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**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Craftsman Corner LLC
P.O. Box 597
Eastsound, WA 98245

File No.: PCUP00-10-0011

Request: Conditional Use Permit

Parcel No: 271412007 and a portion of 271412013

Location: 208 Enchanted Forest Road
Eastsound

Summary of Proposal: Conditional Use Permit for commercial use

Land Use Designation: Service and Light Industrial; Orcas Island Overlay;
Conservancy Overlay

Hearing Date: March 3, 2011

Application Policies and Regulations: SJCC 18.80.100(D) et. seq.

Decision: Denied.

[S.J.C. COMMUNITY]

APR 19 2011

DEVELOPMENT & PLANNING

1 **BEFORE THE HEARING EXAMINER FOR THE COUNTY**
2 **OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

4 RE: Craftsman Corner LLC 5 6 Conditional Use Permit (PCUP00-10-0011)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
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8 **OVERVIEW**

9 The application is denied. Even though denied, it contains a mixed bag of rulings in
10 which everyone concerned, including the Applicant, benefits. The key points of the
 decision are as follows:

- 11 1. The primary and perhaps sole reason for denial is noncompliance with the airport
12 overlay district requirements. The application contains an alarming and highly
13 unusual number of deficiencies, both in design and information. However, all of
 these other issues could have been addressed by conditions of approval.
- 14 2. Under the airport overlay requirements the buildings on the Applicant's property
15 should have been located as far from the extended runway centerline of the Orcas
16 Airport as possible. This requirement no longer attaches to the existing buildings,
17 but does apply to the building subject to a pending building permit application. It
18 may not be possible to orient the proposed building space further west, but this
19 information was not submitted into the record. Compliance with this requirement
 could result in a major reconfiguration of the site plan. Consequently, compliance
 cannot be deferred to conditions of approval. The public should have the
 opportunity to comment on any major changes in site design.
- 20 3. This decision could have been much shorter by simply providing that it is denied
21 due to noncompliance with the extended runway centerline requirement. The
22 Examiner has provided guidance on other (not all) major issues raised in order to
23 provide some needed resolution to the numerous issues raised by this project.
24 However, since most of the issues addressed in this project are not necessary for
25 the final decision, it should be recognized that they can still be revisited in a
 reapplication or in other proceedings related to the project. By the same token,
 parties who disagree with the advisory determinations of this decision would not
 be bound to appeal them, since as "dicta" they have no preclusive effect.

1
2 4. If the Applicant chooses, he can reapply with a site configuration that complies
3 with the extended runway requirements. In addition to configuring the proposed
4 building as far from the extended runway centerline as possible, the Applicant
5 would have to demonstrate that adding any more additional building space to the
6 project site is consistent with airport overlay requirements. Given the already
7 existing number of people that are concentrated along the centerline by this
8 project, it may very well not be consistent to attract any more. Further, if the
Applicant reapplies he would have to remedy all of the deficiencies identified in
this decision. The Examiner will not be as open to deferring compliance to
conditions of approval when what is necessary for compliance is so clearly
identified in this decision.

9 5. A conditional use permit or site plan review is not required for the buildings that
10 have already acquired building permit approval. In the approval process of those
11 building permit applications, a determination was impliedly if not expressly made
12 that no conditional use/site plan approval was required. That decision cannot be
13 revisited in this conditional use application. The first two buildings and their
14 associated, code authorized uses are "grandfathered" and should be allowed to
15 continue. However, approval of the third building is contingent upon its
16 cumulative impacts meeting code requirements. This means that the impacts of
17 all three buildings must be considered in determining whether the third building
18 should be approved.

19 6. By the same reasoning identified in the preceding paragraph, the propane tank is
20 also "grandfathered" and no longer subject to challenge. However, one exception
21 to the "grandfathered" status of the propane tank and two existing/under
22 construction buildings may apply to the extent that these structures constitute a
23 danger to public health and safety. Further, even though grandfathered, the
24 County will probably be able to abate the structures as public nuisances if they
25 qualify as public nuisances.

TESTIMONY

See summary of testimony, attached as Exhibit A.

EXHIBITS

All exhibits identified in the "Exhibits for Pearson/Craftsman Corner" exhibit list
submitted in conjunction with the 1/24/11 staff report are admitted into the record.
In addition the following documents are also admitted:

27. 3/2/11 legal memorandum from Adina Cunningham.

28. 1/6/11 email from fire marshal.
29. 2/23/11 letter from Janet Alderton
30. 12/27/11 letter from San Juan County Public Works
31. 12/17/10 letter from Washington State Department of Ecology
32. 3/3/11 letter from Francine Shaw
33. 3/1/11 letter from Sadie Bayley
34. Petition prepared by Sadie Bayley
35. Errol Speed written comments.
36. Errol Speed exhibits (numbered as 1-10A by him)
37. Scott Lancaster comments.
38. Applicant notebook – short version
39. Applicant notebook – long version
40. Development permit submissions for projects site submitted by staff
41. Errol Speed Rebuttal documents
42. Cunningham Rebuttal documents.
43. Bayley Rebuttal documents.
44. Applicant reply to Rebuttal.

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicant is Craftsman Corner LLC.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on March 3, 2011. During his rebuttal period, the Applicant submitted two notebooks (Ex. 38 and 39) that contained several dozen pages of new evidence. The notebooks had been prepared in advance of the hearing but had not been submitted to any other parties or staff until all testimony had been concluded. In order to give the other parties an opportunity to respond to this voluminous material, the Examiner left the record open through March 10, 2011 to give all parties an opportunity to review the notebooks at County offices and until March 17, 2011 for a written response to the notebooks. The record was also left open until March 10, 2011 for staff to provide copies of all permitting decisions made on the project site and all other parties were given until March 17, 2011 to respond to these comments. The Applicant had until March 24 to reply to the comments submitted by the other parties. On March 15, 2011 Adina Cunningham requested additional time to respond to the notebooks. The Examiner extended the public response deadline to the notebooks to March 22, 2011 and the Applicant reply to March 29, 2011.

Substantive:

1 3. Site and Proposal Description. The Applicant requests a conditional use
2 permit to authorize a commercial business composed of equipment rental and retail
3 with substantial storage at the corner of Lovers' Lane and Enchanted Forest Road on
4 Orcas Island. The site will be composed of three buildings. What will be referenced
5 as the "First Building" has been constructed and was approved by a building permit
6 issued on 4/28/05. What will be referenced as the "Second Building" is still under
7 construction and was approved by a building permit on 1/25/10. The Second
8 Building is an addition to the First Building. What will be referenced as the "Third
9 Building" is subject to a pending building permit application that was filed on
10 11/18/10. The building permit for the Third Building has not been approved and no
11 construction has commenced. The Third Building permit application cannot be
12 approved without approval of the subject conditional use permit application.

8 The project site is flat and lower in elevation than the road at the west end and at the
9 level of the road on the east end of the property. It is bounded on the north and east
10 by a wetland, the Eastsound Swale, and on the south and west by roads. The site has
11 been graded (retaining wall, driveway to the east into wetland, grading for
12 construction, and parking) and surfaced to develop the existing buildings and uses on
13 the site. The driveway into the wetland did not receive any land use approvals from
14 CDPD or DOE/Corps and the Applicant also placed a well within the wetland that has
15 without any state or federal wetland permits. The Applicant also leases a portion of
16 the property to the north and has developed it with a drainage detention pond,
17 parking, wash-down slab and stores some equipment on that part of the site. The
18 owner of the north property, the Port of Orcas, has not signed the conditional use
19 permit application.

15 The site is developed with a building housing an equipment rental business.
16 Customer and employee vehicles are parked in various places on the site. An above-
17 ground propane tank provides retail propane. Some larger equipment is stored
18 outside. Some retail goods are displayed outside.

18 Further details of the project are identified in the staff analysis portion of the 2/1/11
19 staff report, pages 5-7, which is incorporated by this reference as if set forth in full.
20 The Applicant's land scape plan, dated December 10, 2010, Ex. 2, provides the most
21 detailed site plan for the proposal available.

21 4. Characteristics of the Area. The three properties to the north are owned by
22 the Port of Orcas and remain undeveloped in support of the airport use, to the north.
23 To the east, south and west, properties are developed for residential use. The
24 Eastsound swale limits placement of physical development, so the residential
25 development to the east is distant and not visible from this site. Development on the
south side of the road mostly pre-dates wetland regulations and is visible from this
site.

