No. 93963-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL DURLAND, KATHLEEN FENNELL,
and DEER HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WESLEY HEINMILLER,
ALAN STAMEISEN, and SUNSET COVE LLC,

Respondents.

REPLY IN SUPPORT OF PETITION FOR REVIEW TO THE SUPREME COURT

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I. SUMMARY OF REPLY ARGUMENT

Petitioners Michael Durland, Kathleen Fennell and Deer Harbor Boatworks (collectively "Petitioners") respectfully submit that the issues before this Court are of significant public importance and that the Court should not be misled by the "alternative facts" presented by Respondent San Juan County (the "County") and Messrs. Heinmiller and Stameisen ("Heinmillers") concerning permitting decisions and what has been required regarding finality and predictability for well over 30 years in the case law, and 25 years in the Growth Management Act, RCW 36.70A.020(7) (goal to ensure predictability when processing permits). The Court should reject the Respondents' invitation to deny review of the U-turn decision-making of the County with respect to the permit history of the subject properties. The issues in this case must be decided to address a potential gap in the law regarding finality of permit decisions and to reaffirm the Court's judiciary role in enforcing limitations on local decision-making authority.

This Court ensures that the state's case law is consistent, complies with statutory requirements, is not in conflict with constitutional rights, and is predictable. *See* RAP 13.4(b). "LUPA is consistent with the policy in favor of finality of land use decisions. It specifically authorizes a system of 'uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and

timely judicial review.' RCW 36.70C.010." *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 459 54 P.3d 1194 (2002); *see also* RCW 36.70A.020(6) (permit processing should be fair to "ensure predictability"). As stated on the Supreme Court's website:

> The mission of the Washington Supreme Court is to protect the liberties guaranteed by the constitution and laws of the state of Washington and the United States; impartially uphold and interpret the law; and provide open, just, and timely resolution of all matters.[1]

This matter does not concern a dispute between neighbors, but is a challenge to the County's reversal of course concerning permit rights and conditions that it acknowledged for decades. In the cross-hairs is the Doctrine of Finality under which a permit and conditions to a permit issued to a property owner is final if not challenged. *E.g., Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). As to predictability, all County employees and Department heads with responsibility have recognized and documented that a building permit with setback requirements was issued to Mr. Smith for construction of the barn in question.

The Court of Appeals in this matter, on page 7 of its decision, stated, "***if a building permit was approved for the barn in 1981, that approval was a land use decision that could not be challenged.***" *See also*

[1] http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/

CP 42-43. As the Court ruled in *Skamania County v. Columbia River Gorge Com'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001):

> We have also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property.... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit." *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974).

See also Sintra, Inc. v. City of Seattle, 119 Wash.2d 1, 5, 829 P.2d 765 (1992) (concluding that a "body of cogent, workable rules upon which regulators and landowners alike can rely" is essential to resolving land use regulation disputes). If a permit with the 10-foot setback was approved, that land use decision cannot be challenged or disavowed. *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005).

Petitioners note that the doctrine of finality also applies to judgments (*see Flannagan v. Flannagan*, 42 Wn.App. 214, 218, 709 P.2d 1247 (1985)), and that land use decisions should be similarly considered an adjudication of rights, particularly by and between adjoining properties. *See, e.g., Stientjes Family Trust v. Thurston County*, 152 Wn.App. 616, 618, 217 P.3d 379 (2009) ("A land use decision is final when it leaves nothing open to further dispute and sets to rest the cause of action between the parties"). Thus, the doctrine of finality benefits both the property

owner and adjacent property owners that are protected by conditions of approval, including but not limited to, side-yard setbacks.[2] Protections of the doctrine do not diminish with the passage of time.

The case hinges on whether elected County officials can override the decisions of thieir own Building and Permitting Departments and retroactively change past land use permitting decisions that its own Building and Planning Deartment Heads have recognized and documented for decades and upon which citizens have relied. As the Court well knows, the permit process is not only used to grant rights to a property owner, but also in many circumstances to ensure protection of the environment, to make certain that public services are not overburdened and to consider and protect property rights of adjacent and neighboring properties. *See, e.g.*, RCW 36.70B.040 (determination of consistency); *see generally*, Washington State Environmental Policy Act ("SEPA") RCW Chapter 43.21C; WAC Chapter 197-11. Permit conditions are included under these authorities to protect adjacent property rights and property values, a goal that Mr. Durland has failed to achieve because of the County's recent denial of the fact that 10-foot setbacks were required

[2] Property line setbacks and yards are universally accepted as legitimate exercises of the police power. *E.g., Barrie v. Kitsap Cy., 93 Wash.2d 843*, 850, 613 P.2d 1148 (1980); *Sherwood v. Grant Cy.*, 40 Wash.App. 496, 501, 699 P.2d 243 (1985). Zoning codes regulate setbacks, types of uses, height, parking requirements, design (for some types of projects) and similar concerns for the common good. *See Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 27-28, 586 P.2d 860 (1978).

when the barn was constructed. Because the barn was constructed in violation of the setbacks, it is an illegal structure that cannot be converted. *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998); SJCC § 18.80.120(A) and SJCC § 18.40.310(D).

