68453-1

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

NO. 68453-1-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This case is about the rights of individuals to have access to court to challenge illegal development on their neighbor's property. With no notice to the neighbors or anyone else in the public, San Juan County approved a building permit for respondents Heinmiller and Stameisen to build a second story on top of an existing garage on their property. The building permit was approved in violation of a number of prohibitions in the San Juan County Code.

The County now argues that to have their day in Court, neighbors must be omniscient in knowing when building permits are approved. The County argues that an individual is barred from challenging illegal development on his or her neighbor's property when he or she fails to file an appeal within 21 days of approval of that development even if the County provided no notice to the public of the approval before that deadline. This is obviously inappropriate because it is impossible for a person to file an appeal of a decision when that person does not know that the decision had been made.

The County advances a second, parallel argument. According to the County, not only should a party be clairvoyant and file judicial appeals before notice is provided, but the party should also file administrative appeals (*i.e.*, exhaust administrative remedies) before receiving notice. The County's

arguments on both counts are wrong. The law does not impose impossible burdens on citizens seeking access to the courts. Statutes should not be construed to create such absurd results. Indeed, if they were so construed, they would violate due process safeguards.

II. ASSIGNMENTS OF ERROR

Assignment of Error

The trial court erred when it granted respondents' motions to dismiss in the Order on Respondent Heinmiller, Stameisen, and San Juan County's Motions to Dismiss Under CR 12(b) (Feb. 3, 2012).

Issues Pertaining to Assignment of Error

- Land Use Petition is timely when it is filed within 14 days of the date that San Juan County provided notice that decision was publicly available and 11 days after the decision was first mailed to a member of the public.
- Requirement for exhaustion of administrative remedies can and should be excused under LUPA where lack of public notice deprived neighboring landowners a fair opportunity to participate in the administrative process.

III. STATEMENT OF THE CASE

A. San Juan County's Approval of the Building Permit at Issue in This Matter

Wesley Heinmiller and Alan Stameisen (hereinafter collectively referred to as "Mr. Heinmiller") applied for a building permit to build a second story on top of their existing garage on August 8, 2011. CP 38. Mr. Heinmiller lives on waterfront property on Orcas Island directly adjacent to property owned by appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (hereinafter collectively referred to as "Mr. Durland") and the development proposal will have very adverse impacts on Mr. Durland's property. CP 34. The County did not provide any notice of the building permit application to the public and Mr. Durland was unaware that the application had been filed. CP 76.

Three months later, on November 1, 2011, the County approved the building permit, BUILDG-11-0175, allowing Mr. Heinmiller to build a second story on top of his existing garage. CP 81. At the time, the County did not provide any notice that the decision was publicly available nor did it mail the decision to any members of the public. CP 76. Mr. Durland was unaware that the building permit had been approved and issued. CP 76-77.

B. History of Other Development on the Heinmiller/Stameisen Property

Over ten years ago, in 2001, Mr. Heinmiller obtained a building permit to construct a new garage in place of an old garage on his property. CP 80. The building permit for the new garage (Building Permit No. 11983) contained the following restrictions: "New garage must be in footprint of old; cannot be closer to shoreline." *Id.* Following the issuance of that earlier building permit and construction of the new garage, Mr. Durland believed that Mr. Heinmiller had built the new garage in violation of the building permit requirements. CP 74-75. It appeared that the new garage had been built in a footprint that was different from the old garage on their property and Mr. Heinmiller built the new garage closer to the shoreline than the old one had been. CP 75.

On March 22, 2011, Mr. Durland filed a complaint with the County requesting that the County proceed with a code enforcement action against Mr. Heinmiller for building an illegal structure. CP 75. The County did not respond to Mr. Durland's complaint until nearly nine months later, on December 15, 2011. *Id.* The County ultimately denied Mr. Durland's complaint. *Id.*

C. Mr. Durland's Public Records Act Request

On November 3, 2011, because the County had not responded to his code enforcement complaint, Mr. Durland submitted a public records request to San Juan County for documents related to his complaint. CP 75. County staff member, Kandy Seldin, responded to Mr. Durland's request on November 8, 2011 indicating that she would look into it and get back to him in a week. *Id.*[1] Having not heard back a week later, Mr. Durland wrote to the Public Records Officer, Stan Matthews, on November 15, 2011 and asked about the status of his request. CP 76. Mr. Matthews did not respond. *Id.*

In the late afternoon of November 22, 2011, which unbeknownst to Mr. Durland at the time happened to be the same day as the deadline for an administrative appeal of building permit BUILDG-11-0175, the second story building permit that he did not know existed, Kandy Seldin sent an e-mail to Mr. Durland indicating that the documents that he had requested were ready for production. CP 76. She indicated that the documents would be available for viewing or as printed copies mailed to him after payment. *Id.* Mr.

