No. 93963-2

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, ALAN STAMEISEN, and SUNSET COVE LLC

Respondents.

HEINMILLER, STAMEISEN, AND SUNSET COVE LLC'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks's (collectively "Durland") have spent eight years trying to prevent respondents Wes Heinmiller, Alan Stameisen, and Sunset Cove LLC ("Heinmiller") from having an Accessory Dwelling Unit ("ADU") on the adjacent Heinmiller property. The ADU is inside a barn built in 1981 by the then-owner of the Heinmiller property, William Smith. Their legal challenges to respondent San Juan County's issuance of the necessary permits in 2009 have been rejected by the County Hearing Examiner, the Whatcom County Superior Court, and the Court of Appeals.

Durland's current appeal under the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW, hinges on one central issue: whether any side yard setback requirement applied to the barn when it was constructed in 1981. The Hearing Examiner below correctly determined that there was no setback requirement for the structure in 1981, hence no setback violation, and denied Durland's appeal of the County's issuance of the appropriate permits.

Durland then filed a LUPA petition in Whatcom County Superior Court, which considered extensive briefing and a detailed record, conducted a three hour hearing, and affirmed the Hearing

Examiner.

Durland appealed again, and the Court of Appeals also affirmed, reaching the same legal conclusions as the Hearing Examiner and the superior court, and denied Durland's motion for reconsideration.

Durland now comes to this court, claiming that the Examiner, the superior court, and the Court of Appeals all erred in finding and applying the actual law that governed the 1981 barn construction, and in rejecting the speculation and conjecture offered by Durland to the contrary. But the underlying courts did not err, and Durland fails to show that that review of this unusual, fact specific case is warranted under RAP 13.4. The Court of Appeals decision did not overlook or misapply any controlling authority from this court, is not in conflict with any other Court of Appeals decision, and does not raise any issue of broad public interest. The petition should be denied.

II. ISSUES PRESENTED FOR REVIEW

Heinmiller joins in Respondent County's *Answer to Petition for Review*, and the factual overview and legal analysis therein. From Heinmiller's perspective, the issues presented by Durland's petition are restated as follows:

A. Whether the Court should accept review of a decision that turns on a 1978 County ordinance which is no longer in existence,

where the decision does not conflict with any decision of this Court or any other Court of Appeals decision?

B. Whether the court should accept review of a decision involving unique facts from 1981 which are highly unlikely to recur, and thus a decision from this Court would not provide needed guidance to lower courts for future cases?

C. Whether the court should accept review of a decision that does not implicate any constitutional issue, nor any issue of substantial public interest, and where Durland has had a full and fair opportunity to argue his case before the Hearing Examiner and two appellate courts, which unanimously and consistently ruled against him?

III. STATEMENT OF THE CASE

In 1975, San Juan County enacted Res. 224-1975 (**CP 330-339**), which adopted Washington's then-current version of the Uniform Building Code, with certain exceptions and modifications. In general, if a San Juan County property owner wanted to build a barn or shed on their property, it would have required at least a one hour firewall, and in lieu of that, a 10 foot side yard setback. Res. 224-1975, §4.04.

Two years later, the County adopted Res. 58-1977 **(CP 341-46)**, which substantially amended Res. 224-1975 and changed the scope of County regulation of new structures. Under §9 of Res. 58-1977, which

was directed to Class J structures, those structures were withdrawn from regulatory oversight by the County, no building permits were required, and Uniform Building Code ("UBC") requirements including setbacks were withdrawn. **CP 42 at n.4, 343, 784-85** However, under §10 a builder could voluntarily submit building drawings for a Class J structure for review by the County, and pay a fee for same. **CP 343-44**

In 1981 Heinmiller's predecessor, William Smith, built a barn on his property. The barn was a Class J structure under Res. 58-1977. There is no evidence of a building permit ever having been applied for by Smith, or issued by the County. No copy of an actual permit has ever surfaced, despite exhaustive searches by both the County and Durland. **CP 42, at n. 4**. This makes complete sense in light of §9 of Res. 58-1977, which withdrew these structures from County regulation.

C. 1986-1990: Durland purchases adjacent property, and executes Boundary Line Agreement and Easement with Smith so that Durland can obtain permits to run a commercial boatyard.