CONCLUSIONS OF LAW

1 Procedural:

2 1. Authority of Hearing Examiner. The hearing examiner is authorized to
3 conduct hearings and issue final decisions on conditional use permit applications.
4 San Juan County Code ("SJCC") 18.80.020 Table 8.1.

5 Substantive:

6 2. Zoning Designations. The subject property is designated as Service and
7 Light Industrial (as part of the Eastsound Subarea Plan), Conservation Overlay and
8 Orcas Island Airport Overlay.

9 3. Scope of Permit Application. This conditional use application is for
10 authorization of the Third Building only. The impacts of the entire project as a whole
11 will be evaluated as to whether the Third Building can be approved. Approval of this
12 conditional use permit is not required for the First and Second Buildings, as well as
13 for the uses that vested with the First and Second Building permit approvals. Failure
14 to acquire provisional/site plan approval in conjunction with the building permits for
15 the First and Second Buildings is irrelevant, since those building permits have been
16 approved. Along the same lines, the extensive evidence presented regarding
17 incomplete applications, absence of inspections, after-the-fact permit approvals and
18 the like are also not relevant to this application.

19 The Applicant has correctly emphasized that prior permitting decisions should not be
20 revisited. The courts take a firm stand against revisiting project approvals. *See*
21 *Chelan County v. Nykreim*, 146 Wn.2d 904 (2002). *Nykreim* stands for the principle
22 that an improperly issued final land use decision cannot be revoked and a judicial
23 appeal of the decision is barred if a judicial appeal is not filed within 21 days of
24 issuance. The courts have expressly ruled that even illegal decisions must be
25 challenged in a timely manner. *Habitat Watch v. Skagit County*, 155 Wn.2d 397
(2005). Further, a land use decision time barred from appeal under LUPA's 21-day
appeal deadline cannot be collaterally attacked in the appeal of another land use
decision. 155 Wn.2d at 410-411 (petitioners could not attack validity of special use
permit whose LUPA appeal had expired through appeal of subsequently issued
grading permit); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169,
181 (2000) (petitioner could not collaterally challenge a time barred rezone decision
by its LUPA petition challenging a plat approval).

23 A building permit cannot issue unless it is determined that the structure complies with
24 all applicable zoning and building code requirements. *See* IBC 105.3.1 (2009)¹.

25 ¹ Reference is made to the 2009 edition but the language requiring that a building permit comply with
all applicable development regulations has been place in all prior editions of the building codes that
applied to development of the project.

1 Consequently, the permits issued for the first two buildings necessarily included a
2 determination that no provisional/site plan approval was necessary for those
3 developments. That determination cannot be collaterally attacked in this permit
4 review.

5 Given the judicial emphasis upon finality, it should not be surprising that this
6 proceeding cannot reconsider prior decisions to not require conditional use/site plan
7 review. Approval of a building permit represents the final significant decision in the
8 development review process, where that decision should provide some reasonable
9 assurance that all regulatory hurdles have been satisfied and overcome. Similarly,
10 approval of the permits also necessarily included the determination that the structures
11 complied with the Eastsound wetland regulations. This was not an oversight on the
12 part of the County, but as testified to by Ms. Shaw it was the County's interpretation
13 of the Eastsound regulations while she served as the deputy director of the San Juan
14 County Community Development and Planning Department in 2005. See Ex. 32.
15 That determination and any other code compliance issue dealing with the first two
16 buildings cannot be revisited in this permit review.

17 Taking a narrow interpretation of the *Nykreim* cases, it can be argued that they only
18 bar the revocation of permits but do not preclude the reconsideration of issues that
19 were resolved in prior permit applications. This is not how *Nykreim* has been applied.
20 In the *Wenatchee Sportsmen* decision, a trial court reversed County approval of a
21 special use permit application on the grounds that the densities of the development
22 proposal were inconsistent with densities allowed by Growth Management Act,
23 Chapter 36.70A RCW, outside of urban growth areas. The Court of Appeals
24 disagreed, ruling that the densities for the project were approved by a prior rezone
25 and the rezone had not been timely appealed. Project opponents attempt to do the
same thing here. They (at least some) do not argue that the prior building permit
applications should be revoked. They argue that the conditional use permit should be
denied because the uses authorized by the first two building permits are not valid. As
in the *Wenatchee Sportsmen* decision, the former building permits cannot be
collaterally attacked through this conditional use review.

Although the code compliance issues of the first two building permits cannot be
revisited, the impacts of the project as a whole must be considered in assessing
compliance with conditional use criteria. SJCC 16.55.230(D) requires conditional
use review if "total use area exceeds 10,000 square feet". The conditional use criteria
also require consideration of cumulative impacts. SJCC 18.80.100(D)(4).
Combining these requirements with the judicial requirements on finality, the impacts
of the added construction and use must be assessed in terms of how they add to the
impacts that already exist at the site as opposed to assessing the impacts on their own.
For example, if the noise regulations limit noise to 55 decibels and the project is
currently at 50 decibels, the additional development/use could not increase noise
levels by more than 5 decibels. If the existing development already exceeds noise
levels, no additional noise could be added by the proposed development.

1 Project opponents argue in their rebuttal response, Ex. 42, that *Nykreim* doesn't apply
2 to the uses of this project because the uses were never approved. As previously
3 discussed, the building permits for the first and second permits necessarily included
4 decisions that no use permit was required for construction of the buildings. This
5 decision cannot be revisited. No separate approval was issued for use of the buildings
6 because no separate approval was required. Under these circumstances, the
7 opponent's arguments would only apply if approval of a building permit does not vest
8 the property owner to uses that are permitted outright². By this logic, any authorized
9 use could be terminated by amending the zoning code to prohibit the use. Of course,
10 this interpretation is completely at odds with the County's nonconforming use
11 regulations and case law on nonconforming use rights and the vested rights doctrine.
12 Even in the context of conditional use permit review triggered by area requirements,
13 it is unlikely that a court would toss out the due process and policy considerations
14 underlying nonconforming rights and finality that protect uses authorized at the time
15 of building permit approval.

16 Buried in the email exhibits is an email from Shirene Hale to the County Prosecutor
17 expressing concern over the ability of the County to revoke erroneously issued
18 permits for projects that may harm the public. See Ex. 19. The email generally
19 references case law on equitable and promissory estoppel as allowing permit
20 revocation for projects that harm the public, without any citation. Since the cases
21 were not precisely identified it isn't possible to comment on their applicability. A
22 few points are relevant to alleviate the concerns of the County. First, if the cases
23 predate *Nykreim* (issued in 2002), they may no longer be applicable. *Nykreim* served
24 to overrule a long established line of cases that held that permits issued in violation of
25 applicable regulations can be revoked because they were never valid in the first place.
Also, more important, the County probably has recourse against dangerous projects
that were erroneously approved. If they truly serve as a danger to the community it
they can probably be abated as a public nuisance. See Chapter 7.48 RCW; cf. *Seattle*
v. McCoy, 101 Wash. App. 815 (2000)(lawful business is not nuisance per se, but
may become a nuisance by reason of circumstances).

It is also recognized that the *Nykreim* case law has not yet addressed erroneously
issued permits for projects that endanger public health and safety. Courts may well
create an exception for projects that violate health and safety regulations, as they do
in application of the vested rights doctrine. See *Hass v. City of Kirkland*, 78 Wn.2d
929 (1971); *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 138 Wn.2d 1 (1998).
If this health/safety exception applies to *Nykreim*, the County can apply the exception
in a code enforcement action as easily as it could in conditional use permit review. In
this case a code enforcement action would be the more appropriate venue, given that

² Of course, for a use to qualify as permitted outright the use must comply with applicable use requirements. A property owner would not vest to an invalid use, unless that use was expressly approved by the County.

1 the record of this case was not fully developed on those issues and the format of an
2 enforcement hearing is more conducive to evaluating the rights of the parties.

3 4. Undefined Use. It has been difficult to assess this application because the
4 Applicant is unable/unwilling to provide any specifics on the nature of his use. In a
5 recent conditional use application, staff argued that it is a long standing practice of
6 the County to not require details on specific uses for conditional use applications, at
7 least in the context of buildings that will be leased. This is because a landlord cannot
8 be expected to know what tenants will fill the building once it's completed. In order
9 to reconcile this gap of information with the requirements of the conditional use
10 review process, the Examiner approved the conditional use permit application with
11 conditions that required staff review of all subsequent proposed uses of the building.
12 *See Olerin LLC San Juan Examiner Decision, PCUP00-10-0012 (2011).*

13 A property owner such as Mr. Pearson faces the same type of uncertainty as a
14 landlord. He cannot always be reasonably expected to know in detail how he will use
15 his property for a growing business. To the extent necessary, any missing
16 information on anticipated uses could be deferred to staff review once Mr. Pearson
17 has solidified his plans for use of the building.

