No. 89293-8

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,

Respondents.

HEINMILLER AND STAMEISEN'S ANSWER TO PETITION FOR REVIEW

John H. Wiegenstein, WSBA #21201
Elisha S. Smith, WSBA #29210
HELLER WIEGENSTEIN PLLC
144 Railroad Ave., Suite 210
Edmonds, WA 98020-4121
(425) 778-2525
(425) 778-2566 FAX
Attorneys for Respondents Heinmiller and Stameisen

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I. STATEMENT OF THE CASE

The Land Use Petition Act, Chapter 36.70C RCW ("LUPA"), provides for judicial review of a "land use decision." LUPA defines a "land use decision" as 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 various types of issues, including application for a building permit. In this case, the permit application in question was by respondents Heinmiller and Stameisen ("Heinmiller"). San Juan County issued the permit. But petitioners Durland failed to appeal the permit issuance to the Hearing Examiner, as provided by County code. Instead, Durland filed a LUPA petition in superior court, which correctly dismissed the petition. The Court of Appeals properly affirmed, holding that there was no "land use decision" and thus no basis for LUPA judicial review.

A. Procedural background

Michael Durland, Kathleen Fennel, and Deer Harbor Boatworks ("Durland") filed three superior court actions against respondent Heinmiller, all arising out of the issuance of the same building permit[1].

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[1] (A) Appeal #1: COA No. 68453-1-I (the appeal in which this brief is filed -- appeal of Skagit County Superior Court No. 11-2-02480-9). This appeal concerns Durland's complaints about San Juan County Permit BUILDG-11-0175.

CP 33-38. The parties are neighboring property owners in San Juan County.

B. San Juan County's issuance of a building permit to Heinmiller

On August 8, 2011, Heinmiller applied to San Juan County for a building permit to construct a garage addition to be used as an office and entertainment area. San Juan County approved of the request and issued permit BUILDG-11-0175 to Heinmiller on November 1, 2011. CP 38.

San Juan County utilizes a Hearing Examiner to hear appeals concerning local land use decisions. The County Code requires that appeals be filed within 21 days following the date of the written decision being appealed. SJCC 18.80.140; CP 9-14. A party may then appeal the Hearing Examiner's decision to the Superior Court.

C. Procedural history in this action.

In this matter, Durland eventually found out about the issuance of the permit to Heinmiller, and decided that he had complaints about it,

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(B) Appeal #2: COA No. 68757-3-I (appeal of part of the decision in San Juan County Superior Court No. 12-2-05047-4). The subject matter of this appeal concerned the same permit, BUILDG-11-0175. Review in this matter has been terminated because the appeal was improperly filed before trial court proceedings were concluded.

(C) Appeal #3: COA No. 69134-1-I (second appeal of San Juan County Superior Court No. 12-2-05047-4). The subject matter of this appeal concerns the same permit, BUILDG-11-0175; the Court of Appeals issued its ruling on September 23, 2013, affirming the trial court dismissal of Durland's claims.

and/or construction proposed under the same. Rather than appealing to the San Juan County Hearing Examiner, Durland instead filed a land use petition in the Skagit County Superior Court. CP 35.

On motions by Heinmiller and San Juan County, the Skagit County Superior Court dismissed Durland's land use petition on February 3, 2012, because there was no "land use decision" for the trial court to review and even if there was, the petition was filed too late. CP 4-16; CP 17-26; VRP 1-24.

Durland appealed, and the Court of Appeals affirmed, holding that there was no "land use decision" under LUPA. The Court of Appeals also awarded Heinmiller attorney fees under RCW 4.84.370. This decision is the subject of Durland's Petition for Review in this court.

D. Proceedings in Durland's other appeals arising from the same building permit.

Separate from this action, Durland filed an appeal with the Hearing Examiner regarding the *same permit*. The Hearing Examiner rejected Durland's appeal. Durland then filed another LUPA petition, appealing the Hearing Examiner's decision, this time in San Juan County Superior Court. The San Juan County Superior Court dismissed all claims against Heinmiller and the County in that action, and Durland then again appealed to the Court of Appeals. *See COA No. 68757-3-I and COA No. 69134-1-I Docket Sheets, as well as LUPA Petition subject of same,*

attached hereto at Appendix A.

The first of those appeals was dismissed as premature; the second, No. 69134-1-I, proceeded on the merits, and the Court of Appeals issued its ruling on September 30, 2013, affirming the superior court. *Copy attached as Appendix B.*

II. STANDARD OF REVIEW

Acceptance of review by the Supreme Court is governed by RAP 13.4(b), which states:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Durland's Petition argues that the Court of Appeals' substantive ruling raises due process issues (RAP 13.4(b)(3)), and that the attorney fee award conflicts with other Court of Appeals decisions and raises issues of substantial public interest (RAP 13.4(b)(2) and (4)). Durland is incorrect on both counts.

III. ARGUMENT

LUPA is the codification of the strong and long-recognized public policy of administrative finality in land use decisions. James v. Kitsap

County, 154 Wn.2d 574, 589, 115 P.3d 286 (2005). The purpose and policy of definite time limits is to allow property owners to proceed with assurance in developing their property. Id.

A. The Court of Appeals correctly ruled that there was no "land use decision" for the superior court to review, and affirmed dismissal of Durland's petition.

The trial court, and Court of Appeals, correctly dismissed Durland's claims. RCW 36.70C.020(2) defines a "land use decision" as the final decision by the official within the local jurisdiction with the highest level of authority to make such a decision. This statute states, in pertinent part:

> Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.
>
> ...
>
> (2) "Land use decision" means 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) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;
>
> ....

RCW 36.70C.020(2)-(2)(a).

In San Juan County, the Hearing Examiner is the official with the highest level of authority to make a final determination as to Durland's appeal. SJCC 18.80.140; CP 9-14. Under LUPA, San Juan County's issuance of a building permit is also a project action subject to review under LUPA, assuming the petitioner (Durland) followed through with the Hearing Examiner process first. Asche v. Bloomquist, 132 Wn. App. 784, 90, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007); Chelan County. v. Nykreim, 146 Wn.2d 904, 929, 52 P.3d 1 (2002).

Here, the Court of Appeals correctly determined that there was no "land use decision" as defined by LUPA, because Durland skipped the necessary step of appealing first to the Hearing Examiner. This was a simple, straightforward analysis relying on the plain language of the statute. There was no error.

B. Durland's due process argument was not sufficiently raised below, and is actually the heart of his other appeal, which the Court of Appeals just decided.

Durland seeks review in this court on the theory that his due process rights were violated. But in the hearing before the superior court Durland's counsel conceded that no due process argument was being made:

> *And we're not even arguing due process.* Frankly I think there's a due process violation but the court's [sic] have established that if this court decides there is no jurisdiction then this court doesn't have the jurisdiction to decide on due process issues.

VRP 13 (emphasis added).

Similarly, at oral argument in the Court of Appeals, Durland counsel again conceded that this action did not involve due process claims, and that those claims were instead briefed and developed in the *other* (then-pending) appeal in Division 1, No. 69134-1-I:

> MS. NEWMAN: May it please the Court. Claudia Newman on behalf of-- oh, sorry. (inaudible). Claudia Newman on behalf of Appellants Michael Durland, Kathleen Fennell and Durland Boat Works. And I'd like to reserve three minutes, please.
>
> The question presented to this Court with this case is, can a County keep the approval of a permit hidden or quiet from the public for twenty-one days, to avoid a legal challenge? Does the Land Use Petition Act really allow that to happen? And the answer is no, absolutely not.
>
> JUDGE APPELWICK: Counsel, one of the things that puzzles me is, nowhere in your briefing do you cite what the notice requirement is when a building permit is issued. What is it?
>
> MS. NEWMAN: That's right. There is no-- this is a different-- because there is no...
>
> JUDGE APPELWICK: What is...
>
> MS. NEWMAN: There's no notice requirement in the San Juan County Code-- I mean, I'm sorry, the Island County Code that requires notice for a building permit. But that's irrelevant...
>
> JUDGE APPELWICK: And does that...
>
> MS. NEWMAN: ...to the issues before the Court.
>
> JUDGE APPELWICK: ...does that violate any state law?
>
> MS. NEWMAN: No.

JUDGE APPELWICK: Is that a constitutional problem?

MS. NEWMAN: It's, it's a constitutional problem I would say, which is a case that you'll be hearing in a couple months from now. It hasn't been set for oral argument yet.

VRP at 2-3 (*attached as Appendix C).* Durland counsel confirmed this later in the rebuttal portion of her argument:

JUDGE DWYER: Let me ask the question that I asked. In your briefing you discussed that you filed the instant LUPA appeal in Skagit County?

MS. NEWMAN: Uh huh. Uh huh.

JUDGE DWYER: That you also filed a request for a hearing before the Hearing Examiner, an appeal before Hearing Examiner. There's a mention that that was denied on time limits grounds, and then the rest of the briefing talks about this dispute. Is that reference a reference to this other litigation that's coming up later for us?

MS. NEWMAN: I mean, there is, the future litigation is, involves due process issues concerning no notice and administrative review.

JUDGE DWYER: But from this, from this thing? From this transaction?

MS. NEWMAN: Oh, yes.

JUDGE DWYER: From this transaction? Not different (inaudible)?

MS. NEWMAN: From this transaction, yes.

JUDGE DWYER: So those issues are going to be, are separately briefed and will be argued to a different group of (inaudible) judges? Okay.

MS. NEWMAN: Right. I would like, I'm starting to think it may make sense to consolidate for this court, to hear those and this at the same time.

JUDGE APPELWICK: It's a little late.

VRP at 17-18.