Durland bought his property in 1986. It is adjacent to what was then the Smith property, and is now the Heinmiller property. Beginning in 1986, Durland tried to obtain shoreline substantial development and conditional use permits to operate an industrial boatyard there. **CP 736-37** In that process, the location of the common boundary line came up, and led to ongoing discussions between Durland and Smith about that

issue. In 1990, Durland and Smith commissioned a survey (**CP 233**) that revealed, *inter alia*, that the barn was only 1.4 feet from the property line.

With their respective attorneys' assistance, Durland and Smith then negotiated, executed and recorded a Boundary Line Agreement and Easement ("Agreement"). **CP 234-243** The Agreement created a twenty-foot buffer around the barn structure, extending onto the Durland property, specifically for setback purposes. Durland also covenanted to not build within the twenty-foot setback easement, and consented to the location of the barn. The setback easement was enacted for Durland's benefit so he could obtain a Conditional Use Permit ("CUP") and operate a boatyard next door to a residence, and to insulate the barn from his commercial operation. Nothing in the document limited the construction, interior arrangements, or future use of the barn.

The County then issued Durland his CUP, **CP 742-43**, and Durland's commercial boatyard has operated continuously since.

D. 1995: Smith sells to Heinmiller family and Stameisen, and in 1997 Heinmiller's parents construct ADU within the barn.

In 1995, Smith (now deceased) conveyed his property to respondents Heinmiller and Stameisen, and the parents of Mr.

Heinmiller, Harold and Ella Heinmiller. The elder Heinmillers moved into the house on the property in 1995. At that time, Wes Heinmiller and Alan Stameisen were living and working in California for most of the year. In 1997, the elder Mr. Heinmiller did most of the planning and worked with local contractors to make changes to convert the boat barn to an ADU, at a cost to Heinmiller of at least $175,000. Unfortunately, the elder Heinmillers did this conversion work without a permit. The work was completed sometime in 1997. **CP 842-859**

E. 2007-2008: Transfer of Heinmiller property, and subsequent code enforcement efforts.

In 2007, a decade after the work was completed, the elder Heinmillers conveyed their interest in the property to Messrs. Heinmiller and Stameisen. Harold Heinmiller died shortly thereafter, in spring, 2007. Mrs. Heinmiller passed away in early 2016.

As a result of a code enforcement complaint made approximately 10 years after the ADU work was completed, in February, 2008, the County issued a Notice of Correction to Heinmiller. Heinmiller and the County then entered into an Agreed Compliance Plan, dated April 25, 2008. **CP 217-220**. The Plan required Heinmiller to remove certain structures, legalize the ADU with a conditional use permit ("CUP") or a substantial development permit ("SDP"), and take other actions. In reliance on the Agreed Compliance Plan, Heinmiller

demolished and removed a deck, removed a carport, applied for and obtained an ADU permit, worked with designer Bonnie Ward on house drawings, and submitted a building and ADU application.

On May 13, 2009, the Agreed Compliance Plan was modified by the parties entering into a Supplemental Agreed Compliance Plan (**CP 221-22**), which allowed Heinmiller to reduce the height of the building a few inches to 16 feet. This eliminated the need for a CUP or SDP.

F. 2009: Permits are issued pursuant to the compliance plans, and Durland appeals same to the Hearing Examiner, then Superior Court, then Court of Appeals.

In 2009, following Heinmiller's actions to meet the Agreed Compliance Plans, the County issued a building permit, change of use permit, and ADU permit for the barn.

Durland appealed the issuance of the permits to the Hearing Examiner. Following a hearing on May 6, 2010, the Examiner dismissed the appeal, primarily on procedural grounds - i.e., that Durland was required to appeal the earlier Compliance Plans, and had missed the applicable appeal deadline. **CP 365-389**

Durland then appealed to Skagit County Superior Court, which affirmed in part and reversed in part. **CP 391-395**. He appealed again to the Court of Appeals, which affirmed in part, reversed in part, and remanded for further proceedings. **CP 399-423**; *Durland v. San Juan*

County, 174 Wash. App. 1, 298 P.3d 757 (2012) ("*Durland I*"). The central issue before the court in *Durland I* was whether the Agreed Compliance Plan(s) were – as the superior court and Examiner found – "land use decisions" under LUPA, in which case Durland's appeal was time-barred. The court decided they were not, that the issuance of the permits in 2009 was the "land use decision" which Durland needed to appeal, and that Durland's appeal was therefore timely. The court remanded to the Examiner for further proceedings on the merits. *Durland I*, 174 Wash. App. at 26. The court did not rule on the merits (except as to roof pitch and ADU square footage issues, which are not at issue here), and expressly declined to address Durland's claim that the barn was illegal and could not be permitted because the setback was insufficient. *Id.,* 174 Wash. App. at 19 n.13.

