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No. 74039-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

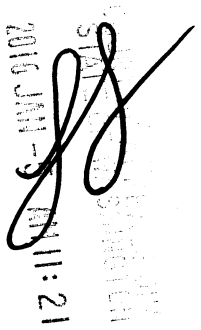
MICHAEL DURLAND, KATHLEEN FENNELL,
and DEER HARBOR BOATWORKS,

Appellants,

v.

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

Respondents.



APPELLANTS' OPENING BRIEF - CORRECTED

Dennis D. Reynolds
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
Counsel for Appellant

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I. INTRODUCTION

The San Juan County Hearing Examiner erroneously approved permits to allow – after the fact – conversion of an uninhabited barn into an Accessory Dwelling Unit. The barn is illegally within a 10-foot setback on the property line shared with Appellants Durland.[1] No law or facts justify granting the permits when the barn's location violates the setback both when it was built and now. The Decision's[2] upholding of the issuance of the permits conflicts with provisions of the San Juan County Code that prohibit issuance of a building permit or other development permit for any parcel of land that has been developed in violation of local regulations. *See* SJCC § 18.100.030; § 18.100.070.[3]

Further, the permits do not comply with the Shoreline Management Act ("SMA"), chapter 90.58 RCW and violate the SMA and SJCC § 18.50.330.E.1, which prohibit accessory structures that are not water-dependent from being located seaward of the most landward extent of the residence. This Court should reverse the County and enter an order nullifying the after-the-fact applications approved by the County and ordering the illegal improvements taken down.

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[1] Appellants include Michael Durland, his partner Kathleen Fennell, and his industrial business Deer Harbor Boatworks (hereafter "Durland"), which business is conducted on the property adjacent to the property of the permit applicants Respondents Wesley Heinmiller and Alan Stameisen (hereafter "Heinmiller").

[2] ***CP*** 31-46 (Examiner's Decision dated March 15, 2015) (Appendix **A-1**).

[3] The local ordinances cited herein are attached hereto as Appendix **A-2**.

This Court has already considered this dispute in *Durland v. San Juan County*, 174 Wn. App. 1, 6, 298 P.3d 757 (2012) (*Durland I*). The Court reversed the grant of permits, holding that, in relevant part, the appeal of the permits was not barred by failure to appeal compliance plans entered by Heinmiller and the County; the Court held these compliance plans were not "land use decisions" under the Land Use Procedures Act ("LUPA"), chapter 36.70C RCW. 174 Wn. App. at 12-19. The Court affirmed the Superior Court's award of fees to Durland because it had invalidated the ADU permit, *id.* at 25-26, and remanded for consideration the substance of Durland's LUPA petition challenges regarding the permits. *Id.* at 19, 26 ("We remand to the hearing examiner for consideration of the issues previously determined to be barred along with any other issues yet to be determined.").

Whether the setback applied to the property in 1981 was not within the issues remanded. The Examiner recognized this fact in his March 15, 2015 decision (the "Decision") at page 1:

> The July 23, 2010 decision determined the legal determinations made in the compliance plans on the side-yard setback could not be revisited in the appeal of the building and other permits.

CP 31.

Yet, that is exactly what the Examiner did on remand. Although the compliance plans recognized the 10-foot setback and the legal requirement of the barn to comply with the setback, the Examiner reversed course and took it upon himself to revisit such legal determination. First, he refused to consider supplemental evidence offered by the County showing a Building Permit was issued in 1981 requiring a 10-foot setback for the barn. ***CP*** 950-952 (County's response to Applicant's motion to supplement).[4] Second, he decided, contrary to substantial evidence in the record and years of understanding between all parties, that Resolution No. 58-1977 "excused" the setback imposed by the 1981 building permit and applicable regulations, including Resolution No. 224-1975.[5] ***CP*** 40-41 (Decision, pp.9-10). This is an erroneous interpretation of that resolution. Third, the Examiner missed that the County has interpreted Resolution No. 58-1977 as applying a 10 -foot setback to the very structure in question. *See, infra*, p.8, p.23.

The Examiner's ruling also represents an erroneous application of law to the facts because the County already had applied the setback to the applicants' property in 1981, a decision that never was appealed and may not be collaterally attacked now. Even the Examiner recognized in Conclusion of Law 11 (***CP*** 42-43) (Decision, pp.11-12) that the building

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[4] *See* N.10, *infra.*

[5] The two resolutions are attached hereto as Appendix **A-3**.

permit issuance is a final land use decision that cannot now be challenged. Finally, Heinmiller never disputed that the setback applied when the barn was constructed in 1981, an issue that they have conceded as demonstrated in *Durland I*: "San Juan County Resolution No. 224-1975, in effect at the time, required the barn to be at least 10 feet away from the property line." *Durland I*, 174 Wn. App. at 1. For these reasons, approval of the after-the-fact permits is reversible error.

II. ASSIGNMENTS OF ERROR

1. The Hearing Examiner erred when he issued the Decision and granted the permits.

2. The Examiner erred when he refused to consider supplemental evidence submitted by San Juan County showing a building permit was issued to Heinmiller predecessor-in-interest which, along with other documents in the record, show a 10- foot setback for the Barn was imposed.

3. The Superior Court erred when it approved the Decision by the Hearing Examiner and denied the appeal in its Order Dismissing LUPA Appeal, signed by the Honorable Deborra E. Garrett on September 14, 2015 and filed on September 17, 2015.

4. Additional assignment of error is made to the following ostensible findings of fact (set forth as conclusions of law) in the Decision:

- The barn was legally constructed in 1981. (Conclusions of Law 4, 7, 9 and 13)
- The barn is a valid, nonconforming structure. (Conclusions of Law 4, 8, 12 and 14)
- The barn is exempt from shoreline permitting requirements. (Conclusions of Law 14, 15 and 17)

- The record is unclear whether a building permit issued for the Barn in 1981. (Conclusion of Law 11)

- It is incorrect that the Barn is subject to the 10-foot side yard setback. (Conclusions of Law 4 and 13)

- Whether the Applicant actually acquired the permit is irrelevant since no 10-foot setback applied. (Conclusion of Law 4)

- Without intentional misrepresentation in building plans the doctrine of finality does not apply. (Conclusion of Law 11)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Whether after-the-fact permits should be denied because they would authorize an uninhabited structure illegally built within a side-yard setback: (1) in violation of a building permit issued in 1981 and (2) existing County regulations that prohibit an accessory dwelling unit within the 10-foot setback? (**Assignments of Error 1, 3 and 4**). This includes the following sub-issues:

1. Whether the Decision exceeds the scope of the remand by addressing whether the 10' setback applied to the parcel in 1981 because the Examiner ruled that the legal determinations in the compliance plans on the side-yard setback could not be revisited, Heinmiller failed to contest this issue and *Durland I* recognized the setback applied?

2. Whether the 10-foot setback requirement for "Class J" structures pursuant to Resolution No. 224-1975 applies as a matter of law notwithstanding Res. 58-1977, which contains no provisions that alter the side-yard setback requirement for "Class J' structures such as the barn?

3. Whether, notwithstanding any other regulation, SJCC § 18.100.030 and § 18.100.070 prohibit issuance of the permits because the parcel was developed in violation of local regulations?

4. Whether the Examiner erred when he permitted a collateral attack on the 1981 permit conditions by reconsidering whether the 10' setback applied to the parcel when the County applied the setback in the 1981 building permit and the owner failed to appeal that permit requirement?

B. Whether after-the-fact permits issued Heinmiller should be vacated and ruled null and void because they authorize a structure within the shoreline environment contrary to land use requirements set out in the Shoreline Management Act and local shoreline master program requirements? (**Assignments of Error 1, 3 and 4**).

C. Whether substantial evidence supports any implied finding of the Examiner that (1) a building permit was not issued for the barn, and/or (2) compliance with the 10-foot setback requirement was unnecessary and/or voluntary? (**Assignments of Error 1, 3 and 4**).

D. Presuming the evidence is outcome-determinative, which Appellants do not concede, whether this Court should consider the County's supplemental evidence excluded by the Examiner? (**Assignment of Error 2**)

E. Whether this Court should issue a ruling vacating the Heinmiller permits and holding them null and void without a second remand? (**Assignments of Error 1, 3 and 4**).

IV. STATEMENT OF THE CASE

This appeal concerns a dispute over a sideyard setback and a barn illegally built within that setback. The barn was then illegally converted from an uninhabited building to a dwelling unit. The County discovered Heinmiller's code violations and, as one would expect of a County charged with fairly enforcing its laws, took enforcement action against the Heinmiller for the unpermitted construction/conversion of the barn. Since then, the County has attempted an about-face to acquiesce in Heinmiller's

(and his predecessor's) disregard for the permit requirements and regulations of the County. This Court reviews the permits granted by the County when Heinmiller eventually sought to legitimize these violations.

A. Durland operates an industrial business adjacent to the shoreline property for which Heinmiller sought permits to authorize his conversion of a previously uninhabited barn within the property setback to a habitable ADU.

Appellants Michael Durland and Kathleen Fennell are domestic partners. Mr. Durland owns Deer Harbor Boatworks, an industrial and commercial boat storage operation and a boatyard business. ***CP*** 2. The Deer Harbor Boatworks property is adjacent to Heinmiller's property on the shoreline of Orcas Island, in San Juan County. ***CP*** 7. The Heinmiller property is residential. *Ibid.* The County tax records list Sunset Cove LLC, not Heinmiller, as the owner of the subject property. ***CP*** 3. Heinmiller/Stameisen are named as applicants for the applications at issue. *Ibid.* Respondent San Juan County is the decision-making authority that approved the after-the-fact building permits and excused shoreline permitting requirements for Heinmiller's conversion of an existing barn into an accessory dwelling unit. ***CP*** 2-3.

B. The Barn was constructed in the 1980's within a 10-foot property line setback.

Heinmillers' predecessor-in-interest William G. Smith in 1981 knowingly constructed a barn within a 10-foot property line setback on the

property line shared with Durland. (***CP*** 00150, 00274, 00275). This violated the Buildings and Construction Title of the San Juan County Code, which states: "No structure built pursuant to this article shall be located closer than 10 feet to any property line." SJCC § 15.04.620; County Resolution No. 224-1975.

The site plan issued for the non-habitable barn structure required compliance with the 10-foot property line setback and the site plan represented that the barn would be located at least 10 feet from the property line. (***CP*** 00285).[6] The County's building inspection report and related documents confirm the 10-foot setback requirement. (***CP*** 00282, 00284, 00285). Nonetheless, the barn was constructed 17 inches from the property line. The Barn is within shoreline jurisdiction. (***CP*** 00233).

Mr. Durland purchased his property in 1986. He discovered the setback violation during the permitting process for shoreline permits required for Mr. Durland's business. (***CP*** 00742-743).[7] At Durland's Shoreline Development Permit and Conditional Use Permit hearings in 1986/1987, the storage barn was discussed and considered a good buffer between the light industrial boatyard use on Durland's land and the residential use of Smith's property. (***CP*** 00744-748). Mr. Durland agreed to a setback buffer on his property (20 feet) that prohibited him from

[6] *See* Appendix **A-4**.
[7] Durland's shoreline approvals are in the Record (***CP*** 00923-926; 00927-930).

building any closer to the Barn, thereby establishing sensible buffers for the two properties and the different uses. (***CP*** 00233, 00234-243). In so doing, he relied on the fact that the structure would not be converted to any other use. The agreement did not "legalize" the nonconformity of the structure and, importantly, did not contemplate any future change of use.[8]

As this Court recognized in *Durland I*, Durland "did not ... want the barn to be used for residential purposes for fear of conflicts with the industrial use of his property." 174 Wn. App. at 7 n. 2. The agreement "established a common boundary line and, because the new line did not correct the barn's location with respect to setback requirements, created a 20-foot-wide "easement" (actually a restrictive covenant) on Durland's property that terminated upon the removal or destruction of the barn." *Id.* "Durland agreed to the restrictive covenant because he saw a benefit from the barn, which provided a buffer between his industrial property and any residential uses on the far side of the barn." *Id.*

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[8] The Examiner affirmatively ruled in Conclusion of Law 5 in the Decision that the agreement did not correct the setback violation and there has been no revision or amendment to the building permit approved in 1981. ***CP*** 41 (Decision, p.10). He concluded that a reduced setback (if one had been approved) should have been incorporated into a revised or amended building permit approval. There is no evidence of such approval in the record.

C. Heinmiller converted the barn to an ADU without permits and the County started an enforcement action to require code compliance but then approved after-the-fact permits.

Heinmiller purchased the Smith property in 1995. Heinmiller proceeded to convert the Barn into an approximately 1,000 square foot ADU without permits. (***CP*** 00149). The work included alterations to the exterior and interior of the Barn for use as an ADU, which work continued until stopped by a County Code Enforcement Officer in 2007. When the County learned of the violation, it issued a Notice of Correction in 2008. (***CP*** 00149). This resulted in an Agreed Compliance Plan between the County and Heinmiller dated April 25, 2008. (***CP*** 00176).

The 2008 Compliance Plan required Heinmiller to apply for after-the-fact building and change of use permits for the ADU conversion and related work. If the permits were issued, the County indicated it would not take further "compliance action." Thereafter, the County and the property owners, executed a Supplemental Agreed Compliance Plan dated April 28, 2009. (***CP*** 00180-181). Where the original Compliance Plan recognized that Heinmillers required a shoreline permit for the work, the Supplemental Agreed Compliance Plan concluded that shoreline permits were not necessary. (***CP*** 00180). The converted ADU is more than 16 feet in height and located waterward of the residence and is 33 feet from

the ordinary high water mark. The accessory structure is not water-dependent. The structures comprise more than 50% of the lot width.

The Compliance Plans did not promise that after-the-fact permits would be granted for the ADU conversion project. The County expressly addressed the possibility that the permits would be denied. In that event, the Compliance Plans required demolition of the unpermitted work or development of an alternative plan. (***CP*** 00217, 00221).

As contemplated by the Supplemental Agreed Compliance Plan, Heinmiller applied for an after-the-fact building permit, a change of use permit and an ADU permit, but did not seek either a shoreline permit or written exemption. The Appellants participated in the County's review of these applications and appealed their approval to the County Hearing Examiner in 2010. (***CP*** 00165-167).

On July 23, 2010, the County Hearing Examiner issued a decision ("Original Decision") (***CP*** 00138-161) denying Appellants' administrative appeal. In this ruling, he acknowledged the set-back violation, but ruled that it had been "corrected" by the Compliance Plan which could not be "collaterally attacked" because it had not been timely appealed. (***CP*** 00152-153). The Original Decision finds at page 13 that the Barn was constructed in violation of the sideyard setbacks required by Resolution No. 224-1975. (***CP*** 00152-153).

D. The Court of Appeals reversed the first approval of the permits and remanded.

Durland appealed the Original Decision to the Superior Court and then to the Washington State Court of Appeals, which reversed the decision as noted previously. *Durland I.* These proceedings established, among other things, that the San Juan County Code has required a 10-foot setback since 1981 when the barn was first built. *See Durland I,* 174 Wn. App. at 6, n. 1, *citing* Resolution No. 224-1975. *See also* SJC 58-1977.

The Court also ruled with respect to the 1986/1987 agreement allowing the barn to remain in its location that it was expressly contemplated that the barn would remain uninhabited, as follows:

> The agreement established a common boundary line and, because the new line did not correct the barn's location with respect to setback requirements, created a 20-foot-wide "easement" (actually a restrictive covenant) on Durland's property that terminated upon the removal or destruction of the barn. Durland agreed to the restrictive covenant because he saw a benefit from the barn, which provided a buffer between his industrial property and any residential uses on the far side of the barn. ***He did not, however, want the barn to be used for residential purposes for fear of conflicts with the industrial use of his property.***

Durland I, 174 Wn. App. at 7, n.2 (emphasis supplied). The Court's remand directed the Examiner to hold a new hearing on the basis that the

Compliance Plans were not determinative in the permit review and to address Durland's arguments that the County could not issue permits for the ADU conversion because the barn was an illegal structure due to setback violations when constructed. *Durland I*, 174 Wn. App. at 19, 26.

E. The issues before the Hearing Examiner on remand included whether the County authorized a departure from the required 10-foot property line setback.

The Hearing Examiner issued a pre-hearing ruling in which he stated that all issues in the original appeal were still "alive" with exception of the roof pitch of the barn. The November 5, 2014 Pre-Remand Hearing Order No. 1 presents the central question: whether the County authorized a departure from the 10-foot setback required by Resolution 224-1975? (***CP*** 00550-553). "All issues" expressly did not include the legal determinations made in the compliance plans on the side-yard setback. Decision at p.1. The Examiner ruled that such determinations could not be revisited in the appeal of the building and other permits. *Ibid.*

The Examiner held a hearing on November 12, 2014 and left the record until March 15, 2015 to allow the property owners time to present evidence on whether the County had allowed a "departure" from the setback. During this time, a County Plans Checker issued a "supplemental" Staff Report which argued that the County had been in

error in stating that a building permit had been issued for the barn.[9] This submittal also asserted for the first time that, when constructed, the barn was not required to comply with the 10-foot side-yard setback requirement based a new interpretation of County Code requirements in 1981.

The County disavowed the supplemental Staff Report via a motion filed by Sam Gibboney, the Director of Community Development and Planning, opposing the contents of the report because it is "factually inaccurate and states conclusions that are at odds with the building permit records held by San Juan County" and "the report does not represent the position of San Juan County and was an unauthorized submittal..." (***CP*** 00950). Mr. Gibboney's Motion states that, as this Court already recognized in *Durland I*, a building permit had in fact been issued for the barn and submitted additional exhibits to document the existence of a building permit for the barn. (***CP*** 00951). The Hearing Examiner refused to consider the evidence submitted by the County to refute the unauthorized supplemental Staff Report. (***CP*** 39, Decision, p.8). The submitted materials included:

- A 1981 payment receipt from William Smith for cost of the building permit issued for the Barn.

[9] The assertion that no building permit had been issued was apparently withdrawn, although the Decision does not make any clear finding or conclusion that a building permit was, or was not issued, despite substantial evidence in the record that a permit was issued to Mr. Smith. (***CP*** 00176, 00282-285, 00322)

- A hand written ledger documenting building permits issued in 1981, showing a building permit for the Barn issued to Bill Smith.

CP 00949-951, County's response to Applicant's motion to supplement.[10]

F. The Hearing Examiner again denied appellants' appeal and granted the permits to permit the barn's conversion to an ADU in the setback area.

