IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89745-0

COURT OF APPEALS NO. 69134-1-I

MICHAEL DURLAND, et al.,

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

PETITION FOR REVIEW

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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Appellants seek review of an unpublished Court of Appeals decision captioned *Durland, et al. v. San Juan County, et al.* (Sep. 30, 2013) (App. A hereto). The decision is reported at 2013 WL 5503681. The Court of Appeals denied appellants' motion for reconsideration on October 31, 2013 (App. B hereto). The Court of Appeals granted respondents Heinmiller's and Stameisen's motion for reconsideration on the issue of attorney's fees on November 15, 2013 (App. C hereto).

III. ISSUES PRESENTED FOR REVIEW

1. Under the Due Process Clause of the United States Constitution, government may not deprive a person of a "property interest" without prior notice and an opportunity to be heard. In turn, a property interest exists when state law gives rise to a reasonable expectation of entitlement, which will arise when the law is couched in mandatory terms. Do the mandatory height, size, and other limitations in the San Juan County Code, as applied to the issuance of a building permit, give rise to a reasonable expectation of entitlement to their benefits?

2. Under the Supremacy Clause of the United States Constitution, claims brought pursuant to the federal Civil Rights Act, 42 U.S.C. § 1983, are immune to state remedy-exhaustion and timeliness requirements. In Washington, are Section 1983 claims that arise in the land use context subject to the exhaustion requirements and the 21-day limitations period in Washington's Land Use Petition Act?

3. RCW 4.84.370 provides for an award of attorney's fees on appeal "of a decision by a county, city, or town to issue, condition, or deny a development permit." Does it also authorize a fee award in a case that does not challenge a decision "to issue, condition, or deny" a permit?

IV. STATEMENT OF THE CASE

This case is a companion case to *Durland et al. v. San Juan County et al.*, Supreme Court No. 89293-8, (hereinafter referred to as "*Durland I*"), which was recently granted review by this Court.[1] The facts of both cases arise from San Juan County's issuance of an illegal building permit to Mr. Durland's and Ms. Fennell's neighbors, Wes Heinmiller and Alan Stameisen. The two cases are based on the same underlying facts and were appealed separately only because appellants availed themselves of two

[1] This Court granted review in *Durland I* on December 11, 2013, and the parties' supplemental briefs are due on January 10, 2013. At the time that appellants filed their petition for review in *Durland I*, they were awaiting a decision from the Court of Appeals in this case. *See Durland I*, Petition for Review at 7 n. 4 (August 29, 2013).

different procedures for challenging the permit. Both cases raise fundamental issues of due process and fair play in the land use context.

As discussed below and in our petition for review in *Durland I*, the permit will severely impact Mr. Durland's and Ms. Fennell's use and enjoyment of their property. The County issued the permit in violation of mandatory height, size, and other limitations in the San Juan County Code (the "SJCC"). Yet, Mr. Durland and Ms. Fennell were given no prior notice of the permit and, at every turn, they have been denied their right to challenge it. In *Durland I*, they were denied their right to contest the permit in a direct challenge under Washington's Land Use Petition Act. And in this case they were denied their right to oppose the permit before the County's hearing examiner. Because appellants have been denied their due process right to notice and a hearing, this Court should grant review.

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 83.

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

to the footprint of the existing garage and to refrain from moving it any closer to the shoreline than the existing structure. CP 83, 89.

Heinmiller and Stameisen did not comply with their building permit; instead, they built the new garage outside the footprint of the existing structure and closer to the shoreline than the old garage had been. CP 84. Upon discovering these violations, Mr. Durland filed a complaint with the County on March 22, 2011, wherein he asked the County to take action to correct Heinmiller's and Stameisen's violations. *Id.*

The County did not respond to Mr. Durland's complaint and, frustrated with the County's inaction, Mr. Durland filed a public records request on November 3, 2011, for documents relating to the County's investigation. *Id.* Mr. Durland had hoped to discover that the County was investigating the violations and he believed that the County would not allow further development without first resolving the issues. CP 84, 87.

But he was wrong — Heinmiller and Stameisen had already applied for a second building permit to add a second-story office and "entertainment area" to the illegal garage. CP 85, 90. And on November 1, 2011, two days prior to Mr. Durland's records request, the County granted the application and issued the permit without any public notice. CP 85.

