**SAN JUAN COUNTY**
**HEARING EXAMINER**

# FINDINGS, CONCLUSIONS, AND DECISION

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| Appellants: | Orca Dreams LLC, David Honeywell, Managing Member<br>PO Box 928<br>Friday Harbor, WA 98250 |
| File No.: | PAPL00-15-0005 |
| Request: | Appeal of Denial of Tree Removal Permit, File number PSTREE-15-0008 |
| Parcel Nos: | 353344008, 340411004, and 340411003 |
| Location: | The shorelands adjacent to 1601 False Bay Drive, San Juan Island |
| Summary of Appeal: | A May 12, 2015 hazardous tree removal plan was denied September 4, 2015. |
| Public Hearing: | November 19, 2015 |
| Applicable Policies and Regulations: | SJCC 18.20.020 Definition of Hazardous tree<br>SJCC 18.35.030(D) Exemptions<br>SJCC 18.80.140 Appeal of Administrative Decision |
| Decision: | Appeal Granted |

S.J.C. DEPARTMENT OF
DEC 15 2015
COMMUNITY DEVELOPMENT

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

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| In the Matter of the Appeal of | | |
| | ) | NO. PAPL00-15-0005 |
| **Orca Dreams LLC, by** | ) | |
| **David Honeywell, Managing Member** | ) | **Orca Dreams Hazardous Tree** |
| | ) | **Removal Plan Appeal** |
| of the September 4, 2015 denial of a | ) | |
| Hazardous Tree Removal Plan associated | ) | |
| with a proposed subdivision at | ) | |
| 1601 False Bay Drive, San Juan Island | ) | |

## SUMMARY OF DECISION

The appeal of the September 4, 2015 denial of a hazard tree removal plan is **GRANTED.** The Appellant may severely prune or remove the hazard trees consistent with the May 12, 2015 hazard tree removal plan.

## SUMMARY OF RECORD

**Request:**

Orca Dreams LLC, by David Honeywell, Managing Member, appealed the San Juan County Department of Community Development's denial of the request to remove 11 hazard trees from the beach access path associated with real property addressed as 1601 False Bay Drive, requesting that the denial be reversed and that they be allowed to remove or prune the 11 trees.

**Hearing Date:**

The San Juan County Hearing Examiner held an open record public hearing on the request on November 19, 2015. At the conclusion of the hearing, the parties agreed to extend the deadline for decision issuance to December 14, 2015.

**Testimony:**

At the open record public hearing, the following individual presented testimony under oath:

Julie Thompson, Planner, San Juan County Department of Community Development
Sam Gibboney, Director, San Juan County Department of Community Development
Dave Honeywell, Appellant
John Geniuch, Certified Arborist, Appellant Witness

The Appellant was represented by attorneys Stephanie Johnson O'Day and Nick Power.

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**Exhibits:**
The following exhibits were admitted in the record:

1. Department of Community Development Staff Report, dated November 6, 2015
2. Appellants' Appeal Request, dated September 22, 2015, with the following attachments:
   A. Decision denying hazard tree removal plan PSTREE-15-0008, September 4, 2015
   B. Hazardous Tree Evaluation Report, by John Geniuch of Design Solutions Development Group, Arborist Services Division, undated, with attached photos and hazard tree evaluation forms
   C. Email from Stephanie Johnson O'Day to David Honeywell, dated August 11, 2015
   D. Hazardous Tree Evaluation Report Addendum, dated September 10, 2015 with attached photos
   E. San Juan County GIS Aerial Parcel map showing location of tree removal request
3. Plat of Orca Dreams, Sheet 2 of 2, and Site plan for tree removal request depicted on topographic survey, Sheet 1 of 1
4. San Juan County Code 18.50.330 together with Ordinance 26-2012
5. Two color copies of photos of failed Tree 5
6. Email from Randall Gaylord, dated October 28, 2015
7. Email from Rene Beliveau to Island Skyline Tree Care, dated March 8, 2010
8. Table purporting to report "County Actions on Hazardous Tree Removal Requests", submitted by Appellants, listing outcomes of 14 hazard tree removal requests dating back to September 2013

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

## FINDINGS

1. Orca Dreams LLC applied to San Juan County for a subdivision on 38.73 acres creating eight lots for detached single-family residential development. Formerly known as the Mar Vista Resort, the overall subject property contains substantial waterfront area at the base of a low hill. Current and future residents and guests of the proposed plat access the beach by an existing pedestrian path that contains much mature vegetation. The subdivision proposal included trimming some of the vegetation on the hillside along the waterfront to clean up existing trails and a pathway leading to the shoreline to return them to their original condition, indentifying specific trees and shrubs. The subdivision application, submitted on March 28, 2014, is presently on hold and is not part of the instant proceedings. *Exhibits 2 and 2.B.*

2. According to Appellants, on March 31, 2014, the new 2013 San Juan County critical areas ordinance (CAO) began to be implemented.[1] *Exhibit 2, page 2*. The new CAO regulates vegetation removal within 200 feet of fish and wildlife habitat conservation areas (FWHCAs), which include all waterfront property in San Juan County because all marine waters have been designated FWHCAs. *Exhibit 2; San Juan County Code (SJCC) 18.35.030*. In response to the subdivision proposal's request to trim and remove vegetation, the San Juan County Department of Community Development (the Department) requested more information. *Exhibit 2*.

