

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SUPREME COURT NO. 89293-8

COURT OF APPEALS NO. 68453-1-I

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MICHAEL DURLAND, et al.,

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONERS MICHAEL DURLAND,  
KATHLEEN FENNELL, AND DEER HARBOR BOATWORKS

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## **I. INTRODUCTION**

This case is about access to the courts, fundamental fairness, and due process in the land use context. The question presented is whether a county or city may evade judicial review of land use decisions simply by concealing them. In this case, San Juan County provided no notice of issuing a development permit. The Court of Appeals indulged the County's actions. Its opinion is a roadmap for every municipality in the State on how to shield land use decisions from judicial review. According to the Court of Appeals, every land use decision in Washington could evade judicial review so long as the local jurisdiction does not tell anyone about it until after the deadline expires for an administrative appeal.

We discussed these issues in depth in our Petition for Review. We write here to highlight not only the serious due process issues created if the decision below were affirmed, but also the manner in which the court's ruling could shut the courthouse doors to litigants across the State of Washington.

## **II. SUPPLEMENTAL STATEMENT OF THE CASE**

On November 1, 2011, San Juan County authorized Wes Heinmiller and Alan Stameisen to build a second-story addition to their garage. *See* CP 81. The decision was issued in violation of numerous

provisions of the San Juan County Code (“SJCC”). *See* CP 35–36.<sup>1</sup> The County gave no notice of the decision to appellants Michael Durland and Kathleen Fennell (herein “Durland”) who live next door. *See* CP 75–78. The second-story addition will impact Durland’s view and their use and enjoyment of their property.

The County issued its approval in the form of a simple building permit. Under the SJCC, no notice is required for the issuance of building permits and none was given. The County also declined to respond to Durland’s repeated inquiries about his neighbor’s development until long after it was too late to appeal the permit to the San Juan County Hearing Examiner. *See* CP 74–78. This was despite that he had made repeated inquiries to the County about his neighbor’s illegal development, and despite that County staffers would have known of his keen interest in the subject. *See* Pet. for Review at 3–4. *See also* Op. Br. at 5–7; CP 78.<sup>2</sup>

Because Durland had no notice of the permit until after the deadline had passed for the county’s administrative appeal process, he

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<sup>1</sup> *See also* Opening Brief of Appellants at 7 (June 25, 2012) (herein “Op. Br.”); Reply Brief of Appellants at 22 (Oct. 10, 2012) (herein “Reply Br.”); Petition for Review at 5 (Aug. 29, 2013) (herein “Pet. for Review”).

<sup>2</sup> We do not go into the full details of Durland’s unfair treatment in this brief. But he was extraordinarily diligent in attempting to discover his neighbor’s illegal development and was frustrated by the County at every turn. *See* CP 74–78; Pet. for Review at 2–4. There is no merit to respondents’ allegations that he “deliberately and intentionally” sat on his rights to oppose the City’s clandestine building permit. *See* Heinmiller and Stameisen’s Answer to Petition for Review at 18 (Oct. 14, 2013).

challenged the permit in superior court under Washington's Land Use Petition Act ("LUPA"), chapter 36.70C. LUPA provides the "exclusive" state law cause of action for challenging land use decisions. *See* RCW 36.70C.030(1). The lawsuit was filed well within LUPA's limitations period at RCW 36.70C.040(3). *See* Op. Br. at 9–6; Reply Br. at 7–17. But he also appealed the permit to the County's Hearing Examiner on December 19, 2011, seeking to persuade the Examiner to accept an appeal filed after the deadline because he had no notice of the underlying permit. The examiner concluded he was constrained by the county code to exercise jurisdiction only over cases filed within the code's prescribed time limit and dismissed that appeal. That decision is under review in *Durland, et al. v. San Juan County, et al.*, Supreme Court No. 89745-0 (herein "*Durland II*").

Durland's LUPA appeal in superior court was dismissed for failure to exhaust administrative remedies. *See* CP 156–58. In essence, it was dismissed for failure to pursue the very administrative appeal process that was no longer available by the time the County finally notified him about the permit (after his many requests for information).

