

FILED
Court of Appeals
Division III
State of Washington
2/15/2019 4:33 PM
Court of Appeals No. 36334-1-III

No. 97910-3

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA
NATION,

Respondent,

v.

YAKIMA COUNTY, GRANITE NORTHWEST, INC., FRANK
ROWLEY, and THE ROWLEY FAMILY TRUST

Petitioners.

BRIEF OF PETITIONERS

Markham A. Quehrn,
WSBA No. 12795
MQuehrn@perkinscoie.com
Julie Wilson-McNerney,
WSBA No. 46585
JWilsonMcNerney@perkinscoie.com

PERKINS COIE LLP
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425.635.1400
Facsimile: 425.635.2400

Paul McIlrath, WSBA No. 16376
Deputy Prosecuting Attorney
Paul.McIlrath@co.yakima.wa.us

Yakima County Corporate
Counsel Division
128 N. 2nd Street, Room 211
Yakima, WA 98901-2639
Telephone: 509.574.1209
Facsimile: 509.274.1201

Attorneys for Petitioners Yakima County, Granite Northwest, Inc.,
Frank Rowley, and the Rowley Family Trust

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
IV. STATEMENT OF THE CASE.....	5
A. The Final MDNS and Conditional Use Permit Decisions.....	5
B. Procedural Background.....	6
C. The Trial Court’s Ruling.....	10
D. Petitioners’ Appeal.....	12
V. ARGUMENT	13
A. Standard of Review.....	13
B. The statute of limitations applicable to the 2018 LUPA Petition began to run when the Board, while sitting in a quasi-judicial capacity, passed a resolution affirming the Hearing Examiner’s decision.	15
C. The trial court erred in deciding that the Board did not sit in a quasi-judicial capacity when it affirmed the Hearing Examiner’s decision.	18
D. The trial court failed to apply the four-part <i>Raynes</i> test for determining whether an action was quasi- judicial.....	22
E. The trial court erred in finding that the Board did not conduct an adjudicatory hearing and that the Board’s review and deliberations fell short of a quasi-judicial action.	27
F. The Board’s resolution was not a written decision pursuant to RCW 36.70C.040(4)(a).....	29
VI. CONCLUSION.....	32
Appendix A. Excerpts from Pertinent Statutes and Yakima County Code.....	A-1
Appendix B. Board of Yakima County Commissioners' Resolution....	B-1
Appendix C. Transmittal Letter	C-1

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006), <i>review denied</i> , 159 Wn.2d 1005, 153 P.3d 195 (2007).....	16
<i>Brouillet v. Cowles Pub. Co.</i> , 114 Wn.2d 788, 791 P.2d 526 (1990).....	13
<i>City of Medina v. T-Mobile USA, Inc.</i> , 123 Wn. App. 19, 95 P.3d 377 (2004).....	23
<i>Cnty. Treasures v. San Juan Cnty.</i> , 192 Wn.2d 47, 427 P.3d 647 (2018).....	29, 32
<i>Crosby v. Cnty. of Spokane</i> , 137 Wn.2d 296, 971 P.2d 32 (1999).....	13
<i>Durland v. San Juan Cnty.</i> , 182 Wn.2d 55, 340 P.3d 191 (2014).....	17
<i>In re Request of Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986).....	13, 14
<i>Keep Watson Cutoff Rural v. Kittitas Cnty.</i> , 145 Wn. App. 31, 184 P.3d 1278 (Div. III, 2008).....	13, 16
<i>King’s Way Foursquare Church v. Clallam Cnty.</i> , 128 Wn. App. 687, 116 P.3d 1060 (2005), <i>as amended</i> (Aug. 23, 2005).....	31
<i>Knight v. City of Yelm</i> , 173 Wn.2d 325, 267 P.3d 973 (2011).....	13, 16
<i>Lanzce G. Douglass, Inc. v. City of Spokane Valley</i> , 154 Wn. App. 408, 225 P.3d 448 (2010).....	23
<i>Mercer Island Citizens for Fair Process v. Tent City 4</i> , 156 Wn. App. 393, 232 P.3d 1163 (2010).....	17

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>Northshore Inv'rs, LLC v. City of Tacoma</i> , 174 Wn. App. 678, 301 P.3d 1049 (2013)	17, 30
<i>Raynes v. City of Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992)	passim
<i>Rettkowski v. Dep't of Ecology</i> , 122 Wn.2d 219, 858 P.2d 232 (1993)	26
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002)	21
<i>Samuel's Furniture, Inc. v. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002), <i>amended on recons.</i> , 63 P.3d 764 (2003)	15
<i>San Juan Fidalgo Holding Co. v. Skagit Cnty.</i> , 87 Wn. App. 703, 943 P.2d 341 (1997), <i>as amended (Sept. 30, 1997), as amended (Nov. 5, 1997)</i>	16
<i>Smith v. Skagit Cnty.</i> , 75 Wn.2d 715, 453 P.2d 832 (1969)	14, 26
<i>State v. Thetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	13
 STATUTES	
RCW 35A.63.170(2)	23
RCW 36.70.970(2)	23
RCW 36.70B.020	25
RCW 36.70B.020(1)	19, 20
RCW 36.70C	23, 29

TABLE OF AUTHORITIES
(continued)

	Page(s)
RCW 36.70C.005.....	passim
RCW 36.70C.020(2).....	17
RCW 36.70C.020(2)(a).....	15
RCW 36.70C.040.....	13
RCW 36.70C.040(2).....	15, 16
RCW 36.70C.040(3).....	15
RCW 36.70C.040(4)(a).....	passim
RCW 36.70C.040(4)(b).....	passim
RCW 42.36.....	21, 26
RCW 42.36.010.....	22, 25
RCW 42.36.060.....	25
RCW 43.21C.....	5, 6, 10
RCW 43.21C.075.....	10
Yakima County Code 16B.02.050.....	23
Yakima County Code 16B.09.....	8, 18
Yakima County Code 16B.09.050.....	8, 9
Yakima County Code 16B.09.050(3)(b).....	18, 19, 25
Yakima County Code 16B.09.050(5).....	17, 29
Yakima County Code 16B.09.055(3).....	8, 19, 27

TABLE OF AUTHORITIES
(continued)

	Page(s)
RULES	
RAP 17.5(a), (b).....	21

I. INTRODUCTION

The trial court entered an order allowing a time-barred Land Use Petition Act, RCW 36.70C.005 *et seq.* (“LUPA”), petition to proceed to a hearing. LUPA requires that petitions be filed and served within 21 days of the issuance of the land use decision being appealed. Compliance with this requirement is essential to vest a trial court with appellate jurisdiction to hear and decide a LUPA petition. Here, the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) failed to invoke the trial court’s appellate jurisdiction by filing their LUPA petition one day late. LUPA’s jurisdictional limitation is strict. LUPA petitions have been dismissed in cases where a petition has been served as little as 15 minutes past the 21-day deadline. Yet, the trial court in this case refused to dismiss the untimely LUPA petition because it erroneously concluded that the Board of Yakima County Commissioners (“Board”) was not acting in a quasi-judicial capacity when it conducted a closed record appeal of the Hearing Examiner’s open-record hearing decision. The trial court so ruled despite unrefuted evidence that the Board fully reviewed and considered the record before the Hearing Examiner and rendered its decision to affirm the Hearing Examiner’s decision at an open public meeting. In so doing, the trial court inferred that the Board’s review was perfunctory, despite evidence to the contrary.

The trial court compounded the error by concluding that a transmittal letter authored by Yakima County (“County”) Planning Department staff, forwarding a copy of the Board’s decision (Resolution 131-2018 or the “Resolution”) to the respondents a few days later, in and of itself constituted a land use decision that triggered the LUPA statute of limitations period. Characterizing this transmittal letter as the “written decision,” the trial court erroneously applied RCW 36.70C.040(4)(a) as a basis to conclude that the Yakama Nation’s appeal was timely filed.

