

**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY**

In the Matter of the Appeal filed by)
)
6 **FRIENDS OF THE SAN JUANS, a**)
7 Washington not-for-profit)
corporation,)
8 Appellants,)
)
9 of permit approvals for the demolition)
and replacement of a residential)
10 structure on a parcel in southwest San)
11 Juan Island, issued by the **SAN JUAN**)
COUNTY DEPARTMENT OF)
12 **COMMUNITY DEVELOPMENT,**)
)
13 Respondent,)
)
14 **DAVE AND NANCY HONEYWELL,**)
15 **AKA ORCA DREAMS, LLC,**)
)
16 Applicants)
_____)

File No. PAPL00-17-0007
Demolition Permit No. BPDEMO-17-0003
Building Permit No. BUILDG-17-0021

DECISION

S.J.C. DEPARTMENT OF
MAR 12 2018
COMMUNITY DEVELOPMENT

I. BACKGROUND AND SUMMARY OF DECISION.

Shortly after this appeal commenced, the Applicants filed a Motion to Dismiss, arguing that the appellants did not have standing to bring the appeal, and that the appeal was inadequate for other substantive reasons. At the time any Motion to Dismiss, aka request for Summary Judgment is considered, the law requires the Examiner to construe all inferences in favor of the non-moving party. Here, the appellants opposed dismissal by arguing that their counsel was fully empowered to file the appeal, and in oral arguments and throughout the appeal, they argued that they submitted written comments that should be considered as regarding the challenged permit decisions. Where it can be argued that they filed comments or did not, the Examiner relied on appellant’s opposition materials to construe facts in their favor. Assuming written comments were filed about the challenged

1 permit applications, summary judgment/dismissal was inappropriate.

2 Then, at the hearing, County witnesses established that the appellant did not submit
3 written comments about the challenged permit applications. Instead, the record shows that
4 appellant submitted written comments regarding another project proposal by the
5 Honeywell's that has since been withdrawn. Further, the appellants (acting through their
6 officers and counsel) know very well how to submit written comments about a particular
7 project proposal, including a building permit application, because they have done so in
8 other matters, just not in this instance.

9 Because the appellant failed to submit written comments about the challenged
10 permit applications, they cannot establish standing in this appeal on such basis. The
11 Examiner is without powers to modify county codes or to exercise equitable authority to
12 essentially construe a written comment about a different, much larger project proposal, as a
13 written comment about a specific, much smaller building permit application.

14 Having failed to rebut the fact that they failed to submit timely written comments
15 regarding the specific permit applications that are at issue in this appeal, appellants sought
16 to establish standing as an "aggrieved" party through testimony at the public hearing. They
17 expressly relied on the testimony and personal experiences of just one person, their
18 Executive Director. Despite their efforts and arguments, their effort failed, as their basis is
19 too remote, general, and not within the specific zone of interests protected by applicable
20 county codes and policies, and relevant caselaw on the subject.

21 Recognizing that a full appeal record was developed during the hearing process, in
22 the interest of judicial economy, this Decision also addresses the appellants' four
23 substantive issues raised to support their appeal. None of those issues were supported by
24 sufficient evidence or legal authority needed to satisfy the appellants' burden of proof.
25 None of the issues raised on appeal would serve as a basis to reverse either challenged
26 permit, even if the appellants had standing. Accordingly, the pending appeal must fail.

II. APPLICABLE LAW.

Jurisdiction.

21 In this matter, the appellants, Friends of the San Juans, appeal a demolition permit
22 and a building permit to remove and replace an old cabin with a new single-family
23 residence in its place. County permits BUILDG-17-0021 and BPDEMO-17-0003 were
24 both issued on July 26, 2017. *Staff Report.* Building and demolition permits are addressed
25 in Title 15 of the County Code. SJCC 2.22.100(A)(3) explains that the Hearing Examiner
26 shall conduct public hearings, prepare a record thereof, and enter findings of fact and
conclusions based upon those facts, for appeals of matters arising pursuant to SJCC Title 15
(building and fire codes). Decisions of the hearing examiner shall represent the final

1 decision in such matters. *Id.*

2 The Examiner's jurisdiction is further supported by SJCC 18.80.140(A)(1), which
3 grants the Hearing Examiner specific authority to review and consider appeals of
4 development permits, such as the building and demolition permits challenged in this appeal.
5 Under SJCC 18.20.040 "D", the term "Development Permit" is defined to include "a
6 County permit or approval required for a project, including but not limited to building and
7 other construction permits, [and] demolition permits," among other things.

