process violations, and various unnatural and undesirable consequences that would flow from their interpretation were it to be adopted.

### ***Timeliness under LUPA***

The authority on the timeliness of a filing under LUPA is the LUPA statute itself. RCW 36.70C.040 of LUPA governs the timeliness of a LUPA petition:

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<sup>16</sup> See for example HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 466, 61 P.3d 1141 (2002), a case where a LUPA petition was filed 21 days after a reconsideration decision.

<sup>17</sup> RCW 36.70C.020(1).

<sup>18</sup> State ex rel. Evergreen v. WEA, 140 Wn.2d 615, 632, 999 P.2d 602 (2000).

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

RCW 36.70C.040(3).

'Land use decision' is defined in RCW 36.70C.020 as follows:

*(1) "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;*

RCW 36.70C.020(1).

Applying the definition of 'land use decision' in RCW 36.70C.020(1) to Jefferson County's land use process, the '*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*' [emphasis supplied] is clearly the determination made when a reconsideration order is issued on a timely-filed motion for reconsideration. The determination made in the initial final order cannot be '*final*' in the sense of LUPA, since it can be modified or overturned by a subsequent local land use determination. This is further clarified by the words '*including those with authority to hear appeals*'.

Mr. Mellish and Jefferson County agree, and the trial judge found, that the date when a ruling is issued on a timely-filed Motion for Reconsideration that terminates the local land use process, becomes the date of the 'land use decision' or 'final determination' referred to in the LUPA statute, and the 21-day appeal period commences from that date of issuance. Given the definition of 'final' ('pertaining to or coming at the

end; last in place, order, or time', Webster's New Universal Unabridged Dictionary 2003) no other interpretation can be sustained. The determination at the end of the local land use process is 'final' for the purposes of LUPA, and all earlier determinations are not. It should be noted here that Mr. Mellish's Land Use Petition specifically challenged the denial of the Motion for Reconsideration, not merely the initial decision granting the Conditional use Permit which that denial affirms and incorporates.<sup>19</sup>

### ***Strained and Absurd Consequences of Frog Mountain's Interpretation***

Now let us briefly examine a very small sample of the numerous inconsistencies, contradictions, and due process violations inherent in Frog Mountain's interpretation. According to Frog Mountain's theory, in the instant case there is no date on which Mr. Mellish could have filed a timely LUPA petition. The most obvious reason for this (though not the only one) is that the filing of a LUPA petition requires that the petitioner's administrative options be exhausted. After Mr. Mellish filed his motion for reconsideration, his administrative remedies were exhausted only when he was mailed the Reconsideration Order on July 21st, whereas under the Frog Mountain theory a LUPA petition would be timely only if filed on or before July 16<sup>th</sup>.

This raises an obvious and illuminating question: if the Motion for Reconsideration had been granted, instead of denied, what, according to Frog Mountain's theory, would its recourse under LUPA have been? Even if it knew of the Motion for Reconsideration, it could not file an appeal prior to the issuance of the decision granting the Motion, because it is impossible to appeal a decision that has not yet been issued – yet

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<sup>19</sup> CP at 335, Land Use Petition, page 1

on its theory the LUPA timeline would have expired by the time its appeal was possible. Thus they would have had no recourse under LUPA at all.

Even more simply, and independent of the amount of time the Examiner took to rule on the Motion for Reconsideration: the granting of the Conditional Use Permit is not appealable by Frog Mountain because it is in their favor, whereas the Granting of the Motion for Reconsideration is not appealable because, in its theory, it is not the 'final determination.'

More generally, Frog Mountain's interpretation would give rise to many unnecessary resorts to the Courts and to much unnecessary expense and delay. It is in everyone's interest that land use questions be settled at the local administrative level if at all possible.<sup>20</sup> This is one of the reasons why Jefferson County has its reconsideration process. If parties to a land use case feel any uncertainty about whether taking advantage of the later stages of a local land use process will adversely affect their rights under LUPA, they will simply file a LUPA petition straight away, further burdening our already-overloaded court system and entailing much unnecessary trouble, expense and delay for all the parties involved.

As stated by Jefferson County in its September 11, 2007 Memorandum of Authorities:

*if the logic put forth by FMPC is correct, then an aggrieved person or entity fighting a permitting decision within a county that had established locally a "hearing and subsequent appeal" process would have to both simultaneously file a LUPA petition and file the appeal papers to request a closed record appeal. Suddenly, there would be two judicial or quasi-judicial matters concerning the same*

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<sup>20</sup> KSLW v. Renton, 47 Wn. App. 587, 591, 736 P.2d 664 (1986).

*dispute going on at the same time in different venues. That possible result defies logic.*

(Appendix Page A-4, lines 8-11, CP 240)

It would also clearly give rise to enormous costly and unnecessary confusion should the two venues arrive at differing conclusions. In State v. Grays Harbor County, 122 Wn. 2d 244, 857 P.2d 1039 (1993), a SEPA case, SEPA and local code taken together would have required litigants to simultaneously pursue an administrative SEPA appeal and a judicial appeal of the underlying local administrative decision. 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 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 issue 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.*

Grays Harbor County at 255-56. In that case the Court overturned the local 'parallel-track' requirement. The difference with the present case, of course, is that Jefferson County is not advancing this 'parallel-track' interpretation: only Frog Mountain is, with no support in LUPA, local code, precedent, or case law.

A statute must be construed to give effect to the Legislature's intent (Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002)) and to avoid strained or absurd results (State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).) Frog Mountain's interpretation leads to strained and absurd results (some of which are described above), and does not give effect to the intent of the LUPA statute, which is to provide a remedy at the State level that is available when, and only when, all local

administrative remedies have been exhausted (i.e. the local administrative process is complete.)

All this is clear – and sufficient to decide the case. For completeness we address the questions of Jefferson County Code and the wording on Jefferson County's forms raised by Frog Mountain. As remarked before, neither Jefferson County Code, nor the wording on the County's forms, is in any way determinative of LUPA appeals timelines.

## **Jefferson County Code**

Jefferson County Code ("JCC") 18.40.310 reads as follows:

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.

