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NO. 89293-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL DURLAND, et al,

Appellants,

v.

SAN JUAN COUNTY, et al,

Respondents.

Filed
FEB 20 2014
Clerk of Supreme Court
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b/h

BRIEF OF *AMICI CURIAE* BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON AND THE ASSOCIATION OF WASHINGTON
BUSINESS IN SUPPORT OF SAN JUAN COUNTY

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 ORIGINAL

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I. INTRODUCTION

This case concerns a challenge to the doctrine of administrative finality, and whether builders, suppliers, lenders, insurance companies, can justifiably rely on the finality of land use decisions like the building permit at issue here. San Juan County's permit issuance procedure is similar to many jurisdictions in Washington. If the Court of Appeals decision below is overturned, land use permits throughout Washington may be at peril of a challenge, leaving property owners in a precarious position.

II. IDENTITY AND INTEREST OF *AMICI CURIAE* BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, and THE ASSOCIATION OF WASHINGTON BUSINESS

The Building Industry Association of Washington (BIAW) represents over 8,000 member companies who employ nearly 200,000 Washingtonians. BIAW is made up of 16 affiliated local associations throughout the state, and is in turn affiliated with the National Association of Home Builders in Washington D.C. Most of BIAW member companies are directly or indirectly involved in land development and the concomitant permitting process.

BIAW's members are engaged in every aspect of the residential home building industry – from initial site development to remodeling. BIAW's members routinely walk up to the permit counters of Washington's cities and counties to submit site plans and building permit applications like the one at

issue in this case. They work together on a daily basis with the staff of various planning departments across the state to ensure compliance with applicable laws and regulations. They are directly affected by any regulatory change, any change to permit requirements, controlling case law and any change in appeal processes. They rely on determinations made by the local jurisdictions and the finality of land use permitting decisions that have not been appealed within the applicable deadline.

Founded in 1904, the Association of Washington Business (AWB) is the state's oldest and largest general business membership federation, acting as the state's chamber of commerce and representing the public policy interests of the statewide business community before the legislative, executive, and judicial branches of the state. AWB's 8,250 members employ over 750,000 individuals in Washington, nearly one-third of the state's workforce. This membership ranges from highly visible and iconic Washington-based corporations who do business around the state and around the globe, as well as very small storefronts, manufacturers, builders, developers, and service providers from every corner of the state.

Permit applicants involved in the development of real property, be it residential, industrial, or commercial, make up a significant sector of AWB's membership, participating in a Land Use Committee that advises AWB's Board of Directors on matters of potential statewide public importance. AWB's Land Use Committee has recommended, and AWB's Board directed,

filing this brief to assert its members' interest in the continued clarity, consistency, and force of the finality effectuated by LUPA's 21-day appeal period – finality relied upon by its membership.

III. STATEMENT OF THE CASE

Amici BIAW and AWB incorporate and adopt the statement of the case set forth in San Juan County's Answer to the Petition for Review at 2 and the Supplemental brief of San Juan County at 1-2.

IV. ISSUES OF CONCERN TO AMICI

Amici are concerned about the following issue: whether the Land Use Petition Act's (LUPA) stated purpose of favoring administrative finality, certainty, and predictability in building permit determinations protects property owners from untimely challenges.

V. ARGUMENT

"The tendency of the law must always be to narrow the field of uncertainty."

Oliver Wendell Holmes, Common Law 127 (1881).

According to *Northshore Development v. Tacoma*, 174 Wash.App. 678, (2013), "[t]he trial court has no authority to hear this case if the appeal was untimely . . . LUPA's filing and service requirements are jurisdictional." See RCW 36.70C.040(2); *Lakeside Indus. v. Thurston County*, 119 Wn.App. 886, 900, (2004) ("where procedural requirements are not met, the court lacks jurisdiction to hear the appeal . . . LUPA's purpose is to reform the court's

review of land use decisions made by local jurisdictions by establishing uniform, expedited appeal procedures in order to provide consistent, predictable, and timely judicial review”) (citing *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn.App. 593, 597 (1999) and *Chelan County v. Nykriem*, 146 Wn.2d 904, 932 (2002). Thus, a land use decision becomes unreviewable if not appealed to the superior court within LUPA's specified timeline. *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 407 (2005).

First, the Court of Appeals below properly found that San Juan County's building permit decision does not constitute a "land use decision" because it was not a "final determination by a local jurisdiction's body or officer with the highest level of authority to make a determination." RCW 36.70C.020(2)(a); *Durland v. San Juan County*, 175 Wn.App. 316, 321 (2013). Here, the permit decision was made by the San Juan County Department of Community Development and Planning, which was subject to appeal to a Hearing Examiner. Because there is no decision from the Hearing Examiner, there is no final determination by the "jurisdiction's highest authority."

