SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 93963-2

MICHAEL DURLAND, ET AL,

Appellants,

v.

SAN JUAN COUNTY, ET AL,

Respondents.

SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves a longstanding dispute between neighbors arising out of San Juan County's issuance of a building permit, change of use permit and accessory dwelling unit (ADU) permit to Respondents ("Heinmiller") in 2009.

This case does not present any novel issues of law or matters of public interest. The outcome of this case will effect only Petitioners ("Durland") and Heinmiller. Durland has not established good cause for this Court to continue review of this case where the hearing examiner, superior court judge, and the Court of Appeals all affirmed the issuance of the permits.

II. ISSUES PRESENTED FOR REVIEW

The issues presented by Durland's Petition for Review are restated as follows:

A. Whether the Court should accept review of a decision regarding a highly fact specific dispute between neighbors in which the lower courts applied well established principles of land use law?

B. Whether the Court should accept review of a GMA issue raised for the first time on appeal in a Land Use Petition Act case?

C. Whether the Court should accept review of a case that presents no novel issues of law or matters of public interest and the Petitioner

has exhausted all of his procedural appeal rights and remains dissatisfied with unanimous holdings of the lower courts?

III. FACTUAL BACKGROUND

In 1975 San Juan County passed Resolution 224-1975 adopting Washington State's uniform building code and other State codes. CP 330-339. Resolution 224-1975 included the adoption of setbacks. CP 335. In 1977 San Juan County passed Resolution 58-1977 which repealed portions of Resolution 224-1975. CP 341-346. Specifically, §§9.01 and 02 repealed the provisions of Resolution 224-1975 that regulate Class J structures including the side yard setback requirements. In 1981, a Class J barn was built near the boundary between Durland's property and the property now owned by Heinmiller.

This case began in 2009, nearly 30 years after the barn was constructed, when Durland appealed to the San Juan County Hearing Examiner the issuance of a building permit, change of use permit and ADU permit for remodel of the Class J barn structure on his neighbor Heinmiller's property. CP 174. Durland further appealed to Skagit County Superior Court and ultimately to the Court of Appeals. CP 399-423. The Court of Appeals remanded certain issues to the Hearing Examiner for further proceedings. CP 423.

On November 12, 2014, the Hearing Examiner held a closed record hearing on the remanded issues. Following the hearing, three reports were submitted by employees of the San Juan County Planning Department. CP 902, 892, and 858-860. The Hearing Examiner denied motions from both parties to supplement the record with additional exhibits, including all three reports from San Juan County staff. CP 032-047.

The Hearing Examiner denied the appeal.[1] In Conclusion of Law 4 the Hearing Examiner concluded, "[t]he barn structure is a valid nonconforming structure. It was lawfully constructed in 1981 and it was exempt from all side yard setback requirements at that time." CP 040. The Hearing Examiner also concluded:

> Since there was no setback requirement when the barn was constructed in 1981 and no building permit was required, whether or not the applicant actually acquired a building permit is irrelevant. In either event, the barn was lawfully constructed. No building or setback standard applied at the time the barn was built and there is nothing in the record to remotely suggest that anything else about the barn was illegal.

CP 041.

Durland then filed a Land Use Petition with Whatcom County Superior Court pursuant to Chapter 36.70C RCW. A hearing on the merits

[1]The Hearing Examiner upheld the appeal on the issue of living space but allowed that the applicants could modify the proposal to conform with living space requirements as interpreted in the 2012 Court of Appeals decision.

was held on August 31, 2015. At the conclusion of the hearing, following a short recess, Judge Deborra Garrett issued a detailed and thorough decision from the Bench affirming the Hearing Examiner's decision. TR. 56-60. Judge Garrett held that the barn structure was legal from inception. TR 56, lns 21-22. Judge Garrett found this conclusion was supported by the clear intent of Resolution 58-1977 that Class J structures, such as the barn structure, not be regulated in any way. TR. 57, lns 8-11. Judge Garrett stated,

> I don't find it significant, I don't find significant the issue of whether or not a building permit was issued, and that's based on the findings I've just told you that in my view the law did not require a setback. Whether a permit was issued and whether the parties believed that a setback was required are different issues, but they ultimately don't resolve for us the issue here today, which is regardless of what the parties thought, was a setback required and in my view it was not.

TR. 57 ln 20 – 58 ln 5.

Durland next appealed to the Court of Appeals. The Court of Appeals conducted a *de novo* appeal of the code interpretation issue and affirmed, holding, "[t]he hearing examiner did not err in interpreting Resolution No. 58-1977 as repealing all regulations of Class J structures. The ten foot setback requirement in Resolution No. 224-1975 did not apply to the storage barn at the time it was built." *Durland v. San Juan County*, 195 Wn. App. 1061, 2016 WL 4736051, at 6 (2016).

Unsatisfied with the previous three rulings Durland now petitions this Court to accept review of this dispute between neighbors regarding a barn built over 35 years ago. The Court should decline review for the reasons stated below.

IV. ARGUMENT

This case comes to the Court after a superior court judge and a unanimous panel of the Court of Appeals Division I, in an unpublished decision, upheld the hearing examiner's decision.

Considerations for acceptance of review by the Supreme Court are provided in Rule of Appellate Procedure 13.4(b). Durland requests acceptance of review under RAP 13.4(b) (1), (2), and (3). Durland has not established good cause for the Court to continue review at this level. The appealed decision does not conflict with any Court of Appeals or Supreme Court decisions, does not raise any constitutional issues and does not involve any issues of substantial public interest.

