No. 958645

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GREGORY AND JANETTE KOVSKY, husband and wife,

Petitioners,

v.

ROBERT FANFANT and MELANIE R. BISHOP, husband and wife,
and
KING COUNTY,

Respondents.

MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

I. INTRODUCTION

Since its enactment, courts have applied the 21-day statute of limitations of the Land Use Petition Act ("LUPA") in a stringent manner. At first, this strict application of the 21-day statute of limitations appeared to further LUPA's purpose to "establish[] uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. However, the unforgiving application of the appeal period has resulted in judicial precedent that is anything but "consistent, predictable, and timely." In fact, court precedent has led to an inevitable conclusion: the application of LUPA is infringing upon constitutional rights to procedural due process and notice. Under the Court of Appeals' reasoning in this case, ordinary citizens can have property rights extinguished with no notice, and then be barred from the courts because of LUPA's 21-day statute of limitations.

While this Court has avoided the trampling of due process rights without notice under LUPA in the past by resolving previous cases on other grounds, this Court can no longer ignore the problem and ought to grant review of this case to address this important issue.

II. IDENTITY AND INTEREST OF AMICI PARTIES

All of the *amici* parties are organizations dedicated to civil rights and the fair application of Washington's land use laws. All of the *amici* parties either are directly affected or represent clients that are affected by notice provisions of Washington law.

University Legal Assistance at Gonzaga University School of Law ("ULA") is a non-profit legal clinic that assists individuals and local civil advocacy groups with legal matters, administrative law, environmental law and land use. ULA has a substantial interest in how government decisions impact individuals and their rights. As a clinic, ULA serves clients that need help navigating local government and state regulations. See Mot. For Amicus Curiae Status, at 1.

Futurewise is a non-profit statewide public interest group working to promote healthy communities and cities while protecting farmland, forests, and shorelines. Futurewise focuses on the efficient management of growth in Washington and related land use laws. Futurewise works in cities and counties that may be affected by a ruling on the due process requirements of LUPA. *See* Mot. For Amicus Curiae Status, at 2.

Neighborhood Alliance of Spokane County ("The Alliance") is a nonprofit organization created for educational and charitable purposes that emphasizes government accountability, especially in land use and planning

issues. The Alliance works to support efforts of neighborhood-based groups in Spokane County and in planning consistent with the comprehensive plans and the Growth Management Act of the State of Washington. *See* Mot. For Amicus Curiae Status, at 2.

As set forth in the attached Motion, the *amici* parties have an interest in the review of this case because this decision has significant public policy implications. If this decision is left intact, the ability of the *amici* parties to represent their community interests will be impaired because their access to the courts will be impaired. Review by this court on the due process issues is critical to allowing the *amici* parties to continue to have reasonable access to the courts to address land use issues of broad community concern. The *amici* parties want to ensure that the important constitutional implications of due process are heard by this Court.

III. REASONS WHY REVIEW SHOULD BE GRANTED

a. Authority for Review

When a petition for review is filed, this Court accepts review if it falls under one of the four categories found under RAP 13.4 (b). Said categories include "(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." RAP 13.4 (b)(3-4). In this instance, Petitioners' review is warranted both as an issue of constitutional concern as well as the substantial public interest that should be determined by this Court. The *amici* parties believe the highest court in Washington ought to decide on the permissibility of a Washington law that is being applied in a manner that deprives parties of their procedural due process protections.

b. Procedural Due Process Can Only Be Guaranteed Through Effective Notice to Individuals That Are Being Deprived of a Property Interest.

The U.S. Supreme Court has maintained the same definition of due process for over a century, that "'[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citing *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). These words highlight the importance of due process in our system and demonstrate the essential element of due process: notice. When considering notice, the Court has also established two important aspects that need to be considered: flexible due process and notice reaching the intended parties.

1. Due Process – Flexible to the Situation

LUPA allows only 21 days to appeal a final land use decision to superior court. RCW 36.70C.040. This is a deadline that Washington courts have historically interpreted very strictly despite the United States Supreme Court making it clear that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances.... All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,'" *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (footnote omitted), to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 348–49.

The Sixth Circuit has explained that "the fundamental requirement of procedural due process is that an individual be given an opportunity to be heard at a meaningful time and in a meaningful manner." *Morrison v. Warren*, 375 F.3d 468, 475 (6th Cir.2004) (*citing Mathews*, 424 U.S. at 335). As a general matter, in land use cases, procedural due process is satisfied if a party is afforded notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker. *See Thomas v.*

Cohen, 304 F.3d 563, 576 & n. 4 (6th Cir.2002) (*citing Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1004 (4th Cir.1970)).

Washington courts have also acknowledged that due process is not a rigid concept that is designed to fit all situations regardless of circumstances. In a case of property takings, this Court said "'[a] procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case.'" *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 423, 511 P.2d 1002, 1006 (1973) (citing *Bell v. Burson*, 402 U.S. 535, 540 (1971)). Despite decisions recognizing that due process should not be a single rule for all situations, courts have continued to enforce the 21-day rule despite a clear history of parties failing to receive notice and being deprived of their due process rights.

2. Notice - Reaching the Intended Parties

The United States Supreme Court has established that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In addition, "there must be notice to a party of some kind, actual or constructive, to a

valid judgment affecting his rights, is admitted . . .. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether" *Windsor v. McVeigh*, 93 U.S. 274, 277–78 (1876).

Generally, "notice must be given of applications for zoning or building permits or certificates, in some public manner, or to persons who may be interested in contesting the application, or whose property rights may be adversely affected." 101A C.J.S. Zoning and Land Planning § 273. Consistent with this, Washington courts have held that a neighboring landowner should be afforded a fair opportunity to be heard. *See Gardner v. Pierce County Board of Commissioners*, 27 Wn. App. 241, 243–44, 617 P.2d 743 (1980) (court tolled the time period to appeal a land use decision when the lack of public notice deprived a neighboring landowner of a fair opportunity to be heard).

Washington courts agree with the United States Supreme Court's view of notice establishing that there needs to be consideration given to "unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *State v. Nelson*, 158 Wn.2d 699, 704, 147 P.3d 553, 555 (2006) (*citing Jones v. Flowers*, 547 U.S. 220 (2006) (establishing that notice was insufficient when two notices mailed to the address maintained in state

records were returned "unclaimed" and state took no additional steps to notify the taxpayer before selling his property)). In *Speelman v. Bellingham/Whatcom Cty. Hous. Authorities,* the Court of Appeals deemed notice, which a housing authority knew would not be received by the person intended, constitutionally insufficient. 167 Wn. App. 624, 632, 273 P.3d 1035, 1040 (2012). In that case, the housing authority was aware that the intended recipient was not receiving the notice, because they knew she no longer lived at the location where the notices were being sent. *Id.*

When reviewing both the United States Supreme Court's and Washington Court's rulings regarding due process and notice, it is clear that due process is constitutionally required where citizen's property rights are at issue and due process should not be applied without consideration of unique circumstances. Where a person is at risk of losing their protected property rights, precedent says that they deserve notice that is designed to notify them – even if that is more than what the statute requires.

c. This Court Should Accept Review of This Case to Confront LUPA's Procedural Due Process Conflict.

This case presents a prime example of the constitutional problems that have arisen from prior court decisions that have applied LUPA's 21-day statute of limitations to land use decisions even in the absent of actual or constructive notice. Quite simply, ordinary citizens' constitutionally-

protected property rights and interests are being destroyed without notice and in violation of their constitutional right to procedural due process. The *amici* parties are cognizant of LUPA's intent to provide administrative ease and certainty, but these goals cannot be fulfilled at the expense of Washington citizens' constitutional rights.

1. Significant Cases Demonstrating that LUPA's 21-Day Appeal Period Without Adequate Notice Violates Due Process.

Although many cases involving questions under LUPA have been brought before this Court, the question of LUPA's violation of procedural due process rights has yet to be addressed. Over the years, LUPA's statute of limitations has been applied in an increasingly stringent manner—to the point where constitutionally-protected procedural due process are being trampled.

The strict application of LUPA started in 2005 when the case *Habitat Watch v. Skagit County* cited a 1963 pre-LUPA decision called *Pierce v. King County*. *Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 407, 120 P.3d 56, 61 (2005).

In *Pierce,* this Court decided that even illegal actions need to abide by notice procedures. *Pierce v. King County*, 62 Wn.2d 334, 382 P.2d 628 (1963). The illegal action in question was a zoning code resolution that

constituted arbitrary and capricious "spot zoning" and was deemed void. *Id.* Since this case was pre-LUPA and dealt with a writ of certiorari, the timeliness issue fell under whether the time for commencement for this action had run. *Id.* The key difference in *Pierce*, that is being lost in the subsequent LUPA cases, is that it specified that the applicable limitations period began with "acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law. A different rule would... leave persons most detrimentally affected thereby without redress in the courts against arbitrary legislative action." *Id* at 334, 382 P.2d at 635. This Court in *Pierce* decided that even though the illegal resolution was passed in January of 1959 the time did not begin to run until almost two and a half years later in June of 1961 either at the time respondents saw the surveying activities or when the respondents applied for the building permit. *Id. Pierce* concluded that the commencement of action was timely, the resolution was illegal, and judgement was entered adverse to the improvement company. *Id* at 340-41, 382 P.2d at 638-39.

The court in *Habitat Watch* upheld the illegal actions by the county where it gave notice of the initial permit decision and the first extension, but gave no notice of the public hearing nor the second and third extensions. *Habitat,* 155 Wn.2d at 397. As a result, the petitioners in *Habitat Watch* did not receive notice until seven years after the last public hearing on the

project when actual construction began. *Id.* The court upheld that decision by incorrectly using *Piece* to justify illegal actions as also needing to be appealed within LUPA's strict 21-day appeal period. *Id.*

After *Habitat Watch*, courts have continued to tighten the application of LUPA's 21-day statute of limitations. In 2014, this Court held that the 21-day appeal period must be strictly upheld even when petitioners were not provided notice of the action until 34 days after the decision. *Durland v. San Juan County,* 182 Wn.2d 55, 340 P.3d 191 (2014). Unlike this case, this Court determined that there were no due process issues because the plaintiff did not have a constitutionally protected right in maintaining his views. *Id.* at 69, 340 P.3d at 198-99.

In 2018, the Court of Appeals in the unpublished opinion *EPIC v. King County* dismissed a claim where the notice provided incorrect information about how to appeal the permit decision by directing them to the Hearings Examiner instead of through LUPA. *End the Prison Indus. Complex ("EPIC") v. King Cty.*, No. 77212-1-I, 2018 WL 2418494, at 1 (Wash. Ct. App. May 29, 2018). Petitioners followed the instructions and appealed the land permit to the Hearing Examiner. *Id.* The Hearing Examiner dismissed the appeal. *Id.* at 2. After that dismissal, 21-days later, petitioners filed a LUPA petition. *Id.* The court dismissed the case stating that the land use decision was the initial permit, not the decision by the

Hearing Examiner. *Id.* at 7. As a result, the LUPA appeal was well past the 21-day appeal period. *Id.*

In this case, Petitioners Kovskys were not provided any form of notice of the permit application or the approval of the building permit. *Kovsky v. Fanfant*, Ct. App. No. 76142-1-I p. 2 (April 16, 2018). Unlike the facts of the *Pierce* case, Petitioners failed to receive notice through "acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law." *Pierce*, at 334, 382 P.2d at 635.

The *amici* parties assert that the *Habitat Watch* case, along with the *Pierce* decision, has been misread and misapplied to allow the lack of notice to become acceptable. The Court in *EPIC v. King County* takes this to a ridiculous level by permitting decision makers to give false information about how to appeal in order bar their claim. These unjust rulings cannot continue. This Court should adopt the test in *Pierce* and require that the 21-day LUPA timeframe to begin after "acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law." *Pierce*, at 334, 382 P.2d at 635.

Procedural due process requirements are in place so that these problems do not occur, yet the significance of due process and notice are not being applied in these situations. As the case law surrounding LUPA's

notice progresses, it chips away, more and more, of the right to notice provided by the Constitution. We need to end this injustice before it goes any further.

2. Unlike Previous LUPA Cases, This Case Presents Conflicts with the Constitutionally-Protected Right to Procedural Due Process.

Since the decision in *Habitat Watch,* courts have avoided addressing the due process issues with LUPA. However, in *Durland,* the court explained exactly what it would need before considering a due process claim. "Durland's due process claim fails because there is no mandatory language in [the code] giving rise to a protected property interest." *Durland,* at 73, 340 P.3d at 200. Unlike the *Durland* case, this case involves a recognized property interest granted by the King County Code—precisely what this Court wanted to see before deciding LUPA's compliance with procedural due process. Accordingly, the time is now ripe for this Court to rule on the permissibility of a law that is depriving notice to those with a recognized interest at stake.

d. This Court Has Authority to Declare This Law Unconstitutional and Should Grant Review.

Petitioners' case is very similar to other cases where Washington state laws have been deemed void for insufficient due process when property rights were at stake. *See Nielsen v. Washington State Dept. of*

Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013) (holding that RCW 46.20.385 was void for due process issues because it removed the possibility of appeal of a license revocation); *Van Blaricom v. Kronenberg*, 112 Wn. App. 501, 50 P.3d 266 (2002) (holding that RCW 6.25.070 violated due process clause because it allowed prejudgment attachment of property without notice or a hearing); *Watson v. Washington Preferred Life Ins. Co.*, 81 Wn.2d 403, 502 P.2d 1016 (1972) (holding RCW 23A.08.308 void for due process because not enough notice was required to be provided to shareholders that a representative would be court appointed to vote for them).

In each of these cases, courts determined that the state laws infringed on the property rights of the plaintiffs by not requiring adequate notice that their property were in danger of being taken. For example, the plaintiff in *Nielsen* objected to RCW 46.20.385 which stated that a person could get a temporary license after having it revoked, but if they choose that option they lost their ability to appeal the decision to revoke. *Nielsen*, at 50, 309 P.3d at 1224. The government argued that the statute created clarity and finality for administrative decisions, but the court decided instead that "the asserted merit of administrative finality does not constitute a sufficient government interest to justify denial of the statutorily-granted right to access courts." *Id.*

at 61, 309 P.3d at 1229. With this decision, the court made clear that due process requires access to courts to address property rights takings. *Id.*

In addition to access to appeals, Washington courts have also stated that notice is vital to ensuring procedural due process and statutes that do not require adequate notice are void stating "[i]t is fundamental that a notice to be meaningful must appraise the party to whom it is directed that his person or property is in jeopardy." *Watson,* at 408, 502 P.2d at 1020 (*citing Ware v. Phillips*, 77 Wn.2d 879, 882, 468 P.2d 444, 446 (1970)).

LUPA's strict 21-appeal period has been applied more and more stringently to the point where the constitutional due process right to effective notice is violated. This Court has the ability to require that constitutionally necessary notice is afforded to parties before LUPA's 21-day appeal period begins to run.

IV. CONCLUSION

For the reasons set forth above, ULA, Futurewise, and the Neighborhood Alliance of Spokane County respectfully requests that this Court recognize the importance of notice and accept review of this case to address the procedural due process rights as they apply to the application of the LUPA appeal period.

DATED this 16th day of July 2018.

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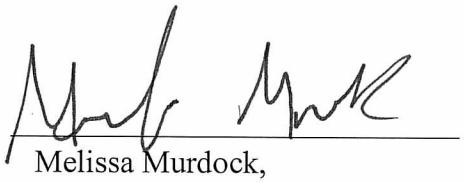

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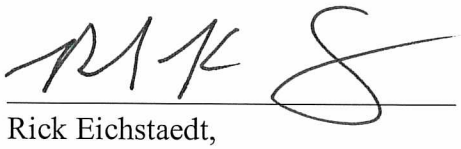

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