Here, where Durland has expressly waived due process arguments in the proceedings below, and represented that those issues were briefed and argued in the *other* appeal, and where no decision on due process grounds was made by either the superior court or Court of Appeals in this action, there is no basis for this court to even consider accepting review. RCW 2.44.010; Nguyen v. Sacred Heart Med. Ctr., 97 Wash. App. 728, 735, 987 P.2d 634 (1999).

C. The Court of Appeals correctly held, in the most recent appeal, that Durland had no substantive right to personal notice of issuance of building permit, and thus there could be no due process claim.

San Juan County has no duty to notify neighbors of its decisions on permits. Neither does LUPA require individual notice of building permit issuance to neighbors. Asche v. Bloomquist, *supra*. The statute of limitations clock set forth in LUPA starts ticking regardless of actual notice to neighbors. The Court of Appeals, in the "other" appeal (No. 69134-1-I, decision dated September 23, 2013) correctly held that Durland had no constitutionally recognized property interest in the issuance of the Heinmiller building permit, and hence there was no issue of due process with respect to the County's policy (as is surely the case with most, if not all, other jurisdictions in Washington) of not providing personal notice of same to Durland or other neighbors.

Asche is also instructive on this issue. In that case, the trial court

dismissed a LUPA petition filed by the Asches as untimely. The Asches owned adjoining property to the Bloomquists, and the Asches complained about a building permit that Kitsap County granted to the Asches on September 9, 2004. The permit was issued in regard to a house that the Bloomquists wanted to build on their property, and the Asches complained that the permit violated various zoning ordinances and would injure them by blocking their Mount Rainier view. Asche, 132 Wn.App. at 788-89. The Asches did not receive notice of the issuance of the building permit. They complained that they did not have notice of the permit approval until they saw construction and contacted the Bloomquists' builder; and that when they contacted the County, the County "told them not to hire an attorney and that the County would 'handle it' without an attorney." Id. The Asches did not file their LUPA petition until about five months after the building permit was issued, on February 2, 2005. Id. at 789.

In Asche, the parties agreed that the date the permit was granted was the date of "issuance" under LUPA (Id. at 796; 802, FN 4); and significantly, although the date of issuance in that case was not disputed, the Court confirmed that that was the date of issuance under RCW 36.70C.040(3) despite the Asches' complaints about lack of notice of the permit. Id. at 795.

Like Durland, the Asches also asserted that if LUPA barred their challenge to the permit, their procedural due process rights were violated because they had no notice of the building permit's issuance. Id. However, the Court found that neither LUPA nor the County regulations required notice to neighbors of the issuance of building permits. Id. With respect to that argument, the Court found:

> Nonetheless, the Asches' due process argument fails. Our Supreme Court has established a bright-line rule in Habitat Watch; LUPA applies even when the litigant complains of lack of notice under the procedural due process clause. We note that Habitat Watch had been given notice and had participated in proceedings to oppose the special use permit. Habitat Watch, 155 Wash.2d at 402, 120 P.3d 56 (2005). Then, in two instances, Habitat Watch was not given notice required by the local ordinance and therefore did not have the opportunity to challenge the special use permit's extension. Habitat Watch, 155 Wash.2d at 403, 120 P.3d 56. The court held that despite the lack of notice, LUPA barred Habitat Watch's challenges. Habitat Watch, 155 Wash.2d at 401, 120 P.3d 56. The court stressed that LUPA's "statute of limitations begins to run on the date a land use decision is issued," Habitat Watch, 155 Wash.2d at 408, 120 P.3d 56, and that "even illegal decisions must be challenged in a timely, appropriate manner." Habitat Watch, 155 Wash.2d at 407, 120 P.3d 56. Given that position, we are constrained to hold that the Asches' due process challenge fails. Having failed to file a land use petition within 21 days of the building permit's issuance, they have lost the right to challenge its validity.

Id. at 798-99; see also, p. 796.

Other Washington courts have found similarly. See, e.g., See, Applewood Estates Homeowners Ass'n v. City of Richland 166 Wn.App. 161, 269 P.3d 388 (2012) (reversing trial court's decision not to dismiss

LUPA petition based on untimeliness; citing to Asche, Habitat Watch, and Samuel's Furniture[2]; court confirmed LUPA does not require individualized notice for the 21-day clock to begin; that Washington has a strong public policy of supporting administrative finality in land use decisions; and that it is up to the legislature -- which is presumed to be aware of court decisions interpreting LUPA -- to change any provisions regarding notice, or the 21-day clock); Nickum v. City of Bainbridge Island, 153 Wn.App. 366, 223 P.3d 1172 (2009) (affirming trial court's dismissal of LUPA action for lack of standing due to failure to exhaust administrative remedies; and confirming that trial court lacked jurisdiction to hear the matter, noting "...21 day LUPA deadline is absolute" and untimely filing of an appeal prevents a superior court from reviewing the same, and that LUPA's "...time limits also apply to due process claims").

D. The Court of Appeals correctly awarded attorney fees to Heinmiller.

RCW 4.84.370 provides:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court

[2] Samuel's Furniture, Inc. v. Dep't of Ecology , 147 Wn.2d 440, 54 P.3d 1194 (2002), *amended on denial of reconsideration by* 63 P.3d 764 (2003).

shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Under Division 1's analysis, relying on Prekeges v. King County, 98 Wash. App. 275, 990 P.2d 405 (1999), Heinmiller was properly awarded attorney fees in the Court of Appeals. As set forth in Prekeges, 98 Wash. App. at 411, the test under RCW 4.84.370 is:

1. Was Heinmiller the prevailing party on appeal before the court of appeals? YES

2. Is the case on appeal an appeal of a local land use decision? YES, the statute specifically refers to "a decision by a county, city or town, to issue . . . a building permit . . ."

3. Was Heinmiller the prevailing party before the county? YES, the county issued the building permit to Heinmiller and that permit remains valid and in effect under the Court of Appeals decision.

4. Was Heinmiller the prevailing party in all prior judicial proceedings? YES, Heinmiller prevailed in the superior court.

Durland claims that RCW 4.84.370 cannot apply here because he never appealed the permit issuance to the Hearing Examiner. But while LUPA itself requires this to have occurred before a "land use decision" exists, which may be appealed under LUPA, RCW 4.84.370 does *not* contain any such requirement. Subsection (1) refers only to "a decision by a county, city or town, to issue . . . a building permit . . .", which clearly encompasses the building permit in this case. And subsection (1)(a) only requires that Heinmiller have been the "prevailing or substantially prevailing party before the county, city, or town, . . . " Heinmiller did prevail – he was issued the building permit he applied for. The statute does not require that any specific process have occurred at the county level, or any involvement by Durland; it merely requires that Heinmiller have obtained what he sought at the county level. He did.

The Prekeges court also made clear that "[t]he statute does not require that the party must have prevailed on the merits. See San Juan Fidalgo v. Skagit County, 87 Wash.App. 703, 943 P.2d 341 (1997), *review denied,* 135 Wn.2d 1008, 959 P.2d 127 (1998) (party prevailed in superior court when court dismissed opponent's LUPA petition for failure to achieve timely service)." Notably, even Division 2 recognizes that Washington law makes clear that a superior court retains

jurisdiction to dismiss a LUPA appeal where the prerequisites for maintaining the action have not been met. Nickum v. City of Bainbridge Island, 153 Wn.App. 366, 223 P.3d 1172 (2009), *supra.*

Durland claims that Division 2 has a different rule regarding attorney fees. This is incorrect. The genesis of this was Overhulse Neighborhood Assn. v. Thurston County, 94 Wash. App. 593, 972 P.2d 470 (1999), where the court concluded that:

> Under the plain language of the statute, Thurston County may be considered the "prevailing party" if its *decision* is *upheld* at superior court and on appeal. But the superior court dismissed for lack of jurisdiction and did not review the merits of the County's decision. The logic of *Peacock v. Piper,* 81 Wash.2d 731, 504 P.2d 1124 (1973), is analogous. "`The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision on the merits....'" *Peacock,* 81 Wash.2d at 734, 504 P.2d 1124 (citation omitted).

However, the case that the Overhulse court relied on, Peacock, involved a much different situation. Peacock involved a state court suit brought by the parents of an injured child. The Peacocks had previously sued in federal court under the Federal Tort Claims Act, but that was dismissed for lack of jurisdiction. Peacock, 81 Wn.2d at 733-34. Later, they sued in state court, and the defendants sought dismissal, claiming that the prior federal court dismissal was res judicata. The supreme court disagreed, stating "The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision

upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal." Id.

The procedural setting in this case is different: Washington courts interpreting LUPA have made clear that the superior court does have jurisdiction to decide whether LUPA's prerequisites have been met, and to dismiss the petition if they have not been. The Overhulse court conflated the concept of dismissal of a case for lack of subject matter jurisdiction – which does not resolve the claim, and allows the claim to be brought in a proper forum – with the concept of a decision being "upheld" on appeal. But the two concepts are completely separate. And RCW 4.84.370 contains *no* language requiring that a decision be "on the merits," and superior court decisions which *do* adjudicate a case on procedural grounds are routinely "upheld" on appeal. Indeed, the county decision here – to issue the permit – has been upheld by two courts; the permit is valid and in effect. The *basis* for upholding that decision – whether procedural or otherwise – is irrelevant.

Moreover, while cases have discussed LUPA's prerequisites in terms of "jurisdiction" for the superior court to consider the LUPA petition, it is clear that the superior court in this case did have jurisdiction to decide whether those prerequisites had been met,

concluded they had not, and properly dismissed the petition. Durland does not argue otherwise. Thus, unlike Peacock, the superior court decision did adjudicate Durland's petition, finding it barred by non-compliance with LUPA's prerequisites. Durland cannot go file a new petition in some other court, unlike in Peacock; this case is, in fact, the res judicata, final determination of Durland's claims.