Without the Court's intervention, the message being sent to citizens of this state is that Hearing Examiners and County-assigned legal counsel can revisit, change or even deny protections of past decisions inconsistent with Staff action without recourse. The Hearing Examiner and the Court of Appeals correctly recognized that if a building permit was issued for the barn, even if it was issued in error and not appealed within the required time frame, it stands as a final decision. The County cannot collaterally attack or disavow the requirements of the permit its employees and Department heads admit was issued.

The County and Heinmillers make much ado about the fact the actual permit document itself was not located (failing to address that many County documents of that time period were inadvertently destroyed by water damage). This position is contrary to every other piece of evidence in the record including, but not limited to an inspection report, receipt for payment for the permit, site plan, building plan, hand-written ledger, barn building plans approved by the County and Code checklist.), CP 147, 284-85 (Site Plan), CP 149 (Building Plan, 1981), CP 186 (Barn Building

Plans- approved by San Juan County, 10-15-81), CP 858 (R-22 San Juan County Response to Motion to Supplement); CP 1505 (receipt for the permit); and CP 1508 (permit ledger); *see also* CP 176 (Compliance Plan affirming 10-foot setback for Barn); CP 949-51. Most of these documents were stamped with "All Structures shall be a minimum 10 feet from adjacent property lines. S.J. Co. 58-77." Moreover, since 1986, more than twenty County employees and officials have, and still agree, that a building permit was issued and in effect for the barn.[3]

The County has affirmed that the set-back requirements were violated when it reviewed Mr. Durland's conditional use permit application in 1986-87, and again when it commenced code enforcement against the Heinmillers for converting the barn to an accessory dwelling unit without permits. The 2008 Compliance Plan prepared by the County also recognized a building permit and 10-foot setback requirement (AR 00012, 00039), and the Prosecuting Attorney at that time accepted the position that a permit had been issued to the original property owner,

[3] Throughout the barn history since 1986 beginning with the Board of Adjustment Hearing for Deer Harbor Boatworks and Marina, and through the several Hearings over the last eight years, there have been six Board of Adjustment appointees, three County Managers, two County Planners, two Building Officials, five Heads of Community Development and Planning, two County Code Enforcement Officials, one Deputy Prosecuting Attorney, and the Prosecuting Attorney himself who have all agreed, stated, or provided documentation that the barn had a building permit and was required to have a 10-foot setback. Not once since 1987 have any County officials or employees ever stated that the barn did not have a building permit. No appeal from Heinmiller was filed at any time to challenge the findings that the barn had a building permit.

Mr. Smith.[4] Notably, the Heinmillers never appealed or disputed any of these decisions concerning the permit or setback requirements.

Both the County and Heinmillers admitted the barn was constructed pursuant to a building permit during the Superior Court and Court of Appeals hearings in *Durland I* when they argued the Compliance Plan was the deciding document which stated that a building permit was issued for the barn with a 10 foot required setback. No appeal by Heinmiller was filed challenging the decisions in this regard.

Perhaps most telling is the fact that, at the Board of Adjustment hearing for the conditional use permit, all members of the County, the Board, Bill Smith, and Mr. Durland recognized the barn as an illegal building and allowed it to stand as a buffer between the proposed industrial/commercial Boatyard and the residential property the barn was built on. This was with the explicit restriction that if it was ever destroyed it could not be rebuilt in the same location.

The County recognized the barn as having a proper building permit which required it to be built 10 feet from the property line. Durland graciously applied a 20-foot setback from the barn as a no build area on his property. This easement in no way granted benefits to the Smith

[4] This Plan was written by Ron Henrickson, Head of the County's Planning Department, and approved by Randy Gaylord County Prosecuting Attorney.

property. This easement was for a barn or shed as in 1981 it was not legal for the structure to be anything but a barn or shed. The easement did not address the conversion of the barn to a habitable space as that was not allowed in 1981 and would not be allowed today for any structure in the same location where the barn stands. No appeal was made by the property owner, Bill Smith, that the barn was not an illegal structure or did not have a building permit. All of this begs the question: **If the barn was legally allowed to be constructed in 1981 without a permit and without setbacks why then did the Board of Adjustment require Durland to grant an easement for a no build zone?**

The Examiner's decision is rogue and based on a strained analysis that ignores everything previously accepted by all parties in this matter and is based upon a rejection of competent evidence from County employees which did not support the Examiner's views. *See* CP 892; CP 950-51.[5] Ironically, the County quotes the Examiner's statement that it is difficult to try to "unravel" decisions made in the past. Yet, the disavowing of the building permit issued to Smith, a fact that all parties, and particularly the County, have agreed on for years, itself "unravels" the thread of reality, leaving Durland scratching his head and wondering how

[5] These are the documents the Examiner refused to enter and the Court decided not to review, although their consideration was requested.

this could be. Simply put, one cannot "connect the dots" between all of the evidence in the record concerning issuance of a building permit and the continued requirement of a 10-foot setback after adoption of Res. 58-1977 to conclude that the Smith Barn was built legally. It was not.

