

FILED  
Court of Appeals  
Division III  
State of Washington  
3/14/2019 12:37 PM

No. 97910-3

Court of Appeals No. 36334-1-III  
Yakima County Superior Court No. 18-2-01517-39

---

**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 RESPONDENT**

---

Ethan Jones, WSBA 46911  
ethan@yakamanation-olc.org  
Shona Voelckers, WSBA 50068  
shona@yakamanation-olc.org

YAKAMA NATION OFFICE  
OF LEGAL COUNSEL  
P.O. Box 151, 401 Fort Road  
Toppenish, WA 98948  
(509) 865-7268

R. Joseph Sexton, WSBA 38063  
joe@galandabroadman.com

GALANDA BROADMAN, PLLC  
8606 35<sup>th</sup> Avenue NE, Ste. L1  
P.O. Box 15146  
Seattle, WA 98115  
(206) 557-7509

Attorneys for Respondent, the Confederated Tribes and Bands of the  
Yakama Nation

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION	
II. COUNTERSTATEMENT OF ISSUES.....	1
III. COUNTERSTATEMENT OF THE CASE.....	1
A. Background.....	1
B. Yakama Nation’s 2018 Lawsuit.....	3
C. Yakima County Superior Court Hearing.....	4
IV. ARGUMENT.....	4
A. The Superior Court Did Not Err In Holding That The Board’s Resolution Was A “Final Written Decision” Under LUPA, Terminating The Administrative Appeal Under RCW 36.70C.040(4)(a).....	4
B. Even If It Did Sit In a Quasi-Judicial Capacity, The Board Was Still Expressly Required To Issue A “Final Written Decision” Terminating The Yakama Nation’s Administrative Appeal.....	18
V. CONCLUSION.....	21

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Chaussee v. Snohomish Cty. Council</i> , 38 Wn. App. 630, 689 P.2d 1084 (1984).....	13
<i>Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.</i> , No 17-2-01434-39.....	2
<i>Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.</i> , No 18-2-01517-39.....	3
<i>Habitat Watch v. Skagit Cty.</i> , 155 Wn. 2d 397, 120 P.3d 56 (2005) .....	20
<i>Harris v. Hornbaker</i> , 98 Wn.2d 650, 658 P.2d 1219 (1983).....	12
<i>Kanekoa v. Washington State Dep't of Soc. &amp; Health Servs.</i> , 95 Wn. 2d 445, 626 P.2d 6 (1981). ).....	19
<i>King's Way Foursquare Church v. Cty.</i> , 128 Wn. App. 687, 116 P.3d 1060 (2005), <i>as amended</i> (Aug. 23, 2005).....	9, 10
<i>Lybbert v. Grant Cty.</i> , 141 Wn.2d 29, 1 P.3d 1124 (2000) .....	18
<i>Northshore Inv'rs, LLC v. City of Tacoma</i> , 174 Wn. App. 678, 301 P.3d 1049 (2013).....	8, 9
<i>Raynes v. City of Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992).....	13
<i>Shellenbarger v. Brigman</i> , 101 Wash. App. 339, 3 P.3d 211, 214 (2000) .....	15
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	12

**TABLE OF AUTHORITIES**  
(continued)

**Page(s)**

**Cases**

*Williams v. Seattle School Dist. 1*,  
97 Wn.2d 215, 643 P.2d 426 (1982)..... 13

**Statutes**

RCW 36.70C.040(3).....3, 4  
RCW 36.70C.040(4).....4, 5, 20  
RCW 36.70C.040(4)(a)..... 1, 3, 4, 5, 6, 7, 8, 14, 18, 21  
RCW 36.70C.040(4)(b)..... 5, 10, 11, 12, 16  
RCW 36.70C.040(4)(c)..... 5  
YCC 16B.06.070(1)..... 2  
YCC 16B.09.050(1)(a)..... 13  
YCC 16B.09.050(1)(b) ..... 13  
YCC 16B.09.050(5).....1, 3, 4, 5, 6, 7, 9, 19, 20  
YCC 16B.09.055..... 13

**Other**

Black's Law Dictionary (10th ed. 2014). ..... 19  
Oxford Dictionary of English (3rd Rev. Ed. 2010). ..... 19

## **I. COUNTERSTATEMENT OF THE ISSUES**

The Yakima County Code ends administrative actions for purposes of the Land Use Petition Act on the issuance of “The Board’s final written decision,” triggering the 21-day LUPA appeal period.<sup>1</sup> Respondent timely filed its appeal within 21 days of Yakima County’s final written decision being issued under RCW 36.70C.040(4)(a). Where Respondent relied on the Yakima County Code’s plain language in timely filing its appeal, should the Superior Court’s denial of Petitioners’ Motion to Dismiss consistent with such plain language be affirmed?