Frog Mountains' entire case – such as it is – rests on the apparent similarity between the words 'final decision' in the first sentence of JCC 18.40.310 (which also appears on the approval of the Conditional Use Permit) and the terms 'land use decision' and 'final determination' used in the LUPA statute. The meaning of the code is, however, clear once its purpose is taken into account. Its purpose is not to regulate LUPA timelines (which are in any case beyond the purview of local code) but to regulate the conditions and timelines for Jefferson County's Motion for Reconsideration process.

As such, the meaning of the word 'final' in the first sentence of JCC 18.40.310 has to be 'conclusive of the open record phase of the local land use process', not 'conclusive of the local land use process as a whole.' This is clear from the fact that JCC 18.40.310 goes on to describe the process whereby that 'final' decision may be modified or overturned. At the point in the process described in the first sentence, all

administrative options are not yet exhausted if a timely motion for reconsideration is filed.

The word 'final' appears again in the fourth sentence of the paragraph, '*If the request is denied, the previous action shall become final.*' This time the word 'final' does indeed mean 'conclusive of the local land use process as a whole.' All administrative options really are exhausted, the denial of the request is conclusive of the entire local land use process, and '*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*' has been made, and so the LUPA countdown begins.

Respondent Mr. Mellish submits that this interpretation of the code is the only reasonable, or even logically possible one. It is also the interpretation adopted by Jefferson County, the body charged with the enforcement of the code. The trial court found the above to be the 'most reasonable interpretation'<sup>21</sup> of the applicable Jefferson County Code. All that is necessary to affirm this interpretation, however, is that it is not actually unreasonable, since when a term in a statute is ambiguous (i.e. amenable to more than one reasonable interpretation<sup>22</sup>), deference must be given to the interpretation of the administrative agency charged with the statute's enforcement.<sup>23</sup> That administrative agency is Jefferson County, whose interpretation concurs with Respondent Mr. Mellish.

Frog Mountain also cites to JCC 18.40.320(1) which states that

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<sup>21</sup> Memorandum Opinion on Motion to Dismiss (Appendix C) page 8 line 21. CP at 211.

<sup>22</sup> King County v. Cent. Puget Sound Bd., 91 Wn. App. 1, 16, 951 P.2d 1151 (1998).

<sup>23</sup> Mall, Inc. v. Seattle, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987) ("considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement").

*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.*

JCC 18.40.320 It is not completely clear exactly what this item of code is supposed to mean. It is possible that the word 'final' here has the same meaning as in the first sentence of JCC 18.40.310, namely 'conclusive of the open-record portion of the local land use process.' It is also possible that the 'permit decision' referred to is the post-Reconsideration one referred to in the third sentence of JCC 18.40.310, '*If the request is denied, the previous action shall become final.*'

What is clear is that any interpretation of JCC 18.40.320 incompatible with Jefferson County's Motion for Reconsideration process described in JCC 18.40.310 (the immediately preceding code section) must be incorrect, since invalidating JCC 18.40.310 would conflict with the principle that a statute must be construed in such a way that no part of it is rendered meaningless or superfluous<sup>24</sup>. Separately, in cases where an item of code is ambiguous, deference is due to the interpretation of the body charged with the enforcement of the code<sup>25</sup>, which in this case is Jefferson County, who affirm the validity of JCC 18.40.310 in their Memorandum of Authorities<sup>26</sup>.

Nor can any interpretation of JCC 18.40.320 be sustained that would attempt to supplant or override LUPA's definition of a 'final determination' by stating that a determination other than the last determination of the local land use process was in fact 'final' for the purposes of LUPA. For JCC 18.40.320, a local code provision, may not

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<sup>24</sup> See for example Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); State v. Sunich, 76 Wn. App. 202, 205, 884 P.2d 1 (1994); Oestreich v. Labor and Industries, 64 Wn. App. 165, 822 P.2d 1264

<sup>25</sup> Mall, Inc. v. Seattle, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987)

<sup>26</sup> Appendix A-3, line 15 through A-4, line 5, CP 239-240.

conflict with LUPA, a state statute. Rabon v. City of Seattle, 135 Wn.2d 278, 287 and 292, 957 P.2d 621 (1998). Therefore, to the degree that this code provision could possibly be interpreted as overriding LUPA's definition of a 'final determination', this code provision would be void. Id. It is forbidden by LUPA to bring a judicial appeal of a decision that is not the "final determination" by the local jurisdiction. RCW 36.70C.010(1); 36.70C.030(1). For JCC 18.40.320(1) to not be void, it must be interpreted that a final Type III project permit decision is made on the date that the decision on a timely motion for reconsideration is issued because that is the date the "final determination" is issued.

Finally, it should be noted that no code provision, however interpreted, is the controlling authority on what the terms 'land use decision' and 'final determination' mean in the context of LUPA – LUPA is.

### *Wording on Jefferson County Forms*

The appellant's brief uses several references to the wording on documents and forms issued by Jefferson County to support its case.

A typical example is on Page 7, line 2, where the Appellants' brief states, incorrectly, that 'The permit correctly states that is must be appealed within 21 days of issuance'. The language of the Permit is actually as follows (emphasis added):

*Pursuant to RCW 36.70C, the applicant or any aggrieved party **may** appeal this final decision to Jefferson County Superior Court within twenty-one (21) days of the date of issuance of the land use decision. For more information related to judicial appeals see JCC 18.40.340.*

CP at 349, quoted in Appellant's Brief at the bottom of Page 1. One point that this illustrates is that the language on documents and forms does not limit any party's appeal

options under LUPA. For the language of the Permit only refers to the possibility of an appeal to Jefferson County Superior Court, whereas State law allows appeals to the Superior Court of either of the two adjacent counties (RCW 36.01.050), and State law controls. The Petition in question was actually filed in Clallam County. It is thus clear that such language on forms does not override the provisions of State law.

More significantly perhaps, the Permit uses the word 'may', not 'must' as misquoted in the Brief of Appellants.

