

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Appellants: Saratoga Passage Partners LLC, c/o Pamela Carver
4432 95th Ave. NE
Bellevue, WA 98004

Applicant: Frank and Kathy Messano
1 Westerly Court
Orcas Island

File No.: PAPL00-09-0001

Request: Building Permit/Inspection Denial

Parcel No: 361223008

Location: 1 Westerly Court
Orcas Island

Summary of Appeal: Appeal of building permit/inspection approval for single-family deck.

Shoreline Designation: Rural Farm Forest

Hearing: May 11, 2010

Decision: The appeal is dismissed.

S.J.C. COMMUNITY

MAY 26 2010

DEVELOPMENT & PLANNING

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BEFORE THE HEARING EXAMINER FOR SAN JUAN COUNTY

RE: Saratoga Passage Partners, Inc. Appeal of Building Permit Inspection (PAPL00-09-0001)	ORDER OF DISMISSAL
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INTRODUCTION

The appellants appeal an after-the-fact inspection and/or building permit approval of a residential deck. The appeal is dismissed on the basis that the grounds of appeal are not within the scope of the inspection and the appeal on the building permit approval is untimely.

EXHIBITS

See the San Juan County Department of Planning Staff Report, prepared by Lee McEnery, dated April 13, 2010, for a full list of exhibits presented (identified as "attachments" on p. 3 of the report).

FINDINGS OF FACT

Procedural:

1. Appellant. The appellants are the Saratoga Passage Partners LLC, represented at the hearing by Bill Weissenger.
2. Hearing. The Hearing Examiner conducted a phone conference on the Applicant's motion to dismiss on May 11, 2010. The phone conference was a continuation of the hearing held on May 6, 2010. Present in the phone conference were Lee McEnery, San Juan County planner; Michael Murray, attorney for Frank and Kathy Messeno, applicants; and Bill Weissenger, attorney for appellants Saratoga Passages.

Substantive:

3. Basis for Appeal. San Juan County issued a building permit to the Applicants on March 4, 2009, for after-the-fact approval of a deck replacement. The new decks were not allowed to extend further sea-ward than the prior decks. According to the staff report, the building permit application erroneously identified the sea-ward end of the replaced decks as the sea-ward end of the newly constructed

1 decks. According to the Appellants,¹ the newly constructed decks in point of fact
2 were constructed four feet further seaward than the replaced decks. The Appellants
3 filed their appeal on October 26, 2009. The appeal decision referenced in their appeal
4 is an inspection report dated October 6, 2009. The Appellants state “Appellants
5 appeal the approval of the Deck Permit.”

6 CONCLUSIONS OF LAW

7 Procedural:

8 1. Authority of Hearing Examiner. It is unclear whether the Appellants are
9 appealing the building permit or inspection decision. The Examiner has authority to
10 hear the appeal of the inspection decision but not the issuance of the building permit.

11 The Examiner has no authority to hear the building permit appeal because it is
12 untimely. The courts have treated the issuance of a building permit as the trigger for
13 commencing the 21-day appeal period under the Land Use Petition Act, Chapter
14 37.70C RCW. *See, e.g., James v. Kitsap County*, 154 Wn.2d 574, 586 (2005). In line
15 with these decisions, the Examiner concludes that the issuance of a building permit is
16 a final decision subject to administrative appeal. The failure to timely appeal the
17 issuance of a building permit deprives the Hearing Examiner of the authority to hear
18 the appeal, whether the time limit is considered jurisdictional or a statute of
19 limitations². *Cf., Nickum v. City of Bainbridge Island*, 153 Wn. App. 366 (2009).
20 SJCC 18.80.140(E) (1) provides that appeals must be filed within 21 calendar days of
21 the written decision. The Appellant’s October 26, 2009 appeal was not filed within
22 21 days of the March 4, 2009 building permit decision and, therefore, cannot be
23 construed as applying to the building permit.

