

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

In the Matter of the Appeal filed by )  
)  
AEROVIEW PROPERTY OWNERS )  
ASSOCIATION, )  
Appellants, )  
)  
of a Building Permit issued to install a )  
concrete slab for a propane storage )  
tank at 27 Aeroview Lane on Orcas )  
Island, issued by the )  
)  
SAN JUAN COUNTY DEPARTMENT OF )  
COMMUNITY DEVELOPMENT, )  
)  
Respondent, )  
)  
INTER-ISLAND PROPANE, )  
)  
Applicant )

**File No. APPEAL-19-0001**

**Re: Building Permit No. BUILDG-18-0246**

**DECISION**

S.J.C. DEPARTMENT OF  
NOV 13 2019  
COMMUNITY DEVELOPMENT

**I. SUMMARY OF DECISION.**

The issues raised in the written appeal statement are not supported by sufficient evidence or legal authority needed to satisfy the appellant's burden of proof. Instead, the Record includes a credible and preponderance of evidence, as well as controlling legal authority, to support issuance of the challenged building permit. Accordingly, the pending appeal must fail.

**II. APPLICABLE LAW.**

***Jurisdiction.***

In this matter, the appellants, Aeroview Property Owners Association, appeal

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1 Building Permit No. BUILDG-18-0246 issued by San Juan County on June 6, 2018 to install  
2 a concrete pad for a propane storage tank at 27 Aeroview Lane (TPN No. 271158011000) on  
3 Orcas Island. *Staff Report, page 1.* Building permits are addressed in Title 15 of the County  
4 Code. SJCC 2.22.100(A)(3) explains that the Hearing Examiner 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 decision in such matters. *Id.*

5 The Examiner's jurisdiction is further supported by SJCC 18.80.140(A)(1), which  
6 grants the Hearing Examiner specific authority to review and consider appeals of  
7 development permits, such as the building permit challenged in this appeal. Under SJCC  
8 18.20.040 "D", the term "Development Permit" is defined to include "a County permit or  
approval required for a project, including but not limited to building and other construction  
permits," among other things.

9 ***Standing.***

10 The appellants submitted comments while the application for the challenged permit  
11 was under review by County staff, and they have authority to enforce covenants of the sort  
12 they raise in this appeal. The Staff Report concedes that the appellants likely have standing  
13 both as parties who commented on the application and as a potentially aggrieved party, citing  
14 SJCC 18.80.140.C.3 and .4. The appellants had a full and fair opportunity through the appeal  
hearing process to develop a full evidentiary record seeking to support the issues raised in  
their appeal.

15 ***Open-Record Appeal.***

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

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

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

21 **III. RECORD.**

22 The Record for the matter includes all application materials, the written appeal  
23 statement submitted by the appellant, exhibits marked and numbered during the course of the  
24 public hearing, pre-hearing briefs, and post-hearing written closing arguments submitted by  
the appellant and the applicant. Copies of all materials in the record and a digital audio

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1 recording of the open-record hearing conducted for this appeal are maintained by the  
2 Community Development Department. The Record includes a Staff Report, dated August  
3 15, 2019, prepared to address issues raised in this appeal, which included the following 4  
4 exhibits, attached thereto:

5 Exhibit 1 – Aeroview Property Owners Association Appeal materials, including 5  
6 page letter, a copy of the challenged Building Permit, Aeroview plat materials,  
7 Aeroview comment letter submitted re: Inter-Island Building Permit application, and  
8 some Department records generated while considering the challenged permit;

9 Exhibit 2 – Conditional Use Permit (CUP) No. PCUP0017-0018, issued by San Juan  
10 County to Inter-Island Propane to install a bulk propane storage and distribution  
11 facility, in accord with Final Order and Judgment issued by Island County Superior  
12 Court Judge Alan R. Hancock granting appeal by Inter-Island and reversing previous  
13 Hearing Examiner’s decision to deny such CUP, subject to conditions. The exhibit  
14 includes the Staff Report and conditions of approval recommended for the Inter-  
15 Island CUP;

