69134-1

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 69134-1-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

# OPENING BRIEF OF APPELLANTS

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## I. INTRODUCTION

This case is about the rights of individuals to have notice and an opportunity to oppose illegal development projects that injure them. Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (hereinafter collectively referred to as "Mr. Durland") have been deprived of the opportunity to oppose their neighbors' illegal development because San Juan County did not notify them until it was too late to meaningfully challenge it.

Last year, San Juan County issued a building permit to Mr. Durland's neighbors, respondents Wes Heinmiller and Alan Stameisen, to build a second story on top of an existing garage on their property. The building permit was approved in violation of several prohibitions in the San Juan County Code, including the requirement to obtain a shoreline conditional use permit, and is but one of other illegal projects undertaken by Mr. Durland's neighbors over the past few years.

The San Juan County Code did not require the County to give notice to Mr. Durland, the neighbors, or anyone else in the public before issuing the building permit. As a result, while Mr. Durland filed an appeal to the San Juan County Hearing Examiner immediately upon discovering the permit was issued, Mr. Durland missed his appeal deadline and the Hearing Examiner

dismissed the appeal as untimely. Under state and local law, Mr. Durland has therefore lost his opportunity to challenge the permit.

Paradoxically, even though it did not require notice, the Code required the neighbors and anyone else harmed by the permit to file an appeal to the San Juan County Hearing Examiner within 21 days of the permit's issuance. The Code therefore sets the impossible requirement that Mr. Durland appeal a decision he did not even know about. This impossible requirement is not only unfair, it violates Mr. Durland's due process rights under the Washington State and United States Constitutions.

Mr. Durland now brings this civil rights action under 42 U.S.C. § 1983 on the basis that the County deprived him of a property interest in violation of the Due Process Clause of the United States Constitution.

Specifically, appellants are challenging the lack of a notice requirement in the San Juan County Code for "development permits" as defined in SJCC 18.20.040. Lack of notice, combined with the requirement that the permit be appealed to the Hearing Examiner within 21 days, violated appellants' due process rights. *See* SJCC 18.80.140A.1; SJCC 18.80.140D.1. Appellants seek an injunction and damages on the grounds that the San Juan County Code provisions and the San Juan County Hearing Examiner's decision deprived them of procedural due process.

Mr. Durland also filed a Land Use Petition challenging the Hearing Examiner's decision on the grounds that it violated appellants' procedural due process rights. Mr. Durland requested a remand to the Hearing Examiner with an order to proceed with the merits of Durland's appeal. In this appeal, Mr. Durland does not challenge the building permit itself. He simply requests an opportunity to be heard.

## II. ASSIGNMENTS OF ERROR

**First Assignment of Error**

The superior court erred when it granted respondent San Juan County's motion for summary judgment on appellants' claims under the Civil Rights Act, 42 U.S.C. § 1983, in its Order Granting San Juan County's Motion for Summary Judgment (July 6, 2012).

***Issues Pertaining to First Assignment of Error***

- Petitioners have a reasonable expectation of entitlement that San Juan County will deny nearby development when the development violates mandatory height and size limitations in the County's development code. This reasonable expectation of entitlement is a property right within the meaning of the Due Process Clause of the United States Constitution.

- The San Juan County Building Code violates the Due Process Clause of the United States Constitution by failing to require prior notice to nearby land owners before the County approves development that violates the County's mandatory height and size limitations.
- The 21-day statute of limitations and exhaustion requirements under the Land Use Petition Act ("LUPA") do not apply to actions not falling within LUPA's definition of "land use decisions" or to claims for monetary damages.
- LUPA's 21-day limitations period and exhaustion requirements do not apply to actions under 42 U.S.C. § 1983 because Section 1983 actions are governed solely by Washington's residual statute of limitations for tort suits.

**Second Assignment of Error**

The superior court erred when it dismissed appellants' claims under the Washington State Land Use Petition Act (LUPA), ch. 36.70C RCW, in its Order Granting Motion for Dismissal (April 13, 2012).

***Issues Pertaining to Second Assignment of Error***

- Appellants satisfied the exhaustion and limitations period under LUPA by appealing the Hearing Examiner's decision within 21-days of its issuance.

## III. STATEMENT OF THE CASE

Appellants Michael Durland and Kathleen Fennell live on waterfront property on Orcas Island immediately adjacent to respondents Wesley Heinmiller and Alan Stameisen (hereinafter collectively referred to as "Heinmiller"). CP 83.

On August 8, 2011, Heinmiller applied for a building permit to add a second story to an existing garage on his property. CP 90. According to the application, the second-floor addition would serve as an office and entertainment area. *Id.* Because the San Juan County Code does not require public notice for this type of permit, the County did not provide any public notice of Heinmiller's application. CP 85. Because the County did not notify Mr. Durland that Heinmiller filed the application, Mr. Durland was completely unaware of the application and had no reason to suspect his neighbors were planning to build a second-story that would have negative impacts on the use and enjoyment of his land. CP 85-86.

