69134-1

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

NO. 69134-1-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

San Juan County, Wes Heinmiller and Alan Stameisen ask this court to adopt a rule that would, for practical purposes, bar credible Federal 42 U.S.C. §1983 claims against local governments who violate individual procedural due process rights. They claim that certain deadlines and requirements established by the Land Use Petition Act (LUPA), ch. 36.70C RCW apply to bar the federal claims.

The rule advanced by respondents would require that, to challenge a lack of notice of a right to appeal a permit within a certain deadline, a person would have to file the appeal within that deadline. This is an impossible standard that has the practical effect of prohibiting that person from asserting his due process rights.

This Machiavellian treatment of claims brought under 42 U.S.C. §1983 is forbidden by established federal case law. State LUPA requirements cannot and do not apply to bar federal 42 U.S.C. §1983 claims. To the extent this division of the Court of Appeals has held that the LUPA 21-day limitations period applies to Section 1983 claims, this Court should overturn that precedent. *See Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010) It

appears from that case that this Court was not made aware of the binding Supreme Court precedent that prohibits this conclusion.

Mr. Durland's appeal is not a "collateral attack" of Heinmiller's building permit and Mr. Durland is not making an attempt for an "end run" around the provisions of the San Juan County Code.[1] Mr. Durland's constitutional right to procedural due process was violated and the proper relief for that violation is damages and/or due process. The San Juan County Code and San Juan County Hearing Examiner operated to deprive Mr. Durland of his right to notice and an opportunity to be heard in opposition to San Juan County's approval of Heinmiller's building permit.

The federal and state constitutions provide this fundamental right and because that right was violated, Mr. Durland should be given the opportunity to have due process.

II. ARGUMENT

A. Argument in Support of Durland's Civil Rights Act Claim Under 42 U.S.C. § 1983

1. Durland possesses a constitutionally protected property interest

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[1] Heinmiller characterizes this appeal as requesting "yet another" opportunity to challenge the building permit. Heinmiller Br. at 14. Mr. Durland has had no opportunity to challenge the building permit. He is not requesting "yet another" opportunity, he is requesting the one opportunity that he did not have.

In his opening brief, Mr. Durland argued that he has a constitutionally protected property interest in having his neighbors and San Juan County observe the mandatory height and size limitations for accessory buildings in the San Juan County Code. *See* Op. Br. at 19–20.

Mr. Durland's argument is supported by case law holding that mandatory restrictions on permit decisions give rise to a reasonable expectation of entitlement, and therefore a property interest, that the decision maker will follow the law. *See* Op. Br. at 18–19. *See also Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217, n. 4 (10th Cir. 2003).

Mr. Durland's argument is also supported by *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), where the Court of Appeals found that land owners had a property interest in their neighbors' observance of mandatory height limitations in the local code. Notably, the analysis in *Asche* is consistent with the case law discussed above, and thus supports a holding that the mandatory height and size limitations in this case conferred a property interest on Mr. Durland.

In response to Mr. Durland's arguments, the County makes a number of erroneous, irrelevant, and unsupported arguments that are

calculated to do nothing more than obfuscate the issue. For example, the County appears to argue that, at least when land is involved, the only property interests protected by procedural due process are traditional interests such as fee titles and easements. *See* County Br. at 7. The County cites *King County v. Rasmussen*, 299 F.3d 1077 (9th Cir. 2002), for this proposition. *Id.* Yet, *King County* concerned a plaintiff who misread his own deed and mistakenly believed he held a reversionary interest in the land acquired by the County. *See King County*, 299 F.3d at 1087–88. Unlike this case, the plaintiff in *King County* could point to no other instrument, or state or local ordinance, giving him a reasonable expectation that the County could not use the disputed land.

