74039-3

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No. 74039-3-I

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

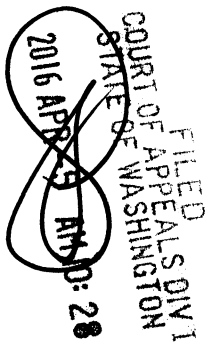
MICHAEL DURLAND, KATHLEEN FENNELL,
and DEER HARBOR BOATWORKS,

Appellants,

v.

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

Respondents.



APPELLANTS' REPLY BRIEF

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. REPLY INTRODUCTION[1]

The County and the Heinmillers have resorted to speculation, false statements, and name-calling against Mr. Durland instead of focusing on the facts. Those facts do not support their position. Two key propositions are supported by substantial evidence in the record: (1) the law in 1981 required a 10-foot side yard setback for the barn structure in question; and (2) a building permit was issued for the Barn setting forth the10-foot setback requirement. The permit cannot be challenged at this time, despite the efforts of the County and Heinmillers to disavow its existence at this late date. It is indisputable that the Barn was built less than 10 feet from the property line. Thus, the structure is illegal and cannot be legally converted to an ADU. The case really is this simple.

First, Resolution 58-77 (CP 341-46) did not remove or waive setback requirements (or any other performance standards) for structures such as the Barn. Respondents can talk about the "correct law" that needs

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[1] Appellants submit this singular Reply Brief answering the Response Briefs filed by San Juan County (the "County") and Heinmiller and Stameisen (collectively "Heinmiller"). The County failed to respond to Mr. Durland's shoreline arguments. The Heinmillers' responses on the issues are summarily stated, without citation to any evidence in the record and based on unsupportable assumptions. Durland's shoreline arguments in his Opening Brief (pp.32-39) are incorporated herein by reference and show: (1) the County correctly determined in the 2008 Compliance Plan that the converted Barn is not a normal appurtenance to residential use and that both shoreline substantial development permit and shoreline conditional use permits are required. SJCC §18.50.330.E.3 and E.4, and (2) as a matter of law, the 2009 Amended Supplemental Compliance Plan does not constitute a shoreline exemption under SJCC § 18.50.020.F.1 and/or WAC 173-27-040(1)(a) because there has been no consideration of shoreline policies or the impact on the utilization, protection, restoration and preservation of the shoreline. It was error for the Hearing Examiner to fail to require compliance with the Shoreline Management Act ("SMA") and the County's Shoreline Master Plan ("SMP")

to be applied, but with due respect, it already has and the Superior Court and the Examiner erroneously missed this point.

The term "setback" is not even found in the Resolution, other than in Section 8.03, which states, "The application shall also contain a statement of the setback requirements and the applicant's agreement to comply therewith." The interpretation of the Resolution offered by by the County and Heinmiller is contrary to law and inconsistent with statutory construction principles, particularly given that it was adopted as a cost-saving measure for the County and not a free-for-all for property owners to build structures without any performance standards. All of the interpretative gyrations by the Heinmillers, the County, and the Hearing Examiner to convince themselves the Resolution waived setback requirements is for naught.

Second, the County's conduct is consistent with Mr. Durland's interpretation of the resolution. Substantial evidence in the record shows that Res. 58-77 was applied by the County to enforce the 10-foot side-yard setback when the Barn was originally constructed in 1981. This is documented by the County stamp used on permit documents, which states "All structures shall be minimum 10 feet from adjacent property lines S.J.C. 58-77." (CP 281, CP 283, CP 321). This stamp is placed on the Smith site plan for the Barn. (CP 284).

Tellingly, the County does not even address its Res. 58-77 stamp. This demands an answer to the question: if the Resolution did, in fact remove setback requirements, why did the County make a stamp to state the exact opposite and to clarify that Resolution 58-77 does require setbacks? Neither Respondent has an answer. Not only are the Respondents' arguments contrary to substantial evidence in the record, they defy common sense.

Third, the County did in fact issue a building permit to Heinmillers' predecessor. In *Durland I*, this Court ruled, "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."[2] *See also* Compliance Plan, p.1, reference to Building Permit No. 3276. (CP 176). *See also* Building Permit Receipt (CP 01505), Building Inspection Permit (CP 01507), and Building Permit Ledger (CP 01508).

