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

NO. 67429-3-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

OPENING BRIEF OF APPELLANTS MICHAEL DURLAND, et al.

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I. ASSIGNMENT OF ERROR

1. The superior court erred in granting San Juan County's Motion for Partial Dismissal by an Order entered on October 21, 2010.

2. The superior court erred in denying Durland's Motion for Reconsideration by an Order entered on December 29, 2010.

3. The superior court erred in affirming, in part, the San Juan County Hearing Examiner's Decision in Administrative Appeal No. PAPL00-09-0004, dated July 23, 2010, by an Order entered on June 20, 2011.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the Hearing Examiner have jurisdiction to resolve issues arising under the Land Use Petition Act, ch. 36.70C RCW (LUPA)?

2. Were San Juan County's Code Enforcement Compliance Plans "final" land use decisions as that term is used in LUPA, RCW 36.70C.020(2)? *Assignment of Error 1 and 2.*

3. Can a code violation be cured by a private agreement to which the County is not a party? *Assignments of Error 1 and 2.*

4. Is the County Code provision related to roof pitch unambiguous, precluding modification of the requirement by county staff in the guise of "construing" it? *Assignment of Error 3.*

5. Did the Hearing Examiner err in treating the roof alteration as a “grandfathered” non-conforming use? *Assignment of Error 3.*

III. STATEMENT OF THE CASE

This case deals with two adjacent parcels of land located on Orcas Island adjacent to Deer Harbor. One parcel is owned by respondents Heinmiller and Stameisen (hereinafter collectively “Heinmiller”).¹ The parcel is zoned Residential and is being used for residential purposes.

The adjacent parcel to the north is owned by the appellants Durland, et al. CP 136. Durland’s property is zoned Industrial and is currently being utilized as a boat yard and marina. CP 13:25-26; CP 15:15-16.

In 1981, San Juan County issued a building permit for a 30 foot by 50 foot “storage barn” or “storage structure” [hereinafter “barn”] on the property now owned by Heinmiller. CP 21:14-15; CP 78; CP 184-188. Though the barn was located within the 200 foot shoreline jurisdiction, therefore requiring a shoreline permit; no shoreline permit was sought or issued. CP 79-80; CP 147.²

¹ In February, 2011, Heinmiller and Stameisen quit claimed the parcel to Sunset Cove Estate LLC pursuant to WAC 458-61A-211.

² San Juan County first adopted a Shoreline Master Program in October 1976.

A building permit was issued, though. CP 184-188. It approved a barn ten feet from the property line. San Juan County Resolution No. 224, in effect at that time, also required the barn to be placed at least ten feet from the property line. CP 23:1-5; CP 78; CP 184-189.

In 1990, Durland was seeking a conditional use permit and a shoreline permit to allow for the development of his property. A property line survey revealed that the barn was actually located only 1.4 feet from the property line. CP 78. To address this issue, Durland and the previous owner of the Heinmiller property executed a Boundary Line Agreement and Easement (hereinafter “restrictive covenant”). CP 137-146.

The restrictive covenant did two things. First, it established a common boundary line between the two properties. CP 138:11-22. Second, because the new common boundary line did not correct the barn’s location relative to county setback requirements, the document created a 20-foot wide “easement” (really a restrictive covenant) on Durland’s side of the line. CP 138:23-28. The function of the 20-foot wide restrictive covenant was to assure a 20-foot separation between the barn and a storage building proposed for construction by Durland on his property. If the County Code’s 10-foot setback requirement were honored on both sides, a 20-foot separation between buildings would be assured. In effect, the private agreement

provided for the 20-foot separation by locating almost all of it on Durland's side of the line.³

Durland was willing, in effect, to shift a portion of Heimiller's ten foot setback to his side of the line because Durland saw that the barn would provide a buffer between his industrial property and any residential uses on the far side of the barn. CP 12:11-13. While Durland had agreed to allow the barn to remain within close proximity to the property line, he did not want a residence in that location for fear it would result in conflicts due to the industrial use of his property. CP 13:1-5. The restrictive covenant expressly provided for its termination upon the removal or destruction of the barn structure. CP 139:3.

Heimiller purchased the property with the barn in approximately 1995. CP 15:16; CP 16:8. Sometime in 1997, Heimiller's parents contracted for the conversion of a portion of the barn to an Accessory Dwelling Unit (ADU). CP 15:17-18. This conversion involved the construction of a living room, kitchen, bedroom, and bathroom on the first floor and a loft with a bedroom and bathroom on the second floor. CP 78-79; CP 211b; CP 218-219. In addition, external improvements to the barn included a deck, a carport, siding, and eaves. CP 79-80; CP 217. In direct violation of County

³ The language of the document actually measures the 30 feet from the north

Code requirements, no building or shoreline permits were secured for this work which cost at least \$175,000 in labor and materials. CP 78; CP 16:19; CP 21:20.⁴

In 2007, Heinmiller filed an application for an Upland Conditional Use Permit seeking authorization to utilize the residential unit in the former barn as a vacation rental unit. CP 21: 20-22.⁵ Because of that request, the County was finally made aware of the unpermitted conversion to a residence. CP 21:20-22. In February 2008, San Juan County issued a Code Violation Notice of Correction for this unpermitted work, essentially requiring its demolition. CP 21:22; CP 78.

Heinmiller, of course, did not want to demolish the barn or terminate its use as a residence. He discussed options with the County for coming into compliance. The County agreed to allow Heinmiller to attempt to get after-the-fact permits for the residence, before compelling its demolition.

side of the barn. Therefore, 1.4 feet on the easement was located on Heinmiller's property.

⁴ Unless exempt, development within the shoreline that exceeds \$5000 requires a substantial development permit. SJCC 18.50.020(F) (referencing WAC 173-27-040).

⁵ The Record of the proceedings is inconsistent as to Heinmiller's intent. The Hearing Examiner's decision states that Heinmiller intended to convert the Barn to an ADU for Mr. Heinmiller's parents. CP 15:15-17. However, the decision further states that after the passing of Mr. Heinmiller's father, the intent was for Heinmiller to live in the ADU and rent out the main home as a vacation residence. CP 16:8-15. The decision also states the purpose of the Upland Conditional Use Permit (Permit 07CU13) was to allow the ADU to be used as a vacation rental. CP 21:19-21.

