

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

*DLW*

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**LOUISE LAUER and DARRELL de TEINNE,**

*Respondents,*

v.

**PIERCE COUNTY; and MIKE and SHIMA GARRISON,**

*Appellants.*

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

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APPELLANTS GARRISON'S  
SUPPLEMENTAL BRIEFING REGARDING  
*MELLISH V. FROG MOUNTAIN PET CARE, ET AL*, No. 37583-4-II (12/15/2009)

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## V. INTRODUCTION

On December 15, 2009, the Court of Appeals issued its decision in *Mellish v. Frog Mountain Pet Care, Et Al*, No. 37583-4-II (12/15/2009), wherein the Court held that a motion to reconsider a local land use decision will not toll the statutory time period for filing a LUPA Petition under RCW 36.70C.040. The *Mellish* decision is dispositive of the appeal in this case.

## VI. RELEVANT FACTS

The underlying land use decision that is the subject of Respondents' LUPA petition and this appeal was issued by the Pierce County Hearing Examiner on December 13, 2007. AR at 27-40. A motion to reconsider was filed by Respondents on December 21, 2007. AR at 14-20. Briefing on the motion to reconsider followed. AR at 7-25. On March 4, 2008, the Hearing Examiner issued a decision denying the motion to reconsider. AR at 1-6. Respondents' LUPA petition was filed on March 27, 2008. CP at 1-32.

## VII. ARGUMENT

- A. **THE *MELLISH* DECISION IS DISPOSITIVE BECAUSE RESPONDENTS' LUPA PETITION WAS FILED 105 DAYS AFTER THE FINAL DECISION AND THE SUPERIOR COURT THEREFORE LACKED JURISDICTION.**

RCW 36.70C.040(2) clearly states that “[a] land use petition is

*barred*, and the court *may not grant review*, unless the petition is timely filed with the court...” [Emphasis Added]. The Courts have found that the “time for filing” requirement is jurisdictional.<sup>1</sup> As noted by the Court in *Nickum v. Bainbridge Island*, this is consistent with LUPA's stated purpose of providing “consistent, predictable, and timely judicial review.”<sup>2</sup> As further noted in *Habitat Watch v. Skagit County*:

LUPA's stated purpose is “timely judicial review.” It establishes a uniform 21-day deadline for appealing the final decisions of local land use authorities and is intended to prevent parties from delaying judicial review at the conclusion of the local administrative process.... [O]nce a party has had a chance to challenge a land use decision and exhaust all appropriate administrative remedies, a land use decision *becomes unreviewable by the courts* if not appealed to superior court within LUPA's specified timeline.<sup>3</sup>

Thus, the 21 day LUPA deadline is “absolute.”<sup>4</sup>

1. The Superior Court’s Decision should be Reversed because Respondents’ LUPA Petition was Untimely.

The Court’s recent decision in *Mellish* is dispositive of the issues in this case. The Court in *Mellish* held that a motion to reconsider does not toll the statutory time period required for filing a LUPA Petition under

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<sup>1</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶33, citing RCW 36.70C.010.

<sup>2</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶33.

<sup>3</sup> *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005). [Emphasis Added] [Citations Omitted].

<sup>4</sup> See *Habitat Watch*, 155 Wn.2d at 406-07; *Chelan County v. Nykreim*, 146 Wn.2d 904, 932-33, 53 P.3d 1 (2002); *Spice v. Pierce County*, 149 Wn.App. 461, 467, 204 P.3d 254 (2009); *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn.App. 31, 37-38, 184 P.3d

RCW 36.70C.040.<sup>5</sup> The record in this case clearly establishes the facts necessary for the Court to find that Respondents' LUPA petition was untimely.<sup>6</sup> In this case, the LUPA petition was filed 105 days after the decision of the Hearing Examiner, well beyond the 21-day period mandated by RCW 36.70C.040. AR at 27-40 and CP at 1-32. As such, the Superior Court did not have jurisdiction to review the Hearing Examiner's decision, and the Superior Court's decision must therefore be reversed.

2. There is No Waiver under RCW 36.70C.080.

In the Response to Appellant's Motion for Supplemental Briefing, Respondents argued that the Appellants should not be permitted to raise this issue because it was "waived" under RCW 36.70C.080.