8 ***Standing.***

9 As discussed above, the appellants do not have standing. They failed to submit any
10 written comments to the county regarding either of the two specific permit applications that
11 are challenged in this appeal. And, at the hearing, they failed to establish how they are an
12 "aggrieved party." In any event, County staff participated in the hearing process, providing
13 evidence and testimony supporting the challenged permits, and the appellants were
14 permitted to develop a full evidentiary record seeking to support their issues raised on
15 appeal.

16 ***Open-Record Appeal.***

17 As provided in SJCC 18.80.140(A)(1), appeals to the hearing examiner of
18 development permits are "open-record" appeals.

19 ***Burden of Proof on Appellant, Standard of Review.***

20 SJCC 2.22.210.H provides that "For an administrative decision to be reversed or
21 modified, the appellant has the burden by a preponderance of the evidence to show that the
22 legal decision criteria are erroneously applied by the decision maker".

23 **III. RECORD.**

24 The Record for the matter includes all application materials, pre-hearing and post-
25 hearing briefs from the parties, and exhibits marked and numbered during the course of the
26 public hearing. A complete list and copies of exhibits included in the Record are
maintained by the County, reflecting numbers A – Z, and then AA - MM. Copies of the list
were made available to the parties throughout the course of the hearing. The Record
includes a Staff Report, prepared to address issues raised in this appeal, with 12
attachments, numbered L-1 through L-12.

All witnesses who appeared at the appeal hearing offered testimony under oath. The
appellants relied on the testimony of their Executive Director, Ms. Buffum, and questioning
of County officials involved in issuing the challenged permits, specifically the County's

1 Planning Manager, Linda Kuller, and the Community Development Department Director,
2 Erika Shook. County staff provided testimony showing how the challenged permits were
3 issued because they satisfied applicable codes and policies. The project applicant, Mr.
4 Honeywell, was present throughout the hearing and testified in support of his project. As
5 noted during the public hearing, the Examiner conducted a site visit to observe conditions
6 on the project site and the downhill, adjacent shoreline area.

7 Upon consideration of all the evidence, testimony, codes, policies, regulations, and
8 other information contained in the file, including without limitation post-hearing briefs, the
9 undersigned Examiner issues the following findings, conclusions and Decision. This
10 Decision was delayed in large part due to other pending appeals of development activities
11 of the same applicant, which consumed most of the hearing calendar through December,
12 followed by another appeal of a building permit pursued by the same appellant. These
13 matters do not occur in a vacuum. The codes, policies and legal authorities overlap on
14 many issues. They all require sufficient time for analysis and fair determinations regarding
15 each matter, as this is the final decision of the County regarding the two challenged permits.

16 IV. FINDINGS OF FACT.

17 1. Any statements of fact or findings set forth in previous or subsequent portions of
18 this Decision that are deemed to be findings of fact are hereby adopted and incorporated
19 herein as such.

20 2. In January of 2017, Orca Dreams LLC, owned by the Honeywell family, applied for
21 a demolition permit and a building permit to remove and replace an existing cabin on their
22 property, which is located above the southwest shoreline of San Juan Island, on Golden
23 Paintbrush Lane, part of a larger site that was once known as the "Mar Vista Resort." *Staff
24 Report; Testimony of Mr. Honeywell, Ms. Shook.*

25 3. The Staff Report credibly explains a prior Boundary Line Modification made to
26 create the lot where the cabin is situated, and the size of the cabin's roof and deck area (638
Sq.Ft.). *Staff Report, page 2.* It summarizes mostly undisputed facts that establish the
condition (Fair, according to the Assessor), and the features in the structure (2 bedrooms,
shower, lavatory, toilet, kitchen sink, hot water and electric baseboard heaters), and how the
existing cabin is nonconforming as to the applicable aesthetic setback required by SJCC
18.50.330.D. This nonconformity is the key basis for the pending appeal.

4. Following review of the pending applications, staff issued the requested Demolition
and Building Permits on or about July 26, 2017. The appellants, Friends of the San Juans,
filed their written appeal, and paid their appeal fees, on or about August 15, 2017.