Three months later, on November 1, 2011, the County approved the building permit for Heinmiller to add a second story to the garage. CP 90. (Permit No. BUILDG-11-0175). Again, because the County Code does not require it to do so, the County did not provide any public notice of the approval or otherwise notify Mr. Durland of the County's action. CP 85-86. Mr. Durland therefore had no idea that the permit was issued. *Id.*

Prior to issuing the permit, the County was fully aware that Mr. Durland had a strong interest in knowing about any permits issued to Heinmiller. CP 84-87. Mr. Durland also would have been able to challenge the permit had the County not been dilatory in responding to his complaints and requests for information. *Id.* Prior to Heinmiller filing the application for a second-story building permit, Mr. Durland discovered the existing garage had been built illegally and contacted County staff to inform them of the code violation. CP 83-84. On March 22, 2011, Mr. Durland filed a complaint with the County requesting that the County proceed with a code enforcement action against Heinmiller for the illegal structure. CP 84. This is the same garage that would be expanded under the building permit issued on November 1, 2011 without any public notice. *Id.*

Seven months later the County had still not responded to Mr. Durland's complaint, and Mr. Durland submitted a Public Records Act

request to San Juan County for documents related to his complaint. CP 84. County staff member Kandy Seldin responded to Mr. Durland's request on November 8, 2011 and indicated that she would get back to him in a week. CP 84.[1] Having not heard back the next week, Mr. Durland wrote to the Public Records Officer, Stan Matthews, on November 15, 2011 and asked about the status of his request. CP 84-85. Mr. Matthews did not respond. CP 85.

In the late afternoon of November 22, 2011, which unbeknownst to Mr. Durland happened to be the same day as the deadline for an administrative appeal of the building permit, Kandy Seldin sent an e-mail to Mr. Durland indicating the documents he requested were ready for production. CP 85. She indicated the documents would be available for viewing or as printed copies mailed after payment, and Mr. Durland promptly followed up by sending a check to the County. *Id.*

Mr. Durland ultimately received the documents on December 5, 2011. *Id.* Upon reviewing the documents, he noticed, for the first time, a reference to the building permit for a second story on the garage. CP 86. This was the

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[1] A public agency is required to respond "promptly" to an information request under the Public Disclosure Act. RCW 42.17.320. This has been interpreted to mean that the agency has five business days to take one of the following actions: produce the records for inspection; deny access to the requested records; or provide a reasonable estimate of the additional time necessary to respond to the request.

first time that he heard anything about the building permit for a second-story addition to the garage. *Id.*

On December 7, 2011, Mr. Durland requested a copy of the building permit from the County. CP 86. The County Office Manager, Lisa Brown, e-mailed a copy of the building permit to Mr. Durland on Thursday, December 8, 2011. *Id.* Upon receiving the permit, Mr. Durland learned for the first time that Heinmiller had received the permit to build a second story on the garage without notice to Mr. Durland. *Id.* This had all occurred during the time the County was purportedly conducting a code enforcement review on the very same garage.

After reviewing the permit, it became plainly evident to Mr. Durland that it was issued in violation of numerous San Juan County Code provisions. *Id.* The permit was issued in violation of limits on the size of accessory structures on the property; prohibitions against building additions to existing 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). In addition, the second-story addition required a shoreline conditional use permit pursuant to SJCC 18.50.330.E.4, yet the County approved the building permit without requiring a shoreline permit. The

violations would allow illegal development in the shoreline and significantly impact Mr. Durland's view.

The San Juan County Code sets forth a process for an administrative appeal of this type of permit to the Hearing Examiner. *See* SJCC 18.80.140. The Code states that "appeals to the Hearing Examiner must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed. . . ." SJCC 18.80.140.D.1.

Mr. Durland, Kathleen Fennell, and Deer Harbor Boat Works filed an appeal with the San Juan County Hearing Examiner on December 19, 2011, which was eleven (11) days after Mr. Durland's actual notice of the building permit, but more than twenty one (21) days after the building permit was approved. CP 86; CP 68. They did not file the appeal on November 22, 2011, which was 21 days after the approval because they received no notice of the permit approval and had no idea that the permit existed within the 21-day window.

It became evident to Mr. Durland after looking at the code that by the time he received responsive documents to his Public Records Act request, the statute of limitations deadline for an appeal of the second-story building permit had passed. CP 86. Had he received the information in a timely manner, he would have been able to appeal the building permit by November 22, 2011. *Id.*

Mr. Durland's appeal, deemed administrative appeal number PAPL00-11-0003 by the Examiner's office, listed the numerous code violations of Building Permit BUILDG-11-0175 and sought, as relief, reversal of the permit approval on the grounds that it was inconsistent with the San Juan County Code. CP 68.

San Juan County and Heinmiller filed motions to dismiss the administrative appeal on the grounds that it was not filed within 21 days of issuance of the building permit as was required by the San Juan County Code. CP 66. The Hearing Examiner issued an Order of Dismissal granting the motions and dismissing the appeal as untimely. CP 73-76. The Examiner also concluded that the doctrine of equitable tolling could not be applied because the deadline for an appeal had been made jurisdictional by his own rules and, even if it were not, he did not have legal authority to consider equitable tolling. CP 74-75.

