68453-1

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

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NO. 68453-1-I

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MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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# REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Statutes and Regulations — Page

County Regulations — Page



Court Rules — Page



Other Authorities — Page

## I. INTRODUCTION

The dispute in this case is not over whether Michael Durland should be allowed to file an appeal pursuant to the Land Use Petition Act after the 21 day time limit has expired, the dispute in this case is about when the clock started for the 21 day deadline to file. Under LUPA, an appeal must be filed within 21 days of the "issuance of the land use decision" being appealed and, in this case, Durland filed his appeal within that time period.

Respondents take the position that the "issuance date" was the date of the building permit – November 1, 2011. But that makes no sense because LUPA states that the "date on which a written land use decision is issued" is "three days after a written decision was mailed by the local jurisdiction or, it not mailed, the day on which the local jurisdiction provides notice that a written decision is publicly available." RCW 36.70C.040(4)(a). RCW 36.70C.040(4) does not say that the date of issuance of a land use decision is the date of the written decision.

In this case, the first possible date that the land use decision was "issued" under the LUPA meaning of that term, was the first day that San Juan County provided notice that the building permit was publicly available – December 5, 2011. The County did not mail the decision to anyone before

that date, nor did the County provide any notice whatsoever that the decision was publicly available before that date.

With a timely petition, the other issue presented to this Court is whether considerations of fairness and practicality call for an exception to the exhaustion requirement in this case. The authors of LUPA did not intend to change the well-established doctrine of exhaustion as it had been developed for decades before LUPA was adopted. It is a mistake to read LUPA as prohibiting a court from applying any equitable exceptions to the requirement. That interpretation results in draconian results that are not consistent with law and that are based on a contemptuous perspective of justice. Exceptions can be made under LUPA and this case, without question, presents one of the rare circumstances where an exception should be made. Requiring exhaustion in this case would not only violate the due process rights of appellants, but would cause a manifest injustice. Despite doing everything they possibly could do, appellants had no possible option for a fair opportunity to participate in the administrative process.

## II. STATEMENT OF FACTS

In their statement of facts, respondents disparage Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (hereinafter collectively

referred to as "Durland") for filing two separate appeals at the same time to protect their legal interests in this case. It is important for the court to understand the background and reasoning behind filing two separate appeals of the building permit at issue in this case at the same time.

San Juan County issued the building permit without any notice on November 1, 2011. The San Juan County code states: "Appeals to the hearing examiner must be filed (and appeal fees paid) within 21 calendar days *following the date of the written decision being appealed.*" SJCC 18.80.140(D)(1) (emphasis supplied); CP 11. Thus, unlike LUPA, the clock for an administrative appeal to the hearing examiner in San Juan County does start ticking on the date of the written decision. Because of that language, the deadline for filing an administrative appeal with the San Juan Hearing Examiner was clearly November 22, 2011. Because Durland didn't even know that the permit existed before November 22, 2011, he couldn't possibly have filed an appeal on time. Durland did file an administrative appeal to the Hearing Examiner, but only in an attempt to address the due process issue presented by the San Juan County code provisions.

In contrast, the deadline for filing an appeal of the building permit under the Land Use Petition Act had not yet passed when the County first

provided notice that the decision had been made to Durland. Under RCW 36.70C.040(4), the deadline for filing a LUPA appeal was, at the earliest, December 26, 2011. Therefore, Durland filed this direct appeal of the building permit to Superior Court on December 19, 2011.

Durland did everything that a person in his position could and would do under the circumstances presented to him. At the time of filing, it was unclear, under existing case law at the time, whether a direct appeal or an administrative appeal was the proper route to take. Because of the complexity and uncertainties associated with the legal outcome of either appeal, the responsible approach for Durland to take was to file two different appeals at the same time. The necessity of this approach has become obvious as both appeals have been litigated.

## III. STANDARD OF REVIEW

To prevail on a motion to dismiss under CR 12(b)(6), "a defendant has the burden of establishing 'beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995) (*quoting Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). Under this standard a court must "accept as true

the allegations in a plaintiff's complaint and any reasonable inferences therein." *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

Moreover, a motion to dismiss "should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to a valid claim, even if the facts are alleged informally for the first time on appeal." *Fondren*, 79 Wn. App. at 854. Motions to dismiss "should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits." *Gasper v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 629, 128 P.3d 627 (2006).

