68453-1

68453-1

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

NO. 68453-1-I

MICHAEL DURLAND, et al.,

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

BREIF OF RESPONDENT SAN JUAN COUNTY

Amy S. Vira, WSBA No. 34197
San Juan County Prosecuting Attorney
350 Court Street, 1st Floor
P. O. Box 760
Friday Harbor, WA 98250
360-378-4101
Attorney for San Juan County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT CASES

WASHINGTON COURT OF APPEALS CASES

STATE STATUTES

STATE RULES

COUNTY REGULATIONS

I. INTRODUCTION

This is an appeal of a land use petition brought under Chapter 36.70C RCW, the Land Use Petition Act. Appellants would have this Court believe this case is about the right of individuals to have access to court to challenge illegal development on their neighbor's property. Appellant's brief, pg. 1. It is not.

This case is about consistent, predictable, and timely judicial review in land use cases. It is about the State Supreme Court and the Legislature's strong preference for finality in land use decisions.

Respondents Heinmiller and Stameisen applied for and were granted a building permit. Twenty-one days after the permit was issued the right to appeal had passed. Over five weeks after the permit was issued, despite San Juan County Code clearly providing for appeal to the hearing examiner, Appellants appealed the permit directly to superior court. Appellants claim they have been deprived of the right to appeal, yet they had no right to notice of the permit. They cannot be deprived of a right they never had.

Chapter 36.70C RCW and supporting case law is clear; to appeal a land use decision a petitioner must have standing under the Land Use Petition Act. One of the requirements for standing is the exhaustion of administrative remedies. Additionally, the appeal must be timely. These

requirements were not met in this case and the superior court properly dismissed the petition.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Does failure to exhaust administrative remedies deprive Durland of standing?
2. If so, can the exhaustion requirement be excused under LUPA?
3. Was the Land Use Petition timely filed?

III. STATEMENT OF THE CASE

Respondents Wes Heinmiller and Alan Stameisen ("Heinmiller") applied for a building permit for property located in Deer Harbor on Orcas Island, San Juan County. CP 38. Heinmiller applied for the building permit on August 8, 2011, and the permit was issued by San Juan County ("the County") and became a public record on November 1, 2011. CP 38. The permit was mailed to the Heinmiller's representative on November 2, 2011. CP 181.

Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks ("Durland") filed the land use petition that is the subject of this appeal on December 19, 2011, in Skagit County Superior Court. CP 33. Both the County and Heinmiller filed motions to dismiss. CP 4; CP 19-26. The Superior Court granted dismissal under CR 12(b). CP. 156-157.

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 (2001). The court reviews CR 12(b)(6) dismissals de novo. Asche v. Bloomquist, 132 Wn. App. 784, 789, 133 P.3d 475 (2006). 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). In this case, Durland failed to exhaust his administrative remedies resulting in lack of standing. Further, the land use petition is time-barred under LUPA. For both of these reasons the superior court properly dismissed the case.

Additionally, the Court should decline to consider facts recited in Durland's brief that are not supported by the record. RAP 10.3(a)(5); Sherry v. Financial Indem. Co., 160 Wn.2d 611, 615, 160 P.3d 31 (2007). Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review. State v. Stubbs, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) (reversed on other grounds, State v. Stubbs, 170 Wn. 2d 117, 240 P.3d 143 (2010)). The Court should disregard those legal arguments that are not supported by legal citation or reasoned argument.

V. ARGUMENT

A. Summary

In this case, a permit was applied for and granted. The County issued the permit and the 21-day LUPA appeal period passed. The Court is now being asked to waive the fundamental principles of LUPA including the requirements of exhaustion of administrative remedies and the 21-day appeal period limits and carve out an exception to LUPA that is not consistent with LUPA's stated purpose.

The superior court properly dismissed this matter for failure to exhaust administrative remedies as required by RCW 36.70C.060 and failure to meet the requirements of RCW 36.70C.040. This Court should apply precedent interpreting LUPA and affirm the superior court's dismissal.

B. Dismissal was proper because Durland failed to exhaust his administrative remedies and thus lacks standing.

1. Exhaustion of administrative remedies is required to establish standing under LUPA.

"Like the 21-day statute of limitation in the Land Use Petition Act (LUPA), exhausting administrative remedies is a fundamental tenet under LUPA; failure to do either is an absolute bar to bringing a LUPA petition

to superior court." West v. Stahley, 155 Wn. App. 691, 699, 229 P.3d 943(2010)(*as amended, review denied* 170 Wash.2d 1022, 245 P.3d).

