

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

NO. 67429-3-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

BRIEF OF RESPONDENT SAN JUAN COUNTY

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I. Introduction

This matter involves a code enforcement action undertaken by Respondent San Juan County. The County discovered that a portion of an existing building had been converted to an accessory dwelling unit without permits. A notice of violation was issued. Subsequently, the County and the property owners (Respondents Heinmiller and Stameisen) entered into an Agreed Compliance Plan and Supplemental Agreed Compliance Plan which described the steps necessary to resolve the code enforcement action.

The property owners ultimately obtained the permit approvals contemplated in the Agreed Compliance Plan and Supplemental Agreed Compliance Plan. An administrative appeal of the permit approvals was filed by Petitioners Durland, Fennel, and Deer Harbor Boatworks.

The San Juan County Hearing Examiner concluded that many of the issues raised in the appeal of the permit issuance had already been decided by the Agreed Compliance Plan and Supplemental Agreed Compliance Plan. Consequently, the Hearing Examiner determined that the already-resolved issues could not be collaterally challenged as part of a challenge to permit issuance. A land use petition was later filed

challenging the Hearing Examiner decision.

Similarly, the Skagit County Superior Court concluded that those issues already decided could not be collaterally challenged later. The County now asks this Court to affirm the decision reached by both the Superior Court and the Hearing Examiner.

II. Issues Pertaining to Petitioner's Assignments 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 land use decisions as that term is used in LUPA, RCW 36.70C.020(2)?
3. Has the time to challenge the barn's compliance with setback requirements passed?
4. Is the County code provision related to roof pitch unambiguous?
5. Did the Hearing Examiner err in treating the roof alteration as a "grandfathered" non-conforming use?

III. Statement of the Case

Respondents Wes Heinmiller and Alan Stameisen are the owners of a property at 117 Legend Lane in Deer Harbor on Orcas Island (the

“Heinmiller Property”). CP 10.¹ Petitioner Michael Durland is the owner of the adjacent property to the north (the “Durland Property”). CP 21. Both properties are located in San Juan County.

The Heinmiller property contains a 30-foot by 50-foot “storage barn” or “proposed storage structure” (hereinafter “barn”) constructed in 1981. CP 21; CP 78. Plans for the barn indicated that it would be 10 feet from the side property line shared with the Durland Property. CP 21; CP 78. A 1990 survey revealed that the barn was only 1.4 feet from the side property line. CP 21; CP 78. On December 7, 1990, the owners of the Heinmiller and Durland properties recorded a “Boundary Line Agreement and Easement” which prevented the owner of the Durland Property from building within 20 feet of the barn. CP 21; CP 137-146. Several years later, a portion of the barn was converted to an accessory dwelling unit (“ADU”) without permits. CP 21.

Code enforcement action. The ADU conversion came to the attention of San Juan County and code enforcement action was taken, including the issuance of a notice of correction in 2008. CP 21. After the

¹ As noted in the Opening Brief of Appellants, in February 2011 the property was quit claimed to Sunset Cove Estate LLC under WAC 458-61A-211.

notice of correction was issued, an Agreed Compliance Plan was prepared dated April 25, 2008. CP 78-81. The Agreed Compliance Plan was signed by both the County's Community Development and Planning Director and the property owners. CP 81. The Agreed Compliance Plan sets out the steps needed to bring the property into compliance, stating that:

The parties agree that the owners are required to take the following action to bring the property into compliance with the County Code.

CP 80.

The Agreed Compliance Plan required the owners of the Heinmiller Property to apply for permits for the conversion to an ADU and other work.² CP 80-81. If permits were not obtained, the unpermitted work was to be demolished. CP 81. The Agreed Compliance Plan acknowledges the barn's location 1.4 feet from the property boundary, stating: "The County has acquiesced in the location and recognized the setback easement of twenty feet as a substitute for the property boundary setback of ten feet." CP 78. The Agreed Compliance Plan described the

² Other work addressed in the Agreed Compliance Plan involves the demolition of a deck, carport, and other alterations. CP 80-81. These requirements are not at issue in this case.

barn as “nonconforming” and did not require that it be removed or relocated. CP 80-81. Instead, the Agreed Compliance Plan required either demolition of the ADU or a building permit, change-of-use permit, ADU permit, and shoreline permits. CP 80-81.

In 2009, the County’s Community Development and Planning Director and the owners of the Heinmiller Property executed a Supplemental Agreed Compliance Plan (“Supplemental Compliance Plan”). CP 82-83. The Supplemental Compliance Plan indicated that the ADU conversion could be brought into compliance without a shoreline substantial development permit if certain steps were taken, including reducing the height of the barn to 16 feet. CP 83.

Petitioners Durland, Fennel, and Deer Harbor Boatworks (hereinafter “Durland”) filed an administrative appeal of the Supplemental Compliance Plan. CP 22:6. The San Juan County Hearing Examiner (“Hearing Examiner”) dismissed the administrative appeal of the Supplemental Compliance Plan as untimely. CP 22:6-7.

Permit applications, approvals, and appeals. The owners of the Heinmiller Property ultimately applied for a building permit, change-of-use permit, and ADU permit as contemplated by the Agreed Compliance

Plan and Supplemental Compliance Plan. CP 21:6-8. These permits were approved by the County on November 23 and 24, 2009. CP 21:7-8. On December 11, 2009, Durland filed an administrative appeal challenging all three permits. CP 67-68. The appeal identifies seven issues, which are summarized as follows:

1. Whether the permits are consistent with regulations regarding land developed in violation of local regulations.
2. Whether the ADU complies with setback requirements.
3. Whether the ADU complies with building width limitations for properties with shoreline frontage.
4. Whether the ADU complies with waterfront setback requirements for accessory structures.
5. Whether the appropriate shoreline approvals, such as a shoreline conditional use permit, substantial development permit, or shoreline exemption have been obtained.
6. Whether the ADU complies with the living area limitation of 1,000 square feet.
7. Whether the ADU complies with roof pitch requirements in the Deer Harbor Hamlet Plan.

CP 67-68.

The Hearing Examiner considered Durland's administrative appeal at a hearing held on May 6, 2010. CP 21:9. In doing so, the Hearing Examiner considered, as a threshold question, what impact the Agreed Compliance Plan and Supplemental Compliance Plan had on the building permit process. CP 25:6-8. The Hearing Examiner determined that the

compliance plans had resolved certain issues, and that those issues thus could not be raised in Durland's appeal of the building permit. CP 25:7-8; CP 27:22-23. The Hearing Examiner identified specific issues raised in the appeal which were time-barred because they were addressed in the Compliance Plan and Supplemental Compliance Plan and were not timely appealed. CP 23-31. The Hearing Examiner resolved the remaining issues in favor of the owners of the Heinmiller Property. *See* CP 32:17. The Hearing Examiner's decision is the subject of this LUPA action, which was filed on August 13, 2010. CP 1; CP 2:5-7; CP 11-33.

The Skagit County Superior Court reached the same conclusion as the Hearing Examiner and ordered that: "Those portions of the land use petition filed in this matter pertaining to issues already resolved in the Compliance Plan and Supplemental Compliance Plan are dismissed." CP 35. The superior court considered two remaining issues regarding roof pitch and living area at a hearing on the merits. CP 257-259. On appeal, San Juan County asks this Court to affirm the decisions of the Hearing Examiner and Superior Court regarding issues already decided in the Agreed Compliance Plan and Supplemental Compliance Plan.

IV. Standard of Review

When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court. *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (Div.1, 2001). In a LUPA case, the court may grant relief only if the moving party satisfies statutory standards for relief. RCW 36.70C.130(1). The statute provides that:

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

...

(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; [or]

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision[.]

RCW 36.70C.130(1)

These statutory standards of LUPA reflect a clear legislative intention that the court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation.

City of Medina v. T-Mobile USA, Inc., 123 Wn. App. 19, 24, 95 P.3d 377, (Div. 1, 2004). On appeal of an administrative decision, the review is of the record before the hearing examiner, including the hearing examiner's findings of fact and conclusions of law. *Id.* Unchallenged findings of fact are verities on appeal. *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (Div. 1, 2001).