18 5. SEPA Review. A Determination of Nonsignificance was issued for the
19 subject conditional use permit on December 8, 2011. Concerns were raised that the
20 environmental checklist only addressed the impacts of the third building permit
21 application. No appeal of the Determination of Nonsignificance was timely filed.
22 Without an appeal, the Examiner has no jurisdiction to consider the adequacy of the
23 environmental review.

24 6. Owner signature. The Port of Orcas has not signed the application for the
25 conditional use permit. The Port is the lessor and grantor of some property and an
26 easement adjoining the project site that is used by the Applicant as lessee and grantee
27 for drainage facilities. The staff notes that the leased Port property is used for more
28 than just the drainage facilities, such as storage. The Applicant notes that lessors and
29 grantees of utility property/easements do not usually have to sign land use
30 applications.

31 SJCC 189.80.020©(2) requires the signature of the owner of "the" property or a
32 notarized statement by the owner(s) that the application has been submitted with their
33 consent. The legal question is what constitutes "the" property for purposes of the
34 application. If the only staff concern is that the Applicant uses the Port property for
35 more than operation of its drainage facilities the issue is easily resolved – the permit
36 is only approved for the property owned by the Applicant and the use rights governed
37 by the conditional use permit do not extend to storage on the Port property. The
38 project could be conditioned to remove any ambiguity on these usage rights.

1 As conditioned it does appear that the signature of the Port would not be necessary.
2 The lease and easement documents provided by the Applicant (Ex. 38) provide all of
3 the property interests necessary to operate the project as proposed and conditioned. It
4 is also unlikely that San Juan County requires the signatures of every lessor or
5 easement grantee of a property interest served by a project. If that were the case the
6 signature of every grantee of every utility and road easement would be required,
7 which would make it virtually impossible for a developer to acquire signatures for
8 any major controversial project. Having said that it is recognized that a detention
9 pond/access road is certainly a more substantial part of a project than a water line
10 easement. If staff can show that they have consistently required lessor/grantee
11 signatures for these type of facilities, the signature issue could be reconsidered upon
12 reapplication.

13 7. Permit Review Criteria. In the service and light industrial district, SJCC
14 16.55.230(D) requires conditional use review if “total use area exceeds 10,000 square
15 feet”. There is no dispute amongst the parties that the project will exceed 10,000
16 square feet in use area. The criteria for a conditional use permit are governed by
17 SJCC 18.80.100(D). Those criteria are quoted in italics below and applied with
18 corresponding conclusions of law.

19 **SJCC 18.80.100(D)(1):** *The proposed use will not be contrary to the intent or*
20 *purposes and regulations of this code or the Comprehensive Plan;*

21 8. Several code compliance issues are raised in the record, which are addressed
22 individually below. Since the project does not comply with airport overlay
23 requirements, the project fails to satisfy the criterion quoted above.

24 A. Parking. The staff report asserts that the project is prohibited by airport
25 overlay regulations because it exceeds maximum parking requirements.
However, the project can be conditioned to allocate use below maximum
parking levels.

As noted in the staff report, SJCC 18.40.030(B)(5) prohibits any commercial
uses that exceed ten required parking spaces. The Applicant argues that this
code provision does not apply because it has a header of “public assemblies”
and public assemblies are defined to include theaters, meeting rooms and
other types of uses involving large concentrations of people. This
interpretation is not persuasive. It is fairly clear that the text subject to the
“public assembly” header categorizes all uses that attract large groups of
people, not just those that are defined as “public assembly” elsewhere in the
zoning code. Those uses are more specifically called out as commercial uses
with 10 or more parking spots, high density residential uses and high density
campgrounds. Limiting the “public assembly” subsection to the types of uses
interpreted by the Applicant would make no sense as applied to the

1 campground and high density residential uses, since neither typically involves
2 theater or meeting room type settings.

3 The staff report identifies how the Applicant computes parking requirements
4 but makes no comment as to whether these are accurate. The Applicant does
5 correctly apply parking rations of one stall per 300 square feet of retail space
6 and one stall per 1,000 square feet of storage space for what it designates as
7 public access storage in its January, 2011 landscape plan, as required³ by
8 Table 300-1 of the Eastsound regulations (Chapter 16.55 SJCC).

9 What is not as clear is whether its nonpublic storage of 1,000 square feet does
10 not trigger any parking requirements. The Applicant claims that this space
11 falls under Note 3© of Table 300-1, which doesn't require parking for
12 structures that don't generate any parking demand from employees or
13 customers. It may very well be true that storage space this small doesn't
14 accommodate any appreciable amount of employee traffic, but confirmation
15 from the staff on this interpretation would be helpful.

16 It is evident that the staff and Applicant have a different understanding of
17 what constitutes public access storage. Staff understands the term to denote a
18 mini-storage facility, as discussed in the staff report analysis of Table 300-1 of
19 Chapter 16.55 SJCC. From the Applicant's annotated response, Ex. 38, it is
20 fairly clear that the term does not encompass mini-storage and is merely the
21 portion of "substantial storage" that will be made accessible to the public.

22 The conditions of approval could subject the Applicant's parking
23 computations to staff approval. The Applicant would have to propose a mix
24 of retail and storage space that enables it to comply with the 10 parking space
25 limitation of SJCC 18.40.030(B)(5). Staff would need to determine what
parking is required⁴ (as opposed to provided) for the first two buildings.
Deducting the required parking from ten leaves the amount of required
parking that the third building may trigger. The Applicant can change the mix
of retail/commercial in the first two buildings as necessary or desired to
comply with the 10 space maximum.

26 B. Aquifer Recharge. The staff report notes that the Applicant has not provided
27 information on use of industrial and other chemicals as required by SJCC
28 18.30.140(D), which requires the Applicant to provide "*a list of the quantities*

29 ³ Table 300-1 doesn't precisely identify parking requirements for commercial storage, but the closest
30 categories for commercial storage rental and warehouse space require the one space per 1,000 square
31 feet employed by the Applicant.

32 ⁴ If the amount of parking provided was less than the amount required at the time of building permit
33 approval, the required amount shall be the amount provided.

1 *and types of chemicals that will be used, proposed spill containment plans,*
2 *and a plan for disposal of waste materials.”*

3 It is unclear whether this information and any plan for protection of the
4 aquifer was considered in the building permit review of the First and Second
5 Buildings. As discussed in Conclusion of Law No. 3, the Applicant’s
6 conformance to aquifer recharge requirements for the First and Second
7 Buildings is beyond the scope of this conditional use permit review.

8 Although this conditional review does not cover the chemical uses approved
9 in the First and Second Buildings, it appears likely that the additional building
10 area proposed for the Third Building will increase the amount of chemicals
11 used. Compliance with SJCC 18.30.140 for chemicals generated by the new
12 building space will be required prior to building permit issuance. Any
13 construction required to mitigate impacts of chemical use shall occur outside
14 the swale and swale buffer – specifically, the wash-down area may not be
15 materially enlarged or altered.

16 C. Open Space/Proximity to Extended Runway Centerline. Staff and others
17 raised concerns about compliance with SJCC 18.40.032(B)(5) and
18 18.40.032(B)(6), which require 40% open space to provide emergency
19 airplane landing space. These regulations require that to the extent possible,
20 the open space must be located closest to the extended runway centerline and
21 also be contiguous with the open space of adjoining parcels. Structures for
22 human occupancy shall be located “on those portions of the site farthest from
23 the extended runway centerline.” The Applicant has not met its burden of
24 proof in establishing compliance with these regulations.

25 As a public safety regulation, this is not a standard to be trifled with. As noted
in SJCC 18.40.032(B)(5), the open space is required to “maximize the
opportunity for pilots in an emergency to avoid structures intended for human
occupancy.” Mr. Speed demonstrated that airplanes have crashed around the
airport. *See* Ex. 25, attached Speed numbered ex. 32 and 33.