On February 24, 2012, Mr. Durland filed a Complaint for damages and injunctive relief pursuant to the Civil Rights Act, 42 U.S.C. § 1983, in San Juan County Superior Court. CP 4-12. The Section 1983 claim alleged that the San Juan County code violated appellants' civil due process rights under the United States Constitution by failing to provide notice and an opportunity to be heard on the illegalities of the building permit. *Id.* The Section 1983 claim also

challenged the Hearing Examiner's decision as violative of appellants' due process rights. *Id.*

Mr. Durland also included a Land Use Petition claim challenging the Order of Dismissal issued by the Examiner pursuant to the Land Use Petition Act, ch. 36.70C RCW. *Id.* Petitioners' LUPA petition challenged the San Juan County Hearing Examiner's decision on the grounds that it violated Durland's constitutional due process rights. *Id.*

Out of an abundance of caution, at the same time that he filed an appeal with the San Juan County Hearing Examiner, Mr. Durland also filed a direct appeal of the same building permit in Skagit County Superior Court. *See Durland, et al. v. San Juan County, et al.*, Skagit County Superior Court Cause No. 11-2-02480-9. CP 77-81. Petitioners filed that appeal on December 19, 2011, which was eleven (11) days after Mr. Durland's actual receipt of the building permit. *Id.*

That appeal is a separate matter from this appeal. Both San Juan County and respondents Heinmiller and Stameisen moved to dismiss that LUPA petition on the grounds that it was untimely (filed after the 21-day time limit in LUPA) and that Durland had failed to exhaust administrative remedies. CP 67. On February 3, 2012, the Skagit County Superior Court dismissed the LUPA Petition. *Id.* Petitioners Durland, Fennell, and Deer Harbor Boatworks

filed a Notice of Appeal with the Court of Appeals on March 2, 2012 and that appeal is currently pending before the Court of Appeals under Case No. 68453-1-I. *Id.*

As noted above, this is not the first time that Mr. Durland's neighbors have skirted the law or otherwise undertaken illegal development on their property. Heinmiller and Stameisen have remodeled a barn and converted the use illegally on their property; they have remodeled a garage illegally on their property; and they are, with this new permit, adding a second addition to that garage illegally on their property. CP 91.

Mr. Durland has filed legal challenges of those illegal structures over the past few years because they have significant adverse impacts to his property. *Id.* In his attempts to right those wrongs, however, Mr. Durland has repeatedly been subjected to what can only be described as remarkably unfair circumstances in the land use appeals process. CP 91-92. Suffice it to say that practically every defense argued by respondents to his challenges have been procedural – all meant to bar him from addressing the substance of his claims – in an effort to prohibit him from proving the structures are illegal. CP 92.

On the one occasion that a court heard the merits of his claims, Durland prevailed and succeeded in having the permit remanded to the County. *Id.* This case is yet another example of both the County's and Heinmiller's efforts

to avoid having the court hear the merits of a challenge to an obviously illegal building permit. This time, however, the procedural pitfalls crossed the line and violated Mr. Durland's constitutional due process rights. Mr. Durland now asks simply for an opportunity to be heard after being denied notice and any meaningful opportunity to prove the illegality of his neighbor's actions.

## IV. ARGUMENT

This appeal involves two separate claims for relief. The first is a Civil Rights Act claim under 42 U.S.C. § 1983, also known as Section 1983. Appellants' Section 1983 claim challenges the San Juan County Code provisions SJCC 18.20.040; 18.80.140A.1; and SJCC 18.80.140.D.1, as well as the Hearing Examiner's decision, for violating appellants' civil due process rights under the United States Constitution. The claim seeks monetary damages and an injunction requiring the San Juan County Hearing Examiner to hear the merits of Durland's appeal of the building permit.

The second (alternative) claim is made pursuant to the Washington State Land Use Petition Act (LUPA), ch. 36.70C RCW. The LUPA claims challenge the Hearing Examiner's decision dated February 2, 2012 on the grounds that the decision to dismiss the appeal violates appellants' civil due process rights under the Washington State and United States Constitutions. Each claim is addressed below.

A. Argument and Authority in Support of Mr. Durland's Civil Rights Act Claim under 42 U.S.C. § 1983

The San Juan County Superior Court dismissed Mr. Durland's Section 1983 claims on summary judgment and, therefore, did not reach the merits of the claims. In the proceedings below, respondent San Juan County filed a motion for summary judgment challenging appellants' Section 1983 claims on two separate grounds. First, the County argued that appellants did not possess a constitutionally-protected property interest. CP 119. Second, the County argued that the statute of limitations and exhaustion requirements in LUPA barred appellants' Section 1983 claims. CP 122. Both arguments are addressed below.