In this case, the superior court resolved some of the issues raised by the land use petition in an order granting San Juan County's motion for partial dismissal. CP 34-35. The court reviews CR 12(b)(6) dismissals de novo. *Asche v. Bloomquist*, 132 Wn. App. 784, 789, 133 P.3d 475 (2006), *rev. denied*, 159 Wn.2d 1005 (2007). Dismissal is appropriate under CR 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Id.* (affirming dismissal of time-barred action under LUPA). Many of the issues raised in this case are time-barred under LUPA and therefore are properly dismissed.

V. Argument

A. Summary

In this case, Durland challenges the issuance of three permits by San Juan County. Included in the challenge are collateral challenges to an earlier land use decision, an Agreed Compliance Plan and Supplemental Agreed Compliance Plan (together referred to as “Compliance Plan”) which was issued as part of a code enforcement proceeding. Because the collateral challenges are time-barred under LUPA, they must be dismissed.

The San Juan County Hearing Examiner considered an administrative appeal of the permits issued by the County. In doing so, the Examiner appropriately recognized that the Compliance Plan had already resolved certain issues, and that he therefore could not revisit those issues as part of later permit decisions.

The Compliance Plan is a final determination and therefore a land use decision under LUPA because it satisfies County Code requirements, is not subject to further review, and identifies future steps to be taken for compliance. The Compliance Plan is similar to other code enforcement actions which this Court has held to be land use decisions.

Because the time to challenge the Compliance Plan had passed at

the time the land use petition was filed, issues raised in the petition but already resolved in the Compliance Plan must be dismissed under LUPA as untimely collateral challenges. Similarly, setback issues raised now relate to a structure which was permitted decades ago; those issues are also untimely under LUPA and must be dismissed.

B. The Hearing Examiner appropriately exercised authority and determined that a compliance plan was valid after the time to appeal the compliance plan had passed.

The issue of Hearing Examiner authority was not raised before the trial court and should not be raised for the first time on appeal. RAP 2.5(a). The question of Hearing Examiner authority, which is distinct from a question of trial court jurisdiction, could have been raised under RCW 36.70C.130(1)(e) and is not subject to the exception in RAP 2.5(a)(1).

A land use decision becomes valid once the opportunity to challenge it has passed. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000). This is because LUPA prevents a court from reviewing an untimely land use petition. *Id.*

It is undisputed that the San Juan County Hearing Examiner has

authority to consider appeals from the granting of a building permit pursuant to the San Juan County Code (“SJCC”). *See* SJCC 2.22.030, 2.22.100, and 18.80.140(B)(11).

While considering the building permit appeal, the Hearing Examiner considered, as a threshold question, what impact the Compliance Plan had on the building permit process. CP 25:6-8. In this instance, the Hearing Examiner determined that a Compliance Plan which predated a building permit resolved certain issues, and that those issues, therefore, could not be raised in the building permit challenge. CP 25:7-8³; CP 27:22-23.⁴

To resolve this threshold question, the Hearing Examiner considered whether the compliance plan was final (CP 24:24-25:5), whether an administrative appeal of the compliance plan was available (CP 24:22-23), and whether a timely judicial appeal of the compliance plan was filed (CP25:1-3).

It is appropriate and necessary for the Hearing Examiner to resolve

³ “The Examiner concludes that the compliance plans are final land use decisions on all zoning compliance.” CP 25:7-8.

⁴ “[A] final determination cannot be collaterally attacked in a subsequent permit review.” CP 27:22-23.

such threshold questions as part of the exercise of the Hearing Examiner's authority. Even if Hearing Examiner lacked authority to make such threshold decisions, it is inconsequential because the Superior Court reached the same conclusion. *See* CP 35. The Superior Court's order states that "Those portions of the land use petition filed in this matter pertaining to issues already resolved in the Compliance Plan and Supplemental Compliance Plan are DISMISSED." CP 35.

C. The Compliance Plan is a final land use decision which cannot be collaterally challenged.

The land use petition which was filed by Durland in this matter challenges the issuance of three permits. Many of the challenges are, in fact, collateral challenges to an earlier land use decision, the Agreed Compliance Plan and Supplemental Compliance Plan (together the "Compliance Plan"). Because these collateral challenges are time-barred under LUPA, they should be dismissed.

The Land Use Petition Act ("LUPA") is the exclusive means of judicial review for land use decisions, with limited, specific exceptions. RCW 36.70C.030. 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. County of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286 (2005). The purpose and policy of definite time limits is to allow property owners to proceed with assurance in developing their property. *Id.* Because LUPA prevents a court from reviewing an untimely petition, a land use decision becomes valid once the opportunity to challenge has passed. *Wenatchee Sportsmen*, 141 Wn.2d at 181.

The superior court's dismissal of many of the issues in the land use petition is appropriate because the Compliance Plan is a land use decision under LUPA. Under LUPA, a land use decision is defined as follows:

"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:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning

or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Where a local jurisdiction allows or requires a motion for reconsideration to the highest level of authority making the determination, and a timely motion for reconsideration has been filed, the land use decision occurs on the date a decision is entered on the motion for reconsideration, and not the date of the original decision for which the motion for reconsideration was filed.

RCW 36.70C.020(2).

The focus in this case is whether a compliance plan is a “final determination” under RCW 36.70C.020(2). *See* Opening Brief of Appellants 20. Because the Compliance Plan at issue is a final determination, and, therefore, a final land use decision, it may not be collaterally challenged by a challenge to a later-issued land use decision.

1. The Compliance Plan is a final determination, not an interlocutory decision.

Under LUPA, a final determination is “one which leaves nothing open to further dispute and which sets at rest cause of action between the

parties.” *Heller Bldg., LLC v. City of Bellevue*, 147 Wn. App. 46, ¶ 18, 194 P.3d 264 (Div. 1, 2008) (quoting *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002)).

Washington courts have consistently held that a local jurisdiction’s determination is a final determination under LUPA where it: (1) contains the elements required for the particular type of determination; and (2) is not subject to further appeal or review by the local jurisdiction. *See Heller*, 147 Wn. App. 46. This is so when a final determination identifies future land use decisions which may occur at a later date. *See Id.* at ¶¶ 12 and 24.

The result of a compliance plan under the San Juan County Code is to set to rest any disputes over what must occur for a property owner to achieve compliance with the County’s regulations: If the compliance plan is followed, no further code enforcement action will be taken; if it is not followed, further code enforcement action will be taken. *See* SJCC 18.100.040(D). Because the Compliance Plan at issue contains all the elements of a compliance plan required by the County code and is not subject to further review by the County, it is a final determination under LUPA.

a. The Compliance Plan contains all elements of a compliance plan required by the San Juan County Code.

The San Juan County Code establishes both civil and criminal enforcement provisions for violations of its land use laws. *See, e.g.*, SJCC 18.100.060. However, a primary intent of the County's enforcement provisions is to encourage the voluntary correction of violations. *See* SJCC 18.100.010. To this end, one method to achieve compliance is the development of a mutually agreeable compliance plan. *See* SJCC 18.100.040(D). The County's code provisions regarding compliance plans are as follows:

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 Compliance Plan was executed by San Juan County and the owners of the Heinmiller Property. CP 81; CP 83. The Compliance Plan establishes a specific time frame for compliance. CP 81; CP 83. By its terms, the Compliance Plan indicates what steps are necessary to bring the

property into compliance with County regulations; it states:

The parties agree that the owners are required to take the following action to bring the property into compliance with the County Code.

See CP 80; *See also* CP 83. There is no allegation in this case that the Compliance Plan is incomplete or failed to comply with the County Code.

The fact that a completed determination in compliance with local laws is a final determination is illustrated by *Heller*, 147 Wn. App. 46. The local jurisdiction's practice regarding stop work orders was to: (1) call the owner and contractor; (2) post a stop work order; and (3) send a letter of explanation. *Id.* at ¶ 23. The court held that a posted stop work order itself was not a final decision because it did not contain either the reason for the order or the conditions under which work could resume, both of which were required by the local jurisdiction's own codes. *Id.* at ¶ 20. On the other hand, a letter of explanation subsequently sent by the local jurisdiction was a final decision because it complied with the local jurisdiction's requirements for stop work orders and was clearly intended to be the final step in the three-step process for stop work orders. *Id.* at ¶ 24. *Accord* *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679-80, 86 P.3d 1169 (2004) (holding that a letter was not a final, appealable

decision when “the letter did not comply with the City’s own code”).

