IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89293-8, 89745-0

COURT OF APPEALS NO. 68453-1-I

MICHAEL DURLAND, et al.,

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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PETITIONERS' RESPONSE TO BRIEF OF *AMICUS CURIAE*

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I. INTRODUCTION

As we discussed in our Petition for Review and in our Supplemental Brief, this case is about access to the courts, fundamental fairness, and due process in the land use context.[1] Below, the Court of Appeals construed Washington's Land Use Petition Act ("LUPA") to impose an absolute and unyielding requirement that citizens exhaust local administrative remedies before challenging land use decisions in court. Further, it held that this unbending and inflexible rule applies even when the land use decision was hidden from the public eye until *after* the local appeal window closed. In effect, the Court of Appeals decision provides a roadmap for every city and county in the State of Washington on how to shield their decisions from scrutiny.

The court reached this striking conclusion without considering the one place in LUPA that even mentions the exhaustion requirement — RCW 36.70C.060.[2] Further, the court paid no mind to the plain fact that, had San Juan County simply followed its own rules for substantial

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[1] *See* Petition for Review (Aug. 29, 2013) at 10 to 17 (herein "Pet. for Review"); Supplemental Brief of Petitioners Michael Durland, Kathleen Fennell, and Dear Harbor Boatworks (Jan. 10, 2014) at 1 to 12 (herein "Supplemental Br.").

[2] As noted in our Petition for Review and our Supplemental Brief, RCW 36.70C.060 requires litigants in the land use context to exhaust their administrative remedies before challenging a land use decision in court, but only "to the extent required by law." *See* RCW 36.70C.060(2)(d). Here, the Court of Appeals found a stricter exhaustion requirement in LUPA's definition of the term "land use decision," which does not even mention the exhaustion requirement. *See* Pet. for Review at 15–16; Supplemental Br. at 12–16.

development in the shoreline, notice would have been given and appellants would have had an opportunity to challenge the development at issue here.[3] In doing so, the court departed from the plain language of LUPA and held that a local jurisdiction may shield literally *any* land use decision from judicial review (and from administrative review, too) simply by keeping it secret.

We respectfully submit that the court's holding was not only wrongheaded and unmindful of the text of LUPA, it would be disastrous for the state and the many citizens who must use the courts to vindicate their interests. If the Court of Appeals' decision is allowed to stand, every city and county in the state could pick and choose when and where they would have their land use decisions open to judicial review. (If the Court of Appeals decision is upheld, why would a city or county publicize the issuance of *any* land use decision when the prize of keeping it secret is complete immunity from suit?)

Amicus Curiae would apparently welcome this result, and they write that the serious issues presented in this case — including the fundamental issues of due process and access to the courts — are mere "quibbles."[4] Of course, we understand *amici's* motive for making such

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[3] *See* Pet. for Review at 6; Supplemental Br. at 6, n. 4, 11, n. 10.

[4] *See* Brief of *Amici Curiae* Building Industry Association of

callous remarks; it would no doubt serve their interests handsomely to secure an opinion from this Court as draconian as the opinion below.

But we respectfully disagree with *amici's* flippant assessment of this case as involving mere "quibbles" about due process. We write here to dispel their misguided invitation that this Court run rough-shod over appellants' right to judicial review and their right to challenge land use decisions that injure them.

II. RESTATEMENT OF THE CASE

Petitioners incorporate and rely upon their statement of the case as set forth in the Petition for Review and in the Supplemental Brief of Petitioners Michael Durland, Kathleen Fennell, and Dear Harbor Boatworks. *See* Pet. for Review at 2–9; Supplemental Br. at 1–7.

III. ARGUMENT

A. *Amici's* Warning of Dire Consequences Are Unfounded and Irrelevant Because This Case has Nothing to Do With LUPA's 21-Day Limitations Period.

Before we discuss the merits of *Amici's* arguments, we believe it is important to discuss their misleading rhetoric.