Durland's arguments are all based on his belief that the barn structure was illegal when built. Starting with this unsupported conclusion Durland presents arguments concerning the doctrine of finality and public policy. The issue of whether the barn was legally constructed is key to Durland's case and is also the very reason this Court should not accept review. Each of the lower courts applied basic principles of statutory

interpretation and arrived at the same conclusion as the Hearing Examiner: the barn structure was legal when built. CP 040-041; TR 56-57; *Durland v. San Juan County*, 195 Wn. App. 1061, 2016 WL 4736051, at 4-6 (2016). Issues of statutory interpretation of the San Juan County code requirements in 1981, which affect only the two neighboring property owners, do not warrant this Court's review.

A. The Court of Appeals Correctly Interpreted the San Juan County Code Requirements as they existed in 1981.

The Court of Appeals reviewed the interpretation of the San Juan County Code *de novo* allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. RCW 36.70C.130(1)(b); *Durland v. San Juan County*, at 4. Durland asserts the court erred arguing that Resolution 58-1977 repealed those provisions of Resolution 224-1975 that are building code requirements but not zoning code requirements. Petition at 16. The problem with this argument is that the record shows that in 1981 setback requirements were contained in the building code in San Juan County. CP 648 (testimony of San Juan County Planner Lee McEnery). Land use code setbacks first appeared in 1998. *Id.*

Furthermore, as addressed by both the superior court and the Court of Appeals, the language of Resolution 58-1977 clearly indicates an intent not to regulate Class J structures and to exempt them from the requirements

of Resolution 224-1975. Section 8.03 which Durland cites as confirmation of setback requirements (Petition at 16) refers specifically to owner built residences, not Class J structures. CP 341.

Rules of statutory interpretation, the record before the Court, and common sense, all support the conclusion reached by the Court of Appeals. The 1977 resolution repealed the setback requirements for Class J structure; thus no setback was required for the barn structure when it was built in 1981.

Finally, Durland argues at length that a permit with a ten foot setback requirement was issued; however, whether or not a permit was issued is not relevant because no permit was required. No evidence exists in the record that a permit was issued and Durland does not provide any citations to the record demonstrating otherwise. As stated by the Hearing Examiner,

> This case serves as a classic example of the difficulties involved in trying to unravel permitting decisions made years in the past. The huge expense in resources, the uncertainties in reviewing records decades old and the lack of any significant benefit to undergoing such an investigation provide a compelling policy basis to only allow circumvention of finality for intentional as opposed to negligent misrepresentation in the permitting process.

CP 043. There are no issues of intentional or negligent misrepresentations in this case. This is merely a matter of a litigant unhappy with the resolution of his ongoing neighbor dispute.

B. Durland waived Issues B, C and D.

Of the four issues presented in the Petition for Review, only Durland's Issue A, alleging that the Court of Appeal's decision conflicts with case law, even arguably meets the requirements of RAP 13.4. The remaining three issues not only fail to meet the requirements of RAP 13.4 but Durland's brief fails to contain arguments to support them and consequently should not be considered. Without adequate, cogent argument and briefing, this Court should not consider an issue on appeal. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

Durland's Issue B alleges that the Court of Appeal's decision is contrary to Growth Management Act policies. Petition at 1. Growth Management Act issues and arguments were not made before the Court of Appeals and the Growth Management Act and its policies are not referred to anywhere else in the Petition. This is a straightforward appeal under the Land Use Petition Act, RCW Chapter 36.70C, not an appeal under the GMA, RCW Chapter 36.70A. This issue is waived and should not be considered.

Durland's Issues C and D likewise do not meet the requirements of RAP 13.4. Both issues raise questions formed around incorrect assertions of the role of this Court and the purpose of discretionary review and do not address either the facts of this case or the requirements of the Rules of

Appellate Procedure. To the extent these issues are briefed in the Petition, no legal authority is given to support them.

For example, Durland states that if the Court accepts review, "it will not only have the opportunity to opine on the policies of finality and predictability ... but also the broad public purpose of requiring buildings to be setback from other properties..." Petition at 17. Durland provides no authority for this assertion of the Court's role. Counties have authority to provide for exemptions from the State Building Code. *Graham v. San Juan County*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984). Though this Court sets policies for the judiciary and interprets the law, it is the legislature's function is to set policy and draft and enact law. *In re Estate of Hambleton*, 181 Wn.2d 802, 818, 335 P.3d 398 (2015). This case does not present any issues of public interest for the Court to address.

By failing to adequately brief issues B, C, and D, Durland has waived these issues and they should not be considered.

C. Reasonable Attorneys' Fees Should Be Awarded to San Juan County under RCW 4.84.370.

Pursuant to RAP 18.1(b), San Juan County makes this request for an award of reasonable attorneys' fees pursuant to RCW 4.84.370. The superior court upheld the County's granting of the permit following a hearing on the merits and the Court of Appeals upheld the superior court's

decision. San Juan County is a prevailing party entitled to attorneys' fees under RCW 4.84.370(2). *Durland v. San Juan County*, 182 Wn.2d 55, 79, 340 P.3d. 191 (2014).

V. CONCLUSION

Because, this land use dispute between neighbors does not present any conflicts among Washington case law or any issues of substantial public interest, the Court should deny discretionary review.

DATED this 12th day of January 2017.

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