Second, even if the permit decision below is considered a "land use decision," the Appellant irrefutably failed to bring the appeal within the 21-day LUPA appeal deadline of RCW 36.70C.040(3). CP 15-16. In either event, the appellant has demonstrably failed to exhaust administrative remedies and the Superior Court had no jurisdiction to hear this appeal. The

21-day deadline is strictly followed -- the doctrine of substantial compliance does not apply. *See Ashe v. Bloomquist*, 132 Wn.App. 784, 795-96 (2006) (“[T]o serve the purpose of timely review, LUPA provides stringent deadlines, requiring that a petitioner file a petition for review within 21 days of the land use decision”); *see also Habitat Watch*, 155 Wn.2d at 407 (holding that even illegal decisions under local land use codes must be challenged under LUPA in a timely, appropriate manner).

Third, allowing a neighboring property owner to bring a lawsuit after an appeal period has passed the applicable LUPA deadline – and without a decision by the highest level authority in the County -- would be a sweeping and dramatic change to land use law in Washington, and contrary to this court’s prior holdings as well as the legislature’s intent. RCW 36.70B.140 expressly permits the means of building permit approval at issue in this case, and this Court has long recognized the importance of administrative finality.

In sum, the legislature has not authorized the Superior Court to review the decision in this case. This court should therefore affirm the Court of Appeals decision below.

A. THIS COURT HAS REPEATEDLY RECOGNIZED THE IMPORTANT PUBLIC POLICY SUPPORTING ADMINISTRATIVE FINALITY, CERTAINTY AND PREDICTABILITY IN LAND USE DECISIONS.

In *Deschenes v. King County*, 83 Wn.2d 714, 176 (1974), this Court stated the importance of adhering to time limitations in land use cases: “[t]he

purpose of time limitations in such matters is to give finality . . . if there were not finality, no owner of land would ever be safe in proceeding with development of his property.” This reasoning has been a consistent theme in Washington Supreme Court land use decisions over the past 30 years.

In another pre-LUPA case, *West Main Associates v. City of Bellevue*, 106 Wn.2d 47 (1986), this Court considered the application of the vested rights doctrine to a city ordinance. The court in *West Main* stated: “society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.”

In *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1 (1992), this Court considered a takings challenge by a developer that arose from a city low-income housing ordinance. In *Sintra*, this Court highlighted the benefits of administrative finality to both the land owner and the government, pointing out that “[i]ncreasingly, this court is called upon to resolve disputes concerning land use regulation, and the trend is likely to continue,” then explaining its objective in resolving these disputes: “[a] body of cogent, workable rules upon which regulators and landowners alike can rely is essential to the task.” *Sintra*, 119 Wn.2d at 5.

This Court in *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, (2001) expanded on this theme, pointing out that federal courts also have long recognized the importance of administrative finality. There, this Court quoted the federal court decision in *Eagle-Picher Indus. v. United*

States Environmental Protection Agency, 759 F.2d 905 (D.C. Cir. 1985), which said, “Statutory time limits for review of agency action . . . serve the important purpose of imparting finality into the administrative process, thereby conserving administrative resources.”

Several Washington Supreme Court cases issued since LUPA’s enactment have re-iterated the same public policy considerations favoring certainty, finality and predictability in land use decisions. For example, this Court ruled in 2000 that a party’s failure to bring a timely LUPA challenge to a site-specific rezone in Chelan County barred a later challenge to the County’s approval of the plat application for the same property. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169 (2000).

Two years later, this Court continued its “stringent adherence to statutory time limits” in *Chelan County v. Nykreim*, 146 Wn.2d 904, (2002). There, this Court considered the applicability of LUPA in the context of a boundary line adjustment challenge. The Court ruled in favor of the property owner, explaining that it has long “recognized strong public policy supporting administrative finality in land use decisions.” *Nykreim*, 146 Wn.2d at 931 (citing *Skamania County*, 144 Wn.2d at 49).

The Court in *Nykreim* perfectly summarized the consequences of ignoring administrative finality. The Court concluded that “[l]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature’s

intent to provide expedited appeal procedures in a consistent, predictable and timely manner.” *Nykreim*, 146 Wn.2d at 933.

In a 2005 case involving a developer’s challenge to impact fees issued by Kitsap County as a condition for a building permit, the Court rejected the developer’s challenge, once again pointing to its long standing recognition of “the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions.” *James v. County of Kitsap*, 154 Wn.2d 574, 589 (2005). See also *Knight v. City of Yelm*, 173 Wn.2d 325, 337-38 (2011) (“[r]equiring strict compliance with the statutory bar against untimely petitions promotes the finality of local land use decisions”).