Here, no deeds are at issue, and it is indisputable that a property interest can be created by a local ordinance like the San Juan County Code, not just by deed. *Veradale Valley Citizens' Planning Comm'n v. Bd. of Comm'rs of Spokane County*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978). It is also indisputable that the 14th Amendment protects far more than traditional interests in land. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("[t]he types of interests protected as 'property' are varied and, as often as not, intangible,

relating to the whole domain of social and economic fact.") (quotation omitted).

The County also cites *Fusco v. State of Connecticut*, 815 F.2d 201 (2nd Cir. 1987), for the proposition that a person does not have a property interest in the procedure used to challenge a local land use decision. *See* County Br. at 8. The County's reliance on *Fusco* apparently stems from its belief that Mr. Durland is making a similar argument to the one rejected by the court in that case.[2] Yet, Mr. Durland has never argued that his "property interest" stems solely from the Hearing Examiner appeals procedure. Instead, he argues that because he has a property interest in having his neighbors obey the mandatory height and size limitations in the County Code, he is entitled to notice and a hearing before he is deprived of that right. *See* Op. Br. at 19–20. Unlike the plaintiff in *Fusco*, Mr. Durland is not asking this Court to equivocate between "property" and procedural due process. *Fusco* is, therefore, irrelevant.

Last, the County cites *Fulilar v. City of Irwindale*, 760 F. Supp. 164 (D.C. Calif. 1999), for the proposition that a person does not have a

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[2] *See* County Br. at 7 (arguing that "Mr. Durland fails. . .to identify any provision in the San Juan County Code which confers on a neighbor a 'reasonable expectation of entitlement' to receive notice of another landowner's building permit."). *See also id.* at 11 (arguing that "the opportunity of an abutting landowner . . . to appeal decisions of local agencies is a mere procedural right and not a property right protected by the 14th Amendment.").

constitutionally protected property interest in maintaining the economic value of her land. *See* County Br. at 9. As above, *Fulilar* is completely irrelevant because Mr. Durland does not base his arguments on a mere loss of property value, which has never been protected by the 14th Amendment. Instead, his property interest flows from the mandatory size and height restrictions in the San Juan County Code.

In addition to the arguments above, the County argues that the "degree of discretion" test for determining whether a property interest exists in the outcome of a permit decision applies only to permit applicants. *See* County Br. at 10. This argument should be rejected.

As discussed in Mr. Durland's opening brief, a person has a property interest in the outcome of a permit decision when the decision maker lacks discretion to grant or deny the permit. *See, e.g., 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). In other words, a property interest in the outcome of the decision exists if there are "articulable standards" that constrain the decision-making process. *Wedges/Ledges*, 24 F.3d at 64 (internal quotation omitted).

The County concedes that *Hyde Park* and *Wedges/Ledges* state the applicable law. *See* County Br. at 10. The County seeks to distinguish these cases, however, on the ground that the degree of discretion test applies only to permit applicants, and not to third parties who oppose the decision. *See* County Resp. Br. at 10 (arguing that "the caselaw upon which Durland relies is inapposite, because it addresses whether a permit applicant possesses a property interest in approval of the permit.").

The County's argument was specifically rejected by the 10th Circuit in *Crown Point I, LLC v. Intermountain Rural Electric Association*. In *Crown Point I*, the plaintiff sued the City of Parker for failing to provide notice and opportunity to be heard before awarding Intermountain an easement across the plaintiff's land. Relying on *Hyde Park*, the *Crown Point I* court explained that "when a party challenges a land use decision by a governing body on due process grounds, the proper inquiry is whether that body had limited discretion in granting or denying a particular zoning or use application." *Crown Point I*, 319 F.3d at 1217. The *Crown Point I* court also rejected the same argument that the County makes here; that the *Hyde Park* test only applies to permit applicants.

> Plaintiff attempts to distinguish *Hyde Park* by arguing that the reasoning of the case should apply only to due process claims brought by a landowner who received an

> unfavorable decision on its own application for a particular land use, and not to a third party who has not made an application before the town council. This distinction fails. Crown Point seeks to challenge the decision of the Parker Town Council to grant Intermountain's proposed land use on due process grounds. The inquiry in this case therefore, as in the situation presented in *Hyde Park,* is whether the Town had only limited discretion to grant or deny a particular land use.

