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No. 67429-3-I

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

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER
HARBOR BOATWORKS,

Appellants,

v.

SAN JUAN COUNTY, WES HEINMILLER, and ALAN
STAMEISEN,

Respondents/Cross-Appellants.

OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS
WES HEINMILLER AND ALAN STAMEISEN

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A. ASSIGNMENTS OF ERROR ON CROSS APPEAL

No. 1 The trial court erred in entering paragraph 2 of the Order on Decision on the Merits, dated June 20, 2011, reversing the Hearing Examiner's decision with respect to the computation of living area in the alternative dwelling unit (ADU) on Heinmiller's property.

No. 2 The trial court erred in entering paragraph 4 of the Order on Decision on the Merits, dated June 20, 2011, awarding statutory costs to Durland.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1 Where a state statute imposes a mandatory duty on San Juan County to apply provisions of the International Residential Code (IRC) in considering whether to issue a building permit, and where disregard of the IRC would lead to absurd results such as forcing a County to include all garage or residence space in calculating the size of an ADU, was it error for the trial court in this Land Use Petition Act (LUPA) proceeding to find that the County wrongly calculated the size of the proposed Heinmiller ADU to comply with the IRC?

No. 2 Where Heinmiller prevailed on approximately 6 of 7 issues set forth in Durland's Land Use Petition filed against him in the trial court, was it erroneous for the trial court to award statutory costs to Durland as though the Durland was the prevailing party?

C. STATEMENT OF THE CASE

1. Introduction

The parties in this case are neighbors in Deer Harbor, Washington. Appellants Michael Durland, Kathleen Fennel, and Deer Harbor Boatworks (“Durland”) complain about alleged violations of building and zoning regulations by neighbors Wesley Heinmiller and Alan Stameisen (“Heinmiller”) -- specifically, regarding an ADU, constructed inside a barn on the Heinmiller property.

San Juan County issued after-the-fact permits approving of the construction of the ADU. The permits were issued after Heinmiller worked with the County in order to negotiate two Compliance Plan agreements required by the County to ensure Heinmiller’s compliance with the San Juan County Code (SJCC). Durland complains that the permits should not have been issued.

2. Durland’s Execution of Boundary Line Agreement and Easement

Durland’s complaints concern a barn that has been situated on Heinmiller’s property since prior to the time the parties purchased their respective properties. *Clerk’s Papers*¹ at 43-44, 52. In 1990, after Durland

¹ Referred to as “CP” herein. At this time, the superior court has not yet provided an index with numbering of the Respondents’ Supplemental Designation of Clerk’s Papers, which includes the Verbatim Transcript of Proceedings (referred to herein as “VT”) before the Hearing Examiner. Thus, references to the Verbatim Transcript do not yet correspond to numbering of the Clerk’s Papers.

purchased his property, the Heinmiller and Durland properties were surveyed. *CP 52*. At that time, it was discovered that the barn structure encroached into the applicable setback on Heinmiller's property. *Id.* Durland then executed a Boundary Line Agreement and Easement, agreeing to allow the encroachment while imposing a restriction that prevented Durland from building within 20 feet of the barn. *Id.*

3. Heinmiller's Construction of ADU

In later years, in part because Heinmiller desired to have accommodations on his property to house himself and his partner, and also his aging parents, Heinmiller considered an ADU on his property as one option. *CP 47, 52*. Thereafter, a portion of the barn was converted to an ADU without permits as required by the SJCC. *CP 52*. After coming to the attention of San Juan County in 2008, the County issued a Notice of Correction to the Heinmiller in that same year. *Id.* Durland had by this time complained to the County about perceived violations in regard to the ADU. *CP 212-213*.

4. Compliance Plan Agreements Entered into by Heinmiller and San Juan County

After receiving the Notice of Correction, Heinmiller worked extensively with the County to come up with a solution to the code violation problem. *CP 52-53*. These negotiations resulted in two detailed Compliance Plans that Heinmiller agreed to in order to bring the ADU

into compliance with County shoreline and development regulations. *Id.*

The first Compliance Plan, executed in 2008, is a 4-page, single-spaced, formal document in the nature of a pleading or court order, signed by the San Juan County Director of Community Development and Planning Department, and also signed by both Heinmiller and Stameisen. *CP 121-124*. This agreement sets forth a detailed plan for Heinmiller to bring the ADU into compliance with County regulations, and includes:

- A detailed factual recitation.
- Identification of the parties and property involved.
- Identification of the alleged violations of the County Code.
- What the County Code requires.
- Identification of the County Code provisions applicable.
- A detailed “Correction of Violations and Compliance Schedule.” This portion of the Compliance Plan states, in pertinent part:
 - “The parties agree that the owners are required to take the following action to bring the property into compliance with County Code[],” and then lists precisely the steps that Respondents would have to take in order to bring the perceived violations into compliance, with deadlines for achieving the same.
- Signatures of the property owners (Respondents) and the San Juan County Director of the Community Development and Planning Department.

Id.

The Supplemental Compliance Plan, executed in 2009, has a similar format. *CP 125-126.* That plan outlines in detail the parties' modified agreement with respect to the claimed violations, with deadlines built in to achieve compliance. *Id.* The Supplemental Compliance Plan contains language reinforcing the mandatory effect of the first Compliance Plan: "All provisions in the underlying Agreement shall remain in effect except as expressly modified by this supplement." *Id.*

The Compliance Plans make clear decisions on how the alleged violations were to be corrected. As the Superior Court later ruled in this matter, the Compliance Plans decided that an ADU could be located in the barn; that the barn complied with side yard setbacks; that shoreline permits were not needed for the ADU conversion; that the barn structure was compliant with other lot coverage setbacks such as waterfront setback limitations and building width limitations; and that certain permits could be issued. *CP 34-35.*

Heinmiller proceeded to take the steps outlined in the Compliance Plans. As a result, County approved the permits on November 23 and 24, 2009. *CP 53.*

5. Durland's Late Appeal of the Second Compliance Plan

Before the permits had been approved, Durland recognized the conclusive nature of the Compliance Plans, because he attempted to file an

administrative appeal of the Supplemental Agreed Compliance Plan. *CP 53, 127-134*. However, the County informed Durland that administrative appeals were not allowed in San Juan County. *CP 211*. Durland proceeded to then have counsel file an appeal of the Supplemental Agreed Compliance Plan (which appeal included challenges to the original Compliance Plan) with the San Juan County Hearing Examiner. However, because of Durland's delay, that appeal was dismissed as untimely. *CP 87*.

With new counsel, Durland then filed another appeal, this time regarding the same building permits contemplated by the Compliance Plans. An evidentiary hearing was held before the Hearing Examiner on that appeal, and the Hearing Examiner's decision is the subject of the current appeal to this Court.

6. Evidence Regarding ADU Square Footage

A primary issue before the Hearing Examiner was whether the ADU complied with the 1000 square foot living area requirement set forth in the SJCC. Extensive testimony and argument were presented on this issue².

