NO. 89745-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69134-1-I

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

MICHAEL DURLAND and KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Petitioners/Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER and ALAN STAMEISEN,

Respondents.

SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review involves a claim asserted under 42 U.S.C. § 1983 alleging that San Juan County's issuance of a residential building permit for a neighbor's garage addition constituted a violation of Petitioners' due process rights. The Appellants/Petitioners are Michael Durland, Kathleen Fennell and Deer Harbor Boatworks, who own property adjacent to that of Wes Heinmiller and Alan Stameisen. For the sake of brevity, Petitioners are referred to collectively herein as "Durland."

Durland alleges that the San Juan County Code violated his due process rights by not requiring that individualized notice of a residential building permit be provided to the owners of nearby land. Durland further contends that the San Juan County Code is unconstitutional because it requires that a challenge to a building permit decision be undertaken within 21 days. He sought review of the trial court's summary dismissal of his claims under the Land Use Petition Act (LUPA) and Section 1983, and now seeks discretionary review of the Court of Appeals' unanimous decision affirming dismissal.

San Juan County submits that there are no legitimate grounds for Supreme Court review. The trial court's dismissal order was correctly affirmed because (1) Durland possessed no constitutionally protected property interest in notice of a neighbor's residential building permit; (2) the Constitution does not mandate that neighbors receive

individualized notice of a residential building permit issued to a different landowner; and because (3) a permit which is not timely appealed under the Land Use Petition Act ("LUPA"), RCW 36.70C, must be deemed valid, and cannot be challenged in a collateral action. Moreover, Durland's claim and appeal is moot. Therefore, Durland has no standing to seek relief under Section 1983.

The ruling of the Court of Appeals was in conformance with state and federal decisions relating to Section 1983 claims. Thus, there is no reason for this Court to revisit this settled area of law. The Court should deny discretionary review.

II. ISSUES PRESENTED FOR REVIEW

San Juan County believes that the issues presented by Durland's Petition for Review may be best stated as follows:

A. Whether a person who has no ownership or possessory interest in another's property possesses a constitutionally protected "property interest" in receiving notice of a building permit issued for the other's property.

B. Whether Durland satisfied the substantial burden of demonstrating that provisions of the San Juan County Code relative to notice and appeals of permits are unconstitutional.

C. Whether an action under 42 U.S.C. § 1983 challenging a permit on an adjacent property is properly dismissed where there was no timely appeal of the issuance of the permit under the local ordinance.

D. Whether Durland's appeal is barred by mootness and absence of standing, based on Durland's representation that he is not challenging the Heinmiller building permit.

III. FACTUAL BACKGROUND

This case arises out of a residential building permit which was issued by San Juan County to Durland's neighbors, Wes Heinmiller and Allen Stameisen (collectively, "Heinmiller"). At the trial court level, Durland contended that the permit should not have been issued because it was allegedly in violation of certain San Juan County building and land use ordinances. He further contended that his due process rights were violated because he was not provided individualized notice of the permit so that he could timely challenge it through an appeal to the Hearing Examiner.

Durland concedes that he does not hold title or any other ownership or possessory interest in the property which was the subject of the building permit application. But he argues that provisions of the San Juan County Code are unconstitutional because they do not provide for notice of ordinary building permits to neighboring property owners.

Heinmiller filed his application for an addition to a residential garage on August 8, 2011. (CP 6). On November 1, 2011, San Juan County approved the Permit Application. (CP 7). The San Juan County Code does not mandate that notice be given to neighbors of decisions on standard building permit applications. However, such permits are filed

and recorded as public records in the Department of Community Development and Planning. (CP 7).

The deadline for appealing the building permit decision was November 22, 2011. (CP 10). Durland filed an appeal of the building permit with the San Juan County Hearing Examiner on December 19, 2011. (CP 10). The Examiner dismissed Durland's challenge based on absence of jurisdiction, because the appeal was not filed within the 21-day appeal period provided in the San Juan County Code. SJCC 18.80.140.D.1. (CP 67).

