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SUPREME COURT
STATE OF WASHINGTON
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No. 89293-8

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER
HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN
STAMEISEN,

Respondents.

RESPONDENTS HEINMILLER AND STAMEISEN'S
SUPPLEMENTAL BRIEF

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I. SUPPLEMENTAL STATEMENT OF THE CASE

This case does not raise any question of due process, or any question of a constitutionally protected property interest, even though petitioners Durland, Fennell and Deer Harbor Boatworks have now framed it as such.

The trial court and Court of Appeals correctly recognized that Durland's LUPA petition was fatally defective because he never bothered to appeal the issuance of the building permit to the Hearing Examiner, and therefore never obtained the "land use decision" that is a prerequisite for bringing a LUPA petition. That decision did not turn on principles of notice, or the timeliness of notice, or any other element that Durland might attempt to weave into a constitutional claim. Indeed, as set forth in Heinmiller's Answer to Petition for Review, in oral argument at the Court of Appeals Durland counsel expressly *denied* that this case posed constitutional due process issues, and instead claimed that another appeal pending by Durland addressed those concerns.

Despite that record, this Court has accepted review of a case that presents no constitutional issue and which should be – and, to date, has been – resolved on simple statutory grounds.

In addition, an award of attorney fees to Heinmiller is mandated by the plain language of the fee statute at issue.

II. ARGUMENT

- A. There is no need to address an alleged constitutional violation when the court can decide this appeal on straightforward, statutory grounds.

Statutes are presumed to be constitutional; the burden is on Durland to demonstrate LUPA's alleged unconstitutionality beyond a reasonable doubt. Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). And it is axiomatic, as a matter of well-established policy, that this Court should decline to reach a constitutional question if the case before it can be decided on other grounds. See, e.g., State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992); Senear v. Daily Journal-American, 97 Wn.2d 148, 641 P.2d 1180 (1982); Ohnstad v. Tacoma, 64 Wn.2d 904, 395 P.2d 97 (1964).

Durland filed his LUPA petition in this case as a prophylactic “backup” to his parallel course of action in his other pending appeal. *CP* 28-32, 35. In that case, Durland (correctly) first appealed to the Hearing Examiner, and *then* – once he had obtained a “land use decision” as defined by RCW 36.70C.020(2) – appealed *that* decision by means of the LUPA action filed in superior court. Durland's appeal to the Hearing Examiner, although fatally untimely, was a prerequisite to filing the LUPA petition.

In the case at bar, Durland knew he was skipping a necessary

prerequisite to bringing a LUPA petition. His reasoning for doing so is immaterial. And that presents this Court with a simple, straightforward resolution of this appeal: affirmed, for the reasons set forth in the Court of Appeals decision and in Heinmiller's Answer to Petition for Review.

B. Durland's due process argument was not sufficiently raised below, and is actually the heart of his other appeal, which the Court of Appeals just decided.

As is set forth in Heinmiller's Answer to Durland's Petition for Review (at pages 6-9), the purported constitutional issues which have been raised to this Court were abandoned by Durland in the lower tribunals. At both the hearing before the superior court and the Court of Appeals, Durland's counsel conceded that no due process argument was being made, and asserted that instead, that argument was being made in another, separate appeal (Supreme Court No. 89745-0; Petition for Review by Durland pending).

Despite the label Durland now chooses to put on his claims, the constitutional issues raised by Durland are not fairly or sufficiently before this Court since they were not argued to the courts below. Even though Durland's Petition for Review was granted, this Court should decline to address them here. See, Peoples Nat'l Bank v. Peterson, 82 Wn.2d 822, 828-30, 514 P.2d 159 (1973) (refusing to review

constitutional issues which were not properly raised to lower courts, following acceptance of review).

C. Durland has no constitutionally protected property interest in the Heinmiller garage building permit or the County's procedures in issuing same.

Respondent San Juan County, in its Answer to Petition for Review, and in its Supplemental Brief, has addressed the issue of whether Durland had a protected property interest in a building permit issued to someone else. As the County demonstrates, there is no legal basis for Durland's claim of a constitutionally protected property interest in this setting. Absent such an interest, there is no due process issue. Heinmiller joins in the County's analysis on this point.

Moreover, this Court's prior decisions involving LUPA's 21-day period for filing a LUPA petition, and its holdings that actual notice of the decision is not required, have not been disturbed by our Legislature. As was aptly stated in Applewood Estates Homeowners Ass'n v. City of Richland, 166 Wn. App. 161, 170, 269 P.3d 388 (2012):

"The Legislature is presumed to be aware of judicial interpretation of its enactments, and so absent a legislative change, [the Court] presume[s] that the legislature approves of [its] interpretation." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting Friends of Snoqualmie Valley v. King County Boundary Review Bd., 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). The legislature has amended LUPA since Samuel's Furniture and Habitat Watch but has not changed any provision relating to actual notice, the date a land use decision is issued, or the 21-day time limitation. See Mellish, 172 Wn.2d at

215 (discussing Laws of 2010, chapter 59, amending the definition of "land use decision" in LUPA).