Durland offered no expert testimony on this issue, instead relying

² At the Hearing on the Merits before the Superior Court, Durland's counsel conceded that barn storage space is properly excluded from the calculation of ADU square footage, and that Durland instead was only asserting that the Hearing Examiner erred in upholding the County's determination that areas of the ADU with a ceiling height of less than five feet were *not* counted. However, these issues were considered together by the Examiner, County, and Heinmiller's expert, and are as a result are to some extent briefed collectively here as part of one decisionmaking process.

only his own argument and that of his counsel. In contrast, Heinmiller offered testimony of Architectural Designer Bonnie Ward to demonstrate the ADU's compliance with size limitations. County staff also offered testimony to support the finding that the ADU complied with size limitations set forth in the SJCC.

a. Architectural Designer Testimony Supporting Square Footage Calculations

Ward offered testimony on the issue of whether the ADU spaces to be utilized as “habitable space” and “living space” met the SJCC size requirements. As referenced by the Examiner in his decision, Ward was well-qualified to render her opinions. *CP 48; VT at 143-148.*

Ward was hired to prepare as-built drawings and a site plan for the Heinmiller ADU. *CP 48; VT 148.* She measured the building, and then used a CAD system to calculate the building and ADU to scale. *CP 48; VT 149.* Exhibit 18, prepared by Ward and admitted by the Examiner, shows as-built (or partially as-built) floor plans for the two levels of the building. Part of these show shaded areas, and those shaded areas generally reflect the living or habitant space on both levels. *CP 48.* Ward did not count the boat barn/garage space or entry space in the first floor living area “... because that was not habitable space.” *CP 48-49, 223; VT 149-50, 161-62, 169.* Ward also depicts in this drawing the sloped ceiling areas where the same are too low (less than five feet) to constitute living/habitable space under the IRC. *Id.*

b. County Staff Testimony Supporting Square Footage Calculations

In its plan review process, County staff calculated the ADU to comply with the 1000 square foot requirement, finding the ADU to measure out to 955 square feet: “The part of the building devoted to the ADU use is consistent with the 1000 square foot in living area requirement. The building itself is larger, and the balance of it is used for storage.” *CP 65-67.*

San Juan County Director and Chief Building Official Renee Belaveau testified at the hearing below in support of the County’s conclusion. He commented:

[ADU square footage] ... is determined by the interior living area which is the square footage within the interior-exterior wall lines, however, on a sloped roof situation, the Code is kind of silent on how you measure it because it’s really not much of a wall line to go to so we default to the Building Code which defines floor area as that area greater than five feet... .The state building codes are mandated by the state whether we adopt them or not so we have to enforce them.

CP 46; VT 91-93. It should be noted that the interior height of the second floor of the existing barn structure ranges in height from between two feet seven inches to seven feet. *CP 224.*

In reaching his conclusions, Belaveau had met with Ward to review the plans she had generated. *VT 92.* He commented that the County has also adopted and follows the IRC, which applies to the ADU. *CP 46; VT 93-94.* Both the IBC and the IRC apply and speak to the issue of defining square footage, according to Belaveau. *Id.* He further testified that the IRC

provisions referencing habitable space, living space, and height as it affects room area informed the County's calculation of the square footage for the ADU. *Id.* Belaveau testified that he believed the method of calculation he described was consistent with how the County had done calculations for other buildings. *VT 92.*

7. Testimony Regarding Roof Pitch

Another primary issue before the hearing examiner was whether the proposed roof modification for the ADU complied with County Code requirements. Per the Supplemental Agreed Compliance Plan, the ridge line of the existing roof would be lowered by four inches so that a shoreline substantial development permit would not be necessary. *CP 85-86, 25-27.*

Again, Durland offered only his own testimony and his counsel's argument on this point. In contrast, Heinmiller offered testimony of Bonnie Ward on the roof pitch issues; further, County staff offered testimony in support of their conclusions that the proposed roof modification would comply with the SJCC.

a. Architectural Designer Testimony Supporting Roof Pitch Calculations

Ward testified that per the original building plans for the barn on the roof, the pitch was 4:12. *CP 48, VT 152-53.* She noted that the SJCC does not require a gable roof, nor does the Deer Harbor Hamlet Plan. *CP 48; VT 155.* Neither do they require any particular type of roof to be used

in the Deer Harbor Hamlet area. *Id.*

In Ward's opinion, roofs do not have to have a purely triangular shape on the ridge to have a 4:12 pitch. Exhibit 21 is a drawing of a shed roof that Ward prepared, which slopes on one side but has no gable, yet still has a 4:12 pitch. *CP 226; VT 153.* Exhibit 22 is a drawing that Ward prepared of a hip roof, still having a 4:12 pitch. *CP 227; VT 154.* A hip roof is one which is pitched on all four sides, and not just two, with a small, flat portion on the top. *Id.*

In Ward's opinion, lowering the roof on the Heinmiller barn would not destroy the existing 4:12 pitch. As shown in Exhibit 19, which depicts the proposed roof modification (CP 224), she calculated that the modified roof would still have a 4:12 pitch despite the fact of having a small, flattened portion on top as the flat portion would constitute less than ten percent of the roof and would not be noticeable from the exterior. *CP 48; VT 150-151, 154-155.*

Ward further opined that if Respondents' roof were lowered to a height of 16 feet and remain a gable roof, the result would be to make the upper level of the ADU uninhabitable due to decreasing the living space/habitable area in such a way as to destroy the living area. *CP 48; VT 155-156.*

b. County Staff Testimony Supporting Roof Pitch Calculations

On behalf of the County, Associate Planner Lee McEnery also offered testimony in support of the approval of the permits with respect to the roof. McEnery testified that the roof pitch requirements of the SJCC are not detailed, and while the Code states a roof pitch requirement, it does not require any particular method of calculating that. *CP 45-46; VT 75-76.* McEnery noted, however, that the purpose behind the Deer Harbor roof pitch requirements is visual; i.e., what the roof looks like. *VT 75, 81.*

McEnery performed calculations and an assessment regarding the roof pitch, using the building plans and a scale. *CP 45-46; VT 74.* Considering the options for measuring the pitch, she chose to measure using the outside edge of the flat area on the roof. *CP 45-46; VT 74-75.* The result of such measurement was a 4:12 pitch. *CP 45-46; CP 65-67.*

Given that the purpose of the pitch requirements is visual, McEnery explained, it is important that it is unlikely anyone could see the flattened portion from the ground or driving by this building. *CP 45-46; VT 75.* Her interpretation of the pitch requirements as allowing the flattened portion was, in her opinion, a practical way of viewing the requirements. *Id.*

Like Ward, McEnery also testified that the SJCC does not require roofs to have a gable; the Code merely refers to the required pitch and nothing more. *CP 45-46; VT 77.* Ultimately, McEnery found, because of the lack of any visual impact by the flattening of a small portion of the roof,

the roof modification would still serve the purpose behind the pitch requirement. In McEnery's words: "... most design standards are about what it looks like -- the top of the roof is -- so the flattened, the cut off part, is so inconsequential in the scale of things that it doesn't really serve as a flat roof and I'm not so sure it would be at all visible from any public road. I doubt that it would be." *CP 45-46; VT 81.*

8. Hearing Examiner's Findings

In an extensive decision, the Examiner denied Durland's appeal. *CP 41-64*

a. Examiner's Findings Respecting ADU Size

At CP 62-63, the Examiner describes his reasoning for coming to the conclusion that this ADU complies with the square footage requirements. He opined that the SJCC provides that an ADU may be internal to a garage or other structure, and under Durland's interpretation of the Code all of the floor space of the entire structure would have to be added into the ADU square footage calculations, which would be nonsensical. The Examiner found that the Code should not be interpreted in a manner that leads to "unlikely, strained or absurd results" like that. *CP 62.*