On July 1, 2013, the Court of Appeals upheld the superior court's dismissal of Durland's LUPA appeal. *See* Pet. for Review, App. A. It held, in essence, that Washington courts have *no* jurisdiction to review land use

permits unless all administrative remedies are pursued on time (even if doing so is impossible). It held there are no exceptions to the rule. *See id.*

But as Durland argued below, the exhaustion requirement is not absolute. It is a prudential rule “founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges.” *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997). The rule requires courts to weigh many factors to decide whether requiring exhaustion is desirable. *See, e.g., Prisk v. City of Poulsbo*, 46 Wn. App. 793, 797–98, 732 P.2d 1013 (1987). In short, it is not an absolute bar that prevents citizens from vindicating their rights in court and the Washington Legislature did not change this long-standing rule when it passed LUPA. *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 378, 223 P.3d 1172 (2009). LUPA contains an exception to the exhaustion requirement that is broad enough to encompass the traditional, common-law exceptions to the exhaustion requirement.

The Court of Appeals did not consider these exceptions. Nor did it even look to the one place where LUPA expressly discusses the exhaustion requirement as an element of standing — RCW 36.70C.060(2)(d). Instead, it found a stricter, unyielding exhaustion requirement in LUPA’s definition of “land use decision,” RCW

36.70C.020(2). And it held there are no exceptions. *See* Pet. for Review, App. A at 4–6.

In essence, the Court of Appeals’ decision would have people in the position of Mr. Durland and Ms. Fennell do the impossible — appeal a decision before they receive actual or constructive notice of the decision. For those without such prescience, their rights to vindicate their interests in court are lost forever.

As we discussed in our Petition for Review, the Court of Appeals’ decision raises serious concerns about manifest fairness and due process. *See* Pet. for Review at 10–17. But in addition, if San Juan County can evade judicial review simply by concealing its permit decisions, so could every other jurisdiction for any other land use decision. If the opinion below is allowed to stand, it would allow a city or county to approve virtually *any* development project, no matter how big or how small, so long as it is kept secret until the local appeal window expires.<sup>3</sup> In this way, this case is not only about a building permit for a garage — the opinion below could insulate any land use permit in Washington from judicial review.

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<sup>3</sup> Indeed, a local jurisdiction might shield every land use permit from judicial review simply by adopting such a short administrative appeals window that no person, even *with* notice, could reasonably satisfy it. Or the jurisdiction could impose unreasonably high fee barriers, effectively closing the courthouse doors by making it financially impossible for ordinary people to pay administrative appeal fees.

Moreover, while the County did not impose on *itself* a duty to notify affected parties before issuing Heinmiller’s building permit, that was immaterial to the Court of Appeals’ decision. Thus, the effect of the opinion below would be the same even if it *had* adopted such procedures but simply refused to comply with them. According to the court, if a county requires an administrative appeal, and that appeal is not filed, judicial review is precluded even if the county ignored its own notice requirements.<sup>4</sup>

The Court of Appeals got it wrong. LUPA’s definition of the term “land use decision” does not require this Court to read into it an unyielding exhaustion requirement that violates fundamental notions of fair play and due process. Nor does it require this Court to adopt an interpretation of LUPA that shields every land use decision from review so long as the local jurisdiction chooses to delay notice until after the door has closed on the administrative appeal process. This Court should reverse the Court of Appeals and allow Durland’s LUPA challenge to go forward

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<sup>4</sup> In fact, had the County gone through the *appropriate* review process in this case, Durland would have received notice in time to challenge the permit. The shoreline review provisions of the local code — which the County should have complied with — required the County to notify the public before it approved Heinmiller’s and Stameisen’s second-story addition. *See* SJCC 18.80.110.B. *See also* Reply Br. at 22; Pet. for Review at 6. This is a common scheme for land use permits in the shoreline areas across the State.

on the merits. It should also reverse the award of \$13,373.50 in attorney's fees to respondent Heinmiller. *See* Pet. for Review, App. C.

### III. ARGUMENT

A. The Court of Appeals Erred in Holding that LUPA Contains an Unyielding Requirement to Exhaust Administrative Remedies, Unrestrained by Fundamental Principles of Fairness and Due Process.

As discussed above, LUPA is the “exclusive” state-law cause of action for challenging land use decisions. *See* RCW 36.70C.030(1). It requires litigants to exhaust their administrative remedies before going to court. *See* RCW 36.70C.060(2). But the drafters of LUPA were careful to not make the requirement absolute. They drafted the requirement broadly to incorporate the State's traditional approach to the exhaustion requirement that was established prior to the Act's passage. RCW 36.70C.060(2) provides, in relevant part:

Standing to bring a land use petition under this chapter is limited to the following persons:

...

(2) [A] person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

...