5. Shortly after this appeal commenced, the Applicants filed a Motion to Dismiss,
arguing that the appellants did not have standing to bring the appeal, and that the appeal

1 was inadequate for other substantive reasons. At the time any Motion to Dismiss, aka
2 request for Summary Judgment is considered, the law requires the Examiner to construe all
3 inferences in favor of the non-moving party. Here, the appellants opposed dismissal by
4 arguing that their counsel was fully empowered to file the appeal, and in oral arguments and
5 throughout the appeal, they argued that they submitted written comments that should be
6 considered as regarding the challenged permit decisions. Where it can be argued that they
7 filed comments or did not, the Examiner relied on appellant's opposition materials to
8 construe facts in their favor. Assuming written comments were filed about the challenged
9 permit applications, summary judgment/dismissal was inappropriate. Copies of all
10 pleadings associated with the Motion to Dismiss, and an Order denying such motion, issued
11 on or about October 4, 2017, are included as part of the record. *See Exhibits B, C, D, E,*
12 *and G.*

13 6. Then, at the hearing, County witnesses established that the appellant did not submit
14 written comments about the challenged permit applications. *Testimony of Ms. Shook;*
15 *Declaration of Ms. Shook, Staff Report, Attachment L-10, a true and correct copy of the*
16 *County file for the two challenged permits, which does not reflect any written comments*
17 *received from the appellants. Instead, the record shows that appellant submitted written*
18 *comments regarding another project proposal by the Honeywell's that has since been*
19 *withdrawn. Testimony of Ms. Shook. Further, the appellants (acting through their officers*
20 *and counsel) know very well how to submit written comments about a particular project*
21 *proposal, including a building permit application, because they have done so in other*
22 *matters, just not in this instance. See FOSJ appeal of building permit in Appeal File No.*
23 *PAPL00-17-0011.*

24 7. Because the appellant failed to submit written comments about the challenged
25 permit applications, they cannot establish standing in this appeal on such basis. The
26 Examiner is without powers to modify county codes or to exercise equitable authority to
essentially construe a written comment about a different, much larger project proposal, as a
written comment about a specific, much smaller building permit application.

8. SJCC 18.80.140.C provides that appeals to the Hearing Examiner may be initiated
by: 1) an applicant; 2) any recipient of the notice of application (NOTE: there is no dispute
that this provision does not apply to this situation because a formal Notice of Application is
not required for building and demolition permit applications); 3) any person who submitted
written comments to the director concerning the application; or 4) any aggrieved person.
There is no dispute that the appellants cannot achieve standing via subsections 1 or 2.
Throughout the process, they attempted to present evidence that should be construed to
provide them standing under either or both subsections 3 and 4, as a party who submitted
written comments regarding the application(s) or as an aggrieved person.

9. As noted above, the appellants did not submit any written comments to the director
regarding the two challenged permit applications. Comments about another, larger, and

1 subsequently withdrawn land use proposal are not the same.

2 10. Having failed to rebut the fact that they failed to submit timely written comments
3 regarding the specific permit applications that are at issue in this appeal, appellants sought
4 to establish standing as an “aggrieved” party through testimony at the public hearing. They
5 expressly relied on the testimony and personal experiences of just one person, their
6 Executive Director. Despite their efforts and arguments, their effort failed, as their basis is
7 too remote, general, and not within the specific zone of interests protected by applicable
8 county codes and policies, and relevant caselaw on the subject.

9 11. The Examiner conducted a site visit onto the property with a County staff member
10 who was not assigned to work on this matter. The site visit was on a calm morning prior to
11 the hearing, and the Examiner was able to walk around the existing cabin, and down to the
12 shoreline beneath the site. The tide was average, with some exposed sand, and without
13 knowing where the Ordinary High Water Mark would be, standing out along the exposed
14 beach surface area, the cabin was not visible from many, if not most, points below on the
15 beach. The brush, trees, and “screening” that fills the steeply sloping area between the
16 cabin and beach is not entirely opaque, but many of the trees were without leaves, given the
17 time of year (December). The Examiner finds that the cabin would be even less visible
18 from the OHWM in the Spring and Summer seasons, when the deciduous trees and shrubs
19 are filled with leaves.

20 12. Appellants argue that “Ms. Buffum will suffer harm to her interests in recreating
21 along less-developed shorelines and observing as much wildlife as possible” in the vicinity
22 of the Honeywell property. (*Appellants’ closing brief, at page 7, lines 5-7*). They seek to
23 distinguish her personal interests from those in the *Nykreim* case, where they believe that
24 the sole interest of the party challenging a land use decision was the preservation of zoning
25 protections. *Id.* As support for their assertion, appellants claim that Ms. Buffum’s harm
26 will be derived from “the presence of a new, larger residence”, with alleged “increased
lighting” and the use of which would “increase its visual presence from public viewing
points on the water and would decrease the presence of wildlife available for viewing from
those waters.” *Id., at page 7, lines 14-16.* Appellants’ closing brief alleges that Ms.
Buffum’s testimony included statements asserting how the “increased visual impacts of the
structure on the shoreline and decreased wildlife would harm Ms. Buffum’s aesthetic and
recreational enjoyment in and around the False Bay Preserve”; that the impacts “will be
added to impacts that have already occurred” by tree removal that occurred on another
portion of the applicant’s property, located further to the south; that impacts “to Ms.
Buffum’s recreational and aesthetic interests would be redressed by reversal of the permit
and construction of the new residence at least 50 feet from a screened shoreline or 100 feet
from an unscreened shoreline.” *Id., at page 7, lines 17-23.*