In misapplying the law, the trial court disregarded the unambiguous and controlling language of the statute and failed to conduct the analysis required by *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), to determine if the Board acted in a quasi-judicial capacity. On its face, the Resolution states that the record and transcripts under appellate review were before the Board, and based upon that review, the Board affirmed the decision of the Hearing Examiner. On this record, RCW 36.70C.040(4)(b) is dispositive, and the trial court erred in disregarding this statute. This Court should reverse that order and dismiss the Yakama Nation’s untimely appeal with prejudice.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered an Order Denying Petitioners' Motion to Dismiss for Lack of Jurisdiction that contradicts RCW 36.70C.040(4)(b). *See* CP 264-266.
2. The trial court erred in deciding that the Board of Yakima County Commissioners did not sit in a quasi-judicial capacity when it made its land use decision by written resolution at a closed-record quasi-judicial appeal. *See* VRP 48:22-25.
3. The trial court erred in failing to apply the four-part test in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), to determine, based upon the facts before the court, whether the Board acted in a quasi-judicial capacity. *See* VRP 49:21-25, 50:1-4.
4. The trial court erred in finding that the Board's closed-record appeal did not constitute an adjudicatory hearing and that the review and deliberations undertaken by the Board before it made its decision and entered its resolution confirming its decision fell short of what was required to be considered a quasi-judicial action. VRP 48:2-25.
5. The trial court erred in applying RCW 36.70C.040(4)(a) as the applicable LUPA statute of limitations when the trial court concluded that the County Planning Department staff's transmittal letter forwarding a copy of Resolution 131-2018 constituted the land use decision that

commenced the LUPA statute of limitations period *See* VRP 49:1-25, 50:1-4.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Petitioners' Motion to Dismiss, when the provisions of RCW 36.70C.040(4)(b) establish conclusively that the LUPA petition was barred by the statute of limitations? (Assignment of Error 1.)

2. Whether the trial court erred in deciding that the Board of Yakima County Commissioners did not sit in a quasi-judicial capacity when it made its land use decision? (Assignment of Error 2.)

3. Whether a trial court can decide the nature of a legislative body's action without applying the four-part test in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992)? (Assignments of Error 1 and 3.)

4. Whether the trial court erred by finding that the Board did not conduct an adjudicatory hearing and by inferring, contrary to unrefuted evidence, that the Board's review of the Yakama Nation's appeal was perfunctory, and thus insufficient to qualify as a quasi-judicial action? (Assignment of Error 4.)

5. Whether a transmittal letter, written by the Yakima County Planning Department, is the "written decision" of the Board for purposes

of applying LUPA's 21-day statute of limitations? (Assignments of Error 1 and 5.)

6. Whether a trial court may apply the LUPA statute of limitations for written land use decisions in RCW 36.70C.040(4)(a) to a resolution adopted by a legislative body sitting in a quasi-judicial capacity? (Assignments of Error 1, 2, and 5.)

IV. STATEMENT OF THE CASE

A. The Final MDNS and Conditional Use Permit Decisions

This dispute involves the County's issuance of the April 7, 2017, Final Mitigated Determination of Non-Significance ("MDNS") under the State Environmental Policy Act, Chapter 43.21C RCW ("SEPA"), and a Type 2 Conditional Use Permit ("CUP") allowing the expanded use of Granite's existing quarry east of Selah, Washington, on the south side of Interstate 82. CP 66-68, 73, 90.

The County's CUP decision explained the appeals process for the CUP and Final MDNS, advised interested parties that the Yakima County Code ("YCC") did not authorize an administrative appeal of a SEPA threshold determination for a Type 2 permit application, and stated that the "threshold determination [the Final MDNS] can be appealed to Yakima County Superior Court within 21 days." CP 91.

B. Procedural Background

On April 21, 2017, the Yakama Nation filed an administrative appeal of the CUP with the County Planning Division to be heard by the Hearing Examiner. CP 29. A week later, the Yakama Nation filed a LUPA Petition in Yakima County Superior Court (hereinafter, the “2017 LUPA Petition”) to preserve their SEPA claims pending the Yakama Nation’s administrative appeal of the CUP. CP 272-300. The superior court stayed the 2017 LUPA Petition to allow the Yakama Nation to exhaust their administrative remedies with respect to the CUP. CP 183-85.

After a six-month-long open-record proceeding that included two rounds of prehearing motions, written discovery, depositions, and a hearing on the merits, the Hearing Examiner affirmed the County’s CUP Decision, finding for Petitioners in this case, on all counts, subject to further administrative review by the Board. CP 28-63.

On February 13, 2018, the Yakama Nation appealed the Hearing Examiner’s decision to the Board in a 19-page legal brief (“Appeal Statement”) that addressed the Yakama Nation’s standing to appeal, the Board’s scope of review, and stated the legal bases for the errors the Yakama Nation alleged the Hearing Examiner committed in rendering his decision. CP 227-245. The Yakama Nation also provided Proposed

Amended Findings of Fact and Conclusions of Law for the Board to adopt should the Board decide to reverse the Hearing Examiner's decision. CP 246-249.

After the Yakama Nation filed its Appeal Statement, the County Planning Division transmitted the record before the Hearing Examiner and the transcript of the open-record hearing to the Board for review. CP 25, 256. The County Planning Division transmitted the record to the Board several weeks prior to the April 10, 2018 closed-record public meeting. CP 256. The Board subsequently reviewed the record prior to the closed-record quasi-judicial public meeting, and thereafter notified the clerk that it was prepared to schedule a closed-record public meeting. CP 256. That this occurred is clear in the record below:

A few weeks ago Planning staff provided the Clerk of the Board with a copy of the appeal record and Hearing Examiner decision for the Board's review per YCC 16B.09.055(3). . . . The Clerk notified us that the Board has reviewed the materials and would like us to schedule the public meeting.

Id. The purpose of the public meeting was, pursuant to YCC 16B.09.050, to render its decision or, at its election, the Board could request further

briefing and hear oral argument at a public hearing.¹ App. A at 5-6.

At a public meeting on April 10, 2018, the Board elected to announce its decision, based upon its prior review of the record, to unanimously uphold and affirm the Hearing Examiner's decision. CP 25-26. This quasi-judicial action was concluded and the Board's decision reduced to writing in the Resolution, which was signed and dated April 10, 2018. *Id.* The Resolution states, in relevant part:

WHEREAS, the record of the open record appeal hearing and transcripts were provided to the Board of County Commissioners (BOCC) for review in accordance with Yakima County Code 16B.09.055; and

WHEREAS, at a public meeting with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner's decision in accordance with Yakima County Code 16B.09.055(3); and

NOW, THEREFORE, the Decision of the Hearing Examiner in APL2017-00003 is affirmed. The appeal of the Yakama Nation (under APL2018-0000 1) is denied.

¹ Title 16B.09 of the Yakima County Code was amended during the pendency of the administrative appeal in this case by Ordinance No. 7-2017, which can be found on the County's website at:

<https://yakimacounty.us/DocumentCenter/View/14775/7-2017>. Ordinance No. 7-2017 includes as an appendix a marked-up version of the prior code provisions. A copy of the relevant portions of the code prior to the revision has been provided as Appendix A. This brief cites to the former version of the code.

Id. On April 10, 2018, the Resolution became a final administrative action, ripe for judicial review. *See id.*

Three days later, on April 13, 2018, Noelle Madera, Senior Project Planner in the County's Planning Division, sent a transmittal letter to Yakama Nation's counsel enclosing the Resolution. CP 24. This letter refers to the decision made by the Board on April 10 in the *past tense*, and does not purport to be the decision of the Board:

On April 10, 2018, the Board of County Commissioner's (BOCC) ***held*** a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner's decision or hold a closed record hearing. ***The BOCC unanimously decided*** to affirm the Hearing Examiner's decision and ***signed Resolution 131-2018, which is attached for your records.*** YCC 16B.09.050(1)(a) requires written notification of this decision. At this point, all administrative appeals have been exhausted. Please feel free to contact me if you have any questions at 509-574-2300.

Id. (emphasis added).

On May 2, 2018, 22 days after the passage of the Resolution, the Yakama Nation filed their 2018 LUPA Petition in Yakima County Superior Court, challenging the Resolution. CP 1-20. That same day, the Yakama Nation also served a copy of the 2018 LUPA Petition on the

County Auditor, Granite, Frank Rowley, and the Rowley Family Trust.
CP 93-94.