24 The Examiner does have authority over the inspection decision because it was timely
25 filed. SJCC 2.22.100(A) (3) broadly grants the Examiner authority to hear appeals of
“matters arising pursuant to SJCC Title 15 (building and fire codes).” Inspections are
governed by the building code. *See IRC 109*. The Appellants filed their appeal of the

19 ¹ In providing attribution to staff and the Appellant on assertions that the Applicant’s building permit
20 application mischaracterized the size of the replaced deck, the Examiner is purposely avoiding making
21 any finding on this issue. Resolution of the issue is not necessary for the subject motion to dismiss and
is more appropriately handled in the code enforcement proceedings related to the same issue.

22 ² It is an open issue whether a jurisdiction is barred from second guessing its permitting decision for
23 approvals based upon misrepresentations by the applicant. One could argue that under these
24 circumstances the validity of a building permit decision is still “live” during permit inspections and
25 that an inspection could be denied on the basis that the underlying permit is invalid. However, it
appears that the courts expect a jurisdiction to challenge an invalid permit by appeal as opposed to
using the inspection process for that purpose. *See Nykreim v. Chelan County*, 146 Wn.2d 904
(2002)(County action to invalidate boundary line decision invalid because County failed to timely file
judicial appeal to its own decision).

1 inspection report was filed 20 days after issuance of the report, which satisfies the 21-
2 day filing period of SJCC 18.80.140(E)(1).

3 2. Equitable Tolling. The Appellants argue that the appeals period for the
4 building permit is tolled under the doctrine of equitable tolling. The hearing
5 examiner does not have the authority to consider equitable doctrines such as equitable
6 tolling. *See Chaussee v. Snohomish County*, 38 Wn. App. 630 (1984) (hearing
7 examiner has no authority to consider equitable estoppel defense because the
8 examiner was not given this authority by ordinance or statute). Nothing in the
9 hearing examiner statutes or the SJCC authorize the Examiner to consider equitable
10 tolling.

11 3. Rule 3.4. Hearing Examiner Rule of Procedure 3.8 requires motions to
12 dismiss on grounds that the appeal is frivolous must be filed within five days of the
13 appeal. The Appellants argue that this motion applies to the subject motion to
14 dismiss. The Examiner concludes that Rule 3.4 does not apply. The Applicant bases
15 its motion on the assertion that the appeal is untimely, not that it is frivolous.

16 4. Scope of Appeal to Inspection Decisions. IRC R109.4 provides that work
17 shall not be done beyond the point indicated in each successive inspection without
18 first obtaining the approval of the building official. IRC R109.4 further provides that
19 after each inspection the building official is required to determine whether progress is
20 satisfactory and may continue or notify the permit holder if the work “fails to comply
21 with this code.” As previously discussed, a permit inspection does not provide an
22 opportunity for the County to second guess the validity of the underlying building
23 permit. Rather, IRC R109 fairly clearly sets up a system designed to ensure that
24 construction proceeds in conformance with an approved building permit and that the
25 work done in conformance to the approved permit is otherwise done in conformance
with applicable building codes.

5. Appeal Beyond Scope of Inspection Decisions. The Appellants’ appeal is
limited to assertions that the decks fail to comply with setback requirements and that
a shoreline substantial development permit is required. Both of these issues relate to
whether or not the building permit should have been issued, which is beyond the
scope of an appeal to an inspection approval.

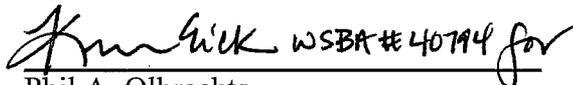
6. Dismissal. As noted in the preceding Conclusion of Law, the Appellants’
appeal issues are all outside the scope of an appeal of a building permit inspection.
Consequently, the appeal is dismissed.

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DECISION

The above-captioned case is dismissed without prejudice.³

Dated this 21st day of May, 2010.


Phil A. Olbrechts
San Juan County Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

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

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

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State shorelines hearings board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirement 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.

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

³ It is unlikely that the Appellants would be in any position to refile a timely appeal. However, given the misrepresentation allegedly involved in the building permit application, the Examiner is willing to leave that option open should any other irregularities toll the appeal period.