In order to meet its burden of proof in establishing compliance, the Applicant
must identify the location of the extended runway centerline and demonstrate
that the open space is configured closest to this centerline and human
occupied structures away from it.

In its rebuttal reply, Ex. 44, the Applicant stated that he had done a survey to
determine that the extended runway centerline was approximately through the
middle of the property. This is consistent with the findings of Mr. Speed, who
placed the centerline along the east wall of the first building. With the
centerline in this location and the wetland occupying the eastern side of the
project site, it is clear that any buildings on the site should have been located

1 as close to the western side of the site as possible. The First and Second
2 Buildings do not meet this objective, but as discussed in Conclusion of Law
3 No. 3 that is not an issue that can be addressed in this decision. The Third
4 Building enjoys no such immunity. If the scale of the building depicted in the
5 landscape plan, Ex. 2, is accurate, the building space of the Third Building
6 could fairly easily be placed along the western edge of the property. If there
7 are reasons that this could not be done, those reasons are not in the record and
8 it was the responsibility of the Applicant to address this. The fact that the
9 violations of the First and Second Buildings place them squarely within the
10 centerline area does not excuse adding a further concentration of people along
11 what is treated as a crash zone by SJCC 18.40.032(B)(5).

12 It must also be recognized that the site simply may not be suitable for any
13 additional concentration of people as proposed for the Third Building. SJCC
14 18.40.032(B)(5) provides that the site must contain a “minimum” of 40%
15 open space. More open space may be required for this project given its
16 concentration of occupied structures along the extended runway centerline.
17 Further information from the Port of Orcas, pilots or others with expertise is
18 necessary to make this determination. Evidence on the safety hazards
19 involved in attracting additional population at the project site will probably
20 play a significant role in the interpretation and application of SJCC
21 18.40.032(B)(5) and 18.40.032(B)(6). The record for this proceeding is not
22 complete enough to find compliance.

23 D. Propane Tank. The propane tank has acquired mechanical permit approval.
24 Like building permits, mechanical permits require a determination that the
25 project is consistent with all applicable laws. *See* IMC106.4 (2009)⁵. Like the
building permits, the issuance of the mechanical permit constitutes a
determination that the propane tank satisfies applicable zoning regulations.
As discussed in Conclusion of Law No. 3, if the propane tank constitutes a
safety hazard, it probably can be abated by a code enforcement or nuisance
action.

E. Parking Access. SJCC 18.40.110(2) requires that all road access to new
commercial development comply with public health, safety and welfare.
Concerns during public testimony were raised about parking ingress and
egress. The staff report asserts that the parking layout has been revised and
requires approval from public works. The Applicant asserts in its annotation
of the staff report, Ex. 38, p. 11, that it has acquired approval. There is no
documentation of this approval. The project can be conditioned for Public
Works approval if not already acquired.

⁵ Reference is made to the 2009 edition but the language requiring that a mechanical permit comply with all applicable development regulations has been placed in all prior editions of the mechanical codes that applied to development of the project.

1 F. Outdoor Storage. SJCC 18.40.320 requires screening of outdoor storage
2 yards. The staff report notes that the northern portion of the yard has outdoor
3 storage and does not comply with this screening requirement. The Applicant
4 acknowledges this storage and states it will comply with the screening
5 requirements. The staff have also commented that portions of the drainage
6 tract leased from the Port are used by the Applicant for storage. As discussed
7 in Conclusion of Law No. 6, those portions of the site on the drainage tract
8 may not have any storage if the Port of Orcas doesn't sign the application.
9 The project can be conditioned to comply with the requirements of SJCC
10 18.40.320.

11 G. Drainage. SJCC 18.60.060(B)(7) requires drainage controls to regulate
12 impacts to water quality. The staff report notes that information is not
13 available to show that the wetland buffers were considered in the location of
14 drainage improvements. The Applicant testified that the drainage plan was
15 over-engineered in order to cover future construction, but it is unclear whether
16 it was extensive enough to cover the new development. The adequacy of the
17 drainage plans for the First and Second Buildings' compliance with wetland
18 regulations has been approved and cannot be reassessed in this conditional use
19 review. However, if the Third Building will adversely affect the wetland, that
20 impact must be mitigated in conformance with the regulations in place when
21 the application for the third building permit vested. No mitigation may
22 involve expansion of drainage facilities into the wetland⁶ or its buffer. There
23 is insufficient information to determine compliance with SJCC
24 18.60.060(B)(7).

25 The staff report in its analysis of SJCC 16.55.250(B)(2))(c) notes that it's not
clear whether the Applicant have implemented the 2009 drainage plan. That
is a code enforcement issue. If and when a final determination is made that
the plan has not been implemented in a code enforcement action, that
determination can serve as grounds to deny the conditional use permit under
SJCC 18.100.030(F).

H. Wetlands. Several concerns were raised about development activities within
the buffer to Eastsound Swale as well as the swale itself. The record is
unclear on several factual issues, so general conclusions are made as follows:

1. *Wetland Buffer Width*. It is unclear whether a 50 foot or 100 foot buffer
applies to the Eastsound Swale. If vegetation within 50 feet of the swale
was removed and this removal was not in conjunction with an approved
landscaping or drainage plan, a 100 foot buffer would apply. It is

⁶ "Wetland", "Eastsound Swale" and "swale" are used interchangeably in this decision.

1 immaterial if the vegetation removal was approved for some other reason.
2 If no such vegetation removal occurred, a 50 foot buffer would apply.

3 SJCC 16.55.250(B)(2)(a) imposes a hundred foot buffer “until the
4 developer demonstrates compliance with all requirements of this section.”
5 If the developer does establish compliance, then SJCC 16.55.250(B)(2)(b)
6 imposes a fifty foot buffer. The policy reason for this difference in buffer
7 lengths is not expressly identified, but it is rational to impose greater
8 protection for wetlands that have been subjected to degradation within
9 their buffers that is unauthorized by SJCC 16.55.250.

10 The unauthorized activity at issue in this case is governed by SJCC
11 16.55.250(B)(2)(c)(i), which provides as follows:

12 *Except as provided in subsection (B)(2)(b) [for work in
13 conjunction with approved landscaping and drainage
14 plans] of this section, no vegetation within the approved
15 buffer shall be altered or removed for development and
16 natural vegetation shall be retained to the extent possible
17 on the remainder of the site.*

18 Francine Shaw, Deputy Director of the San Juan County Community
19 Development and Planning Department during permit review of the First
20 Building, testified that she considered the buffer to be 50 feet during her
21 review of the building permit application for the First Building. Although
22 exceptions/exemptions to the buffer were applied by Ms. Shaw, this does
23 not detract from the fact that the buffer was considered to be fifty feet for
24 purposes of the “approved buffer” designation in SJCC
25 16.55.250(B)(2)(c)(i). Also, as further discussed below, there are no
express or implied exceptions to the 50 foot buffer. *Nykreim* does not bar
this conclusion, since it is made for purposes of determining the buffer for
this application and not those for the first and second buffers.

Ms. Bayley testified that there had been significant habitat removal. It is
unclear if this was done within the swale buffers as opposed to the swale
itself and also unclear whether it was done in conjunction with an
approved landscaping or drainage plan. The Applicant’s annotations to
the staff report, Ex. 38 at p. 6, notes that the area surrounding the First
Building was already cleared with a mowed lawn prior to construction.
Beyond this the Applicant did not appear to address this issue. However,
it must also be acknowledged that the significance of this issue was not
discussed prior to or during the hearing. Should the Applicant choose to
reapply this issue will have to be addressed in depth.

1 Using the scale of the "landscape buffer plan guidelines" site plan, dated
2 12/10, a portion of the proposed Third Building extends into the 50 foot
3 buffer and the entire Third Building would be located within a 100 foot
4 buffer. Proposed parking on the south side of the first building would also
be within both the 50 and 100 foot buffers. No new structures or new
parking would be allowed within the buffers. However, if existing
parking is utilized it would be allowed as a nonconforming use.

- 5 2. *SJCC 18.30.150 Buffer Exemptions.* The Applicant correctly notes that
6 SJCC 18.30.150(D)(1)(j) exempts wells from the wetland requirements of
7 SJCC 18.30.150. In the building permit review of the First and/or Second
8 Buildings staff also applied other exemptions to allow other development
9 within the wetland buffer. However, these exemptions do not apply to the
10 buffer requirements of the Eastsound Subarea plan imposed under SJCC
11 16.50.250. There is nothing in the wetland regulations of SJCC 18.30.150
12 or 16.50.250 to suggest that the 18.30.150 exemptions or any other
exemptions apply to the 16.50.250 buffers. Indeed, County Code
annotations suggest that SJCC 16.50.250 was adopted in 1996 and the first
version of SJCC 18.30.150 regulations were adopted in 1998. If that is the
case, it is not reasonable to conclude that the County Council could have
intended that 16.50.250 be subject to exemptions adopted two years later.

