

**SAN JUAN COUNTY
HEARING EXAMINER**

ADMINISTRATIVE APPEAL – ON REMAND

Appellants: Michael Durland, Kathleen Fennell,
Deer Harbor Boatworks

Appellant Attorney: Dennis Reynolds
200 Winslow Way W. Suite 380
Bainbridge Island, WA 98110

Applicant/Property Owner: Wes Heinmiller and Alan Stameisen

Applicant Attorney: Mimi Wagner
425 B. Caines St.
Friday Harbor, WA 98250

S.J.C. COMMUNITY

MAR 16 2015

File No.: PAPL00-09-0004

DEVELOPMENT & PLANNING

Request: Appeal of Building Permit, ADU and Change of Use

Parcel No: 260724011

Location: 117 Legend Lane, Deer Harbor, Orcas Island

Comprehensive Plan Designation: Deer Harbor Hamlet Residential

Shoreline Designation: Rural

Hearing: None.

Decision: Appeal denied on all counts, provided that revisions to interior living space are made and applicant submits ADU certificate required by SJCC 18.50.020(G).

1 County Code maximum area limitations on the interior living space of accessory dwelling units
2 include storage areas that are less than five feet in height contrary to the determination made
3 otherwise in the 2010 examiner decision.

4 On remand it is determined that there was no setback violation when the subject building was
5 constructed in 1981. A 1973 County regulation exempted all Class J structures, which included
6 barns, from the County's building code ordinance, which included the ten foot side-yard setback.
7 Since the barn was lawfully constructed in 1981, there is no question that it now qualifies as a
8 valid nonconforming structure and that the permits issued in 2009 were all validly issued so long
9 as the changes proposed in those permits complied with applicable law in 2009.

10 Under the Court of Appeals interpretation of maximum allowable living space for ADUs, the 2009
11 permits did exceed the maximum allowable space. The applicants remedied this noncompliance
12 issue by reducing the amount of interior living space to the amount required under the Court of
13 Appeals interpretation. This decision requires the amount to be reduced as proposed by the
14 applicants as a condition of denying the appeals.

15 Exhibits

- 16 1. Letter of appeal
- 17 2. Compliance Plan
- 18 3. Supplemental Agreed Compliance Plan
- 19 4. 5/3/10 emails regarding scheduling
- 20 5. Weissinger Memo 5/3/10
- 21 6. Durland Notebook
- 22 6-0 1990 Survey
- 23 6-1 7/22/09 09APL006 Staff Report
- 24 6-2 5/29/90 letter to John Thalacker
- 25 6-3 Affidavit of Carla Rieg
- 26 6-4 7/31/08 Email from Jon Cain to Michael Durland
- 6-5 Photos looking west
- 6-6 1995 Aerial Photo
- 6-7 2007(?) Aerial Photo
- 6-8 Building permit for garage
- 6-9(a) Site plan
- 6-9(b) Code checklist
- 6-9(c) 1981 building plan
- 6-10 1998 Building permit
- 6-10(a) 1998 Modular permit application
- 6-10(b) 1998 Building and mechanical permit
- 6-10(c) 1998 Building permit, inspector copy
- 6-10(d) 1998 Water availability certificate
- 6-11 9/12/00 letter from Fay Chaffee

- 1 6-11(a) 2000 Building permit
 - 2 6-11(b) 2000 Building permit application
 - 3 6-11(c) 2000 Building permit – garage
 - 4 6-11(d) 2000 Permit fee worksheet
 - 5 6-12(a) 2008 Building permit
 - 6 6-12(b) 2009 Building permit
 - 7 6-12(c) 2009 Permit receipt
 - 8 6-13 IRC R305 (2006)
 - 9 6-14 IRC Section 1009 (2006)
 - 10 6-15 Innovations for Living – Cathedral Ceiling insulation specifications
 - 11 6-16 SJCC 18.40.240
 - 12 6-17 SJCC 18.20.120 living area definition
 - 13 6-18 Ordinance No. 26-2007
 - 14 6-19 Eastsound Subarea Plan roof standards
 - 15 6-20 6/8/09 Letter from Ron Hendrickson
 - 16 6-21 Site plan for Heinmiller modular home permit application
 - 17 6-22 Site plan for change of use permit
 - 18 6-23 A-4, building plans for change of use permit dated 9/23/09
 - 19 7. Email from Rosanna O'Donnell to Lee McEnery, 10/08/07
 - 20 8. Aerial photo obtained by Heinmiller when home was purchased in 1995
(unknown date, but taken after 1981)
 - 21 9. Photograph of deck and persons working on ADU (taken in late 1990's)
 - 22 10. Photograph of inside of ADU (taken in late 1990's)
 - 23 11. Photograph of kitchen and bathroom (taken in late 1990's)
 - 24 12. Photograph of exterior of boat barn and adjoining Durland property
 - 25 13. Photograph of exterior of boat barn (taken in late 1990's)
 - 26 14. Photograph of boundary between Durland and Heinmiller properties
 - 15. Photograph of boundary between Durland and Heinmiller properties
 - 16. Photograph from boat launch ramp of ADU
 - 17. Texmo building plans dated 10/8/81
 - 18. ADU floor area plans
 - 19. Cross Section of ADU
 - 20. Gable Roof diagram
 - 21. Shed Roof diagram
 - 22. Hip Roof diagram
 - 23. Site plan prepared by Bonnie Ward
 - 24. SJ Resolution 224-1975
 - 25. 6/18/08 Email from Renee Belaveau
 - 26. SJ Resolution 58-1977
- Reconsideration Exhibits:
- R1 Ex. 18 with revisions proposed by applicant to comply with Court of Appeals

