69134-1

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

NO. 69134-1-I

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,

Respondents.

BRIEF OF RESPONDENTS WES HEINMILLER AND ALAN STAMEISEN

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I. INTRODUCTION

Respondent San Juan County issued a routine building permit for Respondents Heinmiller and Stameisen to construct an office above their garage. Appellants Mr. Durland, Ms. Fennell, and Deer Harbor Boatworks (collectively, "Durland") own property adjoining that of Messrs. Heinmiller and Stameisen (collectively, "Heinmiller"). After Durland learned of the building permit, he filed a belated appeal of it to the San Juan County Hearing Examiner.

The San Juan County Municipal Code ("SJCC") requires an appeal of the granting of a building permit to be filed with the San Juan County Hearing Examiner within 21 days of its issuance. Durland filed his appeal to the Examiner 48 days after the permit was issued. Because the appeal was untimely, the Hearing Examiner lacked jurisdiction to consider the appeal, and therefore dismissed it.

Durland then appealed the Hearing Examiner's decision to the San Juan County Superior Court within 21 days of the Examiner's decision, styled as a Petition under the Land Use Petition Act ("LUPA"). That Petition was combined in the same document with a Complaint against San Juan County under 42 USC § 1983. The Superior Court dismissed the LUPA Petition on a CR 12(b) motion because Durland had failed to timely appeal the building permit under the SJCC. The Superior Court dismissed

all remaining claims under 42 USC § 1983 following CR 56 motions. Durland appeals again.

II. RESPONSE TO DURLAND'S ASSIGNMENTS OF ERROR

Heinmiller does not assign error to the San Juan County Superior Court's decision. The issue to be determined by the Court of Appeals is:

Should the Court of Appeals affirm the Superior Court's dismissal of Durland's appeal of the Hearing Examiner's dismissal, because Durland's appeal to the Hearing Examiner was untimely under the SJCC, thereby depriving the Hearing Examiner of jurisdiction to hear the appeal, notwithstanding Durland's inclusion of due process claims made under the vehicle of 42 USC § 1983?

III. STATEMENT OF THE CASE

A. Procedural Background.

On April 13, 2012, the San Juan County Superior Court dismissed the LUPA Petition portion of Durland's lawsuit on a CR 12(b)(1) motion. On July 6, 2012, the Superior Court dismissed the remaining claims for San Juan County's alleged due process violations under CR 56. Durland appeals both dismissals.

B. San Juan County's Issuance of a Building Permit to Heinmiller.

Heinmiller applied to San Juan County for a building permit to add an office above his garage on August 8, 2011. CP 29. On November 1, 2011, San Juan County issued the building permit (#BLDG-11-0175). As Durland concedes, San Juan County is a "no-notice" jurisdiction for routine building permits, such that no one is required to give notice of these permits (whether applied for or granted) to anyone. Appellants' Brief at 5; CP 161.

C. Durland's Untimely Appeal to the Hearing Examiner.

Durland appealed the building permit to the Hearing Examiner the 48th day after it was issued. CP 10. Under SJCC 18.80.140(D)(1), such appeals are due within 21 days of the issuance of the permit. (Appendix.) It is undisputed that the SJCC sets forth an administrative process for appealing building permits, that any appeals must be filed with the San Juan County Hearing Examiner within 21 days of the issuance of the permit, and that the appeal was filed on the 48th day after the permit was granted. CP 10.

The Hearing Examiner dismissed the appeal. The Examiner stated that the administrative appeal deadline is clearly a jurisdictional deadline in the rules applicable to San Juan County Hearing Examiner matters, that he did not have authority to toll the deadline, and that even if he did have

authority to toll the deadline, he could not do so in this case. CP 13-16.[1]

D. Durland's Appeal to Skagit County Superior Court.

Concurrent with his appeal of the building permit #BLDG-11-0175 to the Hearing Examiner, Durland filed a LUPA action appealing that same building permit directly to Skagit County Superior Court. That Court dismissed the petition on CR 12(b) motions by Respondents Heinmiller and San Juan County. CP 20.

