

**SAN JUAN COUNTY  
HEARING EXAMINER**

**ADMINISTRATIVE APPEAL**

Appellants: Michael Durland, Kathleen Fennell,  
Deer Harbor Boatworks

Applicant/Property Owner: Wes Heinmiller and Alan Stameisen

File No.: PAPL00-09-0004

Request: Appeal of Building, Change of Use and Accessory  
Dwelling Unit Permit

Parcel No: 260724011

Location: 117 Legend Lane, Deer Harbor, Orcas Island

Comprehensive Plan Designation: Deer Harbor Hamlet Residential

Shoreline Designation: Rural

Hearing: May 6, 2010

Decision: The appeal is denied.



1 County then negotiated a compliance plan that provided a potential avenue to leave the building  
2 standing. The Compliance Plan calls out the possibility that the building permit will be rejected and  
3 specifies that if the building permit application is rejected that the building will be torn down or  
4 some alternative to achieve compliance. Mr. Bricklin noted that this provision is significant  
5 because it defeats the applicant's argument that collateral estoppel precludes the issues raised by the  
6 applicant. The applicant appears to argue that the compliance plan constitutes a County decision  
7 that the applicant is entitled to a building permit. The provision at issue clearly shows that no  
8 determination on compliance with building permit criteria had been made. Mr. Bricklin also noted  
9 that there was no adjudication of building permit rights when the compliance plan was negotiated.  
10 In fact, the Hearing Examiner made a determination (in the Eckland case, attached to the applicant's  
11 brief) that he had no authority to hear a challenge to a compliance order (although it was based upon  
12 grounds that the appeal was untimely). County staff had also advised that there was no right to  
13 appeal a compliance plan (Ex. 20).

14 Mr. Bricklin noted that the root of the problems of this case arise from the fact that adjoining  
15 properties are residential and industrial. When Mr. Durland tried to get permits to develop his  
16 property, it was discovered that the barn on his neighbor's property was too close to the property  
17 line. Mr. Durland agreed to let the barn stay in place because it was a great buffer to the boatyard.  
18 He agreed to a setback buffer that prohibited him from building close to the barn. Mr. Durland is  
19 not renegeing on the setback buffer. The setback buffer is based on the premise that the barn is a  
20 buffer, not a residential use.

21 Mr. Bricklin also noted that the building is not a legal nonconforming use, it is an illegal  
22 building. He noted that under 18.100.070(D) that you cannot get a permit to change the use of an  
23 illegal building. The definitions section, 18.20.040 defines nonconforming as a use, structure, site  
24 or lot which conforms to the laws in effect on the date of its creation but no longer confirms to  
25 current code requirements. According to 18.20.090, an illegal use is a use or structure that was not  
26 legal the day it was established. The building was illegal because it was not within required  
setbacks (10 feet) and it was not built consistent with the issued building permit. The building  
permit showed that the barn would be built ten feet from the property line.

Mr. Bricklin stated that the applicant is arguing that even if illegal, the County has acquiesced  
in the setback violation. Mr. Bricklin noted that acquiescence by the County in a violation does not  
change it to a legal act. Mr. Bricklin referred to Youdes SHB 02-018, where San Juan County  
issued permits for an illegal structure. The shoreline hearings board still found that the permit was  
illegal. In *Longview Fiber* 89 Wn. App. 627 the court ruled that agency acquiescence does not  
estop an agency for enforcing later on. *Mercer Island v. Thymin*, 9 Wn. App. 479 contains strong  
language where Judge Callow the court goes at some length to explain that acquiescence does not  
make an illegal act legal.

Mr. Durland, Appellant, testified that he purchased his property in 1986. He acquired a  
shoreline conditional use at that time for a boat yard and marina. The property was zoned suburban  
at the time but was recently rezoned industrial. Mr. Durland testified that in 1995 the Applicant's

1 property was composed of a barn, garage and modular home and that by 2007 the garage had been  
2 attached into the modular home so that there were just two structures instead of three. Mr. Durland  
3 discovered that the barn was too close to his property line when he was preparing a shoreline  
4 application. During the permitting process it was suggested that the barn would serve as a good  
5 buffer and so Mr. Durland agreed to a setback buffer. Use of the barn changed a few years ago  
6 when the barn was changed to living space. Then Mr. Durland began to get complaints about his  
7 industrial operations. Mr. Durland noted that he owns the property between the barn and the  
8 shoreline (see Ex. 6-0).

9 Mr. Durland stated that the prosecuting attorney's office had told him he could not appeal the  
10 Compliance Plans and that building permit issuance was the time to appeal. The CDPD director  
11 also wrote Mr. Durland to tell him there was no right to appeal a Compliance Plan. See Ex. 6-20.  
12 He testified that the building permit plans (Ex. 6-9a-c) showed that the barn would be ten feet from  
13 the side property lines. The barn was actually 17 inches from the property line. See Ex. 6-0. No  
14 variance was ever issued for the setback violation. The County prosecutor (Ex. 6-4) advised that no  
15 land use decision recognized the barn as a legal nonconforming structure.

16 Carla Rieg has lived next to Mike Durland for almost 18 years. Mr. Smith was the prior  
17 owner of the Applicants' property. She knows Mr. Smith very well. She noted that Mr. Smith  
18 ignored the property line for the barn because he had assumed that he would eventually own the  
19 Durland property as well. Mr. Smith used the barn for storage and a workshop only. Mr. Smith  
20 never mentioned or intended that he would use the barn for residential use. Ms. Rieg is a friend of  
21 Mr. Durland.

22 18.40.240(F)(5) provides that any additions to an existing building for an ADU shall not  
23 exceed allowable lot coverage or encroach onto setbacks. Mr. Durland indicated that this standard  
24 was violated due to the setback violation.

25 A regulation provides that the width of a building shall not exceed 50% of the shoreline  
26 frontage. Using the building permit site plan for the last modular home application for Mr.  
27 Heinmiller, Mr. Durland determined that the shoreline was 227 feet in width. He noted that the  
28 modular home was 86 feet and the boat was 30 feet, totaling more than 50% of the shoreline  
29 frontage. He did not count the boat ramp or walkway. When he applied for his permits he was told  
30 that those type of structures counted towards shoreline width.

31 18.50.330(E)(1) prohibits accessory structures that are not water-dependent from being  
32 seaward of the most landward extent of the residence. Mr. Durland testified that the ADU is  
33 waterward of the residence.

34 18.50.020 prohibits substantial development on shorelines without shoreline substantial  
35 development permit and conditional use permits for structures accessory to a residential structure.  
36 Mr. Durland testified that no conditional use permit has been applied for. The Applicants' position  
37 is that the ADU qualifies as an appurtenance because it is less than 16 feet high. Mr. Durland

1 disagrees, citing 18.50.330(E)(2)(a), which only allows either one garage or one accessory building  
2 and not to exceed 1,000 square feet to qualify as an appurtenant structure. Mr. Durland noted that  
3 there are three permitted structures on the property and the barn is over 1,000 square feet. Mr.  
4 Durland showed three permits to support this, Exs. 6-8 (garage), 6-9 (storage barn) and 6-10  
5 (modular home).