After the Hearing Examiner dismissed Durland's appeal based on exhaustion and limitations, Durland filed a "Land Use Petition and Complaint" in San Juan County Superior Court, which sought to challenge the Examiner's decision under RCW 36.70C ("LUPA"). (CP 4-12). Durland also asserted a claim under 42 U.S.C. § 1983, based on an alleged violation of his procedural due process rights. Durland contended in his LUPA appeal that the permit was issued in violation of the County Code.

The trial court, the Honorable Donald Eaton, dismissed Durland's LUPA petition based on his failure to exhaust remedies by timely challenging the building permit issued to Heinmiller. (CP 108-110). Subsequently, the Court granted the motions of San Juan County and Heinmiller to dismiss the damages claim under 42 U.S.C.§ 1983 based on (1) the absence of a constitutionally protected property interest which would support a due process claim under Section 1983; and (2) the failure

of Durland to satisfy the exhaustion and limitations requirements of LUPA and the San Juan County Code. (CP 163-64). Durland appealed to the Washington Court of Appeals.

Durland represented on appeal that he is *not* challenging the building permit issued to Heinmiller. (Opening Brief in Court of Appeals, pp. 3, 31). Instead, he now argues only that SJCC 18.80.140.D.1 is violative of the Due Process Clause because it does not require that individualized notice of a residential building permit be provided to all residents of San Juan County.

San Juan County respectfully asks this Court to deny discretionary review. The Court of Appeals' unanimous opinion properly rejected Durland's argument that each resident of a county possesses the same constitutionally protected property interest in a residential permit as the interest possessed by the owner of the property. To accept Durland's argument in this case would mean that virtually every citizen has a constitutional right to notice of a neighbor's simple building permit. This would presumably allow any neighbor or citizen of a city or county to challenge and delay a another's home construction or remodel, by merely arguing that the County somehow mistakenly issued the permit. The Courts have wisely rejected such a massive and unwarranted expansion of

a "property interest" actionable under the Due Process Clause.[1] This Court should deny review.

IV. ARGUMENT

A. The Court of Appeals Correctly Held That Durland Does Not Possess a Constitutionally Protected Property Interest Upon Which a Due Process Claim Could be Based.

Durland's appeal is based on 42 U.S.C. § 1983. That statute is remedial in nature. It does not create substantive rights. Instead, it provides a remedy for violation of federal rights found elsewhere in the U.S. Constitution or federal statutes. Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994). In this case, Durland alleges that his procedural due process rights under the 14th Amendment were violated because the San Juan County Code does not require that neighbors be given notice of a residential building permit. (CP 11). That claim was properly rejected by the trial court and the Court of Appeals, because Durland did not possess a "property interest" which would support a due process claim.

A party seeking recovery under Section 1983 based on an alleged deprivation of due process must first establish that he possessed a constitutionally protected property interest which the local government deprived him of without due process. Board of Regents v. Roth, 408 U.S.

[1] In his Petition for Review, Durland argues that the permit issued to Heinmiller was violative of San Juan County Code. But because in this appeal Durland is not actually challenging the permit itself, and because the trial court's order was based on procedural and jurisdictional grounds, the County will not respond to Durland's assertions regarding the substantive legality of the permit. Suffice it to say that the County strongly disagrees that the permit was issued in violation of the San Juan County Code.

564, 577, 92 S. Ct. 2701 (1972); Parratt v. Taylor, 451 U.S. 527, 536, 101 S.Ct. 1908 (1981).

For purposes of due process, a substantive property right cannot arise merely by virtue of a procedural right. Carlisle v. Columbia Irrigation District, 165 Wn.2d 555, 573, 229 P.3d 761 (2010); Dorr v. Butte County 795 F.2d 875 (9th Cir. 1986). Nor does one have a property interest in a rule of law. Branch v. U.S., 69 F.3d 1571, 1578 (C.A. Fed. 1995), cert. den., 519 U.S. 810.

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

Durland acknowledges that he must demonstrate that he possessed a "property interest" in order to pursue a due process claim under Section 1983784,. But he mistakenly asserts that the San Juan County Code provided him a "reasonable expectation of entitlement and thereby gave [him] a property right." (CP 5). Durland fails, however, to identify any provision of the San Juan County Code which confers *on a neighbor* a "reasonable expectation of entitlement" to receive notice of another

landowner's building permit. Indeed, at ¶ 7.23 of his LUPA Petition and Complaint, Durland expressly acknowledged that the Code does *not* provide any such expectation to neighboring property owners. (CP 10). Because Durland cannot identify a statutory basis for an "entitlement" to notice of his neighbor's building permit, his due process claim must fail. Board of Regents v. Roth, supra.