*a. Jurisdictional Issues Can Be Raised at Any Time.*

Initially, when considering whether a waiver has occurred, it is important to keep in mind the general rule that jurisdictional issues can be raised at any time. This is because, when "a superior court acts in an appellate capacity...the superior court has only the jurisdiction as

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1278 (2008), *review denied*, 165 Wn.2d 1013, 199 P.3d 410 (2009).

<sup>5</sup> *Mellish v. Frog Mountain Pet Care, Et Al*, No. 37583-4-II (12/15/2009), at ¶17.

<sup>6</sup> Where a judgment is correct, it will be sustained on any appropriate grounds within the established facts. *Ertman v. Olympia*, 95 Wn.2d 105, 621 P.2d 724 (1980); and *Mid-Century Ins. Co. v. Brown*, 33 Wn.App. 291, 654 P.2d 716 (1982). If additional facts were required, the proper remedy is to remand the case to the trial court for more fact-finding. *State v. Adamski*, 111 Wn.2d 574, 585-586, 761 P.2d 621, 627 (1988), *citing Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976); *In re*

conferred by law. Thus, before a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal.”<sup>7</sup> It is well settled that the 21-day LUPA filing requirement is *jurisdictional*, and as such the issue may be properly raised at any time.<sup>8</sup> Therefore, but for the provisions of RCW 36.70C.080, it cannot be disputed that Appellants can raise this issue at this stage of the Appeal.

RCW 36.70C.080(3) sets-forth what is “waived” if not raised at the initial hearing. This language, however, is in conflict with the clear language of RCW 36.70C.040(2) which, as noted above, states that “[a] land use petition is barred, and the court may not grant review” if the petition is untimely. This provision makes clear that the Superior Court *never had jurisdiction* to begin with; and, as such, the decision reversing the Hearing Examiner was erroneous as a matter of law.

The LUPA time-of-filing requirements control access to the

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*Cross*, 99 Wn.2d 373, 378 n. 3, 662 P.2d 828 (1983).

<sup>7</sup> *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344, 345 (2005), citing *Crosby v. County of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32 (1999).

<sup>8</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶33; *Habitat Watch*, 155 Wn.2d at 407; *Spice*, 149 Wn.App. at 466, citing *Chaney v. Fetterly*, 100 Wn.App. 140, 145, 995 P.2d 1284, review denied, 142 Wn.2d 1001, 11 P.3d 824 (2000); *Asche v. Bloomquist*, 132 Wn.App. 784, 795, 133 P.3d 475 (2006), review denied, 159 Wn.2d 1005, 153 P.3d 195 (2007); *Harbor Lands LP v. City of Blaine*, 146 Wn.App. 589, 592, 191 P.3d 1282, 1284 (2008), citing *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *Deaconess Hosp. v. Washington State Highway Comm 'n*, 66 Wn.2d 378, 409, 403 P.2d

superior court's substantive review of any LUPA decision and the failure to timely file an appeal prevents court access for such review. The Court should reverse the Superior Court and affirm the decision of the Hearing Examiner.

***b. Appellants Raised Jurisdictional and Procedural Issues at the Initial Hearing.***

Appellants exercised their rights under RCW 36.70C.080 alleging several defenses at the initial hearing. Appellants acknowledge that they did not raise the specific issue addressed in *Mellish*, but they did raise several arguments regarding the failure of the Superior Court to obtain jurisdiction. CP at 35-48, and 122-133. Importantly, Appellants specifically argued that the Court lacked jurisdiction because Respondents failed to exhaust their administrative remedies and the appeal was untimely. CP at 46-48, 126, and 130-132.

Appellants preserved their defenses as required under RCW 36.70C.080. At every avenue, the Appellants disputed the legality, sufficiency, and timeliness of Respondents' LUPA petition. The *Mellish* decision simply offers an alternative basis for reversing the Superior Court's otherwise clearly erroneous decision. This Court may reverse the Superior Court and affirm the Hearing Examiner's decision on an

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54 (1965); and RAP 2.5.

alternative basis if the record is “sufficiently developed to consider the ground fairly.”<sup>9</sup> As discussed above, all facts necessary to determine whether the LUPA appeal was untimely under *Mellish* are sufficiently developed within the record. There can be no dispute that Respondents’ did not file their LUPA petition until 105 days after the final decision was issued by the Hearing Examiner. The Court should reverse the Superior Court decision and reinstate the Hearing Examiner’s decision.