Amici begin their brief with the dire omen that "[i]f the Court of Appeals decision below is overturned, land use permits throughout

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Washington and the Association of Washington Business in Support of San Juan County (Feb. 11, 2014) at 10 (herein "Amici Br.").

Washington may be at peril of a challenge, leaving property owners in a precarious position." Amici Br. at 1. *Amici* then write for several pages about the need for clear and predictable standards in the commercial development industry. *See id.* at 3–8. The intended implication of *amici's* rhetoric is that if the decision below is reversed, the courts would be awash with lawsuits challenging old land use decisions upon which their members have relied.

We are surprised by *amici's* opening salvo, especially because their warnings relate solely to the issue of "finality," which flows from LUPA's 21-day limitations period at RCW 36.70C.040(3).[5] Those issues were briefed extensively below.[6] The Court of Appeals did not address the statute of limitations in light of its ruling on the issue of remedy exhaustion. Further, the parties to this case have not raised the limitations period as an issue requiring resolution by this Court. Yet *amici* devote no more than a single paragraph to the issue that *is* before this Court — namely, LUPA's statutory exhaustion requirement. *See Amici* Br. at 4.[7]

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[5] *See* Amici Br. at 3 (describing *amici's* interest as being cabined to the "continued clarity, consistency, and force of the finality effectuated by LUPA's 21-day appeal period").

[6] *See, e.g.,* Opening Brief of Appellants (June 25, 2012) at 9–16 (herein "Opening Br."); Reply Brief of Appellants (Oct. 10, 2012) at 7–13 (herein "Reply Br.").

[7] Indeed, this Court will observe that virtually every authority and quotation cited by *amici* concern LUPA's 21-day statute of limitations (except, of course, for those relating to wholly irrelevant issues such as *amici's* opening quotation from "Oliver Wendell Homes," *sic*, concerning the apportionment of duties between judge and

Amici's confusion about the core issue in this case is perplexing. Unlike LUPA's 21-day limitations period (which defines a period during which a land use decision is open to judicial attack *after* it is issued), the exhaustion requirement, at least as construed by the Court of Appeals below, concerns a completely separate issue: what does it take to obtain a final land use decision in the first place? In a very real sense, the two issues concern opposite ends of the spectrum. While *amici* are focused exclusively on when the limitations period *ends*, the core issue in this case concerns the issue of when it even *begins*.

That is why we do not argue here (and we have never argued) for an *exception* to LUPA's 21-day limitations period. Instead, we discussed extensively below why appellants Michael Durland and Kathleen Fennell *satisfied* LUPA's strict 21-day statute of limitations under the plain terms of the statute.

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jury). In other words, virtually *none* of the cases relied upon by *amici* relate in any way to LUPA's exhaustion requirement, the core issue in this case. *See, e.g.*, *Northshore Dev. v. Tacoma*, 174 Wn. App. 678, 689, 301 P.3d 1049 (2013) (discussing application of LUPA's 21-day limitations period to oral land use decisions); *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433 (2004) (discussing applicability of LUPA's limitations period to SEPA determinations); *Chelan County v. Nykriem*, 146 Wn.2d 904, 932, 52 P.3d 1 (2002) (discussing LUPA's limitations period in relation to a county's challenge to its own boundary line adjustment); *Asche v. Bloomquist*, 132 Wn. App. 784, 795–96, 133 P.3d 475 (2006) (discussing, under the heading "LUPA's Statute of Limitations," LUPA's statute of limitations); *James v. County of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005) (same); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2006) (same); *Knight v. City of Yelm*, 173 Wn.2d 325, 337–38, 267 P.3d 973 (2011) (same).