While the Overhulse analysis may have led Division 2 to a different result in the past, in Nickum Division 2 explicitly followed the Division 1 rule in awarding attorney fees:

> If a party receives a building permit and the decision is affirmed by two courts, they are entitled to fees under this statute. *Habitat Watch,* 155 Wash.2d at 413, 120 P.3d 56. " [P]revailing party" under the statute includes circumstances in which courts dismiss a LUPA action on jurisdictional grounds. *San Juan Fidalgo Holding Co. v. Skagit County,* 87 Wash.App. 703, 709, 713-15, 943 P.2d 341 (1997). Both Verizon and the City qualify as prevailing parties. Hence they are entitled to fees under RCW 4.84.370.

Nickum, 155 Wash.App. at 384.

In sum, the Court of Appeals decided the attorney fee issue correctly. The older law in Division 2 is distinguishable, and Division 2 has now come into alignment with Division 1. The attorney fee issue in this case further is ancillary to the main issue – whether Durland's LUPA petition was properly dismissed – and does not warrant review by this court.

Lastly, Durland simply should not be allowed to make an end-run around LUPA's clear requirements, force Heinmiller to incur substantial fees and costs to defend at every level of his appeals, and then claim that Heinmiller did not "prevail" simply because Durland deliberately and intentionally chose not to appeal to the Hearing Examiner before filing his LUPA petition. Rewarding a litigant – by removing his exposure to paying the other party's attorney fees – for a deliberate failure to comply with LUPA would be illogical, unjust, and not in accordance with the clear language of RCW 4.84.370.

E. Heinmiller should be awarded attorney fees on this petition.

Pursuant to RAP 18.1 and RCW 4.84.370, Heinmiller requests an award of reasonable attorney fees in responding to Durland's petition.

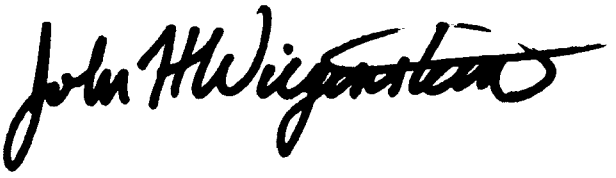
IV. CONCLUSION

Durland has failed to show how any of the RAP 13.4(b) criteria are satisfied here. There was no error by the trial court, or by the Court of Appeals, and there is no basis for this Court to accept review. Durland conceded, or waived, any due process claims in this action at oral argument before the Court of Appeals; and those claims lack merit.

As to attorney fees, the Court of Appeals correctly followed its own precedent, with which Division 2 now agrees, applied the plain

language of RCW 4.84.370, and awarded Heinmiller his attorney fees on appeal. Review by this court is not warranted, and Heinmiller should be awarded his attorney fees in connection with this petition.

DATED 14 October 2013.



John H. Wiegenstein, WSBA #21201
Elisha S. Smith, WSBA #29210
HELLER WIEGENSTEIN PLLC
Attorneys for Respondents Heinmiller and Stameisen

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SAN JUAN COUNTY

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOAT WORKS, Petitioners, v. SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN, Respondents.	NO. 12 2 05047 4 LAND USE PETITION AND COMPLAINT

1. Name and Mailing Address of the Petitioners

Michael Durland, Kathleen Fennell, and Deer Harbor Boat Works
155 Channel Road
P.O. Box 203
Deer Harbor, WA 98243

2. Name and Mailing Address of the Petitioners' Attorney

David A. Bricklin
Bricklin & Newman, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
Telephone (206) 264-8600
Facsimile (206) 264-9300

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

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3. The Name and Mailing Address of the Local Jurisdiction Whose Land Use Decision is at Issue

San Juan County
350 Court St.
Friday Harbor, WA 98250

4. Identification of the Decision Making Body or Officer

Petitioners are challenging the Order of Dismissal issued by the San Juan County Hearing Examiner in Administrative Appeal No. PAPL00-11-0003 regarding building permit number BUILDG-11-0175. A copy of that decision is attached hereto as Exhibit A.

5. Identification of Each Person to be Made a Party Under RCW 36.70C.040(2)(b)-(d)

Wes Heinmiller and Alan Stameisen
117 Legend Lane
Orcas Island
Deer Harbor, WA 98243

6. Facts Demonstrating That the Petitioner Has Standing to Seek Judicial Review

6.1. The petitioners are adversely affected by the subject land use decision. The individual petitioners reside on and own the real estate immediately adjacent to the Heinmiller/Stameisen property. Petitioners also conduct a business on their property. The development authorized by the subject decision will adversely impact views from the petitioners' property, increase ambient light on the business and residential portions of their property, and diminish their ability to enjoy the shoreline.

6.2. The decisions deprived petitioners of property interests without due process of law. The San Juan County Code gave petitioners a reasonable expectation of entitlement and thereby, gave them a property right.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

6.3. The permit authorizes an addition to an illegal or non-conforming structure in violation of shoreline and zoning requirements intended to protect the petitioners' property from construction projects situated too close to the shoreline and which are too high. The permitted development will adversely impact the individual petitioners' enjoyment of the property for residential and business purposes.

6.4. San Juan County was required to consider the interests of the adjacent property owners when it made its permit decisions. A judgment in favor of the petitioners would eliminate the prejudice the petitioners suffer as a result of this decision because it would require the applicants to revise their development to eliminate the illegal height and reduce the impact on the petitioners' property.

6.5. Petitioners exhausted their administrative remedies when they filed an appeal of the building permit with the San Juan County Hearing Examiner. The Hearing Examiner decision is a final land use decision.

7. A Separate and Concise Statement of Each Error Alleged to Have Been Committed and the Facts Upon Which the Petitioners Rely to Sustain the Statements of Error

7.1. Petitioners Michael Durland and Kathleen Fennell live on and own waterfront property on Orcas Island that is adjacent to the property owned by respondents Wesley Heinmiller and Alan Stameisen.

7.2. On August 8, 2011, respondents Wesley Heinmiller and Alan Stameisen applied for a building permit to build a second story on top of an existing garage on their property.

7.3. San Juan County did not provide public notice of the Heinmiller/Stameisen building permit application. Petitioners received no notice of the application from the County and were unaware that the application had been filed.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

7.4. Three months later, on November 1, 2011, the County approved the building permit (BUILDG-11-0175) allowing respondents Heinmiller and Stameisen to build a second story on top of their existing garage.

7.5. San Juan County did not provide any public notice of the building permit approval. Petitioners received no notice of the approval from the County and did not know that the building permit had been approved and issued until December 5, 2011.

7.6. Petitioner Durland discovered the existence of the building permit for the first time when he was reviewing documents that he received on December 5, 2011 in response to a public disclosure request. The County's response to Durland's public disclosure request was untimely. If the County had provided the requested documents in a timely manner, Durland would have learned of the existence of the building permit less than 21 days after it was issued.

7.7. Mr. Durland requested a copy of the second story building permit from the County on December 7, 2011.

7.8. The San Juan County Office Manager e-mailed a copy of the building permit (BUILDG-11-0175) to Mr. Durland on Thursday, December 8, 2011.

7.9. Upon receipt of the permit, Mr. Durland and the other petitioners learned, for the first time, that on November 1, 2011, without notice to petitioners or the public in general, San Juan County had approved the requested building permit and thereby authorized Wesley Heinmiller and Alan Stameisen to build a second floor addition to the existing illegal structure for an office and entertainment area.

7.10. After reviewing the permit, it became plainly evident to Mr. Durland that it had been issued in violation of numerous San Juan County Code provisions.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax (206) 264-9300

7.11. The permit was issued in violation of San Juan County Code 18.50.330 E.2, which limits the number and size of accessory structures ("normal appurtenances") associated with a single-family residence. The Code allows two accessory structures (*i.e.*, one garage building and one accessory dwelling unit) only if each structure covers no more than 1,000 square feet of land area. The accessory dwelling unit on the property covers more than 1,000 square feet of land area. Therefore, the second accessory unit (the garage) is not permitted under this section of the Code. No other section of the Code allows a second accessory structure on the property in this configuration. Because the garage is not a lawful accessory structure, a building permit to add to the garage could not be lawfully issued. SJCC 18.100.030 F.

7.12. The existing garage also is illegal because it fails to comply with the terms of an earlier building permit issued when the garage was rebuilt. That earlier permit authorized reconstruction of the garage, but only if it were rebuilt in its original footprint and only if it were rebuilt no closer to the shoreline than the predecessor garage. Contrary to these limitations in the earlier permit, the garage was rebuilt in a different footprint and closer to the shoreline. Because the rebuilt garage did not conform to the earlier permit, the rebuilt garage is an illegal structure. Because the rebuilt garage is an illegal structure, the County could not lawfully issue a permit authorizing an addition to that illegal structure. SJCC 18.100.030 F.

7.13. SJCC 18.50.020 prohibits substantial development on shorelines without first obtaining a shoreline substantial development permit. SJCC 18.50.330 E.4 requires a shoreline conditional use permit for structures accessory to a residential structure. The applicants have failed to obtain the requisite shoreline permits for the structures. Therefore, the development permit was issued illegally. Pursuant to SJCC 18.100.030 F, the County should not have issued a building permit to add on to an illegal structure.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

7.14. As just noted, SJCC 18.50.330 E.4 requires a shoreline conditional use permit for structures accessory to a residential structure. The applicants did not obtain the requisite shoreline permit to add to the height of this accessory structure. The County should not have issued a building permit authorizing construction on this accessory structure prior to the applicant demonstrating it could qualify for a shoreline permit and receiving such permit.