Mr. Durland first learned of the new permit from a vague reference in the County's response to his records request (which, conveniently for

the County, came on the very day that his deadline expired for appealing the permit to the County's hearing examiner). CP 85. Upon his receipt of the County's response, Mr. Durland quickly requested a copy of the new permit and discovered that it violated numerous code provisions. CP 86. It was issued in violation of mandatory 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.

Perhaps most egregious, the second-story addition required a shoreline conditional use permit, without which it could not be permitted. *See* SJCC 18.80.110.G. But the County did not require a shoreline permit or give the required notice. The County ignored that requirement and Mr. Durland had no way to know of the permit until long after it was issued.

B. Proceedings Below

Shortly after he obtained the new permit and discovered that it violated the SJCC, Mr. Durland filed an appeal with the San Juan County

Hearing Examiner.[2] *See* CP 68. Mr. Durland's appeal sought reversal of the permit on the grounds that it was inconsistent with the SJCC. CP 70–72. But the hearing examiner dismissed the appeal on timeliness grounds.[3] The dismissal effectively denied Mr. Durland and Ms. Fennell of their only opportunity to contest the permit before the County. *See* CP 73–76.

On February 24, 2012, Mr. Durland and Ms. Fennell filed a complaint for damages and injunctive relief pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (herein "Section 1983"). *See* CP 4–12. In essence, Section 1983 provides a federal cause of action for the deprivation of constitutional rights. And the remedy provided by Section 1983 is "supplemental" to — *i.e.*, it is in addition to and is not diminished by — remedies provided under state law. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Monell v. Dept. of Social Serv. of N.Y.*, 436 U.S. 658, 701, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Appellants' Section 1983 claim is an as-applied challenge to the SJCC for failure to require

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[2] Mr. Durland and Ms. Fennell also filed a land use petition in the Skagit County Superior Court as a direct challenge to the permit under LUPA. *See* CP 77–81. The Court of Appeals decision in that case (which held that Mr. Durland could not challenge the permit in court without first appealing it to the County's hearing examiner — the very course of action that he attempted to pursue in this case) is now on review to this Court in *Durland et al. v. San Juan County et al.*, Supreme Court No. 89293-8.

[3] The SJCC provides that building permits may be appealed to the hearing examiner within 21 days of issuance. SJCC 18.80.140.D.1. Mr. Durland could not file his administrative appeal within this appeal window because he had no notice of the permit until it was too late.

timely notice of the building permit, as required by the federal Due Process Clause. CP 11. The Section 1983 claim also challenges the hearing examiner's dismissal as a denial of appellants' due process right to be heard in opposition to the permit. *See id.*

The complaint also includes an alternative claim under Washington's Land Use Petition Act ("LUPA"), chapter 36.70C RCW. *See* CP 10. In Washington, LUPA is the "exclusive" state law cause of action for challenging land use decisions. *See* RCW 36.70C.030. LUPA contains a strict 21-day statute of limitation and generally requires plaintiffs to exhaust their administrative remedies prior to filing a lawsuit (for example, by first appealing the decision administratively). *See* RCW 36.70C.040(3), -060(2)(d). But like Section 1983, LUPA also provides a cause of action for challenging land use decisions on constitutional grounds. RCW 36.70C.130(1)(f). Like their Section 1983 claim, appellants' alternative LUPA claim challenges the hearing examiner's dismissal as a violation of their due process right to be heard. *Id.*

The superior court dismissed Mr. Durland's LUPA claims on April 13, 2012. *See* CP 108–109. On July 6, 2012, the superior court granted respondents' motions for summary judgment on the Section 1983 claim. *See* CP 163–64. As to both claims — including the Section 1983 claim — respondents argued that the claims were barred by LUPA's exhaustion and

timeliness requirements. *See, e.g.*, CP 24–25, 34, 122–24. Respondents also argued that appellants lacked a property interest in the mandatory height, size, and other limitations in the SJCC. *See* CP 119–122, 131.

On appeal, respondents renewed their argument that LUPA's procedural requirements are "jurisdictional" prerequisites under Section 1983. They also renewed their argument Mr. Durland and Ms. Fennell lack a property interest under the Due Process Clause.