As we discuss below, LUPA's 21-day limitations period does not begin to run until a land use decision is "issued." *See* RCW 36.70C.040(3). But for written decisions — like the one at issue here — a decision is not "issued" until "three days after [it] is mailed by the local jurisdiction or, if not mailed, *the date on which the local jurisdiction provides notice that a written decision is publicly available*." RCW 36.70C.040(4)(a).[8] As this Court explained in *Samuel's Furniture, Inc. v. State Department of Ecology*, while this provision does not require "individualized notice" before the statute begins to run, it does "require that a local jurisdiction provide *general public notice by virtue of publication of the land use decision*." 147 Wn.2d 440, 462, 54 P.3d 1194 (2002) (emphasis added).

Applying the plain language of LUPA here, LUPA's statutory limitations period could not have begun until December 5, 2011 (when the County first informed a member of the public of the permit's existence),

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[8] In other circumstances (*e.g.*, when the decision is made orally) the date of issuance is the date that the decision was entered on the public record. *See* RCW 36.70C.040(4)(c). In turn, when the decision is made by local ordinance or resolution, the date of issuance is the date that it was passed. *See* RCW 36.70C.040(4)(b). *See also Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408–09, 120 P.3d 56 (2005) (explaining that the running of LUPA's 21-day statute of limitations depends on the date of issuance, which in turn depends on the manner in which the decision was made). Some appellate opinions have confused these distinctions. *See, e.g., Applewood Homeowner's Ass'n v. City of Richland*, 166 Wn. App. 161, 169–170, 269 P.3d 388 (2012) (acknowledging that, under this Court's opinion in *Habitat Watch*, written land use decisions are not "issued" for purposes of LUPA until they or mailed or until public notice is given — but later holding that a written land use decision is "issued" on the date that it is entered into the public record, the applicable standard for oral land use decisions).

or December 8, 2011 (when the County first emailed the decision to a member of the public). *See* Opening Br. at 14–15; Reply Br. at 7–8. Prior to those dates, there is no evidence that San Juan County mailed the decision or, indeed, informed anyone of its existence. *See* Opening Br. at 14. Further, accounting for the three-day grace period at RCW 36.70C.040(4) for "mailed" decisions, the decision could not have been "issued" for purposes of LUPA until December 8, 2011, or December 11, 2011, respectively. *Id.* Judged by either of those dates, appellant's land use appeal was timely filed within 21 days of the permit's "issuance." *See* CP 33–37 (Land Use Petition dated December 16, 2011). In short, appellants timely filed their land use petition and complied with LUPA's 21-day limitations period.

Because appellants timely complied with LUPA's 21-day limitations period, *amici's* concerns and dire warnings are completely misplaced. Appellants complied with LUPA's 21-day limitations period and there is no evidence that a ruling in our favor (on the separate issue of remedy exhaustion) would somehow undermine *amici's* asserted interest in finality.

To the extent that LUPA's 21-day limitations period is relevant at all to the issues before this Court, it is relevant only to show that the legislature took pains to clarify that the statute would not begin to run until

after the public received some form of notice. *See* Supplemental Br. at 15–16. Were the Court to adopt the Court of Appeals' reasoning, the notice requirement would be cut off at its knees by allowing local jurisdictions to evade judicial and administrative review altogether by simply not telling anyone about their decisions until the local appeal window closes. *See id.*

B. Affirming the Court of Appeals Could Eliminate Judicial Review of Land Use Decisions in the State of Washington.

Instead of raising issues under LUPA's 21-day limitations period and issues of "finality," this appeal concerns the doctrine of exhaustion of administrative remedies as codified by LUPA. The issue presented in this case is whether LUPA requires exhaustion even when the local jurisdiction conceals its land use decision until *after* the local appeal window closes. More broadly, this appeal asks whether a local jurisdiction may effectively insulate *any* decision from administrative and judicial review simply by keeping it secret.