The Hearing Examiner issued his decision on remand on March 15, 2015. The Decision correctly recognized that the Compliance Plan "did not excuse compliance with the ten-foot side yard setback requirement." (***CP*** 38, Decision, p.7, line 23) This should have led to denial of the permits. The record contains no evidence of any County decision directly or indirectly approving a setback variance or other "departure" from the requirement. *See also* ***CP*** 41 (Conclusion of Law 5). Nonetheless, Durland's appeal was rejected and the converted barn was allowed to remain within the 10-foot setback as an ADU.

Contrary to the Court of Appeals' ruling in *Durland* I, and ignoring the admissions of the County and the property owners (Smith and Heinmiller, respectively) for nearly 30 years concerning the legal

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[10] The record includes the County's response to Heinmiller's motion to supplement (***CP*** 00950-952) but not the attachments to the response. If the County fails to acknowledge its own records which show that a building permit was issued to Mr. Smith, Petitioners will file a motion to supplement to submit the records discarded by the Examiner and request their review. *See* Assignment of Error 2. Failure to allow a proper rebuttal violates due process. *See Rabon v. City of Seattle (Rabon II)*, 107 Wn. App. 734, 743-44, 34 P.3d 821 (2001); *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 522-23, 29 P.3d 689 (2001).

requirement of a 10-foot setback, the Hearings Examiner ruled that the barn structure is a valid nonconforming structure. (***CP*** 40-41, Decision, pp.9-10). The Examiner ruled that (1) no building permit was required for the barn in 1981; (2) the barn was exempt from side-yard setback requirements as a "Class J" occupancy structure in 1981; and (3) even though no residential structure is permitted within a 10-foot side-yard setback, the conversion of the barn to an ADU in this location is allowed. (***CP*** 42, 44, Decision, p.11, p.13) Regarding noncompliance with the Shoreline Management Act, the Examiner ruled that the ADU was exempt. (***CP*** 46, Decision, p.15)

G. LUPA Appeal

Appellants appealed the Decision to the Superior Court. ***CP*** 1-110. In a summary decision, the Court denied the LUPA appeal. ***CP*** 1527-28. The lower court was impressed that the structure had been in place for a substantial period of time, and thus, according to the superior court judge, under the doctrine of finality, the mere passage of time had made the barn a legal building. RP 6:11-24 (Oral Opinion, August 31, 2015). This timely appeal followed. ***CP*** 1529-34.

V. ARGUMENT

A principle of land use law is that once an illegal building, always an illegal building. The County applied the setback requirement to the

barn in 1981 and never waived or repealed it. Simply, the law of this case is that San Juan County imposed a 10-foot setback in 1981 for an unoccupied barn owned and constructed by William G. Smith: "In 1981, the County issued a building permit for a storage barn to Smith. The permit approved a barn that was to be built ten feet from the property line shared with the Durland property. The barn was constructed that year."[11]

The Examiner had leave to consider a "departure" from the established setback, but found none, in either the (1) compliance plan, (2) the boundary line agreement, or (3) the uniform building code. There was no cross appeal of this ruling. Simply, the Examiner should have enforced all applicable regulations, including those that prohibit conversion of an illegal structure into a guest house and those required by the Shoreline Management Act. On *de novo* review of the legal rulings of the Examiner, this Court should reverse and direct denial of the permits.

Washington courts recognize that the purpose of setbacks is to primarily protect adjoining uses and the community as a whole. *Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 210, 884 P.2d 910 (1994) (ruling that reasonable setback requirements are an accepted land use tool and all property tends to benefit from their enforcement). As noted in McQuillan Municipal Corporations, section 25.138 (3d Ed 2010), setbacks "tend to

[11] *Durland I*, 174 Wn. App. at 6.

preserve public health, add to public safety from fire, and enhance the public welfare by improving living conditions and increasing the general prosperity of the neighborhood." In the land use context, the term "reasonable" is designed to provide flexibility to balance public and private interests. *See, e.g., Buechel, supra.*

Here, no valid legal or factual ground supports granting the permits where the barn was, and remains, in violation of the setback requirements, in violation of the 1981 permit, inconsistent with other County regulations and in violation of the Shoreline Management Act.

No variance or other "departure" from the setback requirement was granted by the County. Indeed, Heinmiller could not make the necessary showing for this Court of Appeals, because impacts on adjoining uses are one of the primary considerations when reviewing an application of a side-yard variance. *See, e.g.*, SJCC § 18.80.100.E.4 (requiring a showing, among others, that "[t]he granting of the variance will not be materially detrimental to the public welfare or injurious to the right of other property owners in the vicinity."). Through the ruling, the Examiner has permitted Heinmiller to evade these standards.

A. Standard of Review

The role of this Court under LUPA is to correct wrongful decision-making. Durland pursues relief under the following LUPA standards of

review:

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;

RCW 36.70C.130(1). Standard (b) presents a question of law, which appellate courts review de novo. *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009); *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 426-27, 256 P.3d 295 (2011). The County cannot claim "expertise" in determining legal questions, such as its authority or jurisdiction to take action, procedural issues, or a determination of pure issues of law where a statute, resolution or code provision is unambiguous. *See id.* Moreover, in this case the County, via Ms. Gibboney, contested the construction of the regulations offered in the supplemental Staff Report and adopted by the Examiner. The Examiner failed to accord deference to the County's official interpretation. Any deference accorded by this Court should be to the County's rebuttal of the unauthorized supplemental Staff Report.

Subsection (c) presents a factual question that this Court reviews for substantial evidence. *Cingular Wireless LLC v. Thurston County*, 131

Wn. App. 756, 768, 129 P.3d 300 (2006). Substantial evidence is "evidence that would persuade a fair-minded person of the truth of the statement asserted." *Id.*

Under subsection (d), this Court determines whether the application of the law to the facts was clearly erroneous. A finding is clearly erroneous if, even though there is some evidence to support it, this Court is left with a definite and firm conviction that a mistake has been committed after looking at the entire record of evidence. *Id.*; *see also*, *Skagit County v. Dept. of Ecology*, 93 Wn.2d 742, 748, 613 P.2d 115 (1980).

Courts do not defer to an interpretation which conflicts with the language of the law. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Resolution No. 58-77 unambiguously supports Durland's argument that the setback applies to this parcel. This Court also must recognize the Department of Planning's long-standing interpretation that a 10-foot setback applies to agricultural buildings and to this barn. *Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 890, 154 P.3d 891(2007) (agency was estopped from contradicting long-standing policy and practice and was bound by its prior practice which established precedent); *see also Bosteder v. City of Renton*, 155 Wn.2d 18, 39,117 P.3d 316 (2005).

It is ultimately for the court to determine the purpose and meaning of the law. *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981); *Waste Mgmt. of Seattle*, 123 Wn.2d at 627; *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325-26, 646 P.2d 113 (1982). There is no deference to the Examiner's erroneous legal rulings whether the side-yard setback requirements applied to the barn. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); *City of University Place v. McGuire,* 102 Wn. App. 658, 667, 9 P.3d 918 (2000); *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 813-14, 828 P.2d 549 (1992).

B. Because the barn failed to comply with a 10-foot property line setback, the Examiner erroneously approved the permits to allow conversion of the illegally built barn to an ADU.

1. The Examiner's ruling exceeds the scope of the remand.

The Court should reverse because the Examiner exceeded the scope of the remand. Heinmiller never disputed that in 1981 the 10' setback applied to his property and the setback is the law of the case, as noted above. Indeed, that the 10-foot setback applied to their property was the basis of Heinmiller's compliance agreements with the County. When these proceedings began, Heinmiller never disputed the requirement. Because this was not disputed, the Court of Appeals recognized in *Durland I* that the 10-foot setback applied and that the permit "approved a

barn that was to be built 10 feet from the property line shared with the Durland property." 174 Wn. App. at 6, n.1. The appellate court's opinion determines the scope of the remand order. *E.g., State v. Kilgore*, 167 Wn.2d 28, 49, 216 P.3d 393 (2009) (Sanders, J., dissenting) (citing *United States v. Kendall*, 475 F.3d 961, 965 (8th Cir. 2007). When the Court of Appeals remanded, the issue of whether the law required a setback was not contested and was not part of the remand. *See, e.g., Petition of Bugai*, 35 Wn. App. 761, 765-66, 669 P.2d 903 (1983) (rejecting petitioners' arguments on appeal that were beyond the scope of remand and noting that petitioner did not contest the scope of the order of remand); *State v. Weaver*, 171 Wn.2d 256, 260 n.2, 251 P.3d 876 (2011) (defendant attempted to raise new argument for the first time on remand, court declined to consider argument because it exceeded scope of remand).

The Decision itself at page 1 also expressly recognizes that "the legal determinations made in the compliance plans on the side-yard setback [cannot] be revisited in the appeal of the building and other permits." Such determinations include the ruling that a 10-foot sideyard setback was legally required when the barn was constructed in 1981. The Decision further recognizes that the boundary line agreement between Durland and Smith did not correct the setback violation. Conclusion of Law 5 (***CP*** 41, Decision, p.10). Indeed, any reduced setback would have

been required to have been incorporated into a revised or amended building permit approval. *Ibid.* There is no evidence in the record of such a decision. *See ibid.*

2. Substantial evidence supports issuance of a building permit and related plan approval documents imposing a 10-foot setback.

The record amply demonstrates that a building permit was issued and that such permit required compliance with the 10-foot setback (***CP*** 00176, Compliance Plan), (***CP*** 00282, Building Inspection Permit for Storage Barn), (***CP*** 00283, Site Plan), (***CP*** 00285, Building Plan, 1981), (***CP*** 00322, Barn Building Plans-approved by San Juan County, 10-15-81), (***CP*** 00950, R-22 San Juan County Response to Motion to Supplement). *See* the Building Inspection Report, Code Checklist, and stamped "Approved" Building Plan, with stamp stating: "All Structures shall be a minimum 10 feet from adjacent property lines. S.J. Co. 58-77." (Appendix A-4). For the Examiner to have ruled otherwise is unsupported by substantial evidence and is error.[12]

3. The 10-foot setback applied to the parcel and barn structure may not be collaterally attacked thirty years later.

The Examiner's "reconsideration" of whether the 10-foot setback applied to the parcel and the Barn impermissibly contradicts the 1981

[12] One need only review the text of Conclusion of Law No. 2 (***CP*** 39, Decision, p.8) to determine that the supplemental Staff Report clearly influenced the Examiner's decision.

permit. The doctrine of finality prevents revisiting the terms of that permit now. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002). As noted below, this is so even if a permit was issued in error. The building permit was issued and its requirements are determinative. The Examiner's Decision recognizes that building permits not timely challenged are "final" and cannot be collaterally attacked. Conclusion of Law 11 (***CP*** 42-43, Decision, pp.11-12). However, he failed to rule that a structure built in violation of applicable regulations and the contrary to the terms of final, unchallenged building permits cannot be considered legal. *See Rhod-A-Zalea*, 136 Wn.2d at 6; SJCC §§18.80.120(A) and 18.40.310(D).

The County has never rescinded the building permit as "improperly approved."[13] While finality applies to the terms and conditions of a land use permit that has been issued, there is no case law or any other authority which stands for the proposition that a structure built in violation of permit requirements becomes "legal" after the passage of any amount of time or only if building plans are "intentionally misrepresented." The Examiner and lower court erred in this regard.

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[13] The *Nykriem* court noted that, before LUPA, an improperly approved building permit could be rescinded by the agency that issued if an aggrieved property owner sought injunctive relief, because the applicant/property owner had no vested right in the approval. 146 Wn.2d at 922 n.60 (*Nolan v. Blackwell,* 123 Wash. 504, 212 P. 1048 (1923); *Eastlake Community Council v. Roanoke Assocs., Inc.,* 82 Wn.2d 475, 481, 513 P.2d 36 (1973); *Larsen v. Town of Colton,* 94 Wn. App. 383, 973 P.2d 1066 (1999). No property owner has ever challenged the building permit as improperly approved here, or that the requirement of the 10-foot setback in the permit is illegal or unsupported.

The doctrine of finality applies to land use permitting decisions, pre-dates the *Nykriem* line of cases and has been applied to writ of review (RCW Ch. 7.16) cases predating LUPA.[14] Washington courts have long been protective of permit rights which become final and "vested" as early as the time of a complete building permit application (before a permit is even issued). *See, e.g., Erickson and Assocs. v. McLerran,* 123 Wn.2d 864, 870, 872 P.2d 1090, 1093 (1994); *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684-685, 649 P.2d 103 (1982); *West Main Assocs. v. City of Bellevue,* 106 Wn.2d 47, 50, 720 P.2d 782, 785 (1986); *Peter Schroeder Architects v. City of Bellevue,* 83 Wn.App. 188, 920 P.2d 1216 (1996), *rev. denied,* 131 Wn.2d 1011 (1997); *see also Stempel v. Department of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973).

A previously unchallenged final land use decision cannot be collaterally attacked by any person – whether permittee, agency or other interested person. *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005). Even permits that are wrongfully issued by a governmental agency become "final" if not timely challenged, and thus

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[14] LUPA replaced the writ of review process for land use decisions. RCW 36.70C.030(1). Prior to enactment of LUPA, an aggrieved person could challenge a county's land use decision through a writ of certiorari. *See Harris v. Hornbaker,* 98 Wash.2d 650, 658 P.2d 1219 (1983); *Responsible Urban Growth Group v. City of Kent,* 123 Wash.2d 376, 868 P.2d 861 (1994); *Chaussee v. Snohomish County Council,* 38 Wash.App. 630, 689 P.2d 1084 (1984); *R/L Assocs., Inc. v. Klockars,* 52 Wash. App. 726, 763 P.2d 1244 (1988).

rendered valid. *Nykriem, supra*, 146 Wn.2d at 931-32; *Wenatchee Sportsman Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). As the Washington Supreme Court recognized:

> if this court allows local government to rescind a previous land use approval without concern of finality, ***innocent property owners relying on a county's land use decision will be subject to change in policy whenever a new County Planning Director disagrees with a decision of the predecessor director***. [Amicus curiae] also assert that land use decisions from this court emphasize the need for property owners to rely on an agency's determinations with reasonable certainty.

Nykriem, 146 Wn.2d at 933 (footnotes omitted) (emphasis added).

This is precisely what happened here – Durland (an innocent property owner) relied on the building permit decision that has for decades been recognized as requiring compliance with a 10-foot setback. The parties all agreed this is the case, as demonstrated by the 2008 and 2009 compliance plans, and as set forth by this Court in its decision in *Durland I*. The County has never officially (directly or indirectly) taken the position that the building permit was issued illegally and no one has ever challenged the setback requirement. The Examiner's decision is based on his reliance on an unauthorized report that is not the position of the County Planning Department. The Examiner did not (and had no

authority to) rescind the building permit that was issued. The permit stands and with it the setback requirement.

Even if the barn was incorrectly subjected to building permit requirements and the setback, no party has ever appealed or otherwise challenged the permit. The Decision impermissibly permits a collateral attack on the building permit requirements and improperly excuses the property owner's failure to comply with such requirement when the structure was built in 1981.

4. The Examiner's interpretation of the setback requirements is contrary to law.

The Examiner's statutory construction of Res. 58-1977 is the cornerstone of his decision that the County withdrew setback requirements for "Class J" structures such that the barn could be considered nonconforming. Although there is no legal basis for the Examiner to even reach the question, for the reasons stated herein, pp.15-24, his construction was erroneous. Mr. Smith's project was subject to County zoning regulations in 1981 when it was constructed, which regulations were not modified by any provision of Res. 58-1977.

Under Washington law, courts "interpret local ordinances the same as statutes. An unambiguous ordinance will be applied by its plain meaning, while only ambiguous ordinances will be construed." *Sleasman*

v. City of Lacey, 159 Wn.2d 639, 151 P.3d 990, (2007) (internal citations omitted); *City of Gig Harbor v. North Pacific Design, Inc.*, 149 Wn. App. 159, 167, 201 P.3d 1096 (2009), *rev. denied*, 166 Wn.2d 1037. Courts assess the plain meaning of a statutory enactment "viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Burns v. City of Seattle,* 161 Wn.2d 129, 140, 164 P.3d 475 (2007). The subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another are also considered. *Id.* at 146.

Res. 58-1977 is a six-page document entitled "***A Resolution Amending Resolution 224-1975, Providing for Changes in Application, Administration and Enforcement of the State Building Code in San Juan County***." Not one sentence expressly or impliedly changes, deletes or modifies in any manner the land use performance requirement of side yard setbacks. Deletion of any performance requirements was not the purpose of the Resolution. As the court in *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 313-14, 686 P.2d 1073 (1984) ruled:

> In 1975, the San Juan County Board of Commissioners, having had no prior building code, adopted the State Building Code as the local building code. San Juan County Resolution No. 224-1975. ***After 2***

> ***years under the Code, the Commissioners determined that the county, which is composed of over 100 islands, did not have the resources to enforce all the provisions of the Code.*** The Commissioners also determined that "owner-built residences" constitute a distinct and separate class, and that "no legitimate governmental purpose is justified by the application of the [Building Code] to owner-built residences in view of the cost and consequences of such enforcement."

(Emphasis added).

Section 9.01 of Res. 58-1977, which applies to Class J structures such as the Barn, repeals only those provisions of Res. 224-1975 and the UBC that require persons to obtain a permit, pay a fee, or obtain an inspection because it is "unreasonable" to do so. As confirmed in *Graham, supra*, this was a cost-saving measure and does not address or delete any dimensional requirements – only UBC or building code requirements, not zoning requirements. Res. 58-1977 requires applicants to confirm they are aware of and will abide with setback requirements and gives Class J structure applicants the opportunity to have a building inspector also confirm compliance with regulations such as setbacks through a plans-check. *See* §§ 8.03 and 10 of Res. 58-1977.

The record shows the County's Department of Community Development in 1981 went to the trouble to print the 10-foot setback on

the County's "Building Inspection Permit" (***CP*** 00282) and manufacture a stamp stating that Resolution 58-1977 required a 10-foot setback from all property lines. The stamp which references the setback (***CP*** 00282) was shown on the Building Code Checklist (***CP*** 00284). As discovered in February 2015, the County has withheld information on the building permit for the Barn, including a hand written ledger noting the building permit was issued in 1981 and a copy of the payment receipt the County wrote to William Smith after he paid for the building permit for the Barn.