(d) The petitioner has exhausted his or her administrative remedies *to the extent required by law.*

RCW 36.70C.060(2) (emphasis added).

Here, the phrase “to the extent required by law” encompasses the traditional, equitable exceptions to the exhaustion requirement. It should be interpreted to incorporate those exceptions, not exclude them. Historically, the exhaustion requirement has been waived when the petitioner had no notice of the decision in time to pursue a local remedy. *Gardner v. Pierce County Bd. of Comm’rs*, 27 Wn. App. 241, 243–44, 617 P.2d 743 (1980) (holding that requiring exhaustion “would be unreasonable and violative of due process” if no notice was given of the underlying land use decision). As Division II has held, LUPA did not strip the courts of their authority “to independently determine whether to excuse a land use petitioner’s failure to exhaust administrative remedies due to insufficient notice or another recognized exception.” *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 378, 223 P.3d 1172 (2009). That authority existed prior to LUPA, as recognized in *Gardner*,<sup>5</sup> and LUPA does not express a clear and manifest intention on the part of the Legislature to change the State’s more nuanced approach to exhaustion.<sup>6</sup>

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<sup>5</sup> *Gardner* was cited approvingly by this Court in *Citizens for Clean Air v. City of Spokane*, 114 Wn. 2d 20, 28–29, 785 P.2d 447 (1990).

<sup>6</sup> *See, e.g., In re Parentage of L.B.*, 155 Wn.2d 679, 695, n. 11, 122 P.3d 161 (2005) (“Whether a statutory enactment acts to preempt or diminish common law rights is determined by legislative intent, . . . and it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent”) (internal quotations and citations omitted).

Moreover, the phrase “to the extent required by law” *must* be construed, at least, to provide an exception when mandated by basic due process requirements. *See* Pet. for Review at 14 – 15.<sup>7</sup> This Court has recognized this basic fact, if implicitly, as applied to LUPA. *See Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406–07, 120 P.3d 56 (2005) (“[O]nce a party *has had a chance* to challenge a land use decision *and exhaust all appropriate remedies*,” the petitioner must challenge it within LUPA’s statutory limitations period.) (emphasis added). This Court has repeatedly observed that LUPA’s strict procedural requirements — including the exhaustion requirement — would engender significant due process violations if imposed rigidly to preclude access to the courts.<sup>8</sup>

Indeed, as early as 1974, this Court held that due process requires local governments to notify landowners before making decisions that

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<sup>7</sup> *See also State v. Crediford*, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996) (Washington courts “are obliged to construe [every] statute in a way that is consistent with its underlying purpose and *avoids constitutional deficiencies*.”) (emphasis added).

<sup>8</sup> *See, e.g., Habitat Watch*, 155 Wn.2d at 410, n. 8 (reserving judgment on whether LUPA’s statute of limitations bars an appellant who had no notice of the challenged decision); *Chelan County v. Nykriem*, 146 Wn.2d 904, 924, 52 P.3d 1 (2002) (recognizing that issuance of a building permit without notice raises due process concerns, but the petitioner had actual notice of the decision in time to bring the challenge within a reasonable time); *Samuel’s Furniture, Inc. v. State Dept. of Ecology*, 147 Wn.2d 440, 462, 54 P.3d 1194 (2002) (holding that LUPA does not require individualized notice of land use decisions, but it does “require that a local jurisdiction provide general public notice of publication of the land use decision.”). *Cf Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 219, 257 P.3d 641 (2011) (reversing Court of Appeals interpretation of LUPA that would deprive the petitioner of a “realistic chance to exhaust administrative remedies”).

negatively affect the character and use of adjacent properties. See *Barrie v. Kitsap County*, 84 Wn.2d 579, 586, 527 P.2d 1477 (1974).<sup>9</sup> The facts of *Barrie* are illustrative. There, Kitsap County had published notice of an application to rezone land for commercial development, but the notice failed to inform the public about the nature and scope of the project. As a result, neighboring property owners could not effectively oppose the project at a public hearing. *Id.* at 585. This Court held that the inadequate notice deprived appellants of due process of law, which requires “notice reasonably calculated under all the circumstances to apprise affected parties of the pending action and afford them an opportunity to present their objections.” *Id.*

This case presents a similar (albeit more egregious) violation of due process than the one found in *Barrie*. Heinmiller and Stameisen’s second-story addition will impact Mr. Durland’s and Ms. Fennell’s view and their use and enjoyment of their property, not unlike the “unsightly” and “objectionable” project at issue in *Barrie*. Like the appellants in *Barrie*, Durland was entitled to notice of adjacent development under basic due process requirements. The only salient difference between the