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[1] A public agency is required to respond "promptly" to an information request under the Public Disclosure Act. RCW 42.17.320. This has been interpreted to mean that the agency has five business days to take one of the following actions: produce the records for inspection; deny access to the requested records; or provide a reasonable estimate of the additional time necessary to respond to the request. *Id.*

Durland quickly followed up with a check in the mail and asked that she mail the documents to him. *Id.*

Mr. Durland ultimately received documents in response to his request on December 5, 2011. CP 76. While he was reviewing the documents, he noticed, for the first time, a reference to the building permit for the second story on the garage. *Id.* Thus, Mr. Durland discovered the existence of the building permit for the second story on the garage for the first time when he was reviewing documents that he received on December 5, 2011 in response to his public disclosure request. This was also the first time that the County had given any notice to anyone in the public that the decision was publicly available. *Id.*

Because the documents originally received by Mr. Durland did not contain a copy of the building permit, Mr. Durland requested a copy of the second story building permit from the County on December 7, 2011. CP 77. The County Office Manager, Lisa Brown, e-mailed a copy of the building permit (BUILDG-11-0175) to Mr. Durland on Thursday, December 8, 2011. *Id.* This was the first time that San Juan County mailed a copy of the land use decision to anyone in the public. Upon receipt of the permit, Mr. Durland learned, for the first time, that on November 1, 2011, without notice to Mr.

Durland, San Juan County had approved the requested building permit and thereby authorized Mr. Heinmiller to build a second floor addition to the existing garage for an office and entertainment area. *Id.* This had all occurred during the time that the County was purportedly conducting a code enforcement review on that very same garage. CP 77-78.

D. Appeals of the Building Permit

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. CP 77. Mr. Durland filed a Land Use Petition in Skagit County Superior Court pursuant to the Land Use Petition Act (LUPA), ch. 36.70C RCW, on December 19, 2011. CP 33.

Mr. Durland also filed an administrative appeal of the building permit with the San Juan County Hearing Examiner on December 19, 2011, which was within eleven (11) days of Michael Durland's receipt of the building permit. CP 101-105. Petitioners filed both appeals concurrently with the understanding the LUPA appeal could still be timely filed, but the deadline for filing an administrative appeal had passed. He filed the administrative appeal nonetheless because he believed at the time that the San Juan County Hearing

Examiner had the authority to toll the 21 day deadline for an administrative appeal based on the doctrine of equitable tolling.[2]

In the Skagit County Superior Court matter (which is the matter on appeal now), respondents Heinmiller, Stameisen, and San Juan County filed motions to dismiss the Land Use Petition on the grounds that it had been untimely filed and that petitioners had failed to exhaust their administrative remedies. CP 4-8; CP 19-26. The Skagit County Superior Court ultimately issued an Order on respondent Heinmiller, Stameisen, and San Juan County's Motion to Dismiss under CR 12(b) granting those motions and dismissing the matter. CR 161-163. This appeal followed.

IV. ARGUMENT

The Land Use Petition filed by Mr. Durland was filed in a timely manner because it was filed within fourteen days of the date that San Juan County provided notice that the building permit approval decision was publicly available and eleven days after the decision was first mailed to a member of the public, Mr. Durland. Furthermore, the requirement for exhaustion of administrative remedies can and should be excused under LUPA where lack of public notice deprived the neighboring landowners a fair opportunity to

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[2] This ultimately proved to be inaccurate and the Hearing Examiner dismissed the appeal for lack of jurisdiction.

participate in the administrative process. These issues are addressed in full below.

A. The Land Use Petition was Filed in a Timely Manner by Petitioners

1. A land use decision is timely when it is filed within 21 days of the "issuance" of the land use decision

The Land Use Petition Act (LUPA), ch. 36.70C RCW, governs judicial review of Washington land use decisions. RCW 36.70C.030. Under LUPA, a Land Use Petition must be filed with the Court and served on the persons identified in RCW 36.70C.040(2) within 21 days of the issuance of the land use decision. RCW 36.70C.040(3).

The date of issuance of the land use decision is a defined term in LUPA. LUPA states:

> (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(4).

