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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 89293-8

MICHAEL DURLAND, et al,

Appellants,

v.

SAN JUAN COUNTY, et al,

Respondents.

SAN JUAN COUNTY'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENT SAN JUAN COUNTY

Respondent San Juan County (“the County”), by and through the San Juan County Prosecuting Attorney's Office, respectfully requests this Court deny review of the July 1, 2013, published Court of Appeals opinion in the case of Durland, et al. v. San Juan County, et al., No. 68453-1-I, (175 Wn. App. 316, 305 P.3d 246 (2013)). The Court of Appeals decision, which was the second level of appeals in this matter, affirmed the trial court’s order dismissing the land use petition filed by Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks (“Durland”) on December 19, 2011.

II. COURT OF APPEALS OPINION

The Court of Appeals correctly held that, “[p]ursuant to LUPA, a local government’s decision is not subject to judicial review by the superior court unless it is a ‘land use decision.’ Because Durland failed to obtain a ‘final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination,’ RCW 36.70C.020(2)(a), the grant of the building permit at issue did not constitute a ‘land use decision.’ Thus, the superior court was without authority to review San Juan County’s decision to grant the permit.” Because the Court of Appeals correctly applied well established Washington law, this Court should deny review of this matter.

III. STATEMENT OF THE CASE

Respondents Wes Heinmiller and Alan Stameisen (“Heinmiller”) applied for a building permit for property located in Deer Harbor on Orcas Island, San Juan County. CP 38. Heinmiller applied for the building permit on August 8, 2011, and the permit was issued by the County and became a public record on November 1, 2011. CP 38.

Durland filed the land use petition that is the subject of this appeal on December 19, 2011, in Skagit County Superior Court. CP 33. Both the County and Heinmiller filed CR 12(b) motions to dismiss asserting, among other things, that Durland had not exhausted his administrative remedies and thus lacked standing pursuant to LUPA. CP 4; CP 19-26. The Superior Court granted Respondents CR 12(b) motions and dismissed the land use petition with prejudice. CP. 156-157.

Durland appealed and the Court of Appeals affirmed the Superior Court’s Order in a published decision dated July 1, 2013. Durland now petitions this Court for discretionary review.

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**IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF
APPEALS DECISION**

**A. None of the Grounds for Review under RAP 13.4(b) are
Present in this Case.**

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should deny review because the issues raised in this petition do not implicate any of the grounds for review mandated by RAP 13.4(b).

Here, Durland argues that RAP 13.4(b)(3) and (4) apply because “[t]he Court of Appeals’ dismissal of this case raises a fundamental issue of due process...”. Petition for Review, 9. Durland goes on to argue that LUPA’s exhaustion requirements should not be interpreted to violate

constitutional rights and states, “[i]t is entirely possible to interpret LUPA so that it would not deprive Mr. Durland, Ms. Fennel, or anyone else of their right to notice and opportunity to be heard.” Petition for Review, 15-16. This argument, however, is based on the flawed premise that Durland had a right to notice of the permit issued to Heinmiller. In fact, Durland admits the San Juan County Code does not require notice of the issuance of a building permit. Petition for Review, 4, fn 1.

Because Durland does not have a right to notice of the issuance of a building permit to his neighbor’s property, the Court of Appeals’ decision did interpret LUPA’s exhaustion requirements consistent with the principles of due process.

Any party seeking recovery based on an alleged deprivation of due process must first establish that he possessed a constitutionally protected property interest which the local government deprived him of without due process. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972). Because Durland did not hold an interest in the Heinmiller property, and because the San Juan County code did not require notification to neighbors of residential building permits, Durland did not possess a reasonable expectation of entitlement which would give rise to a property interest protected by the U.S. Constitution. Board of Regents v. Roth, supra. San Juan County’s lack of a notice requirement is typical

throughout the state. See for example, Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009). Absent such a property interest Durland's due process claim must fail.

Durland's dissatisfaction with the Courts' resolution of this case does not qualify for discretionary review under RAP 13.4(b). None of the grounds for review presented in RAP 13.4(b) are present in this case.

B. The Court of Appeals Decision was Based on Well Established Law.

The Court of Appeals affirmed the dismissal of Durland's land use petition because the decision to grant the building permit was not a "land use decision" for purposes of LUPA. Durland v. San Juan County, 175 Wn. App. 316, 320, 305 P.3d 246 (2013). This is because the decision to grant the permit was not issued by "the body or officer with the highest level of authority" to do so in San Juan County. Id. at 321. San Juan County Code 18.80.140(B)(11) provides that the San Juan County hearing examiner has authority to conduct open-record appeal hearings of the development permits issued or approved by the director and/or responsible official, and to affirm, reverse, modify, or remand the decision that is on appeal. Thus, in San Juan County the Hearing Examiner is the body or officer with the highest level of authority to grant or deny permits.

The Court of Appeals stated that Ward v. Bd. Of Skagit County Comm'rs, 86 Wn. App. 266, 936 P.2d 42 (1997) controlled the disposition of this case. Durland, at 322. The Ward case held that,

[i]n order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, by necessity, exhaust his or her administrative remedies. Thus, exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as a 'land use decision' subject to judicial review under LUPA.

86 Wn. App. at 270-271.

Ward has been favorably cited by this Court in Chelan County v. Nykreim, 146 Wn.2d 904, 938, 52 P.3d 1 (2002) and Twin Bridge Marine Park, L.L.C. v. State, Dept. of Ecology, 162 Wn.2d 825, 857, 175 P.3d 1050 (2008), yet Ward is not mentioned in Durland's Petition for Review. Durland has failed to provide this Court with authority or explanation for reversal of Ward.

V. CONCLUSION

Based on the preceding argument, the County respectfully requests that the Court deny review in this matter. Durland has failed to show that review is appropriate under RAP 13.4(b) and the record and applicable law show that the Court of Appeals correctly decided all of the issues presented. As such, this Court should deny any further review of this case.

Respectfully submitted this 25th day of September 2013.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

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