## IV. ARGUMENT

### A. The Building Permit Was a Land Use Decision Because It Was Not Appealed to the Hearing Examiner

Contrary to the argument made by respondents Heinmiller and Stameisen, because the building permit at issue in this appeal was not appealed to the Hearing Examiner, it is a "land use decision" as that term is defined in RCW 36.70C.020.

The Land Use Petition Act (LUPA) states, in relevant part:

> (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 . . .

RCW 36.70C.020(2) (emphasis supplied).

As the Supreme Court has said:

> "Final" has a specific meaning in context of appellate jurisdiction. A "final decision" is "[o]ne which leaves nothing open to further dispute and which sets at rest [the] cause of action between parties."

*Samuels Furniture, Inc. v. State Department of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002), *citing Black's Law Dictionary*, 567 (5th ed. 1979). ". . . A judgment is considered final on appeal if it concludes the action by resolving the plaintiff's entitlement to the requested relief." *Id., citing First Feine Vessel Owners v. State*, 92 Wn. App. 381, 387, 966 P.2d 928 (1998).

When no appeal of a building permit is filed with the Hearing Examiner in San Juan County, the building permit becomes final. The San Juan County Code states:

> (a) Finality. All project permit decisions, and administrative determinations or interpretations issued under this code, ***shall be final unless appealed***. (*See* SJCC 18.10.030(C).)

SJCC 18.80.130 (emphasis supplied).

In this case, building permit BUILDG-11-0175 was a final determination made by the body with the highest level of authority to make

the determination because it was not appealed to the Hearing Examiner. The building permit is in effect and Heinmiller and Stameisen are authorized to proceed with construction under that permit under SJCC 18.80.130. The building permit is a "final decision" that leaves nothing open for further dispute and sets at rest the legal rights of the parties when it is not appealed.

B. The Land Use Petition Was Filed in a Timely Manner by Petitioners

1. Under RCW 36.70C.040(4)(a), which applies in this case, Durland's Land Use Petition was timely filed

The issue of timeliness of Durland's appeal in this case revolves entirely around the statutory language in RCW 36.70C.040(4)(a). Under RCW 36.70C.040(4)(a), a land use decision is "issued" three days after the written decision was mailed by the local jurisdiction or, if not mailed, the day on which the local jurisdiction provides notice that a written decision is publicly available. RCW 36.70C.040(4)(a).[1] The question presented to this court demands a focused analysis of that statutory language as applied in this case. Neither Heinmiller, nor the County, do that. Apparently recognizing the weakness of their position if they address this language head on, they both completely avoid any analysis of RCW 36.70C.040(4)(a) in their response

[1] There is no dispute that the building permit was a written decision.

briefs. They both know that they cannot win the argument if they acknowledge the plain language in this provision.

Under RCW 36.70C.040(4)(a), the date of issuance of the building permit in this case was, at the earliest, December 5, 2011. *See* Opening Brief of Appellants at 13-16. The County did not mail the building permit or provide notice that the permit was publicly available anytime before that date. *Id.* Respondents argue that the "issuance" date under LUPA was the date of the permit – November 1, 2011. San Juan County Brief at 2, *citing* CP 38; Brief of Respondents at 19. If the authors of LUPA had intended the issuance date to be the actual date of the land use decision, then the language of LUPA would have stated that the issuance date was the actual date of the land use decision.

In an apparent attempt to argue that the County provided notice that the building permit was publicly available on the date of the building permit, respondent Heinmiller's brief contains statements of "fact" that are not in the record, that are unsupported by any evidence or testimony, and that are completely false. *See* Brief of Respondents (Sep. 7, 2012) at 5-6. This

deception is serious cause for concern because this so-called "facts" speak to the very heart of this central issue presented to this court.[2]

Heinmiller claimed, falsely, in its Statement of Facts that as of November 1, 2011, "[m]embers of the public could easily access a copy of the permit by doing a simple search on the San Juan County website." *Id.* at 5. This is not true, this is not in the record, and this statement should be stricken entirely from the Brief of Respondents. There is no evidence whatsoever in the record that notice of the building permit (BUILDG-11-0175) in this case was posted on the San Juan County website on the date that it was issued. Indeed, if that had occurred and was in the record, one can imagine that would have been the centerpiece of respondents' defense.

