

67429-3

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

NO. 67429-3-I

MICHAEL DURLAND, et al.

Appellants,

v.

SAN JUAN COUNTY, et al.,

Respondents.

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APPELLANTS' DURLAND, et al.'s REPLY BRIEF
AND RESPONSE BRIEF TO HEINMILLER
AND STAMEISEN'S CROSS-APPEAL

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**I. DURLAND’S APPEAL OF THE NEWLY ISSUED
PERMITS WAS TIMELY AND WAS NOT A
BELATED, COLLATERAL ATTACK ON THE
EARLIER COMPLIANCE PLANS**

This case is not a challenge to the Compliance Plan and Supplement Compliance Plan (collectively, the Compliance Plans). Rather, Durland appeals permits issued by San Juan County in violation of their own County Code. The Permits authorized the conversion of an illegal, non-residential structure for accessory residential purposes. The structure (formally a barn/storage shed) is within the fragile shoreline environment of the County.

The County and Heinmiller¹ continue to assert that the determination of whether the permits were authorized by the County Code was actually made in the earlier Compliance Plans and, thus, could not be attacked collaterally when the permits were issued. But, the Compliance Plans did not determine that the permits could be issued; they only stated that *if* the permits were eventually issued, that would conclude the compliance matter. The Compliance Plans expressly acknowledge that the permits might not be granted. Even more emphatically, the Compliance Plans acknowledged one of the permits that might be issued would be one to demolish the converted area: “Submit a complete demolition permit application for removal of the converted space ...

¹ For ease of reference, we refer to the Respondents Heinmiller and Stameisen, collectively, as Heinmiller.

and restore the structure to its permitted configuration for storage.” CP 00042. Confronted with Compliance Plans that left open the issue of whether the ADU would be demolished or saved, Durland had no reason to appeal the Compliance Plans. It was only when the County decided to issue a building permit in lieu of a demolition permit that the matter became ripe for review. Durland timely appealed when the building permits were issued and should have been allowed to proceed.

A. San Juan County’s Compliance Plans Are Not Final Land Use Determinations as They Do Not “Set to Rest” the Compliance Process.

As the County and Heinmiller correctly note, final determinations for the purpose of LUPA are those land use decisions that leave “nothing open to further dispute” and “set to rest the cause of action.” County Resp. Br. at 15, Heinmiller Resp. Br. at 36 (*citing Heller Building LLC v. City of Bellevue*, 147 Wn. App. 46, 55, 194 P.3d 264 (2008); *Samuel’s Furniture Inc. v. Washington Dept. of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002)). Both the County and Heinmiller contend the Compliance Plans are final land use determinations triggering LUPA’s filing deadline as to permits issued subsequent to the Compliance Plans. Both also largely contend the case of *Heller* controls the outcome of the present case. County Resp. Br. at 15-19; Heinmiller Resp. Br. at 37-40. The County asserts that, like the final action in *Heller*, the

Compliance Plans satisfied code requirements and informed Heinmiller of steps necessary to correct violations. County Resp. Br. at 17-19. Similarly, Heinmiller argues that the *Heller* court recognizes final land use decisions can occur prior to issuance of a permit. Heinmiller Resp. Br. at 40.

A compliance plan can include a final land use determination. For instance, if a compliance plan includes a final determination that a violation exists, that determination of an existing violation can be a land use decision subject to immediate appeal. But that does not mean the identification of actions the wrongdoer *may* take to correct the violation requires an immediate appeal of those potential, not-yet-issued permits.² Yet that is how County and Heinmiller read *Heller*.

In *Heller*, the city determined that construction work then underway exceeded the scope of a previously issued permit. *Heller*, 147 Wn. App. at 52. That determination of an existing violation was the basis for the city's issuance of a stop work order. *Id.* The determination was initially made in a stop work order and later restated with more detail in a letter. *Id.* at 53. The focus of the court's review was whether the initial stop work order contained sufficient information to constitute a final determination that the existing work

² In fact, a violator may never seek identified permits so a challenge before issuance would result in a case not ripe for review.

exceeded the terms of the permit. The court determined the initial stop work order did not contain sufficient information about the existing violation to constitute a “land use determination,” *i.e.*, that the work exceeded the allowed scope of the permit:

Here, the stop work order stated that HBL had exceeded the scope of its permit but did not state in what way the scope had been exceeded. It stated that HBL needed to provide revisions to comply with current codes and ordinances but did not specify any provision of the BCC. Where it should have stated a deadline for completing the corrections, it merely stated, “contact city.” The stop work order did not contain the information that the BCC required, which would have informed HBL of the substance of its violation in a way that would allow HBL to correct the violation or make an informed decision whether to challenge the City's decision.

Heller, 147 Wn. App. at 55-56.

In contrast to the initial stop work order, the subsequent letter contained the missing information about the existing violation: “The March 2, 2007, letter, on the other hand, contained the information that the [city code] requires in a stop work order.” *Id.* at 56. After deciding that the property owner had timely appealed the existing violation determination in the follow-up letter, the court proceeded to consider the substance of the appeal.

