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No. 68453-1-I

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

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Land Use Petition Act (LUPA) requires that a land use petition be filed within 21 days of the issuance of a land use decision. LUPA further requires petitioners to exhaust their administrative remedies at the local level (here, San Juan County) prior to seeking relief in a superior court. In this case, there was never any "land use decision" before the superior court to review, because the petitioners failed to obtain and appeal from any Hearing Examiner decision. Instead, they bypassed the exhaustion requirement at the County level and went straight to superior court. Moreover, they did so late, well past the strict, 21-day statutory deadline set forth in LUPA. The trial court was correct in dismissing the land use petition for lack of jurisdiction, standing, and/or exhaustion of administrative remedies, and the Court of Appeals should affirm the dismissal.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the superior court's dismissal of Durland's Land Use Petition should be affirmed where Durland skipped San Juan County's administrative requirement to timely appeal a final building permit decision by the County to the Hearing Examiner before filing a judicial appeal, thereby depriving the superior court of jurisdiction to hear the

appeal on the basis of Durland's lack of standing, and failure to exhaust administrative remedies?

III. STATEMENT OF THE CASE

A. Procedural background

This case involves an appeal of a matter filed pursuant to LUPA. CP 33-38. This is the second of four recent appeals filed by Michael Durland, Kathleen Fennel, and Deer Harbor Boatworks ("Durland") against Respondent Heinmiller[1]. The latter three appeals all concern the same permit. *Id.* 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

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[1] (A) Appeal #1: COA No. 67429-3-I (appeal of Skagit County Superior Court No. 10-2-01536-4 -- all briefs filed, oral argument occurred September 5, 2012). This appeal involves permits issued concerning an ADU on the Heinmiller property.

(B) Appeal #2: 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.

(C) Appeal #3: 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.

(D) Appeal #4: COA No. 691341-3-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.

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.

C. Durland skipped any appeal to the local Hearing Examiner and detoured straight to the Skagit County Superior Court

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.

In this matter, Durland eventually found out about the issuance of the permit to Heinmiller, and decided that he had complaints about it, and/or construction proposed under the same. Rather than filing any form of grievance about the permit to the San Juan County Hearing Examiner, however, Durland skipped that step and instead filed a land use petition in the Skagit County Superior Court. CP 35. Durland's appeal to the Skagit County Superior Court was filed on December 19, 2011, 48 days after the date the permit was granted. CP 33.

D. Durland also filed a grievance with San Juan County Hearing Examiner regarding the same permit, and appealed separately to the San Juan County Superior Court from the Examiner's decision

In a separate matter, involved in the third and fourth of Durland's appeals to this Court, Durland filed a grievance with the Hearing Examiner regarding the *same permit -- and then appealed separately* from the Hearing Examiner's decision to the San Juan County Superior Court. *See COA No. 68757-3-I and COA No. 691341-3-I Docket Sheets, as well as LUPA Petition subject of same, attached hereto at Appendix A.* The San Juan County Superior Court has now dismissed all claims against Heinmiller and the County in the superior court action from which those appeals were taken. While the same permit and subject matter are involved in the second, third, and fourth appeals, this current (second) appeal is a separate and distinct legal proceeding involving an appeal from the Skagit County Superior Court, and no decision by the San Juan County Hearing Examiner. Notably, Durland's other litigation against Heinmiller demonstrates his acute awareness of the time-of-filing requirements and procedures concerning land use decisions.

E. The Skagit County Superior Court dismissed Durland's land use petition for failure to exhaust administrative remedies, and untimeliness

Heinmiller and San Juan County filed Motions to Dismiss Durland's appeal in the Skagit County Superior Court, arguing essentially that there was no land use decision before the trial court to review and that

even if there was, the petition was filed too late. CP 4-16; CP 17-26; VRP 1-24. The Skagit County Superior Court agreed with the position asserted by Heinmiller and the County, and dismissed the land use petition on February 3, 2012. CP 161-163; VRP 1-24.

