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NO. 69134-1-I

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

MICHAEL DURLAND and KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER and ALAN STAMEISEN,

Respondents.

BRIEF OF RESPONDENT SAN JUAN COUNTY

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I. INTRODUCTION

This appeal involves a claim asserted under 42 U.S.C. § 1983 alleging that San Juan County's issuance of a residential building permit for a neighbor's garage addition constituted a violation of Appellants' due process rights. The Appellants are Michael Durland, Kathleen Fennell and Deer Harbor Boatworks, who own property adjacent to that of Wes Heinmiller and Alan Stameisen. For the sake of brevity, Appellants are referred to collectively herein as "Durland."

Durland alleges that the San Juan County Code violates his due process rights by not requiring that individualized notice of a residential building permit be provided to the owners of nearby land. Durland further contends that the San Juan County Code is unconstitutional because it requires that a challenge to a building permit decision be undertaken within 21 days. He seeks review of the trial court's summary dismissal of his claims under the Land Use Petition Act (LUPA) and Section 1983.

San Juan County submits that the trial court's dismissal order was correctly entered because (1) Durland possessed no constitutionally protected property interest in notice of a neighbor's residential building permit; (2) the Constitution does not mandate that neighbors receive individualized notice of a simple building permit issued to a different landowner; and because (3) a permit which is not timely appealed under the Land Use Petition Act ("LUPA"), RCW 36.70C, must be deemed valid, and cannot be challenged in a collateral action. Therefore, Durland

has no standing, and the trial court had no jurisdiction to provide the relief sought in the Complaint.

This Court should affirm the decision of the trial court and dismiss this appeal.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

San Juan County believes that the issues pertaining to the assignments of error may best be stated as follows:

A. Whether Durland possessed a constitutionally protected "property interest" in receiving notice of a permit issued for a nearby property in which Durland held no ownership or possessory interest.

B. Whether Durland has satisfied the substantial burden of demonstrating that provisions of the San Juan County Code relative to notice and appeals of permits are unconstitutional.

C. Whether an action under 42 U.S.C. § 1983 challenging a permit on an adjacent property is properly dismissed where the plaintiff did not timely appeal the issuance of the permit under the local ordinance.

D. Whether this appeal is barred by mootness and absence of standing, based on Durland's representation that he is not challenging the Heinmiller building permit.

III. FACTUAL BACKGROUND

This case arises out of a residential building permit which was issued by San Juan County to Durland's neighbors, Wes Heinmiller and Allen Stameisen. At the trial court level, Durland contended that the

permit should not have been issued because it was allegedly in violation of certain San Juan County building and land use ordinances. He further contended that his due process rights were violated because he was not provided individualized notice of the permit so that he could timely challenge it through an appeal to the Hearing Examiner.

Durland concedes that he does not hold title or any other ownership or possessory interest in the property which was the subject of the building permit application. But he argues that provisions of the San Juan County Code are unconstitutional because they do not provide for notice of ordinary building permits to neighboring property owners.

Heinmiller and Stameisen filed their application for an addition to a residential garage on August 8, 2011. (CP 6). On November 1, 2011, San Juan County approved the Permit Application. (CP 7). The San Juan County Code does not mandate that notice be given to neighbors of decisions on standard building permit applications. However, such permits are filed and recorded as public records in the Department of Community Development and Planning. (CP 7).

The deadline for appealing the building permit decision was November 22, 2011. (CP 10). Durland filed an appeal of the building permit with the San Juan County Hearing Examiner on December 19, 2011. (CP 10). The Examiner dismissed Durland's challenge based on absence of jurisdiction, because the appeal was not filed within the 21-day

appeal period provided in the San Juan County Code. SJCC 18.80.140.D.1. (CP 67).

After the Hearing Examiner dismissed Durland's appeal based on exhaustion and limitations, Durland filed a "Land Use Petition and Complaint" in San Juan County Superior Court, which sought to challenge the Hearing Examiner's decision under RCW 36.70C ("LUPA"). (CP 4-12). Durland also asserted a claim under 42 U.S.C. § 1983, based on an alleged violation of his procedural due process rights. Durland contended in his LUPA appeal that the permit was issued in violation of the San Juan County Code.