E. Durland's Appeal of the Skagit County Superior Court's Dismissal in Companion Appeal, Court of Appeals No. 685431-I.

The Skagit County Superior Court dismissal described in (D) above was appealed under Court of Appeals Case No. 685431-I. In that case, all briefs have been filed, and no date for oral argument (if any) has been set.

F. Durland's Appeal of the Hearing Examiner's Dismissal to San Juan County Superior Court (the Subject of this Appeal).

Durland appealed the Hearing Examiner's dismissal of his late-filed administrative appeal to San Juan County Superior Court on February 27, 2012. CP 4. Durland agrees that the SJCC does not mandate

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[1] Durland has abandoned his equitable tolling argument. VT at 18.

notice be given to him of this permit, that his remedy to challenge the permit is to appeal to the Hearing Examiner, and that he appealed well past the 21 day limit in the SJCC. CP 10. However, he argued at the Superior Court, and argues at the Court of Appeals, that his procedural due process rights were violated by the Hearing Examiner's decision. CP 10-11.[2] The San Juan County Superior Court dismissed the LUPA appeal for lack of jurisdiction under CR 12(b)(1) (as Durland's appeal to the Hearing Examiner was untimely and he had failed to exhaust), and dismissed the Complaint under 42 USC § 1983 pursuant to CR 56, because Durland did not have a constitutionally protected property interest upon which his claims could rest. CP 161-62.

IV. ARGUMENT

A. Standard of Review.

"When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court." Citizens to Preserve Pioneer Park v. City of Mercer Island, 106 Wn. App. 461, 470, 24 P.3d 1049 (2001), citing Biermann v. City of Spokane, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). The issue of standing is jurisdictional.

[2] Durland clarifies in his Response to Motions to Dismiss at the Superior Court that the alleged legal errors of the Hearing Examiner are limited to those set forth in paragraphs 7.25 through 7.29 of his Land Use Petition and Complaint filed in Superior Court, and that other recitations of alleged error in his LUPA Petition and Complaint are for background purposes only.

Harrington v. Spokane County, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005), citing RCW 36.70C.040(2); Chelan County v. Nykriem, 146 Wn. 2d 904, 926, 52 P.3d 1 (2002).

B. The Superior Court Properly Dismissed Durland's Land Use Petition and Complaint As Time-Barred Under the SJCC.

The San Juan County Hearing Examiner has the authority to conduct open-record appeal hearings of development permits issued, and to affirm, reverse, modify, or remand the permit that is on appeal. SJCC 18.80.140(B)(11) (Appendix). The SJCC requires that appeals of building permits be filed within 21 days of the issuance of the permit, and there are no exceptions or extensions to the 21 day appeal period. SJCC 18.80.140(D) provides:

> D. Time Period and Procedure for Filing Appeals.
>
> 1. Appeals to the hearing examiner must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed; and
>
> . . .
>
> 3. All appeals shall be delivered to the director by mail, personal delivery, or fax, and received before 4:30 p.m. on the due date of the appeal period. Applicable appeal fees must be paid at the time of delivery for the director for the appeal to be accepted.
>
> 4. For the purposes of computing the time for filing an appeal, the date of the decision being appealed shall not be

> included. If the last day of the appeal period is a Saturday, Sunday, or a day excluded by RCW 1.16.050 as a legal holiday for the County, the filing must be completed on the next business day (RCW 36A.21.080).

(Appendix.) It is undisputed that Durland's appeal to the Hearing Examiner was filed on the 48th day after the permit was granted, and was untimely. CP 14.

The Hearing Examiner Rules state that untimely appeals cannot be considered by the Examiner, as the Examiner would lack jurisdiction:

> B. Notice of Appeal
>
> The contents of an appeal and the filing requirements thereof shall comply with applicable provisions of the San Juan County Code. The content and filing requirements shall be considered jurisdictional. The Hearing Examiner shall have no authority to consider appeals that fail to comply with the content and filing requirements of the San Juan County Code.

San Juan County Hearing Examiner Rules, Chapter IV(B). (CP 48.)