F. San Juan County's approval of the permits was entered into the public record and easily obtainable when the permit was issued to Heinmiller

As stated, San Jan County granted the permit on November 1, 2011. CP 38. As of that date, the permit was public record. Members of the public could easily access a copy of the permit by doing a simple search on the San Juan County website. Indeed, the undersigned performed a search online and in less than 10 minutes pulled up information on several permits obtained by Durland himself in recent years (*see Appendix B)* -- the point being that anyone with internet ability can search for and pull up permit history. Alternatively, the same information would be yielded by placing a telephone call or making a visit to the permitting office every week or two to ask about any new permits issued on parcels that a member of the public is concerned about. Heinmiller did not receive personal notice of the permits issued to Durland despite the fact that he has been Durland's neighbor for some 17 years.

Here, Durland failed to secure public record information that was available to him, and then when he decided he had complaints about the permit, he failed to utilize the review procedures required at the County level and instead filed his faulty and untimely appeal directly in the superior court. The superior court properly dismissed the action for lack of standing and jurisdiction, and untimeliness.

IV. STANDARD OF REVIEW

A. The trial court properly dismissed Durland's land use petition under the CR 12(b)(6) standard

A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) if "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" Asche v. Bloomquist, 132 Wn. App. 784, 789-90, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007) (citations omitted) (affirming trial court's dismissal of statutorily time-barred LUPA action). An appellate court reviews such dismissals de novo. Id. at 789. CR 12(b)(1) also allows dismissal where the Court has no jurisdiction over the subject matter of an action. Given Durland's lack of standing and failure to timely file the land use petition, dismissal was appropriate under CR 12(b).

V. ARGUMENT

A. There was no "land use decision" for the superior court to review, because no Hearing Examiner decision was before the court

RCW 36.70C.020 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 reviewable under

LUPA, and is a land use decision subject to review. Asche, 132 Wn.App. at 790; Chelan Cnty. v. Nykreim, 146 Wn.2d 904, 929, 52 P.3d 1 (2002). Here, the decision at issue is a building permit issuance; however, there is no proper appeal of a "land use decision" as defined by LUPA, because there has been no Hearing Examiner decision with respect to the permit, nor an appeal therefrom.

B. Durland lacked standing to appeal directly to Superior Court

LUPA contains special standing provisions which require Durland to exhaust his administrative remedies prior to filing for review in superior court. RCW 36.70C.060 states as follows:

> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> (1) The applicant and the owner of property to which the land use decision is directed;
>
> (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. *A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:*
>
> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; *and*
>
> *(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.*

RCW 36.70C.060 (emphasis added). See also, Ward v. Bd. of Cnty. Comm'r, Skagit Cnty., 86 Wn.App. 266, 270-71, 936 P.2d 42 (1997).

Here, Durland failed to exhaust administrative remedies by failing to see the administrative appeal process through, and then appealing from a "final" "land use decision." Exhaustion is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA. Stanzel v. City of Puyallup, 150 Wn.App 835, 841, 209 P.3d 534 (2009), *rev. denied*, 227 P.3d 852 (2010). To allow otherwise would authorize premature judicial intrusion into land use decisions. See, Grandmaster Sheng-Yen Lu v. King Cnty., 110 Wn.App. 92, 101, 38 P.3d 1040 (2002). Because Durland failed to see the administrative process through, he lacked standing to bring his appeal in the superior court.

C. Durland's faulty appeal to the superior court was also untimely

Durland did not have standing to bring his appeal in the first place, but even if he did, the appeal was untimely. RCW 36.70C.040 requires that the petition be filed within 21 days of a land use decision, or else be barred. The statute states, in pertinent part:

> Commencement of review - Land use petition - Procedure
>
> (1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.
>
> (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:
>
> ...
>
> (3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.
>
> (4) For the purposes of this section, the date on which a land use decision is issued is:
>
> (a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;
>
> (b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or
>
> (c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

RCW 36.70C.040 (emphasis added).

LUPA is the codification of the strong and long-recognized public policy of administrative finality in land use decisions. James v. Cnty. of Kitsap, 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. LUPA is the exclusive means of judicial review of land use decisions, with specific, limited exceptions. RCW 36.70C.030. Under LUPA, a land use petition is barred and cannot be reviewed unless the petition is filed within 21 days of issuance of the land use decision. Because LUPA prevents a court from reviewing an untimely petition, a land use decision becomes valid once the opportunity to challenge has passed. Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 181, 4 P.3d 123 (2000). Even illegal decisions must be challenged in a timely manner. Habitat Watch v. Skagit Cnty., 155 Wn.2d 397, 407, 120 P.3d 56 (2005).

Thus, even if this Court were to find that the subject matter of this appeal was a "land use decision," Durland's superior court action was filed too late, and was therefore time-barred.