In this case, the Compliance Plan was a final determination like the follow-up letter in *Heller* because it was fully executed and complied with County code requirements by establishing a time for compliance and identifying necessary steps to avoid further enforcement action.

This case is also similar to *Harrington v. Spokane County*, 128 Wn. App. 202, ¶¶ 25-26, 114 P.3d 1233 (2005), in which the court held that a final determination was made at the completion of a particular process; in that case the building permit process. *See id.* at ¶¶ 25-26. In *Harrington*, a local jurisdiction sent letters during building permit review explaining what was needed to satisfy septic requirements and the jurisdiction’s authority to consider alternative septic proposals. *Id.* at ¶¶ 5-7. The letters in *Harrington* were a part of the building permit review process but did not complete the review by approving or denying the permit; instead, the permit approval itself was the final point in the process. *Id.* at ¶¶ 25-26. In this case, the challenge is to a process that was completed, the compliance plan process, not to correspondence regarding a potential compliance plan. It is the Compliance Plan itself that is the final determination.

Finally, the Compliance Plan was written and specific. CP 78-83. Memorializing the decision in writing distinguishes this matter from *Vogel v. City of Richland*, 161 Wn. App. 770, 255 P.3d 805 (2011), which held that an oral decision was not a land use decision because there was not a specific decision that the public could review and act on. *Id.* at ¶16. Furthermore, the Compliance Plan is more than a mere procedural decision such as a hearing examiner's discovery order, which was deemed not to be a final decision in *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998). The Compliance Plan was written and clearly set out what had been decided. CP 78-83. It is a final determination and therefore a land use decision.

b. The Compliance Plan is not subject to further review before it becomes final.

The County code does not provide for administrative appeals of a compliance plan or supplement thereto. *Compare* SJCC 18.100.040 (no provision for administrative appeal) *with* SJCC 18.100.070(A)(4) (establishing administrative appeal rights for civil penalties for violations of the Shoreline Master Program). Because no County official or body may review an appeal of a Compliance Plan, it is a final determination

under RCW 36.70C.020(2).

Furthermore, the Compliance Plan is not subject to remand, as distinguished from *Stientjes Family Trust v. Thurston County*, 152 Wn. App. 616, 217 P.3d 379 (Div. 1, 2009). In *Stientjes*, the court held that no final determination had been made where the highest county body with authority to consider the permit had remanded the matter to the Hearing Examiner for further consideration. *Id.* at ¶ 14. In contrast, here a final decision has been made because there are no additional steps for the Hearing Examiner or any other county official to take to finalize the Compliance Plan.

c. The fact that other land use decisions regarding the Heinmiller Property might occur later does not affect the Compliance Plan's status as a land use decision.

A code enforcement action which identifies the steps needed for compliance is a land use decision for purposes of LUPA. *Heller*, 147 Wn. App. 46 at ¶¶ 12 and 24. As described above, in *Heller*, a stop work order was issued as part of a code enforcement action. The court held that a letter sent after a stop work order was posted was a final decision because it complied with the jurisdiction's requirements for stop work orders,

contained the reasons for the decision, and listed the conditions for resuming work; this informed the owner of the substance of the violation in a manner that allowed the owner to correct the violation or make an informed decision whether to challenge the City's action. *Id.* at ¶¶ 20-24.

Like the City's final action in *Heller*, the County's action in entering into a compliance plan informed the property owners of the steps necessary to correct the violations. *See* CP 80-81; CP 83. The letter in *Heller* identified future steps necessary to achieve compliance, including the need to submit applications for approval. *Heller*, 147 Wn. App. 46 at ¶ 12. Similarly, the County's Compliance Plan identified future permit applications as a method to resolve the code enforcement action. *See* CP 80-81; CP 83.

The fact that future land use decisions regarding building permits and other matters may be made regarding the property is not a factor in the definition of "land use decision" found in RCW 36.70C.020(2). If only one land use decision per property were possible, jurisprudence regarding collateral challenges under LUPA would be unnecessary.

2. A collateral challenge to the Compliance Plan is not permitted because the time to challenge the Compliance Plan has passed.

Under LUPA, a petitioner 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 County*, 155 Wn.2d 397, 410-11, 120 P.3d 56 (2005) (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 180-82, 4 P.3d 123 (2000)). As the Washington Supreme Court 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.

Durland claims that this case is not a collateral challenge because it is not a challenge to the Compliance Plan, but to the permits issued by the County subsequent to the Compliance Plan. However, because the Compliance Plan determined what steps were necessary to bring the ADU into compliance, challenging the permits now for failure to follow the appropriate steps is, in fact, a collateral challenge of the type prohibited by *Wenatchee Sportsmen*.

a. Challenges to the Compliance Plan are untimely.

The land use petition in this matter was filed on August 13, 2010. CP 1. Because the Agreed Compliance Plan and Supplemental

Compliance Plan were issued in 2008 and 2009 (CP 81; CP 83), the 21-day appeal period to challenge them under LUPA had long since passed. *See* RCW 36.70C.040. Durland was aware of the Compliance Plan and filed an administrative appeal of the Supplemental Compliance Plan. *See* CP 22:6.⁵ Because no timely judicial appeal of the Compliance Plan was filed, the Compliance Plan is no longer reviewable and may not be challenged now via a challenge to the County's permit issuance.

b. The Compliance Plan resolved issues raised in the challenge to the permit issuance.

In this case, the Compliance Plan recognized that an ADU could be located in the barn on the Heinmiller Property. CP 80-83. The Compliance Plan explicitly recognizes the barn as compliant with regard to side yard setbacks (i.e., setbacks from the property line shared with the Durland property). CP 22; CP 78. The Compliance Plan includes all of the actions required to bring the property into compliance with the County Code. CP 80-81; CP 83. Nothing in the Compliance Plan requires the barn to be relocated, nor are any additional permits required by the

⁵ The administrative appeal was dismissed by the Hearing Examiner as untimely. CP 22:6-7.

Compliance Plan to keep the barn in its existing location. CP 80-81; CP 83. This is consistent with the statement that the barn is nonconforming. *See* CP 79. The decision that nothing is required now to approve the barn's existing location is a land use decision regarding setbacks. *See Harrington*, 128 Wn. App. 202 at ¶ 26 (stating that approval of a building permit application included an implicit denial of an earlier request).

Furthermore, the Compliance Plan explicitly indicates that shoreline permits are needed unless the height of the barn is reduced, in which case no shoreline permits are needed. CP 80; CP 83. By identifying the acquisition of permits as a path to compliance that is an alternate to demolition, the Compliance Plan acknowledges that permits may be issued for the property. *See* CP 78 (“The County agrees that there are alternative methods of compliance that do not involve demolition of the 30’ by 50’ structure.”)

Durland argues that the County Code prohibits the County from issuing permits for the Heinmiller Property. As noted above, the Compliance Plan requires that permits be obtained in order to bring the property into compliance with the County Code. CP 80-81; CP 83. This includes not only permits for the proposed ADU conversion, but also

demolition permits to remove other work on the property. CP 80-81. The fact that all of the alternatives outlined in the Compliance Plan require permits demonstrates that the County has concluded permits may be issued for the property. The County could not require permits to correct violations without first determining that it is at least possible for permits to be issued.

The bar on collateral challenges to the Compliance Plan does not mean that no challenge to the permit applications is possible, but only that those issues already decided by the Compliance Plan may not be challenged now. Several considerations were left to be resolved later, at the building permit stage. For example, the Compliance Plan did not determine whether the ADU complies with the living area limitation of the San Juan County Code or the roof pitch requirements of the Deer Harbor Hamlet Plan. *See* CP 25:18-26:2; *See also* CP 78-83. Because consideration of living area limitations and roof pitch was not part of the Compliance Plan, but rather was deferred to the permit approval stage, challenges to those aspects of the proposal are not time-barred.

Issues that were decided as part of the Compliance Plan and not timely appealed may not be raised now as part of a challenge to the

issuance of permits for the project. *See Habitat Watch*, 155 Wn.2d at 410-411; *See also Wenatchee Sportsmen*, 141 Wn.2d at 180-182. Allowing the issues to be decided now would nullify the time limitation of LUPA and the certainty it provides. Permitting collateral challenges to compliance plans would eliminate the usefulness of compliance plans as a code enforcement tool because they would provide no certainty, eliminating their benefits.

