NO. 958645

SUPREME COURT OF THE STATE OF WASHINGTON

GREGORY KOVSKY AND JANETTE KOVSKY, husband and wife,

Petitioners,

v.

ROBERT FANFANT and MELANIE R. BISHOP, husband and wife, and KING COUNTY,

Respondents.

KING COUNTY'S ANSWER TO AMICUS CURIAE

DANIEL T. SATTERBERG
King County Prosecuting Attorney

YOUN-JUNG KIM, WSBA #23516
Senior Deputy Prosecuting Attorney
Attorneys for Respondent King County

King County Prosecuting Attorney
King County Courthouse
516 Third Avenue, Suite W400
Seattle, Washington 98104
(206) 477-1120

TABLE OF CONTENTS

Table of Authorities ii

I. INTRODUCTION 1

II. RESPONSE TO INTEREST OF AMICUS CURIAE 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT FOR DENIAL OF REVIEW 2

A. The Due Process Issue Raised by *Amici* Was Never Considered by the Trial Court or the Court of Appeals 2

B. No Property Right Implicating Due Process is Involved 3

C. Notice of the Land Use Decision Met Statutory Requirements 4

D. Petitioners Received Actual Notice of the Building Permit 6

V. CONCLUSION 8

Washington State Cases

Durland v. San Juan County, 182 Wn.2d 55,74-75, 340 P.3d 191 (2014) 3, 4

Gardner v. Pierce County Board of Commissioners, 27 Wn. App. 241, 617 P.2d 743 (1980) 5

Kovsky v. Fanfant, 2018 WL 1801408 *1 (2018) 6

Nielsen v. Washington State Dept. of Licensing, 177 Wn. App. 45, 309 P.3d 1221 (2013) 4

Pierce v. King County, 62 Wn.2d 324, 382 P.2d 628 (1963) 6, 7, 8

Seattle Shorelines Coalition v. Justen, 93 Wn.2d 390, 397-98, 609 P.2d 1371 (1980) 8

Speelman v. Bellingham/Whatcom County Housing Authorities, 167 Wn. App. 624, 273 P.3d 1035 (2012) 4

State v. Nelson, 158 Wn.2d 699, 147 P.3d 553 (2006) 4

State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999) 1, 3

Van Blaricom v. Kronenberg, 112 Wn. App. 501, 50 P.3d 266 (2002) 4

Watson v. Washington Preferred Life Insurance Co., 81 Wn.2d 403, 502 P.2d 1016 (1972) 4

Statutes and Court Rules

RAP 2.5(a) 2

RAP 10.3(f) 2

RAP 13.4(b)(3) 2

RAP 13.4(b)(4) 2

RCW ch. 36.70C (LUPA) 3

RCW 36.70C.010 8

RCW 36.70C.040 7
36.70C.040(4) 7

Other Authorities

101A C.J.S. Zoning and Land Planning § 273 5

I. INTRODUCTION

King County issued a building permit for construction of an amateur ham radio tower and provided notice of its land use decision in compliance with applicable statutes. Petitioners Gregory Kovsky and Janette Kovsky filed a lawsuit challenging that land use decision over seven months after notice of the permit decision was made publicly available. The Kovskys' Petition for Review before this Court raised an issue based on notice for that building permit after insisting throughout the proceedings below that they are not challenging the building permit decision. The Memorandum of *Amicus Curiae* in Support of Petition for Review relies solely on that very issue. King County requests that the Court deny review.

II. RESPONSE TO INTEREST OF *AMICUS CURIAE*

Amici urge the Court to accept review based on an issue that was not raised or litigated below. Not only is the issue being raised for the first time before this Court, Petitioners have claimed repeatedly that they are not challenging the building permit. Consequently neither the trial court nor the Court of Appeals ruled on the issue and the record is "insufficient to determine the merits of the constitutional claim...." *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Given this

background and for the reasons argued below, *amici*'s stated interest would not be properly advanced by the Court accepting review.

III. STATEMENT OF THE CASE

King County incorporates by reference the facts contained in its Answer to Gregory Kovsky's and Jeannette Kovsky's Petition for Review.

IV. ARGUMENT FOR DENIAL OF REVIEW

Pursuant to Rules of Appellate Procedure (RAP) 10.3(f) King County's Answer to the Memorandum of *Amicus Curiae* will be limited to addressing matters raised in the *amicus* brief. However some overlap between this Answer and King County's Answer to Petition for Review is unavoidable since they both urge the Court to accept review based on their due process arguments.

A. The Due Process Issue Raised by *Amici* Was Never Considered by the Trial Court or the Court of Appeals.

Amici urge the Court to accept review on the grounds that the court of appeals decision raises a significant constitutional question of law and an issue of substantial public interest. *See* RAP 13.4(b)(3) and (4). The sole issue *amici* urge the Court to accept review of is an issue being raised for the first time before this Court. While RAP 2.5(a) permits "manifest error affecting a constitutional right" to be raised for the first time on appeal, as an exception to the general rule, it is narrowly construed. *See*

WWJ Corp., 138 Wn.2d at 602 ("[i]f the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted") (citations omitted). Petitioners did not raise their due process issue before the trial court and formally withdrew it from their appeal. The record from the trial court is therefore wholly insufficient for this Court to decide the merits of the due process claim. The Court should decline *amici*'s request for the reasons outlined in King County's answer to the petition for review.

B. No Property Right Implicating Due Process is Involved.

With no analysis of whether a property right implicating due process is at issue, *amici* urge the Court to accept review and declare that that the Land Use Petition Act (LUPA), RCW ch. 36.70C is unconstitutional. *Amici* also contend that this case "involves a recognized property interest granted by the King County Code" without engaging in any analysis as to whether the code creates a property interest subject to due process. As demonstrated in King County's Answer to the Kovskys' Petition for Review, the King County Code does "not create a property interest in the denial of a third-party's building permit." *Durland v. San Juan County*, 182 Wn.2d 55,74-75, 340 P.3d 191 (2014). Without the requisite property interest, the neighbors in *Durland* had no basis to

require notice and their due process claim failed. *Id.* at 75. Pursuant to the Court's analysis in *Durland* the Kovskys also lack sufficient property interest and no due process rights are implicated.

Amici rely on due process analyses involving property rights that were well established, and are therefore distinguishable. *State v. Nelson,* 158 Wn.2d 699, 147 P.3d 553 (2006) (revocation of driver's license); *Speelman v. Bellingham/Whatcom County Housing Authorities*, 167 Wn. App. 624, 273 P.3d 1035 (2012) (termination of housing voucher); *Nielsen v. Washington State Dept. of Licensing*, 177 Wn. App. 45, 309 P.3d 1221 (2013) (revocation of driver's license); *Van Blaricom v. Kronenberg,* 112 Wn. App. 501, 50 P.3d 266 (2002) (prejudgment attachment of real property); *Watson v. Washington Preferred Life Insurance Co.*, 81 Wn.2d 403, 502 P.2d 1016 (1972) (shareholder voting rights). In none of the cases *amici* cite was there any debate about whether property rights implicating due process were involved.

C. Notice of the Land Use Decision Met Statutory Requirements.

Amici cite an excerpt from 101A C.J.S. Zoning and Land Planning § 273 that in general "notice must be given of applications for zoning or building permits or certificates, in some public manner, or to persons who may be interested in contesting the application, or whose property rights

may be adversely affected." However, that section of the treatise also states,

> There must be sufficient compliance with a statutory requirement as to the person who must give the notice, and the time of giving notice...[t]he notice is not required to be given personally but may be given by posting notices on the property or by publication. The notice must afford an opportunity to a person, by the exercise of reasonable diligence, to determine if the person's property would be affected by the determination for which application has been made and to what extent.

(citations omitted). There is no contention that King County failed to meet its statutory notice requirements. No due process rights are implicated under these circumstances.

Amici's reliance on *Gardner v. Pierce County Board of Commissioners*, 27 Wn. App. 241, 617 P.2d 743 (1980) is also misplaced. The notice issue in *Gardner* related to whether the acknowledged lack of notice should excuse a requirement to exhaust administrative remedies. *Id.* at 243. The lack of notice meant the petitioners "had not enjoyed a fair opportunity to exhaust the administrative process" and the court concluded that exhaustion would not be required. *Id.* at 243-44. But here the Kovskys received all the notice to which they were entitled and *Gardner* does not command a different result.

////

////

D. Petitioners Received Actual Notice of the Building Permit.

Amici contend that Petitioners "were not provided any form of notice of the permit application or the approval of the building permit" and cite to the Court of Appeal's opinion. Memorandum of *Amicus Curiae* at 12. The opinion actually states, "[t]he Kovskys were not notified of Robert's plans to build the Ham radio tower or the issuance of the building permit." *Kovsky v. Fanfant*, 2018 WL 1801408 *1 (2018). While seemingly a minor difference in language, there is an important distinction. The Court of Appeals' opinion reflects the fact that the Kovskys did not receive personal notice of the building permit at the time it was issued. They did, however, receive the statutorily required notice when DPER publicly posted information regarding the permit. CP 277; 327-339. Furthermore, contrary to *amici*'s contention that the Kovskys failed to receive notice, they received actual notice of the permit on January 26, 2016 through email correspondence. CP 434, 442-443. Even if the date of actual notice is used for purposes of triggering LUPA's filing deadline, the Kovskys filed their lawsuit after that deadline had expired.

Amici urge the Court to adopt the standard in *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963) that LUPA's 21-day statute of limitations period should begin with the "acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a

matter of law." *Id.* at 334. As *amici* note, *Pierce* was a pre-LUPA decision that addressed whether laches applied to an illegal zoning decision where the aggrieved property owners did not have actual knowledge at the time the action was taken and "would not normally be expected to learn" of it. *Pierce*, 62 Wn.2d at 334. Under these particular circumstances the Court applied laches and allowed the aggrieved property owners to proceed with the *writ of certiorari* based on the date they acquired actual knowledge of events that gave them notice of the zoning decision. In doing so the Court concluded,

> If Petitioners are in a situation where they would normally be expected to learn of the legislative action, where they are directly affected by it, and where they do not have actual knowledge, the time for the commencement of certiorari begins with acquisition of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law.

Id.

Amici fail to demonstrate a meaningful distinction between the standard they advocate and LUPA's standards. LUPA requires that an action challenging a land use decision be commenced within 21 days of the land use decision's issuance. RCW 36.70C.040. The statute establishes the date of issuance depending on the type of decision involved. RCW 36.70C.040(4). Thus LUPA incorporates the notice concept in *Pierce* that the statute of limitations is triggered by "acquisition

of knowledge or with the occurrence of events from which notice ought to be inferred as a matter of law." *Pierce*, 62 Wn.2d at 334.

As this Court has noted, "[i]t is the general rule that a right of action created by statute or ordinance...is subject to such valid restrictions, conditions, or limitations as the legislative body may place upon it." *Seattle Shorelines Coalition v. Justen*, 93 Wn.2d 390, 397-98, 609 P.2d 1371 (1980). LUPA is a product of the legislative balancing of competing interests in providing "uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. Court decisions applying LUPA's 21-day deadline are consistent with the "valid restrictions, condition, or limitations" on notice requirements that the legislature imposed after consideration of these competing interests. Neither the Petitioners nor *amici* provide this Court with a compelling basis to declare that LUPA's notice requirements are constitutionally defective.

V. CONCLUSION

For the reasons set forth in King County's Answer to the Kovskys' Petition for Review and the foregoing reasons, King County requests the Court to deny review in this matter.

////

DATED this 14th day of August, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

s/ Youn-Jung Kim

YOUN-JUNG KIM, WSBA # 23516
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney Office
516 Third Avenue, W400
Seattle, Washington 98104
(206) 477-1120

Certificate of Service

I, Monica Erickson, hereby certify and declare that on August 14, 2018, I did cause to be delivered by uploading to the Washington State Appellate Courts Electronic Filing Portal *King County's Answer to Amicus Curiae* to the following individuals:

David A. Bricklin Jacob E. Brooks Bricklin & Newman, LLP 1424 4th Avenue, Suite 500 Seattle, WA 98101 bricklin@bnd-law.com brooks@bnd-law.com	Andrew J. Kinstler Debra M. Akhbari Helsell Fetterman, LLP 1001 4th Avenue, Suite 4200 Seattle, WA 98154 akinstler@helsell.com dakhbari@helsell.com
Shellie McGaughey 3131 Western Ave, Suite 410 Seattle, WA 98121 shellie@mcbdlaw.com	Richard K. Eichstaedt Gonzaga University School of Law 721 N Cincinnati St. Spokane, WA 99202-2021 eichstaedt@gonzaga.edu

Signed this 14th day of August, 2018 at Seattle, Washington.

Monica Erickson

Monica Erickson, Legal Assistant to
Youn-Jung Kim, WSBA #23516

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

August 14, 2018 - 4:09 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95864-5
Appellate Court Case Title:	Gregory Kovsky, et ano. v. Robert Fanfant, et al.
Superior Court Case Number:	16-2-04095-1

The following documents have been uploaded:

- 958645_Answer_Reply_20180814160708SC105806_2365.pdf
  This File Contains:
  Answer/Reply - Other
  The Original File Name was 2018-08-14 King Countys Answer to Amicus Curiae.pdf

A copy of the uploaded files will be sent to:

- akinstler@helsell.com
- bricklin@bnd-law.com
- brooks@bnd-law.com
- cahill@bnd-law.com
- dakhbari@helsell.com
- eichstaedt@gonzaga.edu
- lnewell@cforjustice.org
- reception@mcbdlaw.com
- shellie@mcbdlaw.com

Comments:

Sender Name: Monica Erickson - Email: monica.erickson@kingcounty.gov
Filing on Behalf of: Youn-Jung Kim - Email: jina.kim@kingcounty.gov (Alternate Email:)

Address:
516 3rd avenue Room W-400
Seattle, WA, 98104
Phone: (206) 477-1120

Note: The Filing Id is 20180814160708SC105806