D. Durland's arguments on appeal concerning a lack of proper notice and lack of due process have already been flatly rejected by Washington courts interpreting LUPA

While the above law should be dispositive, Durland raises other issues on appeal, and basically asks this Court to disregard established law. Ultimately, Durland's arguments about a lack of notice and due process fail. Controlling Washington law shows that these arguments have no merit, and Durland has not demonstrated any basis upon which this

Court could or should decide differently.

1. *The permit was issued, and became public record, on November 1, 2011: the date of the permit issuance to Heinmiller*

The permit was clearly a public record when granted. It is axiomatic that Durland obtained what were already "public records" in his public records request.

2. *Durland was not entitled to personal notice of the permit, and a lack of personal notice did not deprive him of due process*

Durland argues that his due process rights have been violated. *Appellant's Opening Brief, at 25.* Yet at the hearing before the superior court, Durland's counsel conceded that this was not so:

> *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). To the extent that the Petitioners are now making a different -- and directly contradictory -- argument than that made to the superior court, it should not be considered.

If this Court does consider the argument, it should be rejected. San Juan County has no duty to notify neighbors of its decisions on permits. Neither does LUPA require notice of building permit issuance to

neighbors. Asche, *supra*. The statute of limitations clock set forth in LUPA starts ticking regardless of actual notice to neighbors.

Asche is 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[2].

[2] While this decision indicates that a decision on building permits can be a "land use decision" if it complies with RCW 36.70C.020(1)(a)-(c), there is no indication that the County Code at issue in that case required appeals to be brought to a higher level within the County before filing a LUPA petition in Superior Court. This is unlike the case at bar

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.

Similar to what Durland alleges, 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. 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.

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in that San Juan County requires appeals on building permits to be brought to the Hearing Examiner as the highest level of authority to render a decision respecting building permits.

> 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[3]; 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").

E. A county's response to a public records request does not delay LUPA's statute of limitations clock after a record has become a public record

Contrary to Durland's assertions, no Washington court has held that where a member of the public does not receive actual notice of a permit at the time it issues, the "issuance" date of the permit is the date that he receives a copy of it in a public records disclosure request, or three days after it is mailed to him, or at some other date when the complaining person chooses to inquire and obtains actual notice of the issuance.

In support of his argument that the "issuance" date was later than the permit was issued, Durland relies heavily on Habitat Watch v. Skagit Cnty., 155 Wn.2d 397, 120 P.3d 56 (2005). Oddly enough, Durland actually relies almost exclusively on this case, where his counsel had conceded to the superior court that: "Habitat Watch doesn't really apply here." VRP 12.

Durland's counsel was correct -- the case "doesn't really apply," as there is no holding in the case to support his position. In that case, the

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[3] 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).

court noted that it was unclear when and if the decisions at issue were entered in the public record. Id. at 408. The specific decisions at issue were time extensions of a special use permit. Contrary to what Durland represents in briefing to this Court, the Habitat Watch court did not find that the date of "issuance" was the date that Habitat Watch received records in response to a public records request; to the contrary, the court found that that date would have been "the very latest" issuance date possible since it was unclear on that record whether and when the decisions had previously been entered into the public record. Id. at 409. In fact, the court specifically noted: "We need not determine when the decisions were issued because even under the *last possible* date, Habit Watch failed to file a LUPA petition within 21 days." Id. at 409 (FN 6) (emphasis added).

Durland talks at length about Footnote 5 of the court's opinion, in which the court notes that there are "...two possible interpretations of the language in RCW 36.70C.040(4)(c)." One possibility noted by the court is that that provision could be a "catch-all" where subsections (a) and (b) do not apply. A second possibility noted by the court, and one that it found "more likely," is that subsection (c) applies to decisions that are neither written or made by ordinance or resolution, such as an oral decision that

later becomes memorialized in writing. The court noted that under that second possible interpretation, "...subsection (c) would not apply to this case because the decisions at issue were written and thus could not be issued only under subsection (a), when they were either mailed or notice was given that the decisions were publicly available." Id. The court even notes that "...it may not have been possible for the decisions in this case to have been issued via entrance into the public record, depending upon the legislature's intent in designating the three types of issuance in RCW 36.70C.040(4)." Id. at 408. Yet the court does not conclude that the legislature's intent was one way or the other.

