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No. 84246-9

SUPREME COURT OF THE STATE OF WASHINGTON

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Martin Mellish, *Petitioner*,

v.

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

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SUPPLEMENTAL ANSWER OF RESPONDENT FROG MOUNTAIN  
PET CARE RE: HOUSE BILL 2740, CH 59, LAWS OF 2010

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ORIGINAL

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ATTACHMENT TO EMAIL

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## I. INTRODUCTION

Because Frog Mountain's development rights vested upon filing of their complete application, House Bill 2740 (Laws of 2010, Ch. 59) cannot be applied retrospectively to the land use process governing that application. Due process, Washington's vested rights doctrine, and the presumption that statutes should be applied retrospectively all command this result. Amicus and petitioner ask this Court to allow the legislature to change the rules of the game on a land use project years after the complete application was filed. Washington's vested rights doctrine prevents such a holding.

But even if we apply the amendment retrospectively, under the facts of this case, the result is the same as determined by the appellate court. Review should not be granted.

## II. HOUSE BILL 2740 IS NOT APPLICABLE TO THIS CASE.

### A. Statutory amendments are presumed to apply prospectively.

House Bill 2740 amended RCW 36.70C.020. Generally, statutes are presumed to apply prospectively.<sup>1</sup> An amendment is like any other statute

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<sup>1</sup> *State v. Humphrey*, 139 Wash.2d 53, 57, 983 P.2d 1118 (1999); *Macumber v. Shafer*, 96 Wash.2d 568, 570, 637 P.2d 645 (1981); *Dragonslayer, Inc. v. Washington State Gambling Com'n*, 139 Wash.App. 433, 448, 161 P.3d 428, 435 (2007).

and applies prospectively only.<sup>2</sup> As indicated by amicus, a statutory amendment may be applied retrospectively if the amendment is remedial.<sup>3</sup> An amendment is remedial when “it relates to practice, procedure, or remedies, and does not affect a substantive or vested right.”<sup>4</sup>

B. House Bill 2740 affects a vested right.

Frog Mountain’s permit application vested when it was filed. Vesting is a fundamental concept in Washington land use law, providing protection for property owners to ensure that subsequently enacted regulations will not impair a project. Vested rights provide certainty and fairness to property owners and guide government staff in applying the laws.<sup>5</sup>

To protect individual property rights, Washington has long recognized the doctrine of vested rights.<sup>6</sup> The doctrine is rooted in our constitution’s due process protections. By promoting a date certain

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<sup>2</sup> *State v. Humphrey*, 139 Wash. 2d at 60 (citing *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460, 832 P.2d 1303 (1992)); See also *Dragonslayer, Inc.*

<sup>3</sup> *McGee Guest Home, Inc. v. Department of Social and Health Services of State of Wash.*, 142 Wash.2d 316, 320, 12 P.3d 144 (2000).

<sup>4</sup> *State v. Humphrey*, 139 Wash.2d at 63.

<sup>5</sup> Overstreet and Kirchheim: *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 Seattle U.L.Rev. 1043, 1043-1044 (2000).

<sup>6</sup> See, e.g. *State ex rel. Ogden v. City of Bellevue*, 45 Wash.2d 492, 496, 275 P.2d 899 (1954).

vesting point, the doctrine insures “that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law.”<sup>7</sup> Any restriction limiting vested rights must satisfy constitutional due process requirements.<sup>8</sup> “Despite the expanding power over land use exerted by all levels of government, ‘[t]he basic rule in land use law is still that, absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. amends. 5,14’”<sup>9</sup>

In Washington, vested rights accrue when a developer files a “*sufficiently complete*” land use application. When this occurs, the project becomes “vested” to the laws in effect at the time the application is filed.<sup>10</sup> The project is vested regardless of whether a permit issues or not. The statutes and ordinances, though, guide the issuance of the permit, in effect at the time a complete application is filed. Here, there is no dispute – Frog Mountain filed a complete application.

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<sup>7</sup> *Valley View Indus. Park v. City of Redmond*, 107 Wash.2d 621, 637, 733 P.2d 182 (1987).

<sup>8</sup> *West Main Associates v. City of Bellevue*, 106 Wash.2d 47, 52, 720 P.2d 782 (1986).

<sup>9</sup> *West Main, supra*, 106 Wash.2d at 50, *citing*, *Norco Constr., Inc. v. King Cy.*, 97 Wash.2d 680, 684, 649 P.2d 103 (1982).

<sup>10</sup> *West Main, supra*, 106 Wash.2d at 51, *citing*, *Allenbach v. Tukwila*, 101 Wash.2d 193, 676 P.2d 473 (1984). [Emphasis Added.]. *See also*, *Victoria Tower Partnership v. City of Seattle*, 49 Wash.App. 755, 760, 745 P.2d 1328 (1987).