- 1 ruling on floor space requirements. Also included are building official
2 handwritten calculations on square feet using Ex. 18.
- 3 R2 9/25/14 Applicant Motion for Prehearing Conference and Order.
4 R3 10/29/14 Staff Report and attachments excluding Attachment 4 e-mail from Jon
5 Cain to Rene Beliveau, Attachment 5 email from Jon Cain to Rene Beliveau,
6 attachment 6 letter from Rene Beliveau to Wes Heinmiller and attachment 10.
7 R4 10/30/14 Appellant Prehearing Brief excluding attachments A-1 through A-4 as
8 well as an references to those attachments in the brief.
9 R5 10/30/14 Applicant Prehearing brief including attachments.
10 R6 11/3/14 Applicant Response to Appellant 10/30/14 prehearing brief
11 R7 11/3/14 Appellant Response to Applicant Prehearing Brief excluding attachments
12 A-1 and A-2 and any references to those attachments in the brief
13 R8 11/4/14 Appellant Amended Response to Applicant Prehearing Brief excluding
14 attachments A-1 and -2 and any references to those attachments in the brief.
15 R9 11/5/14 Appellant Reply re 10/30/14 Appellant Prehearing Brief.
16 R10 11/5/14 Applicant Reply Brief re 10/30/14 Applicant Prehearing Brief
17 R11 11/5/14 Prehearing Order I
18 R12 11/7/14 Applicant Brief Regarding County Deviation from Building Code
19 R13 11/10/14 Amended Staff Report to Hearing Examiner
20 R14 11/10/14 Appellant Brief re Setback Variance Issue
21 R15 1981 San Juan County Comprehensive Plan
22 R16 1976 San Juan County Shoreline Master Program
23 R17 Transcript of Original Examiner Appeal Hearing (commencing May 6, 2010)
24 R18 6/10/87 Board of Adjustment Findings and Decision, 18-SJ-86 and 15-CU-86
25 R19 9/10/86 Board of Adjustment Findings and Decision, 18-SJ-86 and 15-CU-86
26 R20 1/29/15 Applicant Motion to Supplement with P. 7 revision submitted 2/2/15
excluding references to Geniuch supplemental report
R21 2/5/15 Appellant Opposition to Motion to Supplement excluding declaration and
references to declaration.
R22 2/6/15 San Juan County Response to Motion to Supplement excluding
attachments and references to attachments
R23 All email correspondence between the parties and the hearing examiner regarding
this appeal, excluding attachments (which are admitted separately when found
admissible).
R24 11/7/14 Staff Report from John Geniuch
R25 2/12/15 Applicant Reply re New Evidence excluding references to attachments to
2/6/16 County Response

Findings of Fact

Procedural:

1. Appellants. The appellants are Michael Durland, Kathleen Fennell; and Deer Harbor Boatworks, collectively referenced as “appellant”.
2. Property Owners. Wes Heinmiller and Alan Stameisen.
3. Hearing. The Examiner held a hearing on the appeal on May 6, 2010, in the San Juan County Council meeting chambers in Friday Harbor. The record was left open through May 12, 2010, for any prior Hearing Examiner decisions on living space. The applicant had until May 17, 2010 to respond. The parties subsequently requested that the Examiner not issue a decision pending an attempt at resolving the appeal. On June 17, 2010, they advised that they had not been able to reach agreement and requested the Examiner to issue a decision. The examiner decision resulting from the 2010 hearing was subsequently appealed to the Washington State Court of Appeals. The Court of Appeals remanded the examiner decision for “further proceedings”. *Durland v. San Juan County*, 174 Wn. App. 1, 26 (2012).

A prehearing conference for the remand hearing was held on October 15, 2014 at 1:00 pm by phone conference. A closed record hearing on the remand was held on November 12, 2015. The record was left open in order to provide the applicant an opportunity to investigate potential new evidence regarding a 1987 variance decision referenced by the appellant that may have recognized the boundary line agreement between referenced in the compliance plans as substituting for the ten foot side yard requirement. The applicants were given until January 30, 2015 to investigate this evidence because the county records were stored in another state and would take several weeks to retrieve. In the meantime the San Juan County building official submitted a supplemental staff report asserting the building department had erroneously concluded that a building permit had been issued for the barn in 1981 and that in fact no permit was ever issued. Instead of requesting for admission of evidence regarding the 1987 variance decision, on January 29, 2015 the applicant made a motion to supplement the record with the building official’s supplemental report. The parties then provided comment on the exhibit list for the decision. Email correspondence between the parties regarding remand issues ended on March 15, 2015, which is considered the close of the closed record appeal hearing.