16 Exhibit 3 – Letter dated April 10, 2019, from Ms. Higginson, attorney for Inter-Island  
17 Propane, to the San Juan County Prosecutor’s Office (5-pages), explaining Inter-  
18 Island’s position that their Building Permit must be issued, and that issues already  
19 decided or raised during the CUP application process may not be raised again during  
20 the building permit process;

21 Exhibit 4 – Building Permit No. BUILDG-18-0246, a set of the approved Building  
22 Permit documents that are challenged in the instant appeal.

23 At the hearing, the appellants added the following exhibit to the record:

24 Exhibit H-1 – a Declaration of Restrictions for the Aeroview Subdivision.

25 During the appeal hearing, attorney Stephanie Johnson O’Day, represented the  
26 appellants; Erika Shook, Director of the Department of Community Development,  
represented the respondent Department; and attorney Carla J. Higginson, represented  
respondent/applicant Inter-Island Propane, LLC.

All witnesses who appeared at the appeal hearing offered testimony under oath, and  
party representatives were given wide latitude to question witnesses called by other parties.  
The following people provided sworn testimony during the public hearing:

1. Robert Waunch, for the appellants, developer of Aeroview subdivision;
2. Wayne Munich, Appellant, owner of a lot in the Aeroview subdivision;

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3. Richard Fant, President of the Aeroview Property Owners Association;
4. Erika Shook, Director of the Respondent-Department of Community Development;
5. John Geniuch, Applicant's design professional; and
6. Danny Galt, Applicant, one of the owners of Inter-Island Propane.

Upon consideration of all the evidence, testimony, codes, policies, regulations, and other information contained in the Record, the undersigned Examiner issues the following findings, conclusions and Decision.

#### IV. FINDINGS OF FACT.

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

2. In this appeal, the Aeroview Property Owners Association challenges Building Permit No. BUILDG-18-0246, issued on or about June 7, 2019 by the San Juan County Community Development Department to the applicant, Inter-Island Propane. There is no dispute that the appeal was timely, as it was filed on June 10, 2019. (*Staff Report; Ex. 1, appeal statement; Ex. 4, building permit file materials*).

3. The face of the building permit application describes the Project/Work as follows: "Install concrete slab for propane storage tank."

4. The concrete slab would be installed at 27 Aeroview Lane (TPN No. 271158011000), part of the Aeroview Subdivision in the far north portion of Orcas Island, just west of the Orcas Island airport.

5. There is no dispute that the appellant has standing to raise the instant appeal, because they submitted written comments while the challenged building permit application was under review by Department officials. (*SJCC 18.80.140.C; Ex. 1, appeal materials, specifically Inter-Island Propane building permit application comment letter dated Nov. 16, 2018 from the appellant's attorney, Ms. O'Day, to Ms. Shook, the Department Director*).

6. The appellant's written appeal statement argues that "San Juan County should not have issued a building permit to allow the installation of a 30,000-gallon outdoor storage tank" on the above-referenced property because it allegedly violates two restrictions on the face of the Aeroview Plat. Specifically, Aeroview alleges that plat restrictions prohibit outdoor storage on the Inter-Island property, and/or mandate that "any storage tank on the subject property must be indoors and must have a residential appearance, at least on the Seaview Avenue side of the building." (*See Ex. 1, appeal materials, including appeal letter dated June 10, 2019, on page 3, Sec. III, Argument, 1<sup>st</sup> paragraph, and page 4, 2<sup>nd</sup> complete*

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1 paragraph; copies of Aeroview Subdivision as originally recorded, First Alteration to  
2 Aeroview Subdivision, and Second Alteration of Aeroview Subdivision, all of which include  
3 limitations on the property in question that read: "3. No outdoor storage other than as  
referenced elsewhere in this document" and "4. The building must have a residential  
appearance on the street side.").

