

## **CASE REPORT**

### **LAND USE PETITION ACT (LUPA) - VOLUNTARY CODE COMPLIANCE AGREEMENTS. Voluntary code compliance or correction agreement did not constitute a “land use decision” subject to LUPA. *Durland v. San Juan County*, No. 67429-3-I, Division I Court of Appeals (2013).**

**I. Facts.** Wes Heinmiller converted a portion of a barn located on his property to an accessory dwelling unit (ADU) without securing any building or shoreline permits for this work, in violation of the San Juan County Code. Nearly ten years later, Heinmiller applied for an upland conditional use permit seeking authorization to use the ADU as a vacation rental unit. Due to this application, the County discovered the code violations and issued a “notice of correction.” After negotiations, the County and Heinmiller entered into an “agreed compliance plan,” wherein Heinmiller agreed to either submit after-the-fact permit applications for conversion to an ADU (if the necessary permit applications were denied, Heinmiller was required to identify an alternative method of compliance within 60 days) or to submit a demolition permit application for removal of the converted space. One year later, the County and Heinmiller executed a supplemental agreed compliance plan allowing Heinmiller to avoid the need for a shoreline substantial development permit and a conditional use permit if certain steps were taken. Mr. Durland, Heinmiller’s neighbor, filed an administrative appeal of the supplemental compliance plan 22 days after the execution of the supplemental compliance plan. The county planning director informed Durland that there was no administrative appeal process to challenge a compliance plan. Nevertheless, the County’s Hearing Examiner reviewed the appeal and dismissed it on the basis that it was filed one day late under LUPA. Durland then filed an appeal when Heinmiller applied for the after-the-fact permits for the ADU conversion. The Hearing Examiner determined that many of Durland’s arguments regarding the permits were precluded because they related to the compliance plans, which were subject to LUPA, and were time-barred. The trial court likewise concluded that the compliance plans were land use decisions under LUPA and that Durland’s challenges to the permits amounted to a collateral attack on the compliance plans.

**II. Applicable Law and Analysis.** The Court of Appeals reversed the Hearing Examiner and trial court’s rulings that the compliance agreements constituted “land use decisions” under LUPA subject to the 21-day statute of limitations. A “land use decision” is defined as a “final determination” by a local jurisdiction’s body or officer with the highest level of decision-making authority. In this case, the court determined that the compliance agreements were not “land use decisions” because they were not final determinations that left nothing open to further dispute.<sup>1</sup>

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<sup>1</sup> Previous case law has determined that a land use decision is “final” for purposes of LUPA when it “leaves nothing open to further dispute” and “sets at rest [the] cause of action between the parties.” In contrast, an interlocutory or

Because the compliance plans at issue offered Heinmiller options with respect to procuring after-the-fact permits for the ADU conversion or applying for demolition permits to remove the ADU structure, the plans did not determine the course of action between Heinmiller and the County with certainty. Thus, the neighbor had nothing to appeal at the time the compliance plans were executed. Demolition of the structure would have been satisfactory to Durland. Furthermore, the court stated that the compliance plan did not leave “nothing open to further dispute” because the County and Heinmiller agreed to a supplemental compliance plan one year later, confirming that the initial plan was not a final determination of Heinmiller’s rights or obligations. The compliance plans also did not determine that any of the permits would be issued; they only stated that *if* the permits were obtained, the property would be brought into compliance.

**III. Conclusion.** This case stands for the proposition that most voluntary code compliance or correction agreements executed to resolve code violations will not be considered “land use decisions” under LUPA triggering a 21-day appeal period. Because many agreements will involve obtaining further permits to correct violations and may offer multiple courses of action for the violator to achieve compliance, the agreements themselves will not be considered final determinations. Consequently, if subsequent appeals are available for corrective actions taken pursuant to the agreements, the agreements themselves may be subject to attack. If you have any questions regarding land use decisions or voluntary code compliance agreements, please do not hesitate to contact your city attorney.