6 18.40.240(F)(1) provides that an ADU shall not exceed 1,000 square feet in living area. There  
7 are no exclusions within the definition of living area for storage space, etc. Mr. Durland stated that  
8 when he applied for an ADU he was told that everything within the walls counts as living space.  
9 Based upon that definition he computed that the ADU contained over 1,308 square feet of living  
10 space.

11 The Deer Harbor Hamlet Plan, Ex. 6-18, requires a minimum roof pitch of 4:12. Mr. Durland  
12 testified that the applicant's attempt to comply with this by cutting off the top portion of the roof  
13 and making it flat, which is not consistent with a 4:12 pitch requirement.

14 Mr. Durland testified that the height of the upper floor is six feet eight inches, which is  
15 contrary to the IRC (2006 ed.), which requires a minimum seven-foot height. He testified that the  
16 stairway width is 14 inches and the IRC requires 26 inches. The ceiling are 2 x 6, which also  
17 violates the IRC:

18 The Examiner ruled that the appeal is limited to issues raised in the appellant's appeal notice.  
19 The Examiner said he would take under advisement objections related to the relevance of  
20 compliance with various building code requirements.

21 Lee McEnery testified that the Setback Easement is why the ADU is not considered in  
22 noncompliance with setback requirements. Ms. McEnery stated that she did not see anything  
23 inaccurate in the way that Mr. Durland determined that the width of the structures along the  
24 shoreline are more than 50% of the width of the shoreline. Ms. McEnery stated that the code  
25 requirement for the ADU having to be landward of the home was not in effect when the barn was  
26 built. She acknowledged that the ADU is not compliant with all current code requirements. As to  
compliance with SJCC 18.50.330(E)(2)(a), Ms. McEnery agreed that the barn footprint was more  
than 1,000 square feet. Ms. McEnery also agreed that the applicants had to acquire a building  
permit in order to comply with the Compliance Plans. Ms. McEnery was unable to comment on the  
building permit history of the structures, because that is outside her department. Ms. McEnery  
could not testify on the 1,000 square foot ADU requirement (1,000 square feet maximum of livable  
space) because that was a building permit issue. Ms. McEnery acknowledged that the roof pitch  
requirement could be interpreted in one of two ways. The alternative interpretation could be that  
the pitch is measured to an imaginary roof peak extrapolated from the sloped side instead of the flat  
area. Ms. McEnery testified that from a visual perspective one would not probably even see the flat  
part of the roof and she felt her measuring method was most appropriate. She noted that the flat  
portion of the roof was very inconsequential. No part of San Juan County regulations define pitch.  
In cross Mr. Bricklin noted that Ex. 6-19 of the Eastside Subarea Plan addressed combination

1 flat/sloped roofs and that there's nothing similar applicable to the subject property. The Eastside  
2 Subarea Plan does not apply to the subject property. On the 50% shoreline width requirement, Ms.  
3 McEnery used the site plan for the change in use permit, page A-1. She stated that using that site  
4 plan, it came in a little under the 50% requirement. Ms. McEnery did not include the wooden  
5 sidewalk and boat ramp in her 50% calculation because they were on-grade and did not cast a  
6 shadow. The department's practice has been to not include on-grade development, such as  
7 sidewalks and boat ramps, in the 50% calculations. Ms. McEnery did not provide any examples of  
8 this past practice or elaborate upon how often this practice has been implemented.

9  
10 Renee Belaveau, San Juan County Community Development and Planning Department  
11 director and chief building official, testified for the applicant. Mr. Belaveau determined that the  
12 living area of the ADU was 955 square feet. He noted that the code is silent on sloped roof  
13 situations. Consequently the staff looked to the building code, which defines floor area as that area  
14 with a height of more than five feet. The SJCC 18.20.120 living area definition is also silent on  
15 how to deal with low hanging ceilings. Mr. Belaveau stated that he believes this methodology has  
16 been used before (using the building code definition of floor area), but the issue does not come up  
17 very often. Mr. Belaveau also testified that the County currently uses the 2006 building codes as  
18 mandated by state law even though the SJCC only references adoption of the 2003 codes. Both the  
19 IRC and IBC define floor area to exclude areas with less than five-foot ceiling height. Mr.  
20 Belaveau testified that only changes to the barn would need to comply with the current building  
21 codes but that existing structural elements would not. Mr. Belaveau also testified that if the  
22 nonconformity is the building and not the use that the building nonconformity would not have to  
23 conform to current standards, if the building is a legal nonconforming structure.

24  
25 Ms. Wagner testified for the applicant. She noted that Mr. Durland's parcel is zoned  
26 industrial and that the lot adjoining to the south, her client's, is residential. Her client acquired  
ownership in 1995. Her client had planned to convert the barn to an ADU for their parents. In  
1997 the parents hired some local workmen to do the work. The parents were erroneously informed  
they did not need building permits. They completed the work in eight months in 1997 and incurred  
\$140,000 in expenses for the construction. The County issued a compliance order in 2008. A  
Compliance Plan was subsequently issued that allowed the use to continue. The County determined  
that no shoreline substantial development or conditional use permit was necessary if the height of  
the ADU was reduced to 16 feet. A supplemental Compliance Plan was issued in 2009. Mr.  
Durland appealed the supplemental plan but it was dismissed by the hearing examiner as untimely  
and the Examiner never ruled on whether Mr. Durland had a right to appeal the supplemental  
Compliance Plan. Mr. Durland is appealing the same issues he tried to appeal in his appeal to the  
supplemental Compliance Plan. The Compliance Plan requires a building permit, but many issues  
were agreed upon in the Compliance Plan and cannot be revisited for the building permit. Ms.  
Wagner argued collateral estoppel under Tegland 14A Washington Practice 35:32. 14 Wn. Practice  
35:34 provides that parties must have full and fair opportunity to argue the issues. Mr. Durland had  
the opportunity but he was late. Nykreim also bars further relitigation of the Compliance Plan due  
to the necessity for finality. Res judicata also applies because Mr. Durland failed to timely appeal  
the Compliance Plans. Ms. Wagner noted that she had researched the old San Juan regulations and

1 there were no sideyard setback requirements in the Zoning Code in 1981. If there was a sideyard  
2 setback requirement, it would have been from the fire code, which required a ten-foot side yard or  
3 burn resistant law. The 2000 comp plan is the first time sideyard setbacks are referenced. The 1991  
4 shoreline master program contained the ADU landward limitation and 50% requirements for the  
5 first time. The property was surveyed in 1987. The Compliance Plan contains agreement that the  
6 ADU is a legal nonconforming structure. Nobody in 1981 knew that the building was closer than  
7 ten feet to the sideyard setback as depicted in the building plans for the 1981 permit application.  
8 Nobody in the 1980's complained about the location or asserted a fire code violation. SJCC  
9 18.100.030 does not grant a private right of action; it is for code enforcement. Mr. Durland also has  
10 no standing to enforce SJC 18.100.070. The 1981 fire code probably required a twenty-foot  
11 separation or firewall.