The trial court, the Honorable Donald Eaton, dismissed Durland's LUPA petition based on his failure to exhaust remedies by timely challenging the building permit issued to Heinmiller and Stameisen. (CP 108-110). Subsequently, the Court granted the motions of San Juan County and Heinmiller/Stameisen to dismiss the remaining claim under 42 U.S.C.§ 1983 based on (1) the absence of a constitutionally protected property interest which would support a due process claim under Section 1983; and (2) the failure of Durland to satisfy the exhaustion and limitations requirements of LUPA and the San Juan County Code. (CP 163-64). This appeal followed.

Durland contends in this appeal that he is *not* challenging the building permit issued to Heinmiller and Stameisen. (Opening Brief, pp. 3, 31). Instead, he now argues only that SJCC 18.80.140.D.1 is violative

of the Due Process Clause because it does not require that notice of a residential building permit be provided to neighbors. Durland represents that he now seeks only a determination that the San Juan County Code is unconstitutional. San Juan County respectfully asks this Court to affirm the decision of the trial court and to dismiss this appeal.[1]

IV. ARGUMENT

A. Durland Does Not Possess a Constitutionally Protected Property Interest Upon Which a Due Process Claim Could be Based.

Durland's appeal is based on 42 U.S.C. § 1983. That statute is remedial in nature. It does not create substantive rights. Instead, it provides a remedy for violation of federal rights found elsewhere in the U.S. Constitution or federal statutes. Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994). In this case, Durland alleges that his procedural due process rights under the 14th Amendment were violated because the San Juan County Code does not require that neighbors be given notice of a residential building permit. (CP 11). But that claim must fail, because Durland did not possess a constitutionally protected "property interest" which would support a due process claim. Any party seeking recovery under Section 1983 based on an alleged deprivation of due process must first establish that he possessed a constitutionally protected property

[1] In his Opening Brief, Durland argues that the permit issued to Heinmiller was violative of San Juan County Code. But because in this appeal Durland is not actually challenging the permit itself, and because the trial court's order was based on procedural and jurisdictional grounds, the County will not respond to Durland's assertions regarding the substantive legality of the permit. Suffice it to say that the County disagrees that the permit was issued in violation of the San Juan County Code.

interest which the local government deprived him of without due process. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972); Parratt v. Taylor, 451 U.S. 527, 536, 101 S.Ct. 1908 (1981).

For purposes of due process, a substantive property right cannot arise merely by virtue of a procedural right. Carlisle v. Columbia Irrigation District, 165 Wn.2d 555, 573, 229 P.3d 761 (2010); Dorr v. Butte County 795 F.2d 875 (9th Cir. 1986); Robbins v. U.S. Bureau of Land Management, 438 F.3d 1074, 1085 (10th Cir. 2006). Nor does one have a property interest in a rule of law. Branch v. U.S., 69 F.3d 1571, 1578 (C.A. Fed. 1995), cert. den., 519 U.S. 810.

A constitutionally protected property interest exists only where the plaintiff demonstrates that he possessed a "reasonable expectation of entitlement created and defined by an independent source" such as federal or state law. Board of Regents v. Roth, supra. A mere subjective expectation on the part of the plaintiff does not create a property interest protected by the Constitution. Clear Channel v. Seattle Monorail, 136 Wn. App. 781, 784, 150 P.3d 249 (2007); Media Group v. City of Beaumont, 506 F.3d 895, 903 (9th Cir. 2002).

Durland acknowledges that he must demonstrate that he possessed a "property interest" in order to pursue a due process claim under Section 1983. But he mistakenly asserts that the San Juan County Code provided him a "reasonable expectation of entitlement and thereby gave [him] a property right." (CP 5). Durland fails, however, to identify any

provision of the San Juan County Code which confers on a neighbor a "reasonable expectation of entitlement" to receive notice of another landowner's building permit. Indeed, at ¶ 7.23 of his LUPA Petition and Complaint, Durland expressly acknowledged that the Code does *not* provide any such expectation to neighboring property owners:

> The San Juan Code does not require any notice be provided to impacted parties or anyone in the public of building permits. . . .