Durland argues that a property interest arises from his ownership of property near the Heinmiller property. But the law does not recognize such a property right in the context of a procedural due process claim. To the contrary, the courts have consistently rejected similar claims. In King County v. Rasmussen, 299 F.3d 1077 (9th Cir. [WA] 2002), cert. denied, 538 U.S. 1057, the County sought to quiet title to an abandoned railroad right-of-way bisecting Rasmussen's property. Rasmussen objected that his due process rights as an adjacent landowner had been violated by the County's actions. The Ninth Circuit Court of Appeals held that because Rasmussen did not have a reversionary ownership interest in the right-of-way, he was not deprived of due process when the right-of-way was converted to a public trail. 299 F.3d at 1090.

Landowners ordinarily do not have a property interest in views across a neighbor's property. Collinson v. John L. Scott, 55 Wn. App. 481, 778 P.2d 534 (1989). This rule has been applied specifically in the context of a claim that a neighbor had not received notice of a permit on adjoining property. In Fusco v. State of Connecticut, 815 F.2d 201 (2nd

Cir. 1987), cert. denied, 484 U.S. 849, neighbors of a landowner sued the state alleging that they were not given adequate opportunity to challenge land use approvals given to the landowner. The court rejected the claim that the neighbors possessed a constitutionally protected property interest which would support a federal due process claim:

> The opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the 14th Amendment.

815 F.2d at 205-206. Accord, Evans v. Burruss, 933 A.2d 872, 883-84 (Md. 2007).

Similarly, in Fulilar v. City of Irwindale, 760 F. Supp. 164 (D.C. Calif. 1999) the plaintiffs complained that the city's issuance of a building permit to an adjoining property owner allowed a development which was too close to their property, diminishing the value of their land. The court nonetheless dismissed their damages claims as a matter of law, because the plaintiffs possessed no constitutionally protected property interest upon which a due process claim could rest:

> Plaintiffs, in their Complaint, assert that the City of Irwindale's failure to recognize the setback zoning requirement, allowing a development to be built too close to their property, caused them damage by diminishing the value of their property. However, governmental action allegedly causing a decline in property values has never been held to deprive a person of property within the meaning of the 14th Amendment.

760 F. Supp. at 166.

In this case, as Durland concedes, the San Juan County Code does not require that notice of residential building permits be issued to neighbors. The Washington legislature has expressly allowed local governments to exclude simple building permits from the notice requirements of more complex applications, such as conditional use permits. RCW 36.70B.140(2). The absence of individualized notice in this context is typical of ordinances throughout the state. For example, in Nickum v. City of Bainbridge Island, 153 Wn. App. 356, 372, n.4, 223 P.3d 1172 (2009) the City did not require notice to the public of building permits issued to neighboring landowners. But that was held not to give rise to a collateral challenge. Id. at 379. See also, Homeowners Association v. City of Richland, 166 Wn. App. 161, 169, 269 P.3d 3088 (2012) (City of Richland's code upheld despite not giving individualized notice to neighbors).

In his Petition for Review, Durland cites caselaw for the proposition that with regard to procedural due process requirements, a property interest is created "if the procedural requirements are intended to be a significant substantive restriction on . . . decision making." But the caselaw upon which Durland relies is inapposite, because it addresses whether a *permit applicant* possesses a property interest in approval of the permit. See, Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 63 (9th Cir. 1994); Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000).

While it is obvious that a land owner is entitled to challenge the permit conditions and restriction placed on his own property, and has a right to notice of such conditions in order to challenge them, it does not follow that every neighbor or resident of San Juan County (or any other jurisdiction) has a constitutionally protected interest in notice of another's simple building permit. The Court will note that virtually all of the cases cited by Durland in the Petition for Review involved challenges by the landowner himself, and not challenges by neighbors who had neither ownership nor possessory interest in the property. The San Juan County Code did not articulate procedural requirements *for the benefit of neighbors* which placed a "significant, substantive restriction on [the County's] decision making." Thus there is no property interest upon which Durland's due process claim could rest.