12 Wesley Heinmiller bought the subject property (117 Legend Lane) in 1995. He bought the  
13 property for his parents. His parents moved onto the property shortly after purchase. They lived  
14 there about 12 years until his father passed away. His mother now needs to live in a group home.  
15 He testified that the property contains a tool shed, a home with attached garage, the ADU and a pier  
16 and dock. There is no wooden sidewalk. Shortly after purchase the Mr. Heinmiller commenced  
17 plans to replace the mobile home with a two-story house with the intent of living with his partner on  
18 the first floor and his parents living on the second floor. Upon reconsideration Mr. Heinmiller's  
19 father began converting the barn into an ADU in order to provide for more privacy between parents  
20 and son. His father had the help of general laborers to convert the building. The initial phase of the  
21 conversion took about eight months. Mr. Heinmiller is a yacht captain. After Mr. Heinmiller's  
22 father passed away, Mr. Heinmiller and his partner had planned to live in the ADU and rent out the  
23 main home as a vacation residence. Then when he and his partner were required to move out of the  
24 ADU, he and his partner moved into the main house.

25 Mr. Heinmiller's father rebuilt the interior of the ADU. As a barn it was just a shell of a  
26 structure. Mr. Heinmiller's father constructed a living room, dining room, kitchen, panty and  
bathroom on the first floor and a loft and bathroom on the second floor. They put in drywall,  
carpeting and other amenities. A deck and carport had also been constructed, but was then removed  
upon instruction from the County. The ADU improvements have cost at least \$175,000 in labor  
and materials. Mr. Heinmiller explained that the fence shown in Ex. 15 is on the boundary line  
between the Durland and Heinmiller properties.

On cross-examination, Mr. Bricklin inquired about the detached garage. Mr. Heinmiller  
stated that originally the mobile home was connected to the garage by a breezeway. He then  
acquired a permit to build a garage, which was added to the home. The garage is only three sided  
and its fourth side is the home. The roofline of the garage is the same as the home. The boat ramp  
is made of concrete. The pier extends onto land with a platform for a short distance ending at the  
high tide line. Ex. 17 is plans for the barn. The bottom of the plans provide that the barn shall be  
located a minimum of ten feet from the property line, referencing "S.J. Co. 58-77". Mr. Heinmiller  
testified that he plans to remove the eaves of the ADU on the Durland side of the ADU.

1 Bonney Ward testified on behalf of Mr. Heinmiller. She acquired a bachelors in interior  
2 design from Purdue University in 1969 and has been working as an interior designer since then.  
3 She started out primarily as a commercial interior designed in Colorado for restaurants and the like.  
4 In 1988 she moved to Orcas Island where she does 100% residential design. From her Orcas Island  
5 office she primarily works in San Juan County, but also other areas as well. She has worked with  
6 building codes in having to conform to setbacks, building heights, occupancy and other building  
7 issues. Ms. Ward explained the design process, which is done in phases of consultant with the  
8 client. Ms. Ward differentiated interior design from architecture, which is more engineering  
9 oriented. She noted that an architect was not necessary for the Heinmiller ADU because there were  
10 no structural issues involved. She has designed about 35 ADU's since 1993. She has done about  
11 100 design projects since opening her Orcas Island office. Her work has been featured Seattle  
12 Homes and Lifestyles twice and in Colorado she designed a home of the year in Colorado Homes  
13 and Lifestyles and her work has been featured in other magazines as well.

9 Ms. Ward was hired to prepare as-built drawings for the ADU in 2007 for the work already  
10 done. In June of 2009 she updated the plans to reflect ADU use. She used the CAD system to  
11 determine the floor areas depicted in Exhibit 18. She physically measured the building herself by  
12 measuring the exterior and interior walls and the height. The shaded areas in Ex. 18 are the  
13 habitable areas. Mr. Ward noted that the San Juan County County Code requires a 4:12 roof pitch,  
14 which is a rise of 4 over a run of 12. The 1981 plans (Ex. 17) show that the roof meets this  
15 requirement. Ex. 20 shows a gable roof, which is a two-sided roof that forms a peak. Ms. Ward  
16 explained that a hip roof (Ex. 22) has a pitched roof on four sides. She noted that the ADU roof is  
17 still a 4:12 pitch roof even though there is a flat portion on top, because the flat portion is less than  
18 10% of the roof and the flat portion is not noticeable from the exterior. The San Juan County Code  
19 and Dear Harbor Hamlet regulations do not require a gable roof or any other type of roof. If the  
20 roof has to be lowered to a 16-foot gable roof it would make the upper level uninhabitable. Ms.  
21 Ward prepared Ex. 23, which is a survey of the Heinmiller lot and location of structures. She used  
22 County documents for the survey and then verified all measurements with a measuring tape. For  
23 Ex. 18, Ms. Ward clarified that she considered any area in the second floor that was greater than  
24 five feet as closet space and those areas less than five feet as storage space. She noted that Ex. 18  
25 does not identify the closet space as habitable, but that if it is counted as habitable the ADU would  
26 still meet area requirements. She said that in the plans she submitted to the County that the closet  
area was counted as living area.

21 On cross-examination Ms. Ward noted that the habitable area is the "living area" referenced in  
22 ADU area restrictions. She agreed that the "boat barn/garage" area in Ex. 18 was within the  
23 exterior walls of the ADU structure. She also agreed that the "boat barn/garage" area was not a  
24 deck, unenclosed porch, overhang or stairwell. She noted that the stairwell is counted towards  
25 living area in the first floor of the ADU even though it is not grey. Ms. Ward agreed that it was  
26 possible to have a hip roof that does not have a flat area on top. She stated that would be  
considered a dutch gable. Ms. Ward clarified that the "phase one" work she did with the as-builts,  
the kitchen was excluded, because the intent was to modify the ADU to be a bunkhouse. She noted  
that Ex. 18 would require some modifications to the existing structure, such as the firewall, which

1 currently does not exist. Ms. Ward confirmed that Ex. 19 is to scale.

2 After inquiry from the Examiner, the parties agreed to check into whether any prior Examiner  
3 decisions had addressed how to measure living area.