(CP 10). Because Durland cannot identify any statutory basis for an "entitlement" to notice of his neighbor's permit, his due process claim must fail. Board of Regents v. Roth, supra.

Durland does not contend that he holds fee title or any possessory interest in the property for which the building permit was issued. Instead, he suggests that a property interest arises from his ownership of property adjacent to the Heinmiller property. But the law does not recognize such a property right in the context of a procedural due process claim. To the contrary, the courts have consistently rejected similar claims by neighboring property owners. In King County v. Rasmussen, 299 F.3d 1077 (9th Cir. [WA] 2002), cert. denied, 538 U.S. 1057, the County sought to quiet title to an abandoned railroad right-of-way bisecting Rasmussen's property. Rasmussen objected that his due process rights had been violated by the County's actions. The Ninth Circuit Court of Appeals held that because Rasmussen did not have a reversionary ownership interest in

the right-of-way, he was not deprived of due process when the right-of-way was converted to a public trail:

> The Rasmussens argue that they have lost their property right in the railroad right-of-way without due process of law. . . . Because we affirm the District Court's holding that the original deed conveyed a fee simple, the Rasmussens have no rights in the subject property on which to base a due process or eminent domain claim.

299 F.3d at 1090.

Landowners ordinarily do not have a property interest in views across a neighbor's property. Collinson v. John L. Scott, 55 Wn. App. 481, 778 P.2d 534 (1989). This rule has been applied specifically in the context of a claim that a neighbor had not received notice of a permit on adjoining property. In Fusco v. State of Connecticut, 815 F.2d 201 (2nd Cir. 1987), cert. denied, 484 U.S. 849, certain neighbors of a landowner sued the state alleging that they were not given adequate procedural opportunity to challenge land use approvals given to the landowner. The court rejected the claim that the neighbors possessed a constitutionally protected property interest which would support a federal due process claim:

> The opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the 14th Amendment.

815 F.2d at 205-206.

Similarly, in Fulilar v. City of Irwindale, 760 F. Supp. 164 (D.C. Calif. 1999) the plaintiffs complained that the city's issuance of a building permit to an adjoining property owner allowed a development which was too close to their property, diminishing the value of their land. The court nonetheless dismissed their damages claims as a matter of law, because the plaintiffs possessed no constitutionally protected property interest upon which a due process claim could rest:

> Plaintiffs, in their Complaint, assert that the City of Irwindale's failure to recognize the setback zoning requirement, allowing a development to be built too close to their property, caused them damage by diminishing the value of their property. However, governmental action allegedly causing a decline in property values has never been held to deprive a person of property within the meaning of the 14th Amendment.

760 F. Supp. at 166.

In this case, as Durland concedes, the San Juan County Code does not require that notice of residential building permits be issued to neighbors. This is typical of ordinances throughout the state. For example, in Nickum v. City of Bainbridge Island, 153 Wn. App. 356, 372, n.4, 223 P.3d 1172 (2009) the City did not require notice to the public of building permits issued to neighboring landowners. But that was held not to give rise to a collateral challenge. Id. at 379. See also, Homeowners Association v. City of Richland, 166 Wn. App. 161, 169, 269 P.3d 3088 (2012) (City of Richland's code upheld despite not giving individualized notice to neighbors).

In his Opening Brief, Durland cites caselaw for the proposition that with regard to procedural due process requirements, a property interest is created "if the procedural requirements are intended to be a significant substantive restriction on . . . decision making." But the caselaw upon which Durland relies is inapposite, because it addresses whether a *permit applicant* possesses a property interest in approval of the permit. See, Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 63 (9th Cir. 1994); Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000). It is clear in this case that the San Juan County Code did not articulate procedural requirements *for the benefit of neighbors* which placed a "significant, substantive restriction on [the County's] decision making." Thus there is no constitutionally protected property interest upon which Durland's due process claim could rest.

In arguing that he possessed a property interest requiring notice of his neighbor's permit, Durland relies primarily on Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006). But that reliance is misplaced. In Bloomquist, unlike the current dispute, the local Kitsap County Code not only had building height restrictions (which are present in virtually every jurisdiction) but it also had a unique statutory "View Protection Overlay Zone" which expressly granted rights to adjoining landowners to keep their views unobstructed. As the Court of Appeals stressed in Bloomquist, absent an easement or express statutory language, a

neighboring property owner does not have a property right in a view across adjoining property:

> Initially, the Asches do not have a common law property right in the view across their neighbor's property.

