IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89293-8

COURT OF APPEALS NO. 68453-1-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

PETITION FOR REVIEW

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations — Page

County Regulations — Page

Court Rules	Page

I. IDENTITY OF THE PETITIONERS

Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks, appellants below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Appellants seek review of the published opinion issued by the Court of Appeals for Division I in the case of *Durland, et al. v. San Juan County, et al.* (July 1, 2013) (2013 WL 3324220) (App. A hereto). The Court of Appeals denied Appellants' motion for reconsideration on July 30, 2013 (App. B hereto).

III. ISSUES PRESENTED FOR REVIEW

1. The Land Use Petition Act ("LUPA"), ch. 36.70C RCW, provides that aggrieved persons may appeal local land use decisions to the superior court, provided, *inter alia*, that they exhaust their administrative remedies "to the extent required by law." Does LUPA implicitly include an additional, absolute requirement to exhaust administrative remedies, unrestrained by due process, which would preclude parties from challenging a decision of which they had no actual or constructive notice?

2. RCW 4.84.370 provides that the Court of Appeals may award attorney's fees to the prevailing party in a land use case provided that the party also "prevailed" or "substantially prevailed" before the

superior court and before the local jurisdiction, and provided further that the decision on appeal is "upheld." Does RCW 4.84.370 also allow the Court of Appeals to award fees when it does not address or uphold the decision below, but dismisses the case on jurisdictional grounds?

IV. STATEMENT OF THE CASE

This case is about the rights of individuals to have notice and an opportunity to oppose illegal development projects that injure them. In violation of their due process rights, Appellants have been deprived of the opportunity to oppose their neighbors' illegal development because San Juan County did not notify them of the decision until it was too late to challenge it using the County's administrative appeals process. Review by this Court is necessary to redress this illegal conduct, and to ensure that similar conduct does not injure other Washington citizens in the future.

A. Facts Giving Rise to the Dispute

Appellants Michael Durland and Kathleen Fennell own waterfront property on Orcas Island, where they live and run a small business called Deer Harbor Boatworks. CP 74.

In 2001, San Juan County issued a building permit to Mr. Durland's neighbors, Wes Heinmiller and Alan Stameisen, allowing them to rebuild a previously-permitted, one-story garage adjacent to Mr. Durland's and Ms. Fennell's property. *Id.* The building permit required

Heinmiller and Stameisen to confine their new garage to the footprint of the existing garage, and to refrain from placing the new garage any closer to the shoreline than the existing structure. CP 74, 80.

Heinmiller and Stameisen did not comply with their building permit; instead, they built their new garage outside the footprint of the existing structure and closer to the shoreline than the old garage had been. CP 75. Upon discovering these violations, Mr. Durland filed a complaint with the County on March 22, 2011, wherein he requested that the County take action against Heinmiller and Stameisen for violating their building permit and for building an illegal structure. *Id.*

For many months, the County ignored Mr. Durland's complaint and, in time, he grew suspicious that the County was stalling. *Id.* at 75. Frustrated with the County's inaction, Mr. Durland filed a public records request with the County on November 3, 2011, for documents relating to its investigation. *Id.* Mr. Durland had hoped to discover that the County was taking action on his neighbor's illegal development. He believed the County would not allow further development of the garage without resolving the alleged violations. *Id.* at 77. And he assumed that should further development be approved, the County would follow its own mandatory notice requirements for the issuance of a shoreline conditional use permit (discussed *infra*). *See id.* at 78.

But he was wrong. Unbeknownst to Mr. Durland, Heinmiller and Stameisen had already applied to the County for a second building permit to add a second-story office and "entertainment area" to the illegal garage. *Id.* at 76, 81. Heinmiller and Stameisen submitted their application on August 8, 2011, when the County was allegedly investigating Mr. Durland's complaint, and shortly before Mr. Durland began to suspect that the City was stalling. *See id.* at 76. The San Juan County Code (the "SJCC") did not require notice of the application to be given to the neighbors and none was given.[1] On November 1, 2011, two days prior to Mr. Durland's public records request, the County granted the application and issued the permit without providing any public notice of its action. *Id.*

Unfortunately for Mr. Durland, he would not learn about the new permit until after his appeal window expired under the SJCC. The SJCC provides that building permits may be appealed to the County Hearing Examiner within 21 days of issuance. SJCC 18.80.140.D.1. If no appeal is filed, the permit becomes a "final" decision not subject to further review by the County. SJCC 18.80.130.

---

[1] Under Washington law, the issuance of a building permit is a ministerial act insofar as the local government has no discretion to deny or delay the permit provided that substantive local code requirements are met. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 961, 954 P.2d 250 (1998). The SJCC does not require public notice prior to, or at any time after, the issuance of a building permit.