On September 30, 2013, the Court of Appeals affirmed the superior court's dismissal of the 1983 claim, holding that appellants do not have a property interest in the height, size, and other limitations in the SJCC. *See* App. A at 8. But the Court of Appeals failed to articulate any test for determining the existence of a property interest under the federal Due Process Clause. *See generally* App. A at 5–7. And it failed to discuss any of the numerous cases cited by appellants holding that, in the land use context, a landowner has a property interest in the granting or denial of a *nondiscretionary* permit decision (*i.e.*, one where the city or county has no legal option but to deny the permit). Instead, the court relied on a misreading of the Division II opinion in *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006), which we discuss below.[4]

[4] The court did not expressly resolve appellants' LUPA claim. But the court's order on reconsideration, which we discuss in the text below this note, suggests that it resolved the LUPA claim on the same ground that it resolved the Section 1983

The Court of Appeals also denied Heinmiller's and Stameisen's request for attorney's fees. *See* App. A at 8–9. But the court later reversed itself and granted Heinmiller's and Stameisen's request for fees on appellants' alternative LUPA claim. *See* App. C. This is despite that the decision being appealed — the hearing examiner's dismissal on timeliness grounds — was not a decision to "issue, condition, or deny a development permit," as required by the fee-shifting provisions of RCW 4.84.370.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review of 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 or if it involves an issue of substantial public interest. RAP 13.4(b)(1)–(4). Moreover, the facts and issues in this case are inextricably intertwined with those of *Durland I*. This Court granted review of *Durland I* on December 11, 2013, and it should grant review here so that the two cases may be reviewed together.

Like *Durland I*, the Court of Appeals' opinion in this case raises a fundamental issue of due process; do citizens have a reasonable expectation that a municipality will deny nearby development when the development violates mandatory and nondiscretionary restrictions in the

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claim; lack of a property interest. We intend our discussion below relating to property interests to apply equally in support of our LUPA claim and our Section 1983 claim.

local development code? As we noted in our petition for review in *Durland I*, this Court has stated that lack of notice in the land use context is a violation of due process. *See Barrie v. Kitsap County*, 84 Wn.2d 579, 585, 527 P.2d 1377 (1974). *Accord Larsen v. Town of Colton*, 94 Wn. App. 383, 391, n. 6, 973 P.2d 1066 (1999). Here, we ask this Court to grant review and to clarify, as a necessary implication of that holding, that citizens also have a "property interest" in the requirements of the underlying development or zoning code.

This case also raises substantial questions under the Supremacy Clause of the United States Constitution. Respondents argued below — and we anticipate that they will argue here — that LUPA's exhaustion and timeliness requirements apply to federal claims under Section 1983. But they do not. Section 1983 claims are limited only by the forum state's residual limitations period for tort claims. *See Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). This Court should grant review and make clear that no other timeliness or exhaustion requirements apply to Section 1983 claims, whether they are brought by Mr. Durland, Ms. Fennell, or anyone else.

Finally, as in *Durland I* the Court of Appeals' fee award is premised on an expansive interpretation of RCW 4.84.370 that is at odds with the American rule that governs the awarding of attorney's fees. This

Court should grant review and clarify that RCW 4.84.370 provides for an award of attorney's fees *only* when the case is on appeal from a decision "to issue, condition, or deny a development permit." RCW 4.84.370(1). The statute does not apply when, as here, the case arises from a decision denying an appeal on timeliness grounds.

A. The Dismissal of Appellant's Due Process Claims Raises Serious Questions under the Due Process Clause of the United States Constitution

Under the Due Process Clause, local government may not deprive a person of a "property interest" without prior notice and an opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Here, Mr. Durland and Ms. Fennell possess a constitutionally-protected property interest to support their due process claims and Court of Appeals erred in holding otherwise.

"Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law." *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962 n. 15, 954 P.2d 250 (1998), *citing Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). 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 must look to the language of the statute and ask whether it is "couched in mandatory terms." *Wedges/Ledges of CA, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). *See also, e.g., Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). With respect to permits or other decisions, a property interest is also created when there are "'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).

This "mandatory terms" test applies in the land use context. And as the Tenth Circuit and the Colorado Supreme Court have held, it applies not only when a permit applicant challenges the *denial* of a permit (the typical situation in which the test is invoked) but also when affected third parties challenge the *issuance* of a permit. *See Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 n. 4 (10th Cir.

2003); *Hillside Cmty. Church v. Olsen*, 58 P.3d 1021, 1028 n. 6 (Colo. 2011). The two situations are "simply opposite sides of the same argument." *Hillside Cmty. Church*, 58 P.3d at 1028 n. 6.

Below, Mr. Durland and Ms. Fennell alleged violations of the height, size, and other development limitations in the SJCC. And there can be little doubt that these limitations impose mandatory and nondiscretionary restrictions on the issuance of building permits.[5] Because Heinmiller and Stameisen did not comply with these limitations, the County had no authority to issue the permit and Mr. Durland and Ms. Fennell have protected property interest its denial.