Nor can Durland base his Section 1983 claim on the short limitations period for appealing permit decisions. Under the language of the San Juan County Code, the opportunity of an abutting landowner (or anyone else) to appeal decisions of local agencies is a mere procedural right and not a property right protected by the 14th Amendment. Carlisle v. Columbia Irrigation Dist., supra, 168 Wn.2d at 573; Fusco v. State of Connecticut, supra, 815 F.2d at 205-206. Thus, Durland had no

constitutionally protected property interest upon which a due process claim could rest.[2]

Because Durland held no ownership or possessory interest in the Heinmiller property, and because the applicable ordinance did not require individual notice to neighbors of residential building permits, Durland did not possess a reasonable expectation of entitlement which would give rise to a property interest protected by the U.S. Constitution. Board of Regents, supra. The Court of Appeals properly affirmed the trial court's dismissal of Durland's Section 1983 claim.

B. The San Juan County Code is Not Unconstitutional.

Recognizing that the San Juan County Code does not grant him a "reasonable expectation of entitlement" with respect to his neighbor's building permit, Durland argues on appeal that he is not really challenging the building permit. (Opening Appeal Brief, page 3, line 5; page 31, line 2). Instead, Durland argues that he is only challenging the constitutionality of the San Juan County Code provisions.

But Durland is unable to demonstrate that the San Juan County Code is violative of the 14th Amendment to the Constitution. It is settled that statutes and ordinances are presumed to be constitutional and legally valid. The burden rests on one challenging the statute to show otherwise.

[2] In Asche v. Bloomquist, 132 Wn. App. 784, 133 P.3d 475 (2006) the Court of Appeals did find that a neighbor had a property interest in a view across his neighbor's property, but only because the Kitsap County Code created a "view protection overlay zone" which stated that a structure could not cause blockage of views from adjacent

State v. Branch, 129 Wn.2d 635, 919 P.2d 1228 (1996). Indeed, it is frequently said that a party challenging the constitutionality of a statute has the burden of overcoming the presumption of validity by proving its unconstitutionality "beyond a reasonable doubt." Habitat Watch v. Skagit County, 155 Wn.2d 397, 414, 416, 120 P.3d 56 (2005).

The steep burden of proving unconstitutionality applies to due process challenges to statutes. A party asserting that a statute violates due process must overcome the presumption of constitutionality and establish that the enactment of the statute was arbitrary and irrational. National Railroad Passenger Corp. v. Atchison Topeka & Santa Fe Railway Co., 470 U.S. 451, 472, 105 S. Ct. 1441 (1985).

Neither at the trial court level nor on appeal did Durland provide legal support for his assertion that a building code violates the Due Process Clause of the United States Constitution when it does not provide for notice to neighbors of a permit issued to a different landowner. To the contrary, the absence of a notice requirement is typical of ordinances throughout the state. As noted above, a similar absence of notice exists in the City of Bainbridge Island's building code, but the court in Nickum v. City of Bainbridge Island, supra, held there was no basis to toll the permit appeal statute of limitations. Indeed, the Court of Appeals in Nickum observed that such "no notice" ordinances are common and that to rule

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property. The Court held that absent such a specific overlay zone, a neighbor possesses no property interest on which a due process claim could rest. Id. at 791.

them invalid would open up hundreds of permits to challenge months or years after they were issued:

> To allow tolling of the administrative deadline in this case would open to challenge all previous permit determinations made by the City or similar localities with "no notice" permit requirements.

153 Wn. App. at 372.

In view of the strong presumption against a finding of unconstitutionality, Durland's due process claim under Section 1983 was properly dismissed. There is no genuine basis for discretionary review.

C. Durland's Failure to Comply With the Exhaustion and Limitations Requirements of LUPA Also Mandated Dismissal of His Damages Claim.

1. A "Land Use Decision" Subject to LUPA is Broadly Defined.

Durland was precluded from recovering damages against San Juan County because of his failure to satisfy the exhaustion and limitations requirements of the Land Use Petition Act, RCW 36.70C. The trial court determined that Durland's LUPA appeal was subject to dismissal (CP 108-110). The dismissal of the LUPA action also mandated dismissal of Durland's claim under Section 1983.