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<sup>9</sup> Cf. *Larsen v. Town of Colton*, 94 Wn. App. 383, 391, n. 6, 973 P.2d 1066 (1999) (holding that to bar access to the courts for review of land use decisions, based on an alleged lack of notice, “would raise serious due process concerns.”), *overruled on other grounds by Chelan County v. Nykriem*, 146 Wn.2d at 926..

two cases is that, unlike in *Barrie*, Mr. Durland and Ms. Fennell received *no* notice of their neighbor's development (not just defective notice) and they were kicked out of court, too.<sup>10</sup>

The law that informed this Court's holding in *Barrie* has not changed. The drafters of LUPA were cognizant of Washington's traditional, nuanced approach to exhaustion. LUPA should not be construed to effectively deprive Mr. Durland, Ms. Fennell, or anyone else of their only ability to challenge illegal development in violation of manifest principles of fairness and due process.<sup>11</sup>

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<sup>10</sup> This case is also like *Barrie* insofar as Durland was entitled to notice under applicable code provisions. In *Barrie*, the appellants were entitled to notice under the County Enabling Act in addition to being entitled to it under due process. *See Barrie*, 84 Wn.2d at 585. Here, in addition to basic notions of fairness and due process, Durland would have been entitled to notice under the shoreline review provisions of the SJCC had the County required Heinmiller to apply for a shoreline conditional use permit (as it should have done) in addition to issuing him a simple building permit. *See* SJCC 18.80.110.B; Reply Br. at 22. *See also* note 4, *supra*. This is not the first time this Court has seen such tactics as part of an effort to evade applicable code requirements. *See Dept. of Ecology v. Pacesetter Const. Co., Inc.*, 89 Wn.2d 203, 206 – 07, 571 P.2d 196 (1977).

<sup>11</sup> The County argues that Mr. Durland and Ms. Fennell do not have a "property interest" to support a due process claim. *See* San Juan County's Answer to Petition for Review at 4–5 (Sept. 25, 2013). But it did not raise this argument below despite that the due process issue was clearly presented to the Court of Appeals. *Compare* Brief of Respondent San Juan County at 13 with Op. Br. at 2, 25. *See also* Reply Br. at 18–19; CP 94–95. Nor did it identify the issue in its answer to our Petition for Review as a new issue requiring resolution by this Court. *See* County Answer at 3–4. If this Court wishes to resolve the issue here, we invite it to review our petition for review in *Durland II*, which we have attached hereto as Appendix A. Our petition in *Durland II* deals extensively with the issue. Consistent with established federal case law, the mandatory provisions of the SJCC suffice to confer a property interest on appellants sufficient to support their due process claim. *See Wedges/Ledges of CA, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 n. 4 (10th Cir. 2003); *Hillside Cmty. Church v. Olsen*, 58 P.3d 1021, 1028 n. 6 (Colo. 2011). Moreover, even were Mr. Durland and Ms. Fennell to lack a property

B. The Court of Appeals Erred in Holding that Exhaustion is Required under LUPA's Definition of "Land Use Decision."

The Court of Appeals ignored the State's traditional approach to exhaustion. Indeed, it ignored the entire text and context of RCW 36.70C.060(2), the only provision of LUPA that expressly addresses the exhaustion requirement. In doing so, the court paved the way to insulate every land use permit in the State from judicial review.

The Court of Appeals found an unyielding exhaustion requirement in the statute's definition of "land use decision." LUPA defines the term "land use decision" to mean "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(2). From this, the court reasoned that because the County's hearing examiner has appellate jurisdiction to review building permits, only a decision from that office could constitute the final "land use decision" under LUPA. Thus, the court reasoned, the superior court lacked jurisdiction to review the staff-issued building permit even though, in fact,

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interest, the traditional exceptions to the exhaustion requirement would still apply. "Where one has not enjoyed a *fair opportunity* to exhaust the administrative process, or where resort to administrative procedures would be futile, exhaustion of administrative remedies will not be required." *Gardner*, 27 Wn. App. at 243-44 (emphasis added). Similarly, exhaustion will not be required when, as here, the matter is primarily a legal dispute. See *Prisk*, 45 Wn. App. at 798; *Credit General v. Zewdu*, 82 Wn. App. 620, 628, 919 P.2d 93 (1996). See also Op. Br. at 24-26; Reply Br. at 20-23.

it was the county's "final" action under the local code.<sup>12</sup> This interpretation would allow any municipality to shield from scrutiny any permit decision — regardless of applicable notice requirements — simply by keeping it secret until the appeal deadline expires. And it would open the door for every municipality in the State to insulate land use decisions not only from internal administrative review, but from judicial review, too.