The Legislature has been aware of this Court's LUPA decisions, and has revised various other portions of LUPA since the statute's 1995 enactment (e.g., RCW 36.70C.030, modified by 2010 1st sp.s. c 7 § 38 and 2003 c 393 § 17; RCW 36.70C.120, regarding discovery, modified by 2005 c 274 § 273; RCW 36.70C.130, regarding energy overlay zones, modified by 2009 c 419 § 2). But there has been no change to the 21-day requirement, and no change to require actual notice of the "land use decision" before the 21 days begins to run. It is not for this Court to impose a judicial amendment to the statute now.

D. Even if a protected property interest existed, Durland had constructive notice, and any decision to require individualized actual notice should be left to the Legislature.

The issuance of the Heinmiller garage building permit was a routine action by the local governmental body. The permit, and the accompanying permit application file, were and are public records available to anyone. Durland cannot contend that the permit issuance was concealed from him (or anyone else). Durland *had* notice: the same constructive notice that all citizens have when a government agency issues a document and makes it public record.

Further, as set forth in Heinmiller's Answer to Petition for review,

the alleged due process issue comes before this Court after being conceded by Durland at argument in the trial court and Court of Appeals proceedings, and with no evidence from which this Court could make a reasoned judgment as to what notice should be required. Durland has failed to even identify what “notice” he contends he was entitled to.

The practical reality is that consideration of whether to impose a new, individual, actual notice requirement for building permits would involve substantial and wide-ranging questions regarding who should be entitled to notice, when, in what form, and by whom – all factors which make such a decision properly the province of the legislature.

E. The plain language of RCW 4.84.370(1) does not require that a decision be “upheld” on the merits, and mandates an award of attorney fees to Heinmiller.

Heinmiller’s Answer to Petition for Review addressed Durland’s attorney fee argument in detail, and demonstrates that the Court of Appeals correctly determined Heinmiller to be a prevailing party who is entitled to fees under RCW 4.84.370(1). But a few additional points are warranted.

RCW 4.84.370 provides:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys’ fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning,

plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Durland refers to a decision being “upheld” and argues that the legislature actually meant to write “a decision on the merits, not a decision based on procedural or jurisdictional grounds,” but there is no language in RCW 4.84.370 to support this strained interpretation. It is well-established that the primary objective in construing statutes is to ascertain the intent of the legislature. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a

whole. Dep't. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Here, the statutory language is clear, and there is nothing in RCW 4.84.370 to suggest that the Legislature intended for our courts to graft the words “on the merits” onto the statutory language. Had the Legislature intended this, it would have drafted the statute differently.

Second, the term “upheld” is found *only* in subsection (2) of the statute, which by its own terms applies only to the governmental body whose decision is challenged – in this case, San Juan County. But it has no application to Heinmiller, whose entitlement to attorney fees is found in RCW 4.84.370(1). Indeed, the cases on which Durland relies (Witt v. Port of Olympia, 126 Wn. App. 752, 759, 109 P.3d 489 (2005); Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn. App. 593, 599, 972 P.2d 470 (1999); Richards v. City of Pullman, 134 Wn. App. 876, 142 P.3d 1121 (2006), and Northshore Investors, LLC v. City of Tacoma, 174 Wn. App. 678, 301 P.3d 1049 (2013)) *all* involved attorney fee claims by the government entity which issued the underlying decision, and which prevailed as a defendant in the ensuing litigation. Each case was decided on procedural grounds, and in each case, the court looked to RCW 4.84.370(2) and seized on the word “upheld” as a basis on which to deny a fee award to the governmental

body. None of the cases address the non-governmental litigant's right to attorney fees. Thus, aside from being wrongly reasoned and wrongly decided (for the reasons set forth in Heinmiller's Answer to the Petition for Review), these cases simply do not address RCW 4.84.370(1) and hence have no bearing on Heinmiller's entitlement to attorney fees.¹

Third, Durland claims that Heinmiller could not have "prevailed" at the county level because the permit issuance was a ministerial act and did not proceed through the Hearing Examiner process. *Petition at 19-20*. But that argument reads into RCW 4.84.370 language that the Legislature did not include. RCW 4.84.370 was enacted as Laws of 1995, Ch. 347, Sec. 718, and was part of the same legislation that enacted LUPA, Chapter 36.70C RCW, as well as a series of other growth and land use-related statutes. *See*, ESHB 1724, 54th Leg., 1995 Reg. Sess. at pp. 92-102 (1995) (*Appendix A hereto*).

