No. 74039-3-I

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

MICHAEL DURLAND, KATHLEEN FENNELL, and DEER HARBOR BOATWORKS,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS HEINMILLER AND STAMEISEN

John H. Wiegenstein, WSBA #21201
Elisha S. Smith, WSBA #29210
HELLER WIEGENSTEIN PLLC
144 Railroad Ave., Suite 210
Edmonds, WA 98020-4121
(425) 778-2525
(425) 778-2566 FAX
Attorneys for Respondents

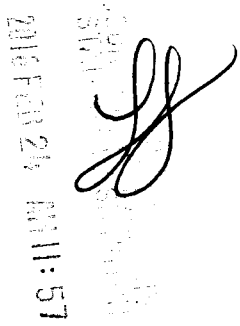

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Regulations

U.S. Cases

I. INTRODUCTION

Appellants Michael Durland, Kathleen Fennell, and Deer Harbor Boatworks's (collectively "Durland") have spent eight years trying to prevent respondents Wes Heinmiller and Alan Stameisen ("Heinmiller") from having an Accessory Dwelling Unit ("ADU") on the adjacent Heinmiller property. The ADU is inside a barn that was built in 1981 by the then-owner of the Heinmiller property, William Smith.

This appeal turns on one central issue: whether any side yard setback requirement applied to the barn when it was constructed in 1981. The Hearing Examiner below correctly determined that there was no setback requirement for the structure in 1981, hence no setback violation, and denied Durland's appeal. Durland appealed to the Whatcom County Superior Court, which affirmed.

Durland now comes to this court, claiming that the Examiner and superior court both committed error by finding and applying the actual law that governed the 1981 barn construction, and by refusing to disturb – on the basis of speculation and conjecture – a 30+ year history of a building which had a right to be where it was, and which was constructed long before Durland or Heinmiller ever entered the picture.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was the barn legal when constructed in 1981 because under SJC Res. 58-1977, it was exempt from County regulation and setback requirements?

B. Did the stamping of building plans with boilerplate notations by a County employee have any legal effect, where SJC Res. 58-1977 exempted the structure from County regulation?

C. Does the Examiner's decision comport with the doctrine of finality, where the barn was legal in 1981 and Durland's predecessor in interest did not challenge it at that time?

D. Was the Examiner free to find and apply the correct law to the setback issue, regardless of the assumptions made earlier by the parties as to what law applied?

E. Does the County code specifically exempt accessory structures such as the Heinmiller ADU from otherwise applicable shoreline development regulations?

F. Should the court award attorney fees and costs to Heinmiller on appeal, pursuant to RCW 4.84.370 and *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014)?

G. In the event that this court were to determine that the Examiner erred, should the matter be remanded for further proceedings before the Examiner?

III. STATEMENT OF THE CASE

This case involves an appeal filed by Durland pursuant to the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. The decisions of which Durland complains were made after remand from this court in *Durland v. San Juan County*, 174 Wash. App. 1, 298 P.3d 757 (2012) ("*Durland I*"), which involved a prior LUPA appeal by Durland regarding the same structure on the Heinmiller property.

The evidence considered by the Examiner in his decision after remand covered a span of 35 years, and revealed the following facts.

A. 1975-1977: San Juan County adopts Res. 224-1975, and then in 1977 substantially modified that by enacting Res. 58-1977.

In 1975, the County enacted Res. 224-1975 (**CP 330-339**), which adopted Washington's then-current version of the Uniform Building Code, with certain exceptions and modifications. One such modification was as follows:

> Section 4.01 SIDE, REAR AND FRONT YARDS No building in Group H and I occupancies and located in Fire Zone No. 3 shall be constructed within ten feet of the property line. No building in Fire Zone No. 3 may be

> located within ten feet of the property line unless any wall within such ten feet constitutes a one hour fire wall.

All of the County constituted Fire Zone No. 3 at the time. Res. 224-1975, §4.04. Thus, if a property owner wanted to build a barn or shed on their property, it would have required at least a one hour firewall, and in lieu of that, a 10 foot side yard setback.

Two years later, the County adopted Res. 58-1977 **(CP 341-46)**, which substantially amended Res. 224-1975 and changed the scope of County regulation of new structures. Under §9 of Res. 58-1977, which was directed to Class J structures, those structures were withdrawn from regulatory oversight by the County, no building permits were required, and Uniform Building Code ("UBC") requirements including setbacks were withdrawn. **CP 42 at n.4, 343, 784-85** However, under §10 a builder could voluntarily submit building drawings for a Class J structure for review by the County, and pay a fee for same. **CP 343-44**

B. 1981: Smith constructs a barn on his property, and the barn was a Class J structure governed by Res. 58-1977.

In 1981 Heinmiller's predecessor, William Smith, built a barn on his property. The barn was a Class J structure under Res. 58-1977. There is evidence in the record that Smith submitted a building plan to the County and a very rough site sketch (**CP 283**), and that the County issued

a building inspection card to Smith (**CP 282**). Both are consistent with the optional §10 process of Res. 58-1977, which was the applicable law.

But there is no evidence of an actual building permit ever having been applied for by Smith, or issued by the County. No copy of an actual permit has ever surfaced, despite exhaustive searches by both the County and Durland. **CP 42, at n. 4**. This makes complete sense in light of Res. 58-1977, §9, which withdrew these structures from regulation and permitting. Durland contends throughout his brief that a permit existed (as discussed further *infra.*) but this is speculation, supposition, and argument. There was no permit, and no evidence in the record to the contrary from anyone having personal knowledge of what actually happened in 1981.

C. 1986-1990: Durland purchases adjacent property, and executes Boundary Line Agreement and Easement with Smith so that Durland can obtain permits to run a commercial boatyard.

Durland bought his property in 1986. It is adjacent to what was then the Smith property, and is now the Heinmiller property. Beginning in 1986, Durland tried to obtain shoreline substantial development and conditional use permits to operate an industrial boatyard there. **CP 736-37** In that process, the location of the common boundary line came up, and led to ongoing discussions between Durland and Smith about that issue. In 1990, Durland and Smith commissioned a survey (**CP 233**) that

revealed, *inter alia*, that the barn was only 1.4 feet from the property line.

Durland and Smith then executed and recorded a Boundary Line Agreement and Easement ("Agreement"). **CP 234-243** As noted on the survey: "This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of Michael Durland and William G. Smith in June, 1990." (Emphasis added.) The Agreement states in part in its recitals:

> 4. In order to settle their differences as to the location of the common boundary line, Smith and Durland have had a survey done by San Juan Surveying, Inc., a Washington corporation.
>
> 5. There is an existing pole barn approximately 30 feet in width and 50 feet in length located in the northwest portion of Parcel A, the north wall of the barn being approximately 1.4 feet from the common boundary line. The barn was constructed when it was believed that the common boundary line was north of its actual surveyed location. (Emphasis added.)