4 7. The appeal statement makes no mention of any alleged error based on applicable  
5 County building or fire codes used for purposes of reviewing, issuing and/or conditioning  
building permits.

6 8. The appeal hearing for this matter was duly noticed and scheduled to occur on August  
7 28, 2019. Before the hearing, the applicant's attorney, Ms. Higginson, filed a Motion to  
8 Dismiss this appeal, alleging that the Examiner did not have jurisdiction to consider this  
9 matter. The appellant submitted a written response opposing the applicant's motion. At the  
10 beginning of the appeal hearing, the Examiner explained that relevant County codes expressly  
11 authorize and delegate authority to the County's Hearing Examiner to conduct hearings and  
12 issue decisions on appeals of development permits issued by the Department. Accordingly,  
13 the applicant's pre-hearing Motion was denied. (See previous section of this Decision  
14 addressing Jurisdiction, citing SJCC 2.22.100(A)(3) which explains that the Hearing  
15 Examiner shall conduct public hearings, prepare a record thereof, and enter findings of fact  
16 and conclusions based upon those facts, for appeals of matters arising pursuant to SJCC  
Title 15 (building and fire codes); and SJCC 18.80.140(A)(1), which grants the Hearing  
Examiner specific authority to review and consider appeals of development permits, such as  
the building permit challenged in this appeal. Under SJCC 18.20.040 "D", the term  
"Development Permit" is defined to include "a County permit or approval required for a  
project, including but not limited to building and other construction permits," among other  
things).

17 9. The appeal hearing moved forward as scheduled, and all parties were able to call  
18 witnesses and question those called by others. At the close of the hearing, counsel for the  
19 appellant and the applicant requested an opportunity to submit post-hearing briefs in lieu of  
making closing arguments. Those briefs were received and forwarded to the Examiner for  
consideration in reaching this Decision.

20 10. The building permit at issue in this appeal came about following a Conditional Use  
21 Permit hearing process handled by the County's previous hearing examiner, whose decision  
22 to deny such permit was appealed and subsequently reversed by Superior Court Judge Alan  
R. Hancock. That process spanned much of 2017-2018. (Staff Report, findings on page 2).

23 11. In the end, the Court ordered the County to issue a Conditional Use Permit (CUP) to  
24 Inter-Island Propane, LLC, to install a bulk propane storage and distribution facility on its  
property in Eastsound, Orcas Island, subject to conditions recommended in the Staff Report

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1 for the matter. (*Ex. 2, Judge Hancock's Order Reversing Hearing Examiner's Decision and*  
2 *Ordering Issuance of Conditional Use Permit, dated April 30, 2018*).

3 11. Under Washington Court Rules, the deadline for appealing most superior court  
4 decisions is thirty (30) days after the challenged ruling is issued. (*RAP 5.2*).

5 12. Instead of pursuing an appeal, on May 10, 2018, the Respondent Department of  
6 Community Development issued a CUP to Inter-Island as ordered by Judge Hancock's ruling.  
7 (*Staff Report, page 2, finding no. 8; Ex. 2, copy of May 10, 2018 letter from DCD Director*  
8 *Ms. Shook to the applicant [Mr. Galt and Mr. Lawson for Inter-Island], serving as*  
9 *notification that CUP No. PCUP0017-0018 was issued subject to conditions in the staff*  
10 *report*). There is no dispute that the appellant did not seek judicial review of the CUP issued  
11 by the department on May 10, 2018, under LUPA or other means.

12 13. Testimony at the appeal hearing for this matter established that, shortly thereafter,  
13 some members of the Aeroview Property Owners Association – specifically Mr. Fant and  
14 Mr. Gourley – attended a public meeting of the San Juan County Council in May of 2018,  
15 after they learned of Judge Hancock's ruling to order issuance of the CUP for Inter-Island  
16 Propane's project. They asked the County Council to appeal the Superior Court ruling.  
17 (*Testimony of Mr. Fant*).

18 14. Minutes of the County Council meeting on May 21, 2018 confirm that Rick Fant and  
19 Eric Gourley each made comments to the Council on such date. The Examiner takes official  
20 notice of the publicly available audio/video recording of the Council's May 21, 2018 meeting,  
21 which confirms that Mr. Fant and Mr. Gourley both asked the County Council to appeal the  
22 Superior Court ruling in favor of issuing the CUP to Inter-Island. During their comments  
23 before the County Council, neither gentleman mentioned either of the two plat restrictions  
24 that they now allege to prohibit the propane tank in the Aeroview subdivision. (*Audio of SJ*  
25 *County Council meeting on 05/21/2018, specifically Mr. Fant's comments at 02:00-07:55,*  
26 *and Mr. Gourley's comments at 08:05-10:52*). A review of the County Council's official  
minutes for the entire month of May 2018 shows that the Council did not discuss or adopt  
any motion, resolution or other directive to undertake an appeal of the Superior Court  
decision in favor of the Inter-Island CUP. Despite their opportunity to do so, and after the  
appellant's public requests for an appeal, the County Council allowed Judge Hancock's ruling  
to stand unchallenged.

15 15. There is no dispute that no one, including the appellant in this matter (the Aeroview  
16 Property Owners Association) or any of its members as individuals, pursued a timely appeal  
17 of Judge Hancock's decision ordering issuance of Inter-Island's requested CUP.

18 16. In fact, Aeroview's written appeal statement expressly claims that "[t]his appeal has  
19 nothing to do with the CUP or the prior appeal thereof." (*Ex. 1, appeal materials, in appeal*

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1 *letter dated June 10, 2019, on page 4, 1<sup>st</sup> sentence of 1<sup>st</sup> full paragraph).* At the appeal  
2 hearing, appellant's counsel repeated this claim, explaining that Appellant's opposition to the  
3 challenged building permit is not about the CUP, but instead is about plat restrictions that  
4 should be read to prohibit outdoor storage, among other things, on the lot at issue.

5 17. Mr. Waunch, the developer who created the Aeroview plat, testified that the plat  
6 restrictions at issue in this appeal should be viewed as county-imposed restrictions. He  
7 believes that any large propane tank placed outdoors should be viewed as "outdoor storage"  
8 of the sort that the plat restrictions would prohibit. He did not point to any provision of the  
9 building code with which the challenged building permit conflicts. Another of Appellant's  
10 witnesses called at the hearing, Mr. Munich, expressly conceded that this appeal is not about  
11 the building code.

12 18. The appellant-association president, Mr. Fant, testified that he has long been fully  
13 aware of the plat restrictions raised in opposition to the challenged building permit, but that  
14 no one raised the plat restrictions earlier because he believed "it was so blindingly obvious"  
15 or something to this effect.

16 19. Ms. Shook testified the 30,000 gallon propane tank was specifically identified as the  
17 proposed structure/use during the CUP application/hearing process, and that the CUP was  
18 issued as directed by the Superior Court Judge following the earlier Inter-Island appeal.

19 20. Mr. Geniuch, the applicant's permit and design consultant, testified that a fence  
20 qualifies as a structure under applicable building code provisions. He noted that the CUP  
21 requires a fence to be constructed surrounding the propane tank site. So, because a fence will  
22 surround the propane tank site, he asserts that the tank should be considered "inside" a  
23 structure, i.e. inside the perimeter of a fence-structure.

24 21. Accepting all testimony at the appeal hearing by appellant and applicant witnesses as  
25 earnest and sincere attempts to support their respective positions, there is no genuine factual  
26 dispute that needs to be resolved to reach a decision on the pending building permit appeal.

27 22. As stated in the written appeal statement and by Appellant-representatives at the  
28 appeal hearing, this appeal does not involve any alleged error or mistake based on any  
29 building code provision. Instead, this appeal is solely based on claims that the two cited plat  
30 restrictions should be read to prohibit issuance of the challenged building permit. The  
31 applicant and the county did not challenge the existence of the two plat restrictions. The  
32 applicant alleges that this appeal should be denied or dismissed, because the appellant failed  
33 to raise the plat restriction issues during the CUP hearing process or in any subsequent appeal  
34 involving the CUP.

35 23. The applicant's closing argument includes the following, credible and accurate

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1 summary of the appellant's failure to appeal, and their failure to raise the plat restriction  
2 issues during the CUP hearing process:

3 Rick Fant testified that he and Eric Gourley, two of the directors named in the Articles of  
4 Incorporation for Aeroview, spoke to the county council on May 21, 2018 asking them to  
5 appeal the judge's decision which mandated the county to issue the requested CUP.  
6 Therefore, it is apparent that he, on behalf of Aeroview, was aware that the appeal of the CUP  
7 had been filed and that the appeal had been granted and the CUP issued. He also testified that  
8 he had participated in the CUP hearing, and the record contained in the staff report submitted  
9 by Erika Shook confirms this. Aeroview had actual knowledge of the proceedings and  
10 certainly had knowledge of the plat restrictions they now argue, yet they did not bring up the  
11 plat restrictions at the CUP hearing, or on appeal, did nothing and waited for over a year (well  
12 past the LUPA appeal period) before filing the present building permit appeal. They are  
13 estopped from now challenging the permit, particularly when it is plain from testimony and  
14 remarks by counsel that their only basis for doing so is that they wish to prohibit the 30,000  
15 gallon propane tank that has been legally permitted by the county.

16 *(Inter-Island Propane's Closing Argument, in the form of a letter dated Sept. 10, 2019, from  
17 counsel, Ms. Higginson, on page 3, at sec. 3).*

18 24. In the end, the appellant's failure to timely raise the plat restriction issues in any  
19 previous forum, despite ample opportunities to do so, serves as a basis to deny the instant  
20 appeal and affirm the challenged building permit.

21 25. The challenged building permit is for a concrete slab for a propane storage tank. *(See  
22 Building Permit Application, Description of Project/Work).* The propane tank was expressly  
23 approved as part of the CUP process. The only structure authorized in this building permit  
24 is the concrete pad itself.

25 26. The appellant must concede that it failed to direct attention to any building or life-  
26 safety code with which the challenged building permit might conflict.

27 27. The plat restrictions raised in this building permit appeal do not prohibit or include  
28 standards for concrete slab construction or installation.

29 28. The use to be served by the concrete slab was adjudicated and decided in the  
30 Conditional Use Permit process. The 30,000-gallon propane storage tank and required  
31 fencing for such use was approved through issuance of Conditional Use Permit No. PCUP00-  
32 17-0018. *(See Description of the Application, in Staff Report for CUP, at page 2, included  
33 in the Record as part of Ex. 2).*

34 29. The policy of finality in land use decisions has been cited several times by the

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1 Washington Supreme Court to hold that even improperly approved land use decisions will  
2 stand as valid where potential challenges are not raised in a timely manner. (See *Wenatchee*  
3 *Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000)(untimely petition  
4 under LUPA precluded collateral attack of the land use decision and rendered an improper  
5 approval valid; also see discussion of untimely challenges of land use decisions in *Community*  
6 *Treasures v. San Juan County*, 192 Wn.2d 47, 427 P.3d 647 (2018)). Similar considerations  
7 apply here.

8 30. In this appeal, even if one accepts the appellant's interpretation of the two plat  
9 restrictions to prohibit outdoor storage tanks like the 30,000 gallon propane tank specifically  
10 authorized in the CUP, and declines to accept the applicant's view that a fence enclosure  
11 renders the tank's placement as something other than "outdoor storage," the appellant did not  
12 and cannot offer evidence or legal authority to ignore or excuse their failure to appeal the  
13 CUP or the Superior Court ruling reversing the initial denial of the CUP. Assuming that the  
14 plat restrictions should have been read to prohibit the propane tank, the appellant's failure to  
15 assert such claims during the CUP process, any LUPA process, or Notice of Appeal regarding  
16 the Superior Court ruling, all serve to make such arguments untimely in this building permit  
17 appeal, rendering the potentially improper building permit approval valid.

18 31. This building permit appeal may not be used as a collateral attack on the CUP decision  
19 that authorized the 30,000-gallon propane tank. But, that is precisely what the substance of  
20 *this* building permit appeal is about. This appeal does not direct attention to any provision in  
21 County building or life safety codes that indicate the challenged building permit was issued  
22 in error. Instead, it challenges the building permit for a concrete slab by asserting that the  
23 item to be placed atop the slab should not be allowed in the Aeroview subdivision, based on  
24 terms of two plat restrictions that the same appellant or members of the appellant-association  
25 could have raised in the CUP hearing process, any LUPA appeal of such decision, and/or any  
26 appeal to the Court of Appeals of the Superior Court ruling that ordered issuance of the CUP  
authorizing placement of a 30,000 gallon propane tank on the applicant's property in the  
Aeroview subdivision.

32. Withholding evidence or not raising specific issues in prior land use processes –  
because one party believes their evidence or issue is or should be "blindingly obvious" to  
others, especially prior decision-makers – does not enhance the merits of this building permit  
appeal. In fact, Washington Court decisions indicate that the sequence of events that came  
before this building permit appeal was filed must render the appellant's plat restriction issues  
moot for purposes of deciding whether the challenged building permit should be affirmed.

32. Based on the record for this appeal, and the very limited issues raised in appellant's  
appeal, the Examiner finds and concludes that the same principles of finality in land use  
decisions which underpin the state's Land Use Petition Act and caselaw discussing  
development permits must apply in this building permit appeal. To do otherwise would allow

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1 for an end-run around a fully-informed party's responsibility to raise known-issues in a timely  
2 manner during previous land use permitting processes and/or appeals of such decisions.

3 33. The facts in this appeal are analogous to those summarized in the *Wenatchee*  
4 *Sportsmen* case. Here, the appellant is challenging the issuance of a building permit for a  
5 concrete slab, based on language in two plat restrictions that were not raised in a previous  
6 land use permit approval process (for a CUP) or any subsequent challenges of such  
7 conditional use permit. The appellant in this building permit appeal essentially argues that  
8 its failure to appeal issuance of the CUP or to raise the plat restriction issues in any previous  
9 land use permitting process or appeal thereof should be irrelevant, because, the appellant  
10 argues, building code provisions are just some of the applicable land use laws and regulations,  
11 like the plat restrictions, that the challenged building permit must satisfy in order to be  
12 approved.

13 34. In *Wenatchee Sportsman*, a party challenging issuance of a land use decision (there,  
14 a subdivision), argued that the validity of a rezone approved prior to consideration of the  
15 challenged subdivision and its failure to appeal such rezone when it was approved should be  
16 irrelevant to its claims because the zoning ordinance was only one of the applicable land use  
17 laws in effect. A subdivision which meets the minimum lot size requirement of the zoning  
18 ordinance, it argued, must also comply with other applicable laws. The subdivision-opponent  
19 claimed, and the trial court agreed, that the approved but challenged subdivision project  
20 constituted an impermissible instance of urban growth outside of the jurisdiction's adopted  
21 urban growth boundary, in violation of the Growth Management Act (the GMA). However,  
22 the Washington Supreme Court ruled that the issue of whether the zoning rules for the  
23 challenged-subdivision allowed for urban growth outside of an urban growth boundary  
24 should have been raised in a timely LUPA challenge to the *rezone*, not in the later challenge  
25 to the plat. The Supreme Court explained that at that time any court could have been asked  
26 to review the rezone decision, it could have considered whether the minimum density allowed  
by the zoning code was compatible with the urban growth boundary/GMA mandates. "If  
there is no challenge to the decision, the decision is valid, the statutory bar against untimely  
petitions must be given effect, and the issue of whether the zoning ordinance is compatible  
with the [urban growth boundary/GMA issues] is no longer reviewable." Instead, the court  
reasoned: "[t]he only issue that can be raised concerning the rezone is whether the plat  
application conforms to the zoning requirements. [The subdivision opponents] did not argue  
in the court below and does not argue here that the [challenged subdivision] project violates  
the County's [] zoning ordinance. Therefore, with respect to the issue of whether the  
[challenged subdivision approval] violates the GMA, we hold that the County did not err in  
its decision." (*Wenatchee Sportsmen*, 4 P.3<sup>rd</sup> at 129).

35. LUPA's stated purpose is "timely judicial review." RCW 36.70C.010. It establishes  
a uniform 21-day deadline for appealing the final decisions of local land use authorities and  
is intended to prevent parties from delaying judicial review at the conclusion of the local

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1 administrative process. As the Washington Supreme Court interpreted and applied LUPA  
2 in *Wenatchee Sportsmen, Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002),  
3 and *Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194, 63  
4 P.3d 764 (2002), "once a party has had a chance to challenge a land use decision and exhaust  
5 all appropriate administrative remedies, a land use decision becomes unreviewable by the  
6 courts if not appealed to superior court within LUPA's specified timeline." (*Habitat Watch*  
7 *v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), citing *Wenatchee Sportsmen*, 141  
8 Wn.2d at 181 ("Because [LUPA] prevents a court from reviewing a petition that is untimely,  
9 approval of the rezone became valid once the opportunity to challenge it passed."); *Nykreim*,  
10 146 Wn.2d at 925, 940).

11 36. LUPA embodies the same idea expressed by Washington Courts in pre-LUPA  
12 decisions – that even illegal decisions must be challenged in a timely, appropriate  
13 manner. (See *Pierce v. King County*, 62 Wn.2d 324, 334, 382 P.2d 628 (1963) (holding that  
14 even though a county resolution constituted illegal spot zoning and was therefore void ab  
15 initio, the applicable limitations period "begins with acquisition of knowledge or with the  
16 occurrence of events from which notice ought to be inferred as a matter of law[,]” as cited  
17 and discussed in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005)).

18 37. The *Habitat Watch* case is another Washington Supreme Court decision that appears  
19 to be on point, or at least instructive in reaching a decision on this pending appeal of a building  
20 permit. There, the project opponents, known as “Habitat Watch,” sought to vacate a grading  
21 permit that was issued to facilitate development of a golf course use, which had been the  
22 subject of a Special Use Permit issued to allow the golf course. Here, the challenged building  
23 permit for a concrete slab is challenged, following issuance of a conditional use permit  
24 authorizing placement of a large propane gas tank.

25 38. In the *Habitat Watch* case, the grading permit LUPA challenge was dismissed on  
26 summary judgment because the trial court found that the grading permit was granted in  
accordance with applicable law and was therefore valid. Habitat Watch appealed the  
dismissal of its challenge to the grading permit on the sole ground that it was issued for an  
impermissible use. There, Habitat Watch argued that because there was no lawful  
establishment of a golf course use, the approval of the grading permit for golf course  
construction was precluded. The Washington Supreme Court rejected the project-opponent’s  
challenge by relying on its decision in *Wenatchee Sportsmen* to preclude consideration of an  
untimely challenge. Because *Wenatchee Sportsmen* held that a petitioner could not  
collaterally challenge the substance of a previous, un-appealed land use decision by way of a  
LUPA petition that challenged a subsequent permit approval when the period for challenging  
the initial land use decision had already passed, the same rule that applied  
in *Wenatchee Sportsmen* controlled the grading permit challenge presented in the *Habitat*  
*Watch* case. In challenging the grading permit, Habitat Watch actually (and exclusively)  
challenged the validity of a special use permit and its extensions. Because appeal of the

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1 special use permit and its extensions were time barred under LUPA, Habitat Watch could not  
2 collaterally attack them through its challenge to the grading permit. The Supreme Court  
3 affirmed the trial court's dismissal of collateral attacks on prior land use decisions attempted  
4 in Habitat Watch's grading permit appeal, and found the grading permit was valid. *Habitat*  
5 *Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005).

