

89293-8

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 89745-0, ~~89756-8~~

COURT OF APPEALS NO. 69134-1-I

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MICHAEL DURLAND, et al.,

Petitioners,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONERS MICHAEL DURLAND,  
KATHLEEN FENNELL, AND DEER HARBOR BOATWORKS

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David A. Bricklin, WSBA No. 7583  
Claudia M. Newman, WSBA No. 24928  
Bryan Telegin, WSBA No. 46686  
BRICKLIN & NEWMAN, LLP  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154  
(206) 264-8600  
Attorneys for Petitioners

TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. ARGUMENT .....</b>	<b>4</b>
A. Petitioners Possess a Constitutionally Protected Property Interest in the Height, Size, and Other Limitations of the San Juan County Code .....	4
B. The SJCC Is Unconstitutional As Applied to Petitioners .....	12
C. The Supremacy Clause Precludes Application of LUPA’s Timeliness and Exhaustion Requirements to Section 1983 Claims .....	14
D. This Case is Not Moot and Petitioners Have Standing .....	17
E. The Court of Appeals’ Fee Award should Be Reversed.....	19
<b>III. CONCLUSION .....</b>	<b>20</b>

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Asche v. Bloomquist</i> , 132 Wn. App. 784, 133 P.3d 475 (2006).....	11, 12, 14
<i>Barrie v. Kitsap County</i> , 84 Wn.2d 579, 585, 527 P.2d 1377 (1974).....	8
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).....	4, 11
<i>Chelan County v. Nykriem</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	6
<i>Concerned Coupeville Citizens v. Town of Coupeville</i> , 62 Wn. App. 408, 814 P.2d 243, 245 (1991).....	12
<i>Cosmopolitan Eng'g Croup, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2006).....	19
<i>Crown Point I, LLC v. Intermountain Rural Elec. Ass'n</i> , 319 F.3d 1211 (10th Cir. 2003) .....	6, 9
<i>Felder v. Casey</i> , 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).....	15
<i>Fleurry v. Clayton</i> , 847 F.2d 1220 (7th Cir. 1988).....	6
<i>Fulilar v. City of Irwindale</i> , 760 F. Supp. 164 (D.C. Calif. 1999) .....	7
<i>Fusco v. State of Connecticut</i> , 815 F.2d 201 (2nd Cir. 1987).....	7
<i>Halsted v. Sallee</i> , 31 Wn. App. 193, 639 P.2d 877 (1982).....	13

<i>Hansen v. Friend</i> , 118 Wn.2d 476, 824 P.2d 483, 488 (1992).....	12
<i>Haywood v. Drown</i> , 556 U.S. 729, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009).....	15
<i>Hillside Cmty. Church v. Olsen</i> , 58 P.3d 1021 (Colo. 2011).....	6
<i>Howlett v. Rose</i> , 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990).....	15
<i>Hyde Park Co. v. Santa Fe City Council</i> , 226 F.3d 1207 (10th Cir. 2000).....	5, 6
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).....	10
<i>King County v. Rasmussen</i> , 299 F.3d 1077 (9th Cir. 2002).....	7
<i>Lauer v. Pierce County</i> , 173 Wn.2d 242, 267 P.3d 988 (2011).....	2
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).....	5, 17
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....	13
<i>Mercer Island Citizens for Fair Process v. Tent City 4</i> , 156 Wn. App. 366, 223 P.3d 1172 (2009).....	14
<i>Mission Springs, Inc. v. City of Spokane</i> , 134 Wn.2d 947, 954 P.2d 250 (1998).....	5
<i>Monroe v. Pape</i> , 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).....	14
<i>Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.</i> , 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).....	5

<i>National Railroad Passenger Corp v. Atchinson Topeka &amp; Santa Fe Railway Co.</i> , 470 U.S. 471, 105 S.Ct. 1441 (1985).....	13
<i>Nickum v. City of Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172 (2009).....	14
<i>Overhulse Neighborhood Ass'n v. Thurston County</i> , 94 Wn. App. 593, 972 P.2d 470 (1999).....	19-20
<i>Owens v. Okure</i> , 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).....	15
<i>Parks v. Watson</i> , 716 F.2d 646 (9th Cir. 1983) .....	5
<i>Patsy v. Bd. of Regents of Fla.</i> , 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).....	15
<i>Penn Cent. Transp. Co. v. City of New York</i> 438 U.S. 104, 98 S.Ct. 2646, L.Ed.2d 631 (1978).....	10
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922).....	10, 11
<i>Southview Associates, Ltd v. Bongartz</i> , 980 F.2d 84 (2nd Cir. 1992).....	6
<i>State ex rel. Macri v. City of Bremerton</i> , 8 Wn.2d 93, 111 P.2d 612 (1941).....	19
<i>Testa v. Katt</i> , 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).....	15
<i>Wedges/Ledges of CA, Inc. v. City of Phoenix</i> , 24 F.3d 56 (9th Cir. 1994).....	5, 6
<i>Wilson v. Garcia</i> , 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).....	15