In *Samuel’s Furniture v. State Dept. of Ecology*, 147 Wn.2d 440 (2002) this Court outlined the negative consequence of expanding Ecology’s enforcement authority to include matters brought after the applicable appeal deadline had passed:

The blanket enforcement authority sought by Ecology is in sharp contrast to the policy favoring finality in land use decisions. Under Ecology’s position, even though a party relies in good faith on a local government determination that the SMA does not apply, and therefore proceeds with construction, it may still be subject to Ecology enforcement action weeks, months, and even years later for failing to obtain a substantial development permit. These belated enforcement actions could result in civil and/or criminal penalties being issued against the party as well as the potential loss of thousands of dollars in construction costs that have already been incurred. . . Ecology’s interpretation of the SMA would leave land owners and developers unable to rely on local government decisions – precisely the evil for which LUPA was enacted to prevent.”

147 Wn.2d at 458-459. This Court did not allow the Department of Ecology to bring an enforcement action after an appeal deadline has passed, and it should similarly restrict LUPA challenges that are brought after a permit is final.

B. THE LEGISLATURE ENACTED LUPA WITH THESE PUBLIC POLICY CONSIDERATIONS IN MIND

The Legislature's intent was clear when it enacted LUPA. The expressed purpose of LUPA is "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing 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 (emphasis added). The Land Use Petition Act mandates that any challenge be filed within 21 days of the issuance of the land use decision. RCW 36.70C.040. "Land use decision" is defined as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination." RCW 36.70C.020.

The Court in *Nykreim* emphasized the importance of the LUPA's public policy favoring finality:

To allow respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose in enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide

expedited appeal procedures in a consistent, predictable and timely manner.

Nykreim, 146 Wn.2d at 933 (emphasis added). This Court in *James* provided a succinct summary of the critical nature of time limits when it comes to providing certainty to developers: “The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property.” *James*, 154 Wn.2d at 589.

The Legislature explicitly enunciated the public policy behind setting the 21-day time limit in LUPA – and the exhaustion of administrative remedies requirement that appealable decisions are made by the body with the highest level of authority. This Court should follow the Legislature’s dictates, and not read out of the statute the Legislature’s intent to provide predictability and certainty in the land use decision making.

C. LUPA’S NOTICE REQUIREMENTS WERE MET.

The Appellant quibbles that his due process rights have been trammled in this case because he did not receive notice of the underlying permit when it was granted by the San Juan County . *See, e.g.*, Petition for Review at 11-12. However, records related to the issuance of the permit in this case were -- and are -- a matter of public record that may be accessed by any interested party.

The question of whether notice in this case was sufficient has already been addressed by this Court and the Courts of Appeal –

repeatedly. According to this Court, “LUPA does not require that a party receive individualized notice of a land use decision in order to be subject to the time limits for calculating a LUPA petition.” *Samuel’s Furniture*, 147 Wn.2d at 462 (2002).

According to *Applewood Homeowner’s Association v. City of Richland*, 166 Wn.App. 161, 170 (2012), “Applying the legal principles derived from *Samuel’s Furniture*, *Habitat Watch*, and *Asche*, we conclude the Neighbors were not entitled to personal notice, distinct from the notice contemplated by the filing of a public record as discussed in RCW 36.70C.040(c). Accordingly, we hold the Neighbors’ LUPA petition filed nearly four months after the City made its determination was time barred,”

San Juan County’s notice requirements are consistent with many other jurisdictions in the state, and are in conformity with RCW 36.70B.140(2), which allows jurisdictions to except certain permits from notice requirements. *See* San Juan County Code 18.80.010 (a building permit is not a “project permit”). Therefore, San Juan County’s notice is in harmony with both the legislature’s directives and this court’s jurisprudence.

V. CONCLUSION

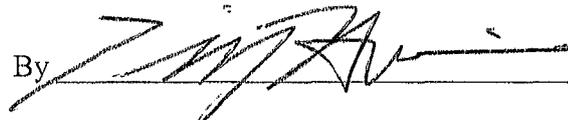
This Court has faced numerous cases involving statutory time limits for challenging land use decisions. Repeatedly,

the Court has concluded that it is critical to the land use system to have a set of rules that provide certainty, predictability and finality to both the land owners and the government. In this case, the Appellant requests that the Court ignore years of precedent emphasizing the importance of certainty and finality by granting neighboring property owners the authority to overturn the decisions of local officials. A decision in favor of the challenging neighbor would be disastrous to property owners and members the building community who rely on the certainty created by LUPA. See *Nykriem*, 146 Wn.2d at 933 (“[I]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position.”)

Therefore, *amici* BIAW and AWB request this Court to uphold the Court of Appeals decision that the Superior Court lacked jurisdiction to hear this case due to the failure to timely appeal.

Respectfully submitted this 11th day of February, 2014.

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Please see the attached amicus brief and motion to file amicus brief for filing:

Case No: 89293-8

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