Substantive:

4. Permitting History. The appeal concerns the conversion of a barn into an ADU. The barn was built in 1981. The building plans for the barn structure depicted the barn as ten feet from the side property line shared with the Durland property. In 1990 the Heinmiller and Durland properties was surveyed and it was discovered that the barn was only 1.4 feet from the side property line. As a result, the adjoining property owners executed a “Boundary Line Agreement and Easement”, Ex. 5, attached Ex. F, hereinafter referred to as the “boundary line agreement”. The boundary line agreement prevented the owner of the Durland property from building within

1 twenty feet of the barn.

2 Several years after the boundary line agreement was executed, a portion of the barn was converted
3 to an ADU without any building permits. In 2008 the County was made aware that the ADU had
4 been constructed without required building plans or compliance with shoreline regulations. The
5 County issued a Notice of Correction in 2008. This resulted in an Agreed Compliance Plan dated
6 April 25, 2008 ("Compliance Plan"). The Compliance Plan required the acquisition of shoreline
7 permits. The Compliance Plan also recognized the boundary line agreement as bringing the barn
8 into conformance with the ten-foot side-yard setback that applied to the barn when constructed in
9 1981. Subsequent to execution of the Compliance Plan, the County executed a Supplemental
10 Agreed Compliance Plan, which concluded that shoreline permits were not necessary if the height
11 of the barn was reduced to sixteen feet and other actions were taken. The Compliance Plan and
12 Supplemental Agreed Compliance Plan were both signed by Mr. Heinmiller and Mr. Stameisen.

13 Mr. Durland filed an administrative appeal of the Supplemental Agreed Compliance Plan. The San
14 Juan County Hearing Examiner dismissed the appeal as untimely. As required by the Compliance
15 Plans, Heinmiller and Mr. Stameisen applied for an after-the-fact building permit, a change-of-use
16 permit, and an ADU permit for the ADU constructed several years earlier. San Juan County
17 approved the permits on November 23 and 24, 2009. Those permits are the subject of this appeal.

18 5. Appeal History and Basis. The Appellants filed the subject appeal on December 11, 2009.
19 The appeal challenges the validity of the permits identified as issued in November 23 and 24,
20 2009. The Appellants assert that the permits are invalid because the barn structure fails to comply
21 with numerous zoning and building code requirements. Each of the grounds of appeal are quoted
22 below in italics and assessed in corresponding Conclusions of Law. Mr. Durland testified that he
23 is injured by the code violations because the ADU violates side-yard setback requirements and is
24 too close to the boat manufacturing activities on his property. He believes that the occupants of the
25 ADU will complain about his activities because of their proximity to them.

26 6. Pertinent Characteristics of ADU and barn. As depicted in R1, the floor area for all habitable
portions of the ADU portion of the barn is less than 1,000 square feet. In 1981 the barn did not
include any firewalls. The barn was constructed 1.4 feet from the sideyard boundary line shared
with Mr. Durland.

Conclusions of Law

Procedural:

1. Authority of Hearing Examiner. Appeals of building permits are reviewed by the Hearing
Examiner, after conducting an open-record public hearing, pursuant to
SJCC18.80.140(B)(11).

- 1 2. Motions to Supplement the Record Denied. Both the applicant and appellant requested an
2 opportunity to supplement the record with additional evidence. The appellant's request was
3 denied during the closed record appeal and the appellant's request (made in Ex. R 20) is
denied by this Conclusion of Law.

4 Denial of the appellant's request for supplementation was already explained during the closed
5 record hearing, but the grounds for that denial bear repeating to prevent any
6 misunderstanding. The parties were not deprived of any opportunity to present evidence as a
7 result of the Court of Appeals decision. The only pertinent change to the legal landscape of
8 this case in the Court of Appeals ruling was that compliance plans are not final land use
9 decisions subject to the finality principles of the *Nykreim* line of cases. When the parties
10 made their case before the examiner in 2010 the law was unclear whether compliance plans
11 were considered final land use decisions. Accordingly it was incumbent upon them to cover
12 the contingency that the examiner or a reviewing court would ultimately conclude that a
13 compliance plan was not a final land use decision. Indeed, the appellant's entire appeal was
based upon the premise that a compliance plan was not a final land use decision. If the
appellant didn't take that position, there would have been no point in filing the appeal. The
fact that the examiner ruled that the compliance plans were final land use plans after the close
of the record and that this decision was reversed after the close of the record had absolutely
no bearing or influence on the evidence presented by the appellant before the close of the
hearing.

14 During the closed record review the appellant argued that new evidence regarding the
15 meaning and intent of the boundary line agreement should be admitted because the Court of
16 Appeals decision made the significance of the boundary line agreement more of an issue
17 without the finality of the compliance plan to immunize it from challenge. Of course, as
18 previously identified, when the appellant argued its appeal in 2010 it had to premise its case
19 on the position that the compliance plans were not final land use decisions. The appellants
20 were fully aware at that time that both the County and the applicant were relying upon the
21 boundary line agreement to justify the setback. The appellant at that time should have been
prepared and actually did argue that the boundary line agreement did not excuse compliance
with the ten foot side yard setback requirement. If there was additional evidence to support
that position, the appellant at that time either didn't think it was significant enough to present
or hadn't found it yet. The Court of Appeals decision did not in any way impair the
opportunity for the appellant to fully litigate the issue in 2010.