D. The time to challenge the barn's compliance with setback requirements has passed.

Durland asks the court to decide the issue of whether or not the barn is an illegal structure, as opposed to a nonconforming structure, as a result of its location 1.4 feet from the property line. This issue was resolved by the Hearing Examiner, who ruled that the issue had already been decided by the Compliance Plan. CP 28:19-21.

Because the issue was not reached by the superior court, it should not be reached here. Furthermore, even if this Court desires to reach the issue of whether or not the barn complies with setback requirements, the courts lack authority to decide the issue at this time because the time for a challenge to the location of the structure has passed.

The barn was constructed in 1981. CP 21. Plans for the barn indicated that it would be 10 feet from the side property line shared with the Durland Property, but a 1990 survey revealed that the barn was only 1.4 feet from the side property line. CP 21; CP 78. The then-owners of the Heinmiller and Durland properties recorded a “Boundary Line Agreement and Easement” which prevented the owner of the Durland Property from building within 20 feet of the barn. CP 21; CP 137-146. There is no information in the record regarding the time that the County first became aware of the 1990 survey or the “Boundary Line Agreement and Easement,” although both documents are identified in the Compliance Plan. *See* CP 78.

LUPA became effective in 1995. Laws of 1995, ch. 347. LUPA replaces the writ of certiorari for appeal of land use decisions and is the exclusive means of judicial review of land use decisions. RCW 36.70C.030(1). The County is bound by LUPA’s 21-day limitation on appeals. *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002). Although an action arguably could have been brought to enforce the setback before LUPA became effective, after LUPA any action must be brought within 21 days of the land use decision.

Regardless of whether limitations accrued upon enactment of LUPA or when the County first learned the barn was 1.4 feet from the property line, any appeal period available to the County or others to challenge the location of the barn has long since passed. Consequently, it is immaterial whether or not the private agreement “cured” any defect, because at this time the courts lack any authority to revisit the permit granted in 1981. *See* RCW 36.70C.040. This is because even an illegal decision must be timely challenged. *Habitat Watch*, 155 Wn.2d at 407.

E. The County does not have a position regarding roof pitch or roof alteration.

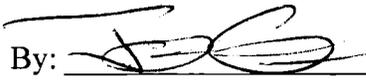
San Juan County does not have an interest in the issues regarding roof pitch and roof alteration, which are raised by Appellants as Appellants’ issues 4 and 5 pertaining to assignments of error. Consequently, the County will not argue those issues here.

VI. Conclusion

For the reasons described above, the County respectfully requests that the Court affirm the orders of the Skagit County Superior Court dismissing certain issues raised by Durland as time-barred under LUPA and denying reconsideration.

Respectfully submitted this 22ND day of November 2011.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: 

Jonathan W. Cain, WSBA #37979
Deputy Prosecuting Attorney
Attorney for San Juan County

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APPENDIX 1

Attached are the following sections from the San Juan County Code:

2.22.030
2.22.100
18.80.140
18.100.010
18.100.040
18.100.060
18.100.070

2.22.030 Establishment.

The office of hearing examiner is hereby created pursuant to RCW 36.70.970 and San Juan County Charter Section 3.70. The hearing examiner shall interpret, review, and implement land use regulations as provided by ordinance and may perform such other quasi-judicial functions or conduct other nonlegislative hearings as are delegated by the County council. Unless the context requires otherwise, the term "hearing examiner" as used herein shall include examiners pro tem. (Ord. 30-2008 § 3; Ord. 3-1994)

2.22.040 Appointment.

The County council shall appoint the hearing examiner for terms which shall initially expire one year following the date of original appointment and thereafter expire up to two years following the date of each reappointment, subject to the terms of an executed contract. The hearing examiner shall serve under a professional services contract. The County council may also, by professional services contract, appoint one or more examiner pro tem for terms and functions deemed appropriate by the County council, to serve in the event of absence or inability to act of the examiner. (Ord. 30-2008 § 4; Ord. 3-1994)

2.22.050 Qualifications.

The hearing examiner and examiner(s) pro tem shall be appointed solely with regard to their qualifications for the duties of such office and shall have such training and experience as will qualify them to conduct administrative or quasi-judicial hearings on regulatory matters and to discharge other functions conferred upon them by ordinance. Examiners and examiners pro tem shall hold no other appointed or elected public office or position in San Juan County government. (Ord. 3-1994)

2.22.060 Removal.

A hearing examiner may be removed from office by a majority vote of the County council, subject to the terms of the executed professional services contract between the County council and the hearing examiner. (Ord. 30-2008 § 5; Ord. 3-1994)

2.22.070 Freedom from improper influence.

No person, including County elected and appointed officials, shall attempt to influence an examiner in any pending matter except at a public hearing duly called for such purpose, nor interfere

with an examiner in the performance of duties in any way; provided, that this section shall not prohibit the County prosecutor from rendering legal services to the examiner upon request. (Ord. 3-1994)

2.22.080 Conflict of interest.

The examiner shall not conduct or participate in any hearing, decision or recommendation in which the examiner has a direct or indirect personal, business, financial or other interest which might exert such influence upon the examiner or interfere with the examiner's decision making process, or concerning which the examiner has had substantive prehearing contacts with proponents or opponents. Any actual or potential conflict of interest shall be disclosed to the parties immediately upon discovery of such conflict. The examiner pro tem shall perform the duties of hearing examiner whenever a conflict of interest exists or the hearing examiner is otherwise unable to perform the duties of the office. (Ord. 3-1994)

2.22.090 Rules.

The rules and regulations for the conduct of public hearings before the examiner shall be adopted and thereafter amended from time to time by the County council by resolution or ordinance, and thereafter codified and made part of the County code. (Ord. 30-2008 § 6; Ord. 3-1994)

2.22.100 Authority.

A. The hearing examiner shall receive and examine available information, conduct public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon those facts. Those decisions of the hearing examiner shall represent the final decision upon the following matters:

1. Shoreline substantial development permits, shoreline conditional use permits, and shoreline variances;
2. Conditional use permits, subdivisions, and binding site plans for more than four lots;
3. Appeals of matters arising pursuant to SJCC Title 15 (building and fire codes);
4. Appeals from decisions of the CD&P director on boundary line modifications, simple land divisions, provisional uses, short subdivisions, binding site plans (up to four lots), temporary uses (Level II), discretionary uses, and other development permits issued by the CD&P director;

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5. Appeals from administrative determinations made by the CD&P director pursuant to SJCC 18.10.030;

6. For project actions, appeals from decisions of the responsible official under SEPA; and

7. Matters that have been consolidated by the CD&P director for review and approval by the hearing examiner.

B. **Decisions Final.** The decision of the hearing examiner on all matters shall be final and not subject to appeal to the County council unless the County council has adopted procedures for the discretionary review of decisions of the hearing examiner. Decisions on shoreline permits are subject to approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110. Final decisions may be appealed to superior court or to state boards as provided by law. (Ord. 30-2008 § 7; Ord. 9-2002 § 1; Ord. 3-1994)

2.22.105 Hearing examiner clerk – Duties and responsibilities.

The CD&P director shall designate a person to serve as the clerk of the hearing examiner. The hearing examiner clerk shall have the following duties and responsibilities:

A. Acceptance and marking of written testimony and exhibits, and maintenance of the record of the proceedings. These items constitute the official record of the hearing examiner proceedings;

B. Under the general direction of the hearing examiner, scheduling hearings or other actions before the hearing examiner, in cooperation with the examiner and the CD&P director; and

C. Under the supervision of the hearing examiner, preparation, certification, and transmittal of the official record of the proceedings when an appeal of an examiner's decision is filed. (Ord. 30-2008 § 8; Ord. 26-2002 § 7; Ord. 3-1994)

2.22.110 Submittal of applications.

All applications and matters to be submitted to the examiner shall be submitted to the administrator as specified by the ordinance governing the application. The administrator shall accept such applications only if the applicable filing requirements are met. The administrator, in coordination with the examiner, shall assign a date of public hearing for each submittal, in accordance with the ordinance governing the application or appeal. (Ord. 9-2002 § 2; Ord. 3-1994)

2.22.120 Report and recommendation of the administrator.

When an application has been scheduled before the hearing examiner, the administrator shall coordinate and assemble the comments and recommendations of other County departments and governmental agencies having an interest in the application and shall prepare a report summarizing the factors involved and the planning department findings, conclusions, and recommendations. At least 10 days prior to the scheduled hearing, the report shall be filed with the examiner and copies mailed to the applicant and appellant, and made available for any interested party. (Ord. 9-2002 § 3; Ord. 3-1994)

2.22.130 Multiple applications.

The examiner may consider two or more applications relating to a single project concurrently, and the findings of fact, conclusions and decision on each application may be covered in one written decision. (Ord. 3-1994)

2.22.140 Time of meetings.

A. Notice of the time and place of the public hearing shall be given as provided in the ordinance governing the application or appeal.