13 It should be noted that even though the SJCC 18.30.150(D)(1)
14 exemptions do not apply, this will not create an untenable situation for
15 most property owners who have valid existing structures within the swale
16 or its buffers. The nonconforming use provisions of SJCC 16.55.040 and
nonconforming rights created by case law provide for the reasonable use
of valid nonconforming uses.

- 17 3. *State and Federal Wetland Permits.* As discussed in Conclusion of Law
18 No. 3, the building permits for the First and Second buildings authorize
19 the structures subject to those permits and the validity of that approval
20 cannot be revisited in this review. The building permit approvals do not
21 excuse any requirements to acquire state or federal permits for the road
22 and well within the swale. The County does not have the authority to
23 make decisions on those permits, so they are outside the scope of building
24 permit approval. The Applicant should also note that SJCC 18.100.030(F)
25 prohibits the approval of any project upon land associated with a "a final
determination of violation of state law", unless approval is conditioned on
compliance. If the Applicant decides to reapply, he should take care of
any outstanding permit requirements for the well and access road or
remove the structures as suggested by Mr. Paulsen from DOE during the
hearing.

1 I. Excavation. The staff report notes in its analysis of SJCC 18.60.060(E)(1)
2 that the volume of grading had not been provided to determine whether the
3 100 cubic yard threshold had been triggered for SEPA review. The issue is
4 moot because SEPA review was done for the project. Whether or not grading
5 impacts should have been more thoroughly addressed in that SEPA review
6 cannot be considered because the SEPA threshold determination was not
7 appealed.

8 J. Traffic. The staff report notes that SJCC 18.60.090(A)(6) requires traffic
9 studies for projects that generate over 100 trips per day and that the ITE
10 manual predicts over 100 trips per day. The Applicant submitted a trip
11 generation assessment from Leveric Engineering concluding that the project
12 (including all three buildings) generates 43 trips per day. The Leveric study is
13 based upon the assumption that the use will be “farm and garden”. The study
14 goes on to discuss the fact that “farm and garden” does not fit into any ITE
15 category and so trip generation is derived from other, similar categories. This
16 was not the best use description to employ, given that the Applicant testified
17 they were no longer doing “farm and garden” in order to comply with the
18 Notice of Correction. It’s understood that “retail with substantial storage” is
19 too broad to compare to the ITE trip generation use categories. The types of
20 uses that the Applicant have in mind do appear to be all identified in the use
21 allocation outlined at page 2 of the traffic report.

22 Overall, the trip generation assessment appears to be a fairly credible accurate.
23 Staff’s conclusions are contrary to this assessment and it does not appear that
24 the assessment was submitted for staff evaluation prior to the hearing, despite
25 the fact that the trip generation assessment was completed January, 2011 and
the staff issued their staff report with their trip generation conclusions in
February, 2011. Ultimately, however, staff had the chance to respond to the
report during the rebuttal period after the close of verbal testimony and
declined to do so. As it stands, the Examiner would have to conclude that the
Applicant’s trip generation assessment is the most compelling evidence on the
subject. Staff will have another opportunity to address this issue should the
Applicant choose to reapply.

The Applicant will also have to understand that since they are providing only
general information on the type of use at the project site that their project
would be conditioned as limited to generating the trips estimated in their
report. The less information the Applicant provides on his potential use, the
more restrictive he will find the conditions of approval.

24 K. Exterior Lighting. The staff report notes that insufficient information is
25 provided to determine compliance with SJCC 18.60.170, which requires that
exterior lighting be energy efficient and shielded or recessed to prevent glare.
In its annotation of the staff report the Applicant proposes low light LED

lights. Compliance can be attained by conditioning the project to using the LED lighting and otherwise meeting staff approval.

- L. Substantial Storage. In its analysis of SJCC 18.80.100(D)(2)(A)(1), the staff report questions whether the Applicant proposes sufficient storage space to qualify as “retail with substantial storage”. The storage space identified in the Applicant’s January, 2011 landscape plan qualifies as “retail with substantial storage” if the goods stored are moderately large scale goods associated with farm and gardening activities.

The staff report quotes the Applicant’s January, 2011 landscape plan, Ex. 2, as stating that the “substantial storage associated with the retail is 1,000 square feet.” The Examiner could not find this quote on the plan. As stated by the Applicant in its staff report annotation, Ex. 38, the landscape plan provides for 5,000 square feet of “public access storage” and 1,000 square feet of “non-public storage”. SJCC 16.55.040 defines “substantial storage space” as “the ratio of covered and uncovered storage area to retail area is greater than two and the gross building area exceeds 10,000 square feet.”

If the storage space proposed by the Applicant qualifies as “storage area” under the SJCC “substantial storage space” definition, the Applicant’s proposed use allocation meets the “retail with substantial storage” use designation. Unfortunately, it is not entirely clear what qualifies as “storage area”. An expansive interpretation would include the shelf space in a grocery store, since goods are stored on those shelves until sold. As ably discussed in pages 10-11 of the rebuttal brief of Ms. Cunningham, Ex. 42, the purpose of the service and light industrial district, SJCC 16.55.230(A), reveals that the district is intended to accommodate retail uses that are not appropriate within the Village Commercial District. As noted during public testimony, the retail that is appropriate for the Village Commercial District is retail that is compact enough for pedestrian access, creating a “walking village”. This purpose is consistent with the comments of staff, who assert that the “retail with substantial storage” was intended to apply to uses such as lumber yards. A lumber yard would not be appropriate within a pedestrian friendly downtown commercial core.

Given the factors above, the storage component of “retail with substantial storage” is for fairly large scale goods that result in spaces that are not compatible with a pedestrian friendly commercial core. This would include large bags of feed, gardening supplies and equipment, construction materials and supplies. These types of goods, which were identified by the Applicant as potentially stored on his property, would qualify for “retail with substantial storage”.

1 M. Landscaping. In its analysis of SJCC 18.80.100(D)(3), the staff report
2 notes that the proposal does not include adequate landscape screening or
3 buffers. In its analysis of SJCC 16.55.230(E)(6) the staff report identifies the
4 deficiencies. The primary issue of contention is whether landscape screening
5 as opposed to buffering is required along the street frontage of the property.
6 In pertinent part, SJCC 16.55.230(E)(6) provides as follows:

7 *...Landscaped buffers shall be required along public street*
8 *frontage in all new development, and screening shall be required*
9 *between existing residential uses and new nonresidential*
10 *developments....*

11 Staff and Mr. Speed take the position that the screening requirement applies
12 along both property frontages because existing residential uses are located
13 across the street on both Lover's Lane and Enchanted Forest Road. The
14 Applicant argues that the residences are separated by a public road from their
15 project and that screening is only required for uses that share a property line.
16 Technically, the project does share a property line with the residential uses.
17 Public right of way is only considered an easement and the abutting property
18 owners have a fee interest underlying the road, usually to the centerline. *See,*
19 *e.g., Christian v. Purdy, 60 Wn. App. 798 (1991).* The Applicant also appears
20 to argue that the regulation quoted above does not contemplate the situation of
21 having both screening and a landscape buffer. As demonstrated in the staff
22 report, this is not correct, since the trees of the buffer can create the screening
23 required by SJCC 16.55.230(E)(6).

24 The screening issue is not an easy one. The purpose of the screening
25 requirement is to protect residential uses from the aesthetic impacts of
proximate nonresidential uses. SJCC 16.55.230(E)(6) doesn't expressly
require that the residential and nonresidential uses be adjoining, but no one
would seriously argue that screening would be required "between" a
residential and nonresidential use if there is an intervening lot between them,
especially if the intervening lot is developed. By the same token, a utility
easement would not be considered to provide sufficient separation to avoid the
screening requirement. Public right of way falls somewhere in between these
extremes, with the added consideration that screening can be harmful to a
business by requiring it to conceal itself from the travelling public.