The substance of the appeal bears no semblance to the substance of the appeal here. In *Heller*, the property owner was challenging the city's determination that a violation already existed. The primary issue was whether

the existing work being done was beyond the scope of the previously issued permit: “We must determine whether substantial evidence supports the City’s determination that HBL exceeded the scope of its permit when it demolished additional exterior walls, repaired the foundation, and poured a new slab.” *Id.* at 58.

In contrast, Durland is not challenging the County’s determination that a violation existed. If that were the nature of his challenge, Durland would concede that a challenge should have been made when the finding of non-compliance was made in the Compliance Plans. Rather than challenging the County’s determination of non-compliance (as was done in *Heller*), Durland is challenging subsequent decisions made by the County when it decided Heinmiller qualified for certain permits that would correct the non-compliance. *Heller* did not determine that the permits issued subsequent to the stop work order (or the subsequent stop work letter) had to be challenged before they were issued, *i.e.*, when they are identified as potential curative steps in the stop work letter.

Indeed, in *Heller*, not only was the stop work order letter not a final determination of whether subsequent curative permits could be issued consistent with the city’s code, but the court expressly stated that issues pertaining to subsequent curative permits were not ripe for review. *Id.* at 63-

64. It is only when the city took action on the future curative permit application would there be a final determination as to those permit issues. Specifically, in *Heller* the property owner attempted to challenge not only the city's determination that the work was beyond the scope of the prior building permit but, also, the city's processing of the application for a curative permit. However, the court determined that the challenge regarding the future permit was *premature*. In coming to this conclusion the court stated:

HBL argues that the City erred in concluding that the moratorium prevented it from accepting or processing the permits necessary for HBL to recommence construction However, because HBL has not shown that the City has refused to process any permits for which HBL has applied, **this issue is not ripe for review**.

Id. at 63-64 (emphasis supplied).

Thus, *Heller* is totally consistent with Durland's position. The determination in a stop work order that a violation has occurred is a final land use decision subject to immediate appeal pursuant to LUPA. But the subsequent issue of what permits can or will be issued to potentially correct the non-compliance are not ripe for review when the initial finding of non-compliance is made. It is only when those subsequent permit decisions are made that the legitimacy of those subsequent permit decisions can be challenged under LUPA.

Similarly, in this matter, when the Compliance Plans were issued, they identified permits that *might be issued* to cure the violation. But, it is not until those permits are issued that Durland could assert they did not conform to the County Code. It was only after the permit application was filed and processed and, a permit decision made, that the permit decision could be challenged by the permit applicant or a neighbor (Durland). The Compliance Plans in the present matter did satisfy SJCC 18.100.040(D)'s minimal content requirements – mutually agreeable plan and establishment of a time frame for compliance. If Heinmiller wanted to appeal the non-compliance finding in the plans he could have done so at that time. But the Compliance Plans did not constitute final action on the subsequent permit applications. As in *Heller*, the Compliance Plans left open the pathway for compliance, a path that would require analysis of other regulations before permit decisions could be made and compliance potentially achieved. It is the approval of these permits – permits that actually cure the code violation - that are the final point in the compliance process and gives rise to this LUPA challenge. It is those subsequently-issued permits that “set to rest” the compliance process. *Samuel's Furniture Inc.*, 147 Wn.2d at 452; SJCC 18.100.040(D) (requiring the “terms of the compliance plan” to be met before a violation is closed).

If the court views the Compliance Plans as ambiguous, it can consider the manner in which the County characterized the plans prior to this dispute arising. Shortly after the plans were issued, the County's Deputy Prosecuting Attorney told Mr. Durland that the Compliance Plans were not appealable land use decisions and that the time for appeal was upon issuance of building permits. TR at 24:15-23. Specifically, the Prosecuting Attorney's Office stated:

[I]f a permit application is submitted by a property owner as a means to resolve a code information action, a third party may participate in any public hearings on the matter and *will have a method of appeal available through administrative appeal and/or court action in conjunction with the permit.*

CP 5 (emphasis added).

Also, when asked for a document showing that a land use decision had been made by the County recognizing the barn as a non-conforming structure, something the County now asserts the Compliance Plans did, the Deputy Prosecuting Attorney responded that no decision has occurred. CP 179. Analogizing the present matter to contract law, as a compliance plan serves as a contract between the County and the code violator, subsequent conduct may be used as an aid to interpretation. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). The County's representations to Durland clearly demonstrate that, prior to this dispute arising, the County did not view the

Compliance Plans as final land use decisions regarding the not-yet-issued permits.

Lastly, both the County and Heinmiller contend the April 2008 Compliance Plan made a final decision about the legal status of the barn. County Resp. Br. at 25-26; Heinmiller Resp. Br. at 47. Basically, any factual findings the County may have provided in the Compliance Plans regarding the barn's original illegality are not relevant to the ultimate determination that a code violation existed. The code violation being addressed by the County in the Compliance Plans was not about the alleged illegal construction of the barn, but the illegal conversion of the barn into an ADU prior to securing the necessary and required permits. Any finding regarding the original illegality was not necessary to the code violation determination, which is not what Durland is objecting to. Durland is appealing the issuance of permits allowing for the ADU.

B. This Case is not a Collateral Challenge to Determinations Made During the Non-Final Compliance Plan Process. It is a Challenge to Three New Permits and the Land Use Actions Authorized by Those Permits.