13 13. Even accepting all of Appellants’ characterizations of evidence as credible and
14 sincere, it does not support any finding that Ms. Buffum is or will be personally prejudiced

1 by the two challenged permits.

2 14. Under caselaw applying language found in the Land Use Petition Act, which
3 confers standing on petitioners who are “aggrieved” parties, which is substantially similar
4 to that used on the County Code, aggrieved person has standing to appeal), an allegedly
5 aggrieved person has standing to file a land use petition only if she shows that the land use
6 decision has prejudiced her or is likely to. RCW 36.70C.060(2)(a). To satisfy the prejudice
7 requirement, Washington courts require a petitioner must show that she would suffer injury
8 in fact as a result of the land use decision. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934,
9 52 P.3d 1 (2002).

10 15. To show an injury in fact, the petitioner must allege a “specific and perceptible”
11 harm. *Knight*, 173 Wn.2d at 341, quoting *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.
12 App. 816, 829, 965 P.2d 636 (1998). If the petitioner alleges a threatened rather than an
13 existing injury, she “must also show that the injury will be immediate, concrete and
14 specific; a conjectural or hypothetical injury will not confer standing.” *Suquamish*, 92 Wn.
15 App. at 829 (internal quotation marks omitted), quoting *Harris v. Pierce County*, 84 Wn.
16 App. 222, 231, 928 P.2d 1111 (1996).

17 16. In this appeal, none of Ms. Buffum’s concerns about increased lighting, decreases in
18 the presence of wildlife, were supported by any expert analysis or credible principle of
19 causation. Homes throughout San Juan County are allowed to have lights, within and
20 around the structure. The proposed cabin at issue in this matter was not shown to be
21 anything more than a regular structure, not particularly different that other similarly-sized,
22 relatively small residential structures that are located on hundreds of parcels through the
23 island and the county. The testimony of a single individual is insufficient to establish that a
24 new, relatively small cabin, should be the assumed “cause” or “source” of adverse lighting
25 impacts or others that will result in a decrease in the presence of wildlife in the area.

26 17. Aesthetic preferences are always a matter of taste, and taste is not a constant,
readily-quantifiable yardstick to use when determining if a building permit application
meets the criteria for approval of such ministerial matters. Tastes and aesthetic preferences
change over time. Any trip along the shorelines around San Juan County will illustrate how
architectural styles and customer-tastes have changed through the years, on any number of
physical aspects that can be viewed from the water looking along the shorelines and up into
properties that can be seen from below, including without limitation, glass reflectivity, the
tint of glass, paint colors, exterior siding, roofing materials, metal vs. wood columns,
geodesic domes, yurts, log cabins, McMansions, longhouses, shed roof structures, A-frame
structures, and many one-of-a-kind ‘statement’ homes. At any given point in time, an
individual floating along the shores of San Juan County might have a ‘preferred shoreline
aesthetic’ that disfavors a structural feature selected by some shoreline property owner.
Such matters of taste cannot and do not serve as a basis to achieve “aggrieved party” status
in a permit appeal, challenging some aspect of an applicant’s project, which conforms to all

1 applicable County building and design codes. None of Ms. Buffum's asserted concerns rise
2 to the level to establish any bona fide injury in fact.

3 18. In previous LUPA cases, applying the "aggrieved" person standard, the facts in such
4 cases convincingly establish how the facts in this case are far below those needed to
5 achieve standing to appeal the challenged permits. In the Washington Court of Appeals
6 decision in *Suquamish*, there was evidence that Indian tribal members, one of whom lived
7 150 feet from the proposed project and another whose property would be surrounded on
8 three sides by the proposed project, would be affected by the large predicted increase in
9 traffic. This evidence was held sufficient to establish injury in fact. *Suquamish*, 92 Wn.
10 App. at 831. In another case, a petitioner owned land 1,300 feet away from the proposed
11 subdivisions and alleged that the development's use of an already-overdrawn aquifer would
12 adversely affect her ability to exercise her senior water rights. *Knight*, 173 Wn.2d at 342-
13 43. These allegations were held sufficient to establish injury in fact. *Knight*, 173 Wn.2d at
14 343. In another case, a petitioner testified that his 60-acre property adjacent to the proposed
15 project would be damaged by storm water runoff from the proposed project site. This too
16 was held sufficient to establish injury in fact. *Anderson v. Pierce County*, 86 Wn. App.
17 290, 300, 936 P.2d 432 (1997).

