



CASE REPORT

LAND USE PETITION ACT (LUPA)—“FINAL DETERMINATION”—MOTION FOR RECONSIDERATION. A motion for reconsideration of a land use decision made by a jurisdiction’s body or officer with the highest level of authority does not toll LUPA’s strict 21-day superior court appeal filing deadline. RCW 36.70C.040(2), (3). *Mellish v Frog Mountain Pet Care, et al*, Slip Op. No. 37583-4-II (December 15, 2009).

I. Issue and Facts. In *Mellish*, the court considered whether a county hearing examiner’s decision approving a conditional use permit and minor variance, required for a proposed remodel and expansion of a dog and cat boarding facility, was a “final determination” under LUPA’s definition of a “land use decision.” If so, the decision triggered the running of LUPA’s 21-day appeal period, even though a motion for reconsideration was pending. Mellish, a project opponent, filed a motion for reconsideration. The hearing examiner issued a decision denying the motion for reconsideration and the county issued a permit to Frog Mountain. Mellish then filed a LUPA petition within 21 days of the denial of the motion for reconsideration, but more than 21 days after the hearing examiner’s decision approving the permit and variance. Mellish and the County argued that the 21-day appeal period did not begin to run until the decision denying the motion for reconsideration was made by the hearing examiner. The superior court agreed with Mellish that the motion for reconsideration tolled the 21-day LUPA appeal period and then reversed the examiner’s decision on the merits. Frog Mountain appealed on the basis that Mellish did not file his petition within 21 days of the hearing examiner’s decision. Division II of the Court of Appeals agreed with Frog Mountain and reversed the superior court with instructions that the superior court dismiss the LUPA appeal with prejudice.

II. Applicable Law and Analysis. The appeals court first determined that the hearing examiner issued a final decision under former RCW 36.70C.020(1)(a) when he approved the conditional use permit and variance and that an appeal was required within 21 days. RCW 36.70C.040(2). Since the hearing examiner was the county’s highest level of decision making authority on the conditional use permit and variance, the decision was a final determination. The county was not free to define a “final determination” in its local code because LUPA requires uniformity in expedited appeal procedures. RCW 36.70C.010 and *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002). The appeals court rejected arguments that the motion for reconsideration was itself an appeal to a higher authority and that the decision was not final until the hearing examiner decided the motion to reconsider.

Having determined the decision of the hearing examiner on the merits of the application to be a final decision, the court of appeals then held that a motion for reconsideration of a LUPA final decision does not toll the filing deadline. Compelling to the court was the absence of any provision in LUPA, as found in other statutes, expressly providing that a reconsideration motion either renders an otherwise final decision non-final or tolls the deadline for filing an appeal. The court pointed to other contexts where the legislature, desiring to alter the effect of unambiguous

statutory provisions, such as by tolling a statute of limitations, “has done so expressly.” LUPA contains no similar tolling provision for motions for reconsideration. Finally, the appeals court reviewed the doctrine of equitable tolling and determined that none of the predicates for equitable tolling were demonstrated. The predicates for equitable tolling are bad faith, deception, or false assurances by the other party and the exercise of diligence by the party asserting that equitable tolling should apply.

III. Conclusion. This decision addresses an issue of first impression for the appellate courts of this state. Although the decision is deeply-rooted in statutory language and case law expressing that LUPA was intended to provide consistency, uniformity and expedited appeal procedures, another division of the court of appeals could decide differently. Cities should exercise caution and consult their city attorney when considering whether or not to adopt code language that allows for reconsideration of a land use decision made by a highest level decision maker, or when determining the effect of such a motion on the running of the 21-day LUPA appeal period if your city’s code already allows for a reconsideration motion. In January of 2010, the State Supreme Court will hear oral argument in the case of *Skinner v. Civil Serv. Comm’n of City of Medina*, 146 Wn. App. 171, 173, 188 P.3d 550 (2008). The state’s highest court accepted review of an appeal brought by the City of Medina challenging a Division One decision holding that a motion for reconsideration of a civil service commission’s decision denying an appeal of a disciplinary decision tolled the 30-day statute of limitations in RCW 41.12.090. Although a different statutory context, the decision reached by the State Supreme Court in *Skinner* may provide a clearer picture as to the impact and lasting effect of the decision by Division II in *Mellish v. Frog Mountain, et al.*