The Examiner further found that Durland's literal interpretation of the SJCC would lead to the absurd result of including storage areas and ignoring roof slopes. He determined that the County's use of the IRC in

excluding areas of space with a ceiling height of less than five feet was logical and that the effect of the IRC was mandatory. *CP 62-63*

Given the evidence before him, the Examiner ultimately found that the ADU complied with the maximum size requirements set forth in the SJCC. *CP 42, 62-63.*

b. Examiner's Findings Regarding Roof Pitch

The Examiner found that because the roof pitch requirement did not come into effect until well after the building was constructed, because the building itself is nonconforming, the roof pitch requirements were inapplicable. *CP 63.*

c. Examiner's Findings Regarding Issues Precluded From Consideration on the Merits

The Examiner also found that certain issues raised by Durland were time-barred. He reasoned that the Compliance Plans constituted final land use decisions under LUPA as they specified precisely what Heinmiller would need to do in order to bring the barn/ADU into compliance; the San Juan County Code specified that no further action would be taken if those terms were met; and the County would be precluded from later applying a different interpretation on those issues. Further factors showing the finality of the plans were that they made clear that demolition of the ADU would be unnecessary; they were carefully designed to ensure compliance with their specific terms; and finality was the goal of the plans, given all the time

put into creating them. *CP 54-58.*

The only exception to those findings, according to the Examiner, was the issue of the ADU permit, which did require a separate review process mandated by the zoning code; however, he noted that the zoning compliance issues were specifically addressed in the Plans already, such that those issues were not to be reassessed later for ADU permit review. *CP 57-58.*

The Examiner reasoned that Washington law does not allow Petitioners to collaterally attack the determinations made in the Compliance Plans via an attack on the building permit issuance, which constituted a second attack on the same issues under the guise of a new theory. *CP 58.*

9. Superior Court's Decision Affirming Hearing Examiner on All Issues But One

The Superior Court affirmed the Hearing Examiner's findings that a number of issues raised by Durland were precluded from review. However, the Court reversed the Examiner's finding that the size of the ADU complied with the SJCC, stating that it was erroneous to apply provisions of the IRC and to exclude areas with a roof height of less than five feet. *CP 255-56, 257-259.* Further, the Court affirmed the Examiner's decision with respect to the roof pitch, finding that the SJCC does not provide guidelines for calculating a variable roof pitch and that the 4:12

pitch requirement was susceptible to more than one interpretation, such that deference would be given to the County's interpretation of the same.

Id. Lastly, the Court awarded statutory costs to Durland, despite the fact of Durland prevailing on only one of approximately seven issues. *Id.*

D. SUMMARY OF ARGUMENT

Heinmiller shows that, under the applicable standard of review, the trial court improperly reversed the Hearing Examiner's decision affirming San Juan County's calculation of living area in the ADU. The County's calculations were based on mandatory provisions of the IRC, which are to be read in harmony with the SJCC. Under a reading of the SJCC and IRC together, areas of the ADU with a roof height of less than five feet are to be excluded from the square footage calculation. Reading the SJCC without reference to the IRC and in the fashion advanced by Durland leads to absurd results, such as forcing the County to include every square foot of a garage or other outbuilding, even though the ADU itself occupies only a part of the same. For those reasons, the Hearing Examiner properly affirmed the County's calculation of square footage of the ADU, and the trial court's ruling reversing the same was erroneous.

Heinmiller further demonstrates that the trial court properly affirmed the Hearing Examiner's decision, in which the Examiner found that the proposed modifications to the roof of the barn structure housing the ADU would not violate roof pitch requirements of the SJCC. The trial

court's decision on this issue is not clearly erroneous and is based on substantial evidence in the record, including testimony by an expert Architectural Designer and County Staff, concluding that even with the modification, the roof pitch would comply with the SJCC. The trial court also properly determined that the County's method of calculation of the roof pitch was proper, taking into account the purposes of visual consistency in the Deer Harbor area, as the Code does not set forth any specific method of calculation.

Additionally, Heinmiller demonstrates that trial court properly dismissed time-barred challenges brought by Durland as he failed to timely appeal the Compliance Plans. These detailed agreements set forth the agreed course of mandatory compliance by Heinmiller to legalize the ADU. Durland is attempting to collaterally attack the issues decided in those Plans, which were final land use decisions that left nothing open to further dispute. These attacks are impermissible under Washington law. The trial court's ruling on this issue was proper.

Lastly, Heinmiller demonstrates that since he prevailed on approximately some 6 of 7 issues raised by Durland and that the one issue on which Durland prevailed does not destroy Heinmiller's ability to maintain the ADU, the trial court erred in awarding statutory costs to Durland. Further, for the same reasons, Heinmiller is entitled to an award of reasonable attorney's fees herein.

E. ARGUMENT

1. Standard of Review

Durland correctly outlines part of the applicable standard of review, which is that under LUPA, a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of six standards listed in RCW 36.70C.130(1) has been met. Wenatchee Sportsmen Ass'n v. Chelan Cnty., 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000). The relevant standards for this case are as follows:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]

(d) The land use decision is a clearly erroneous application of the law to the facts [.]

RCW 36.70C.130(1).

Some additional standards of review control as well. Subsection (b) of RCW 36.70C.130(1) involves a question of law under which the standard of review is *de novo*, while still according the proper measure of deference mandated by the statute. Cingular Wireless, LLC v. Thurston Cnty., 131 Wn.App. 756, 768, 129 P.3d 300 (2006) (citation omitted). The subsection (c) standard involves a factual determination to be reviewed under the

substantial evidence test. Under the substantial evidence standard, “... there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” Wenatchee Sportsmen, 141 Wn.2d at 176 (citation omitted); see also, Cingular Wireless, 131 Wn.App. at 768 (citation omitted). Lastly, the subsection (d) standard involves applying the law to the facts; under that test, a decision cannot be reversed unless the court is left with a “... definite and firm conviction that a mistake has been committed.” Id.

Additionally, an appellate court “... must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations.” Lanzce C. Douglass, Inc. v. City of Spokane Valley, 154 Wn.App. 408, 415-16, 225 P.3d 448 (2010), *review denied*, 169 Wn.2d 1014 (2010) (citing City of Medina v. T-Mobile USA, Inc., 123 Wn.App. 19, 24, 95 P.3d 377 (2004)); Cingular Wireless, 131 Wn.App. at 768. The “‘clear legislative intention’” underlying RCW 36.70C.130(1) also demonstrates that deference is to be accorded to the local jurisdiction, which has expertise in regulating land use. City of Medina, 123 Wn.App. at 24. Further, evidence and any inferences therefrom “... must be viewed in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority” (in this case, Heinmiller). Id. (citing City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001), and Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick

Corp., 115 Wn.App. 417, 429, 62 P.3d 912 (2003)).

2. Issues that Durland Failed to Raise to the Superior Court Should be Disregarded on Appeal

For the first time on appeal, Durland argues that the Hearing Examiner lacked authority to render a decision on “state law issues” and to refuse to consider certain of his claims. *Durland’s Opening Brief*, at pp. 11-12; 15-17. Durland also contends, for the first time on appeal, that this Court should decide “... 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.” *Id.* at pp. 14-15. Yet Durland fails to cite to legal authority allowing these issues to be raised for the first time now.

This Court should refuse to consider both issues. RAP 2.5(a) states:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 2.5(a). None of these grounds are satisfied here. The trial court did not have the opportunity to consider and rule on the issue of hearing

examiner authority, and thus, the issue has not properly been preserved for appeal. Further, while the issue of the effect of the private agreement may have been referenced in passing in some of Durland's briefing below, it was not a point which was argued to and decided by the trial court.