18 19. In contrast, as the appellants note in their briefing papers, in *Nykreim*, four married
19 couples who owned property upstream from the property at issue alleged that their sole
20 interest in the matter was to preserve zoning protections in their district. Unaccompanied
21 by other allegations alleging specific injuries to petitioners or their properties, this interest
22 was too abstract to confer standing. *Nykreim*, 146 Wn.2d at 935. To have standing, a
23 petitioner's interest "must be more than simply the abstract interest of the general public in
24 having others comply with the law." *Nykreim*, 146 Wn.2d at 935.

25 20. Appellants argue that their interests are greater than just having others comply with
26 the law. But, a 2016 Court of Appeals decision involved abstract allegations of presumed
27 harm and unsupported allegations of speculative impacts attributed to a challenged local
28 government decision, somewhat similar to those at issue in this appeal. See *Thomson v.*
29 *Mercer Island*, 193 Wn. App. 653, 375 P.3d 681 (Div. I, 2016).

30 21. In the Mercer Island case, a LUPA petitioner asserted that the creation of a new plat
31 as part of a challenged short plat approval violated the city's code and comprehensive plan
32 for land use, as well as Washington law. Mr. Thompson's land use petition identified 11
33 legal errors surrounding the creation and approval of the challenged Tract X, but it did not
34 allege any specific injury to Thompson or his property. His sole interest was trying to
35 enforce zoning protections in his neighborhood. His abstract interest in having others
36 comply with the law was not enough to confer standing. See *Nykreim*, 146 Wn.2d at 935.
37 Nevertheless, like the appellants in this matter, Mr. Thompson argued that the court must
38 assume his allegations of legal error were true and "presume" harm to adjacent property.
39 Like the appellants herein, he argued that the challenged application violated principles in

1 the local government's Code that promote air, light, open space, and consistent bulk and
2 scale, among other things. Like the appellants in this matter, Mr. Thompson speculated that
3 the "ultimate result" of the challenged permit approval (a short plat) would create a
4 negative effect on open space, air, light, comfort, and aesthetics. The Court rejected such
5 arguments, because there was, and remains, no legal authority allowing a court to presume
6 harm. Even though the short plat would result in some physical changes to the property, in
7 the Mercer Island case it was an increase in the amount of impervious surface area, the
8 petitioner failed to show any "immediate, concrete, and specific" injury. *Suquamish*, 92
9 Wn. App. at 829 (internal quotation marks omitted), quoting *Harris*, 84 Wn. App. at 231.
10 Because Thompson failed to show that the creation of Tract X prejudiced him, or is likely
11 to, he lacked standing to bring a land use petition.

12 22. In this appeal, even if one accepts all of the appellants general allegations as true,
13 and accepts the fact that the old cabin will be replaced with a new structure that is still
14 relatively small, but larger than the existing cabin, Ms. Buffum – as the sole witness and
15 source of evidence to support the instant appeal – failed to show any immediate, concrete,
16 and specific injury that would result from the challenged permits. While the appellants
17 seek to distinguish their allegations from those that Washington Courts have consistently
18 deemed too general to support status as an "aggrieved party", in substance, their personal
19 statements made without any authoritative, credible support are insufficient to find that
20 additional light and reductions in wildlife in the area will result from approval of the two
21 challenged ministerial permits. Even worse, a self-proclaimed "preferred shoreline
22 aesthetic" is a matter of personal opinion, and nothing more. Anyone, absolutely anyone,
23 could achieve status as an "aggrieved party" and challenge a building permit if the County's
24 code was read to allow each person to declare their own personal taste as the standard that
25 must be met by all sorts of development projects throughout the County. That would be
26 contrary to the premise that building and demolition permits, like those involved in this
27 appeal, are ministerial permits that must be approved if an applicant meets relevant
28 requirements set forth in applicable codes and regulations. Building and demolition permits
29 are not subject to review and approval by random visitors who might drive by, or in this
30 case float by, a building site. There is absolutely zero authority for such insinuation or
31 argument. Quite the opposite is true – an applicant is entitled to a building permit as a
32 matter of right once the relevant ordinance provisions are met; issuance of a permit is a
33 purely ministerial act. *Mission Springs, Inc. v. City of Spokane*, 134 Wash.2d 947, 960, 954
34 P.2d 250 (1998).