4 In rebuttal, Mr. Durland testified that 9(b) of his exhibits has a notation that structures shall be 10  
5 feet from the property line. The Texmo building plans also have this notation. Both notations  
6 reference S.J. Co. 58-77. Section 4 of Resolution 224 (Ex. 24) provides that side, rear and front  
7 yards shall be built within ten feet of a property line within Fire Zone No. 3. Section 4.04 defines  
8 Fire Zone No. 3 as all of San Juan County outside an incorporated city, including the Heinmiller  
9 and Durland properties. Mr. Durland stated that the walls of the barn are just studs with tin on the  
10 outside. Ms. Wiggins objected on the basis that the appellants had not demonstrated that  
11 Resolution No. 224 was in effect in 1981 when the barn was built. Mr. Durland testified that the  
12 building plans for the new garage showed it as detached – in the same footprint as the prior garage.  
13 Exhibits 11(a) and (b) showed that the building permit was approved on the basis that it would be in  
14 the same footprint as the old. The photo of Ex. 6 shows that the garage at that time (1995) was  
15 detached. Mr. Durland stated he did not appeal the first Compliance Plan because he was told by  
16 the prosecuting attorney that he could not. Prior to the second Compliance Plan Mr. Durland  
17 discovered that Mr. Heinmiller had requested a formal administrative determination in December.  
18 Mr. Durland further found out that three months that the check for the administrative determination  
19 was returned and that instead the second Compliance Plan resolved the questions raised in the  
20 request for an administrative determination. Given these circumstances Mr. Durland was concerned  
21 that the second Compliance Plan would be construed as an administrative determination so he  
22 appealed it.

23 On cross, Mr. Durland testified that “at the time” H occupancies are hotels and apartment  
24 houses, I occupancies are dwellings and lodging houses. J occupancies are now classified as a U  
25 occupancy, which includes barns. Mr. Durland received this information from an email from Renee  
26 Belaveau (Ex. 25). Ms. Wagner noted that Resolution No. 224 (Ex. 24) does not require a ten-foot  
setback for J occupancies. Mr. Durland has not ever read SJ 58-77 and that the building department  
was unable to locate that regulation for him.

27 In closing, Ms. Wagner emphasized that the Examiner review the Compliance Plans, which  
28 recognize the ADU structure as nonconforming and this resolves the illegality issue. Even if not the  
29 Appellants have not shown any evidence of illegality, except the last minute uniform fire code  
30 provision, where it is not clear that these code provisions even applied to the ADU structure. SJ 58-  
31 77 does not have any side-yard setback requirement. Ms. Wagner argued that it is meaningless to  
32 conclude that a compliance plan cannot be appealed if the issues of the compliance plan can be  
33 resurrected via a building permit appeal. Ms. Wagner concedes her client was not promised a  
34 building permit, but her client was promised that the issues resolved in the Compliance Plan would  
35 not be an issue. The Compliance Plan did not require a shoreline substantial development permit.  
36 It is an absurd result to read the ADU area restrictions literally and conclude that all storage areas  
are considered habitable areas. If the San Juan County Code wanted to limit 4:12 roofs to gabled

1 roofs it should have said so. The hearing examiner rules provide that the Appellant has the burden  
2 of proof in the appeal. The setback issue was resolved by the Setback Easement.

3 In closing, Mr. Bricklin stated that the Compliance Plan does not determine whether the  
4 applicant is entitled to permits. The issue of whether the applicant is entitled to permits has not  
5 been litigated. The fact that Mr. Durland was late with his appeal does not make change the fact  
6 that he did not have a right to challenge the Compliance Plan. The ADU building is illegal because  
7 (1) it violates separation/setback requirements and (2) it is not consistent with the ten-foot setback  
8 of the building plans of the building permit application. Private covenants do not alter code  
9 requirements. There was no firewall installed as an alternative to the 10-foot setback requirements.  
10 Resolution 224 clearly states that all buildings within Fire Zone 3 must conform to the ten-foot  
11 setback, not just those within H and I occupancies. Mr. Belaveau, in his email construes Resolution  
12 224 as applying the 10-foot setback to all occupancies and in the H and I occupancies a firewall  
13 cannot substitute for the setback. Other than arguing that the issues cannot be relitigated, the  
14 applicant has not explained how it can modify an illegal building, as prohibited by SJCC  
15 18.100.030(F) and 18.100.070(D). On the 50% measurement issue, the applicant and staff ignored  
16 the existence of the boat ramp and pier. They are structures that should have been included in the  
17 calculation. The Zoning Code definition of "structure" is any piece of work built up, whether on,  
18 above or below the surface. On the waterward issue, the applicant and county have not addressed it.  
19 The County also cannot issue a building permit without a shoreline permit unless the structure  
20 qualifies as a normal appurtenance and it does not. The garage is part of the house but it was not  
21 permitted to be attached. On the living area definition, the storage area and boat/barn is clearly part  
22 of the living area. On the roof issue, the East Sound plan shows that when the County wanted to  
23 allow roofs with a flat portion, it did so.  
24  
25  
26

## Exhibits

1. Letter of appeal
2. Compliance Plan
3. Supplemental Agreed Compliance Plan
4. 5/3/10 emails regarding scheduling
5. Weissinger Memo 5/3/10
6. Durland Notebook
  - 6-0 1990 Survey
  - 6-1 7/22/09 09APL006 Staff Report
  - 6-2 5/29/90 letter to John Thalacker
  - 6-3 Affidavit of Carla Rieg
  - 6-4 7/31/08 Email from Jon Cain to Michael Durland
  - 6-5 Photos looking west
  - 6-6 1995 Aerial Photo
  - 6-7 2007(?) Aerial Photo
  - 6-8 Building permit for garage
  - 6-9(a) Site plan
  - 6-9(b) Code checklist

- 1 6-9(c) 1981 building plan
- 2 6-10 1998 Building permit
- 3 6-10(a) 1998 Modular permit application
- 4 6-10(b) 1998 Building and mechanical permit
- 5 6-10(c) 1998 Building permit, inspector copy
- 6 6-10(d) 1998 Water availability certificate
- 7 6-11 9/12/00 letter from Fay Chaffee
- 8 6-11(a) 2000 Building permit
- 9 6-11(b) 2000 Building permit application
- 10 6-11(c) 2000 Building permit – garage
- 11 6-11(d) 2000 Permit fee worksheet
- 12 6-12(a) 2008 Building permit
- 13 6-12(b) 2009 Building permit
- 14 6-12(c) 2009 Permit receipt
- 15 6-13 IRC R305 (2006)
- 16 6-14 IRC Section 1009 (2006)
- 17 6-15 Innovations for Living – Cathedral Ceiling insulation specifications
- 18 6-16 SJCC 18.40.240
- 19 6-17 SJCC 18.20.120 living area definition
- 20 6-18 Ordinance No. 26-2007
- 21 6-19 Eastsound Subarea Plan roof standards
- 22 6-20 6/8/09 Letter from Ron Hendrickson
- 23 6-21 Site plan for Heinmiller modular home permit application
- 24 6-22 Site plan for change of use permit
- 25 6-23 A-4, building plans for change of use permit dated 9/23/09
- 26 7. Email from Rosanna O'Donnell to Lee McEnery, 10/08/07
8. Aerial photo obtained by Heinmiller when home was purchased in 1995 (unknown date, but taken after 1981)
9. Photograph of deck and persons working on ADU (taken in late 1990's)
10. Photograph of inside of ADU (taken in late 1990's)
11. Photograph of kitchen and bathroom (taken in late 1990's)
12. Photograph of exterior of boat barn and adjoining Durland property
13. Photograph of exterior of boat barn (taken in late 1990's)
14. Photograph of boundary between Durland and Heinmiller properties
15. Photograph of boundary between Durland and Heinmiller properties
16. Photograph from boat launch ramp of ADU
17. Texmo building plans dated 10/8/81
18. ADU floor area plans
19. Cross Section of ADU
20. Gable Roof diagram
21. Shed Roof diagram
22. Hip Roof diagram
23. Site plan prepared by Bonnie Ward