1. Standard of review

"The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court." *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). In reviewing the superior court's grant of summary judgment, "the court must construe all the facts and reasonable inferences in favor of the nonmoving party." *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (1994). Issues of law are reviewed *de novo*. *Clayton v. Grange Ins. Ass'n*, 74 Wn. App. 875, 877, 875 P.2d 1246 (1994).

2. Overview of Section 1983

Section 1983 provides a private cause of action to anyone deprived of a constitutional right by a person acting under color of state law. 42 U.S.C. § 1983. Local governments such as San Juan County are "persons" for purposes of Section 1983 and may be held liable under the statute for damages and prospective injunctive relief. *Monell v. Dept. of Social Serv. of N.Y.*, 436 U.S. 658, 701, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). For purposes of Section 1983, actions "under color of state law" include actions that are authorized by statute or local ordinance. *Id. See also West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (explaining the "traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'") (*quoting States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)).

3. Appellants possess a constitutionally protected property interest and were deprived of that interest without a meaningful opportunity to be heard

Under the Due Process Clause, local government may not deprive a person of a property interest without notice and a hearing. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "Due process essentially requires the opportunity to be heard at a

meaningful time and in a meaningful manner." *Rabon v. City of Seattle*, 107 Wn. App. 734, 742, 34 P.3d 821 (2001) (*citing Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Under Washington law, Mr. Durland possesses a constitutionally protected property interest to support his due process claims under 42 U.S.C. § 1983, and he was deprived of the only opportunity to be heard when the San Juan County Hearing Examiner dismissed his appeal.

"A property right is protected by the United States Constitution when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law." *Asche v. Bloomquist*, 132 Wn. App. 784, 797, 133 P.3d 475 (2006). *See also Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962 n. 15, 954 P.2d 250 (1998). The state law giving rise to the property interest may be a statute or local ordinance. *See Veradale Valley Citizens' Planning Comm'n v. Bd. of Comm'rs of Spokane County*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978). Once it is established that a person has a reasonable expectation of entitlement, "the types of interests protected as 'property' are varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148,

71 L.Ed.2d 265 (1982) (*quoting Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949)).

To determine whether a statute or local ordinance gives rise to a reasonable expectation of entitlement, a court should look to the language of the statute and whether it is "couched in mandatory terms." *Wedges/Ledges of CA, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). With respect to procedural requirements in a statute, a property interest is created "'if the procedural requirements are intended to be a significant substantive restriction on . . . decision making.'" *Id.* (*quoting Goodisman v. Lytle*, 724 F.2d 818, 820 (9th Cir. 1984). In other words, a procedural limitation on decision making gives rise to a reasonable expectation of entitlement if it imposes "'articulable standard[s]'" that constrain the decision-making process. *Wedges/Ledges*, 24 F.3d at 64 (*quoting Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983)).

For example, in *Asche v. Bloomquist*, the Asches challenged a building permit issued by Kitsap County on the grounds that the County issued the permit in violation of the Kitsap County Code, which imposed a mandatory height limitation of 35 feet. *See Ache*, 132 Wn. App. at 798. The Asches asserted the 21-day deadline for filing an appeal in LUPA violated their procedural due process rights because they had no notice of the building

permit's issuance. *Asche*, 132 Wn. App. at 796. Before addressing the due process argument, the Court analyzed whether the Asches had a property interest.

The Court concluded the Asches did have a property interest in preventing their neighbors from building a house that exceeded the height limitation. *Id.* at 797-798. In doing so, the Court focused on the mandatory nature of the height limitation, explaining that "the plain language of [the zoning] ordinance requires that buildings more than 28 feet and less than 35 feet *can only be approved* if the views of adjacent properties, such as that of the Asches, are not impaired." *Id.* at 798 (emphasis added). This height limitation gave the Asches an expectation of entitlement that buildings adjacent to theirs would not be built in a manner that would adversely impact their views. *Id.*

The *Asche* Court's reasoning is consistent with cases holding that, in the land use context, mandatory restrictions on permit decisions give rise to a reasonable expectation of entitlement that the decision maker will follow the law. *See Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). This includes when the person claiming a property interest is a neighboring property owner to the person applying for the permit. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 n. 4 (10th Cir. 2003) ("[W]hen a party challenges a land use decision by a

governing body on due process grounds, the property inquiry is whether that body had limited discretion in granting or denying a particular zoning or use application."); *Hillside Cmty. Church v. Olsen*, 58 P.3d 1021, 1028 n. 6 (Colo. 2011) ("Whether a litigant claims a protected property interest with regard to the granting of a permit or its denial are simply opposite sides of the same argument."). *See also Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) (holding that "a right to a particular decision reached by applying rules to facts, is 'property'").