As we have discussed elsewhere, the natural consequence of the Court of Appeals' decision could be to shield any land use decision in the state from judicial review. *See* Supplemental Br. at 1, 5. The court adopted a draconian and illogical interpretation of LUPA's definition of "land use decision," RCW 36.70C.020(2). *See id.* at 12–16. The court's decision completely disregarded the *only* provision of LUPA that even discusses

the exhaustion requirement (RCW 36.70C.060(2)(d)). *Id.* Last, the court held that the definition of "land use decision" imposes an unyielding exhaustion requirement that will not bend even when the local jurisdiction ignores its own, self-imposed notice requirements. This holding would allow a city or county to shield any land use decision from judicial review, no matter how big or how small, provided it is clever enough to hide it. *See id.* If San Juan County may evade judicial review by ignoring its own notice requirements, what is there to stop any other jurisdiction from doing the same for any other land use decision?

Viewed through this lens, it is apparent that *amici* are not concerned about administrative "finality," a term that implies at least *some* opportunity to challenge the decision before it is final. Instead, *amici* are interested in securing complete immunity from judicial review. Tellingly, *amici* do not dispute our claim that the decision below would allow any city or county in the State of Washington to evade judicial review at will. Nor do they dispute that this result would obtain even if — as here — the city or county had adopted specific public notice requirements but failed to follow them. *Amici* also do not engage the critical interpretive issue in this case; how should LUPA's express exhaustion requirement at RCW 36.70C.060(2) be construed? Their brief does not even cite, let alone discuss, that key provision.

In essence, this Court stands at a crossroad. Will it allow every city and county in the State of Washington to shield their land use decisions from judicial review (local notice requirements notwithstanding)? Or will it interpret LUPA to avoid that draconian result (*amici's* irrelevant concern about finality notwithstanding)? Significantly, we see no way for this Court to split the baby. LUPA either does, or it does not, impose an absolute and unyielding exhaustion requirement. And if San Juan County can shield this decision from review by keeping it secret, so can every other city and county for literally any other land use decision, whether it is for a small residential garage, a large shopping mall, or a huge subdivision.

For the reasons stated in our Petition for Review and in our Supplemental Brief, we respectfully submit that this Court should not construe LUPA to impose an absolute exhaustion requirement. *See* Pet. for Review at 13–17; Supplemental Br. at 7–12. Doing so would not only violate fundamental principles of fair play, access to the courts, and due process, but would disregard the plain language of LUPA itself. *See* Supplemental Br. at 12–16.

Unlike the Court of Appeals' misinterpretation of LUPA's definition of "land use decision," LUPA's exhaustion requirement is not absolute. It requires exhaustion only "to the extent required by law." RCW

36.70C.060(2)(d). That phrase is broad enough to incorporate the state's traditional, flexible approach to the exhaustion requirement, and it is certainly broad enough to incorporate the fundamental requirements of due process. *See* RCW 36.70C.060(2)(d). *See also Gardner v. Pierce County Bd. of Comm'rs*, 27 Wn. App. 241, 243–44, 617 P.2d 743 (1980); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 378, 223 P.3d 1172 (2009). Accordingly, it should be construed to embrace those exceptions, not exclude them.

In all, we believe that this Court said it best in *Habitat Watch*: "once a party *has had a chance* to challenge a land use decision *and exhaust all appropriate remedies*," the decision is a final land use decision under LUPA. *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406–07, 120 P.3d 56 (2005). Here, appellants ask for no more than a fair opportunity to exhaust their administrative remedies before the decision is forever shielded from judicial review. We respectfully submit that *amici's* apparent desire to achieve complete immunity from suit is not so weighty that this Court should completely deny appellant's interest in that humble result. Moreover, *amici's* desire is not so weighty as to justify denying every other litigant in the state of the same fair opportunity.

C. Due Process Cannot Be Overcome by Entering a Decision in the Public Record, or Through Statutory Exceptions to the Notice Requirement.

Last, we address *Amici's* substantive arguments about the due process notice requirement.