The County and Heinmiller repeatedly attempt to characterize Durland's challenge as a collateral attack on the Compliance Plans, essentially arguing that the Compliance Plans impliedly authorize the issuance of the challenged permits. Therefore, according to the County and Heinmiller, any

challenge to a permit amounts to a challenge to a compliance plan. The Court need look no further than the words of the Compliance Plans to see that they did not presume a determination that the curative permits identified in the Compliance Plans would necessarily be issued.

The original Compliance Plan and the Supplemental Compliance Plan expressly address a scenario where Heinmiller's application for the curative permits is denied:

3. The owners will take EITHER action ...
 - a. Submit necessary permit applications for conversion of a portion of the storage structure to ADU or bunkhouse ...
 - ii. *If either the SDP or CUP are denied*, the owners will either (A) obtain a demolition permit ... or (B) identify an alternative method of compliance...

CP 80-81 (emphasis added).

Thus, the premise for the County's and Heinmiller's argument is not present. The Compliance Plans do not implicitly or explicitly serve as a determination that the curative permits will be issued. To the contrary, they explicitly recognize the opposite. Arguments that are premised on treating the Compliance Plans as implicit decisions to issue the curative permits must fail.

C. Durland's Earlier Appeal of the Supplemental Compliance Plan Does Not Demonstrate that the Compliance Plans were Final Land Use Decisions.

Both the County and Heinmiller point to Durland's 2009 appeal of the Supplemental Compliance Plan,³ asserting this somehow demonstrates Durland understood the Compliance Plans were final land use decisions. County Resp. Br. at 5, 24; Heinmiller Resp. Br. at 6, 36. That Durland attempted to appeal the Compliance Plans is irrelevant. Durland, acting out of excessive caution and believing that the Supplemental Compliance Plan was an administrative determination, was merely attempting to appeal in the event the County later claimed an administrative appeal was required. But the County agrees no administrative appeal was available. CP 18; CP 210; TR 25:11-22; TR 180:5-22; TR 181:1-2. Thus, Durland's (untimely) administrative appeal of the plan is irrelevant.

D. LUPA May Not Bar a Challenge to a Decision Based on Inaccurate, Mistaken, and Erroneous Information

In the Hearing Examiner's decision, it was noted that LUPA may not bar a challenge when a land use decision was based on inaccurate information provided by the applicant. CP 28-29. Such a situation is present here. If, as the County and Heinmiller contend, the Compliance Plans are final decisions,

³ This appeal was not addressed on the merits; it was dismissed as untimely. CP 22:6-7.

the information they were based upon was incorrect. First, the boundary line survey did not find that the property boundary shown on the original building plan for the barn was incorrect. The line was correctly denoted and the 1990 Boundary Line Agreement and Easement did not modify the property line.⁴ CP 137; CP 177; TR 45:13-22. The history of this agreement/easement was never discussed with the signing parties, leaving the County's understanding of it to be based on pure conjecture. TR 24:6-11. Second, the site has been permitted for three distinct structures – the house, a garage, *and* the barn. Therefore, inaccurate information relating to the barn's ability to be considered a normal appurtenance within the shoreline area, thereby exempting it from the need to secure the required permit (regardless of height), was presented by the applicant. CP 186 (Site Plan); CP 184-185 (Permit for Barn); CP 189-198 (Permits for Modular House and Garage); TR 38-41; TR 178-179. Thus, such factual misrepresentations as to the legality of the barn and the ability of the applicant to conform with shoreline regulations should not serve to bar Durland's appeal of the subsequently issued permits. *Compare Lauer v. Pierce County*, ___ P.3d ___ (2011), 2011 WL 622623 (2011) (holding misrepresentations on application do not permit vesting).

⁴ The Record denotes a boundary line survey in 1990. However, the survey was actually done in 1987 and recorded in 1990. CP 78; TR 20:19-21.

**II. SAN COUNTY CODE UNAMBIGUOUSLY
ESTABLISHES A MINIMUM ROOF PITCH OF 4:12 IN
DEER HARBOR THAT APPLIES TO NON-
CONFORMING STRUCTURES.**

As Durland articulated in his opening brief, two errors occurred in regards to the roof pitch. First, the County Staff's interpretation of the code provision amounted to an "invented" exemption not authorized by the San Juan County Council. Second, the Hearing Examiner's determination that the structure was "grandfathered" was an erroneous interpretation of the law. Opening Brief at 37-43.

San Juan County states it has no interest in regards to the issue of roof pitch. County Resp. Br., at 29. We address Heinmiller's response below.

A. Durland Does Not Argue the County Code Requires a Certain Style of Roof.

Heinmiller repeatedly mischaracterizes Durland's argument. According to Heinmiller, Durland argues that the County Code requires a particular style of roof. Heinmiller Resp. Br. at 31-32. Durland has never made that argument. Rather than advancing arguments based on roof style (*e.g.*, gable or shed), Durland's argument was focused exclusively on the roof pitch. As we explained, the existing gable roof satisfies the code's minimum pitch requirement. Opening Brief at 36. To evade the County's shoreline permitting regulations, Heinmiller elected to reduce the structure's overall height – from

17 feet to below 16 feet - by flattening a portion of the roof.⁵ It is this modification to the existing, conforming roof pitch that violates code requirements. The style is inconsequential.