3. The Appellants submitted a hazardous tree evaluation report (the report) prepared by John Geniuch, Certified Arborist. Mr. Geniuch conducted a site visit to assess for hazard trees. As noted in the report, the pathway is used for pedestrian and small vehicle access to the beach and to the site of a former dock (now reduced to pilings). Along the existing trail and the beach at the end of the trail, a total of 12 trees of concern were evaluated using Department hazard tree evaluation forms; all 12 are located within the 200-foot FWHCA zone adjacent to the shoreline. Photographs of the identified defects and hazards accompany the hazard tree evaluation form for each tree. Approval of the proposed hazard tree plan would reduce the canopy cover of the forested shoreline area by 4.28%. *Exhibit 2.B; Geniuch Testimony*.

4. Trees 1 through 6 are Scouler's willows on the low bank at the intersection of the hillside and the beach. Trees 1, 2, 3, 5, and 6 are located in severely eroding soils as a result of tidal action, and display varying degrees of lean, rot, structural defects, branch dieback, and evidence of recent substantial failure. Also, their location in the tidal slope area creates the potential that failure could result in slumping of the bank. Rather than remove them completely, the hazard tree report proposed to severely prune Trees 1 through 6, leaving them eight to 10 feet in height, which was intended to reduce structural hazards and increase safety for users of the trail. The report asserted that shoreline bank stability would be enhanced by the proposed pruning, because of reduce structural hazard and continued bank stabilization of the existing root structures. *Exhibit 2.B; Geniuch Testimony*.

5. The report identified Trees 7 through 12 as red alders on the upper portion of the trail access the beach and dock. The report indicated that Trees 7 through 12 exhibited signs of root rot, insect infestation, canker, trunk rot, cracking bark and limbs, and varying degrees of lean over pedestrian and vehicular access routes. In addition to the pathway strike zone, Tree 12 was also reported to have an electrical transformer in its target zone. *Exhibit 2.B; Geniuch Testimony*.

6. Trees 1, 2, and 3, were rated to pose a very high degree of hazard and were proposed for severe pruning. Tree 4 was rated to pose a moderate degree of hazard, and only minor

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[1] The effective date in Ordinance 26-2012 is March 1, 2013. *Exhibit 4*. The Department did not contradict Appellant's assertion that the new CAO went into effect after the March 28, 2014 submittal of the Appellants' subdivision application. The record does not clarify this apparent discrepancy.

pruning of limbs was proposed. Trees 5 and 12 were rated as posing an extreme degree of hazard; Tree 5 was proposed to undergo severe pruning and Tree 12 to be removed. Tree 6 was rated as posing a high degree of hazard and proposed for severe pruning. Trees 7, 8, 9, 10, and 11 were rated as posing a very high degree of hazard and were recommended for removal. *Exhibit 2.B; Geniuch Testimony.*

7. In a September 4, 2015 decision from the Department Director Sam Gibboney, Tree 12 was approved for removal due to the threat of damage to the utility infrastructure in its strike zone. It was subsequently removed. The Director's decision stated that the remaining 11 trees were not approved for removal or severe pruning because "[a]lthough these trees may ultimately fall, the potential for significant property damage or personal injury seems unlikely. The area described is a path to a beach. It is not in proximity to a residential appurtenant or accessory structure. No standard is presented to define this private path as a 'high use area'." *Exhibit 2A, page 1.* The denial decision goes on to cite the SJCC provisions that establish what pruning is allowed in FWHCAs. *Exhibit 2A.*

8. Sometime after the September 4th denial of the remaining hazard tree requests, Tree 5 experienced significant failure. One of the two codominant trunks fractured and fell down onto the beach at the bottom of the slope. *Exhibit 5; Geniuch Testimony.*