1. Durland Cannot Avoid the 21-Day Time Limit in the SJCC by the Vehicle of 42 USC § 1983 Claims in his Various Appeals.

Durland seeks to get around stringent land use law time of filing requirements by using 42 USC § 1983. 42 USC § 1983, of course, does not confer additional substantive rights, but merely serves as a vehicle by which individuals can seek redress for the violation of federal

constitutional rights elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144, n. 3, 99 S.Ct. 2689, 2694, n. 3, 61 L.Ed.2d 433 (1979)). Durland believes that by asserting his due process claim under the vehicle of Section 1983, he may evade the 21 day statutes of limitations for land use challenges, and have three years to make his land use challenge (using the benefit of the three-year personal injury claim statute of limitation).

Washington Courts have squarely rejected the proposition that constitutional claims asserted in connection with a land use dispute can evade the stringent time of filing requirements applicable to land use claims. "... LUPA time limits also apply to due process claims." Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 383, 223 P.3d 1172 (2009) (citing Asche v. Bloomquist, 132 Wn. App. 784, 798, 133 P.3d 475 (2006)). "LUPA applies even when the litigant complains of lack of notice under the procedural due process clause." Asche, 132 Wn. App. at 798. In Asche, the court noted that " 'even illegal decisions must be challenged in a timely, appropriate manner,' " and thus, because the complainants failed to file a land use petition within 21 days of a building permit's issuance, they lost their right to challenge the validity of the permit. Id., quoting Habitat Watch v. Skagit County, 155 Wn. 2d 397,

407, 120 P.3d 56 (2005). The analysis is the same here. Durland lost his right to challenge the permit, including making his due process challenge under 42 USC § 1983.

Because Durland's appeal to the Hearing Examiner was untimely, the Hearing Examiner properly dismissed it, and the Superior Court properly dismissed the Land Use Petition and Complaint challenging the Examiner's decision.

C. Exhaustion of Administrative Remedies is an Absolute Prerequisite to a LUPA Appeal; Durland Failed to Exhaust.

No LUPA case, to the undersigned's knowledge, has waived the exhaustion requirement. The cases cited by Durland in support of his argument that exhaustion is not required are either not LUPA cases, or are pre-LUPA cases.[3] At the hearing on the Motions to Dismiss in Superior Court, Durland's counsel conceded the cases she cited in support of her argument that the LUPA exhaustion requirement could be excused were not LUPA cases, but commented, "I don't think these cases have to be LUPA cases. I don't know why we're making a distinction." VT at 33.

[3] See, e.g., n. 8 on p. 32 of Appellants' Brief, citing Prisk v. City of Poulsbo, 46 Wn. App. 797, 732 P.2d 1013 (1983) and Orion Corp. v. State, 103 Wn. 2d 441, 693 P.2d 1369 (1985), n. 10 on p. 34, citing Connor v. Universal Utilities, 105 Wn. 2d 168, 170, 712 P.2d 849 (1986).

There is an excellent reason to make a distinction: the Land Use Petition Act, RCW 36.70C. LUPA requires exhaustion of administrative remedies, without exceptions in the case law, as a prerequisite for appeals to the Superior Court. RCW 36.70C.060(2)(d). The purpose of LUPA "is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. LUPA law is strict, bright-line, and some may say harsh. Exhaustion is a jurisdictional requirement. Nickum, 153 Wn. App. at 371. " 'Exhaustion of administrative remedies is a prerequisite to obtaining a decision that qualifies as a decision reviewable under LUPA.' . . . This requirement includes complying with administrative time-of-filing requirements." Id. at 376-77, quoting Stanzel v. Pierce County, 150 Wn. App. 835, 841, 209 P.3d 534 (2009), and citing Ward v. Bd. of Skagit County Comm'rs, 86 Wn. App. 266, 271-72, 936 P.2d 42 (1997). Because Durland did not exhaust his administrative remedies (as his appeal of the building permit to the Hearing Examiner was filed on the 48th day after it was granted, rather than within 21 days of it being granted), the Superior Court properly dismissed the LUPA petition.

"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. Further, the Washington Supreme Court explains in James v. County of Kitsap:

> 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 v. County of Kitsap, 154 Wn. 2d 574, 589, 115 P.3d 286 (2005).

