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STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89293-8

MICHAEL DURLAND, et al,

Appellants,

v.

SAN JUAN COUNTY, et al,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT SAN JUAN COUNTY

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5211878 (W.D. Wash. 2013)

I. BACKGROUND

Michael Durland and Kathleen Fennel (collectively “Durland”) own real property in Deer Harbor on Orcas Island. CP 74. Wes Heinmiller and Alan Stameisen (collectively “Heinmiller”) own the property next door. CP 74. The two property owners have had a number of disputes which have involved San Juan County (“the County”).¹ The dispute now before the Court stems from the issuance on November 1, 2011, of a building permit to Heinmiller for a remodel of an existing garage. CP 38.

Durland sought judicial review of the building permit and filed a Petition under the Land Use Petition Act (LUPA) in Skagit County Superior Court on December 19, 2011 – 44 days after the building permit was issued. CP 33. Durland alleged that the building permit was issued by mistake and asked the court to declare the building permit void. CP 36-37. The County brought a motion pursuant to CR 12(b) arguing that the petition was time barred and that Durland had failed to exhaust his administrative remedies. CP 4-14. Skagit County Superior Court Judge John Meyer granted the CR 12(b) motion and dismissed the petition. CP 156-57. Durland appealed.

¹ This case is the second of three Court of Appeals decisions. See *Durland v. San Juan County*, 174 Wn. App. 1, 298 P.3d 757 (2012) (*Durland I*) (concerning an outbuilding on the Heinmiller property and a County compliance plan with Heinmiller) and *Durland v. San Juan County*, (unpublished opinion) 2013 WL 5503681 (2013) (*Durland III*) (an appeal of the same permit at issue in this case, in which Durland brought a 42 U.S.C. §1983 claim for damages alleging denial of due process).

Judge Dwyer of Division One of the Court of Appeals, writing for a unanimous court, affirmed the dismissal on jurisdictional grounds, holding that since the appealed decision was not a “land use decision,” LUPA did not grant authority to the superior court to review the decision. *Durland v. San Juan County*, 175 Wn. App. 316, 321-22, 305 P.3d 246 (2013) (*Durland II*).

II. RESTATEMENT OF ISSUES

1. Whether a neighbor who fails to pursue administrative review of a building permit, as authorized by local ordinance, may instead invoke the superior court’s jurisdiction under LUPA?
2. Whether a landowner possesses a constitutionally protected “property interest” in receiving notice of the issuance of a building permit for neighboring property owned by another?

III. ARGUMENT

Durland filed a LUPA petition in superior court without seeking administrative review from the local jurisdiction. Consequently, the LUPA petition was appropriately dismissed for failure to exhaust administrative remedies. Alternatively, the petition fails because it was not timely filed.

Durland asserts that his due process rights have been compromised based on a public records request and an assertion that Durland was entitled to notice of a building permit for neighboring property. However, there is no right to notice of a building permit in Washington State, and

Durland has no property interest that would give rise to a due process claim. Furthermore the public records requests discussed by Durland are not relevant to the LUPA issues presented in this case.

A. LUPA

This case was properly dismissed on the grounds that the petitioners failed to exhaust administrative remedies as required by LUPA. The matter also fails under LUPA because the petition was not timely filed.

LUPA is the exclusive method of appealing land use decisions. RCW 36.70C.030. LUPA is the codification of the strong and long-recognized public policy of administrative finality in land use decisions. *James v. County of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005). The purpose and policy of definite time limits is to allow property owners to proceed with assurance in developing their property. *Id.* at 589. To meet the policy of finality, the legislature has directed that a land use petition is barred unless it is filed “within twenty-one days of the issuance of the land use decision.” RCW 36.70C.040(3).

Before LUPA, a line of Washington cases held that an improperly approved building permit is void and may be rescinded by the agency which erroneously issued it. Those cases were based upon holdings that a building permit issued in violation of law or under mistake of fact conferred no vested right in the applicant.

Chelan County v. Nykreim, 146 Wn.2d 904, 920, 52 P.3d 1 (2002) (internal citations omitted). Durland argues that the building permit at issue is improper and seeks to apply pre-LUPA principles; however, in 1995 the legislature adopted LUPA in order to provide consistent, predictable, and timely judicial review to landowners, builders and neighbors. RCW 36.70C.010.

LUPA's 21 day limitation period begins to run on the date a land use decision is issued. RCW 36.70C.040(3). As observed by this Court in *Habitat Watch*, “[t]he statute designates the exact date a land use decision is ‘issued,’ based on whether the decision is written, made by ordinance or resolution, or in some other fashion.” 155 Wn.2d 397, 408, 120 P.3d 56 (2005); RCW 36.70C.040(4)(a). A similar limitation period for administrative appeals in San Juan County begins “on the date of the written decision.” SJCC 18.80.140(D)(1) (attached as Appendix A).

A principle that guides court decisions is that land owners should be afforded certainty in government decisions concerning development of their property. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954 P.2d 250 (1998) (applicant for a permit is entitled to its immediate issuance upon satisfaction of relevant ordinance criteria and SEPA). This Court has repeatedly held that a permit decision is final unless it is timely appealed. *Wenatchee Sportsmen Ass'n v. Chelan*

County, 141 Wn.2d 169, 4 P.3d 123 (2000); *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 26 P.3d 241 (2001); *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). The principle of *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009). The statutes codifying these principles of finality require dismissal of this LUPA petition.

1. The requirement to exhaust administrative remedies is found in two places in LUPA and is a jurisdictional prerequisite to maintaining an action.

LUPA requires that challengers “exhaust the administrative remedies that were available to them.” *Lauer v. Pierce County*, 173 Wn.2d 242, 255, 267 P.3d 988 (2011). There are two provisions in LUPA that require exhaustion of administrative remedies. The first is found in RCW 36.70C.020(2)(a) which defines “land use decision” as:

a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on [development permits]...

When statutory language is plain and unambiguous, the statute’s meaning must be derived from the wording of the statute itself. *Post v.*

City of Tacoma, 167 Wn.2d 300, 310, 217 P.3d 1179 (2009). San Juan County Code 18.80.140(B)(11) (attached as Appendix A) provides that the San Juan County Hearing Examiner has authority to conduct open-record appeal hearings of development permits issued or approved, and to affirm, reverse, modify, or remand the decision that is on appeal.² Thus, in San Juan County, the Hearing Examiner is the body or officer with the “highest level of authority” to grant or deny building permits. For this reason, the Court of Appeals correctly affirmed the dismissal of Durland’s land use petition on the grounds that the building permit was not a “land use decision” for purposes of LUPA. *Durland II*, 175 Wn. App. at 320. This is consistent with the plain and unambiguous language of RCW 36.70C.020(2)(a).

The Court of Appeals properly followed its decision in *Ward v. Bd. of Skagit County Comm’rs*, 86 Wn. App. 266, 936 P.2d 42 (1997). The *Ward* court confirmed that LUPA establishes a prerequisite of exhaustion of administrative remedies before a decision qualifies for judicial review:

[i]n order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, by necessity, exhaust his or her administrative remedies. Thus, exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as a ‘land use decision’ subject to judicial review under LUPA.

² “Development permits” include building permits and other ministerial permits per SJCC 18.20.040 (attached as Appendix B).

Id. at 270-271. This Court approvingly cited the decision in *Ward* as authority in *Chelan County v. Nykreim*, 146 Wn.2d 904, 938, 52 P.3d 1 (2002) and *Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology*, 162 Wn.2d 825, 857, 175 P.3d 1050 (2008).

The exhaustion rule is also found in LUPA's section on standing, which provides that for an aggrieved person to have standing the petitioner must have "exhausted his or her administrative remedies to the extent required by law." RCW 36.70C.060(2)(d). Although the Court of Appeals did not rule on this ground,³ it provides an alternative basis for dismissal.