7.15. The proposed addition of a second floor to the garage will cause the garage to exceed the height limits in SJCC 18.50.330 B.15 and 18.50.330 E.2.a.

7.16. The permit was issued in violation of SJCC 18.50.330.D.2.e.iii. That section requires that the proposed development be subject to the standards in chapter 173-27 WAC (Permits for Development on Shorelines of the State) and the County failed to apply those requirements. In 1991, the total area of the residence was approximately 1552 square feet. The total area that has been constructed on the property as of the date of the approval of the building permit (including other development) is over the maximum allowed for nonconforming use. The County erred when it failed to require a conditional use permit or variance for this development under the Shoreline Management Act.

7.17. The building permit was issued in error because it was not reviewed by the Deer Harbor Plan Review Committee as required by SJCC 18.30.250. Defendants Heinmiller and Stamiesen's property is located in the Deer Harbor Hamlet and, therefore, the proposal for development on their property is subject to this provision. If the County had followed proper process, Petitioners would have had notice of the building permit application.

7.18. If the County had required a conditional use permit or variance request under the Shoreline Management Act, petitioners would have received notice of the application for the development at issue in this appeal.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

7.19. Petitioners filed an appeal of the building permit with the San Juan County Hearing Examiner on December 19, 2011, which was eleven (11) days after they had received a copy of the permit.

7.20. The San Juan County Code sets forth an administrative process for challenging building permits. Appeals to the San Juan County Hearing Examiner must be filed within 21 calendar days following the date of the written decision being appealed. SJCC 18.80.140.D.1.

7.21. Pursuant to SJCC 18.80.140.D.1, the deadline for appealing Building Permit No. BUILDG-11-0175 was November 22, 2011.

7.22. As of November 22, 2011, petitioners had not received any notice of the decision, had no knowledge that an application had been filed for a building permit, and had no knowledge that a decision had been made to approve this building permit on the property adjacent to petitioners' property. Petitioners did not become aware of this information until after November 22, 2011.

7.23. The San Juan County Code does not require any notice be provided to impacted parties or anyone in the public of building permits, yet the Code requires that those same parties or members of the public file an appeal within 21 days of issuance of a building permit if they want to challenge the permit.

7.24. Petitioners have had no opportunity and will have no opportunity at any time in any forum to challenge the illegal issuance of Building Permit No. BUILDG-11-0175.

7.25. The San Juan County Hearing Examiner's Order of Dismissal (Exhibit A) violates the constitutional rights of petitioners. The San Juan Hearing Examiner's decision caused petitioners to be subjected to the deprivation of procedural due process rights secured by the Washington State Constitution, Wash. Const. Art. I, § 3, and the United States Constitution, U.S. Const., Amend. XIV.

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

7.26. The Hearing Examiner erred as a matter of law when he failed to apply the doctrine of equitable tolling to Petitioners' appeal. The Hearing Examiner had the authority to toll the appeal deadline and justice and fairness required that it be tolled.

7.27. The Hearing Examiner's decision was made in error as a matter of law under 42 U.S.C. § 1983. The decision caused petitioners to be subjected to deprivation of procedural due process rights secured by the Washington State Constitution, Wash. Const. Art. I, § 3, and the United States Constitution, U.S. Const., Amend. XIV.

7.28. The Hearing Examiner was acting under color of law when he issued the Order of Dismissal and the decision issued by the Hearing Examiner was a proximate cause of injuries and damage to petitioners.

7.29. The Examiner's decision and the San Juan County Code deprived plaintiffs of a significant property interest without due process of law.

8. Cause of Action: 42 U.S.C. § 1983, Procedural Due Process

8.1 Sections I through VII in their entirety are hereby incorporated into this cause of action.

8.2 In addition to the Hearing Examiner's decision, the San Juan County Code provisions also violate 42 U.S.C. § 1983.

8.3 The appeal provisions in the San Juan County Code combined with the lack of notice provisions cause unconstitutional violations of petitioners' procedural due process rights as applied in this case.

9. Request for Relief

Petitioners respectfully request that this Court:

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

9.1. Issue an Order declaring that petitioners' constitutional procedural due process rights have been violated by the lack of notice and no opportunity to be heard to challenge Building Permit No. BUILDG-11-0175.

9.2. An Order reversing the decision of the San Juan County Hearing Examiner and remanding with instructions to the Examiner to proceed with an open record appeal hearing on the merits of petitioners' appeal.

9.3. In the alternative, an Order declaring that exhaustion of administrative remedies before the Hearing Examiner is unnecessary and an Order scheduling a hearing before this Court on the merits of petitioners' appeal of building permit BUILDG-11-0175.

9.4. A judgment and Order declaring that building permit number BUILDG-11-0175 is void and of no effect.

9.5. An Order awarding petitioners damages in an amount to be determined at trial.

9.6. An Order awarding petitioners their attorneys' fees and costs.

9.7. Issuance of such other relief as it deems just and necessary.

Dated this 24th day of February, 2012.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____
David A. Bricklin, WSBA No. 7583
Claudia M. Newman, WSBA No. 24928
Attorneys for Petitioners

Durland\Superior Court\2012\Land Use Petition-Final

Bricklin & Newman, LLP
Attorneys at Law
1001 Fourth Avenue, Suite 3303
Seattle WA 98154
Tel. (206) 264-8600
Fax. (206) 264-9300

BEFORE THE HEARING EXAMINER FOR SAN JUAN COUNTY

RE: Michael Durland, Kathleen Fennell; and Deer Harbor Boatworks Administrative Appeal PAPL00-11-0003	ORDER OF DISMISSAL

Summary

The above captioned matter concerns an administrative appeal of a building permit. The appeal is dismissed as untimely. It is undisputed that the Appellants did not file their appeal within the applicable administrative appeal deadline. The Appellants argue that the doctrine of equitable tolling should be applied to extend the administrative appeal deadline. The Examiner does not have the authority to apply the doctrine of equitable tolling. Even if he did, the doctrine is inapplicable because the administrative appeal deadline is jurisdictional.

Exhibits

1. 12/29/11 San Juan County Motion to Dismiss
2. 1/4/12 Email Examiner Scheduling Order
2. 1/12/12 Respondent's Joinder in Dismissal
3. 1/20/12 Petitioners' Response to Motions to Dismiss
4. 1/27/12 Respondent's Reply in Support of Motion to Dismiss

Findings of Fact

Procedural:

EXHIBIT A

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

1. Appellant. The Appellants are Michael Durland. Kathleen Fennell; and Deer Harbor Boatworks, collectively referenced as "Appellants."

2. Property Owners. Wes Heinmiller and Alan Stameisen.

Substantive:

4. Chronology. On November 1, 2011 San Juan County issued a building permit to the property owners. The Appellants filed an appeal of the building permit with San Juan County on December 19, 2011. The Appellants received no notice of the building permit until December 5, 2011 when Michael Durland saw a reference to the building permit in some documents he acquired from a records request relating to a code enforcement issue he had with the subject property. As a result of discovering the reference, Mr. Durland requested a copy of the building permit and received it on December 8, 2011.

Conclusions of Law

1. Authority of Hearing Examiner. The Examiner has no authority to consider the appeal because it was not timely filed. Appeals of building permits are reviewed by the Hearing Examiner, after conducting an open-record public hearing, pursuant to SJCC18.80.140(B)(11). However, San Juan County Hearing Examiner Rule IV(B) provides that the appeal content and filing requirements of the San Juan County Code "*shall be considered jurisdictional*" and that the Examiner "*shall have no authority to consider appeals that fail to comply with the San Juan County Code.*" SJCC 18.80.140(D)(1) provides that administrative appeals of building permit decisions must be filed with the Examiner within 21 days of the date of the permit appealed. It is undisputed that the Appellants did not meet this deadline.

2. Equitable Tolling. The Appellants argue that the 21 day deadline should be extended under the doctrine of equitable tolling. There are two reasons this doctrine cannot be applied in this case. First, the Examiner does not have the authority to impose equitable tolling. Second, even if the Examiner did have such authority case law makes clear that the doctrine does not apply to jurisdictional appeal requirements.

The limited jurisdiction of hearing examiners has been fairly clear since at least 1984, where the Court of Appeals ruled that a hearing examiner may only exercise those powers expressly conferred by ordinance or by necessary implication. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984). Based on this principle the *Chaussee* court determined that a hearing examiner has no authority under county ordinances to consider equitable estoppel. There is similarly no code provision that authorizes the Hearing Examiner to consider equitable tolling. Indeed, given that the County Council adopted the Hearing Examiner Rules of Procedure, it does appear somewhat

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

presumptuous to conclude that the Examiner could disregard the jurisdictional requirements adopted by the Council whenever he found the equities so required.

Should a court rule that the Examiner does have authority to impose equitable tolling, the Examiner of this case finds that tolling does not apply. As made clear in the case law and recognized by the Appellants in their briefing, equitable tolling does not apply to jurisdictional requirements. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 378 (2009). The *Nickum* court looked to the development regulations and hearing examiner rules of Bainbridge Island to determine whether the filing requirements of that city were jurisdictional, specifically looking for any express statements that the requirements were "jurisdictional". In San Juan County, as discussed in Conclusion of Law No. 1 herein, the Hearing Examiner Rules of Procedure unequivocally provide that the SJCC administrative appeal filing deadlines are jurisdictional.

DECISION

The appeal is dismissed as untimely.

DATED this 2nd day of February, 2012.