B. The hearing examiner shall conduct public hearings two days each month, as necessary except during November and December, when only one hearing will be held unless a second hearing is necessary due to the number of agenda items. Hearings shall take place as specified in the hearing examiner contract; provided, that the hearings days shall be consistent from month to month. The hearing examiner may schedule special meetings and continued meetings, as deemed necessary. (Ord. 3-1994)

2.22.150 Decisions.

Decisions shall be rendered and transmitted in accordance with the ordinance requirements governing the application or appeal. Pursuant to RCW 36.70.970, hearing examiner decisions shall be in writing and shall include findings and conclusions, based on the record, to support the decision. The findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the County's Comprehensive Plan and development regulations (if applicable).

If an application is approved, the hearing examiner may attach conditions necessary to ensure compliance with the County Comprehensive Plan

cable procedures of Chapter 18.50 SJCC and SJCC 18.80.110.

E. Procedures for Nonconforming Use or Structure not Subject to the Shoreline Master Program.

1. The procedures for provisional uses (SJCC 18.80.070) shall apply to the actions and activities described in SJCC 18.40.310(B) through (D), as limited by SJCC 18.40.310(G) through (I).

2. The procedures for conditional uses (SJCC 18.80.100) shall apply to the actions and activities described in SJCC 18.40.310(F) as limited by SJCC 18.40.310(G) through (J).

F. Illegal Use. Any use, structure, or other site improvement not established in compliance with this code and other applicable codes and regulations in effect at the time of establishment is not nonconforming; rather, it is illegal and subject to enforcement provisions of Chapter 18.100 SJCC. (Ord. 15-2002 § 12; Ord. 2-1998 Exh. B § 8.12)

18.80.130 Project permit decisions.

A. Finality. All project permit decisions, and administrative determinations or interpretations issued under this code shall be final unless appealed. (See SJCC 18.10.070(C).) Requests for reconsideration are not authorized.

B. Final decision on a project permit application shall be in writing and shall include findings and conclusions based on the record made before the decisionmaker (see Table 8.1), the SEPA threshold determination (Chapter 43.21C RCW) and the procedures for administrative appeal, if any. The notice of decision may be a copy of the report or decision on the project permit application.

C. The notice of decision shall be provided to the applicant and to any person who, prior to the rendering of the decision, requested (in writing) notice of the decision.

D. Timing of Notice of Final Decision. The notice of decision shall be issued within 120 days after the County notifies the applicant that the application is complete, unless excluded in subsection (D)(1) of this section, and except for shoreline permit applications for limited utility extensions (RCW 90.53.140(13)(b)) or construction of a bulkhead or other measures to protect a single-family residence, its appurtenant structures from shoreline erosion. In those cases, the decision to grant or deny the permit shall be issued within 21 days of the last day of the comment period specified in SJCC 18.80.030(B)(2). The time frames set forth

in this section shall apply to project permit applications filed on or after the effective date of this code.

1. Calculation of Time Periods for Issuance of Notice of Final Decision. In calculating the time for issuance of the notice of decision, the following periods shall be excluded:

a. Any period during which the applicant has been requested by the County to correct plans, perform required studies, or provide additional information. The excluded period shall be calculated from the date the County notifies the applicant of the need for additional information until the County determines the resubmitted information satisfies the request; and

b. Any period during which an environmental impact statement is being prepared following a determination of significance pursuant of Chapter 43.21C RCW; and

c. Any appeal period; and

d. Any extension of time mutually agreed upon by the applicant and San Juan County.

2. The time limits established in this section do not apply if a project permit application:

a. Requires an amendment to the Comprehensive Plan of to this code;

b. Requires approval of the siting of an essential public facility as provided in RCW 36.70A.200; or

c. Is substantially revised by the applicant, in which case the time period shall start from the date at which the revised project application is determined to be complete.

E. If the County is unable to issue its final decision on a project permit application within the time limits provided for in this section, it shall provide written notice of this fact to the project applicant. The notice shall include a statement of reasons why the time limits have not been met and an estimated date for issuance of the notice of decision. (Ord. 15-2002 § 13; Ord. 2-1998 Exh. B § 8.13)

18.80.140 Appeals.

A. Appeals – General. Appeals are either open-record appeals or closed-record appeals (see definitions in Chapter 18.20 SJCC), and include:

1. Appeals to the hearing examiner of permits (development permits and/or project permits) granted or denied by the administrator (administrator is the decisionmaker);

2. Appeals to the hearing examiner of administrative determinations or interpretations made by the administrator (administrator is the decisionmaker);

3. Appeals to the BOCC of permit decisions made by the hearing examiner (hearing examiner is the decisionmaker);

4. Appeals to the BOCC of decisions of the hearing examiner arising out of matters where the administrator was the decisionmaker;

5. SEPA appeals of project actions, as defined in WAC 197-11-704;

6. Appeals of consolidated matters (i.e., appeal of administrative determination consolidated with project permit application hearing);

7. A timely appeal of a code interpretation or decision made by the administrator or building official stays the effective date of such decision until the matter has been resolved at the County level. (See also SJCC 18.10.030 and RCW 36.70C.100.)

8. The appeal path for project permits is shown in Table 8.1. The appeal path for SEPA is shown in Table 8.3.

7. Discretionary use permits;

8. Administrative determinations or interpretations (see SJCC 18.10.030);

9. SEPA threshold determinations (DNS and DS) of project actions (see WAC 197-11-704);

10. EIS adequacy;

11. Development permits issued or approved by the administrator; and

12. Consolidated matters where the administrator was the decisionmaker.

C. Closed-Record Appeals. Closed-record appeal procedures apply where an appeal of a decision issued after an open-record appeal hearing has been properly filed.

1. The board of County commissioners hears closed-record appeals of the following types of decisions:

a. Decisions of the hearing examiner issued after an open-record predecision hearing;

b. Decisions of the hearing examiner issued after an open-record appeal hearing.

2. Closed-record appeal hearings shall be on the record made before the hearing examiner, and no new evidence or testimony may be presented.

3. The board of County commissioners must sustain the examiner's findings of fact where such findings are supported by substantial evidence, and must sustain the examiner's conclusions unless such conclusions are contrary to law.

4. If, after consideration of the record, written appeal statements and any oral arguments, the board of County commissioners determines that an error in procedure occurred or may have occurred; or additional information or clarification is desired with respect to the decision of the hearing examiner, or if the parties have reached a settlement, the board shall remand the matter to the hearing examiner.

5. The burden of proof in a closed-record appeal is on the appellant.

D. Standing to Appeal. Appeals to the hearing examiner or BOCC may be initiated by:

1. The applicant;

2. Any recipient of the notice of application (see SJCC 18.80.030);

3. Any person who submitted written comments to the administrator or the hearing examiner concerning the application;

4. Any aggrieved person; and

5. Any person who submitted written or oral testimony at an open-record predecision hearing or an open-record appeal hearing.

Table 8.3. SEPA Processing and Appeals.