San Juan County Code 18.80.140(B)(11) provides that the San Juan County hearing examiner has authority to conduct open-record appeal hearings of the development permits issued or approved by the director and/or responsible official, and to affirm, reverse, modify, or remand the decision that is on appeal. *See also* SJCC 2.22.100. Here, Durland did not appeal the issuance of the building permit to the San Juan County hearing examiner as provided in SJCC 18.80.140(B)(11) and therefore did not exhaust his administrative remedies prior to filing the land use petition. This failure to exhaust administrative remedies is an absolute bar to bringing the land use petition in superior court. *See* West at 699.

In West, West argued that he failed to exhaust administrative remedies because he did not receive proper notice of the decision. Id. at 697. The Court rejected West's argument citing to Nickum v. City of Bainbridge Island, 153 Wn. App. 366, 223 P.3d 1172 (2009). In Nickum, landowners brought a LUPA challenge against the City of Bainbridge Island challenging the city's issuance of a permit to allow construction of a wireless facility on a neighbor's property. Id. The city's code required administrative appeals of land use decisions be filed within 14 days of the

decision. Id. at 374. The landowners were not aware the permit had been issued and did not file their appeal to the city hearing examiner until approximately 50 days after the permit was issued. Id. at 372. The city hearing examiner dismissed the appeal because it was untimely under the city code. Id. at 373. The Nickum Court upheld the trial court's dismissal for lack of standing and lack of jurisdiction concluding that the landowners could not avail themselves of the court's jurisdiction over LUPA actions. Id. at 382. The petition before this Court, as in Nickum and West, fails due to lack of standing and lack of jurisdiction.

2. Without exhaustion of administrative remedies there is no land use decision that may be appealed.

RCW 36.70C.020(2) defines "land use decision" as "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..."

Here, a building permit was issued on November 1, 2012. CP 38. A land use petition appealing the issuance of the building permit was filed on December 19, 2012. CP 33. There was no appeal to the San Juan County Hearing Examiner.

These facts are similar to those in Ward v. Skagit County, 86 Wn. App. 266, 936 P.2d 42 (1997). In Ward, the Skagit County Code provided

that appeals of permits should be filed with the board of county commissioners within 14 days of the decision. Id. at 269. The Wards appealed the denial of a permit on the 15th day after the denial and the appeal was rejected. Id. The Wards then filed a land use petition in superior court which was dismissed for failure to exhaust administrative remedies. Id. The Ward Court affirmed the dismissal stating,

> *In order to obtain a final determination of the local governmental body with the highest level of authority to make the determination, one must, by necessity, exhaust his or her administrative remedies.* Thus, exhaustion of administrative remedies is a necessary prerequisite to obtaining a decision that qualifies as 'a land use decision' subject to judicial review under LUPA, ...

Id. at 270-271 (emphasis added).

In this case, the decision appealed – the issuance of the building permit – is not a final land use decision under LUPA because it is not a final determination by the local jurisdiction's body or officer with the highest level of authority to make the determination. That officer, in San Juan County, is the San Juan County hearing examiner. *See* SJCC 2.22.100; 18.80.140, discussed supra. Because the appealed decision is not that of the San Juan County hearing examiner, it is not a final land use decision under LUPA and the appeal was properly dismissed.

3. No LUPA case has waived the exhaustion requirement.

Waiving the exhaustion requirement in this case is not supported by legal authority, fairness or practicality. Durland asserts that the exhaustion requirement can be waived when considerations of fairness and practicality outweigh the policies underlying the doctrine however, the cases cited by Durland to support this assertion are either pre-LUPA or non-LUPA cases. Appellant's Brief, pgs. 18 (citing Prisk v. City of Poulsbo, 46 Wn. App. 793, 797, 732 P.2d 1013 (1987)(a pre-LUPA case), Keller v. City of Bellingham, 20 Wn. App. 1, 578 P.2d 881 (1997)(a non-LUPA case), Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997)(a non-LUPA case), and Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985)(a non-LUPA case)).

Although some LUPA cases have discussed exceptions to the exhaustion requirement, none have found an exception applicable in the context of LUPA. *See* Nickum v. City of Bainbridge Island, 153 Wn. App. 366; West v. Stahley, 155 Wn. App 691.

In West v. Stahley, the court concluded that failure to exhaust administrative remedies is an "absolute bar" to bringing a LUPA petition in superior court. 155 Wn. App. at 699. Durland dismisses West as "highly suspect" arguing that West disregard decades of well-established principles of law. Appellants Brief, pg. 19. That statement, however, is

not accurate, the West court applied decades of established law within the confines of the Land Use Petition Act. The equitable remedies argued by Durland are simply not applicable under the strict requirements of LUPA.