The case now before the Court is similar to the situation in *Asche v. Bloomquist* with respect to the issue concerning property interests.[2] The San Juan County Code created a property interest for plaintiffs because the Code regulates construction of garage buildings and/or accessory dwelling units within the shoreline area. SJCC 18.50.330.B.14 and .15. The San Juan County Code allows one garage building and/or one accessory building unit, each of which covers no more than 1,000 square feet of land and is no taller than 16 feet above existing grade; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade. *Id.* If

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[2] The *Asche v. Bloomquist* case is different from this case with respect to the relationship of the due process claims to the LUPA claims as is explained in detail below.

exhaustion requirements and 21-day limitations period. The County's argument lacks merit for several reasons.

a. The Land Use Petition Act does not apply to claims for monetary damages or compensation

First, the County's argument that LUPA exhaustion and limitation requirements apply to plaintiffs' Section 1983 claims fails because the procedures, standards, and deadlines under LUPA do not apply to claims for monetary damages or compensation.

As quoted below, LUPA expressly states that its procedures and standards do not apply to claims provided by any law for monetary damages or compensation.

> If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition.

RCW 36.70C.030(c). The Section 1983 claims were set forth in the same complaint with the Land Use Petition and they are claims brought for monetary damages. Therefore, LUPA standards and deadlines do not apply to appellants' separate claims for monetary damages brought under Section 1983.

b. Neither the County's development code nor the hearing examiner's decision are "land use decisions" within the meaning of LUPA

Second, LUPA's time limits and exhaustion requirements do not apply to Mr. Durland's Section 1983 claims because the claims challenge County Code provisions and the Hearing Examiner's order of dismissal, neither of which are "land use decisions" within the meaning of LUPA.

LUPA sets forth a process for judicial review of "land use decisions," as that term is defined by the Act. RCW 36.70C.030; RCW 36.70C.020(1). LUPA defines the term "land use decision" as follows:

> "[L]and use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to made 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, . . .
>
> 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 . . .

RCW 36.70C.020(1).

As mentioned above, Mr. Durland is challenging provisions of the San Juan County Code (SJCC 18.20.040; SJCC 18.80.140.A.1; and SJCC 18.80.140.D.1) on the grounds that they violate his constitutional due process rights. These provisions obviously do not fall under the purview of LUPA because they are not "final determinations" made on specific development applications. They are simply parts of the San Juan County Municipal Code.

Mr. Durland also challenges the Order of Dismissal issued by the San Juan County Hearing Examiner on February 2, 2012 because the decision violated appellants' due process rights. That decision is also not a "land use decision" under LUPA.[3]

Referring back to the definition of above, 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." RCW 36.70C.020(1). In *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009), the court stated as follows:

> A "land use decision" is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with

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[3] Because there is some ambiguity over whether the Hearing Examiner's decision is a land use decision under RCW 36.70C.020(1), Mr. Durland filed a Land Use Petition challenging the Hearing Examiner's decision within 21 days of it being made. As has been explained already, that Land Use Petition was filed at the same time as the Civil Rights Act claims and arguments in support of the claims brought pursuant to the Land Use Petition Act are set forth herein in Section B below.

> authority to hear appeals." RCW 36.70C.020(1). If a decision is not timely appealed, then the agency's initial decision is final. Twin *Bridge Marine Park*, 162 Wn.2d at 854-55, 175 P.3d 1050. **Therefore, a hearing examiner's denial of an untimely administrative appeal is not a land use decision for purposes of the LUPA 21 day time limit** and the Nickums were required to file their LUPA appeal within 21 days of the only final determination following the issuance of the original permit. *Twin Bridge Marine Park*, 162 Wn.2d at 853-55, 175 P.3d 1050; *Ward*, 86 Wn. App. at 272, 936 P.2d 42.

*Nickum v. City of Bainbridge Island*, 153 Wn. App. at 381 (emphasis supplied). Applying the holding of *Nickum* here, the Hearing Examiner's decision was not a "land use decision" within the meaning of LUPA because the Hearing Examiner merely dismissed the appeal as untimely. The 21-day limitations period therefore does not apply.

In addition, the Hearing Examiner's decision was solely about procedure; it did not involve any interpretation regarding the application itself or "regulat[e] the improvement, development, modification, maintenance, or use of real property." *See* RCW 36.70C.020(1). A decision about procedure is not a land use decision triggering the 21-day statute of limitations under LUPA. In *Vogel v. City of Richland*, 161 Wn. App. 770, 255 P.3d 805 (2011), the Court stated the following:

> That determination was not a land use decision, since it does not "regulate the improvement, development, modification, maintenance, or use of real property." It was only a decision about the process to be followed in making a land use decision.

*Vogel v. City of Richland*, 161 Wn. App. at 778-779 (citations omitted). The court concluded that the trigger for the 21-day limitations period is the final land use decision itself, not a procedural decision. Plaintiffs are challenging the procedural decision under Section 1983.

In sum, neither the County Code provisions nor the Hearing Examiner's decision are "land use decisions" under LUPA. When a decision is not a "land use decision" under LUPA, LUPA's time limits and exhaustion requirements do not apply.

c. Section 1983 claims are governed solely by the three-year statute of limitations in RCW 4.16.080(2)

Last, the United States Supreme Court has made it abundantly clear that Section 1983 claims are governed solely by a state's residual statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). As a consequence, petitioner's claim is governed by the three-year limitations period at RCW 4.16.080(2), not LUPA's 21-day limitations period at RCW 36.70C.040(3).