Mr. Durland first learned of the new permit from the documents that the County provided in response to his public records request. But the County did not notify him that his documents were available until November 22, 2011 — the very day that the appeal period expired under the SJCC.[2] And the County did not provide the documents until December 5, 2011 — more than a month after Mr. Durland requested them. *Id.* [3]

Nevertheless, Mr. Durland quickly requested a copy of new permit, whereupon he discovered that it was issued in violation of numerous San Juan County Code provisions. *Id.* at 77. It was issued in violation of limits on the size of accessory structures; prohibitions against additions to illegal structures; prohibitions against expanding non-conforming structures in the shoreline; and height limitations. *See* SJCC 18.50.330.E.2; SJCC 18.100.030.F; SJCC 18.50.330.B.15; and SJCC 18.50.330.E.2.a. *See also* SJCC 18.50.330.D.2.e(i)–(iv). These violations would allow additional illegal development in the shoreline and further impact Mr. Durland's and Ms. Fennell's view and their enjoyment of their land.

---

[2] While County staff did not provide Mr. Durland with a response to his public records request until November 22, 2011, they were involved with the permit application and with other litigation involving the Heinmiller/Stameisen property. *See* CP 78. In light of the other litigation, staff would have known Mr. Durland had a keen interest in his neighbors' conduct. *Id.* The County provided no explanation for delaying release of the files containing the permit until after the deadline for appeals had passed.

[3] The November 22 notice did not alert Mr. Durland that a new permit had been issued on November 1. *See* CP 76. Mr. Durland did not learn of the existence of the permit until the documents were delivered to him on December 5, 2011. *Id.*

Perhaps most egregious, the second-story addition required a shoreline conditional use permit pursuant to SJCC 18.50.330.E.4, without which the building permit could not legally be issued. *See* SJCC 18.80.110.G. Yet, the County did not require a shoreline permit. Had it done so, Mr. Durland would have received notice and he could have contested the permit. *See* SJCC 18.80.110.B. Because the County ignored that requirement, no notice was given and Mr. Durland had no way of knowing of the permit until long after it was issued. By using this illegal procedure, the County deprived Mr. Durland of his only opportunity to file a timely administrative appeal.

B. Proceedings Below

On December 16, 2011, Mr. Durland and Ms. Fennell appealed the second building permit to the Skagit County Superior Court. *See* CP 33. They filed their appeal under LUPA, which provides "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). They alleged that the permit violated several provisions of the SJCC, including those discussed above. *See id.* at 35–37. And they filed eleven days after Mr. Durland first learned of the second building permit, well within LUPA's 21-day statute of limitations at RCW 36.70C.040(3). *See* CP 33.

The superior court dismissed the case on February 3, 2012, on jurisdictional grounds. *See* CP 156. And the Court of Appeals affirmed the superior court's decision on July 1, 2013. *See* App. A.[4]

The Court of Appeals affirmed the dismissal because Mr. Durland and Ms. Fennell failed to exhaust their administrative remedies. *Id.* at 4–6. In the court's view, LUPA required them to appeal to the County Hearing Examiner within the local appeal window despite that they had no way of discovering the second building permit until after the window had closed. *Id.* at 6. But the Court of Appeals did not base its decision on the one provision in LUPA that expressly discusses the exhaustion requirement (RCW 36.70C.060). That provision, titled "Standing," requires exhaustion only "to the extent required by law." *See* RCW 36.70C.060(2)(d) (App. E). Mr. Durland and Ms. Fennell demonstrated below that Washington law has always excused the exhaustion requirement when fairness, equity, and due process mandate a more lenient approach. *See* CP 93-95.

The Court of Appeals did not consider these exceptions. Nor did it consider the important due process issues involved in this case or the clear

---

[4] Mr. Durland also appealed the permit to the San Juan County Hearing Examiner, who dismissed his appeal for failure to comply with the County's 21-day limitations period in the SJCC. Mr. Durland appealed the Hearing Examiner's dismissal to the Skagit County Superior Court, and the case is now on appeal to the Court of Appeals for Division I. *See Durland, et al. v. San Juan County, et al.*, No. 050474-1-I (filed July 27, 2012). Oral argument was heard on July 18, 2013, and the parties are currently awaiting a decision in that case.

statutory text at RCW 36.70C.060(2)(d). Instead, it found what it characterized as an absolute exhaustion requirement at RCW 36.70C.020(2) (App. D), LUPA's definition of "land use decision." That definition provides that "land use decision" means "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.* . . ." (emphasis added).

Focusing exclusively on the italicized portion of this definition (and ignoring the remainder of the statute) the court reasoned that because the SJCC gives the hearing examiner appellate jurisdiction over the building permit, only a decision from that office counts as a "land use decision" under LUPA. App. A at 7. Because LUPA provides the "exclusive means of judicial review of land use decisions," RCW 36.70C.030, the court reasoned that the superior court lacked jurisdiction to review anything less than a decision by the Hearing Examiner. *Id.* at 9. In essence, the court held that LUPA requires Mr. Durland and Ms. Fennell to do the impossible: appeal a decision of which they had no actual or constructive knowledge.

The Court of Appeals denied Mr. Durland's and Ms. Fennell's petition for reconsideration on July 30, 2013. *See* App. B. It then awarded Heinmiller $13,373.50 in attorney's fees under RCW 4.84.370. *See* App.

C. In making the award, the court departed from several reasoned opinions from Divisions II and III, which hold that RCW 4.84.370 allows an award of attorney's fees only when the party prevails "on the merits," and when the substance of the local jurisdiction's decision is "upheld." Here, Heinmiller did not prevail on the merits because the case was dismissed on jurisdictional grounds. For that reason, the building permit also was not "upheld" within the meaning of RCW 4.84.370.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals opinion if it involves a significant question of law under the Constitutions of the State of Washington or of the United States, if it involves an issue of substantial public interest, or if the decision conflicts with other decisions of this Court or the Court of Appeals. RAP 13.4(b)(1) - (4).