Thus, to determine when the 21 day clock starts ticking for a LUPA appeal, one must look to the above language to determine when the land use decision being appealed was "issued." In the case of a written decision, the decision is issued three days after that 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. RCW 36.70C.040(4)(a). If the decision is made by ordinance or resolution, the clock starts ticking on the date a legislative body passes the ordinance or resolution. RCW 36.70C.040(4)(b). If neither of those apply, the clock starts ticking on the date that the decision is entered into the public record. RCW 36.70C.040(4)(c).

The Washington State Supreme Court analyzed the language in RCW 36.70C.040(4) at some length in *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 408-409, 120 P.3d 56 (2005) (hereinafter referred to as "*Habitat Watch*"). In that case, Skagit County approved a special use permit for the construction of a golf course in 1993. *Id.* at 400. The project languished in the hands of its first two owners, and by the time respondent Upper Skagit

Indian Tribe bought the project and finally began construction in 2002, the special use permit had been extended three times. *Id.* In May, 2002, a Habitat Watch member noticed logging activity near the proposed golf course site. *Id.* at 403. This activity came nearly five years after the last properly granted permit expired and seven years after the last public hearing on the project. *Id.* By June 5, 2002, Habitat Watch became aware that the golf course project was still proceeding at the site despite the long delay since the last public hearing. *Id.*

Habitat Watch submitted a public disclosure request to Skagit County. The County produced documents to Habitat Watch in response to that request on June 24, 2002. The records made available to Habitat Watch through its public disclosure request on June 24, 2002 revealed the existence of the third extension for the first time to Habitat Watch. Habitat Watch filed a LUPA appeal challenging the third extension of the special use permit on August 1, 2002, but that was well over 21 days after June 24, 2002 – the day it had received the response to the records request.

In reviewing whether the LUPA appeal had been timely filed, the *Habitat Watch* Court focused on the LUPA definition of the date of issuance in RCW 36.70C.040(4). *Id.* at 408-409. In *Habitat Watch*, the decision on

appeal was a written decision and there was nothing in the record that showed that the extension decision had been mailed to parties of record (beyond the response to the public disclosure request) or otherwise made publicly known, nor had it been passed by ordinance or resolution. *Id.* at 408.[3]

The Court concluded that under RCW 36.70C.040(4)(a), which applies to written decisions, the decisions on appeal had been, at the very latest, issued on June 24, 2002, when the County made them available in response to Habitat Watch's public disclosure request. *Id.* at 409. According to the Court, the County's response to the public disclosure request constituted notice that a written decision was publicly available pursuant to RCW 36.70C.040(4)(a).

Because Habitat Watch did not file a LUPA petition within 21 days after it had received the response to its public disclosure request, the court found the petition to be untimely. *Id.* at 409. The Court suggested, however,

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[3] The *Habitat Watch* Court interpreted RCW 36.70C.040(4)(c) to apply only when a decision is neither written nor made by ordinance or resolution. *Habitat Watch* at 408, fn.5. Subsection (c) would include other types of decisions such as decisions made orally at a City Council meeting. *Id.* These decisions would be issued when the minutes from the meeting are made open to the public or the decision is otherwise memorialized such that it is publicly acceptable. *Id.* Subsection (c), therefore, did not apply in *Habitat Watch* because the decisions at issue were written and thus could be issued only subsection (a), when they were either mailed or notice was given that the decisions were publicly available. *Habitat Watch* at 408.

that if they had filed the LUPA appeal within 21 days of their receipt of the public disclosure response (Jun. 24, 2002), it would have been timely. *Id.*

More recently, referring to *Habitat Watch*, another Court stated:

> The Supreme Court has suggested that a LUPA appeal filed within 21 days of actual notice of certain land use decisions, such as [a decision] not requiring notice, may be timely. 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.

Nickum v. Bainbridge Island, 153 Wn. App. 366, 382, n.11, 223 P.3d 1172 (2009) (citations omitted), *citing Habitat Watch*, 155 Wn.2d at 409 and n.7.

2. Petitioners filed the Land Use Petition within 21 days of "issuance" of the building permit approval as that term is defined in LUPA

Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks filed the Land Use Petition at issue in this matter within 21 days of the County's "issuance" of the building permit as that term is defined in RCW 36.70C.040(4).