Id. at 1217, n. 4.

In rejecting Intermountain's argument, the *Crown Point I* court looked to the Colorado Supreme Court's decision in *Hillside Community. Church v. Olson*, 58 P.3d 1021 (Colo. 2002). *See Crown Point I*, 319 F.3d at 1247. In *Hillside Community Church*, the Colorado Supreme Court applied the same degree of discretion test when determining whether land owners had a protected property interest in opposing their neighbor's development. *See Hillside Cmty. Church*, 58 P.3d at 1027–28.

The County does not discuss *Crown Point I* or *Hillside Community Church*. Nor does the County offer any argument for why this Court should not apply the same test here. The County's argument should, therefore, be rejected.

Finally, this Court should reject the County's and Heinmiller's arguments distinguishing *Asche v. Bloomquist*. In *Asche*, the Court of appeals held that land owners had a protected property right in preventing

their neighbors from exceeding the mandatory height limitations in the local code. *See Asche*, 132 Wn. App. at 798. In so holding, the court's analysis tracked that of *Crown Point I* and *Hillside Community Church*. In particular, the court focused on the mandatory nature of the local height restrictions, and found that the building permit could "*only* be approved if the views of adjacent properties, such as that of the Asches, are not impaired." *Id.* (emphasis added). In other words, the *Asche* court applied the same degree of discretion test that the County acknowledges is the proper test for permit applicants.

Here, the height and size limitations in the San Juan County Code place mandatory restrictions on accessory buildings. *See* Op. Br. at 19–20. Because Heinmiller's development will exceed those height and size limitations, the building permit may not issue and Mr. Durland has a constitutionally protected property interest in seeing that his neighbors, and the County, observe the law. Mr. Durland had a right under the 14th Amendment to be given notice and an opportunity to be heard, which the County denied when it failed to notify him of his appeal rights to the San Juan County Hearing Examiner.

2. The San Juan County Code violated Durland's procedural due process rights

In its response brief, San Juan County argues, for the first time, that Mr. Durland has not shown the San Juan County Code is unconstitutional "beyond a reasonable doubt." County Br. at 12. This claim was not presented to the trial court and should not be considered on appeal. RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483, 488 (1992); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 412-13, 814 P.2d 243, 245 (1991).

In an apparent attempt to justify presenting this new issue, San Juan County states that Mr. Durland is "now" challenging the constitutionality of the San Juan County Code, and not the building permit, as if this were something new. *See* County Br. at 4-5; 12. Yet, the Complaint filed in this matter clearly challenged the constitutionality of the San Juan County Code provisions as applied to Mr. Durland.[3] Moreover, the County's Motion for Summary Judgment, which is now on appeal, challenged Mr. Durland's Section 1983 claims on two, highly specific and limited grounds. CP 117-124. First, the County argued that Mr. Durland did not possess a constitutionally protected property interest. CP 119. Second, the County argued that the statute of limitations and

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[3] *See* CP 11 ("The appeal provisions in the San Juan County Code combined with the lack of notice provisions cause unconstitutional violations of petitioners' procedural due process rights as applied in this case").

exhaustion requirements in the Land Use Petition Act, ch. 36.70C RCW (LUPA), barred Mr. Durland's Section 1983 claims. CP 122. In other words, the County did not challenge Mr. Durland's assertion that the San Juan County Code is unconstitutional as applied to him.

Thus, the County's accusation that Mr. Durland "failed to provide legal support for his assertion that the building code violates the due process clause" is fundamentally misguided. Mr. Durland did not address the constitutionality of the San Juan County Code because the County did not raise the issue in its motion. Moreover, Mr. Durland is at a distinct disadvantage in responding to the County's argument now because the record has not been sufficiently developed to fairly respond to the argument. *See* RAP 2.5(a). Mr. Durland therefore requests that the Court disregard the County's argument on this issue based on RAP 2.5(a).