For example, the second-story addition to Heinmiller's and Stameisen's garage is governed by Chapter 18.50 of the SJCC. *See* App. A at 6. That chapter provides, in part, that "[r]esidential development is *only* permitted landward of the extreme high water mark" if it meets the substantive standards at Section 18.50.330 of the Code. SJCC 18.50.330.B.1 (emphasis added). Among these standards are mandatory height limitations with which the building permit fails to comply. *See*

[5] Indeed, the very nature of Heinmiller's and Stameissen's "building permit" implies that the County had no discretion to issue the permit once it became evident that respondents would violate the SJCC. Washington courts have long recognized that the granting or denying of a building permit is a ministerial act. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 929, 52 P.3d 1 (2002). *See also id.* at 929, n. 110 (collecting cases). A municipality has no discretion to grant or deny a building permit "save to ascertain if the proposed structure complies with the zoning regulations." *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 28, 385 P.2d 372 (1963).

SJCC 18.50.330.B.15 (limiting the height of garages to 16 feet).[6] *See also* CP 71. Nothing in the SJCC authorizes the County to issue a building permit for taller structures in the shoreline area, as it did here.

Similarly, Chapter 18.50 of the SJCC provides that "[a]ccessory structures which are not specified . . . as normal appurtenances to a residential use shall be permitted *only* as conditional uses." SJCC 18.50.330.E.4 (emphasis added). In this case, the addition to the garage violates the mandatory size limits at SJCC 18.50.330.E.2.a and is, therefore, not a "normal appurtenance." *See* CP 71. Because Heinmiller and Stameisen did not seek a conditional use permit, and the County did not grant one, the addition is prohibited outright. As such, Mr. Durland and Ms. Fennell have a property interest in preventing their neighbors' illegal development. *See Wedges/Ledges*, 24 F.3d at 62. *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'").

Below, the Court of Appeals did not discuss the mandatory terms test. Nor did it articulate any other test for determining the existence of a

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[6] SJCC 18.50.330(14) also provides that "[t]he maximum permitted height for residential structures is 28 feet." Again, this is a mandatory limit and, tellingly, the restriction was designed to prevent "significant adverse visual impacts," one of the very harms that Mr. Durland and Ms. Fennell allege.

reasonable expectation of entitlement.[7] Instead, the court claimed to have followed the reasoning in the Division II case of *Asche v. Bloomquist* when it ruled that appellants lack a property interest. *See* App. A at 5–6. But, as we pointed out in our briefs, the reasoning in *Asche* supports the mandatory terms test, not a casual and unstated dismissal of it.

In *Asche*, the Asches challenged a building permit issued by Kitsap County on the grounds that it violated mandatory height limitations in the Kitsap County Code. *See Ache*, 132 Wn. App. at 798. Like Mr. Durland and Ms. Fennell, they complained that the county's failure to notify them of the permit decision violated their due process rights. *Id.* at 796. And the court held that they had a property interest to support their claim. *Id.* at 797-98.

In reaching that conclusion — and consistent with the mandatory terms test — the Court focused on the mandatory nature of the height limitations, 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). The court also focused on whether the Asches would have had a "right to prevent" the development. *Id.*

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[7] Surprisingly, the Court of Appeals seemed to be unaware that Mr. Durland and Ms. Fennell even raised this issue. The court's opinion states that counsel first mentioned the mandatory nature of the SJCC at oral argument. *See* App. A at 7. But appellants' opening brief devoted five pages to this very issue, together with seven pages of their reply brief. *See* Opening Brief of Appellants at 15–20 (Nov. 21, 2012); Reply Brief of Appellants at 2–9 (Jan. 23, 2013).

This Court should grant review and clarify that, consistent with its prior rulings, appellants have a property interest in the mandatory terms of the SJCC. Like the situation in *Asche*, the mandatory provisions in the SJCC preclude Heinmiller's and Stameisen's second-story addition. Mr. Durland and Ms. Fennell would have had a "right to prevent" the building permit had they been notified of it. And, consistent with the mandatory terms test, they have a property interest in challenging the illegal permit.