***c. There Was No Intentional Waiver Because The Mellish Decision Represents a Change in the Law.***

Waiver is the “voluntary and intentional relinquishment of a *known* right.”<sup>10</sup> Courts generally recognize an exception to waiver where a “new issue arises while the appeal is pending because of a change in the law.”<sup>11</sup>

As stated by this Court recently:

A party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided, if the decision could not have reasonably been anticipated. A contrary rule would induce parties to drown the trial judge with reservations.

... Where the law has changed between the time of trial and appeal, the Court rejected the argument that the claim of error needed to be preserved with an objection at trial,

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<sup>9</sup> *State v. Sondergaard*, 86 Wn.App. 656, 658, 938 P.2d 351 (1997), *review denied*, 133 Wn.2d 1030, 950 P.2d 477 (1998), and *Bernal*, 87 Wn.2d at 414.

<sup>10</sup> *Harvey v. University of Washington*, 118 Wn.App. 315, 318, 76 P.3d 276 (2003). [Emphasis Added].

<sup>11</sup> *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 441-442, 191 P.3d 879, 886 (2008), *quoting*, *United States v. Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir.2005) (*quoting* *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir.1994)).

concluding that “such a rule would result in counsel's inevitably making a long and initially useless laundry list of objections to rulings that were plainly supported by existing precedent.”<sup>12</sup>

It cannot be disputed that the *Mellish* decision constitutes a change in the law. Prior to the *Mellish* decision, the precedent was to the contrary – a point the *Mellish* Court acknowledges in the closing paragraphs of the decision:

We are aware that this result may seem inequitable. In *nearly every legal context*, a timely reconsideration motion tolls the statute for appealing a matter. *No case law stated the contrary in the LUPA context until we addressed the question today and, until we filed this opinion*, reasonable practitioners and pro se litigants may have concluded that filing a reconsideration motion gave them more time to file a LUPA appeal.<sup>13</sup>

Cases reviewing similar appeal provisions further establish the significance in the change in the law. In *Hall v. Seattle School District No. 1*, the Court found that a motion to reconsider an administrative decision operated to toll the appeal period set forth in RCW 28A.405.320.<sup>14</sup> The Court further found that there is no “common law”

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<sup>12</sup> *State v. Harris*, No. 36565-1-II (01/07/2010), at ¶12, quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (holding that intervening change in the law made error plain on appeal). [Citations Omitted].

<sup>13</sup> *Mellish v. Frog Mountain Pet Care, Et Al*, No. 37583-4-II (12/15/2009), at ¶12. [Emphasis Added].

<sup>14</sup> 66 Wn.App. 308, 315-316, 831 P.2d 1128 (1992), citing *Simonson v. Veit* 37 Wn.App. 761, 765, 683 P.2d 611, 613 (1984) (Holding that the reasoning behind the rule that a motion to reconsider tolls the time for filing an appeal is that a timely petition for rehearing “suspends the finality of the judgment pending that court's further determination on whether the judgment should be modified. A similar analysis was used

rule that a motion to reconsider does not toll the time to file an appeal.<sup>15</sup> Similarly, in *Skinner v. Civil Service Commission of the City of Medina*, the Court found that when, as in this case,<sup>16</sup> the administrative rules allow a party to seek reconsideration “the time for appeal runs from the entry date of the ruling on reconsideration and not that of the initial decision.”<sup>17</sup>

It also cannot be disputed that Appellants never voluntarily or intentionally relinquished their right to object to the timeliness of Respondents’ LUPA petition. Appellants have strenuously opposed this LUPA petition at every stage. The record is replete with examples of Appellants asserting every objection and defense that was cognizable under the law at that time. Appellants filed a motion to strike, a motion to dismiss for lack of standing, extensive briefing objecting to Respondents’ petition on the merits, and a motion to reconsider. CP at 35-48, 122-133, 165-193, and 389-464.