The Agreement created a twenty-foot buffer around the barn structure, extending onto the Durland property, specifically for setback purposes:

> 2. Easement.
>
> Durland hereby conveys and quit claims to Smith a set back easement 20 feet in width along the south boundary of Parcel B, the easement being adjacent to the north side of the existing barn and extending 20 feet west of the west side of the existing barn and 20 feet east of the east side of the existing barn. The existing barn is shown on the survey recorded at Book 11 of Surveys, Page 15, records of San Juan County.

Durland also covenanted to not build within the twenty-foot setback easement, and consented to the location of the barn:

> The owners and future owners of Parcel B [the Durland parcel] agree that they shall not construct a building or structure within said easement within 20 feet of the existing shed, and hereby consent to the present location of the existing shed.

(Paragraph 2, continued.) (Emphasis added.)

The setback easement was enacted for Durland's benefit so he could obtain a CUP and open a boatyard next door to a residence, and to insulate the barn from his commercial operation. The purpose of the easement was clearly tied to the existence of the barn structure: the easement "shall terminate at such time as the existing barn structure is removed or destroyed." *Id.* The document refers to the structure as a "barn" or "shed," which were the natural descriptive terms to use at the time, but those were not terms of limitation. Nothing in the document limited the construction, interior arrangements, or future use of the building in any way.

The County then issued Durland his CUP, **CP 742-43**, and Durland's commercial boatyard has operated continuously since.

D. 1995: Smith sells to Heinmiller family and Stameisen, and in 1997 Heinmiller's parents construct ADU within the barn.

In 1995, Smith (now deceased) conveyed his property to four individuals: respondents Heinmiller and Stameisen, and the parents of Mr. Heinmiller, Harold and Ella Heinmiller.

The elder Heinmillers moved into the house on the property in 1995. They had a limited income and needed more assistance as they aged. The original family plan was to convert the existing mobile home on the property into a two-story house for Heinmiller and his parents to live in together. **CP 845** However, the plan changed due to the elder Heinmillers' health issues, and so that they would not all be "right on top of each other" (**CP 845**) -- such that Messrs. Heinmiller/Stameisen would live in the ADU, and the elder Heinmillers would continue to live in the main house. At that time, Wes Heinmiller and Alan Stameisen were living and working in California for most of the year. In 1997, the elder Mr. Heinmiller did most of the planning and worked with local contractors to make changes to convert the boat barn to an ADU, at a cost to Heinmiller of at least $175,000. Unfortunately, the elder Heinmillers did this conversion work without a permit. The work was completed sometime in

1997. **CP 842-859** (testimony of Wes Heinmiller).[1]

E. 2007-2008: Transfer of Heinmiller property, and subsequent code enforcement efforts.

In 2007, a decade after the work was completed, the elder Heinmillers conveyed their interest in the property to Messrs. Heinmiller/Stameisen, who then became the sole record owners of the property. Harold Heinmiller died shortly thereafter, in spring, 2007. Mrs. Heinmiller eventually moved to an assisted living facility (**CP 843, 847)** but passed away in early 2016.

As a result of a code enforcement complaint made approximately 10 years after the ADU work was completed, in February, 2008, the County issued a Notice of Correction. Heinmiller and the County then entered into an Agreed Compliance Plan, dated April 25, 2008. **CP 217-220**. The Plan required Heinmiller to remove certain structures, legalize the ADU with a conditional use permit ("CUP") or a substantial development permit ("SDP"), and take other actions. In reliance on the Agreed Compliance Plan, Heinmiller demolished and removed a deck, removed a carport, applied for and obtained an ADU permit, worked with

[1] Durland claims that the ADU conversion work continued up until 2007 (*App. Brief at 10*), but fails to cite anything in the record to support this notion.

designer Bonnie Ward on house drawings, and submitted a building and ADU application.

On May 13, 2009, the Agreed Compliance Plan was modified by the parties entering into a Supplemental Agreed Compliance Plan (**CP 221-22**), which allowed Heinmiller to reduce the height of the building a few inches to 16 feet. This eliminated the need for a CUP or SDP.

Durland filed an appeal of the Supplemental Agreed Compliance Plan. This appeal was heard before Hearing Examiner William Nielsen on August 5, 2009. The Hearing Examiner dismissed the appeal as untimely on August 13, 2009. **CP 223**. That dismissal was not appealed.

F. 2009: Permits are issued pursuant to the compliance plans, and Durland appeals same to the Hearing Examiner, then Superior Court, then Court of Appeals.

In 2009, the County issued a building permit, change of use permit, and ADU permit for the barn (per the Agreed Compliance Plans). Durland appealed these to the Hearing Examiner. Following a hearing on May 6, 2010, the Examiner dismissed the appeal, primarily on procedural grounds - i.e., that Durland was required to appeal the earlier Compliance Plans, and had waited too long. **CP 365-389**

Durland then appealed to Skagit County Superior Court, which affirmed in part and reversed in part. **CP 391-395**. He appealed again to

the Court of Appeals, which affirmed in part, reversed in part, and remanded for further proceedings. **CP 399-423**; *Durland v. San Juan County*, 174 Wash. App. 1, 298 P.3d 757 (2012) (*"Durland I"*).

The central issue before the court in *Durland I* was whether the Agreed Compliance Plan(s) were – as the superior court and Examiner found – "land use decisions" under LUPA, in which case Durland's appeal was time-barred. The court decided they were not, that the issuance of the permits in 2009 was the "land use decision" which Durland needed to appeal, and that Durland's appeal was therefore timely. The court remanded to the Examiner for further proceedings on the merits. *Durland I*, 174 Wash. App. at 26. The court did not rule on the merits (except as to roof pitch and ADU square footage issues, which are not at issue here), and expressly declined to address Durland's claim that the barn was illegal and could not be permitted because the setback was insufficient. *Id.,* 174 Wash. App. at 19 n.13.

The *Durland I* decision was of limited scope, and Durland's claim that "whether the setback applied to the property in 1981 was not within the issues remanded" (*App. Brief at 2*) is simply wrong. The language Durland quotes from the Examiner's March 15, 2015 Decision (**CP 32**) is actually a reference to the Examiner's original 2010 decision that Durland

was too late to challenge the Compliance Plans – the exact, central issue on which the *Durland I* court reversed, and remanded for further proceedings. On remand, as the Examiner noted, "the legal determinations made in those [Compliance Plans] are not determinative in building permit review," **(CP 32)** and all issues (except roof pitch) were "live" and subject to determination on the merits. **CP 36, 38**

Durland also claims that Heinmiller "never disputed that the setback applied when the barn was constructed in 1981, an issue they have conceded as demonstrated in *Durland I" (App. Brief at 4).* But this is misleading at best. The quoted footnote from *Durland I* is simply the court's notation as to what Res. 224-1975 stated. As set forth in detail *infra.*, this court did not make any ruling on that issue, because in all of the proceedings to that time, the parties had *assumed* that Res. 224-1975 was the applicable law when the barn was built. The Examiner was free to figure out and apply the *correct* law (Res. 58-1977) on remand, and nothing in the parties' prior conduct or *Durland I* prevented that.