B. *No Deference is Due to County Staff's Interpretation of an Unambiguous Code Provision.*

Heinmiller asserts the County's construction of the applicable regulation is entitled to deference. Heinmiller Resp. Br. at 32. Whether an agency's construction of a statute is accorded deference depends on whether the statute is ambiguous. *Puget Sound Energy v. Washington Dept. of Revenue*, 158 Wn. App. 616, 624, 248 P.3d 1043 (2010) (*citing Waste Mgmt. of Seattle, Inc. v. Utilities & Transportation Commission*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994)). Interpretation always begins with the plain meaning of the regulation; if the meaning is unambiguous, the inquiry ends. *Id.* at 621 (*citing Lake v. Woodcreek Homeowners' Association*, 169 Wn.2d 516, 516, 243 P.3d 1283 (2010)). SJCC 18.30.350(H) is unambiguous - *The minimum permitted roof pitch in Deer Harbor is 4:12*. This is an objective, numerical requirement established by the San Juan County Council - a requirement County planning staff is mandated to apply.

⁵ Heinmiller Resp. Br. at 9 and 29 states the roof would be lowered by four inches to evade shoreline permitting. This is incorrect and is not supported by the citations to the record provided by Heinmiller. See, CP 79; 186, TR

C. The County's Methodology for Measuring Pitch Exempts a Portion of the Roof from County Code 4:12 Pitch Mandate.

Heinmiller argues that although the County Code may establish a minimum roof pitch, it does not set forth a procedure for calculating roof pitch, requiring County staff to “come up with a way to calculate the pitch of the proposed ADU roof.” Heinmiller Resp. Br. at 31-32. But, as noted above, interpretation always begins with the plain meaning and if it is unambiguous, the inquiry ends. *Puget Sound Energy*, 158 Wn. App. at 624. In addition, any interpretation employed by staff cannot create a conflict with the regulation. *Waste Management*, 123 Wn.2d at 628. Both of these rules apply here.

First, the plain meaning of SJCC 18.30.350(H) is unambiguous - *minimum permitted roof pitch in Deer Harbor is 4:12*. The issue is not about roof style or visual consistency. Once again, it is simply the application of an objective, numerical requirement established by the County Council - a requirement County planning staff is mandated to apply.

Second, the methodology utilized by county staff started the pitch measurement at the outside edge of the flattened portion of the roof, *i.e.*, excluding the flat portion of the roof from the Code's minimum pitch mandate. Exempting that portion of the roof creates a conflict with the requirement for a 4:12 pitch, a requirement which pertains to the entire roof not just portions of it.

Another tenet of statutory interpretation is that words should not be added when the legislative body has chosen not to include them. *Five Corner Family Farm v. State*, ___ Wn. 2d ___ (2011 WL 6425114, Dec. 22, 2011). Durland presented the Eastsound Sub-Area Plan design standards to demonstrate that the County knew how to set forth a methodology that would allow a portion of the roof to be flat; that methodology is not provided for in the Deer Harbor Plan. CP 170; TR 76-77.

D. Non-Conforming Structures are not Inherently Immune from Regulation. Within San Juan County, there is not a “Right” to Modifications that Increase Non-conformity with Existing Development Regulations.

Heinmiller argues that the Code’s provisions regarding legal, non-conforming structures authorize the change in the roof pitch. Even if the barn was legally nonconforming, the roof of the structure is not non-conforming. The rules regarding non-conforming uses are irrelevant to this issue.

The County Code distinguishes between uses that were illegal when built and those that were legally built, but no longer conform to modern code requirements.⁶ As might be expected, the law is more lenient with regard to modifying “legal, non-conforming” structures than illegal ones.⁷ Whereas no

⁶ The former structures are “illegal.” SJCC 18.20.090(I). The latter structures are “legal, non-conforming.” SJCC 18.20.140(N).

⁷ It is well-settled law in Washington that the policy of zoning legislation is to phase out non-conforming uses and structures. *Anderson v. Island County*, 81 Wn.2d 312,

permits may be issued to modify an illegal structure (except to cure the illegality), SJCC 18.40.310 allows for the issuance of permits for legal, non-conforming structures under some circumstances. Heinmiller seeks to use the more permissive provisions applicable to legal, non-conforming structures to save the flat roof. This effort fails for two reasons.

First, the barn was illegal when built and, therefore, does not qualify for the more lenient treatment afforded legal, non-conforming structures. *See infra*. Despite evidence to support the illegal nature of the structure, that issue has not been addressed on its merits because the Hearing Examiner determined the issue was time barred. If the Court agrees with Durland that the Hearing Examiner erred in not ruling on that issue, then that issue should be remanded for a decision by the Hearing Examiner. Therefore, it is premature to address whether the legal, non-conforming structure provisions are applicable to address the roof issue.

Second, even if the building were viewed as a legal, non-conforming structure, the building's existing roof is not non-conforming. *Opening Br.*, at

323, 501 P.2d 94 (1972). It is also well-settled law that although disfavored, non-conforming uses and structures can continue to exist so as to avoid constitutional challenges. *Open Door Baptist v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 44 (2000). These legal principles are recognized within the San Juan County Code's non-conforming use provisions, SJCC 18.40.310 which for maintenance but modifications are allowed with an important caveat - "non-conforming structures may be modified or altered, *provided the degree of nonconformity of the structure is not increased.*" SJCC 18.40.310(D) (emphasis added).