G. 2014-2015: Hearing Examiner denies appeal, finding that the barn was never subject to setback requirements and may be used as an ADU because doing so does not increase the degree or nature of non-conforming use.

On remand, the Hearing Examiner considered additional briefing by the parties, including requests by both parties to supplement the record with new evidence. Ultimately, the Examiner declined to consider any new evidence, primarily because both parties had a full opportunity to present evidence on, and brief, all those issues in the 2009-10 proceedings and also in the Superior Court and Court of

Appeals. **CP 38-39**

Following extensive motion practice on these issues, and further briefing and analysis, the Examiner denied Durland's appeal on the merits. The crux of the Examiner's decision was his ruling that Res. 58-1977 applied to the barn when it was built in 1981, and that no permit or setbacks were required when the barn was built. **CP 32, 40-41.** The Examiner also found that the ADU work did not expand the nature of the non-conforming condition and that the County code expressly exempted the ADU from shoreline development regulations. **CP 44-46.**

H. 2015: Whatcom County Superior Court affirms Hearing Examiner, finding that the Res. 58-1977 applied and thus the barn was never subject to setback requirements.

Durland then filed a LUPA petition in Whatcom County Superior Court, challenging the Hearing Examiner's decision. After extensive briefing and 3 hours of argument, the court (Hon. Deborra E. Garrett) took the matter under advisement, affirmed the Hearing Examiner, and dismissed Durland's appeal. As set forth in Respondent County's *Answer to Petition for Review*, the court concluded that no permit was ever required under Res. 58-1977, that the setback requirements of Res. 224-1975 had been eliminated for Class J structures by Res. 58-1977, and that the barn as legal when constructed.

I. 2016: Court of Appeals affirms, and denies Durland's motions for reconsideration and to present new evidence to the court.

Durland appealed to the Court of Appeals, which affirmed. The court agreed with the interpretation and construction of Res. 58-1977 made by the Hearing Examiner and the superior court, holding that that no permit had been required in 1981 and no setback requirement had been imposed at that time. *Slip Op. at 11-12.* The court also rejected Durland's argument that the County was estopped from arguing that no permit had issued, because Durland had not shown reliance upon either the hypothetical permit or the few ancillary materials actually in the record from 1981. *Slip Op. at 14.*

Durland sought reconsideration, and sought to admit new evidence *after* the court's decision. Heinmiller opposed both motions, pointing out that the "new" evidence was mostly hearsay, or irrelevant, and that in his LUPA appeal to the superior court, Durland was afforded the option to supplement the record with evidence that he felt was improperly excluded by the Hearing Examiner (RCW 36.70C.120(2)(b)), and/or to seek leave of court to conduct additional discovery if he felt that was necessary. RCW 36.70C.102(5); *Isla Verde Int'l. Holdings, Inc. v. City of Camas,* 99 Wn. App. 127, 141, 990 P.2d 429 (1999). He did neither. Instead, ignoring RAP 9.11, Durland

waited until *after* the Court of Appeals decided the case before seeking to advance the evidence. The Court of Appeals denied both motions.

III. STANDARD OF REVIEW

Acceptance of review by the Supreme Court is governed by RAP 13.4(b), which states:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Each of these criteria "are straightforward and relatively narrow." *Washington Appellate Practice Deskbook, §18.2(3)* (Wash. State Bar Assn., 4th ed. 2016). Issues which are not clearly stated in the petition are waived. RAP 13.4(c)(5); RAP 13.7(b); *State v. Gossage*, 165 Wn.2d 1, 6, 195 P.3d 525 (2008), *cert. denied* 557 US 926 (2009). Even if raised in the petition, an issue is waived if not supported by argument. RAP 13.4(c)(7), (d); RAP 10.3(a)(5); *In re Detention of A.S.*, 138 Wn.2d 898, 922 n.10, 982 P.2d 1156 (1999).