This footnote language does not support Durland's position for several reasons. First, it is not a holding. See, Nickum, *supra* ("Our Supreme Court has *suggested* that a LUPA appeal filed within 21 days of actual notice of certain land use decisions, such as a SEPA exemption determination not requiring notice, may be timely [citing Habitat Watch]. But, here, the Nickums failed to file their LUPA petition within 21 days of their actual notice of the permit; thus, we need not address this *possibility*.") 153 Wn.App. at (emphasis added). Further, the Habitat Watch court's language specifically contemplates that the issuance date may have been and probably was earlier -- it's just that the date was not

clear from the record before the court.

Here, unlike the situation in Habitat Watch, there is a clear issuance date: the date of the permit. As of that date, it became public record, and available to anyone who cared to see it. Ultimately, the same scenario as was present in Asche is before this Court now: a building permit was issued by San Juan County to Heinmiller; as was appropriate in Asche, that was its date of issuance; Durland was not entitled to personal notice of the issuance; a lack of personal notice did not deprive him of due process; and Durland has now filed suit too late under the stringent statutory time bar.

F. Durland fails to establish any basis for an exception to be made regarding LUPA's stringent exhaustion requirement

Durland argues that exceptions should be made for him regarding the exhaustion requirement set forth in LUPA. While the above should be dispositive, Durland's argument fails for multiple additional reasons.

1. Durland's argument is unsupported by adequate legal authority.

The primary argument advanced by Durland is that the phrase "to the extent required by law" in RCW 36.70C.060(2)(d) "clearly refers to the decades of established case law" *(Appellants' Brief, at 17)* regarding the exhaustion doctrine. In support of that assertion, Durland cites to

numerous non-LUPA or pre-LUPA cases. This assertion lacks merit. Durland cites to no LUPA case that says this. The only rational interpretation of this language is that the exhaustion requirement simply refers to the extent of administrative remedies available at the local level -- i.e., whatever the "highest level of authority" is for considering a land use decision.

LUPA is highly detailed and regards a specialized area of law -- land use -- with very specific purposes, including a desire of the legislature to allow property owners to proceed with assurance in developing their property and to ensure finality in land use decisions. See, e.g., James v. Cnty. of Kitsap, *supra*. These statutes control in land use cases, and this Court cannot just dismiss these provisions so easily, as Durland suggests. LUPA cases clearly control over any non-LUPA cases, and the language of the statute itself must control.

Durland criticizes West v. Stahley, 155 Wn.App. 691, 699, 229 P.3d 943 (2010), *review den.*, 170 Wn.2d 1022 (2011), a recent Division Two case. In that case, the court held that the failure to exhaust administrative remedies is an "absolute bar" to brining a LUPA petition in Superior Court. Id. at 699. Yet Durland fails to mention that review was denied by the Washington Supreme Court in that case -- thus our highest

Court apparently would not agree with Durland that the West decision is "highly suspect" (*Appellants' Opening Brief, at 19*). West remains good law.

2. LUPA's requirements, and the deadlines set forth in the San Juan County Code, are jurisdictional.

Durland advances the position that for decades, Washington courts have held that the exhaustion doctrine is not jurisdictional. This assertion is wrong. LUPA requires exhaustion as a prerequisite for appeals in superior court, and LUPA case law makes clear that the exhaustion requirement is jurisdictional. See Nickum, 153 Wn.App. at 371, 373-79. (confirming that under LUPA, petitioners must first exhaust available administrative remedies, including appeals to local hearing examiners, and that the exhaustion requirement includes time of filing requirements; court comments "To allow tolling of the administrative deadline in this case would open to challenge all previous permit determinations made by the City or similar localities with 'no notice' permit statutes. This would ensure that the doctrine would no longer be used 'sparingly.'").

The Washington Supreme Court has been clear: "LUPA's stated purpose is 'timely judicial review'...LUPA embodies the same idea expressed by this court in pre-LUPA decisions -- that even illegal

decisions must be challenged in a timely, appropriate manner." Habitat Watch., 155 Wn.2d at 406-07. The Washington Supreme Court has also stated:

> As we stated in Nykreim, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions...The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property.

James, 154 Wn.2d at 589 (citation omitted). Furthermore, the San Juan County Hearing Examiner rules make clear that the timing requirements are jurisdictional. *San Juan County Hearing Examiner Rules, at Ch. IV(B).*

Durland's arguments concerning non-jurisdictional requirements and non-LUPA case law is not controlling, and is simply wrong.