Former County Building Official, Mr. John Geniuch, confirmed in a February 3, 2015 email to County Officials (including the attorney representing the County in this case) that he was incorrect in his

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[2] *Durland v. San Juan Cty.*, 174 Wn. App. 1, 7, 298 P.3d 757 (2012). *See also* Durland Opening Brief, p.23. The Respondents contend that this statement is not a "ruling," but it is the law of the case, as established by the Examiner in the First Hearing. *See* Decision, p.1, CP 31. *See also* Durland Opening Brief, pp.21-22. In other words, the permit was issued with the required 10-foot setback. It is of no import that according to Respondents, this was a mistake. Under the doctrine of finality, even an incorrect permit is binding if not appealed, although in this case, the setback was properly applied.

unauthorized "Supplemental Staff Report" (CP 902) to the Hearing Examiner which stated no building permit was issued:

> The attached page contains ledger entries where the permit number #3276 was used, now clearly used mistakenly, for two separate and distinct permits. The first is a fire station on Orcas, the second belonging to the former owner of the subject parcel, William Smith. This ledger entry appears to match the alleged date range as well as the tax parcel number that was used at the time.
>
> I would like to revise my analysis and state that I now believe an error occurred in 1981 that resulted in 2 building permits being issued with the same number. It also appears that only one set of documents was retained (file cards and physical permit file), that belonged to the fire station.

CP 892. No one disavowed this statement and nothing is "unclear," as the County contends.[3]

The only reference to the possibility of no building permit being issued for the barn was put forth in a factually inaccurate report, which was unauthorized by the County and subsequently corrected by Mr. Geniuch, affirmatively stating that ledger entries show issuance of a building permit to Mr. Smith. (CP 950-952). The official County position

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[3] The County misrepresents that Sam Gibboney "disavowed" Mr. Geniuch's clarification/ correction of the unauthorized Supplemental Staff Report. County Br. at pp.3-4. Ms. Gibboney only stated that the Supplemental Staff Report should not be admitted into the record because it was inaccurate. CP 950-952. It is true that the Examiner did not allow this material into the record, but the Court can do so. *See* Durland Opening Brief, p.15, N.10.

put forth by Sam Gibboney Department Head of Community Development and Planning (CP 950-952) was that "the report is factually inaccurate and states conclusions that are at odds with the building permit records held by San Juan County. Thus, the Report does not represent the position of San Juan County and was an unauthorized submittal that was authored by Mr. Geniuch in isolation." The Official County position is that a building permit, Number 3276, was issued by the County and paid for by Bill Smith. The Hearing Examiner ruled, "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') ...." CP 01419. Yet, both Respondents baldly allege there is "no evidence" that a permit was issued in the face of facts in the administrative record, a feeble contention, as set out below in more detail.

This is not the only material misrepresentation or omission the County has made on substantive matters in this matter. The Court can consider the following in assessing the County's candor to the tribunal:

- Stating that the County made a decision that recognized the Barn as a non-conforming building. There is no documentation and no such decision in the record. The Count's legal officer stated to the contrary. (*See* CP 276) (Jon Cain email).

- Stating in the Compliance Plan that Mr. Durland's boundary line was found to be incorrect. CP 176. This is false.

- Taking the position in the Compliance Plan that a private agreement could modify County setback requirements. CP 177-78. This is false.

- Ignoring the stated position of both the County Head Building Official, John Geniuch, and Community Development and Planning Department Head, Sam Gibboney, who provide documentation that a building permit was in fact issued to William Smith for the Barn in 1981.

- Ignoring the County stamp, which reads "All structures must be minimum 10 feet from adjacent property lines. S.J.C. 58-77."

Mr. Durland is not asking the Court to rule on whether the conflicting, misleading, and outright false statements presented by opposing counsel effected an ethical violation.[4] However, justice is based upon the actual facts, not what government attorneys chose to argue, since argument is not evidence. He does request that this Court keep in mind the dubious history of misrepresentations when ruling on this appeal and not allow the County to substitute argument for fact.

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[4] *See e.g.*, RPC 3.3 (candor to the tribunal); *see also* RPC 3.4(e) (fairness to opposing counsel).