There is absolutely no support whatsoever in the record for a claim that members of the public could have accessed a copy of the building permit from the San Juan County website on November 1, 2011. Perhaps San Juan County created and introduced this service recently, but it was not available on November 1, 2011, when the building permit at issue in this lawsuit was issued. *Id.*

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[2] Appellants are filing a Motion to Strike this portion of the brief and Appendix B with the Court. If that motion is granted, the Court can disregard this portion of Appellants' Reply.

The attorney for Heinmiller apparently took it upon herself to perform "a search online" wherein she "pulled up information on several permits obtained by Durland himself in recent years (*see* Appendix B)." Brief of Respondents at 5, Appendix B. Appendix B was attached to the Brief of Respondents without any acknowledgement that this piece of" evidence" is not in the record before this Court. *Id.*[3] It was also offered without any declaration under oath of its veracity. *Id.* Furthermore, this document provides information that is irrelevant and inapplicable to the issue presented because it shows the results of a search performed on the website on June 28, 2012 for completely different permits. *Id.* Appendix B and the commentary associated with it in the Brief of Respondents should not be considered by this court.

San Juan County also makes a claim of "fact" that is not supported by the record. The County argues that the permit was mailed to the Heinmillers' representative on November 2, 2011. San Juan County Brief at 15, *citing* CP 181. This argument fails because there is no evidence that the County mailed the permit to Heinmillers' representative on November 2, 2011. The citation

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[3] Appendix A was also inappropriately attached to the brief without any acknowledgment that this piece of evidence is not in the record before this Court, was not presented to the Superior Court, and was offered without any declaration under oath of its veracity or any attempt to move to supplement the record.

that is provided in the response brief to support this claim is a statement made by the San Juan County attorney to the Court during oral argument before the Superior Court. *See* RP 17 (a.k.a CP 181). A statement made by the County's attorney during legal argument does not constitute evidence in and of itself –evidence in the record must support that statement. There is *nothing* in the record to support that statement. There is a copy of the building permit – no declaration of mailing. CP 38. As far as the record before this Court is concerned, the permit was not mailed to the applicant by San Juan County.

Second, a mailing made solely to the applicant would not have even started the clock ticking under RCW 36.70C.040(4)(a). The provision regarding mailing is in the same sentence as the statement that the clock would start on the date "on which the local jurisdiction provides notice that a written decision is publicly available." This demonstrates a clear intention by the authors that the land use decision must be mailed to the public, not privately to the developer who is receiving the permit approval, in order for the clock to start on an appeal. There is a clear indication in RCW 36.70C.040(4)(a) that public notice is a key component to beginning the clock ticking. This obviously makes sense considering that a statutory

deadline for an appeal should not start unless there is at least a scintilla of effort by the local jurisdiction to distribute of the decision to those who may appeal.

2. The Supreme Court's analysis in *Habitat Watch* applies to this case

Heinmiller's claim that Durland's counsel told the Superior Court that *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), does not apply in this case is a deceptive and incorrect characterization of what Durland's counsel said to the Court during oral argument. *See* Respondents' Brief at 16, *citing* VRP 12. It is clear from reading it in the entire context of that oral argument that Durland's argument to the Superior Court was precisely the same argument that was presented in appellants' Opening Brief and here. *See* Appellants' Opening Brief at 10-12.

As Durland's attorney explained to the Superior Court, the *Habitat Watch* court's interpretation of RCW 36.70C.040(4) does apply in this case. The only distinction between this case and *Habitat Watch* (*i.e.*, where counsel for Durland told the Court that *Habitat Watch* does not apply in this case) is that the appellant in *Habitat Watch* did not file its LUPA petition within 21 days after the local jurisdiction had provided notice that the written decision was publicly available through a public disclosure response. *Id.* at 409. In

this case, in stark contrast, Durland did file his LUPA appeal within 21 days of the date that the County first provided public notice that the written decision was publicly available. *Id.* at fn. 6.

3. The question of whether the County was legally obligated to provide notice of the building permit is not presented in this appeal

In an attempt to distract from the language in RCW 36.70C.040(4)(a), both respondents distort Durland's arguments into being about a "right to notice" of the building permit. The issue of whether the County was legally required to provide notice of the building permit to Durland is not presented to this Court. San Juan County issued the building permit without any notice on November 1, 2011 and they were not legally required to provide notice to Durland on that date.