The Jefferson County Notice of Type III Land Use Decision mailed along with the Conditional Use Permit<sup>27</sup> makes it perfectly clear that an aggrieved party wishing to contest a land use decision has two options – they **may** file a judicial appeal, or they **may** timely-file a Motion for Reconsideration. Furthermore, the Notice of Type III Land Use Decision mailed along with the denial of the Motion for Reconsideration<sup>28</sup> makes it perfectly clear that an aggrieved party wishing to contest the decision of the Motion for Reconsideration has **one** option available to them – to file a LUPA petition within the twenty-one day period specified by LUPA of the Denial of the Motion for Reconsideration. It is this latter option (whose deadline is clearly and accurately specified in Jefferson County's instructions) of which Mr. Mellish availed himself. There is thus no contradiction between the language on Jefferson County's forms and the trial court's ruling on the timeliness of Mr. Mellish's LUPA filing.

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<sup>27</sup> Appendix A-14, CP 226

<sup>28</sup> Appendix A-23, CP 235

## ***Other Claims of Frog Mountain***

**That the 21-day period runs from the date when the decision should have been issued**

This claim is Point F, starting on Page 15 of the Appellants' brief.

All that is necessary to refute this claim is Section RCW 36.70C.040 of LUPA, which states:

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

RCW 36.70C.040(3). No reference is made to the date on which the land use decision **should have been** issued, for obvious reasons. For instance, if LUPA were to take into account the date on which a decision **should have been** issued, a delayed decision would be unappealable simply by being delayed, which would obviously represent an unnecessary due process violation. The concept of when a decision **should have been** issued is also a much more slippery one than the date on which it *was* issued (which may be ascertained simply by consulting the date on the document issuing the decision or the Declaration of Mailing.)

Frog Mountain states on page 17, second paragraph, of its brief that 'The Hearing Examiner's decision on reconsideration was a week late. This may not be long. However, under LUPA, substantial compliance does not apply.' They quote a case in which the Court found that substantial compliance does not apply to the service requirements of LUPA. This confuses compliance with LUPA itself with compliance with the provisions of local code.

Mr. Mellish filed within twenty-one days of the ruling on the Motion for Reconsideration, and thus fully (not merely substantially) complied with the timeliness requirements of LUPA. The Hearing Examiner's failure to render a decision within the timelines specified by local code is not a violation of LUPA, but an imperfection in the local land use process. Such an imperfection might be appealable under LUPA if a party could show that they were harmed by it (which Frog Mountain is not, since the decision was in their favor and simply affirmed what they already believed to be the case.)

**That since Frog Mountain was not notified of the filing of the Motion for Reconsideration, the filing was invalid**

This claim was never made to or ruled upon by the trial court. It does not appear in Frog Mountain's Assignments of Error section (for obvious reasons, since there is no trial court finding to which any error could be assigned). It therefore cannot legitimately be raised on appeal.<sup>29</sup>

It is also without merit. Mr. Mellish fully complied with all Jefferson County's procedures for filing a Motion for Reconsideration, which do not include notifying other parties. Jefferson County's right to have such a procedure is enshrined in Chapter 36.70B of RCW, as stated in the County's Memorandum of Authorities.<sup>30</sup> Frog Mountain was not harmed by the absence of notification, since the decision on the Motion for Reconsideration was in its favor.

---

<sup>29</sup> RAP 2.5(a)

<sup>30</sup> Appendix A-3 line 20, CP 239

**That the LUPA deadline is not affected by any misrepresentations by the County**

Mr. Mellish agrees with Frog Mountain on this issue – which, however, does not arise, since Mr. Mellish has consistently taken the position that Jefferson County advised him **correctly** and did not make any misrepresentations. This is also the position taken by Jefferson County.<sup>31</sup> Frog Mountain is here, as in their original Motion to Dismiss, arguing against an assertion that no other party has ever made.

**C. CONCLUSION**

Frog Mountain's arguments regarding timeliness have no foundation in LUPA, the controlling authority, or in Jefferson County code, or even in the language that appears on Jefferson County's documents. Their interpretation is completely contrary to precedent, leads to strained and absurd results, and if adopted would give rise to much complex, expensive, time-consuming and unnecessary litigation, and unnecessarily burden Washington State's already-overburdened court system. It would also introduce uncertainty and doubt into local land use processes state-wide. For all these reasons Frog Mountain's appeal should be denied.

Respectfully submitted this 9th day of October 2008,

M. S. Mellish  
Martin Mellish (pro se)  
930 Martin Rd  
Port Townsend, WA 98368

(360)385-0082

<sup>31</sup> Memorandum of Authorities (Appendix A) Page 2 line 13, CP 238

SCANNED-4

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BARBARA CHRISTENSEN

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR CLALLAM COUNTY**

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

Case No.: 07-2-00791-4

**MEMORANDUM OF AUTHORITIES ON  
BEHALF OF  
RESPONDENT JEFFERSON COUNTY**

**EVIDENCE RELIED UPON:**

- Declaration of Associate Planner David W. Johnson, with four (4) attachments; and this
- Memorandum of Authorities.

**PRELIMINARY STATEMENT:**

Respondent Jefferson County ("the County") files this Memorandum of Authorities because it asserts that the Petitioner timely filed his LUPA Petition. For reasons that will be described below the Motion to Dismiss of co-Respondents Frog Mountain Pet Care ("FMPC") and Harold and Jane Elyea should be denied. However, the County also asserts Your Honor

**MEMORANDUM OF AUTHORITIES ON  
BEHALF OF  
RESPONDENT JEFFERSON COUNTY**  
Page 1

JUELANNE DALZELL  
PROSECUTING ATTORNEY  
FOR JEFFERSON COUNTY  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

**ORIGINAL**

A-1

1 will, once the merits of this LUPA Petition are argued, affirm the County's granting of the permit  
2 that the Petitioner now challenges.

### 3 STATEMENT OF FACTS

4 As laid out in the Declaration of Associate Planner David W. Johnson, the application by  
5 FMPC can be quickly summarized as a remodel and expansion of a legal non-conforming  
6 dog and cat boarding facility now located in a Rural Residential zone, where the  
7 underlying zoning is one residence per five acres, also known as RR 1:5. (Johnson Decl.,  
8 ¶7). Because of those circumstances it required a Conditional Use Permit and was  
9 subject to an open record hearing. (Johnson Decl., ¶8, 9). The Hearing Examiner's  
10 decision granting the permit, dated June 20, 2007, was mailed to all interested parties  
11 (including Petitioner Mellish) on June 21, 2007 and was the subject of a timely Motion  
12 for Reconsideration filed on June 28, 2007 (Johnson Decl., ¶11 through ¶15, inclusive).  
13 The Motion for Reconsideration was formally denied in an Order dated July 21, 2007 and  
14 the Order was mailed to all parties on that same date. (Johnson Decl., ¶16, ¶17).