Durland certainly knew of Res. 58-1977 at the time of the original 2009-2010 Hearing Examiner process, as it was discussed by Durland counsel at the hearing and included in the record as an Exhibit. **CP 34** Whether Durland knew all along that Res. 58-1977 applied and was fatal

to his appeal, and therefore ignored it and took the position that Res. 224-1975 was controlling, is unknown. Heinmiller obviously was not aware at that time of the impact of Res. 58-1977 on the entire barn/ADU issue.

Durland also claims that he "relied" on the barn not being converted to any other use. *App. Brief at 9.* But Durland offers no citation to any evidence to support this after the fact, self-serving statement. More important, the detailed and comprehensive Boundary Line Agreement that Durland signed in 1990 (**CP 234-43**) contains *no* such reference or limitation. Likewise, the selected quotes from *Durland I (App. Brief at 9)* reflect assumed facts, or facts alleged by Durland, but do not represent a determination by the court of any fact or legal issue that was actually in dispute in that appeal, or material to the court's decision on the issues that *were* on appeal.

G. 2014-2015: Hearing Examiner denies appeal, finding that the barn was never subject to setback requirements and may be used as an ADU because doing so does not increase the degree or nature of non-conforming use.

On remand, the Hearing Examiner considered additional briefing by the parties, including requests by both parties to supplement the record with new evidence. Ultimately, the Examiner declined to consider any new evidence, primarily because both parties had a full opportunity to present evidence on, and brief, all those issues in the 2009-10 proceedings

and also in the superior court and court of appeals. **CP 38-39**

Following extensive motion practice on these issues, and further briefing and analysis, the Examiner denied Durland's appeal on the merits. The crux of the Examiner's decision was his ruling that Res. 58-1977 applied to the barn when it was built in 1981, and that no setbacks were required when the barn was built. **CP 32, 40-41.** The Examiner also found that the ADU work did not expand the nature of the non-conforming condition (i.e., the structure's non-compliance with *current* County setback requirements) and that the ADU was expressly exempt from shoreline development regulations. **CP 44-46**

H. 2015: Whatcom County Superior Court affirms Hearing Examiner, finding that the Res. 58-1977 applied and thus the barn was never subject to setback requirements.

Durland's first LUPA appeal regarding the Heinmiller property was made to Skagit County Superior Court, and that ultimately led to this court's decision in *Durland I.*

In 2011 and 2012, Durland filed separate LUPA appeals in Skagit County and San Juan County superior courts, both arising out of the County's grant of permits for Heinmiller to modify a different building (a garage) on their property. These were affirmed by the court of appeals in No. 68453-1-I (appeal of Skagit County Superior Court No. 11-2-02480-9)

and No. 69134-1-I (appeal of San Juan County Superior Court No. 12-2-05047-4). The supreme court granted Durland's petitions for review of both decisions, affirmed both court of appeals decisions, and also affirmed the award of attorney fees to Heinmiller. *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014).

In 2015, after the Hearing Examiner issued the decision which is the subject of *this* appeal (on remand from *Durland I*), Durland appealed to Whatcom County Superior Court. After briefing and argument, the court (Hon. Deborra E. Garrett) affirmed the Hearing Examiner and dismissed Durland's appeal.

Durland claims that Judge Garrett affirmed the Examiner simply because "the mere passage of time had made the barn a legal building." *App. Brief at 16.* This is not true. Judge Garrett explained that the central basis for her decision was the application of Res. 58-1977 and the fact that the barn never required a permit, and was not subject to setback requirements, which at that time were contained within the UBC provisions that Res. 58-1977 expressly withdrew from application to Class J structures. **VRP at 56-60.**

IV. STANDARD OF REVIEW

Durland has the burden of proof in this appeal. RCW 36.70C.130(1).

LUPA identifies six standards of review at RCW 36.70C.130(1). Durland has identified three of those (subsections (1)(b) through (d)), as follows [2]:

> (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. 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;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;

Subsection (b) involves a question of law under which the standard of review is *de novo*. *Freeburg v. City of Seattle*, 71 Wn.App. 367, 371, 859 P.2d 610 (1993). Subsection (c) involves factual determinations reviewed under the substantial evidence test. Substantial evidence is that which would persuade a fair-minded person of the truth of the statement asserted.

[2] In his appeal to the superior court, Durland also raised a subsection (f) constitutional due process argument (**CP 13, 1402-04**); that argument has been abandoned on this appeal.

Id.; *see also, Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006) (citation omitted). Subsection (d) involves applying the law to the facts; a decision can be reversed only if the court is left with a definite and firm conviction that a mistake has been made. *Cingular Wireless*, 131 Wn.App. at 768 (citation omitted).

A reviewing court must also give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations. *Durland I, supra.*, 174 Wash. App. at 12*; Lanzce C. Douglass, Inc. v. City of Spokane Valley*, 154 Wn.App. 408, 415-16, 225 P.3d 448 (2010), *review denied*, 169 Wn.2d 1014 (2010); *Cingular Wireless*, 131 Wn.App. at 768. Evidence and any inferences therefrom must be viewed in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority (in this case, Heinmiller). Id. In addition, the administrative decision is to be given substantial weight. *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164 (1980), *overruled on other grounds*, *SANE v. City of Seattle*, 101 Wn.2d 280, 676 P.2d 1006 (1984). Further, unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Under these standards, Durland has failed to demonstrate that the Examiner's decision or that of the Whatcom County Superior Court should be reversed in any respect.

V. ARGUMENT

This dispute, beginning with the original Hearing Examiner proceedings in 2009, has been driven by two fundamental assumptions that were made early on, both of which turned out to be incorrect.

First, the parties assumed that Res. 224-1975 applied to the barn when it was built in 1981. Second, the parties logically assumed that a building permit was issued for the barn, pursuant to Res. 224-1975 (even though the presumed permit has never been found), and that pursuant to Res. 224-1975, the permit included a 10 foot side yard setback requirement.

But there is no such permit, and never was. *None* of the witnesses (whether the parties, County personnel, or otherwise) have any personal knowledge of what actually occurred in 1981 or what documents were created at that time.

In his 2015 decision on remand, the Examiner analyzed and applied the correct law, Res. 58-1977, under which no permit for the barn would have been applied for or issued, and under which no side yard setback was

required. The "missing permit" which was the subject of so much argument and so many assumptions, for so many years, never existed because it was never required in the first place.

A. The Examiner and superior court correctly concluded that no side yard setback applied to the barn as constructed, pursuant to Res. 58-1977.