The Court of Appeals' dismissal of this case raises a fundamental issue of due process: can members of the public legally be precluded from challenging decisions that harm them simply because they are deprived of the opportunity to avail themselves of local remedies? The most basic tenet of due process is that citizens must have notice and an opportunity to oppose government actions that harm them. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). But the Court of Appeals interpreted LUPA in a way that deprives Mr. Durland and Ms.

Fennell (and threatens to deprive others) of this fundamental right. This Court should grant review and clarify that LUPA does not abrogate the basic requirement of due process — notice and an opportunity to be heard.

Similarly, Heinmiller's fee award conflicts with several decisions by Divisions II and III. It also implicates the important public policies underlying the American rule governing fee awards, which the Court of Appeals disregarded when it construed RCW 4.84.370 broadly to not only authorize fee awards in cases resolved on the merits, but also in cases dismissed on purely procedural or jurisdictional grounds. This Court should grant review, resolve the conflict among the divisions, and ensure that the American rule is not abrogated unnecessarily.

A. The Dismissal of Mr. Durland's Appeal under LUPA Raises Serious Constitutional Questions, Implicates Issues of Substantial Public Importance, and Conflicts with Decisions of this Court.

Building permits and other land use decisions are ubiquitous in contemporary society. For example, according to the United States Census Bureau, in 2012 alone, more than 28,000 building permits were issued in Washington for new privately-owned housing units.[5] And for many years, Washington courts have been filled with cases involving disputes over

[5] *See* http://www.census.gov/construction/bps/txt/tb2u2012.txt (last visited Aug. 27, 2013).

land use and the many procedural hazards and pitfalls that confront plaintiffs who must use the courts to vindicate their interests.[6]

The doctrine of exhaustion of administrative remedies is one such pitfall, and not only does it affect an untold number of Washington citizens, it implicates serious due process considerations. If the Court of Appeals' decision stands, these citizens may be deprived of their ability to seek redress without ever being notified that their rights are at stake.

1. The doctrine of exhaustion of administrative remedies must be applied in a manner consistent with due process.

The doctrine of exhaustion of administrative remedies generally requires parties to avail themselves of administrative remedies provided by a local jurisdiction's ordinances before suing the local jurisdiction in court. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). Typically, a party wishing to challenge a city or county land use decision must first follow the steps that local ordinances provide for an administrative appeal. *Id.* at 866.

But for several decades, Washington courts have held that the exhaustion requirement is not absolute.[7] Instead, it is a prudential rule

---

[6] For example, a Westlaw search for "LUPA" returns 149 published opinions by the Washington Court of Appeals from 1997 to the present and 169 unpublished opinions. (For comparison, during this same time period the Washington Court of Appeals published 174 opinions, and issued 152 unpublished opinions involving habeas corpus.) This is undoubtedly a small fraction of the number of similar cases that did not make it to the appellate level of review.

"founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges." *Id.* The rule requires courts to weigh many factors to decide whether requiring exhaustion is desirable. *See Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797–98, 732 P.2d 1013 (1987). In this way, the rule is traditionally a flexible one — it is not an absolute bar preventing citizens from vindicating their rights in court.

One legally-required exception to the exhaustion rule is constitutional due process. As this Court has long held, "[o]ne of the basic touchstones of due process in any proceeding is notice reasonably calculated under all the circumstances to apprise affected parties of the pending action and afford them an opportunity to present their objections." *Barrie v. Kitsap County*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1974). *See also Mathews*, 424 U.S. at 348. In *Barrie*, this Court held that due process requires local governments to notify landowners before making decisions that negatively affect the character and use of adjacent properties. *See Barrie*, 84 Wn.2d at 585–86. *Accord Larsen v. Town of Colton*, 94 Wn.

---

[7] *See, e.g., Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797, 732 P.2d 1013 (1987); *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985); *Smoke v. City of Seattle*, 132 Wn.2d 214, 937 P.2d 186 (1997); *Keller v. City of Bellingham*, 20 Wn. App. 1, 578 P.2d 881 (1978), *aff'd on other grounds*, 92 Wn.2d 726, 600 P.2d 1276 (1979).

App. 383, 391, n. 6, 973 P.2d 1066 (1999), *overruled on other grounds by Chelan County v. Nykriem*, 146 Wn.2d 904, 926–27, 52 P.3d 1 (2002).

A natural consequence of this notice requirement is that plaintiffs may not be barred from challenging a local land use decision for failure to exhaust administrative remedies unless they are notified of the decision in time pursue an administrative appeal. *Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 243–44, 617 P.2d 743 (1980) (holding that requiring exhaustion "would be unreasonable and violative of due process" if no notice was given of the underlying land use decision).[8]

2. The Court of Appeals interpreted LUPA in a manner that violates the state and federal due process clauses, and is inconsistent with prior decisions of this Court.