40. To the contrary, the existing roof complies with the 4:12 minimum pitch requirement set forth in SJCC 18.40.350(H). Permitting a modification that creates non-conformity where none previously existed is blatantly contrary to even the more lenient code provisions applicable to legal, non-conforming structures:

[N]on-conforming structures may be modified or altered, **provided the degree of nonconformity of the structure is not increased.**

SJCC 18.40.310(D) (emphasis added).

Heinmiller ignores the first issue and takes a novel approach with regard to the second, citing a dissenting opinion to support his claim that he has a vested right to create additional non-conformity through modifications to the structure. Heinmiller Resp. Br. at 29-30 (citing to the dissenting opinion in *Rhod-A-Zalea & 35th Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998)). In contrast to the dissent, the controlling majority decision in the *Rhod-A-Zalea* case held:

A protected nonconforming status generally grants the right to continue the existing use but *will not grant the right to significantly change, alter, extend, or enlarge the existing use.*

Rhod-A-Zalea, 136 Wn.2d at 7 (emphasis added).

Thus, even if the barn is “only” a legal, non-conforming structure, and not totally illegal, the barn’s existing non-conformity based on setbacks does

not shield it from complying with subsequently enacted roof pitch regulations. SJCC 18.40.310(D) permits modifications to nonconforming structures, but does not exempt those modifications from existing development regulations. The County's Chief Building Official and Director of the Community Development and Planning Department recognized this:

Any changes to that building would have to meet the new Code requirements ...parts that they modify would have to meet today's standards.

TR at 98:10-12. Despite this statement, the County issued a permit allowing the new roof modification to not meet "today's standards." The Hearing Examiner erred when concluding the structure enjoyed "grandfathered" rights from the County's current regulations for Deer Harbor.

E. Compliance with County's Roof Pitch Requirement Does Not Preclude Use of Structure as Accessory Dwelling Unit.

Heinmiller complains that if he were to comply with the 4:12 pitch requirement, his ability to use the second floor of the illegally-constructed ADU would be obliterated. Heinmiller Resp.Br. at 34. This is untrue. The current structure's roof is a 4:12 pitch and Heinmiller had been utilizing this area of the ADU without a need to modify the roof. Moreover, compliance with the code's roof pitch requirement does not mean that the building cannot be used. It simply means that Heinmiller will need to obtain a shoreline permit (instead of evading those permit requirements by flattening the top of the roof)

if he wants to convert the barn to a residence – an ADU. Heinmiller’s efforts to avoid shoreline regulations hardly provide equitable or other grounds for bending the objective, mathematical roof pitch standards of the County Code.

**III. PRIVATE RESTRICTIVE AGREEMENTS DO NOT
LEGALIZE STRUCTURES AND THE COURT, IN
THE INTEREST OF THE EFFICIENT
ADMINISTRATION OF JUSTICE, HAS THE
AUTHORITY TO ADDRESS THIS ISSUE**

An underlying question posed by Durland in these proceedings is whether the County had the authority to issue permits to convert the barn to a residence despite the barn having been originally built illegally (*i.e.*, not a legally built structure that become nonconforming by operation of subsequently adopted regulations). The barn’s status as an illegal structure was previously determined by the County during Durland’s shoreline application process in the late 1980s. Durland presented undisputed testimony that the County Board of Adjustment, the County Building Department, and the County Planning Department all concluded the barn had been built illegally as it was placed too close to the property line. TR at 17:16-19; TR at 28:21-23; TR 29:1-2. The undisputed testimony also indicated that the misplacement of the barn was not accidental, but a deliberate act by the previous property owner. CP 139; TR at 31:13-23; TR at 32:1-9.

Pursuant to SJCC 18.100.030(F) and 18.100.070(D), the County is precluded from issuing permits for an illegal structure. Part of Durland's challenge to the permits before the Hearing Examiner was based on these code provisions, *i.e.*, that because the barn was illegal, these code sections precluded the County from issuing permits to allow the conversion into an ADU. The County admits the structure was built illegally in violation of code setback requirements, but claims the illegality was cured by a subsequent private agreement. County Resp. Br. at 3-5.

A violation of public law (the San Juan County Code) cannot be cured by adoption of a private agreement (an easement) between two property owners. The code violation can only be cured by bringing the building into compliance with the code, obtaining a variance from the code's requirements, or amending the code to eliminate the requirement. A private agreement, not involving the county, can be abrogated at any time without the County's consent.⁸

Neither Respondent asserts that a private agreement can be used to eradicate a violation of a public law. Instead, the Respondents raise three

⁸ The Compliance Plan states the setback easement is a substitute for the property boundary setback of 10 feet required by the County Code and building permit. CP 120. However, that easement is subject to termination without the County's consent. If terminated, what would satisfy code requirements then?

procedural objections in an effort to preclude this court from deciding an issue which forms the crux of this appeal. As shown below, none of the procedural defenses are sound. Thus, the court should proceed to address the issue and, thereupon, determine that the barn was built illegally; that the illegality was not cured by the private agreement; and, therefore, permits could not be issued to modify the barn until the illegality is cured. SJCC 18.100.030(F); 18.100.070(D).