In support of its holding, the court relied on *Ward v. Board of Skagit County Commissioners*, 86 Wn. App. 266, 936 P.2d 42 (1997). But neither *Ward* nor the opinion below justifies such an unreasonable reading of LUPA and the jurisdiction-stripping consequences that they encourage.

First, it is a basic principle of statutory interpretation that a statute cannot be construed to render part of it superfluous. *See, e.g., State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). Yet, the Court of Appeals' decision would do just that. LUPA contains an express provision that deals with exhaustion and that provision incorporates the established common-law exceptions. *See* RCW 36.70C.060(2). Reading LUPA's definition of "land use decision" to impose the same requirement (only stricter) would read that *explicit* exhaustion provision out of the statute.

Second, the definition of "land use decision" requires a

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<sup>12</sup> Under the SJCC, if no appeal is filed the permit becomes a "final" decision not subject to further review by the County. SJCC 18.80.130.

“determination.” RCW 36.70C.020(2). Where no administrative appeal decision exists, the only “determination” is the one made by staff. The court contorted the statute by concluding that the *absence* of a decision by the examiner was a “determination” precluding judicial review.

Third, the definition of “land use decision” is at the very least ambiguous. As noted above, LUPA provides that a land use decision is “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.” RCW 36.70C.020(2). But rather than using this definition to alter the circumstances under which exhaustion is required — an issue that is addressed by RCW 36.70C.060(2) — the Legislature may simply have intended the definition of “land use decision” to identify which decision is subject to judicial review in the common scenario where an agency issues both a permit and, later, a decision on appeal.

In other words, LUPA’s definition of “land use decision” makes clear that when an agency issues two decisions in the same matter, the decision on review is the one by the “officer with the highest level of authority to make the determination, including appeals.” This makes clear that a party need not (and in fact cannot) file a judicial appeal of the initial

permit decision *if* another decision exists by a higher-ranking official.<sup>13</sup>

Unlike the opinion below, this reading of the definition gives effect to it without diminishing the role of RCW 36.70C.060(2) as specifying the circumstances under which exhaustion is required (i.e., only “to the extent required by law”). It also reflects the SJCC, which states explicitly that if an initial permit decision is not appealed, it becomes a “final” decision. *See* SJCC 18.80.130; Reply Br. at 6. As stated in the *Habitat Watch* concurrence, even a lower-level “staffer” decision may become a “land use decision” if no administrative appeal is taken.<sup>14</sup> There is no need or cause to interpret LUPA to effectively insulate *any* land use decision from review when neither the applicant nor the local jurisdiction provide notice of it before the administrative appeal deadline runs.

Finally, even aside from providing an open invitation to evade judicial review of any land use decision in the State of Washington, the Court of Appeals’ decision ignores the important role that notice plays

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<sup>13</sup> For example, LUPA’s definition of “land use decision” ensures that litigants do not get two bites at the apple by appealing a decision once to the local jurisdiction’s appellate body, and then by appealing that *same* decision in court. As this Court noted in *Habitat Watch*, the terms of a permit are subject to change as it moves through the local review process. *See Habitat Watch*, 155 Wn.2d at 415–16. A litigant might think the initial decision, not the decision made on local appeal, is more susceptible to judicial attack. The definition makes clear that only the higher-level decision is subject to judicial review.

<sup>14</sup> *See Habitat Watch*, 155 Wn.2d at 406–07 (“[U]nless [local] review is sought, the most minor decision made by the person with the least authority is a ‘land use decision’” under LUPA.) (Chambers, J., concurring)

under LUPA. When the Legislature adopted LUPA, it included a strict 21-day deadline for judicial appeals. *See* RCW 36.70C.040(3). But the Legislature was careful that the limitations period does not begin until *after* interested parties receive some form of notice.<sup>15</sup> In this way, “LUPA is a legislatively crafted compromise that values efficiency, certainty, *and* notice.” *Habitat Watch*, 155 Wn.2d at 420 (Chambers, J., concurring) (emphasis added). This requirement would be meaningless if local jurisdictions could cut the notice requirement off at the knees simply by failing to tell people about available administrative remedies.