Even if we accept the unsupportable position that a building permit was not issued, the evidence clearly shows that the County manufactured a stamp in 1981 to clarify that, even if Res. 58-1977 removed requirements for a building permit, the law still prohibited buildings to be erected within a 10-foot setback.[6] Moreover, it is an error to interpret Res. 58-1977 as eliminating setback requirements under statutory construction principles.

The Heinmillers speculate that the manufactured stamp was the result of some rogue "low level staffer in the County building department" running amok in the building Department stamping all documents with "language inconsistent with the law" and imposing "new legal obligations" on building permit documents. But speculation is not evidence. *Seven Gables Corp. v. MGM/UA Ent'mt Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). More importantly, it runs counter to substantial evidence in the record.

[6] It is telling that the County does not mention the stamp in its answer. There is no way for it to explain away employees' use of the stamp on the referenced two permitting documents stating that Res. 58-1977 imposed a 10-foot setback.

Courts must make decisions on the plain language of the law. In this case, in the text of Res. 58-1977, there is no mention that it removed setback requirements for Class J structures. The manufactured stamp that the County used on permitting documents is further proof that when Res. 58-1977 was in effect the County interpreted and clarified the Resolution as requiring 10-foot setbacks from adjoining property lines. The County's own permit archives show that Class "J" structures were all required to have 10' setbacks along with other appurtenant structures such as garages, sheds, and pump houses.

Perhaps most importantly, the Court's role is to stand between citizens and the government as a check on actions taken without legal authority and – as here – to take corrective action where elected officials step over the line to justify decisions by withholding and denying the existence of pertinent documents and disavowing official statements of the head of the County Planning Division. Only the County Deputy Prosecuting Attorney has disputed that a building permit was issued for the barn that required 10-foot setbacks, notwithstanding Department Head Sam Gibboney's statement to the contrary. Even in the face of unanimous agreement of County employees and department heads, the Deputy Prosecuting Attorney is overlooking and ignoring these decisions and ignoring the opinion of her own boss Prosecuting Attorney Gaylord and

her fellow Deputy Prosecuting Attorney Jon Cain, by arguing that no building permit was issued for the barn. The only explanation for the County's insistence in this regard is that it has favored the Heinmillers over Mr. Durland, which is impermissible on many levels, not the least of which is the prohibition over arbitrary and capricious decision-making.

Petitioners trust that the Court will not allow the egregious actions of the County and Heinmillers to stand. Durland requests that the Court accept review and require the County to stand behind the decisions and statements it has consistently made concerning the building permit issued to Mr. Smith since 1986. The predictability and fairness of the land use permitting system is at risk without a correction of the lower courts' and the County's decisions. This Court should definitively and affirmatively rule that land use permits cannot be challenged or reversed ad hoc by local citizens or local government.

II. REPLY ARGUMENT

A. Review Should Be Accepted Because the Decision of the Court of Appeals is in Conflict with Longstanding Case Law Established by the Supreme Court and the Court of Appeals Concerning the Doctrine of Finality and the Law of Contemporaneous Policy.

Substantial evidence in the record supports a determination that a permit was issued to Mr. Smith for the barn, which permit requires a 10-foot setback. This was never disputed by the County (since 1986) or the

Heinmillers (since 2008) until it worked to their advantage to do so. The tactics used by Respondents and the manipulation and ignorance of facts in the record concerning the permit constitute an illegal reversal of the official position of the County and a collateral attack on the terms and conditions of the permit. As set forth below, the County's actions are further arbitrary and capricious. County archives show that "Class J" structures such as the barn in question. as well as other appurtenant structures such as garages, sheds, and pump houses, all were required to have a 10-foot setback.

If this Court does not accept review, the doctrine of finality will have an unintended "asterisk" for permit decisions that a jurisdiction or property owner wishes to disavow years later. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002). In light of the permit stamp, Res. 58-1977 cannot reasonably be interpreted to have deleted setback requirements. *See Burns v. City of Seattle,* 161 Wn.2d 129, 140, 164 P.3d 475 (2007); *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 313-14, 686 P.2d 1073 (1984), (ruling that Res. 58-1977 was a cost-saving measure). There is not a single sentence that the resolution deleted any dimensional requirements.