B. Application of LUPA's Procedural Requirements Would Implicate Issues of Substantial Public Importance and Raise Serious Constitutional Questions under the Supremacy Clause

This Court should also grant review on the issue of whether LUPA's procedural requirements apply to Section 1983 claims. As noted above, respondents argued to the Court of Appeals that, in order to maintain a Section 1983 claim in the land use context, a plaintiff must comply with LUPA's exhaustion requirement and 21-day limitations period.[8] The Court of Appeals did not rule on these issues and its silence may represent an overruling, *sub silentio*, of a string of Washington cases that are directly contrary to binding federal law.[9] This Court may wish to

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[8] *See* Brief of Respondent San Juan County at 14–23 (Dec. 21, 2012); Brief of Respondents Wes Heinmiller and Alan Stameisen at 13–15 (Dec. 21, 2012). As discussed extensively in our petition for review in *Durland I*, LUPA's exhaustion requirement generally requires a plaintiff to appeal a land use decision administratively before challenging it in court. *See* RCW 36.70C.060(2)(d).

[9] *See Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn.

resolve these alleged jurisdictional issues and to resolve this potential conflict prior to ruling on the merits of this case.

As noted above, the remedy provided by Section 1983 is "supplemental" to state-law remedies. *Monroe*, 365 U.S. at 183. Thus, the Court has held that a plaintiff need not exhaust *any* state-law remedies prior to initiating a Section 1983 lawsuit. *See, e.g., Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (rejecting state notice-of-claim statute as applied to Section 1983 claims brought in state court); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."). Thus, LUPA's exhaustion requirements simply cannot be applied to bar a Section 1983 claim.[10]

Similarly, the Supreme Court has held that the timeliness of every Section 1983 claim must be judged *solely* by the forum state's residual

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App. 366, 404–405, 223 P.3d 1172 (2009) (holding that LUPA's 21-day limitations period applies to Section 1983 claims); *Asche*, 132 Wn. App. at 798–99; *Nickum v. City of Bainbridge Island*, 153 Wn. App. 356, 383, 223 P.3d 1172 (2009) (holding that "LUPA time limits also apply to due process claims.").

[10] In this case, LUPA's exhaustion requirements do not apply for the additional reasons that (1) the Section 1983 claim includes a claim for damages, which is outside the scope of LUPA, *see* RCW 36.70C.030(1)(c), and (2) the SJCC and the hearing examiner's decision do not fit within LUPA's definition of "land use decision." *See* RCW 36.70C.020(1). *See also Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223, 381, P.3d 1172 (2009). Moreover, the hearing examiner did not have jurisdiction to consider constitutional issues. *See Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 639–640, 689 P.2d 1084 (1984). Thus, it would have been impossible to exhaust the claims in this appeal by raising them before the hearing examiner.

limitations period for tort claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Owens,* 488 U.S. at 236. States lack the legal authority to impose a shorter limitations period. *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).

In Washington, the residual limitations period is three years, *see* RCW 4.16.080(2), and no Section 1983 claim may be held to a shorter period. Because there are enumerable ways that future land use decisions might infringe the constitutional rights of Washington citizens, this Court should grant review and clarify that LUPA's procedural hurdles do not preclude the bringing of Section 1983 claims in the land use context.

C. The Award of Attorney's Fees Implicates Issues of Substantial Public Importance

Finally, this Court should grant review of the Court of Appeals' fee award to respondents Wes Heinmiller and Alan Stameisen. *See* App. C. As in *Durland I*, the award was made under RCW 4.84.370, which awards attorney's fees to parties who prevail before the local jurisdiction, the superior court, and the Court of Appeals. However, the statute is limited in scope — it applies only to cases on appeal from "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." RCW 4.84.370(1) (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 the American rule since the beginning of its statehood. *See, e.g., Larson v. Winder*, 14 Wash. 647, 651, 45 P. 315 (1896). The rule provides that "[i]n the absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney's fee as part of the costs of litigation." *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941) (emphasis added).

As noted in our petition for review in *Durland I* — in which this Court accepted review of a similar issue under RCW4.84.370 — the American rule embodies many important public policies. In part, the rule ensures that less wealthy plaintiffs will not be deterred from seeking redress for fear of being saddled with their opponent's legal fees.[11]

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[11] *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 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.").

Accordingly, abrogation of the rule, in whole or in part, requires "a clear expression of intent from the legislature." *Cosmopolitan Eng'g Croup, Inc: v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006).