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. Background**

On April 10, 2015, Petitioners Granite Northwest, Inc., Frank Rowley, and Rowley Family Trust (collectively “Granite”) submitted a conditional use permit application and State Environmental Policy Act Checklist with Yakima County.<sup>2</sup> Granite’s goal was to expand its ongoing gravel mining operation within a Yakama burial ground, a Washington State-recorded archaeological site, and dedicated historical cemetery under Washington State law (“Burial Ground”) located at the confluence of the Yakima River and Naches River at Selah Gap.<sup>3</sup> Despite receiving significant and repeated objections from the Yakama Nation (Respondent), the Washington State Department of Archaeology and Historic Preservation, and other interested parties, on April 7, 2017,

---

1. YCC 16B.09.050(5).

2. CP 08.

3. *Id.* at 6-8.

Yakima County issued a Conditional Use Permit and Final MDNS authorizing Granite’s gravel mine expansion within the Burial Ground.<sup>4</sup>

For a brief period applicable to the administrative appeal litigation at issue here, Yakima County Code (“YCC”) 16B.06.070(1) bifurcated the county’s administrative appeal process, requiring litigants to administratively appeal a Conditional Use Permit as a “land use decision” to the Yakima County Hearing Examiner, and simultaneously appeal the Final MDNS underlying the Conditional Use Permit directly to Superior Court.<sup>5</sup> As a result, Respondent timely filed the 2017 Lawsuit and a contemporaneous bifurcated administrative appeal of Yakima County’s Conditional Use Permit.<sup>6</sup> After a contested motion, the Superior Court stayed the 2017 Lawsuit pending the outcome of the Conditional Use Permit administrative appeal.<sup>7</sup> The Yakima County Hearing Examiner presided over an open record hearing, and conditionally affirmed the County’s permitting decision on January 29, 2018.<sup>8</sup>

On February 13, 2018, Respondent appealed the Hearing Examiner’s Decision to the Yakima Board of County Commissioners (the “Board”) under Chapter 16B.09 of YCC and requested a closed record (i.e. quasi-judicial) hearing.<sup>9</sup> On April 13, 2018, Yakima County emailed the final written decision in the form of the Board’s resolution to the

---

4. CP 65-90.

5. CP 13.

6. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.*, No 17-2-01434-39.

7. See *Id.*.

8. CP 28-63.

9. CP 227-45.

Respondent rejecting the Yakama Nation’s closed record hearing request, and instead affirming the Hearing Examiner’s decision without conducting any quasi-judicial proceedings, as was its prerogative under applicable law.<sup>10</sup> After the bifurcated administrative process, Respondent filed the 2018 Lawsuit challenging the Board’s written decision on May 2, 2018, nineteen days after issuance of the “final written decision” required under YCC 16B.09.050(5).<sup>11</sup>

**B. Yakama Nation’s 2018 Lawsuit**

The land use decision at issue in the 2018 Lawsuit is a written decision under RCW 36.70C.040(4)(a) because Yakima County specifically requires a “final written decision” in its applicable ordinance as the terminating event for an administrative appeal for purposes of LUPA.<sup>12</sup> The earliest the written decision could be considered issued was when the County electronically mailed the written decision to Respondent on April 13, 2018, assuming it was also made publicly available on that date.<sup>13</sup> The filing deadline for Respondent’s land use petition was, at the earliest, twenty-one days after the written decision was provided to the parties enclosed in a letter on April 13, 2018, which was May 4, 2018.<sup>14</sup> Respondent filed the 2018 Lawsuit on May 2, 2018, two days before the filing deadline under RCW 36.70C.040(4)(a).<sup>15</sup>

---

10. CP 252.

11. *Confederated Tribes and Bands of the Yakama Nation v. Yakima County, et al.*, No 18-2-01517-39, CP 1-94.

12. YCC 16B.09.050(5).

13. RCW 36.70C.040(3)-(4)(a).

14. RCW 36.70C.040(4)(a).

15. *Confederated Tribes and Bands of the Yakama Nation*, No 18-2-01517-39.