2. Durland did not exhaust administrative remedies after the building permit was issued.

"The rationale for the exhaustion requirement is that the administrative officer or agency may possess special expertise necessary to decide the issue, and that an administrative remedy may obviate the need for judicial review." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 633, 733 P.2d 182 (1987). This Court has affirmed that the exhaustion of remedies requires citizens to raise issues to the local government and encourages parties to participate at that level. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997).

³ Having found the superior court lacked jurisdiction to hear the LUPA petition, the Court of Appeals did not address standing. *Durland II*, at 325.

Durland asks to be excused from exhaustion of administrative remedies and contends the requirement is flexible, “not absolute,” and subject to a judicial evaluation of desirability for administrative review, citing two pre-LUPA cases: *Gardner v. Pierce County Bd. of Commissioners*, 27 Wn. App. 241, 243-44, 617 P.2d 743 (1980) (preliminary plat requiring notice) and *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797-98, 732 P.2d 1013 (1987) (park fees imposed on developer). (Petition pp 12-13).

In *Gardner*, the plaintiff was entitled to notice of the county’s action and did not receive it, whereas in this case, Durland was not entitled to notice. 27 Wn. App. at 243; SJCC 18.80.010 (attached as Appendix C). *Prisk* is not based upon excusing the failure to timely seek administrative review; rather it involved the limited power of the administrative tribunal to consider a facial constitutional challenge to the validity of an ordinance imposing park impact fees on a developer. “Where the issue raised is the constitutionality of the very law sought to be enforced, exhaustion is unnecessary.” *Prisk*, at 798. *Prisk* is distinguishable because it involved a facial challenge to an ordinance and cannot be read as an exception to the requirement to exhaust administrative remedies in a LUPA lawsuit. Here there is not a facial challenge to the exhaustion requirement. See *Harrington v. Spokane County*, 128 Wn. App. 202, 210, 114 P.3d 1233

(2005) (distinguishing *Prisk* and holding that an “as applied” challenge requires administrative review).

3. Exhaustion is not excused due to lack of notice.

Durland also contends that an exception to the rule requiring exhaustion of administrative remedies is found in the requirement for notice whenever constitutional “due process rights” of notice and opportunity to be heard are implicated. Durland argues that even in the absence of a statute or ordinance requiring notice, administrative review is not triggered until notice is provided. (Petition pp. 12-13). Durland is asking this Court to write into LUPA a judicially-crafted exception to the procedural process of LUPA that would allow a party to elect to forego administrative remedies in favor of judicial remedies. The Court, however, must give the meaning set forth by the legislature, even when the results may seem unduly harsh. *Nykreim*, 146 Wn.2d at 926.

The cases and statutory provisions relied upon by Durland for an exception to the exhaustion requirement are not applicable. Durland relies on *Barrie v. Kitsap County*, in which this Court examined the text of a notice required by statute for an area wide rezone and concluded that the description of the action to be taken in the notice was deficient. 84 Wn.2d 579, 585-86, 527 P.2d 1377 (1974) Contrary to Durland’s assertion, the holding in *Barrie* is not that local governments must notify landowners

before making decisions that negatively affect the character and use of adjacent properties (Petition, p. 12), but rather that the required notice provided in *that case* was defective. *Id.* Durland also relies on footnote 6 of *Larsen v. Town of Colton*, which is pure dicta. 94 Wn. App. 383, 391, fn. 6, 973 P.2d 1066 (1999).

Durland looks to the phrase “to the extent required by law” in the standing provision, RCW 36.70C.060(2), as an embodiment of constitutional principles of due process. The problem with this is that all statutes are presumed to be constitutional, so the phrase “to the extent required by law” in RCW 36.70C.060(2) must mean something different. *See Habitat Watch*, 155 Wn.2d at 414. These words reflect the legislature’s recognition that the cities and counties of this state vary in their exhaustion requirements, the time periods for initiating them, and who hears administrative appeals. Whatever administrative procedure is required, it must be followed. *See Ward*, 86 Wn. App. 266 (no exhaustion); *Lauer v. Pierce County*, 173 Wn. 2d at 255 (exhaustion satisfied).

4. This action is time barred under LUPA because Durland did not commence this action within 21 days of issuance of the building permit.

Durland missed two deadlines, not one. A separate basis for dismissal that was considered by the courts below is that Durland failed to

commence this action within 21 days of issuance of the permit as required by RCW 36.70C.040.⁴ Thus, even if Durland is excused from exhausting administrative remedies, that action does not toll his obligation to file with the court within the strict time requirements of LUPA.

In *Applewood Estates Homeowners Ass'n v. City of Richland*, the challenger missed an administrative appeal and the 21 day bar of LUPA. 166 Wn. App. 161, 269 P.3d 388 (2012). In that case, the Court relied upon the 21 day bar of LUPA and not the bar created by failure to exhaust administrative remedies. *Id.* Both approaches are sound, and regardless of the approach taken by this Court, the Court should affirm dismissal because a jurisdictional prerequisite has not been met. *Nickum v. Bainbridge Island*, 153 Wn. App. 366, 382, 223 P.3d 1172 (2009).

B. NOTICE

1. There is no notice requirement for building permits under state law or the San Juan County Code.

Although *project permits* (such as conditional use permits) have notice requirements, construction or *development permits* (such as building permits) have no notice requirement under state law or local ordinances. The notice required in connection with the issuance of a building permit is

⁴ See *Durland II*, fn. 1. If further proceedings are necessary, though not currently in the record, the County anticipates showing that the building permit was mailed to the applicant on November 2, 2011, and therefore was “issued” for the purposes of LUPA three days later on November 5, 2011. See RCW 36.70C.040(4)(a).

assessed by evaluating what state law requires. *Town of Castle Rock v. Gonzales*, 545 US 749, 757, 125 S. Ct. 2796 (2005). In Washington State, local land use permitting procedures must conform to the 1995 regulatory reform provisions adopted in Chapter 36.70B RCW. These provisions classify permit types and determine the extent of notice required for the applications, hearings and decisions related to project permits. *See generally* RCW 36.70B.060 and RCW 36.70B.110-130.

The Washington legislature has specifically allowed local governments to exclude certain types of permits and approvals including “building or other construction permits” from these notice requirements. RCW 36.70B.140(2). Consistent with the state statute, the San Juan County Code removes construction-type permits, including building permits, from the notice requirements for project permits. SJCC 18.80.010 (attached as Appendix C). This classification of permits by the legislature is central to the approach used by San Juan County, and is typical of local jurisdictions throughout the state. *See for example, Nickum v. City of Bainbridge Island*, 153 Wn. App. at 372, fn 4.

2. Generalized or individualized notice of a building permit is not required by state law or local ordinance as a prerequisite to applying the 21 day bar of LUPA.

This court has consistently rejected the argument that the LUPA time limit runs only against entities that had notice, standing, or were aggrieved

under the statute. *Cedar River Water and Sewer Dist. v. King County*, 178 Wn.2d 763, ¶32, ___P.3d___ (2013) (citing *Samuel's Furniture*, 147 Wn.2d at 462; *Nykreim*, 146 Wn.2d at 935). After reviewing the court decisions on this subject, Division III of the Court of Appeals said: “Applying the legal principles derived from *Samuel's Furniture*, *Habitat Watch*, and *Asche*, we conclude the Neighbors were not entitled to personal notice, distinct from the notice contemplated by the filing of a public record as discussed in RCW 36.70C.040(4)(c).” *Applewood*, 166 Wn. App. at 170.

Samuel's Furniture uses this plain statement of the rule: “LUPA does not require that a party receive individualized notice of land use decisions in order to be subject to the time limits for filing a LUPA petition.” 147 Wn.2d at 462. In the concurring opinion in *Habitat Watch*, Justice Chambers, though disagreeing with the principle, acknowledged the scope of this Court's holding in *Samuel's Furniture* on notice, stating, “[i]n *Samuel's Furniture*, we effectively approved the practice of giving no notice, even to those entitled to it by law.” *Habitat Watch*, 155 Wn.2d at 420 (Chambers, J., concurring).