In all, the decision below misconstrues the statute and, in doing so, sanctions a scheme that violates manifest principles of fair play and due process. This Court should reverse the Court of Appeals and allow this LUPA challenge to move forward.

C. The Court of Appeals Erred in Holding that RCW 4.84.370 Authorizes an Award of Attorney’s Fees under the Unique Circumstances of this Case.

This Court should also reverse the award of \$13,373.50 in attorney’s fees to respondent Wes Heinmiller. *See* Pet. for Review, App.

C. In making the award, the Court of Appeals disregarded the

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<sup>15</sup> *See* RCW 36.70C.040(4)(a) (providing that for written land use decisions, the 21-day limitations period does not begin until the decision “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.*”) (emphasis added). *See also* *Habitat Watch*, 155 Wn.2d at 409; *Samuel’s Furniture*, 147 Wn.2d at 462.

presumptions and policies that underlie the American rule on the awarding of attorney's fees. *See* Pet. for Review at 18–19. It also misconstrued the applicable fee-shifting statute.<sup>16</sup>

The award was made under RCW 4.84.370, which authorizes fee awards to parties who “prevail” or “substantially prevail” before the local jurisdiction, and who later prevail before the Court of Appeals. *See* RCW 4.84.370(1)(a). The statute also authorizes fee awards to cities and counties whose decisions are “upheld at superior court and on appeal.” RCW 4.84.370(2). For the Court's convenience, we have attached a copy of RCW 4.84.370 as Appendix B.

As a fee-shifting statute, RCW 4.84.370 is an exception to the American rule that governs fee awards. The American rule provides that “[i]n absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney's fee as part of the costs of litigation.” *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113–14, 111 P.2d 612 (1941) (emphasis added).

As we explained in our Petition for Review, the American rule embodies many important public policies, including access to justice. *See* Pet. for Review at 18, n. 15. Like most American jurisdictions,

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<sup>16</sup> This Court should also reverse the fee award if it reverses the Court of Appeals' decision on the access to court issue.

Washington has followed this rule since the beginning of its statehood. *See, e.g., Larson v. Winder*, 14 Wn. 647, 651, 45 P. 315 (1896). This Court has held that because fee-shifting statutes are exceptions to the American rule, they must be construed narrowly. *See Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). Abrogation of the American rule, in whole or in part, requires “a clear expression of intent from the legislature.” *Id.*

Applied here, RCW 4.84.370 does not contain a “clear expression of intent from the Legislature” to award attorney’s fees when the case escapes review on the merits. Instead, the text and context of RCW 4.84.370 suggest just the opposite; the Legislature did *not* intend to authorize fee awards when (as here) the case is dismissed on procedural or jurisdictional grounds. The statute also does not authorize a fee award when (as here) no adversarial proceeding was held before the local jurisdiction. The Court of Appeals had “no power” to award fees to respondent Heinmiller. *State ex rel. Macri*, 8 Wn.2d at 113.

For example, in *Overhulse Neighborhood Ass'n v. Thurston County*, Division II observed that the statutory phrase “prevailing party or substantially prevailing party,” as well the requirement that a city or county’s decision be “upheld” on appeal, suggests that fees may be awarded only in cases that are disposed of “on the merits.” 94 Wn. App.

593, 601, 972 P.2d 470 (1999). In reaching that conclusion, the court looked to the established law of *res judicata*, under which a dismissal on jurisdictional grounds does not preclude future litigation. In that case, there cannot, by definition, be a “prevailing party” because neither party may use the decision as a shield against future attacks. *See id.*, citing *Peacock v. Piper*, 81 Wn.2d 731, 504 P.2d 1124 (1973). The Legislature would have been aware of this common-law principle when it drafted RCW 4.84.370 and the statute should be construed accordingly. *Id.*<sup>17</sup>

Similarly, Division II has observed that RCW 4.84.370 does not expressly authorize fee awards on appeal from purely ministerial decisions — like the issuance of a building permit — that involve no adversarial proceedings. *See Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006). The statutory phrase “prevailing party” contemplates an adversarial process. Without one, there is nothing to “prevail” against.<sup>18</sup>

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<sup>17</sup> *See also Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 701, 301 P.3d 1049 (2013); *Richards v. City of Pullman*, 134 Wn. App. 876, 884, 142 P.3d 1121 (2006); *Witt v. Port of Olympia*, 126 Wn. App. 752, 759–60, 109 P.3d 489 (2005). Heinmiller argues that *Overhulse* is no longer good law in light of Division II’s decision in *Nickum v. City of Bainbridge Island*, *supra*, in which the court awarded attorney’s fees in a case that was disposed of on purely procedural grounds. *See* Heinmiller and Stameisen’s Answer to Petition for Review at 17. But even more recently, *Overhulse* was cited as good law by Division II in *Northshore Investors, LLC v. City of Tacoma*. *See* 174 Wn. App. at 701. Rather than demonstrate that Division II has “come in line,” *Nickum* reflects a continued conflict of authority even within Division II itself.