### **C. Yakima County Superior Court Hearing**

The Superior Court heard Petitioners' motion to dismiss on August 17, 2018.<sup>16</sup> At this hearing the Superior Court held (1) that the "written decision is the resolution," as required by the Yakima County Code, (2) that this written decision constitutes "a final administrative action for purposes of 36.70C RCW," and (3) therefore the Yakama Nation's 2018 Lawsuit "was made timely to the Court."<sup>17</sup> In effect, the Superior Court's holding is founded on Yakima County's own codified requirement that the Board's "final written decision shall constitute a final administrative action for purposes of Chapter 36.70C RCW."<sup>18</sup>

### **III. ARGUMENT**

#### **A. The Superior Court Did Not Err In Holding That The Board's Resolution Was A "Final Written Decision" Under LUPA, Terminating The Administrative Appeal Under RCW 36.70C.040(4)(a).**

A land use petition is timely if filed and served within twenty-one days of the issuance of the challenged land use decision.<sup>19</sup> The date upon which a land use decision is considered 'issued' differs depending on the nature of the decision.<sup>20</sup> There are three options to determine when a land use decision is considered issued for purposes of the 21-day appeal period under RCW 36.70C.040(4):

“(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the

---

16. VRP 1-94.

17. VRP 49-50.

18. YCC 16B.09.050(5).

19. RCW 36.70C.040(3).

20. RCW 36.70C.040(4).

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.”<sup>21</sup>

The Yakima County Code, in turn, requires a “final written decision” to end administrative appeals under LUPA:

“The Board’s final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.”<sup>22</sup>

The Superior Court correctly held that Yakima County terminated the Respondent’s administrative land use appeal with a ‘written decision’ because the plain language of the Yakima County Code requires a written decision.<sup>23</sup> Regardless of how Petitioners attempt to construe the court’s oral pronouncements at the hearing on Petitioners’ Motion to Dismiss to better fit their narrative, the Superior Court’s written order taken together with the Court’s stated reasoning makes clear that the Court gave effect to the “final written decision” requirement and ruled that Respondent timely filed its appeal under RCW 36.70C.040(4)(a).<sup>24</sup>

Even though it’s not necessary to the Superior Court’s holding, it also correctly determined that Yakima County’s public meeting to address

---

21. RCW 36.70C.040(4).

22. YCC 16B.09.050(5).

23. Put another way, if the written resolution is not a written decision “for the purposes of Chapter 36.70C RCW” as YCC 16B.09.050(5) requires, then there has been no final administrative action and the administrative appeal has not ended.

24. CP 264.

its legislative agenda was not a quasi-judicial hearing under Washington law. Yakima County described the meeting as a “public meeting” in both its meeting announcement and the ultimate Board Resolution,<sup>25</sup> Granite Northwest, Inc. identified it as a “public meeting, not a public hearing,”<sup>26</sup> and the Yakima County Board denied the Yakama Nation’s request for a quasi-judicial appeal, failed to announce the public meeting as a ‘hearing,’ did not allow argument or briefing, and did not offer any substantive discussion.<sup>27</sup> Petitioners cannot now argue that what they said was a “meeting” is now a “hearing” when it benefits them on this appeal. Petitioners have failed to demonstrate that the Superior Court erred in its holding and Petitioners’ appeal should be denied.

**1. The Superior Court Applied The Yakima County Code’s Plain Language Requiring A “Final Written Decision” To End The Administrative Appeal Process Under LUPA And Trigger The 21-Day Appeal Period.**

Yakima County Code § 16B.09.050(5) is incompatible with Petitioners’ argument that the Board’s final decision on Respondent’s administrative land use appeal cannot be a written decision under RCW 36.70C.040(4)(a). The Superior Court acknowledged this at the hearing on Petitioners’ motion to dismiss: “in this case the written decision is the resolution” and this “is consistent with that language in the code that says the Board’s **final written decisions . . . shall constitute a final**

---

25. CP 26 (“WHEREAS, at a public meeting with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner’s decision . . .”) CP 24; CP 256.

26. CP 259 (emphasis in original).

27. CP 25-26.

**administrative action for purposes of 36.70C RCW.”**<sup>28</sup> Petitioners misconstrue the Superior Court’s explanation of its holding to allege that the Court based its decision on a finding that the Yakima County Planning Division’s April 13, 2018 e-mail conveying the Resolution was the ‘written decision’ triggering RCW 36.70C.040(4)(a).<sup>29</sup> The Superior Court made no such finding. Further, the Respondent does not contend that the April 13, 2018 letter or the email transmitting it from the County’s Planning Department were a written decision. Rather, as the Superior Court held, the resolution itself is a “written decision” under RCW 36.70C.040(4)(a), as required by YCC 16B.09.050(5)’s plan language. The resolution was signed and dated April 10, 2018, but the requisite written decision was not mailed or made publicly available on that day. The earliest it was mailed or made publicly available was April 13, 2018.