- 1           24.    SJ Resolution 224  
2           25.    6/18/08 Email from Renee Belaveau  
3           26.    SJ Resolution 58-1977

## Findings of Fact

### Procedural:

- 4
- 5
- 6    1.    Appellant. The appellants are Michael Durland, Kathleen Fennell; and Deer Harbor  
7    Boatworks, collectively referenced as “Appellants.”
- 8    2.    Property Owner. Wes Heinmiller and Alan Stameisen.
- 9    3.    Hearing. The Examiner held a hearing on the application on May 6, 2010, in the San Juan  
10   County Council meeting chambers in Friday Harbor. The record was left open through May 12,  
11   2010, for any prior Hearing Examiner decisions on living space. The applicant had until May 17,  
12   2010 to respond. The parties subsequently requested that the Examiner not issue a decision pending  
an attempt at resolving the appeal. On June 17, 2010, they advised that they had not been able to  
reach agreement and requested the Examiner to issue a decision.

### Substantive:

- 13
- 14   4.    Permitting History. The appeal concerns the conversion of a barn into an ADU. The barn  
15   was built in 1981. The building plans for the barn structure depicted the barn as ten feet from the  
16   side property line shared with the Durland property. In 1990 the Heinmiller and Durland  
17   properties was surveyed and it was discovered that the barn was only 1.4 feet from the side  
18   property line. As a result, the adjoining property owners executed a “Boundary Line Agreement  
and Easement”, Ex. 5, attached Ex. F, hereinafter referred to as the “Setback Easement”. The  
19   Setback Easement prevented the owner of the Durland property from building within twenty feet of  
the barn.

20   Several years after the Setback Easement was executed, a portion of the barn was converted to an  
21   ADU without any building permits. In 2008 Mr. Heinmiller applied for a conditional use permit to  
22   use the ADU as a vacation rental. As a result the County was made aware that the ADU had been  
23   constructed without required building plans or compliance with shoreline regulations. The County  
24   issued a Notice of Correction in 2008. This resulted in an Agreed Compliance Plan dated April 25,  
2008 (“Compliance Plan”). As discussed in the Conclusions of Law<sup>1</sup>, the Compliance Plan was a  
final determination by County staff as to what was necessary to bring the barn into compliance  
with County shoreline and development regulations. The Compliance Plan required the

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26   <sup>1</sup> As necessary throughout this decision, factual determinations are made in the Conclusions of Law and legal  
conclusions are made in the Findings of Fact.

1 acquisition of shoreline permits. The Compliance Plan also recognized the Setback Easement as  
2 bringing the barn into conformance with the ten-foot side-yard setback that applied to the barn  
3 when constructed in 1981. Subsequent to execution of the Compliance Plan, the County executed  
4 a Supplemental Agreed Compliance Plan, which concluded that shoreline permits were not  
5 necessary if the height of the barn was reduced to sixteen feet and other actions were taken. The  
6 Compliance Plan and Supplemental Agreed Compliance Plan were both signed by Mr. Heinmiller  
7 and Mr. Stameisen.

8 Mr. Durland filed an administrative appeal of the Supplemental Agreed Compliance Plan. The San  
9 Juan County Hearing Examiner dismissed the appeal as untimely. As required by the Compliance  
10 Plans, Heinmiller and Mr. Stameisen applied for an after-the-fact building permit, a change-of-use  
11 permit, and an ADU permit for the ADU constructed several years earlier. San Juan County  
12 approved the permits on November 23 and 24, 2009.

13 5. Appeal History and Basis. The Appellants filed the subject appeal on December 11, 2009.  
14 The appeal challenges the validity of the permits identified as issued in November 23 and 24,  
15 2009. The Appellants assert that the permits are invalid because the barn structure fails to comply  
16 with numerous zoning and building code requirements. Each of the grounds of appeal are quoted  
17 in the Conclusions of Law. Mr. Durland testified that he is injured by the code violations because  
18 the ADU violates side-yard setback requirements and is too close to the boat manufacturing  
19 activities on his property. He believes that the occupants of the ADU will complain about his  
20 activities because of their proximity to them.

21 6. Pertinent Characteristics of ADU and barn. As depicted in Exhibit 18, the floor area for all  
22 habitable portions of the ADU portion of the barn (defined as those portions of the ADU with a  
23 ceiling height of five or more feet) is less than 1,000 square feet. In 1981 the barn did not include  
24 any firewalls. The barn was constructed 1.4 feet from the sideyard boundary line shared with Mr.  
25 Durland.

## 26 **Conclusions of Law**

### **Procedural:**

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

### **Substantive:**

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

1 3. 1981 Sideyard Setback Requirement. San Juan County Resolution No. 224 applied to the  
2 1981 building permit application for the barn. Section 4.01 of the resolution imposed a ten foot  
3 sideyard setback upon all buildings within Fire Zone 3, unless the walls in the setback area are  
4 firewalls. The barn did not include any firewalls. The barn is located in Fire Zone 3 because it is  
5 (and was in 1981) not located in any incorporated area as contemplated in Section 4.04 of  
6 Resolution No. 224. Consequently, the barn was constructed in violation of the Resolution No.  
7 224 sideyard setback when constructed in 1981.

8 4. Compliance Plans are Final Land Use Decisions Subject to the Land Use Petition Act  
9 ("LUPA"), Chapter 36.70C RCW. RCW 36.70C.020(1) defines a final land use decision in  
10 relevant part as follows:

11 *"Land use decision" means a final determination made by a local*  
12 *jurisdictions body or officer with the highest level of authority to make the*  
13 *determination, including those with authority to hear appeals on,*

14 *(b) An interpretative or declaratory decision regarding the application*  
15 *to a specific property of zoning or other ordinances or rules regulating the*  
16 *improvement, development, modification, maintenance or use of real property...*

17 In applying the land use decision above, there are two issues that must be assessed: (1) whether a  
18 compliance plan constitutes a decision regarding the application of zoning requirements; and (2)  
19 whether a compliance plan is a final administrative determination.