Similarly, Durland's argument relies heavily on the court's analysis in Gardner v. Pierce County Board of Commissioners, 27 Wn. App. 241, 617 P.2d 743 (1980). Gardner is a pre-LUPA case thus the Gardner court's analysis of the requirement to exhaust administrative remedies does not consider the standing requirements of RCW 36.70C.060(2)(d) or the requirement for a "land use decision" as defined by RCW 36.70C.030(2). Additionally, Gardner is distinguishable from the facts in this case because there Gardner was entitled to notice of the county's action and did not receive it. Id. at 243. Here, Durland was not entitled to any notice of the issuance of the building permit. *See* Applewood Estates Homeowners Assn v. City of Richland, 166 Wn. App. 161, 168 supra. Consequently, the Gardner court's equity analysis is not applicable in this case. LUPA does not mandate specific, personal notice of a land use decision for the 21-day clock to begin. Applewood Estates Homeowners Assn v. City of Richland, 166 Wn. App. 161, 168, 269 P.3d 388 (2012)(citing Samuel's Furniture, Inc. v. Department of Ecology, 147 Wn.2d 440 (2002)).

Finally, the interests of fairness and practicality do not weigh in favor of waiving the exhaustion requirement. As discussed above, Durland was not entitled to notice of the land use decision and was not improperly denied the opportunity to participate in the administrative process.

LUPA's stated purpose is to provide for "timely" judicial review. RCW 36.70C.010; Applewood, 166 Wn. App. at 167. A ruling by the Court that the exhaustion requirements and the 21 day filing requirements can be waived if an interested party is not aware of the land use decision until after the time has run would be counter to the courts' policy under LUPA of favoring finality in land use matters. *See* Melish v. Frog Mountain Pet Care, 172 Wn.2d 208, 215, 257 P.3d 641 (2011); Twin Bridge Marine Park, L.L.C. v. Dept. of Ecology, 162 Wn.2d 825, 843, 175 P.3d 1050 (2008).

Under Durland's reasoning, a property owner could apply for and obtain a building permit, commence construction under the permit and months later be subject to an appeal of that permit when their neighbor or other aggrieved party receives notice and files a LUPA petition. Such an interpretation would provide no finality to a property owner who would have no way of knowing if or when an aggrieved party might learn of their project and file and appeal and would be in complete opposition to

LUPA's stated purpose of providing consistent, predictable, and timely review. RCW 36.70C.010.

4. The doctrine of equitable tolling does not apply to jurisdictional time limits.

Even were the elements of equitable tolling present, the doctrine would not apply in this case because equitable tolling applies only to statutes of limitation and not to jurisdictional time limits. Nickum, at 376 (*citing* In re Pers. Restraint of Hoisington, 99 Wn. App. 423, 431, 993 P.2d 296 (2000)). San Juan County Hearing Examiner Rules clearly state under Chapter IV, Subsection B:

> The content and filing requirements shall be considered jurisdictional. The Hearing Examiner shall have no authority to consider appeals that fail to comply with the content and filing requirements of the San Juan County Code.

Hearing Examiner Rules Ch IV(B).

Because the filing requirements for an appeal of a land use decision to the Hearing Examiner are jurisdictional, the doctrine of equitable tolling does not apply.

5. The doctrine of equitable tolling does not apply in this case because there is not a showing of bad faith.

Finally, even if the doctrine of equitable tolling did apply, Durland has failed to establish a showing of bad faith. In Nickum, as in this case,

the landowners argued that justice and fairness required that the deadline for filing be tolled. Nickum, at 376. The Nickum court then stated,

> a limited exception to the administrative time-of-filing requirement exists. 'The failure to file a timely appeal of a land use decision has been excused where the lack of public notice deprived a neighboring landowner of a fair opportunity to participate in the administrative process.'

Id. (internal citations omitted). The Nickum court goes on to state:

> The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. 'Assuming that a failure to exhaust administrative remedies can be cured through the application of equity, equity cannot be invoked in the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff.'

Id. at 378 (*citing* Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998); Prekeges v. King County, 98 Wn. App. 275, 283 990 P.2d 405 (1999)). The Nickum court found that a mere allegation that the city had acted erroneously was insufficient to toll the administrative statute of limitations. Id.

Similarly in this case, Durland has not alleged bad faith, deception or false assurances on the part of the County. Because Durland has not established bad faith, deception, or false assurance by the County, the doctrine of equitable tolling does not apply and the land use petition was properly dismissed for failure to exhaust administrative remedies.

6. Durland's due process arguments should be disregarded.

Durland arguments regarding deprivation of due process are raised for the first time in his appellate brief. Issues raised for the first time on appeal should not be considered by the Court. RAP 2.5; *see also* Mellish v. Frog Mountain Pet Care, 172 Wn.2d 208, 221, 257 P.3d 641 (2011).