To that end, Heinmiller and the County executed an Agreed Compliance Plan (hereinafter “Compliance Plan”), dated April 25, 2008. CP 78-81. The Plan provided a factual background on the matter, *e.g.*, issuance of the 1981 building permit for the barn; the status of the barn as an illegal and/or non-conforming structure under the County’s shoreline and zoning regulations;⁶ and the structure’s illegal use as an ADU.⁷ CP 78-81. The Compliance Plan ordered the immediate cessation of the barn’s use for residential purposes and required submittal of a demolition permit for the removal of the deck and carport. CP 80. The Compliance Plan then set forth a variety of alternatives by which Heinmiller might try to bring the rest of the building into compliance with the San Juan County Code. CP 80-81.

Heinmiller was basically given two choices - submit complete applications for a Shoreline Substantial Development Permit, a Conditional Use Permit, and all other necessary permits for review or submit a complete demolition permit application. CP 80-81. The Compliance Plan did not commit the County to issue any permits. To the contrary, it expressly noted the possibility that the permit applications would be denied. In that situation,

⁶ Illegality and non-conforming of the barn structure itself arises from both its encroachment within the side-yard setback and the failure to secure shoreline permits at the time of construction.

⁷ The ADU’s illegality arises from the fact that no permits were sought to convert the barn to a residence or to allow for the use.

the demolition (or the identification of an alternative method of compliance) was required. CP 80-81. Section 3 of the Compliance Plan stated, in relevant part:

The owners will take EITHER action (a) or (b) as follows:

- a. Submit necessary permit applications for conversion of a portion of the storage structure to an ADU or bunkhouse. The first step is submittal of complete Shoreline Substantial Development Permit and Conditional use Permit applications, ... The owners' next step is as follows:
 - i. If the SDP and CUP are approved, the owners will submit complete applications for all other necessary land use approvals such as building permits ...
 - ii. If either the SDP or CUP are denied, the owners will either (A): obtain a demolition permit for removal of the converted space inside the storage structure .. and restore the structure to its permitted configuration for storage ... or (B) identify an alternative method of compliance ...
- b. Submit a complete demolition permit application for removal of the converted space ...

CP 80-81.

A year later, Heinmiller decided that none of the alternatives set forth in the Compliance Plan were satisfactory. An amendment was negotiated which allowed the consideration of a new alternative. This new alternative would allow Heinmiller to seek County approval to reduce the building's height by a foot as a means of avoiding the need for a shoreline permit. (The

requirement for a shoreline permit was triggered by buildings over 16 feet tall. The barn was 17 feet.) CP 79-80; CP 82-83.

The result was the Supplemental Agreed Compliance Plan (hereinafter “Supplemental Compliance Plan”), dated April 28, 2009. CP 82-83. The Supplemental Compliance Plan did not void the original Compliance Plan; all provisions of that Plan remained in effect. CP 83. Thus, like the original Compliance Plan, the Supplemental Compliance Plan acknowledged that none of the stated alternatives might be successful and demolition might still be required.

Durland did not appeal the original Compliance Plan. However, in June 2009, Durland, nervous that an appeal of a compliance plan might be required, belatedly appealed the Supplemental Compliance Plan.

In defending Durland’s appeal of the Supplemental Compliance Plan, San Juan County asserted that no appeal to the Examiner was available, *i.e.*, that the County Code allowed administrative appeals of permits, not compliance plans. *See, e.g.*, CP 210 (letter from San Juan County Planning Director Henrickson stating there is no administrative appeal process for a neighboring property owner in compliance proceedings). The Hearing Examiner did not rule on that issue or the merits, though, because the appeal had been filed a day late. CP 126; CP 22:6-7.

Durland, now represented by counsel, agrees with the County that no administrative appeal of the Compliance Plan was available. Thus, the tardiness of that filing is irrelevant.

Based on representations by the County that relief could be sought at the time of development permit issuance, Durland actively participated in the County's review process for the building, ADU, and change of use permits. CP 5:4-26; CP 13:6-8; CP 24: 1-13; CP 49;⁸ CP 210. Despite the concerns raised by Durland during that process, in November 2009, the County issued three "after-the-fact" permits: a building permit, an ADU permit, and a change of use permit. CP 71-77.

Durland filed a timely appeal of those permitting decisions to the County Hearing Examiner. CP 67-69. An evidentiary hearing was held.

At the conclusion, the Hearing Examiner, with one exception, found Durland's appeal amounted to a collateral attack on the previously issued Compliance Plan and Supplemental Compliance Plan (collectively, "Compliance Plans") and, therefore, was time barred. CP 11. The Hearing Examiner's construed the Compliance Plans as "land use decisions" subject

⁸ Hearing Examiner Exhibits, 2009 Appeal of Supplemental Compliance Plan – July 14, 2009 memo from Jonathan Cain, San Juan County Deputy Prosecutor stating "...if a permit application is submitted by a property owner as a means to resolve a code enforcement action, a third party may participate in any public hearings on the matter and will have a method of appeal available through administrative appeal and/or court action in conjunction with the permit."

to the Land Use Petition Act (LUPA), RCW 36.70C, and LUPA's requirement for appeals to be filed within 21 days of issuance. CP 23-27. The only exception recognized by the Hearing Examiner was in regards to the ADU issues. The Hearing Examiner concluded that the Compliance Plans "do not substitute for ADU review and approval" and, therefore, he addressed the ADU issues on the merits. CP 27:5-7; CP 31-32. However, the Hearing Examiner concluded that the ADU approval was consistent with the County Code and denied that portion of Durland's appeal, too. CP 32.

Durland then appealed the Hearing Examiner's decision by filing a LUPA petition in Skagit County Superior Court. CP 1-9. As did the Hearing Examiner, the court found that the Compliance Plans were final land use decisions for the purpose of LUPA and Durland's challenge to the subsequently issued permits largely amounted to a collateral attack on those earlier issue decisions. CP 34-35. As to the ADU issues, the Superior Court upheld the Examiner's determination that the roof pitch was acceptable, but reversed the Examiner regarding the ADU's compliance with square footage size limitations. CP 255-256; CP 258. The Court remanded the ADU approval for further consideration of the size limitations. CP 258. An appeal to this Court by Durland followed, with Heinmiller seeking review of the size limit issue. CP 260-268.

IV. STANDARD OF REVIEW

When conducting judicial review under LUPA, the Court of Appeals sits in the same position as the Superior Court and gives no deference to the Superior Court's findings. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54–55, 196 P.3d 141 (2008). Review of the action is based on the administrative record before the Hearing Examiner. *Id.* (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); *Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 841, 974 P.2d 1249 (1999)). Relief is granted when appellants carry the burden of establishing that one of the standards in RCW 36.70C.130(1)(a)-(f) has been met. These standards include:

- (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;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

However, Durland contends that one of the issues decided by the Hearing Examiner (*i.e.*, whether Durland could have filed a LUPA appeal of the Compliance Plans such that his failure to do so precluded him from challenging the permits) was beyond the authority of the Hearing Examiner.

As argued *infra*, the Hearing Examiner is authorized only to decide issues arising under the County Code. The Skagit County Superior Court was the first forum with jurisdiction to decide the LUPA exhaustion issue. Thus, as to this issue, the Court of Appeals reviews the Superior Court's decision, not the Hearing Examiner's. Furthermore, when, as here, the record before the Superior Court consists entirely of written documents and issues pertaining to statutory construction, the Court of Appeals' review is *de novo* with no deference due to lower court. *City of Olympia v. Drebick*, 156 Wn.2d, 289, 295, 126 P.3d 802 (2006). *See also, Dolan v. King County*, ___ Wn.2d ___, 258 P.3d 20, 27 (2011) (citing *Progressive Animal Welfare Society v. Univ. of Washington*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)).

V. ARGUMENT

A. Summary

Both the original construction of the barn within two feet of the property line and the later conversion of the barn for use as an ADU resulted in an illegal, non-conforming structure. The San Juan County Code expressly prohibits the issuance of a building permit or other development permit for any parcel of land that has been developed in violation of its regulations. The prohibition appears twice in the Code:

No approval shall be granted for a land use permit, land division, building permit or sewage disposal permit for any

lot, tract, or parcel of land on which there is a final determination of a violation of any state law or County ordinance, pertinent to use or development of the property, unless such violations are either corrected prior to application or are required to be corrected as a condition of approval. County approval granted on that basis may be revoked at any time if the then-owner, manager, tenant, employee, etc., fails to comply with conditions of approval or violates any state law or County ordinance pertinent to use or development of the property.

SJCC 18.100.030(F) (emphasis supplied).

D. Development and Building Permits. *No building permit, septic tank permit, or other development permit shall be issued for any parcel of land developed or divided in violation of the master program or of local regulations.* This prohibition shall not apply to an innocent purchaser for value without actual notice. All purchasers or transferees of property must comply with provisions of this ordinance. Each purchaser or transferee may recover damages from any person, firm, corporation, or agent selling, transferring, or leasing land in violation of this chapter, including any amount reasonably spent as a result of inability to obtain any development permit or spent to conform to the requirements of this code. Such purchaser, transferee, or lessor may, as an alternative to conforming his or her property to these requirements, rescind the sale, transfer, or lease.

SJCC 18.100.070 (emphasis supplied).

Despite these code provisions and the illegal, non-conforming status of the barn, San Juan County issued three permits – a building permit, an ADU permit, and a change of use permit. The issuance of these permits for an illegal structure formed the heart of Durland’s appeal to the Hearing Examiner. However, the Examiner never addressed the merits of Durland’s

claims, deciding instead that Durland should have raised these claims by filing a LUPA appeal when the Compliance Plans were adopted.

The Hearing Examiner erred because no LUPA appeal was available to challenge the Compliance Plans. They were not final land use decisions. The Compliance Plans merely set forth options Heinmiller could pursue to address his illegal conversion of the barn to an ADU. LUPA allows judicial review only of “final” land use decisions. A “final” decision is one that “leaves nothing open to further dispute and sets to rest [the] cause of action between the parties.” *Stientjes v. Thurston County*, 152 Wn. App. 616, 623, 217 P.3d 379 (2009) (citing *Samuel’s Furniture v. Dept. of Ecology*, 147 Wn.2d 449 452, 54 P.3d 1194 (2002)). Because the Compliance Plans were not final decisions, no LUPA appeal was available. Durland’s issues should have been addressed when he raised them at the time the County issued the permits – truly final land use decisions.

We also demonstrate that the Examiner lacked authority under the County Code to make a ruling on LUPA’s requirements. But because the Superior Court ruled to the same effect, the LUPA exhaustion issue is properly before the Court.

If this matter is remanded to the Examiner, one of the primary issues will be whether the barn’s nonconformity with the setback requirements can

be cured by reference to a private agreement to which the County is not a party. It would be efficient for the Court to address this legal issue now. We demonstrate that the restrictive covenant on Durland's property does not render the barn a legal, conforming structure. It remains too close to the property line. That ruling, if made, would shorten the remand proceedings considerably.

Lastly, we address the roof pitch issue. We demonstrate that the Examiner erred in finding that the new flat roof was grandfathered. Prior to the proposed work, the roof conformed with the roof pitch regulations. Rebuilding the roof to create a new nonconformity is not excused by any notion of grandfathered rights. We also demonstrate that County staff attempted to side step the roof pitch requirement by construing the County Code to include exemptions that simply are not there. The County Code's roof pitch requirements are not ambiguous. County staff had no authority to construe an unambiguous regulation and no authority to create exemptions.

B. The Hearing Examiner Lacked Authority to Decide Whether the Compliance Plans Were "Final" Decisions for Purposes of LUPA's Exhaustion Requirement and, Therefore, Incorrectly Failed to Address Most of Durland's Claims

The Hearing Examiner lacked authority to refuse to consider an administrative appeal of the recently issued after-the-fact permits on the basis

that Durland had failed to file a judicial appeal of the previously adopted Compliance Plans. The Hearing Examiner concluded the Compliance Plan and Supplemental Compliance Plan were final land use decisions subject to LUPA's 21-day time limitation. CP 24-25. To reach that result, the Hearing Examiner had to decide that the Compliance Plans were final land use decisions as that term is defined in state law, RCW 36.70C LUPA. But, the San Juan County Code does not grant the Examiner the authority to decide state law issues. The Examiner's authority is limited to construing the County Code. The Hearing Examiner exceeded his authority in deciding issues under state law.

The Hearing Examiner's authority and jurisdiction to hear matters derives from the San Juan County Code.⁹ The Office of the Hearing Examiner is an administrative tribunal within the County and, therefore, like other legislatively-created administrative tribunals, the Hearing Examiner's power is limited to only those powers conferred by the County Code, either expressly or by necessary implication.¹⁰ The Hearing Examiner has the authority to "interpret, review, and implement land use regulations as provided by ordinance." The County Code denotes the types of permits,

⁹ SJCC 2.22 creates the Office of the Hearing Examiner.

¹⁰ See, e.g., *Lejeune v. Clallam County*, 64 Wn. App. 257, 270, 823 P.2d 1144 (1992).

decisions, or appeals that are subject to hearing examiner review.¹¹ Review of LUPA issues is not among them. Whether or not the Compliance Plans, for the purposes of LUPA, are final land use decisions is for the Court, not an administrative hearing examiner, to decide.

Durland recognizes that the Hearing Examiner may, in certain situations, utilize Washington case law on statutes to assist in construing the County Code. But that is not what the Hearing Examiner did. The Hearing Examiner was not construing any part of the County Code. Rather, the Hearing Examiner repeatedly used Durland's failure to file a *judicial* LUPA appeal of the Compliance Plans within 21 days of their issuance as a bar to the review of his timely filed *administrative* appeal of the development permits. Therefore, this aspect of the Hearing Examiner's decision should be reversed pursuant to RCW 36.70C.020(1)(e) because the decision was outside the authority and jurisdiction of the Hearing Examiner.

Even though the LUPA issue was beyond the Hearing Examiner's jurisdiction, the Superior Court had jurisdiction of the issue and reached the same conclusion as the Hearing Examiner. The issue, thus, is properly before this Court. We address the propriety of the Superior Court's ruling in the next section.

¹¹ SJCC 2.22.030, 2.22.100, 18.80.140(B).

C. ***The Compliance Plans Were Not Final Land Use Decisions Subject to LUPA When They Were Issued***

The Compliance Plans were not final land use decisions. The Compliance Plans set forth a process identifying alternative permitting options that Heinmiller could pursue. If Heinmiller succeeded in obtaining the permits identified in the Compliance Plans, he would cure his non-compliance – assuming that the permits were not successfully challenged on appeal. If Heinmiller did not pursue the permits, or was unsuccessful in his attempt to secure the permits, then the County would resume its enforcement efforts.

Thus, the Compliance Plans were just that – “plans.” They were not permits and did not purport to resolve the entire controversy. The Compliance Plans were interlocutory decisions, not subject to immediate judicial review. Durland did not have the right under LUPA to appeal those interlocutory decisions and he lost no rights by not doing so. Durland’s appeal of the subsequently-issued permits was timely and should have been addressed fully on the merits.

1. ***The Land Use Petition Act, RCW 36.70A, allows judicial review only of “final” land use decisions***

Enacted in 1995, the Land Use Petition Act (LUPA), RCW 36.70C, is intended to “reform the process for judicial review of land use decisions

made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.” RCW 36.70A.010.

LUPA’s purpose is consistent with Washington’s policy of favoring finality in land use decisions. *Post v. Tacoma*, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009) (citing *Twin Bridge Marine Park, LLC v. State*, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008)). The finality requirement serves two purposes. First, by establishing a 21-day period for bringing judicial appeals, LUPA assures that a permit holder can quickly determine if the permits are free from challenge. Second, by allowing judicial appeals of only “final” land use decisions, LUPA protects the courts from being inundated with challenges to a multitude of local government decisions prior to the final determination. This finality requirement also serves to prevent premature judicial intrusion into land use decisions when the local government may still provide relief. *Chelan County v. Nykreim*, 146 Wn.2d 904, 938, 52 P.3d 1 (2002); *Stientjes v. Thurston County*, *supra* 152 Wn. App. at 623 (citing *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 101, 38 P.3d 1040 (2002)).

While LUPA clearly requires “land use decisions” to be appealed to court within 21 days, RCW 36.70C.040(3), LUPA just as clearly limits this

requirement to land use decisions which are “final.” LUPA does this by defining “land use decision” to mean only decisions which are “final:”

(2) "*Land use decision*" means a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

RCW 36.70A.020(2) (emphasis supplied).

2. ***Interlocutory decisions are not final decisions***

A land use decision is final when it “leaves nothing open to further dispute and sets to rest [the] cause of action between the parties.” *Stientjes, supra*, 152 Wn. App. at 623 (citing *Samuel’s Furniture v. Dept. of Ecology*, 147 Wn.2d 449 452, 54 P.3d 1194 (2002)). A final determination is one that “concludes the action by resolving the plaintiff’s entitlement to the requested relief.” *Id.* at 618.

The trigger for LUPA is, therefore, the final land use decision itself, not an earlier intermediate or procedural decision. *Vogel v. City of Richland*, 161 Wn. App. 770, 778, 255 P.3d 805 (2011). In *Vogel*, property owners challenged a city’s decision to allow a private street as a minor amendment to a plat. More than 21 days before the appeal was filed, city staff had issued a memorandum which stated that the public works department “will approve the project once [it] determine[s] the project to be consistent with City development standards.” *Id.* at 775 (alterations in original). The memo also

specified that the department would process the request as a minor, not a major, amendment to the plat. The City claimed the appeal was tardy because it was filed more than 21 days after this memorandum was written. The Court disagreed that the memorandum was a final decision for LUPA purposes:

That determination was not a land use decision, since it does not regulat[e] the improvement, development, modification, maintenance, or use of real property. Former RCW 36.70C.020(1)(b). It was only a decision about the process to be followed in making a land use decision. The trigger for the 21-day limitations period is the final land use decision itself, not any earlier procedural decision, even if a flawed procedure leading up to the land use decision might later be a basis for a LUPA challenge.

Id. at 778.

Appellate courts have long held that the review of interlocutory superior court decisions is disfavored because it results in fragmented, piecemeal appeals. *Minehart v. Morning Star Boys Ranch, Inc.* 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing *Maybury v. City of Seattle*, 53 Wn.2d 716, 336 P.2d 878 (1959)). The same rationale for precluding the review of interlocutory decisions is seen in LUPA's requirement for finality – prevention of the premature intrusion by the courts. In *Samuels' Furniture v. Dept. of Ecology*, the Court expressly stated that an interlocutory decision is “one that is ‘not final,’ but is instead ‘intervening between the

commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.” *Samuels’ Furniture v. Dept. of Ecology*, 147 Wn. 2d 440, 452, 54 P.3d 1194 (2002).

Similar to the present matter, *Stientjes Family Trust v. Thurston County, supra*, dealt with a dispute between neighboring property owners and an interlocutory decision. The Stientjes requested, and were issued, a building permit for a carport. The County issued a stop work order (because of critical area issues), but it subsequently vacated it. Via-Fourre, a neighbor, appealed the lifting of the stop work order to the County’s Hearing Examiner. The Hearing Examiner dismissed the appeal as untimely under LUPA because, in the Hearing Examiner’s opinion, the appeal was really a challenge to the original building permit. Via-Fourre appealed that decision to the Board of County Commissioners which reversed the Hearing Examiner and remanded for consideration of issuing a stop work order if the project was not in compliance with the critical area ordinance requirements.

Judicial appeals followed, with the Superior Court holding that Via-Fourre’s failure to timely challenge the building permit rendered any subsequent challenge concerning the permit an impermissible collateral attack. In reversing the Superior Court, the Court of Appeals looked at whether the County Commissioners’ decision, the decision actually before

the court on appeal, was a final land use decision. The Court found that the County Commissioners' decision was not final for the purposes of LUPA. It was interlocutory because by remanding the matter for further review, the County Commissioners did not settle the controversy between the parties.¹²

Likewise, in *WCHS Inc. v. City of Lynnwood*, 120 Wn. App. 668, 86 P.3d 1169 (2004), the appellants had sought to develop a drug treatment center and filed a complete building permit application four days prior to the City's enactment of a moratorium. The City subsequently refused to process the application because WCHS had not received certification from the State of Washington for such a facility; resulting in what City staff concluded to be an incomplete application subject to the moratorium. The city claimed two letters it issued related to the building permit were final decisions subject to LUPA.

The Court of Appeals disagreed, finding neither letter amounted to a final decision. The Court noted that a letter "does not constitute a final order unless the letter clearly fixes a legal relationship as a consummation of the administrative process." *WCHS*, 120 Wn. App. at 679. The Court pointed out that the second letter did not use the words "decision, final, or appealable;" indicated that the application would remain open; and failed to

¹² *Stientjes*, 152 Wn. App. at 622.

comply with the City's municipal code for permit denials. As for the first letter, the Court held it did not constitute a final appealable decision because it failed to comply with adopted regulations for denial of a business license nor did it state certification was required. The Court then held that the dispute was about "an interim decision made in the process of, but prior to, reaching a final decision on a permit" and "LUPA does not apply to interlocutory decisions." *WCHS Inc.*, 120 Wn. App. at 679-680 (citing *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 781-82, 964 P.2d 1211 (1998) (LUPA's definition of land use decision does not include an interlocutory procedural order)).

In sum, decisions that do relate to procedural issues and even decisions which address some, but not all, substantive issues, are interlocutory decisions. They are not final and are not subject to immediate judicial review. If it were otherwise, the courts would be swamped by a constant stream of appeals of intermediate decisions that did not conclude all aspects of the matter.

3. The Compliance Plans were interlocutory decisions

In the present case, the interlocutory nature of the Compliance Plans is shown in three ways: (1) by their function – laying out a roadmap for possibly coming into compliance, not by issuing any permits or deciding

conditions that might be attached to them; (2) by the language of the Compliance Plan themselves which do not use words like “final” or “decision”; and (3) by the absence of an administrative appeal which San Juan County makes available for nearly all truly final land use decisions.

a. The Compliance Plans established a road map for Heinmiller to come into compliance; they did not resolve the permit issues

The Compliance Plans presented alternative procedures by which Heinmiller could seek to bring the illegal ADU into compliance with the County Code. These alternatives, by their very nature, left the matter open. The Compliance Plans did not guarantee permit issuance – that was left to the permit approval process. Nor did the Plans specify conditions that might be attached to the permits, if they were issued. The Compliance Plans simply established various courses of action which would lead to the ultimate land use decisions – the permits themselves.

For instance, one alternative for Heinmiller was to seek after-the-fact permits for the residential conversion and its use as an ADU. If Heinmiller pursued that alternative and filed the applications, the public – including Mr. Durland – would have an opportunity to be heard as to whether the permits

should be issued and, if so, with what conditions.¹³ It would be at that point Durland could argue the permits should not be issued because the structure was an illegal structure (because it was too close to the property line) and, therefore, pursuant to SJCC 18.100.030(F) and 18.100.070(D), no permits could be issued unless *that* illegality was corrected. Only when the County staff decided that issue; addressed any other issues that might be raised concerning the application; and issued or denied the permits would there be a final County decision subject to judicial review pursuant to LUPA.

b. The language of the Compliance Plans did not suggest a final decision

The interlocutory nature of the Compliance Plans also is demonstrated by their terminology – they fail to use the words *decision* and/or *final*, merely setting up a process for seeking the challenged permits. The Compliance Plans issued by San Juan County left the controversy open and gave no indication that the County intended them to be final, directly or indirectly. The Compliance Plans did not eliminate the requirement for County staff to assess compliance with County regulations and to condition or deny the permits, if the project did not comply.

¹³ SJCC 18.80.030 requires a notice of application be mailed to adjacent property owners. This provision also provides a 21 day comment period for permit applications unless that application is for a shoreline permit, then a 30 day comment period is requirement.

c. The lack of an administrative appeal of compliance plans is consistent with characterizing the Compliance Plans as non-final, interlocutory decisions

Characterizing the Compliance Plans as interlocutory is consistent with the manner in which they are treated in the County Code. The County Code provides for administrative appeals of all development and project permits issued by the Community Development Director. SJCC 18.80.140. Development permits include building and other construction permits, mechanical permits, demolition permits, plumbing permits, clearing and grading permits, driveway permits, and on-site sewage disposal permits. SJCC 18.20.040 D. Project permits include land divisions, boundary line modifications, binding site plans, planned unit developments, conditional use permits, variances, shoreline substantial development permits, shoreline conditional use permits, shoreline variances, provisional use permits and temporary use permits. SJCC 18.20.160 P. But, while the County Code provides administrative appeals for all of these truly final land use decisions, it does not provide for an administrative appeal of a compliance plan. Presumably, that is because compliance plans do not resolve land use issues with finality, but rather outline possible means by which a property owner can achieve compliance with code requirements. The lack of an administrative

appeal is consistent with characterizing the Compliance Plans as interlocutory, non-final decisions.

4. The Examiner’s Rationale for characterizing the Compliance Plans as “final” was flawed

While Durland does not believe the Hearing Examiner had authority to address the issue of whether Durland had the opportunity to file a LUPA appeal of the Compliance Plans, *see supra* at Section B, Durland addresses the Examiner’s rationale in the event the Court decides to consider it or the respondents offer it as their own.

The Hearing Examiner concluded the Compliance Plans demonstrated, not directly but “indirectly,” that the County intended them to be final. CP 25:9-14. According to the Hearing Examiner, this “indirectly” stated intention of finality was based on the Compliance Plan’s statement that: “The County agrees that there are alternative methods of compliance that do not involve demolition of [the structure].” CP 78. How the Compliance Plans’ acknowledgment that there are alternatives to demolition denotes a “final” decision is mystifying to say the least.

The Compliance Plan primarily discussed a single zoning issue – whether the barn and/or the ADU was a “normal appurtenance” exempt from the County’s shoreline use regulations, SJCC 18.50 – concluding neither the structure nor its use as an ADU qualified it for an exemption. CP 78-80.

Although reference is made to the possibility for shoreline permit denial, no guarantee was provided that Heinmiller could secure an ADU permit, especially given San Juan County's policy to limit the number of ADUs – assigning permits on a first come/first serve basis.¹⁴

The Supplemental Compliance Plan addressed only the potential to avoid shoreline permitting review by reducing the barn's height, without a single reference to a county code provision. CP 82-83. No guarantees of permit issuance were made there, either.

The Compliance Plans did not discuss any of the numerous other regulations which would need to be addressed if Heinmiller applied for the permit, including, but not limited to, zoning regulations related to the Deer Harbor Hamlet residential zone,¹⁵ which includes a requirement for rental ADUs to secure a conditional use permit, and shoreline regulations generally related to all development along with those specific to residential development.¹⁶

¹⁴ Upon the enactment of Ordinance 51-2008 on December 2, 2008, the County changed to a lottery system for issuance of ADU permits that satisfied the county code provisions. Later, Heinmiller prevailed in the lottery, allowing him the right, but not a guarantee, to seek a permit. This is noted in the Supplemental Compliance Plan.

¹⁵ SJCC 18.30.250 to 18.30.370.

¹⁶ SJCC 18.50 Shoreline Use Regulations; SJCC 18.50.330 Residential Development.

The Compliance Plans did not identify conditions that might be attached to the permits or exclude from consideration any condition that might be suggested by County staff, Heinmiller, Durland, or other members of the public.

The “specific suggestions”¹⁷ the Hearing Examiner noted in the Compliance Plans were just that – “recommendations” – not final decisions. The Compliance Plans recommended that Heinmiller consider several possible alternatives, *e.g.*, seek shoreline permits, demolish the ADU, or lower the roof. “Suggestions” do not invoke finality, they denote possibility. No final decisions were made as to any of the permits that Heinmiller might seek to avoid demolition of the barn.

Lastly, the Hearing Examiner derived the County’s indirect intent as to finality from the County Code, specifically SJCC 18.100.040(D). This code provision states the County will take no further action if the terms of a compliance plan are met. This does not mean a permit resulting from a compliance plan cannot be appealed by a third party. It merely means that if the wrongdoer obtains an after-the-fact permit, the County will not take any further action. It does not commit the County to issuing the permit and does not preclude others from challenging the permit, if one is issued.

¹⁷ CP 25: 21.

5. *The cases addressing collateral attacks on previously issued decisions are not applicable to the facts of this matter*

The courts have addressed situations in which a LUPA petition amounts to a collateral attack on a previously issued decision. None of those cases are analogous to this one.

In *Habitat Watch v. Skagit County*, 155 Wn. 2d 397, 120 P.3d 56 (2005), the petitioner challenged a grading permit for development of a golf course. The authorization for the grading permit came from a special use permit that had been granted and extended by the Hearing Examiner three times – but never appealed. Moreover, the petitioners did not challenge the grading permit on grounds that it was inconsistent with the grading code. Instead, the petitioners’ sole allegation was that the grading permit was invalid because the three extensions of the special use permit were improper. But the time for challenging the extensions had long since passed. The Supreme Court saw that the grading permit appeal really amounted to an untimely challenge to the earlier special use permit and dismissed it:

In challenging the grading permit, Habitat Watch actually (and exclusively) challenges the validity of the special use permit and its extensions. Because appeal of the special use permit and its extensions are time barred under LUPA, Habitat Watch cannot collaterally attack them through its

challenge to the grading permit. The trial court correctly found the grading permit was valid.

Habitat Watch, 155 Wn.2d at 410-411.

Likewise, in *Wenatchee Sportmens Assoc. v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), petitioner timely challenge the County's approval of a plat application, but had failed to challenge the rezone two years earlier that established the allowed density for the project. The plat appeal did not challenge any of the new decisions embodied in the plat approve (*e.g.*, street design, open space dedication). Instead, the appeal challenged the density of the plat. But the density decision had been made two years earlier with the approval of the rezone. Thus, the plat appeal, based solely on density considerations, was an untimely collateral attack:

WSA's failure to file a timely LUPA challenge to the rezone bars it from collaterally challenging the validity of the rezone in this action opposing the project application. The issue of whether the rezone should have allowed urban growth outside of an IUGA had to be raised in a LUPA petition challenging the rezone decision itself. Because the zoning requirements for the property were established by the rezone approval, the only reviewable question in this case is whether the project application complies with those zoning requirements.

Wenatchee Sportmens, 141 Wn.2d at 173. *See also Somers v. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001); *Woods v. Kittitas County*, 162 Wn. 2d 597, 174 P.3d 25 (2007).

In each of these cases, the petitioners filed a timely appeal of a recently issued decision, but the heart of the appeal was a challenge to a final decision made at an earlier time. In contrast to these collateral attack cases, the heart of this appeal is not a challenge to the Compliance Plans. Durland does not complain that the County agreed not to use its enforcement and penalty tools while Heinmiller attempted to obtain after-the-fact permits. Instead, Durland is challenging the subsequently issued permits. The Compliance Plans here did not decide that the zoning or shoreline permits would be issued or with what conditions. To the contrary, the Compliance Plans expressly left open the possibility that those permits would be denied and the ADU converted space demolished.

Unlike *Wenatchee Sportsmen*, *Somers*, and *Woods*, Durland's appeal does not challenge the validity of the previously issued Compliance Plans. The only issue presented by Durland is whether the newly issued permits comply with the County's development regulations.

D. The Restrictive Covenant Did Not Transform an Illegal Structure into a Legal Structure

Because of the Hearing Examiner's ruling on the LUPA exhaustion issue, he never reached the merits of most of the issues raised by Durland. One of those is primarily a legal issue. If this Court reverses on the LUPA exhaustion issue and remands to the Hearing Examiner for consideration of

the previously rejected issues, the parties and efficient administration of justice would benefit from the Court resolving this potential decisive legal issue now.

As noted above, if the barn was an illegal, non-conforming structure, no permits could be issued until the illegal nonconformity was abated. SJCC 18.100.030(F); 18.100.070(D). It was undisputed that the barn was built too close to the property line violating both the Code's 10-foot setback requirements and the terms of the building permit. The Compliance Plan expressly states the barn failed, and continues to fail, to comply with setback requirements for the zoning district. CP 78. "The site plan shows the storage structure ten feet from the north property line. The County approval required the structure to be placed at least ten feet from the property line . . . the building is only 1.4 feet from the property boundary." It also is undisputed that Durland and Heinmiller's predecessor entered into an agreement requiring Durland to forego building within 20 feet of the existing bar. CP 139. . The legal issue is whether that restrictive covenant cures the Code violation or whether the barn – still just 1.4 feet from the property line – remains an illegal non-conforming structure.

The restrictive covenant relied upon by the County and Heinmiller to abate the barn's illegality and nonconformity with the County Code was

executed by Durland and the previous owner of the property; the County was not a party to this agreement. CP 138-139. A private agreement, for which the County has no enforcement powers, cannot “serve to legalize the placement” of the barn nor did it bring the barn “into conformity with the setback requirements in 1990.” CP 66; CP 29: 23. *Viking Properties v. Holmes*, 155 Wn.2d 112, 130, 118 P3d 322 (2005) (holding that City has no authority to enforce restrictive covenants).

While a private restrictive covenant agreement cannot cure a code compliance issue, there are other avenues Heinmiller could pursue to cure the defect. For instance, he could seek a variance from the County to authorize a smaller setback than required by the Code. SJCC 18.80.100 establishes a process and criteria for variances from the County Code’s dimensional, bulk, and area requirements -- a process that is not satisfied by the execution of a private agreement. Nothing in the record denotes that Heinmiller has sought such a variance.

Alternatively, Heinmiller could seek to negotiate a lot line adjustment with Durland to move the property line ten feet from the edge of the barn. But Heinmiller has not negotiated such an agreement with his neighbor nor applied for a boundary line adjustment from the County. *See* SJCC 18.70.030 (authorizing boundary line adjustments).

In sum, in the interests of the efficient administration of justice, and because the relevant facts are not in dispute, the Court should determine that the private restrictive covenant does not cure the building's non-compliance with the Code.

E. The Hearing Examiner Erroneously Approved a Building Permit in Violation of County Code Requirements for Roof Pitch

1. The building permit violates the Code's roof pitch requirements

The Heinmiller property is located within the Rural Shoreline environment of San Juan County. A shoreline permit is required for most, but not all, development within the shoreline. In particular, SJCC 18.50.330(E) exempts certain structures from shoreline permitting requirements if the structure is no taller than 16 feet.

A year after the issuance of the Compliance Plan, Heinmiller proposed another alternative in an attempt to avoid review under the County's Shoreline Master Program. Specifically, Heinmiller proposed to modify a portion of the barn's existing roofline so as to reduce its height from 17 feet to no more than 16 feet above existing grade. CP 82-83. To achieve this height reduction, Heinmiller proposed to reconfigure the peak of the current gable roof and create a flat portion.

The problem though, was that by solving one problem, Heinmiller created another. The County Code precludes flat roofs in this zoning district.

The Deer Harbor Hamlet Plan regulations require a minimum roof pitch of 4:12. SJCC 18.30.320, Table 3.9. This minimum pitch ratio is reiterated in SJCC 18.30.350(H). The current roof, based on its 1981 design, has a 4:12 pitch and, therefore, complies with the County Code.

The new flat roof proposed by Heinmiller would reduce the height and might, thereby, avoid the need for a shoreline permit. But the flat roof fails to comply with the County Code's minimum pitch requirements. The permit to rebuild the roof with an illegal roof pitch should have been denied. The Hearing Examiner's (and Superior Court's) approval of the permits for the flat roof should be reversed.

The County staff and the Hearing Examiner offered different rationales for approving the permit. Neither stands up to analysis, as demonstrated in the next sections.

2. County staff had no authority to re-write the unambiguous roof pitch regulation in the guise of "construing" it

San Juan County planning staff justified its decision by reading into the County Code an exemption that does not exist. County staff provided three rationales for the exemption: (1) the newly created flat roof represented

less than ten percent of the entire roof; (2) the County Code did not require a certain style of roof; and (3) the flat portion of the roof was not very visible so it did not need to comply with the 4:12 pitch requirement. CP 14:22-26; CP 15:1-5; CP 17:9-16. County staff did not contend that any of these factors are identified in the County Code as a basis for exempting a roof from the minimum pitch requirements. Instead, the County staff suggested that it is allowed to create exceptions in the name of “construing” the code requirement. CP 255-259.