132 Wn. App. at 797. But the Court of Appeals noted the unique language of the Kitsap County Ordinance, which provided that buildings more than 28 feet in height could be "approved only if the views of adjacent properties . . . are not impaired." 132 Wn. App. at 798. In other words, by its very terms, the ordinance granted a statutory expectation to adjoining property owners in protection of their views. No comparable language is contained in the San Juan County Code. Therefore, the owners of neighboring properties have no constitutionally protected "expectation of entitlement" that would support a due process claim.

Nor can Durland base his Section 1983 claim on the short limitations period for appealing permit decisions. Under the language of the San Juan County Code, the opportunity of an abutting landowner (or anyone else) to appeal decisions of local agencies is a mere procedural right and not a property right protected by the 14th Amendment. Carlisle v. Columbia Irrigation Dist., supra, 168 Wn.2d at 573; Fusco v. State of Connecticut, supra, 815 F.2d at 205-206. Thus, Durland had no constitutionally protected property interest upon which a due process claim could rest.

Because Durland held no ownership or possessory interest in the Heinmiller property, and because the applicable ordinance did not require notification to neighbors of residential building permits, Durland did not possess a reasonable expectation of entitlement which would give rise to a property interest protected by the U.S. Constitution. Board of Regents, supra. The absence of such a property interest is fatal to Durland's due process claim under Section 1983.

B. Durland Has Not Shown That the San Juan County Code is Unconstitutional "Beyond a Reasonable Doubt."

Recognizing that the San Juan County Code does not grant him a "reasonable expectation of entitlement" with respect to his neighbor's building permit, Durland now argues that he is not really challenging the building permit. (Opening Brief, page 3, line 5; page 31, line 2). Instead, Durland argues that he is only challenging the constitutionality of the San Juan County Code provisions.

But Durland is unable to demonstrate that the San Juan County Code is violative of the 14th Amendment to the Constitution. It is settled that statutes and ordinances are presumed to be constitutional and legally valid. The burden rests on one challenging the statute to show otherwise. State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996). Indeed, it is frequently said that a party challenging the constitutionality of a statute has the burden of overcoming the presumption of validity by proving its unconstitutionality "beyond a reasonable doubt." Habitat Watch v. Skagit

County, 155 Wn.2d 397, 414, 416, 120 P.3d 56 (2005). When any state of facts can be reasonably conceived which justifies a statute or ordinance, it will be presumed to exist and the legislation to have been enacted in response to it. Homes Unlimited, Inc. v. City of Seattle, 90 Wn.2d 154, 579 P.2d 133 (1978).

The steep burden of proving unconstitutionality applies to due process challenges to statutes and ordinances. A party asserting that a statute violates due process must overcome the presumption of constitutionality and establish that the enactment of the statute was arbitrary and irrational. National Railroad Passenger Corp. v. Atchison Topeka & Santa Fe Railway Co., 470 U.S. 451, 472, 105 S. Ct. 1441 (1985).

Neither at the trial court level nor on appeal has Durland provided legal support for his assertion that a building code violates the Due Process Clause of the United States Constitution when it does not provide for notice to neighbors of a permit issued to a different landowner. To the contrary, the absence of a notice requirement is typical of ordinances throughout the state. As noted above, a similar absence of notice exists in the City of Bainbridge Island's building code, but the court in Nickum v. City of Bainbridge Island, supra, held there was no basis to toll the permit appeal statute of limitations. Indeed, the Court of Appeals in Nickum observed that such "no notice" ordinances are common and that to rule

them invalid would open up hundreds of permits to challenge months or years after they were issued:

> 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 requirements.

153 Wn. App. at 372.

In view of the strong presumption against a finding of unconstitutionality, Durland's due process claim must fail. Neither his summary judgment briefs nor his Opening Brief on appeal provided Durland's contention that the Constitution requires notice to neighbors of residential building permits. Therefore, Durland's due process claim under 42 U.S.C. § 1983 was properly dismissed, and that decision should be affirmed.