The Court should find that Respondents’ LUPA petition was untimely, and affirm the Hearing Examiner’s decision.

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in *Sitko v. Rowe*, 195 Wn. 81, 79 P.2d 688 (1938), where the court held that the time for a notice of appeal does not begin to run until the entry of an order denying the motion for a new trial. It would serve no purpose to require appellants to file a notice of appeal while a motion for reconsideration or new trial was pending in the court below. The notice of appeal was filed within 30 days of the denial of the motion for reconsideration and properly brings the judgment before us for review.”).

<sup>15</sup> 66 Wn.App. at 316.

<sup>16</sup> See PCC 1.22.130 (An aggrieved party or person may file a motion to reconsider within seven working days of the date of the Examiner's written decision.).

<sup>17</sup> 146 Wn.App. 171, 175-176, 188 P.3d 550 (2008).

**B.     EQUITABLE TOLLING DOES NOT BAR APPLICATION OF THE *MELLISH* DECISION IN THIS CASE.**

Respondents briefly assert in their response to Appellants' Motion for Supplemental Briefing that they "reserve the right" to "request to apply the principles of equitable tolling." *Response to Motion for Supplemental Briefing*, at 9. Because a Reply brief is not permitted pursuant to the Commissioner's ruling, Appellants will attempt to address this potential argument without the benefit of knowing the basis for Respondents' position.

The doctrine of equitable tolling permits a court to allow an action to proceed even though a statutory time period has elapsed "but it must use the doctrine sparingly."<sup>18</sup> The party asserting equitable tolling bears the burden of proof.<sup>19</sup> To establish equitable tolling, Respondents must demonstrate "bad faith, deception, or false assurances" and that they exercised "diligence."<sup>20</sup> At this stage, Appellants are without the benefit of knowing what evidence of "bad faith, deception, or false assurances" might possibly be asserted by Respondents. There is simply no evidence of "bad faith, deception, or false assurances" in the record nor are

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<sup>18</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶24, citing, *State v. Duvall*, 86 Wn.App. 871, 875, 940 P.2d 671 (1997); *Finkelstein v. Sec. Props., Inc.*, 76 Wn.App. 733, 739-40, 888 P.2d 161 (1995).

<sup>19</sup> See *City of Bellevue v. Benyaminov*, 144 Wn.App. 755, 767, 183 P.3d 1127 (2008), review denied, 165 Wn.2d 1020, 203 P.3d 378 (2009).

<sup>20</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶24, citing *Millay*

Appellants aware of any that might be alleged. RP at 1-43, and CP at 1-338.

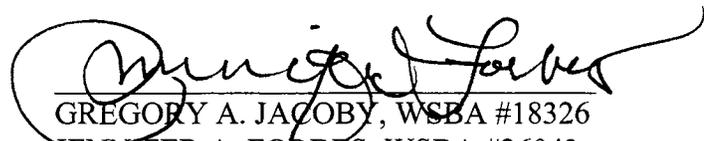
Ultimately, however, it does not matter if Respondents were able to show “bad faith, deception, or false assurances” as the doctrine of equitable tolling only applies to “statutes of limitations” and *does not apply* to “jurisdictional time limits.”<sup>21</sup> In accordance with this rule, the Court in *Nickum v. Bainbridge Island* specifically found that equitable tolling would not apply to the “LUPA time-of-filing requirements” as they are jurisdictional.<sup>22</sup>

### VIII. CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner.

Dated this 1<sup>st</sup> day of February 2010.

Respectfully submitted,

  
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v. *Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

<sup>21</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶20.

<sup>22</sup> *Nickum v. City of Bainbridge Island*, No. 38217-2-II (11/24/2009), at ¶34.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2010, a true and correct copy of the foregoing document was served upon counsel of record, via the methods noted below, properly addressed as follows:

**Counsel for Respondents Lauer and DeTienne:**

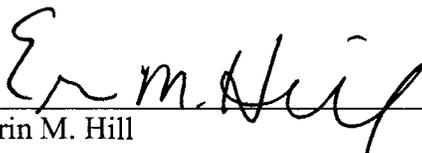
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1<sup>st</sup> day of February 2010.

  
\_\_\_\_\_  
Erin M. Hill