Here, the decision on appeal is not a local decision "to issue, deny, or condition" a building permit. As Mr. Durland and Ms. Fennell repeatedly attempted to make clear below, the decision on appeal in this case is a hearing examiner's dismissal of an administrative appeal on timeliness grounds. That decision, which deprived Mr. Durland and Ms. Fennell of their due process right to contest their neighbors' building permit, did not "issue, condition, or deny" any permit whatsoever. And RCW 4.84.370 does not contain a "clear expression of intent from the legislature" that attorneys' fees be awarded on appeal of such decisions.

As in *Durland I*, this Court should grant review to correct an 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 of the dismissal of Appellants' case and of the fee award to Respondents Wes Heinmiller and Alan Stameisen.

Dated this 16h day of December, 2013.

Respectfully submitted,

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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.	)	No. 69134-1-I DIVISION ONE UNPUBLISHED FILED: September 30, 2013

Cox, J. — "A prima facie case under 42 U.S.C. § 1983 requires the plaintiff to show that a person, acting under color of state law, deprived the plaintiff of a federal constitutional or state-created property right without due process of law."[1] "Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law."[2]

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[1] Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998).

[2] Id. at 962 n.15 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)).

Here, property owners Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (collectively "Durland") fail to demonstrate any constitutionally protected property right either under the San Juan County Code or otherwise. Accordingly, the trial court properly dismissed this action. We affirm.[3]

Wesley Heinmiller and Alan Stameisen (collectively "Heinmiller") own property on Orcas Island in San Juan County. On August 8, 2011, Heinmiller applied for a permit to build a second story on his garage located on his property.

On November 1, the San Juan County Department of Community Development and Planning granted the building permit. The San Juan County Code does not require public notice for the issuance of this type of permit.

Durland owns property adjacent to Heinmiller's property. On December 8, Durland received documents based on a Public Records Act request he made to San Juan County. During his review of these documents, he discovered that the County had issued a building permit to Heinmiller over a month earlier.

On December 19, Durland appealed the issuance of this permit to the San Juan County Hearing Examiner. The hearing examiner dismissed Durland's appeal as untimely.

Durland then commenced this action. The complaint, after stating a number of factual allegations, states that the hearing examiner's decision and the San Juan County Code violate 42 U.S.C. § 1983.[4] The request for relief seeks a

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[3] We deny Heinmiller's motion to strike portions of Durland's statement of the case in his opening brief. We have disregarded materials not properly before us for purposes of deciding this case.

[4] Clerk's Papers at 11.

declaration that Durland's due process rights were violated by the lack of notice and opportunity to be heard on the issuance of the building permit. There is no substantive challenge in the complaint to the permit the County issued.

In May 2012, San Juan County moved for summary judgment in this case on the basis that Durland could not establish a constitutionally protected property interest. The superior court granted the motion.

Durland appeals.

DISMISSAL OF 42 U.S.C. § 1983 CLAIM

Durland argues that the trial court erred when it summarily dismissed his 42 U.S.C. § 1983 claim. He contends that he was deprived of a constitutionally protected interest without a meaningful opportunity to be heard. We disagree.

This court reviews summary judgment determinations de novo, engaging in the same inquiry as the trial court.[5] Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[6] Further, summary judgment is appropriate if reasonable minds could reach but one conclusion from all the evidence.[7]

Constitutionally Protected Property Interest

Durland argues that he has a constitutionally protected property interest that supports his § 1983 claim against San Juan County. Specifically, he

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[5] Harberd v. City of Kettle Falls, 120 Wn. App. 498, 507, 84 P.3d 1241 (2004).

[6] CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002).

[7] Harberd, 120 Wn. App. at 507-08.

contends that the San Juan County Code's height and size limitations for garage and accessory buildings confer a property interest in having the County comply with these limitations. He asserts that he is entitled to notice and a hearing before he is deprived of that claimed right. We disagree.

Under 42 U.S.C. § 1983,

> Every person who, under color of any statute, ordinance, regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"To establish a prima facie due process violation under § 1983, the plaintiff must show that the defendant deprived the plaintiff of a constitutionally protected property right."[8] "Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law."[9] "'A protected property interest exists if there is a legitimate claim of entitlement to a specific benefit.'"[10] More specifically, "a zoning ordinance can create a property right."[11]

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[8] Manna Funding, LLC v. Kittitas County, 173 Wn. App. 879, 894-95, 295 P.3d 1197 (2013) (citing Mission Springs, Inc., 134 Wn.2d at 962; Robinson v. City of Seattle, 119 Wn.2d 34, 58, 830 P.2d 318 (1992)).