Ultimately it is simply hard to believe that the County Council could have
intended to require potentially blocks of commercial and industrial
development to hide themselves from their street frontage. The economic
impacts could be devastating, while at the same time right of way width and
improvements provide as much separation from residences "across the street"
as some intervening lots do between residential and nonresidential uses on the
same side of the street. Further, commercial developments over 10,000 square

1 feet such as this one are subject to conditional use review, where enhanced
2 landscaping requirements can be imposed to buffer aesthetic impacts while
also allowing the business to be visible from the adjoining roads.

3 For the reasons stated above, the landscaping requirements identified in the
4 staff report analysis of SJCC 16.55.230(E)(6) and SJCC 16.55.300(F) shall be
5 imposed except that full screening should not be required. The business
should be visible from its two entrances while vegetative screening is used to
obscure the business way from the entrances.

6 N. Signs. The staff report review of SJCC 16.55.300(D) notes that no
7 information on signs has been provided. This information should be provided
8 as part of any reapplication.

9 **SJCC 18.80.100(D)(2):** *The proposal is appropriate in design, character and*
10 *appearance with the goals and policies for the land use designation in which the*
proposed use is located;

11 9. As discussed in Conclusion of Law No. 8, additional landscape screening
12 is necessary to buffer aesthetic impacts to adjoining residential uses. Further
13 information is also necessary to determine if signage is compatible with the area and
consistent with applicable sign regulations.

14 **SJCC 18.80.100(D)(3):** *The proposed use will not cause significant adverse impacts*
15 *on the human or natural environments that cannot be mitigated by conditions of*
approval;

16 10. As discussed in Conclusion of Law No. 8, more information is necessary
17 to determine the width of the wetland buffer, which in turn will help determine what
18 portions of the (new) proposal are within wetland buffers. More information is also
needed on any chemical usage at the site and staff confirmation is needed of traffic
generation figures.

19 **SJCC 18.80.100(D)(4):** *The cumulative impact of additional requests for like actions*
20 *(the total of the conditional uses over time or space) will not produce significant*
21 *adverse effects to the environment that cannot be mitigated by conditions of approval;*

22 11. As identified in Conclusion of Law No. 8, more information is necessary
23 to determine whether the cumulative impacts of all development at the project site
will cause significant adverse impacts to traffic, wetlands, and airplane safety.

24 **SJCC 18.80.100(D)(5):** *The proposal will be served by adequate facilities including*
25 *access, fire protection, water, stormwater control, and sewage disposal facilities;*

12. As identified in Conclusion of Law No. 8, more information is necessary to determine whether traffic facilities that serve the site are adequate and whether stormwater facilities pose any threat to wetlands.

SJCC 18.80.100(D)(6): *The location, size, and height of buildings, structures, walls and fences, and screening vegetation associated with the proposed use shall not unreasonably interfere with allowable development or use of neighboring properties;*

13. As previously noted, enhanced landscaping should be required to shield aesthetic impacts.

SJCC 18.80.100(D)(7): *The pedestrian and vehicular traffic associated with the conditional use will not be hazardous to existing and anticipated traffic in the neighborhood;*

14. Concerns were raised in testimony and the Notice of Correction about traffic backing onto a public street. The Applicant's reply to rebuttal, Ex. 44, p. 4, notes that this problem has been remedied in a revised site plan. It is unclear what was done to correct the problem and whether staff found the revisions sufficient to correct the alleged safety problem. This information would be needed in any reapplication hearing. A staff response to Ms. Bayley's concerns over site distance problems at the intersection of Lover's Lane and Enchanted Parkway would also be needed. It would be appropriate for staff to respond that a traffic study is necessary to address these issues, even if the threshold of SJCC 18.60.090(A)(6) is not reached.

SJCC 18.80.100(D)(8): *The proposal complies with the performance standards set forth in Chapter 18.40 SJCC;*

15. The proposal does not comply with the requirements of Chapter 18.40 SJCC as discussed in Conclusion of Law No. 8.

SJCC 18.80.100(D)(9): *The proposal does not include any use or activity that would result in the siting of an incompatible use adjacent to an airport or airfield (RCW 36.70.547); and*

16. The proposal is separated from the airfield by some vacant lots owned by the Port, so it is unclear whether the proposal would be considered "adjacent" to the airport for purposes of this criterion. At any rate, the compatibility of the use is addressed in the application of the Airport Overlay regulations in this decision.

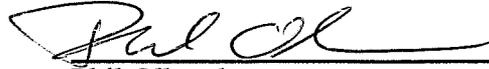
SJCC 18.80.100(D)(10): *The proposal conforms to the development standards in Chapter 18.60 SJCC.*

17. As discussed in Conclusion of Law No. 8, the project can be conditioned to comply with the requirements of Chapter 18.60 SJCC.

1 **DECISION**

2 The proposed project is not consistent with all the criteria for a conditional use permit
3 due to noncompliance with Airport Overlay (Chapter 18.40 SJCC) regulations. The
4 application for a conditional use permit is denied.

5 Dated this 15th day of April, 2011.

6
7 
8 Phil Olbrechts
9 County of San Juan Hearing Examiner

10
11 **Effective Date, Appeal Right, and Valuation Notices**

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

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

20 Depending on the subject matter, this decision may be appealable to the San Juan
21 County Superior Court or to the Washington State shorelines hearings board. State
22 law provides short deadlines and strict procedures for appeals and failure to timely
23 comply with filing and service requirement may result in dismissal of the appeal. See
24 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
25 promptly review appeal deadlines and procedural requirements and consult with a
private attorney.

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

Exhibit A

Summary of Hearing Testimony

Pearson, PCUP00-10-0011

Note: *This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary to the decision issued by the Hearing Examiner. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner.*

The Examiner commenced the hearing by ruling that he had no authority to address the validity of the City's development regulations. He swore in the parties and admitted Exhibits 1-26, identified in the staff report, into the record. Ex. 27, a hearing memorandum from Adina Cunningham was admitted as Ex. 27. A letter from the fire marshal was admitted as Ex. 28. A letter from Janet Alderton was admitted as Ex. 29. A letter from public works dated 12/27/10 was admitted as Ex. 30. A 12/17/10 letter from DOE regarding the wetland was admitted as Ex. 31.

Paul Anderson, from DOE, was connected into the hearing by speaker phone.

Lee McEnery, San Juan County planner, noted that the recommendation was for denial for several reasons, all identified in the staff report. In response to questions from the Examiner Ms. McEnery noted that Port of Orcas owns part of the property subject to the application, that they have not signed off on the application and that she doesn't know why they have not. She acknowledged that the Port's signature is required for approval. She also clarified that the Eastsound plan makes dated references to "site plan review" which have now been replaced by "provisional review" in other parts of the code and that the conditional use review process takes the place of provisional review as a "higher" review process. Ms. McEnery also acknowledged that the petroleum storage tank is considered prohibited bulk storage of flammable materials.

Curt Johnson, Applicant's representative, noted that he is confused by the process. He noted that if the County had used the provisional use process there would be no public hearing. He said the Applicant was given a Notice of Correction in August, 2010 and required to acquire either a provisional use or conditional use permit for three [sic] alleged corrections involving landscaping, traffic, use change and use area. The Applicant has been using one building since 2007 for equipment rental with incidental retail. The alleged use change prompted the Notice of Correction at or near the same time a second building permit was approved to add to add to the existing use. The second building is still under construction. The Applicant thought the hearing today was for the third building permit (1,700 square feet), which would have triggered the conditional use threshold of 10,000 square feet with the other two buildings. The Applicant was hoping that in addition to allowing the 10,000 square feet, the conditional use permit would allow for substantial storage in addition to the existing uses (equipment rental with incidental retail). This was encouraged by the code enforcement officer because incidental retail is difficult to define. The conditional use permit has morphed into a soap box for all alleged past

violations. Mr. Johnson acknowledged that the Applicant hasn't yet received Army Corps approval. He noted that the issues with the wetlands could be fixed in an afternoon project as part of the current construction for the second building. All problems can be easily addressed. Many of the alleged violations are associated with projects that have already been approved. Mr. Johnson noted that staff is recommending denial of a permit application recommended by staff for violations approved by staff in prior applications. On wetlands, there's a statement in the subarea plan that everything will be developed away from the Eastsound swale. The first and second buildings were approved within the fifty foot buffer. These approvals should not serve as a basis for denial of the third building permit application, which is for a building that is 100 feet away from the swale. The third building is as far from the runway as possible on the site without building into the swale buffer. The propane tank has all required approvals. The Applicant has stopped what was on the edge of farm and garden, which was the outside storage of compost on pallets. He hasn't ordered any restock and there are a few residuals left. He's sticking to strictly equipment rental with incidental retail.