15 Because there are no other County appeal processes available to Mr. Mellish, the  
16 neighbor aggrieved by the decision to grant the permit to FMPC, he was informed of  
17 what he needed to do to timely file this LUPA Petition. (Johnson Decl., ¶17 through ¶19,  
18 inclusive). Mr. Mellish had 24 days from July 21, 2007 to file his LUPA Petition.  
19 (Johnson Decl., ¶19, ¶20). In accordance with the County's development regulations,  
20 which allow a person aggrieved by a permitting decision to seek a Motion for  
21 Reconsideration, it is the conclusion of Associate Planner Johnson (and thus of the  
22 County) that the LUPA Petition now being challenged was filed before the 24 days  
23 expired. (Johnson Decl., ¶18 through ¶21, inclusive).  
24

22 **MEMORANDUM OF AUTHORITIES ON**  
23 **BEHALF OF**  
24 **RESPONDENT JEFFERSON COUNTY**  
Page 2

JUELANNE DALZELL  
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(360) 385-9180

A-2

1 **LEGAL ARGUMENT**

2 **THE LUPA 'CLOCK' OF 24 DAYS DID NOT BEGIN TICKING DOWN UNTIL**  
3 **THE DATE WHEN THE MOTION FOR RECONSIDERATION WAS DENIED**

4 The "land use decision" (a term of art in Ch. 36.70C RCW) that triggered the strict 21  
5 days + 3 days for mailing Statute of Limitations laid out in RCW 36.70C.040(3) and .040(4)(a)  
6 in this particular fact-pattern was the denial of the Motion for Reconsideration dated July 21,  
7 2007.<sup>1</sup> In that regard FMPC is incorrect in measuring the 24 days from June 20, 2007 and that  
8 is why the motion to dismiss should be denied.

9 The County makes such a statement because the July 21, 2007 decision is the only  
10 decision made by a County representative that fits the definition of "land use decision" as listed  
11 at RCW 36.70C.020(1)(a):

12 "(1) "Land use decision" means a final determination by a local  
13 jurisdiction's body or officer with the highest level of authority to make  
14 the determination, including those with authority to hear appeals, on:  
15 (a) An application for a project permit or other governmental approval  
16 required by law before real property may be improved, developed,  
17 modified, sold, transferred, or used, ....." (Emphasis supplied.)

18 The County has established a never-challenged system in its development regulations where a  
19 person or entity aggrieved by a Hearing Examiner's decision on a Conditional Use Permit is  
20 authorized to ask that same Hearing Examiner to reconsider his or her decision. In that regard,  
21 see the Jefferson County Code at §18.40.310, the full text of which is at the second page of  
22 Attachment Two to the Johnson Declaration and will not be repeated here.

23 Clearly, LUPA and its sister statutory scheme, the Regulatory Reform Act of 1995 now  
24 codified at Ch. 36.70B RCW, contemplate that a person or entity aggrieved by a county's  
25 permitting decision will have more than 'one bite at the apple' before a County representative to  
26 obtain the result they desire. In fact, RCW 36.70B.060(6) allows a local government to create  
27 precisely such a two-step process, i.e., "one consolidated open record appeal," and at the

28 <sup>1</sup> See Attachment Three to the David W. Johnson Declaration.

1 county's option "a closed record appeal before a single decision-making body or officer." Given  
2 that Ch. 36.70B RCW approves of a local government establishing a "hearing and subsequent  
3 appeal" process before the matter (typically a disputed permit) becomes susceptible of an appeal  
4 to the Superior Court under LUPA, this County's decision to allow a Motion for Reconsideration  
5 is also lawful and, more importantly, creates the situation where only the decision on the Motion  
6 for Reconsideration is a "land use decision" that starts the 24 day LUPA "clock" ticking down.

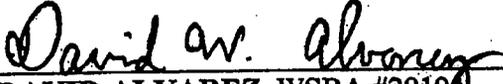
7 Separately, the Petitioner had the ability to file a LUPA Petition relating to the Order  
8 Denying his Motion for Reconsideration within 24 days of July 21, 2007 and, in essence, this pro  
9 se Petitioner did so.

10 Your Honor can also note that if the logic put forth by FMPC is correct, then an  
11 aggrieved person or entity fighting a permitting decision within a county that had established  
12 locally a "hearing and subsequent appeal" process would have to both simultaneously file a  
13 LUPA Petition and file the appeal papers to request a closed record appeal. Suddenly, there  
14 would be two judicial or quasi-judicial matters concerning the same dispute going at the same  
15 time in different venues. That possible result defies logic.

16 **CONCLUSION**

17 The Motion to Dismiss by co-Respondents FMPC and the Elyeas should be denied based  
18 on the logic stated above.

19 DATED this 11<sup>th</sup> day of September, 2007.

20   
21 **DAVID ALVAREZ, WSBA #29194**  
22 Chief Civil Deputy Prosecuting Attorney  
23 On behalf of Respondent Jefferson County

24 **MEMORANDUM OF AUTHORITIES ON  
BEHALF OF  
RESPONDENT JEFFERSON COUNTY**  
Page 4

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A-4

SCANNED-24

FILED  
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2007 SEP 13 P 4:21  
BARBARA CHRISTENSEN

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR CLALLAM COUNTY**

MARTIN MELLISH,  
  
Petitioner,

vs.

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

Case No.: 07-2-00791-4

**DECLARATION OF  
DAVID W. JOHNSON**

I, **DAVID W. JOHNSON**, being of full age and sound mind do hereby declare as follows:

1. I am competent to make the statements found in this Declaration.
2. I make the statement found in this Declaration based upon personal knowledge.
3. I am employed as an Associate Planner for the planning department of Jefferson County, an agency formally known as the Department of Community Development or "DCD."

