



CASE REPORT

LAND USE – FAILURE TO TIMELY APPEAL PERMITS NOT SUBJECT TO PUBLIC NOTICE. Courts cannot entertain appeals of land use decisions unless the appellant has exhausted all administrative appeals first. Exhaustion includes the timely filing of administrative appeals, even if the appellant is not required to receive notice of the land use decision. *Nickum v. Bainbridge Island*, ___ Wn. App. ____, Slip Op. 38217-2.

I. Facts. Verizon acquired a building permit from Bainbridge Island to construct an equipment shed and utility pole for some communications antenna. Bainbridge Island issued a building permit and determined the project to be exempt from the State Environmental Policy Act (“SEPA”) on September 14, 2007. The Nickums owned property adjacent to the project. They received no notice of the building permit or SEPA exemption decisions and no notice was required. The Nickums filed an appeal of the decisions to the Bainbridge Island Hearing Examiner on November 8, 2007, about nine days after they first learned of the permits. The Hearing Examiner dismissed the appeal as untimely, noting that Bainbridge Island regulations impose a 14 day appeal deadline from the date of permit issuance. The Nickums filed a judicial appeal under the Land Use Petition Act , Chapter 36.70C RCW (“LUPA”), 19 days after issuance of the Examiner’s decision.

II. Applicable Law and Analysis. Under the doctrine of exhaustion of administrative remedies, LUPA appellants must exhaust all available administrative appeals prior to seeking judicial relief. This requirement includes complying with administrative time-of-filing requirements. The Nickums argued that it was not practically possible for them to timely file an administrative appeal of those decisions because they didn’t know they had been issued. The Court of Appeals determined that it could not toll (extend) the administrative appeals period because Bainbridge Island had not necessitated an extension due to bad faith, deception or false assurances.

The Nickums asserted that requiring a timely appeal for permits without notice violated their due process rights (constitutional fairness). The Court of Appeals determined that they could not consider this argument because the Nickums’ LUPA action was filed too late and LUPA is the judicial mechanism to consider due process claims. LUPA requires an appeal to be filed within 21 days of the issuance of a final decision. The Court of Appeals determined that the Hearing Examiner decision was not the final decision because it was based upon an untimely administrative appeal. Consequently the final decision was the issuance of the building permit and SEPA exemption decision, which were issued much more than 21 days prior to the LUPA appeal.

III. Conclusion. Even when aggrieved parties receive no notice of a decision, they are still expected under this decision to file timely administrative and judicial appeals if they want to be heard. The greatest impact will be with building permit decisions, where notice is rarely required for surrounding property owners.