As we discussed extensively in our Petition for Review and in our Supplemental Brief, this case implicates serious due process concerns, including no less than the "touchstone" of due process: "notice reasonably calculated under all the circumstances to apprise affected parties of the pending action and afford them an opportunity to present their objections." *Barrie v. Kitsap County*, 84 Wn.2d 579, 585, 527, P.2d 1377 (1974). *See also Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 641 (2011). In *Barrie*, this Court addressed a situation similar to the one at issue here, and held that the county's failure to give adequate notice (let alone any notice) stated a due process violation. *See Barrie*, 84 Wn.2d at 586; Supplemental Br. at 10–11. *See also Gardner*, 27 Wn. App. at 243–44 (holding that requiring exhaustion "would be unreasonable and violative of due process" if no notice were given of the underlying land use decision).

Here, appellants ask for no more than notice reasonably calculated to appraise them that their rights are at stake, the same requirement mandated in *Barrie*. But *amici* apparently view appellants as raising an

insignificant issue, merely "quibbling" that their "due process rights have been trammeled." *See* Amici Br. at 10. *Amici* further suggest that the bare existence of a land use decision in the public record suffices to meet the due process requirement for "notice reasonably calculated under all the circumstances to apprise affected parties" that their rights are at stake. *See id.*

Amici's derisive and flippant argument ignores both the law and the facts. *Amici* cite no case (and we are aware of none) in which a court held that the bare existence of a public record (as opposed to notice of it) satisfies the due process notice requirement. Such a decision would essentially charge every citizen with knowledge of the contents of every government desk, drawer, and office file. Further, while *amici* cite two cases that allegedly support their argument indirectly, their reliance on those cases falls wide of the mark.

For example, *amici* cite *Samuel's Furniture* for the blanket proposition that LUPA does not require individualized notice. *See* Amici Br. at 11. But they ignore that in *Samuel's Furniture*, this Court expressly recognized the serious due process issues involved in that case, but determined that the respondent (the Washington Department of Ecology) was incapable of suffering a due process violation. *See Samuel's Furniture*, 147 Wn.2d at 463 (holding that "the due process clause does

not protect government entities from state action"). *Amici* also ignore that this Court did not hold that LUPA completely exempts local jurisdictions from their obligation to provide notice of land use decisions. This Court observed explicitly that LUPA requires just the opposite: "*that a local jurisdiction provide general public notice by virtue of publication of the land use decision.*" *Id.* at 462 (emphasis added).

Next, *amici's* reliance on *Applewood Homeowner's Association* does not require a different result. As we noted above (note 8, *supra*) the opinion in *Applewood Homeowner's Association* betrays a fundamental confusion about when land use decisions are "issued" under LUPA. After expressly recognizing that LUPA contains specific provisions governing the "issuance" date for both written and oral decisions (with written decisions requiring some form of public notice, but oral decisions requiring only that the decision be reduced to a public record) the court went on to apply LUPA's provisions relating to *oral* decisions when determining the date of issuance for a *written* decision. *See Applewood Homeowner's Ass'n*, 166 Wn. App. at 169. The *Applewood* opinion is misguided and completely inapposite.

Amici also cite RCW 36.70B.140(2) for the proposition that the legislature has authorized the withholding of public notice for "project permits," including building permits. *See* Amici Br. at 11. We

acknowledge that RCW 36.70C.140(2) authorizes the withholding of public notice for some purposes, but only when the exclusion is made by "[a] local government *by ordinance or resolution*." *Id.* (emphasis added). Here, *amici* admit that San Juan County has not expressly excluded building permits from applicable notice requirements by ordinance or resolution, thus their reliance on the statute is misplaced. *See* Amici Br. at 11 (explaining that under San Juan County Code 18.80.010, "a building permit is not a project permit").

Nevertheless, LUPA itself requires public notice if the local jurisdiction wishes to avail itself of LUPA's procedural requirements and the 21-day statute of limitations. *See* RCW 36.70C.040(4)(a); *Samuel's Furniture*, 147 Wn.2d at 462. Further, the state is incapable of exempting local decisions from the constitutional due process notice requirement. In short, RCW 36.70B.140 stands for no more than if a local jurisdiction does *not* wish to avail itself of LUPA's 21-day limitations period, and if it wishes to proceed *regardless* of due process requirements, it may exempt local building permits from otherwise-applicable requirements.