C. Durland's Failure to Comply With the Exhaustion and Limitations Requirements of LUPA Also Mandates Dismissal of His Damages Claim.

1. A "Land Use Decision" Subject to LUPA is Broadly Defined.

Durland was precluded from recovering damages against San Juan County because of his failure to satisfy the exhaustion and limitations requirements of the Land Use Petition Act, RCW 36.70C. The trial court determined that Durland's LUPA appeal was subject to dismissal (CP 108-110). The dismissal of the LUPA action also mandated dismissal of Durland's claim under Section 1983.

It is undisputed that Durland did not appeal the decision on the Heinmiller permit within the 21-day appeal period established by the San Juan County Code. SJCC 18.80.140.D.1. Therefore, his attempted LUPA challenge was untimely, because he had not timely exhausted administrative remedies. RCW 36.70C.060(2)(d). The Washington courts have held that the exhaustion and limitations requirements under LUPA also serve as a bar to damages claims, because in order to prevail on a damages claim, a plaintiff would have to show that the underlying permitting action was improper. And since that is not possible when LUPA claims have been dismissed, the damages claims are also subject to dismissal.

Under settled Washington law, a land use permit or other approval will be "deemed valid" and cannot be collaterally attacked once the opportunity to challenge it under LUPA has passed. In Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) the Supreme Court held that a county's decision to rezone a property could not be challenged except by timely petition under LUPA:

> Because RCW 36.70C.040(2) prevents the court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed.

144 Wn.2d at 181. Subsequent cases have confirmed that LUPA is the exclusive means of challenging site-specific land use decisions, and that once the appeal period has expired, the underlying permit decision must be deemed valid, even if its legality is "questionable":

> Under Wenatchee Sportsmen Ass'n, approval of the BLA in this case despite its questionable legality "became valid once the opportunity to challenge it passed."

Chelan County v. Nykreim, 146 Wn.2d 904, 925-26, 53 P.3d 1 (2002).

Because the propriety of the building permit for Heinmiller can no longer be challenged, there would be no basis for Durland to argue in a collateral action that the County's approval of the permit was legally improper and thereby deprived him of his due process rights.[2]

In attempting to get around the "exclusive remedy" provisions of LUPA, Durland argues that the definition of "land use decision" should be narrowly defined so as not to apply to the issuance of the building permit to Heinmiller and Stameisen herein. That argument is groundless. In Nykreim, supra, the plaintiffs challenged the County's approval of a Boundary Line Adjustment, but after the 21-day appeal period under LUPA had lapsed. They argued that LUPA's "exclusive remedy" provisions should not apply to an informal "over the counter" approval. The Supreme Court disagreed, holding that informal actions by a county on a site-specific land use permit application are subject to LUPA, just as much as formal quasi-judicial decisions.

> While LUPA states that it replaces the writ of certiorari, it does not limit judicial review to quasi-judicial land use decisions. In fact, it expressly states that LUPA "shall be the *exclusive* means of judicial review of land use decisions."

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[2] As noted above, Durland has repeatedly asserted that he is no longer challenging the building permit which was issued to Heinmiller. (Opening Brief, pp. 3, 31).

Nykreim, 146 Wn.2d at 930. The Nykreim court stressed that unless a category of decision is expressly excluded under RCW 36.70C.030, the decision may only be challenged through a timely LUPA petition:

> . . . according to its obvious meaning with regard to previous common law or, in this case, Chapter 7.16 RCW, all land use decisions are subject to LUPA unless specifically excluded under RCW 36.70C.030.

Id. at 931.

The Washington Supreme Court has made clear that the exclusivity provisions of LUPA apply not only to approvals of a permit application, but also to determinations that compliance with a particular ordinance or statute is *not* required. Thus, in Samuel's Furniture v. DOE, 147 Wn.2d 440, 54 P.3d 1194 (2002) the Washington Department of Ecology challenged a county's determination that a permit application was exempt from Shoreline Management Act permit requirements. But because the DOE had not filed a timely LUPA petition within 21 days after the county's decision, the Supreme Court held that DOE had no standing to challenge the local government's interpretation:

> Ecology's interpretation of the SMA would leave landowners and developers unable to rely on local government decisions – precisely the evil for which LUPA was enacted to prevent.