Phil A. Olbrechts
San Juan County Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter, such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirement may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

an appeal are encouraged to promptly review appeal deadlines and procedural requirements and consult with a private attorney.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Superior Court Case Summary

Court: San Juan Superior
Case Number: 12-2-05047-4

Sub	Docket Date	Docket Code	Docket Description	Misc Info
-	02-27-2012	FILING FEE RECEIVED	Filing Fee Received	230.00
1	02-27-2012	SUMMONS	Summons	
2	02-27-2012	COMPLAINT	Land Use Petition And Complaint	
3	02-27-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
4	02-29-2012	NOTICE OF APPEARANCE	Notice Of Appearance - Weissinger & Wagner For Resp Heinmiller & Stameisen	
5	03-01-2012	NOTICE OF APPEARANCE	Notice Of Appearance - Resp Sjc	
6	03-01-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
7	03-05-2012	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Preliminary Matters	04-06-2012
-	03-05-2012	COMMENT ENTRY	Called Atty To Renote For 10:30 Not 9am!	
8	03-05-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
9	03-05-2012	NOTE FOR MOTION DOCKET	Note For Motion Docket -amended Changes Time To 10:30 4/6 Dkt 8	
10	03-05-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
11	03-14-2012	NOTICE OF ASSOCIATION OF COUNSEL	Notice Of Association Of Counsel Johnsen With Gaylord	

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Directions

San Juan Superior
350 Court St, #7
Friday Harbor, WA
98250-7901
Map & Directions
360-378-2399
[Phone]
Visit Website

12	03-14-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
13	03-21-2012	NOTICE OF HEARING ACTION	Notice Of Hearing Motion To Dismiss	04-06-2012
14	03-21-2012	MOTION TO DISMISS	Respondents Heinmillers & Stam-Iesen's Motion To Dismiss Under Cr12b6	
15	03-21-2012	PROPOSED ORDER/FINDINGS	Proposed Order Granting Respondents Heinmiller's & Stameisen's Motion To Dismiss Under Cr 12b6	
16	03-21-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
17	03-23-2012	NOTICE OF HEARING ACTION	Notice Of Hearing - renote Renote - Preliminary Mtns	04-13-2012
18	03-23-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
19	03-23-2012	NOTE FOR MOTION DOCKET ACTION	Renote For Hearing Motion To Dismiss	04-13-2012
20	03-28-2012	MOTION	Sjc's Motion To Dismiss Land Use Petition	
21	03-28-2012	MEMORANDUM	Memorandum In Support Of San Juan County's Motion To Dismiss Land Use Petition	
22	03-28-2012	COMMENT ENTRY	(proposed) Order Granting Motion For Dismissal	
23	03-28-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
24	03-28-2012	NOTE FOR MOTION DOCKET	Note For Motion Docket	04-13-2012
25	03-28-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
26	03-29-2012	MOTION	Motion For Order Setting Dates For Submittal Of Record, Etc	
27	03-29-2012	COMMENT ENTRY	...proposed Order	

			Setting Dates	
28	03-29-2012	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Plaintiffs' Motion To Set Dates &	04-13-2012SS
		ACTION	Respondents Motion To Dismiss	
29	03-29-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
30	04-02-2012	MOTION	Motion (revised)for Order Setting Dates	
31	04-02-2012	PROPOSED ORDER/FINDINGS	Proposed (revised) Order Setting Dates	
32	04-02-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
33	04-10-2012	RESPONSE	Petitioners Response To Respon- Dents' Motions To Dismiss	
34	04-10-2012	DECLARATION	Declaration Of Claudia M Newman In Dismiss	
			Support Of Response To Motions To	
35	04-10-2012	DECLARATION	Declaration Of Michael Durland	
36	04-10-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
37	04-11-2012	REPLY	San Juan County's Reply In Support Of Motion To Dismiss Land Use	
			Petition	
38	04-11-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
39	04-11-2012	REPLY	Reply In Support Of Respondents Heinmillers & Stameisen's Motion	
			To Dismiss Under Cr 12b6	
40	04-11-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
41	04-13-2012	ORDER	Order Granting Dismissal Re: Lupa Only	
-	04-13-2012	MOTION HEARING	Motion Hearing	

		APT	Actual Proceeding Time		NO
42	04-13-2012	COMMENT ENTRY	Minute Entry For 4/13/2012		
43	04-25-2012	ANSWER	Answer To Complaint (san Juan County)		
44	04-25-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service		
45	05-02-2012	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Motion For Summary Judgment	06-01-2012	
46	05-02-2012	MOTION FOR SUMMARY JUDGMENT	San Juan County's Motion For Summary Judgment		
47	05-02-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service		
48	05-07-2012	NOTE FOR MOTION DOCKET ACTION	Amended Note For Motion Motion For Summary Judgment	06-08-2012	
49	05-07-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service		
50	05-09-2012	NOTICE OF APPEAL TO COURT OF APPEAL	Notice Of Appeal To Court Of Appeal Div 1		
-	05-09-2012	APPELLATE FILING FEE	Appellate Filing Fee	280.00	
51	05-09-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service		
52	05-10-2012	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Motions For Summary Judgment	06-08-2012SS	
53	05-10-2012	MOTION FOR SUMMARY JUDGMENT	Deft Heinmillers & Stameisens Motion For Summary Judgment		
54	05-10-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service		
55	05-11-2012	LETTER	Letter To Court Of Appeals From Deputy Clerk Dated 5/11/12		
56	05-16-2012	AFFIDAVIT OF MAILING	Affidavit Of Mailing		
57	05-25-2012	RESPONSE	Response By Petitioner To Def Summary Judgment Heimiller &		

			Stameisen Motion For
58	05-25-2012	RESPONSE	Response By Plaintiff To Sjc Motion For Summary Judgment
59	05-29-2012	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service
60	05-31-2012	ACCEPTANCE OF SERVICE	Acceptance Of Service
61	06-04-2012	REPLY	Reply Brief By Sjc In Support Of Motion For Sj
62	06-04-2012	CERTIFICATE	Certificate Of Service
-	06-06-2012	EX-PARTE ACTION WITH ORDER	Ex-parte Action With Order
63	06-06-2012	ORDER	Order Granting Defs Heinmiller And Stameisen Motion For Sj
-	06-08-2012	SUMMARY JUDGMENT HEARING APT	Summary Judgment Hearing Actual Proceeding Time
64	06-08-2012	COMMENT ENTRY	Minute Entry 6/8/12
65	06-20-2012	COURT'S DECISION	Court's Decision On Summary Summary Judgment) Judgment Motion (court Grants County's Motion For
66	07-06-2012	ORDER GRANTING SUMMARY JUDGMENT	Order Granting San Juan County's Motion For Summary Judgment

Appellate Court Case Summary

Case Number: 687573
Filing Date: 05-09-2012
Coa, Division I

Event Date	Event Description	Action
05-09-12	Notice of Appeal	Filed
05-15-12	Case Received and Pending	Status Changed
05-25-12	Letter	Filed
06-19-12	Court's Mot to Determine Appealability	Filed
06-22-12	Voluntary motion to Dismiss	Filed
07-20-12	Certificate of Finality	Filed
07-20-12	Disposed	Status Changed
07-20-12	Decision Filed	Status Changed
07-20-12	Ruling terminating Review	Filed

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600 University St
One Union Square
Seattle, WA 98101-1176
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[Office Email]
206-464-7750[Clerk's Office]
206-389-2613[Clerk's Office Fax]

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APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MICHAEL DURLAND, KATHLEEN FENNEL, and DEER HARBOR BOATWORKS,	)	NO. 68453-1-I
Petitioners,	)	Skagit County Superior Court
v.	)	Cause No. 11-2-02480-9
SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,	)	
Respondents.	)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 5th day of June, 2013, Skagit County Cause No. 11-2-02480-9 came on for an Oral Argument before Marlin J. Appelwick, Judge, Linda Lau, Judge, and Stephen J. Dwyer, Presiding Chief Judge, sitting at King County Court of Appeals Courthouse, City of Seattle, State of Washington.

DAVID BRICKLIN AND CLAUDIA NEWMAN, Bricklin & Newman, LLP, 1001 4th Ave., Suite 3303, Seattle, WA 98154-1167, for Petitioners;

AMY VIRA, San Juan County Prosecutor's Office, 350 Court St., 2nd Floor, P.O. Box 760, Friday Harbor, WA 98250, for Respondents.

Beth Carlson
Court Reporter
20480 Pond View Lane
Poulsbo, Washington 98370
(360) 697-3979

MOTION CALENDAR IN PROGRESS

WHEREUPON, the following proceedings were had and done to-wit:

MS. NEWMAN: May it please the Court. Claudia Newman on behalf of-- oh, sorry. (inaudible). Claudia Newman on behalf of Appellants Michael Durland, Kathleen Fennell and Durland Boat Works. And I'd like to reserve three minutes, please.

The question presented to this Court with this case is, can a County keep the approval of a permit hidden or quiet from the public for twenty-one days, to avoid a legal challenge? Does the Land Use Petition Act really allow that to happen? And the answer is no, absolutely not.

JUDGE APPELWICK: Counsel, one of the things that puzzles me is, nowhere in your briefing do you cite what the notice requirement is when a building permit is issued. What is it?

MS. NEWMAN: That's right. There is no-- this is a different-- because there is no…

JUDGE APPELWICK: What is…

MS. NEWMAN: There's no notice requirement in the San Juan County Code-- I mean, I'm sorry, the Island County Code that requires notice for a building permit. But that's irrelevant…

JUDGE APPELWICK: And does that…

MS. NEWMAN: …to the issues before the Court.

JUDGE APPELWICK: …does that violate any state law?

MS. NEWMAN: No.