C. The Trial Court's Ruling

On August 3, 2018, Granite, Frank Rowley, and the Rowley Family Trust filed a Motion to Dismiss for Lack of Jurisdiction the Yakama Nation's 2018 LUPA Petition on the grounds that the 21-day statute of limitations for filing the 2018 LUPA Petition established by RCW 36.70C.040(4)(b) had run when the Yakama Nation filed the 2018 LUPA Petition. CP 95-110. The Motion to Dismiss was accompanied by a declaration. *See* CP 111-209. Yakima County joined in the Appellant's motion. VRP 20:22-25, 21:1.

Granite and Frank Rowley concurrently filed a Motion to Dismiss for Lack of Jurisdiction the Yakama Nation's 2017 LUPA Petition on the grounds that dismissal of the 2018 LUPA Petition would result in the 2017 LUPA Petition being a standalone SEPA appeal in violation of RCW 43.21C.075. VRP 16:5-25, 17:1-25, 18:1-25, 19:1-7.

The Yakama Nation responded, arguing in a motion in opposition that the 21-day statute of limitations began to run on the date of the Yakima County Planning Division's transmittal letter. CP 210, 213-214. The Yakama Nation argued that this letter was the "written decision" that triggered the 21-day appeal period, and that the Board did not act in a

quasi-judicial capacity when it reviewed and affirmed the Hearing Examiner's decision. CP 210-211, 215-217. The Yakama Nation's motion in opposition was supported by a declaration. CP 225-263.

After hearing arguments and reviewing the documentary evidence, the trial court entered an Order denying Petitioners' motions. In denying the motions, the trial court erroneously disregarded the unambiguous and controlling language of RCW 36.70C.040(4)(b) and concluded that the 2018 LUPA Petition was timely filed pursuant to RCW 36.70C.040(4)(a). CP 264-265. The trial court overlooked unrefuted evidence that the Board fully reviewed and considered the record before the Hearing Examiner before it announced its decision at an open public meeting. The trial court determined that, in deciding not to hold another public hearing, that the review and deliberations undertaken by the Board before it made its decision fell short of what was required to be considered a quasi-judicial action. VRP 47:11-25, 48:1-25. The Court reached this decision without applying the four-part test enunciated in *Raynes*, 118 Wn.2d at 244-45, to determine whether the Board's action was quasi-judicial in nature. Contrary to the law and the facts before the court, the trial court erroneously ruled that the Board did not act in a quasi-judicial capacity, VRP 48:22-25, 49:21-25, 50:1-4, and ruled that RCW 36.70C.040(4)(b) did not apply. VRP 48:22-25.

Reaching for jurisdiction where none existed, the trial court erroneously concluded that the statute of limitations began to run on the date the County Planning Division sent a letter transmitting the Board's "written decision" to the Yakama Nation's counsel. VRP 49:1-20. Relying on the transmittal letter rather than the Board's Resolution, the trial court erroneously ruled that the Yakama Nation's 2018 LUPA Petition had been timely filed on May 2, 2018. VRP 49:1-20, 50:1-4.

D. Petitioners' Appeal

On September 14, 2018, Petitioners filed two Notices of Discretionary Review with the trial court, indicating their intent to request interlocutory review of the trial court's orders denying Petitioners' Motion to Dismiss both the 2017 and 2018 LUPA petitions for lack of jurisdiction. On September 28, 2018, Petitioners filed their Motions for Discretionary Review. Commissioner Wasson heard oral arguments on Petitioners' Motions on November 14, 2018. On December 21, 2018, Commissioner Wasson granted Petitioners' Motion for Discretionary Review of the trial court's order in the 2018 LUPA Petition but denied Petitioners' Motion for Discretionary Review of the trial court's order in the 2017 LUPA Petition.²

² The 2017 LUPA Petition is stayed, by stipulation of the parties, pending this Court's disposition of this appeal.

V. ARGUMENT

A. Standard of Review

“The issue [of] whether a court has jurisdiction is a question of law subject to de novo review.” *Crosby v. Cnty. of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999) (citing *State v. Squally*, 132 Wn.2d 333, 937 P.2d 1069 (1997)); *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). LUPA’s timely filing and service requirements are jurisdictional. RCW 36.70C.040; *Knight*, 173 Wn.2d at 339; *Keep Watson Cutoff Rural v. Kittitas Cnty.*, 145 Wn. App. 31, 38, 184 P.3d 1278 (Div. III, 2008).

Where a trial court decides a case on the basis of affidavits, the court of appeals reviews the trial court’s decision and findings of fact de novo. *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990). The court of appeals has more freedom to “review factual findings based *solely* on documentary evidence, as the trial court was in no better position than the appellate court to make observations of demeanor” of non-existent witnesses. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987) (argument and record before trial court consisted of affidavits and memoranda of law). The court of appeals is “not bound by trial court’s findings of fact” when the “record of the proceeding below consists entirely of written or graphic materials and contains no trial court assessment of witnesses’ credibility or competency.” *In re Request of*

Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986); *overruled by statute on other grounds as recognized by Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 372, 374 P.3d 63 (2016). When “the record on appeal is identical to that considered by the trial court, [the court of appeals is] not bound by the trial court’s findings of fact.” *Id.* (citing *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969); *Eiden v. Snohomish Cnty. Civil Serv. Comm'n*, 13 Wn. App. 32, 37, 533 P.2d 426 (1975)).

Here, the trial court erred by finding that the Board did not conduct an adjudicatory hearing and that the review and deliberations undertaken by the Board before it made its decision fell short of what was required to be considered a quasi-judicial action. The trial court erred as a matter of law by not applying four-part test in *Raynes* and by ruling that the Board did not act in a quasi-judicial capacity. This error caused the trial court to apply the wrong statute of limitations, RCW 36.70C.040(4)(a) rather than RCW 36.70C.040(4)(b). RCW 36.70C.040(4)(b) applies to a “land use decision” made by “ordinance or resolution by a legislative body sitting in a quasi-judicial capacity.” By application of RCW 36.70C.040(4)(b), the 2018 LUPA Petition, which was filed and served 22 days after the date the Board passed the Resolution, is time-barred as a matter of law and should have been dismissed with prejudice.

B. The statute of limitations applicable to the 2018 LUPA Petition began to run when the Board, while sitting in a quasi-judicial capacity, passed a resolution affirming the Hearing Examiner's decision.

The trial court erred by refusing to dismiss the Yakama Nation's time-barred claims against Petitioners. 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." RCW 36.70C.040(2). The petition is timely if filed and served "within twenty-one days of the issuance of the land use decision." RCW 36.70C.040(3). A land use decision is "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]n application for a project permit." RCW 36.70C.020(2)(a). A "final determination" is one that ends an action between the parties. *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002), *amended on recons.*, 63 P.3d 764 (2003).

Here, the statute that commenced the 21-day period for an appeal of the Resolution is RCW 36.70C.040(4)(b). This statute is clear and unambiguous on its face: "If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity," the date a land use decision is issued is "*the date the body passes the*

ordinance or resolution.” RCW 36.70C.040(4)(b) (emphasis added). This deadline is “stringent.”³ *Asche v. Bloomquist*, 132 Wn. App. 784, 795, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005, 153 P.3d 195 (2007). “Requiring strict compliance with the statutory bar against untimely petitions promotes the finality of local land use decisions.” *Knight*, 173 Wn.2d at 338 (citation omitted).

LUPA’s timely filing and service requirements are jurisdictional. RCW 36.70C.040(2); *Knight*, 173 Wn.2d at 339; *Keep Watson Cutoff Rural*, 145 Wn. App. at 38. “A superior court hearing a LUPA petition acts in an appellate capacity and with only the jurisdiction conferred by law.” *Knight*, 173 Wn.2d at 337 (citing *Conom v. Snohomish Cnty.*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005)). “[B]efore a superior court may exercise its appellate jurisdiction, statutory procedural requirements must be satisfied. A court lacking jurisdiction must enter an order of dismissal.” *Id.* (internal quotations and citations omitted). Therefore, a “land use decision becomes unreviewable by the courts if not appealed to the superior court within LUPA’s specified 21-day timeline. Once the 21-day

³ See *San Juan Fidalgo Holding Co. v. Skagit Cnty.*, 87 Wn. App. 703, 705-706, 710-711, 943 P.2d 341 (1997), *as amended* (Sept. 30, 1997), *as amended* (Nov. 5, 1997) (LUPA appeal dismissed because petition delivered to the Skagit County Auditor’s Office approximately 15 minutes after the office had closed on the last day of the 21-day service period for commencing land use appeals).

period passes, a land use decision becomes final and binding and is deemed valid and lawful.” *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 399, 232 P.3d 1163 (2010). (citations omitted). Because LUPA contains explicit rules for filing and service, the doctrine of substantial compliance does not comply. *Northshore Inv'rs, LLC v. City of Tacoma*, 174 Wn. App. 678, 689, 301 P.3d 1049 (2013), *disapproved of on other grounds by Durland v. San Juan Cnty.*, 182 Wn.2d 55, 340 P.3d 191 (2014).