C. Dismissal was proper because the land use petition is untimely.

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 Assn v. Chelan County, 141 Wn.2d 169, 181, 4 P.3d 123 (2000).

Durland argues that the petition was timely because it was filed within 14 days of the date the decision was publicly available and 11 days after it was mailed to Durland. Appellant's Brief, pg. 8. These arguments fail.

1. The land use decision was "issued" when it became publicly available.

The County agrees that the Land Use Petition Act governs judicial review of Washington land use decisions and that pursuant to RCW 36.70C.040(3) a land use petition must be filed and served within 21 days of the issuance of the land use decision. The County further agrees that the RCW 36.70C.040(4) details when a land use decision is deemed "issued." Durland's assertion, however, that the land use decision was issued in this case when it was provided to Durland is unsupported by the record before the Court.

The issuance date on the building permit is November 1, 2011. CP. 38. On November 1, 2011, the permit was a public record that was publicly available. In Applewood Estates Homeowners Assn v. City of Richland, the city's development services manager approved a minor amendment to a PUD by issuing a written decision. 166 Wn. App. 161, 166, 269 P.3d 388 (2012). Neighbors became aware of the decision and appealed it three months later. Id. at 166-167. The Applewood court

stated, "[the development services manager] provided a written decision, a public record, administratively approving a minor amendment requested by the Developer on June 16, 2010." Id. at 167. The court goes on to say,

> the Neighbors were not entitled to personal notice, distinct from the notice contemplated by the filing of a public record as discussed in RCW 36.70C.040(c). Accordingly, we hold the Neighbors'' LUPA petition filed nearly 4 months after the City made its determination was time barred.

Id. The building permit, in this case, is a written document that became a public record when issued. CP 38. In this case, as in Applewood, Durland was not entitled to personal notice beyond that contemplated by the filing of the public record and his appeal more than a month after the permit was issued is likewise untimely.

2. At the latest, the land use decision was "issued" when mailed to the permit applicant.

Even were the Court to find that the building permit was not entered into the public record on the date it was issued, the permit was mailed to the applicant's representative on November 2, 2011. CP 181. Thus, at the latest, the permit was issued on November 5, 2011, three days after the date it was mailed to the applicant's representative. RCW 36.70C.040(4)(a).

Durland's appeal was filed on December 19, 2011. CP 33. Whether the permit is deemed issued under LUPA on November 1, 2011 or November 5, 2011, Durland's appeal far exceeds the 21 day requirement of RCW 36.70C.040(3) and was properly dismissed.

VI. CONCLUSION

For the reasons described above, the County respectfully requests that the Court affirm the order of the Skagit County Superior Court granting the County's and Heinmiller's motions to dismiss.

Respectfully submitted this 7th day of September 2012.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: _____
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

APPENDIX

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

2.22.100

18.80.140

Hearing Examiner Board:

Chapter IV (B)

appropriate, an opportunity to reply to such information shall be provided to the Parties of Record specified by the Hearing Examiner, either in writing or through further hearings.

D. Content of the Record

The record of a permit hearing shall include at least the following:

1. The application.
2. The staff report.
3. All documentary or physical evidence received and considered, including all exhibits filed.
4. Electronic recordings of the proceedings and/or an accurate written transcription thereof.

CHAPTER IV. APPEAL HEARINGS

A. Who May Appeal

On matters within the Hearing Examiner's jurisdiction, any person aggrieved by an administrative decision, as defined by law, may appeal to the Hearing Examiner.

B. Notice of Appeal

The contents of an appeal and the filing requirements thereof shall comply with applicable provisions of the San Juan County Code. The content and filing requirements shall be considered jurisdictional. The Hearing Examiner shall have no authority to consider appeals that fail to comply with the content and filing requirements of the San Juan County Code.

C. Clarification of Notice of Appeal

If the appeal is unclear and does not sufficiently explain the basis for the appeal, the Hearing Examiner may issue an order requiring that the appellant amend the appeal within 10 days of the date of the order. If the appeal is not satisfactorily amended within the time allowed, it shall be dismissed.

D. Motions

The Hearing Examiner shall dismiss an appeal, without hearing, when it is determined by the Hearing Examiner to be untimely, without merit on its face, incomplete, or frivolous.

Any application to the Hearing Examiner for an order shall be by motion which, unless made during a hearing, shall be in writing, stating the reasons for the request and setting forth the relief or order sought. Written motions shall be received at least five days in advance of the hearing.

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;

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 application 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 (J).

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 18.80.030(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 procedure 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 90.58.140(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 or to this code;

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

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.

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);
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.

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 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 same shall meet the requirements of SJCC 18.60.090(C).

C. Applications for vacations of County roads may be processed pursuant to SJCC 18.80.080(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;