Heinmiller's and the County's first procedural argument is that because the superior court did not address the issue, this court should not address it either. But this court's review authority is plenary, it directly reviews the decision of the hearing examiner not the superior court. *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54-55, 196 P.3d 141 (2008). Whether the superior court reached the issue is irrelevant. Moreover, Durland did raise this issue in superior court and the court rejected the argument. CP 35 (Item 5(E)).

Next, the County argues that this court should not address the issue because it represents a time-barred challenge to the 1981 permit issued for the barn, with the filing deadline for a challenge to that permit triggered either by the adoption of LUPA or when the County became "aware" of the illegality. County Resp. Br. at 28-29. The County, as it has does elsewhere in its brief,

mischaracterizes the challenge. Durland does not question the validity of the 1981 permit issued for the construction of the barn. Rather, Durland questions the ability of the County to issue new permits to modify a structure determined to be illegal until such time as the structure achieves conformance with the County Code. Durland has explicitly demonstrated that the barn is illegal as it was intentionally not built in compliance with the terms of the building permit (which required a ten foot setback from the property line) and which required compliance with the building plans on file with the County (which included the ten foot setback) and, the County has made such a conclusion. *See Op. Br.* at 34; CP 178; TR 17:4-23; TR at 31:13-19; TR at 32:1-4; TR 18:7-11. The issue raised is the consequences that flow from the failure of the barn to comply with the terms of that permit and the County Code. The issue is appropriate for this court to consider and enter a ruling given its relevance to the matter.

Heinmiller's procedural defense is that the court should not address the issue because it was not before the Hearing Examiner. This is untrue. The Hearing Examiner entered a ruling on this very issue, stating that the barn was constructed in violation of setback requirements and then concluding that the 1.4 foot side-yard setback is "code compliant due to the Setback Easement." CP 53:1-5 (Conclusion of Law 3); CP 58-60. In Durland's LUPA petition to the superior court, error was assigned in this regard and presented to the court

for its review. CP 7 (§ 7.8 and 7.9). In addition, Durland's Notice of Appeal to this court expressly challenged the court's ruling on motions, which included the ability of the County to issue permits under SJCC 18.100.030(F) and 18.100.070(D). CP 35. Therefore, the issue has been present since the commencement of this action before the Hearing Examiner. CP 130; CP 179.

Thus, none of the procedural objections to addressing this dispositive issue are valid. The court should rule on Durland's claim that the barn is an illegal structure pursuant to the County Code, as the County has previously determined; that a private agreement does not operate to cure a violation of the County Code; and, therefore, SJCC 18.100.030(F) and 18.100.070(D) preclude issuance of any permits to modify the structure until such time as the illegality is cured.

**IV. HEINMILLER'S ACCESSORY DWELLING UNIT IS
LARGER THAN THE MAXIMUM ALLOWED BY THE
UNAMBIGUOUS SAN JUAN COUNTY CODE.**

Heinmiller cross-appeals the Superior Court's decision that the ADU permit was illegal because the living area is larger than allowed by the County Code. The San Juan County Code unambiguously establishes a maximum size for an ADU and bases that size on "living area" for which a specific definition has been adopted by the San Juan County Council. Heinmiller does not argue that his ADU meets the Code's "living area" requirement. Instead,

he argues that the definition of in the International Residential Code (IRC) should be employed instead.

The Superior Court, rejecting Heinmiller’s argument, determined that the County Code caps the “living space” of an ADU with an unambiguous definition. The Superior Court did not err in finding the County Code provisions unambiguous and in determining that Heinmiller’s ADU violates the “living space” size threshold.

A. The County Code Unambiguously Defines the Maximum Square Footage for an ADU and Sets Forth an Equally Unambiguous Definition for Measuring the Square Footage.

The sizing of an ADU is based on SJCC 18.40.240(F), which provides, in relevant part:

The following standards apply to all accessory dwelling units:

1. Size. An accessory dwelling unit permitted subsequent to the adoption of this section *shall not exceed 1,000 square feet in living area as defined in SJCC 18.20.120.*

(Emphasis added).

SJCC 18.20.120 defines “Living Area” as:

[T]he internal space measured from the interior of the exterior walls, excluding decks, overhangs, unenclosed porches or unheated enclosed porches, and the stairwell on one level of a two-story structure.

The County Code definition unambiguously measures living space “from the interior of the exterior walls.” In a room with a sloping dormer

ceiling, Heinmiller seeks to exclude from this definition the area within the walls that is beneath those portions of the ceiling that are less than five feet in height. That may have been a reasonable approach for the County Council to take, but it is not the definition it employed. The Council's definition includes all space inside the exterior walls without regard to the height of the ceiling. The Superior Court correctly resolved this issue.

The Superior Court's holding as to the meaning of "living area" is consistent with several rules of statutory interpretation. First, unambiguous statutes are not subject to interpretation; one is to only look at the plain language of the statute without considering outside sources. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Second, when the legislative body has defined a term, the statutory definition of the term controls its interpretation. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) (holding legislative definitions included in statute are controlling); *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991) (citing *City of Seattle v. Shepard*, 93 Wn.2d 861, 866, 613 P.2d 1158 (1980) (holding legislative definitions control in construing the statutes and ordinances in which they appear)). Lastly, words cannot be added to an unambiguous statute when the legislative body has chosen not to include that language; the assumption is that the legislative body meant exactly what it said.