3. Cases cited by Durland are inapposite.

Durland cites to various non-LUPA cases in arguing that his failure to exhaust should be excused, asserting that considerations of "fairness and practicality" outweigh the policies underlying the doctrine. *Appellants' Opening Brief, at 18.* The cases cited by Durland will be addressed only briefly -- they are largely inapplicable or distinguishable.

In Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997), there was no available administrative remedy to provide the relief sought

by the applicant for master use permits to construct certain residences, despite statutory language requiring exhaustion. Id. at 217, 224-227. Yet it is undisputed in the case at bar that an administrative remedy was available -- well-demonstrated by the fact that Durland has used that remedy multiple times in his other appeals against Heinmiller. Indeed, as the record before this Court makes clear, Durland even filed a motion seeking a stay of the superior court proceeding below (CP 28-45) to allow their appeal to the hearing examiner at issue in Durland's third and fourth appeals to this Court to become resolved.

Prisk v. City of Poulsbo, 46 Wn.App. 793, 732 P.2d 1013 (1987), *rev. denied*, 108 Wn.2d 1020 (1987) is also distinguishable. In that case, the court held that a petitioner challenging the constitutionality of development fees imposed by the City need not exhaust administrative remedies prior to seeking judicial review on that issue. In Prisk, the administrative agency did not have the authority to decide the constitutional issue, and that the avenue of appeal would be to the body that imposed the fees -- thus considerations of fairness, etc. outweighed the policies requiring exhaustion. The Prisk court also notes that the nature of the dispute as legal rather than factual supported an exception to the exhaustion requirement. But no such situation is present in the case at

bar; the San Juan County Hearing Examiner had the authority to render a decision on timeliness and/or substance of Durland's Land Use Petition.

Presbytery of Seattle v. King Cnty., 114 Wn.2d 320, 787 P.2d 907 (1990), involved a challenge to an ordinance, and the court found that the petitioner had not met the heavy burden of establishing futility as an exception to exhaustion. The court also notes, at Footnote 36, the various policies behind the exhaustion doctrine generally -- including avoidance of the premature interruption of the administrative process; allowing an agency to develop the necessary factual background on which a decision may be based; allowing the exercise of agency expertise; allowing local entities to correct their own mistakes; and discouraging people from bypassing administrative remedies and going straight to the courts. Notably, allowing Durland to bypass the hearing examiner requirements in this case would violate all of those principles. Presbytery is not helpful to Durland.

Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985) is also inapplicable. That case involved the futility of requiring a petitioner to apply for a permit that the petitioner would not even pursue and certainly would not get. There is no such futility shown present in the case at bar.

Neither does Keller v. City of Bellingham, 20 Wn.App. 1, 578

P.2d 881 (1978), *aff'd,* 92 Wn.2d 726 (1979) apply. In that case, citizens challenging improvements to a chlor-alkali plant circumvented the Board of Adjustment and did not obtain an agency decision that the court could review; but the court found that it could review the matter since the decision would not have been jurisdictional and all parties agreed to the court review. Once again, this situation is not at all analogous to the case at bar.

Credit Gen. Ins. Co. v. Zewdu, 82 Wn.App. 620, 919 P.2d 93 (1996) involved a dispute concerning insurance coverage. The court in that case recognized that exhaustion may be excused where only issues of law are presented, but actually found that finding such an exception would not be appropriate where an agency's fact-finding expertise is implicated -- even if an agency is called upon to interpret a legal issue. The court noted:

> If a lawsuit presents only issues of law, the court may excuse exhaustion because the agency's usual fact finding task is not implicated, and, in any event, the courts have ultimate authority to interpret statutes....Still, when an agency is charged with interpreting and applying a particular statute, that agency expertise usually assists the court in performing the judicial function....Because agency expertise would assist the court in interpreting the statutes applicable to this case, requiring exhaustion is appropriate, even though this case presents legal, rather than factual, issues.

Id. at 628-29. Credit General is actually supportive of Heinmiller's position in that review by the Hearing Examiner -- whether on a legal issue such as jurisdiction or a substantive issue such as the propriety of permit issuance -- is a prerequisite and necessary to be before the court for review.