As noted above, in 1977 the County substantially modified Res. 224-1975, by way of Res. 58-1977 (**CP 341-46**). Res. 58-1977, §8.01, spoke to owner-built residences and stated:

> SECTION 8.01 PURPOSE AND REPEALER
>
> The Board of County Commissioners of San Juan County finds that Resolution No. 224-1975 adopting the State Building Code (hereafter "UBC") regulates without sufficient justification therefor the construction of homes by property owners in San Juan County, finds that numerous homes have been constructed by owners in violation of the provisions of Resolution No. 224-1975, and that San Juan County does not have the resources to enforce the provisions of said resolution with respect to such violations, finds that owner-built residences constitute a distinct and separate class, and finds that no legitimate governmental purpose is justified by the application of the UBC to owner-built residences in view of the cost and consequences of such enforcement. **All provisions of Resolution No. 224-1975 and the UBC which conflict with the provisions of this section are hereby repealed. (Emphasis added.)**

More importantly, with respect to Class J structures, such as the Smith barn, Res. 58-1977 went even further, completely removing those

structures from County regulation:

> SECTION 9 CLASS J STRUCTURES
>
> SECTION 9.01 PURPOSE
>
> The commissioners of San Juan County find that the **regulation of Class J structures, except for tanks on towers more than six feet high, provided for in Resolution No. 224-1975 and the UBC unreasonably restricts the freedom of residents of San Juan County** to construct such structures as accessory buildings to private residences or for agricultural purposes, that **there is no pressing governmental interest served by the regulation of structures in this category**, and that it is unreasonable to require any person or corporation constructing Class J structures, as defined in Section 1501 of the UBC, to pay a permit fee as a condition of constructing such structures as accessory buildings to private residences or for agricultural purposes. **No permit, fee or inspection shall be required for such structures. (emphasis added)**
>
> SECTION 9.02 REPEALER
>
> **Provisions of Resolution No. 224-1975 and the UBC which are inconsistent with this section are hereby repealed. (emphasis added)**

As the Examiner and Judge Garrett found, Res. 58-1977 not only exempted Class J structures from building permit requirements, but further provided that the County had no legitimate interest in regulating Class J structures *at all.* **CP 40, 41 n.2, VRP at 57**. Thus, the setback requirements set forth in Res. 224-1975, which were adopted as part of the UBC, no longer existed or applied to the barn when Smith built it in 1981.

Durland argues that that the Smith barn "was subject to County zoning regulations in 1981 when it was constructed, which regulations were not modified by any provision of Res. 58-1977" (*App. Brief at 27*). But Durland ignores the fact that there were *no* zoning requirements for setbacks in 1981. County planner Lee McEnery explained that setbacks had been part of the building code (i.e., UBC) until 1998, when they were incorporated into the zoning code. **CP 784-85** And Res. 58-1977 expressly withdrew Class J structures from those building code requirements.

There is no question that Res. 58-1977 was a valid exercise of the County's authority. In *State ex rel. Graham v. San Juan County*, 102 Wn.2d 311, 686 P.2d 1073 (1984), the court upheld a challenge to this very resolution, finding it valid even though it had the practical effect of removing large categories of structures from normal UBC requirements. The court recognized that the RCW allowed for this, and that the County's development status, governance philosophy, and budget challenges at the time were logical grounds for the decision not to regulate certain classes of structures. The text of Res. 58-1977 is clear, and the Examiner's interpretation was correct.

Durland's analysis of *Graham* quotes language from the case (*App. Brief at 28*-29) as a "ruling," when in fact it was merely the court's recitation of background facts. *Graham*, 102 Wn.2d at 313-14. The actual issue before the court was "whether the County may exempt 'owner-built residences' from most of the requirements of the State Building Code." *Id.* at 311. The court held that the County did have that power.[3]

Durland also relies on language from §8 of Res. 58-1977, the section that addresses owner-built residences (which still require a permit under §8.03; **CP 341-42**), and tries to apply that to §9, which addressed Class J structures. *App Brief at 29, 30.* But §8 and §9 are completely different portions of Res. 58-1977 and address different types of structures. Durland repeats this error in stating that "the application shall also contain a statement of the setback requirements and the applicant's agreement to comply therewith," again citing to §8.03 and ignoring the language of §9. *App. Brief at 30.*

Res. 58-1977 also recognized that a person building a Class J structure might benefit from the plan review expertise available at the

[3] Durland's treatment of *Graham* mirrors his characterization of *Durland I*; i.e., confusing and conflating background facts, arguments, and dicta found in the opinion, with the court's actual rulings and holdings.

County, even though there was no legal requirement to do so. §10 of Res. 58-1977 expressly set out that advisory process:

> SECTION 10 SERVICES AVAILABLE FROM THE BUILDING DEPARTMENT
>
> The Commissioners of San Juan County believe that the services of the building inspector should be made available to Citizens of San Juan County in those circumstances where a plan-check or on-site inspection is not required, but where **the holder of an owner-built residence permit, or the person constructing a Class J structure**, desires to obtain these services. **Applicants for permits for owner-built residences, or builders of Class J structures, may obtain a plan- check from the building inspector** upon payment of a fee determined as follows: . . .
>
> **The owner of a permit for construction of and owner-built residence, or a person constructing a Class J structure, may obtain an on-site inspection** . . . . (emphasis added)

The language of §10 repeatedly distinguishes between people who have *permits* for an owner-built residence, and *builders of Class J structures* or *a person constructing a Class J structure.* There are no references at all to permits for Class J structures.

In light of §10, the documents that *do* exist in the record make complete sense: they are consistent with Smith paying a plan-check fee under §10 for voluntary review of the barn plans. The Examiner correctly noted this as a likely and logical scenario. **CP 42 n.4.**

B. The various notations on County documents from 1981 do not show that a "building permit" was issued, and are void and unenforceable under Res. 58-1977.

Durland's central argument is that a permit was issued for the barn in 1981 and required a 10 foot setback; this theme surfaces over and over again in his brief, with repeated references to "the permit."

But there never was a permit, and the evidence was more than sufficient for the Examiner to make that factual conclusion. The most obvious evidence here was the absence – after extensive search and effort – of the very document Durland keeps referring to: the alleged permit itself. Coupled with this is the language of Res. 58-1977, under which there would never be a permit for a Class J structure such as the barn. There was no error in the Examiner's failure to find that a building permit issued in 1981 and required a 10 foot setback.

All of the other "evidence" on this point – which is what Durland relies upon – is merely argument, supposition, assumptions, and conclusions made 30+ years later by people with no personal knowledge of what had taken place in 1981. For example, Durland argues that a permit was issued based on a statement by County employee Sam Gibboney. **CP 950-52;** *App. Brief at 19, 23.* But the Examiner excluded this material from the remand hearing and did not consider it **(CP 35-36,**

39). The Examiner had the authority to make that discretionary decision. Nothing in the Court of Appeals decision, or any other law, required the Examiner to open the record to take further evidence. The Examiner was free to limit or exclude new evidence, and proceed with argument and decision on the existing record. SJCC 2.22.210(F)-(G),(M); SJCC 2.22.230(I) (rules for Hearing Examiner proceedings).