35 23. In this matter, Ms. Buffum testified that she enjoys boating and kayaking throughout
36 the San Juans, and that she has a "preferred shoreline aesthetic". She explained that the
37 proposed new residential structure would affect her preferred aesthetic, generally because
38 the additional height and width of the replacement structure is larger than what she calls the
39 smaller 'commercial' residential structure that currently rests on the site. The appeal
40 generally asserts that the permits should be revoked because there is insufficient screening
41 from the water. Ms. Buffum speculated that future bulkheading/armoring/hardening

1 activities might occur at some point in the future, to protect the newer structure proposed
2 for the site. She testified that she believes there will be fewer fish, and impacts on wildlife
in the area, which fronts on the entrance area leading into False Bay.

3 24. On cross examination, Ms. Buffum conceded that she is not a licensed Geologist,
4 engineer or other sort of expert commonly used to address some of the issues raised by the
5 appellants in this appeal. Further, she noted just two occasions (one in September of 2017,
6 after the challenged permits were issued, and one at some point about 7 years ago) when
7 she kayaked in the area in front of the Honeywell's property (formerly the Mar Vista
property); and an unspecified number of times on a power boat or other watercraft. She
admits that she has never seen the property from upland, when it was the Mar Vista resort,
or under the Honeywell's ownership.

8 25. The appellants stipulated that they rely solely on the testimony and experiences of
9 Ms. Buffum, and not those of other members, to support their appeal. They did not offer
10 any expert reports or professional studies to support their appeal or rebut County staff
findings and determinations, or professional reports included in the application file.

11 26. Ex. GG is the Prosecutor's Office legal opinion referenced and relied upon by
12 County staff in connection with issuing the challenged permits and responding to the instant
appeal.

13 27. County witnesses provided testimony and evidence in support of the challenged
14 permits. They noted that the Staff Report explained their position regarding the "aesthetic
15 setback" issue; that the term 'screening' does not mean that you cannot see a structure at all
16 – in other words, there is no requirement that 'screening' must be 100% opaque, and fully
screen all views of the challenged structure from the water.

17 28. Part of the appeal involves questioning whether the old structure has been used as a
18 residence. Mr. Honeywell testified that some of his family members have stayed in the
19 cabin for visits over the last few years, since he has owned the property (2013). He noted
20 that the cabin is now used to store his sister-in-law's belongings, after she had a stroke.
21 Based on facts, evidence, and site visits regarding many matters handled by the undersigned
22 Examiner in San Juan County over the past several years, including this appeal, the
23 Examiner finds that there are many residential structures located throughout the County that
24 are unoccupied by owners or visitors for extensive periods of time. There is no evidence in
the record to establish that the Honeywell cabin has been used less or more than other,
similar older cabins located throughout the county. In fact, the record in this matter shows
that the cabin has, in fact, been used for residential purposes, including as a place for
visiting grandchildren, and to store personal belongings, like many houses do all over the
county. It has not been abandoned.

25 29. The written appeal raises 4 alleged errors to support Appellants' request that the two

1 permits should be rescinded. As discussed above, the record demonstrates that the
2 appellants do not have standing to pursue this appeal. In the interest of judicial economy,
3 recognizing that the matter may be subject to appeal before another forum, the parties
4 developed a complete record at the appeal hearing regarding the substantive issues raised in
5 the appeal. Rather than await any potential remand from a reviewing authority, this
6 decision addresses all of the substantive issues raised by the appellants in this matter. All
7 of those must fail, because the evidence supports the challenged permits and is not
8 sufficient to meet appellants' burden of proof. Each of the specific grounds for appeal are
9 addressed in the Staff Report.

10 30. Regarding appellants' first issue, generally regarding the Setback, from Ordinary High
11 Water Mark / Screening arguments – as noted in the Staff Report, the appeal fails to make
12 reference to all applicable county codes that must be considered in considering setbacks and
13 screening. The bottom line is, the challenged permit was issued in compliance with
14 applicable county codes, because screening requirements flow from the Ordinary High
15 Water Mark, not some point out in the navigable waters beyond the project site. Screening
16 is not required to be 100% opaque. Evidence in the record demonstrates that there is
17 screening, in the form of plant materials, trees, shrubs and the like, between the structure
18 and the OHWM. The Examiner's site visit provided an opportunity to see such screening
19 first hand. The appellants failed to establish that the County used an improper setback for
20 the new structure, or that screening requirements will not or cannot be satisfied.