Notably, whereas LUPA requires a "land use decision" as defined in RCW 36.70C.020 before a petition for judicial review may be had, RCW 4.84.370(1) does not refer to a "land use decision" and does

¹ A logical reading of the statute as a whole further suggests that the legislature enacted subsection (2) simply to address the governmental entity's role as litigant whose prior decision has been challenged, whereas in subsection (1) the government entity is the "forum" or decision-maker for the underlying decision, and prevailing party status is defined as between the other parties to that decision. See also, Chelan County v. Nykreim, 146 Wn.2d 904, 944-45, 52 P.3d 1 (2002) (Alexander, C.J., dissenting; County should not have standing under LUPA to seek judicial review of its own decision, since a decision-maker cannot be "aggrieved" by its own act).

not otherwise incorporate LUPA's definitions. Our legislature used different words in enacting these sections, and the more expansive language of RCW 4.84.370(1) must be given effect. United Parcel Serv., Inc. v. Department of Rev., 102 Wn.2d 355, 362, 687 P.2d 186 (1984) ("where the Legislature used different language in different sections, it can be assumed that legislative intent was different.")

In addition, the Court must bear in mind LUPA's codification of the strong and long-recognized public policy of administrative finality in land use decisions. James v. Kitsap County, 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. The attorney fee provisions of RCW 4.84.370 reflect that same policy, by making persistently unsuccessful litigants pay the prevailing party's attorney fees. The legislature clearly intended to put real teeth into RCW 4.84.370, and thereby provide a strong incentive for those who unsuccessfully challenge land use decisions, such as Durland, to carefully consider the wisdom of continued appeals.

Moreover, applying RCW 4.84.370 as Durland argues would lead to an exceptionally perverse and unfair result, in which a litigant who brings procedurally invalid challenges to the local government decision would be *insulated* from attorney fee risk, whereas the challenger who

knowingly brings procedurally correct challenges but loses on a debatable substantive issue would be forced to pay the other side' attorney fees. This would reward frivolous, unfounded challenges such as the one at bar, a result which is directly at odds with the plain language of the statute and the legislature's intent. The harm done to the prevailing party, such as Heinmiller, by being dragged through long, drawn out, expensive layers of judicial review – a harm of which the legislature was acutely aware, and which LUPA and RCW 4.84.370 were intended to reduce – is exactly the same in either case. The penalty to the unsuccessful litigant should be as well.

F. Heinmiller should be awarded attorney fees on this appeal.

Pursuant to RAP 18.1 and RCW 4.84.370, Heinmiller requests an award of reasonable attorney fees in the proceedings before this Court.

III. CONCLUSION

Durland's LUPA petition was fatally defective from the start. The trial court and Court of Appeals correctly applied the clear language of LUPA, and there are no constitutional issues presented on the facts before this Court. The Court of Appeals decision should be affirmed in all respects, and attorney fees and costs awarded to Heinmiller.

RESPECTFULLY SUBMITTED 10 January 2014.

A handwritten signature in black ink, reading "John H. Wiegstein". The signature is written in a cursive style with a large, prominent "J" and "W".

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APPENDIX A

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 1724

54th Legislature
1995 Regular Session

Passed by the House April 23, 1995
Yeas 94 Nays 0

Speaker of the
House of Representatives

Passed by the Senate April 11, 1995
Yeas 44 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Timothy A. Martin, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 1724** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE HOUSE BILL 1724

AS AMENDED BY THE SENATE

Passed Legislature - 1995 Regular Session

State of Washington 54th Legislature 1995 Regular Session

By House Committee on Government Operations (originally sponsored by Representatives Reams, Rust, L. Thomas, Goldsmith, Ogden, Patterson, Poulsen, Scott, Regala, Mastin, Valle and Chopp; by request of Governor Lowry)

Read first time 03/01/95.

1 AN ACT Relating to implementing the recommendations of the
2 governor's task force on regulatory reform on integrating growth
3 management planning and environmental review; amending RCW 36.70A.130,
4 36.70A.140, 36.70A.280, 36.70A.300, 36.70A.320, 36.70A.330, 34.05.514,
5 43.21C.031, 43.21C.075, 43.21C.080, 43.21C.110, 43.21C.900, 90.58.020,
6 90.58.030, 90.58.050, 90.58.060, 90.58.080, 90.58.090, 90.58.100,
7 90.58.120, 90.58.140, 90.58.180, 90.58.190, 34.05.461, 36.70A.440,
8 36.70A.065, 36.70A.065, 43.21C.033, 35.63.130, 35A.63.170, 36.70.970,
9 58.17.090, 58.17.092, 58.17.100, 58.17.330, 7.16.360, and 58.17.180;
10 reenacting and amending RCW 36.70A.030 and 36.70A.290; adding new
11 sections to chapter 36.70A RCW; adding a new section to chapter 43.21C
12 RCW; adding a new section to chapter 64.40 RCW; adding new sections to
13 chapter 43.131 RCW; adding a new section to chapter 4.84 RCW; adding
14 new chapters to Title 36 RCW; adding a new chapter to Title 90 RCW;
15 adding a new chapter to Title 82 RCW; creating new sections;
16 recodifying RCW 36.70A.065 and 36.70A.440; repealing RCW 90.58.145,
17 90.62.010, 90.62.020, 90.62.030, 90.62.040, 90.62.050, 90.62.060,
18 90.62.070, 90.62.080, 90.62.090, 90.62.100, 90.62.110, 90.62.120,
19 90.62.130, 90.62.900, 90.62.901, 90.62.904, 90.62.905, 90.62.906,
20 90.62.907, and 90.62.908; providing effective dates; providing
21 expiration dates; and declaring an emergency.

1 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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12 NEW SECTION. **Sec. 1.** The legislature recognizes by this act that
13 the growth management act is a fundamental building block of regulatory
14 reform. The state and local governments have invested considerable
15 resources in an act that should serve as the integrating framework for
16 all other land-use related laws. The growth management act provides
17 the means to effectively combine certainty for development decisions,
18 reasonable environmental protection, long-range planning for cost-
19 effective infrastructure, and orderly growth and development.

20 **PART I - GROWTH MANAGEMENT ACT**

21 NEW SECTION. **Sec. 101.** The legislature finds that during project
22 review, a county or city planning under RCW 36.70A.040 is likely to
23 discover the need to make various improvements in comprehensive plans
24 and development regulations. There is no current requirement or

- 1 (5) RCW 90.62.050 and 1977 c 54 s 4 & 1973 1st ex.s. c 185 s 5;
2 (6) RCW 90.62.060 and 1982 c 179 s 2, 1977 c 54 s 5, & 1973 1st
3 ex.s. c 185 s 6;
4 (7) RCW 90.62.070 and 1973 1st ex.s. c 185 s 7;
5 (8) RCW 90.62.080 and 1987 c 109 s 156, 1977 c 54 s 6, & 1973 1st
6 ex.s. c 185 s 8;
7 (9) RCW 90.62.090 and 1977 c 54 s 7 & 1973 1st ex.s. c 185 s 9;
8 (10) RCW 90.62.100 and 1977 c 54 s 8 & 1973 1st ex.s. c 185 s 10;
9 (11) RCW 90.62.110 and 1973 1st ex.s. c 185 s 11;
10 (12) RCW 90.62.120 and 1973 1st ex.s. c 185 s 12;
11 (13) RCW 90.62.130 and 1977 c 54 s 9;
12 (14) RCW 90.62.900 and 1973 1st ex.s. c 185 s 13;
13 (15) RCW 90.62.901 and 1973 1st ex.s. c 185 s 14;
14 (16) RCW 90.62.904 and 1973 1st ex.s. c 185 s 15;
15 (17) RCW 90.62.905 and 1973 1st ex.s. c 185 s 16;
16 (18) RCW 90.62.906 and 1973 1st ex.s. c 185 s 18;
17 (19) RCW 90.62.907 and 1973 1st ex.s. c 185 s 19; and
18 (20) RCW 90.62.908 and 1977 c 54 s 10.

19 NEW SECTION. **Sec. 620.** Sections 601 through 616 of this act shall
20 constitute a new chapter in Title 90 RCW.

21 **PART VII - APPEALS**

22 NEW SECTION. **Sec. 701.** This chapter may be known and cited as the
23 land use petition act.

24 NEW SECTION. **Sec. 702.** The purpose of this chapter is to reform
25 the process for judicial review of land use decisions made by local
26 jurisdictions, by establishing uniform, expedited appeal procedures and
27 uniform criteria for reviewing such decisions, in order to provide
28 consistent, predictable, and timely judicial review.

29 NEW SECTION. **Sec. 703.** Unless the context clearly requires
30 otherwise, the definitions in this section apply throughout this
31 chapter.

32 (1) "Land use decision" means a final determination by a local
33 jurisdiction's body or officer with the highest level of authority to

1 make the determination, including those with authority to hear appeals,
2 on:

3 (a) An application for a project permit or other governmental
4 approval required by law before real property may be improved,
5 developed, modified, sold, transferred, or used, but excluding
6 applications for permits or approvals to use, vacate, or transfer
7 streets, parks, and similar types of public property; excluding
8 applications for legislative approvals such as area-wide rezones and
9 annexations; and excluding applications for business licenses;

10 (b) An interpretative or declaratory decision regarding the
11 application to a specific property of zoning or other ordinances or
12 rules regulating the improvement, development, modification,
13 maintenance, or use of real property; and

14 (c) The enforcement by a local jurisdiction of ordinances
15 regulating the improvement, development, modification, maintenance, or
16 use of real property. However, when a local jurisdiction is required
17 by law to enforce the ordinances in a court of limited jurisdiction, a
18 petition may not be brought under this chapter.