Finally, *amici* not only misconstrue the law, they are unabashedly ignorant of the facts. They chide appellants for raising due process notice requirements because the land use decision at issue here was, since it came into existence, "a matter of public record that that may be accessed by any

interested party." Amici Br. at 10. We will not repeat here all the ways that appellants tried, in vein, repeatedly, for months, to learn of their neighbor's development. For a complete retelling of the story, we invite the Court to read our Petition for Review (as *amici* should have done). *See* Pet. for Review at 2–6. Suffice it to say that Appellants made every conceivable effort to discover their neighbor's illegal development. But their requests for information fell on deaf ears; they were not informed of their neighbor's land use permit until the very day that the local appeal window closed. We submit that no reasonable person could possibly conclude that this satisfied the due process requirement for notice reasonably calculated under all the circumstances to apprise interested parties.

If *amici* desire certainty, predictability, and finality, they can have it with the simple act of providing notice. Doing so would be exceedingly easy and would start the clock running on LUPA's 21-day statute of limitations. But if no notice is given, *amici* can hardly complain that the clock has never begun. In essence, *amici* and local jurisdictions are the masters of their own fate. If they desire certainty and predictability, it is their choice to have it or to abandon it. The choice is theirs.

D. *Amici's* Concerns about Finality Are Illusory and Should Not Be Used to Deny Citizens' Access to the Courts.

Finally, we agree with the views expressed by the Lange Family Trust ("Lange") regarding *amici's* views of finality and their extreme interpretation of LUPA.[9] For example, we note the tension between *amici's* desire for certainty and predictability in the land use context, and this Court's decision in *Lauer v. Pierce County*, 173 Wn.2d 242, 267 P.3d 988 (2011). In *Lauer*, this Court observed that a permit issued on the basis of false information, and that is illegal at the time of its issuance, "confers no rights upon the applicant." *Lauer*, 173 Wn.2d at 263. We struggle to find justification in a law that would shield developers from adverse action, but that would confer no rights upon them.

We also note that *amici's* desire for certainty and predictability appears to be aimed exclusively at the citizens of this state who would vindicate their rights in court. As Lange observes, the issuance of a simple building permit does not prevent subsequent enforcement by the local jurisdiction (as occurred in *Lauer* itself). Indeed, hurdles to obstacles to official enforcement would appear to conflict with the clear requirements

[9] Mr. Lange and the Lange Family Trust have moved the Court to appear as *amicus curiae*, and we urge the Court to grant their motion. *See* Motion to File Brief of Amici Curiae Scott K. Lange, Trustee and Elizabeth R. Lange, Trustee, Trustees of the Lange Family Trust (Feb. 28. 2014).

of state law[10] and the International Building Code, which provides, in part: "Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction *shall not be valid*." *See* IBC § 105.4 (emphasis added).

We agree with Lange that baring citizen action — while allowing official action under the same circumstances — would not result in "finality." It would simply encourage collusion between the commercial building industry and the local jurisdictions charged its oversight. We also agree that LUPA's procedural shields for so-called "final" land use decisions should not be construed to insulate permits that remain open to enforcement, revocation, and rescission.

IV. CONCLUSION

For the reasons set forth above, and in appellants' briefing and the Petition for Review, this Court should reject *amici's* specious arguments and reverse the decision of the Court of Appeals. This Court should allow Mr. Durland's and Ms. Fennell's LUPA appeal to move forward to a resolution on the merits.

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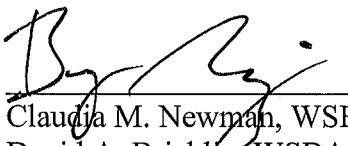
[10] *See, e.g.*, RCW 90.58.210 (providing that the requirements of the Shoreline Management Act "shall" be enforced).

Dated this 28 day of February, 2014.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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