Washington law does, and should continue to, protect building permit holders from late-filed challenges by neighbors or others objecting to their permitted projects. A building permit holder should be entitled to proceed with investing in his property after the 21 day appeal period applies, without fear of legal challenge from an unhappy neighbor six months or years later, after the owner has completed a substantial investment in the construction. Under LUPA, the Washington legislature has mandated that the harsh impact is to be imposed on the appellant who didn't exhaust, rather than on the permit holder.

Durland failed to exhaust his administrative remedies, and the requirement of exhaustion should be respected. Requiring administrative

exhaustion avoids premature interruption of the administrative process, provides for full development of the facts, allows for the exercise of agency expertise, protects the autonomy of administrative agencies, and discourages litigants from ignoring administrative procedures by resort to the courts. Harrington, 128 Wn. App. at 209-10 (citing Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn. 2d 861, 866, 947 P.2d 1208 (1997)).

Durland's failure to exhaust his administrative remedies in this case precluded his LUPA appeal to Superior Court. In West v. Stahley, the Court of Appeals stated:

> Just as a LUPA petitioner must bring a petition within 21 days of the final land use decision, a LUPA petitioner *must* exhaust all administrative remedies before obtaining a final land use decision. RCW 36.70C.070(1)(d). Therefore, like the 21-day statute of limitation, exhausting administrative remedies is a fundamental tenant [*sic*] under LUPA; failure to do either is an absolute bar to bringing a LUPA petition to superior court.

West v. Stahley, 155 Wn. App. 691, 699, 229 P.3d 943 (2010) (as amended, review denied, 170 Wn. 2d 1022, 245 P.3d 772). A land use decision becomes valid once the opportunity to challenge it has passed, because LUPA prevents a court from reviewing an untimely petition. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn. 2d 169, 181, 4 P.3d 123 (2000).

Because Durland's appeal to the Hearing Examiner was filed late, he failed to exhaust his administrative remedies, and thus the Superior Court properly dismissed the Land Use Petition and Complaint.

D. Durland Cannot Use 42 USC § 1983 to Have a "Second Bite" at Challenging the Permit.

Durland uses 42 USC § 1983 to request the "opportunity to be heard" on the permit on remand, but insists he is not challenging the permit itself. This position is inconsistent. The 42 USC § 1983 claims are brought only against San Juan County, as appropriate, as the statute provides relief for certain conduct "under color of law." Durland requests damages against San Juan County, a remedy potentially available to him under 42 USC § 1983.

However, Durland attempts an end-run around the provisions of the SJCC barring his late appeal to the Hearing Examiner, *seeking an opportunity to litigate the permit again* under the guise of a 42 USC § 1983 claim made solely against San Juan County. Durland states that he "does not challenge the underlying building permit, but rather his loss of the opportunity to be heard in opposition to it." Appellants' Brief at 32. See also Brief at 3. He requests the Court of Appeals reverse the Superior Court's orders and "remand this matter to the Court with an order to proceed on the merits." Appellants' Brief at 36.

If Durland were requesting damages only from San Juan County only on remand, his request would be at least facially credible. But he is requesting damages and *yet another* opportunity to challenge the building permit, as part of his due process claim. The following exchange occurred at Superior Court:

> COURT: And the challenge to the Hearing Examiner's decision is that he should have exercised his, what is it the Hearings Examiner should have done? If I was to remand it back to the Hearing Examiner what is it he should do to right it?
>
> MS. NEWMAN: Well he could not, it was really, he should have heard the petition but the only way we can get there is by this court ordering him to do it based on constitutional claims. And we're not asking the court now to decide whether . . .
>
> COURT: So all you can do is ask the court to send it back from here for the Hearings Examiner to hear the claims about the building permit. And you're suggesting that the Hearings Examiner can do that even though the county rules state he has no jurisdiction because of the timing but this court can say this court has the discretion to waive the exhaustion of administrative remedies and say maybe he didn't have the authority to do it but I do so I'm going to waive that requirement and send it back even though it's a late filing you need to hear it.
>
> MS. NEWMAN: Right.