Should this Court reach the County's argument concerning the constitutionality of the San Juan County Code, despite the County's failure to raise it below, Mr. Durland provides the following argument.

First, Mr. Durland is bringing an as-applied challenge to the San Juan County Code. In an as-applied challenge, "the party challenging the statute contends that the statute, as actually applied, violated the

constitution." *School Disticts' Alliance for Adequate Funding of Special Education v. State*, 149 Wn. App. 241, 265, 202 P.3d 990 (2009).

Second, claims alleging a violation of procedural due process are not governed by "rational basis review," as intimated by the County. *See* County Br. at 13 (arguing that the Code should be upheld if "any state of facts can be reasonably conceived which justifies" it). Instead, procedural due process claims are governed by a unique balancing test established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See also City of Redmond v. Moore*, 151 Wn.2d 664, 670 92 P.3d 875 (2004) (applying the *Mathews* test in the context of a facial challenge alleging violations of procedural due process). Under the *Mathews* test, the reviewing court must consider the private interests affected by the action; the risk of erroneous deprivation through the procedures used; the probable value of additional procedural safeguards; and the government's interest in additional procedural safeguards. *Mathews*, 424 U.S. at 335. In every case, however, government must provide notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Halsted v. Sallee*, 31 Wn. App. 193, 197, 639 P.2d 877 (1982). *See also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992).

Here, it is beyond a reasonable doubt that the San Juan County Code operated to deprive Mr. Durland of his right to notice and an opportunity to be heard in opposition to San Juan County's actions, which deprived him of his property interest in having his neighbors observe mandatory height and size limitations. In the San Juan County Code, building permits (called "development permits") are assigned a different process than discretionary project permits. *See* SJCC § 18.80.010.[4]

The Code states that if an individual wants to challenge a building permit, it must file an administrative appeal to the Hearing Examiner "within 21 calendar days following the date of the written decision being appealed." SJCC 18.80.140(d). The appeal is an "open record appeal," which means that the person challenging the building permit may submit any argument or evidence necessary to demonstrate that the permit had been issued improperly under the Code. However, unlike discretionary project permits, the Code does not require the County to provide notice of the issuance of a building permit. SJCC 18.80.010, -.030. In practical effect, this means that people whose property interests are taken through

[4] "Project permits" are defined to include, but are not limited to, subdivisions, conditional use permits, variances, and other discretionary permits. For project permits, the County will issue public notice of the application, notice of a public hearing, a public comment period, and notice of the decision. *See* SJCC 18.80.020. Mandatory permits (non-discretionary), such as building permits, are referred to as "development permits" and no notice is required for those permits.

the issuance of a building permit have *no* opportunity to challenge the permit, which is precisely what happened in this case, let alone the opportunity to be heard "at a meaningful time and in a meaningful manner."[5]

The County's sole support for its position that no due process violation exists is its contention that "the absence of a notice requirement is typical of ordinances throughout the state." County Br. at 13. This factual statement should be disregarded by the Court because it is made with no citation and nothing in the record supports this claim. The County also cites *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009), for the proposition that courts should not toll administrative statutes of limitation simply because the local government failed to provide notice. County Br. at 14.

Unfortunately, because the County raises this issue for the first time on appeal, the record has not been sufficiently developed. Durland has had no opportunity to challenge the County's unsupported claim that no-notice ordinances are "typical." *See* RAP 2.5(a). However, even

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[5] Applying the *Mathews* test, it is also likely that notice of building permits would reduce the risk of erroneous deprivations, as well as impose minimal costs on San Juan County. However, the record has not been sufficiently developed for this Court to address these issues in light of the County's failure to raise the issue below.

assuming no-notice ordinances are "typical," that does not necessarily mean that they are constitutionally valid.