LUPA codifies its version of the exhaustion requirement at RCW 36.70C.060(2), as an element of standing. But, reflecting the established case law in Washington prior to LUPA's passage, the Legislature was careful to not make the requirement absolute. Instead, RCW 36.70C.060(2) provides, in relevant part:

> Standing to bring a land use petition under this chapter is limited to the following persons:
> . . .

[8] Another exception to the exhaustion requirement, equally applicable to this case, is that exhaustion will not be required when the matter is primarily a legal dispute. In that case, there is no need to defer to agency fact-finding. *See Prisk*, 45 Wn. App. at 798; *Credit General v. Zewdu*, 82 Wn. App. 620, 628, 919 P.2d 93 (1996).

> (2) [A] person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
> . . .
>
> (d) The petitioner has exhausted his or her administrative remedies *to the extent required by law.*

RCW 36.70C.060(2) (emphasis added).

Here, the phrase "to the extent required by law" is broad enough to encompass the traditional, equitable exceptions to the exhaustion requirement. As such, the phrase should be interpreted to incorporate those exceptions, not exclude them.[9] Indeed, the phrase *must* be construed, at a minimum, to provide an exception when due process notice requirements require a more lenient approach. *See State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996) (Washington courts "are obliged to construe [every] statute in a way that is consistent with its underlying purpose and *avoids constitutional deficiencies.*") (emphasis added). This Court has recognized this basic fact, if implicitly, as applied to LUPA. *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406–07, 120 P.3d 56 (2005) ("[O]nce a party *has had a chance* to challenge a land use decision *and*

---

[9] *See, e.g., In re Parentage of L.B.*, 155 Wn.2d 679, 695, n. 11, 122 P.3d 161 (2005) ("Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent, . . . and it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent") (internal quotations and citations omitted).

exhaust all appropriate remedies," the petitioner must challenge it within LUPA's statutory limitations period.) (emphasis added).[10]

Rather than look to the language of RCW 36.70C.060(2), the only provision in LUPA that even mentions the exhaustion requirement, the Court of Appeals found a stricter, unyielding exhaustion requirement in LUPA's definition of "land use decision," RCW 36.70C.020(2). *See* App. A at 6. As discussed *supra*, the court reasoned that because "land use decision" means a decision by "the highest level of authority to make the determination," it must preclude courts from reviewing staff decisions not appealed administratively — even if no notice was provided.

This reasoning ignores the many decisions of this Court holding that a statute should not be interpreted to violate constitutional rights.[11] Here, it is entirely possible to interpret LUPA so that it would not deprive Mr. Durland, Ms. Fennell, or anyone else of their right to notice and an

---

[10] Similarly, Division I has construed LUPA's exhaustion requirement to contain an exception where the plaintiff was not notified of the land use decision, although in that case the exception did not apply. *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 378, 223 P.3d 1172 (2009) (under LUPA, courts "have the ability to independently determine whether to excuse a land use petitioner's failure to exhaust administrative remedies due to insufficient notice or another recognized exception."). *Cf Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 219, 257 P.3d 641 (2011) (reversing Court of Appeals' decision under LUPA where it would deprive the petitioner of a "realistic chance to exhaust administrative remedies").

[11] *See, e.g., State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) ("[W]here a statute is susceptible of more than one interpretation, some of which may render it unconstitutional, the court will adopt a construction which sustains the statute's constitutionality, if at all possible."); *In re Cross.*, 99 Wn.2d 373, 383, 662 P.2d 828 (1983) (same).

opportunity to be heard. For example, LUPA's definition of "land use decision" may be interpreted to require a decision by a local *appellate* body only when an appeal is actually taken or could have been taken to that body.[12] This would be consistent with the SJCC, which provides that if an administrative appeal is not taken, the decision becomes "final" for local purposes. *See* SJCC 18.80.130. As Justice Chambers noted in his concurring opinion in *Habitat Watch*, while LUPA generally limits review to decisions of the highest-ranking local officer, "unless [local] review is sought, the most minor decision made by the person with the least authority is a 'land use decision'" under LUPA. 155 Wn.2d at 418 (Chambers, J., concurring). LUPA should not be construed "to bar the courthouse door to those who had no notice, especially when the decisions at issue were decisions made by lower level staffers." *Id.*[13]

To date, this Court has been mindful to not construe LUPA in a manner that would violate due process.[14] The Court of Appeals did not

---

12 When notice is provided after the deadline for administrative appeals, there is no "body or officer . . . with authority to hear appeals," RCW 36.70C.060(2).

13 Alternatively, while LUPA provides the exclusive means of challenging "land use decisions" as defined at RCW 36.70C.020(2), it does not divest superior courts of their power to review other types of decisions under more general grants of jurisdiction. *See, e.g., Burst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2002). *See also Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). LUPA might therefore be interpreted to allow challenges to the type of decision at issue here even if the Court of Appeals' interpretation of RCW 36.70C.020(2) is upheld.

14 *See Habitat Watch,* 155 Wn.2d at 410, n. 8 (reserving judgment on

take the same measured approach below, and this Court should grant review to clarify that LUPA does not abrogate the due process rights of Mr. Durland, Ms. Fennell, or anyone else.

B. The Award of Attorney's Fees Implicates Issues of Substantial Public Importance and Is in Conflict with Other Decisions by the Courts of Appeals.