20 As to the first issue, there is no question that the Compliance and Supplemental Agreed Compliance  
21 Plans of this appeal apply zoning and other development regulations to the Heinmiller property.  
22 The plans assess setback, shoreline and accessory dwelling unit requirements. By necessity, any  
23 compliance plan has to apply development regulations in order to determine what is necessary for  
24 compliance.

25 The fact that the agreement is not in the form of a formal interpretation is not of any significance.  
26 SJCC 18.100.040(D) states that a compliance plan may be entered into by the administrator and  
person in violation and that "no further action will be taken if the terms of the Compliance Plan are  
met." In short, once a compliance plan has been executed, San Juan County is precluded from  
applying a different interpretation to the activities covered by the code enforcement action. The  
interpretations in a code enforcement action are as final and binding as any formal zoning  
interpretation.

The consideration of a compliance plan as a final land use decision is consistent with *Heller  
Building, LLC v. Bellevue*, 147 Wn. App. 46 (2008). In *Heller*, one of the issues was whether a stop  
work order and a subsequent letter explaining why the stop work order had been issued constituted

1 final land use decisions under LUPA. The court ruled that the stop work order did not constitute a  
2 final land use decision because it did not contain sufficient information identifying the basis for the  
3 violation and what needed to be corrected as required by local regulations. The court determined  
4 that a subsequent letter providing the missing information did constitute the final decision and that  
5 stop work orders themselves can constitute final land use decisions if they contain mandated  
6 information. Like a properly prepared stop work order, the compliance plans of this case identify  
7 violations and what needs to be corrected. In substance, there is little to distinguish them from a  
8 stop work order as it relates to LUPA appeals.

9 The second issue relating to whether the compliance plans are final land use decisions is whether  
10 they are in fact final determinations. It is somewhat unclear whether the administrator is the highest  
11 decision making authority because of SJCC 18.80.140(A)(2), which authorizes appeals to the  
12 Hearing Examiner of administrative determinations and interpretations. SJCC 18.80.140(A)(2) is  
13 similar to RCW 36.70C.020(1), where zoning interpretations qualify as appealable land use  
14 decisions if they are final zoning interpretations. The analysis above that concludes that RCW  
15 36.70C.020(1) applies to compliance plans can also be used to conclude that a Compliance Plan is a  
16 zoning interpretation subject to administrative appeal under SJCC 18.80.140(A)(2). Despite these  
17 similarities, the San Juan Prosecuting Attorney's Office has concluded that a compliance plan is not  
18 subject to administrative appeal. See Ex. 6-1.

19 The Examiner will defer to the Prosecuting Attorney's interpretation that SJCC 18.80.140(A)(2)  
20 does not provide an administrative appeal to compliance plans. It is noteworthy that no party to this  
21 proceeding disputed the opinion of the Prosecuting Attorney on this issue. Beyond this, there is  
22 good reason to distinguish San Juan County's administrative appeals process from LUPA. One  
23 significant feature of a compliance plan is that it requires the agreement of the code enforcement  
24 defendant. There is no discernable reason why a code enforcement defendant would want to appeal  
25 a document that he or she agreed to sign. If the defendant disagrees with a County interpretation, he  
26 or she can create an avenue of appeal by requesting an interpretation. Consequently, the most likely  
appellant of a compliance plan would be by a third party. Third parties are not entitled to any notice  
on the execution of compliance plans. The practical result would be few realistic opportunities for  
appeal and the absence of notice to affected third would create due process issues on appeal  
deadlines that administrative tribunals do not have the authority to address. The parties did not  
submit into evidence the reasons why the Prosecuting Attorney concluded that Mr. Durland could  
not appeal the Compliance Plans. Those reasons could have included standing issues (which are  
related tangentially to the lack of notice to adjoining owners), which are also compelling reasons for  
finding no appeal right. The Examiner concludes that a code enforcement agreement is a code  
enforcement tool and not an administrative determination or interpretation triggering appeal rights  
under SJCC 18.80.140(A)(2).

It should also be noted that the end result of this decision will remain the same whether or not the  
approval of a compliance plan is a "final" land use decision. If the approval is subject to  
administrative appeal, the appellant is barred from revisiting the issues resolved in the agreement

1 because he failed to exhaust his administrative remedies<sup>2</sup> by failing to timely appeal the  
2 Compliance Plans. If the approval is not subject to administrative appeal, as shall be discussed, the  
3 appellant is barred from revisiting the Compliance Plan issues because he failed to file a timely  
judicial appeal to the Compliance Plans.

4 5. The Compliance Plans did not Defer Zoning Code Compliance Issues to Building Permit or  
5 ADU Permit Review. The Appellant raises the compelling argument that zoning issues addressed  
6 in the Compliance Plan can be revisited because the Compliance Plans require that applicant to  
7 acquire a building permit. IRC R105.3.1 (2006 ed.) requires a building permit application to  
8 conform “to the requirements of pertinent laws,” which would include zoning regulations. The  
question for this appeal, therefore, is whether the compliance plans should be read as allowing  
zoning issues to be revisited through the building permit review process. The Examiner concludes  
that the compliance plans are final land use decisions on all zoning compliance.

9 In determining whether a land use determination is a final land use decision, the courts look to the  
10 intent of the municipality in issuing the determination. *See, e.g., Heller Building, LLC v. Bellevue,*  
11 *147 Wn. App. 46, 57 (2008).* The compliance plans do not expressly state that they constitute a  
12 final determination on zoning compliance. However, there are numerous factors that establish that  
the County intended the agreements to serve as a final decision on zoning code compliance:

13 A. Demolition Unnecessary. Although the County did not make any direct comments on  
14 their intent regarding finality of the zoning determinations, there is some compelling language that  
15 indirectly addresses the issue. The first paragraph of the Compliance Plan ends with “[t]he County  
16 agrees that there are alternative methods of compliance that do not involve demolition of the 30’ by  
17 50’ structure.” Most of the zoning compliance issues raised by the Appellant would require  
demolition if violations were found to occur. The County would not have proclaimed that it had  
concluded demolition was unnecessary if it intended to revisit zoning compliance in building permit  
review.