Furthermore, the County's reliance on *Nickum* is misplaced. The portion of the *Nickum* opinion cited by the County[6] does not address procedural due process rights under the Constitution. That portion of the decision concerned the doctrine of equitable tolling, which may only be exercised in very limited circumstances (*e.g.*, the plaintiff must demonstrate bad faith), and which courts should use "sparingly." *Nickum*, 153 Wn. App. at 379. Unlike the doctrine of equitable tolling, notice and an opportunity to be heard must be provided in *every* case that implicates procedural due process, whether or not the plaintiff demonstrates bad faith on the part of the defendant. *Halsted*, 31 Wn. App. at 197; *Bryant*, 119 Wn.2d at 224. The fundamental concepts of procedural due process are not applied as "sparingly" as the equitable, judge-made doctrine of tolling.

3. The exhaustion and limitations requirements of LUPA do not apply to plaintiffs' Civil Rights Act claims

Respondents argue that Durland's failure to comply with the exhaustion and limitations requirements of LUPA mandates dismissal of

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[6] The County cites the *Nickum* opinion at page 372 of the Washington Reports. *See* County Br. at 14. However, the block quote in the County's brief is actually found at page 379 of the *Nickum* opinion. Mr. Durland assumes that the County intended to cite page 379.

his Section 1983 claim. County Br. at 14; Heinmiller Br. at 6. However, as the Opening Brief of Appellants demonstrates, the exhaustion and limitations requirements of LUPA do not apply to Mr. Durland's Section 1983 claims for many reasons. *See* Op. Br. at 20-30.

As was explained in the Opening Brief, Mr. Durland is challenging San Juan County code provisions provisions are clearly not "land use decisions" that are subject to LUPA deadlines or requirements. *See* Op. Br. at 22-25. LUPA requirements clearly and simply do not apply when a party is challenging the constitutionality of code provisions in County ordinances under federal law. *Id.* In addition, the Opening Brief demonstrated that the San Juan County Hearing Examiner's decision, which Mr. Durland is also challenging, is also not a "land use decision." *Id.* Not surprisingly, neither the County, nor Heinmiller, argue that the challenged San Juan County code provisions are "land use decisions" as that term is defined in RCW 36.70C.020. In addition, neither of them argue that the Hearing Examiner decision was a "land use decision" under that definition.

As was also explained in the Opening Brief, the Land Use Petition Act does not apply to claims for monetary damages or compensation and the Section 1983 claims request monetary damages. *See* RCW

36.70C.030(c). Respondents do not present any argument in response to this.

Even if the Hearing Examiner's decision is considered to be a "land use decision" under LUPA, Mr. Durland filed his Section 1983 claims within 21 days of the issuance of that decision and there were no administrative remedies available to exhaust. *See* Op. Br. at 30-36. Therefore, even if LUPA's requirements applied to Section 1983 claims, the appeal was timely and all exhaustion requirements were met.

Even if LUPA did apply, the 21-day deadline for filing would not apply to this case because Section 1983 claims are governed solely by the three year statute of limitations at RCW 4.16.080(2), and the LUPA 21 day deadline cannot and does not apply to bar those claims. *See* Opening Br. at 25-29. As the Opening Brief demonstrates, the United States Supreme Court has repeatedly made clear that Section 1983 claims are all governed by a state's residual statute of limitations for personal injury actions. No other limitations period can apply. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).

States cannot single out a special class of Section 1983 cases for increased procedural hurdles. *Haywood v. Drown*, 556 U.S. 729, 735, 129

S.Ct. 2108, 173 L.Ed.2d 920 (2009). And a state court of general jurisdiction has no authority under the Supremacy Clause to refuse to hear a Section 1983 case absent a neutral jurisdictional basis for doing so. *See Testa v. Katt*, 330 U.S. 386, 392, 67 S.Ct. 810, 91 L.Ed. 967 (1947). Unlike the LUPA 21-day statute of limitations, a neutral jurisdictional basis must reflect "the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." *Howlett v. Rose*, 496 U.S. 356, 381, 110 S.Ct. 2430, 110 L.Ed.2d 332.