This Court should also review the Court of Appeals' decision to award attorney's fees to Respondent Heinmiller. The award was made under RCW 4.84.370, which authorizes fee awards to parties who prevail before the local jurisdiction, and who later prevail before the superior court and the Court of Appeals. The statute 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

---

whether LUPA's statute of limitations bars an appellant who had no notice of the challenged decision); *Nykriem*, 146 Wn.2d at 924 (recognizing that issuance of a building permit without notice raises due process concerns, but the petitioners had actual notice of the decision in time to challenge it within a reasonable time); *Samuel's Furniture, Inc. v. State Dept. of Ecology*, 147 Wn.2d 440, 462, 54 P.3d 1194 (2002) (holding that LUPA does not require individualize notice of land use decisions, but LUPA and due process require, at least, that some form of public notice be provided).

> 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.*

RCW 4.84.370 (emphasis added).

As a fee-shifting statute, RCW 4.84.370 is an exception to the American rule that governs the awarding of attorney's fees. Like most American jurisdictions, Washington has followed this rule since the beginning of its statehood. *See, e.g., Larson v. Winder*, 14 Wn. 647, 651, 45 P. 315 (1896). The rule provides that "[i]n absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney's fee as part of the costs of litigation." *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941) (emphasis added).

The American rule embodies many important public policies, not the least of which is access to justice — it ensures that less wealthy plaintiffs will not be deterred from seeking redress for fear of being saddled with their opponent's legal fees should they lose.[15] Accordingly,

---

[15] *See, e.g., Ackerman v. Kaufman*, 41 Ariz. 110, 114, 15 P.2d 966 (1932) ("Our public policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he

this Court has held that because fee-shifting statutes are exceptions to the American rule, they must be construed narrowly. *See Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). Abrogation of the American rule, in whole or in part, requires "a clear expression of intent from the legislature." *Id.*

As applied to RCW 4.84.370, the Courts of Appeals for Divisions II and III have heeded the requirement to construe fee-shifting statutes narrowly.[16] In each instance, RCW 4.84.370 was held to authorize a fee award *only* in cases disposed of on the merits; it does not apply to cases dismissed on procedural or jurisdictional grounds.[17] Here, the superior court dismissed Mr. Durland's and Ms. Fennell's appeal on jurisdictional grounds, and the Court of Appeals affirmed on that basis. *See* App. A. at 10, n. 7. The County's decision was never analyzed or upheld.

In awarding fees, the Court of Appeals followed *Prekeges v. King County*, 98 Wn. App. 275, 285, 990 P.2d 405 (1999), reasoning that it was

---

lose."); *Straus v. Victor Talking Mach. Co.*, 297 F. 791, 799 (2nd Cir. 1924) ("[I]t would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage.").

[16] *See, e.g., Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049 (2013); *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006); *Witt v. Port of Olympia*, 126 Wn. App. 752, 759–60, 109 P.3d 489 (2005); and *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 601, 972 P.2d 470 (1999).

[17] As the court observed in *Witt*, the terms "prevailing party" and "substantially prevailing party," and the requirement that the local decision be "upheld," all contemplate that the case be resolved on the merits. *See Witt*, 126 Wn. App. at 759.

empowered to award fees because RCW 4.84.370 does not explicitly *require* a resolution on the merits. *See id.* But the court asked the wrong question; it should have asked whether the statute expressly *confers* authority to make a fee award under these circumstances. As Divisions II and III have held, it does not. Because neither the superior court nor the Court of Appeals ruled on the merits of the case, they did not address, let alone "uphold" the County's decision and RCW 4.84.370 is inapplicable.[18] This Court should grant review to correct the Court of Appeals' erroneous interpretation of RCW 4.84.370, and to ensure that the American rule, and the important public policies that it protects, are not abrogated without a clear legislative directive that they be abandoned.

VI. CONCLUSION

For the reasons above, Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks respectfully request that this Court grant review under RAP 13.4(b)(1)-(4) of the dismissal of Appellants' case, and of the fee award to Respondent Wes Heinmiller.

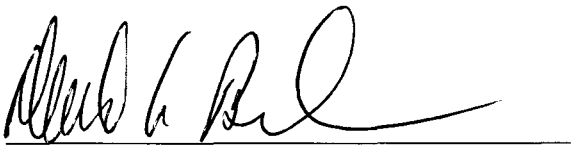
---

[18] Similarly, Division II has held that because RCW 4.84.370 allows for an award of attorney's fees only when "the prevailing party on appeal *was the prevailing or substantially prevailing party before the county, city, or town*," the statute does not allow an award on appeal of a purely ministerial local decision, such as the issuance of a building permit with no public hearing. *See Asche v. Bloomquist*, 132 Wn. App. 784, 802, 133 P.3d 475 (2006). *But see Nickum*, 153 Wn. App. at 383. The absence of any hearing or other form of adjudication before San Juan County provides yet another reason why Heinmiller was not entitled to fees under RCW 4.84.370.