22 It should also be noted that the evidence proffered by the appellant on the meaning and intent
23 of the boundary line agreement was ultimately irrelevant anyway, as this decision rules in
24 Conclusion of Law No. 6 that the boundary line agreement did not excuse compliance with
25 any applicable side yard setback. The basis for Conclusion of Law No. 6 was that the agreed
26 upon setback was never approved under a revised or amended building permit application.
The intent of the agreement had no bearing on whether or not an amendment to the building
permit was approved.

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The appellant's request for supplementation was based upon a supplemental staff report issued by the San Juan County building official. In that report the building official asserted that the County had been in error in its statements that a building permit had been approved for the barn in 1981 and that the building permits referenced in the administrative record for the barn were actually a permit for a fire hall located on another parcel of property. After the appellant filed their motion to supplement the record with this document the County provided a responsive pleading documenting that the building official was in error in his supplemental report and that a building permit had in fact been issued for the barn in 1981. Given that the appellant's request for supplementation was solely based upon the discovery of new evidence five years after the close of the hearing, the conflicting evidence presented by the County on the issue and the case law and principles of finality that discourage re-opening records after they are a closed as demonstrated in the responsive briefing of the appellant, the appellant's motion for supplementation is denied.

Although the evidence in the supplemental staff report is denied, the building official did raise an important legal argument that has had some influence in this decision. As previously noted, the building official pointed out in his supplemental report that the applicant's barn was exempt from setback regulations when it was constructed in 1981. The building official based this interpretation upon San Juan County Resolutions No. 224-1974 and Resolution 58-1974. Although the examiner can likely take judicial notice of these adopted laws, they were admitted into the record in the initial hearing as Exhibits 24 and 26, respectively. Consequently, although the legal argument was not something the parties had an opportunity to address, the parties had access to the applicable law since the initial hearing and also had an opportunity to request argument once it was raised in the building official's supplemental report. It may have been useful to provide the parties with an opportunity to brief the building official's interpretation, but the remand had already been on-going for several months when the supplemental report was submitted. Ultimately, of course, the examiner could have come to the building official's interpretation on his own in reading through the exhibits after the record was closed, and at that point there would have been no obligation to give the parties an opportunity to brief the issue. It must be noted, however, that the conclusion of this decision that the barn was exempt from setback requirements was based solely upon the laws in effect when the barn was constructed and the findings of fact in this decision. None of the additional evidence in the building official's supplemental report had any bearing or influence on this conclusion.

Substantive:

3. Zoning Code and Shoreline Designation. The subject property is designated Deer Harbor Hamlet Residential in the San Juan County Comprehensive Plan and has a Shoreline Master Program designation of Rural.

1 4. Nonconforming Use Status of ADU. The barn structure is a valid nonconforming structure.
2 It was lawfully constructed in 1981 and it was exempt from all side yard setback requirements at
3 that time.

4 Throughout the initial hearing on this matter it was uncontested that the barn was subject to the ten
5 foot side yard requirement of San Juan County Resolution No. 224—1975. As a result of this
6 remand, it is determined that this understanding was incorrect. Resolution No. 58-1977 exempted
7 Class J structures from the Resolution No. 224-1975. Consequently, the building was “legal” (at
8 least so far as setback requirements apply) when it was constructed in 1981.

9 Section 9.01 of Resolution No. 58-1977 provided as follows:

10 *The commissioners of San Juan County find that regulation of Class J structures, ...provided for*
11 *in Resolution No. 224-1975 and the UBC unreasonably restricts the freedom of residents of San*
12 *Juan County to construct such structures as accessory buildings to private residences or for*
13 *agricultural purposes, that there is no pressing governmental interest served by the regulation of*
14 *structures in this category, and that it is unreasonable to require any person or corporation*
15 *constructing Class J structures, as defined in 1501 of the UBC to pay a permit fee as a condition*
16 *of constructing such structures as accessory buildings to private residences or for agricultural*
17 *purposes. No permit, fee or inspection shall be required for such structures.*

18 Section 9.02 of Resolution No. 58-1977 provided as follows:

19 *Provisions of Resolution No. 224-1975 and the UBC which are inconsistent with this section are*
20 *hereby repealed.*

21 Chapter 15 of the 1973 edition of the UBC, which applied at the time Resolution No. 224-1975
22 and was in effect through October 13, 1981, *see* San Juan County Resolution 179-1981, defined a
23 Class J occupancy to include garages, carports, sheds and agricultural buildings¹. The barn is an
24 agricultural building that qualifies as a Class J occupancy under this definition. Consequently, the
25 barn constructed in 1981 was subject to the exemption language of Section 9.01 of Resolution No.
26 58-1977.