[9] Mission Springs, Inc., 134 Wn.2d at 962 n.15 (citing Bd. of Regents, 408 U.S. at 577).

[10] Nieshe v. Concrete Sch. Dist., 129 Wn. App. 632, 641-42, 127 P.3d 713 (2005) (internal quotation marks omitted) (quoting Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984)).

[11] Asche v. Bloomquist, 132 Wn. App. 784, 797-98, 133 P.3d 475 (2006).

This court reviews de novo questions of law, including statutory construction.[12]

Here, Durland relies primarily on Asche v. Bloomquist to make his case.[13] In Asche, Division Two considered whether the Asches had a property interest under a Kitsap County zoning ordinance.[14] It concluded that the Asches had a property interest in preventing their neighbors, the Bloomquists, from building a structure over 28 feet in height.[15] The court came to this conclusion because of a "View Protection Overlay Zone" in the Kitsap County Code.[16] According to this zoning ordinance, a building may be built up to 28 feet without any prerequisites.[17] But a building taller than 28 feet but less than 35 feet could "only be approved if the ***views of adjacent properties***, such as that of the Asches, are not impaired."[18]

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[12] Id. at 797.

[13] Opening Brief of Appellants at 17-18 (citing Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006)).

[14] Asche, 132 Wn. App. at 797-99.

[15] Id. at 798.

[16] Id.

[17] Id.

[18] Id. (emphasis added).

The court concluded that the Asches had "a property right, created by the zoning ordinance, in preventing the Bloomquists from building a structure over 28 feet in height."[19] Thus, procedural due process applied to this property right.[20]

Here, Durland cites specific provisions of the San Juan County Code to support his assertion that there is a similar constitutionally protected property right in this case. These provisions are found within the Shoreline Master Program. Specifically, he relies on SJCC 18.50.330(B)(14), which regulates the height of residential structures, and SJCC 18.50.330(B)(15), which regulates the height and size of garage and accessory buildings.

Durland also relies on SJCC 18.50.330(E)(2)(a), (3), and (4). Respectively, these provisions discuss which accessory uses and developments are exempt from permitting requirements, when a shoreline substantial development permit is required, and when accessory structures may be permitted as conditional uses.[21]

It is noteworthy that not one of these cited provisions mentions any consideration of adjacent property views. This fact alone distinguishes this case from Asche.[22]

The only reference to views in any of these cited provisions is in SJCC 18.50.330(B)(14). That provision generally limits the height of residential

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[19] Id.

[20] Id.

[21] SJCC 18.50.330(E)(2)(a), (3), and (4).

[22] See Asche, 132 Wn. App. at 798.

structures to 28 feet, provided that heights above 35 feet are permitted as conditional uses.[23] In such cases, the "applicant must demonstrate that the structure will not result in significant adverse visual impacts, nor interfere with normal, public, visual access to the water."[24] This language refers to "***public***, visual access to water."[25] Significantly, this language does not refer to visual impacts of adjacent property owners.

Additionally, as the trial court correctly reasoned, SJCC 18.50.140 assists in defining what views are at issue here. This provision generally addresses public views with one exception. SJCC 18.50.140(D) describes view protection for "surrounding properties to the shoreline and adjoining water." But that protection applies when there is "development on or over the water."[26] In the instant case, there is no "development on or over the water." Thus, harmonizing the provisions at issue, the visual impacts language on which Durland relies does not apply to adjacent property owners.

At oral argument for this case, Durland advanced the theory that the cited statutory framework on which the claim rests is mandatory, not discretionary, in character. From this, Durland argues that a property right exists. Neither the briefing below nor the briefing here is persuasive on this point. Accordingly, we reject this argument.

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[23] SJCC 18.50.330(B)(14).

[24] Id.

[25] Id.

[26] SJCC 18.50.140(D).

In sum, the superior court correctly determined that these zoning ordinances do not confer a property right on Durland to prevent Heinmiller from building a garage that could impact Durland's view as an adjacent property owner. Consequently, procedural due process protections do not apply. The court properly dismissed the 42 U.S.C. § 1983 claim.

ATTORNEY FEES

Heinmiller requests an award of attorney fees and costs under RCW 4.84.370. For the reasons discussed below, we deny this request.

RCW 4.84.370(1) provides for an award of "reasonable attorneys' fees and costs . . . to the prevailing party or substantially prevailing party on appeal before the court of appeals . . . of a decision by a county . . . to issue, condition, or deny a . . . building permit . . . ."