III. ARGUMENT

Durland fails to meet any of the criteria under RAP 13.4. Durland's fundamental problems are (1) that the Hearing Examiner

made certain factual determinations that Durland does not agree with, and (2) that Hearing Examiner, the Superior Court, and the Court of Appeals all applied the law in a way that he does not agree with. The evidence before the Hearing Examiner did not establish that a building permit was ever issued for the barn.[1] And even if there had been evidence from which the Examiner *could* have concluded that a permit issued, there was also substantial evidence from which the Examiner could (as he did) find that a permit did *not* issue. And regardless of speculation about a permit, the law, Res. 58-1977, withdrew the barn from any County regulation at all, including setback requirements.

None of the provisions of RAP 13.4 allow for review based on the finder of fact not having found the facts, or applied the law, as the petitioner wished.

A. The Court of Appeals decision does not conflict with any controlling precedent from this Court.

The decisions of the Superior Court and Court of Appeals do not conflict with this court's precedent. RAP 13.4(b)(1). Nowhere does Durland explain how this could be, or cite any case to show this. There is no decision of this court, or the Court of Appeals, holding that San

[1] As in his Court of Appeals briefing, Durland repeatedly states that "the permit" existed, and repeatedly represents to this Court what "the permit" did or did not say. *Petition at 3, 4, 4 n.1, 11, 12, 13, 14, 17, 18.* But "the permit" has never been located or produced, and it is mere speculation by Durland and others in 2008-2015 as to whether one ever existed in 1981, especially in light of the fact that Res. 58-1977 expressly removed Class J structures such as the barn from any permitting requirements or other County regulation. *See Brief of Respondents Heinmiller and Stameisen* (Court of Appeals, Feb. 23, 2016) at 24-28.

Juan County Res. 58-1977 required a building permit for Class J structures, or holding that setback requirements from the UBC somehow survived and were incorporated into Res. 58-1977. There is no decision of this court, or the Court of Appeals, holding that a low level staffer in a county building department in 1981 can alter the law, or impose new legal obligations, by applying to a document a rubber stamp which contains language inconsistent with the law as adopted by County resolution – even if that document had been an actual building permit. Thus there is no basis for review under RAP 13.4(b)(1).

As in the courts below, Durland argues that the Court of Appeals decision conflicts with the "finality" analysis in *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). It does not. First, Durland's argument presupposes that in 1981 there was a legal requirement imposed by the County on Smith, by way of a building permit, to locate the barn 10 feet from the boundary. As discussed *supra*, there was no permit, and no such legal requirement, and the Court of Appeals decision therefore did not turn on a *Nykreim* analysis.

Durland argues that *Nykreim* required Smith to have mounted some kind of legal challenge back in 1981. But LUPA was enacted in 1995, and thus could not have controlled the 1981 permit activities. Moreover, the *Nykreim* line of cases involved either an unhappy applicant, or a complaining neighbor, who wanted a County permitting decision reversed by the superior court via LUPA petition. This case

involves the exact opposite: everyone was content in 1981, but now, in 2017, Durland wants the court to *enforce* a regulatory requirement that supposedly should have existed back in 1981, but which (because of Res. 58-1977) lacked the necessary enabling legislation, and to *enforce* the terms of a non-existent building permit. This makes no sense.

Indeed, Durland's quote from *Nykreim (Petition at 14)*, actually supports Heinmiller's position. It is Heinmiller who is entitled to rely on Res. 58-1977 and the absence of a 1981 permit. [2] As the Court of Appeals pointed out, Durland was not even on the scene in 1981 to "rely" on an alleged 10 foot setback requirement when the barn was built, and took no action to his detriment even if he did have such a belief at some point. Durland wants this Court to speculate on the supposed existence of a 1981 permit, and on supposed language therein, to do for him what he did not do in the 1990 boundary line adjustment that he negotiated and signed: forbid the use of an ADU in the barn. Nothing in RAP 13.4 supports a grant of review here.