**DECLARATION OF  
DAVID W. JOHNSON**  
Page 1

**JUELANNE DALZELL  
PROSECUTING ATTORNEY  
FOR JEFFERSON COUNTY  
Courthouse - P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180**

**ORIGINAL**

A-5

- 1 4. I have been employed as an Assistant & Associate Planner for Jefferson County
- 2 for two years.
- 3 5. As part of my employment for Jefferson County I was responsible for the
- 4 application of Frog Mountain Pet Care.
- 5 6. In that role I am fully familiar with the facts that underlie this LUPA Petition.
- 6 7. The application by Frog Mountain Pet Care can be quickly summarized as a
- 7 remodel and expansion of a legal non-conforming dog and cat boarding facility
- 8 now located in a Rural Residential zone, where the underlying zoning is one
- 9 residence per five acres, also known as RR 1:5.
- 10 8. Because the proposed expansion exceeded ten percent (10%), the applicant was
- 11 required to obtain a discretionary Conditional Use Permit.
- 12 9. In accordance with the Jefferson County Code, Title 18, the application was the
- 13 subject of an open record hearing on May 11, 2007.
- 14 10. I testified at that May 11, 2007 hearing as did the applicant, the applicants'
- 15 attorney, supporters of the proposal and at least one opponent of the proposal,
- 16 Petitioner Martin Mellish.
- 17 11. The Deputy Hearing Examiner signed his decision on June 18, 2007 and DCD
- 18 received a copy of that decision on June 20, 2007.
- 19
- 20
- 21

22 **DECLARATION OF**  
23 **DAVID W. JOHNSON**  
24 Page 2

**JUELANNE DALZELL**  
**PROSECUTING ATTORNEY**  
**FOR JEFFERSON COUNTY**  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

A-6

1 12. As a result of receiving the Hearing Examiner's decision DCD issued a "Type III  
2 Land Use Permit" to the applicant dated June 20, 2007. See Attachment One to  
3 this Declaration.

4 13. In accordance with state law a "Jefferson County Notice of Type III Land Use  
5 Decision" was sent to the applicant and interested parties such as Petitioner  
6 Mellish on June 21, 2007. Attached to such a notice was a copy of the Hearing  
7 Examiner's decision, which is not attached here but is attached to the original  
8 LUPA Petition. See Attachment Two to this Declaration.

9 14. The second page of the "Notice of ...Land Use Decision ..." informs the reader  
10 that a person or entity aggrieved by the decision of the County's Hearing  
11 Examiner has the opportunity to file a Motion for Reconsideration. This  
12 opportunity is provided in local code as enacted at Jefferson County Code  
13 §18.40.310.  
14

15 15. They must file such a Motion for Reconsideration ("MFR") within five (5)  
16 business days of the date the Land Use Decision is issued, a deadline satisfied by  
17 Mr. Mellish who filed his MFR on June 28, 2007, precisely five business days  
18 after the decision was mailed out.

19 16. The Hearing Examiner denied the MFR on or about July 21, 2007. See  
20 Attachment Three to this Declaration.  
21

22 **DECLARATION OF**  
23 **DAVID W. JOHNSON**  
24 Page 3

**JUELANNE DALZELL**  
**PROSECUTING ATTORNEY**  
**FOR JEFFERSON COUNTY**  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

A-7

1 17. On that same date the Denial of the MFR was sent to all interested parties,  
2 including Petitioner Mellish, with another "Notice of Land Use Decision." This  
3 second Notice of Land Use Decision is Attachment Four to this Declaration.

4 18. The Notice of Land Use Decision sent on July 21, 2007 stated that any party  
5 aggrieved by the Denial of the MFR was provided with a 24 day time frame within  
6 which to file in Superior Court a LUPA Petition in accordance with state law  
7 asking that the Superior Court review the county's decision.

8 19. The 24 day time frame exists because it represents three (3) days for mailing the  
9 decision on top of the 21 days provided by state law under LUPA.

10 20. If one measures 24 days from July 21, 2007, then the deadline for filing the LUPA  
11 Petition would have been August 14, 2007.

12 21. The LUPA Petition of Mr. Mellish was filed on August 10, 2007.

13 22. I have seen the motion papers filed by the attorney for the applicant seeking to  
14 dismiss the Mellish LUPA Petition because he claims it was filed too late.

15 23. I am not trained as a lawyer and thus do not know if that attorney has accurately  
16 applied the correct law to these facts.

17 24. Your Honor may be assisted by knowing the sequence of events as perceived by  
18 the County's staff.  
19  
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22 **DECLARATION OF**  
23 **DAVID W. JOHNSON**  
24 Page 4

**JUELANNE DALZELL**  
**PROSECUTING ATTORNEY**  
**FOR JEFFERSON COUNTY**  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

A-8

1 I declare under penalty of perjury pursuant to the laws of the State of Washington that the  
2 statements listed in this Declaration are true and correct.

3  
4 9/10/07

5 Date and Place

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DAVID W. JOHNSON

22 **DECLARATION OF**  
23 **DAVID W. JOHNSON**  
24 Page 5

**JUELANNE DALZELL**  
**PROSECUTING ATTORNEY**  
**FOR JEFFERSON COUNTY**  
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(360) 385-9180

A-9

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

ATTACHMENT

# 1

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

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

MLA NUMBER: MLA06-00397

PROJECT PLANNER: David Wayne Johnson

**PROJECT DESCRIPTION:**

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

**PROJECT LOCATION:**

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

**CONDITIONS:**

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

LOG ITEM

A-10 # 41  
Page 1 of 2

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

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

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

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

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

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

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

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

**FINDINGS:**

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

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

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

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

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

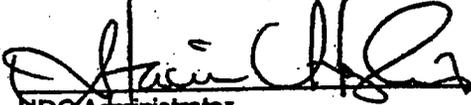
**LOG ITEM**  
# 41  
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- Set back buildings, utilities and roads as far as possible from surface waters (streams, rivers, lakes, marine waters), or at least 150 feet from the edge of the water
- All development activities should avoid unstable slopes, wetlands, and forested areas near surface waters
- Remove minimal vegetation for site development, especially large trees
- Allow trees that have fallen into surface waters to remain there
- Infiltrate stormwater from buildings and driveways onsite through drywells rather than discharging directly into surface waters or roadside ditches

Any individual, group, or agency can bring suit for a listed species "taking", even if you are in compliance with Jefferson County development codes. The risk of a lawsuit against you can be reduced by consulting with a professional fisheries habitat biologist, and following the recommendations for site development provided by the biologist. For more information, contact the National Marine Fisheries Service in Seattle at (206)528-8613, or the U.S. Fish and Wildlife Service at (503) 231-6121.