(VT 27.) The difference now is that Durland is asking the Court of Appeals to remand the matter to the Superior Court for a hearing on the permit. Brief at 36.

The Court of Appeals should not allow Durland's time-barred challenge to the permit to proceed at the Superior Court level under the guise of a 42 USC § 1983 claim. Heinmiller would be a party in interest, as it is his permit that would be heard on remand. Yet, the 42 USC § 1983 claim is not asserted against him. (CP 157-159.) These machinations are an improper collateral attack on a prior land use decision, and as such, were properly rejected by the Superior Court, and should be rejected by the Court of Appeals as well. Habitat Watch, 155 Wn.2d at 410-11 (citing Wenatchee Sportsmen, 141 Wn.2d at 181).

Durland's inconsistent position on this issue shows that the 42 USC § 1983 claim is asserted as an attempt to prevent his land use challenge from being time-barred.

E. The Superior Court Correctly Concluded that Durland Lacked a Constitutionally Protected Property Interest, a Required Prerequisite for His 42 USC § 1983 Claim.

The parties agree that a litigant seeking relief under 42 USC § 1983 must establish that he has a constitutionally protected property interest. CP 161. Durland bases his claim of a constitutionally protected interest on Asche, 132 Wn. App. 784. But the Asche Court's finding of a property right upon which to base a procedural due process claim flowed from a unique Kitsap County Code provision not applicable in San Juan

County. Specifically, the Asche Court stated:

> The applicable zoning ordinance here provides that a building inside the "View Protection Overlay Zone" may be built up to 28 feet and provides no other prerequisites. KCC 17.321C.040. Accordingly, the Asches have no right to prevent the erection of a 28 foot or shorter building under the zoning ordinance. But the plain language of this ordinance requires that buildings more than 28 feet and less than 35 feet can only be approved if the views of adjacent properties, such as that of the Asches, are not impaired. Thus, the Asches have a property right, created by the zoning ordinance, in preventing the Bloomquists from building a structure over 28 feet in height. And, therefore, procedural due process applies.

132 Wn. App. at 798. This Kitsap County ordinance specifically required that the views of adjacent properties in the "View Protection Overlay Zone" not be impaired if the County allowed construction of structures of more than 28 and less than 35 feet in height. This ordinance, and the "View Protection Overlay Zone," is not the law in San Juan County. There is no ordinance applicable in San Juan County that gives view protections to a neighbor in connection with a building permit sought by another neighbor. Durland could not, at the Superior Court level, and cannot now, identify any SJCC provision that would form the basis for his procedural due process claim. CP 162.

F. The Court Should Strike Durland's Unsupported and Erroneous Factual Allegations.

Durland makes many unsupported, erroneous, and inflammatory factual allegations concerning Heinmiller's conduct and his property.[4] Heinmiller disputes these allegations. These allegations are either unsupported by any reference to the record, or the supporting reference does not in fact support the allegation. Because these allegations are improper and unfairly prejudicial to Heinmiller, the Court should strike and disregard these unsupported allegations.

G. Request for Attorney's Fees and Expenses, and for Costs.

Pursuant to RAP 18.1, if Heinmiller prevails or substantially prevails on this appeal, he requests his attorney's fees and expenses under RCW 4.84.370. That statute provides that "reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals of a decision by a county . . . to issue . . . [a] building permit," if Respondents prevailed before the county (as they did) and all prior judicial proceedings (as they did). Further,

[4] E.g., at page 1, "illegal projects," "illegal development;" at page 6, "illegally" built garage and "illegal structure" (unsupported by citations); at page 8, permit "issued in violation of numerous San Juan County Code provisions," and "without requiring a shoreline permit" (unsupported); at page 9, "illegal development" and "significantly impact Durland's view" (unsupported); at page 12, "skirted the law or otherwise undertaken illegal development... illegally .... Illegally ... illegally...", "illegal structures... significant adverse impacts... remarkably unfair circumstances... all meant to bar him from addressing the substance of his claims"; "Durland prevailed and succeeded" (all unsupported); at page 12: "avoid having the court hear the merits ... obviously illegal", "procedural pitfalls" (unsupported). Pursuant to Engstrom v. Goodman, 166 Wn.App. 905, 909 n. 2, 271 P.3d 959 (2012), Heinmiller is not filing a separate motion to strike on this issue.