19 (2) "Local jurisdiction" means a county, city, or incorporated
20 town.

21 (3) "Person" means an individual, partnership, corporation,
22 association, public or private organization, or governmental entity or
23 agency.

24 NEW SECTION. **Sec. 704.** (1) This chapter replaces the writ of
25 certiorari for appeal of land use decisions and shall be the exclusive
26 means of judicial review of land use decisions, except that this
27 chapter does not apply to:

28 (a) Judicial review of:

29 (i) Land use decisions made by bodies that are not part of a local
30 jurisdiction;

31 (ii) Land use decisions of a local jurisdiction that are subject to
32 review by a quasi-judicial body created by state law, such as the
33 shorelines hearings board or the growth management hearings board;

34 (b) Judicial review of applications for a writ of mandamus or
35 prohibition; or

36 (c) Claims provided by any law for monetary damages or
37 compensation. If one or more claims for damages or compensation are
38 set forth in the same complaint with a land use petition brought under

1 this chapter, the claims are not subject to the procedures and
2 standards, including deadlines, provided in this chapter for review of
3 the petition. The judge who hears the land use petition may, if
4 appropriate, preside at a trial for damages or compensation.

5 (2) The superior court civil rules govern procedural matters under
6 this chapter to the extent that the rules are consistent with this
7 chapter.

8 NEW SECTION. **Sec. 705.** (1) Proceedings for review under this
9 chapter shall be commenced by filing a land use petition in superior
10 court.

11 (2) A land use petition is barred, and the court may not grant
12 review, unless the petition is timely filed with the court and timely
13 served on the following persons who shall be parties to the review of
14 the land use petition:

15 (a) The local jurisdiction, which for purposes of the petition
16 shall be the jurisdiction's corporate entity and not an individual
17 decision maker or department;

18 (b) Each of the following persons if the person is not the
19 petitioner:

20 (i) Each person identified by name and address in the local
21 jurisdiction's written decision as an applicant for the permit or
22 approval at issue; and

23 (ii) Each person identified by name and address in the local
24 jurisdiction's written decision as an owner of the property at issue;

25 (c) If no person is identified in a written decision as provided in
26 (b) of this subsection, each person identified by name and address as
27 a taxpayer for the property at issue in the records of the county
28 assessor, based upon the description of the property in the
29 application; and

30 (d) Each person named in the written decision who filed an appeal
31 to a local jurisdiction quasi-judicial decision maker regarding the
32 land use decision at issue, unless the person has abandoned the appeal
33 or the person's claims were dismissed before the quasi-judicial
34 decision was rendered. Persons who later intervened or joined in the
35 appeal are not required to be made parties under this subsection.

36 (3) The petition is timely if it is filed and served on all parties
37 listed in subsection (2) of this section within twenty-one days of the
38 issuance of the land use decision.

1 (4) For the purposes of this section, the date on which a land use
2 decision is issued is:

3 (a) Three days after a written decision is mailed by the local
4 jurisdiction or, if not mailed, the date on which the local
5 jurisdiction provides notice that a written decision is publicly
6 available;

7 (b) If the land use decision is made by ordinance or resolution by
8 a legislative body sitting in a quasi-judicial capacity, the date the
9 body passes the ordinance or resolution; or

10 (c) If neither (a) nor (b) of this subsection applies, the date the
11 decision is entered into the public record.

12 (5) Service on the local jurisdiction must be by delivery of a copy
13 of the petition to the persons identified by or pursuant to RCW
14 4.28.080 to receive service of process. Service on other parties must
15 be in accordance with the superior court civil rules or by first class
16 mail to:

17 (a) The address stated in the written decision of the local
18 jurisdiction for each person made a party under subsection (2)(b) of
19 this section;

20 (b) The address stated in the records of the county assessor for
21 each person made a party under subsection (2)(c) of this section; and

22 (c) The address stated in the appeal to the quasi-judicial decision
23 maker for each person made a party under subsection (2)(d) of this
24 section.

25 (6) Service by mail is effective on the date of mailing and proof
26 of service shall be by affidavit or declaration under penalty of
27 perjury.