Because the resolution must be a written decision to terminate the appeal process under Yakima County’s Code, the earliest that the 21-day appeal period began to run was on April 13, 2018, when the County provided an electronic copy (i.e. notice of public availability) of the resolution to the Respondent.<sup>30</sup> The Respondent filed the 2018 Lawsuit on May 2, 2018, which is two days prior to the earliest possible twenty-one day deadline of May 4, 2018. The Superior Court did nothing more than apply the plain meaning of Yakima County’s own code requiring a final written decision to trigger the 21-day appeal period under LUPA.

---

28. VRP 49-50.

29. Brief of Petitioners at 12.

30. RCW 36.70C.040(4)(a); CP 24.

**2. Washington Common Law Supports The Superior Court’s Decision That The Yakima County Board of Commissioners Issued A Final Written Decision Under RCW 36.70C.040(4)(a).**

Petitioners’ concession that *Northshore Inv’rs, LLC v. City of Tacoma*,<sup>31</sup> is a “case with similar but not identical facts” is an understatement.<sup>32</sup> This concession belies the significance of the distinctions between *Northshore Inv’rs LLC* and the facts in the appeal before this Court. Two facts in particular guiding the appellate court’s decision in *Northshore Inv’rs* militate against extending that holding here.

First, in *Northshore Inv’rs*, the City of Tacoma had no ordinance requiring a “final written decision.”<sup>33</sup> Instead, the Division II Court of Appeals’ decision in *Northshore Inv’rs LLC* rests on the dispositive conclusion that the Tacoma City Council was not required to issue a written decision at all.<sup>34</sup> Second, because a “final written decision” was not required in *Northshore Inv’rs*, there was only an oral decision in that case.<sup>35</sup>

Northshore argued that the city council was required to issue a written decision affirming the hearing examiner’s recommendation.<sup>36</sup> But the plain language of Tacoma’s municipal code permitted an oral decision as a final administrative action under RCW 36.70C *et seq.*, as the court noted there:

---

31. 174 Wn. App. 678, 689-95, 301 P.3d 1049 (2013).

32. Brief of Petitioners at 30.

33. *Northshore Inv’rs, LLC*, 174 Wn. App. at 688 (“We hold that the TMC does not require the Council to issue written decisions . . .”).

34. *Id.*

35. *Id.* at 695.

36. *Id.* at 696.

TMC 1.70.050, which is titled “Review of Council decision,” states: “Pursuant to RCW Chapter 36.70C, the final date of the decision of the City Council on the appeal shall be deemed to be the date the motion concerning the appeal is adopted by the City Council and shall be considered to have been entered into the public record on that date.” Thus, chapter 1.70 TMC . . . contemplates the Council issuing final land use decisions at city council hearings by oral motion. If a written decision were required in all instances, TMC 1.70.050 would be rendered meaningless.<sup>37</sup>

This is the critical distinction between *Northshore Inv’rs LLC* case and the case before this Court. Unlike *Northshore Inv’rs LLC*, the Yakima County Code does not allow the Board to pass a final land use decision by oral motion or even by resolution alone. It requires a final written decision.<sup>38</sup> In short, *Northshore Inv’rs* is inapposite and actually supports the Superior Court’s reliance on the county code to find that a final written decision is required to end administrative appeals under LUPA.

Petitioners’ reliance on *King’s Way Foursquare Church v. Clallam Cty.*<sup>39</sup> likewise does not support Petitioners’ case. The *Clallam Cty.* case stands for the proposition that the date a Board “orally indicated its intent” to pass a resolution is not necessarily the date it “passed” the resolution.<sup>40</sup> Rather, the date of the decision is “*generally* the date on which the decision is reduced to writing.”<sup>41</sup> In this case, *Clallam Cty.* has limited applicability because Yakima County expressly requires a “final written decision” to end administrative appeals for purposes of LUPA. Here, the

---

37. *Id.* at 697.

38. YCC 16B.09.050(5).

39. 128 Wn. App. 687, 116 P.3d 1060 (2005), *as amended* (Aug. 23, 2005).

40. *Clallam Cty.*, 128 Wn. App. at 691.

41. *Id.* (emphasis added).