Appellants were denied the opportunity to respond to the unofficial report and the Examiner excluded the submission of Ms. Gibboney issued in response to the rogue Building Plans checker's report. Although the Examiner said he did not admit nor consider the "supplemental staff report," the challenged Examiner findings and conclusions mirror those in the disavowed report.

Although the requirement for a building permit and/or inspection may have removed under the terms of Resolution No. 58-1977 to relieve such property owners of fee-related burdens, the Resolution did not include any exemptions from dimensional requirements in Res. 224-1975. Section 8.03 of Res. 58-1977 confirms the setback requirement remained: "The application shall also contain a statement of the setback requirements and the applicant's agreement to comply therewith."

5. The San Juan County Code prohibits issuance of a building permit or other development permit for any parcel that has been developed in violation of local regulations, like here.

The Barn was illegally constructed in 1981 too close to the property line, *i.e.*, in violation of setback requirements and of the permit issued by the County. The County Code prohibits issuing permits for the modification or enlargement of illegal buildings. For this reason, the permit approval should not stand.

Pursuant to SJCC § 18.40.310, a structure cannot be a valid nonconforming structure where, as here, it was constructed in violation of applicable requirements. This provision reads:

> A nonconforming use, structure, site, or lot is ***one that did conform to the applicable codes which were in effect on the date of its creation***, but no longer complies because of subsequent changes in code requirements.

SJCC § 18.40.310 (emphasis added). The Examiner's ruling is in direct conflict with SJCC §18.40.310. Additionally, an illegal building can never be a "valid nonconforming use." *See Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998); SJCC §§18.80.120(A) and 18.40.310(D).

A residential structure would not have been permitted in that location in 1981, and a residential structure is not permitted today within

10 feet of any property line. *See* SJCC § 18.60.050, Table 6.2. A structure constructed in an illegal location is not, and cannot be considered to be, a conforming or even a nonconforming structure; it will always be an illegal structure, regardless of whether a "barn" or "ADU" is permitted under applicable zoning or in the applicable shoreline environment. SJCC § 18.40.310; SJCC § 18.60.050.

In reversing, this Court should recognize the broad public purpose of requiring buildings to be setback from other properties, something the Superior Court overlooked. 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). The Examiner's Decision undermines the stability and consistency of these precepts. It is also contrary to law.

C. The Hearing Examiner erroneously interpreted the SMA and local shoreline regulations to hold that the ADU is exempt from the requirement of a shoreline permit.

The Examiner made an erroneous interpretation of the law, or erred in applying the law to the facts, when he ruled that the converted

ADU was exempt from shoreline permitting requirements under the SMA, RCW Ch. 90.58, and the County's SMP. This justifies reversal.

There is no dispute that the Barn is within the shoreline environment as it is within 200 feet of the ordinary high water mark ("OHWM") and no dispute that the ADU conversion constitutes "development" as defined by SJCC §18.20.040. The factors that require a shoreline permit (or at the very least a shoreline exemption) are:

> (1) the converted structure remains over 16 feet in height and is too tall for a guesthouse in the shoreline because it does not meet the normal appurtenance definition in SJCC § 18.50.300.E.2.a;
>
> (2) an ADU is not a water-dependent use and the structure is an accessory building located seaward of the most landward corner of the residence, contrary to SJCC § 18.50.330.E.1;
>
> (3) the structure is too close to the top of the bank. The closest corner of the barn to the top of the ban is about 33 feet from the OHWM and the Code requires a 50-foot setback from the OHWM, SJCC § 18.50.330.D.2;
>
> (4) the structures on the subject property comprise at least 118 feet of the shoreline frontage of 230 feet, which is more than 50% of the width of the parcel, contrary to SJCC § 18.50.330.B.13; and
>
> (4) substantial evidence in the record shows the structure has been used for commercial purposes, such that the ADU is not exempt from shoreline permit requirements pursuant to SJCC § 18.50.330.E and SJCC § 18.50.020.G.

As correctly set forth in the 2008 Compliance Plan, the fact that the converted Barn is not a normal appurtenance to the residential use

(primarily due to its size and dimensions) means that both shoreline substantial development permit and shoreline conditional use permits are required. SJCC § 18.50.330.E.3 and E.4. Considering the fact that the structure is located within the required shoreline setback and comprise over 50% of shoreline coverage, it is questionable whether the Heinmillers would be able to obtain such permits under the SMP standards.

A shoreline approval is not a mere formality. The courts have construed the Shoreline Management Act for waters of statewide significance (such as the Straits of Juan de Fuca) as recognizing statewide interests over local and requiring preservation and protection of the natural character of the shoreline. *See Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39-40, 202 P.3d 334 (2009). The SMA calls for "coordinated planning ... recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020; *Nisqually Delta Ass'n v. City of DuPont*, 103 Wash.2d 720, 726, 696 P.2d 1222 (1985). Without compliance with permit requirements, the goals and objectives of the SMA, including the public's general rights and personal property rights protected by shoreline permit review processes are severely compromised.

An owner's failure to obtain a permit deprives the surrounding property owners the opportunity to participate in the public process

associated with permitting to ensure that any potential impacts of the proposal are mitigated or avoided.

> The permit application process provides several steps in an effort to assure the "coordinated planning . . . necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest," another stated policy of the SMA. RCW 90.58.020.

Department of Ecology v. City of Spokane Valley, 167 Wn. App. 952, 275 P.3d 367 (2012); *See* RCW 90.58.020.

Not only must the permit applicant seeking a shoreline substantial development permit demonstrate that its proposal is consistent with the local master program and the SMA, but public input into that determination is provided through (1) public notice of the application, (2) an opportunity for members of the public to comment and receive notice of a final decision, and (3) the public's opportunity to participate in any hearing held on an application and to appeal the permit decision to the shorelines hearings board before construction may proceed. *City of Spokane Valley, supra* (citing RCW 90.58.140(4), (7); RCW 90.58.180(1), (2); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 205, 884 P.2d 910 (1994)).

In San Juan County, the SMP explicitly applies to "every person, individual, firm, partnership, association, organization, corporation, local or

state governmental agency, public or municipal corporation, or other nonfederal entity which develops, owns, leases, or administers lands, wetlands, or waters which fall under the jurisdiction of the Shoreline Management Act, except for the right of any person established by treaty to which the United States is a party." SJCC § 18.50.020.B. The SMP regulations implement the goals and policies of the County Comprehensive Plan Shoreline Element and "apply to all of the land and waters of San Juan County which fall under the jurisdiction of the Shoreline Management Act." SJCC § 18.50.020.A. The SMP applies to all "development" as defined by SJCC Chapter 18.20. SJCC § 18.50.020.D.

Notwithstanding the Supplemental Agreed Compliance Plan, which stated that shoreline permits were not "necessary" if the height of the barn was reduced to 16 feet and other actions were taken, the Heinmillers still are required by law to obtain a shoreline exemption decision (assuming, for argument's sake, they actually reduced the height of the barn to 16 feet) and must comply with the policies of the Shoreline Management Act and the policies and regulations of the SMP. SJCC § 18.50.020.F.1; SJCC § 18.50.040.A.

No shoreline permit was required for the Heinmiller's converted ADU that requires both a shoreline substantial development permit and shoreline conditional use permit. Not only Mr. Durland, but the public as a

whole, was deprived of the opportunity to participate in the decision-making that allowed the ADU to remain at its current dimensions, as a non-water dependent use within the required shoreline setback and covering more than 50% of the lot width. Even if such participation did not result in the permits being denied, at the very least, a decision on shoreline permit applications could have been conditioned to provide additional protections for the environment and surrounding properties. Compliance with the SMA and SMP is required for all developments and all properties within 200 feet of the OHWM. It is vital, not only for ensuring the health of the shoreline itself, but also to implement the County's own adopted Comprehensive Plan policies. The Examiner's decision to "exempt" the ADU cannot be sustained under the facts or the law.

The Examiner further erred by failing to rule that a formal shoreline exemption is required; the 2009 Amended Supplemental Compliance Plan does not constitute an exemption under the law. Shoreline exemptions are narrowly construed[15] (as stated in SJCC § 18.50.020.F.1) and not easily provided:

> In determining the intended scope of exemptions from the substantial development permitting process, we consider the explicit findings enacted as part of the SMA as an aid to construing its provisions. They include

[15] *See* WAC 173-27-040(1)(a).

> findings that "the shorelines of the state are among the most valuable and fragile of its natural resources" and "there is great concern throughout the state relating to their utilization, protection, restoration, and preservation." RCW 90.58.020. They include further findings that "ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the[ir] management and development" and that "unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.
>
> In construing the exemptions it is appropriate, too, to consider the difference that an exemption makes to utilization, protection, restoration, and preservation of the shoreline.

City of Spokane Valley, 167 Wn. App. at 962-63. The record does not show the County considered the SMA policies, or, for that matter, the impact on the utilization, protection, restoration and preservation of the shoreline when it summarily stated in 2009 that no shoreline permits were required for the converted ADU. As discussed above, such a determination is contrary to law and not supported by substantial evidence in the record. It was error for the Examiner and the Superior Court to ignore important, state-wide shoreline protection goals and policies in upholding the issuance of after-the-fact permits for the ADU without a demonstration of SMA compliance.

D. This Court must rule on the legality of the County's decision without further remand.

Under the circumstances of this case, the County is not entitled to a remand to further attempt to justify its decision to allow conversion of an illegally constructed structure to a new ADU use. *See, e.g., Levine v. Jefferson County*, 116 Wn.2d 575, 582, 807 P.2d 363 (1991) (noting that there is no citation in the record to any identifiable agency policy upon which land use restrictions were based and no indication that the County actually considered any such policies and stating, "The County, at this late date, is not entitled to a remand to identify these policies"). The *Levine* court upheld the Court of Appeals' decision that ordered the building permit to be issued without remanding to the Board of County Commissioners, ruling that, "the County created a thoroughly inadequate record, devoid of any agency findings of facts or citations to any policies to support the attachment of the restrictions." 116 Wn.2d at 579.

Here, too, this Court should rule on the legality of the County's decision-making and order that the after-the-fact permits may not be issued. Neither the law nor substantial evidence in the record supports the County's decision that the barn was excused from setback requirements such that it could be considered "non-conforming," under the Code and subject to a change of use. The Court should not remand to the County for

any further decision-making as per *Levine, supra.* Given that the record is devoid of any evidence the County: (1) issued a variance or otherwise excused setback requirements, or (2) rescinded the building permit, there can be no finding the barn is a legal structure. Moreover, considering the history of inconsistent, "moving target" positions the County has taken, as described herein, Mr. Durland should not be again subject to the whim of the Prosecuting Attorney's office's "interpretation" of law or evidence.

In 1981 the County correctly issued the permit for construction of the barn that required compliance with the 10-foot set-back. After Heinmiller's predecessor illegally ignored that requirement and after Heinmiller illegally converted the barn to an ADU without the necessary permits, the County also correctly began a code enforcement action.

Since that time, the County's inconsistent actions are suspect and demonstrate bias in favor of Heinmiller. The current Prosecuting Attorney has provided inconsistent and incorrect information. He first informed Mr. Durland that the Compliance Plan was neither a final land use decision nor a LUPA final decision, then argued before the Courts that the Compliance Plan was a final land use decision. The Prosecuting Attorney's Office provided an official statement to Mr. Durland that no land use decision "recognized" the barn as a non-conforming structure or changed it to a non-conforming structured (***CP*** 00276), but then the

Prosecutor argued before the Court that such a decision had been made in 1990 when the barn was supposedly determined to be a nonconforming structure.[16] Finally, at the hearing before the Examiner in 2010, the County admitted that a building permit was issued for the barn in 1981, only later to allow a building plans reviewer in 2015 to state that there was no building permit issued for the barn. The latter representation was disputed by the Department Head Sam Gibboney. Still, the Prosecuting Attorney argued to the Superior Court that the Examiner was correct in 2015 that there may not have been a building permit issued.

Finally, an e-mail from Department Head Rene Beliveau in 2010 stated that buildings must be located 10 feet from property lines and confirmed that the barn was subject to a 10-foot side yard setback. (AR 00203). Such statement completely supports the County position in 1981 that a setback was imposed, as established by a stamp which states the Resolution 58-1977 requires a 10-foot setback from all property lines. Once again, however, the Prosecuting Attorney's Office argued in the second appeal that they agreed with the Examiner that Resolution 58-1977 removed the requirement for side yard setbacks, contrary to substantial documentation in the record and the County's prior positions and enforcement action.

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[16] ***CP*** 00276 (email dated July 31, 2008 to Durland, "No land use decision 'recognized' the barn as a non-conforming structure or changed it to a non-conforming structure.").

The County's attorney has ignored 30 years of documented history and collaterally attacked the County Staff's own decision in 1986/1987 that the Barn was an illegally built structure in order to allow a habitable structure in a building where a habitable structure could not be located in 1981 or today. The County should not be given another chance to make a ruling on remand, given this history. *Levine, supra*, 116 Wn.2d at 582.

VI. CONCLUSION

For all the foregoing reasons, this Court should reverse the decision of the Superior Court, order the County's approval of after-the-fact permits vacated and any asserted permitting decision in favor of Heinmiller null and void, and direct the Heinmillers to restore the barn to the original structure permitted in 1981.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

By _____

Dennis D. Reynolds, WSBA #04762
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
E-mail: dennis@ddrlaw.com
Counsel for Appellants

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 (1) the original of the foregoing brief was timely filed by Priority U.S. Mail on December 7, 2015, pursuant to RAP 18.6(c), as follows:

Washington State Court of Appeals, Division I
600 Union Street
One Union Square
Seattle, WA 98101-1176
By Priority U.S. Mail

I further certify that I caused a true and correct copy of the foregoing brief 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 and U.S. Mail*

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 and U.S. Mail*

[*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 4th day of January, 2016.

Christy Reynolds
Christy A. Reynolds
Legal Assistant

APPENDIX A-1

SAN JUAN COUNTY
HEARING EXAMINER

ADMINISTRATIVE APPEAL – ON REMAND

Appellants:	Michael Durland, Kathleen Fennell, Deer Harbor Boatworks
Appellant Attorney:	Dennis Reynolds 200 Winslow Way W. Suite 380 Bainbridge Island, WA 98110
Applicant/Property Owner:	Wes Heinmiller and Alan Stameisen
Applicant Attorney:	Mimi Wagner 425 B. Caines St. Friday Harbor, WA 98250
File No.:	PAPL00-09-0004
Request:	Appeal of Building Permit, ADU and Change of Use
Parcel No:	260724011
Location:	117 Legend Lane, Deer Harbor, Orcas Island
Comprehensive Plan Designation:	Deer Harbor Hamlet Residential
Shoreline Designation:	Rural
Hearing:	None.
Decision:	Appeal denied on all counts, provided that revisions to interior living space are made and applicant submits ADU certificate required by SJCC 18.50.020(G).

BEFORE THE HEARING EXAMINER FOR SAN JUAN COUNTY

RE: Michael Durland, Kathleen Fennell; and Deer Harbor Boatworks Administrative Appeal PAPL00-09-0004	APPEAL OF BUILDING, CHANGE OF USE AND ACCESSORY DWELLING UNIT PERMIT -- DECISION ON REMAND

Summary

The appellants appeal the after-the-fact issuance of a building, accessory dwelling unit ("ADU") and change of use permit issued in 2009 for the partial conversion of a barn structure into an accessory dwelling unit. The appeal is denied. The permits were validly issued, with the proviso that interior living space must be reduced as proposed by the applicant during remand proceedings.

The original hearing examiner final decision on the above-captioned appeal was issued on July 23, 2010. This decision results from a remand by the Washington State Court of Appeals. The primary contention of the appellants in the original hearing in 2010 was that building permits could not issue for the ADU conversion because the building it was located in violated a side yard setback requirement when it was initially constructed in 1981. A code compliance plan was issued for the conversion that required the permits subject to the administrative appeal. The compliance plan also essentially recognized that the side yard violation had been corrected by a boundary line agreement. The July 23, 2010 hearing examiner decision determined that the legal determinations made in the compliance plans on the side yard setback could not be revisited in the appeal of the building and other permits. This decision was ultimately remanded back for further proceedings by *Durland v. San Juan County*, 174 Wn. App. 1 (2012). The purpose of the remand was to integrate two holdings of the Court of Appeals into the final examiner decision: (1) code compliance plans are not final land use decisions and, therefore, the legal determinations made in those plans are not determinative in building permit review as determined in the 2010 examiner decision; and (2)

County Code maximum area limitations on the interior living space of accessory dwelling units include storage areas that are less than five feet in height contrary to the determination made otherwise in the 2010 examiner decision.

On remand it is determined that there was no setback violation when the subject building was constructed in 1981. A 1973 County regulation exempted all Class J structures, which included barns, from the County's building code ordinance, which included the ten foot side-yard setback. Since the barn was lawfully constructed in 1981, there is no question that it now qualifies as a valid nonconforming structure and that the permits issued in 2009 were all validly issued so long as the changes proposed in those permits complied with applicable law in 2009.

Under the Court of Appeals interpretation of maximum allowable living space for ADUs, the 2009 permits did exceed the maximum allowable space. The applicants remedied this noncompliance issue by reducing the amount of interior living space to the amount required under the Court of Appeals interpretation. This decision requires the amount to be reduced as proposed by the applicants as a condition of denying the appeals.