Moreover, under LUPA deference is due to the Examiner's interpretation, not Sam Gibboney's interpretation (*Lancze C. Douglass, supra.*), and there is nothing in the record to suggest that Gibboney has any expertise or competence in assessing how Res. 58-1977 was applied to Class J structures back in 1981. Gibboney was making *factual assumptions,* made without any personal knowledge, as to whether a permit had actually been issued in 1981 and what it supposedly said.

Likewise, Durland offers no citation to the record, or explanation, to support his claim of the "Department of Planning's long-standing interpretation that a 10 foot setback applies to agricultural buildings and to this barn." *App. Brief at* 20. What someone in the Planning Department in 2014-2015 may think the law was in 1981, is of no import. The cases cited by Durland regarding historical agency action are similarly inapplicable. *Silverstreak v. Washington State Dept. of Lab. & Indus.*, 159

Wn.2d 868, 154 P.3d 891 (2007), involved prevailing wage issues on a public project. Many years earlier, L&I had issued a policy document interpreting the WAC regulation in issue, and for years contractors relied on that in pricing and bidding the work. In *Silverstreak*, the suppliers and subcontractors bid the work based on that L&I document and thus did not price it per prevailing wages. Later, after the work was done, L&I argued that they *should* have paid prevailing wage, issued violations to the subcontractors, and tried to force payment of the unpaid wages. The court rejected this, applying an estoppel analysis and pointing out that the contractors rightly relied on the prior L&I guidance document and that it would be manifestly unjust to allow L&I to change the rules after the fact. *Silverstreak*, 159 Wn.2d at 887-891.

Unlike *Silverstreak*, there is no evidence here of any pattern of legal interpretation by the County regarding Res. 58-1977 as applied to Class J structures, or that such "pattern" is somehow in conflict with the Examiner's analysis and decision, or that Durland somehow "relied" on the prior "pattern" to his detriment. If anyone is entitled to rely on Res. 58-1977, and to avoid manifest injustice, it is Heinmiller. [4]

[4] The other case cited by Durland, *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (2005), involved search warrants and a civil damages claim arising out of alleged defects in same. It does not address any issue presented here.

The various documents from 1981 that do exist **(CP 282, 283, 285, 322)** do not support a different result. As noted *supra.*, they are all consistent with Smith submitting materials for a voluntary plan check under Res. 58-1977, §10.

Durland's claim that a setback was legally imposed by way of a County employee's apparent application of rubber stamps to some of those materials is incorrect. *App. Brief at 23* It is true that in a typical setting, the issuance of a building permit (and the requirements contained within), along with the notations and conditions imposed by the planning department or other County departments, would apply to the project in question, and could be enforced in the event of non-compliance by the project owner. But that all presumes that the County has, in fact, imposed those requirements on the project by the underlying enabling ordinance.

In this case, it did not. Once the County decided, via Res. 58-1977, to leave Class J structures unregulated, the subsequent rubber stamp notations by County departments (whether on a drawing, site plan, etc.) were of no force or effect. It is logical enough that if Smith submitted drawings for voluntary review under Res. 58-1977, §10, a County employee would review that and might (for whatever reason – habit, if nothing else) apply boilerplate rubber stamp notations on them. But

Smith's project *never was* subject to County regulation, due to Res. 58-1977, and so any departmental action to require a permit or other materials, or to enforce building or zoning codes on the Class J structure, would have been without legal basis. *Swinomish Indian Tribal Cmty. v. Dep't. of Ecology*, 178 Wn.2d 571, 580-81, 311 P.3d 6 (2013) (summarizing law in context of administrative agencies applying rules that are inconsistent with enabling statute; such rules are invalid and unenforceable). It is well settled that a permit issued, or permit conditions imposed, without a valid underlying ordinance are void. *See, e.g., Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991) (County had no authority to impose mitigation measures as condition of permit); 101A C.J.S. Zoning and Land Planning §285; *Summit Prop., Inc., v. Wilson*, 26 Ariz. App. 550, 550 P.2d 104 (1976).

The fact that Smith apparently submitted project materials to the County that were not required under Res. 58-1977 does not change this result. Had the County actually tried to impose or enforce a setback requirement on the structure in 1981, that effort would have failed, just as Durland's effort to do so should fail now. The structure was legal when it was constructed.

C. The Examiner's decision comports with the doctrine of finality, where no permit was issued in 1981 and Durland's predecessor failed to object to the barn location at that time.

Durland claims that under the doctrine of finality, a 35-year-old barn must now be deemed illegal. *App. Brief at 23-25.* This ignores reality and is not supported by the record.

First, Durland's argument presupposes that in 1981 there was a legal requirement imposed by the County on Smith, by way of a building permit, to locate the barn 10 feet from the boundary. As discussed *supra.*, there was no permit, and no such legal requirement. Second, there was no reason for Smith to appeal or otherwise contest the County-stamped notations on the materials submitted for advisory review. He built his barn where he did, believing that it was 10 feet from the property line, and neither the County nor Smith's neighbor had any objection. In the 1990 Agreement, Durland himself acknowledged that the boundary location had been uncertain. **CP 235** If anyone had an interest in contesting the construction or location of the barn in 1981, it was Durland's predecessor – and that person failed to take any action.

Durland argues that under LUPA cases such as *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), Smith should have mounted some kind of legal challenge back in 1981. But LUPA was enacted in

1995, and thus could not have controlled the 1981 permit activities. Moreover, each of these cases cited by Durland involved either an unhappy applicant, or a complaining neighbor, who wanted a County permitting decision reversed by the superior court via LUPA petition. This case involves the exact opposite: everyone was content in 1981, but now, in 2016, Durland wants the court to *enforce* a regulatory requirement that supposedly should have existed back in 1981, but which (because of Res. 58-1977) lacked the necessary enabling legislation, and to *enforce* the terms of a non-existent building permit. This makes no sense.

Indeed, Durland's quote from *Nykreim (App. Brief at 26)*, actually supports Heinmiller's position. It is Heinmiller who is entitled to rely on Res. 58-1977 and the absence of a 1981 permit. [5] Durland was not even on the scene in 1981 to "rely" on an alleged 10 foot setback requirement when the barn was built, and took no action to his detriment even if he did have such a belief at some point. Now, Durland is attempting to rely on the supposed existence of a 1981 permit, and on supposed language therein, to try to accomplish what he did not do in the 1990 boundary line adjustment: forbid the use of an ADU within the barn.

---

[5] The Examiner made no factual finding as to whether a building permit ever issued in 1981 (**CP 42-43**), and explained that this was irrelevant to the ultimate decision; thus the Examiner's added commentary about finality and whether or how Durland could challenge a permit if it *had* been issued back in 1981 (**CP 43**) are mere dicta.

The principles of finality that Durland asserts actually support the Examiner's decision, and support the long history of County acceptance of the structure's location.

D. The Examiner was free to find and apply the correct law to the setback issue, regardless of what the parties previously may have assumed the law to have been.