The Board is the legislative body of Yakima County and reviews decisions of the Yakima County Hearing Examiner as “a legislative body sitting in a quasi-judicial capacity.” The Resolution was the Board’s final decision on the Yakama Nation’s administrative appeal of the CUP, was ripe for judicial review, and was passed and dated on April 10, 2018. Pursuant to RCW 36.70C.040(4)(b), the 21-day appeal period runs from the date the body passes the ordinance or resolution.⁴ The 21-day period within which Petitioners had to file and serve their 2018 LUPA Petition began to run on April 10, 2018. A timely judicial appeal of the Resolution

⁴ Under the Yakima County Code, the resolution passed by the Board on April 10, 2018, was a final land use decision. YCC 16B.09.050(5). Resolution 131-2018 is 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, on ... [a]n application for a project permit.” RCW 36.70C.020(2).

had to be filed and served on or before May 1, 2018. The Yakima Nation filed and served its 2018 LUPA Petition on May 2, 2018, which is 22 days from and after the date the Board passed the Resolution. The 2018 LUPA Petition is time-barred. The trial court erred in finding it had jurisdiction to hear the 2018 LUPA Petition and should have entered an order dismissing the 2018 LUPA Petition with prejudice.

C. The trial court erred in deciding that the Board did not sit in a quasi-judicial capacity when it affirmed the Hearing Examiner's decision.

The matter before the Board was a closed-record appeal authorized by then-applicable Yakima County Code Title 16B.09. YCC

16B.09.050(1)(a) provided, in relevant part:

Upon receipt of a written appeal of a Hearing Examiner's decision on . . . a Type 2 appeal, . . . [t]he Board may decide to affirm the Hearing Examiner's decision based on its review of the written request and transcript *without a public hearing, further written brief or oral argument.*

App. A at 5-6 (emphasis added). YCC 16B.09.050(3)(b) imbued the

Board with the authority to

grant the appeal or grant the appeal with modifications *if the appellant has carried the burden of proof and* the Board finds that the recommendation or determination of the Hearing Examiner is *not supported by material and substantial evidence.* In all other cases, the appeal shall be denied.

Id. (emphasis added).

The Board reviewed the Yakama Nation's 19-page Appeal Statement,⁵ the record created over a six-month period before the Hearing Examiner, and the transcript of the hearing before affirming the Hearing Examiner's decision at a public Board meeting. CP 25-26, 256. The Board took about a month to complete this review. CP 256. In reaching its decision, the Board determined, pursuant to YCC 16B.09.055(3), that it did not need additional briefing from Petitioners and did not need to hear oral argument. CP 26; App. A at 7. Rather, the Board rendered a decision based upon its review of a robust record informed by prehearing motions, written discovery, depositions, exhibits, legal briefing, argument, post-hearing briefs, a detailed written decision authored by the Hearing Examiner, the transcripts of that proceeding, and the Yakima Nation's Appeal Statement. CP 25, 29-32, 34, 256. It is certainly reasonable for the Board to conclude, and it was within the Board's prerogative under YCC 16B.09.055(3) to do so, that it had a sufficient basis to conduct and conclude its closed-record review.

⁵ This Appeal Statement is the "appeal argument" allowed by RCW 36.70B.020(1) in a closed record appeal and was all that was required for the Board to undertake its closed record review.

The Board's decision, memorialized in the Resolution, affirmed the decision of the Hearing Examiner, and denied the Yakama Nation's appeal. CP 25-26. In so doing, the Board determined the legal rights, duties, and privileges of specific parties, functioning like a court or appellate body in a quasi-judicial capacity.

Yet, the trial court found that the Board did not sit in a quasi-judicial capacity because the Board "did not have a public hearing" at which additional arguments were accepted, did not receive briefing from Petitioners, and did not hear oral argument. VRP 47-50:1-4. A public hearing is not essential to the function of a "closed-record appeal," which is defined as

an administrative appeal *on the record* to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record *with no or limited new evidence or information allowed* to be submitted and *only appeal argument allowed*.

RCW 36.70B.020(1) (emphasis added). Lack of public comments and arguments from appellate counsel does not change the quasi-judicial nature of the Board's action.

Furthermore, there are many instances involving judicial determinations where opportunities for oral argument lie within the

discretion of the judiciary, including this Court's discretion to hear oral argument on this motion. See RAP 17.5(a), (b); *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002) (local superior court rules did not violate party's due process rights where oral argument on dispositive motion not allowed). Similarly, the decision made by the Board is no less quasi-judicial because it exercised its discretion not to hear oral argument and to decide the matter on the record before it.

When it filed its Appeal Statement with the Board, the Yakama Nation undisputedly viewed the Board's authority to decide its appeal as a quasi-judicial function. The Yakama Nation explicitly acknowledged this by citing the Appearance of Fairness Doctrine codified at Chapter 42.36 RCW in noting that it would be

unethical and improper ex parte communication for the BOCC, as Yakima County's appellate body in this proceeding, to substantively communicate directly with Yakima County's party-representative (the Yakima County Planning Department) or party-representative's legal counsel (the Yakima County Corporate Counsel Division) about this matter outside the presence of all parties.

CP 244. The Appearance of Fairness Doctrine states that the

[a]pplication of the appearance of fairness doctrine to local land use decisions *shall be*

limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are *those actions of the legislative body . . . or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.*

RCW 42.36.010 (emphasis added). The nature and function of the decision made by the Board did not change because, after reviewing the Yakama Nation's Appeal Statement, they did not feel compelled to take further briefing or hear oral argument.

D. The trial court failed to apply the four-part *Raynes* test for determining whether an action was quasi-judicial.

The trial court found that it did not need to apply the four-part test developed by the Washington Supreme Court to determine if an action is a quasi-judicial or legislative action. VRP 49:21-25, 50:1-4. *Raynes*, 118 Wn.2d, at 244-45. If the four-part test is applied to the facts in this case, then the conclusion that the Board did act in a quasi-judicial capacity, sitting as an appellate body and conducting a closed record review of a decision made by an inferior tribunal, is compelling. The trial court's failure to apply this test is an error in and of itself that led the trial court to err further by applying the wrong statute of limitations.

Applying the four-part test, the first inquiry to be made by a court is "whether the court could have been charged with the duty at issue in the

first instance.” *Raynes*, 118 Wn.2d at 244 (citations omitted). The record in this case unequivocally shows that the Board was charged with conducting an appellate review of a decision by a hearing examiner. Courts are frequently charged with this duty in the first instance. RCW 36.70.970(2); RCW 35A.63.170(2); *see also City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004) (on appeal of hearing examiner’s decision superior court reviews the record before the hearing examiner); *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010) (Court of Appeals, like the trial judge, reviews the decision of the hearing examiner in an appellate capacity).

The next inquiry is “whether the courts have historically performed such duties.” *Raynes*, 118 Wn.2d at 244 (citations omitted). Courts have historically performed appellate review of local land use decisions, by writ of certiorari, and then by LUPA petitions following the enactment of Chapter 36.70C RCW. This duty—conducting a closed-record review of the Hearing Examiner’s land use decision—is precisely the duty that the Board was charged to undertake by YCC 16B.02.050:

“Closed Record Appeal” means an administrative appeal or hearing, conducted by the Board of County Commissioners following an open record hearing conducted by the Hearing Examiner on a project permit application. The appeal or hearing is on the

record with only appeal argument allowed.
See also RCW 36.70B.020(1).

App. A at 3. On this point, there can be no credible dispute.

The inquiry then turns to “whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application.” *Raynes*, 118 Wn.2d at 244 (citations omitted). Here, as in *Raynes*, the action of the municipal corporation was a land use decision (the adoption of a zoning ordinance) and not a determination of liability. In *Raynes*, the court concluded that a zoning ordinance did not involve the application of current law to a factual circumstance, but instead required the policymaking role of a legislative body. *Id.* at 245. The court concluded that, in contrast to a closed record appeal as presented in this case, “[a] series of public hearings was held, and a survey of public opinion was conducted.” *Id.* at 245. The court concluded that “[p]olicymaking decisions which are based on careful consideration of public opinion are clearly within the purview of legislative bodies.” *Id.*

In sharp contrast, in this case, the Board could take no further testimony, could not consider public opinion, and could not engage in

policy making or legislation. As noted above, the Board duties were defined and limited by RCW 36.70B.020:

“Closed record appeal” means an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

The Board, like a judicial body, was also not free to engage in *ex parte* communications concerning the matter under review. *See* RCW 42.36.010 (applies to actions of the legislative body determining the legal rights, duties, or privileges of specific parties); RCW 42.36.060 (*ex parte* communications prohibited). The Board, in this case, applied existing law to present facts. It denied the Yakama Nation’s appeal of Granite’s conditional use permit. The Board determined the specific rights of specific parties. The Board did not pass an ordinance of general applicability or set or establish any policy or legislation. Rather, the Board determined, for purposes of YCC 16B.09.050(3)(b), that the Yakama Nation failed to carry its burden of proof or establish that the Hearing Examiners’ decision was not supported by material and substantial evidence. As such, the third prong of the four-part test is fully satisfied.

The final question is “whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.” *Raynes*, 118 Wn.2d at 244 (citations omitted). The Board’s action here—affirming a decision made by an inferior tribunal after undertaking a closed-record review of the record, transcripts, and the Yakama Nation’s Appeal Statement in a proceeding the Nation admits was subject to the “Appearance of Fairness Doctrine, RCW 42.36 *et seq.*,” CP 244—more closely resembles the ordinary business of courts, as opposed to those of legislators or administrators. The ordinary business of legislators has been characterized by our Supreme Court as follows:

Unlike a judicial hearing where issues of fact should be resolved from the evidence only without regard to the private views of the judges, ***a legislative hearing may reach a decision in part from the legislator’s personal predilections or preconceptions. Indeed, the election of legislators is often based on their announced views and attitudes [o]n public questions.***

Smith v. Skagit Cnty., 75 Wn.2d 715, 740-41, 453 P.2d 832 (1969)

(emphasis added). That was not the type of business conducted by the Board when it denied the Yakama Nation’s appeal. Nor is the Board’s action akin to that of an administrator in an executive role, who is charged with implementing delegated authority. *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 226-227, 858 P.2d 232 (1993) (an agency may only do

that which it is authorized to do by the legislature). The Board unequivocally exercised a quasi-judicial function when it considered and decided the appeal and passed the Resolution. The trial court erred when it concluded otherwise.

E. The trial court erred in finding that the Board did not conduct an adjudicatory hearing and that the Board's review and deliberations fell short of a quasi-judicial action.

The evidence before the trial court clearly showed (a) that the Yakama Nation's Appeal Statement was delivered to the Board on February 13, 2018; (b) that the record and transcripts from the Hearing Examiner's proceeding were provided to the Board more than a month before it rendered its decision; (c) that in advance of the April 10, 2018 public meeting, the Board advised the Clerk of the Board that it had reviewed the record and would like to schedule a public meeting; (d) that the Resolution recites that the open record appeal hearing and transcripts were provided to for review; and (e) that based on this review, the Resolution recites that the Board decided to affirm the Hearing Examiner's decision in accordance with YCC 16B.09.055(3). There is no evidence in the record that would suggest that the Board did anything other than fully and faithfully perform these duties in considering and in deciding the Yakama Nation's appeal.

The trial court, however, found these actions to be insufficient to establish the Board's actions as quasi-judicial. The trial court determined that because the Board exercised its prerogative not to hold a public hearing, where the Board could (in the context of a closed-record review) only hear further legal arguments that it felt it did not need, the Board failed to perform a quasi-judicial function. As noted above, not only does this ruling conflict with *Raynes*, it infers that the review and deliberations undertaken by the Board before it made its decision were inadequate to recognize that action as quasi-judicial.

There is nothing in the record to support any such inference. The documentary evidence before the trial court establishes that the Board fully and faithfully perform the duties required to conduct a closed record appellate review of the Hearing Examiner's decision. Because the trial court's decision relied exclusively on documentary evidence and affidavits, this Court may review the trial court's findings of fact *de novo*. The evidence before the trial court, and now before this Court, reviewed under the *Raynes* analysis, fully supports a determination that the Board acted in a fair and impartial quasi-judicial manner when it affirmed the decision of the Hearing Examiner and denied the Yakama Nation's appeal.

F. The Board’s resolution was not a written decision pursuant to RCW 36.70C.040(4)(a).

The trial court also erred in deciding that the statute of limitations applicable to “written decisions” (issued by decision-makers other than legislative bodies acting in a quasi-judicial capacity) applies to the transmittal letter sent by County Planning Department staff. In so doing, the trial court “disregard[ed] the basic tenets of statutory construction and interpret[ed] clear and unambiguous language to achieve a result contrary to the purpose LUPA was enacted to achieve.” *Cnty. Treasures v. San Juan Cnty.*, 192 Wn.2d 47, 53, 427 P.3d 647 (2018).

Instead of applying RCW 36.70C.040(4)(b), which establishes a statute of limitations for land use decisions made by resolution by legislative bodies sitting in a quasi-judicial capacity, the trial court found that the County Planning Division’s April 13, 2018, transmittal letter constituted a “written decision” under RCW 36.70C.040(4)(a). However, the transmittal letter is not the written decision of the Board, or anyone else. The transmittal letter does not commence the statute of limitations in this case. The Resolution does.

Only a writing of the Board may be considered a final administrative action for purposes of Chapter 36.70C RCW. YCC 16B.09.050(5). Given the signed Resolution dated April 10, 2018, Ms.

Madera's transmittal letter cannot be deemed to be a written decision to which RCW 36.70C.040(4)(a) applies. In a case with similar but not identical facts, the Washington Court of Appeals refused to accept petitioner's argument that a "notice of appeal results" sent by the city clerk constituted a written decision that triggered LUPA's statute of limitations where the City Council had made an oral vote on the appeal days earlier. *Northshore*, 174 Wn. App. at 689-695. In *Northshore*, the City Council by oral vote denied an administrative appeal from a city Hearing Examiner's recommendation to deny a rezone request. *Id.* at 684-86. Several days later, the City Clerk mailed a notice of appeal results that stated that the City Council had met and made a decision. *Id.* at 691. The Court of Appeals held that the LUPA statute of limitations began to run on the day that the City Council voted; not the day the clerk issued the letter. *Id.* at 695. This Court should find the same.

As in *Northshore*, Ms. Madera's letter indicates that the Board had already made a decision. Her letter to the Yakama Nation states, in part:

On April 10, 2018, the Board of County Commissioner's [sic] (BOCC) *held* a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner's decision or hold a closed record hearing. The BOCC unanimously *decided* to affirm the Hearing Examiner's decision and *signed* Resolution

131-2018, which *is attached for your records.*

CP 24. The use of the past tense informs the recipient that a decision had already been made by the time of Ms. Madera's writing. Therefore, her letter does not constitute a written decision for purposes of RCW 36.70C.040(4)(a). Additionally, Ms. Madera works for the Planning Department, is not a member of the Board, and it is not authorized to render decisions in closed-record appeals. The letter itself leaves no room for confusion on this point. It stains credibility to confuse that letter, signed by a "Senior Project Planner" working for the County Planning Department, not the Board, with a "written decision" of the Board. The letter refers to the decision made by the Board in the past tense (referring back to the April 10 public meeting). Were there any other doubt, the letter encloses the Board's written decision, the Resolution, dated April 10, 2018. Nothing on behalf of the Board is decided by this transmittal letter.

The Washington Court of Appeals has unambiguously held that when a county board of commissioners sits in a quasi-judicial capacity, "the date of a decision is generally the date on which the decision is reduced to writing,"—that is, the date a resolution is signed. *King's Way Foursquare Church v. Clallam Cnty.*, 128 Wn. App. 687, 691, 116 P.3d

1060 (2005), *as amended* (Aug. 23, 2005). No additional action on the part of Ms. Madera was needed to finalize the Board’s resolution.

The result reached by the trial court evades the clear and unambiguous language of RCW 36.70C.040(4)(b) and LUPA’s strict requirement to file a LUPA claim within 21 days of the land use decision to avoid a “harsh result.” VRP 47:9. This the law does not allow. *See Cmty. Treasures*, 192 Wn. at 53.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to reverse the trial court’s Order Denying Petitioners’ Motion to Dismiss for Lack of Jurisdiction and dismissal this case with prejudice.

RESPECTFULLY SUBMITTED this 15th day of February 2019.

//

//

//

//

//

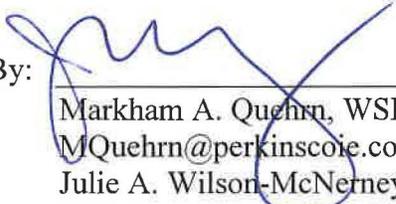
//

//

//

//

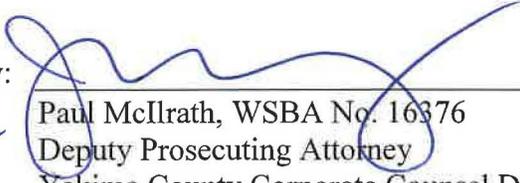
PERKINS COIE LLP

By: 

Markham A. Quehrn, WSBA No. 12795
MQuehrn@perkinscoie.com
Julie A. Wilson-McNerney, WSBA No. 46585
JWilsonMcNerney@perkinscoie.com
10885 N.E. Fourth Street, Suite 700
Bellevue, WA 98004-5579
Telephone: 425.635.1400
Facsimile: 425.635.2400

Attorneys for Petitioner

**YAKIMA COUNTY PROSECUTING
ATTORNEY'S OFFICE**

By: 

Paul McIlrath, WSBA No. 16376
Deputy Prosecuting Attorney
Yakima County Corporate Counsel Division
128 N. 2nd Street, Room 211
Yakima, WA 98901-2639
Paul.McIlrath@co.yakima.wa.us
Telephone: 509.574.1209
Facsimile: 509.274.1201

*for
per
email
authorization*

Attorneys for Petitioner

Appendix A

Excerpts from Pertinent Statutes and Yakima County Code

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.]

specified:

- (1) Adoption and amendment of development regulations as defined by RCW 36.70A;
- (2) Area-wide rezones to implement new county policies; and
- (3) Adoption of the county comprehensive plan, sub-area plans, other general purpose or specific county plans and any plan amendments.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.01.040 Legislative Enactments not Restricted.

Nothing in this Title shall limit the authority of the Board of County Commissioners to amend the County's comprehensive plan or development regulations.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.01.050 Conflict of Provision.

In the event of conflicts between any portion of this Title and other rules, regulations, resolutions, ordinances or statutes lawfully adopted by Yakima County, the procedures contained in this Title shall govern.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

Chapter 16B.02 DEFINITIONS

Sections:

- 16B.02.010 Definitions.
- 16B.02.020 Administrative Official.
- 16B.02.030 Agency with Jurisdiction.
- 16B.02.040 Board of County Commissioners.
- 16B.02.045 Buildable Land.
- 16B.02.050 Closed Record Appeal.**
- 16B.02.055 Day.
- 16B.02.060 Decision Maker.
- 16B.02.070 Hearing Examiner.
- 16B.02.080 Open Record Hearing.
- 16B.02.082 Optional Consolidated Permit Review.
- 16B.02.085 Policy Plan Map.
- 16B.02.090 Project Permit Application.
- 16B.02.093 Public Meeting.
- 16B.02.095 Reviewing Official.
- 16B.02.100 SEPA.

16B.02.010 Definitions.

Certain terms and words used in this Title are defined in the following Sections. When not inconsistent with the context, words used in the present tense include the future; the singular includes the plural, and the plural the singular; “shall” is always mandatory and “may” indicates a use of discretion in making a decision. Whenever terms defined elsewhere in the Yakima County Code appear in this Title, they shall be given the meaning attributed to them.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.020 Administrative Official.

“Administrative Official” means the Yakima County Planning Director or the director’s designee. This term is synonymous with “Director” or “Administrator.”

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exhs. A, B) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.030 Agency with Jurisdiction.

“Agency with Jurisdiction,” for purposes of this Title, means any agency with authority to approve, veto, or finance, all or part of any project permit application as defined by this Title.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.040 Board of County Commissioners.

“Board of County Commissioners,” also abbreviated as “BOCC,” or “Board,” is the legislative authority of Yakima County.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.02.045 Buildable Land.

“Buildable Land,” for the purposes of 16B.10.095(2)(a), means land suitable and available for residential, commercial, and industrial uses and includes both vacant land and developed land that, in the opinion of the planning agency, i.e., the Planning Division together with its Planning Commission as defined in RCW 36.70.020(13)(b), is likely to be redeveloped.

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exhs. A, B) (part), 2012).

16B.02.050 Closed Record Appeal.

“Closed Record Appeal” means an administrative appeal or hearing, conducted by the Board of County Commissioners following an open record hearing conducted by the Hearing Examiner on a project permit application. The appeal or hearing is on the record with only appeal argument allowed. See also RCW 36.70B.020(1).

(Ord. 6-2014 § 2 (Exh. A)(part), 2016: Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

jurisdiction on the proposed action. Hearings shall be combined if requested by an applicant, provided that:

- (a) The hearing is held within the geographic boundaries of Yakima County;
 - (b) Each agency is not expressly prohibited by statute from doing so;
 - (c) Sufficient notice of the hearing is given to meet each of the agencies' adopted notice requirements as set forth in statute, ordinance, or rule;
 - (d) Each agency has received the necessary information about the proposed project from the applicant in enough time to hold its hearing at the same time as the local government hearing; and
 - (e) The joint hearing can be held within the required time periods or the applicant may agree to a particular schedule in the event that additional time is needed in order to combine the hearings.
- (2) All agencies participating in a combined hearing may issue joint hearing notices and develop a joint format, select a mutually acceptable hearing body or officer, or take such other actions as may be necessary to hold joint hearings consistent with each of their respective statutory obligations.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

Chapter 16B.09 ADMINISTRATIVE APPEALS, CLOSED RECORD HEARINGS, AND JUDICIAL APPEALS

Sections:

- 16B.09.010 Administrative Appeal of Project Permits and Environmental Determinations.
- 16B.09.020 Standing to Initiate Administrative Appeals.
- 16B.09.030 Notice of Appeal.
- 16B.09.040 Open Record Appeals.
- 16B.09.045 Open Record Appeal Procedures.
- 16B.09.050 Closed Record Decisions and Appeals.**
- 16B.09.055 Closed Record Appeal Procedures.**
- 16B.09.060 Judicial Appeals.
- 16B.09.070 Appeals Standards and Criteria.

16B.09.010 Administrative Appeal of Project Permits and Environmental Determinations.

(1) An appeal of a Type 1, 2, or 3 project decision or an appeal of a final environmental determination (SEPA) shall be filed with the Planning Division within fourteen calendar days of the mailing of the final decision or environmental determination issued under SEPA. If the decision does not require mailing, the appeal shall be filed within fourteen calendar days following the issuance of the final decision. Appeals shall be delivered to the Planning Division by mail or

The following procedures (Subsections 1 through 3) shall apply to any appeal heard by the Examiner under this Title unless the Examiner holds a prehearing conference under Subsection 4 of this Section and issues an order establishing the appeal procedure.

(1) Memorandum to Examiner. Within ten days of filing the appeal, the appellant shall file with the Planning Division a memorandum setting forth the appellant's arguments and authority. The appellant's memorandum to the Hearing Examiner shall clearly identify whether the subjects of the appeal are concerned either with procedural issues or substantive determinations, or both, as defined in YCC 16.04.040. Such arguments and authority shall be restricted to those issues set forth in appellant's written appeal statement;

(2) Staff Report. At least twenty days prior to the date of the scheduled hearing before the Examiner, County staff shall file with the office of the Hearing Examiner and provide the appellant with a staff report responding to the appellant's memorandum concerning the appeal; and

(3) Reply Memorandum. At least ten days prior to the date of the scheduled hearing before the Examiner, the appellant or landowner may file with the Planning Division any reply memorandum which the appellant or landowner desires to file. The scope of the reply memorandum shall be restricted to responding to issues raised in the staff report.

(4) Prehearing Conference. Any party may request a prehearing conference not later than ten days following the filing of appeal. The prehearing conference may be held at the discretion of the Examiner, in consultation with the Administrative Official. If the Examiner exercises his discretion to hold a prehearing conference on an appeal the Examiner may issue an order establishing the procedure and schedule for the hearing and for the submittal of reports by County staff, applicant, and appellant, not inconsistent with this Title. The Examiner's order shall provide for the submittal of appellant's memorandum setting forth the appellant's arguments and authority, a County staff report responding to appellant's memorandum, applicant's memorandum responding to the appellant's memorandum, and appellant's reply memorandum. All written reports shall be submitted prior to the appeal hearing, consistent with the terms of the order. The parties shall provide copies of all submitted material to the other parties.

(5) Failure to Comply. Failure to comply with the requirements of this Section may result in the Examiner taking such action in regard to the failure as is appropriate including, but not limited to dismissing the matter, continuing the hearing, postponing the hearing or limiting testimony at the hearing. The Hearing Examiner or Yakima County may require any appellant(s) who cause(s) a delay in the proceedings by not adhering to the submittal schedule to pay all additional fees associated with rescheduling meetings, including Hearing Examiner fees.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012).

16B.09.050 Closed Record Decisions and Appeals.

(1) Closed record appeals or closed record hearings shall be on the record. The record before the Board shall include all materials received in evidence at any previous stage of the review, audio/visual tapes of the prior hearing, a transcript in the case of an appeal, the Hearing

Examiner's determination or recommendation, and argument by the parties at the Examiner's hearing. Upon receipt of a written appeal of a Hearing Examiner's decision on a Type 3 permit or a Type 2 appeal, the Board will decide how it will dispose of the appeal based on the record of the Hearing Examiner's decision and in accordance with this Section and YCC 16B.09.055.

- (a) The Board may decide to affirm the Hearing Examiner's decision based on its review of the written request and transcript without a public hearing, further written brief or oral argument. The appellant and parties of record shall be so notified in the manner provided by YCC 16B.05.050; or,
 - (b) The Board may elect to consider the appeal based on the record of proceedings before the Hearing Examiner, the written appeal statement, any written memoranda of authorities submitted in compliance with the schedule of YCC 16B.09.055 and oral argument at a closed record public hearing. The appellant and other parties of record shall be notified of the Board's decision to consider the appeal, the invitation of written memoranda and its final decision on the appeal after its consideration in the manner provided by YCC 16B.05.050.
- (2) Oral argument at a closed record public hearing is limited to parties of record. Oral argument is allowed on a Type 4 recommendation of the Hearing Examiner and may be allowed for a closed record appeal in accordance with YCC 16B.09.055(7) if the Board chooses to conduct a public hearing.
- (3) The Board's action on a closed record hearing or appeal shall be as follows:
- (a) Following the Board's closed record hearing on a Type 4 recommendation of the Hearing Examiner, the Board may affirm the recommendation of the Hearing Examiner, remand the matter back to the Hearing Examiner with appropriate directions, or may reverse or modify the Hearing Examiner's recommendation.
 - (b) Following the Board's review of a closed record appeal of a Hearing Examiner's Type 2 or 3 decision, the Board may grant the appeal or grant the appeal with modifications if the appellant has carried the burden of proof and the Board finds that the recommendation or determination of the Hearing Examiner is not supported by material and substantial evidence. In all other cases, the appeal shall be denied.
- (4) If the Board renders a decision different from the Hearing Examiner's determination or recommendation, the Board shall adopt amended findings and conclusions accordingly. If the Board affirms the Examiner's determination or recommendation, it may adopt the findings and determinations or recommendations of the Examiner as the final decision.
- (5) The Board's final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012: Ord. 14-1998 § 1 (part), 1998: Ord. 4-1996 § 1 (part), 1996).

16B.09.055 Closed Record Appeal Procedures.

The following procedures shall apply to any appeal considered by the Board of County Commissioners.

(1) Appeal Statement. The appellant's written appeal statement shall specify the claimed error(s) or issue(s) which are being appealed and shall specifically state all the grounds for such appeal, limited to stating why the record does or does not support the decision of the Hearing Examiner because the decision:

- (a) Was based on improper procedures that prejudiced the appellant;
- (b) Was not based on substantial evidence; or
- (c) Constitutes clearly erroneous application of the development regulations to the proposed project.

Issues or grounds of appeal which are not so identified shall not be considered by the Board.

(2) Transcript. The appellant shall order preparation of a written transcript or portion of the transcript agreed upon by the appellant and Administrative Official. The transcription must be performed and certified by a County approved transcriber. In addition, the certified transcription must be received by the Administrative Official directly from the transcriber not more than thirty days following receipt of the appeal statement.

- (a) The Administrative Official shall maintain a list of pre-approved transcribers that are court approved; and if needed, shall coordinate with parties to the appeal so that no more than one official transcription is admitted into the record.
- (b) The cost of the transcript must be paid by the appellant within five days of receipt of the transcriber's statement for the cost. Upon payment of the statement the transcriber will deliver a copy of the transcript to the Administrative Official. If the statement is not paid, the appeal will be dismissed.

(3) Disposition of Appeal. The Administrative Official will consult with the Clerk of the Board who shall set the date, time and place at which the matter will be considered. Copies of the record, to the extent practicable, will be furnished by the Administrative Official to the Board, the appellant and the applicant. At the next regular meeting of the Board following receipt of the record from the Administrative Official, the Board will decide at a public meeting whether to affirm the decision of the Hearing Examiner, or to invite written memoranda of authorities and direct the Clerk to schedule a closed record public hearing.

(4) Notice of Hearing. If the Board decides to invite written memoranda of authorities and conduct a closed record public hearing in accordance with YCC 16B.09.050, the Planning Division shall notify the parties of record that an appeal has been filed and that copies of the notice of appeal and any written argument or memorandum of authorities accompanying the notice of appeal may be obtained from the Planning Division. The notice to parties shall also state that parties of record wishing to respond to the appeal may submit written argument or memorandum to the Planning

Division at least fourteen days prior to the date of the scheduled hearing before the Board. The notice shall further specify that such written argument or memorandum shall not include the presentation of new evidence and shall be based only upon the facts presented to the Examiner. A copy of the notice shall be sent to the appellant and parties of record.

(5) Staff Report. At least fourteen days prior to the date of the scheduled hearing, the Administrative Official shall file a staff report concerning the appeal with the Board, and provide a copy to the appellant and other parties of record.

(6) Memoranda from Appellant and other Parties of Record. Any party of record may submit a written argument or memorandum of authority at least fourteen days prior to the date of the scheduled hearing before the Board of County Commissioners. Such invited written argument or memorandum of authorities shall be filed with the Board with copies to the Planning Division and the other parties. No written argument or authorities may be thereafter submitted. Memoranda, written argument or comments shall not include the presentation of any new evidence and shall be based only on the facts presented to the Examiner. The memoranda are limited to stating why the record does or does not support the decision of the Hearing Examiner.

(7) Oral Argument. Oral argument shall be confined to the issues raised in the hearing record, appeal statement, the Hearing Examiner's decision, staff report, and memoranda of authorities timely filed by the deadlines set for briefing. Oral argument shall be limited to stating why the record does or does not support the decision of the Hearing Examiner. Time allowed for oral argument shall be appropriately limited by the Board.

(8) Decision by the Board. The Board shall deliberate on the matter in public at the advertised public hearing to reach its decision. The decision on the appeal shall be made on the appeal statement, written memoranda of authorities, staff report and any documents comprising the record that formed the basis for the administrative appeal. No additional evidence or testimony shall be given or received except for oral argument as allowed in Subsection 16B.09.055(7) above. A written decision will be made within thirty days of the close of the deliberation and vote on the appeal.

(9) Failure to Comply. Written memoranda of authorities, if invited, must be received by the Clerk of the Board by mail or personal delivery before the close of business on the due date. Late submittals received after the deadline or uninvited memoranda shall not be accepted or distributed for consideration no matter when such submittals were mailed or postmarked.

(Ord. 5-2012 § 2 (Exh. A) (part), 2012).

16B.09.060 Judicial Appeals.

(1) A final determination on an application may be appealed by a party of record with standing to file a land use petition in Superior Court. Such petition must be filed within twenty-one days of issuance of the Board's decision, as provided in Chapter 36.70C RCW.

Appendix B

Board of Yakima County Commissioners' Resolution

BOARD OF YAKIMA COUNTY COMMISSIONERS

**IN THE MATTER OF AFFIRMING THE)
HEARING EXAMINER'S FINAL APPEAL)
DECISION (APL2017-00003 AND APL2017-) RESOLUTION 131-2018
00004) RELATING TO APL2018-00001 AS)
OUTLINED BY YAKIMA COUNTY CODE)
16B.09.055(3))**

WHEREAS, Granite Northwest Inc./Frank Rowley, applied for an expansion of an existing mine (Mining Site/Operation) under CUP2015-00037/SEP2015-00016; and

WHEREAS, on April 7, 2017, The Administrative Official approved both CUP2015-00037 and SEP2015-00016 for the request for a Type II Mining Site/Operation, subject to conditions and mitigation measures outlined in the final decisions; and

WHEREAS, Yakima County received administrative appeals on CUP2015-00037 from the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) under APL2017-00003 and from the Selah Moxee Irrigation District (SMID) under APL2017-00004; and

WHEREAS, SEP2015-00016 was appealed to Superior Court by the Yakama Nation and the SMID. All parties agreed to stay the Superior Court proceedings filed under the Land Use Petition Act (LUPA) relative to the SEPA MDNS threshold determination appeal until the conclusion of the administrative appeal; and

WHEREAS, APL2017-00004 from the SMID was dismissed with prejudice upon agreement of Granite, SMID and the County pursuant to an October 25, 2017, Settlement Agreement and a Stipulation and Order to that effect executed by the Hearing Examiner on November 3, 2017; and

WHEREAS, an open record appeal was held on January 5, 2018; and

WHEREAS, The Hearing Examiner issued his decision affirming the Granite Mining Site/Operation Expansion Final Conditional Use Permit Decision with language clarifications set forth in Section IV of his Decision and affirms the SEPA Final Mitigated Determination of Non-Significance related to said Conditional Use Permit which were both issued on April 7, 2017 and were designated as File Numbers PRJ2014-00216, CUP2015-00037 and SEP2015-00016; and

WHEREAS, Yakima County received an administrative closed record appeal from the Yakama Nation on February 13, 2018, in accordance with Yakima County Code 16B 09; and

WHEREAS, the record of the open record appeal hearing and transcripts were provided to the Board of County Commissioners (BOCC) for review in accordance with Yakima County Code 16B.09.055; and

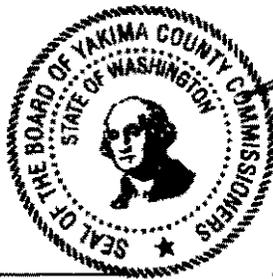
WHEREAS, at a public meeting with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner's decision in accordance with Yakima County Code 16B.09.055(3); and

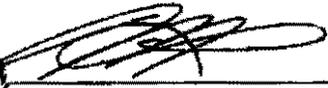
NOW, THEREFORE, the Decision of the Hearing Examiner in APL2017-00003 is affirmed. The appeal of the Yakama Nation (under APL2018-00001) is denied.

DONE this 10th Day of April, 2018

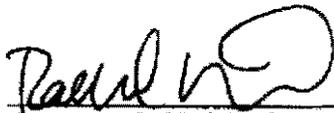


Ron Anderson, Chairman

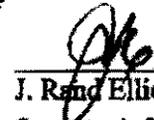




Michael D. Leita, Commissioner



Attest: Rachel Michael
Clerk of the Board



J. Rand Elliott, Commissioner
*Consolidating the Board of County Commissioners
for Yakima County, Washington*

Appendix C
Transmittal Letter



Public Services

128 North Second Street • Fourth Floor Courthouse • Yakima, Washington 98901
(509) 574-2300 • 1-800-572-7354 • FAX (509) 574-2301 • www.co.yakima.wa.us

VERN M REDIFER, P.E. Director

April 13, 2018

Confederated Tribes and Bands of the Yakama Nation

Ethan Jones

P.O. Box 151

Toppenish, WA 98948

Re: APL2018-00001: Notice of Affirmation of Hearing Examiner's Decision

Dear Mr. Jones,

On April 10, 2018, the Board of County Commissioner's (BOCC) held a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner's decision or hold a closed record hearing. The BOCC unanimously decided to affirm the Hearing Examiner's decision and signed Resolution 131-2018, which is attached for your records. YCC 16B.09.050(1)(a) requires written notification of this decision. At this point, all administrative appeals have been exhausted. Please feel free to contact me if you have any questions at 509-574-2300.

Sincerely,

Noelle Madera
Senior Project Planner

C: File
Parties of Record

Attachments:
Resolution 131-2018 – BOCC signed

\\nt2\Planning\Development Services\Projects\2018\APL\APL18-001 Yakima Nation\APL18-001_Notice_of_Affirmation.docx

Yakima County ensures full compliance with Title VI of the Civil Rights Act of 1964 by prohibiting discrimination against any person on the basis of race, color, nation origin, or sex in the provision of benefits and services resulting from its federally assisted programs and activities. For questions regarding Yakima County's Title VI Program, you may contact the Title VI Coordinator at 509-574-2300.

If this letter pertains to a meeting and you need special accommodations, please call us at 509-574-2300 by 10:00 a.m. three days prior to the meeting. For TDD users, please use the State's toll free relay service 1-800-833-6388 and ask the operator to dial 509-574-2300.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on February 15, 2019, I caused to be served a true and correct copy of the foregoing **BRIEF OF PETITIONERS** on the following via the method of service indicated below:

**COUNSEL FOR RESPONDENT
CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA NATION:**

Joe Sexton
Galanda Broadman, PLLC
P.O. Box 15146
Seattle, WA 98115
joe@galandabroadman.com

- Via U.S. Mail, 1st class, postage prepaid
- Via Legal Messenger
- Via Facsimile
- Via Overnight Mail
- Via email
- Via JIS Portal

Ethan Jones
Shona Voelckers
Yakama Nation Office of Legal Counsel
P.O. Box 150, 401 Fort Road
Toppenish, WA 98948
ethan@yakamanation-olc.org
shonavoelckers@yakamanation-olc.org

- Via U.S. Mail, 1st class, postage prepaid
- Via Legal Messenger
- Via Facsimile
- Via Overnight Mail
- Via email
- Via JIS Portal

DATED at Seattle, Washington, this 15th day of February, 2019.

By: 
Cheryl Robertson
Legal Practice Assistant
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

PERKINS COIE LLP

February 15, 2019 - 4:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36334-1
Appellate Court Case Title: Confederated Tribes and Bands of the Yakama Nation v. Yakima County
Superior Court Case Number: 18-2-01517-0

The following documents have been uploaded:

- 363341_Briefs_20190215163034D3527805_8915.pdf
This File Contains:
Briefs - Petitioners
The Original File Name was Brief of Petitioners Court of Appeals No. 36334 1.pdf

A copy of the uploaded files will be sent to:

- ethan@yakamanation-olc.org
- joe@galandabroadman.com
- mquehrn@perkinscoie.com
- paul.mcilrath@co.yakima.wa.us
- shona@yakamanation-olc.org

Comments:

Sender Name: Julie Wilson-McNerney - Email: JWilsonMcNerney@perkinscoie.com
Address:
1201 3RD AVE STE 4900
SEATTLE, WA, 98101-3099
Phone: 206-359-8000

Note: The Filing Id is 20190215163034D3527805