	Threshold Determination		EIS	
	DNS/MDNS	DS	DEIS	FEIS
Comment Period (days)	14	21	30	N/A
Appeal Period (days)	21	21	N/A	21
Consolidated Hearings	yes	no	N/A	yes
Open-Record Appeal Hearing	yes	yes	N/A	yes
Decisionmaker	Hearing Examiner	Hearing Examiner	N/A	Hearing Examiner
Appeal	Superior Court	See RCW 43.21C.075	N/A	Superior Court

B. Open-Record Appeals. The San Juan County hearing examiner has authority to conduct open-record appeal hearings of the following decisions by the administrator and/or responsible official, and to affirm, reverse, modify, or remand the decision that is on appeal:

1. Boundary line modifications;
2. Simple land divisions;
3. Provisional use permits;
4. Short subdivisions;
5. Binding site plans (up to four lots);
6. Temporary use permits (Level II);

E. Time Period and Procedure for Filing Appeals.

1. Appeals to the hearing examiner or to the BOCC must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed; and

2. Appeals of a SEPA threshold determination or an FEIS must be filed within 21 days following the date of the threshold determination or FEIS;

3. All appeals shall be delivered to the administrator by mail, personal delivery, or fax, and received before 4:30 p.m. on the due date of the appeal period. Applicable appeal fees must be paid at the time of delivery to the administrator for the appeal to be accepted.

4. For the purposes of computing the time for filing an appeal, the date of the decision being appealed shall not be included. If the last day of the appeal period is a Saturday, Sunday, or a day excluded by RCW 1.16.050 as a legal holiday for the County, the filing must be completed on the next business day (RCW 36A.21.080).

5. Content of Appeal. Appeals must be in writing, be accompanied by an appeal fee, and contain the following information:

a. Appellant's name, address and phone number;

b. Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);

c. Identification of the decision which is the subject of the appeal, including date of the decision being appealed;

d. Appellant's statement of grounds for appeal and the facts upon which the appeal is based;

e. The relief sought, including the specific nature and extent; and

f. A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.

F. Notice of Hearing. The administrator shall give notice of the appeal hearing as provided in SJCC 18.80.030(C).

G. Decision Time and Notice.

1. The hearing examiner or BOCC shall consider and render a written decision on all appeals. Such decision shall be issued within 60 days from the date the appeal is filed; provided, that the appeal contains all of the information specified in this section.

2. The parties to an appeal may agree to extend these time periods.

H. Consolidated Appeal Hearings.

1. All appeals of development permit or project permit decisions shall be considered together in a consolidated appeal hearing.

2. Appeals of environmental determinations under SEPA, except for an appeal of a determination of significance (DS), shall be consolidated with any open-record hearing (open-record predecision hearing or open-record appeal hearing) before the hearing examiner. (See also SJCC 18.80.020(B)(2), Consolidated Permit Processing, and SJCC 18.80.110(D), Shorelines – Consolidated Permit Processing.)

I. No Requests for Reconsideration. Requests for reconsideration to either the hearing examiner or board of County commissioners are not authorized.

J. SEPA Appeals of Project Actions.

1. The County establishes the following appeal procedures under RCW 43.21C.075 and WAC 197-11-680 for appeals of project actions as defined in WAC 197-11-704:

a. Appeals of the intermediate steps under SEPA (e.g., lead agency determination, scoping, draft EIS adequacy) are not allowed;

b. An appeal on SEPA procedures is limited to review of a final threshold determination (determination of significance (DS) or nonsignificance (DNS/MDNS), or final environmental impact statement (FEIS);

c. As provided in WAC 197-11-680(3)(a)(iv), there shall be no more than one administrative appeal of a threshold determination or of the adequacy of an environmental impact statement (EIS);

d. A timely SEPA appeal shall stay the decision on a project permit application or development permit application until such time as the SEPA appeal has been resolved at the administrative level (i.e., decision by the hearing examiner or appeal withdrawn);

e. An appeal of the issuance of a determination of significance shall be heard and decided by the hearing examiner in a separate open-record hearing. As provided in RCW 36.70B.060(6) and 43.21C.075, this open-record hearing shall not preclude a subsequent open-record hearing as provided by this code;

f. Except for an appeal of a DS, a SEPA appeal (procedural and/or substantive determinations under SEPA) shall be consolidated with the

open-record predecision hearing or open-record appeal hearing on a project and/or development permit, if any, and heard by the hearing examiner;

g. The determination of the responsible official shall carry substantial weight in any appeal proceeding;

h. The hearing examiner's decision on a SEPA appeal is final unless a judicial appeal is filed;

i. Appeals identified in WAC 197-11-680(3)(a)(vi) need not be consolidated with a hearing or appeal on the underlying government action;

j. Notice of the date and place for commencing a judicial SEPA appeal.

2. Notice of the date and place for commencing a SEPA judicial appeal must be given if there is a time limit established by statute or ordinance for commencing an appeal of the permit decision. The notice shall include the time limit for commencing appeal of the permit decision and SEPA issues, and the statute or ordinance establishing the time limit; and where such a judicial appeal may be filed.

3. Such notice is given by:

a. Delivery of written notice to the applicant, all parties of record in any administrative appeal, and all persons who have requested notice of decisions with respect to the particular proposal in question; and

b. Following the notice of decision procedures set forth in SJCC 18.80.130, if applicable;

c. Written notice containing the information required by subsection (J)(2) of this section may be appended to the permit or decision, notice of decision, SEPA compliance documents, or may be given separately.

d. Official notices required by this subparagraph shall not be given prior to the County's final decision on a proposal.

K. Judicial and State Board Appeals. The time limits, methods, procedures and criteria for review of land use decisions by the courts or by a quasi-judicial body created by state law, such as the Shorelines Hearings Board or the Growth Management Hearings Board, is provided by state law. See, for example, Chapter 36.70C RCW (21 days; appeal to superior court). (Ord. 7-2005 §§ 19, 20; Ord. 15-2002 § 14; Ord. 14-2000 § 7(QQQ); Ord. 11-2000 § 7; Ord. 2-1998 Exh. B § 8.14)

18.80.150 Road vacation procedures

A. County road vacations are subject to procedures specified in state law at Chapter 36.87 RCW

and the policies in the Transportation Element 6 of the Comprehensive Plan. Vacations of County road ends shall not be permitted when prohibited under RCW 36.87.130.

B. Applications for vacations of County roads, road rights-of-way, or any portion of one shall meet the requirements of SJCC 18.60.090(C).

C. Applications for vacations of County roads may be processed pursuant to SJCC 18.70.080(B) only when such road vacations are proposed in conjunction with the vacation of the subdivision. Vacation of private roads within recorded subdivisions is subject to plat vacation procedures in RCW 58.17.212. (Ord. 15-2002 § 15; Ord. 2-1998 Exh. B § 8.15)

18.80.160 Procedures for planned unit developments.

A. Purpose and Applicability. Planned unit developments (PUDs) under the development standards and requirements of SJCC 18.60.220 are subject to this permit review process.

B. Application Submittal, Processing and Approval. PUD processing and approval shall occur as part of, and through the same procedures as subdivision or binding site plan application for the project.

C. Additional Application Requirements.

1. In addition to or as part of the materials being prepared to meet the requirements for subdivisions or binding site plans in Chapter 18.70 SJCC, the applicant shall prepare such other illustrations, diagrams, calculations, or descriptive materials as are needed to meet the requirements of SJCC 18.60.220.

2. Project information shall include:

a. A statement that discusses the general design concept of the PUD, and what special purposes (e.g., senior housing; community and environmental purposes), if any, the PUD is intended to meet or fulfill;

b. A description and layout of all proposed developments, including the location, use and size of all proposed structures, and the proposed development schedule;

c. A statement of the number of dwelling units, number of affordable units and their type, average density, use restrictions, information on how affordability will be assured, and other pertinent data;

d. A statement of the percentage and design approach of open space;

Chapter 18.100

ENFORCEMENT

Sections:

- 18.100.010 Intent.
- 18.100.020 Violations.
- 18.100.030 Enforcement and duty to enforce.
- 18.100.040 Investigation and service of notice of violation.
- 18.100.050 Stop work order, emergency, and abatement orders.
- 18.100.060 Penalties.
- 18.100.070 Enforcement and penalties – Shorelines.
- 18.100.080 Enforcement and penalties – Land divisions.