28 NEW SECTION. **Sec. 706.** If the applicant for the land use approval
29 is not the owner of the real property at issue, and if the owner is not
30 accurately identified in the records referred to in section 705(2) (b)
31 and (c) of this act, the applicant shall be responsible for promptly
32 securing the joinder of the owners. In addition, within fourteen days
33 after service each party initially named by the petitioner shall
34 disclose to the other parties the name and address of any person whom
35 such party knows may be needed for just adjudication of the petition,
36 and the petitioner shall promptly name and serve any such person whom
37 the petitioner agrees may be needed for just adjudication. If such a
38 person is named and served before the initial hearing, leave of court

1 for the joinder is not required, and the petitioner shall provide the
2 newly joined party with copies of the pleadings filed before the
3 party's joinder. Failure by the petitioner to name or serve, within
4 the time required by section 705(3) of this act, persons who are needed
5 for just adjudication but who are not identified in the records
6 referred to in section 705(2)(b) of this act, or in section 705(2)(c)
7 of this act if applicable, shall not deprive the court of jurisdiction
8 to hear the land use petition.

9 NEW SECTION. **Sec. 707.** Standing to bring a land use petition
10 under this chapter is limited to the following persons:

11 (1) The applicant and the owner of property to which the land use
12 decision is directed;

13 (2) Another person aggrieved or adversely affected by the land use
14 decision, or who would be aggrieved or adversely affected by a reversal
15 or modification of the land use decision. A person is aggrieved or
16 adversely affected within the meaning of this section only when all of
17 the following conditions are present:

18 (a) The land use decision has prejudiced or is likely to prejudice
19 that person;

20 (b) That person's asserted interests are among those that the local
21 jurisdiction was required to consider when it made the land use
22 decision;

23 (c) A judgment in favor of that person would substantially
24 eliminate or redress the prejudice to that person caused or likely to
25 be caused by the land use decision; and

26 (d) The petitioner has exhausted his or her administrative remedies
27 to the extent required by law.

28 NEW SECTION. **Sec. 708.** A land use petition must set forth:

29 (1) The name and mailing address of the petitioner;

30 (2) The name and mailing address of the petitioner's attorney, if
31 any;

32 (3) The name and mailing address of the local jurisdiction whose
33 land use decision is at issue;

34 (4) Identification of the decision-making body or officer, together
35 with a duplicate copy of the decision, or, if not a written decision,
36 a summary or brief description of it;

- 1 (5) Identification of each person to be made a party under section
2 705(2) (b) through (d) of this act;
- 3 (6) Facts demonstrating that the petitioner has standing to seek
4 judicial review under section 707 of this act;
- 5 (7) A separate and concise statement of each error alleged to have
6 been committed;
- 7 (8) A concise statement of facts upon which the petitioner relies
8 to sustain the statement of error; and
- 9 (9) A request for relief, specifying the type and extent of relief
10 requested.

11 NEW SECTION. **Sec. 709.** (1) Within seven days after the petition
12 is served on the parties identified in section 705(2) of this act, the
13 petitioner shall note, according to the local rules of superior court,
14 an initial hearing on jurisdictional and preliminary matters. This
15 initial hearing shall be set no sooner than thirty-five days and no
16 later than fifty days after the petition is served on the parties
17 identified in section 705(2) of this act.

18 (2) The parties shall note all motions on jurisdictional and
19 procedural issues for resolution at the initial hearing, except that a
20 motion to allow discovery may be brought sooner. Where confirmation of
21 motions is required, each party shall be responsible for confirming its
22 own motions.

23 (3) The defenses of lack of standing, untimely filing or service of
24 the petition, and failure to join persons needed for just adjudication
25 are waived if not raised by timely motion noted to be heard at the
26 initial hearing, unless the court allows discovery on such issues.

27 (4) The petitioner shall move the court for an order at the initial
28 hearing that sets the date on which the record must be submitted, sets
29 a briefing schedule, sets a discovery schedule if discovery is to be
30 allowed, and sets a date for the hearing or trial on the merits.

31 (5) The parties may waive the initial hearing by scheduling with
32 the court a date for the hearing or trial on the merits and filing a
33 stipulated order that resolves the jurisdictional and procedural issues
34 raised by the petition, including the issues identified in subsections
35 (3) and (4) of this section.

36 (6) A party need not file an answer to the petition.

1 NEW SECTION. **Sec. 710.** The court shall provide expedited review
2 of petitions filed under this chapter. The matter must be set for
3 hearing within sixty days of the date set for submitting the local
4 jurisdiction's record, absent a showing of good cause for a different
5 date or a stipulation of the parties.

6 NEW SECTION. **Sec. 711.** (1) A petitioner or other party may
7 request the court to stay or suspend an action by the local
8 jurisdiction or another party to implement the decision under review.
9 The request must set forth a statement of grounds for the stay and the
10 factual basis for the request.

11 (2) A court may grant a stay only if the court finds that:

12 (a) The party requesting the stay is likely to prevail on the
13 merits;

14 (b) Without the stay the party requesting it will suffer
15 irreparable harm;

16 (c) The grant of a stay will not substantially harm other parties
17 to the proceedings; and

18 (d) The request for the stay is timely in light of the
19 circumstances of the case.