<sup>18</sup> Heinmiller argues that he “prevailed” before the County simply because he received a permit. *See* Heinmiller and Stameisen’s Answer to Pet. for Review at 14. But if that were so, there would have been no reason for the Legislature to draft sub-section (2) of the statute, which provides that “in addition to” the party who prevailed

The Court of Appeals disregarded these authorities. Nor did it ask, consistent with the presumptions and policies that underlie the American rule, whether RCW 4.84.370 expressly *confers* authority to make a fee award under the unique circumstances of this case. *See* Pet. for Review, App. A at 9–10. Instead, the court followed *Prekeges v. King County*, *supra*, and asked only whether the statute explicitly “requires” a resolution on the merits. *See id.*, citing 98 Wn. App. 275, 285, 990 P.2d 405 (1999). In doing so, the court erred. This case has not been disposed of on the merits and there was no adversarial process below. This Court should reverse the award and ensure that the American rule, and the important public policies that it protects, are not abrogated without a clear legislative directive that they be abandoned.

## VI. CONCLUSION

For the reasons set forth above, and in appellants’ briefing and the Petition for Review, this Court should reverse the decision of the Court of Appeals and allow Mr. Durland’s and Ms. Fennell’s LUPA appeal to move forward. This Court also should reverse the \$13,373.50 fee award to respondent Wes Heinmiller.

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before the local jurisdiction, the jurisdiction itself may be awarded fees when its decision is “upheld” on appeal. RCW 4.84.370(2). Were the jurisdiction capable of being the other adverse party, it would receive fees under sub-section (1) just like other litigants.

Dated this 10th day of January, 2014.

Respectfully submitted,

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By:



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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

SUPREME COURT NO. \_\_\_\_\_

COURT OF APPEALS NO. 69134-1-I.

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MICHAEL DURLAND, et al.,

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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PETITION FOR REVIEW

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## **I. IDENTITY OF THE PETITIONERS**

Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks, appellants below, hereby petition for review of the Court of Appeals decision identified in Part II.

## **II. CITATION TO COURT OF APPEALS DECISION**

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

## **III. ISSUES PRESENTED FOR REVIEW**

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

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

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

#### IV. STATEMENT OF THE CASE

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

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

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

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

A. Facts Giving Rise to the Dispute

Appellants Michael Durland and Kathleen Fennell own waterfront property on Orcas Island, where they live and run a small business called Deer Harbor Boatworks. CP 83.

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

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

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

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

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

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

the County, came on the very day that his deadline expired for appealing the permit to the County's hearing examiner). CP 85. Upon his receipt of the County's response, Mr. Durland quickly requested a copy of the new permit and discovered that it violated numerous code provisions. CP 86. It was issued in violation of mandatory limits on the size of accessory structures; prohibitions against additions to illegal structures; prohibitions against expanding non-conforming structures in the shoreline; and height limitations. *See* SJCC 18.50.330.E.2; SJCC 18.100.030.F; SJCC 18.50.330.B.15; and SJCC 18.50.330.E.2.a. *See also* SJCC 18.50.330.D.2.e(i)-(iv). These violations would allow additional illegal development in the shoreline and further impact Mr. Durland's and Ms. Fennell's view and their enjoyment of their land.

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

B. Proceedings Below

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

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

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

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

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

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

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

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

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

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

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

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

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

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

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

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

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

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

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

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

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

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

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

"Property interests are not created by the constitution but are reasonable expectations of entitlement derived from independent sources such as state law." *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962 n. 15, 954 P.2d 250 (1998), citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The state law giving rise to the property interest may be a statute or local ordinance. See *Veradale Valley Citizens' Planning Comm'n v. Bd. of Comm'rs of Spokane County*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978). Once it is

established that a person has a reasonable expectation of entitlement, “the types of interests protected as ‘property’ are varied and, as often as not, intangible, relating to ‘the whole domain of social and economic fact.’” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), quoting *Nat’l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

To determine whether a statute or local ordinance gives rise to a reasonable expectation of entitlement, a court must look to the language of the statute and ask whether it is “couched in mandatory terms.” *Wedges/Ledges of CA, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). See also, e.g., *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000). With respect to permits or other decisions, a property interest is also created when there are “‘articulable standard[s]’” that constrain the decision-making process. *Wedges/Ledges*, 24 F.3d at 64, quoting *Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983).