3. No notice is required for a determination that a shoreline permit is unnecessary.

The Shoreline Management Act and local ordinances do not require generalized or individual notice that a shoreline permit is not necessary.

Durland contends that if the County had required a shoreline permit, he would have received notice. (Petition p. 6). He claims he would have appealed that decision, and the lack of notice has deprived him of that opportunity. (Durland Declaration p. 5, lines 11-14). The difficulty for Durland is that the decision to issue the building permit necessarily also included a decision not to require a permit under the Shoreline Master Program. *See* WAC 173-27-140(1).⁵ No notice is required of a decision that a shoreline permit is not needed.

In *Samuel's Furniture*, the city of Ferndale's issuance of fill and grade and building permits necessarily required a determination that the project was outside the shoreline jurisdiction. *Samuel's Furniture*, 147 Wn.2d at 451. The Court held that Ecology should have challenged the issuance of those permits on the basis that they were inconsistent with the Shoreline Management Act because no shoreline substantial development permit was issued. *Id.* As in *Samuel's Furniture*, the decision to issue the building permit in this case included a decision that no shoreline permit was required. Whether that decision was right or not, the time to review it expired when no timely appeal was filed.

⁵ WAC 173-27-140 -- Review criteria for all development.

(1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.

C. DUE PROCESS

1. Durland lacks a property interest that would give rise to a due process claim.

The 14th Amendment to the United States Constitution states: “Nor shall any State deprive any person of life, liberty, or property, without due process of law...” For purposes of due process, a substantive property right cannot arise merely by virtue of a procedural right. *Carlisle v. Columbia Irrigation District*, 165 Wn.2d 555, 573, 229 P.3d 761 (2010); *Dorr v. Butte County*, 795 F.2d 875 (9th Cir. 1986). Nor does one have a property interest in a rule of law. *Branch v. U.S.*, 69 F.3d 1571, 1578 (C.A. Fed. 1995).

A constitutionally protected property interest exists only where the plaintiff demonstrates that he possessed a “reasonable expectation of entitlement created and defined by an independent source” such as federal or state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972). A mere subjective expectation on the part of the plaintiff does not create a property interest protected by the Constitution. *Clear Channel v. Seattle Monorail*, 136 Wn. App. 781, 784, 150 P.3d 249 (2007); *Media Group v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2002).

Under the language of the San Juan County Code, the opportunity of an abutting landowner to appeal decisions of local agencies is a mere

procedural right and not a property right protected by the 14th Amendment. *Carlisle*, 168 Wn.2d at 573; *Fusco v. State of Connecticut*, 815 F.2d 201, 205-06 (2nd Cir. 1987). Thus, Durland had no constitutionally protected property interest upon which a due process claim could rest.

In evaluating “due process” the Court must consider three things:

(a) Whether a property right has been identified; (b) Whether governmental action taken with respect to that property right amounts to a deprivation; and (c) Whether the deprivation, if one be found, was visited on the plaintiff without due process of law. *Fusco, supra*, 815 F.2d at 205 (citing *Parratt v. Taylor*, 451 U.S. 527, 536-37, 101 S. Ct. 1908, (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986)).

A recent ruling from federal district court Judge Thomas S. Zilly analyzed the law with respect to providing notice to neighbors in LUPA cases. Judge Zilly concluded LUPA does not create a property interest: “In sum, although LUPA provides litigants with the opportunity to challenge local land use decisions, LUPA does not necessarily create a corresponding property interest in this procedural process.” See pp 8-12 of the Order in *Neighbors for Notice v. City of Seattle*, 2013 WL 5211878 (W.D.Wash. 2013) (attached as Appendix D).

Durland does not have a cognizable property interest because: (1) LUPA and its requirements to exhaust administrative remedies are procedural which does not trigger a property interest; and (2) no statute grants Durland a property interest in his neighbor's building permit.

Durland is vague about the property interest he claims. In the Reply Brief to the Court of Appeals he wrote, “[t]he due process issue here is connected to the question of administrative remedies, not timeliness of the LUPA petition.” (Reply p. 19). Durland recognized that “[b]ecause he did not receive notice within the 21 day time period for filing an administrative appeal with the San Juan County Hearing Examiner, Durland missed the deadline to appeal and was barred from any opportunity to present his objections at an administrative hearing.” (Reply p. 19). The interest Durland describes is not a property interest, but rather a claim of interest in the administrative process.

Durland's cases on due process do not apply. In *Post v. City of Tacoma*, this Court concluded that the plaintiff had a procedural due process right to challenge the assessment of monetary penalties against him for failure to comply with the local building code. 167 Wn. 2d at 313. The property interest was the right to be free from monetary penalties. *Id.* Durland has no similar property interest here.

Asche v. Bloomquist, is distinguishable from this case because in *Asche* the precise language of the local code regarding views from nearby properties created a property right in plaintiffs' view. 132 Wn. App. 784, 133 P.3d 475 (2006), *review denied*, 159 Wn.2d 1005 (2007). Durland looks to the provisions of the County's shoreline master program for zoning and building regulations in an effort to make *Asche* fit to the facts of this case. (Petition p. 5-6). The provisions cited by Durland do not convey an individualized interest in favor of Durland and are distinguished from the unique language of the local code in *Asche* pertaining to the "view of adjacent properties." *Asche*, 132 Wn. App. at 798.

2. Durland's due process claim is subject to LUPA's time limitations.

Durland looks to the due process provisions of the Constitution in an effort to enlarge the time to seek administrative or judicial review of a land use decision. But if the LUPA challenge fails, so too does the due process challenge: "LUPA applies even when the litigant complains of lack of notice under the procedural due process clause." *Asche*, 132 Wn. App. at 798; *see also*, *Mercer Island Citizens for Fair Process v. Tent City*, 156 Wn. App. 393, 402-03, 232 P.3d 1163 (2010) (recognizing that failure to challenge a land use decision in a LUPA petition bars any claims

that are based on challenges to that land use decision, including those alleging due process).

D. DURLAND'S PUBLIC RECORD'S REQUESTS

Durland's statement of facts discusses two public records requests. The first records request, made to the County's Public Records Officer on November 3, 2011, was for:

all correspondence, letters, and notes of discussion between Community Development and Planning, the Code Enforcement Officer, the Prosecuting Attorney's Office, Heinmiller and Stameisen, and any attorneys contacted and involved in discussing [Durland's] request for Code enforcement.

CP 75. These records were available for inspection and copying on November 22, 2011 (CP 76), twelve business days after the request was made. Durland, who lives on Orcas Island, elected to have the records sent to him rather than inspect the records at the county seat. CP 76. There is no record that the County "delayed the release" of the records, that it answered any questions from him incorrectly, or that the persons who were handling the records request had any knowledge of Durland's interest in a building permit for the garage. (Petition, p. 5, fn. 2).

The record does show that: (1) Durland made a public records request for records unrelated to the issuance of the building permit at issue in this case; (2) that the County promptly responded to this request; and (3) while reviewing the records provided by the County, Durland noticed a

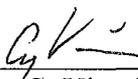
reference to a permit on the Heinmiller property. CP 75-76. When Durland requested the building permit, it was provided in one day. CP 77. Durland's unfounded grievances related to this public records request might have been raised in another way, but they do not create a reason to vary from the strict time bar of LUPA.

IV. CONCLUSION

For the foregoing reasons, the Court should uphold the decision of the trial court, affirm the decision of the Court of Appeals and dismiss this case with prejudice. Pursuant to RAP 14.2 and RCW 4.84.010, this Court should award San Juan County its costs on appeal. The argument regarding attorney fees on appeal is reserved to Heinmiller.

Respectfully submitted this 9th day of January 2014.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: 
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

Appendix A

cable procedures of Chapter 18.50 SJCC and SJCC 18.80.110.

E. Procedures for Nonconforming Use for Structure not Subject to the Shoreline Master Program.

1. The procedures for provisional uses (SJCC 18.80.070) shall apply to the actions and activities described in SJCC 18.40.310(B) through (D), as limited by SJCC 18.40.310(G) through (J).

2. The procedures for conditional uses (SJCC 18.80.100) shall apply to the actions and activities described in SJCC 18.40.310(F) as limited by SJCC 18.40.310(G) through (J).

F. Illegal Use. Any use, structure, or other site improvement not established in compliance with this code and other applicable codes and regulations in effect at the time of establishment is not nonconforming; rather, it is illegal and subject to enforcement provisions of Chapter 18.100 SJCC. (Ord. 15-2002 § 12; Ord. 2-1998 Exh. B § 8.12)

18.80.130 Project permit decisions.

A. Finality. All project permit decisions, and administrative determinations or interpretations issued under this code shall be final unless appealed. (See SJCC 18.80.030(C).) Requests for reconsideration are not authorized.

B. Final decision on a project permit application shall be in writing and shall include findings and conclusions based on the record made before the decisionmaker (see Table 8.1), the SEPA threshold determination (Chapter 43.21C RCW) and the procedure for administrative appeal, if any. The notice of decision may be a copy of the report or decision on the project permit application.

C. The notice of decision shall be provided to the applicant and to any person who, prior to the rendering of the decision, requested (in writing) notice of the decision.

D. Timing of Notice of Final Decision. The notice of decision shall be issued within 120 days after the county notifies the applicant that the application is complete, unless excluded in subsection (D)(1) of this section, and except for shoreline permit applications for limited utility extensions (RCW 90.58.140(13)(b)) or construction of a bulkhead or other measures to protect a single-family residence, its appurtenant structures from shoreline erosion. In those cases, the decision to grant or deny the permit shall be issued within 21 days of the last day of the comment period specified in SJCC 18.80.030(B)(2). The time frames set forth

in this section shall apply to project permit applications filed on or after the effective date of this code.

1. Calculation of Time Periods for Issuance of Notice of Final Decision. In calculating the time for issuance of the notice of decision, the following periods shall be excluded:

a. Any period during which the applicant has been requested by the County to correct plans, perform required studies, or provide additional information. The excluded period shall be calculated from the date the County notifies the applicant of the need for additional information until the County determines the resubmitted information satisfies the request; and

b. Any period during which an environmental impact statement is being prepared following a determination of significance pursuant of Chapter 43.21C RCW; and

c. Any appeal period; and

d. Any extension of time mutually agreed upon by the applicant and San Juan County.

2. The time limits established in this section do not apply if a project permit application:

a. Requires an amendment to the Comprehensive Plan to this code;

b. Requires approval of the siting of an essential public facility as provided in RCW 36.70A.200;

c. Is substantially revised by the applicant, in which case the time period shall start from the date at which the revised project application is determined to be complete.

E. If the County is unable to issue its final decision on a project permit application within the time limits provided for in this section, it shall provide written notice of this fact to the project applicant. The notice shall include a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of decision. (Ord. 15-2002 § 13; Ord. 2-1998 Exh. B § 8.13)

18.80.140 Appeals.

A. Appeals – General. Appeals are either open-record appeals or closed-record appeals (see definitions in Chapter 18.20 SJCC), and include:

1. Appeals to the hearing examiner of permits (development permits and/or project permits) granted or denied by the administrator (administrator is the decisionmaker);

2. Appeals to the hearing examiner of administrative determinations or interpretations made by the administrator (administrator is the decisionmaker);

3. Appeals to the BOCC of permit decisions made by the hearing examiner (hearing examiner is the decisionmaker);

4. Appeals to the BOCC of decisions of the hearing examiner arising out of matters where the administrator was the decisionmaker;

5. SEPA appeals of project actions, as defined in WAC 197-11-704;

6. Appeals of consolidated matters (i.e., appeal of administrative determination consolidated with project permit application hearing);

7. A timely appeal of a code interpretation or decision made by the administrator or building official stays the effective date of such decision until the matter has been resolved at the County level. (See also SJCC 18.10.030 and RCW 36.70C.100.)

8. The appeal path for project permits is shown in Table 8.1. The appeal path for SEPA is shown in Table 8.3.

7. Discretionary use permits;

8. Administrative determinations or interpretations (see SJCC 18.10.030);

9. SEPA threshold determinations (DNS and DS) of project actions (see WAC 197-11-704);

10. EIS adequacy;

11. Development permits issued or approved by the administrator; and

12. Consolidated matters where the administrator was the decisionmaker.

C. Closed-Record Appeals. Closed-record appeal procedures apply where an appeal of a decision issued after an open-record appeal hearing has been properly filed.

1. The board of County commissioners hears closed-record appeals of the following types of decisions:

a. Decisions of the hearing examiner issued after an open-record predecision hearing;

b. Decisions of the hearing examiner issued after an open-record appeal hearing.

2. Closed-record appeal hearings shall be on the record made before the hearing examiner, and no new evidence or testimony may be presented.

3. The board of County commissioners must sustain the examiner's findings of fact where such findings are supported by substantial evidence, and must sustain the examiner's conclusions unless such conclusions are contrary to law.

4. If, after consideration of the record, written appeal statements and any oral arguments, the board of County commissioners determines that an error in procedure occurred or may have occurred; or additional information or clarification is desired with respect to the decision of the hearing examiner, or if the parties have reached a settlement, the board shall remand the matter to the hearing examiner.

5. The burden of proof in a closed-record appeal is on the appellant.

D. Standing to Appeal. Appeals to the hearing examiner or BOCC may be initiated by:

1. The applicant;

2. Any recipient of the notice of application (see SJCC 18.80.030);

3. Any person who submitted written comments to the administrator or the hearing examiner concerning the application;

4. Any aggrieved person; and

5. Any person who submitted written or oral testimony at an open-record predecision hearing or an open-record appeal hearing.

Table 8.3. SEPA Processing and Appeals.

	Threshold Determination		EIS	
	DNS/MDNS	DS	DEIS	FEIS
Comment Period (days)	14	21	30	N/A
Appeal Period (days)	21	21	N/A	21
Consolidated Hearings	yes	no	N/A	yes
Open-Record Appeal Hearing	yes	yes	N/A	yes
Decisionmaker	Hearing Examiner	Hearing Examiner	N/A	Hearing Examiner
Appeal	Superior Court	See RCW 43.21C.075	N/A	Superior Court

B. Open-Record Appeals. The San Juan County hearing examiner has authority to conduct open-record appeal hearings of the following decisions by the administrator and/or responsible official, and to affirm, reverse, modify, or remand the decision that is on appeal:

1. Boundary line modifications;
2. Simple land divisions;
3. Provisional use permits;
4. Short subdivisions;
5. Binding site plans (up to four lots);
6. Temporary use permits (Level II);

E. Time Period and Procedure for Filing Appeals.

1. Appeals to the hearing examiner or to the BOCC must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed; and

2. Appeals of a SEPA threshold determination or an FEIS must be filed within 21 days following the date of the threshold determination or FEIS;

3. All appeals shall be delivered to the administrator by mail, personal delivery, or fax, and received before 4:30 p.m. on the due date of the appeal period. Applicable appeal fees must be paid at the time of delivery to the administrator for the appeal to be accepted.

4. For the purposes of computing the time for filing an appeal, the date of the decision being appealed shall not be included. If the last day of the appeal period is a Saturday, Sunday, or a day excluded by RCW 1.16.050 as a legal holiday for the County, the filing must be completed on the next business day (RCW 36A.21.080).

5. Content of Appeal. Appeals must be in writing, be accompanied by an appeal fee, and contain the following information:

- a. Appellant's name, address and phone number;
- b. Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);
- c. Identification of the decision which is the subject of the appeal, including date of the decision being appealed;
- d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based;
- e. The relief sought, including the specific nature and extent; and
- f. A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.

F. Notice of Hearing. The administrator shall give notice of the appeal hearing as provided in SJCC 18.80.030(C).

G. Decision Time and Notice.

1. The hearing examiner or BOCC shall consider and render a written decision on all appeals. Such decision shall be issued within 60 days from the date the appeal is filed; provided, that the appeal contains all of the information specified in this section.

2. The parties to an appeal may agree to extend these time periods.

H. Consolidated Appeal Hearings.

1. All appeals of development permit or project permit decisions shall be considered together in a consolidated appeal hearing.

2. Appeals of environmental determinations under SEPA, except for an appeal of a determination of significance (DS), shall be consolidated with any open-record hearing (open-record predecision hearing or open-record appeal hearing) before the hearing examiner. (See also SJCC 18.80.020(B)(2), Consolidated Permit Processing, and SJCC 18.80.110(D), Shorelines - Consolidated Permit Processing.)

I. No Requests for Reconsideration. Requests for reconsideration to either the hearing examiner or board of County commissioners are not authorized.

J. SEPA Appeals of Project Actions.

1. The County establishes the following appeal procedures under RCW 43.21C.075 and WAC 197-11-680 for appeals of project actions as defined in WAC 197-11-704:

a. Appeals of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) are not allowed;

b. An appeal on SEPA procedures is limited to review of a final threshold determination (determination of significance (DS) or nonsignificance (DNS/MDNS), or final environmental impact statement (FEIS);

c. As provided in WAC 197-11-680(3)(a)(iv), there shall be no more than one administrative appeal of a threshold determination or of the adequacy of an environmental impact statement (EIS);

d. A timely SEPA appeal shall stay the decision on a project permit application or development permit application until such time as the SEPA appeal has been resolved at the administrative level (i.e., decision by the hearing examiner or appeal withdrawn);

e. An appeal of the issuance of a determination of significance shall be heard and decided by the hearing examiner in a separate open-record hearing. As provided in RCW 36.70B.060(6) and 43.21C.075, this open-record hearing shall not preclude a subsequent open-record hearing as provided by this code;

f. Except for an appeal of a DS, a SEPA appeal (procedural and/or substantive determinations under SEPA) shall be consolidated with the

Appendix B

18.20.040 "D" definitions.

Day Care – Type 1. The following definitions apply to day care facilities for six or fewer children:

"Child care facility" means a family day care home (RCW 35.63.170).

"Family day care home" means a person regularly providing care during part of the 24-hour day to six or fewer children in the family abode of the person or persons under whose direct care the children are placed (RCW 35.63.170).

Day Care – Type 2. The following definitions apply to day care facilities for seven or more children:

"Day care center" means a person or agency that provides care for 13 or more children during part of the 24-hour day (RCW 74.15.020).

"Family day care provider" means a licensed day care provider who regularly provides day care for not more than 12 children in the provider's home in the family living quarters (RCW 74.15.020).

"Mini day care center" means a person or agency providing care during part of the 24-hour day to 12 or fewer children in a facility other than the family abode of the person or persons under whose direct care the children are placed, or for the care of seven through 12 children in the family abode of such person or persons (RCW 35.63.170).

"Day-night sound level (Ldn)" means a measurement used to characterize average sound levels in residential areas throughout the day and night. The Ldn is an A-weighted equivalent sound level at the property boundary in decibels (dB) for a 24-hour period to which 10 dB are added to nighttime sounds (10:00 p.m. to 7:00 a.m.).

"dBA" means the sound pressure level in decibels measured using the "A" weighting network on a sound level meter.

"dbh (diameter at breast height)" means the diameter of a tree measured at 4.5 feet above the ground surface on the uphill side of the tree.

"Dedicate" means to set aside a piece of real property, a structure, or a facility for public or private use or ownership.

"Dedication" means the appropriation of land by an owner for any public or private use, reserving no other rights than those compatible with the full exercise and enjoyment of the public or private uses to which the property is to be dedicated. The intention to dedicate shall be evidenced by the owner filing an application for final subdivision approval showing the intended dedication, and the

acceptance shall be evidenced by the approval of said application for recording.

"Degrade" means to scale down in desirability or salability, to impair in respect to some physical property or to reduce in structure or function, in terms of San Juan County standards and environment.

"Density" means the quantity per unit area, such as the number of dwelling units per acre or acres per dwelling unit.

"Department" means the San Juan County community development and planning department.

"Design capacity" means the theoretical or calculated maximum ability of a system or device to handle the duty for which it is to be used.

"Detached ADU" means an accessory dwelling unit that is physically distinct from the principal residence. To be detached, the ADU and principal residence may not be connected or must be structurally independent per the International Residential Code.

"Developable area" means the area of land which is not constrained from development by land use restrictions.

"Development" means the division of a parcel into two or more parcels; the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any structure; any grading, draining, dredging, drilling, filling, paving, excavation, mining, landfill; or any extension of the use of land. (See also "shoreline development.") For purposes of critical area regulations, "development" does not include activities with a duration of less than 24 months that do not adversely alter critical areas. Not all development requires a permit or review.

"Development area" means the area that is directly altered as a result of development. This includes, but is not limited to, the area containing structures, driveways, gardens, landscaped areas, areas of grading, excavation, or fill.

"Development permit" means a County permit or approval required for a project, including but not limited to building and other construction permits, mechanical permits, demolition permits, plumbing permits, clearing and grading permits, driveway permits, and on-site sewage disposal permits. (See "project permit.") SEPA threshold determinations are not development permits.

"Development right" means the right to develop property subject to federal, state, and local restrictions and regulations.

Development, Shoreline. See "shoreline development."

"Director" means the director of the San Juan County community development and planning department or a designated representative.

"District" means a part, zone, or geographic area within San Juan County within which certain development regulations apply.

"Division of land" means the creation of two or more parcels of land within the boundaries of a single parcel. All contiguous property held in the same or substantially the same ownership, or under the control of the owner, whether or not the property is described in separate legal descriptions, shall be considered as part of the original tract of record for the purposes of Chapter 18.70 SJCC.

"Dock" means a structure that abuts the shoreline and is used as a landing or moorage place for commercial and pleasure craft. A dock typically consists of a pier, ramp, and float.

"Drainage" means surface water runoff; the removal of surface water or groundwater from land by drains, grading, or other means, which include runoff controls to minimize erosion and sedimentation during and after construction or development.

"Drainageway" means any natural or artificial watercourse, trench, ditch, swale, or similar depression where surface water accumulates and flows.

"Dredge spoils" means the material removed by dredging.

"Dredging" means the removal of earth from the bottom of a stream, river, lake, bay, or other water body.

"Driftway" means the critical link between the feeder bluff and the accretion shoreform, through which sand and gravel are transported by the littoral drift process.

"Drinking establishment" means a business primarily engaged in the retail sale of alcoholic beverages for consumption on the premises. A lounge operated as part of a restaurant is considered to be accessory to the restaurant.

"Drive-thru window service" means businesses where patrons may carry on business on the premises while in a motor vehicle.

"Driveway" means a strip of land which provides vehicular access to one or two lots.

"Dry boat storage" means a space on dry land or within a building which is rented to the public for the purpose of storing boats.

"Dune" means a hill or ridge of sand piled up by the wind and/or wave action.

Duplex. See "dwelling unit, two-family (duplex)."

"Dwelling unit" means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. A principal residence and an ADU that meets the requirements of SJCC 18.40.240 constitute a single dwelling unit. Recreational vehicles are not dwelling units.

"Dwelling unit, multiple-family" means one or more structures containing three or more dwelling units.

"Dwelling unit, two-family (duplex)" means a structure containing two dwelling units. (Ord. 26-2012 § 5; Ord. 10-2012 §§ 3, 32; Ord. 52-2008 § 3; Ord. 7-2006 § 2; Ord. 21-2002 § 3; Ord. 12-2002 § 2; Ord. 12-2001 § 3; Ord. 2-1998 Exh. B § 2.3)

18.20.050 "E" definitions.

"Eastsound Subarea Plan" means the document containing the Eastsound Subarea Plan and final map.

"Eating establishment" means a use providing preparation and retail sale of food and beverages.

"Ecology (WDOE)" means the State of Washington Department of Ecology.

"Electrical lines" means electric service, distribution and transmission lines and ancillary support structures and enclosures.

"Emergency" means an immediate danger to public health or safety or of serious environmental degradation.

"Endangered species" means a species which is in danger of extinction throughout all or a significant portion of its range, as classified by the Washington Department of Fish and Wildlife, WAC 232-120-14 and the Washington Department of Natural Resources, Washington Natural Heritage Plan.

"Environmental checklist" means a form prescribed by the director and the state of Washington to identify the potential environmental impacts of a given proposal.

"Environmental impact statement (EIS)" means a draft, final, or supplemental written document that reviews the likely significant and nonsignificant adverse and positive impacts of a proposal, ways to avoid, minimize or lessen the adverse impacts, and alternatives to the proposal.

"Environmentally sensitive area(s) (ESA)" means critical area(s).

Appendix C

become void. (Ord. 11-2000 § 6; Ord. 12-1998 Exh. B § 7.11)

18.70.120 Concurrency.

Land divisions and binding site plans are subject to the concurrency testing and requirements of SJCC 18.60.200. Information shall be provided in the form required by the administrator and by any non-County capital facilities service providers, and sufficient to enable the County and other service providers to determine the concurrency requirements of the development, plus any additional capacity or non-capital alternatives proposed to be funded by the applicant. Concurrency requirements will be identified at the time of preliminary application or binding site plan application; completion is a necessary condition of final subdivision or final binding site plan approval. (Ord. 11-2000 § 6; Ord. 12-1998 Exh. B § 7.12)

Chapter 18.80

APPLICATION, NOTICE, REVIEW, AND APPEAL REQUIREMENTS

Sections:

- 18.80.010 Project permit applications – General.
- 18.80.020 Project permit applications – Procedures.
- 18.80.030 Notice of project permit applications, public comment, and notice of hearing.
- 18.80.040 Open-record predecision hearings.
- 18.80.050 SEPA implementation rules.
- 18.80.060 Procedures for temporary events and uses.
- 18.80.070 Procedures for “yes” uses (uses allowed outright).
- 18.80.080 Permit procedures for provisional uses.
- 18.80.090 Permit procedures for provisional/conditional uses (formerly referred to as discretionary uses).
- 18.80.100 Permit procedures for conditional use and variance permits.
- 18.80.110 Shoreline permit and exemption procedures.
- 18.80.120 Procedures for nonconforming uses and structures.
- 18.80.130 Project permit decisions.
- 18.80.140 Appeals.
- 18.80.150 Road vacation procedures.
- 18.80.160 Procedures for planned unit developments.
- 18.80.170 Binding site plan procedures.
- 18.80.180 Procedures for rural residential cluster developments.
- 18.80.190 Essential public facility conditional use permits.
- 18.80.200 Financial guarantees.

Code reviser’s note: The effective date of Ord. 26-2012, provisions of which are codified in this chapter, was extended to March 1, 2014, by Ord. 3-2013. See online code at www.codepublishing.com/wa/sanjuancounty/ for provisions currently in effect.

18.80.010 Project permit applications – General.

A. Purpose. “Project permits” are defined in SJCC 18.20.160. Such permits include, but are not limited to, subdivisions, conditional use permits, variances, shoreline permits, provisional use permits, and temporary use permits. Concurrency findings, determinations of completeness, and other such administrative approvals are reviewed

as part of the underlying project permit and are not project permits. SEPA threshold determinations are not project permits. Building, driveway, and other construction-type development permits and approvals are not project permits (RCW 36.70B.020(4) and 36.70B.140). (See "development permit" in SJCC 18.20.040.) Procedures for building and development permits that do not trigger a requirement for a project permit are found in SJCC 18.80.070 (procedures for "Yes" uses). The procedures in this subsection are enacted to provide consistent evaluation of project permit applications and to protect nearby properties from the possible negative impacts of such requests by:

1. Providing clear criteria on which to base a decision;
2. Recognizing the effects of unique circumstances upon the development potential of a property;
3. Avoiding the granting of special privileges;
4. Providing criteria which emphasize compatibility with legally existing land uses in the same land use designation;
5. Requiring that the design, scope, and intensity of development are in keeping with the physical aspects of a site and adopted land use policies for the area;
6. Providing criteria which emphasize the rural and small-village character of the County;
7. Combining the environmental review process with the procedures for review of project permit applications; and
8. Providing no more than one open-record hearing, except as provided in Chapters 36.70B and 43.21C RCW.

B. Director's Responsibilities.

1. Responsibilities. The director shall provide for the review of all project permit applications, conducting such field inspections as necessary, to determine whether or not the proposal meets the requirements specified in this code.
 - a. If, upon application for a development permit, the director determines that a project permit is required, the applicant shall be so informed immediately. Upon receipt of an application for a project permit, the director shall conduct a review as specified in this section.
 - b. All applications for project permits shall be reviewed by the director for compliance with this code regardless of whether a development permit is required. No development permit which involves a change or alteration of existing uses

shall be issued until any required project permit has been issued according to the provisions in this chapter.

2. Upon receipt of a project permit application, the director shall review the proposal, conduct or require such field inspections as necessary to determine whether or not the proposal complies with the purpose and intent of this section and this code. The director may require additional information from the applicant sufficient to make a determination. (Ord. 26-2012 § 22; Ord. 11-2011 § 6; Ord. 15-2002 § 1; Ord. 2-1998 Exh. B § 8.1)

18.80.020 Project permit applications – Procedures.

A. Nonbinding Preapplication Conferences and Site Inspections. Preapplication conferences and site inspections are optional, but strongly encouraged, and will be conducted on a time available basis. Any fee assessed for such a preapplication conference and site inspection shall be refunded upon submission of a permit application.

1. Preapplication conferences and site inspections are recommended to provide a prospective applicant and the County the opportunity to discuss the property owner's plans, review available critical area maps, examine the unique site characteristics, discuss stormwater management and low impact development options, determine if and how County regulations may apply, and to encourage the applicant to consider the effect of County regulations in designing the project.

2. Recognizing that project plans are typically incomplete at the preapplication stage, that more information is typically obtained prior to filing a project permit application, and that new regulations may be enacted prior to submission of a project permit application, preliminary discussions at a preapplication meeting shall not be binding on either the County or the potential applicant.

B. Determination of Proper Type of Project Permit.

1. Determination by Director. The director shall determine the proper type of project permit. Table 8.1 summarizes the steps in the review process for each type of project permit.

2. Consolidated Permit Processing. For a proposal that involves two or more shoreline permits and/or other project permits, such applications shall be consolidated under the "highest" procedure (i.e., the rightmost applicable column in Table 8.1) required for such permits or processed individually under each of the procedures identified by

Appendix D

Westlaw.

Page 1

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.
NEIGHBORS FOR NOTICE LLC, a Washington
limited liability company, Plaintiff,
v.
CITY OF SEATTLE, a municipal corporation, et
al., Defendants.

No. C12-2098 TSZ.
Sept. 17, 2013.

John E. Glowney, Maren Roxanne Norton,
Margarita V. Latsinova, Stoel Rives LLP, Seattle,
WA, for Plaintiffs.

Patrick Downs, Seattle City Attorney's Office,
Seattle, WA, for Defendants.

ORDER

THOMAS S. ZILLY, District Judge.

*1 THIS MATTER comes before the Court on the Plaintiff's motion for judgment as a matter of law, docket no. 10. The Court has reviewed the motion, opposition, and reply, and all pleadings related thereto, and now enters the following Order.

I. Background

In 1977, Glenn Rudolph bought the home located at 5501 Kensington Place North in the Green Lake neighborhood of Seattle. Complaint at ¶ 1. The home was situated on a 5,365 square foot lot in an area that is zoned single family 5,000 ("SF 500"). *Id.* In November 2011, Rudolph sold the property to Steele Homes, Inc., a business associated with Seattle developer Dan Duffus (hereinafter "builder"). *Id.* at ¶ 3. After purchasing the property, the builder requested an opinion letter from the City of Seattle's Department of Planning and Development ("DPD") concerning "whether a portion of the property at 5501 Kensington Place North in Seattle qualify[ed] for development as a

separate building site according to the standards of Seattle's land use code." *Id.* at ¶ 4.

Seattle's land use code provides certain exceptions to minimum lot area requirements. *See* Seattle Municipal Code ("SMC") § 23.44.010.B. Until 2012, one of the exceptions that allowed for development of a lot that did not meet the minimum lot area requirements of the underlying zone was for lots established as a separate building site by historic tax records. Former SMC § 23.44.010.B.1.d (2011); *see also* Seattle City Ordinance No. 123978, § 2 (2012).

Prior to Rudolph's purchase of 5501 Kensington Place North, the property had included two separate tax parcels, the parcel containing the residence and a separate parcel measuring 1,050 square feet and shaped as a triangle with 28 feet of frontage on the rear alley and no street frontage. Complaint at ¶ 2. This separate tax parcel existed from approximately 1939 to 1971, *id.* at ¶ 4, and was the result of the County's historic practice of maintaining tax records in the form of a ledger in which each portion of a single developed building site was maintained as a separate line in the ledger if the site consisted of portions of multiple platted lots. DPD Report at 3 (docket no. 10-1). In the case of 5501 Kensington Place North, the property included portions of Lots 6 and 7, Block 30, Wood's South Division of Green Lake Addition. Complaint at ¶ 4; DPD Opinion Letter at 2 (docket no. 11-1).

In response to the builder's request, DPD issued an opinion letter concluding that "Parcels A and B [of 5501 Kensington Place North] qualify for the historic lot area exception provided in SMC Section 23.44.101.B.1.d, and may be developed as separate legal building sites." DPD Opinion Letter at 2. The letter also suggested that it would be possible to achieve a more functional footprint and building location by adjusting the boundary between the two building sites. *Id.* The builder subsequently

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acquired a lot boundary adjustment (“LBA”) from DPD that allowed it to convert the property into two separate building parcels measuring 3,455 square feet (lot A) and 1,910 square feet (lot B) respectively. *Id.* at ¶¶ 6–7. Under City code, there are five land use permit categories, denominated as Types I through V. SMC 23.76.004, Table A. Both lot determination decisions and LBA’s are a Type I “compliance with development standards” permit. *Id.* There is no notice requirement for a Type I permit or for a building permit under the Seattle Municipal Code. SMC 23.76.012.A.1, 020.C.1.

*2 The builder sold lot A with the existing home at 5501 Kensington Place North on March 15, 2012. *Id.* at ¶ 12. On April 12, 2012, the City issued a building permit for Lot B. Response at 5 n. 25. Lot B, now addressed 5435 Kensington Place North, was subsequently developed with a new 1,400 square-foot three-story house. Complaint at ¶¶ 6, 7, 10.

Plaintiff Neighbors for Notice is a Washington LLC whose members live within 100 feet of the newly constructed home at 5435 Kensington Place North. Complaint at 1–2. Plaintiff challenges the City of Seattle’s policies that allowed the development of 5435 Kensington Place North without public notice or process. Plaintiff claims that the lack of public notice concerning the development at 5435 Kensington Place North deprived its members from using Washington’s Land Use Petition Act (“LUPA”), RCW 36.70C.005 et seq., to challenge the development because they were unaware of the City’s decisions until after the 21 day period for filing an appeal under LUPA had expired. ^{FN1} *Id.* at ¶¶ 17, 19. Plaintiff also argues that the development resulted in deprivation of the benefit of SF 500 zoning and in a diminution of property values for surrounding residents. *Id.* at ¶ 19.

FN1. A LUPA challenge must be brought within 21 days after the issuance of the land use decision. RCW 36.70.040(3).

Plaintiff has now filed a Rule 12(c) motion seeking a ruling from the Court that the Complaint alleges a cognizable property interest that is protected by the guarantee of due process under the Fourteenth Amendment to the United States Constitution.

II. Standard

Under Rule 12(c), “[a]fter pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed.R.Civ.P. 12(c). In considering a rule 12(c) motion, the Court must accept all material allegations of the nonmoving party as true, and construe the pleadings in the light most favorable to the nonmoving party. *Doyle v. Raley’s Inc.*, 158 F.3d 1012, 1014 (9th Cir.1998). A pleading’s legal conclusions and inferences will not be deemed admitted, *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 499, 452 (7th Cir.1998), but a Rule 12(c) motion will be granted if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law. *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir.1999).

III. Discussion

Plaintiff contends that its members have property rights to which due process and its notice requirements apply, and it seeks a ruling from the Court under Rule 12(c) so holding. Plaintiff argues that there are three protected property rights at issue in this case: (1) access to LUPA, (2) the benefit of SF 500 zoning, and (3) diminution of property values. Defendants contend that the Plaintiff does not have standing to bring this lawsuit and that there is no protected property right at issue.

1. Standing

To show constitutional standing, the Plaintiff (1) must have suffered an “injury in fact” which is concrete and particularized and actual or imminent; (2) must demonstrate a “causal connection between the injury and the conduct complained of”; and (3) must show that it is “likely, as opposed to merely

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speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted). Article III standing requirements apply whether an organization asserts standing to sue on its own behalf or on behalf of its members. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). However, an organization suing on behalf of its members must also allege facts sufficient to show that: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Lujan*, 504 U.S. at 560–61. If a plaintiff does not have standing to sue under Article III, a federal court lacks subject matter jurisdiction and the suit should be dismissed. *See, e.g., Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir.2003) (“[I]f [Plaintiff] lacks standing to assert his federal copyright claims, the district court did not have subject matter jurisdiction and dismissal was appropriate.”)

*3 In the present case, Defendants contend that the Plaintiff has not established a concrete and particularized injury sufficient to establish standing. The Court disagrees. Neighbors for Notice has alleged that its members, who all live within 100 feet of 5435 Kensington Place North, were deprived of access to state law remedies to challenge the development due to the lack of notice and, as a result, suffered harm. These allegations constitute a sufficient injury to support Article III standing.

2. Property Right

In order to establish a Section 1983 claim, a plaintiff must allege that a person acting under color of state law deprived him of the rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68

L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). That the City was acting under color of state law in this case is not disputed. Rather, the issue is whether, under the second *Parratt* prong the Plaintiff's members were deprived of property without due process of law.

In evaluating the Plaintiff's due process claims, the Court must consider three things.

- (a) whether a property right has been identified;
- (b) whether governmental action with respect to that property right amounts to a deprivation; and
- (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law.

Fusco v. State of Connecticut, 815 F.2d 201, 205 (2d Cir.1987) (citing *Parratt*, 451 U.S. at 536–37). Here, the Plaintiff contends that there are three cognizable property rights at issue: (1) access to LUPA, (2) the benefit of SF 500 zoning, and (3) diminution of property values.

The identification and parameters of what constitutes “property” under the Fourteenth Amendment has evolved over time and encompasses more than tangible physical property. *See Hillside Community Church, S.B.C. v. Olson*, 58 P.3d 1021, 1025 (Colo.2002). Today, the property safeguarded by the Fourteenth Amendment includes certain circumscribed benefits to which a plaintiff has a “legitimate claim to entitlement.” *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). What constitutes a “legitimate claim of entitlement” is determined not by the Constitution, but largely by state law. *Id.* Generally, once a state has legislatively created a certain entitlement and a person can demonstrate a legitimate claim to that entitlement, then the Fourteenth Amendment can be invoked to ensure that the person is not deprived of her entitlement without due process. *Id.*; *Hillside*, 58 P.3d at 1025. The issue for the Court in the present case is whether Washington State has

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created a property right to which the Plaintiff's members have a legitimate claim to entitlement under the circumstances of this case.

a. Access to LUPA

*4 The Parties dispute whether access to LUPA is a cognizable property right protected by the Fourteenth Amendment. Plaintiff argues that access to LUPA is a property interest protected by the Fourteenth Amendment's due process clause, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Defendant contends that access to LUPA is a purely procedural right that does not give rise to an independent property interest, relying on the Second Circuit Court of Appeals decision in *Fusco v. State of Connecticut*, 815 F.2d 201, cert. denied, 484 U.S. 849, 108 S.Ct. 149, 98 L.Ed.2d 105 (1987). The Court adopts the analysis applied in *Fusco* and concludes that access to LUPA under the circumstances of this case is a purely procedural right and does not create an independent property interest protected by the Fourteenth Amendment.

Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Loudermill v. Cleveland Board of Edu.*, 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The Supreme Court has held that a state-created cause of action may constitute a protected property interest where a plaintiff seeks access to the courts to protect his property or to redress a grievance. *Logan*, 455 U.S. at 429 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)). Once state law creates a property interest, it cannot be removed without due process, including “constitutionally adequate notice and hearing procedures.” *Id.*

However, the Supreme Court has also held that state procedures do not always create an interest that is subject to due process. For example, in *Olim v. Wakinekona*, 461 U.S. 238, 250–51, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983), the Supreme Court

held that the state procedures at issue in that case did not create a substantive liberty interest:

Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.... The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

In *Fusco*, the Second Circuit applied this analysis to a state land use law that allowed aggrieved land owners to appeal adverse zoning decisions to the Connecticut Courts, concluding that the statutory right was purely procedural and did not give rise to an independent property interest protected by the Fourteenth Amendment. 815 F.2d 201. *Fusco* is well reasoned and is remarkably similar to the present case.

In *Fusco*, the plaintiffs' neighbors applied to the local Planning and Zoning Commission (“PZC”) to divide their property into two building lots. *Id.* at 202–03. The PZC published notice of and held a hearing on the application in accordance with state law. The neighbors subsequently applied for and, following a second public hearing, received a zoning variance. Plaintiffs did not see the notice for or attend either hearing. After the neighbors conveyed the second building site to a third party buyer, the plaintiffs learned of the property division and zoning variance and filed suit under Section 1983. Plaintiffs alleged deprivation of property without due process of law, contending that because they were unaware of the subdivision hearing they could not comply with the time constraints on taking an appeal as provided for by state law. *Id.* at 204.

*5 The Second Circuit affirmed the district court's dismissal of the complaint for failure to state a claim, concluding that the plaintiffs did not have a property interest in the Connecticut statute “which grants statutorily and classically aggrieved persons

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the right to appeal zoning decisions to the Connecticut courts.” *Id.* at 205. In reaching its conclusion, the Court held that the right of abutting landowners to appeal zoning decisions is “purely procedural and does not give rise to an independent [property] interest protected by the Fourteenth Amendment.” *Id.* at 205–06.

Since *Fusco* was published, other circuit courts, including the Ninth Circuit have applied the same reasoning to hold that some state procedures do not create substantive property rights. *See, e.g., Swartz v. Scruton*, 964 F.2d 607, 610 (7th Cir.1992) (because “[p]rocedural interests under state law are not themselves property rights that will be enforced in the name of the constitution,” plaintiff’s claim of “entitlement to the process—the ‘method’—by which his merit pay raise is determined is not a constitutionally protected property interest”); *Dorr v. County of Butte*, 795 F.2d 875, 877 (9th Cir.1986) (because “a substantive property right cannot exist exclusively by virtue of a procedural right” failure to provide a probationary employee all procedures provided in state law does “not give rise to a protected property interest”). Plaintiff’s position that this Court should decline to follow *Fusco* and should instead conclude that access to LUPA is a protected property interest under *Logan*, does not withstand scrutiny.

Moreover, the cases on which the Plaintiff relies to support its argument that LUPA creates a constitutionally protected property right are not necessarily at odds with the Court’s holding here. For example, in *Asche v. Bloomquist* the Washington Court of Appeals concluded that the applicable zoning ordinance could create a property right in the plaintiff’s view. 132 Wash.App. 784, 798, 133 P.3d 475 (2006) (“The plain language of this ordinance requires that buildings more than 28 feet and less than 35 feet can only be approved if the views of adjacent properties, such as the Asches, are not impaired. Thus, the Asches have a property right, created by the zoning ordinance, in preventing the [neighbors] from building a structure

over 28 feet in height. A nd, therefore, procedural due process applies.”). *Asche* is distinguishable because the Plaintiff in the present case does not allege that its members have a right to anything other than process. Similarly, *Muffett v. City of Yakima*, 2011 WL 5417158 (E.D.Wash. Nov.9, 2011), and *Post v. City of Tacoma*, 167 Wash.2d 300, 217 P.3d 1179 (2009), are also distinguishable. In *Muffett*, the Court did not consider the substance of the plaintiff’s claim, but only concluded that failure to timely appeal under LUPA does not necessarily bar a later-filed claim for violation of due process under Section 1983. 2011 WL 5417158, at *4–5. In *Post v. City of Tacoma*, the Washington Supreme Court concluded that Plaintiff had a due process right to challenge the assessment of monetary penalties against him for failure to comply with the local building code. 167 Wash.2d at 313, 217 P.3d 1179. There is no corollary penalty assessed against Plaintiff in the present case.

*6 In sum, although LUPA provides litigants with the opportunity to challenge local land use decisions, LUPA does not necessarily create a corresponding property interest in this procedural process. Under the facts of this case, Plaintiff does not have a clearly established property right to challenge the City of Seattle’s issuance of a valid opinion letter and LBA that were in compliance with City Code. Plaintiff does not have a legitimate entitlement to preventing the builder from developing his property as two building sites where the Seattle Municipal Code so allows.

b. Single Family Zoning

For the same reasons, the Court concludes that the Plaintiff does not have a property interest in SF 500 zoning. Although a county may not deprive a property owner of procedural due process by rezoning land that he owns without notice and an opportunity to be heard, *Harris v. County of Riverside*, 904 F.2d 497, 502–04 (9th Cir.1990), that is not the situation in the present case. Rather, here the Plaintiff contends that because its members were not notified of proposed changes to a

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neighboring property that resulted in two nonconforming building sites of less square footage than the overlaying zone, they were deprived of the benefit of SF 500 zoning. This claim is without merit. The Seattle Building Code provides for several exceptions to zoned lot size. *See* SMC § 23.44.010.B. These exceptions do not change the overlying zone, but rather allow for “infill” development under limited circumstances. Plaintiff has cited no case that suggests that neighbors have a property right in preventing “infill” development under these circumstances.

In addition, Plaintiff's argument that it has a property interest in SF 500 zoning that is distinct from its alleged property interest in LUPA has no merit. This is a distinction without a difference. Plaintiff claims that it has a property interest in access to LUPA because its members would have opposed the division of 5501 Kensington Place North into two building sites. Thus, for all practical purposes, Plaintiff's claim of a property right in access to LUPA and SF 500 zoning is the same claim.

c. Diminution in Property Value

Plaintiff asserts that the City's approval of the LBA and building permit for 5435 Kensington Place North and the resulting development of that lot in a manner inconsistent with the surrounding SF 500 zone caused its members damage by diminishing the value of their property. They seek damages as a result. But Plaintiff does not cite any case holding that diminution in property value caused by governmental action deprives a person of property within the meaning of the Fourteenth Amendment, and several cases have held to the contrary. *See Fusco*, 815 F.2d at 205–06 (rejecting plaintiff's argument that the diminution in their property value that would result from development constituted a protected property interest); *see also Penn Central Transportation v. City of New York*, 438 U.S. 104, 131, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (Where land-use regulations are reasonably related to the promotion of the general welfare, the

resulting diminution in property value caused by the regulations, standing alone, cannot establish a “taking.”).

IV. Conclusion

*7 Because the Plaintiff has not alleged a cognizable property interest, which is the first element of a Section 1983 claim for deprivation of due process under the Fourteenth Amendment, the Court DENIES the Plaintiff's motion.

The Plaintiff is hereby directed to show cause within 30 days why this case should not be dismissed for failure to state a claim for the reasons outlined in this Order.

Dated this 16th day of September, 2013.

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