Exhibits

1. Letter of appeal
2. Compliance Plan
3. Supplemental Agreed Compliance Plan
4. 5/3/10 emails regarding scheduling
5. Weissinger Memo 5/3/10
6. Durland Notebook
   - 6-0 1990 Survey
   - 6-1 7/22/09 09APL006 Staff Report
   - 6-2 5/29/90 letter to John Thalacker
   - 6-3 Affidavit of Carla Rieg
   - 6-4 7/31/08 Email from Jon Cain to Michael Durland
   - 6-5 Photos looking west
   - 6-6 1995 Aerial Photo
   - 6-7 2007(?) Aerial Photo
   - 6-8 Building permit for garage
   - 6-9(a) Site plan
   - 6-9(b) Code checklist
   - 6-9(c) 1981 building plan
   - 6-10 1998 Building permit
   - 6-10(a) 1998 Modular permit application
   - 6-10(b) 1998 Building and mechanical permit
   - 6-10(c) 1998 Building permit, inspector copy
   - 6-10(d) 1998 Water availability certificate
   - 6-11 9/12/00 letter from Fay Chaffee

6-11(a) 2000 Building permit
6-11(b) 2000 Building permit application
6-11(c) 2000 Building permit – garage
6-11(d) 2000 Permit fee worksheet
6-12(a) 2008 Building permit
6-12(b) 2009 Building permit
6-12(c) 2009 Permit receipt
6-13 IRC R305 (2006)
6-14 IRC Section 1009 (2006)
6-15 Innovations for Living – Cathedral Ceiling insulation specifications
6-16 SJCC 18.40.240
6-17 SJCC 18.20.120 living area definition
6-18 Ordinance No. 26-2007
6-19 Eastsound Subarea Plan roof standards
6-20 6/8/09 Letter from Ron Hendrickson
6-21 Site plan for Heinmiller modular home permit application
6-22 Site plan for change of use permit
6-23 A-4, building plans for change of use permit dated 9/23/09

7. Email from Rosanna O'Donnell to Lee McEnery, 10/08/07
8. Aerial photo obtained by Heinmiller when home was purchased in 1995 (unknown date, but taken after 1981)
9. Photograph of deck and persons working on ADU (taken in late 1990's)
10. Photograph of inside of ADU (taken in late 1990's)
11. Photograph of kitchen and bathroom (taken in late 1990's)
12. Photograph of exterior of boat barn and adjoining Durland property
13. Photograph of exterior of boat barn (taken in late 1990's)
14. Photograph of boundary between Durland and Heinmiller properties
15. Photograph of boundary between Durland and Heinmiller properties
16. Photograph from boat launch ramp of ADU
17. Texmo building plans dated 10/8/81
18. ADU floor area plans
19. Cross Section of ADU
20. Gable Roof diagram
21. Shed Roof diagram
22. Hip Roof diagram
23. Site plan prepared by Bonnie Ward
24. SJ Resolution 224-1975
25. 6/18/08 Email from Renee Belaveau
26. SJ Resolution 58-1977

Reconsideration Exhibits:

R1 Ex. 18 with revisions proposed by applicant to comply with Court of Appeals

ruling on floor space requirements. Also included are building official handwritten calculations on square feet using Ex. 18.

R2 9/25/14 Applicant Motion for Prehearing Conference and Order.

R3 10/29/14 Staff Report and attachments excluding Attachment 4 e-mail from Jon Cain to Rene Beliveau, Attachment 5 email from Jon Cain to Rene Beliveau, attachment 6 letter from Rene Beliveau to Wes Heinmiller and attachment 10.

R4 10/30/14 Appellant Prehearing Brief excluding attachments A-1 through A-4 as well as an references to those attachments in the brief.

R5 10/30/14 Applicant Prehearing brief including attachments.

R6 11/3/14 Applicant Response to Appellant 10/30/14 prehearing brief

R7 11/3/14 Appellant Response to Applicant Prehearing Brief excluding attachments A-1 and A-2 and any references to those attachments in the brief

R8 11/4/14 Appellant Amended Response to Applicant Prehearing Brief excluding attachments A-1 and -2 and any references to those attachments in the brief.

R9 11/5/14 Appellant Reply re 10/30/14 Appellant Prehearing Brief.

R10 11/5/14 Applicant Reply Brief re 10/30/14 Applicant Prehearing Brief

R11 11/5/14 Prehearing Order I

R12 11/7/14 Applicant Brief Regarding County Deviation from Building Code

R13 11/10/14 Amended Staff Report to Hearing Examiner

R14 11/10/14 Appellant Brief re Setback Variance Issue

R15 1981 San Juan County Comprehensive Plan

R16 1976 San Juan County Shoreline Master Program

R17 Transcript of Original Examiner Appeal Hearing (commencing May 6, 2010)

R18 6/10/87 Board of Adjustment Findings and Decision, 18-SJ-86 and 15-CU-86

R19 9/10/86 Board of Adjustment Findings and Decision, 18-SJ-86 and 15-CU-86

R20 1/29/15 Applicant Motion to Supplement with P. 7 revision submitted 2/2/15 excluding references to Geniuch supplemental report

R21 2/5/15 Appellant Opposition to Motion to Supplement excluding declaration and references to declaration.

R22 2/6/15 San Juan County Response to Motion to Supplement excluding attachments and references to attachments

R23 All email correspondence between the parties and the hearing examiner regarding this appeal, excluding attachments (which are admitted separately when found admissible).

R24 11/7/14 Staff Report from John Geniuch

R25 2/12/15 Applicant Reply re New Evidence excluding references to attachments to 2/6/16 County Response

Findings of Fact

Procedural:

1. Appellants. The appellants are Michael Durland, Kathleen Fennell; and Deer Harbor Boatworks, collectively referenced as "appellant".

2. Property Owners. Wes Heinmiller and Alan Stameisen.

3. Hearing. The Examiner held a hearing on the appeal on May 6, 2010, in the San Juan County Council meeting chambers in Friday Harbor. The record was left open through May 12, 2010, for any prior Hearing Examiner decisions on living space. The applicant had until May 17, 2010 to respond. The parties subsequently requested that the Examiner not issue a decision pending an attempt at resolving the appeal. On June 17, 2010, they advised that they had not been able to reach agreement and requested the Examiner to issue a decision. The examiner decision resulting from the 2010 hearing was subsequently appealed to the Washington State Court of Appeals. The Court of Appeals remanded the examiner decision for "further proceedings". Durland v. San Juan County, 174 Wn. App. 1, 26 (2012).

A prehearing conference for the remand hearing was held on October 15, 2014 at 1:00 pm by phone conference. A closed record hearing on the remand was held on November 12, 2015. The record was left open in order to provide the applicant an opportunity to investigate potential new evidence regarding a 1987 variance decision referenced by the appellant that may have recognized the boundary line agreement between referenced in the compliance plans as substituting for the ten foot side yard requirement. The applicants were given until January 30, 2015 to investigate this evidence because the county records were stored in another state and would take several weeks to retrieve. In the meantime the San Juan County building official submitted a supplemental staff report asserting the building department had erroneously concluded that a building permit had been issued for the barn in 1981 and that in fact no permit was ever issued. Instead of requesting for admission of evidence regarding he 1987 variance decision, on January 29, 2015 the applicant made a motion to supplement the record with the building official's supplemental report. The parties then provided comment on the exhibit list for the decision. Email correspondence between the parties regarding remand issues ended on March 15, 2015, which is considered the close of the closed record appeal hearing.

Substantive:

4. Permitting History. The appeal concerns the conversion of a barn into an ADU. The barn was built in 1981. The building plans for the barn structure depicted the barn as ten feet from the side property line shared with the Durland property. In 1990 the Heinmiller and Durland properties was surveyed and it was discovered that the barn was only 1.4 feet from the side property line. As a result, the adjoining property owners executed a "Boundary Line Agreement and Easement", Ex. 5, attached Ex. F, hereinafter referred to as the "boundary line agreement". The boundary line agreement prevented the owner of the Durland property from building within

twenty feet of the barn.

Several years after the boundary line agreement was executed, a portion of the barn was converted to an ADU without any building permits. In 2008 the County was made aware that the ADU had been constructed without required building plans or compliance with shoreline regulations. The County issued a Notice of Correction in 2008. This resulted in an Agreed Compliance Plan dated April 25, 2008 ("Compliance Plan"). The Compliance Plan required the acquisition of shoreline permits. The Compliance Plan also recognized the boundary line agreement as bringing the barn into conformance with the ten-foot side-yard setback that applied to the barn when constructed in 1981. Subsequent to execution of the Compliance Plan, the County executed a Supplemental Agreed Compliance Plan, which concluded that shoreline permits were not necessary if the height of the barn was reduced to sixteen feet and other actions were taken. The Compliance Plan and Supplemental Agreed Compliance Plan were both signed by Mr. Heinmiller and Mr. Stameisen.

Mr. Durland filed an administrative appeal of the Supplemental Agreed Compliance Plan. The San Juan County Hearing Examiner dismissed the appeal as untimely. As required by the Compliance Plans, Heinmiller and Mr. Stameisen applied for an after-the-fact building permit, a change-of-use permit, and an ADU permit for the ADU constructed several years earlier. San Juan County approved the permits on November 23 and 24, 2009. Those permits are the subject of this appeal.

5. Appeal History and Basis. The Appellants filed the subject appeal on December 11, 2009. The appeal challenges the validity of the permits identified as issued in November 23 and 24, 2009. The Appellants assert that the permits are invalid because the barn structure fails to comply with numerous zoning and building code requirements. Each of the grounds of appeal are quoted below in italics and assessed in corresponding Conclusions of Law. Mr. Durland testified that he is injured by the code violations because the ADU violates side-yard setback requirements and is too close to the boat manufacturing activities on his property. He believes that the occupants of the ADU will complain about his activities because of their proximity to them.

6. Pertinent Characteristics of ADU and barn. As depicted in R1, the floor area for all habitable portions of the ADU portion of the barn is less than 1,000 square feet. In 1981 the barn did not include any firewalls. The barn was constructed 1.4 feet from the sideyard boundary line shared with Mr. Durland.

Conclusions of Law

Procedural:

1. Authority of Hearing Examiner. Appeals of building permits are reviewed by the Hearing Examiner, after conducting an open-record public hearing, pursuant to SJCC18.80.140(B)(11).

2. Motions to Supplement the Record Denied. Both the applicant and appellant requested an opportunity to supplement the record with additional evidence. The appellant's request was denied during the closed record appeal and the appellant's request (made in Ex. R 20) is denied by this Conclusion of Law.

Denial of the appellant's request for supplementation was already explained during the closed record hearing, but the grounds for that denial bear repeating to prevent any misunderstanding. The parties were not deprived of any opportunity to present evidence as a result of the Court of Appeals decision. The only pertinent change to the legal landscape of this case in the Court of Appeals ruling was that compliance plans are not final land use decisions subject to the finality principles of the *Nykreim* line of cases. When the parties made their case before the examiner in 2010 the law was unclear whether compliance plans were considered final land use decisions. Accordingly it was incumbent upon them to cover the contingency that the examiner or a reviewing court would ultimately conclude that a compliance plan was not a final land use decision. Indeed, the appellant's entire appeal was based upon the premise that a compliance plan was not a final land use decision. If the appellant didn't take that position, there would have been no point in filing the appeal. The fact that the examiner ruled that the compliance plans were final land use plans after the close of the record and that this decision was reversed after the close of the record had absolutely no bearing or influence on the evidence presented by the appellant before the close of the hearing.

During the closed record review the appellant argued that new evidence regarding the meaning and intent of the boundary line agreement should be admitted because the Court of Appeals decision made the significance of the boundary line agreement more of an issue without the finality of the compliance plan to immunize it from challenge. Of course, as previously identified, when the appellant argued its appeal in 2010 it had to premise its case on the position that the compliance plans were not final land use decisions. The appellants were fully aware at that time that both the County and the applicant were relying upon the boundary line agreement to justify the setback. The appellant at that time should have been prepared and actually did argue that the boundary line agreement did not excuse compliance with the ten foot side yard setback requirement. If there was additional evidence to support that position, the appellant at that time either didn't think it was significant enough to present or hadn't found it yet. The Court of Appeals decision did not in any way impair the opportunity for the appellant to fully litigate the issue in 2010.

It should also be noted that the evidence proffered by the appellant on the meaning and intent of the boundary line agreement was ultimately irrelevant anyway, as this decision rules in Conclusion of Law No. 6 that the boundary line agreement did not excuse compliance with any applicable side yard setback. The basis for Conclusion of Law No. 6 was that the agreed upon setback was never approved under a revised or amended building permit application. The intent of the agreement had no bearing on whether or not an amendment to the building permit was approved.

The appellant's request for supplementation was based upon a supplemental staff report issued by the San Juan County building official. In that report the building official asserted that the County had been in error in its statements that a building permit had been approved for the barn in 1981 and that the building permits referenced in the administrative record for the barn were actually a permit for a fire hall located on another parcel of property. After the appellant filed their motion to supplement the record with this document the County provided a responsive pleading documenting that the building official was in error in his supplemental report and that a building permit had in fact been issued for the barn in 1981. Given that the appellant's request for supplementation was solely based upon the discovery of new evidence five years after the close of the hearing, the conflicting evidence presented by the County on the issue and the case law and principles of finality that discourage re-opening records after they are a closed as demonstrated in the responsive briefing of the appellant, the appellant's motion for supplementation is denied.

Although the evidence in the supplemental staff report is denied, the building official did raise an important legal argument that has had some influence in this decision. As previously noted, the building official pointed out in his supplemental report that the applicant's barn was exempt from setback regulations when it was constructed in 1981. The building official based this interpretation upon San Juan County Resolutions No. 224-1974 and Resolution 58-1974. Although the examiner can likely take judicial notice of these adopted laws, they were admitted into the record in the initial hearing as Exhibits 24 and 26, respectively. Consequently, although the legal argument was not something the parties had an opportunity to address, the parties had access to the applicable law since the initial hearing and also had an opportunity to request argument once it was raised in the building official's supplemental report. It may have been useful to provide the parties with an opportunity to brief the building official's interpretation, but the remand had already been on-going for several months when the supplemental report was submitted. Ultimately, of course, the examiner could have come to the building official's interpretation on his own in reading through the exhibits after the record was closed, and at that point there would have been no obligation to give the parties an opportunity to brief the issue. It must be noted, however, that the conclusion of this decision that the barn was exempt from setback requirements was based solely upon the laws in effect when the barn was constructed and the findings of fact in this decision. None of the additional evidence in the building official's supplemental report had any bearing or influence on this conclusion.

Substantive:

3. Zoning Code and Shoreline Designation. The subject property is designated Deer Harbor Hamlet Residential in the San Juan County Comprehensive Plan and has a Shoreline Master Program designation of Rural.

4. Nonconforming Use Status of ADU. The barn structure is a valid nonconforming structure. It was lawfully constructed in 1981 and it was exempt from all side yard setback requirements at that time.

Throughout the initial hearing on this matter it was uncontested that the barn was subject to the ten foot side yard requirement of San Juan County Resolution No. 224—1975. As a result of this remand, it is determined that this understanding was incorrect. Resolution No. 58-1977 exempted Class J structures from the Resolution No. 224-1975. Consequently, the building was "legal" (at least so far as setback requirements apply) when it was constructed in 1981.

Section 9.01 of Resolution No. 58-1977 provided as follows:

> *The commissioners of San Juan County find that regulation of Class J structures, ...provided for in Resolution No. 224-1975 and the UBC unreasonably restricts the freedom of residents of San Juan County to construct such structures as accessory buildings to private residences or for agricultural purposes, that there is no pressing governmental interest served by the regulation of structures in this category, and that it is unreasonable to require any person or corporation constructing Class J structures, as defined in 1501 of the UBC to pay a permit fee as a condition of constructing such structures as accessory buildings to private residences or for agricultural purposes. No permit, fee or inspection shall be required for such structures.*

Section 9.02 of Resolution No. 58-1977 provided as follows:

> *Provisions of Resolution No. 224-1975 and the UBC which are inconsistent with this section are hereby repealed.*

Chapter 15 of the 1973 edition of the UBC, which applied at the time Resolution No. 224-1975 and was in effect through October 13, 1981, *see* San Juan County Resolution 179-1981, defined a Class J occupancy to include garages, carports, sheds and agricultural buildings[1]. The barn is an agricultural building that qualifies as a Class J occupancy under this definition. Consequently, the barn constructed in 1981 was subject to the exemption language of Section 9.01 of Resolution No. 58-1977.

The provisions quoted above clearly exempted the barn from building permit applications, inspections and fees in 1981. Resolution No. 58-1977 isn't quite as direct about stating that Class J structures are exempt from the setback requirements of Resolution No. 224-1975. In the absence of language directly exempting Class J structures from Resolution No. 224-1975, Section 9.01 and 9.02 could be read as only exempting Class J structures from permits, inspections and permit fees. However, Section No. 9.01 expressly states that Resolution No. 224-1975 unreasonably restricts the freedom of San Juan County residents in constructing Class J structures and that there is no

[1] The 1973 UBC and San Juan County Resolution 179-1981 were not admitted into the record as exhibits, but the examiner takes judicial notice of them.

governmental interest in regulating Class J structures. These sentiments would have little meaning if the only exemptions were from permit applications, investigations and fees. The County Council intended that none of the restrictions of Resolution No. 224-1975 applied to Class J structures. It is tempting to exclude fire protection restrictions from the exemption due to the governmental interest in preventing fire hazards, but the language of Sections 9.01 and 9.02 provides no basis for applying the exemption selectively.

Since there was no setback requirement when the barn was constructed in 1981 and no building permit was required, whether or not the applicant actually acquired a building permit is irrelevant. In either event, the barn was lawfully constructed. No building or setback standards applied at the time the barn was built and there is nothing in the record to remotely suggest that anything else about the barn was illegal.

5. Boundary Line Agreement. The boundary line agreement between Smith and the appellant, Ex. F to Ex. 5, would not correct a setback violation[2] of Resolution No. 224-1975. The applicant asserts that San Juan County used the boundary line agreement to approve a modification to the setback requirements of Resolution No. 224-1975 employing Section 106 of the 1973 UBC. Section 106 authorizes the building official to approve alternatives to building code requirements if the alternative provides for equivalent protection. There is no record of any approval made pursuant to Section 106. Indeed, the County and applicant were likely not even aware that the property was closer than 10 feet to the side property line until 1990 when a survey was made. *See* Finding of Fact No. 4. It is well taken that no written approval or documentation was required by the UBC for such an alternative to be approved. The problem however, is that no revision or amendment was ever approved to the building permit application that was approved in 1981. The 1981 building permit approval, if one was issued, only approved a barn that was proposed to be located ten feet from the side yard property line. If the County intended to authorize a reduction in the setback with a boundary line adjustment, that reduced setback should have been incorporated into a revised or amended building permit approval.

6. Appeal Limited to Grounds Identified in Appeal Statement. The Examiner will limit appeal issues to those identified in the Appellants' Notice of Appeal. SJCC 18.80.140(E)(5)(d) require the Notice of Appeal to identify the grounds of appeal. Hearing Examiner Rule of Procedure IV(B) identifies that the content requirements for appeal statements are jurisdictional. The content requirement would be undermined if other issues are allowed to be considered. The appellant's grounds for appeal are strictly limited to those identified in its appeal statement, Ex. 1[3]. The

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[2] This decision determines that there was no setback violation when the barn was constructed in 1981. Consequently, the boundary line agreement is irrelevant to this final decision. However, in order to help prevent any need for additional remand, the applicability of the boundary line agreement is addressed anyway in case a reviewing court determines that there was a setback violation at the time.

[3] The appellant's statement of appeal fails to take advantage of a key protection for property owners adjoining nonconforming uses and structures. The last paragraph of SJCC 18.40.310(F) arguably requires a conditional use permit for the change in use proposed by the applicant from a barn to an ADU. Ultimately, the County's nonconforming use provisions provide an equitable balance between the exercise of vested development rights for

grounds identified in the appeal statement are quoted below in italics and assessed with corresponding conclusions of law.

1.1 *SJCC 18.100.030 F and 18.100.070 D prohibit issuance of a building permit or other development permit for any parcel of land that has been developed in violation of local regulations. The subject parcel has been developed in violation of local regulations and, therefore, the County erred in issuing permits for additional development on the parcel.*

7. As determined in Conclusion of Law No. 4, the barn was lawfully constructed. It has not been developed in violation of local regulations.

1.2 *The permits were issued for a change of use and physical modification to an existing, but illegal, building.*

8. As determined in Conclusion of Law No. 4, the barn was lawfully constructed and is a valid nonconforming structure. It is not an illegal building.

1.3 *The subject building was illegal from the day it was constructed. At the time of its original construction, the County Code included a requirement that buildings be set back at least ten feet from the property line. This building, though, was built less than two feet from the property line. Because the building did not comply with the Code requirements in effect on the day it was built, the building was illegal from the day it was built.*

9. As determined in Conclusion of Law No. 4, the barn was exempt from the 10 foot side yard requirement by Section 9.01 of Resolution No. 58-1977.

1.4 *The building was illegal from the day it was built for a second reason. The building plans submitted to the County depicted a building to be constructed ten feet from the property line. Those were the building plans approved by the County. The builder violated not just the County Code, but the terms of the building permit when the building was constructed less than ten feet from the property line.*

11. The record is unclear as to whether a building permit was issued for barn in 1981[4]. Whether

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nonconforming uses and ensuring that those rights are not exercised in a manner that adversely affects other property owners. Since the appellant did not raise the conditional use permit as an appeal issue, there is no opportunity in this case to mitigate against impacts that may arise from the proposed conversion.

[4] Although the appellants submitted building permits into the 2010 appeal hearing evidencing numerous alterations to the subject property, a building permit (if one was issued) for the 1981 construction of the barn was never presented. The appellants did submit the building plans for the project, Ex. 6-9(c), but the existence of these plans isn't that probative of the issuance of a building permit. Section 10 of Resolution No. 58-1977 authorized owners of Class J structures to submit building plans for building department review, even when no building permit was required. The person who constructed the 1981 barn may have just submitted the plans for building permit review in order to ensure that the structure was safely built, to meet insurance requirements, etc.

or not a permit was issued, the inaccurate depiction of the side yard setback in the building plans did not make the building illegal for nonconforming use purposes. If no building permit application was approved for the proposal, the building would clearly not be illegal. As determined in Conclusion of Law No. 4, no building permit was required for the barn in 1981. If a building permit application was approved for the proposal, the barn would still be considered legal. As outlined in the 2010 examiner final decision on this case, final land use decisions are immune from legal challenge once their appeal periods have run, even if it turns out that the decision was not consistent with applicable permitting criteria. The Court of Appeals reversed portions of the original final decision because the appellate court believed that the final decision erroneously determined that compliance plans qualify as final land use decisions. Contrary to the ambiguous status of compliance plans, there is no question that building permits qualify as final land use decisions. Consequently, if a building permit was approved for the barn in 1981, it cannot be legally challenged now under the finality court opinions (hereinafter referred to as the "*Nykreim* line of cases") discussed in the original hearing examiner decision on this appeal.

The appellant's position raises the additional issue that the finality cases of the original hearing examiner decision do not apply to permits acquired by misrepresentation. This type of situation has not been addressed by the *Nykreim* line of cases. However, given the strong policy considerations underlying finality, it doesn't appear likely that the courts would create an exception to the Nykreim line of cases for misrepresentation absent a showing of intentional misrepresentation. It is hard to believe that the courts would require the demolition or modification of buildings that may have been built decades ago because of some newly discovered errors in building plans. Should those buildings cause any significant harm to anyone, those impacts could be addressed through the state's nuisance laws. This case serves as a classic example of the difficulties involved in trying to unravel permitting decisions made years in the past. The huge expense in resources, the uncertainties in reviewing records decades old and the lack of any significant benefit to undergoing such an investigation provide a compelling policy basis to only allow circumvention of finality for intentional as opposed to negligent misrepresentation in the permitting process. In this case there is no evidence that the building plans for the barn deliberately misrepresented the distance to appellant's property line. It's fairly clear that this error didn't become manifest to anyone until the survey was done in 1990, as determined in Finding of Fact No. 4.

1.5 *The County Code clearly distinguishes between illegal buildings and non-conforming buildings. Illegal buildings are buildings that failed to comply with the Code requirements at the time they were constructed. SJCC 18.20.090. Non-conforming buildings are buildings that met Code requirements when they were constructed, but no longer meet Code requirements because the Code changed subsequently. SJCC 18.20.140. Understandably, the code treats illegal buildings differently than non-conforming buildings. Whereas, some modifications are allowed to a non-conforming building or use (SJCC 18.40.310), no permit may be issued for a parcel on which an illegal building sits (SJCC 18.100.030 F; 18.100.070 D).*

1.6 *Because the subject building was illegally built, and remains illegal today, the County*

has no authority to issue any of the three permits that are challenged in this action. The permits would allow the use of the building to be changed from a barn/storage facility to a residential (ADU) facility. Because the Code unambiguously prohibits issuance of permits like these for an illegal building, the Examiner should reverse the decision of the Department to issue the permits and should vacate all of them.

12. As determined in Conclusion of Law No. 4, the barn qualifies as a valid nonconforming structure.

2.0 *SJCC 18.40.240 F.5, relating to Accessory Dwelling Units (ADUs), states, in part: "Any additions to an existing building shall not exceed the allowable lot coverage or encroach onto setbacks. The size and design of the ADU shall conform to applicable standards in the building, plumbing, electrical, mechanical, fire, health, and any other applicable codes." Because the building violates the Fire Code, Building Code, and Zoning Code requirements establishing a ten-foot setback, the ADU permits were issued in violation of this Code section.*

13. As determined in Conclusion of Law No. 4, no ten foot side yard setback applied to the barn when it was constructed in 1981.

3.0 *SJCC 18.50.330 B.13 limits the width of buildings in the shoreline to 50 percent of the shoreline frontage. The width of the buildings on the subject property exceed this limitation. This provides an independent reason for finding violation of SJCC 18.40.240 F.5, SJCC 18.100.030 F and 18.100.070 D. The subject permits, issued in violation of these Code sections, should be vacated.*

4.0 *SJCC 18.50.330 E.1 prohibits accessory structures which are not water-dependent from being located seaward of the most landward extent of the residence. The challenged permits authorize construction on and use of an accessory building that violates this requirement, i.e., it is located waterward of the residence.*

14. SJCC 18.50.330(B)(13) and SJCC 18.50.330(E)(1) ware adopted subsequent to the construction of the barn structure in 1981. SJCC 18.40.310(G) requires application of WAC 173-27-080 for nonconforming structures in shoreline areas. The proposed ADU conversion is consistent with WAC 173-27-080.

As to the proposed structural alterations, WAC 173-27-080(2) provides that nonconforming structures may be maintained, repaired, enlarged or expanded provided the alterations don't increase the degree of nonconformity. The proposed interior modifications do not increase the degree of nonconformity and so are authorized by WAC 173-27-080.

The change from storage use of the barn to dwelling use is not so clear under WAC 173-27-080. WAC 173-27-080(6) requires conditional use permits for a change from one nonconforming use to another. However, the barn storage and ADU use are both conforming – they're both authorized in

the Rural shoreline designation as well as the Deer Harbor Hamlet Residential zoning code designation. The appellants apparently take the position that the barn and ADU use must be construed as nonconforming uses because they are located waterward of the principal residence in violation of SJCC 18.50.330(E)(1). However, such a use would not be considered nonconforming in WAC 173-27-080(2). WAC 173-27-080(2) expressly states that "*[s]tructures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks...may be maintained and repaired...*" This language doesn't characterize conforming uses in structures that violate setback requirements as nonconforming uses. This is to be expected, since there is no reason to conclude that a structural nonconformity renders all the uses within it nonconforming.

The pertinent issue for the ADU conversion is: does WAC 173-27-080(2) authorize a change from a conforming barn use to a conforming ADU use in a nonconforming structure. Unfortunately, WAC 173-27-080(2) doesn't expressly address changes from one conforming use to another in nonconforming structures. WAC 173-27-080(6) authorizes a change from one nonconforming use to another nonconforming use with a conditional use permit. Obviously, a change from a nonconforming use to another nonconforming use will generally have more adverse impact than a change from one conforming use to another. If changes between nonconforming uses are authorized, the intent must have been to authorize changes between conforming uses as well. WAC 173-27-080(2) can be read as authorizing these changes:

> *Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.*

Since changes between conforming structures are not addressed by WAC 173-27-080 and WAC 173-27-080(6) authorizes changes between nonconforming uses, the language above must be read as contemplating that changes between conforming uses are authorized so long as all conditions are met, i.e. the change does not increase the extent of nonconformity by expanding the building footprint into areas where the use or development is prohibited. The replacement of the barn use with ADU use does result in the ADU being located in an area where it would otherwise be prohibited, but such an interpretation would result in a stricter treatment of conforming use changes than nonconforming use changes. So long as the ADU conversion does not result in an expansion of the building footprint into prohibited areas, WAC 173-27—080(2) should be read as authorizing the conversion. Alternatively, the barn and the ADU could both be construed as the same type of use, i.e. accessory residential use, such that the conversion simply wouldn't be considered a change in use. The simplicity of this interpretation is compelling, but it glosses over the fact that one type of use is being replaced by another and that WAC 173-27-080 is silent as to how to address the situation.

5.0 *SJCC 18.50.020 prohibits substantial development on shorelines without first obtaining a shoreline substantial development permit. SJCC 18.50.330 E.4 requires a shoreline conditional use permit for structures accessory to a residential structure. The applicants have failed to obtain the requisite shoreline conditional use permit for this accessory structure. (The permittees apparently claim they are exempt from shoreline permit requirements per 18.50.300 E.2, which exempts "normal appurtenances" from permit requirements. But exemptions are to be construed narrowly (SJCC 18.50.020 F) and the development here does not meet the criteria for "normal appurtenances" specified in that section and, therefore, the requirement for a permit remains in effect.) The County should not have issued the other permits in the absence of the required shoreline permit. Moreover, the applicant has not submitted the required certificate when a shoreline exemption for a residential appurtenance is claimed, as required by SJCC 18.50.020 G.*

15. The appeal issue above is unclear as to whether the appellant is claiming that shoreline permits were required for construction of the 1981 barn under the 1976 San Juan County Shoreline Master Program or a shoreline permit for the ADU modifications under the 1998 shoreline regulations. Since the citations are to the 1998 ordinance, it is concluded that the appellants are asserting that a shoreline permit should have been acquired for the ADU modifications[5], which is consistent with the briefing and arguments made by the parties.

The ADU conversion is clearly exempt from shoreline permit requirements. SJCC 18.50.020(G) exempts ADUs from shoreline permit requirements, provided that the owner submits a certificate that the structure will be constructed by the owner, lessee or contract purchaser for his or her use or that of a family member or a person providing health care services to the family. The uncontested evidence of the 2010 hearing is that the ADU was built for a family member of the property owner. The certificate is also required as a condition of sustaining the appeal[6]. SJCC 18.50.330(E)(4) only requires a shoreline conditional use permit for accessory uses when they don't qualify as normal appurtenances. However, SJCC 18.50.020(G) defines ADUs as normal appurtenances when the afore-mentioned certificate is provided. Consequently, no shoreline conditional use permit is required either.

6.0 *SJCC 18.40.240 F.1 provides that an ADU shall not exceed 1,000 square feet in living area. The ADU at issue here is larger than 1,000 square feet. Therefore, the permits were issued illegally and should be vacated.*

16. As revised by the appellant during remand, the ADU has less than 1,000 square feet in living area as required by SJCC 18.40.240(F)(1).

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[5] If the appellant was asserting a shoreline permit was required in 1981 for construction of the barn, that argument would be beyond the scope of the appeal because the appeal statement did not reference any violations of the 1976 shoreline master program.

[6] It appears that the certificate was entered into the record during the hearing in 2010, however the examiner did not have access to that exhibit prior to issuing a timely decision.

In the final 2010 hearing examiner decision, it was determined that areas within the ADU that were less than five feet in height did not qualify as living space. With the exclusion of these areas from living space computations, the 2010 examiner decision determined that the living space was less than 1,000 square feet in area. The Court of Appeals reversed the examiner on this point, holding all areas within the interior building walls constituted living space, even if those areas were less than five feet in height. Under this interpretation the ADU as proposed during the 2010 hearing exceeded 1,000 square feet in building area. In order to remedy this problem, the applicant has modified the interior building space as depicted in Ex. R1. As modified in Ex. R1, the ADU will have less than 1,000 square feet of living space as required by SJCC 18.40.240(F)(1).

7.0 *The permits are invalid because they were issued for a structure that has a roof too flat to meet the minimum pitch requirements in the Deer Harbor Hamlet Plan.*

17. As noted in the current version of the Deer Harbor Hamlet Plan (adopted 2007), specific regulations for the Deer Harbor area were only first put together in 1999, which was well after the building was constructed in 1981. The pitch requirement referenced by the appellant in Ex. 6-18 was adopted in 2007. As a nonconforming structure, the subsequently enacted Deer Harbor roof pitch requirements do not apply.

DECISION

The appeal is upheld on the issue of living space (Appellant Issue 6.0, Ex. 1) and denied on all others. In order to achieve compliance with SJCC 18.40.240(F)(1), the applicant's building plans be revised to conform to the modifications proposed in Ex. R1, provided that staff may approve minor additional modifications as necessary to accommodate insulation requirements, provided further that the interior living space as interpreted by the Court of Appeals remains at or below 1,000 square feet. The appeal is also sustained on condition that the applicant submit a certificate as required by SJCC 18.50.020(G) that identifies that the ADU was constructed by the owner, lessee or contract purchaser of the subject property for his or her use or that of a family member or a person providing health care services to the family.

Dated this 15th day of March, 2015.

Phil A. Olbrechts

County of San Juan Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter, such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirement may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and consult with a private attorney.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

APPENDIX A-2

18.30.320 Development standards.

All development and use within the exterior boundaries of the Deer Harbor Hamlet shall conform to the development standards set forth in Table 18.30.320.

Table 18.30.320. Development Standards

Density, Dimension, Open Space Standards for the Deer Harbor Hamlet Activity Center			
Activity Center Land Use Designation[1]	**HC**	**HI (A+B)**	**HR**
Maximum Density (parcel area/total number of dwelling units)[13]	[Please refer to the Deer Harbor Hamlet Plan Maps] See SJCC 18.70.010(E)		
Minimum Lot Area			
Minimum Setbacks[2, 3, 4, 5]			
Front or Road (feet)	10	20	20
Rear and Side Yard	0[6]	0[6]	10
Maximum Building Dimensions			
Building Height (feet)[7, 8]	26[14]	26[14]	26[14]
Building Footprint[9]	3,000 sq. ft.	4,000 sq. ft.	2,500 sq. ft.
Building Floor Area[10]	5,000[13] sq. ft.	6,000 sq. ft.	5,000 sq. ft.
Minimum Roof Pitch	4:12	4:12	4:12
Lot Coverage (%)[11]	–	40%	30%
Minimum Required Open Space or Landscaped Area (%)[12]	10%	5%	30%

Notes

1. Hamlet land use designations:

   HC = Hamlet commercial

   HI-A = Hamlet industrial (Boatworks TPN 260724003A)

   HI-B = Hamlet industrial (Connor/Cookston TPNs 260633013 and 260752001)

   HR = Hamlet residential

2. Setbacks from roads in activity centers shall be measured from the margin line of the road right-of-way. This measurement shall be to a line parallel to and measured perpendicularly from the

appropriate line. Side and rear setbacks are measured from the edge of the property in the same manner as street setbacks.

3. Fences are exempt from setback requirements, except when impairing safe sight lines at intersections, as determined by the County engineer.

4. Setbacks do not apply to mail boxes, wells, pump houses, bus shelters, septic systems and drainfields, landscaping (including berms), utility apparatus such as poles, wires, pedestals, manholes, and vaults, and other items as approved by the administrator.

5. Road right-of-way setbacks may be waived, at the discretion of the County engineer, when the presence of shoreline setbacks, property lines, topography or other restrictions make it unreasonable to construct a structure without encroaching into the road right-of-way setback.

6. The minimum side and rear setbacks shall be 15 feet if the site containing the proposed use is adjacent to any hamlet residential property.

7. Chimneys, smokestacks, fire or parapet walls, ADA-required elevator shafts, flagpoles, utility lines and poles, communication sending and receiving devices, HVAC and similar equipment, and spires associated with places of worship are exempt from height requirements.

8. Structures used for the storage of materials for agricultural activities are exempt from the maximum building height requirements.

9. Building footprint will be determined by the horizontal area enclosed by the exterior wall line and contiguous roofline excluding porches and decks that extend no more than 10 feet from exterior wall line that is closest to the average grade up to a maximum of 250 square feet of deck or porch space. Porches and decks that extend more than 10 feet from exterior wall line or are larger than 250 square feet will be included in overall footprint.

10. Building floor area will be determined by the entire horizontal area enclosed by the exterior wall line and contiguous roofline excluding porches and decks that extend no more than 10 feet from exterior wall line up to a maximum of 250 square feet of deck or porch space. Porches and decks that extend more than 10 feet from exterior wall line, or are larger than 250 square feet, will be included in overall floor area.

11. Lot coverage is measured by the percentage of the total area of a lot or lots within a single development occupied by all structures, excluding roof overhangs and covered porches not used for sales, storage or service.

12. Open space must be maintained in its natural condition, in agricultural or forestry use, or landscaped according to SJCC 18.60.160.

13. Within commercial zones the construction of any building or buildings may not exceed 5,000 square feet of total floor area within any structure or structures cumulatively on a single parcel.

14. A height bonus allowing a maximum height of 28 feet will be granted for those buildings with a roof pitch no less than 6:12.

(Ord. 25-2012 § 28; Ord. 26-2007 § 11)

18.100.030 Applicability.
This chapter applies to violations of any provision of SJCC Title 18; Chapters 13.08, 15.04, 15.12, 16.36, 16.45 and 16.55 SJCC; and the regulatory provisions of any adopted subarea plan or activity center. Violations include but are not limited to:

A. Failure to obtain required permits or authorizations;

B. Failure to comply with the terms or conditions of a permit or authorization;

C. Failure to comply with the above rules or regulations;

D. Failure to comply with a stop work or emergency order issued under this chapter; or

E. Intentional misrepresentation of any material fact in any application, plan, or other information submitted to obtain a land use permit, building permit, or other authorization. (Ord. 9-2013 § 2)

18.100.070 Notice of violation.
A. Every violation of the regulations listed in SJCC 18.100.030 is subject to a notice of violation. Separate notices of violation are not required.

B. A notice of violation represents a determination by the director that a violation has been committed and monetary penalties shall be assessed. The determination of a violation is final and the person(s) named in the notice of violation shall correct the violation by the date stated in the notice of violation, unless the notice of violation is appealed, withdrawn, or amended.

C. The notice of violation may list corrective actions suggested to remedy the violation.

D. A notice of violation shall be withdrawn by the director if at any time it is determined that it was issued in error.

E. A notice of violation may be amended at any time in order to correct clerical errors or to cite additional authority for a stated violation. An amended notice of violation shall contain all information required in SJCC 18.100.080.

F. When an administrative or judicial appeal is pending, additional notices of violation may be issued at the same location for new or additional violations. (Ord. 9-2013 § 6)

15.04.620 Setback requirements.

No structure built pursuant to this article shall be located closer than 10 feet to any property line. (Ord. 80-1992)

18.50.330 Residential development.

A. Exemptions. The SMA specifically exempts from the substantial development permit requirements the construction of a single-family residence by an owner, contract purchaser or lessee for his or her own use, or the use of his or her family. Such construction and normal appurtenant structures must otherwise conform to this master program including any shoreline variance or conditional use permit requirements of this section. Exempt residential appurtenances are specified in SJCC 18.50.020(G).

B. Regulations – Location and Design.

1. Residential development is only permitted landward of the extreme high water mark, except as specifically allowed for houseboats, below.

2. If there is evidence that a shoreline area proposed for residential development may be unstable, as indicated by the "Coastal Zone Atlas of Washington" or similar reasonable evidence, the applicant may be required to submit a geological or geohydrological report attesting to the stability of the building site, a plan for stabilizing the area, and a plan for controlling erosion during and following construction activities. Any such plan shall be prepared by a qualified, licensed professional geotechnical engineer. However, residential structures which will require bulkheads or other shoreline fortifications at the time of construction or in the foreseeable future are prohibited. Evidence that such fortifications will be necessary to protect all or part of the development shall be grounds for denial of all or part of the proposed development.

3. Mobile home courts and parks, and subdivisions for mobile homes, shall not be permitted on shorelines unless all structures can be thoroughly screened from view from both the water and the land by means of natural cover (such as trees and shrubs).

4. Utility lines installed within subdivisions and nonexempt developments shall be placed underground and shall comply with applicable provisions of SJCC 18.50.130 and 18.50.350.

5. Drainage and surface runoff from residential areas shall be controlled so that pollutants will not be carried into water bodies.

6. In all new land divisions and multiple-unit and multifamily developments, one of the following standards shall be met:

a. A common area of 75 feet measured landward from the ordinary high water mark shall be established along the entire waterfront of the property

to be developed, and all other common area requirements of subsection (F)(2) of this section shall also be met. A minimum of one and one-quarter acres within shoreline jurisdiction shall be provided for each unit to be located within the shoreline jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction; or

b. At least 20 percent of the area within the shoreline jurisdiction shall be designated as common area, and all other common area requirements of subsection (F)(2) of this section shall also be met. A minimum of two acres within the shoreline jurisdiction shall be provided for each unit to be located within the shoreline jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction.

7. In all proposed land divisions and multiple-unit and multifamily developments on shorelines the terrain, access, potential building sites, areas appropriate for common ownership, and special features of the site shall be considered in the design of the development. Allowable densities are maximum densities and are not guaranteed. The approved density shall be determined on a case-by-case basis and shall be based on considerations of topography, protection of natural resources and systems, and the intent and policies of the Shoreline Management Act, the State Environmental Policy Act, the Comprehensive Plan, this code, and this Shoreline Master Program.

The allowed density may be reduced below the maximum if SEPA analysis or other evaluation of the site or area-wide conditions demonstrates that adverse effects of development at the maximum density can be mitigated or avoided by a reduction to the approved density, and no appropriate alternative means of mitigation is available.

8. Land clearing, grading, filling, or alteration of wetlands, natural drainage, and topography for residential construction shall be limited to the area necessary for driveways, buildings, and view and solar access corridors. Cleared surfaces not to be covered with gravel or impervious surfaces shall be replanted promptly with native or compatible plants (i.e., groundcovers or other plant materials adapted to site conditions which will protect against soil erosion). This applies to individual construction and shoreline subdivisions.

Existing vegetation shall be used to visually buffer structures as viewed from the shoreline, public roads, and adjoining properties. All applications for new construction and subdivisions shall indicate any trees to be removed. If trees are to be removed beyond those required to construct a single-family residence, then a tree removal plan shall also be submitted. The plan shall:

a. Identify the proposed building areas and driveways and view and solar access corridors; and

b. Demonstrate how existing natural screening will be retained while providing for construction, views, and sunlight.

Removal of trees smaller than three inches in diameter, as measured four feet above grade, shall not be restricted unless there is evidence that the shoreline is unstable The removal of smaller trees, brush, and groundcover may be restricted in unstable shorelines.

9. All subdivisions and nonexempt residential developments shall have water supplies adequate so that groundwater quality and quantity are not endangered by over-pumping.

10. All new waterfront subdivisions and multifamily residential developments shall prohibit moorage facilities other than mooring buoys, but allow property owners to seek approval of joint-use moorage facilities to serve the entire subdivision or development.

11. Any parcel which constituted a legal building site prior to the adoption of this master program shall continue to constitute a legal building site regardless of the density requirements imposed by this master program. All parcels are subject to all other applicable state and County regulations.

12. Construction of a single-family residence for the use of the owner or beneficial owner and their family is exempt from substantial development permit requirements in accordance with WAC 173-27-040(2)(g) and SJCC 18.50.020 (F). Any other single-family residential construction is subject to shoreline permit requirements. For the purposes of this SMP, the beneficial owner is an individual who is a member of a family corporation, trust, or a partnership, and who is related by blood, adoption, marriage or domestic partnership to all other members of the corporation, trust or partnership. In no case shall construction of more than one single-family residence on a single parcel owned by a family be exempt from shoreline permit requirements.

13. Developments on waterfront parcels shall cover no more than 50 percent of the width of the parcel as measured across the seaward face of each building site from side lot line to side lot line. However, on lots less than 80 feet wide at the building line, structures may cover an area up to 40 feet wide as long as a minimum setback of 10 feet from side property boundaries is maintained.

14. The maximum permitted height for residential structures is 28 feet. Residential structures are permitted to exceed this height only when the roof has

a minimum 6-in-12 pitch which does not extend beyond a maximum height of 35 feet above the existing grade at the base of the structure. Any residential structure which exceeds a height of 35 feet above existing grade, as measured along a plumb line at any point, shall be permitted only as a conditional use. The applicant must demonstrate that the structure will not result in significant adverse visual impacts, nor interfere with normal, public, visual access to the water. The applicant must also demonstrate that there are compensating factors which make a taller structure desirable from the standpoint of the public interest. Artificially created grades to gain height advantages are prohibited.

15. One garage building and/or one accessory dwelling unit each of which covers no more than 1,000 square feet of land area and is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade.

16. Division of land that would exceed maximum density standards may be allowed by conditional use if the following circumstances are also demonstrated by the owners:

a. The property is not located within a natural shoreline environment designation.

b. The property is occupied by existing, individually owned single-family dwelling units that exceed currently allowable maximum residential density standards and all such units are documented to have existed on the property before May 28, 1976.

c. All the dwelling units have been maintained on the site consistent with nonconforming use standards in WAC 173-14-055, as amended, and have not been abandoned or removed from the property since May 28, 1976.

d. There is no history of use or occupancy other than for residential or vacation residential purposes for the owners' personal use and that of their nonpaying guests.

e. There is evidence of an adequate approved water supply for each unit accepted in writing by the County sanitarian.

f. There is an approved septic system for each unit or there is documentation that a functioning septic system exists to serve each unit and that adequate drainfield reserve area exists.

g. The proposal is designed to allow the simultaneous transfer or division of each ownership interest in the property.

17. Any conditional use permit granted to allow transfers of individual ownerships in property owned and developed as described in subsection (B)(16) of this section shall include the following conditions, at a minimum:

a. Conditional use permit approval shall not itself constitute a legal division or transfer of land ownership. The property owners must simultaneously effect a legal division or segregation of property attached to each residential unit, under all applicable state and County laws before any transfer of individual units may occur. Such division or segregation must be initiated within two years of the effective date of the conditional use permit.

b. Residential density on the property shall not exceed that expressly provided for in subsection (B)(16) of this section.

c. Residential use and development shall be restricted to single-family units and residential accessories only.

d. The entire parcel owned in common shall be restricted to prohibit a residential density in excess of that made legally nonconforming on May 28, 1976.

18. *Repealed by Ord. 7-2005.*

19. Miscellaneous Exceptions. The lot coverage and setback requirements of subsections (B)(13) and (D) of this section shall not apply to those parcels which are less than 0.3 acres in size, where the parcel boundaries were approved in a division of land before December 31, 1990. If the lot document approving a division of land establishes different coverage and setback standards from those in subsections (B)(13) and (D) of this section, the standards on the document approving the division of land shall control. Lot coverage and setback standards of this section may be waived by the decisionmaking body if necessary to accommodate actual development legally established on the affected property. Land division must occur according to the subdivision or short subdivision standards in the County code or by condominium standards under state law.

C. Prohibited Uses and Activities.

1. New residential structures and accessory structures are prohibited over water or floating on the water, except as specifically allowed in this chapter.

2. Subdivisions and nonexempt residential structures, including accessory uses, which will exceed the physical capabilities of the proposed site to absorb the resulting impacts shall not be approved.

3. Residential development within floodways, wetlands, and other hazardous (such as steep slopes and areas with unstable soils or geologic conditions) or environmentally sensitive areas shall only be allowed subject to the regulations of the environmentally sensitive areas overlay district as specified in this code (SJCC 18.35.020 through 18.35.140).

4. The creation of landfills in water bodies or their associated wetlands for the purpose of residential development is prohibited.

D. Regulations – Setback Standards.

1. All structures shall be set back from water bodies and associated wetlands sufficiently to protect natural resources and systems from degradation.

a. All structures shall be set back a safe distance behind the tops of feeder bluffs, as determined by a licensed geotechnical engineer.

b. Every residential structure built at a beach site shall be located landward of the berm or bank, as dictated by the topography, to assure protection of the beach site.

2. Residential structures shall be located behind the treeline and set back a minimum of 50 feet from the OHWM, top of bank or berm, whichever is greater. Residential structures are also subject to the following:

a. Setbacks from wetlands associated with shorelines (Chapter 173-22 WAC) shall be measured from the natural edge of these features.

b. If there is no natural screening or if the shoreline area is cleared so as to preclude natural screening before a building permit application is approved, then a minimum setback of 100 feet from the OHWM or from the top of bank or berm, whichever is greater, will apply regardless of the environment designation.

c. A setback less than the minimums specified above may be authorized by the administrator only if it will result in a lesser environmental or visual impact.

d. If existing houses on adjoining waterfront lots are closer than the specified minimum setback, a lesser setback may be authorized by the administrator. This setback may be equal to the average setback of existing houses on adjacent lots, if the minimum setback would cause obstruction of views from the building site due to the location of existing houses and if consistent with other applicable regulations in this master program.

e. Nonconforming single-family residential development, made nonconforming by the above setback regulation in 1991, shall be subject to the standards contained in Chapter 173-27 WAC (Permits for Development on Shorelines of the State); provided, that:

i. A nonconforming residence of 2,000 square feet or smaller may be expanded by an amount equal to the existing floor area of the residence as long as the resulting total floor area does not exceed 2,000 square feet, or the existing floor area may be increased by an amount not to exceed 25 percent, whichever is larger. A nonconforming residence with an existing floor area in excess of 2,000 square feet may be expanded by no more than 25 percent of the total existing floor area. In no case shall any portion of the expansion be located seaward of the most seaward point of the existing residence. For the purposes of this computation, floor area shall include all areas enclosed within the walls of the house and all attached decks and porches.

ii. Additions to nonconforming residences shall conform to all other applicable shoreline regulations as well as to other applicable County and state regulations.

iii. A nonconforming residence may be expanded incrementally if the ultimate expansion does not exceed the maximum allowable increase in floor area over that existing on the effective date of this regulation.

iv. For purposes of this section, "residence" shall mean the primary residential structure on the property. Accessory dwelling units and other accessory residential structures are not included.

3. Building setbacks from shorelines must be established as conditions of preliminary plat approval in all new waterfront subdivisions and short subdivisions. A plat restriction must specify the required setbacks and all building setbacks must be shown on the face of the plat. Once a building setback line is determined, removal of trees seaward of the setback line shall be expressly limited in plat restrictions. Tree removal restrictions in subsection (B)(8) of this section will also apply.

E. Regulations – Accessory Use.

1. Accessory structures which are not water-dependent shall not be permitted seaward of the most landward extent of the residence. If this regulation would result in greater adverse impacts on shoreline features or resources or would conflict with other applicable regulations of this master program, the administrator may authorize by written findings and determination an alternative location without requiring a shoreline variance permit.

2. The following accessory uses and developments, when associated with an exempt single-family residence, are defined as "normal appurtenances" and are therefore exempt as provided in SJCC 18.50.020(F)(2)(g):

a. One garage building and/or one accessory dwelling unit each of which covers no more than 1,000 square feet of land area and is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade. In no case shall an accessory dwelling unit exceed 1,000 square feet;

b. No more than two separate outbuildings no larger than 200 square feet each, no taller than 16 feet above average grade level, and not used for human habitation; provided, that in addition, one outbuilding for any other residential purpose may be substituted for an accessory dwelling unit or garage if the structures do not exceed size limits specified in subsection (E)(2)(a) of this section; and

c. Grading (excavation and fill) of up to the maximum cubic yardage allowed by state law (see WAC 173-27-040(g)) for foundations and a driveway, plus any additional grading necessary for an individual on-site sewage disposal system.

3. A shoreline substantial development permit shall be required for construction of any nonexempt accessory development on a single parcel within 200 feet of the ordinary high water mark. Construction of an accessory dwelling unit that will be used for vacation rental (short-term) or long-term rental is not exempt. Any grading in excess of the amount exempt under SJCC 18.50.020(F)(2)(g) shall be subject to substantial development permit requirements.

4. Accessory structures which are not specified in this section as normal appurtenances to a residential use shall be permitted only as conditional uses.

5. Vacation rental or transient occupancy of a single-family residence or an accessory dwelling unit is subject to the applicable provisions of this section, the performance standards in SJCC 18.40.270 and the permit requirements specified in UDC Tables 18.30.030 and 18.30.040.

6. Every accessory dwelling unit in the shoreline must be located in a way that maintains the single-family appearance and shall also meet the performance standards for accessory dwelling units set forth in SJCC 18.40.240.

F. Regulations – Public/Visual Access.

1. Opportunities for physical and visual public access to the shoreline shall be considered in review of residential subdivisions and nonexempt developments. Physical public access shall be based on an adopted County public access plan.

2. Land divisions and multiple-unit or multifamily unit developments shall provide a usable shoreline common area of reasonable size for the number of dwelling units in the development. In addition to the designated common area(s), there shall be appropriate easements dedicated to provide land access to the common area(s) to all property owners within the development. In all new subdivisions, standards for care and maintenance of shoreline common areas shall appear on the face of the plat and shall be consistent with the provisions of this SMP.

a. If tidelands are privately owned, the area between ordinary high tide and the line of extreme low tide shall be dedicated to all property owners in the development as a part of the common area.

b. In locations where, as a result of topography or sensitive features of the site, such as natural marshes, swamps, or unstable, eroding bluffs, the application of this provision would not be feasible or would create a potential hazard, the administrator may authorize the designation of a different waterfront common area.

G. Houseboats.

1. Location. Houseboats are prohibited on state-owned aquatic land and shall be allowed only within a portion of a marina located within the shoreline jurisdiction of an activity center which has been granted shoreline substantial development permit approval for houseboat moorages. Houseboat moorage spaces shall be limited to those areas within a marina specifically identified on approved project

plans for this use and the allotted area shall not exceed 10 percent of overall moorage space. The maximum square footage and height of any houseboat unit shall be specified in the project approval and shall minimize adverse impacts on the scenic qualities of the shoreline. Individual houseboat moorages are prohibited.

2. Standards. Houseboat moorage proposals shall demonstrate that:

a. Houseboat units will be connected to an approved sanitary sewer or other approved upland waste disposal system with demonstrated capacity to serve the number of units proposed, and that greywater will also be discharged to such a system;

b. Houseboat units will be connected to an approved potable water supply with demonstrated capacity to serve the number of units proposed;

c. Materials used in the maintenance of houseboats moored at the marina will not result in contaminants or debris entering the water; and

d. Location of the houseboat area shall ensure that at least six feet of water depth shall be maintained at low water and that grounding at low tides will be prevented.

H. Regulations by Environment.

1. Urban. Residential development shall be permitted in the urban environment subject to the policies and regulations of this SMP.

2. Rural. Residential development shall be permitted in the rural environment subject to the policies and regulations of this SMP.

3. Rural Residential. Same as rural.

4. Rural Farm-Forest. Same as rural.

5. Conservancy. Residential development shall be permitted in the conservancy environment subject to the policies and regulations contained in this master program. No residential land division or other form of multiple-unit residential development shall be allowed unless conservancy values are fully recognized and protected.

6. Natural. Residential development shall not be permitted in the natural environment; provided, that the owner of an existing parcel of record may construct a single-family residence and appurtenant structures for his or her own use. Vacation (short-term) rental of a single-family residence or accessory

dwelling unit is prohibited. Land division is prohibited. Alteration of natural topography and vegetation shall be restricted to that which is absolutely necessary for the construction of the structure(s) and access to them. Alteration of the land-water interface is prohibited.

7. Aquatic. Residential development, except for permitted houseboats, is prohibited in the aquatic environment.

8. Eastsound Urban. Same as urban. Multifamily developments shall include provisions for public shoreline access.

9. Eastsound Residential District. Residential development is allowed subject to this master program and the applicable provisions of the Eastsound Subarea Plan. Multifamily developments shall include provision for public shoreline access.

10. Eastsound Marina District. Residential development is allowed in accordance with the marina district section of the Eastsound Subarea Plan.

11. Eastsound Conservancy. Same as conservancy.

12. Eastsound Natural. Same as natural.

13. Shaw Rural. Same as rural, except that residential transient accommodations (vacation rental of a residence or ADU) by themselves or in combination with any commercial use shall be prohibited.

14. Shaw Rural Farm-Forest. Same as rural farm-forest, except that residential transient accommodations (vacation rental of a residence or ADU) by themselves or in combination with any commercial use shall be prohibited.

15. Shaw Conservancy. Same as conservancy, except that residential transient accommodations (vacation rental of a residence or ADU) by themselves or in combination with any commercial use shall be prohibited.

16. Shaw Natural. Same as natural. (Ord. 7-2005 §§ 15, 16; Ord. 21-2002 § 6; Res. 5-2002 §§ 2, 3; Ord. 12-2000 § 2; Res. 145-1998; Ord. 2-1998 Exh. B § 5.5.18)

APPENDIX A-3

RESOLUTION NO. 224 1975

A RESOLUTION PROVIDING FOR THE ADOPTION, ADMINISTRATION AND ENFORCEMENT OF THE STATE BUILDING CODE WITH CERTAIN AMENDMENTS AND EXCLUSIONS AS SET FORTH HEREIN, ESTABLISHING FEE SCHEDULES AND REPEALING RESOLUTION NOS. 69-1973 AND 74-1973.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY AS FOLLOWS:

SECTION 1.01 PURPOSE. This ordinance adopts by reference the State Building Code but with certain amendments, modifications and exclusions authorized by sections 4 and 6 of the State Building Code Act and Chapter 8, Laws, 1975, 1st Ex. Sess. and set forth herein.

SECTION 1.02 ADOPTION OF STATE BUILDING CODE. There is hereby adopted by reference the State Building Code as set forth in the State Building Code Act, Ch 96, Laws 1974, 1st Ex. Sess, as amended by Chapters 8, 110 and 282 Laws 1975, 1st Ex. Sess and Ch. 19.27 RCW but with the amendments, modifications and exclusions set forth below or in future amendments to this ordinance. The code so adopted comprises the following codes:

A. Uniform Building Code and Related Standards, 1973 edition, published by the International Conference of Building Officials. (Hereinafter called Uniform Building Code or UBC.)

B. Uniform Mechanical Code, 1973 edition, published by the International Conference of Building Officials and the International Association of Plumbing and Mechanical Officials. (Hereinafter called Uniform Mechanical Code.)

C. The Uniform Fire Code with appendices thereto, 1973 edition, published by the International Conference of Building Officials and the Western Fire Chief's Association. (Hereinafter called Uniform Fire Code).

D. The uniform Plumbing Code, 1973 edition, published by the International Association of Plumbing and Mechanical Officials (Hereinafter called Uniform Plumbing Code.): PROVIDED, that Chapter 11 of the Uniform Plumbing Code is not adopted; and PROVIDED, that notwithstanding any wording in that code, nothing in the Uniform Plumbing Code shall apply to the installation of any gas piping, water heaters, or vents for water heaters; and

E. The rules and regulations adopted by the State Building Code Advisory Council establishing standards for making buildings and facilities accessible to and usable by the physically handicapped or elderly persons as provided in sections 1 through 7 of Ch. 110, Laws 1975, 1st Ex. Sess.

In case of conflict among the codes enumerated in subsections A, B, C and D of this section, the first named code shall govern over those following.

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SECTION 1.03 DEFINITIONS. As used in this ordinance; "State Building Code" means the codes set forth in subsections A,B,C, D and E of section 1.02 above as amended or modified by this ordinance or amendments to this ordinance and with the exclusions to such codes set forth in this ordinance or amendments to this ordinance;
"Building Department" means the Building Department of San Juan County; and
"Building Official" means the head of the Building Department and his duly authorized deputies.
"UBC" means Uniform Building Code as described in subsection A of Section 1.02 above.

SECTION 1.04, APPLICATION. From the Effective date of this ordinance, the provisions of the San Juan County Building Code shall be controlling within the areas of San Juan County lying outside the corporate limits of any city or town.

SECTION 1.05 ADMINISTRATION. The Washington State Building Code and the San Juan County Building Code shall be enforced by the Building Official in the unincorporated areas of San Juan County except as provided below with respect to the Uniform Fire Code. All permits shall be issued and all fees collected by the Building Department.

The Uniform Fire Code may be administered and enforced in whole or in part by a fire protection district within the county within its boundaries. The County and any fire protection district which can and will take over this responsibility shall enter into an agreement defining the responsibilities of the parties with respect to the administration and enforcement of the Uniform Fire Code.

SECTION 2.01 EXCLUSION OF SINGLE FAMILY DWELLINGS AND GROUP J OCCUPANCIES FROM CERTAIN PROVISIONS OF UBC; FINDING. The Board of County Commissioners finds that certain provisions of UBC, hereinafter set forth in sections 2.02 through 2.11 inclusive, are not necessary or desirable in an area almost entirely rural and in many instances place an undue hardship on owners and builders of single family dwellings and buildings in the Group J occupancy.

SECTION 2.02 UBC 103 AND 104 LIMITED. ANy repair to a single family dwelling or a building or structure in Group J Occupancy, which is non-structural shall not require a permit or be subject to an inspection, unless the need for the repair is the result of fire or major earthquake, notwithstanding the provisions of sections 103 and 104, UBC.

SECTION 2.03 UBC 104 (h) LIMITED. The requirement in UBC Section 1.04, subsection (h) that buildings shall be maintained in a sanitary condition shall not apply to single family dwelling houses and buildings in Group J occupancy, provided that such buildings and structures comply with all applicable rules and regulations of the Washington State Department of Social and Health Services and of the San Juan County Health Board, which rules and regulations, if any, shall be enforced by the County Sanitarian and not by the Building Official. The requirement

that buildings be maintained in a safe condition shall apply to all buildings and structures..

SECTION 2.04. UBC 202 LIMITED. The refusal of the right of entry set forth in sec. 2.02 (d) of the Uniform Building code shall not, in the case of single family dwellings, constitute a misdemeaner but the building official shall have recourse to any other remedy provided by law to secure entry. In addition, if the Building Official is refused entry at a reasonable time, he may order the work stopped by notice in writing served on any persons engaged in the doing or causing such work to be done, and any such persons shall forthwith stop such work until authorized by the Building Official, after inspection, to proceed with the work.

SECTION 2.05 UBC 301 (a) and 304 LIMITED. No permit shall be required for the demolition of any single family dwelling or any building or structure in a Group J occupancy, and UBC 301 (a) is so modified. UBC 304, Inspections, shall not apply to the demolition of a single family dwelling or any building or structure with a Group J occupancy.

SECTION 2.06. UBC 301 (c) NOT APPLICABLE. The provisions of section 301 (c) authorizing the Building Official to require plans and specifications to be prepared and designed by an engineer or architect licensed by the State of Washington to practice as such, shall not apply to single family dwellings or buildings or structures in Group J occupancy. UBC 301 (d) remains applicable to all plans submitted to the Building Official.

SECTION 2.07. UBC 302 (d) MODIFIED. The provisions of UBC section 302 (d), Expiration, shall not apply to single family dwellings or buildings or structures in the Group J occupancy. Instead, the permit for single family dwellings and structures in the Group J occupancy shall be valid for one year and may be renewed from year to year upon payment of an additional renewal fee each year as provided in Section 19 of this ordinance.

SECTION 2.08. UBC 304 (d) ITEM 3 NOT APPLICABLE. The requirement with respect to lath and/or wall board inspection set forth in UBC section 304 (d) item 3 shall not apply to single family dwellings and buildings and structures in Group J occupancy.

SECTION 2.09 UBC 1405 (b) MODIFIED. The requirement in UBC section 1405 (b) that every dwelling unit be provided with a kitchen equipped with a kitchen sink and with bathroom facilities consisting of a water closet, lavatory and either a bathtub or shower, and the further requirement that plumbing fixtures shall be provided

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with running water necessary for their operation shall not apply to single family dwellings.

SECTION 2.10 UBC 1410 NOT APPLICABLE.
UBC section 1410 shall not apply to single family dwellings.

SECTION 2.11 UBC 203 LIMITED
UBC section 203 shall apply only to Public Buildings.

SECTION 3.01 BOARD OF APPEALS, APPEALS RELATING TO FEES.
The valuation of a proposed building or structure by the BUilding Official for the purpose of fixing fees pursuant to section 3.03 (a) below may be appealed to the Board of Appeals.

SECTION 3.02 VIOLATION AND PENALTIES; UBC 205 MODIFIED.
Section 205 of the Uniform Building Code is amended to read as follows:

Sec. 2.05 It shall be unlawful for any person, firm or corporation to erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy or maintain any building or structure in San Juan County outside of the Corporate limits of any incorporated city or town, or cause the same to be done, contrary to or in violation of any of the provisions of this Code, as amended by this ordinance or any subsequent amendments. Any person, firm or corporation violating any of the provisions of this Code as amended shall be deemed guilty of a misdemeanor, and each such person shall be deemed guilty of a separate offense for each and every day or portion thereof during which any violation of any of the provisions of this Code is committed, continued or permitted, and upon conviction of any such violation, said person shall be punishable by a fine of not more than $100 for a first offense and not more than $300 for a subsequent offense or by imprisonment for not more than 90 days, or by both such fine and imprisonment.

SECTION 3.03. BUILDING PERMIT FEES; SUBSTITUTION FOR UBC 303.
The following is substituted for UBC Section 303;

(a) A fee for each building permit shall be paid to the Building Official as set forth in the table of fees below.

The determination of value or valuation under the Uniform Building Code shall be made by the Building Official, subject to the right of appeal granted by section 17 of this ordinance. The valuation to be used in computing the permit and plan-check fees shall be the total value of all construction work for which the permit is issued, as well as all finish work, painting, roofing, electrical, plumbing, heating, air conditioning, elevators, fire-extinguishing systems and any

other permanent work or permanent equipment.

Where work for which a permit is required by this Code is started or proceeded with prior to obtaining said permit, the fees specified in the table of fees below shall be doubled, but the payment for such double fee shall not relieve any persons from fully complying with the requirements of this Code in the execution of the work nor from any other penalties prescribed herein.

TOTAL VALUATION	FEE
$1.00 to $500.00	$10.00
$501.00 to $2,000.00	$10.00 for first $500.00 plus $0.65 for each additional $100.00 or fraction thereof, to and including $2,000.00.
$2,001.00 to $25,000.00	$20.00 for the first $2,000.00 plus $4.00 for each additional $1,000.00 or fraction thereof, to and including $25,000.00
$25,001.00 to $50,000.00	$112.00 for the first $25,000.00 plus $3.00 for each additional $1,000.00 or fraction thereof, to and including $50,000.00.
$50,001.00 to $100,000.00	$187.00 for the first $50,000.00 plus $2.00 for each additional $1,000.00 or fraction thereof, to and including $100,000.00.
$100,001.00 to $500,000.00	$287.00 for the first $100,000.00 plus $1.50 for each additional $1,000.00 or fraction thereof, to and including $500,000.00.
$500,000.00 and up	$887.00 for the first $500,000.00 plus $1.00 for each additional $1,000.00 or fraction thereof.

The fee for a renewal of a building permit shall be one-half of the original fee or $30.00, whichever is the smaller, except that the fee for a renewal of a permit for a single family dwelling or a building or structure in Group J occupancy shall be only $10.00.

(b) Plan-checking fees. No plan-checking fee shall be charged for buildings in Group I and J occupancy, except that when plans are incomplete when submitted or are subsequently changed to such an extent as to require additional plan checking, a plan checking fee equal to ten percent of the amount of the building permit fee shall be charged. THis plan checking fee shall not be a credit

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against the building permit fee.

With respect to buildings and structures in other than Group I and Group J occupancy, a plan-checking fee shall be charged. When the valuation of the proposed construction exceeds $1,000.00 and a plan is required to be submitted by Subsection (c) of Section 301, a plan-checking fee shall be paid to the Building Official at the time of submitting plans and specifications for checking.

Plan checking fees for buildings other than those in Group I and J occupancy shall be 65 per cent of the building permit fees as set forth in the table of fees above.

The plan checking fee shall be a credit against the building permit fee if one is issued. If no building permit is issued, the plan checking fee shall be retained.

Where plans are incomplete, or changed so as to require additional plan checking, an additional plan-check fee shall be charged equal in amount to 10% of the building permit fee. This additional fee shall not be a credit against the building permit fee.

(c) Expiration of Plan Check. Applications for which no permit is issued with 180 days following the date of application shall expire by limitation and plans submitted for checking may thereafter be returned to the applicant or destroyed by the Building Official. The Building Official may extend the time for action by the applicant for a period not exceeding 180 days upon written request by the applicant showing that circumstances beyond the control of the applicant have prevented action from being taken. In order to renew action on an application after expirationof the original 180 days and any extension, the applicant shall resubmit plans and pay a new plan-check fee.

(d) Reinspection Fee. The fee for each reinspection shall be $10.00. A reinspection fee of ten dollars shall be charged when the Building Official is unable to make an inspection at the time arranged because of inaccurate directions provided by applicant as to the location of the site, or when applicant fails to keep an appointment for an inspection.

SECTION 3.04. OTHER FEES.
Mobile Home Location and Foundation fee shall be $25.00. Modular Home Location and Foundation fee shall be $25.00. Plumbing permits shall be $3.00 plus $2.50 for each fixture to be connected to the plumbing. Furnace permit fee shall be as set forth in the Uniform Mechanical Code.

SECTION 4.01. SIDE, REAR AND FRONT YARDS. No building in Group H and I occupancies and located in Fire Zone No. 3 shall be constructed within ten feet of the property line. No building in Fire Zone No.3 may be located within ten feet of the property line unless any wall within such ten feet constitues a one hour fire wall.

SECTION 4.02. FIRE WARNING SYSTEM.
Section 1413 of the Uniform Building Code shall apply only to dwelling units constructed after January 1, 1975.

SECTION 4.03. GUARDRAILS; UBC 1716 AMENDED.
Section 1716 of the Uniform Building Code is amended to read as follows:

Section 1716. Guardrails. All unenclosed floor and roof openings; open and glazed sides of landings; open sides of stairs, balconies or porches which are more than 30 inches above grade; and roofs used for other than service of the building, shall be protected by a guardrail. Guardrails shall be not less than 42 inches in height except guardrails for exterior porches and decks may be not less than 36 inches in height. Open guardrails and stair railings shall have intermediate rails or an ornamental pattern such that no object 9 inches in diameter can pass through. The height of stair railings may be as specified in Section 3305 (i).

EXCEPTION:

1. Guardrails need not be provided on the landing side of loading docks.

SECTION 4.04. FIRE ZONE ESTABLISHED.
Until such time as San Juan County enacts a separate ordinance creating and establishing fire zones, all of the county outside of the corporate limits of any incorporated city or town is declared to be Fire Zone No. 3.

SECTION 4.05 MINIMUM DEPTH OF FOOTING.
The minimum depth of footing shall be 12 inches below the exterior grade unless the foundation rests on solid rock, in which case it may be required to be pinned to the rock at 6 foot minimum intervals with no. 4 R.F. Bars, minimum, This amends table 29A, following Section 2909 of the Uniform Building Code.

SECTION 4.06. EXCLUSION FOR SMALL BUILDINGS.
Small detached buildings, 80 square feet or less in size, shall not be required to comply with the provisions of the San Juan County Building Code. Such Buildings may not be used for human habitation.

SECTION 4.07. MODIFICATIONS RELATING TO ROOFS.
(a) Section 3202 (c) 7 is amended by adding the words "Owner hand split shakes subject to the inspection and approval of the Building Department". (b) Section 3203 (d) 8, Paragraph 4, Felt is not mandatory when roof pitch is over 5 in 12.

SECTION 4.08. AUTOMATIC FIRE EXTINGUISHING SYSTEM FOR CERTAIN COMMERCIAL BUILDINGS, NOT APPLICABLE TO EXISTING BUILDINGS.
In the Appendix to the Uniform Building Code, Chapter 15, Sec. 1509 (b) the words "and is provided with an approved automatic fire extinguishing system, conforming to UBC Standard No. 38-1"

SECTION 5.01 UNIFORM FIRE CODE, STORAGE OF BALED FIBRES AND AGRICULTURAL PRODUCTS. Section 7.104 and 7.105 LIMITED.
Section 7.104 and 7.105 of the Uniform Fire Code shall not apply to any building existing prior to January 1, 1975 unless or until such building is used for commercial purposes.

SECTION 5.02. UNIFORM FIRE CODE. ENFORCEMENT. SECTION 1.205
Section 1.205 of the Uniform Fire Code is deleted.

SECTION 5.03 UNIFORM FIRE CODE. SECTION 15.109 LIMITED.
Section 15.109 of the Uniform Fire Code shall not apply to flammable liquids used solely for agricultural purposes and dispensed only by gravity flow.

SECTION 5.04. ELECTRIC WIRING ETC., FURNACES.
All electrical wiring, devices, appliances and equipment shall be installed in accordance with the Electrical Installation Laws of the State of Washington, Chapter 19.28 RCW.

SECTION 5.05. SEPTIC TANK AND DRAINFIELD APPROVALS.
San Juan County Health Department approval is required for all permits pertaining to buildings or additions to buildings, requiring domestic sewage facilities and not services by public sanitary sewers. When reqquired, the individual sewage permit shall be approved prior to the issuance of a building permit.

SECTION 5.06. MOBILE HOMES.
Mobile homes shall comply with electrical, heating and structural requirements imposed by the State of Washington Department of Labor and Industries in compliance with RCW 43.22.230. All mobile homes shall bear the State Inspection Insignia as specified by Ch. 157, Session Laws, 1967, as amended, before issuance of a building permit. County building permits shall be obtained before mobile homes that are to be placed on lots, or modular homes, are occupied.

Mobile homes shall be fixed to a permanent foundation as specified in the Uniform Building Code, Section 29.05, when ever the supporting frame of the mobile home permits. Mobile home models which are not adapted to placement on a conventional perimeter foundation may be required to have additional support. All mobile homes shall have fire retardant skirting around the base.

SECTION 6.01 UNIFORM PLUMBING CODE. APPLICATION LIMITED.
The provisions of the Uniform Plumbing Code shall apply only to new construction, relocated buildings and to any major plumbing reconstruction in any building.

SECTION 6.02. UNIFORM PLUMBING CODE. PERMIT REQUIRED.
It shall be unlawful for any person to install any plumbing, drainage, piping work or any fixture or water heating or treating equipment in connection with any work to which the Uniform Plumbing Code applies as set forth in section 6.01 above withou

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first obtaining a permit from the Building Official to do such work.

SECTION 6.03. AMENDMENT TO UNIFORM PLUMBING CODE. CONSTRUCTION OF PERMIT.

The issuance or granting of a permit or approval of plans and specifications shall not be deemed or construed to be a permit for, or approval of, any violations of any of the provisions of this code.

SECTION 6.04. AMENDMENT TO UNIFORM PLUMBING CODE. ELIGIBILITY FOR PERMIT.

A permit may be issued only to a person holding a valid unexpired Plumbing Contractors certificate of registration, provided that a permit may be issued to the owner or lessee of the building in which the work is to be done for work to be done only by him, with materials purchased by him.

SECTION 7.01. VIOLATIONS - PENALTIES.

Codes other than UBC. The penalties for the violation of any provision of the San Juan Building code shall be as set forth in Section 3.02 above.

SECTION 7.02. CONSTRUCTION.

If any provision of this ordinance, or of the codes referred to herein, or its application to any person or circumstance is held invalid, the remainder of the Resolution, or the application of the provision to other persons or circumstances is not affected.

SECTION 7.03. REPEAL.

Resolutions 69-1973 and 74-1973 are hereby repealed, provided that any violation of the repealed Resolutions prior to the effective date of this Resolution may be prosecuted or other remedy pursued by San Juan County as if said resolutions were still in effect.

SECTION 7.04. EFFECTIVE DATE.

This Resolution shall take effect on the date of its adoption.

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ADOPTED this 15 day of December, 1975

ATTEST:
HENRY R. BYERS

BOARD OF COUNTY COMMISSIONERS
SAN JUAN COUNTY, WASHINGTON

San Juan County Auditor
and Clerk of the Board
of County Commissioners

Chairman

Member

Member

Form Approved:

Legal Advisor to the Board
of County Commissioners

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RESOLUTION NO. -1975

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00202

RESOLUTION NO. 58 - 1977

A RESOLUTION AMENDING RESOLUTION NO. 224-1975, PROVIDING FOR CHANGES IN THE ADOPTION, ADMINISTRATION AND ENFORCEMENT OF THE STATE BUILDING CODE IN SAN JUAN COUNTY.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SAN JUAN COUNTY AS FOLLOWS:

SECTION 8 OWNER - BUILDER RESIDENCES.

SECTION 8.01 PURPOSE AND REPEALER.

The Board of County Commissioners of San Juan County finds that Resolution No. 224-1975 adopting the State Building Code (hereafter "UBC") regulates without sufficient justification therefor the construction of homes by property owners in San Juan County; finds that numerous homes have been constructed by owners in violation of the provisions of Resolution No. 224-1975, and that San Juan County does not have the resources to enforce the provisions of said resolution with respect to such violations, finds that owner-built residences constitute a distinct and separate class, and finds that no legitimate governmental purpose is justified by the application of the UBC to owner-built residences in view of the cost and consequences of such enforcement. All provisions of Resolution No. 224-1975 and the UBC which conflict with the provisions of this section are hereby repealed.

SECTION 8.02 DEFINITIONS.

All terms not separately defined in this ordinance have the meaning defined by Resolution 224-1975 and the UBC. "Owner-builder" for purposes of this section shall mean a natural person and members of that person's immediate family, working without compensation, but shall not include corporations and their agents, partnerships and their agents, non-profit corporations and their agents, and all persons who intend to construct a private residence for sale, lease or rental to other persons.

"Residence", in addition to its ordinary meaning, and the meaning assigned by the UBC, shall mean, for the purposes of this section, Class I dwellings occupied by an owner-builder, and shall specifically not include structures which are used for providing services and goods for sale to members of the public, lodging to persons for compensation, or structures which are used in the manufacture of goods intended for sale to the public, except for cottage industries.

SECTION 8.03 PERMIT REQUIREMENTS FOR OWNER-BUILT RESIDENCES.

Any natural person may apply for an owner-builder building permit for the construction of a residence on that person's property in San Juan County in accordance with the following conditions, providing that no more than one permit shall be issued to that person in any five-year period. For purposes of this section, a person owns property when he is purchasing the property on real estate contract. For purposes of this section, a marital community shall be considered a single person. An owner-builder permit shall also be required for the

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structural alteration or repair of his residence by an owner-builder.

The application, on a form provided by the building inspector, shall contain a verified legal description of the property where the residence is to be constructed, the name and address of the applicant, a statment indicating the applicant's understanding that the residence is being constructed under this section of the building code, and shall recite, further, that the residence constructed under the permit may not be sold, leased, or rented within a period of five years from the date of completion except in conformity with the terms and provisions of this section, or used, at any time, for any commercial purpose. The application shall also contain a statement of the setback requirements and the applicant's agreement to comply therewith.

The application shall be recorded with the San Juan County Auditor by the building inspector. Each application will be accompanied by a $10 permit fee intended to cover the cost of processing, recording, and postage incurred in the processing of the application.

SECTION 8.04

The building inspector shall check the application for completeness, and return it, if necessary, for completion of missing items. The complete application will be recorded with the San Juan County Auditor. The building inspector will mail to the applicant a building permit, together with written recommendation pertaining to the installation and clearances required for safe use of woodburning stoves and ranges, information pertaining to the availability and installation of electronic smoke detectors, and a postcard to be used by the owner-builder in advising the building inspector when the structure is, in the opinion of the owner-builder, substantially completed.

SECTION 8.05 LIMITATION ON USE OF OWNER-BUILT RESIDENCES.

No structure built under an owner-built residence permit shall be sold, leased or rented unless the building inspector is notified in writing by the owner or his agent thirty days prior to the contemplated sale, lease or rental, of the owner's intentions. Within thirty days following receipt of such notice, the building inspector shall conduct an inspection of the premises and provide the owner-builder or his representative with a list of all deficiencies in the construction and condition of the structure which, in the opinion of the building inspector, constitute a real and present danger to the health and safety of persons entering into, living within, or occupying the premises. The owner-builder or his agent shall, within forty-five days after receipt of the inspector's report, correct all such deficiencies unless, within that period of time, an appeal is taken to the board of appeals as provided in the code. The fee for such inspection shall be $50, but no such inspection shall be required and no fee shall be due if the owner-builder undertakes to sell, lease or rent the structure as a residence more than five years after notification by postcard to the building inspector that the structure has been substantially completed.

SECTION 8.06 INSTALLATION OF TRAILERS AND MOBILE HOMES EXCLUDED.

The provisions of the section shall not apply to the installation of a trailer or mobile home, which is regulated by other sections of the UBC. Trailers or mobile homes which are incorporated into an existing owner-built residence shall be installed in conformity with other provisions of the code.

SECTION 8.07 MOVED BUILDINGS.

An owner-builder shall obtain the permits required by this section for the movement of a building previously erected within San Juan County which is to be moved and used for residential purposes by the owner-builder. If the owner-builder desires to move a building constructed outside the county into the county for use as a residence, the building may not be occupied until the building inspector has inspected it, evaluated the structure to ascertain if it is suitable for occupancy as a residence without unduly endangering the lives and safety of the inhabitants, advised the owner-builder of any deficiencies in this category, and has requested, but not required, correction of such deficiencies. An additional charge of $40 for such an inspection will be required. The owner-builder may request inspection of the building before it is moved within the county, and, in this event, the owner shall pay the costs of travel incurred by the inspector, in addition to the inspection fee and permit fee required.

SECTION 9 CLASS J STRUCTURES.

SECTION 9.01 PURPOSE.

The commissioners of San Juan County find that the regulation of Class J structures, except for tanks on towers more than six feet high, provided for in Resolution No. 224-1975 and the UBC unreasonably restricts the freedom of residents of San Juan County to construct such structures as accessory buildings to private residences or for agricultural purposes, that there is no pressing governmental interest served by the regulation of structures in this category, and that it is unreasonable to require any person or corporation constructing Class J structures, as defined in Section 1501 of the UBC, to pay a permit fee as a condition of constructing such structures as accessory buildings to private residences or for agricultural purposes. No permit, fee or inspection shall be required for such structures.

SECTION 9.02 REPEALER.

Provisions of Resolution No. 224-1975 and the UBC which are inconsistent with this section are hereby repealed.

SECTION 10 SERVICES AVAILABLE FROM THE BUILDING DEPARTMENT.

The commissioners of San Juan County believe that the services of the building inspector should be made available to citizens of San Juan County in those circumstances where a plan-check or on-site inspection is not required, but

where the holder of an owner-builder residence permit, or the person constructing a Class J structure, desires to obtain these services. Applicants for permits for owner-built residences, or builders of Class J structures, may obtain a plans-check from the building inspector upon payment of a fee determined as follows: There shall be a $5.00 charge for plan-check on the plans for structures containing less than 250 square feet, a $15.00 charge for structures containing less than 500 square feet, and a $30 charge for structures containing less than 1,000 square feet. The fee for buildings containing more than 1,000 square feet shall be computed by the building inspector with regard for the complexity of the plans and the ease with which the plans may be interpreted, but such fee shall not be less than $30 plus a sum which is not less than 1¢ per square foot, nor more than 3¢ per square foot.

The owner of a permit for construction of an owner-builder residence, or a person constructing a Class J structure, may obtain an on-site inspection from the building inspector upon application for the same and the payment of a fee which shall be $15.00 for inspections on ferry-served islands, and $25.00 for inspections on non-ferry-served islands. The inspector will schedule the on-site inspection as soon as possible, given the performance of his other responsibilities, the owner's availability, and the accessibility of the building site.

SECTION 11 BOARD OF APPEALS.

The Board of Commissioners of San Juan County finds that the public interest will be served by assigning additional functions and responsibilities to the board of appeals which is created by Section 204 of the UBC. Such additional duties shall include a report, at least annually, by the board to the Board of County Commissioners, advising the commissioners with respect to the personnel and operating procedures of the building department.

SECTION 11.01.

The board of appeals shall consist of nine members, three from each commissioner district, who shall be appointed by the county commissioner for that district. The county commissioners shall endeavor to appoint board members from each of the following areas, to obtain diverse backgrounds and expertise:

1) general or specialty contractors licensed by the state of Washington;
2) owner-builders;
3) fire commissioners, fire chiefs or fire fighters.

SECTION 11.02 ORGANIZATION OF BOARD.

The board, following appointment of the first members, shall meet and elect a chairman who shall serve for a period of two years or until a replacement is chosen. The board shall organize itself into three panels, one for each commissioner district, which panels may sit to hear appeals in accordance with Section 204 of the UBC. Members of the board shall serve without compensation, but shall be entitled to reimbursement for sums expended in transportation and meals while attending to the business of the board.

SECTION 11.03 PUBLIC INFORMATION.

The board of appeals, with the assistance of the building official, shall undertake to place in every public library in San Juan County a copy of the UBC, together with county resolutions adopting and amending the same, and such books and instructional materials as the board, with the advice of the building official and the county agricultural extension agent, believes will be of value to owner-builders or persons building Class J structures. The costs of these books shall be a public expense payable from funds appropriated for the operation of the building department.

SECTION 12 MISCELLANEOUS PROVISIONS.

SECTION 12.01 ENFORCEMENT.

The commissioners of San Juan County reaffirm the obligation of government to protect and promulgate the rights of individual citizens. This code has been created and shall be implemented in accordance with this obligation, and enforcement of the code shall not be undertaken for the purpose of intimidating, harassing or discriminating against any individual or individuals because of race, religion, sex, life-style, or economic status.

SECTION 12.02 UNIFORM PLUMBING CODE.

The provisions of the Uniform Plumbing Code shall not apply to any construction undertaken by an owner-occupant of a residence, or on work done by an owner to a structure in the Class J category.

SECTION 12.03 PLANS.

The provisions of Section 301(c) of the UBC dealing with content of plans and specifications shall not apply to plans prepared by an owner-builder for an owner-builder residence, or to plans prepared by any person for a Class J structure.

SECTION 12.04 HAND-SPLIT SHAKES.

Section 4.07 of Resolution No. 224-1975 is repealed insofar as it amends Section 3202(c)(7) and Section 3203(d)(8) of the UBC.

SECTION 13 CODE REQUIREMENTS FOR PROFESSIONAL BUILDERS.

No work shall be performed on an owner-built residence for monetary compensation by persons licensed as general contractors or specialty contractors by the State of Washington, their agents, employees, or other on-site trades people. An owner-builder may, however, employ licensed electricians or plumbers to work on a home built under the owner-builder permit, which work shall comply and be conducted in accordance with the State Electrical Code and Uniform Plumbing Code as adopted in San Juan County.

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SECTION 14 RENEWAL FEES.

Section 3.03 of Resolution 224-1975, which requires a fee

for the renewal of a building permit, is hereby repealed. There shall be no fee for the renewal of a building permit.

SECTION 15 EFFECTIVE DATE.

This ordinance shall be effective upon adoption.

ADOPTED this 22nd day of March, 1977.

BOARD OF COUNTY COMMISSIONERS
SAN JUAN COUNTY, WASHINGTON

Chairman

Member

Member

ATTEST:
HENRY R. BYERS

San Juan County Auditor and
Ex-officio Clerk of the Board

Prepared by:
MICHAEL C. REDMAN

PROSECUTING ATTORNEY
SAN JUAN COUNTY

cc: P.A.
Building Supt

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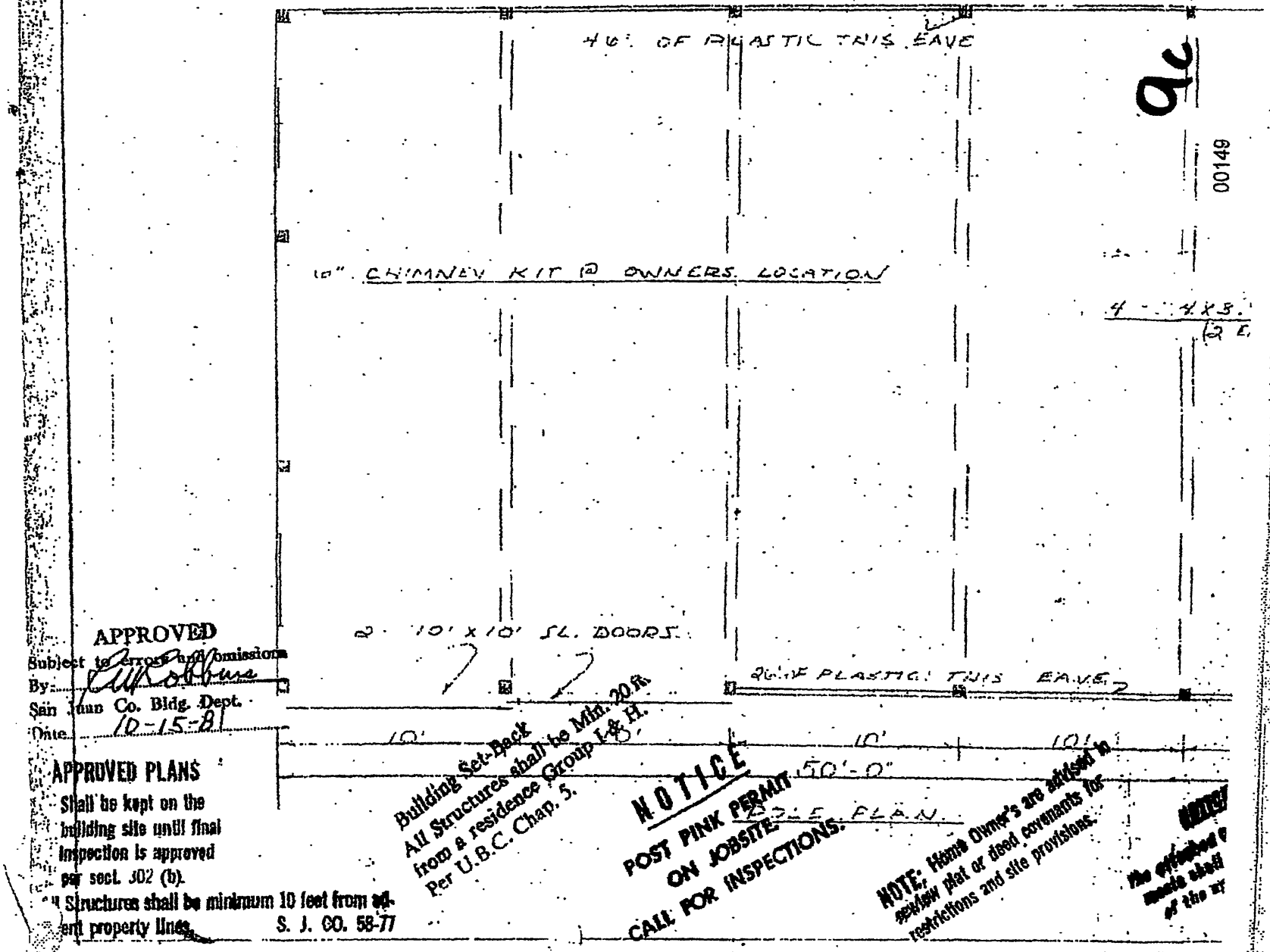
00209

APPENDIX A-4


46' OF PLASTIC THIS EAVE
16" CHIMNEY KIT @ OWNERS LOCATION
2 - 10' x 10' SL. DOORS
26'-0" PLASTIC THIS EAVE
10'
10'
10'
50'-0"
Building Set-Back
All Structures shall be Min. 20 ft.
from a residence Group I & II.
Per U.B.C. Chap. 5.
NOTICE
POST PINK PERMIT
ON JOBSITE
CALL FOR INSPECTIONS.
NOTE: Home Owner's are advised to
review plat or deed covenants for
restrictions and site provisions.
APPROVED
Subject to errors and omissions
By
San Juan Co. Bldg. Dept.
Date 10-15-81
APPROVED PLANS
Shall be kept on the
building site until final
inspection is approved
per sect. 302 (b).
Structures shall be minimum 10 feet from ad-
jacent property lines.
S. J. CO. 58-77
00149