Durland places primary reliance on Gardner v. Bd. of Commissioners, 27 Wn.App. 241, 617 P.2d 743 (1980). Yet that case is distinguishable as well. Gardner involved a challenge to a preliminary plat approval on property neighboring that owned by the petitioner. However, that statute at issue in that case required that notice be given, and public hearings and testimony were required. The court also noted that the decision at issue apparently became a part of the record after the appeal deadline had passed, making any appeal futile. There can be no comparison between the facts of Gardner and the facts of the case at bar, which involves a no-notice permit issuance and a permit that became public record upon issuance.

A further argument advanced by Durland is that Nickum, *supra,* recognizes an exception to the exhaustion requirement in a LUPA situation. Yet that case that does not compel the result that Durland urges. In Nickum, the court recognized only this one "limited exception": "...where the lack of public notice deprived a neighboring landowner of a fair

opportunity to participate in the administrative process." Nickum, 153 Wn.App. at 377. The court ultimately did not apply this exception. Even if it had, however, this is of no avail to Durland, because he simply cannot demonstrate any lack of a fair opportunity to participate in the administrative process.

Ultimately, Durland fails to establish any proper basis to exempt him from LUPA's clear exhaustion requirements.

G. Durland's position, if accepted, would lead to absurd, illogical, and untenable results

If Durland were correct, the date of issuance of a county's building permit would be outside the county's control: it would, instead, be controlled by the subjective beliefs, and the actions of, neighbors or other members of the public. For example, suppose that Durland chose to make a public records request years after the permit had been issued to Heinmiller. Or suppose that Heinmiller's garage were shielded from public view by trees, and construction began and was completed after the permit was issued but before Durland happened to notice that construction had taken place; or assume that Durland notices construction after it has been completed. It makes no sense to determine that the "issuance" of the permit decision, for LUPA purposes, is the date of receipt of a public

records request or the date someone observes construction after the fact. To find this and allow challenges to land uses that far after the fact would defeat the purposes of LUPA and disallow property owners from proceeding with assurance in lawfully developing their property. It would allow the complaining person -- Durland, in this case -- to control the date of "issuance" and the timing of a LUPA appeal, and indeed reward him for his own delay and failure to monitor permitting activity relating to neighboring property. And it would leave the county and the permit applicant in a position of *never knowing* when the appeal period has run and thus when projects may proceed without further challenge.

No Washington case law supports Durland's interpretation, and his interpretation has specifically been rejected by our courts. It is up to the legislature to change the law if it deems fit. LUPA's current requirements on notice and exhaustion are stringent, and there is no basis for an exception to be made for Durland as he urges this Court to carve out for him.

Lastly, Durland's position is simply disingenuous. He ended up filing an administrative appeal with the San Juan County Hearing Examiner regarding the same permit, and based on the same complaints as formed the basis for his faulty appeal to the Skagit County Superior Court

in this matter. Furthermore, he then appealed the Hearing Examiner's decision directly to the San Juan Superior Court -- again, regarding the very same permit at issue here, and the very same subject matter. Durland should not be heard to ask this Court to make an exception for him here. Based on his lengthy history of litigation against Heinmiller, including with regard to the very permit at issue here, Durland well knows what the law requires of him. He well knows that he is required to proceed at the local level before filing a land use petition in the superior court. For these reasons, Durland cannot demonstrate, and should not be seriously heard to complain about, any lack of "fairness" or "practicality."

H. Reasonable attorneys' fees should be awarded to Heinmiller

Pursuant to RAP 18.1(b), Heinmiller makes this request for an award of reasonable attorneys' fees. An award of fees is proper under RCW 4.84.370, as Heinmiller received a building permit and has prevailed with respect to the permit at the superior court level, as he should in this Court. See, Id. at 384 ("If a party receives a building permit and the decision is affirmed by two courts, they are entitled to fees under this statute [referring to RCW 4.84.370 and citing Habitat Watch]…'Prevailing party' under the statute includes circumstances in which courts dismiss a LUPA action on jurisdictional grounds.")

VI. CONCLUSION

LUPA's requirements are strict and stringent, and are well known to Durland. Durland failed to comply with those requirements in order to establish the Superior Court's jurisdiction to hear his appeal, and failed to establish that he is entitled to any kind of equitable or other exception to those requirements. Allowing the exception advanced by Durland would eviscerate the policy of LUPA finality, and should be rejected. Because the trial court decision was correct and based on settled principles of law, this Court should affirm the trial court in all respects, and award attorney fees to Heinmiller.