The question is when the clock for a LUPA appeal starts ticking. The point being made by Durland is that, to start the clock for a 21 day period to file a LUPA appeal, the County was required to either mail the decision or provide notice that the decision was publicly available. They did neither until, at the earliest, December 5, 2011. The County may not be legally obligated to provide notice, but if they want to start the clock ticking for a

LUPA appeal, they have to follow the requirements as they are set forth in RCW 36.70C.040(4)(a) for that to occur.

4. RCW 36.70C.040(4)(c) does not apply in this case

There is no dispute that the decision that is being appealed in this case was a written decision. Nonetheless, respondents imply that RCW 36.70C.040(4)(c) applies in this case, not RCW 36.70C.040(4)(a). While neither respondent makes an explicit argument that the language in subsection (c) applies in this case, they both repeatedly refer to the language from subsection (c) when they say that the building permit was "entered into the public record."

As was pointed out in appellants' Opening Brief, the *Habitat Watch* court correctly interpreted RCW 36.70C.040(4)(c) to apply only when a decision is neither written, nor made by ordinance or resolution. *Habitat Watch* at 408, fn. 5. Subsection (c) would include other types of decisions such as decisions made orally at a City Council meeting. *Id.* These decisions would be issued when the minutes from the meeting are made open to the public or the decision was otherwise memorialized such that it is publicly acceptable. Subsection (c), therefore, does not apply in this case because the decision at issue was written and thus could be issued only pursuant to

subsection (a), when it was either mailed or notice was given that the decision was publicly available.

Furthermore, RCW 36.70C.040(4)(c) does not state that the issuance date is the date of the building permit. That provision states that it was the date the decision was entered into the public record. The term "entered" is different from the concept of simply becoming a public record. The term "entered" signifies an intent that the local jurisdiction somehow takes some action to let the public know that the particular action has been taken.

The decision that was issued recently by Division II in *Applewood Estates Homeowners Association v. City of Richland*, 166 Wn. App. 161, 269 P.3d 388 (2012) was wrongly decided and should not be followed by this Court for several reasons. First, that court interpreted RCW 36.70C.040(4)(c) incorrectly by presuming that it meant that the clock started ticking on the day that a decision "became" a document that could be requested by the public. Second, without any analysis whatsoever and in direct contradiction to *Habitat Watch*, that court inappropriately applied RCW 36.70C.040(4)(c) to a written decision.

5. San Juan County has control over when the 21 day LUPA time period begins

The County and Heinmiller both warn of dire consequences if this Court does not hold that the issuance date under LUPA was the date of the building permit – November 1, 2011. Their threats of so-called "absurd" and "untenable" outcomes are unwarranted. The County has complete control over the "date of issuance" as that date is defined in RCW 36.70A.040(4)(a). With the advent of the internet, the County can easily start the LUPA clock ticking by creating a service that provides notice that a written decision is publicly available on their website. In fact, "Appendix B," to the Brief of Respondents shows us that the County has apparently set something up to address this need. They did not do it for the 2011 building permit, but they can clearly do it in all future cases.

On the other hand, there will be "absurd and untenable" results if the Court adopts respondents' position on this issue. That would not only require this court to ignore the language in LUPA under RCW 36.70C.040(a)(4), but it would result in a substantial injustice to members of the public. This interpretation would incentivize keeping the issuance of permit approvals hidden from the public so that local governments can avoid any possibility of an appeal. LUPA may have a stated purpose of expedited appeal procedures

that provide consistent, predictable, and timely judicial review, but there is no indication whatsoever in the language of RCW 36.70C.040(4)(a) that this was meant to occur at the expense of public involvement and due process. Barring the public from appealing when the local jurisdiction provided no notice in any form whatsoever that the written decision was publicly available is not what the authors of LUPA intended.

C. Considerations of Fairness and Practicality Call for an Exception to the Exhaustion Requirement

1. The requirement for exhaustion of administrative remedies under LUPA is not absolute

Respondents argue that exhaustion is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA. Respondents Brief at 9; Brief of Respondent San Juan County at 4-5. But Division II recognized that the exhaustion rule was not absolute and is not jurisdictional under LUPA in *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 377, 223 P.3d 1172 (2009).