All Section 1983 claims arising in a state, regardless of their underlying facts or legal theories, are governed by the state's statute of limitations for personal injury actions. *Wilson*, 471 U.S. at 276.[4] This

[4] In *Wilson*, the Court explained that this rule flows from 42 U.S.C. § 1988(a), which governs the rules of decision applicable to Section 1983 claims. That statute

includes Section 1983 claims based on procedural due process even though such claims do not resemble traditional personal injury actions. *Id.* at 273. Moreover, if the state has more than one limitations statute for personal injury actions, as Washington does,[5] Section 1983 claims must all be governed by the state's residual limitations statute. *Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). States lack the legal authority to impose a shorter limitations period on any Section 1983 claim. *Burnett v. Grattan*, 468 U.S. 42, 43, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) (rejecting six-month limitations period for employment disputes); *Johnson v. Davis*, 582 F.2d 1316, 1317 (4th Cir. 1978) (rejecting special one-year limitations period for prisoner claims). *See also Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (rejecting state notice-of-claim statute as applied to Section 1983 claims brought in state court).

Here, Washington's residual statute of limitations for personal injury actions is found at RCW 4.16.080(2). That statute requires personal injury

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directs courts to apply state law only when such law is consistent with the remedial goals of Section 1983. Subjecting Section 1983 claims to varying limitation periods based on the underlying facts or legal theories of the claims would be repugnant to the remedial goals of Section 1983. *Wilson*, 471 U.S. at 275.

[5] *See* RCW 4.16.080(3) (governing personal injury claims not enumerated elsewhere); *id.* at .100 (governing claims of libel, slander, assault and battery, and false imprisonment); *id.* at .110 (actions against a sheriff or other officer for the escape of a prisoner); *id.* at .340 (actions based on childhood sexual abuse); *id.* at .350 (actions based on injuries occurring as a result of health care).

actions to be brought within three years of the injury. Thus, petitioner's Section 1983 claim is timely and, under binding Supreme Court precedent, this Court cannot hold petitioners' procedural due process claim to the shorter, 21-day limitations period in LUPA. *Wilson*, 471 U.S. at 273, 276; *Owens*, 488 U.S. at 236.

As a matter of state law, Washington courts have deemed LUPA's 21-day limitations period to be jurisdictional, and have held that as a consequence the limitations period governs civil rights claims. *See Nickum v. City of Bainbridge,* 153 Wn. App. 366, 382, 223 P.3d 1172 (2009). For purposes of Section 1983 claims, those holdings are irrelevant. *See Howlett v. Rose*, 496 U.S. 356, 382, 110 S.Ct. 2430, 110 L.Ed.2d 332 ("The force of the Supremacy Clause is not so weak that it can be evaded by the mere mention of the word 'jurisdiction.'"). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

Under the Supremacy Clause, a state court of general jurisdiction may not decline to hear a Section 1983 claim except on the basis of a "neutral jurisdictional rule." *Haywood v. Drown*, 556 U.S. 729, 735, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009); *accord Howlett*, 496 U.S. at 373. *See also Testa v. Katt*, 330 U.S. 386, 392, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (holding that state courts must hear federal causes of action). Further, under the Supremacy

Clause a statute is jurisdictional *only* if it reflects "the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." *Howlett*, 496 U.S. at 381. For example, the Supreme Court has held that venue and *forum non conveniens* rules are jurisdictional because they reflect a court's limited power over persons and events beyond the state's geographic boundaries.[6] LUPA's 21-day limitations period does not reflect any similar concern. Nor does LUPA's 21-day limitations period reflect the competency of superior courts to adjudicate Section 1983 claims; superior courts are empowered to hear Section 1983 claims by law. *See* Wash. Const. Art. IV, § 6. Instead of reflecting concerns of power over the person and competency over the subject matter, LUPA's 21-day limitations period reflects the same concern for repose that is typical of statutes of limitation.[7] Therefore, whatever the appropriate label under Washington law, LUPA's 21-day limitations period is simply not jurisdictional for purposes of the Supremacy Clause and Washington courts may not refuse to hear Section 1983 claims on the basis of that provision.

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[6] *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 123, 65 S.Ct. 459, 89 L.Ed. 789 (1945) (upholding state court's refusal to hear federal cause of action based on state statute preventing the court from hearing actions arising outside the state's physical boundaries); *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4, 71 S.Ct. 1, 95 L.Ed. 3 (1950) (upholding state *forum non conveniens* rule as applied to federal cause of action).