**APPEALS:**

Pursuant to RCW 36.70C, the applicant or any aggrieved party may appeal this final decision to Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision. For more information related to judicial appeals see JCC 18.40.340.

 6/20/2007  
UDC Administrator

LOG ITEM.

# 4  
Page 3 of 3

A-12



**JEFFERSON COUNTY  
DEPARTMENT OF COMMUNITY DEVELOPMENT**

621 Sheridan Street  
Port Townsend, WA 98368

ATTACHMENT  
# 2

*Al Scalf, Director*

**JEFFERSON COUNTY NOTICE OF  
TYPE III LAND USE DECISION**

June 20, 2007

The Jefferson County Hearing Examiner has submitted his written Findings, Conclusions, and DECISION regarding the following application: MLA06-00397

**Applicant:** HAROLD S ELYEA  
870 MARTIN RD  
PORT TOWNSEND WA 983689379

**Parcel:** 001291015

**Project Description:**

The proposal is to expand a legal non-conforming dog and cat boarding facility in a Rural Residential zone. This expansion requires a Conditional Use permit and a Variance to reduce the required 100 foot setback from the property line. A license from Animal Services is required as well as a sanitation plan from the Environmental Health Department. The Proposal is exempt from SEPA review per WAC 197-11-800(1)(c)(ii). Public notice and a public hearing are also required.

**Project Location:**

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

For the above project, the Hearing Examiner has:

**Approved the Application**

A copy of the Hearing Examiner's report and decision is attached for information. Appeals of this decision must be made as outlined in the attached instruction sheet.

**LOG ITEM**

# 42  
Page 1 of 2

Building Permits/ Inspections

Development Review Division

Long Range Planning

A-13

(360) 379-4450

FAX: (360) 379-4451

**INSTRUCTIONS FOR FILING APPEALS OF  
TYPE III LAND USE DECISIONS:**

**REFERENCE FILE NO. MLA06-00397  
PROJECT PLANNER: D JOHNSON**

The Hearing Examiner's decision on a Type III permit (including the decision on the underlying project and any decision on a SEPA appeal) may be appealed by the applicant or any aggrieved party to Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision..

For the purposes of this section, the date on which a land use decision is issued is three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available.

For more information related to judicial appeals see JCC 18.40.340 and RCW 36.70C. For more information on reconsideration, see JCC 18.40.310.

**18.40.310 Reconsideration**

A party of record at a public hearing may seek reconsideration of a Hearing Examiner's final decision by filing a written request for reconsideration with the hearing examiner through the Department of Community Development within five business days of the date of the final written decision per JCC 18.40.310. 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.

The request for reconsideration 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.

**JCC 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]

**LOG ITEM**  
# 42  
Page 2 of 2

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CERTIFICATION OF MAILING

I make the following certification:

I am competent to testify and make this certification based upon personal knowledge. On this 21<sup>st</sup> day of June, 2007, I deposited into the U.S. Mail with first class

postage affixed, true and correct copies of Hearing Examiner Decision  
in the above matter, addressed to: Type III Conditional Use Permit  
Notice of HE Decision

Adjacent Property Owners: See attached list.

Agencies: See attached list.

Interested Parties: See attached list.

Applicant/Representative - Posting Packet: 1 set of laminating sheets with  
Notices, Posting Instruction, Affidavit, and a copy of Notice.

Newspapers

Official Posting Places (X3)

Other: \_\_\_\_\_

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

EXECUTED this 21<sup>st</sup> day of June, 2007 at Port Townsend, Washington.

Dorinda J. Hilmer  
Declarant

LOG ITEM  
# 43  
Page 1 of 4

ZON06-00040  
\* PENINSULA DAILY NEWS  
~~JEFF OWEN~~ *Evan Cael*  
1939 E SIMS WAY  
PORT TOWNSEND, WA 98368

ZON06-00040  
TERRY WAGNER  
1726 FRANKLIN ST  
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ZON06-00040  
GEORGE RANDELL  
PO BOX 1873  
PORT TOWNSEND, WA 98368

LOG ITEM  
# 43  
Page 2 of 4  
A-16

ZON06-00040  
JOAN SPENCER  
GORDON SPENCERQ  
1640 E MARROWSTONE RD  
NORDLAND, WA 98358

ZON06-00040  
KAREN LONG  
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LOG ITEM  
# 43  
Page 3 of 9  
A-17

ZON06-00040  
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2194 VICTORIA AVE  
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SEVERDALE, WA 98383-9154

WA 98368



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727 TAYLOR STREET  
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ZON06-00040  
HAROLD S ELYEA  
870 MARTIN RD  
PORT TOWNSEND, WA 983689379

LOG ITEM  
# 43  
Page 4 of 4

Att 18

ATTACHMENT  
#3

OFFICE OF THE HEARING EXAMINER

JEFFERSON COUNTY

DECISION ON RECONSIDERATION

CASE NO.: Conditional Use Permit – Variance ZON06-0040 – ZON07-00018  
MLA06-00397

APPLICANT: Frog Mountain Pet Care  
Harold & Jane Elyea  
870 Martin Road  
Port Townsend, WA 98368

REPRESENTATIVES: David Horton  
3212 NW Byron Street, Suite 104  
Silverdale, WA 98383-9154

A Decision approving, with conditions, a Conditional Use Permit and Variance application, to allow a remodel and expansion of a legal non-conforming dog and cat boarding facility was approved on June 18, 2007. A Motion for Reconsideration was submitted on June 28, 2007 by Martin Mellish. A response was received from David Johnson, the Jefferson County Department of Community Development representative, on June 29, 2007. The following is an analysis of each of the grounds for reconsideration that were specified in the Motion.