Dated this 29th day of August, 2013.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

David A. Bricklin, WSBA #7583
Claudia M. Newman, WSBA #24928
Attorneys for Appellants

Durland\Supreme\Petition for Review

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,	)	DIVISION ONE
Appellants,	)	No. 68453-1-I
v.	)	PUBLISHED OPINION
SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,	)	
Respondents.	)	FILED: July 1, 2013

DWYER, J. — Property owners Michael Durland, Kathleen Fennel, and Deer Harbor Boatworks (Durland) appeal from the superior court's dismissal of a land use petition filed pursuant to the Land Use Petition Act (LUPA), chapter 36.70C RCW. Pursuant to LUPA, a local government's decision is not subject to judicial review by the superior court unless it is a "land use decision." Because Durland failed to obtain a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination," RCW 36.70C.020(2)(a), the grant of the building permit at issue did not constitute a "land use decision." Thus, the superior court was without authority to review San Juan County's decision to grant the permit. Accordingly, we affirm.

I

On August 8, 2011, Wesley Heinmiller and Alan Stameisen (Heinmiller) applied to the San Juan County Department of Community Development and Planning for a building permit for property located in Deer Harbor on Orcas

Island. The Department granted the building permit on November 1, 2011.

On December 19, 2011, Durland filed a LUPA petition in Skagit County Superior Court, challenging the grant of the building permit. Durland asserted that the building permit authorized construction in violation of county shoreline and zoning requirements. As requested relief, Durland sought a judicial determination that the building permit was "void." On the same day, Durland filed an administrative appeal of the decision to grant the building permit with the San Juan County hearing examiner.

In superior court, both San Juan County and Heinmiller filed motions to dismiss Durland's LUPA action. San Juan County sought dismissal of Durland's petition pursuant to Civil Rule (CR) 12(b)(6), contending, among other things,[1] that Durland had not exhausted his administrative remedies and, thus, lacked standing pursuant to LUPA. Asserting the same contentions, Heinmiller sought dismissal of the petition pursuant to either CR 12(b)(1) or CR 12(b)(6).

Durland responded, admitting that he had not timely filed an administrative appeal of the building permit decision. Nevertheless, he asserted that his failure to exhaust administrative remedies should be excused because he had not known that the permit had been granted until after the limitation period for filing

[1] San Juan County and Heinmiller additionally asserted that Durland's land use petition, filed more than 21 days after the permit was issued, was untimely. Durland responded, maintaining that his land use petition had been timely filed. On appeal to this court, Durland reiterates his contention that his land use petition was timely filed pursuant to RCW 36.70C.040(3), which provides that such a petition is timely if filed "within twenty-one days of the issuance of the land use decision." He asserts that, pursuant to the statutory delineation of when a land use decision is "issued," the decision was issued not when the building permit was granted but, instead, when he himself received a copy of the permit. Because we affirm the superior court's order on other grounds, we do not address this contention.

an administrative appeal had expired. Believing that the administrative appeal limitation period could be tolled, Durland additionally sought a stay of the proceedings in the superior court until his appeal to the hearing examiner had been resolved.

On February 3, 2012, the superior court granted Heinmiller's and San Juan County's CR 12(b) motions, dismissing with prejudice Durland's LUPA petition. The court additionally denied Durland's motion to stay the proceedings.

Durland appeals.

II

The resolution of this case turns on whether the legislature has authorized the superior court to review the decision in question. Specifically, we must determine whether San Juan County's decision to grant the building permit constituted a "land use decision" for purposes of LUPA, thereby rendering the matter proper for judicial review by the superior court. We hold that it did not.

We review de novo a superior court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12(b)(6). West v. Stahley, 155 Wn. App. 691, 696, 229 P.3d 943 (2010). The superior court properly dismisses a claim pursuant to CR 12(b)(6) "only if it appears beyond a reasonable doubt that no facts justifying recovery exist." West, 155 Wn. App. at 696. Similarly, we review de novo rulings to dismiss for lack of jurisdiction pursuant to CR 12(b)(1). Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 373-74, 223 P.3d 1172 (2009).

Absent specific, limited exceptions,[2] the Land Use Petition Act is "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). The stated purpose of the act is to provide "consistent, predictable, and timely judicial review." RCW 36.70C.010. Our Supreme Court has "long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions." James v. Kitsap County, 154 Wn.2d 574, 589, 115 P.3d 286 (2005) (citing Chelan County v. Nykreim, 146 Wn.2d 904, 931-32, 52 P.3d 1 (2002)).

LUPA invokes the appellate jurisdiction of the superior court; accordingly, "the superior court has only the jurisdiction as conferred by law." Conom v. Snohomish County, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). Pursuant to LUPA, the superior court, acting in its appellate capacity, may review only "land use decisions," as defined by the act. See RCW 36.70C.010; 36.70C.030(1). As our Supreme Court has declared, "LUPA applies only to actions that fall within the statutory definition of a land use decision." Post v. City of Tacoma, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009).

Pursuant to LUPA, a "land use decision" is

> 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 . . . [a]n application for a project permit or other governmental approval required by law before real

[2] LUPA does not apply to judicial review of "[l]and use decisions made by bodies that are not part of a local jurisdiction"; "[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law"; "applications for a writ of mandamus or prohibition"; or "[c]laims provided by any law for monetary damages or compensation." RCW 36.70C.030(1).