JUDGE APPELWICK: Is that a constitutional problem?

MS. NEWMAN: It's, it's a constitutional problem I would say, which is a case that you'll be hearing in a couple months from now. It hasn't been set for oral argument yet.

JUDGE APPELWICK: So we don't have a determination that there is a notice of violation?

MS. NEWMAN: Right. That's, I, that is not relevant to the question before the Court. Because, the question before the Court is when does the clock start ticking for a LUPA appeal?

JUDGE APPELWICK: It might not be the question before the Court. Where, where is the final land use decision?

MS. NEWMAN: The permit approval was the land use decision that we are appealing. The building permit approval for the second story garage.

JUDGE APPELWICK: But don't you have a statutory definitional problem with that theory?

MS. NEWMAN: The theory of…

JUDGE APPELWICK: Because a land use decision is, by definition, a final determination by a local jurisdiction's body or officer at the highest level of authority to make that determination, including those with authority to hear appeals. And an application such as the building permit when issued was appealable. And a hearing examiner had the authority to review and

make the final determination. So, absent a final determination…

MS. NEWMAN: The, the Code is crystal clear on this. And that is-- and it responds to that. The Island County Code states that a building permit is final unless appealed. And a builder, a developer, can start proceeding with construction with the building permit when it's not appealed. A building permit is officially final unless it's appealed to the Hearing Examiner. If you don't invoke the jurisdiction of the Hearing Examiner it's final. There's, there's really no doubt about that.

JUDGE APPELWICK: But there is no decision by the hearing examiner. And isn't that definitional?

MS. NEWMAN: There's no appeal. There has been no appeal filed. His jurisdiction was not invoked in this case.

JUDGE DWYER: The fact that it's, that a building permit when issued is final unless appealed does not address the question that Judge Appelwick was asking, though. Because it-- obviously, the San Juan County Commission can't amend the state statute. The state statute requires…

MS. NEWMAN: It's…

JUDGE DWYER: …it to be a final determination, as defined in the statute. Not a final order as determined under local ordinance.

MS. NEWMAN: It's-- no. The, the way that the LUPA defines a final decision gives-- it basically states that it's, um, a final

determination made by the highest authority. So the highest authority is defined by the Island County Code. And so you look to the Code to determine who is the highest authority to make this decision?

JUDGE DWYER: Including…

MS. NEWMAN: And there's no question that it was a final ...

JUDGE DWYER: Including those with the authority to hear appeals.

MS. NEWMAN: Yes.

JUDGE DWYER: That's right in the statute.

MS. NEWMAN: Yes, but, but the, the Hearing Examiner's jurisdiction was never invoked.

JUDGE DWYER: I understand that.

JUDGE APPELWICK: Well, then, then you have the *Ward* case, which adds this overlay. Exhaustion of remedies is a necessary prerequisite to obtaining a decision that qualifies as a land use decision subject to review under LUPA.

MS. NEWMAN: Right. And I want to point out that the law, LUPA, states that you must exhaust your administrative remedies to the extent required by law. And the law is very clear that this Court has an equitable power to have an exception to the, the requirement for administrative remedies.

And I want to add something that was not in the brief. Statutes, as in LUPA, must be construed with reference to the

common law, for it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent. So, if LUPA intended to bar or, um, eliminate decades of established law on the exhaustion of administrative remedies that allowed for certain exceptions, that allowed this Court to exercise its equitable powers, then the legislature when they were writing LUPA had to be very clear about that if they were doing that.

In fact, it was the opposite. The legislature in LUPA said, exhausted his or her administrative remedies to the extent required by law. Which is saying, you must do that as-- we're subsuming all of this common law on exhaustion.

JUDGE APPELWICK: Well, not all local governments have the same stacking of administrative review. Some have one level. Some have two. Different permits have different reviews to different places.

MS. NEWMAN: Uh huh.

JUDGE APPELWICK: As required by law, is going to vary by local jurisdiction.

MS. NEWMAN: Well I'm saying, as the *NCM* court concluded, I am saying that to the extent required by law is referring to the common law. The extent-- administrative, exhaustion of administrative remedies should be met to the extent that the law defines this doctrine. There's a doctrine of exhaustion that has

been developed over decades and there are many different exceptions.

The Court-- it's not, exhaustion is not a jurisdictional bar. There's, you know, I think there's some confusion over jurisdiction and real jurisdiction or standing jurisdiction, if that, um, how can I… And exhaustion is something that this Court has the authority to exercise equitable powers to determine whether or not considerations of fairness should outweigh the positives of exhaustion.

And in this case they, this is a classic case. I think it's probably the best example that I can see where the facts show that considerations of fairness and equity should outweigh, um, exhaustion. Have I answered your question adequately?

JUDGE APPELWICK: You're working on it.

MS. NEWMAN: Okay. Thank you.

MS. VIRA: Good morning. May it please the Court. I'm Amy Vira here for Respondent San Juan County, and I intend to defer the majority of Respondent's time to Mr. Wiegenstein, unless the Court has a question…

JUDGE LAU: (inaudible)

MS. VIRA: To Mr. Wiegenstein for the, the other Respondents. Unless the Court has questions for the County.

JUDGE APPELWICK: Well, you're…

JUDGE LAU: You want to split your time, is that what you're

saying?

JUDGE APPELWICK: Well she's, she's trying to bail out without answering my question is what she's trying to do.

MS. VIRA: I'm happy to answer your questions.

JUDGE APPELWICK: It was, it was your briefing that, that put forward the *Ward* case.

MS. VIRA: Correct.

JUDGE APPELWICK: So what is your response, if any, to counsel's answer to the panel's questions with regard to the provision in the San Juan Code that provides that, absent appeals building permits are final, apparently, and that interplay between that and the LUPA statutory requirements of there being a final decision?

MS. VIRA: I hope I understand your question correctly. But, I agree with the *Ward* court that, having failed to obtain a decision from the authority with the highest level of decision making in, which in San Juan County on building permit appeals is the San Juan County Hearing Examiner, there is no final land use decision under LUPA, and a LUPA is, thus, inappropriate. Is that what you're asking?

JUDGE APPELWICK: Is-- and, and why is it that the San Juan County provision that says that building permits when issued are final unless there's an appeal, why does that not trump it?

MS. VIRA: Because of the language, unless there's an appeal.

And the Hearing Examiner has authority and the San Juan County Code provides that they should be appealed to the Hearing Examiner within the 21-day time provided in the Code. And that's the person with the highest level of authority to make that decision under, in San Juan County as provided in 36.70(c).020.

So, if you don't do that it does become final at the end of that twenty-one days, but doesn't become a final land use decision under LUPA. And to, to do, to find otherwise would allow…

JUDGE APPELWICK: And is the, is the permit becoming final different from it becoming a final land use decision?

MS. VIRA: It definitely is, yes. It's a, it's a final permit issuance but it's not a final land use decision under LUPA. And, and I think this is clear if you think about the examples. Otherwise a disgruntled citizen could just wait. If they didn't like the Hearing Examiner or they just didn't want to bother with the ordeal of expense of the Hearing Examiner they'd just wait till that twenty-one days has expired and then they can go straight to Superior Court. It makes that whole section of the San Juan County Code superfluous. More like an option rather than…

JUDGE APPELWICK: Well, it wouldn't make it superfluous if they had actual notice. The problem here is, where is the, where is the requirement and the code of notice to the public? And where is there evidence in this case that there was notice to the public that triggered the appeal period for administrative exhaustion

purposes?

MS. VIRA: There is no notice requirement for a building permit.

JUDGE APPELWICK: Well then what…

MS. VIRA: … um, as (inaudible) a building permit.

JUDGE APPELWICK: Then where is the due process in having an appeals exhaustion process for administrative review if you don't tell anybody about the decision?

MS. VIRA: Well, the permit is, becomes a public record. It's entered into the public record when it's issued and it's, it's there at the Planning Department. The applicant…

JUDGE APPELWICK: Which public record? Which file cabinet? How do they know it's there to go ask for it?

MS. VIRA: They have to go ask. They don't, they don't get notice.

JUDGE APPELWICK: Then there is no notice. Then there is nothing to trigger your 14-day administrative exhaustion period.

MS. VIRA: It's triggered when-- the San Juan County Code provides that that, it's actually twenty-one days in San Juan County is triggered by the issuance of the permit that's provided in the Code. So it says that starts running when the permit is issued. And it is there in the County office.

JUDGE APPELWICK: Again, notice. Where's the notice?

MS. VIRA: The Code doesn't require notice.

JUDGE DWYER: Counsel indicated that there's another pending case between the same parties.

MS. VIRA: That is correct.

JUDGE DWYER: Is this-- your dialogue with Judge Appelwick, is this an issue in that case?

MS. VIRA: I believe it is.

JUDGE DWYER: Is that, um, I mean, is that from the, is that an appeal from the dismissal of the late-filed application for the Hearing Examiner?

MS. VIRA: The Hearing Examiner. Yes, it is. Yes.

JUDGE LAU: What is the name of the case?

JUDGE DWYER: It's the same people.

MS. VIRA: It's the same.

JUDGE LAU: The same?

MS. VIRA: It's the same, yes. And it's the same permit. It was appealed here.

JUDGE LAU: Well, (inaudible) on this issue was going to be held against you when I (inaudible).

MS. VIRA: Oh, good.

JUDGE DWYER: And I'll say we're aware of that. Because when you go, internally when you go on the computer it spits out like three cases or something with the same party names, and we have to figure out which one we're working on.

MS. VIRA: I understand.

JUDGE LAU: We are just, uh, counsel's (inaudible) she made an argument that exhaustion can be excused based on the Court's exercise of its equitable power and this is the perfect case for that.