Under settled Washington law, a land use permit or other approval will be "deemed valid" and cannot be collaterally attacked once the opportunity to challenge it under LUPA has passed. In Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000) the

Supreme Court held that a county's decision to rezone a property could not be challenged except by timely petition under LUPA:

> Because RCW 36.70C.040(2) prevents the court from reviewing a petition that is untimely, approval of the rezone became valid once the opportunity to challenge it passed.

141 Wn.2d at 181. Subsequent cases have confirmed that LUPA is the exclusive means of challenging site-specific land use decisions, and that once the appeal period has expired, the underlying permit decision must be deemed valid, even if its legality is "questionable":

> Under Wenatchee Sportsmen Ass'n, approval of the BLA in this case despite its questionable legality "became valid once the opportunity to challenge it passed."

Chelan County v. Nykreim, 146 Wn.2d 904, 925-26, 53 P.3d 1 (2002).

Because the propriety of the building permit for Heinmiller can no longer be challenged, there is no basis for Durland to argue in a collateral action that the County's approval of the permit was legally improper and thereby deprived him of his due process rights.

The Washington Supreme Court has made clear that the exclusivity provisions of LUPA apply not only to approvals of a permit application, but also to determinations that compliance with a particular ordinance or statute is *not* required. Thus, in Samuel's Furniture v. DOE, 147 Wn.2d 440, 54 P.3d 1194 (2002) the Washington Department of Ecology challenged a county's determination that a permit application was exempt from Shoreline Management Act permit requirements. But because the DOE had not filed a timely LUPA petition within 21 days

after the county's decision, the Supreme Court held that DOE had no standing to challenge the local government's interpretation:

> Ecology's interpretation of the SMA would leave landowners and developers unable to rely on local government decisions – precisely the evil for which LUPA was enacted to prevent.

147 Wn.2d at 459. The exclusive remedy provisions of LUPA apply even when the litigant complains of lack of notice. Cedar River Water and Sewer District v. King County, 178 Wn.2d 763, 786 (2013); Mercer Island Citizens for Fair Process v. Tent City, 156 Wn. App. 393, 402-403, 232 P.3d 1163, 1168 (2010); Homeowners Association v. City of Richland, supra, 166 Wn. App. at 169-70.

The requirement that a local land use action be challenged under LUPA applies not only to decisions to issue a permit but also to *interpretative decisions* regarding the application of a zoning ordinance to specific property. The definition of "land use decision" in RCW 36.70C.020 is very broad and includes not only actions on project permits but also interpretive or declaratory decisions regarding the codes applicable to a permit. RCW 36.70C.020(2)(b).

Thus, in Asche v. Bloomquist, supra, the Court of Appeals confirmed that a county's interpretation regarding the application of an ordinance to a building permit application must be timely challenged under LUPA, or the interpretation will be deemed valid:

> . . . It does not matter whether the Asches are challenging the validity of the permit or the interpretation of the county

> zoning ordinance as applied to the piece of property. LUPA covers both.

Id. at 791. In Chelan County v. Nykreim, supra, the court held that a declaratory action was barred by LUPA's exclusivity provisions, even though the decision to issue the boundary line adjustment had been made over the counter by the Planning Director, and no timely appeal of the BLA to the Hearing Examiner was ever made. 146 Wn.2d at 931-32. A party's failure to exhaust his administrative remedies does not affect the finality of the local government's decision under RCW 36.70C.020. Twin Bridge Marine Park v. Department of Ecology, 162 Wn.2d 825, 854-56, 175 P.3d 1050 (2008) (concurring opinion).

2. LUPA's Exclusivity and Limitations Provisions Apply to Damages Actions.

The "exclusive remedy" provisions of LUPA bar collateral attacks on land use decisions, including actions to recover damages. In Asche v. Bloomquist, supra, the Court found that the plaintiff neighbors had not timely challenged the issuance of a permit under LUPA. And because the LUPA action was dismissed, the Court held that the damages claims asserted by the plaintiffs were also subject to dismissal, because the plaintiffs would be precluded in the damages action from seeking a determination that the approval was erroneous:

> Their public nuisance claims on this ground are barred by LUPA's 21-day statute of limitations because the Asches would need to have an interpretive decision regarding the application of a zoning ordinance to a specific property declared improper to prevail.