147 Wn.2d at 459.

The requirement that a local land use action be challenged under LUPA applies not only to decisions to issue a permit but also to

interpretative decisions regarding the application of a zoning ordinance to specific property. The definition of "land use decision" in RCW 36.70C.020 is very broad and includes not only actions on project permits but also:

> An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance or use of real property; . . . .

RCW 36.70C.020(2)(b).

Thus, in Asche v. Bloomquist, supra, the Court of Appeals confirmed that a county's interpretation regarding the application of an ordinance to a building permit application must be timely challenged under LUPA, or the interpretation will be deemed valid:

> . . . It does not matter whether the Asches are challenging the validity of the permit or the interpretation of the county zoning ordinance as applied to the piece of property. LUPA covers both.

Id. at 791.

Durland seeks to avoid the exclusive remedy and limitations provisions of LUPA by arguing that he is not challenging the building permit issued to Heinmiller, but merely the constitutionality of the County's building code. The argument is misleading, and does not allow Durland to avoid the application of LUPA's exhaustion and limitations provisions.

The Land Use Petition and Complaint herein was filed as an appeal directed specifically at the issuance of the building permit to Heinmiller. (CP 4-12). Furthermore, at Paragraph 8.1 of the Petition and Complaint, Durland expressly incorporated all of the language of the Land Use Petition (challenging the Heinmiller permit), to support his claim under 42 U.S.C. § 1983. (CP 11). Thus, it is disingenuous for Durland to argue that this case is somehow unrelated to a permitting action, and therefore not subject to LUPA. A similar argument was recently rejected by the Court of Appeals in Brotherton v. Jefferson County, 160 Wn. App. 699, 249 P.3d 660 (2011). In that case, the plaintiff argued that his failure to pursue a timely appeal under LUPA should not be a bar to his collateral lawsuit, because he was seeking only a determination of invalidity of the Jefferson County ordinance. The Court of Appeals rejected this argument:

> The Brothertons also argue that LUPA does not apply because they are challenging only the constitutionality of JCC 8.15.165, not the validity of the County's land use decision. But their Complaint sought to reverse the County's denial of their waiver request and require the County to re-review their request under state law. The Brothertons' requested relief demonstrates that they are ultimately challenging the County's land use decision. Like the plaintiffs in *Holder*, the Brothertons' arguments arise directly from the County's final land use decision. Accordingly, LUPA applies.

160 Wn. App. at 705.

Nor is there any legal basis for Durland's argument that the decision to grant the permit is not subject to LUPA, because the original permit decision was not made by the Hearing Examiner. If that argument

were accepted, it would mean that a plaintiff could challenge an administrative land use approval years later – and avoid the exclusivity and limitations requirements in LUPA -- simply because plaintiff failed to make a timely appeal to the Hearing Examiner at the time the approval was issued. The Supreme Court has rejected that argument.

In Chelan County v. Nykreim, supra, the court held that a declaratory action was barred by LUPA's exclusivity provisions, even though the decision to issue the boundary line adjustment had been made over the counter by the Planning Director for Chelan County, and no timely appeal of the BLA to the Hearing Examiner was ever made. 146 Wn.2d at 931-32. A party's failure to exhaust its administrative remedies does not affect the finality of the local government's decision under RCW 36.70C.020. Twin Bridge Marine Park v. Department of Ecology, 162 Wn.2d 825, 854-56, 175 P.3d 1050 (2008) (concurring decision).

2. LUPA's Exclusivity and Limitations Provisions Apply to Damages Actions.

Simply stated, the "exclusive remedy" provisions of LUPA bar collateral attacks on land use decisions, including actions to recover damages. In Asche v. Bloomquist, supra, the Court found that the plaintiff neighbors had not timely challenged the issuance of a permit under LUPA. And because the LUPA action was dismissed, the Court held that the damages claims asserted by the plaintiffs were also subject to dismissal,

because the plaintiffs would be precluded in the damages action from seeking a determination that the approval was erroneous:

> Their public nuisance claims on this ground are barred by LUPA's 21-day statute of limitations because the Asches would need to have an interpretive decision regarding the application of a zoning ordinance to a specific property declared improper to prevail.