While deference to the construction of an ordinance by those officials charged with its enforcement is proper, especially when there is a consistent pattern of construing it a certain way, *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992), statutory interpretation of an ordinance is generally not appropriate when the language is clear on its face. *Chelan County v. Nykriem*, 146 Wn. 2d 904, 926, 52 P.3d 1 (2002); *Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Neither the County staff nor Heinmiller has identified any ambiguity in the regulation which would give license to County staff to invent exemptions in the name of clarifying an unambiguous code requirement. The County staff’s creative “construction” of the code should be rejected.

The County Code language is unambiguous. SJCC 18.30.350(H) provides: *Roof Pitch. The minimum permitted roof pitch in Deer Harbor is 4:12.* The relevant portions of SJCC 18.30.320, Table 3.9, states: “Minimum Roof Pitch – 4:12.” The County Code does not state that 51 percent of the roof or 90 percent of the roof must be 4:12 pitch. The “roof” – in its entirety – must have a 4:12 pitch.

A flat roof has a pitch of 0:12, well below the code minimum of 4:12. The County staff’s interpretation was to exclude the flat portion of the roof from the calculation by measuring the roof from the outside edge of the flat roof, not from the center-most point of the roof. CP 14: 22-24. No language in the County Code authorizes County staff to exclude the flat part of a roof from the pitch calculation, regardless whether the flat part is 5 percent, 10 percent, or 49 percent of the roof. The County code simply requires a 4:12 pitch – no exceptions. By determining pitch based on its invented methodology, the staff erroneously exempted a portion of the roof from compliance with the unambiguous 4:12 pitch requirement.

Next, County staff’s reference to the County Code’s silence as to the style of the roof (*e.g.*, gables, shed, or hip) is wholly irrelevant. The pitch requirement applies regardless of the roof’s style.

Finally, County staff's observation that the flat portion of the roof would be difficult to see from some vantages also was irrelevant. The County Council established an objective, numerical requirement, not a subjective standard. If the County Council decides to amend its code to introduce a subjective element (*e.g.*, "roofs must have a 4:12 pitch except where a lesser pitch would have minimal aesthetic impacts"), that is the County Council's prerogative. But that legislative authority resides with the elected County Council, not the unelected staff. *See* San Juan County Charter, Article 2, Section 2.30(2)(d) (legislative power granted to County Council).

3. *The Hearing Examiner erred by concluding the roof modification was a "grandfathered" non-conforming structure*

To his credit, the Hearing Examiner did not accept the County staff's erroneous analysis. But the Hearing Examiner's rationale for affirming issuance of the permit was equally deficient.

The Hearing Examiner concluded the modified roof was not subject to the Deer Harbor regulations because the barn was a "grandfathered" non-conforming structure. CP 32:10-14. The problem with this rationale, of course, is that before eliminating the top foot of the roof, the roof totally conformed with the County Code's roof pitch requirements. Regardless

whether the building was conforming or non-conforming in other respects, Heinmiller could not create a new non-conformity where one did not exist before.

Obviously, if the barn were viewed as a legal, conforming structure, the roof could not be modified to create a non-conformity where one did not exist before. The same result occurs if the barn is viewed as an illegal, non-conforming structure (*e.g.*, because of setback or height violations).

The County Code permits certain modifications to non-conforming structures. But the allowed changes cannot create new non-conformities or enlarge an existing one. SJCC 18.40.030(D) expressly provides that alterations of a non-conforming structure are permitted only if the degree of non-conformity does not increase. The modification to the barn's roof obviously runs afoul of this limitation. *See also, Anderson v. Island County*, 81 Wn.2d 312, 323, 501 P.2d 594 (1972) (although non-conforming uses or structures are allowed to continue, the policy of zoning is to phase them out because non-conformity is disfavored under the law); *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000) (same). Allowing an existing, non-conforming structure to be altered so as to create

yet another non-conformity with the County Code would be expressly contrary to the policy articulated in case law as well as the County Code.¹⁸

Durland concedes that the barn, in and of itself, existed before the adoption of the 4:12 roof pitch requirements. When the roof pitch requirement was adopted in 2007, CP 32: 11-13,¹⁹ the barn's roof met the newly adopted requirement. CP 211a. The roof pitch has been conforming all along. It is the new, proposed alteration of a portion of that roof to a 0:12 pitch that fails to meet the current regulatory standard.

The Examiner's decision should be reversed. The Hearing Examiner's rationale that Heinmiller somehow enjoyed "grandfathered" rights to create a nonconformity which did not exist before is not only an erroneous interpretation of the law, but also a clearly erroneous application of the law to the facts of this matter. RCW 36.70C.130(1)(b) and -.130(1)(d).

VI. CONCLUSION AND REQUEST FOR RELIEF

Based on RCW 36.70C.130(1)(b), .130(1)(d), and .130(1)(e), Durland requests the Court to reverse the decisions of the Skagit County Superior

¹⁸ The reduction in the height of the roof would be an "alteration" because it amounts to a vertical diminution of the barn. *See* SJCC 18.20.090A.

¹⁹ The Hearing Examiner's decision notes that specific regulations for Deer Harbor were put together in 1999, however, it is the Deer Harbor Hamlet Plan that regulates development in the area. That plan was not adopted until 2007, with the passage of Ordinance 26-2007.

Court and the Hearing Examiner regarding the LUPA exhaustion issue and the roof pitch issue.

Additionally, if the Court reaches the merits of the illegal non-conforming use issue, the Court should determine that the barn's 1.4 foot setback from the property line renders the barn an illegal, non-conforming use and precludes issuance of any permits (pursuant to SJCC 18.100.030(F) and 18.100.070(D)) until that illegality and nonconformity is abated. If the Court does not address the merits of that issue, the Examiner should be directed to do so on remand.

Dated this 26 day of October, 2011.

Respectfully submitted,

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By:



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Attorneys for Appellants

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, WES
HEINMILLER, and ALAN
STAMEISEN,

Respondents.

NO. 67429-3-I

(Skagit County Superior
Court Cause No. 10-2-01536-4)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of
the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for
Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks herein.

On the date and in the manner indicated below, I caused the Opening Brief
of Appellants Michael Durland, et al. to be served on:

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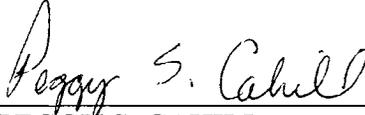
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DATED this 20th day of October, 2011, at Seattle, Washington.



PEGGY S. CAHILL

Durland\Appeals\Decsv