RESPECTFULLY SUBMITTED this 7th day of September, 2012.

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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

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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.

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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.

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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.

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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.

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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.

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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.

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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:

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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

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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

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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

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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.

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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	

About Dockets

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

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	

Disclaimer

What is this website? It is an index of cases filed in the municipal, district, superior, and appellate courts of the state of Washington. This index can point you to the official or complete court record.

How can I obtain the complete court record? You can contact the court in which the case was filed to view the court record or to order copies of court records.

How can I contact the court? Click **here** for a court directory with information on how to contact every court in the state.

Can I find the outcome of a case on this website? No. You must consult the local or appeals court record.

How do I verify the information contained in the index? You must consult the court record to verify all information.

Can I use the index to find out someone's criminal record? No. The Washington State Patrol (WSP) maintains state

			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

About Dockets

About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

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

Disclaimer

What is this website? It is an index of cases filed in the municipal, district, superior, and appellate

APPENDIX B

SAN JUAN COUNTY ASSESSOR

Real Estate Parcel Information

Search

Assessor Home Page
Parcel Search
Polaris - Parcel Map
Property Tax FAQ
Property Tax Statistics
Personal Property
Current Use Programs
Designated Forest Land
Exemptions
Washington State Dept of Revenue

Use Notes/Disclaimer

Charles Zalmanek, Assessor
350 Court St
PO Box 1519
Friday Harbor, WA 98250
(360) 378-2172

Email
assessor@sanjuanco.com

Owner Information	Site Address	Codes	
MICHAEL S DURLAND	155 Channel Rd	**Parcel #**	260724003000
PO BOX 34		**TA_ID**	8721
DEER HARBOR, WA 98243		**Tax Area**	ORCAS/CEMETERY
	☐ Current Use	☐ Mfg/Modular	☐ Senior/Disabled Exemption

Market Values as of 1/1/2008		Land Information	
Building Value	$155,220	**Legal Acres**	2.25
Land Value	$372,680	**Taxable Acres**	2.00
Total Appraised Value	$527,900	**Short Legal**	PR GL 7 (TGW .85 AC OYSTERLANDS)
Recorded documents (Auditor)		View Tax Statement	Sec 07, T 36N, R 2W — Locate on map

Land Segment Information

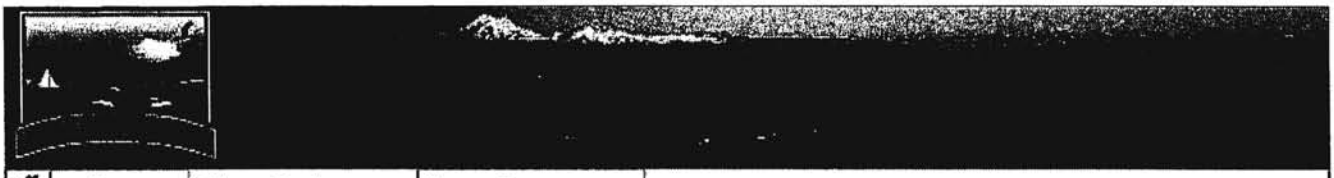
Segment ID	WATERFRONT	WATERFRONT (ft)	TIDELANDS (ft)	MARINEVIEW	TOPOGRAPHY	TERRITORIAL VIEW
11929	BEACH ACC, MED BANK	297.00	-	-	CLEAR, LEVEL	FAIR
11930	-	-	-	-	-	-

No Sales Information Available

Improvements/Features

1 Story - Built: Remodel: no information

- AREA: sq. ft.



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BLGREV-11-0046

Applied	Approved	Issued	Final	Expires
05/17/2011	10/14/2011	03/26/2012		

Type **HABITABLE REVISION**

Permit Description

REV 1 TO 15062 ENTRANCE STAIRS

Status **issued**

Permit Address **155 CHANNEL RD DEER HARBOR WA 98243**

Applicant **MICHAEL DURLAND** Owner **Y**

Owner **MICHAEL DURLAND**

Viewing Permit **<-- Select the information you would like to view.**

Details

ISLAND	**ORCAS**
OF # HRS PLAN REVIEW/REVISIONS	**5**
REVISION TYPE	**RESIDENTIAL**
INCLUDE MECHANICAL?	**N**
CONSTRUCTION TYPE	**RESIDENTIAL**
INCLUDE PLUMBING?	**N**
OF # STORIES	**2**
SEPTIC DESIGN #	**N/A**
OF BUILDING SQ FT AMT ADDED	**152**
WATER AVAILABILITY #	**N/A**
STORMWATER PLAN FEE?	**N**
AFTER THE FACT	**N**
PLANNER NAME	**FAY CHAFFEE**
PLAN REVIEWER NAME	**FRED SCHALLER**
PF RADIANT FLR PIPING	**N**