Francine Shaw, former Deputy Director of Community Development and Planning, testified that the property is zoned Service and Light Industrial and that if a building exceeds 4,000 square feet a provisional use permit was required at the time of the 2005 application. Ms. Shaw had determined that the building was approximately 2,376 square feet. There were three parking stalls and those brought you up to an additional 499.5 square feet. There was an aisle that accessed the parking area that was 468 square feet. The total was 3343 square feet, which wasn't enough to trigger provisional use review and that's why it wasn't required at the time. On the 50 foot swale setback requirement, the Eastsound plan was adopted years before the County's critical areas requirements. Staff in 2005 felt that the 50 foot setback was arbitrary and there was no best available science to support it. The County had a wetland study done for the swale and determined that the 50 foot buffer was not necessary. The County also had several exceptions to wetland buffers within its wetland regulations. The Eastsound Plan was silent on the applicability of the exceptions to the Eastsound buffer. Since it was silent, staff applied the exceptions. Ms. Shaw's testimony was summarized in a letter admitted as Exhibit 32.

Mr. Johnson added that the engineering numbers on impervious surface were only estimates and exceeded what was actually built. The first engineering report for the first building permit estimated 4138 square feet of impervious surface. The second, full report by Greg Braun[sp?] used an estimate of 21,000. As-builts are usually lower. Engineers don't like to get caught under-designing something and tend to overestimate. It's inaccurate to conclude that the square feet of the first building was over 4,000 square feet and triggered provisional/site plan review. The Examiner asked what the area was for what was actually constructed and did not receive a direct or comprehensible answer.

Mr. Pearson and Mr. Johnson both noted that there was ambiguity in the code as to whether the area thresholds for provisional and conditional use operated on a cumulative basis. Mr. Pearson noted that the County shop buildings, which were built in phases, exceed 10,000 square feet yet no conditional use was processed. Mr. Johnson noted that Mr. Pearson understandably had site plan review confused with the site plan review involved in building permit review, since both plans are called the same thing. Mr. Pearson thought that his building permit application for additional parking complied with site plan review requirements.

Mr. Pearson noted that no one could tell him what "incidental use" means and because of that ambiguity staff recommended that he apply for a conditional use with the alternate use of "substantial storage" so there would no longer be any question as to whether his use was appropriate.

The Examiner asked what would be used for the substantial storage and Steve Pearson responded that if he went down the "farm and garden" route storage would be composed of materials such as feed, pavers, water tanks and gates. 6,000 square feet would be devoted to storage and 3,000 square feet to retail.

On the owner signature issue, Steve Pearson stated that he is not leasing any property from the Port. The Port gave him an easement for stormwater facilities, access and stormwater.

Adina Cunningham, attorney, make it clear that she is not challenging finality and that project opposition is based upon issues pertaining to the current permit application. The current conditional use application applies to the entire project site. The proposed change in use involves all three buildings. SJCC 18.80.100(D), the criteria for a conditional use permit, requires a review of cumulative adverse impacts. Ms. Cunningham focused upon the Eastsound Swale and noted that federal permits are required for the project due to its impacts upon the swale. Ms. Cunningham asserted that the Applicant cannot claim no significant adverse impacts without complying with federal permitting requirements. She also noted that the only documentation on the size of the project for purposes of site plan review was that the project was 4,138 square feet in area. She noted that the Applicant had the burden of showing compliance with permit requirements and that it should have supplied more accurate numbers if the 4,138 area was incorrect. She noted that the County missed some opportunities to apply the code and that now is the time and opportunity to mitigate the impact of not having buffers to a very important wetland, to mitigate the impacts of a road built within a wetland that shouldn't have been. The most important impact to be addressed is the impact of the well within the wetland. Even if the well is removed there should be restoration. She is not asking that any buildings be torn down. She is asking that the wetland regulations since 2004 should be applied.

In response to questions from the Examiner, Mr. Pearson stated that the use of the existing buildings would not change under the conditional use permit under review. Equipment rental accounts for over 90% of total sales.

Ms. Cunningham presented a power point. She identified the location of the Eastsound Swale and noted that the swale discharges directly, via detention ponds and a drainage pipe, into Eastsound/Fishing Bay. The Applicant's property adjoins the swale. The existing storm water detention pond was installed in 2007 and wasn't approved by the County until 2009. The Applicant's 2007 storm drainage report stated that the bioswale, detention pond and associated piping had already been installed. The bmp's for the wash down slab (apparently to wash down equipment) stated it should be covered and it wasn't. The piping runs along the edge of the wetland and there needs to be more regulatory review. The Clean Water Act requires a federal permit for any discharges to the wetland and it's unknown whether the Applicant's drainage system drains into the wetland. The Applicant's well is also within the wetland. An access road for the well was also built within the wetland and fill was placed

within the wetland. The existing building is approximately fourteen feet from the wetland buffer. A large propane tank near the wetland is prohibited under the Eastsound Subarea Plan. Ms. Cunningham noted that a shoreline permit under the Shoreline Management Act (Chapter 90.58 RCW) as well as an Army Corps wetland permit is required for the work near and within the wetland.

Sadie Bayley testified that she observed development at the project site over six to seven years and was very upset by the damage done to the wetland. She did nothing because she assumed permits were issued and she didn't think she could take on the project by herself. She noted that there's a traffic hazard on Lover's Lane due to poor site distance at the intersection with Enchanted Forest Road. She noted it's not possible to mitigate damage to a Category II wetland. She noted that trees had been removed from the swale and that the wetland exemptions only applied to buffers, not work done within the wetland. She doesn't believe that the County was told about what was going on at the project site. She is noted that pedestrians, bicyclists and numerous cars use Enchanted Road and that it has a four foot deep ditch that requires cars to be towed when they fall into it. She feels a traffic study is necessary for a full review of traffic impacts. She acknowledged that the building is well designed, but her concerns are with the impacts to land. The pond reminds her of a war zone for what's been done to it. She remembers the swale as containing much more wildlife and that it had been in a more pristine condition. She doesn't understand why he isn't subject to the 20 foot setback requirements she's seen in County regulations. She thinks that the industrial use standards should be reviewed, SJCC 18.40-80. She noted that if you're in the service light industrial area you can only sell in building number one for the original use. Ms. Bayley submitted a letter dated March 1, 2011 as Ex. 33 and a petition letter as Ex. 34.

Errol Speed, from Orcas Island, is a landscape contractor. He submitted hearing comments as Ex. 35. He submitted a packet of additional marked as 1-10A, admitted as Ex. 36. He noted that have the property is designated as Conservancy Overlay district, which is a land use designation and that the other half is service light industrial. As noted in the staff report, no site plan review has been done. As acknowledged in the staff report, staff overlooked the use area thresholds for site plan review. He referenced documentation showing that the area of the project triggered site plan and conditional use review. Mr. Speed noted that several parts of the project had been constructed prior to approval of the drainage plan. There is no record of any inspections made as the project was constructed. He noted that the certificate of occupancy was issued a day after the Eastsound Sewer District issued a letter stating that the equipment cleaning station was approved and installed under the supervision of the District. He noted that the District issuing the letter had never seen the drainage plan.

Mr. Speed made corrections to the staff report. The leased premises from the Port is .65 acres plus .99 acres is a total of [sic] 1.5 acres for the site size. There are actually two land use designations for the site. It's not clear that property has been legally divided. It's not clear how the tax parcel numbers were created and property lines that appear on planning documents are not substantiated by any approved subdivision. The well on the property is illegal and located on illegal fill as shown on drilling reports. The well drilling report has drilling dates that were before the Applicant owned the property. The SEPA checklist was only done for the third building. The staff chronology starts in 2005 and much happened before that. On 8/13/2003 a wetland delineation report was prepared, 10/23/2003 a sanitary setback

document with Port, 2/4/04 well inspection report signed for domestic use and four foot fill identified, 9/21/04 driveway access permit where Pearson presents himself as owner when he hasn't yet purchased the property, Avocet testing sheet checked as individual even though presented as public system, 11/19/04 statutory warranty deed shows when purchase took place, 1/3/05 community water well inspection – incomplete and unsigned with a plot plan that doesn't identify extent of the swale and health official still approves well site, 1/3/05 Group B water system checklist incomplete and unsigned even though filed at health department and well had already been dug for a year, 1/20/05 declaration of covenant requiring well site to be free of impurities while well in wetland subject to ponding, 1/20/05 water facilities inventory form that are all incomplete and signed, culminating in 4/11/05 certificate of water availability. Mr. Pearson could not develop his property because he had no water source so he dug an illegal well. On the second building permit applied in 8/09, the only thing that hadn't been constructed was the building itself. All other work was done without required permits. There is no treatment system for particulates that are discharged from the wash down slab.