Durland complains that the Examiner, and superior court, should not have considered the correct law (Res. 58-1977) because both parties had previously assumed that Res. 224-1975 was the governing ordinance. He argues that the "law of the case" doctrine forbids this, and that the Examiner therefore went beyond the scope of the issues on remand. This is incorrect.

The "law of the case" doctrine was discussed at length in *Roberson v. Perez*, 156 Wn. 2d 33, 123 P.3d 844 (2005), which involved a civil claim against a law enforcement officer arising out of a grossly flawed sexual abuse investigation. The issue was whether the court of appeals was obligated to adhere to its decision in the first appeal (in which it held that the plaintiff did not have a cause of action), when there had subsequently been a change in controlling precedent - before the second appeal – such that the plaintiff now *could* have a cause of action. The court concluded that the "law of the case" doctrine did not apply and that

the court of appeals had correctly looked to the current state of the law in the second appeal. *Roberson*, 156 Wn.2d at 44.

As the *Roberson* court explained, the doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* at 41. But the doctrine will not be applied where (1) the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party, or (2) there has been an intervening change in controlling precedent between trial and appeal. *Id.* at 42.

The "law of the case" doctrine does not apply here and did not bar the Examiner from evaluating and applying the correct law. In Durland's prior appeal, there never was "an appellate holding enunciating a principle of law" as to which County ordinance applied. In the original proceedings before the Examiner in 2009, the parties both assumed that the 1975 ordinance was the applicable law regarding setback requirements, and so the issue of "what law applies?" was never contested and the Examiner never made a contested legal decision as to what the law was.

Neither did the superior court in the LUPA appeal that followed, for the same reasons. The LUPA appeal involved three issues: (1) whether the previous compliance plans were "land use decisions" under

LUPA and thus had to be timely appealed, which Durland failed to do, (2) whether the ADU square footage was calculated correctly, and (3) whether the roof height had been calculated correctly. The *Durland I* court ruled only that (1) the compliance plans were not "land use decisions," (2) the ADU square footage had not been calculated correctly, and (3) the roof height had been calculated correctly. *Id.*, 174 Wash. App at 26. The court remanded to the Examiner for further proceedings on the merits.

Here, too, Durland repeatedly misrepresents *Durland I.* He states that *Durland I* "established" that Res. 224-1975 applied, and "ruled" that "in the 1986-1987 agreement allowing the barn to remain in its location that it was expressly contemplated that the barn would remain uninhabited." *App. Brief at 12.* Neither statement is true; *Durland I* did no such thing. And though Durland correctly states that on remand, "all issues" were live for decision except for the roof pitch issue *(App. Brief at 13)*, he again misstates the record by claiming that " 'all issues' expressly did not include the legal determinations made in the compliance plans on the side yard setback. Decision at p.1. The Examiner ruled that such determinations could not be revisited in the appeal of the building and other permits." *App. Brief at 13.* Durland provides no cite to the record here, and for good reason: this is Durland's version of language from the

2015 Examiner decision (**CP 32**) in which the Examiner is actually referring to the prior *2010* Examiner decision (**CP 138-161**). And it was that exact issue – the Examiner's decision that it was too late for Durland to challenge the legal determinations in the Compliance Plans - that Durland successfully appealed in *Durland I.*

In *Durland I* the parties, and the court, had assumed that a building permit was issued for the barn, and that Res. 224-1975 governed setback requirements (*Id.* at 6, n.1), but that assumption had nothing to do with the actual issues on appeal and was not material to the court's analysis or rulings. The court specifically declined to address the setback issue:

> **We decline Durland's invitation to decide the setback issue, which was not reached by the hearing examiner or the superior court.** This issue involves Durland's argument that the County could not issue permits for the ADU conversion because the barn was an illegal structure by virtue of the fact that it did not comply with the ten-foot setback requirement under the original 1981 building permit or then-existing SJCC provisions. He requests this court to rule that (1) the barn was built illegally; (2) the illegality was not cured by the private restrictive covenant; and (3) therefore, permits could not be issued to modify the barn until the illegality was cured, under SJCC 18.100.030(F) and SJCC 18.100.070(D). **This issue should be considered by the hearing examiner with the other issues on remand. (emphasis added)**

Durland I, 174 Wash. App. at 19 n.13.

Nowhere in the prior appeals did the parties contest which law applied, and nowhere did the superior court or this court make a determination of which ordinance applied; that question simply never came up. Because the issue was never contested on the merits and determined by the court, there is no preclusive or *res judicata* effect, no "law of the case" on that issue, and nothing preventing the Examiner from figuring out and applying the correct law – Res. 58-1977 – in the proceedings on remand. Every issue that Durland had originally raised in his appeal was live for decision on remand, to be decided on the merits, with the exception of the roof height issue. The Examiner did exactly what this court directed him to do. [6]

Nor was Durland taken by surprise. Durland had briefed the law on these issues back in 2010, and the relevant evidence (including Res. 58-1977) was already in the record from that time. **CP 38-39** In the 2010 hearing before the Examiner, Durland and his attorney offered testimony and argument regarding Res. 58-1977 and Res. 225-1975, specifically regarding the concept of the Class J structures and setback requirements at

[6] The cases Durland cites shed little light here. In *In re Bugai*, 35 Wn. App. 761, 669 P.2d 903 (1983), involved a personal restraint petition. The case does not provide any facts or analysis that would bear on this appeal. *State v. Weaver*, 171 Wn.2d 256, 251 P.3d 876 (2011), merely restates the rule that issues that could have been appealed the first time but were not, generally will not be considered on a subsequent appeal.

the time the barn was built. **CP 898-99, 906-09** Durland also argued these same issues in briefing prior to the final Examiner hearing in late 2014. **CP 939-49.**

Moreover, it would be erroneous and unjust to consciously *ignore* the correct law on remand, simply because the parties had previously assumed (in 2009-2010) that a different 35 year old ordinance had applied back in 1981. As the *Roberson* court put it, "[t]his common sense formulation of the doctrine assures that an appellate court is not obliged to perpetuate its own error." *Roberson,* 156 Wn.2d at 42. In the same vein, a party is not precluded from arguing a different, inconsistent position on the law later in the case. *King v. Clodfelter*, 10 Wn. App. 514, 518 P.2d 206 (1974) (judicial estoppel can apply in some cases to changing assertions of fact, but does not require that a party adhere to a consistent argument as to the law).[7]

In short, it is never too late to identify and apply the correct law to the evidence, which is just what the Examiner and superior court did.

[7] See also RAP 2.5(c)(1), which states "If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." Here, the Examiner functions as the trial court, and any issue of the Examiner's initial (2009) conclusions as to what County ordinance applied in 1981 can and should be considered by this court, regardless of that issue not being brought up in *Durland I. See, e.g., State v. Kilgore,* 167 Wn.2d 28, 216 P.3d 393 (2009).

There was no error.

E. The ADU is exempt from Shoreline Management Act regulations based on the express exemptions to same contained in SJCC 18.50.020 and .330.