In this case, there is no dispute that the decision was a "written" decision and, therefore, RCW 36.70C.040(4)(a) applies. As described above, with respect to "written" decisions, that provision states that the date of issuance of a land use decision is "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." RCW 36.70C.040(4)(a). Building Permit (BUILDG-11-0175) was "issued" either on December 5, 2011 or December 11, 2011. The County did not provide any public notice of the building permit approval and did not mail the written building permit to anyone in the public before either of those two dates. The first "mailing" of the building permit to a member of the public was on December 8, 2011, when the County Office Manager, Lisa Brown, e-mailed a copy of the building permit to Mr. Durland. Therefore, the written decision was mailed by the local jurisdiction for the first time on December 8, 2011 (if e-mail is considered mailing). Three days after that mailing is December 11, 2011. Therefore, the 21 day clock for filing a LUPA appeal of the building permit at issue began on December 11, 2011 – three days after the County mailed the decision to Mr. Durland. This means that the deadline for filing a LUPA appeal of the building permit was January 2, 2012. Petitioners filed their LUPA appeal on December 19, 2011 – long before that deadline.

If e-mail is not considered "mailing" under RCW 36.70C.040(4)(a), then the date of issuance of the building permit was December 5, 2011. As RCW 36.70C.040(4)(a) states, if a written decision is not mailed, the date of issuance of that decision is the "date on which the local jurisdiction provides

notice that a written decision is publicly available." As stated above, the County did not mail the building permit to anyone in the public at any time before e-mailing it to Mr. Durland, nor did it issue public notice of the approval. The very first time that the County provided notice that the building permit was publicly available was December 5, 2011 when Mr. Durland received the response to his public disclosure request. That would make the deadline for a LUPA appeal December 26, 2011. The LUPA appeal was filed on December 19, 2011 – long before that deadline.[4]

It is worth repeating that San Juan County did not mail the written decision to anyone in the public, nor did it provide any notice that the written decision was publicly available at any time before notifying Mr. Durland of its existence via a public records response and ultimately mailing it to Mr. Durland on December 8, 2011. The date of issuance is three days after a written decision is mailed, or on the date on which the local jurisdiction provides notice to the public as a whole that a written decision was available. Therefore, the

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[4] If the building permit were not characterized as a "written decision," the 21 day clock would not have started ticking until the building permit was "entered into the public record." The building permit here was never "entered into the public record." At the very least, it could be said that it was entered into the public record when it was made available in response to a public disclosure request.

date of issuance of the decision was either December 5, 2011 or December 11, 2011 and the LUPA petition was filed before both of those dates.

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

1. The requirement for exhaustion of administrative remedies under the Land Use Petition Act

The Land Use Petition Act generally requires that a petitioner exhaust administrative remedies prior to filing an appeal in Superior Court. Specifically, LUPA states, in relevant part:

> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> . . .
>
> (2) [A] 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(2) (emphasis supplied).

2. The requirement for exhaustion of administrative remedies is not absolute

The phrase "to the extent required by law" in RCW 36.70C.060(2) refers to decades of established case law that define the parameters of the requirement for exhaustion. This statutory language in LUPA indicates a desire by the authors that the doctrine of administrative remedies, as it has been developed in case law, be applied to appeals of land use decisions. Thus, one needs to look generally at how that doctrine is applied by the courts to determine how it should be applied under LUPA.

The doctrine of exhaustion of administrative remedies generally requires a party to exhaust the administrative remedies provided by a local jurisdiction's ordinances before filing a superior court challenge to an action taken by that a local jurisdiction. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). In other words, a party who is challenging the granting or denial of a certain land use decision must follow the steps that local ordinances provide for appealing the decision before appealing to state superior court. *Id.* at 866.

For several decades and in more cases than appellants can cite here, Washington courts have ruled that the exhaustion rule is not absolute and is not jurisdictional. *See, e.g., Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797, 732 P.2d 1013 (1987); *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985); *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997); *Keller v. City of Bellingham*, 20 Wn. App. 1, 578 P.2d 881 (1978), *aff'd on other grounds*, 92 Wn.2d 726, 600 P.2d 1276 (1979). The exhaustion rule is one of restraint, requiring courts to weigh and balance many factors in order to decide whether requiring exhaustion is desirable. *Prisk v. City of Poulsbo,* 46 Wn. App. at 797. When consideration of fairness and practicality outweigh the policies underlying the doctrine, compliance with the rule is unnecessary. *Id.* at 797-798, *citing Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985).