The site plan for the first building in 2005 has notes that provides that space will be rented for uses allowed in Eastsound plan, specifically mini storage, construction related business and manufacturing. None of the documentation identifies equipment rental as a proposed use and Mr. Speed has done six months of research on the documents.

The wash down slab is used for storage of equipment and wash down. The slab does not address any concerns regarding industrial chemicals. As the equipment ages this problem will compound.

Mr. Speed argued that the project violates airport overlay district requirements. He noted that that public assemblies are prohibited in the district and he believes that the proposed commercial use involves a concentration of people that qualifies as a public assembly.

All the south parking is noncompliant. Mr. Pearson is subject to a hundred foot buffer, not a 50 foot buffer, because he hasn't followed code requirements.

When Ms. Shaw testified that the project had been approved, she was only referring to the drainage plan. Mr. Speed referred to a site plan prepared by the Applicant. Mr. Speed determined that the impervious surface depicted on the plan was 4,385 feet.

Paul Anderson, is a wetland specialist with DOE and his responsibilities include reviewing applications for wetland fills and shoreline application and he also investigates unauthorized fill activities. He provides assistance to San Juan County on fill permits and provides SEPA comments. Mr. Anderson has done a site visit on November 4, 2010 as well as November in 2009. He did a site visit last November to determine whether there had been unauthorized fill in a wetland. He determined that there was a small area of unauthorized fill located at the access road and also that the well had been unauthorized. He notified San Juan County of his findings and that the encroachments be removed. He also noted that federal approval was required for the fill and well. Mr. Anderson noted that he had observed a culvert on Fishing Bay that runs through the Outlook Inn property and connects to a vault that has several pipes connecting to it. One of those connecting pipes drains ponds on the Outlook Inn property. Those ponds are part of what was formally the swale. It's not clear what effect the water withdrawal by the well has

on the swale. There's a potential to dry up the wetland and downstream flow. The SEPA submittal shows the well outside the native growth protection tract and that's not accurate.

In cross examination, Mr. Pearson asked if Mr. Anderson had seen the Notice of Intent to Construct a Water Well that he had filed with the Department of Ecology. Mr. Anderson noted that would have been filed with another DOE program that regulates water resources. He noted that separate permits are necessary for work in wetlands. Mr. Anderson noted that the fill should have acquired state and federal permits. He noted that the Applicant would either have to acquire the permits or remove the access road, decommission the well and restore the wetland. Mr. Anderson has been involved in wetland work for over 20 years. Mr. Anderson noted that even though San Juan regulations may have exempted drilling of the well from development restrictions in wetlands that state and federal permits would still be required. There are no state or federal exemptions for work within wetlands. On redirect, Mr. Anderson testified that he could not find any record of the well as registered with the state.

Scott Lancaster submitted a letter as Ex. 37. Mr. Lancaster compared the project to the Gerard property, where three applications were denied for development due to airport and wetland restrictions. He noted that if the Gerards aren't allowed to develop, the same should apply to Pearson. He noted that he had investigated a lease arrangement with Mr. Pearson in 2007 at the site for retail and that the lease fell through because it was discovered that the Eastsound plan prohibited retail use. This shows that Mr. Pearson knew in 2007 that he could not use his property for retail. Mr. Lancaster questioned whether selling chain saws, lawn mowers and generators was ancillary to renting a back hoe. For the second building permit, it should be noted that the permit was for an addition to the existing building, not for a new building. This was why no red flags went off for the additional 4,000 square feet. In the last month there's been three different plans for three different parking configurations. To this point there's been no information provided on what the uses will be. He also noted that he owns Ace Hardware and that he knows that the proposed parking will be insufficient for the amount of trips generated by the project.

Steve Emmes, resident of Auga [?], knows Mr. Pearson. He noted that Pearson rental facility is a God send for area residents. His wife has worked for Mr. Pearson for the last three to four years. He acknowledged he has a financial interest in the project but so do others that have testified. No opposition to the project arose until retail was considered, which would compete with the business of some project opponents. He noted that permits should be final and not revisited and that other developments in the area would also raise questions if revisited. He noted that the washdown slab drains into a ditch that doesn't discharge into the swale. The water stands in the ditch and evaporates and Mr. Pearson takes the remnants to a hazardous waste landfill. Mr. Emmes noted that Mr. Pearson does not intentionally violate code requirements. He also noted that it's very difficult to know what is required for development since there are so many agencies involved.

Kathlene [sp?] Speed testified that she disagreed with testimony that Mr. Pearson knew what was required. He is a builder and knows County regulations. She also noted that developers should be allowed to get after-the-fact permits on the basis that they didn't know. The County didn't know about

the well and so couldn't tell him to get permits for the wells. She noted that there is no use allowed for the buildings at the site.

On rebuttal, Ms. McEnery stated that the regulations on site plan requirements have not changed since 2003. She explained that staff was not invoking a County regulation that authorizes denial of a permit application for properties that have code violations because the Notice of Correction required the Applicant to apply for the permit. Ms. McEnery referenced comments from Ms. Shaw on the 50 foot wetland buffer as being arbitrary and noted that employees could not substitute their judgment for code requirements. She noted that the application should be reviewed prospectively, based upon the requirement that projects over 10,000 square feet need a conditional use permit, and not upon what had or hadn't been done in the past. The north property leased from the Port is used for parking, equipment storage and some grading has been done. It's not just a drainage facility. Related to the same property, the wetland report doesn't mention the Port property. The staff report should have identified Conservancy as one of the designations. Most other development in the area pre-dates the wetland restrictions.

In rebuttal, Curt Johnson, Applicant's representative, noted that the Applicant had relied upon assurances for County staff and paid consultants that the development is code compliant. Addressing the alleged wetland violations would be an afternoon job. The Applicant would be willing to live with a condition requiring abatement and would also appreciate the opportunity to acquire the required permits. The propane tank has the required permits – mechanical and electrical permits and comments from the fire marshal that it doesn't concern them. The Applicant is willing to berm the tank from the road to make it safer. He noted that the room is full of competing businesses. As to parking, the ten parking spaces is required under a "public assembly" heading, which applies to uses such as theaters and not retail. As to the subdivision of the property, the property was created legally through a subdivision exemption for land sold to a government with the power of condemnation – the property was created through a sale of the northern portion to the Port of Orcas, which has the power of condemnation. The Gerard project is a different issue dealing with subdivision issues. As for specificity in use, the Applicant is trying to keep his options open. Mr. Johnson suggested that the project could be approved through the reasonable use process.

In rebuttal, Steve Pearson explained that he is applying for a permit because the County was uncomfortable with relying upon incidental use. Everything he's asked for is an allowable use. The only reason there's a conditional use involved is because of the area of the project. On the area of the stormwater, his instruction to the engineer was to use a fully built out scenario so that further storm drainage engineering work wouldn't have to be done when the project was expanded. There are two 10,000 square foot requirements involved. The substantial storage requirement is for 10,000 square feet of impervious [?] surface. The 10,000 square feet for the conditional use is use area, which is buildings and parking and storage. On the wash down slab, the applicable best management practices are those for uncovered slabs (he couldn't cover it next to the airport) and all drainage from the slab enters the sewer system and not the wetland. As to the bmp requirements, he has no equipment over 20,000 pounds and he has doesn't have parking for over 100 cars. There's a seal on the well that

prevents contamination from the wetland. Mr. Pearson entered two notebooks into the record as Ex. 38 (short version) and long version notebook as Ex. 39.

The Examiner left the record open through March 10, 2011 to give an opportunity for the public to review the notebooks and until March 17, 2011 for a written response to the notebooks. The record was also left open until March 10, 2011 for staff to provide copies of all permitting decisions made on the project site and all other parties were given until March 17, 2011 to respond to these comments. The Applicants had until March 24 to reply to the comments submitted by the other parties.