A. *Failure to Address Compliance with Comprehensive Plan.*

A previous Decision denying the Double D Electric Cottage Industry permit was cited extensively in the Motion. This reliance is misplaced because Frog Mountain Pet Care, unlike Double D Electric, is a legal non-conforming business and is considered neither a cottage industry nor a home business. The particular Comprehensive Plan sections relating to cottage industries and home businesses are not applicable to this application. The applicable Comprehensive Plan provisions for this application did relate to promoting economic development. Obviously, there are many other provisions that the applicant has to satisfy prior to obtaining his requested permits. The specific development regulations must be satisfied. As noted by the County representative, any inconsistencies between the Comprehensive Plan and the Development Regulations are resolved in favor of the Development Regulations. Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn. 2d 861, 947 P.2d 1208 (1997).

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Page 3 of 4

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JEFFERSON COUNTY

A-19

B. *Failure to Address Compliance with Code on Kennels.*

The applicable requirements for animal kennels were discussed in Finding No. 6. The facility has been interpreted by the County representatives as an indoor facility. This is also the Examiner's interpretation. The primary facilities are indoors. This is where all of the sleeping areas are located. The play yards are located outside, but that alone does not make this an "outdoor" facility.

C. *Failure to Address Insufficiency of Requested Setback Variance.*

Findings 8 and 9 discuss the variance criteria. The applicant is not going to increase the already existing intrusion into the setback. The existing structure is 50 feet from the property line. The expansion will not intrude more than 70 feet into the setback.

D. *Misplaced Deference to DCD on "Indoor Only" Requirement*

This issue is discussed above. Locating the play yards outside does not make this facility an outdoor facility.

E. *Variance Criteria*

Remarks made by County staff relating to other properties owned by the applicant have no bearing on this particular proposal. The applicant did show that the variance criteria was satisfied on this particular site.

F. *Status of Dog Runs*

The dog runs are part of the legal nonconforming use of the property. There are no new dog runs proposed.

**DECISION:**

Motion for Reconsideration denied.

ORDERED this 18 day of July, 2007.



MARK E. HURDELBRINK  
Deputy Hearing Examiner

LOG ITEM -2-  
# 47  
Page 4 of 4

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JUL 20 2007

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CERTIFICATION OF MAILING

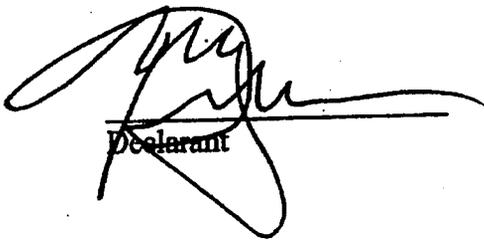
I make the following certification:

I am competent to testify and make this certification based upon personal knowledge. On this 21<sup>ST</sup> day of July, 2007, I deposited into the U.S. Mail with first class postage affixed, true and correct copies of HE notice of Motion in the above matter, addressed to: for Reconsideration Denial

- Adjacent Property Owners: See attached list.
- Agencies: See attached list.
- Interested Parties: See attached list.
- Applicant/Representative - Posting Packet: 1 set of laminating sheets with Notices, Posting Instruction, Affidavit, and a copy of Notice.
- Newspapers
- Official Posting Places (x3)
- Other: \_\_\_\_\_

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

EXECUTED this 21<sup>ST</sup> day of July, 2007 at Port Townsend, Washington.

  
Declarant

LOG ITEM  
# 48  
Page 1 of 8

JEFFERSON COUNTY NOTICE OF  
TYPE III LAND USE DECISION

July 20, 2007

The Jefferson County Hearing Examiner has submitted his written Findings,  
Conclusions, and DECISION regarding the following application: MLA06-00397

**Applicant:** HAROLD S ELYEA  
870 MARTIN RD  
PORT TOWNSEND WA 983689379

**Parcel:** 001291015

**Project Description:**

A Conditional Use Permt to expand a legal non-conforming dog and cat boarding  
facility in a Rural Residential zone.

**Project Location:**

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

For the above project, the Hearing Examiner has:

**Denied the Motion for Reconsideration**

A copy of the Hearing Examiner's report and decision is attached for information.  
Appeals of this decision must be made as outlined in the attached instruction sheet.

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Page 2 of    

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**INSTRUCTIONS FOR FILING APPEALS OF  
TYPE III LAND USE DECISIONS:**

**REFERENCE FILE NO. MLA06-00397**

**PROJECT PLANNER; D JOHNSON**

The Hearing Examiner's decision on a Type III permit (including the decision on the underlying project and any decision on a SEPA appeal) may be appealed by the applicant or any aggrieved party to Jefferson County Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision..

For the purposes of this section, the date on which a land use decision is issued is three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available.

For more information related to judicial appeals see JCC 18.40.340 and RCW 36.70C. For more information on reconsideration, see JCC 18.40.310.

**JCC 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 4.26.060), 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]

**LOG ITEM**  
# 48  
Page 3 of     

A-23

**OFFICE OF THE HEARING EXAMINER**

**JEFFERSON COUNTY**

**DECISION ON RECONSIDERATION**

**CASE NO.:** Conditional Use Permit – Variance ZON06-0040 – ZON07-00018  
MLA06-00397

**APPLICANT:** Frog Mountain Pet Care  
Harold & Jane Elyea  
870 Martin Road  
Port Townsend, WA 98368

**REPRESENTATIVES:** David Horton  
3212 NW Byron Street, Suite 104  
Silverdale, WA 98383-9154

A Decision approving, with conditions, a Conditional Use Permit and Variance application, to allow a remodel and expansion of a legal non-conforming dog and cat boarding facility was approved on June 18, 2007. A Motion for Reconsideration was submitted on June 28, 2007 by Martin Mellish. A response was received from David Johnson, the Jefferson County Department of Community Development representative, on June 29, 2007. The following is an analysis of each of the grounds for reconsideration that were specified in the Motion.

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-1-

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JEFFERSON COUNTY

LOG ITEM

# 48

Page 4 of

A-24

B. *Failure to Address Compliance with Code on Kennels.*

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Remarks made by County staff relating to other properties owned by the applicant have no bearing on this particular proposal. The applicant did show that the variance criteria was satisfied on this particular site.