The County apparently concedes that this line of Supreme Court precedent is binding. However, the County seeks to evade the clear rule from these cases, first, by relying on appellate decisions from the Washington Court of Appeals holding that the LUPA 21-day limitations period applies to due process claims. County Br. at 21 (*citing Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010) and *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009)). Second, the County argues that Mr. Durland misunderstands the County's argument, which according to it relies on the concept that once the 21-day limitations period has lapsed, land use decisions are "deemed" valid. *Id.* at 21-22.

To the extent this division of the Court of Appeals has held that the LUPA 21-day limitations period applies to Section 1983 claims, this Court should overturn that precedent. There does not appear to be anything in the text of *Mercer Island Citizens* to suggest this Court was aware of the binding Supreme Court precedent discussed above. Nor does it appear that Division II was aware of this precedent when it authored the *Nickum* opinion. The Superior Court's holding on this issue was also clearly harmful to Mr. Durland because his case was dismissed. Thus, there are more than adequate grounds for overruling *Mercer Island Citizens*, and this Court should take the opportunity to do so here. *See State v. Stalker*, 152 Wn. App. 805, 811–12, 219 P.3d 722 (2009).

The County's argument about this being a collateral attack of a land use decision that is "deemed" valid after 21 days is equally unavailing. *See* County Br. at 22; Heinmiller Br. at 13-15. The United States Supreme Court has consistently rejected attempts to evade the clear reach of the Supremacy Clause in this manner. *See e.g. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431–32, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("Each of our due process cases has recognized, either explicitly or implicitly, that because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the

State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.") (internal quotation and brackets omitted).

"[A]ny other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.* In other words, the United States Supreme Court has mandated that lower courts look behind the specific wording of state statutes and court decisions to determine whether a refusal to entertain a Section 1983 claim rests on a neutral jurisdictional basis, or simply a statement of local policy. As established in the Opening Brief, the LUPA 21-day limitations period is not a neutral jurisdictional rule, and any holding to the contrary is erroneous regardless of how it is phrased.

Furthermore, respondents mistakenly assume the statute of limitations for Mr. Durland's Section 1983 claim began running the day Heinmiller received his building permit. For a procedural due process claim, the statute of limitations begins to run the day the due process deprivation occurs. San Juan County does not allow a person to challenge a building permit before it is issued, but rather provides only post-deprivation relief. The County Code stays the effectiveness of a building permit pending a final resolution of the appeal. SJCC 18.80.140(A)(5). In

essence, this is like suspending a child from school (a deprivation of a property right), but staying the effectiveness of the suspension until after the child has an opportunity to be heard (essentially providing procedural due process before actually depriving the child of his right go to school). Obviously, in such a case the child would be premature to allege a deprivation of procedural due process before her hearing date.

The same rule applies here. Because procedural due process is allegedly provided by the County's Code after a building permit is issued, Mr. Durland's due process injuries were not complete until after he was denied an opportunity to be heard by the Hearing Examiner. *See Hudson v. Palmer*, 468 U.S. 517, 534, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). As a consequence, no statute of limitations period could have run until after the Hearing Examiner denied his appeal.

Heinmiller warns of dire consequences if Mr. Durland is allowed to file a Section 1983 claim without having filed a timely administrative appeal. Heinmiller Br. at 18. He lists all manner of negative outcomes that would occur if administrative decisions would not be "final" for years and appeals to Superior Court could be brought substantially months or years later than the 21 days after the permit was issued. *Id.* But the outcomes that Heinmiller warns of would not occur as a result of

recognizing the legal requirement of a 3 year statute of limitations for a 42 U.S.C. § 1983 claim. These supposed consequences are easily avoided. As long as the County provides notice of its building permits (they already do provide notice for the vast majority of other land use permits already) there would be no due process violation. Certainty and finality are easily obtained simply by providing notice of the building permit application to neighbors of the development.