While the Court in *West v. Stahley* does make a blanket statement otherwise, a close look at that case demonstrates that that Court, too, recognized that a court is allowed to balance equities under LUPA to determine whether exhaustion should be excused. *West v. Stahley*, 155 Wn.

App. 691, 699, 229 P.3d 943 (2010) (*as amended, rev. denied*, 170 Wn.2d 1022, 245 P.3d 772). The *West v. Stahley* Court did not reach the issue of equity because, as it said, "equity would not cure West's failure to exhaust his administrative remedies." *Id.* West had failed to exhaust administrative remedies because he failed to appeal to the City Hearing Examiner within 14 days after he had actual notice and that, the Court concluded, removed any hope of his being excused from the exhaustion requirement. *West v. Stahley*, 155 Wn. App. at 698-699.

2. Requiring exhaustion in this case would violate the due process rights of appellants

As appellants argued in their Opening Brief, requiring exhaustion in this case would violate Durland's constitutional due process rights. *See* Appellants' Opening Brief at 23-25.

San Juan County argues that Durland's arguments regarding deprivation of due process are raised for the first time in his appellate brief and issues raised for the first time on appeal should not be considered by the Court. San Juan County Brief at 13. To the contrary, Durland raised the issue concerning due process violations with the Superior Court. *See* CP 94-95. Furthermore, RAP 2.5 states that a party may raise claimed errors for the first time in the appellate court that are related to a manifest error affecting a

constitutional right. An error affecting a constitutional right is "manifest" if it caused actual prejudice. *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 221, 257 P.3d 641 (2011). Here, the error caused actual prejudice to Durland. Because he did not receive notice within the 21 day time period for filing an administrative appeal with the San Juan County Hearing Examiner, Durland missed the deadline to appeal and was barred from any opportunity to present his objections at an administrative hearing. He will be forced to watch his neighbor proceed with development that is illegal under the Code without any opportunity to present his objections – he has no possible avenue for relief. He has been prejudiced significantly.

Respondent Heinmiller confuses the context of the due process issue. The due process issue here is connected to the question of administrative remedies, not timeliness of the LUPA petition. The so-called "bright line rule" mentioned in *Asche v. Bloomquist* begins with the premise that the LUPA petition was filed after the 21 day deadline. *Asche v. Bloomquist*, 132 Wn. App. 784, 789-90, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007). The Court in that case concluded that it could not consider a due process challenge for lack of notice for missing the 21 day deadline under LUPA because the petition had been filed after the 21 day deadline. *Id.* In

this case, the LUPA petition was filed in a timely manner and, therefore *Asche v. Bloomquist* does not apply to this due process issue.

3. Even if Durland's due process rights were not violated, considerations of fairness and practicality call for an exception to the exhaustion requirement

Even if Durland's constitutional due process rights were not violated by the requirement to exhaust administrative remedies, case law makes it clear that considerations of fairness and practicality call for an exception to the exhaustion requirement in this case. *See* Opening Brief of Appellants at 23-26. The courts allow exceptions in rare circumstances when equity calls for an exception to be made and this is a prime example of such a rare circumstance. *Id.*

In an effort to remain within the page limit, Durland will refrain from presenting the full scope of events that occurred in connection with his diligence on obtaining information and the County's failure to provide him with even the slightest fair process. The full statement of events that occurred surrounding Mr. Durland's repeated attempts to obtain information before and during the administrative appeal period and the County's failure to provide him with that information are set forth in Michael Durland's Declaration at CP 126-130. It is especially ironic that respondents claim that

Mr. Durland should regularly call the County and ask for information about the property when that is precisely what he did. The County did not provide him with any information despite his explicit requests before the deadline.

Durland places primary reliance on *Gardner v. Board of Commissioners*, 27 Wn. App. 241, 617 P.2d 743 (1980) because that case is similar on the facts to the case before this Court. *Gardner* demonstrates that a court will waive the exhaustion requirement when lack of public notice deprives the appellant of a fair opportunity to participate in that process.