20 (3) The court may grant the request for a stay upon such terms and
21 conditions, including the filing of security, as are necessary to
22 prevent harm to other parties by the stay.

23 NEW SECTION. **Sec. 712.** (1) Within forty-five days after entry of
24 an order to submit the record, or within such a further time as the
25 court allows or as the parties agree, the local jurisdiction shall
26 submit to the court a certified copy of the record for judicial review
27 of the land use decision, except that the petitioner shall prepare at
28 the petitioner's expense and submit a verbatim transcript of any
29 hearings held on the matter.

30 (2) If the parties agree, or upon order of the court, the record
31 shall be shortened or summarized to avoid reproduction and
32 transcription of portions of the record that are duplicative or not
33 relevant to the issues to be reviewed by the court.

34 (3) The petitioner shall pay the local jurisdiction the cost of
35 preparing the record before the local jurisdiction submits the record
36 to the court. Failure by the petitioner to timely pay the local

1 jurisdiction relieves the local jurisdiction of responsibility to
2 submit the record and is grounds for dismissal of the petition.

3 (4) If the relief sought by the petitioner is granted in whole or
4 in part the court shall equitably assess the cost of preparing the
5 record among the parties. In assessing costs the court shall take into
6 account the extent to which each party prevailed and the reasonableness
7 of the parties' conduct in agreeing or not agreeing to shorten or
8 summarize the record under subsection (2) of this section.

9 NEW SECTION. **Sec. 713.** (1) When the land use decision being
10 reviewed was made by a quasi-judicial body or officer who made factual
11 determinations in support of the decision and the parties to the quasi-
12 judicial proceeding had an opportunity consistent with due process to
13 make a record on the factual issues, judicial review of factual issues
14 and the conclusions drawn from the factual issues shall be confined to
15 the record created by the quasi-judicial body or officer, except as
16 provided in subsections (2) through (4) of this section.

17 (2) For decisions described in subsection (1) of this section, the
18 record may be supplemented by additional evidence only if the
19 additional evidence relates to:

20 (a) Grounds for disqualification of a member of the body or of the
21 officer that made the land use decision, when such grounds were unknown
22 by the petitioner at the time the record was created;

23 (b) Matters that were improperly excluded from the record after
24 being offered by a party to the quasi-judicial proceeding; or

25 (c) Matters that were outside the jurisdiction of the body or
26 officer that made the land use decision.

27 (3) For land use decisions other than those described in subsection
28 (1) of this section, the record for judicial review may be supplemented
29 by evidence of material facts that were not made part of the local
30 jurisdiction's record.

31 (4) The court may require or permit corrections of ministerial
32 errors or inadvertent omissions in the preparation of the record.

33 (5) The parties may not conduct pretrial discovery except with the
34 prior permission of the court, which may be sought by motion at any
35 time after service of the petition. The court shall not grant
36 permission unless the party requesting it makes a prima facie showing
37 of need. The court shall strictly limit discovery to what is necessary
38 for equitable and timely review of the issues that are raised under

1 subsections (2) and (3) of this section. If the court allows the
2 record to be supplemented, the court shall require the parties to
3 disclose before the hearing or trial on the merits the specific
4 evidence they intend to offer. If any party, or anyone acting on
5 behalf of any party, requests records under chapter 42.17 RCW relating
6 to the matters at issue, a copy of the request shall simultaneously be
7 given to all other parties and the court shall take such request into
8 account in fashioning an equitable discovery order under this section.

9 NEW SECTION. **Sec. 714.** (1) The superior court, acting without a
10 jury, shall review the record and such supplemental evidence as is
11 permitted under section 713 of this act. The court may grant relief
12 only if the party seeking relief has carried the burden of establishing
13 that one of the standards set forth in (a) through (f) of this
14 subsection has been met. The standards are:

15 (a) The body or officer that made the land use decision engaged in
16 unlawful procedure or failed to follow a prescribed process, unless the
17 error was harmless;

18 (b) The land use decision is an erroneous interpretation of the
19 law, after allowing for such deference as is due the construction of a
20 law by a local jurisdiction with expertise;

21 (c) The land use decision is not supported by evidence that is
22 substantial when viewed in light of the whole record before the court;

23 (d) The land use decision is a clearly erroneous application of the
24 law to the facts;

25 (e) The land use decision is outside the authority or jurisdiction
26 of the body or officer making the decision; or

27 (f) The land use decision violates the constitutional rights of the
28 party seeking relief.

29 (2) In order to grant relief under this chapter, it is not
30 necessary for the court to find that the local jurisdiction engaged in
31 arbitrary and capricious conduct. A grant of relief by itself may not
32 be deemed to establish liability for monetary damages or compensation.