Board “orally indicated its intent” to pass Resolution 131-2018 and voted on it.<sup>42</sup> The Board dated its resolution April 10, 2018, but the final written decision was not mailed nor was notice given that it was publicly available until April 13, 2018.<sup>43</sup>

Moreover, it was undisputed in *Clallam Cty.* that the county commissioners convened a quasi-judicial proceeding, and, therefore, the date of the resolution rather than the vote controls under RCW 36.70C.040(4)(b).<sup>44</sup> The county board in *Clallam Cty.* issued findings of fact and conclusions of law to terminate its administrative proceeding as part of a final adjudicative process after the hearing examiner had issued its decision.<sup>45</sup>

In contrast, the Yakima Board of County Commissioners was not sitting in a quasi-judicial proceeding per their own election. The Yakima County Superior Court’s ruling gave effect to the plain meanings of both county and state laws.

### **3. The Board Did Not Sit In A Quasi-Judicial Capacity When It Voted On Its Resolution.**

The Superior Court was correct that it did not need to analyze the four-part test for determining whether the Board sat in a quasi-judicial capacity on April 10, 2018.<sup>46</sup> But the Superior Court was also correct in its

---

42. CP 25-26.

43. *Id.*

44. *Clallam Cty.*, 128 Wn. App. at 691-692.

45. *Id.* at 689-90 FN 2.

46 The Superior Court in its verbal explanation of its order noted that “in this case the written decision is the resolution” and this “is consistent with that language in the code that says the Board’s final written decisions . . . shall constitute a final administrative action for purposes of 36.70C RCW.” VRP 49-50.

*dicta* noting that setting aside Yakima County Code’s requirement of a final written decision as a final administrative action for purposes of LUPA, the Board did not sit in a quasi-judicial capacity on April 10, 2018. Yakima County conceded as much at the Initial Hearing in an exchange with the Superior Court:

The Court: It - - but do you think it was a hearing in the traditional judicial sense like we’re having today? And this is a hearing in - - as far as I am concerned.

Mr. McIlrath (for Yakima County): I - - I, myself would consider it a hearing. It’s an opportunity for them to make a decision and - - **but the hearing actually would be if they decide to hold a closed record hearing. Now that clearly would be a hearing.**

The Court: It clearly would be a hearing.

Mr. McIlrath: Yeah.<sup>47</sup>

In other words, if the Board had granted the Respondent’s request for a closed record hearing, that would have clearly been a quasi-judicial proceeding, but the Board rejected the request and instead issued the resolution without a hearing.

RCW 36.70C.040(4)(b) provides that ordinances or resolutions passed “by a legislative body sitting in a quasi-judicial capacity” are issued “the date the body passes the ordinance or resolution.”<sup>48</sup> The Superior Court held that this subsection does not apply because Yakima County requires a written decision and that was made clear both at the

---

47. CP 25.

48. RCW 36.70C.040(4)(b).

hearing and in the final written order.<sup>49</sup> Notwithstanding, while not necessary to the Superior Court’s analysis regarding Yakima County Code’s requirement for a written decision, upon review of the applicable law and standard used to distinguish between quasi-judicial actions and actions taken in some other governmental capacity, it is apparent that the Board did not act in a quasi-judicial capacity when it issued its final written decision. This furnishes another and separate ground upon which the Superior Court properly denied Petitioners’ motion to dismiss.

“Whether an agency action is considered quasi-judicial depends on whether the decision was adjudicatory in nature.”<sup>50</sup> Washington courts have provided a 4-part test for determining when a local agency’s action is quasi-judicial or ministerial:

- (1) whether a court could have been charged with making the agency's decision;
- (2) whether the action is one which historically has been performed by courts;
- (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and
- (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.<sup>51</sup>

On April 10, 2018, in response to the Respondent’s Notice of Appeal requesting a quasi-judicial hearing, the Board convened a public

---

49. *Id.* See Also APP 400-401.

50. *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967 (1999), citing *Harris v. Hornbaker*, 98 Wn.2d 650, 659–60, 658 P.2d 1219 (1983).