San Juan County argues that *Gardner* is a pre-LUPA case, thus, the *Gardner* court's analysis of the requirement to exhaust administrative remedies does not consider the standing requirements of RCW 36.70C.060(2)(d) or the requirement for a "land use decision" as defined by RCW 36.70C.030(2). As was argued in appellants' Opening Brief and above, the language of LUPA in RCW 36.70C.060(2) allows this Court to refer to established case law that define the parameters of the requirement for exhaustion. The statutory language in LUPA indicates a desire by the authors of the doctrine of administrative remedies, as has been developed in case law, be applied to appeals of land use decisions.

San Juan County also argues that *Gardner* is distinguishable from the facts in this case because there Gardner was entitled to notice of the County's action and did not receive it. San Juan County Brief at 9. The issue here is not simply lack of notice. The issue is the 21 day deadline *combined* with no notice of the permit. It was literally impossible for Mr. Durland to exercise his right to be heard. Under San Juan County code provision, Mr. Durland would have to be clairvoyant. In this way, the administrative appeal process acts as an unconstitutional bar to those who are impacted by the development.

Furthermore, Durland *was* entitled to notice of the decision because the activity being permitted required a shoreline use permit. This proposal constitutes substantial development on the shoreline that requires a shoreline substantial development permit under SJCC 18.50.020 and SJCC 18.50.330.E.4. Under the San Juan County Code, the County is legally required to provide notice to neighbors when it receives an application for and issues a shoreline substantial development permit. SJCC 18.80.030; SJCC 18.80.010. Therefore, Durland was entitled to notice and did not receive it only because the County improperly and illegally characterized the proposal as requiring only a building permit.

Respondents' analysis comparing every case cited by appellants with the facts of this case misses the point entirely with respect to the purpose behind Durland's reliance on certain cases cited in his Opening Brief. Many cases were cited by Durland simply to provide background on the parameters of the requirement for exhaustion. Durland did not contend that every one of the cases cited was on all fours with the facts of this case, nor was it necessary to make such an argument.

D. An Award of Attorneys' Fees Under RCW 4.84.370 Is Not Proper in this Case

An award of attorneys' fees under RCW 4.84.370 is not proper in this case.

As the language in that provision states, attorneys' fees are available only if a party was the "prevailing or substantially prevailing party before the county, city, or town." *Habitat Watch v. Skagit County*, 155 Wn.2d at 413; *Asche v. Bloomquist*, 132 Wn. App. at 802. A party is not a "prevailing party" when there was no hearing on the land use decision below. *Asche v. Bloomquist*, 132 Wn. App. at 483-484. In this case, the issuance of the building permit was ministerial. *Id.* Mr. Durland had no opportunity whatsoever to present his arguments below. There was no hearing. Therefore, it is inappropriate to characterize the respondents as being

"prevailing parties" before the local jurisdiction in this case. Mr. Durland's first challenge was at the Superior Court level and that was dismissed on procedural grounds. There was no "prevailing party" on the merits of the building permit at the local level.

Furthermore, RCW 4.84.370 has been limited to require that the prevailing party prevail "on the merits" in an adversarial proceeding to be awarded fees. *Witt v. Port of Olympia*, 126 Wn. App. 752, 758, 109 P.3d 489 (2005). *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005); *Overhulse Neighborhood Association v. Thurston County*, 94 Wn. App. 593, 972 P.2d 470 (1999). *But see also Prekeges v. King County*, 98 Wn. App. 275, 285, 990 P.2d 405 (1999) (RCW 4.84.370 does not require that the party must have prevailed on the merits). When the issue presented is dismissal of a land use petition for lack of jurisdiction, the court does not reach the merits and attorneys' fees are not awarded. *Id.*

Thus, RCW 4.84.370(2) allows fees only if the government agency's decision is upheld by both the Superior Court and the Court of Appeals. Here, neither the Superior Court nor this Court will have considered the County's decision to issue a building permit. Instead, the Court has considered whether the LUPA petition was timely filed and whether

exhaustion of administrative remedies should be excused. Therefore, respondents are not entitled to attorneys' fees because the Superior Court and the Court of Appeals have not upheld or even considered the decision below.

## V. CONCLUSION

For the foregoing reasons, appellants respectfully request that the Court reverse the decision of the Superior Court and remand to the Court with an order to proceed on the merits of appellants' Land Use Petition.

Dated this 10th day of October, 2012.

Respectfully submitted,

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