> property may be improved, developed, modified, sold, transferred, or used.

RCW 36.70C.020(2)(a). Here, the decision to issue the permit was not made by the "body or officer with the highest level of authority" to do so in San Juan County. Thus, the decision to issue the permit was not a "land use decision." Accordingly, LUPA did not grant authority to the superior court to review San Juan County's decision to grant the permit.

Our decision in Ward v. Bd. of Skagit County Comm'rs, 86 Wn. App. 266, 936 P.2d 42 (1997), controls the disposition of this case. In Ward, the Skagit County hearing examiner issued a decision denying the Wards' applications for a special use permit and a variance. Ward, 86 Wn. App. at 268-69. The Wards thereafter filed an appeal of the hearing examiner's decision to the Board of County Commissioners. Ward, 86 Wn. App. at 269. The Board dismissed the appeal because it was untimely filed. Id. The Wards then filed a LUPA petition in superior court. Id. The superior court dismissed the petition. Id.

On appeal, we noted that the Skagit County Code categorized a hearing examiner's decision as a "final decision," but that such a decision was nonetheless subject to appeal to the Board of County Commissioners. Ward, 86 Wn. App. at 271. Under the Skagit County Code, no body or official had authority to review the Board's determination. Id. Thus, we concluded that the Board was the body with the highest level of authority to make determinations on special use permits and variances in Skagit County. Id. Consequently, only a decision by the Board—not the hearing examiner—constituted a "land use

decision" pursuant to RCW 36.70C.020(1).[3] Id. Because the Board did not issue a final determination regarding the applications, the Wards failed to obtain a "land use decision" pursuant to LUPA. Ward, 86 Wn. App. at 272.

In explaining our decision, we stated:

> Under LUPA, a "land use decision" is "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, inter alia, "an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used[.]" RCW 36.70C.020(1)(a). In 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.

Ward, 86 Wn. App. at 270-71. This discussion correctly interprets the statutory provision at issue. It also correctly discusses the practicalities of the statutory requirement. It does, however, combine two different and distinct principles in its explanation. The first—the court's authority to act—is a product of RCW 36.70C.030(1). The second—the petitioner's standing to bring the petition—is the product of a different statute. We ground our decision in this case on the absence of authority for the superior court to act.

As relevant here, according to the San Juan County Code (SJCC),

[3] At the time Ward was decided, the statutory definition of "land use decision" was found in RCW 36.70C.020(1). Former RCW 36.70C.020 (1997). The statute was amended in 2009, setting forth the definition of "land use decision"—the content of which remained the same—in section two of RCW 36.70C.020. Laws of 2009, ch. 419, § 1.

development permits that are issued or approved "by the director and/or responsible official," are subject to appeal to the San Juan County hearing examiner. SJCC 18.80.140(B)(11). The SJCC further sets forth that, unless appealed, "[a]ll code interpretations and administrative determinations under this code shall be final." SJCC 18.10.030(C). The SJCC does not provide for a body or official to review the hearing examiner's decisions. Thus, the hearing examiner is the "officer with the highest level of authority to make" a final determination. See RCW 36.70C.020(2). As a result, only a decision made by the San Juan County hearing examiner—not a decision of the San Juan County Department of Community Development and Planning—is a "land use decision" as defined by LUPA.

Durland contends that the provisions of SJCC 18.10.030(C) make all unappealed decisions "final." While this may be true for purposes of applying the SJCC, it is not true for purposes of applying LUPA. A virtually identical situation was addressed in Ward.

> The decision of the hearing examiner is a final decision, subject to appellate review by the Board. Skagit County Code § 14.04.240(16). Under the Code, there is no body with authority to review a determination of the Board. Thus, in Skagit County, the Board is the body with the highest level of authority to make a determination on an application for a variance or special use permit. A decision of the Board on such an application therefore constitutes a "land use decision" under RCW 36.70C.020(1), while a decision of a hearing examiner does not.

86 Wn. App. at 271.

Here, the San Juan County Department of Community Development and Planning issued the building permit in question on November 1, 2011. As

Durland concedes, his appeal of the building permit to the San Juan County hearing examiner, filed on December 19, 2011, was untimely. Durland failed to obtain a final determination by the San Juan County hearing examiner and, thus, no "land use decision" was issued such that judicial review is warranted under LUPA. A superior court may not expand its statutory authority by varying LUPA's definition of a "land use decision." Nor may the superior court expand its authority in a LUPA action by reviewing that which the legislature, in enacting LUPA, did not allocate to the court the authority to review. Therefore, the petition was properly dismissed.

Nevertheless, Durland raises on appeal the issue of exhaustion of administrative remedies,[4] contending that, although he did not comply with LUPA's exhaustion requirement, this court should excuse his failure to do so because he was not aware that the building permit had been granted until after the deadline for filing an administrative appeal had passed. However, the

---

[4] Exhaustion of administrative remedies is one prerequisite for a petitioner to have standing to bring the petition. The applicable statute provides:

> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> (1) The applicant and the owner of property to which the land use decision is directed;
>
> (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
>
> (a) The land use decision has prejudiced or is likely to prejudice that person;
>
> (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
>
> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
>
> (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060.

dispositive issue presented herein is whether the legislature conferred authority to the superior court to review San Juan County's decision to grant the building permit. We do not decide whether Durland had standing to bring the petition. Granting relief from the exhaustion requirement might aid Durland in establishing standing. It could not, however, expand the authority of the court to act.[5]

The superior court properly dismissed the petition.