9. The Appellants' arborist takes exception to the Director's determination that the path to the beach is not a high use area and that personal injury from failure of the remaining trees is unlikely. According to an addendum to the tree report prepared by Mr. Geniuch on September 10, 2015, the industry standard for hazard tree evaluation is predicated almost entirely on the target zone of the tree in question, which in current arboriculture practice measures approximately 1.5 times the height of the tree. To determine risks in the target zone, an arborist assigns an occupancy rate to the zone and then - is it constant? is it occasional? - and then looks at consequence of failure. Is there a structure? Will people be under it? These considerations are addressed the SJCC hazard tree definition at SJCC 18.20.080 subsection 2, which requires evaluation of the potential for significant property damage or personal injury if the tree fails. As noted in the addendum tree report, the Director's denial does not question the degree of hazard for any of the trees. Yet, the first prong of the hazard tree definition requires a high probability of failure. The second prong requires only the "potential" for property damage or personal injury. Appellants' arborist argued that no specific degree of potential is established. Regarding potential personal injury, Mr. Geniuch asserted that had anyone been on the beach under Tree 5 when it in fact failed, the risk of personal injury or death would have been very high. Based on the diameter/volume of the failed portion, he estimated that the portion that fell weighed as much as a small car. *Exhibit 2D; Geniuch Testimony.*

10. In his testimony, Mr. Geniuch gave detailed descriptions of the hazards of all ten remaining hazard trees, referring to his photos in the record. Several of the remaining ten trees contain substantial branches that are and are just hanging in the tree. Wind, rain, snow, ice, decay, and the passage of time could cause the trees to fail. Mr. Geniuch testified that the failure of Tree 1 would cut off access to the beach. He also submitted

the opinion that the identified hazard trees could appear to pedestrians using the trail to be good climbing trees, and they are not safe to climb. Mr. Geniuch testified that in addition to potential bank slumping, the hazard trees could damage other healthy trees when they fail. The target zone of Trees 1 through 6 is the beach itself. While noting that it is not generally common for people to be killed by falling trees, he testified that in the week preceding the instant hearing five people in western Washington were killed by falling trees. Mr. Geniuch has advised the Appellants not to use the trail until the hazard trees are removed. *Exhibit 2D; Geniuch Testimony.*

11. Appellants offered a packet containing decision letters for 14 hazard tree removal requests dating back to September 5, 2013. *Exhibit 8.* The September 4, 2015 denial of the Appellants' request is the only denial in that time. Mr. Geniuch testified that based on his experience working in the County, the decision to scrutinize the degree of potential damage or injury under the second prong of the hazard tree definition in the Appellants' case is a sharp contrast to the level of scrutiny applied to previous cases. Mr. Geniuch acted as the certified arborist on a later-submitted hazard tree removal request on behalf of John Bethke (PSTREE-15-0013), which was processed under the current CAO in July 2015. The Bethke trees were near the 200-foot shoreline jurisdiction and near an identified wetland. In that case, Mr. Geniuch noted that the target zone of the Bethke hazard trees was the front lawn, an area that could be used by people to congregate for outdoor gatherings. In contrasting the two cases, he testified that the alders in the Bethke case were smaller and that the Appellants' property has accommodations for significantly more guests, which together in his estimation make the consequence of failure somewhat lesser than the Appellants' request. He testified that the outward signs of stress on the subject trees are greater than those displayed by the Bethke trees. He stated that the Bethke hazardous tree removal request was approved within about four days. He submitted the opinion that there was politics involved in the denial of the Appellants' hazard tree request resulting from previous illegal tree removal and public interest in and pressure on the Department regarding the Appellants' related development proposals. *Geniuch Testimony; Exhibit 8.*

12. The Appellants offered testimony from David Honeywell, who owns a home on the subject property. He testified about the frequency with which residents and guests of the property access the beach via the trail, which is essentially daily. He stated that he drives a small four wheel down that trail regularly with his grandkids, who visit more frequently than once per month. He noted that there are seven residences on the property existing or under construction. The beach accessed by the trail is the only beach on the property and the existing trail is the only access that would not require grading and vegetation removal. He testified that removal of the ten trees in question would not enhance the view at all from the residences upland. Mr. Honeywell reported an incident since he took ownership in 2013 in which a similar willow tree up at barn willow fell with no warning on a sunny, still day. Finally, he stated that he would be happy to replace the removed trees. *Honeywell Testimony.*

13. At hearing, the Department contended that the denial of the hazard tree plan was appropriate because there was no showing of a significant potential for damage. Staff stated that "people shouldn't be on the path in bad weather" and that no structures would be damaged by failure. The Department contended that use of the pathway could easily be restricted during storm events to reduce the possibility of harm. The Department did not hire or consult with a certified arborist in reaching the denial decision. *Thompson Testimony; Exhibit 1.* The Director asserted that the Appellants can use the property without using the beach. She contended that any hazard tree removal decisions rendered prior to adoption of the current CAO are irrelevant. She stated that dying trees play a role in the ecology that must be considered in removal. The Department continues to view the potential for property damage or personal injury are small, that the likelihood of tree failure at the exact moment a person or vehicle in the target zone is remote. *Gibboney Testimony.*

14. The Department requested that the denial be upheld, but in the alternative that if the appeal is granted, that only pruning of Trees 2 through 5 should be allowed and the stump of Tree 6 should be required to be retained. *Exhibit 1.*

## CONCLUSIONS

**Jurisdiction**

The Hearing Examiner is granted jurisdiction to hear and decide appeals of administrative determinations or interpretations made by the Director pursuant to San Juan County Code 18.80.140. Pursuant to SJCC 18.80.140.F.1, the Examiner shall consider and issue a written decision on the appeal within 60 days of the date of filing.

*Applicable Code Provisions*

SJCC 18.20.080 defines "hazardous tree" as: A tree that a certified arborist has determined has: (1) a high probability of falling due to a debilitating disease or structural defect; and (2) potential for significant property damage or personal injury if it falls.

Pursuant to SJCC 18.35.030(D), removal of hazard trees as defined in SJCC 18.20.080 is exempt from standard critical area regulation.[2]

*Guidance from Washington Courts*

Construction of a statute is a question of law and is reviewed de novo. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564 (1998). Because municipal ordinances are the equivalent of a statute, they are evaluated under the same rules of construction. *McTavish*, 89 Wn. App. at 565. When a statute is unambiguous, construction is not necessary and the plain meaning controls. *McTavish*, 89 Wn. App. at 565. Where a statute is ambiguous, the agency's interpretation is

[2] The exact language is: 18.35.030 Critical areas – General exemptions. When conducted in accordance with the provisions of this section, and other applicable requirements, the following uses and activities are exempt from standard critical area regulations:...D. Removal of hazard trees as defined in SJCC 18.20.080. In addition, to allow for defensible space for fire protection purposes, 30 feet of vegetation may be cleared around buildings lawfully existing on the effective date of the ordinance codified in this section. (emphasis added)

accorded great deference in determining legislative intent. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Absent ambiguity, however, there is no need for the agency's expertise. *Waste Management*, 123 Wn.2d at 628. In doubtful cases, great weight is given to the "contemporaneous construction of an ordinance by the officials charged with its enforcement. This is especially true where the administrative construction has been accompanied over a period of years by the silent acquiescence of the legislative body." *Morin v. Johnson*, 49 Wn.2d 275, 279 (1956).

**Conclusions Based on Findings**

1. In the present appeal, the CAO in effect in the Department's review of the May 12, 2015 hazard tree removal plan was relatively new, including the definition of hazard tree, which was amended when Ordinance 26-2012 was adopted. These new provisions have not enjoyed " administrative construction ... accompanied over a period of years by the silent acquiescence of the legislative body." The Department was interpreting and applying relatively new provisions to the request to remove hazard trees. This weighs against deference to the Department's decision. *Findings 2, 7, 11, and 13.*

2. The Department did not consult a certified arborist when it engaged in scrutinizing the Appellants' hazard tree removal request. The instant denial is the only case in evidence in which the Department questioned a certified arborist's determination of hazard. The lack of an established practice of challenging a certified arborist's report, especially in light of Mr. Geniuch's undisputed expertise, weighs against deference to the Department's decision. *Findings7, 9, 10, 11, and 13.*

3. It could be argued that the language of the code is plain and does not require interpretation entitled to deference. By the plain language of the code, a tree is a hazard tree if a certified arborist has determined has: (1) a high probability of falling due to a debilitating disease or structural defect; and (2) potential for significant property damage or personal injury if it falls. Mr. Geniuch so determined, and his determination is supported by substantial evidence in the record. Tree 5 in fact failed after the hazard tree removal plan was denied. The fact that no one happened to be under it at that time is not evidence of non-hazard. According to Mr. Geniuch, the part that fell onto the beach weighed as much as a small car; it is reasonable to assume guests and residents will be on the beach and there is insufficient basis for denying the property owners safe access to their waterfront. *Findings 3, 4, 5, 6, 8, 9, and 10.*

4. Regarding the Department's request in the alternative to restrict approval to only pruning Trees 2 through 5, rather than removal, and requiring the stump of Tree 6 to be retained, the request mirrors what was proposed in the May 12, 2015 plan. *Findings 6 and 14.*

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## DECISION

Based on the preceding findings and conclusions, the appeal of the September 4, 2015 denial of the Appellants' hazard tree removal plan is **GRANTED**. Substantial evidence in the record supports the conclusion that the trees in question meet the definition of hazard trees and should be severely pruned and/or removed consistent with the May 12, 2015 hazard tree removal plan.

**Decided** December 14, 2015.

By:

Sharon A. Rice
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 requirements 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.