[7] *See Asche*, 132 Wn. App. at 795 (referring to "LUPA's Statute of Limitations" and explaining that "[t]o *serve the purpose of timely review*, LUPA provides stringent deadlines, requiring that a petitioner file a petition for review within 21 days of the

In addition, LUPA's 21-day limitations period may not legally be applied to Section 1983 claims because it would single out a limited category of Section 1983 claims for special treatment. In other words, the 21-day limitations period discriminates against federal law. In *Haywood*, the United States Supreme Court struck down a similar New York law that divested trial courts of general jurisdiction from hearing Section 1983 damages claims against corrections officers. *Haywood*, 556 U.S. at 731. The New York law redirected those claims to the state court of claims and put plaintiffs at a procedural disadvantage by requiring them to comply, *inter alia*, with a 90-day notice of claim requirement. *Id.* at 734. The Supreme Court struck down that law, and held that "having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy." *Id.* at 740. Like the state law struck down in *Haywood*, LUPA's 21-day limitations period singles out a discrete subset of Section 1983 claims for special treatment and increased procedural hurdles.

For all of the reasons above, LUPA's 21-day limitations period violates the Supremacy Clause as applied to Section 1983 claims.

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date of the land use decision.") (emphasis added).

5. Plaintiffs filed their Section 1983 claims within 21 days of the Hearing Examiner decision

Even if the Court concludes that LUPA's exhaustion and filing deadlines apply to plaintiffs' Section 1983 claim, the claim should not be dismissed. For the reasons explained below in Section B with respect to appellants' LUPA claims, plaintiffs Section 1983 claims met all of LUPA's limitation and exhaustion requirements.

B. Argument in Support of Claim Brought Pursuant to the Land Use Petition Act, Ch. 36.70C RCW

In addition (and as an alternative) to Mr. Durland's Section 1983 claims, Mr. Durland filed a Land Use Petition under LUPA challenging the Hearing Examiner's decision on the grounds that it violated petitioners' constitutional due process rights. CP 10-11. This claim was filed out of precaution in case the Court determined that the Examiner's decision was a "land use decision" as that term is defined under LUPA. The Land Use Petition did not assert claims of error regarding the building permit, but instead requested that the Hearing Examiner be ordered to proceed with the merits of Mr. Durland's appeal so that Mr. Durland would have a meaningful opportunity to be heard in opposition to the building permit. CP 11-12.

The San Juan County Superior Court dismissed Durland's LUPA petition on procedural grounds and did not proceed to the merits of the due

process claim. The Court dismissed the Land Use Petition on the grounds that appellants were challenging the building permit itself, which they are not, and that they had failed to meet the exhaustion and limitations requirements in LUPA for challenging the permit. Both of these grounds are erroneous.

1. The Land Use Petition Act

The Land Use Petition Act (LUPA), ch. 36.70C RCW, provides the exclusive means of judicial review of "land use decisions," as that term is defined and quoted above. RCW 36.70C.030; RCW 36.70C.020; *see supra* at 22.

A court may grant relief from a land use decision under LUPA if, among other things, the "land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(f). This standard presents a question of law that the Court reviews *de novo*. *Peste v. Mason County*, 133 Wn. App. 456, 466, 136 P.3d 140 (2006).

Proceedings for review under LUPA must be commenced by filing a Land Use Petition in Superior Court within 21 days of the issuance of the land use decision. RCW 36.70C.040. Standing to bring a Land Use Petition under LUPA is limited to the applicant or owner of the property to which the land use decision is directed, or to any other person who has been aggrieved or adversely affected by the land use decision. RCW 36.70C.060(2). Included is a

requirement that the petitioner exhaust his or her administrative remedies to the extent required by law. RCW 36.70C.060(2)(d).

The doctrine of exhaustion of administrative remedies is well-established in Washington. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). It is a legal doctrine that requires a party to exhaust the administrative remedies provided by a local jurisdiction's ordinances before filing a Superior Court challenge to a decision, and in the case of LUPA, a challenge to a land use decision. *Id.* In other words, a party who challenges the land use decision must generally follow the steps that local ordinances provide for appealing the decision to an administrative body before appealing to superior court. *Id.* at 866.[8]

2. Mr. Durland met the exhaustion and limitation requirements of LUPA.

Mr. Durland met the exhaustion and limitations requirements of LUPA. First, Mr. Durland's Land Use Petition does not challenge the underlying building permit, but rather his loss of the opportunity to be heard in opposition to it. That injury, which deprived Mr. Durland of procedural due process

[8] The exhaustion rule is by no means absolute. *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797, 732 P.2d 1013 (1987). Requiring exhaustion is discretionary for the Court and is only a substantive defense (not jurisdictional) and many courts have excused a failure to exhaust in several different situations. *See, e.g., Prisk v. City of Poulsbo*, 486 Wn. App. at 732; *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985). When addressing problems involving the exhaustion of remedies rule, reviewing courts necessarily exercise a great deal of discretion. *Prisk v. City of Poulsbo*, 46 Wn. App. at 797.

rights, was not complete until after the Hearing Examiner dismissed his appeal and took away his only opportunity to be heard in opposition to the permit.[9] As a consequence the Hearing Examiner's decision must trigger LUPA's 21-day limitations period, not the issuance of the underlying building permit. Otherwise, RCW 36.70C.130(1)(f), which expressly provides for challenging a land use decision on the grounds that it is unconstitutional, would be rendered meaningless.