III

Heinmiller requests an award of attorney fees on appeal. Heinmiller prevailed in the superior court on appeal from San Juan County's issuance of the building permit. Heinmiller prevails on appeal in this court. Accordingly, we grant Heinmiller's request for an award of fees.

Reasonable attorney fees and costs shall be awarded to the prevailing party on appeal of a local government decision "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." RCW 4.84.370(1). Fees shall be awarded if "[t]he prevailing party on appeal was the prevailing party or substantially prevailing party before the county, city, or town." RCW 4.84.370(1)(a). "Under this statute, parties are entitled to attorney fees only if a county, city, or town's decision is rendered in

[5] The doctrine of standing does not implicate the superior court's subject matter jurisdiction. Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., ___ Wn. App.___, 298 P.3d 99, 106 (2013); see also Ullery v. Fulleton, 162 Wn. App. 596, 604-05, 256 P.3d 406, review denied, 173 Wn.2d 1003 (2011). Whether a court has authority to act is determined independent of any inquiry into a petitioner's standing to initiate judicial review.

their favor and at least two courts affirm that decision."[6] Habitat Watch v. Skagit County, 155 Wn.2d 397, 413, 120 P.3d 56 (2005). In addition, RCW 4.84.370 "does not require that the party must have prevailed on the merits" in order to be granted a fee award pursuant to the statute.[7] Prekeges v. King County, 98 Wn. App. 275, 285, 990 P.2d 405 (1999). Heinmiller has prevailed at two court levels. An award of fees is warranted.

Upon proper submission, a commissioner of our court will enter an appropriate award.

Affirmed.[8]

Dwyer, J.

We concur:

---

[6] Division Two has issued conflicting decisions, both citing to Habitat Watch, regarding the circumstances in which an appellate fee award is warranted pursuant to RCW 4.84.370. Cf. Nickum, 153 Wn. App. at 383; Asche v. Bloomquist, 132 Wn. App. 784, 802, 133 P.3d 475 (2006). In Asche, the court concluded that a decision had not been rendered in favor of the party requesting a fee award "because issuing a building permit is ministerial." 132 Wn. App. at 802. By contrast, the court in Nickum determined that "[i]f a party receives a building permit and the decision is affirmed by two courts, they are entitled to fees under [RCW 4.84.370]." 153 Wn. App. at 383. The statute authorizing an award of fees explicitly states that it applies to building permits. See RCW 4.84.370(1) (listing "site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, *building permit*, site plan, or similar land use approval or decision" as decisions to which the statute applies) (emphasis added)). Accordingly, we find the decision in Asche to be less persuasive than the decision in Nickum.

[7] We recognize that Division Two of this court views this question differently. See Witt v. Port of Olympia, 126 Wn. App. 752, 758-59, 109 P.3d 489 (2005); Quality Rock Prods., Inc. v. Thurston County, 126 Wn. App. 250, 275, 108 P.3d 805 (2005); Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn. App. 593, 601, 972 P.2d 470 (1999).

[8] Durland's motion to strike a paragraph in the brief of respondents was referred to the panel. The challenged paragraph is not material to the resolution of this case. We deny the motion.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS, Appellants, v. SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN, Respondents.	)	DIVISION ONE No. 68453-1-I ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 30th day of July, 2013

FOR THE COURT:

Dwyer, J.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

August 19, 2013

Claudia Macintosh Newman
Bricklin & Newman, LLP
1001 4th Ave Ste 3303
Seattle, WA, 98154-1167

David Alan Bricklin
Bricklin & Newman, LLP
1001 4th Ave Ste 3303
Seattle, WA, 98154-1167

Elisha Sandra Smith
HELLER WIEGENSTEIN PLLC
144 Railroad Ave Ste 210
Edmonds, WA, 98020-4121

John Henry Wiegenstein
HELLER WIEGENSTEIN PLLC
144 Railroad Ave Ste 210
Edmonds, WA, 98020-4121

Amy Vira
San Juan County Prosecutor's Office
PO Box 760
Friday Harbor, WA, 98250-0760

CASE #: 68453-1-I
Michael Durland, Appellant v. San Juan County, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 16, 2013, regarding request for attorney fees:

> "Respondent Heinmiller is awarded attorney fees of $13,373.50 and costs of $413.10."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

APPENDIX C

RCW 36.70C.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Energy overlay zone" means a formal plan enacted by the county legislative authority that establishes suitable areas for siting renewable resource projects based on currently available resources and existing infrastructure with sensitivity to adverse environmental impact.

(2) "Land use decision" means 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:

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

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

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

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

(3) "Local jurisdiction" means a county, city, or incorporated town.

(4) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

(5) "Renewable resources" has the same meaning provided in RCW 19.280.020.

[2010 c 59 § 1; 2009 c 419 § 1; 1995 c 347 § 703.]

RCW 36.70C.060
Standing.

Standing to bring a land use petition under this chapter is limited to the following persons:

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

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

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

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

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

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