21 31. Regarding appellants' second issue, generally regarding slope stability concerns –
22 appellants did not present any expert reports or other evidence that would support their
23 claim. To the contrary, Staff relied upon special mapping of the area which shows that the
24 site is a bedrock shoreline and not within any category for geologically hazardous areas that
25 would require additional geotechnical studies or reviews. *Staff Report, page 4; Testimony
26 of Ms. Shook.* Additional evidence supporting issuance of the challenged permits is
included in the record, including without limitation the explanation in the Staff Report at
page 4.

32. In their third issue, appellants assert that demolition of an old structure extinguishes
any right to maintain the structure in a non-conforming location, and that the new building
must meet current code provisions. Staff relied upon a long-standing legal opinion,
essentially stating the County's clear policy to allow demolition and replacement of non-
conforming structures located in shoreline areas. Ex. GG. They credibly explained County
interpretations and policies that are consistent with issuance of the challenged permits,
referenced in the Staff Report prepared for this appeal. Among the items that support the
challenged decision is the fact that the County has had this policy for a number of years,
and the County Commissioners never took action to reverse it. In fact, in the latest update
of the County's shoreline codes, the new code includes express language that specifically
authorizes replacement of nonconforming structures in a shoreline area. *Ex. KK, Ord. No.
01-2016, which includes newly updated shoreline regulations regarding replacement of*

1 *homes located within a non-conforming setback.*

2 33. Finally, as their fourth issue, appellants argue that cumulative impacts warrant
3 revocation or modification of the challenged permits. Appellants arguments and testimony
4 alleging cumulative impacts were not supported by credible or convincing evidence.
5 Instead, it was speculative, and based on an assumption that the property owner would later
6 undertake actions that violate various county codes, like improper tree-cutting, to reduce
7 screening. As the appellants and the applicant know all too well, violations of county codes
8 can be enforced through code compliance orders, which might include remediation and/or
9 substantial penalties. Speculation about slope stability, future loss of screening, future
10 problems caused by lighting, and the like are not sufficient to show any cumulative impacts
11 that would support revocation or modification of the two challenged permits.

12 34. The Staff Report includes a discussion and analysis of how the challenged permits
13 meet various code requirements. All statements of fact contained in the Staff Report are all
14 incorporated by reference herein as findings of fact by the Hearing Examiner supporting
15 this Decision.
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V. CONCLUSIONS OF LAW.

1. Based on testimony and evidence in the Record, including without limitation all findings set forth above, the Examiner concludes that the challenged demolition and building permits are fully supported by substantial and credible evidence. The permits were not issued by mistake. The decision to issue the permits was not clearly erroneous, but was instead a reasonable and accurate application of facts to the codes and long-standing County policies at issue.

2. The appellants failed to satisfy their burden of proof to prevail in this appeal.

3. The Examiner finds and concludes that the appellants do not have standing to obtain relief in this appeal. They did not submit written comments regarding the two applications at hand, and they failed to provide evidence sufficient to show that they are an aggrieved party. The Examiner does not have jurisdiction or equitable authority to consider appellants' arguments raised in this appeal that essentially seek to excuse their failure to submit written comments about the two ministerial permits addressed herein.

4. For the specific reasons articulated in the Director's Staff Report, and for the additional reasons set forth herein, all as thoroughly supported by the record established in this appeal, the two challenged permits, Demolition Permit No. BPDEMO-17-0003 and Building Permit No. BUILDG-17-0021, issued on or about July 26, 2017, should be and are each hereby affirmed in their entirety.

5. A basic rule of statutory construction is that a long-standing interpretation given a statute or ordinance by officials charged with its administration is highly persuasive with regard to legislative intent in enacting the statute or ordinance and, consequently, the meaning of the statute or ordinance."¹

6. A legislative body, including a County Commission, is presumed to be familiar with its prior enactments and official interpretations of same.² Second, courts accord deference to a Council's interpretation of its own enactments.³ And third, where a legislative body leaves an enactment unchanged in the face of a decision interpreting such enactment, courts can conclude that if the legislative body wanted to change terms of its enactment it would have expressly amended relevant language to do so rather than leave it unchanged.⁴

¹ 6 McQuillin Mun. Corp. § 20:45 (3d ed.)(citations omitted).
² *Leonard v. City of Bothell*, 87 Wash. 2d 847, 853 (1976); *State v. George*, 161 Wash. 2d 203, 211, 164 P.3d 506, 510 (2007); *State v. Ose*, 156 Wash. 2d 140, 148 (2005).
³ *Chinn v. City of Spokane*, 173 Wash. App. 89, 101 (Div. III, 2013).
⁴ *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.*, 118 Wash. 2d 488, 496-97 (1992).