132 Wn. App. at 801.

This rule has been specifically held applicable in the context of a due process claim: "LUPA time limits also apply to due process claims." Nickum v. City of Bainbridge Island, supra, 153 Wn. App. at 383. Accord, Asche v. Bloomquist at 799. In Mercer Island Citizens v. Tent City, 156 Wn. App. 393, 232 P.3d 1163 (2010), the Court held that failure to comply with the limitations and exhaustion requirements of LUPA constituted a bar to damages claims which are based on the land use decision, including those alleging due process violations:

> But as the caselaw recognizes, claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails. Because all of the group's claims challenge the validity of the TUA and were therefore subject to LUPA, the group's failure to assert them within LUPA's time limitations requires dismissal of all of the claims, including those for damages.

156 Wn. App. at 405.

Durland misconstrues the nature of the County's LUPA defense when he argues that a state may not reduce the standard 3-year statute of limitations for a claim under Section 1983. But the actual issue is not the reduction of the limitations period for a Section 1983 claim, but rather that

the decision by the local government will be deemed valid absent a timely LUPA petition and therefore the appropriateness of the decision may not be relitigated in a damages action.

In James v. Kitsap County, 154 Wn.2d 574, 115 P.3d 286 (2005) a developer challenged the short limitations period for his LUPA appeal, and argued that the Superior Court had original jurisdiction allowing him to challenge the imposition of impact fees as much as three years after the fact, under RCW 4.16.080. The trial court accepted the plaintiff's argument but the Supreme Court reversed, holding that where a statute such as LUPA prescribes specific procedures for the resolution of a particular type of claim, it is appropriate for the courts to require compliance with these requirements before jurisdiction is exercised:

> Applying the procedural requirements of LUPA to challenges of the legality of impact fees imposed does not divest the power of the superior court to exercise its original jurisdiction under *article IV, section 6.* . . . However, the Developers ignore the well established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter.

154 Wn.2d at 587-88. Accord, Sundquist Homes, Inc. v. Snohomish County, 276 F. Supp. 2d 1123, 1127 (W.D. WA 2003), aff'd. 166 Fed. Appx. 903 (Ninth Cir. 2006).

In this case, Durland failed to comply with the procedural requirements of RCW 36.70C. The dismissal of the LUPA action also mandated dismissal of Durland's claim under 42 U.S.C. § 1983.

D. Durland's Claim is Barred by Mootness and Absence of Standing.

A final reason for this Court to affirm the trial court and dismiss this appeal is the absence of a justiciable controversy. Durland has repeatedly advised this Court that he is not challenging the permit issued to Heinmiller. (Opening Brief, pp. 3, 31). Therefore, the declaratory relief sought by Durland is moot and he has no standing to pursue an action under Section 1983.

To have standing to sue under Section 1983, a plaintiff must show that he has suffered some threatened or actual injury that was caused by a constitutional deprivation. A mere abstract injury is not enough. If there is no real or immediate threat that plaintiff will be subject to injury as a result of a challenged policy, there is no standing to pursue a mere advisory action under Section 1983. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660 (1983). If there is no longer a possibility that an appellant can obtain the relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction. Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 521 (9th Cir. 1999); Ruiz v. City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998).

Because Durland concedes that he is no longer challenging the permit issued to Heinmiller, and there is no immediate threat of future

damage to Durland, the claim is moot and Durland has no standing to assert it.

V. CONCLUSION

For all of the above reasons, San Juan County respectfully asks the Court to affirm the summary judgment issued by the trial court and to dismiss this appeal.

DATED this 21st day of December, 2012.

KARR TUTTLE CAMPBELL

By: _____
Mark R. Johnsen, WSBA #11080
Attorneys for Defendant/Respondent
San Juan County

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on December 21, 2012, a true copy of Brief of Respondent San Juan County was served to the following by United States Mail:

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MARILYN J. RICHTER
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
JULY 19, 2016

Nancy Randall

SUBSCRIBED TO AND SWORN before me this 21 day of December, 2012

NOTARY PUBLIC in and for the State of Washington, residing in Washington, Bothell
My Commission Expires: July 19, 2016