4. Durland's Section 1983 claim is not barred by mootness or standing

San Juan County argues, for the first time on appeal, that Durland's 42 U.S.C. § 1983 claim is barred by mootness and the absence of standing. As mentioned above, arguments or theories not presented to the trial court will generally not be considered on appeal. RAP 2.5(a); *Hansen v. Friend*, *supra*; *Concerned Coupeville Citizens v. Town of Coupeville*, *supra*. Because this claim was not presented to the trial court, it should not be considered on appeal. In this case, Mr. Durland has had no opportunity to submit evidence to contradict the County's claims and, therefore, the record has not been sufficiently developed to fairly respond to the argument. *See* RAP 2.5(a).

If this court decides to consider the issue, it should by now be clear that there is no basis for the County's contentions. San Juan County claims "Durland has repeatedly advised this Court that he is not challenging the permit issues to Heinmiller. County Br. at 16. This paraphrasing of Mr. Durland's words subtly misrepresents what Mr. Durland has actually said. Mr. Durland is challenging the fact that the County code provided him with no notice of his opportunity to be heard to challenge the permit. He has a constitutional right to have his day in court and he is asking this court to give him that opportunity. In other words, Mr. Durland is requesting the opportunity to challenge the building permit. Durland is also requesting monetary damages for the due process deprivation. Therefore, the declaratory relief sought by Mr. Durland is not moot.

B. Argument in Support of Claim Brought Pursuant to the Land Use Petition Act, ch. 36.70C RCW

As was demonstrated in Mr. Durland's Opening Brief, Mr. Durland met the exhaustion and limitation requirements of LUPA because he is challenging the loss of the opportunity to be heard in opposition to the building permit and is, therefore, challenging the Hearing Examiner's decision denying that right that was issued on February 5, 2012. Opening

Br. at 30-36. Mr. Durland filed his Land Use Petition in Superior Court less than 21 days after the Hearing Examiner's decision was issued. Furthermore, exhaustion was not an option because the Examiner does not have legal authority to rule on constitutional issues. *See id.* at 34-36.

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

Heinmiller requests that his attorneys' fees and expenses for the LUPA claims be paid under RCW 4.84.370. An award of attorneys' fees under RCW 4.84.370 is not proper in this case.

As the language in that provision states, attorneys' fees are available only if a party was the "prevailing or substantially prevailing party before the county, city, or town." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413, 120 P.3d 56 (2005); *Asche v. Bloomquist*, 132 Wn. App. at 802. A party is not a "prevailing party" when there was no hearing on the land use decision below. *Asche v. Bloomquist*, 132 Wn. App. at 483-484. In this case, the issuance of the building permit was ministerial and the hearing examiner denied the appeal on procedural grounds. *Id.* Mr. Durland had no opportunity whatsoever to present his arguments below. There was no hearing. Therefore, it is inappropriate to characterize the respondents as being "prevailing parties" before the local

jurisdiction in this case. Mr. Durland's first challenge was at the Superior Court level and that was also dismissed on procedural grounds.

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

III. CONCLUSION

For the reasons expressed above, Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks respectfully request that this Court reverse the San Juan County Superior Court Order Granting San Juan County's Motion for Summary Judgment (Jul. 6, 2012) and Order Granting Motion for Dismissal (Apr. 13, 2012) and remand this matter to

the Superior Court with an order to proceed on the merits of Mr. Durland's claims.

Dated this 23rd day of January, 2013.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____

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Durland\Appeals\69034-1-I\Reply Brief-Final

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. 69134-1-I (San Juan County Superior Court Cause No. 12-2-05047-4) 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 Reply Brief of

Appellants to be served on:

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DATED this 23rd day of January, 2013, at Seattle, Washington.

Peggy S. Cahill
PEGGY S. CAHILL

Durland