In addition to twisting and ignoring the facts, the County has attempted to make this an emotional issue, making libelous statements and painting Mr. Durland as someone holding an irrational grudge with unspecified "prejudices" and "personal beliefs."[5] One can only imagine the frustration any property owner would feel where the County has gone back on its word and repeatedly justified its decision to allow an illegal conversion of a structure on the property line (which negatively impacts Mr. Durland's boatyard operations) by ignoring evidence and creating strained legal arguments. Mr. Durland has simply asked that the County enforce the legal requirements as agreed to by all parties in 1987 in which they acknowledged the illegal structure could only remain if it continued to be used as a barn/buffer between residential uses on the Heinmillers' property and commercial/industrial uses on the Durland parcel. *See* Durland Opening Brief, pp.8-9. Arguing that Mr. Durland is litigious is not a basis for denial of the appeal.

Not surprisingly, arguments in the Heinmillers' Response Brief mirror those of the County with respect to Res. 58-77 and concerning the issuance of a building permit. Fundamentally, the Heinmillers' argument continues the lower court's legal error regarding the doctrine of finality.

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[5] Contrary to the County's argument, this is not the fourth appeal to the Court in this matter. It is the second appeal, following remand from the Court in *Durland I* after this Court rejected the arguments that Mr. Durland's challenges in this appeal were time-barred.

There is no authority for the proposition that an illegal structure can become legal due to the mere passage of time. Even the Examiner recognized in Conclusion of Law 11 that the building permit issuance is a final land use decision that cannot now be challenged. CP 01418-19, Decision, pp.11-12. Whether or not all parties were "happy" at the time the barn was constructed is mere speculation and not supported by the record. More importantly, such an assertion – even if supported – has nothing to do with finality.

Respondents do not want this Court to make a definitive ruling ending this matter once and for all, as they would prefer to go back to the Hearings Examiner and apparently hope for the best. In this regard, this Court can note the absence of a cross appeal on the Examiner's rulings that (1) the County did not allow a departure from the 10-foot setback via any variance, and (2) derivatively, the Boundary Line Agreement relied upon the Compliance Plan could not excuse a violation of the 10-foot setback.[6] (CP 01414, Conclusion No. 5, Decision, p.10). Thus, there is nothing to remand, once this Court rules the Barn was illegally constructed within the 10-foot setback. An illegal structure simply cannot be

[6] Declining to find the Compliance Plan was a "departure approval" is correct. A governmental official is not empowered to influence the outcome of a permitting decision on non-criteria grounds. *See* RCW 42.23. *See also Hubbard v. Spokane County*, 146 Wn.2d 699, 711-12, 50 P.3d 602 (2002), overruled on other grounds by *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 278-79, 358 P.3d 1139 (2015).

converted to a new use. *See* SJCC § 18.100.030; § 18.100.070. The Court should reverse the lower court's ruling and affirmatively rule the Barn as converted to an ADU is illegal as a matter of law.

II. COUNTERSTATEMENT OF FACTS

This is the second appearance before the Court of Appeals on this matter of the conversion of a Barn into a guest house which was undertaken without building permits, change of use permits, or shoreline permits. Mr. Durland has never advocated for removing the Barn, which has acted as a buffer between the residential property and the industrial boatyard. He is simply asking for enforcement of his rights as agreed to and approved by all parties in 1986/1987 that the structure remain a storage facility and not be allowed to be converted to an incompatible residential use.[7]

The County first came before this Court defending a flawed Compliance Plan and argued that decisions had been made that prevented Mr. Durland from his right to appeal. Jon Cain, a County Deputy Prosecuting Attorney, argued that such decisions were final, even in the face of his own e-mail to Mr. Durland that stated, "The County made no

[7] Mr. Durland first discovered the setback discrepancy during shoreline development and conditional use permit hearings in 1986. At that time, the County recognized the Barn as having been built within the required setback and made the decision, approved by all parties, to allow the illegally built barn to stand as a buffer and only stand as a barn. If the Barn was destroyed, it would not be allowed to be rebuilt. Had the County not lost the records of this hearing, we would not be in this place today.

decisions." (CP 276, email dated July 31, 2008). This Court saw through the County's argument and remanded the case to the Hearing Examiner.

Once again, the County is defending a fatally flawed argument that is 180 degrees from what it previously argued to this Court. The County is now trying to explain why a building permit for the Barn is in dispute and why the 10-foot setback required under applicable law (that all parties have acknowledged since 1987) is suddenly in question.

After Resolution 58-77 was adopted, changing some permitting requirements of Res. 224-75, San Juan County had a stamp manufactured to clarify the statements in Res. 58-77. That stamp, as noted, says: "All structures must be minimum 10 feet from adjacent property lines. S.J.C. 58-77." This is as clear as it gets. In 1981, when that stamp was placed on the site plan for the Barn, a 10-foot setback was required. The site plan was drawn to show the required 10-foot setback. (CP 00283). Bill Smith knew he was required to build the Barn with a 10-foot setback as he drew on the site plan and as was stamped on the site plan, stated in the Code Checklist, and noted on the Inspection Report.

In past hearings, both the County and Heinmillers provided proof that a building permit was issued to Bill Smith for the Barn. Respondents now disavow this evidence as being "unclear" because it no longer works

to their favor. There is nothing "unclear." To the contrary, the record is clear and easy to follow:

- 1981 – Mr. Durland's predecessor Bill Smith receives a building permit for a barn after submitting a plot plan showing the required 10-foot setback from the adjacent property line. CP 283.[8]

- 1986 – Mr. Durland applies for a Shoreline Substantial Development Permit and Conditional Use Permit. There is a discussion during the Board of Adjustment Hearings between Bill Smith, Michael Durland, Board of Adjustment, County Building Department, and the County Planner that the Barn had been built illegally and was allowed to stand, as a barn only until destroyed, as a buffer between the proposed industrial Boatyard uses and the residential property of Bill Smith. CP 744-748.

- 1990 – A private agreement between Bill Smith and Michael Durland allows the barn or shed to stay as a barn or shed until removed or destroyed and Durland grants a 20-foot buffer in return for the barn or shed standing as a buffer until the barn or shed is destroyed. CP 234-243.

- 1994 – Bill Smith sells property to Heinmiller.

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[8] *See also* hand written ledger, Site Plan, Inspection Report, Code Checklist, Permit Payment receipt, *infra,* pp.15-16.

- 2007 – San Juan County Code Enforcement Officer, Jeff Wasniak, begins code enforcement on the Barn/guesthouse as no building permits or change of use permits or shoreline permits were applied for before alterations to the storage barn.

- 2008 – Initially, the County advises Heinmiller that the Barn must be torn down and issues a Notice of Correction in February 2008.

- 2008 – Compliance Plan is signed by the County and Heinmiller on April 25, 2008. CP 176-179. This Compliance Plan had two fatal errors, both recognized by the Hearing Examiner. The statement that "The Boundary line shown on the plans was determined to be incorrect when a survey of the property was completed in 1990" was found to be a false statement. CP 176. The second statement in the Compliance Plan found to be flawed is "The County has acquiesced in the location and recognized the setback easement of twenty feet as a substitute for the property boundary setback of 10 feet." CP 176. This statement was dismissed by the Hearing Examiner on Remand at page 7 which states that "...the boundary line agreement did not excuse compliance with any applicable side yard setback." CP 01414.

- 2010 – Staff Report states the County was aware of the required 10-foot "building code setback for the barn." CP 162, CP 164.

- 2010 – The first hearing before the Hearing Examiner.

Both the County and Heinmiller argued that a building permit was issued for the Barn. Res. 58-77 was entered as an exhibit and no argument was put forth that the Resolution removed any side yard setbacks. The Hearing Examiner found, "The 1981 building permit approval only approved a barn that was proposed to be located ten feet from the side yard property line." CP 41. He further stated that "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." CP 41.

- 2010 – Bill Smith's friend, Carla Rieg, testifies that

because the adjacent property was undeveloped with an absentee owner, Mr. Smith knowingly built the barn 17 inches from the property line. CP 275; CP 140 (2010 Decision, p.3).

- 2012 – Court of Appeals Decision issued in *Durland I.*

This Court notes that the County required a 10-foot setback when the Barn was constructed. 174 Wn. App. at 6, n.1. The Court remands to the Examiner to consider whether there was any "departure" from the established setback.

- 2015 – Remand Hearing. The Hearing Examiner found

there was no document authorizing a departure from setback requirements

in either: (1) the Compliance Plan, (2) the Boundary Line Agreement (CP 01417), or (3) the Uniform Building Code. (CP 01417, lines 13-14).

III. REPLY ARGUMENT

A. Substantial Evidence Shows a Building Permit Issued in 1981.

Both opposing parties' Response Briefs are silent with respect to evidence concerning issuance of a building permit. In fact, the County does not cite any evidence whatsoever – let alone "substantial" evidence – to support the decision on appeal. It merely asserts that the conclusion the barn was legal when built is "supported by the record outlined above," and that "the record establishes that no permit was required." County Br. at pp.6-7. The County's "Statement of the Case," at pp.2-4, however, contains no citation to any evidence concerning a building permit for the Barn in 1981, and does not even address whether a permit was or was not issued. The Heinmillers similarly ignore the evidence that shows a building permit issued in 1981 for the Barn. Instead, they jump straight to an analysis of Resolution 58-77, on the flawed assumptions that: (1) the Resolution deleted side yard setback requirements; and, thus (2) no building permit must have issued.

Substantial evidence is "evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular Wireless*

LLC v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). *Id.*

Summarizing the evidence relating to issuance of a building permit with the required 10-foot setback, this Court may consider Head Building Official Mr. Geniuch's statement that he was factually wrong regarding the lack of a building permit in his unauthorized Supplemental Staff Report and that he had affirmatively reviewed permit logs to confirm that a permit issued for the Barn. This, coupled with Department Head Sam Gibboney's statements and providing a hand written ledger with the building permit documented as being issued and a payment receipt for the issued permit, leaves no doubt that a building permit had issued.

There is also circumstantial evidence supporting a finding that the County issued a building permit to Mr. Smith, as shown in CP 176 (Compliance Plan). CP 282 (Building Inspection Permit for Storage Barn), CP 00283 (Site Plan), CP 284 (Barn Building Plans- approved by San Juan County, 10-15-81), CP 950 (San Juan County Response to Motion to Supplement). This Court does not need an actual copy of the permit itself to establish building permit had been issued to Mr. Smith. *See, e.g., State v. Henderson*, 16 Wn. App. 526, 529, 557 P.2d 346 (1976) (although State's witnesses were unable to state that they saw the defendant strike the deputy, his conduct and spoken threats were circumstantial evidence

which would permit the jury to find that he did, in fact, commit a physical assault on the deputy).

This evidence remarkably contrasts to Respondents' assertions based solely upon the inconsistent statements of the Hearing Examiner, which appear to debate whether or not the permit had been issued, a flawed inquiry given the fact that this has never been in question and contradicts his prior findings. The County and the Heinmillers offer this Court nothing but speculation and innuendo and no citation to anything in the record in this regard. This is hardly substantial evidence to persuade a fair-minded person that no permit had issued.

The most damning evidence to support a finding that the building permit issued in 1981 is the County-created stamp used on the Building Inspection Report, Code Checklist, and "Approved" Building Plan, which further confirms "All Structures shall be a minimum 10 feet from adjacent property lines. S.J.Co. 58-77." Again, Respondents offer nothing to contradict this substantial proof that the building permit issued to Mr. Smith required compliance with a 10-foot setback.

Contrary to the Heinmillers' arguments, this Court should not defer to a factual finding that is unsupported by substantial evidence, as here, and involves the credibility of a witness' testimony. Heinmillers' Resp. Br. at p.17. Appellate courts give deference on a sliding scale based on

how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the lower tribunal. *Dolan v. King County*, 172 Wn.2d 299, 311, 258 P.3d 20 (2011) (citing *Smith v. Skagit County*, 75 Wn.2d 715, 719, 453 P.2d 832 (1969) (where trial court made no finding of witness credibility, a de novo standard is appropriate). Nor is an administrative decision that lacks factual support to be given substantial weight. C.f., *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164 (1980), overruled on other grounds, *SANE v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984).

After considering the entire record of evidence, the Court should rule that a finding that no building permit was issued for the Barn is clearly erroneous. *See Skagit County v. Dept. of Ecology*, 93 Wn.2d 742, 748, 613 P.2d 115 (1980). Given that the County and Heinmillers offered nothing to refute the evidence other than speculation, a mistake has been committed and should be reversed on appeal. *Id.*

B. Res. 58-77 Did Not Delete the Side Yard Setback Requirements.

The County does not address this argument in its Response Brief, which is telling. The Heinmillers focus solely on the text of Resolution 58-77, arguing to this Court how they believe it should be interpreted, but without any statutory construction analysis or argument. They appear to

urge the Court to defer to the analysis of the trial court and Examiner, but this issue is a question of law, which is reviewed 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).

While it is true that Class J structures such as the Barn enjoyed an exemption from permitting requirements via Section 9 of Res. 58-77, there is not a single reference to waiver or deletion of setback requirements in the entire text of the Resolution. Section 9.01 is very clear 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 construction such structures as accessory buildings to private residences or for agricultural purposes. ***No permit, fee or inspection shall be required for such structures***." (Emphasis added).

To clear up any potential confusion that might arise from Section 9, the County created a stamp that expressly referenced Res. 58-77 and affirmatively stated that all structures must comply with the 10-foot setback requirement. This stamp was used on building plans to clarify to a builder that setbacks were still required because of Res. 58-77 (and were not removed because of Res. 58-77), as the County and Heinmiller would have the Court believe. Not surprisingly, the County consistently has

taken the position (until 2015) that a 10-foot setback applies to agricultural buildings and to this barn, a position it cannot now disavow. *See 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). Creation and use of the stamp, along with the long-standing interpretation of the County that setback requirements apply to all buildings, and especially the Barn, constitutes substantial evidence that cannot be ignored.

Turning to statutory construction, Res. 58-77 is unambiguous, such that the plain meaning must be applied. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007); *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. The plain meaning of a the resolution is determined by viewing the words in the context of the enactment as a whole, including the subject, nature and purpose of the resolution and the consequences of adopting one interpretation over another. *Burns v. City of Seattle*, 161 Wn.2d 129, 140-146, 164 P.3d 475 (2007). Fortunately, there is a reported decision that specifically addresses the purpose of Res. 58-77. *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 313-14, 686

P.2d 1073 (1984), ruled that Res. 58-77 was enacted as a cost-saving measure because the County is comprised of over 100 islands and did not have resources for code enforcement of Res. 224-75.

Not one sentence expressly or impliedly changes, deletes or modifies in any manner the performance requirement of side yard setbacks. Deletion of any performance requirements was not the purpose of the Resolution. In fact, Res. 58-77 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. 58-77.

Respondents' interpretation of Res. 58-77 conflicts with the language of the law and its purpose. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). In addition, it flies in the face of substantial evidence in the record that shows the County clearly did not intend to delete setback requirements, both via use of the stamp and its consistent, long-standing practice. While the Heinmillers would like the Court to read something into Res. 58-77 that is not there, the simple fact is that the language and purpose of the resolution was not to allow property owners to freely build structures without regard to property lines. Had Mr. Smith complied with the law back in 1981, the

Barn would have been a legal structure. He did not, however, and now the Heinmillers have to bear the consequences of their intentional flouting of the law because two wrongs do not make a right.

C. The Doctrine of Finality Prevents a Collateral Attack on Setback Requirements

The County's Response Brief does not address the doctrine of finality, other than to comment that the passage of time does not make the barn a lawful structure. County Br. at p.6. Durland agrees with this statement. However, without any citation to evidence, the County alleges that the Barn was legal when constructed and that no permit was required. The Heinmillers make the same argument. Such assertions are demonstrably without basis, as set forth at pages 19-20, *supra.*

Substantial evidence in the record shows that a permit was issued for the Barn in 1981. *See* pp. 14-17, *supra.* The Heinmillers attempt to side-step the rubber stamp used on all permit-related documents in the record, speculating that it must have been done out of "habit," and without consideration of the alleged "fact" that Res. 58-77 "deleted" setback requirements. This absurd argument does not even get out of the gate. The stamp itself – the one used on all of Mr. Smith's documents – cites to Res. 58-77 and affirmatively states that a 10-foot setback is required. Res. 58-77 clearly did not, and was not intended to change the law to

delete setbacks as discussed above. There is no evidence that such documents are the product of mere "advisory review," either. Again, it is nothing more than speculation on Heinmillers' part.

The Heinmillers' argument is a house of cards and comes crashing down under the fact the County created a stamp that used both "Res. 58-77" and "shall be minimum 10 feet from adjacent property lines" in the same, short notation. The notation is repeated three times on permit-related documents issued to Mr. Smith! There could never have been any reliance on anything other than the fact a setback was required. Mr. Smith counted on the lack of objection from his absentee neighbor back in 1981 and now the Heinmillers hope to capitalize on that fact as well, but this conduct cannot act as a waiver of applicable regulations because neither are above the law.

Without regard to the name-calling, Mr. Durland has a right to expect compliance with the setback conditions of the permit because setbacks are required in order to protect the common good generally and adjoining property owners, specifically. *See, e.g., Barrie v. Kitsap Cy.*, 93 Wn.2d 843, 850, 613 P.2d 1148 (1980); *Sherwood v. Grant Cy.*, 40 Wn. App. 496, 501, 699 P.2d 243 (1985); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 27-28, 586 P.2d 860 (1978).

The Heinmillers wish to avoid conditions set forth in the permitting documents issued to Mr. Smith because now those conditions show the Barn was illegally constructed and cannot be converted to an ADU. But, under the doctrine of finality, they are bound by the setback requirement, regardless of whether the predecessors were "happy" back in 1981. *See Chelan County v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005); *Wenatchee Sportsman Ass'n v. Chelan Cou*nty, 141 Wn.2d 169, 4 P.3d 123 (2000).

The building permit requirements clearly set forth on all permitting documents in the record, and are determinative. As noted *infra*, p.7, the Examiner acknowledged that permit conditions that are not timely challenged are "final" and cannot be collaterally attacked. (Conclusion of Law 11). But, he did precisely that in his Decision, which was then affirmed by the trial court. These errors must be corrected by the Court in this appeal.

D. There is No Basis to Remand the Matter to the Examiner Because the Barn Cannot be Legally Converted.

If the Court agrees that the Hearing Examiner erred in his ruling, there is no basis to remand the matter. *See, e.g., Levine v. Jefferson County*, 116 Wn.2d 575, 582, 807 P.2d 363 (1991). No additional

evidence needs to be considered and there can be no "correction" of the County's erroneous legal conclusions. There is no discretion for the Examiner to uphold after-the-fact permits where the law specifically prohibits conversion of an illegal building, as here. *See* SJCC § 18.100.030; § 18.100.070. 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).

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. The only authority to be exercised here is for the Court to reverse the lower court and direct the County to deny the permits. As in Levine, *supra*, where the County has created such an inadequate record to support its decision-making, it is time for this Court to end the delays and simply rule that the building as converted is illegal. *See Levine*, 116 Wn.2d at 579. Contrary to Heinmillers' argument, there should be no award of attorney fees to either of the Respondents pursuant to RCW 4.84.370 and/or RAP 18.1(b) if Mr. Durland prevails in this appeal

IV. 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 April, 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 the original of the foregoing brief was timely filed on April 4th, 2016 pursuant to RAP 18.6(c), as follows:

Washington State Court of Appeals, Division I
One Union Square
600 Union Street
Seattle, WA 98101-4170
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*	John H. Wiegenstein, WSBA #21201 Heller Wiegenstein PLLC 144 Railroad Avenue, #210 Edmonds, WA 98020-4121 Johnw@hellerwiegenstein.com; MonicaR@hellerwiegenstein.com; docket@hellerwiegenstein.com *Attorneys for Respondents Wesley Heinmiller, Alan Stameisen, and Sunset Cove LLC* By Email*

[*Per Parties' stipulation to electronic service by email; hard copies not served unless requested; documents too large for email (typically >10MB) may be served by Dropbox or similar to allow direct downloading]

DATED at Bainbridge Island, Washington, this 4th day of April, 2016.

Jon Brenner
Paralegal