But even if the Court accepts such an interpretation, the record overwhelmingly shows a permit was issued as set forth above. The

doctrine of finality also protects all persons issued and/or relying on the terms of a permit issued in error. *E.g., Twin Bridge Marine Park, LLC, v. Department of Ecology*, 162 Wn.2d 825, 829, 175 P.3d 1050 (2008) ("This is a well established principle of Washington law that gives closure and clarity to private property owners who wish to develop their land **and to interested citizens**") (emphasis added). This Court, "strongly favor[s] the finality of land use decisions." *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 215, 257 P.3d 641 (2011). Pre-LUPA, Washington courts recognized that even illegal decisions must be challenged in a timely manner. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). The County cannot directly or indirectly revoke its own final land use decision. *Nykreim*, 146 Wn.2d at 933.

B. Review Should be Accepted Because the Decision of the Court of Appeals is in Conflict with Longstanding Case Law Established by the Supreme Court and the Court of Appeals Concerning Arbitrary and Capricious Decision-Making.

The County's actions are the very definition of arbitrary and capricious. A finding of fact made without evidence in the record to support it, and an order based upon such finding, is arbitrary. *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wn.2d 885, 891, 259 P.2d 838 (1953). "Conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious ...."

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 962, 954 P.2d 250 (1998) (quoting *Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997)).

The only person who has questioned the existence of a building permit for the barn is the Hearing Examiner, aided by the meek failure of the County Prosecuting Attorney to point out to the Superior Court and Court of Appeals that alleged "factual" basis for the Examiner's decision is without support and contrary to every other County employee's determinations concerning the building permit.[7] This is not a matter for "speculation" when every County employee is in agreement that a permit was issued. When all interested parties and all documentation points to a building permit being issued, how can the mere opinion of the Examiner ignore this evidence? Moreover, Ms. Gibboney's position cannot be said to be one of "speculation," as she is the County Planning Director and charged with a knowledge of land use requirements in the County as well as its permitting history, given that the Planning Department is constrained to make consistent decisions, and not to favor one property owner over

[7] It was not until an unauthorized and inaccurate submittal by John Geniuch that there was any question that a building permit was required and was issued for the barn. Durland Decl. ¶8. After this unauthorized and inaccurate submittal by John Geniuch his boss, Sam Gibboney supplied more documentation for the existence of a building permit for the barn. *Id.*; CP 950-51. After Sam's Report, John Geniuch changed his statement and concurred that a building permit was issued for the barn. Durland Decl. ¶8; CP 892.

another. *See, e.g.,* RCW 36.70A.020(6) (local jurisdictions must protect property rights from arbitrary or discriminatory actions.

The Prosecuting Attorney's duty is to seek justice, not blindly defend the indefensible. *See Young v. United States ex rel. Vuitton et fils,* 481 U.S. 787, 803 (1987). By rejecting the vast documentation of the building permit and the Stamp which confirms Res. 58-77 did not delete setback requirements, the County Attorney is neglecting her duty to uphold justice. By allowing a falsehood to be perpetuated without correction throughout the review process of the Examiner's decision, the actions of the Deputy Prosecuting Attorney favor one citizen – the Heinmillers – over another, Mr. Durland.

III. CONCLUSION

The Supreme Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 26 day of January, 2017.

By _____

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CERTIFICATE OF SERVICE AND MAILING

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I further certify that the foregoing pleading was timely filed on January 26th, 2017 pursuant to RAP 18.6(c), as follows:

Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov, email
Via Email Attachment

The original will be maintained in the files of the Dennis D. Reynolds Law Office. I further certify that I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Randall K. Gaylord, WSBA #16080, Prosecuting Attorney Amy S. Vira, WSBA #34197, Deputy Prosecuting Attorney San Juan County Prosecutor's Office 350 Court Street / P.O. Box 760 Friday Harbor, WA 98250 amyv@sanjuanco.com; elizabethh@sanjuanco.com *Attorneys for Respondent San Juan County* *By Email**	John H. Wiegenstein, WSBA #21201 Heller Wiegenstein PLLC 144 Railroad Avenue, #210 Edmonds, WA 98020-4121 Johnw@hellerwiegenstein.com; MonicaR@hellerwiegenstein.com; docket@hellerwiegenstein.com *Attorneys for Respondents Wesley Heinmiller, Alan Stameisen, and Sunset Cove LLC* *By Email**
[*Per Parties' stipulation to electronic service by email; hard copies not served unless requested; documents too large for email (typically >10MB) may be served by Dropbox or similar to allow direct downloading]	

DATED at Bainbridge Island, Washington, this 26th day of January, 2017.

Christy Reynolds
Christy A. Reynolds, Legal Assistant