Respondents request their costs under RAP 14.1.

V. CONCLUSION

If Durland is allowed to bypass the timely exhaustion requirement of LUPA by including a due process claim brought under 42 USC § 1983, LUPA law would change dramatically. Administrative decisions would not be final for years. Appeals to Superior Court could be brought substantially months or years later than 21 days after the permit was issued. Permit holders would be in a Catch-22: not able to rely on their permits for years, but forced to build in accordance with the permit before the permit expired, financing is withdrawn, etc. There would be additional negative consequences: savvy lenders may stop making construction loans, construction investment would likely slow, and local government permitting departments would be put in upheaval.

For all of the above legal and policy reasons, which flow from Durland's initial untimely appeal to the Hearing Examiner, the appeal should be dismissed, and costs and attorney's fees awarded to Heinmiller.

RESPECTFULLY SUBMITTED this 21st day of December, 2012.

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APPENDIX

Attached are the following sections from the
San Juan County Code:

18.80.140(B)
18.80.140(D)

18.80.140 Appeals.

A. Appeals – General. Appeals are open-record appeals (see definitions in Chapter 18.20 SJCC), and include:

1. Appeals to the hearing examiner of permits (development permits and/or project permits) granted or denied by the director (director is the decisionmaker);

2. Appeals to the hearing examiner of administrative determinations or interpretations made by the director (director is the decisionmaker);

3. SEPA appeals of project actions, as defined in WAC 197-11-704;

4. Appeals of consolidated matters (i.e., appeal of administrative determination consolidated with project permit application hearing);

5. A timely appeal of a code interpretation or decision made by the director or building official stays the effective date of such decision until the matter has been resolved at the County level. (See also SJCC 18.10.030 and RCW 36.70C.100.)

6. The appeal path for project permits is shown in Table 8.1. The appeal path for SEPA is shown in Table 8.3.

Table 8.3. SEPA Processing and Appeals.

	Threshold Determination		EIS	
	DNS/MDNS	DS	DEIS	FEIS
Comment Period Prior to Action (days)	14	21	30	N/A
Administrative Appeal Period (days)	21	21	N/A	21
Consolidated Hearings	yes	no	N/A	yes
Open-Record Appeal Hearing	yes	yes	N/A	yes
Decisionmaker for Administrative Appeal	Hearing Examiner	Hearing Examiner	N/A	Hearing Examiner
Further Appeals	Superior Court (21 days per Chapter 36.70C RCW) or SHB (21 days per Chapter 90.58 RCW)	See RCW 43.21C.075; Superior Court, SHB: 21 days	N/A	Superior Court or SHB: 21 days

B. Open-Record Appeals. The San Juan County hearing examiner has authority to conduct open-record appeal hearings of the following decisions by the director and/or responsible official, and to affirm, reverse, modify, or remand the decision that is on appeal:

1. Boundary line modifications;
2. Simple land divisions;
3. Provisional use permits;
4. Short subdivisions;
5. Binding site plans (up to four lots);
6. Temporary use permits (Level II);
7. Discretionary use permits;
8. Administrative determinations or interpretations (see SJCC 18.10.030);
9. SEPA threshold determinations (DNS and DS) of project actions (see WAC 197-11-704);
10. EIS adequacy for project actions;
11. Development permits issued or approved by the director; and
12. Consolidated matters where the director was the decisionmaker.

C. Standing to Appeal. Appeals to the hearing examiner may be initiated by:

1. The applicant;
2. Any recipient of the notice of application (see SJCC 18.80.030);
3. Any person who submitted written comments to the director concerning the application; and
4. Any aggrieved person.

D. Time Period and Procedure for Filing Appeals.

1. Appeals to the hearing examiner must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed; and

2. Appeals of a SEPA threshold determination or an FEIS must be filed within 21 days fol-

lowing the date of the threshold determination or FEIS.