F. *Status of Dog Runs*

The dog runs are part of the legal nonconforming use of the property. There are no new dog runs proposed.

**DECISION:**

Motion for Reconsideration denied.

ORDERED this 18 day of July, 2007.

  
MARK E. HURDELBRINK  
Deputy Hearing Examiner

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Page 5 of    

PERSONS DIVISION

A-25

ZON06-00040

\* PENINSULA DAILY NEWS  
~~JERRY OWEN~~ *Evan Cael*  
1939 E SIMS WAY  
PORT TOWNSEND, WA 98368

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TERRY WAGNER  
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Page 6 of     

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Page 7 of

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Page 8 of 8

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SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLALLAM

FILED  
CLALLAM COUNTY  
SEP 24 2007  
4:25 p.m. LF  
BARBARA CHRISTENSEN, Clerk

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

NO. 07-2-00791-4

MEMORANDUM OPINION ON  
MOTION TO DISMISS

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 Plaintiff's 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:

KEN WILLIAMS  
JUDGE  
Clallam County Superior Court  
223 East Fourth Street, Suite 8  
Port Angeles, WA 98362-3015

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

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9 In Subsection 40 of the Act it is stated that:

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

14 The statute describes a "land use decision" at RCW 36.709C.020(1) and indicates  
15 that a land use decision:

16 "Means a final determination by a local jurisdiction's body or  
17 officer with the highest level of authority to make the  
18 determination, including those with authority to hear appeals,  
19 on . . . [applications][enforcement of land use ordinances]"

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

24 Defendants argue that until the reconsideration was denied, the permit which was  
25 issued was not a "final" permit, the appeal period therefore did not begin to run until July  
26 18th, and the appeal is therefore timely filed under the LUPA statute.

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

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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."

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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.

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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, (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 timelines 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

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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 LUPA. The County had not filed for such a petition for a number of months. The County had argued that the BLA was void

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3 as having been issued in violation of County ordinances. The Court held that nevertheless,  
4 LUPA made the BLA final and binding even if illegal. The Court held:

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

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

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

18 LUPA is clear that an appeal must be filed within 21 days of a local jurisdictions  
19 final decision on a land use request. The issue here is simply when did the decision  
20 become final. Did it become final when the Conditional Use Permit was issued, or as  
21 Jefferson County says did it "become final" only when the request for reconsideration was  
22 denied?  
23

24 Here, LUPA is clear. It is the Jefferson County code that is not. The issue  
25 therefore becomes the interpretation of an ordinance. In Tahoma Audubon Society v. Park  
26 Junction, 128 Wn. App. 671, 116 P. 3d 1046 (2005), Division II reviewed a Superior Court  
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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

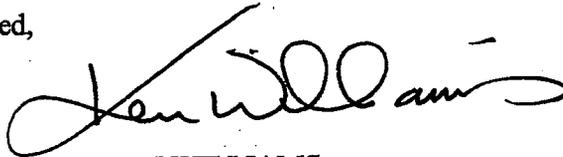
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decision "shall become final". It is this "second" finality when a reconsideration is filed that it is the triggering event for the clock to run on a LUPA appeal.

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 24<sup>th</sup> day of September, 2007.

Respectfully submitted,



KEN WILLIAMS  
JUDGE



**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:
- Certain days are excluded from the time calculation pursuant to subsection (5) of this section;
  - 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);
  - 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
  - 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:
- 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).
  - 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.
  - All time required for the preparation of an environmental impact statement (EIS) following a determination of significance (DS) pursuant to Chapter 43.21C RCW.
  - 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.
  - Any extension of time mutually agreed upon by the county and the applicant.
  - 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:
- Requires an amendment of the Jefferson County Comprehensive Plan or this Unified Development Code; or
  - 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]

## Article V. Appeals

### 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.

- 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.
- Type II Permits.**



**RCW 36.70C.010**

**Purpose.**

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

[1995 c 347 § 702.]



**RCW 36.70C.030**

**Chapter exclusive means of judicial review of land use decisions -- Exceptions.**

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2003 c 393 § 17; 1995 c 347 § 704.]

**NOTES:**

**Implementation -- Effective date -- 2003 c 393:** See RCW 43.21L.900 and 43.21L.901.

**RCW 36.70C.040**

**Commencement of review -- Land use petition -- Procedure.**

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

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1995 c 347 § 705.]

**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.]

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DIVISION II

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STATE OF WASHINGTON  
BY CM  
DEPUTY

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

FROG MOUNTAIN PET CARE,  
HAROLD ELYEA, JANE ELYEA,  
Appellants

WASHINGTON STATE COURT OF  
APPEALS DIVISION II

No. 35<sup>75</sup>783-4-II

v.

Superior Court

MARTIN MELLISH  
and JEFFERSON COUNTY,  
Respondents.

No. 07-2-00791-4

DECLARATION OF SERVICE

I, Matthew Swedlow, under penalty of perjury under the laws of the State of Washington declare as follows:

I am now and at all times herein mentioned a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party in the above entitled action, and competent to be a witness therein. On 8 October 2008 I caused the following document:

1. Respondent Martin Mellish's Response Brief  
to be delivered to:

DECLARATION OF SERVICE - 1

MARTIN MELLISH  
930 Martin Road  
Port Townsend, WA 98368  
Phone: (360) 385-0082

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Court of Appeals Division II, Clerk  
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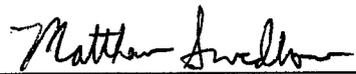
by USPS Express Mail, and to

David P. Horton  
Attorney for Elyea and Frog Mountain Pet Care  
Law Office of David P. Horton, Inc. P.S.  
3212 NW Byron Street, Suite 104  
Silverdale, WA 98383

David Alvarez,  
Deputy Prosecuting Attorney,  
Jefferson County Prosecutor's Office,  
PO Box 1220,  
Port Townsend, WA 98368

by first class U.S. mail.

Dated this 8<sup>th</sup> day of October 2008, at Port Townsend, Washington.

  
\_\_\_\_\_  
Matthew Swedlow.