132 Wn. App. at 801.

This rule has been specifically held applicable in the context of a due process claim: "LUPA time limits also apply to due process claims." Nickum v. City of Bainbridge Island, supra, 153 Wn. App. at 383. Accord, Asche v. Bloomquist at 799. In Mercer Island Citizens v. Tent City, 156 Wn. App. 393, 405, 232 P.3d 1163 (2010), the Court held that failure to comply with the limitations and exhaustion requirements of LUPA constituted a bar to damages claims which are based on the land use decision, including those alleging due process violations.

Durland misconstrues the nature of the County's LUPA defense when he argues that a state may not reduce the standard 3-year statute of limitations for a claim under Section 1983. The actual issue is not the reduction of the limitations period for a Section 1983 claim, but rather that the decision by the local government must be deemed valid absent a timely LUPA petition and therefore the appropriateness of the decision may not be relitigated in a collateral damages action.

In James v. Kitsap County, 154 Wn.2d 574, 115 P.3d 286 (2005) a developer challenged the short limitations period for his LUPA appeal, and argued that the Superior Court had original jurisdiction allowing him to challenge the imposition of impact fees as much as three years after the fact, under RCW 4.16.080. The trial court accepted the plaintiff's argument but this Court reversed, holding that where a statute such as

LUPA prescribes specific procedures for the resolution of a particular type of claim, it is appropriate for the courts to require compliance with these requirements before jurisdiction is exercised:

> Applying the procedural requirements of LUPA to challenges of the legality of impact fees imposed does not divest the power of the superior court to exercise its original jurisdiction under *article IV, section 6.* . . . However, the Developers ignore the well established rule that where statutes prescribe procedures for the resolution of a particular type of dispute, state courts have required substantial compliance or satisfaction of the spirit of the procedural requirements before they will exercise jurisdiction over the matter.

154 Wn.2d at 587-88. Accord, Sundquist Homes, Inc. v. Snohomish County, 276 F. Supp. 2d 1123, 1127 (W.D. WA 2003), aff'd. 166 Fed. Appx. 903 (Ninth Cir. 2006).

Here, there was no compliance with the procedural requirements of RCW 36.70C, and therefore the County's issuance of the building permit to Heinmiller must be deemed valid. The dismissal of the LUPA action also mandated dismissal of Durland's claim under Section 1983.

D. Mootness and Absence of Standing Were Additional Bases for Dismissal.

A final reason for this Court to deny discretionary review is the absence of a justiciable controversy. Durland has repeatedly advised the Court that he is not challenging the permit issued to Heinmiller. (Opening Appeal Brief, pp. 3, 31). Therefore, the declaratory relief sought by Durland is moot and he has no standing to pursue an action under Section 1983.

To have standing to sue under Section 1983, a plaintiff must show that he has suffered some threatened or actual injury that was caused by a constitutional deprivation. A mere abstract injury is not enough. If there is no real or immediate threat that plaintiff will be subject to injury as a result of a challenged policy, there is no standing to pursue a mere advisory action under Section 1983. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S. Ct. 1660 (1983). If there is no longer a possibility that an appellant can obtain the relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction. Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 521 (9th Cir. 1999); Ruiz v. City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998).

Because Durland conceded that he is no longer challenging the permit issued to Heinmiller, and there is no immediate threat of future damage to Durland, his damages claim is moot.

V. CONCLUSION

For all of the above reasons, San Juan County respectfully asks this Court to deny discretionary review.

DATED this 14th day of January, 2014.

KARR TUTTLE CAMPBELL

By: _____

Mark R. Johnsen, WSBA #11080
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AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America; State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. I certify under penalty of perjury under the laws of the State of Washington that on January 14, 2014, a true copy of San Juan County's Answer to Petition for Review was served to the following by the method indicated:

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HEATHER L. WHITE NOTARY PUBLIC COMMISSION EXPIRES 5-11-15 STATE OF WASHINGTON

SUBSCRIBED TO AND SWORN before me this 14 day of ~~December~~ January, 2014

Heather L. White
NOTARY PUBLIC in and for the State of Washington, residing in North Bend
My Commission Expires: 5-11-15

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