18 B. Structure. The structure of the compliance issue shows that zoning code issues were  
19 not deferred to building permit review. The compliance plans address two sets of regulations –  
20 zoning and building. There are no specific building regulation violations identified, only that  
21 permits haven’t been applied for or issued. This is addressed (not surprisingly) by requiring the  
22 applicant to acquire building permits. The compliance plans address the zoning regulations in  
23 greater detail and specific suggestions and requirements are imposed for ensuring compliance. This  
24 segregation of code requirements is a logical way to handle compliance issues. Zoning code issues  
affect whether or not the structure can continue to exist. They should be resolved up front so that  
time is not wasted on building code issues that could otherwise be rendered moot. Zoning code  
requirements are also more subjective and discretionary, lending themselves to the negotiation

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25 <sup>2</sup> There is a significant amount of case law addressing exhaustion of administrative remedies. For purposes of  
26 brevity and because it’s fairly clear that the doctrine would apply here, the Examiner will not provide an  
exhaustive analysis.

1 process involved in formulating the terms of the compliance plans. Building code requirements are  
2 not subject to much debate and can be handled ministerially.

3 C. Finality. The courts recognize a strong public policy supporting administrative finality  
4 in land use decisions. *See, Chelan County v. Nykreim*, 146 Wn.2d 904 (2002). The Applicants'  
5 attorneys have represented that they spent considerable time negotiating and crafting the  
6 Compliance Plans to assure compliance with zoning code regulations. The detail of the compliance  
7 plans also shows that the County spent considerable time addressing and resolving zoning code  
8 issues. Especially given the strong public policies favoring finality, it is unlikely that the County  
9 intended to revisit zoning compliance during building permit review after having spent so much  
10 time and effort in addressing zoning in the compliance plans.

11 In addition to the factors evidencing intent as outlined above, as mentioned previously SJCC  
12 18.100.040(D) states that a compliance plan may be entered into by the administrator and person in  
13 violation and that "no further action will be taken if the terms of the compliance plan are met."  
14 This finality requirement would have little meaning if all compliance issues can be revisited during  
15 building permit review. For the foregoing reasons, except as to ADU permit criteria, the Examiner  
16 concludes that the compliance plans were intended to serve as final determinations on zoning code  
17 compliance and, therefore, qualify as final land use decisions for purposes of LUPA. Given the  
18 extensive efforts by the parties to address zoning issues up front in the compliance plans, the  
19 Examiner concludes that the compliance plans are a final determination on compliance on all  
20 zoning provisions, whether or not a zoning provision is expressly identified in the plans. One  
21 notable exception is ADU requirements, discussed below. The Examiner also recognizes there is a  
22 little ambiguity as to whether the Compliance Plans were intended to serve as a determination of  
23 compliance with zoning provisions that are not specifically discussed. Consequently, for those  
24 compliance issues, should a court find differently, the Examiner will also provide an independent  
25 assessment of compliance.

26 The ADU permit is an exception to the Examiner's conclusion that the compliance plans resolve all  
zoning code issues. The ADU permit is distinguishable because it constitutes a separate review  
process mandated by the zoning code. *See* SJCC 18.40.240(G). As a zoning code permit, an ADU  
permit is distinguishable from a building permit, which is ministerial and only indirectly involves  
issues of zoning code compliance. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App.  
125 (2007) is instructive on how separate land use review processes interrelate for the same project.  
At issue in *Quality Products* was whether the conclusions made in a SEPA determination were  
binding upon an associated special use permit review. The Thurston County Board of  
Commissioners had denied the special use permit application on the basis that the proposal would  
have "significant adverse impacts on the surrounding environment" despite the fact that in issuing  
an MDNS for the project the SEPA responsible official had concluded that the proposal "does not  
have a probable significant adverse impact upon the environment." 139 Wn. App. at 140.

The *Quality Rock* court determined that the SEPA determination did not preclude a reconsideration  
of environmental impacts in the special use permit review. The court found it significant that the

1 MDNS expressly provided that it did not constitute project approval and that compliance was still  
2 expected with all County regulations. The court also noted that the MDNS required the applicant to  
3 acquire a special use permit and that significantly more environmental information was available  
4 for the special use permit review than for the SEPA determination.

5 As in the *Quality Rock* case, the compliance plans of this case expressly require the acquisition of a  
6 zoning code permit. Unlike *Quality Rock*, there is no language suggesting any intent to reconsider  
7 zoning code issues beyond those specifically applying to the required permits. To the contrary, the  
8 purpose of a compliance plan is to resolve code compliance issues. The Examiner concludes that  
9 the compliance plans do not substitute for ADU review and approval, but they do preclude  
10 revisiting zoning code issues that are expressly and specifically addressed in the compliance plans.  
11 Compliance with setback requirements has been specifically addressed in the Compliance Plans and  
12 will not be reassessed for ADU permit review. The 1,000-square-foot requirement was referenced  
13 in the Compliance Plans, but was not assessed for compliance. That issue will be addressed in this  
14 appeal.

15 6. Zoning Determinations of Compliance Plan Can't be Collaterally Attacked in Building Permit  
16 Appeal. The determinative case on the preclusive effect of the compliance plans is *Chelan County*  
17 *v. Nykreim*, 146 Wn.2d 904 (2002). *Nykreim* stands for the principle that an improperly issued final  
18 land use decision cannot be revoked and a judicial appeal of the decision is barred if a judicial  
19 appeal is not filed within 21 days of issuance. The courts have expressly ruled that even illegal  
20 decisions must be challenged in a timely manner. *Habitat Watch v. Skagit County*, 155 Wn.2d 397  
21 (2005). Further, a land use decision time barred from appeal under LUPA's 21-day appeal deadline  
22 cannot be collaterally attacked in the appeal of another land use decision. 155 Wn.2d at 410-411  
23 (petitioners could not attack validity of special use permit whose LUPA appeal had expired through  
24 appeal of subsequently issued grading permit); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141  
25 Wn.2d 169, 181 (2000) (petitioner could not collaterally challenge a time barred rezone decision by  
26 its LUPA petition challenging a plat approval).

18 It is a little debatable whether Mr. Durland had standing to judicially appeal the compliance plans.  
19 Even if Mr. Durland had no standing for a judicial appeal, this would not affect the finality of the  
20 compliance plans. In the *Nykreim* decision itself, the Court ruled that adjoining property owners did  
21 not have standing to challenge the boundary line adjustment decision at issue. Like Mr. Durland,  
22 those neighboring property owners had no avenue to contest the land use decisions made by Chelan  
23 County for neighboring property. The fact that Mr. Durland had an opportunity to appeal a related  
24 building permit application did create an opportunity to revisit the determinations made in the  
25 compliance plans, since as discussed in the previous paragraph a final determination cannot be  
26 collaterally attacked in a subsequent permit review.

24 7. Appeal Limited to Grounds Identified in Appeal Statement. The Examiner will limit appeal  
25 issues to those identified in the Appellants' Notice of Appeal. SJCC 18.80.140(E)(5)(d) require the  
26 Notice of Appeal to identify the grounds of appeal. This requirement would be undermined if other  
issues are allowed to be considered. The Appellants' grounds for appeal are quoted below in italics

1 and assessed with corresponding conclusions of law.