Davis v. Dept. of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). This tenet would also encompass adding items to exclusive lists. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

In this matter, not only is SJCC 18.40.240(F) unambiguous – *an ADU shall not exceed 1,000 square feet of living area* – but it also tells the reader where to find the definition of living area, in SJCC 18.20.120. With this provision, the San Juan County Council has specifically defined “living area,” providing not only how to measure (from the interior of exterior walls), but also what to exclude. While the County Code’s definition excludes certain areas like unheated enclosed porches, conspicuously absent from the list of exclusions is one for “areas with low ceilings.” SJCC 18.20.120’s definition of “living area,” therefore, controls.

B. Heinmiller’s Efforts to Import Definitions of Different Terms from a Different Code is Based on a Misreading of SJCC 18.20.005(B).

Not surprisingly given the unambiguous nature of SJCC 18.20.120’s definition of “living area,” Heinmiller does not contend his ADU complies with that definition. Instead, he argues that it is appropriate to use a definition imported from the International Residential Code (IRC). The IRC definitions Heinmiller asserts should be applicable are not cross-referenced in the County Code’s limitation on ADU “living area” and do not even use the same

terminology.⁹ Those IRC terms are also based on square footage calculations Heinmiller derives from yet another, separate section of the IRC related to minimum ceiling height.¹⁰

According to Heinmiller, SJCC 18.20.005(B) requires the use of the IRC definitions. That section states that if a definition is in conflict with a state law or regulation, the state definition controls. Heinmiller Resp. Br. at 21-23.

⁹ Where the County Code's ADU provisions limit "living area," Heinmiller refers to IRC definitions of "habitable space" and "living space."

¹⁰ The 2003 IRC, the one SJCC 15.04.050 incorporates, established the following definitions in IRC 202:

Habitable Space. A space in a building for living, sleeping, eating or cooking. Bathrooms, toilet rooms, closets, halls, storage or utility spaces and similar areas are not considered habitable spaces.

Living Space. Space within a dwelling unit utilized for living, sleeping, eating, cooking, bathing, washing and sanitation purposes.

In regards to ceiling height, IRC 305.1 provides:

Habitable rooms, hallways, corridors, bathrooms, toilet rooms, laundry rooms and basements shall have a ceiling height of not less than 7 feet (2134 mm). The required height shall be measured from the finish floor to the lowest projection from the ceiling

...

It must be noted, that Heinmiller's expert architectural witness erroneously calculated the structure/ceiling height. Durland testified in regards to the actual ceiling height based on the plans submitted to the County. Durland stated that the purlins in the ADU's ceiling are two by six with R38 insulation. CP 211c. However, R38 is for two by twelve purlins and, therefore, would not fit into a two by six area. Thus, the roof would either need to be raised (so as to accommodate the wider purlins and potentially bringing forth the shoreline permit issue again) or the ceiling would need to be lowered (precluding the upper story's use based on ceiling height). TR at 46:11-19; 50:17-23; CP 205.

But, that code language applies only in situations where the County Code has incorporated by reference a state law definition. The County Code limitation on ADU living area does not include any reference to state law. Thus, the provision relied on by Heinmiller is irrelevant. Specifically, SJCC 18.20.005(B) provides:

All definitions which reference the Revised Code of Washington (RCW), Washington Administrative Code (WAC), and Uniform Building Code (UBC) are intended to mirror the definitions in these codes at the effective date of the Unified Development Code (this code) or as amended. If the definition in this code conflicts with a definition under state law or regulation, the state definition shall control over this definition.

Heinmiller focuses on the second sentence, but clearly, the second sentence is modifying the first. That is, when County Code definitions expressly reference a state statute or state code, but ends up being in conflict with definitions contained in those state laws, the state law definition controls over the County Code definition.¹¹

¹¹ For instance, SJCC 18.20.040 provides a definition of Family Day Care Home with a reference to RCW 35.63.170, the state law defining that use. If the State Legislature amended the definition, SJCC 18.20.005(B) would mandate that the new state law definition apply, not the outdated one contained in the SJCC. *See also*, SJCC 18.20.010 Agricultural Resource Lands, citing definition contained in RCW 36.70A.030(2); SJCC 18.20.050 establishing secure community transition facilities as defined in RCW 71.09.020; SJCC 18.20.090 defining industrial wastewater as provided in WAC 246-272A-0010; SJCC 18.20.030 citing to WAC 173-14-030(8)(b) when defining channel. Durland notes that WAC 173-14-030(8)(b) does not exist. Durland assumes the correct reference should be to WAC 173-22-030(8)(b).

The ADU “living area” space limitation and definition include no reference to state law. Thus, by its clear terms, SJCC 18.20.005(B) does not apply. Heinmiller’s effort to import IRC definitions into the County Code’s ADU provisions should be rejected.

