

1 in all public hearings before the Examiner the same rules and regulations as those adopted by the
2 Board of Adjustment would be used. The Board of Adjustment no longer exists in San Juan
County.

- 3 10. During the second half of 2006 a challenge was filed by attorney Stephanie O'Day to a claim by
4 Friends of San Juan County (FOSJ) that the SEPA determination by the County was incorrectly
5 made. On behalf of her client, Ms. O'Day filed a motion to dismiss the FOSJ claim on the basis of
6 the HE Rule concerning "frivolous appeals". The decision was that that the HE Rules were not
legally adopted and could not be the basis for dismissal. At the December 5, 2007 hearing in this
7 case, Mr. Weissinger acknowledged that he was not aware of that previous decision.
- 8 11. Mr. Weissinger conceded in his motion *in limine* that this appeal was an open record appeal. He
9 argued that the open record provisions apply only to comments from the appellant and the County
and that the public in general is not allowed to participate.
- 10 12. The public hearing was closed December 5, 2007 except for certain written documentation to be
11 provided by CDPD by Wednesday, December 12, 2007. No members of the public attended the
12 December 5, 2007 hearing.
- 13 13. Subsequent to the December 5, 2007 hearing Ms. Stephanie O'Day contacted Ms. Thompson of
14 CDPD to request an opportunity to submit written material concerning the appellants' motion *in*
15 *limine*. Ms. Thompson contacted me. Because the request was to submit material regarding a
16 procedural matter, the contact did not constitute an *ex parte* communication, especially since Mr.
17 Weissinger was to be made aware of the submission forthwith. I indicated to Ms. Thompson that
Ms. O'Day would be allowed to submit the material. I should have more clearly noted that mere
18 submission did not necessarily guarantee consideration and would only apply to the procedural
issues regarding the motion *in limine*. Likewise, Mr. Weissinger was always going to be provided
an opportunity to comment on the O'Day submission prior to any consideration of it by me.
14. It was my hope that since Ms. O'Day was involved in the original case concerning the HE Rules
she might be able to add some new insight. While the O'Day letter of December 14, 2007 and Mr.
Weissinger's response of December 17, 2007 are a part of the record, they did not influence the
final decision of this case in any manner whatsoever.
15. At the December 5, 2007 hearing Mr. Weissinger made an excellent presentation of the factual
background and legal analysis supporting his position. During the hearing reference was made to
two memos from the Prosecuting Attorney's office. These two memos were originally attached to
the Thompson letter of July 16, 2007 but were not submitted to the record. During the
supplementation period prior to December 12, 2007, a memorandum dated June 1, 2007 was
submitted to the record.
16. I am sympathetic to the time, expense and frustration suffered by Mr. and Mrs. Swirtz in their
attempt to get an answer. The previous evidence will not need to be repeated at the next hearing. I
am likewise concerned that the public did not receive proper notice as set forth in the Conclusions
of Law. Allowing a hearing with improper notice would only maintain the current uncertainty
suffered by Mr. and Mrs. Swirtz.
17. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the issues properly presented in the

1 appeal.

- 2 2. On July 14, 2002 San Juan County adopted Ordinance 11-2002. That ordinance added new
3 sections B, C, and D to SJCC 18.10.030. Administrator decisions of any kind were final unless
4 appealed to the Hearing Examiner pursuant to SJCC 18.80.140.
- 5 3. Under the provisions of SJCC 18.80.140(B)(8) the Hearing Examiner “has authority to conduct”
6 open record hearings of “administrative determination or interpretations” pursuant to SJCC
7 18.10.030. Under SJCC 18.80.140(C) only the Board of County Commissioners (now the County
8 Council) has the authority to hold a closed record hearing.
- 9 4. Under SJCC 18.80.140(F) notice of an appeal of an administrative determination shall be the same
10 as the notice provided by SJCC 18.80.030(C). SJCC 18.80.030 provides notice for public
11 hearings of permit applications. Section (A)(2) specifically allows public participation through
12 testimony or written comments or both. There is no suggestion in any ordinance that any
13 limitation on public comment is allowed.
- 14 5. Any previous distinction that might have existed between “permit hearings” and “administrative
15 hearings” is no longer valid under current County ordinances.
- 16 6. Appellants’ claim that the open record hearing should consist only of the appellants and the
17 County is not consistent with SJCC and Comprehensive Plan Policies that call for maximum
18 public participation at all levels.
7. The notice provided to property owners within 300 feet of the property was deficient because of
the appellants’ inclusion of the words, “no public comment will be allowed.”
8. Phone calls between staff and the Hearing Examiner concerning a request to submit argument on a
purely procedural matter does not constitute *ex parte* communication where appellants were
notified and had an opportunity to respond to the submission prior to decision making. In this case
the December 14, 2007 submission was of no consequence in the decision-making process.
9. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

This matter is remanded to CDPD for re-issuance of a correct Notice of Hearing.

DATED this _____ day of January, 2008.

Wm. H. NIELSEN, Hearing Examiner

Appeal

Any appeal of this decision shall be to Superior Court pursuant to the Land Use Petition Act, Chapter 36.70 RCW, within 21 days of the issuance of the decision. See Home Rule Charter, Section 3.70.

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