MS. VIRA: Well, I disagree that it's the perfect case. I think there's lots of reasons why it's not. But first, I think the standing requirements in LUPA don't allow for the exhaustion argument. And, and as I've noted in our briefing all of the cases cited by Petitioner are pre-LUPA or non-LUPA cases. We don't have any LUPA cases where they've waived that standing right.

And so while I agree that exhaustion, the exhaustion doctrine can be waived under the common law, I don't agree that it can be waived under LUPA. But even if it could, they haven't established deception or bad faith on the part of the County, which is discussed in the *NCM* case. And they haven't shown that equity weighs in favor of, of waiving it.

There's no explanation as to why Mr. Durland didn't avail himself of the Planning Department's services earlier to obtain knowledge of this permit. He could have called at any time after it was issued and would be told yes, there's a permit issued. And citizens do that frequently.

JUDGE DWYER: Well, I thought he said that he put in a public records request?

MS. VIRA: And, and the nature of the public records request

isn't in the record before the Court, but it was not related to this building permit. It was a public records request for something different that referenced this and then, and then he contacted the Planning Department and got notice of the permit.

JUDGE DWYER: Well, would he have to use magic words in the phone call that you suggested he should have made instead?

MS. VIRA: He'd just have to call and say, is there an application or a permit on this property? And...

JUDGE DWYER: So you'd give him that answer on the phone, but you wouldn't give him that answer in response to a public records request?

MS. VIRA: The public records request wasn't for that information. It was a public records request about a different matter. And in all of the materials that he received in response to that public records request was an email that contained a reference to this matter. And then he became aware of this, excuse me, of this matter and then I believe, although I can't speak to it for sure, that he then called the Planning Department and learned of the building permit.

And I'm not sure if I'm making myself clear. He made a public records request about an unrelated matter. And just happened to find out about this through that. But had he made a public records request, or a phone call about that building permit he would have received that information immediately. That's something they can

look up in the phone-- or, in the computer system in person or over the telephone. Or by email, I think. And now we have an online system, although that wasn't in place at the time.

And my final response to the equitable tolling is that it applies only to statute of limitations, not jurisdictional time limits, and I think this is a jurisdictional time limit that the Court has. So, I've eaten into almost all of Mr. Wiegenstein's time.

JUDGE LAU: Do you have anything you want to add? Do you want to come up, or…?

MR. WIEGENSTEIN: Yes, Your Honor, I'd like to…

JUDGE LAU: Oh.

MR. WIEGENSTEIN: …it may be only be two minutes and nineteen seconds but…

JUDGE LAU: Twenty-one (inaudible).

MR. WIEGENSTEIN: Two minutes and twenty-one. Thank you. Again, may it please the Court. John Wiegenstein representing Wes Heinmiller and Alan Stameisen, the Respondents on the matter. Counsel for the County, I think, has done a good job articulating for the Court. Responses to the questions the Court had. There's no question here that Mr. Durland didn't avail himself of the Hearing Examiner process, which he did do in the other case that has now wound its way up onto your docket. And that is a flat out bar.

We've got plenty of case law discussed in the briefing by the parties that talks about that. And also plenty of that case law talking about the due process concept and, more particularly, about the concept of notice. And there's nothing to suggest that the County is required to give notice of a building permit, which is a fairly low level decision as development projects go.

The case law has been pretty clear that the person who wishes to file a LUPA petition to appeal has to proceed within that strict 21-day timeframe. *Habitat Watch* and the cases since then have been pretty clear in that regard. Most recently the *Ash* case and *West v. Staley*, both Division II cases, both of which dealt with those issues and both of which review was denied by the Supreme Court.

JUDGE DWYER: The parallel litigation, the third case by my count. I know I was on a panel once before with you folks.

MR. WIEGENSTEIN: You were, Your Honor.

JUDGE DWYER: Yeah.

MR. WIEGENSTEIN: And that's-- I recognized you from the last go around.

JUDGE DWYER: And, uh, I'm grayer now but other than that pretty much same guy. This parallel case. Is the question of the fairness of the notice to facilitate the request for the Hearing Examiner's involvement. Is that an issue that's in that case?

MR. WIEGENSTEIN: I have to, unfortunately, plead some level

of ignorance there.

JUDGE DWYER: Okay.

MR. WIEGENSTEIN: Because I'm not representing Mr. Durland--or, rather, Mr. Heinmiller and Mr. Stameisen in that particular appeal.

JUDGE DWYER: Okay.

MR. WIEGENSTEIN: I wish I could answer your question, Your Honor, but I can't. I presume it would be. Because in that case he went through the Hearing Examiner effort, and he did not do that here.

At the end of the day, I think the Court *(beeps here)*…

JUDGE LAU: Day's over (inaudible)

JUDGE DWYER: Finish your sentence.

MR. WIEGENSTEIN: Well, any time my day's over at a quarter to 11:00 there's, that's not a bad day.

JUDGE DWYER: It was an ironic segue.

MR. WIEGENSTEIN: Thank you all of you.

MS. NEWMAN: Thank you. I have some very important points I want to try to get in here. The public disclosure request was filed two days after the approval of the building permit, by Mr. Durland. It was very much related to the building permit. It was regarding a code enforcement issue on the garage, the first floor of the garage. This building permit that was issued was for the second floor of the garage.

And they provided a response, despite Mr. Durland saying, you know, what's going on? Where's my response? On the day that the administrative appeal would have been due. So they basically held onto this information-- this information that would have alerted him to the existence of this permit-- until the day the administrative appeal was due. Equity clear…

JUDGE DWYER: Let me ask the question that I asked. In your briefing you discussed that you filed the instant LUPA appeal in Skagit County?

MS. NEWMAN: Uh huh. Uh huh.

JUDGE DWYER: That you also filed a request for a hearing before the Hearing Examiner, an appeal before Hearing Examiner. There's a mention that that was denied on time limits grounds, and then the rest of the briefing talks about this dispute. Is that reference a reference to this other litigation that's coming up later for us?

MS. NEWMAN: I mean, there is, the future litigation is, involves due process issues concerning no notice and administrative review.

JUDGE DWYER: But from this, from this thing? From this transaction?

MS. NEWMAN: Oh, yes.

JUDGE DWYER: From this transaction? Not different (inaudible)?

MS. NEWMAN: From this transaction, yes.

JUDGE DWYER: So those issues are going to be, are separately briefed and will be argued to a different group of (inaudible) judges? Okay.

MS. NEWMAN: Right. I would like, I'm starting to think it may make sense to consolidate for this court, to hear those and this at the same time.

JUDGE APPELWICK: It's a little late.

MS. NEWMAN: They're inextricably linked. In that case, I want to point out, they are arguing this permit is a final land use decision. Because we were appealing the Hearing Examiner's decision. And they're saying, no, you can't appeal the Hearing Examiner's decision. You were supposed to file a direct LUPA appeal of the land use decision.

So here we are in this Catch 22. We did everything we possibly could. We filed a Land Use Petition. And one other thing I want to point out is, one enormous difference with this case with all the other cases that are talking about this, is that Mr. Durland-- well, first of all, the County did not issue any notice whatsoever to anyone. General public. Nobody. Of this permit, all right? So it was just in-house.

The first time this ever happened, any notice was given to anyone in the public just happened to be Mr. Durland because he had pulled up the disclosure request. And he did file easily

within twenty-one days of that notice. All the other cases, the folks got actual notice and missed the 21-day deadline after they got actual notice. And that was a big difference. And I just want to point out that *Prekeges*, *Nickum* and *West* v. *Stahley* are all cases, LUPA cases where they, the Court stated, we will apply equity with exhaustion. Equitable remedies. We can have an exception to exhaustion under LUPA. They didn't apply it in those cases but they did recognize that it, it can be done. And, I guess I'll leave it with that, unless you have any questions?

JUDGE LAU: No questions.

MS. NEWMAN: Thank you.

MOTION CALENDAR CONTINUES

CERTIFICATE OF COURT CLERK AND ELECTRONIC COURT REPORTER

STATE OF WASHINGTON)
) ss
COUNTY OF SKAGIT)

I, Beth Carlson, Official Electronic Court Reporter of the State of Washington in and for Skagit County, do hereby certify as follows:

That the foregoing Verbatim Report Of Proceedings, numbered from page 1 through and including page 20, is a true and correct transcript of an Oral Argument held June 5, 2013, in the matter of MICHEAL DURLAND, KATHLEEN FENNEL, and DEER HARBOR BOATWORKS, Petitioners vs. SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN, Respondents, Skagit County Cause No. 11-2-02480-9, before Marlin J. Appelwick, Judge, Linda Lau, Judge, and Stephen J. Dwyer, Presiding Chief Judge, sitting at King County Court of Appeals Courthouse, City of Seattle, State of Washington, on the date hereinbefore mentioned.

DATED at Poulsbo, Washington on this 22nd day of September, 2013.

N. Beth Carlson

Court Reporter

CERTIFICATE

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL DURLAND; KATHLEEN FENNELL; and DEER HARBOR BOATWORKS, Appellants, v. SAN JUAN COUNTY; WES HEINMILLER; and ALAN STAMEISEN, Respondents.	)	No. 69134-1-I DIVISION ONE UNPUBLISHED FILED: September 30, 2013

Cox, J. — "A prima facie case under 42 U.S.C. § 1983 requires the plaintiff to show that a person, acting under color of state law, deprived the plaintiff of a federal constitutional or state-created property right without due process of law."[1] "Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law."[2]

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[1] Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998).

[2] Id. at 962 n.15 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)).