Federal Statutes and Regulations Page

42 U.S.C. § 1983 .....3, 4, 7, 14, 15, 16

State Statutes and Regulations Page

RCW 4.84.370 .....19

RCW 4.84.370(1).....20

RCW 36.70B.140(2) .....8

RCW 36.70C .....2, 3

County Regulations Page

SJCC 18.50.330.B.15 .....6

SJCC 18.50.330.E.2.a .....6

SJCC 18.50.330(14).....7

SJCC 18.80.020 .....8

SJCC 18.80.110.G.....1, 8

SJCC 18.100.050 .....7

Court Rules Page

RAP 2.5(a) .....12

## I. INTRODUCTION

This case is a companion case to *Durland et al. v. San Juan County et al.*, Supreme Court No. 89293-8 (hereinafter referred to as “*Durland P*”). The facts of both cases arise from San Juan County’s issuance of an illegal building permit on November 11, 2011, to Mr. Durland’s and Ms. Fennell’s neighbors, Wes Heinmiller and Alan Stameisen. *See* Pet. for Review at 2–3. Together, the cases raise fundamental issues of due process, fair play, and access to the courts in the land use context. The decisions below in the two cases have completely denied petitioners their right to vindicate their interests in court and to challenge an illegal permit.

As discussed below and in our Petition for Review, the permit will severely impact Mr. Durland’s and Ms. Fennell’s use and enjoyment of their property. The County issued the permit in violation of several mandatory height, size, and other limitations in the San Juan County Code (the “SJCC”). *Id.* at 5. Most egregious, the subject of the permit (a second-story addition and “entertainment area” to an illegal residential garage) should not have been allowed without first obtaining a shoreline conditional use permit from San Juan County. *Id.* *See also* SJCC 18.80.110.G. Had the County observed that requirement, it would have provided public notice of the decision and Mr. Durland and Ms. Fennell

would have been able to participate in the public decision-making process.

The need for both lawsuits would have been obviated.

But the County did not follow its own notice requirements or require a shoreline conditional use permit. Mr. Durland and Ms. Fennell were given no prior notice of the building permit and, at every turn, they have been denied their right to contest it.

In *Durland I*, they were denied their right to contest the permit in a direct challenge under Washington's Land Use Petition Act ("LUPA"), chapter 36.70C RCW. In this case, they were denied their right to oppose the permit by the County's hearing examiner, who dismissed their appeal for failure to comply with San Juan County's 21-day limitations period for administrative appeals. *See* CP 13–15.

Unfortunately for Mr. Durland, the County did not choose to notify him of the permit's existence until after the appeal window closed (his numerous requests for information notwithstanding). *See* CP 83–87. The County has also not seen fit not to rescind the illegal permit, as other counties have done upon learning of their mistakes. *See Lauer v. Pierce County*, 173 Wn.2d 242, 250, 267 P.3d 988 (2011) (discussing Pierce County's suspension of a building permit after learning that it would encroach upon the shoreline).

Following the decision of the County's hearing examiner to deny review of the permit, Mr. Durland and Ms. Fennell filed this lawsuit under 42 U.S.C. § 1983 ("Section 1983"). Petitioners' Section 1983 claim is an as-applied challenge to the SJCC for precluding an opportunity to be heard without first providing adequate notice as required by the federal Due Process Clause. *See* Pet. for Review at 7; CP 11. The Section 1983 claim also challenges the hearing examiner's dismissal as a denial of petitioners' due process right to be heard in opposition to the permit. *See* CP 11. The primary remedy sought in this case (as in any procedural due process case) is a remand to the local jurisdiction so that Mr. Durland and Ms. Fennell may be heard in opposition to the illegal permit.<sup>1</sup> Petitioners also seek damages.

The Court of Appeals ruled that the Section 1983 claim may not go forward because Mr. Durland and Ms. Fennell lack a "property interest" in the height, size, and other limitations in the SJCC. *See* Pet. for Review, App. A at 8. In doing so, the court failed to articulate any test for determining the existence of a property interest under the federal Due

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<sup>1</sup> Petitioners' Land Use Petition and Complaint also includes an alternative claim under Washington's Land Use Petition Act, chapter 36.70C RCW. *See* CP 10. As discussed in our Petition for Review, however, both the Section 1983 claim and the LUPA claim allege a deprivation of procedural due process. *See* Pet. for Review at 7, 8 n. 4. Thus, we intend our discussion about property interests below to apply equally to both claims despite that the Court of Appeals did not expressly rule on our LUPA claim below.

Process Clause. *See id.* at 5–7. It also failed to discuss any of the numerous cases cited by petitioners holding that, in the land use context, a land owner has a property interest in the granting or denial of a nondiscretionary permit decision. *See id.*

Below, we discuss the basis for petitioners’ property interest in the height, size, and other development limitations of the SJCC. We address the Court’s fee award to respondent Wes Heinmiller. And, because respondents raised the issue in complete disregard of binding precedent from the United States Supreme Court, we address the timeliness and exhaustion requirements of Washington’s Land Use Petition Act (“LUPA”) as applied to petitioners’ Section 1983 claim.

## II. ARGUMENT

### A. Petitioners Possess a Constitutionally Protected Property Interest in the Height, Size, and Other Limitations of the San Juan County Code.

The core issue in this appeal is whether petitioners possess a property interest in the mandatory height, size, and other limitations in the San Juan County Code. As discussed below, they do.

Under the Due Process Clause, property rights are created by state and local law and the hallmark of “property” is a “reasonable expectation of entitlement” to a particular benefit. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962, n. 15, 954 P.2d 250 (1998), *citing Bd. of*

*Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Under this standard, the so-called “benefit” need not be traditional or even tangible in nature. It could be literally anything. *See 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’”), quoting *Nat’l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949). “Property,” under the due process clause, is not limited to “ownership” or “possessory” interests in land, as the County implies. *See County Answer* at 12.

In turn, to determine whether a statute or local ordinance gives rise to a reasonable expectation of entitlement, a court must look to the language of the statute and ask whether it is “couched in mandatory terms.” *Wedges/Ledges of CA, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). *See also, e.g., Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). A property interest may also be created by “procedural requirements” that impose “‘articulable standard[s]’” on the decision-making process. *Wedges/Ledges*, 24 F.3d at 64, quoting *Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983). For brevity, we call this the

“mandatory terms” test. It has been adopted by a number of federal and state courts.<sup>2</sup>

The mandatory terms test reflects the unremarkable truism that when a statute or local ordinance is couched in mandatory terms, it will give rise to a “reasonable expectation of entitlement” to its benefits. Not surprisingly, neither San Juan County nor respondents Wes Heinmiller and Alan Stameisen dispute that the mandatory terms test states the applicable standard for determining the existence of a property interest.

It is also undisputed that the provisions of the SJCC impose mandatory restrictions on development, as well as “articulable standards” that constrain the County’s authority. As we discussed in our Petition for Review and in our briefing below, the provisions at issue here are clearly mandatory in nature.<sup>3</sup> (One such provision even protects “significant

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<sup>2</sup> See *Wedge/Ledges*, 24 F.3d at 62; *Hyde Park Co.*, 226 F.3d at 62; *Crown Point I, LLC v. Intermountain Rural Elec. Ass’n*, 319 F.3d 1211 (10th Cir. 2003); *Hillside Cmty. Church v. Olsen*, 58 P.3d 1021 (Colo. 2011); *Southview Associates, Ltd v. Bongartz*, 980 F.2d 84, 101 (2nd Cir. 1992); *Fleurry v. Clayton*, 847 F.2d 1220 (7th Cir. 1988) (holding that “a right to a particular decision reached by applying rules to facts, is ‘property’”).

<sup>3</sup> See, e.g., Pet. for Review at 13–14 (discussing the operation of SJCC 18.50.330.B.15, concerning the height limitations for residential development, and SJCC 18.50.330.E.2.a, concerning size limitations for “normal appurtenances”). See also Appellant’s Opening Brief at 8 (Nov. 21, 2012); Appellant’s Motion for Reconsideration at 5–6 (Oct. 21, 2013); Statement of Additional Authorities (July 18, 2013) (listing additional mandatory provisions of the SJCC). Indeed, the very nature of the land use decision at issue here, a building permit, indicates that the provisions governing its issuance are mandatory in nature. Washington courts have long recognized that the granting or denial of a building permit is a ministerial act, not a discretionary one. See *Chelan County v. Nykriem*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002).

visual impacts,”<sup>4</sup> one of the very harms that petitioners assert.) Moreover, a violation of these code provisions is deemed to be a “public nuisance” as a matter of law, thus giving rise to a traditional, common-law right that it be abated. *See* SJCC 18.100.050 (providing that any violation of Title 18 of the SJCC is “determined to be detrimental to the public health, safety and welfare, and [is a] public nuisance”). As such, petitioners have a reasonable expectation of entitlement to the benefits of the SJCC, including the height, size, and other substantive limitations that the County violated when it issued the illegal building permit.

Instead of disputing the validity of the mandatory terms test, San Juan County seeks, first, to confuse the issue. Contrary to the County’s false characterization of our claim, we are not arguing, and have never argued, that the source of petitioners’ property interest is the County’s internal “limitations period” for administrative appeals or the adjacency of land alone.<sup>5</sup> As we have made clear throughout these proceedings, and

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<sup>4</sup> *See* SJCC 18.50.330(14).

<sup>5</sup> *See* County Answer at 8 (asserting that “Durland argues that a property interest arises from his ownership of property near the Heinmiller property.”); *id.* at 11 (arguing that petitioners may not base their Section 1983 claim “on the short limitations period for appealing permit decisions”). The County also relies substantially on a number of cases that appear to have no relevance other than to create a straw man of our arguments. These include *King County v. Rasmussen*, 299 F.3d 1077 (9th Cir. 2002) (discussing a plaintiff who misread his own deed), *Fusco v. State of Connecticut*, 815 F.2d 201 (2nd Cir. 1987) (rejecting asserted property interest in hearing procedures), and *Fulilar v. City of Irwindale*, 760 F. Supp. 164 (D.C. Calif. 1999) (rejecting property interest in the value of land). *See also* Reply Br. at 4–6 (discussing cases).

consistent with the mandatory terms test, petitioners assert a property interest in the substantive provisions of the SJCC.

The County also chides us for not identifying a provision of the SJCC that requires notice.<sup>6</sup> Again, this argument misses the mark. Whether or not the county's code requires notice and an opportunity to be heard before property rights are impacted, due process does. (Indeed, we claim that the SJCC is unconstitutional, as applied, precisely because it does *not* require notice, individualized or otherwise, for building permits that impair a neighbor's property rights.) But regardless, the SJCC *does* require public notice for substantial development in the shoreline. *See* Pet. for Review at 5. *See also* SJCC 18.80.110.G, -020 (Table 8.1, listing notice requirements). The County simply chose not to follow that requirement. Under similar circumstances, this Court has held that failure to provide required notice states a due process violation. *See Barrie v. Kitsap County*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1974).<sup>7</sup>

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<sup>6</sup> *See* County Answer at 10 (arguing that “as Durland concedes, the San Juan County Code does not require that notice of residential building permits be issued to neighbors”).

<sup>7</sup> As a corollary to the County's argument that we failed to identify a notice requirement in the SJCC, it also argues that the Legislature has specifically authorized the withholding of notice for building permits. *See* County Answer at 10, *citing* RCW 36.70B.140(2). But even if that provision were to apply to this case (we note that the County provides no citation to an ordinance or resolution specifically “excluding” building permits from otherwise-applicable notice provisions) the State of Washington is powerless to carve out exceptions to federal due process requirements. Thus, the provision is irrelevant.

Next, the County argues that while the mandatory terms test states the applicable law, it does not apply in this case because “it addresses whether a *permit applicant* possesses a property interest in approval of the permit,” not whether anyone else possesses a property interest, too. *See* County Answer at 10 (emphasis in original).

The County’s argument was rejected by the 10th Circuit in *Crown Point I, LLC v. Intermountain Rural Electric Association*, 319 F.3d 1211 (10th Cir. 2003). In that case, the court stated 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 court also rejected the same argument that the County makes here; that the test may only be applied in favor of permit applicants.

Plaintiff attempts to distinguish *Hyde Park* [a case adopting the mandatory terms test] 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.

The reasoning in *Crown Point I* is especially relevant here, in the land use context, where it has long been held that the very purpose of zoning and other development regulations is to establish an “average reciprocity of advantage.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922). In other words, “[w]hile each of us is burdened somewhat by such restrictions, *we, in turn, benefit greatly from the restrictions that are placed on others.*” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (emphasis added). These reciprocal benefits are not merely abstract, societal goods. They are personal. ““All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole *but also for the common benefit of one another.*”” *Penn Cent. Transp. Co. v. City of New York* 438 U.S. 104, 140, 98 S.Ct. 2646, L.Ed.2d 631 (1978) (Rehnquist, J. dissenting). Such laws do not, as the County asserts, benefit only the select few who choose to comply with them. *See* County Answer at 11.

Applying these principles here, the mandatory height, size, and other limitations in the SJCC apply not only to respondents Wes Heinmiller and Alan Stameisen, but also to their neighbors, Michael Durland and Kathleen Fennell. Further, members of the community

doubtless understand that, just as they confer benefits on their neighbors by their own compliance, they receive reciprocal benefits from their neighbors' compliance, too. This common understanding is not a "unilateral" or "subjective" expectation, as the County describes it. *See* County Br. at 7. It is the very underpinning of the law. *See Pennsylvania Coal Co., supra*. Thus, it is a proper basis for a property interest under the Due Process Clause. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (property interests "are created and their dimensions are defined by existing rules *or understandings* that stem from an independent source such as state law") (emphasis added).

In all, the substantive provisions of the SJCC impose mandatory limitations on development. Like many such laws, they establish an "average reciprocity of advantage" and petitioners have a property interest in the reciprocal benefits that they bestow.<sup>8</sup>

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<sup>8</sup> We also note that the mandatory terms test, as applied to one who *opposes* a permit, is consistent with the Court of Appeals decision in *Asche v. Bloomquist*, 132 Wn. App. 784, 405, 133 P.3d 475 (2006). In *Asche*, the court held that land owners had a property interest in preventing their neighbors from exceeding mandatory height limits in the local code. *See Asche*, 132 Wn. App. at 798. In so holding, the court focused on the mandatory nature of the 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). Below, the Court of Appeals distinguished *Asche* on the ground that the limitations at issue there specifically identified neighboring land owners as beneficiaries of the law. *See* Pet. for Review, App. A at 6. However, this added burden is unnecessary and illogical in light of the "average reciprocity of advantage" that is presumed to underpin all such laws.

B. The SJCC Is Unconstitutional As Applied to Petitioners.

In addition to disputing that petitioners have a property interest, San Juan County raises the curious argument that, even if they do, the SJCC is not unconstitutional “beyond a reasonable doubt.” *See* County Answer at 12–14. As we noted below, the County raised this argument for the first time on appeal. *See* Reply Br. at 10. It should not be considered here. 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).

Nevertheless, the County misunderstands the applicable standard for claims based on procedural due process. Once a property interest is found, a court must apply a four-part balancing test to determine the level of process that is due. The balancing test requires the court to 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 v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The County does not discuss this test. Instead, it cites a single case for the proposition that the “beyond a reasonable doubt” standard applies to procedural due process claims. But that case dealt with *substantive* due

process, not *procedural* due process. See County Answer at 13, citing *National Railroad Passenger Corp v. Atchinson Topeka & Santa Fe Railway Co.*, 470 U.S. 471, 472, 105 S.Ct. 1441 (1985) (discussing whether Railroad Passenger Act of 1970 “unconstitutionally impairs the private contractual rights of the railroads”).

Nevertheless, the SJCC is unconstitutional under any standard. Due process requires, at the very least, that *some* form of notice be given before property rights are impaired. See, e.g., *Halsted v. Sallee*, 31 Wn. App. 193, 197, 639 P.2d 877 (1982) (Notice must be given “at a meaningful time and in a meaningful manner”). But the SJCC requires no notice for the issuance of a building permit and none was given here. (Indeed, the County even relies on the SJCC to justify the lack of notice. See County Answer at 10, 13.) Because no notice was given, the SJCC is patently unconstitutional as applied to petitioners.

C. The Supremacy Clause Precludes Application of LUPA’s Timeliness and Exhaustion Requirements to Section 1983 Claims.

In our Petition for Review, we raised the issue of whether any of LUPA’s exhaustion and timeliness requirements may legally preclude a Section 1983 claim. See Pet. for Review at 16. We raised the issue because Washington courts have used these procedural hurdles to deny Section 1983 claimants their day in court (including by application of LUPA’s

short, 21-day statute of limitations). *See Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 366, 404–05, 223 P.3d 1172 (2009). *See also* County Answer at 18, *citing Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 383, 223 P.3d 1172 (2009) and *Asche v. Bloomquist*, 132 Wn. App. 784, 405, 133 P.3d 475 (2006). Now, this Court has the opportunity to correct this miscarriage of justice and manifest violation of federal law.

Our briefing below and our Petition for Review demonstrate that LUPA’s procedural requirements cannot apply in the context of Section 1983. *See* Opening Br. at 25–30; Reply Br. at 15–22; Pet. for Review at 16–18. The United States Supreme Court has made it abundantly clear that the remedy provided by Section 1983 is “supplementary” to any available state law remedy. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Thus, Section 1983 claims are immune to state remedy exhaustion requirements like those found in LUPA.<sup>9</sup> They are immune to state limitation periods (with the sole exception of the forum

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<sup>9</sup> *See, e.g., Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (rejecting state notice-of-claim statute as applied to Section 1983 claims); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (“we have on numerous occasions rejected the argument that a §1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies”) (collecting cases).

state's residual limitations period for tort claims).<sup>10</sup> And the states are forbidden from singling out any class of Section 1983 claims for increased procedural hurdles (even when the hurdles are nominally termed "jurisdictional").<sup>11</sup> Here, applying any of LUPA's exhaustion and timeliness requirements to petitioners' Section 1983 claim would violate these clear principles of law.

Surprisingly, the County defends its position that LUPA's exhaustion and timeliness requirements may legally be applied to bar petitioners' Section 1983 claims. Yet, it fails to discuss a single authority cited above or in our briefing below. *See generally* County Answer at 14–19. Instead, it cites a slew of inapposite Washington cases (which also do not address these authorities). *See id.* at 14–17. It also argues that while LUPA's procedural hurdles do not apply *directly* to Section 1983 claims, noncompliance with them will nevertheless result in the underlying

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<sup>10</sup> *See 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).

<sup>11</sup> *Haywood v. Drown*, 556 U.S. 729, 735, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009) (striking down state law that funneled claims arising in the prison context, including Section 1983 claims, into a special forum with increased procedural hurdles; and holding that "[h]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, [a state] is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy"); *Id.* at 740 ("We have never treated a State's invocation of 'jurisdiction' as a trump that ends the Supremacy Clause inquiry"); *Howlett v. Rose*, 496 U.S. 356, 381, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) (rejecting state-law defense as applied to preclude Section 1983 claim). *See also Testa v. Katt*, 330 U.S. 386, 392, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (State courts of general jurisdiction may not refuse to hear federal causes of action).

decision being “deemed” valid and, therefore, immune to any mode of attack.<sup>12</sup>

The County’s argument proves too much. Were the state capable of denying citizens their due process rights through the simple passage of LUPA, it could do the same in any other area of the law. But could the state shield police beatings from challenge, or termination without notice, simply by erecting impossible procedural hurdles? The United States Supreme Court has put the rationale for rejecting this wrongheaded approach bluntly:

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. *Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest.*

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431–32, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (emphasis added; quotations and brackets omitted).

Adopting the County’s misguided theory would allow the state to abolish literally any state-created property interest simply by erecting impossible obstacles to its vindication. The state is without power to do so.

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<sup>12</sup> See County Answer at 18 (arguing that “[t]he actual issue is not the reduction of the limitations period for a Section 1983 claim, but rather the decision . . . must be deemed valid absent a timely LUPA petition and therefore the appropriateness of the decision may not be relitigated in a collateral damages action”).

The procedural requirements of LUPA cannot deprive petitioners or anyone else of their state-created (but federally-secured) rights.

D. This Case is Not Moot and Petitioners Have Standing.

This Court should reject San Juan County's bald assertions that this case is moot and that petitioners lack standing. *See* County Answer at 19–20. As we noted below, these issues were raised for the first time on appeal and should not be considered. *See* Reply Br. at 22–23; RAP 2.5(a).

Nevertheless, the County's arguments about mootness and standing betray a fundamental misunderstanding about the nature of this case. According to the County, this Court cannot grant effective relief because Mr. Durland and Ms. Fennell are not challenging — *in this forum* — the substantive validity of the building permit. *See* County Answer at 19 (asserting that “Durland has repeatedly advised the Court that he is not challenging the permit issued to Heinmiller”).

Petitioners are *not* challenging the substantive validity of the permit in this forum. But they *are* challenging the County's failure to provide notice and a local venue to challenge the permit. That is the crux of due process and that is what petitioners were denied below. Petitioners will, of course, challenge the validity of the permit later if they are granted their requested relief — a remand to the County to rule on the merits of

their administrative appeal. *See* CP 12. They merely request the opportunity to present their case and be heard.<sup>13</sup>

Below, petitioners acknowledged that they were not, in this case and in response to the County's narrow motion for summary judgment, asking this Court to rule on the substantive validity of the permit. *See* Opening Br. at 3, 31.<sup>14</sup> But they certainly did not say that they were waiving their rights for all time. This Court can provide effective relief by remanding the matter to the County and thereby providing Mr. Durland and Ms. Fennell their long-denied opportunity to be heard.

E. The Court of Appeals' Fee Award should Be Reversed.

Finally, this Court should reverse the fee award to respondent Wes Heinmiller, which the Court of Appeals made under the alleged authority of RCW 4.84.370.

As we discussed in our Petition for Review and in our briefing in *Durland I*, RCW 4.84.370 is an exception to the American rule that

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<sup>13</sup> Had the County wished to put petitioners to task on the illegalities of the permit, it could have moved for summary judgment on that issue. But it did not. Instead, the County's motion raised a single issue relating to the substance of petitioners' Section 1983 claim — that they do not *possess* a property interest. *See* CP 119–122. The County could have alleged, in the alternative, that even if petitioners do have a property interest they were not *deprived* of it. *See id.* That would have put the issue squarely before the court, and it is inequitable at best to foist that burden on us now.

<sup>14</sup> *See also* Pet. for Review, App. C at 2, Order Granting Respondents Heinmiller and Stameisen's Motion for Reconsideration and Modifying Opinion (observing that “[a]s we already noted, there was no substantive attack against the permit. Rather, this was a claim that the procedures in this case deprived Durland of constitutionally protected rights”).

governs the awarding of attorney's fees. The rule provides that "[i]n the absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney's fee as part of the costs of litigation." *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941) (emphasis added). Applying this rule, this Court has held that it will construe fee-shifting statutes narrowly. It will ask, for each statute, whether it contains "a clear expression of intent from the legislature" to award fees under the unique circumstances of the case. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006).

Here, RCW 4.84.370 does not contain a clear expression from the legislature to award fees in this case. For example, there was no "prevailing party or substantially prevailing party" before the hearing examiner, as required by RCW 4.84.370(a). Instead, the examiner dismissed the case on procedural grounds. *See, e.g., Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999) (holding that there is no prevailing party under RCW 4.84.370 when the case fails to reach the merits).

Moreover, under the plain terms of the statute, fees may be awarded only on appeal from a "decision by a county, city, or town to issue, condition, or deny a development permit" or "similar land use

approval or decision.” RCW 4.84.370(1). But petitioners have not appealed from a decision by a county, city, or town to issue, condition, or deny *any* type of permit. (Indeed, they are here in court only because they were denied the opportunity to do so.) As the Court of Appeals admitted below, the subject of this appeal does not even concern the substantive legality of the permit. *See* Pet. for Review, App. C at 2. Under the circumstances of this case, the legislature has not manifested a clear expression of intent that attorney’s fees be awarded. The Court of Appeals was “without power” to make an award.

### III. CONCLUSION

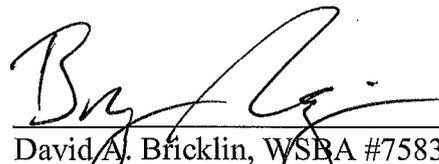
For the reasons above, petitioners Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks respectfully request that this Court reverse the Court of Appeals and allow this Section 1983 claim and Land Use Petition to go forward.

Dated this 28th day of February, 2014.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



David A. Bricklin, WSBA #7583

Claudia M. Newman, WSBA #24928

Bryan Telegin, WSBA # 46686

Attorneys for Petitioners