The policies underlying the doctrine are stated in *West Main Associates v. City of Bellevue*:

The purpose of the vesting doctrine is to allow developers to determine, or “fix,” the rules that will govern their land development. The doctrine is supported by notions of fundamental fairness. As James Madison stressed, citizens should be protected from the “fluctuating policy” of the legislature. Persons should be able to plan their conduct with reasonable certainty of the legal consequences. Society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.<sup>11</sup>

As quoted above, a determination that an application is vested is simply “to allow developers to determine, or ‘fix,’ the rules that will govern their land development.”<sup>12</sup> A finding that a permit application is vested is not tantamount to guaranteeing a developer the ability to build. A vested right merely establishes the ordinances and statutes a permit and

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<sup>11</sup> *West Main, supra*, 106 Wash.2d at 51 *citing*, Hagman, *The Vesting Issue: The Rights of Fetal Development vis a vis The Abortions of Public Whimsy*, 7 *Env't'l L.* 519, 533-34 (1977). [Internal Citations Omitted].

<sup>12</sup> *Id* at 51.

subsequent development must comply with.<sup>13</sup> The doctrine applies to conditional use permit applications,<sup>14</sup> as well as other land use permits.<sup>15</sup>

The policy considerations underlying the doctrine are highlighted by this case.<sup>16</sup> House Bill 2740 was a direct reaction to the appellate court's decision. If this Court were to apply the amendment retrospectively, the rules for Frog Mountain's land use application would have changed long after their application was filed. This would completely reverse this Court's long line of cases protecting landowners and developers from the legislature or local governmental authorities from changing land use rules to thwart an already underway project.

Accordingly, under Washington law, the statutes in effect at the time Frog Mountain's permit application are the statutes that control the development. Frog Mountain is unaware of any precedent that differentiates between substantive and procedural land use statutes or

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<sup>13</sup> *Id* at 53; *Friends of the Law v. King County*, 123 Wash.2d 518, 522, 869 P.2d1056 (1994).

<sup>14</sup> *Weyerhaeuser v. Pierce County*, 95 Wash.App. 883, 976 P.2d 1279 (1999); *Beach v. Bd. of Adjustment*, 73 Wash.2d 343, 438 P.2d 617 (1968).

<sup>15</sup> See *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wash.App. 59, 510 P.2d 1140 (1973) (grading permit applications); *Talbot v. Gray*, 11 Wash.App. 807, 525 P.2d 801 (1974) (shoreline permit applications); *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wash.App. 709, 558 P.2d 821 (1977) (septic tank permit application).

<sup>16</sup> See House Bill Report 2740. (Appendix A). But note that that document specifically states that it does not constitute a statement of legislative intent.

ordinances regarding the vested rights doctrine's application. The case cited by Amicus, *Herr v. Schwager*<sup>17</sup> does not support Mr. Mellish's position. In that case, the statute of limitation had run on an obligation to pay. The legislature then amended the statute to lengthen the limitations period. The issue was whether the defendants had a vested right in avoiding the obligation. They did not. Here, there should be no question – Frog Mountain's application vested at the time it was filed.

### **III. HOUSE BILL 2740 DOES NOT AFFECT THE RESULTS IN THIS CASE.**

Even if House Bill 2740 can apply to Frog Mountain's land use application, Mr. Mellish's reconsideration motion did not stay the time to appeal under LUPA for three reasons. First, Mellish did not timely file his motion. Second, Mellish did not give Frog Mountain notice of the motion. Finally, the Hearing Examiner did not timely consider the motion.

#### **A. These arguments were not waived.**

Amicus has argued that Frog Mountain waived certain arguments because they were not sufficiently raised below. This argument fails for two reasons. The first is that, as pointed out in Frog Mountain's response to Amicus' brief, these issues *were* raised. Second, even if they were not

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<sup>17</sup> 145 Wash. 101, 258 P. 1039 (1927).

previously raised, Frog Mountain should be entitled to raise these issues in response to a change in the law.

Frog Mountain litigated this case based on rules and procedures in effect at the time the litigation was ongoing. Based on those rules Frog Mountain believed (and the appellate court agreed) that the land use petition was time barred. Frog Mountain chose to focus on this argument because it was the clearest, strongest argument. These decisions were made at the time based on the law, as it existed.

But if the Court allows the rules to change at the end of this case, Frog Mountain should be able to raise all arguments it could have raised if it knew what the rules were going to be. It would be fundamentally unfair to bar Frog Mountain from making certain arguments when they could not have known what the eventual rules would be. As such, Frog Mountain should be entitled to raise, and rely on, the below arguments.

B. Mr. Mellish's motion was untimely.

The Jefferson County Code requires that a motion for reconsideration be filed no later than five business days of the date of the final written decision.<sup>18</sup> The date of the decision was June 20, 2007. Five

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<sup>18</sup> JCC 18.40.310.

business days from the date of the decision was June 27, 2007. Mr. Mellish filed his motion for reconsideration on June 28, 2007.