Here, Mr. Durland filed his Land Use Petition in superior court less than 21 days after the decision was issued. The Examiner's decision was signed on February 2, 2012 and was issued for purposes of LUPA on February 5, 2012. *See* RCW 36.70C.040(4)(a). Mr. Durland appealed to the San Juan County Superior Court on February 24, 2012, nineteen days following the issuance of the decision. Mr. Durland therefore filed the Land Use Petition

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[9] The San Juan County Municipal Code does not provide an opportunity to be heard in opposition to a building permit before it is issued. In other words, the Code provides only for "postdeprivation" remedies through an appeal to the Hearing Examiner. Appellants do not challenge the general idea that San Juan County may rely on postdeprivation hearings to satisfy the Due Process Clause. Nonetheless, because San Juan County has chosen to rely on postdeprivation remedies to satisfy the Due Process Clause, an injury based on procedural due process is not complete until *after* the person is denied an opportunity to be heard by the Hearing Examiner. *See Hudson v. Palmer*, 468 U.S. 517, 534, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (explaining that in some circumstances due process may be satisfied by a postdeprivation hearing, but in that case "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy").

within LUPA's limitations period for purposes of alleging a loss of his procedural due process rights.

Mr. Durland also was not required to exhaust any administrative remedies before filing the Land Use Petition because the Hearing Examiner's decision was final and was not subject to any administrative appeal process. The Hearing Examiner stated this himself in his decision.

> This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter, such decisions are not subject to administrative appeal to the San Juan County Council. *See also SJCC 2.22.100.*

CP 75. Because there was no administrative appeal process for challenging the Hearing Examiner's decision, LUPA's exhaustion requirement did not preclude Mr. Durland from bringing his Land Use Petition in superior court.[10]

3. Exhaustion was not an option because the Examiner does not have legal authority to rule on constitutional issues.

Last, it would have been futile for Mr. Durland to have appealed to the Hearing Examiner on constitutional grounds. Under LUPA, the San Juan

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[10] Moreover, a party is expressly allowed to raise issues of manifest error affection constitutional rights for the first time on appeal without any requirement of exhaustion. RCW 36.70C.130(1)(f) expressly allows a petitioner to bring a constitutional claim in a LUPA petition without having to present that issue during the administrative process. *Peste v. Mason County*, 133 Wn. App. at 466. The *Peste* Court also pointed out that parties may raise manifest errors affecting constitutional rights for the first time on appeal. RAP 2.5(a). *See also Connor v. Universal Utilities*, 105 Wn.2d 168, 170, 712 P.2d 849 (1986). Finally, this Court has inherent authority to consider all issues necessary to reach a proper decision. *Id.* As such, Mr. Durland was allowed by law to raise his due process claim in Land Use Petition without having presented the claim during the administrative process.

County Hearing Examiner does not have jurisdiction to consider constitutional claims. *See Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 639-640, 689 P.2d 1084 (1984).

A Hearing Examiner is a creature of the Legislature without inherent or common law powers and they exercise only those powers conferred either expressly or by necessary implication. *Id.* at 636. A Hearing Examiner's determination in an administrative proceeding is typically limited to determining whether or not a particular application for development or decision by the planning department on an application for development is consistent with the state and local laws for the type of development at issue. *Id.*

Washington state law provides the authority for a county to adopt a Hearing Examiner system under which a Hearing Examiner may hear and issue decisions on proposals for certain developments. RCW 36.70B.970. Pursuant to this authority, San Juan County adopted a Hearing Examiner system in Chapter 2.22 SJCC. The authority of the San Juan County Hearing Examiner is set forth in that chapter and does not include the authority to decide constitutional issues. *See* SJCC 2.22.100.

Indeed, the Hearing Examiner himself ruled that his legal authority was limited in this manner and he concluded that he did not have inherent authority to apply equitable tolling. CP 74-75.

In short, not only would it have been nonsensical allege a deprivation of procedural due process until *after* the Hearing Examiner dismissed Mr. Durland's appeal, doing so would have been futile because the Hearing Examiner does not even have jurisdiction to hear that issue.

## V. CONCLUSION

For the reasons expressed above, Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks respectfully request that this Court reverse the San Juan County Superior Court Order Granting San Juan County's Motion for Summary Judgment (Jul. 6, 2012) and Order Granting Motion for Dismissal (Apr. 13, 2012) and remand this matter to the Court with an order to proceed on the merits.

Dated this 21st day of November, 2012.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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|---|---|
| MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,<br><br>Appellants,<br><br>v.<br><br>SAN JUAN COUNTY, WES HEINMILLER, and ALAN STAMEISEN,<br><br>Respondents. | NO. 69134-1-I<br><br>(San Juan County Superior Court Cause No. 12-2-05047-4)<br><br>DECLARATION OF SERVICE |

STATE OF WASHINGTON )
) ss.
COUNTY OF KING )

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks herein.

On the date and in the manner indicated below, I caused the Opening Brief of Appellants to be served on:

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