33 NEW SECTION. **Sec. 715.** The court may affirm or reverse the land
34 use decision under review or remand it for modification or further
35 proceedings. If the decision is remanded for modification or further
36 proceedings, the court may make such an order as it finds necessary to

1 preserve the interests of the parties and the public, pending further
2 proceedings or action by the local jurisdiction.

3 **Sec. 716.** RCW 7.16.360 and 1989 c 175 s 38 are each amended to
4 read as follows:

5 This chapter does not apply to state agency action reviewable under
6 chapter 34.05 RCW or to land use decisions of local jurisdictions
7 reviewable under chapter 36.-- RCW (sections 701 through 715 of this
8 act).

9 **Sec. 717.** RCW 58.17.180 and 1983 c 121 s 5 are each amended to
10 read as follows:

11 Any decision approving or disapproving any plat shall be reviewable
12 (~~for unlawful, arbitrary, capricious or corrupt action or nonaction by~~
13 ~~writ of review before the superior court of the county in which such~~
14 ~~matter is pending. Standing to bring the action is limited to the~~
15 ~~following parties:~~

16 ~~(1) The applicant or owner of the property on which the subdivision~~
17 ~~is proposed;~~

18 ~~(2) Any property owner entitled to special notice under RCW~~
19 ~~58.17.090;~~

20 ~~(3) Any property owner who deems himself aggrieved thereby and who~~
21 ~~will suffer direct and substantial impacts from the proposed~~
22 ~~subdivision.~~

23 ~~Application for a writ of review shall be made to the court within~~
24 ~~thirty days from any decision so to be reviewed. The cost of~~
25 ~~transcription of all records ordered certified by the court for such~~
26 ~~review shall be borne by the appellant)) under chapter 36.-- RCW
27 (sections 701 through 715 of this act).~~

28 **NEW SECTION. Sec. 718.** A new section is added to chapter 4.84 RCW
29 to read as follows:

30 (1) Notwithstanding any other provisions of this chapter,
31 reasonable attorneys fees and costs shall be awarded to the prevailing
32 party or substantially prevailing party on appeal before the court of
33 appeals or the supreme court of a decision by a county, city, or town
34 to issue, condition, or deny a development permit involving a site-
35 specific rezone, zoning, plat, conditional use, variance, shoreline
36 permit, building permit, site plan, or similar land use approval or

1 decision. The court shall award and determine the amount of reasonable
2 attorneys fees and costs under this section if:

3 (a) The prevailing party on appeal was the prevailing or
4 substantially prevailing party before the county, city, or town, or in
5 a decision involving a substantial development permit under chapter
6 90.58 RCW, the prevailing party on appeal was the prevailing party or
7 the substantially prevailing party before the shoreline hearings board;
8 and

9 (b) The prevailing party on appeal was the prevailing party or
10 substantially prevailing party in all prior judicial proceedings.

11 (2) In addition to the prevailing party under subsection (1) of
12 this section, the county, city, or town whose decision is on appeal is
13 considered a prevailing party if its decision is upheld at superior
14 court and on appeal.

15 NEW SECTION. **Sec. 719.** Sections 701 through 715 of this act shall
16 constitute a new chapter in Title 36 RCW.

17 **PART VIII - STUDY**

18 NEW SECTION. **Sec. 801.** The land use study commission is hereby
19 established. The commission's goal shall be the integration and
20 consolidation of the state's land use and environmental laws into a
21 single, manageable statute. In fulfilling its responsibilities, the
22 commission shall evaluate the effectiveness of the growth management
23 act, the state environmental policy act, the shoreline management act,
24 and other state land use, planning, environmental, and permitting
25 statutes in achieving their stated goals.

26 NEW SECTION. **Sec. 802.** The commission shall consist of not more
27 than fourteen members. Eleven members of the commission shall be
28 appointed by the governor. Membership shall reflect the interests of
29 business, agriculture, labor, the environment, neighborhood groups,
30 other citizens, the legislature, cities, counties, and federally
31 recognized Indian tribes. Members shall have substantial experience in
32 matters relating to land use and environmental planning and regulation,
33 and shall have the ability to work toward cooperative solutions among
34 diverse interests. The director of the department of community, trade,
35 and economic development, or the director's designee, shall be a member

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To: OFFICE RECEPTIONIST, CLERK
Cc: John Wiegenstein; Elisha Smith
Subject: Durland v San Juan County - Supreme Court No. 89293-8
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Durland, et al v. San Juan County, et al - Supreme Court Case No. 89293-8

Filing for John H. Wiegenstein, WSBA # 21201, attorney for Respondents Wes Heinmiller and Alan Stameisen
johnw@hellerwiegenstein.com Ph: 425-778-2525

Please find attached for filing the following documents:

1. Respondents Heinmiller and Stameisen's Supplemental Brief, with Appendix A; and
2. Certificate of Service.

Thank you,

Monica Roberts | Legal Assistant



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