C. Mellish failed to give notice.

As noted in Frog Mountain's briefs, and the appellate court's decision,<sup>19</sup> Jefferson County's ordinance did not require the applicant be informed that a motion for reconsideration was required. And not notice was given in this case. The result was that long after the LUPA appeals deadline, the only notice Frog Mountain had was a notice that their permit was issued. This due process defect prejudiced Frog Mountain.

D. The Hearing Examiner failed to consider the motion in a timely manner.

Again, as previously briefed, under the Jefferson County Code, the Hearing Examiner had ten days to consider the motion.<sup>20</sup> (The Hearing Examiner "shall issue a decision within 10 working days of the request").<sup>21</sup> He took over twenty. When a municipal ordinance provides a definite time within which review must be taken, compliance with that time limit is

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<sup>19</sup> *Mellish v. Frog Mountain Pet Care*, 154 Wash.App. 395, 225 P.3d 439, 441 (2010).

<sup>20</sup> JCC 18.40.310.

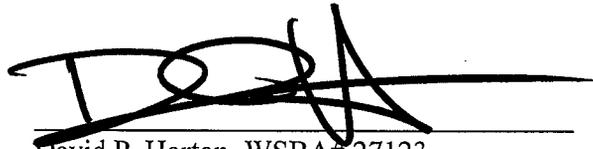
<sup>21</sup> *Id.*

essential for the court to acquire jurisdiction. A court lacking jurisdiction must enter an order of dismissal.<sup>22</sup>

#### IV. CONCLUSION

Because Frog Mountain's permit application vested under the former version of RCW 36.70C.020, that former version controls the process. The amendment contained in House Bill 2740 cannot be applied retrospectively because it pertains to a vested right. Finally, even if applicable, under Jefferson County's code, the reconsideration was not timely. Review should not be granted.

Respectfully submitted this 18th day of June, 2010.



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<sup>22</sup> *KSLW by Wells v. City of Renton*, 47 Wash.App. 587, 595, 736 P.2d 664, 669 (1986).

# HOUSE BILL REPORT

## HB 2740

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### As Passed Legislature

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

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

**Sponsors:** Representatives Seaquist and Angel.

### Brief History:

#### Committee Activity:

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

#### Floor Activity:

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

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

Passed Legislature.

### Brief Summary of Bill

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

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## HOUSE COMMITTEE ON LOCAL GOVERNMENT & HOUSING

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

**Staff:** Thamas Osborn (786-7129).

### Background:

#### The Land Use Petition Act.

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

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

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

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

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

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

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

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

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

#### Recent Court Cases Pertinent to LUPA Appeals.

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

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

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

**Summary of Bill:**

The act clarifies that, under the LUPA, when a motion for reconsideration of a local land use decision has been filed with the local decision-making authority, the date of the "land use decision" is the date of the entry of the decision on the reconsideration motion rather than the date of the original decision.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Staff Summary of Public Testimony:**

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

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

(Opposed) None.

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

(In support with concerns) Arthur West.

**Persons Signed In To Testify But Not Testifying:** None.

**CERTIFICATE OF SERVICE**

On the 18<sup>rd</sup> day of June, 2010, and in the manner indicated below, I caused a copy of the Supplemental Answer of Respondent Frog Mountain Pet Care and a copy of this Declaration of Service, to be delivered to:

Martin Mellish  
930 Martin Road  
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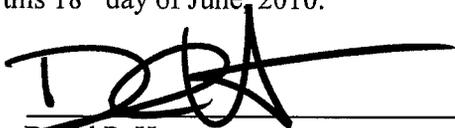
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By US Mail and Electronic Mail

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

Executed at Silverdale, Washington this 18<sup>th</sup> day of June, 2010.

  
\_\_\_\_\_  
David P. Horton

**OFFICE RECEPTIONIST, CLERK**

---

**To:** David Horton  
**Cc:** martin.mellish@yahoo.com; David Alvarez; 'Harold T. Hartinger'  
**Subject:** RE: Case No. 84246-9, Mellish v. Frog Mountain Pet Care

Rec'd 6/18/10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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**From:** David Horton [mailto:dhorton@davidhortonlaw.com]  
**Sent:** Friday, June 18, 2010 11:27 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** martin.mellish@yahoo.com; David Alvarez; 'Harold T. Hartinger'  
**Subject:** Case No. 84246-9, Mellish v. Frog Mountain Pet Care

Hon. Ronald R. Carpenter, Supreme Court Clerk:

Re: Case No. 84246-9, Mellish v. Frog Mountain Pet Care

I attach respondent Frog Mountain's Supplemental Brief and Certificate of Service.

Very truly yours,

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