Here, property owners Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (collectively "Durland") fail to demonstrate any constitutionally protected property right either under the San Juan County Code or otherwise. Accordingly, the trial court properly dismissed this action. We affirm.[3]

Wesley Heinmiller and Alan Stameisen (collectively "Heinmiller") own property on Orcas Island in San Juan County. On August 8, 2011, Heinmiller applied for a permit to build a second story on his garage located on his property.

On November 1, the San Juan County Department of Community Development and Planning granted the building permit. The San Juan County Code does not require public notice for the issuance of this type of permit.

Durland owns property adjacent to Heinmiller's property. On December 8, Durland received documents based on a Public Records Act request he made to San Juan County. During his review of these documents, he discovered that the County had issued a building permit to Heinmiller over a month earlier.

On December 19, Durland appealed the issuance of this permit to the San Juan County Hearing Examiner. The hearing examiner dismissed Durland's appeal as untimely.

Durland then commenced this action. The complaint, after stating a number of factual allegations, states that the hearing examiner's decision and the San Juan County Code violate 42 U.S.C. § 1983.[4] The request for relief seeks a

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[3] We deny Heinmiller's motion to strike portions of Durland's statement of the case in his opening brief. We have disregarded materials not properly before us for purposes of deciding this case.

[4] Clerk's Papers at 11.

declaration that Durland's due process rights were violated by the lack of notice and opportunity to be heard on the issuance of the building permit. There is no substantive challenge in the complaint to the permit the County issued.

In May 2012, San Juan County moved for summary judgment in this case on the basis that Durland could not establish a constitutionally protected property interest. The superior court granted the motion.

Durland appeals.

DISMISSAL OF 42 U.S.C. § 1983 CLAIM

Durland argues that the trial court erred when it summarily dismissed his 42 U.S.C. § 1983 claim. He contends that he was deprived of a constitutionally protected interest without a meaningful opportunity to be heard. We disagree.

This court reviews summary judgment determinations de novo, engaging in the same inquiry as the trial court.[5] Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[6] Further, summary judgment is appropriate if reasonable minds could reach but one conclusion from all the evidence.[7]

Constitutionally Protected Property Interest

Durland argues that he has a constitutionally protected property interest that supports his § 1983 claim against San Juan County. Specifically, he

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[5] Harberd v. City of Kettle Falls, 120 Wn. App. 498, 507, 84 P.3d 1241 (2004).

[6] CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002).

[7] Harberd, 120 Wn. App. at 507-08.

contends that the San Juan County Code's height and size limitations for garage and accessory buildings confer a property interest in having the County comply with these limitations. He asserts that he is entitled to notice and a hearing before he is deprived of that claimed right. We disagree.

Under 42 U.S.C. § 1983,

> Every person who, under color of any statute, ordinance, regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"To establish a prima facie due process violation under § 1983, the plaintiff must show that the defendant deprived the plaintiff of a constitutionally protected property right."[8] "Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law."[9] "'A protected property interest exists if there is a legitimate claim of entitlement to a specific benefit.'"[10] More specifically, "a zoning ordinance can create a property right."[11]

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[8] Manna Funding, LLC v. Kittitas County, 173 Wn. App. 879, 894-95, 295 P.3d 1197 (2013) (citing Mission Springs, Inc., 134 Wn.2d at 962; Robinson v. City of Seattle, 119 Wn.2d 34, 58, 830 P.2d 318 (1992)).

[9] Mission Springs, Inc., 134 Wn.2d at 962 n.15 (citing Bd. of Regents, 408 U.S. at 577).

[10] Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005) (internal quotation marks omitted) (quoting Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984)).

[11] Asche v. Bloomquist, 132 Wn. App. 784, 797-98, 133 P.3d 475 (2006).

This court reviews de novo questions of law, including statutory construction.[12]

Here, Durland relies primarily on Asche v. Bloomquist to make his case.[13] In Asche, Division Two considered whether the Asches had a property interest under a Kitsap County zoning ordinance.[14] It concluded that the Asches had a property interest in preventing their neighbors, the Bloomquists, from building a structure over 28 feet in height.[15] The court came to this conclusion because of a "View Protection Overlay Zone" in the Kitsap County Code.[16] According to this zoning ordinance, a building may be built up to 28 feet without any prerequisites.[17] But a building taller than 28 feet but less than 35 feet could "only be approved if the ***views of adjacent properties***, such as that of the Asches, are not impaired."[18]

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[12] Id. at 797.

[13] Opening Brief of Appellants at 17-18 (citing Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006)).

[14] Asche, 132 Wn. App. at 797-99.

[15] Id. at 798.

[16] Id.

[17] Id.

[18] Id. (emphasis added).

The court concluded that the Asches had "a property right, created by the zoning ordinance, in preventing the Bloomquists from building a structure over 28 feet in height."[19] Thus, procedural due process applied to this property right.[20]

Here, Durland cites specific provisions of the San Juan County Code to support his assertion that there is a similar constitutionally protected property right in this case. These provisions are found within the Shoreline Master Program. Specifically, he relies on SJCC 18.50.330(B)(14), which regulates the height of residential structures, and SJCC 18.50.330(B)(15), which regulates the height and size of garage and accessory buildings.

Durland also relies on SJCC 18.50.330(E)(2)(a), (3), and (4). Respectively, these provisions discuss which accessory uses and developments are exempt from permitting requirements, when a shoreline substantial development permit is required, and when accessory structures may be permitted as conditional uses.[21]

It is noteworthy that not one of these cited provisions mentions any consideration of adjacent property views. This fact alone distinguishes this case from Asche.[22]

The only reference to views in any of these cited provisions is in SJCC 18.50.330(B)(14). That provision generally limits the height of residential

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[19] Id.

[20] Id.

[21] SJCC 18.50.330(E)(2)(a), (3), and (4).

[22] See Asche, 132 Wn. App. at 798.

structures to 28 feet, provided that heights above 35 feet are permitted as conditional uses.[23] In such cases, the "applicant must demonstrate that the structure will not result in significant adverse visual impacts, nor interfere with normal, public, visual access to the water."[24] This language refers to "***public***, visual access to water."[25] Significantly, this language does not refer to visual impacts of adjacent property owners.

Additionally, as the trial court correctly reasoned, SJCC 18.50.140 assists in defining what views are at issue here. This provision generally addresses public views with one exception. SJCC 18.50.140(D) describes view protection for "surrounding properties to the shoreline and adjoining water." But that protection applies when there is "development on or over the water."[26] In the instant case, there is no "development on or over the water." Thus, harmonizing the provisions at issue, the visual impacts language on which Durland relies does not apply to adjacent property owners.

At oral argument for this case, Durland advanced the theory that the cited statutory framework on which the claim rests is mandatory, not discretionary, in character. From this, Durland argues that a property right exists. Neither the briefing below nor the briefing here is persuasive on this point. Accordingly, we reject this argument.

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[23] SJCC 18.50.330(B)(14).

[24] Id.

[25] Id.

[26] SJCC 18.50.140(D).

In sum, the superior court correctly determined that these zoning ordinances do not confer a property right on Durland to prevent Heinmiller from building a garage that could impact Durland's view as an adjacent property owner. Consequently, procedural due process protections do not apply. The court properly dismissed the 42 U.S.C. § 1983 claim.

ATTORNEY FEES

Heinmiller requests an award of attorney fees and costs under RCW 4.84.370. For the reasons discussed below, we deny this request.

RCW 4.84.370(1) provides for an award of "reasonable attorneys' fees and costs . . . to the prevailing party or substantially prevailing party on appeal before the court of appeals . . . of a decision by a county . . . to issue, condition, or deny a . . . building permit . . . ."

Here, Durland argues that fees are not permitted because Heinmiller is not a prevailing party. This argument is based, in turn, on the fact there was no hearing on the land use decision below. As this court recently held in Durland v. San Juan County,[27] which also arose from the facts in this case, that argument is untenable in Division One. The plain words of the statute do not require a party to prevail on the merits to be entitled to fees.[28] Thus, this argument does not serve as a basis for our decision to reject an award of attorney fees.

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[27] 175 Wn. App. 316, 305 P.3d 246, 251 (2013).

[28] Id. (citing Prekeges v. King County, 98 Wn. App. 275, 285, 990 P.2d 405 (1999)).

Instead, we reject an award of fees in this case because it is, essentially, a 42 U.S.C. § 1983 claim, which does not permit an award of fees to a defendant. We say this despite the heading on the complaint. As we already noted, there was no substantive attack against the permit. Rather, this was a claim that the procedures in this case deprived Durland of constitutionally protected rights. We also note that fees were awarded to Heinmiller in the Skagit County case, which addressed the LUPA challenge.[29] In sum, fees are not awardable under the special circumstances of this case.

The award of costs, as distinct from attorney fees, to Heinmiller, as the substantially prevailing party, may be made upon timely compliance with the provisions of RAP 14.1 et seq.

We affirm the summary judgment order.

COX, J.

WE CONCUR:

[29] Id.

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From: Monica Roberts [MonicaR@hellerwiegenstein.com]
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Durland, et al v. San Juan County, et al - Supreme Court Case No. 89293-8

Filing for John H. Wiegenstein, WSBA # 21201, attorney for Respondents Wes Heinmiller and Alan Stameisen
johnw@hellerwiegenstein.com Ph: 425-778-2525

Please find attached for filing the following documents:

1. Heinmiller and Stameisen's Answer to Petition for Review, with Appendices A, B and C; and
2. Certificate of Service.

Thank you,

Monica Roberts | Legal Assistant

HW HELLER WIEGENSTEIN PLLC
LAW OFFICES

(425) 778-2525 | www.hellerwiegenstein.com
144 Railroad Ave., Suite 210, Edmonds, WA 98020