Here, Durland argues that fees are not permitted because Heinmiller is not a prevailing party. This argument is based, in turn, on the fact there was no hearing on the land use decision below. As this court recently held in Durland v. San Juan County,[27] which also arose from the facts in this case, that argument is untenable in Division One. The plain words of the statute do not require a party to prevail on the merits to be entitled to fees.[28] Thus, this argument does not serve as a basis for our decision to reject an award of attorney fees.

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[27] 175 Wn. App. 316, 305 P.3d 246, 251 (2013).

[28] Id. (citing Prekeges v. King County, 98 Wn. App. 275, 285, 990 P.2d 405 (1999)).

Instead, we reject an award of fees in this case because it is, essentially, a 42 U.S.C. § 1983 claim, which does not permit an award of fees to a defendant. We say this despite the heading on the complaint. As we already noted, there was no substantive attack against the permit. Rather, this was a claim that the procedures in this case deprived Durland of constitutionally protected rights. We also note that fees were awarded to Heinmiller in the Skagit County case, which addressed the LUPA challenge.[29] In sum, fees are not awardable under the special circumstances of this case.

The award of costs, as distinct from attorney fees, to Heinmiller, as the substantially prevailing party, may be made upon timely compliance with the provisions of RAP 14.1 et seq.

We affirm the summary judgment order.

COX, J.

WE CONCUR:

[29] Id.

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

MICHAEL DURLAND; KATHLEEN FENNELL; and DEER HARBOR BOATWORKS, Appellants, v. SAN JUAN COUNTY; WES HEINMILLER; and ALAN STAMEISEN, Respondents.	No. 69134-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks, have moved for reconsideration of the opinion filed in this case on September 30, 2013. The panel hearing the case has considered the motion and has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 31st day of October, 2013.

For the Court:

Cox, J.

Judge

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 69134-1-I
Michael Durland, et al., Appellant v. San Juan County, et al., Respondents

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

enclosure

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

MICHAEL DURLAND; KATHLEEN FENNELL; and DEER HARBOR BOATWORKS, Appellants, v. SAN JUAN COUNTY; WES HEINMILLER; and ALAN STAMEISEN, Respondents.	No. 69134-1-I ORDER GRANTING RESPONDENTS HEINMILLER AND STAMEISEN'S MOTION FOR RECONSIDERATION AND MODIFYING OPINION

Respondents, Wes Heinmiller and Alan Stameisen, have moved for reconsideration of the opinion filed in this case on September 30, 2013. The panel hearing the case called for an answer from Appellants, Michael Durland et al. The court having considered the motion and answer, as well as the record, has determined that the motion for reconsideration should be granted. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted and the slip opinion be modified.

At pages 8 and 9, strike the "ATTORNEY FEES" section in its entirety and substitute the following text:

ATTORNEY FEES

Heinmiller requests an award of attorney fees and costs under RCW 4.84.370. For the reasons discussed below, we grant this request.

RCW 4.84.370(1) provides for an award of "reasonable attorneys' fees and costs . . . to the prevailing party or substantially prevailing party on appeal before the court of

appeals . . . of a decision by a county . . . to issue, condition, or deny a . . . building permit . . . or similar land use approval or decision."

This case is essentially a 42 U.S.C. § 1983 claim, which does not permit an award of fees to a defendant. We say this despite the heading on the complaint. As we already noted, there was no substantive attack against the permit. Rather, this was a claim that the procedures in this case deprived Durland of constitutionally protected rights. Heinmiller is not a defendant for the 42 U.S.C. § 1983 claim.

Nevertheless, Durland appealed both the order granting summary judgment regarding the 42 U.S.C. § 1983 claim and the order granting the motion for dismissal of his land use petition. In his briefing before this court, Durland made arguments regarding both orders. Given Durland's arguments on appeal, Heinmiller is a "substantially prevailing party" respecting the order granting the motion for dismissal of the land use petition. Thus, to the extent the arguments in this appeal dealt with that order only, Heinmiller is entitled to an award of fees under RCW 4.84.370(1). Correspondingly, to the extent this appeal dealt with the 42 U.S.C. § 1983 claim, fees are not awardable. Pursuant to RAP 18.1(i), we remand to the trial court for a determination of the amount of reasonable attorney fees to be awarded.

The award of costs to Heinmiller, as the substantially prevailing party, may be made upon timely compliance with the provisions of RAP 14.1 et seq.

We affirm the summary judgment order.

Dated this 15th day of November 2013.

Cox, J.