Declining to consider an issue which was never considered by the trial court serves this rule's purpose of encouraging the efficient use of judicial resources. See, e.g., Home Builders Ass'n of Kitsap Cnty. v. Bainbridge Island, 137 Wn.App. 338, 345, 153 P.3d 231 (2007) (allowing consideration of issues for the first time on appeal as [unlike here] issues were "essential to every trial court's consideration of a permit fee challenge under RCW 82.02.020" and "a matter of significant interest to the public and to governmental entities that regulate building and development," thus "in the best interest of judicial resources" to consider issues on appeal.) Here, it would not be an efficient use of judicial resources to bypass the Superior Court, which is the first appellate court level for reviewing land use decisions -- thereby unfairly forcing the responding party on appeal to spend time and resources on arguments for the first time while under a short deadline to supply a timely "responsive" brief. Durland offers no explanation for why he failed to designate these issues in his Notice of Appeal to the Superior Court, or to argue them in that forum.

For these reasons, the new issues raised by Durland should be disregarded.

3. The Trial Court Erred in Reversing the Hearing Examiner's Square Footage Calculations

a. The Hearing Examiner Correctly Determined that the ADU Complies With the 1000 Square Foot Living Area Requirements of the SJCC Given Mandates of the IRC

Durland asserted to the trial court that one provision in the County Code, SJCC 18.20.120, mandates that the ADU is larger than the Code allows. That section states:

“Living area” means the internal space measured from the interior of the exterior walls, excluding decks, overhangs, unenclosed porches or unheated enclosed porches, and the stairwell on one level of a two-story structure.

SJCC 18.20.120. According to Durland, this is an exclusive list of exclusions, and that since the entry area, boat barn/garage, and storage areas of the ADU do not literally fall within this list of exclusions, that compels the conclusion that virtually all of the space within the walls of the ADU must be included within the living area calculation. That is nonsensical.

b. IRC Provisions Inform the Definitions of Living/Habitable Space and Enlarge the Applicable Exclusions

RCW 19.27.031 makes clear that the IRC applies in San Juan County and elsewhere in this state:

Except as otherwise provided in this chapter, there *shall* be in effect in all counties and cities the state building code which shall consist of the following codes which are hereby adopted by reference:

(1)(a) The International Building Code, published by the International Code Council[,] Inc.;

(b) The International Residential Code, published by the International Code Council, Inc.;

....

RCW 19.27.031(1) (emphasis added).

Use of the word “shall” in a statute imposes a mandatory duty. Wash. State Coal. for the Homeless v. Dep’t of Soc. and Health Servs., 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997). And, a court’s primary objective in interpreting a statute is to ascertain and give effect to the Legislature’s intent as manifested by the statute’s express language. Pierce Cnty. Hous. Auth. v. Murrey’s Disposal Co., Inc., 86 Wn.App. 138, 141-42, 936 P.2d 1 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Additionally, and as argued by San Juan County on the merits below, statutes relating to the same subject matter are read together as a whole, to the end that a harmonious total statutory scheme evolves. Waste Mgmt. of Seattle, Inc. v. Util. and Transp. Comm’n, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). Statutes are thus read as complementary, rather than in conflict (Id.); and in determining the plain meaning of regulation, terms are not to be read in isolation but rather within the context of the regulatory scheme as a whole. Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). Statutes should also be construed to effect their purpose and to avoid strained or absurd consequences resulting from a literal reading. State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

It is further noteworthy that SJCC 18.20.005(B), included with the prefatory provisions to the definition relied upon by Durland and entitled “Interpretations,” states in pertinent part: “...If the definition in this code conflicts with a definition under state law or regulation, the state definition shall control over this definition.” This provision references the RCW, WAC, and UBC, and states that all definitions which reference the same “... are intended to mirror the definitions in these codes... .” Id.

The IRC was also formally adopted by San Juan County pursuant to SJCC 15.04.050.³ Further, IRC 305.1 (2003)⁴ provides:

305.1 Minimum height.

³ SJCC 15.04.050 provides, in pertinent part: “The following codes, copies of which (with the exception of referenced state statutes) are on file with the San Juan County auditor, are hereby adopted, together with all of the regulations, provisions, penalties, conditions and terms included in those codes, as if fully set out in this article, and together with the changes and additions prescribed in SJCC 15.04.070.

- A. International Building Code (IBC), 2003 Edition, published by the International Code Council, as amended and supplemented by the provisions of Chapter 51-50 WAC, together with Appendices
- B. International Residential Code (IRC), 2003 Edition, published by the International Code Council, as amended and supplemented by Chapter 51-51 WAC, except Chapters 11 and 25-42, and together with Appendices”

⁴ At the hearing below, the Examiner raised the issue of which version of the IRC applied, whether the 2003 or 2006 version. He ultimately found that the 2006 version applied. This is immaterial, since the provisions are in substance the same in both versions of the IRC. The 2006 version slightly changes the wording of Exception 3 as follows: “For rooms with sloped ceilings, at least 50 percent of the required floor area of the room must have a ceiling height of at least 7 feet (2134 mm) and no portion of the required floor area may have a ceiling height of less than 5 feet (1524 mm).” This change in the wording does not affect the analysis. Otherwise, the quoted definitions from the 2003 IRC are identical to those in the 2006 IRC.

Habitable rooms, hallways, corridors, bathrooms, toilet rooms, laundry rooms and basements shall have a ceiling height of not less than 7 feet (2134 mm).

The required height shall be measured from the finish floor to the lowest projection from the ceiling.

Exceptions:

...

Not more than 50 percent of the required floor area of a room or space is permitted to have a sloped ceiling less than 7 feet (2134 mm) in height with no portion of the required floor area less than 5 feet (1524 mm) in height.

The IRC defines “habitable space” as “[a] space in a building for living, sleeping, eating or cooking. Bathrooms, toilet rooms, closets, halls, storage or utility spaces and similar areas are not considered habitable spaces.” Further, the IRC defines “living space” as “[s]pace within a dwelling unit utilized for living, sleeping, eating, cooking, bathing, washing and sanitation purposes.” *Id.* Arguably, these definitions do not actually conflict with SJCC 18.20.120, because they simply define specifically what is included within living/habitable space, whereas SJCC 18.20.120 primarily focuses on what areas a living area does not include. But to the extent that SJCC 18.20.120 can be read to present a conflict, both state law and the SJCC itself make clear that the IRC shall govern.

In sum, Petitioners’ reading of the SJCC is improperly narrow and restrictive. Reference to the IRC provisions makes clear that the definition of “living area” in SJCC 18.20.120 is not so limited, and that the living area

of the ADU excludes (for example) both storage spaces and living spaces with a room height of less than five feet.

c. Architectural Designer Calculated ADU Living Area In Accordance with SJCC and IRC

Architectural Designer/expert Bonnie Ward's testimony on these points, as outlined above, demonstrates a well-reasoned approach to calculating living/habitable space in the ADU based on the IRC definitions, which is supported by both the facts and the law. She excluded from the living area calculation space that was not habitable, such as garage space and space under areas with a ceiling height of less than five feet. Based on her study of the SJCC and the IRC, the measurements she took and drawings she prepared, and her review process with the County, Ward concluded that the ADU met the living area requirement.

d. San Juan County Calculated ADU Living Area In Accordance with SJCC and IRC

San Juan County Director and Chief Building Official Renee Belaveau's testimony also supports the County's approvals of the permits. He testified that state law, including the Uniform Building Code and IRC, imposed mandatory duties on the County in its review process for deciding whether permit requirements have been met. Belaveau testified that the SJCC was silent in situations involving living area measurements in a structure with a sloped roof, and that therefore the County used the IRC

definitions to assist in calculating living area. He further testified that he believed this method of calculation was consistent with how the County had done calculations for other buildings in the past. Belaveau confirmed that he met with Ward and reviewed the plans and drawings she prepared as a part of the review process. Belaveau's testimony demonstrates a logical and correct interpretation of applicable codes based on the drawings and measurements of the ADU.

e. Trial Court's Adoption of Durland's Interpretation of SJCC Leads to Absurd Results

It is significant to note that, as referenced by the Examiner, the SJCC explicitly envisions ADUs as often being a part of a garage or some other structure, wherein the space of the ADU itself is to be separately considered. For example, see SJCC 18.20.010, referenced above, and stating that ADUs may be "internal"; see also, SJCC 18.50.330(B)(15), regarding residential development (referencing "One garage building and/or one accessory dwelling unit each of which covers no more than 1,000 square feet of land area and is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade.") The existence of such provisions

further demonstrates the absurdity of Durland's argument before the Examiner that the SJCC requires the measurement of all of the interior space of the barn.

To the extent that Durland is now only contending that excluding areas with a ceiling height of less than five feet was error, that interpretation also leads to absurd results. Chief Building Official Belaveau highlighted the problem of calculating living area where there is a sloped roof and "not much of a wall." As San Juan County argued below on the merits, using a literal interpretation of only SJCC 18.20.120 without reference to the IRC, areas of the proposed ADU on the Heinmiller property with an interior height of as little as two feet seven inches would constitute "living area." In contrast, however, using the IRC in harmony with SJCC 18.20.120 creates a consistent and universal standard that can be applied in situations involving sloped roofs. This approach recognizes that areas with a ceiling height of less than five feet have essentially no utility as living space, similar to an enclosed, unheated porch, stairwell, or overhang, for example. Those spaces may be good for storage or an occasional limited activity of some kind, but they clearly do not allow "living" as any normal person would construe the term.

f. Lack of Precedence in Local Jurisdiction Supports Examiner's Findings of First Impression

The Examiner expressed that he was very interested in the issue of how to calculate the interior area of an ADU. At the hearing, he questioned

County Associate Planner Lee McEnery on whether this issue had ever come up before in another Hearing Examiner decision. VT 171-172. Ms. McEnery was not aware of any such prior precedence having been set. *Id.* The Examiner then asked the attorneys for both parties to search for such precedence, set a schedule and left the record open for submission of the same. VT 196-197. The parties searched and could find no prior Hearing Examiner decisions on that issue, and confirmed this in writing. CP 251-254. Therefore, the lack of such precedence lends credence to the Examiner deciding the issue as a matter of first impression in this jurisdiction.

g. The Examiner's Decision Should have Been Upheld

All of the foregoing compels the conclusion that the Examiner's findings with respect to the measurement of the ADU interior space were legally correct and supported by substantial evidence. There is sufficient evidence to persuade a fair-minded person of the truth of Heinmiller's, the County's, and the Examiner's assertions that the square footage of this ADU complies with the SJCC. There is no evidence or law leading to any definite, firm conviction that the Examiner was mistaken in his findings. Additionally, substantial deference is to be given to the Examiner's legal and factual conclusions, and substantial deference is to be accorded the County's interpretation, with any doubts resolved in favor of Heinmiller. Under the applicable substantial evidence, clearly erroneous, *de novo*, and other standards, the Examiner's decision was correct. Therefore, the Superior

Court's decision reversing the Examiner's decision with respect to the ADU square footage was an erroneous interpretation of law or clearly erroneous application of law to the facts.

Heinmiller's second Assignment of Error, with respect to the award of statutory costs to Durland, is addressed below.

F. RESPONSE TO DURLAND APPEAL

1. The Trial Court Properly Affirmed the Hearing Examiner's Determination that the Proposed Roof Modification Would Comply with Roof Pitch Requirements

a. The Examiner's Conclusion that the Existing Roof Pitch Would be Grandfathered Even with a Small, Flattened Portion is Not Erroneous

Durland argues that the proposed roof modification for the ADU would be unlawful under SJCC 18.30.320 (Table 3.9), which requires a roof pitch of 4:12. He argues that because the height of the roof would be lowered by four inches by flattening the top of the roof (to reduce its height to sixteen feet), that would result in a pitch of less than 4:12. The Hearing Examiner found that because the roof pitch requirement did not come into effect until after the building was constructed, and because the building itself is nonconforming, the roof pitch requirements were inapplicable. Durland basically argues that the Examiner missed the point and focused on the existing roof, rather than the proposed modification.

The Examiner's conclusion, however, is legally and factually supportable. Deference is due to the Examiner's and local jurisdiction's

interpretation of the local regulations, and the evidence in the record does not give rise to a definite and firm conviction that a mistake has been made.

As our courts have recognized:

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.

Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty., 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (citation omitted). In addition, as a “fundamental proposition,” a “... [a] valid nonconforming use carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use.” Id. at 22 (dissenting opinion) (citing Ferry v. City of Bellingham, 41 Wn.App. 839, 844, 706 P.2d 1103, *review denied*, 104 Wn.2d 1027 (1985), and observing: “In Ferry the court found the addition of a crematory to a funeral home (which had a nonconforming use right in a residentially zoned area) did not constitute any enlargement of the nonconforming use and, thus, could not be precluded because of a zoning regulation. Id. Here, Rhod-A-Zalea seeks nothing more than to continue the very use of the land it has rightly enjoyed for over 30 years.”).

Here, even according to Durland, the barn structure is a nonconforming structure. The Examiner concluded that the roof existed for many years prior to the time that Deer Harbor roof pitch requirements were enacted, and can continue to remain as nonconforming. The San Juan

County Code allows certain nonconforming land uses to continue. SJCC 18.80.120(A) states, in pertinent part: “Legally established land uses and structures that have subsequently become nonconforming because of changes to County land use regulations continue to be legal.” SJCC 18.40.310 further describes nonconforming uses and structures, and states in subsection (D) that “[n]onconforming structures may be modified or altered, provided the degree of nonconformity of the structure is not increased.” These provisions demonstrate that a minor modification to a nonconforming structure or use that does not increase the degree of nonconformity does not change its legal nature. For this reason, the Examiner’s finding regarding the continued nonconformity is not clearly erroneous or an erroneous application of the law to the facts.

b. On De Novo Review, Both the Law and Substantial Evidence Show that the Proposed Modification Does Not Violate the Roof Pitch Requirements

i. The SJCC Does Not Require Gable Roofs, and Does not Set Forth Any Procedure for Calculating Roof Pitch

Durland’s argument is essentially that the SJCC’s reference to “roof” means that the roof can only be one shape: triangular, or gable, and that every element of that finished roof must be a flat surface with a 4:12 pitch. But the Code does not say that. Durland also appears to argue that there can only be one way to calculate a 4:12 pitch of a roof, which is on a roof with a triangular shape on top and -- indeed -- over its entire surface, with zero

deviations, exceptions or discontinuities. But the Code does not say that, either.

In fact, the SJCC does not require any particular type of roof, nor does it set forth any particular way of calculating roof pitch. Moreover, unlike Heinmiller, at the hearing before the Examiner, Durland presented no expert testimony or anything beyond his own bare argument to support his assertion that a roof with a small flattened ridge cannot have a 4:12 pitch. The trial court properly found that the roof pitch provision was ambiguous and subject to more than one interpretation, such that the County's interpretation finding no violation was to be given deference.

ii. Evidence Before the Hearing Examiner Demonstrates that the Proposed Modification Would Comply with SJCC Roof Pitch Requirements

This Court's review is *de novo* on questions of whether the law supports the Hearing Examiner's decision. Although the Examiner ultimately decided that the 4:12 roof pitch requirement did not apply, the law and evidence in the record support alternative grounds for finding that this requirement was met.

A key fact that Durland fails to mention is that because the SJCC does not contain methodology for calculating roof pitch, County staff had to come up with a way to calculate the pitch of the proposed ADU roof. County staff took a reasoned approach to this issue and determined that

even with the flattened portion, the pitch still measured out to 4:12.

McEnery's testimony, concerning the fact that the SJCC does not contain a methodology for calculating pitch and that the Code should be interpreted in a manner which effectuates its purposes, is logical. Her reading of the Code is demonstrably correct. SJCC 18.10.020 contains prefatory/introductory provisions for Title 18, and references as some of the purposes behind these regulations as: "To provide for the economic, social, and *aesthetic* advantages of *orderly development* through *harmonious groupings of compatible and complementary land uses* and the application of appropriate development standards..." SJCC 18.10.020(B)(4) (emphasis added). This provision confirms that the visual nature of development is a primary purpose behind the Title 18 regulations.

Just as the purpose of statutory construction is to give effect to the intent of the legislature, effect should be given here to the intent of the local jurisdiction in devising the pitch requirement, which appears to be a desire for some level of visual consistency and aesthetics in the Deer Harbor area. Testimony and evidence presented to the Examiner demonstrated that the proposed modification would not adversely affect those purposes. As McEnery explained, the roof with the modifications would still serve the purposes behind the regulations because there would be virtually no visual impact from the ground or the road whatsoever, given the small, "inconsequential" area to be flattened. The dominant visual and aesthetic

impression that a viewer would receive is a sloped roof with a 4:12 pitch.

Additionally, based on measurements taken by Bonnie Ward and confirmed by the County, even with the flattened portion, the roof pitch measures out to 4:12. Ward's testimony supports the conclusion that the proposed roof modification would not violate the SJCC, as the Code does not require gable roofs; is intended to preserve the visual nature of roofs in the area; and the modified version would still meet the 4:12 requirement even with a small flat area at the top. Indeed, her testimony demonstrates that even a shed roof and a hip roof, both of which have flattened portions at the top, can measure out to a 4:12 pitch.

Durland's interpretation would also essentially obliterate the ability to use the second floor of the ADU. Such approach would defeat the purpose of the lengthy negotiations between Heinmiller and the County in the enforcement phase, is illogical and overly narrow and restrictive, and should be rejected.

iii. Deference is to be Accorded the County in Construing its Own Code Requirements In the Absence of Procedures for Calculating Roof Pitch

Durland correctly concedes that generally, deference is due to the construction of an ordinance by those officials charged with its enforcement, citing Sleasman v. City of Lacey, 159 Wn.2d 639, 646-47, 151 P.3d 990 (1992) and Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 815,

828 P.2d 549 (1992).

Here, the regulations do not define the types of roofs permissible in meeting the 4:12 pitch requirement, nor do they define any required method of calculating the pitch. Interpreting the regulations in a way that serves the purpose behind them was the only logical approach to take. This Court should not substitute its judgment for that of the County in making this determination. Under the clearly erroneous/*de novo* standard, the County's conclusion (and that of Heinmiller) is supportable and not clearly erroneous, as the Superior Court concluded. Further, substantial evidence exists in the record to support these conclusions. For those reasons, the County's approvals of the permits with respect to the roof were proper, and the Superior Court properly affirmed the Examiner's finding that the proposed roof modification would not violate the pitch requirements.

2. The Trial Court Properly Dismissed Time-Barred Issues and Issues Resolved in the Compliance Plans

a. The Compliance Plan and Supplemental Compliance Plan Agreements Were Final Land Use Decisions

Petitioners argue that the Compliance Plans did not trigger LUPA's 21-day statute of limitations because the Plans are not final land use decisions. This is incorrect.

First, Durland himself recognized the final and conclusive nature of the Compliance Plans as he filed or attempted to file appeals regarding them.

Initially, Durland attempted to file an administrative appeal of the Supplemental Agreed Compliance Plan. The County informed Durland that there was no administrative appeal option. Durland then filed another appeal of this plan, this time to the San Juan County Hearing Examiner. However, Durland filed his appeal late, in contravention of the time requirements of SJCC 18.80.140(E)(4)(1), and that appeal was therefore dismissed as untimely. Now, in this LUPA appeal, Durland maintains that the Compliance Plans were not final land use decisions, trying to get around the fact of the prior dismissal of his untimely appeal by now pointing to the actual permits that were issued pursuant to the Compliance Plans. But a close look at these Plans demonstrates that they were, in fact, final land use decisions by the County, and Durland had already had his opportunity to appeal them. To his peril, he simply failed to do so correctly.

The Washington Supreme Court has established that, "...in the context of applying LUPA, a final decision is "[o]ne which leaves nothing open to further dispute and which sets at rest the cause of action between parties." Samuel's Furniture, Inc. v. State Dep't of Ecology, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002); see also, Heller Bldg, LLC v. City of Bellevue, 147 Wn.App. 46, 55, 194 P.3d 264 (2008) (quoting Samuel's, *supra*). "Whether a land use decision is final turns on whether the governmental action at issue 'reaches the merits,' not on whether the wisdom of such action is 'potentially debateable.'" Steintjes Family Trust v. Thurston Cnty., 152 Wn.App. 616,

217 P.3d 379 (2009) (quoting Samuel's, 147 Wn.2d at 452). The Samuel's court contrasted a final decision with one that is interlocutory, or one which "... 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.'" Id.

In the case at bar, San Juan County's code demonstrates the finality intended by the County in executing Compliance Plans. The San Juan County Code contains both civil and criminal enforcement provisions for violations of land use laws. See, e.g., SJCC 18.100.060. Encouraging the correction of violations is a primary intent behind these enforcement provisions. SJCC 18.100.010. Development of Compliance Plans is one method for achieving compliance with the Code, and if such plan is developed, the Code explicitly states that no further action will be taken:

Following a notice of violation, the administrator and person in violation may develop a mutually agreeable compliance plan. The compliance plan shall establish a reasonable and specific time frame for compliance. No further action will be taken if the terms of the compliance plan are met. If no compliance plan is established, enforcement of the violation will proceed.

SJCC 18.100.040(D). The fact that "[n]o further action will be taken" if the terms of the Plans are met demonstrates their conclusive nature.

Heller Building is instructive as to the issue of what is, and what is not, a final land use decision. In that case, the City of Bellevue posted a stop work order on a building project that petitioner HBL had underway. The

Code required that the order state the reason behind it, and the conditions under which the cited work would be permitted to resume. However, the order that was actually posted by the City failed to specify in what way the scope of the previously-permitted work was exceeded, did not specify any provision of the Code with which there needed to be compliance, and did not state a deadline for completing the corrections, instead merely stating: “contact city.” Id. at 56. The court found that the stop work order was not a final land use decision, commenting:

The stop work order did not contain the information that the BCC required, which would have informed HBL of the substance of its violation in a way that would allow HBL to correct the violation or make an informed decision whether to challenge the City’s decision. While a stop work order may be a final determination in some circumstances, here the City’s stop work order was not final and therefore it was not a land use decision under RCW 36.70C.020(1).