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BUILDG-11-0151

Applied	Approved	Issued	Final	Expires
07/11/2011	10/12/2011	10/19/2011	12/09/2011	10/19/2012

Type: **COMM ACC ATT/DET & POOLS**

Permit Description: **WATER STORAGE TANK FOR DEER HARBOR BOATWORKS**

Status: **final**

Permit Address: **155 CHANNEL RD DEER HARBOR WA 98243**

Applicant: **MICHAEL DURLAND** Owner **Y**

Owner: **MICHAEL DURLAND**

Viewing Permit **<-- Select the information you would like to view.**

Details

ISLAND	**ORCAS**
VALUATION	**54953**
STORMWATER PLAN FEE?	**N**
INCLUDE MECHANICAL?	**N**
INCLUDE PLUMBING?	**N**
SHORELINE?	**N**
AFTER THE FACT	**N**
OF SPRINKLER REQUIRED?	**N**
SEPTIC DESIGN #	**N/A**
OF SPRINKLERS PROVIDED	**N**
WATER AVAILABILITY #	**N/A**
PLANNER NAME	**CHRIS LAWS**
PLAN REVIEWER NAME	**JOHN GENIUCH**
ESA'S	**NO**
PLAT	**NO**
ACTIVITY CENTER CODE	**DEER HBR HAMLET INDUSTRIAL-A**
ACRES	**0.84**
BLG HEIGHT	**28max**
PF RADIANT FLR PIPING	**N**
# OF BEDROOMS	**0**
SETBACK NORTH	**45**
SETBACK SOUTH	**~62**
SETBACK EAST	**>200OHT**
SETBACK WEST	**~62**
FIRE ACCESS DIST OVER 75 FT?	**NO**

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PSJXMP-09-0007

Applied	Approved	Issued	Final	Expires
12/31/2009	03/21/2011	03/21/2011	03/22/2011	12/31/2009

Type **SHORELINE EXEMPTION**

Status **final**

Permit Description

MAINTAIN EXISTING BOATYARD, DOCK, RAMP

Permit Address **155 CHANNEL RD DEER HARBOR WA 98243**

Applicant **MICHAEL DURLAND** Owner **Y**

Owner **MICHAEL DURLAND**

Viewing Permit **<-- Select the information you would like to view.**

Details

ISLAND	**ORCAS**
APPROVED/COMPLETED	**03/21/2011**
SHORELINE EXEMPTION	**GENERAL**
PLANNER NAME	**LEE MCENERY**

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

MICHEAL DURLAND, KATHLEEN FENNEL, and DEER HARBOR BOATWORKS, Appellants, vs. SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN, Respondents.	NO. 68453-1-I (Skagit County Superior Court Cause No. 11-2-02480-9 CERTIFICATE OF SERVICE

I, Monica Roberts, certify that on September 7, 2012, I caused copies of the following documents to be served on the parties listed by the method indicated for each:

1. Brief of Respondents Wes Heinmiller and Alan Stameisen; and
2. Certificate of Service.

Via Hand Delivery on September 10, 2012
Attorneys for Petitioners
David Bricklin and Claudia Newman
Bricklin & Newman, LLP
1001 4th Ave., Suite 3303
Seattle, WA 98154-1167

Via Email and U.S. Mail on September 7, 2012
Attorneys for Respondent San Juan County
Amy Vira
San Juan County Prosecutor's Office
P.O. Box 760
Friday Harbor, WA 98250

amyv@sanjuanco.com
elizabethh@sanjuanco.com

I certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 7th day of September, 2012 at Edmonds, Washington.

Monica Roberts
Legal Assistant
HELLER WIEGENSTEIN PLLC
144 Railroad Avenue, Suite 210
Edmonds, WA 98020-4121
(425) 778-2525