27 The provisions quoted above clearly exempted the barn from building permit applications,
28 inspections and fees in 1981. Resolution No. 58-1977 isn't quite as direct about stating that Class
29 J structures are exempt from the setback requirements of Resolution No. 224-1975. In the absence
30 of language directly exempting Class J structures from Resolution No. 224-1975, Section 9.01 and
31 9.02 could be read as only exempting Class J structures from permits, inspections and permit fees.
32 However, Section No. 9.01 expressly states that Resolution No. 224-1975 unreasonably restricts
33 the freedom of San Juan County residents in constructing Class J structures and that there is no

34 ¹ The 1973 UBC and San Juan County Resolution 179-1981 were not admitted into the record as exhibits, but the
35 examiner takes judicial notice of them.

1 governmental interest in regulating Class J structures. These sentiments would have little meaning
2 if the only exemptions were from permit applications, investigations and fees. The County Council
3 intended that none of the restrictions of Resolution No. 224-1975 applied to Class J structures. It
4 is tempting to exclude fire protection restrictions from the exemption due to the governmental
interest in preventing fire hazards, but the language of Sections 9.01 and 9.02 provides no basis for
applying the exemption selectively.

5 Since there was no setback requirement when the barn was constructed in 1981 and no building
6 permit was required, whether or not the applicant actually acquired a building permit is irrelevant.
7 In either event, the barn was lawfully constructed. No building or setback standards applied at the
8 time the barn was built and there is nothing in the record to remotely suggest that anything else
about the barn was illegal.

9 5. Boundary Line Agreement. The boundary line agreement between Smith and the appellant,
10 Ex. F to Ex. 5, would not correct a setback violation² of Resolution No. 224-1975. The applicant
11 asserts that San Juan County used the boundary line agreement to approve a modification to the
12 setback requirements of Resolution No. 224-1975 employing Section 106 of the 1973 UBC.
13 Section 106 authorizes the building official to approve alternatives to building code requirements if
14 the alternative provides for equivalent protection. There is no record of any approval made
15 pursuant to Section 106. Indeed, the County and applicant were likely not even aware that the
16 property was closer than 10 feet to the side property line until 1990 when a survey was made. *See*
17 *Finding of Fact No. 4.* It is well taken that no written approval or documentation was required by
the UBC for such an alternative to be approved. The problem however, is that no revision or
amendment was ever approved to the building permit application that was approved in 1981. The
1981 building permit approval, if one was issued, only approved a barn that was proposed to be
located ten feet from the side yard property line. If the County intended to authorize a reduction in
the setback with a boundary line adjustment, that reduced setback should have been incorporated
into a revised or amended building permit approval.

18 6. Appeal Limited to Grounds Identified in Appeal Statement. The Examiner will limit appeal
19 issues to those identified in the Appellants' Notice of Appeal. SJCC 18.80.140(E)(5)(d) require the
20 Notice of Appeal to identify the grounds of appeal. Hearing Examiner Rule of Procedure IV(B)
21 identifies that the content requirements for appeal statements are jurisdictional. The content
requirement would be undermined if other issues are allowed to be considered. The appellant's
22 grounds for appeal are strictly limited to those identified in its appeal statement, Ex. 1³. The

23 ² This decision determines that there was no setback violation when the barn was constructed in 1981.
24 Consequently, the boundary line agreement is irrelevant to this final decision. However, in order to help prevent any
need for additional remand, the applicability of the boundary line agreement is addressed anyway in case a reviewing
court determines that there was a setback violation at the time.

25 ³ The appellant's statement of appeal fails to take advantage of a key protection for property owners adjoining
26 nonconforming uses and structures. The last paragraph of SJCC 18.40.310(F) arguably requires a conditional use
permit for the change in use proposed by the applicant from a barn to an ADU. Ultimately, the County's
nonconforming use provisions provide an equitable balance between the exercise of vested development rights for

1 grounds identified in the appeal statement are quoted below in italics and assessed with
2 corresponding conclusions of law.

3 1.1 *SJCC 18.100.030 F and 18.100.070 D prohibit issuance of a building permit or other*
4 *development permit for any parcel of land that has been developed in violation of local regulations.*
5 *The subject parcel has been developed in violation of local regulations and, therefore, the County*
6 *erred in issuing permits for additional development on the parcel.*

7 7. As determined in Conclusion of Law No. 4, the barn was lawfully constructed. It has not
8 been developed in violation of local regulations.

9 1.2 *The permits were issued for a change of use and physical modification to an existing,*
10 *but illegal, building.*

11 8. As determined in Conclusion of Law No. 4, the barn was lawfully constructed and is a valid
12 nonconforming structure. It is not an illegal building.

13 1.3 *The subject building was illegal from the day it was constructed. At the time of its*
14 *original construction, the County Code included a requirement that buildings be set back at least*
15 *ten feet from the property line. This building, though, was built less than two feet from the property*
16 *line. Because the building did not comply with the Code requirements in effect on the day it was*
17 *built, the building was illegal from the day it was built.*

18 9. As determined in Conclusion of Law No. 4, the barn was exempt from the 10 foot side yard
19 requirement by Section 9.01 of Resolution No. 58-1977.