At oral argument in the Whatcom County appeal, Durland admitted that the setback issue is really what the case is about (**VRP at 5-7**). He nonetheless renews those arguments here, relying mostly on broad statements as to the purpose of Washington's Shoreline Management Act, Chapter 90.58 RCW ("SMA"), public policy issues, etc. *App. Brief at 32-38*. Durland also lists five alleged reasons why the ADU does not comply with certain definitions or provisions of the County's SMA regulations (*App. Brief at 33*). Though these are listed in a perfunctory fashion, with virtually no analysis, they will be addressed in turn here.

First, Durland's claim that the structure remains over 16 feet tall is incorrect, and is unsupported by any reference to the record. Moreover, it was not raised in the Whatcom County appeal, and therefore should not be considered. An argument not raised in the first level of appellate review will ordinarily not be considered by a higher level appellate court. *State v. Quaale*, 182 Wn.2d 191, 340 P.2d 213, 216 n.1 (2014); *State v. Canady*, 116 Wn.2d 853, 809 P.3d 203 (1991).

Second, the claim that the ADU is not "water dependent" as generally required by SJCC 18.50.330.E(1), ignores the fact that SJCC 18.50.330.E(2) expressly defines the ADU as a "normal appurtenance" to the residence and therefore is exempt, as discussed further below.

Third, Durland's claim that the ADU violates the front yard setback specified in SJCC 18.50.330.D(2), ignores that fact that the barn was located where it was long before the SMA regulations came into effect,[8] and is not a "residence," which is what SJCC 18.50.330.D(2) speaks to.[9] The ADU is an "accessory use" to the Heinmiller single family residence and is therefore controlled by SJCC 18.50.330.E(2).

Fourth, Durland's claim that the structures occupy too much of the shoreline frontage under SJCC 18.50.330.B(13) was never argued in the Whatcom County appeal and therefore is not properly before this court. *State v. Quaale*, *supra*. Moreover, this argument ignores the express language of SJCC 18.50.330.A, which states:

> Exemptions. The SMA specifically exempts from the substantial development permit requirements the construction of a single-family residence by an owner,

---

[8] SJCC 18.50.330.D(2)(e) speaks to residences made nonconforming by the County's 1998 changes in its Shoreline Master Plan (Ord. 2-1998; *see also* SJCC 18.50.390) and its OHWM/top of bank setback requirement, and allows them to remain and in fact be expanded slightly in footprint in some cases.

[9] SJCC 18.50.330.D(2)(e)(iv) states 'For purposes of this section, "residence" shall mean the primary residential structure on the property. **Accessory dwelling units and other accessory residential structures are not included.**'" (emphasis added)

> contract purchaser or lessee for his or her own use, or the use of his or her family. Such construction and normal appurtenant structures must otherwise conform to this master program including any shoreline variance or conditional use permit requirements of this section. Exempt residential appurtenances are specified in SJCC 18.50.020(G).

The commercial development (i.e., not owner/owner-family occupied) of single family residences near shorelines, which is what SJCC 18.50.330.B speaks to, has no application here.

Finally, Durland claims that "substantial evidence in the record shows the structure has been used for commercial purposes." *App. Brief at 33.* But the relevant inquiry is whether the ADU would be used as a *rental,* under SJCC 18.50.330.E(3):

> 3. A shoreline substantial development permit shall be required for construction of any **nonexempt** accessory development on a single parcel within 200 feet of the ordinary high water mark. **Construction of an accessory dwelling unit that will be used for vacation rental (short-term) or long-term rental is not exempt.** (emphasis added)

There is no evidence – none – of the ADU ever being used as a rental, or of any intent to do so in the future, and Durland cites to nothing in the record.

All of these arguments by Durland conspicuously ignore the key County ordinances that apply here, and that the Examiner correctly relied upon in determining that the ADU is exempt: SJCC 18.50.020(F)(2)(g) and

18.50.030(E)(2), which states:

> **E. Regulations – Accessory Use.**
>
> . . .
>
> 2. The following accessory uses and developments, when associated with an exempt single-family residence, are defined as "normal appurtenances" and are therefore exempt as provided in SJCC 18.50.020(F)(2)(g):
>
> a. One garage building and/or one accessory dwelling unit each of which covers no more than 1,000 square feet of land area and is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade. In no case shall an accessory dwelling unit exceed 1,000 square feet;
>
> b. No more than two separate outbuildings no larger than 200 square feet each, no taller than 16 feet above average grade level, and not used for human habitation; provided, that in addition, one outbuilding for any other residential purpose may be substituted for an accessory dwelling unit or garage if the structures do not exceed size limits specified in subsection (E)(2)(a) of this section; and . . . .

The Examiner conditioned approval on Heinmiller executing the necessary certification under SJCC 18.50.020(G) that use of the ADU would meet the requirements for exemption. **CP 46-47**. SJCC 18.50.020(G) states:

> G. Exemptions from Substantial Development Permit Requirements – Residential Appurtenances. Normal appurtenances to a single-family residence are included in the permit exemption provided in subsection (F)(2)(g) of

> this section. "Normal appurtenance" means a structure that is necessarily connected to the use and enjoyment of a single-family residence and includes one garage, one accessory dwelling unit, attached decks, a driveway, utilities, fences, antennas, satellite dishes less than one meter in diameter, and solar arrays serving one single-family residence. For the "normal appurtenance" exemption to apply, the applicant must submit a certificate that the structure will be constructed by an owner, lessee or contract purchaser of a single-family residence for his or her own use or the use of his or her family or a person providing health care to the owner or the owner's family.

Heinmiller had previously executed such a certification (**CP 212-13**), and is willing to do so again.

Because the ADU falls within the express exemption scheme set forth in the County's SMA ordinances, the Examiner was correct in ruling that there is no violation of those ordinances (subject to the certification noted above). Accordingly, the cases cited by Durland setting forth various policy reasons for the SMA's existence, procedures for local jurisdictions to issue exemptions, etc., do not provide any guidance here.

The one case to which Durland refers in any detail, *Dept. of Ecology v. City of Spokane Valley*, 167 Wash. App. 952, 276 P.3d 367 (2012), does not support his argument. In that case, the commercial developer of a subdivision of "spec" homes attempted to get permits to build docks on 30 waterfront lots. The developer claimed the docks fell within an exemption to the shoreline substantial development permit

requirements of RCW 90.58.140. The exemption applied to "construction of a dock ... designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single and multiple family residences . . ." RCW 90.58.030(3)(e)(vii). The court rejected the developer's argument, stating that "[we] hold that the statutory exemption applies only when the owner, lessee, or contract purchaser requests the permit in order to undertake construction for its own noncommercial use." *City of Spokane Valley*, 167 Wash. App. at 955.

Here, the actual owners – Heinmiller and Stameisen – applied for the various permits for the single property in question. *City of Spokane Valley* does not apply.