Without proper analysis to support its conclusion, the Washington State Court of Appeals, Division II, recently summarily dismissed decades of well-established case law. The Court concluded that failure to exhaust administrative remedies is "an absolute bar" to bringing a LUPA petition to Superior Court. *See West v. Stahley*, 155 Wn. App. 691, 699, 229 P.3d 943

(2010).[5] The *West v. Stahley* decision is highly suspect not only because it disregards decades of well-established principles of law, but also because the language in LUPA does not support it.

When interpreting a statute, the Court does not construe unambiguous language. *Whatcom County v. Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). In this case, there is no ambiguity: the final phrase in RCW 36.70C.060(2)(d) requires that a court analyze whether a petitioner has exhausted his or her administrative remedies "to the extent required by law." That phrase clearly refers to the decades of established case law that define the parameters of the requirement for exhaustion, including the exceptions.

To the extent that the Court believes that the language in RCW 36.70C.060(2)(d) is ambiguous, the Court must strive to avoid unlikely, absurd, or strained consequences. *Id.* In this case, it is unlikely that the authors of LUPA intended to set aside established case law that had recognized exceptions to the exhaustion requirement in numerous

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[5] *West v. Stahley* can be distinguished from the case at bar because the appellant in that case had failed to appeal to the City Hearing Examiner within 14 days after he had "actual notice." *Id.* at 698. In that case, the neighbor received notice of a permit on October 10, 2007 and did not appeal to the City Hearing Examiner until October 30, 2007. *Id.* The local ordinance had required him to appeal within 14 days of the decision. In this case, Mr. Durland received a copy of the building permit on December 8, 2011 and the local ordinances set a 21 day deadline for appeals. Mr. Durland filed an appeal with the San Juan County Hearing Examiner on December 19, 2011, which was 11 days after receiving the building permit. CP 29; CP 41-45.

circumstances. Clearly, in certain circumstances, considerations of fairness and practicality can and should outweigh the policies behind the requirement for exhaustion. There are numerous circumstances, like the one in this case, where courts should have discretion to apply an exception to the exhaustion requirement.

Also when interpreting a statute, a Court should not interpret a statute in a way that renders any portion of it meaningless. *Woo v. Firemen's Fund Ins. Co.*, 150 Wn. App. 158, 164, 208 P.3d 557 (2009). If the Court applied a very rigid, absolute requirement for exhaustion of administrative remedies, the Court would be rendering the phrase "to the extent required by law" meaningless. That language was put there for a reason: the authors intended that the doctrine of exhaustion that has been developed by case law be applied in LUPA cases, including the exceptions. The authors of the Land Use Petition Act intended that the doctrine of exhaustion be applied in the same manner that it had been applied to every administrative appeal case before and after the Act was adopted.

In another LUPA case, *Nickum v. City of Bainbridge Island*, 153 Wn. App. at 377, the Court of Appeals did recognize that there were exceptions to the exhaustion requirement in LUPA. That Court stated:

> But a limited exception to the administrative time-of-filing requirement exists. "The failure to file a timely appeal of a land use decision has been excused where the lack of public notice deprived a neighboring landowner of a fair opportunity to participate in the administrative process". . . .

The *Nickum* Court did not ultimately apply an exception in that case, but the Court's decision in that regard was based on different facts as well as an unfortunate and improper parallel made between the doctrine of exhaustion and the doctrine of equitable tolling, which are two entirely separate and distinct legal doctrines.

Regardless of whether the exception applied in *Nickum*, it is important to recognize that the *Nickum* Court made it clear that exceptions to exhaustion do apply under LUPA and, as shown below, an exception should be made in this case.

3. Courts have recognized exceptions to the exhaustion requirement in several different circumstances

As mentioned above, Washington courts have recognized exceptions to the exhaustion requirement in circumstances where the policies of the requirement are outweighed by considerations of fairness and practicality. *Orion Corp. v. State*, 103 Wn.2d at 457. For example, exhaustion is excused if resort to administrative procedures would be futile, *see, e.g., Presbytery of Seattle v. King County,* 114 Wn.2d 320, 338, 787 P.2d 907 (1990), or a court

may relieve a person from exhaustion requirement if it is shown that grave, irreparable harm would result from requiring a person to exhaust administrative remedies. *Dioxin/Organochlorine Center v. Ecology,* 119 Wn.2d 761, 778, 837 P.2d 1007 (1989).