20 1.4 *The building was illegal from the day it was built for a second reason. The building*
21 *plans submitted to the County depicted a building to be constructed ten feet from the property line.*
22 *Those were the building plans approved by the County. The builder violated not just the County*
23 *Code, but the terms of the building permit when the building was constructed less than ten feet from*
24 *the property line.*

25 11. The record is unclear as to whether a building permit was issued for barn in 1981⁴. Whether

26 nonconforming uses and ensuring that those rights are not exercised in a manner that adversely affects other property
owners. Since the appellant did not raise the conditional use permit as an appeal issue, there is no opportunity in this
case to mitigate against impacts that may arise from the proposed conversion.

⁴ Although the appellants submitted building permits into the 2010 appeal hearing evidencing numerous alterations
to the subject property, a building permit (if one was issued) for the 1981 construction of the barn was never
presented. The appellants did submit the building plans for the project, Ex. 6-9(c), but the existence of these plans
isn't that probative of the issuance of a building permit. Section 10 of Resolution No. 58-1977 authorized owners of
Class J structures to submit building plans for building department review, even when no building permit was
required. The person who constructed the 1981 barn may have just submitted the plans for building permit review in
order to ensure that the structure was safely built, to meet insurance requirements, etc.

1 or not a permit was issued, the inaccurate depiction of the side yard setback in the building plans
2 did not make the building illegal for nonconforming use purposes. If no building permit application
3 was approved for the proposal, the building would clearly not be illegal. As determined in
4 Conclusion of Law No. 4, no building permit was required for the barn in 1981. If a building permit
5 application was approved for the proposal, the barn would still be considered legal. As outlined in
6 the 2010 examiner final decision on this case, final land use decisions are immune from legal
7 challenge once their appeal periods have run, even if it turns out that the decision was not consistent
8 with applicable permitting criteria. The Court of Appeals reversed portions of the original final
9 decision because the appellate court believed that the final decision erroneously determined that
10 compliance plans qualify as final land use decisions. Contrary to the ambiguous status of
11 compliance plans, there is no question that building permits qualify as final land use decisions.
12 Consequently, if a building permit was approved for the barn in 1981, it cannot be legally
13 challenged now under the finality court opinions (hereinafter referred to as the “*Nykreim* line of
14 cases”) discussed in the original hearing examiner decision on this appeal.

15 The appellant’s position raises the additional issue that the finality cases of the original hearing
16 examiner decision do not apply to permits acquired by misrepresentation. This type of situation has
17 not been addressed by the *Nykreim* line of cases. However, given the strong policy considerations
18 underlying finality, it doesn’t appear likely that the courts would create an exception to the *Nykreim*
19 line of cases for misrepresentation absent a showing of intentional misrepresentation. It is hard to
20 believe that the courts would require the demolition or modification of buildings that may have
21 been built decades ago because of some newly discovered errors in building plans. Should those
22 buildings cause any significant harm to anyone, those impacts could be addressed through the
23 state’s nuisance laws. This case serves as a classic example of the difficulties involved in trying to
24 unravel permitting decisions made years in the past. The huge expense in resources, the
25 uncertainties in reviewing records decades old and the lack of any significant benefit to undergoing
26 such an investigation provide a compelling policy basis to only allow circumvention of finality for
intentional as opposed to negligent misrepresentation in the permitting process. In this case there is
no evidence that the building plans for the barn deliberately misrepresented the distance to
appellant’s property line. It’s fairly clear that this error didn’t become manifest to anyone until the
survey was done in 1990, as determined in Finding of Fact No. 4.

1.5 *The County Code clearly distinguishes between illegal buildings and non-conforming buildings. Illegal buildings are buildings that failed to comply with the Code requirements at the time they were constructed. SJCC 18.20.090. Non-conforming buildings are buildings that met Code requirements when they were constructed, but no longer meet Code requirements because the Code changed subsequently. SJCC 18.20.140. Understandably, the code treats illegal buildings differently than non-conforming buildings. Whereas, some modifications are allowed to a non-conforming building or use (SJCC 18.40.310), no permit may be issued for a parcel on which an illegal building sits (SJCC 18.100.030 F; 18.100.070 D).*

1.6 *Because the subject building was illegally built, and remains illegal today, the County*

1 *has no authority to issue any of the three permits that are challenged in this action. The permits*
2 *would allow the use of the building to be changed from a barn/storage facility to a residential*
3 *(ADU) facility. Because the Code unambiguously prohibits issuance of permits like these for an*
4 *illegal building, the Examiner should reverse the decision of the Department to issue the permits*
5 *and should vacate all of them.*

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12. As determined in Conclusion of Law No. 4, the barn qualifies as a valid nonconforming structure.

2.0 *SJCC 18.40.240 F.5, relating to Accessory Dwelling Units (ADUs), states, in part:*
“Any additions to an existing building shall not exceed the allowable lot coverage or encroach onto
setbacks. The size and design of the ADU shall conform to applicable standards in the building,
plumbing, electrical, mechanical, fire, health, and any other applicable codes.” Because the
building violates the Fire Code, Building Code, and Zoning Code requirements establishing a ten-
foot setback, the ADU permits were issued in violation of this Code section.