18.100.010 Intent.

The primary intent of all enforcement actions described in this chapter is to educate the public and to encourage the voluntary correction of violations. Civil and criminal penalties will be used only when necessary to ensure compliance with the provisions of this code. Criminal charges will be brought only when civil remedies have failed to ensure compliance. (Ord. 2-1998 Exh. B § 10.1)

18.100.020 Violations.

A. It is a violation of this code for any person to initiate or maintain, or to cause to be initiated or maintained, any use, alteration, construction, location, or demolition of any structure, land, or property within San Juan County without first obtaining permits or authorizations required by this code.

B. It is a violation of this code to remove or deface any sign, notice, complaint, or order required by or posted in accordance with this code.

C. It is a violation of this code to misrepresent any material fact in any application, plans, or other information submitted to obtain any land use authorization.

D. It is a violation of this code for any person to fail to comply with provisions of this code, to fail to comply with the terms or conditions of a permit issued pursuant to this code, or to fail to comply with notices or orders issued pursuant to this chapter.

E. Any activity, act, or conduct contrary to the provisions of this code is hereby declared to be a misdemeanor. The violation itself is an injury to the community and a public nuisance. (Ord. 2-1998 Exh. B § 10.2)

18.100.030 Enforcement and duty to enforce.

A. Provisions of this code will be enforced for the benefit of the health, safety, and welfare of the general public, and not for the benefit of any particular person or class of persons.

B. The administrator is authorized to enforce this code. The administrator may call upon law enforcement, fire, health, or other appropriate County departments to assist in enforcement.

C. The sheriff and all officers and officials charged with enforcement of the law are authorized to enforce provisions of this code.

D. The owner of any real or personal property subject to enforcement action and any person responsible for a violation are liable for failure to comply with this code or to comply with notices or orders issued pursuant to this code.

E. No provision or term used in this code is intended to impose any duty upon the County or any of its officers or employees which would subject them or the County to damages in a civil action.

F. 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. (Ord. 2-1998 Exh. B § 10.3)

18.100.040 Investigation and service of notice of violation.

A. The administrator shall investigate any facts which lead the administrator to reasonably believe that a person, use, or condition is in violation of this code.

B. Should the administrator be denied access to such property to carry out the purpose and provision of this section, the administrator may apply to any court of competent jurisdiction for a search warrant authorizing access.

1. The administrator or his or her designee may request the consent to enter property for the purpose of examining property, buildings, pre-

mises, records, or other physical evidence, or for conducting tests or taking samples.

2. The administrator or designee may apply for an administrative search warrant to a court official authorized to issue a criminal search warrant. An administrative search warrant may be issued for the purposes described in subsection (B)(1) of this section. The warrant shall be issued upon probable cause. It is sufficient probable cause to show either of the following:

a. The inspection, examination, test, or sampling, is pursuant to a general administrative plan to determine compliance with this code; or

b. The administrator has reason to believe that a violation of this code or permit issued pursuant to this code has occurred or is occurring.

C. If after investigation, the administrator determines that any provision of this code has been violated, a notice of correction letter shall be the first attempt at obtaining compliance. If voluntary compliance is not obtained, the administrator shall serve a notice of violation upon the owner and person(s) responsible for the violation. The notice of violation shall state the following:

1. Description of the activity that is causing a violation;

2. Each provision violated;

3. Any civil penalty imposed;

4. The corrective action, if any, necessary to comply with said provisions;

5. A reasonable time for compliance according to provisions of this section; and

6. That continued or subsequent violation may result in criminal prosecution as provided in SJCC 18.100.060(B).

D. 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.

E. When calculating a reasonable time for compliance, the administrator shall consider the following criteria:

1. The type and degree of violations cited in the notice;

2. The stated intent, if any, of a person responsible to take steps to comply;

3. Procedural requirements for obtaining a permit to carry out corrective action;

4. The complexity of corrective action, including seasonal considerations, construction requirements, and the legal rights and responsibilities of landlords and tenants; or

5. Any other circumstances beyond the control of the party responsible.

F. If the administrator believes that the requirements of this section are not being met, the administrator shall, in addition to the notice of violation, issue applicable stop work or emergency orders.

G. The notice of violation, stop work order, or emergency order shall be served upon the owner and person(s) responsible for the violation by personal service, registered mail, or certified mail with return receipt requested, addressed to the last known address of each such person. If after a reasonable search and reasonable efforts are made to obtain service, the whereabouts of the person or persons is still unknown, or service cannot be accomplished and the administrator makes an affidavit to that effect, then service of the notice of violation may be made by:

1. Publication of the notice once each week for two consecutive weeks in the official newspaper of the County;

2. Mailing a copy of the notice or order to each person named on the notice or order by first class mail to the last known address if any, if known, or if unknown to the address of the property involved in the proceeding; and

3. Mailing a copy to the taxpayer of record.

H. A copy of the notice or order shall be posted at a conspicuous place on the premises, unless posting the notice or order is not physically possible.

I. The administrator may mail or cause to be delivered to all residential and nonresidential units on the premises, or to be posted at a conspicuous place on the premises, a notice which informs each recipient or resident about any notice of violation, stop work order, or emergency order and the applicable requirements and procedures. Notices issued in this manner are sufficient for purposes of due process.

J. A notice of violation, a stop work order, or an emergency order may be amended at any time in order to:

1. Correct clerical errors; or

2. Cite additional authority for a stated violation.

K. If the scope of the notice is to be expanded or decreased, then a new notice of violation, a stop work order, or an emergency order shall be issued

in order to expand or decrease the scope of the notice or order as consistent with the intent of this section and new timelines may be established pursuant to subsection (D) of this section.

L. Nothing in this chapter shall be deemed to limit or preclude any civil or criminal action or proceeding available under this section or otherwise.

M. Nothing in this chapter shall be deemed to limit or preclude the administrator from seeking the most appropriate course of action deemed necessary in relationship to the severity of the violation. (Ord. 2-1998 Exh. B § 10.4)

18.100.050 Stop work order, emergency, and abatement orders.

A. Stop Work Order. Whenever a continuing violation of this code will materially impair the administrator's ability to secure compliance with this code, or when any person is proceeding in defiance of permit requirements, the administrator may issue a stop work order specifying the violation and prohibiting any work or other activity at the site. The stop work order shall be served on the person(s) responsible pursuant to SJCC 18.100.040 and shall be posted in a conspicuous place on the premises, if posting is reasonable and practical. Failure to comply with a stop work order shall constitute a violation of this code.

B. Emergency Order.

1. Whenever any use or activity in violation of this code threatens the health or safety of occupants of the premises or any member of the public, the administrator may issue an emergency order directing that the use or activity be discontinued and the condition causing threat to health and safety be corrected. The emergency order shall be served on the person(s) responsible pursuant to SJCC 18.100.040, shall specify the time for compliance, and shall be posted in a conspicuous place on the premises, if posting is physically possible. Failure to comply with an emergency order shall constitute a violation of this code.

2. Any condition described in an emergency order which is not corrected within the time specified in the order is a public nuisance. The administrator is authorized to abate said nuisance summarily by such means as the administrator finds reasonable. The cost of such abatement shall be recovered from the owner or the person responsible or both in any manner provided by law. (Ord. 2-1998 Exh. B § 10.5)

18.100.060 Penalties.

A. Civil Penalties. In addition to any other sanction or remedial procedure which may be available, any person violating or failing to comply with any of the provisions of this code may be subject to a cumulative penalty of up to \$1,000 per day for each active occurrence of violation. Such penalties shall be imposed by court after proper notice and hearing.

B. Criminal Penalties. In addition to incurring civil penalties under this section, a violation of this code is a misdemeanor. Upon conviction of a violation, the violator shall be fined a sum up to \$5,000 for each such violation, shall be imprisoned for a term not exceeding one year, or shall be both fined and imprisoned. Each day of noncompliance with any of the provisions of this code shall constitute a separate offense.

C. Additional Penalties.

1. In addition to civil and criminal penalties, the administrator may seek injunctive relief to enjoin any acts or practices and abate any nuisance or other condition which constitutes or will constitute a violation of this code when other civil or criminal penalties are inadequate to effect compliance, or when otherwise appropriate. Owners of real or personal property adversely affected by a violation of this code may also seek injunctive relief.