F. Reasonable attorneys' fees should be awarded to Heinmiller under RCW 4.84.370.

Pursuant to RAP 18.1(b), Heinmiller makes this request for an award of reasonable attorneys' fees pursuant to RCW 4.84.370. Heinmiller received the permits, prevailed before the Examiner, and prevailed at the superior court level, as he should here. *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014) (awarding fees to Heinmiller for both court of appeals and supreme court proceeding; fee award mandatory regardless of whether Heinmiller prevailed on procedural or substantive grounds).

G. If the court were to determine that the superior court's decision should be reversed, the court should remand to the Hearing Examiner for further proceedings.

Durland's final argument is that this case cannot be remanded because there is no other option besides tearing down the ADU; i.e., he claims that the alleged setback deficiency cannot be cured in any way. But this is incorrect.

Durland relies on an unusual pre-LUPA decision, *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991). That case involved Jefferson' County's decision to impose a variety of conditions and restrictions on Levine's application for a permit to build a sawmill. The County contended that these restrictions were required by its application of SEPA[10] considerations, even though it had made a determination of non-significance under SEPA and did not identify the County policies underlying the restrictions or the specific environmental impacts to be mitigated (both of which SEPA requires). Ultimately, the court of appeals reversed and ordered that the permit issue without any mitigating restrictions. *Levine,* 116 W.2d at 577-78.

The County sought review, and the supreme court affirmed. The County argued that the matter should have been remanded so that the

---

[10] The State Environmental Policy Act, Chapter 43.21C RCW.

County could go back and create the policies that supposedly supported its mitigating conditions. But the supreme court concluded that the County had had plenty of time to do this already and should not be afforded the chance to fabricate those policies now, after providing a completely inadequate record, incomplete briefing, and failing to address recent authority that was right on point. *Id.* at 581-82.

Indeed, Justice Brachtenbach, who joined the unanimous decision, also wrote separately to emphasize the narrow nature of the court's holding and the very unusual circumstances behind it:

> I concur with the majority and write separately to emphasize that this is a very narrow decision, factually and legally.
>
> The majority correctly states that the record is devoid of factual or legal basis for the conditions imposed upon the building permit. Majority, at 581. Despite this lack of any justification for imposing conditions, the County blithely refers to these deficiencies as "minor procedural errors." Brief of Petitioners, at 8.
>
> To appreciate the limited extent of our holding, it is necessary to consider the action of the County. . . ..
>
> After losing in both courts the County now wants the matter to go back to the County Commissioners so that it can start over. It now asks a second opportunity after insisting all the time that it was proceeding properly. On this record the County is not entitled to still another attempt to correct the law and facts when it was in charge of that law and those facts from the outset.

Id. at 582-83 (Brachtenbach, J., concurring)

The unusual facts and procedural history presented in *Levine* do not exist here. In *Levine* the county was making real-time permitting decisions on current facts and law, and was able to control the evolution and presentation of those facts. Here, the County and Heinmiller – and also Durland, as the appellant – are faced with the forensic task of examining actions taken 35 years ago, and a sketchy documentary record from that time, with no witnesses who have any personal knowledge of what was actually done and why. Unlike *Levine,* any theoretical shortcomings in how the County has handled the Heinmiller permit process (and/or responded to Durland's 8-year-long crusade over the ADU) have arisen because of the passage of time since 1981 and the inherent difficulties which that presents.

Moreover, Durland offers no specific analysis as to why the County cannot evaluate other courses of action if this case were to be remanded. If, as Durland contends, there is no other possible result besides tearing down the ADU, then the County ought to be afforded the opportunity to reach that result on its own, rather than having this court pre-emptively decide the matter. And, while Durland claims that a variance for side yard setback could not be granted (*App. Brief at 18*), that is not a foregone conclusion. The County might well consider a formal variance application

from Heinmiller under SJCC 18.80.100(E), and conclude that it should be granted, if for no other reason than that there already exists a 20 foot buffer as a result of the 1990 agreement between Durland and Smith, providing the same benefits and protections that a modern 10-foot side yard setback would offer.

VI. CONCLUSION

Although this case has taken a long and tortuous path to this court, the ultimate decision by the Examiner – once he determined and applied the correct law – was well supported by the law and the evidence. Res. 58-1977 is dispositive; the barn was legal when constructed, and is legal today. The various shoreline regulations argued by Durland become moot once it was determined that the barn was not subject to side yard setback requirements back in 1981.

This case also highlights the difficulty and impracticality of trying to go back 35 years and upset long-standing, accepted conditions (the barn's existence and location) by trying to divine the intent and actions of long-dead people, or long-gone County personnel, on the basis of a few scraps of evidence, and in the notable non-existence of the *one* piece of "evidence" on which Durland so heavily relies: the alleged building permit itself. Principles of finality, and the law as it was in 1981, support the

Examiner's decision.

The standards of review under RCW 36.70C.130(1) are specific, and require deference to the Examiner's fact finding decisions and application of the law to the facts. The standards of review also reflect the legislative policy behind LUPA, which is to promote certainty and finality to land use decisions. Durland's appeal fails to satisfy those standards of review and undercuts the policy grounds underlying LUPA.

The Examiner and superior court should be affirmed here, and attorney fees awarded to Heinmiller under RCW 4.84.370.

RESPECTFULLY SUBMITTED on 23 February 2016.

John H. Wiegenstein, WSBA #21201
Elisha S. Smith, WSBA #29210
HELLER WIEGENSTEIN PLLC
144 Railroad Avenue, Suite 210
Edmonds, WA 98020-4121
(425) 778-2525
(425) 778-2566 fax
johnw@hellerwiegenstein.com
elishas@hellerwiegenstein.com
Attorneys for Respondents Wes Heinmiller, Alan Stameisen, and Sunset Cove LLC

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

MICHEAL DURLAND, KATHLEEN FENNEL, and DEER HARBOR BOATWORKS, Appellants, vs. SAN JUAN COUNTY, WESLEY HEINMILLER, and ALAN STAMEISEN, and SUNSET COVE LLC, Respondents.	NO. 74039-3-I CERTIFICATE OF SERVICE

I, Monica Roberts, certify that on February 23, 2016, I caused copies of the following documents to be served on the parties listed below by the method(s) indicated for each:

1. *Brief of Respondents Heinmiller and Stameisen*; and
2. *Certificate of Service.*

Via E-mail:
Attorney for Plaintiff
Dennis D. Reynolds, WSBA #4762
Dennis D. Reynolds Law Office
200 Winslow Way W, Suite 380
Bainbridge Island, WA 98110
dennis@ddrlaw.com
christy@ddrlaw.com
karen@ddrlaw.com

Via E-mail:
Attorney for San Juan County
Amy Vira, WSBA #34197
San Juan County Prosecutor's Office
P.O. Box 760
Friday Harbor, WA 98250
amyv@sanjuanco.com
elizabethh@sanjuanco.com

I certify under penalty of perjury of the laws of the State of Washington that the foregoing statements are true and correct.

Dated this 23rd day of February, 2016, at Edmonds, Washington.

Monica Roberts
Legal Assistant
monicar@hellerwiegenstein.com