13. As determined in Conclusion of Law No. 4, no ten foot side yard setback applied to the barn when it was constructed in 1981.

3.0 *SJCC 18.50.330 B.13 limits the width of buildings in the shoreline to 50 percent of the*
shoreline frontage. The width of the buildings on the subject property exceed this limitation. This
provides an independent reason for finding violation of SJCC 18.40.240 F.5, SJCC 18.100.030 F
and 18.100.070 D. The subject permits, issued in violation of these Code sections, should be
vacated.

4.0 *SJCC 18.50.330 E.1 prohibits accessory structures which are not water-dependent*
from being located seaward of the most landward extent of the residence. The challenged permits
authorize construction on and use of an accessory building that violates this requirement, i.e., it is
located waterward of the residence.

14. SJCC 18.50.330(B)(13) and SJCC 18.50.330(E)(1) were adopted subsequent to the construction of the barn structure in 1981. SJCC 18.40.310(G) requires application of WAC 173-27-080 for nonconforming structures in shoreline areas. The proposed ADU conversion is consistent with WAC 173-27-080.

As to the proposed structural alterations, WAC 173-27-080(2) provides that nonconforming structures may be maintained, repaired, enlarged or expanded provided the alterations don't increase the degree of nonconformity. The proposed interior modifications do not increase the degree of nonconformity and so are authorized by WAC 173-27-080.

The change from storage use of the barn to dwelling use is not so clear under WAC 173-27-080. WAC 173-27-080(6) requires conditional use permits for a change from one nonconforming use to another. However, the barn storage and ADU use are both conforming – they're both authorized in

1 the Rural shoreline designation as well as the Deer Harbor Hamlet Residential zoning code
2 designation. The appellants apparently take the position that the barn and ADU use must be
3 construed as nonconforming uses because they are located waterward of the principal residence in
4 violation of SJCC 18.50.330(E)(1). However, such a use would not be considered nonconforming
5 in WAC 173-27-080(2). WAC 173-27-080(2) expressly states that “[s]tructures that were legally
6 established and are used for a conforming use but which are nonconforming with regard to
7 setbacks...may be maintained and repaired...” This language doesn’t characterize conforming uses
8 in structures that violate setback requirements as nonconforming uses. This is to be expected, since
9 there is no reason to conclude that a structural nonconformity renders all the uses within it
10 nonconforming.

11 The pertinent issue for the ADU conversion is: does WAC 173-27-080(2) authorize a change from a
12 conforming barn use to a conforming ADU use in a nonconforming structure. Unfortunately, WAC
13 173-27-080(2) doesn’t expressly address changes from one conforming use to another in
14 nonconforming structures. WAC 173-27-080(6) authorizes a change from one nonconforming use
15 to another nonconforming use with a conditional use permit. Obviously, a change from a
16 nonconforming use to another nonconforming use will generally have more adverse impact than a
17 change from one conforming use to another. If changes between nonconforming uses are
18 authorized, the intent must have been to authorize changes between conforming uses as well. WAC
19 173-27-080(2) can be read as authorizing these changes:

20 *Structures that were legally established and are used for a conforming use but which are*
21 *nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be*
22 *maintained and repaired and may be enlarged or expanded provided that said enlargement does*
23 *not increase the extent of nonconformity by further encroaching upon or extending into areas*
24 *where construction or use would not be allowed for new development or uses.*

25 Since changes between conforming structures are not addressed by WAC 173-27-080 and WAC
26 173-27-080(6) authorizes changes between nonconforming uses, the language above must be read as
contemplating that changes between conforming uses are authorized so long as all conditions are
met, i.e. the change does not increase the extent of nonconformity by expanding the building
footprint into areas where the use or development is prohibited. The replacement of the barn use
with ADU use does result in the ADU being located in an area where it would otherwise be
prohibited, but such an interpretation would result in a stricter treatment of conforming use changes
than nonconforming use changes. So long as the ADU conversion does not result in an expansion
of the building footprint into prohibited areas, WAC 173-27—080(2) should be read as authorizing
the conversion. Alternatively, the barn and the ADU could both be construed as the same type of
use, i.e. accessory residential use, such that the conversion simply wouldn’t be considered a change
in use. The simplicity of this interpretation is compelling, but it glosses over the fact that one type
of use is being replaced by another and that WAC 173-27-080 is silent as to how to address the
situation.