3. All appeals shall be delivered to the director by mail, personal delivery, or fax, and received before 4:30 p.m. on the due date of the appeal period. Applicable appeal fees must be paid at the time of delivery to the director for the appeal to be accepted.

4. For the purposes of computing the time for filing an appeal, the date of the decision being appealed shall not be included. If the last day of the appeal period is a Saturday, Sunday, or a day excluded by RCW 1.16.050 as a legal holiday for the County, the filing must be completed on the next business day (RCW 36A.21.080).

5. Content of Appeal. Appeals must be in writing, be accompanied by an appeal fee, and contain the following information:

a. Appellant's name, address and phone number;

b. Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);

c. Identification of the decision which is the subject of the appeal, including date of the decision being appealed;

d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based;

e. The relief sought, including the specific nature and extent; and

f. A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.

E. Notice of Hearing. The director shall give notice of the appeal hearing as provided in SJCC 18.80.030(C).

F. Decision Time and Notice.

1. The hearing examiner shall consider and render a written decision on all appeals. Such decision shall be issued within 60 days from the date the appeal is filed; provided, that the appeal contains all of the information specified in this section.

2. The parties to an appeal may agree to extend these time periods.

G. Consolidated Appeal Hearings.

1. All appeals of development permit or project permit decisions shall be considered together in a consolidated appeal hearing.

2. Appeals of environmental determinations under SEPA, except for an appeal of a determination of significance (DS), shall be consolidated with any open-record hearing (open-record predecision hearing or open-record appeal hearing) before the hearing examiner. (See also SJCC 18.80.020(B)(2), Consolidated Permit Processing, and SJCC 18.80.110(D), Shorelines – Consolidated Permit Processing.)

H. No Requests for Reconsideration. Requests for reconsideration to the hearing examiner are not authorized.

I. Administrative SEPA Appeals of Project Actions.

1. The County establishes the following consolidated appeal procedures, under RCW 43.21C.075 and WAC 197-11-680, for administrative SEPA appeals of project actions as defined in WAC 197-11-704. The comment and appeal path is shown in Table 8.3.

a. Appeals of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) are not allowed;

b. An appeal to the hearing examiner on SEPA decisions is limited to review of a final threshold determination (determination of significance (DS) or nonsignificance (DNS/MDNS)) or the adequacy of a final environmental impact statement (FEIS);

c. As provided in WAC 197-11-680(3)(a)(iv), there shall be no more than one administrative appeal of a threshold determination or of the adequacy of an FEIS;

d. Except as provided in WAC 197-11-680(3)(a)(iv), administrative SEPA appeals authorized by this subsection shall be consolidated with the hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing officer, in conformance with WAC 197-11-680(3)(a)(v);

e. An appeal of a DS shall be heard and decided at a separate, open record hearing to establish whether an applicant must provide an environmental impact statement. As provided in RCW 36.70B.060(6) and 43.21C.075, this open-record hearing shall not preclude a subsequent open-record hearing as provided by this code;

f. A timely appeal of a DS or other application identified in WAC 197-11-680(3)(a)(vi) shall stay the decision on a project permit application or development permit application until such time as the appeal has been resolved at the administrative level (i.e., decision by the hearing examiner) or the appeal has been withdrawn;

g. The determination of the responsible official shall carry substantial weight in any appeal proceeding;

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

MICHAEL DURLAND, KATHLEEN FENNEL, and DEER HARBOR BOATWORKS, Appellants, vs. SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN, Respondents.	NO. 69134-1-I (San Juan County Superior Court Cause No. 12-2-05047-4) DECLARATION OF SERVICE FOR BRIEF OF RESPONDENTS WES HEINMILLER AND ALAN STAMEISEN

Margaret Y. Hall being first duly sworn on oath, deposes and says:

1. I am employed by the Law Offices of William J. Weissinger, P.S.

2. On the 21st day of December, 2012, I transmitted a true and correct copy of the BRIEF OF RESPONDENTS WES HEINMILLER AND ALAN STAMEISEN, with Appendix A, to be served on the following in the manner indicated below:

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

Dated this 21st day of December, 2012 at Friday Harbor, Washington.

Margaret Y. Hall

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