Finally, Durland claims that review under RAP 13.4(b)(1) is warranted under "the laws of contemporaneous public policy." *Petition at 1, 11.* This does not articulate any known basis for review under RAP 13.4, or even a cognizable legal theory.

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[2] The Examiner made no factual finding as to whether a building permit ever issued in 1981 (**CP 42-43**), and explained that this was irrelevant to the ultimate decision; thus the Examiner's added commentary about finality and whether or how Durland could challenge a permit if it *had* been issued back in 1981 (**CP 43**) were mere dicta.

B. The Court of Appeals decision was based on the unique facts and law applicable to this 35 year old project, and does not conflict with any other Court of Appeals decision.

Nor is there any conflict between the Court of Appeals decision and any other Court of Appeals decision, as required by RAP 13.4(b)(2). This not a case where this court must choose between two Court of Appeals decisions that are inherently inconsistent and in conflict with each other. *Cf. Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015) (addressing conflicting Division One decisions as to whether a person facing revocation of community custody status is entitled to a right to counsel at the revocation hearing, under Fifth Amendment due process protections as articulated in *Gagnon v. Scarpelli,* 411 US 778, 93 S.Ct. 1756, 36 L.Ed. 656 (1973)).

Durland appears to recognize that he cannot meet this standard, because he frames the issue as the Court of Appeals decision allowing "inconsistent and arbitrary decisions, contradicting long-standing government practices, and undermining the public's confidence . . .." *Petition at 1.* But these generalized and overwrought claims do not actually articulate a basis for review under RAP 13.4.

Here, the Court of Appeals did not apply the law in a fashion which would create the opposite result from what a different panel or Division has reached addressing the same legal question in an analogous factual and legal setting, as was the case in *Grisby*. There are no factually or legally analogous Court of Appeals decisions because this

case involves its own, unique set of facts stretching back 35 years to the original barn construction (and the local County code in effect at that time) and, more recently, the particular procedural history that unfolded between 2008 and 2014 as the parties to this case tried to unravel what had gone on in 1981 and tried to advance their positions before the Hearing Examiner and multiple reviewing courts.

C. Durland has not shown that the Court of Appeals decision raises state or federal constitutional issues which raise "a significant question of law," nor has he shown an issue of substantial public interest.

RAP 13.4(b)(3) provides for review when a significant question of law is presented in a constitutional setting. In his appeal to the superior court, Durland did raise a constitutional due process argument under RCW 36.70C.130(10(f) (**CP 13, 1402-04**), but he abandoned that argument in his Court of Appeals briefing. He cannot resurrect it now, and he does not even articulate a colorable constitutional argument in his Petition.

Durland claims that "the issues require this Court to affirmatively rule that no land use permits can be challenged or reversed ad hoc by local government." *Petition at 11.* This is not an accurate characterization of the Court of Appeals decision, because it presupposes that a building permit *was* issued, and that the permit contained certain requirements as to setback, and that the applicable law in fact imposed those requirements. But no permit was ever produced

or submitted as evidence, and the Superior Court's and Court of Appeals' decisions applied a logical and correct interpretation of Res. 58-1977, under which no permit would have existed or been required for the barn, and no setback requirements existed.

This case is unusual because of its long history, and the challenges in developing and interpreting evidence that dates back 35+ years. The facts and history of this case are *sui generis,* and the Court of Appeals decision relied on that specific set of facts, applied to the specific issues raised by Durland in huis LUPA petition, and in light of the factual findings that the Hearing Examiner made. There simply is no broad issue of public interest involved here which would warrant this Court's involvement, as required under RAP 13.4.

D. Heinmiller should be awarded attorney fees on this petition.

Heinmiller prevailed in the Court of Appeals and was awarded attorney fees. Heinmiller therefore requests an award of attorney fees in responding to Durland's petition. RAP 18.1(j); RCW 4.84.370.

IV. CONCLUSION

Durland has failed to show how any of the RAP 13.4(b) criteria are satisfied here. He has had a full and fair opportunity to air his grievances before the Hearing Examiner and multiple appellate courts. There was no error by the Hearing Examiner, or by the superior court, or by the Court of Appeals, and there is no basis for this Court to accept review of a case based on unusual and specific facts occurring long ago,

and applying a legal framework (Res. 58-1977) that no longer exists. The Petition should be denied.

DATED 17 January 2017.

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