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

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

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

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

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

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

Similarly, Chapter 18.50 of the SJCC provides that “[a]ccessory structures which are not specified . . . as normal appurtenances to a residential use shall be permitted *only* as conditional uses.” SJCC 18.50.330.E.4 (emphasis added). In this case, the addition to the garage violates the mandatory size limits at SJCC 18.50.330.E.2.a and is, therefore, not a “normal appurtenance.” *See* CP 71. Because Heinmiller and Stameisen did not seek a conditional use permit, and the County did not grant one, the addition is prohibited outright. As such, Mr. Durland and Ms. Fennell have a property interest in preventing their neighbors’ illegal development. *See Wedges/Ledges*, 24 F.3d at 62. *See also Fleury v. Clayton*, 847 F.2d 1229, 1231 (7th Cir. 1988) (holding that “a right to a particular decision reached by applying rules to facts, is ‘property’”).

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

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

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

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

In reaching that conclusion — and consistent with the mandatory terms test — the Court focused on the mandatory nature of the height limitations, explaining that “the plain language of [the zoning] ordinance requires that buildings more than 28 feet and less than 35 feet *can only be approved* if the views of adjacent properties, such as that of the Asches, are not impaired.” *Id.* at 798 (emphasis added). The court also focused on whether the Asches would have had a “right to prevent” the development. *Id.*

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

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

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

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

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

<sup>9</sup> See *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn.

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

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

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

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

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

limitations period for tort claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); *Owens*, 488 U.S. at 236. States lack the legal authority to impose a shorter limitations period. *Burnett v. Grattan*, 468 U.S. 42, 43, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) (rejecting six-month limitations period for employment disputes); *Johnson v. Davis*, 582 F.2d 1316, 1317 (4th Cir. 1978) (rejecting special one-year limitations period for prisoner claims).

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

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

Finally, this Court should grant review of the Court of Appeals' fee award to respondents Wes Heinmiller and Alan Stameisen. *See* App. C. As in *Durland I*, the award was made under RCW 4.84.370, which awards attorney's fees to parties who prevail before the local jurisdiction, the superior court, and the Court of Appeals. However, the statute is limited in scope — it applies only to cases on appeal from “a *decision by a county*,

city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.” RCW 4.84.370(1) (emphasis added).

As a fee-shifting statute, RCW 4.84.370 is an exception to the American rule that governs the awarding of attorney’s fees. Like most American jurisdictions, Washington has followed the American rule since the beginning of its statehood. *See, e.g., Larson v. Winder*, 14 Wash. 647, 651, 45 P. 315 (1896). The rule provides that “[i]n the absence of contract, statute or recognized ground of equity, a court has *no power* to award an attorney’s fee as part of the costs of litigation.” *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 111 P.2d 612 (1941) (emphasis added).

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

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<sup>11</sup> *See, e.g., Ackerman v. Kaufman*, 41 Ariz. 110, 114, 15 P.2d 966 (1932) (“Our public policy requires that the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose.”); *Straus v. Victor Talking Mach. Co.*, 297 F. 791, 799 (2nd Cir. 1924) (“[I]t would be a negation of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage.”).

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

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

As in *Durland I*, this Court should grant review to correct an erroneous interpretation of RCW 4.84.370 and to ensure that the American rule, and the important public policies that it protects, are not abrogated without a clear legislative directive that they be abandoned.

## VI. CONCLUSION

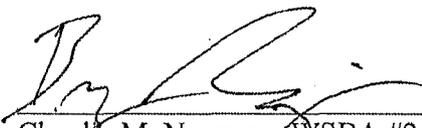
For the reasons above, Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks respectfully request that this Court grant review of the dismissal of Appellants’ case and of the fee award to Respondents Wes Heinmiller and Alan Stameisen.

Dated this 16<sup>h</sup> day of December, 2013.

Respectfully submitted,

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## **RCW 4.84.370**

# **Appeal of land use decisions — Fees and costs.**

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

[1995 c 347 § 718.]

### **Notes:**

**Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.**