6 39. Here, there is no dispute – and appellant witnesses concede – that the appellant  
7 association was fully aware of language in the two plat restrictions before and during the  
8 conditional use permit process that resulted in issuance of the CUP authorizing the propane  
9 tank use on the applicant's property in the Aeroview plat. Their failure to appeal the CUP or  
10 the court's order directing issuance of such permit is fatal in this building permit appeal,  
11 which is solely based on assertions that the propane tank use/outdoor placement would be in  
12 conflict with two plat restrictions, not because the building permit for the concrete slab  
13 violates or failed to consider some applicable provision found in County building codes.

14 40. The County Council did not pursue an appeal of Judge Hancock's ruling in favor of  
15 the applicant's conditional use permit for a large propane tank. Where a legislative body is  
16 expressly asked to do something, or leaves an enactment unchanged in the face of a decision  
17 interpreting such enactment, courts conclude that if the legislative body wanted to change the  
18 situation, it would have taken action rather than leave it unchanged.<sup>1</sup>

19 41. The Examiner carefully considered appellant's legal arguments raised by its  
20 witnesses, its pre-hearing briefs, and its written closing argument. In the end, there are no  
21 facts or legal arguments to support a finding that the challenged determination by the  
22 Department was in error. Appellant's alleged errors and issues supporting their building  
23 permit appeal are nothing more than collateral attacks on the prior land use decision, the CUP,  
24 issued to authorize the applicant's propane tank on its property. Even if the plat restrictions  
25 should be read to prohibit the propane tank use of the applicant's property, that ship has  
26 sailed, and the building permit is valid as issued, because no one appealed the CUP, despite  
their opportunity to do so.

42. A credible, preponderance of evidence in the Record supports the challenged building  
permit for a concrete slab issued by the Department. The Examiner is not left with the  
impression that any mistake has occurred.

43. The appellant failed to satisfy its burden of proof. Accordingly, the appeal must be  
denied.

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<sup>1</sup> *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.*, 118 Wash. 2d 488, 496-97 (1992).

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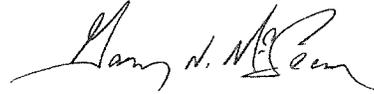
**V. CONCLUSIONS OF LAW.**

1. Based on testimony and evidence in the Record, including without limitation all findings set forth above, the Examiner concludes that the challenged building permit decision is supported by a credible, preponderance of evidence. The permit was not issued by mistake. The permit was not clearly erroneous, but was instead a reasonable and accurate application of relevant facts and building codes to the requested application for construction/installation of a concrete slab.
2. The appellant failed to satisfy its burden of proof to prevail in this appeal.
3. Based on the Record, all findings herein, and applicable caselaw, the Examiner finds and concludes that Building Permit No. BUILDG-18-0246, for construction/installation of a concrete slab, should be and is hereby affirmed in its entirety.
4. Any legal conclusions or other statements made in previous or following sections of this document that are deemed conclusions of law are hereby adopted as such and are incorporated herein by this reference.

**VI. DECISION.**

Based on evidence included in the record for this appeal, appellant failed to meet its burden of proof. Further, controlling legal authority mandates denial of this appeal, as it is based on issues that could have and should have been raised in the previous conditional use permit process and/or subsequent appeals thereof. Accordingly, the pending appeal is respectfully denied and the challenged building permit is affirmed.

ISSUED this 13<sup>th</sup> Day of November, 2019



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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.

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