51. *Chaussee v. Snohomish Cty. Council*, 38 Wn.App. 630, 634–35, 689 P.2d 1084 (1984), citing *Williams v. Seattle School Dist. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982), see also *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244–45, 821 P.2d 1204 (1992).

meeting instead.<sup>52</sup> Under YCC 16B.09.050 the Board could: (1) simply affirm the Hearing Examiner’s decision without accepting additional memoranda and hearing oral argument from the parties; or (2) hold a closed record appeal (i.e. quasi-judicial) hearing with oral arguments, briefing from the parties, a County staff report, and the production of the administrative hearing transcript and record.<sup>53</sup> The Board rejected the Respondent’s closed record appeal (i.e. quasi-judicial) hearing request, and instead simply affirmed the Hearing Examiner in a legislative action on April 10 culminating in a resolution, and later by issuing the resolution as the final written decision unequivocally required under the Yakima County Code.<sup>54</sup>

Petitioners’ argument that the Superior Court held it “did not need to apply the four-part test”<sup>55</sup> to determine if an action is a quasi-judicial or legislative action misconstrues the Superior Court’s reasoning. The Superior Court found the County’s requirement for a final written decision dispositive, and therefore, the resolution was a written decision mailed to the parties on April 13, 2018.<sup>56</sup> The transcript of the hearing on the Motion to Dismiss, read in whole, makes this clear. Consequently, the issue of whether the Board sat in a quasi-judicial capacity when it voted on the resolution is irrelevant because, quasi-judicial or not, a final written

---

52. CP 24; CP 26; CP 256; CP 259.

53. YCC 16B.09.050(1)(a)-(b) (2015); YCC 16B.09.055 (2015).

54. CP 25-26.

55. Brief of Petitioners at 22.

56. VRP 49.

decision was required by the plain terms of Yakima County’s own code.<sup>57</sup> The Superior Court’s discussion of the Planning Department’s April 13, 2018 letter enclosing the Board’s final written decision, i.e., the resolution affirming the Hearing Examiner, reveals Petitioners’ misapprehension regarding the Superior Court’s reasoning on the four-part test analysis for quasi-judicial or legislative actions of county boards of commissioners:

That [the mailing of the written decision] triggers the 21-day period as far as the Court's concerned, and that's consistent with that language in the code that says the Board's final written decisions—**and, in this case, the written decision is the resolution**— ... shall constitute a final administrative action for purposes of 36.70C RCW.

So I can go ahead . . . and walk through the four-step analyzation [sic] that the supreme court's still utilizing in these cases [for determining whether a legislative body was sitting in a quasi-judicial capacity]. I've seen an unpublished opinion that came out in March where they're still -- they're still relying it [verbatim].

**But I don't think I even have to get there. My decision is that the appeal was made timely to the Court.** So the motion is denied . . . for those reasons.<sup>58</sup>

Regardless, the Superior Court’s written order reflects the verbal ruling that the Court does not “even have to get” to the four-part test—noting that the 2018 Lawsuit was “timely filed under RCW 36.70C.040(4)(a),” the part of the LUPA statute governing “written decisions.”<sup>59</sup> Put another way, a written decision is required here, so regardless of the nature of the resolution it must be a “written decision” according to Yakima County’s own codified prescription. And to the extent that Petitioners claim any

---

57. See VRP 49-50.

58. *Id.* (emphasis added).

59. CP 264.

inconsistency between the plain terms of the Superior Court’s written order and its verbal reasoning furnished from the bench, “a written order controls over any apparent inconsistency with the court’s earlier oral ruling.”<sup>60</sup>

Even if the Superior Court had applied the four-factor analysis of whether a local government’s decision is quasi-judicial in nature, the four factors undermine Petitioners’ claim. Under the first factor, while a court might conceivably be charged with affirming or declining to affirm a hearing examiner’s decision, this is unheard of in Washington without a full judicial appeal on some sort of record or beyond the record below. Here, the Board declined to provide any sort of adjudicatory proceedings, in its own discretion.

Under the second factor, the Board’s final written decision was issued after a short discussion among the Board members on this matter—one agenda item in a regular legislative meeting with other non-quasi-judicial items on the agenda. On this “agenda item,” the Board disallowed oral argument or legal briefing by the parties. This meeting without legal argument or evidentiary offerings is not one “which historically has been performed by courts.” Courts do not hold public meetings accepting public comment and declining legal argument or briefing.

Under the third factor, while the Board could arguably be said to have applied “existing law to past or present facts,” the public meeting Yakima County held evinced no such substantive legal analysis applying

---

60. *Shellenbarger v. Brigman*, 101 Wash. App. 339, 346, 3 P.3d 211, 214 (2000).

law to facts “for the purpose of declaring or enforcing liability.” There was no discussion whatsoever of any of the merits of the Respondent’s Notice of Appeal and the County’s deficiencies in processing an application, assessing environmental impacts, and issuing a land use decision. There was no apparent review of the administrative record by the Board, or review of the hearing transcript of the final Hearing Examiner’s hearing to the extent a transcript was even prepared.

Lastly, under the fourth factor and as indicated above, the Board held a public meeting but disallowed legal argument and legal briefing despite the Respondent’s express request for these adjudicatory final steps authorized under Yakima County’s process for this type of administrative appeal. The Board called for this matter as a regular agenda item along with the rest of its legislative agenda items considered on April 10, 2018. The April 10, 2018 Board meeting in no way resembled the ordinary business of courts. Rather, the public meeting looked like every other legislative meeting Yakima County holds in non-quasi-judicial capacities, and was indistinguishable from the other legislative agenda items the Board considered on that date.

Because Yakima County’s code requires a written decision here, and none of the four factors support a conclusion that the Board acted in a quasi-judicial capacity when it affirmed the Hearing Examiner’s final decision, the Superior Court correctly held that RCW 36.70C.040(4)(b)

cannot apply to this dispute, even if there were not an express codified requirement for a “final written decision.”

While Petitioners now assert that the April 10th public meeting was a quasi-judicial “hearing,” they have admitted on at least four occasions that it was actually a “public meeting.” Yakima County announced the meeting by email to the parties on March 14, 2018, stating “[t]he Clerk notified us that the Board has reviewed the materials and would like us to schedule the **public meeting**.”<sup>61</sup> In response, both Mr. James Essig of Granite and Yakama Nation’s Counsel responded to schedule the “hearing.” Granite’s legal counsel immediately jumped in by email to confirm this was not going to be an adjudicatory hearing—“[t]o be clear, Granite understands that this is a public meeting, not a public hearing. . . .”<sup>62</sup> Following the public meeting, Yakima County sent the parties a cover letter and the County’s final written decision, wherein the County stated “[o]n April 10, 2018, the Board of County Commissioner’s [sic] (BOCC) held a **public meeting** in regards to your appeal . . . .”<sup>63</sup> Ultimately, the Board adopted Resolution 131-2018 which states “WHEREAS, at a **public meeting** with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner’s decision . . . .”<sup>64</sup> Given Petitioners’ repeated admission that the Board held a public meeting, not a hearing, they should be equitably estopped from now arguing that

---

61. CP 256 (emphasis added).

62. CP 259-61 (emphasis in original).

63. CP 24 (emphasis added).

64. CP 25-26 (emphasis added).

Respondent erred by relying on their representations, and that the Superior Court somehow committed error by ruling consistent with Petitioners' repeated admissions.<sup>65</sup>

**B. Even If It Did Sit In a Quasi-Judicial Capacity, The Board Was Still Expressly Required To Issue A “Final Written Decision” Terminating The Yakama Nation’s Administrative Appeal.**

Even if the Board was sitting in a quasi-judicial capacity, Petitioners cannot point to any authority indicating that a resolution passed by a Board sitting in a quasi-judicial capacity cannot be a “written decision” for purposes of RCW 36.70C.040(4)(a) when the county ordinance expressly requires a “written decision” as the terminating event for administrative appeals under RCW 36.70C *et seq.* Simply, the County cannot ignore its own code and end appeals process with something that is not considered a “written decision.”

It is axiomatic that a local government must follow its own code, as written.<sup>66</sup> The interpretation of a county’s code is reviewed *de novo* on appeal.<sup>67</sup> The Court gives “considerable deference to the construction of an ordinance by the agency charged with its enforcement, but [] only when the ordinance is ambiguous.”<sup>68</sup> And when a code does not define a given

---

65. “The elements of equitable estoppel are: ‘(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or omission.’” *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000).

66. See *Peter Schroeder Architects, AIA v. City of Bellevue*, 83 Wn. App. 188, 193, 920 P.2d 1216 (1996)(“The City must interpret and enforce the code as it is written, without adding new criteria on a case-by-case basis”).

67. *Id.* at 191.

68. *Id.*

term, courts give such undefined terms “their plain and ordinary meaning, which may be found in dictionary definitions.”<sup>69</sup>

The ordinance at issue here is unambiguous: “The Board’s final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.”<sup>70</sup> “Presumptively, the use of the word ‘shall’ in a statute is imperative and operates to create a duty rather than to confer discretion.”<sup>71</sup> Neither the county code nor LUPA appear to define the term, “written decision.” The term “decision” is defined as “[a] judicial or agency determination after consideration of the facts and the law.”<sup>72</sup> A written decision is one that is “expressed in writing rather than in speech.”<sup>73</sup> Hence, the Yakima Board of County Commissioners must issue a “final written decision” to end the administrative appeal process under LUPA. The resolution the Board voted on is a determination in writing and, therefore, a “written decision.”

The only way Appellants can prevail in showing that the Yakima County Superior Court erred in denying their motion to dismiss is by (1) proving that the Superior Court was wrong in determining that the Board did not sit in a quasi-judicial capacity when it voted on its April 10, 2018 resolution, **and then** (2) provide a legal rule dictating that when a Board must issue a final written decision to end an administrative appeal process

---

69. *Id.* at 192.

70. YCC § 16B.09.050(5)(emphasis added).

71. *Kanekoa v. Washington State Dep’t of Soc. & Health Servs.*, 95 Wn. 2d 445, 448, 626 P.2d 6 (1981).

72. Black’s Law Dictionary (10th ed. 2014).

73. Oxford Dictionary of English (3rd Rev. Ed. 2010).

and does so in the form of a resolution dated before issuing the final written decision, the Superior Court was required to consider the earlier of those two dates as the starting point for the 21-day appeal period under RCW 36.70C.040(4). There is no such authority. In fact, when it is unclear how a county or local agency ended the administrative appeal process under LUPA, a court looks to the last possible date for starting the 21-day appeal process under RCW 36.70C.040(4).<sup>74</sup>

In this case, the Superior Court did nothing more than apply the plain meaning of Yakima County's code that specifically cites to the end of the appeal process under LUPA and requires a written decision. If there is no written decision here, the administrative appeal has never ended under Yakima County's own law. If there is a written decision, the date on which it was issued must control for purposes of the 21-day appeal period. When following the plain meaning of Yakima County's Code, Respondent timely filed its appeal within 21 days of the issuance of the Board's "final written decision" required under YCC 16B.09.050(5). The Superior Court got this issue right. The Petitioners' interlocutory appeal should be denied, and the Respondent's case should proceed on the merits.

---

74. See *Habitat Watch v. Skagit Cty.*, 155 Wn. 2d 397, 408–10, 120 P.3d 56 (2005)(when it was not clear when the final decisions in the case were made for purposes of LUPA, the court noted the "very latest" date when "the written decisions were issued").

**IV. CONCLUSION**

Petitioners have failed to meet their burden to establish that the Superior Court erred in holding that Respondent's LUPA Petition was timely filed under RCW 36.70C.050(4)(a). Accordingly, this Court should deny Petitioners' appeal.

Respectfully submitted this 14th day of March, 2019.

 <hr/> <p>Ethan Jones, WSBA 46911 Shona Voelckers, WSBA 50068 YAKAMA NATION OFFICE OF LEGAL COUNSEL P.O. Box 151, 401 Fort Road Toppenish, WA 98948 (509) 865-7268</p>	 <hr/> <p>R. Joseph Sexton, WSBA 38063 GALANDA BROADMAN, PLLC 8606 35<sup>th</sup> Avenue NE, Ste. L1 P.O. Box 15146 Seattle, WA 98115 (206) 557-7509</p>
---	---

CERTIFICATE OF SERVICE

I, Ethan Jones, certify as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.
2. I am employed with the Yakama Nation Office of Legal Counsel.
3. Today, I electronically mailed and deposited in the U.S. Post Office for mailing a copy of this Brief of Respondent addressed to the following attorneys via First Class mail, postage prepaid:

Markham A. Quehrn  
mquehrn@perkinscoie.com  
Julie A. Wilson-McNerney  
jwilsonmcnerney@perkinscoie.com  
10885 N.E. Fourth Street, Suite 700  
Bellevue, WA 98004-5579

Paul McIlrath  
paul.mcilrath@co.yakima.wa.us  
128 N. 2nd Street, Room 211  
Yakima, WA 98901-2639

The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Yakima, Washington, on March 14, 2019.

  
\_\_\_\_\_  
Ethan Jones, WSBA No. 46911  
Yakama Nation Office of Legal Counsel

# YAKAMA NATION OFFICE OF LEGAL COUNSEL

March 14, 2019 - 12:37 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\_20190314123527D3089364\_1868.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was M16.031 Respondents Brief 3.14.19.pdf*

### A copy of the uploaded files will be sent to:

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

### Comments:

---

Sender Name: Ethan Jones - Email: ethan@yakamanation-olc.org

Address:

PO BOX 150

401 FORT RD

TOPPENISH, WA, 98948-0150

Phone: 509-834-8005

**Note: The Filing Id is 20190314123527D3089364**