C. *The San Juan County Council’s Unambiguous Definition of Living Space Does Not Produce Absurd Results.*

Heinmiller further contends the County Code’s definition of “living area,” standing on its own, would lead to absurd results because it would allow for the inclusion of areas that “have essentially no utility as living space.” Heinmiller Resp. Br. at 27. While it is true that the court should avoid a literal reading of a statute which would produce an absurd result, this cannon of statutory construction is applied sparingly. *Five Corners Family Farms, et al v. State of Washington, et al*, 2011 WL 6425114 at ¶ 23 (Supreme Court, Dec. 22, 2011) (citing *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (noting that application of the absurd results canon, by its terms, refuses to give effect to the words the legislature has written; it necessarily results in a court disregarding an otherwise plain meaning and inserting or removing statutory language, a task that is decidedly the province of the legislature).

Heinmiller premises his absurdity argument on the appropriateness of his exclusion of areas with a ceiling height of less than five feet from the square footage calculation, asserting that the IRC must be read in harmony with

SJCC 18.20.120. Heinmiller Resp. Br. at 27. In actuality, Heinmiller is not reading the IRC in harmony with the County Code; he is supplanting the County Code's definition with those of the IRC.¹² The County Council, by defining living area as it did, determined that a living area includes not only such things as a bedroom or a kitchen but also areas that provide a service to the ADU, such as closets and storage areas regardless of ceiling height. The Court's acceptance of Heinmiller's contention would result not only in disregarding the measurement and exemptions expressly provided for in the County Code's language, but also would have the court inserting superseding language from the IRC. If the County Council did not do this when it took legislative action adopting the provision, it is not up to the County Staff, the Hearing Examiner, or this court to modify the County Council's legislative decision. There is nothing absurd about the County's definition.

D. No Deference is Due the Hearing Examiner's Interpretation of an Unambiguous Statute, Even if it is One of first Impression.

As noted above, neither SJCC 18.20.120 or 18.20.240(F) are ambiguous. Deference to San Juan County's interpretation of its code

¹² Heinmiller has repeatedly relied upon the IRC's definition of "habitable space" and "living space". Heinmiller Resp. Br. at 24. These definitions in and of themselves are in conflict. For example, a bathroom is excluded under the definition of habitable space whereas a space used for bathing is included within the definition of living space. Or, a utility space is not considerable habitable whereas areas for washing and sanitation are included as living space – a laundry room would there be excluded under one but allowed under the other.

provisions depends on whether the provision is ambiguous; absent ambiguity there is no need for the County's expertise in construing its regulations. *Cowiche Canyon Conservancy v. Bosley*, 188 Wn.2d 801, 813-14, 828 P.2d 549 (1992). That this may have been an issue of first impression for the Hearing Examiner does not transform an unambiguous code provision into an ambiguous one.

**V. THE SUPERIOR COURT APPROPRIATELY AWARDED
ATTORNEYS FEES TO DURLAND.**

In the underlying matter, Durland sought, and was awarded, reimbursement of statutory (not actual) attorney fees pursuant to RCW 4.84.010. In his cross-appeal, Heinmiller contends the Superior Court erred because Durland was not the prevailing party. Heinmiller argues that not only did he prevail on the majority of the claims, but he has succeeded in obtaining what he sought – approval to maintain the illegally constructed ADU (because, according to Heinmiller, having to modify the size of the ADU does not take away his ability to keep it). Heinmiller then asserts the court should award him costs pursuant to RCW 4.84.370. Heinmiller Resp. Br. at 46-49.

To be a prevailing party under RCW 4.84.010 is not an exercise of determining which party won the most claims. A plaintiff may be the prevailing party if he obtains significant relief by prevailing on a single issue or claim. *See, e.g., Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002).

Here, Durland obtained the relief he sought: invalidation of the ADU permit and a remand for further consideration by the County. The superior court reversed the County's decision with regard to the living area and remanded the matter to San Juan County to establish compliance with SJCC 18.20.120. CP 257-258. Contrary to Heinmiller's assertion, the superior court did not rule that the ADU may remain; the court ruled that the ADU was not in conformance with the County Code. Heinmiller's argument that he will be able to maintain the ADU is speculative because nothing in the Record suggests the ADU can be reduced and still serve the purpose and function sought by Heinmiller. Therefore, the court did not err when granting statutory costs to Durland as he was the prevailing party.

As to Heinmiller's request for costs pursuant to RCW 4.84.370, that provision applies only if Durland lost completely at all three levels: before the Hearing Examiner, in superior court, and here, in this court. Durland's victory in superior court is sufficient by itself to preclude an award of fees to Heinmiller. Of course, if Durland prevails in this appeal; Heinmiller's request will be doubly deficient.

VI. CONCLUSION

The Court should reverse the decisions of the Skagit County Superior Court and the Hearing Examiner regarding the LUPA exhaustion issue and the

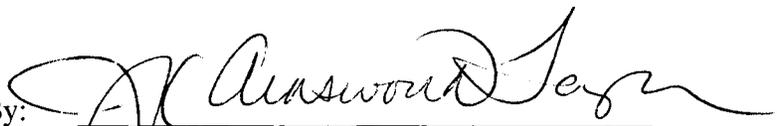
roof pitch issue and affirm the Superior Court's ruling on the ADU living space issue.

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

Dated this 27th day of January, 2012.

Respectfully submitted,

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Durland\Appeals\Reply Brief -- 01 27 12