1 7. In this matter, testimony established that it has long been the County's policy to
2 construe codes to allow replacement of non-conforming structures located in most shoreline
3 areas. *Testimony of Ms. Shook and Ms. Kuller.* County staff referenced a long-standing
4 legal opinion first issued in 2007 by the San Juan County Prosecutor's Office as support for
5 their position. *Ex. GG.* At the hearing, Ms. Shook explained how the County's Shoreline
6 codes were recently amended, and finally approved by the Department of Ecology, and how
the recent amendments essentially ratified and confirmed longstanding County policy, by
allowing replacement of most non-conforming structures that are located in a shoreline
area. *Testimony of Ms. Shook; Ex. KK.*

7 8. These facts weigh heavily against the appellants' arguments. They support the
8 challenged permits, as issuing the demolition permit and the building permit in this
9 situation is fully consistent with prior county interpretations and applications involving
similarly situated structures and proposals.

10 9. Washington case law is very clear that there is no view protection in common law;
11 nor are general views, from the open water into uplands above a shoreline, protected in
12 County Codes at issue in this appeal. See *Asche v. Bloomquist*, 132 Wn. App. 784, 133
13 P.3d 475, 2006 Wash. App. LEXIS 434 (Div. II, 2006). By analogy, if a neighbor does not
14 have a common law right in a view across their neighbor's property, it is stretching
credibility and good faith to argue that more general rights are conferred to protect public
views from open water up onto shoreline properties.

15 10. Additionally, the SJCC imposes height and size limitations on the construction of
16 residential structures, like the one involved in this appeal. Appellants assert that the new
17 structure will be too tall, and too large, and generally that it will somehow interfere with
18 their preferred aesthetic, and previous views up onto an older, smaller, shorter cabin on the
19 site. While not a perfect comparison, the Washington Supreme Court decision in *Durland*
20 *v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014), is persuasive authority on some
21 issues raised in this appeal. Durland argued that county building codes about the height and
22 size of a proposed garage on a neighboring property created a property interest because they
23 were intended to protect neighbors' views of the water. The Supreme Court rejected
Durland's arguments, because the SJCC does not contain mandatory language requiring the
county to consider neighbors' views of the water before issuing building permits for garage
construction. Similarly, the appellants in this matter directed attention to no county code
provisions that would essentially serve as a basis to consider their preferred aesthetic for
structures that can be viewed from the open water, which is far more remote than the claims
of a next-door neighbor.

24 11. Based on the record, the applicant may demolish the existing cabin and construct a
25 new structure within the same, non-conforming setback. The applicant is entitled to receive
their demolition permit and building permit as a matter of right because they demonstrated

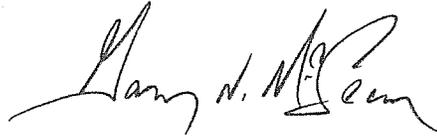
1 that relevant county code provisions were satisfied by their application materials. Again,
2 issuance of a building permit is a purely ministerial act. *Mission Springs, Inc. v. City of
Spokane*, 134 Wash.2d 947, 960, 954 P.2d 250 (1998).

3 12. Any legal conclusions or other statements made in previous or following sections of
4 this document that are deemed conclusions of law are hereby adopted as such, and are
5 incorporated herein by this reference.

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8 **VI. DECISION.**

9 Based on evidence included in the record for this appeal, appellants failed to meet
10 their burden of proof. Accordingly, the pending appeal is respectfully denied and the two
11 challenged permits are each affirmed.

12 ISSUED this 12th Day of March, 2018

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Gary N. McLean, Hearing Examiner

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Effective Date, Appeals, Valuation Notices

Hearing Examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology, pursuant to RCW 90.58.140, WAC 173-27-130 and/or SJCC 18.80.110.

Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County Council, unless the County council has adopted, by ordinance, written procedures for the discretionary review of such decisions. See Section 4.50 of the San Juan County Home Rule Charter and SJCC 2.22.100.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of any appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and confer with advisors of their choosing, possibly including a private attorney.

Affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation.