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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 ENGLEIGH DIVERSIFIED, INC., et al.,

9 Plaintiffs,

10 v.

11 CITY OF PORT ORCHARD, et al.,

12 Defendants.

CASE NO. C11-05324BHS

13 ORDER DENYING
14 PLAINTIFF'S MOTION,
15 DENYING DEFENDANT'S
16 MOTION AND REMANDING
17 TO CITY COUNCIL FOR FINAL
18 DECISION ON THE MERITS

19 This matter comes before the Court on the cross motions of Plaintiff Engley
20 Diversified, Inc., ("EDI") (Dkt. 15) and of Defendant City of Port Orchard ("the City")
21 (Dkt. 18) for partial summary judgment. The Court has reviewed the briefs filed in
22 support of and in opposition to the motions and the remainder of the file and hereby
23 denies both motions and remands this matter to the Port Orchard City Council ("the City
24 Council") for a decision on the merits.

25 **I. PROCEDURAL AND FACTUAL BACKGROUND**

26 On May 20, 2011, EDI filed a motion for partial summary judgment. Dkt. 15. On
27 May 26, 2011, the City filed a cross motion for partial summary judgment. Dkt. 18. Both
28 parties seek summary judgment regarding the exhaustion of administrative remedies, a
condition precedent to EDI's Land Use Petition Act ("LUPA") action. Dkts. 15 & 18.

This matter arises out of EDI's appeal from the City's denial of EDI's construction
permit applications. Dkt. 2 at 5. EDI pursued an appeal to the City's Hearing Examiner

1 (“the Hearing Examiner”) which affirmed the City’s denial on November 9, 2010. Dkt. 16
2 at 6. On November 15, 2010, EDI then filed a timely motion for reconsideration (Dkt. 16
3 at 24), pursuant to Port Orchard Municipal Code (“POMC”) 2.76.130, which states:

4 **2.76.130 Reconsideration.**

5 (1) Request for Reconsideration. The examiner has discretion
6 whether to consider a request for reconsideration. A request for
7 reconsideration must be in writing and filed by a party or aggrieved person
8 within seven working days of the examiner’s decision. The request must
9 include: the grounds for reconsideration, including specific reference to the
10 decision and each claimed error therein whether error of law or fact, and
11 any discovery of new evidence which, upon reasonable diligence, could not
12 have been discovered by a party prior to the close of the hearing on the
13 matter. Failure to allege error is grounds for summary denial of the request.

14 (2) Effect of Request. *The filing of a request for reconsideration*
15 *shall stay the running of the appeal period until the examiner issues a*
16 *decision on the request. Upon issuance of a decision on a request for*
17 *reconsideration, the time for filing an appeal will begin.* The examiner will
18 review the request in light of the official record and his or her decision,
19 taking into account the grounds for the request. The examiner may deny the
20 request; may set a hearing in order to supplement the official record and
21 issue a revised decision following that hearing; or may revise the decision
22 without a hearing. If the request is denied without further hearing or
23 submission of materials by other parties, the denial must be issued in
24 writing within five working days of the date of the request. The examiner
25 has the authority to take any action consistent with the powers granted
26 herein, in order to issue a decision on a request for reconsideration. Action
27 taken by the examiner in response to a request for reconsideration, other
28 than a denial, shall be in writing, and shall be issued within 21 calendar
days of the date of the request.

Dkt. 21 at 6 (emphasis added). On December 6, 2010, the Hearing Examiner denied
EDI’s motion for reconsideration. Dkt. 16 at 27. On December 16, 2011, EDI filed an
appeal of the Hearing Examiner’s decision to the City Council. Dkt. 20 at 4. On March
22, 2011, the City Council dismissed the appeal as untimely. Dkt. 16 at 55-58; *see also*,
POMC 16.06.072(2) (fourteen-day rule).

24 **II. DISCUSSION**

25 EDI moves the Court to find that the City Council erred when it found EDI’s
26 appeal untimely and to find that EDI exhausted its administrative remedies. Dkt. 15 at
27 11. The City argues that the Court should dismiss this case because the City Council’s
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1 decision, finding EDI's appeal untimely, renders EDI without standing to bring the
2 appeal. Dkt. 18 at 2-4. The dispute centers on the interpretation of POMC 2.76.130(2),
3 the effect of a request for reconsideration on the running of the appeal period; each party
4 maintains a different interpretation of the provision. POMC 2.76.130(2); Dkts. 15 at 7 &
5 18 at 4.

6 **A. Parties' Dispute**

7 EDI maintains that the City Council's interpretation of POMC 2.76.130(2) was
8 contrary to the plain language of the provision.¹ Dkts. 15 at 8 & 35 at 5. Specifically,
9 EDI argues that the time for filing an appeal begins "upon issuance of a decision on a
10 request for reconsideration." POMC 2.76.130(2); Dkts. 15 at 7 & Dkt. 16 at 50.

11 Therefore, EDI contends that by filing its appeal on December 16, 2010, nine days after
12 the Hearing Examiner's issuance of its decision on EDI's motion for reconsideration,
13 EDI's appeal to the City Council was timely. Dkts. 15 at 8 & 16 at 49.

14 In contrast, the City argues that the time for filing an appeal begins on the date of
15 the Hearing Examiner's initial decision (Dkts. 16 at 45 & 18 at 3) and that the stay
16 contemplated in POMC 2.76.130(2) "is like pressing pause on a movie. Once the stay is
17 lifted the time to file an appeal continues to run from that point as if the stay of
18 proceedings never occurred." Dkt. 16 at 46. According to the City's interpretation, any
19 of the time passing within the seven-day period allowed for filing a motion for
20 reconsideration is subtracted from the fourteen-day total time allowed for appeal to the
21 City Council. Dkt. 18 at 4.

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25 ¹ EDI also appears to argue that by stipulating to the hearing date and agreeing to "waive
26 any objection to a hearing being set on or before February 22, 2011," the City waived any
27 objection that the appeal was untimely. Dkt. 15 at 6. While the Court is persuaded that this may
28 support remand, the parties have not fully briefed this issue, and it is not necessary to the Court's
decision.

1 The City Council, the final authority for land use decisions, agreed with the City's
2 interpretation of the municipal code, and it found that EDI failed to exhaust
3 administrative remedies by filing an untimely appeal. Dkt. 16 at 55-56. The City Council
4 reasoned the rules of statutory interpretation supported its decision. Dkt. 56-58.

5 **B. Statutory Interpretation**

6 Federal courts must be cautious in determining the meaning of a municipal
7 ordinance where the state supreme court has not provided a controlling interpretation of
8 its meaning. *Cf. Coalition for Economic Equity v. Wilson*, 110 F.3d 1431, 1437 (9th Cir.
9 1997) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-79 (1997)). "In
10 regard to statutory construction, it is well settled that courts should accord great
11 deference to the interpretation given the statute by the officers or agency charged with its
12 administration." *Udall v. Tallman*, 380 U.S. 1 at 16 (1965). Accordingly, a practical
13 interpretation by officials charged with administration of ambiguous statute "will not be
14 lightly disturbed." *Brewster v. Gage*, 280 U.S. 327, 336 (1930). However, such
15 deference is constrained by a court's obligation to honor the clear meaning of a statute,
16 as revealed by its language, purpose and history. *Southeastern Community College v.*
17 *Davis*, 442 U.S. 397, 411 (1979).

19 **1. Plain Language**

20 According to the Supreme Court, "[t]he constructional problem is resolved by the
21 . . . principle . . . that a word is known by the company it keeps (the doctrine of *noscitur*
22 *a sociis*)." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The Ninth Circuit
23 similarly recognizes "that words are to be judged by their context and that words in a
24 series are to be understood by neighboring words in the series." *United States v.*
25 *Carpenter*, 933 F.2d 748, 750-51 (9th Cir. 1991). Thus, a court's inquiry begins and
26 ends with the statutory text, if the text is unambiguous. *Satterfield v. Simon & Schuster,*
27 *Inc.*, 569 F.3d 946, 951 (9th Cir. 2009); *State v. Delgado*, 148 Wn.2d 723, 727 (2003)

1 (stating that where the meaning of the statute is unambiguous, the goal of one tasked
2 with its interpretation is to give effect to the plain meaning).

3 Here, when the City Council interpreted POMC 2.76.130(2), it found that “the
4 time period for an appeal ceas[es] during the period of time that a motion for
5 reconsideration is pending, i.e. a stay, and then *continu[es]* to run once the motion has
6 been ruled upon.” Dkt. 16 at 57 (emphasis added). According to the City Council, the
7 appeal period “is to *resume* as if the stay had not occurred.” *Id.* (emphasis added).

8 This interpretation, however, is contrary to a plain reading of the provision’s
9 unambiguous language. The Court finds nothing ambiguous about POMC 2.76.130(2).
10 The plain language of the code provides, in pertinent part, as follows:

11 The filing of a request for reconsideration shall stay the running of the
12 appeal period until the examiner issues a decision on the request. Upon
13 issuance of a decision on a request for reconsideration, the time for filing
an appeal will *begin*.

14 POMC 2.76.130(2) (emphasis added). It does not say that the effect of filing a motion for
15 reconsideration puts a pin in the time for filing an appeal which will continue or resume
16 after the decision is issued. POMC 2.76.130(2). In short, *begin* is not synonymous with
17 *resume* or *continue*.² Plain language does not require construction. *State v. Wilson*, 125
18 Wn.2d 212, 217 (1994). Therefore, the Court concludes that the plain meaning of the
19 term “begin” indicates that the effect of a motion for reconsideration is a suspension of
20 the start of the appeal period until the motion is decided.

21 Additionally, statutes should not be interpreted so as to render any portion
22 meaningless, superfluous or questionable. *Addleman v. Board of Prison Terms and*
23 *Paroles*, 107 Wn.2d 503, 509 (1986) (citing *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d
24 131, 138 (1982) disagreed with on other grounds by *State, Dept. of Ecology v. Campbell*

26 ² The Court notes that other than it’s own reading of the code, the City Council cites no
27 authority for the proposition that the plain meaning of the term “begin” is ambiguous or may be
28 construed to mean continue or resume.

1 & *Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). Thus, the Court is persuaded by EDI's
2 argument that the "second sentence of POMC 2.76.130(2) clarifies" the intended
3 meaning of the first sentence. Dkt. 15 at 10. To disregard the word 'begin' renders the
4 entire sentence meaningless, and any other interpretation of the sentence renders it
5 superfluous.

6 **2. Absurd Results**

7 Statutes are to be interpreted so as to preclude absurd results whenever possible.
8 *United States v. Wilson*, 503 U.S. 329, 334 (1992). So, even if the Court found the City
9 Council's interpretation facially persuasive, the Court must fully consider the
10 implications of this interpretation. Here, the Court concludes that the City Council's
11 interpretation creates an untenable choice between a right to file a motion for
12 reconsideration and the right to appeal. For example, according to the City Council's
13 interpretation, a party who chooses to exercise its right to move for reconsideration must
14 forgo its right to the full fourteen-day recourse available to others who directly appeal
15 the Hearing Examiner's decision. POMC 2.76.110(3)(a). Under the City Council's
16 interpretation, if a motion for reconsideration is filed on the last day permitted, as in the
17 instant case, the time normally allotted for taking an appeal would be cut in half. By
18 demanding such a price for filing a motion for reconsideration, the City Council's
19 interpretation leads to this and perhaps other absurd results. This Court cannot read such
20 a result into a reasonable appeals process.

22 **3. EDI's appeal**

23 Under POMC 2.76.130(2) the time to file an appeal began on December 6, 2010.
24 EDI then had fourteen days, until December 20, 2010, to file its appeal. EDI filed its
25 appeal with the City Council on December 16, 2010. Thus, the Court finds EDI's appeal
26 timely and because EDI has not exhausted its administrative remedies, the Court
27 remands the appeal to the City Council for consideration on the merits.
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1 **C. Pending Motions**

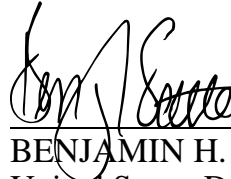
2 Since the Court remands the matter to the City Council for a final decision, the
3 Court denies, without prejudice, all pending motions as moot.

4 **III. ORDER**

5 Therefore, it is hereby **ORDERED** that

- 6 (1) EDI's motion for partial summary judgment (Dkt. 15) is **DENIED**;
7 (2) The City's motion for partial summary judgment (Dkt. 18) is **DENIED**;
8 (3) This matter is **REMANDED** to the City Council for consideration on its
9 merits; and
10 (4) All other pending motions (Dkts. 10, 22, 25, & 39) are **DISMISSED**
11 **without prejudice as moot.**

12 DATED this 7th day of July, 2011.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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