1 5.0 *SJCC 18.50.020 prohibits substantial development on shorelines without first*
2 *obtaining a shoreline substantial development permit. SJCC 18.50.330 E.4 requires a shoreline*
3 *conditional use permit for structures accessory to a residential structure. The applicants have*
4 *failed to obtain the requisite shoreline conditional use permit for this accessory structure. (The*
5 *permittees apparently claim they are exempt from shoreline permit requirements per 18.50.300 E.2,*
6 *which exempts “normal appurtenances” from permit requirements. But exemptions are to be*
7 *construed narrowly (SJCC 18.50.020 F) and the development here does not meet the criteria for*
8 *“normal appurtenances” specified in that section and, therefore, the requirement for a permit*
9 *remains in effect.) The County should not have issued the other permits in the absence of the*
10 *required shoreline permit. Moreover, the applicant has not submitted the required certificate when*
11 *a shoreline exemption for a residential appurtenance is claimed, as required by SJCC 18.50.020 G.*

12 15. The appeal issue above is unclear as to whether the appellant is claiming that shoreline
13 permits were required for construction of the 1981 barn under the 1976 San Juan County Shoreline
14 Master Program or a shoreline permit for the ADU modifications under the 1998 shoreline
15 regulations. Since the citations are to the 1998 ordinance, it is concluded that the appellants are
16 asserting that a shoreline permit should have been acquired for the ADU modifications⁵, which is
17 consistent with the briefing and arguments made by the parties.

18 The ADU conversion is clearly exempt from shoreline permit requirements. SJCC 18.50.020(G)
19 exempts ADUs from shoreline permit requirements, provided that the owner submits a certificate
20 that the structure will be constructed by the owner, lessee or contract purchaser for his or her use or
21 that of a family member or a person providing health care services to the family. The uncontested
22 evidence of the 2010 hearing is that the ADU was built for a family member of the property owner.
23 The certificate is also required as a condition of sustaining the appeal⁶. SJCC 18.50.330(E)(4) only
24 requires a shoreline conditional use permit for accessory uses when they don't qualify as normal
25 appurtenances. However, SJCC 18.50.020(G) defines ADUs as normal appurtenances when the
26 afore-mentioned certificate is provided. Consequently, no shoreline conditional use permit is
required either.

 6.0 *SJCC 18.40.240 F.1 provides that an ADU shall not exceed 1,000 square feet in living*
area. The ADU at issue here is larger than 1,000 square feet. Therefore, the permits were issued
illegally and should be vacated.

 16. As revised by the appellant during remand, the ADU has less than 1,000 square feet in living
area as required by SJCC 18.40.240(F)(1).

⁵ If the appellant was asserting a shoreline permit was required in 1981 for construction of the barn, that argument would be beyond the scope of the appeal because the appeal statement did not reference any violations of the 1976 shoreline master program.

⁶ It appears that the certificate was entered into the record during the hearing in 2010, however the examiner did not have access to that exhibit prior to issuing a timely decision.

1 In the final 2010 hearing examiner decision, it was determined that areas within the ADU that were
2 less than five feet in height did not qualify as living space. With the exclusion of these areas from
3 living space computations, the 2010 examiner decision determined that the living space was less
4 than 1,000 square feet in area. The Court of Appeals reversed the examiner on this point, holding
5 all areas within the interior building walls constituted living space, even if those areas were less
6 than five feet in height. Under this interpretation the ADU as proposed during the 2010 hearing
7 exceeded 1,000 square feet in building area. In order to remedy this problem, the applicant has
8 modified the interior building space as depicted in Ex. R1. As modified in Ex. R1, the ADU will
9 have less than 1,000 square feet of living space as required by SJCC 18.40.240(F)(1).

7.0 *The permits are invalid because they were issued for a structure that has a roof too flat to meet the minimum pitch requirements in the Deer Harbor Hamlet Plan.*

17. As noted in the current version of the Deer Harbor Hamlet Plan (adopted 2007), specific regulations for the Deer Harbor area were only first put together in 1999, which was well after the building was constructed in 1981. The pitch requirement referenced by the appellant in Ex. 6-18 was adopted in 2007. As a nonconforming structure, the subsequently enacted Deer Harbor roof pitch requirements do not apply.

DECISION

The appeal is upheld on the issue of living space (Appellant Issue 6.0, Ex. 1) and denied on all others. In order to achieve compliance with SJCC 18.40.240(F)(1), the applicant's building plans be revised to conform to the modifications proposed in Ex. R1, provided that staff may approve minor additional modifications as necessary to accommodate insulation requirements, provided further that the interior living space as interpreted by the Court of Appeals remains at or below 1,000 square feet. The appeal is also sustained on condition that the applicant submit a certificate as required by SJCC 18.50.020(G) that identifies that the ADU was constructed by the owner, lessee or contract purchaser of the subject property for his or her use or that of a family member or a person providing health care services to the family.

Dated this 15th day of March, 2015.


Phil A. Olbrechts

County of San Juan Hearing Examiner

1
2 **Effective Date, Appeal Right, and Valuation Notices**
3

4 Hearing examiner decisions become effective when mailed or such later date in accordance with
5 the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170.
6 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 SJCC
18.80.110.

7 This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter,
8 such decisions are not subject to administrative appeal to the San Juan County Council. See also,
SJCC 2.22.100

9 Depending on the subject matter, this decision may be appealable to the San Juan County Superior
10 Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines
11 and strict procedures for appeals and failure to timely comply with filing and service requirement
12 may result in dismissal of the 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
consult with a private attorney.

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