Id.

In contrast, however, the court also found that a letter sent to HBL by the city after the stop work order was issued did, in fact, constitute a final land use decision. The court commented:

The March 2, 2007, letter, on the other hand, contained the information that the BCC requires in a stop work order. The City argued, in its brief and again in oral argument, that the letter was not a decision by the City but merely a response to requests by HBL and its attorney for a more detailed explanation of its already final decision. This argument is inconsistent with the letter itself, which states that it “supplements the Stop Work order” and that it is *not* “intended as a response to any previous communications from Heller Building LLC.”

The City forebodes that a decision holding that the stop work order was not a final decision would discourage municipalities from offering any explanations for land use decisions, "so as not to risk unwinding final decisions and increasing their exposure to LUPA petitions and damages claims." However, the City's own code requires more explanation than the City provided in the stop work order it issued here. Instead of issuing a stop work order that complied with its code, the City incorporated code-mandated elements of a stop work order into its subsequently issued letter.

Finally, as evidenced by internal e-mails, the practice implemented by the City to comply with the requirements of the BCC regarding stop work orders is a three-step process culminating in a letter decision. The City's practice was to (1) call the owner and contractor in order to avoid surprise and confrontations with City officials in the field, (2) post the stop work order, and (3) send a letter of explanation.

Because the letter contained the code-mandated reasons for the decision and conditions for resuming work that were omitted from the stop work order and because the record indicates that the City intended the letter rather than the stop work order to be a final determination, we hold that the letter was a final determination and the stop work order was not.

....

We hold that the March 2, 2007, letter was a land use decision under RCW 36.70C.020(1) because it was a final determination by the officer with the highest level of authority to make the determination. Therefore, HBL's petition, which was filed on March 23, 2007, was timely filed within 21 days of the land use decision.

Id. at 56-7 (emphasis added).

Additionally, the facts recited by the Heller Building court make clear that the letter which constituted a final land use decision outlined the steps that would be necessary for HBL to bring the project into compliance, including the submission of a further application for review of the design of the project:

The City sent HBL a letter on March 2, 2007, explaining its decision to stop work on the project. The letter stated that HBL's project could no longer be considered the remodel of an existing nonconforming structure or site within the meaning of BCC 20.20.560 because the work actually performed on the project exceeded the scope of the permit. It further stated that under the moratorium the City was prohibited from accepting "certain of the permits necessary for you to recommence construction on your site." The letter outlined the steps that would be necessary in order to recommence construction after the moratorium expired, including submission of a design review application complying with chapters 20.25B and 20.30F BCC, BCC 20.20.070, and either BCC 20.20.010 or chapter 20.30G BCC.

Id. at 52-53 (emphasis added).

Heller Building confirms that a letter issued prior to permits, which contains the code-mandated reasons for the decision, sets forth and conditions for resuming work, and outlines steps for a building project applicant to bring his or her project into compliance with the controlling local code, constitutes a final land use decision. The substance and effect of the Compliance Plans in this case are similar to the letter in Heller Building, and indeed are even more specific and complete. Like the letter in Heller Building, the Compliance Plans constitute final land use decisions.

Despite its similarities, Durland does not address the Heller Building decision. However, Durland likens the facts of this case to other Washington decisions, all of which are distinguishable and do not compel the result that Durland seeks.

First, Durland cites to Vogel v. City of Richland, 161 Wn.App. 770, 255 P.3d 805 (2011) to argue that the Compliance Plans were interlocutory

decisions. In Vogel, property owners challenged a city's decision to allow a private street as a minor amendment to a plat. City staff had issued two memoranda to the public works department regarding the property owners' complaints. The first of these memoranda, however, was not specific on what had been requested by the applicant or agreed to by the City. Id. at 775. The memoranda contained a "general, nonfinal understanding," and made reference to the City's concurrent review of construction plans to ascertain whether they complied with development standards. Id. The second memorandum commented that the City had decided the plat could be processed as a minor (rather than major) amendment, and on the city's handling of citizen complaints. Id.

The Court of Appeals rejected the developer/applicant's argument that the memoranda constituted final land use decisions, as they did not "regulat[e] the improvement, development, modification, maintenance, or use of real property" and were only decisions about the "... process to be followed in making a land use decision." Id. at 778-79. The Court further commented that the memoranda referred to a decision "... to permit substitution of a private road" but "... do not purport to memorialize the terms of the decision, even summarily." Further, the court observed that these documents "... discuss the private road proposal in nonfinal terms..." which suggested no acceptable proposal had yet been made to the City in order to obtain a permit. Id. at 779-80.

Durland also likens this case to Steintjes, supra. Steintjes involved a dispute between neighbors in regard to the construction of a carport, for which Thurston County issued a permit. The County later issued a stop work order regarding the construction, then vacated that order. The neighbor who claimed to be aggrieved by the construction, Via-Fourre, appealed the vacation of the stop work order, but her appeal was dismissed as untimely, because the Hearing Examiner considered the appeal as really a late challenge to the original permit itself. Via-Fourre then appealed the Examiner's decision to the Board of County Commissioners (BOCC), which was the highest level of authority in the County. The BOCC reversed the Examiner's ruling and remanded for further proceedings, but did not reinstate the stop work order or reverse the County's decision to issue the permit. Nor did the BOCC reverse the Examiner's order of dismissal.

The Court of Appeals found that the BOCC's decision was interlocutory, not a final land use decision, as it "... did not affect Steintjes' right to develop his property" and did not conclusively settle the issue of Via-Fourre's entitlement to relief. However, the court noted that the BOCC's decision did not demonstrate that the complainant had received the relief requested or that the merits of the complaint were reached, and "[b]ecause additional issues in the controversy herein remain to be decided..." the decision was not final.

Durland additionally relies on WCHS Inc. v. City of Lynnwood, 120

Wn.App. 668, 86 P.3d 1169 (2004). WCCHS found that two letters sent by the City of Lynnwood regarding a building permit to WCCHS prior to having WCCHS's application processed were not final land use decisions. As to the first letter, the court found that it was not a final land use decision as it did not use the words "decision, final or appealable," and failed to follow requirements of the City's own Code as it was sent to WCCHS's architect (not WCCHS) and was not even mailed via methods required in the Code. Id. at 679-80. The court found that the second letter also failed to comply with the City's code in that it did not inform WCCHS of its appeal rights within the jurisdiction, did not inform WCCHS that a particular certification at issue in the dispute between the parties was required prior to issuance of a permit, and further did not state that the application was denied -- just that it was incomplete. Id. at 680. The court concluded that "[b]ecause of the unclear, inconsistent, and non-complying nature of these letters they were insufficient to constitute final orders" and "[n]o exhaustion of administrative remedies arose." Id. Instead, the court viewed the letters as an "interim" decision made in the process of reaching a final decision on the permit. Id.

These cases are all distinguishable. Unlike the memoranda referenced in Vogel, which did not describe the terms of any agreement, "even summarily," and were vague and nonfinal, the Compliance Plans at issue here are formal, signed agreements that set forth in great detail the parties' final and binding agreement for Heinmiller to achieve compliance

with the San Juan County Code. There is nothing vague about these Plans, and they most certainly speak in terms of finality because they set forth what Heinmiller shall do pursuant to the SJCC -- actions which, if done as set forth in the Plans, would not allow further enforcement action by the County and would meet the County's permitting requirements. The Plans were self-executing insofar as finality and termination of County enforcement action were concerned. Further, unlike Steintjes, these Plans were not interlocutory decisions. The terms of the Plans reach the merits of many issues surrounding the question of whether the ADU could remain in the barn, and provide that if the actions stated in the Plans were taken, permits would be issued. And unlike the situation in WCHS, Durland does not identify any non-compliance with the San Juan County Code by the Compliance Plans, or deficient notice. Durland does not identify aspects of the County's decision as set forth in the Compliance Plans which left the subject matter open to further dispute or showed that more decision-making was necessary to issue permits; all that was left, upon Heinmiller's doing what the Plans required of him, was the non-discretionary, ministerial act of issuing the permits pursuant to the prior agreement in the Plans. Further, Durland does not identify aspects that are "unclear," "inconsistent," or "non-complying" in the Plans. Ultimately, none of these cases support the result urged by Durland.

3. Untimely Collateral Challenges to the Compliance Plans are Prohibited by LUPA

Under LUPA, a land use petition is barred and may not be reviewed unless the petition is timely filed within 21 days of issuance of the land use decision. RCW 36.70C.040. LUPA is the codification of the strong and long-recognized public policy of administrative finality in land use decisions. James v. Cnty. of Kitsap, 154 Wn.2d 574, 589, 115 P.3d 286 (2005). A party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision. Habitat Watch v. Skagit Cnty., 155 Wn.2d 397, 410-11 (citing Wenatchee Sportsmen, 141 Wn.2d at 180-82. As the Washington Supreme Court has explained:

If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue... is no longer reviewable.

Wenatchee Sportsmen, 141 Wn.2d at 182.

In this case, the Compliance Plans decided a number of issues, as set forth above and in the trial court's order dismissing various issues. These issues were not timely appealed. Durland should not be allowed to raise the issues now as part of a challenge to the issuance of permits for the project. Allowing the issues that were decided in the Compliance Plans to be reviewed now would nullify the time limitation of LUPA and the certainty that it provides. The Superior Court properly found that the issues decided in the Plans were not subject to review in Durland's LUPA challenge.

4. The Trial Court Erred in Awarding Statutory Costs to Durland

In his Land Use Petition, Durland sought review of approximately seven issues which had been raised before the Hearing Examiner. He prevailed on only one of these issues at the Superior Court level. The issue on which Durland prevailed was that the Superior Court reversed the Hearing Examiner's affirmance of the County's calculations of living area of the ADU. This did not defeat Heinmiller's ability to have the ADU on his property; to the extent that the living area calculations were found to be incorrect (in excluding areas with a ceiling height of less than 5 feet), the same is curable through further planning revisions with the County (re-sizing the interior spaces of the ADU to meet the 1000 SF limit, *inclusive* of areas below the 5 foot minimum ceiling height). Durland was not the prevailing party below and was not entitled to an award of statutory costs. Thus, the Superior Court erred in awarding the same.

5. Heinmiller is Entitled to an Award of Reasonable Attorney's Fees on Appeal

Durland brought numerous challenges in his Land Use Petition, and as indicated, has prevailed on only one of those. The complaints in Durland's Land Use Petition include his assertions that the Examiner erred in finding the Compliance Plans to be final land use decisions, such that various issues decided in the plans could not be revisited on appeal as

consideration of the same was time-barred (§7.7-7.8); that the Examiner erred in finding modifications could be made to the barn (§7.9); that permits should not have been issued in violation of SJCC 18.50.330 for a building located waterward of a residence, and that the Examiner erred to the extent he found to the contrary (§7.10); that the Examiner erred to the extent that he found a shoreline development permit was not necessary (§7.11); that the Examiner erred in finding no violation of the SJCC square footage requirements for the ADU (§7.12); and that the Examiner erred in not finding any violation of roof pitch requirements (§7.13). *CP 1-33.*

The Superior Court then ruled that approximately five of seven issues were decided in the Compliance Plans and could not be revisited on appeal, including whether the ADU could be located in the barn; whether the barn complied with side-yard setbacks; whether shoreline permits were necessary; whether the barn was compliant with other lot coverage and setback requirements; and whether permits could be issued for the ADU. *CP 34-35.*

Ultimately, the ADU size limitation and roof pitch issues were considered on the merits, and the trial court affirmed the Examiner's/County's decision with respect to the roof pitch, reversing only on the size limitation issue. The trial court thus entered rulings against Durland and in favor of Heinmiller on all issues but one, and as also indicated above, reversal on the size limit issue did not take away

Heinmiller's ability to maintain the ADU.

RCW 4.83.370 "allows reasonable attorney's fees to a party who prevails or substantially prevails at the local government level, the superior court level, and before the Court of Appeals or the Supreme Court." Julian v. City of Vancouver, 161 Wn.App. 614, 631-32, 255 P.3d 763 (2011) (internal citations omitted). The statute provides in relevant part:

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

RCW 4.84.370(1).

"The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties." Marine Enters., Inc. v. Sec. P. Trading Corp., 50 Wn.App. 768, 772, 750 P.2d 1290 (1988) (citation omitted). "Various cases say the prevailing party is the one 'who

receives an affirmative judgment in its favor." Kysar v. Lambert, 76 Wn.App. 470, 493, 887 P.2d 431 (1995), *review denied*, 126 Wn.2d 1019 (1995) (quoting Marassi v. Lau, 71 Wn.App. 912, 915, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia v. SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481 (2009)). The prevailing party need not prevail on his or her entire claim. Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984). Marassi recognizes that in some cases, it is difficult to assess which parties have substantially prevailed, and that a proportionality approach is more appropriate. Marassi, 71 Wn.App. at 816-17. Under that analysis, the court considers the relative success of the parties where there are multiple distinct and severable claims. Id.

In this case, an award of attorney's fees to Heinmiller is appropriate because he has prevailed on the majority of the claims brought against him at the administrative and superior court level, and has succeeded in obtaining what he ultimately sought: approval to maintain the ADU. Julian, 161 Wn. App. at 631-32 (hearing examiner affirmed approval of short plat application, but on modified conditions, and same was upheld both at superior court and appellate level; held, applicant entitled to fees because, although opponents to application prevailed on arguably significant issues, applicant received what they sought and substantially prevailed). Having to modify the size of the ADU does not take away this right. Whether viewed as "substantially prevailing" or to have secured a

greater victory than Durland under the Marassi approach, an award of reasonable attorneys fees to Heinmiller is appropriate.

G. CONCLUSION

For the foregoing reasons, Heinmiller respectfully requests that this court:

(1) Reverse paragraph 2 of the trial court's Order on Decision on the Merits, entered on June 20, 2011, thereby reinstating the Hearing Examiner's computation of the living area of the ADU on the Heinmiller property;

(2) Reverse paragraph 4 of the trial court's Order on Decision on the Merits, entered on June 20, 2011, thereby reversing the trial court's award of statutory costs to Durland;

(3) Award reasonable attorney's fees to Heinmiller; and

(4) Deny the remainder of Durland's appeal.

Respectfully Submitted this 29th day of November, 2011.



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