Relevant here is an exception to that rule that was established in *Gardner v. Pierce County Board of Commissioners*, 27 Wn. App. 241, 617 P.2d 743 (1980). In that case, the appellant, Booth Gardner, had challenged a Pierce County decision in court without first filing an administrative appeal of the decision. Respondents argued that the court was precluded from reviewing the County's decision on the basis that the Mr. Gardner had failed to exhaust his administrative remedies under the Pierce County code. *Id.* at 243. There was no dispute that the code prescribed a specific process for administrative appeals of such decisions and Mr. Gardner had failed to follow that process before filing his challenge in court. *Id.*

The key issue, however, was that the County had not provided notice of the decision when it was issued. *Id.* Mr. Gardner was not aware that the decision had been made until after the appeal deadline had passed. The court concluded that when a petitioner has no notice of the decision until after the deadline to appeal had passed, it would be unreasonable and violative of due

process to require petitioner to have exhausted his administrative remedies. *Id.* The court said:

> Where one has not enjoyed a fair opportunity to exhaust the administrative process, or where resort to administrative procedures would be futile, exhaustion of administrative remedies will not be required.

Id. at 243-244.

Another exception to the rule requiring exhaustion rides on the character of the issues presented to the Court. If the matter is primarily a legal dispute, with no factual dispute between the parties and no need to defer to agency fact finding, that militates heavily against requiring exhaustion. *See Prisk v. City of Poulsbo*, 45 Wn. App. at 798; *Credit General v. Zewdu,* 82 Wn. App. 620, 628, 919 P.2d 93 (1996).

4. The requirement for exhaustion of administrative remedies should be excused in this case because lack of public notice deprived Mr. Durland a fair opportunity to participate in the administrative process

As in the many cases where courts have excused the requirement for exhaustion of administrative remedies based on considerations of fairness and practicality, the exhaustion requirement should be excused in this case for the same reason. In this case, the requirement for exhaustion of administrative remedies should be excused because the lack of public notice prior to the

appeal deadline deprived Mr. Durland of a fair opportunity to participate in the administrative process. He could not possibly have appealed a decision that he did not know existed.

Exactly like the petitioner in *Gardner v. Pierce County Board of Commissioners*, the petitioners in this case had no notice of the building permit approval until after the deadline to appeal had passed. CP 76-77. The County approved the building permit with no public notice and without informing Mr. Durland. *Id.* He had missed the deadline to appeal the building permit because he did not even know that the building permit existed. Like in *Gardner*, it would be unreasonable and violative of due process to require petitioners to have exhausted their administrative remedies when they could not have possibly done so.

Mr. Durland was diligent in attempting to collect information, but the County withheld information that would have alerted him to the existence of the building permit in time to appeal. As was explained above, Mr. Durland had filed a code enforcement action requesting review of the construction of the illegal garage on the Heinmiller Stameisen property on March 22, 2011. CP 75. While the Code enforcement action was pending, the County had received and approved a building permit application to build a second story

on the very same garage that Mr. Durland claimed had been illegally built. *Id.* During that time, the County never informed him that the building permit had been applied for and approved despite his obvious interest in the structure.

To make matters worse, Mr. Durland had requested documents that would alert him about the building permit once he received them. But the County did not produce those documents to Mr. Durland until after the deadline for an administrative appeal of the building permit to the Hearing Examiner had passed.

As the Court recognized in *Gardner*, requiring exhaustion in this situation would violate the due process rights of appellants. At the very minimum, the federal and state due process clauses demand that deprivation of property be preceded by notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This case presents the most basic, clear deprivation of due process rights that one can imagine. There was no notice, no meaningful opportunity to be heard, and Mr. Durland is barred completely from challenging the illegal development on his neighbor's property despite having received no notice whatsoever of the decision prior to the administrative review deadline.

If that is not enough to support an exception to the exhaustion doctrine, another justification is the character of the issues being presented to this Court in this appeal. As mentioned above, when the matter is primarily a legal dispute with no factual dispute between the parties and no need to defer to agency fact finding, that militates heavily against requiring exhaustion. *See Prisk v. City of Poulsbo*, 445 Wn. App. at 798. That is the situation in this case. In this case, the issues presented are primarily legal and there is virtually not factual dispute between the parties. CP 35-37.

V. CONCLUSION

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

Dated this 25th day of June, 2012.

Respectfully submitted,

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Durland\Appeals\68453-1-I\Opening Brief

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

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

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks herein.

On the date and in the manner indicated below, I caused the Opening Brief of Appellants to be served on:

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DATED this 26th day of June, 2012, at Seattle, Washington.

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PEGGY S. CAHILL

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