2. The administrator may issue a stop work order pursuant to SJCC 18.100.050 at any time during these proceedings.

3. The administrator may issue an emergency order pursuant to SJCC 18.100.050 at any time during these proceedings.

4. The fine for the third and subsequent violations in any five-year period shall be not less than \$500.00 nor more than the maximum allowed by law for gross misdemeanors. (Ord. 2-1998 Exh. B § 10.6)

18.100.070 Enforcement and penalties - Shorelines.**A. Court Actions - Civil Penalty - Review.**

1. The attorney general and the prosecuting attorney may bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions of the Shoreline Management Act or of the master program and to otherwise enforce the provisions of both.

2. Any person who shall fail to conform to the terms of a permit issued under the Shoreline

Master Program or who shall undertake development on the shorelines of the state without first obtaining any permit required under the master program shall also be subject to a civil penalty not to exceed \$1,000 for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

3. The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the penalty. The notice shall describe the violation with reasonable particularity and order that the act or acts constituting the violation or violations cease and desist or, in appropriate cases, require necessary corrective action to be taken within a specific and reasonable time.

4. Within 30 days after the notice is received, the person incurring the penalty may apply in writing to the County for remission or mitigation of such penalty. Upon receipt of the application, the County may remit or mitigate the penalty for good cause, upon whatever terms the County finds acceptable. Any penalty imposed pursuant to this action by the County shall be subject to review by the board of County commissioners. Any penalty jointly imposed by the state and County may be appealed to the Shorelines Hearings Board.

B. General Penalty.

1. In addition to incurring civil liability under this chapter and RCW 90.58.210, any person found to have willfully engaged in activities on the shorelines of the state in violation of the provisions of the Shoreline Management Act or of the master program or rules and regulations adopted pursuant thereto shall be guilty of a gross misdemeanor. A gross misdemeanor shall be punished by a fine of not less than \$25.00 nor more than \$1,000 or by imprisonment for not more than 90 days or by both such fine and imprisonment. The fine for the third and all subsequent violations in any five-year period shall not be less than \$500.00 nor more than \$10,000. Fines for violations of RCW 90.58.550, or any rule adopted thereunder, shall be determined under RCW 90.58.560.

2. Any person who willfully violates any court order or injunction issued pursuant to the master program shall be subject to a fine of not more than \$5,000 or by imprisonment for not more than 90 days, or by both such fine and imprisonment.

18.100.060 Penalties.

A. Civil Penalties. In addition to any other sanction or remedial procedure which may be available, any person violating or failing to comply with any of the provisions of this code may be subject to a cumulative penalty of up to \$1,000 per day for each active occurrence of violation. Such penalties shall be imposed by court after proper notice and hearing.

B. Criminal Penalties. In addition to incurring civil penalties under this section, a violation of this code is a misdemeanor. Upon conviction of a violation, the violator shall be fined a sum up to \$5,000 for each such violation, shall be imprisoned for a term not exceeding one year, or shall be both fined and imprisoned. Each day of noncompliance with any of the provisions of this code shall constitute a separate offense.

C. Additional Penalties.

1. In addition to civil and criminal penalties, the administrator may seek injunctive relief to enjoin any acts or practices and abate any nuisance or other condition which constitutes or will constitute a violation of this code when other civil or criminal penalties are inadequate to effect compliance, or when otherwise appropriate. Owners of real or personal property adversely affected by a violation of this code may also seek injunctive relief.

2. The administrator may issue a stop work order pursuant to SJCC 18.100.050 at any time during these proceedings.

3. The administrator may issue an emergency order pursuant to SJCC 18.100.050 at any time during these proceedings.

4. The fine for the third and subsequent violations in any five-year period shall be not less than \$500.00 nor more than the maximum allowed by law for gross misdemeanors. (Ord. 2-1998 Exh. B § 10.6)

18.100.070 Enforcement and penalties – Shorelines.**A. Court Actions – Civil Penalty – Review.**

1. The attorney general and the prosecuting attorney may bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions of the Shoreline Management Act or of the master program and to otherwise enforce the provisions of both.

2. Any person who shall fail to conform to the terms of a permit issued under the Shoreline

Master Program or who shall undertake development on the shorelines of the state without first obtaining any permit required under the master program shall also be subject to a civil penalty not to exceed \$1,000 for each violation. Each permit violation or each day of continued development without a required permit shall constitute a separate violation.

3. The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the penalty. The notice shall describe the violation with reasonable particularity and order that the act or acts constituting the violation or violations cease and desist or, in appropriate cases, require necessary corrective action to be taken within a specific and reasonable time.

4. Within 30 days after the notice is received, the person incurring the penalty may apply in writing to the County for remission or mitigation of such penalty. Upon receipt of the application, the County may remit or mitigate the penalty for good cause, upon whatever terms the County finds acceptable. Any penalty imposed pursuant to this action by the County shall be subject to review by the board of County commissioners. Any penalty jointly imposed by the state and County may be appealed to the Shorelines Hearings Board.

B. General Penalty.

1. In addition to incurring civil liability under this chapter and RCW 90.58.210, any person found to have willfully engaged in activities on the shorelines of the state in violation of the provisions of the Shoreline Management Act or of the master program or rules and regulations adopted pursuant thereto shall be guilty of a gross misdemeanor. A gross misdemeanor shall be punished by a fine of not less than \$25.00 nor more than \$1,000 or by imprisonment for not more than 90 days or by both such fine and imprisonment. The fine for the third and all subsequent violations in any five-year period shall not be less than \$500.00 nor more than \$10,000. Fines for violations of RCW 90.58.550, or any rule adopted thereunder, shall be determined under RCW 90.58.560.

2. Any person who willfully violates any court order or injunction issued pursuant to the master program shall be subject to a fine of not more than \$5,000 or by imprisonment for not more than 90 days, or by both such fine and imprisonment.

C. **Violator's Liability For Damages.** Any person subject to the regulatory provisions of the Act or of this master program who violates any provisions or any permit issued under those laws shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The prosecuting attorney may bring suit for damages under this section on behalf of the County. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation, the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator.

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. (Ord. 2-1998 Exh. B § 10.7)

18.100.080 Enforcement and penalties – Land divisions.

A. **Review of Sales.** The County assessor shall notify the administrator of any possible violations of this code. To prevent the recording of any instrument or conveyance for a parcel or parcels divided in violation of this code, an official declaration shall be signed by the seller or his or her agent at the time a real estate excise tax affidavit is completed. Forms shall be made available in the County treasurer's office and shall state that one of the following applies to the proposed land division:

1. This sale does not constitute a division of property;
2. This sale constitutes a division of property or a boundary line adjustment but is exempt

from the requirements of the San Juan County land division regulations, under Chapter 18.70 SJCC; or

3. This sale constitutes a division of property or a boundary line adjustment which is regulated by and has been reviewed and approved in terms of this code.

B. A compliance form signed by the administrator shall be included with the affidavit if subsection (A)(3) of this section applies.

C. **Development of Illegally Divided Land.** No application for a building permit, septic tank permit, or other development permit for any lot, tract, or parcel of land divided in violation of state law or of this code will be granted without prior approval of the administrator. Approval will only be given if the applicant demonstrates the following:

1. The County sanitarian has certified that the proposed means of sewage disposal and water supply on and to the lot, tract, or parcel are adequate and that the water supply and sewage system do not interfere with existing or planned water or sewage facilities in the vicinity;

2. The County engineer has certified that the proposed lot, tract, or parcel of land is served with an adequately designed means of access, and with adequate drainage facilities, none of which interferes with existing or planned public or private road and drainage facilities in the vicinity;

3. The proposed development will not adversely affect the safety or health of adjacent property owners;

4. The planning director has certified that the proposed land division and development conform to the policies and directives of the Comprehensive Plan; and

5. The applicant did not know, and could not have known by exercising reasonable care in purchasing the land, that the lot, tract, or parcel had been part of a larger lot, tract, or parcel divided in violation of state law or this code.

D. **Penalties.**

1. Violation of or failure to comply with any of the provisions of Chapter 18.70 SJCC is a misdemeanor, punishable by a fine not to exceed \$250.00. Each and every day during which such violation continues may be deemed a separate offense. Each sale, offer for sale, lease, or transfer of each separate lot, tract, or parcel of land contrary to Chapter 18.70 SJCC constitutes a separate offense. The prosecuting attorney shall have discretion for each violation to proceed with prosecution either criminally or civilly as provided in this