2 1.1 *SJCC 18.100.030 F and 18.100.070 D prohibit issuance of a building permit or other*  
3 *development permit for any parcel of land that has been developed in violation of local regulations.*  
4 *The subject parcel has been developed in violation of local regulations and, therefore, the County*  
5 *erred in issuing permits for additional development on the parcel.*

6 8. SJCC 18.100.030(F) prohibits any land use approvals for the development of a parcel of land  
7 in which there is a “final determination” of a state law or County ordinance pertinent to use or  
8 development of the property. The Appellants have shown no “final determination” of any violation.  
9 No final determination has been made by any decision making authority that the structures on the  
10 property are in violation of state law or County ordinance. To the contrary, as previously discussed,  
11 the Compliance Plans constitute a final determination that the property will be in compliance with  
12 development standards if specified actions are taken.

13 SJCC 18.100.070(D) prohibits any development permits for property developed in violation of  
14 shoreline or other development regulations. As to the violations identified by the Appellants, the  
15 Examiner finds no violation and/or the Compliance Plan serves as a final determination that there is  
16 no violation and this determination can no longer be challenged under *Nykreim*.

17 1.2 *The permits were issued for a change of use and physical modification to an existing,*  
18 *but illegal, building.*

19 9. For the reasons discussed in the preceding Conclusion of Law, the barn is not illegal.

20 1.3 *The subject building was illegal from the day it was constructed. At the time of its*  
21 *original construction, the County Code included a requirement that buildings be set back at least*  
22 *ten feet from the property line. This building, though, was built less than two feet from the property*  
23 *line. Because the building did not comply with the Code requirements in effect on the day it was*  
24 *built, the building was illegal from the day it was built.*

25 10. The Compliance Plan determined that the side-yard setback is code compliant due to the  
26 Setback Easement. Regardless of whether or not this is a valid determination, the Appellants are  
barred from raising this issue again under *Nykreim*.

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

11. The courts have not yet addressed whether *Nykreim* would preclude a challenge to an illegal  
permit where the finding of consistency with development standards was based upon inaccurate

1 information provided by the applicant. At the least, it is unlikely that a court would allow a permit  
2 applicant to benefit in this manner from deliberate and material deception. However, this issue  
3 need not be reached here because San Juan County was well aware of the actual side-yard setback  
4 when it approved the Compliance Plans and was also aware at that time that the storage barn did not  
5 conform to the setback depicted in the 1981 building plans. Page 1 of the Compliance Plan  
6 acknowledges that the County was aware that the storage barn was not located ten feet from the  
7 Durland property line as identified in the 1981 building plans. The setback issue was specifically  
8 addressed in the compliance plans, both in terms of violation of any applicable setback standards  
9 and nonconformity to building plans. *Nykreim* precludes the reconsideration of these issues in this  
10 appeal.

11 1.5 *The County Code clearly distinguishes between illegal buildings and non-conforming*  
12 *buildings. Illegal buildings are buildings that failed to comply with the Code requirements at the*  
13 *time they were constructed. SJCC 18.20.090. Non-conforming buildings are buildings that met*  
14 *Code requirements when they were constructed, but no longer meet Code requirements because the*  
15 *Code changed subsequently. SJCC 18.20.140. Understandably, the code treats illegal buildings*  
16 *differently than non-conforming buildings. Whereas, some modifications are allowed to a non-*  
17 *conforming building or use (SJCC 18.40.310), no permit may be issued for a parcel on which an*  
18 *illegal building sits (SJCC 18.100.030 F; 18.100.070 D).*

19 1.6 *Because the subject building was illegally built, and remains illegal today, the County*  
20 *has no authority to issue any of the three permits that are challenged in this action. The permits*  
21 *would allow the use of the building to be changed from a barn/storage facility to a residential*  
22 *(ADU) facility. Because the Code unambiguously prohibits issuance of permits like these for an*  
23 *illegal building, the Examiner should reverse the decision of the Department to issue the permits*  
24 *and should vacate all of them.*

25 12. The compliance plans contain a series of determinations by the County that the proposed  
26 ADU meets setback requirements and other zoning standards. These determinations of “legality”  
may no longer be challenged under *Nykreim*. As discussed in other parts of this decision, the  
Examiner concludes that none of the other issues raised by the Appellants constitute noncompliance  
with County code requirements. Consequently, the structure is not illegal and the development  
limitations on illegal buildings do not apply.

It is recognized that a structure qualifies as illegal if it was illegal when established<sup>3</sup>. The  
Compliance Plan found compliance with setback requirements due to the Setback Easement (Ex. 5,  
attached Ex. F), executed in 1990. The barn structure probably qualified as an illegal use until it  
was brought into conformity with setback requirements in 1990. It also did not qualify as a  
nonconforming use at the time of construction, because 18.40.310 defines nonconforming structures  
as structures that conformed to applicable standards on the date of its “creation,” but no longer

<sup>3</sup> The Appellants quote SJCC 18.20.090 as defining an illegal structure as one illegal as “constructed”. The  
definition actually provides it as the time the use was “established”.

1 complies due to subsequent changes in code requirements. There is apparently no case law that  
2 addresses the vesting and nonconforming rights attaching to a project that did not vest due to  
3 illegality, but where the illegality was subsequently corrected. This is a fairly common occurrence  
4 where, for example, boundary line adjustments are used to fix setback violations and structural  
5 modifications are made to correct noncompliant structural features. The most logical way to  
6 address the situation would be to relate back the vested rights of the project to the filing of the  
7 complete application. There is no public detriment to such an approach. By contrast, moving the  
vesting point to another point in time, such as the date the project is made conforming, can lead to  
serious unnecessary problems where an otherwise compliant and constructed building is suddenly  
subject to newly enacted regulations. The Examiner concludes that upon execution of the Setback  
Easement, the barn structure became conforming as of the date of its construction.

8 2.0 *SJCC 18.40.240 F.5, relating to Accessory Dwelling Units (ADUs), states, in part:*  
9 *“Any additions to an existing building shall not exceed the allowable lot coverage or encroach onto*  
10 *setbacks. The size and design of the ADU shall conform to applicable standards in the building,*  
11 *plumbing, electrical, mechanical, fire, health, and any other applicable codes.” Because the*  
*building violates the Fire Code, Building Code, and Zoning Code requirements establishing a ten-*  
*foot setback, the ADU permits were issued in violation of this Code section.*

12 13. As previously discussed, *Nykreim* precludes the reconsideration of the County’s determination  
13 in the Compliance Plans that the proposed ADU meets setback requirements.

14 3.0 *SJCC 18.50.330 B.13 limits the width of buildings in the shoreline to 50 percent of the*  
15 *shoreline frontage. The width of the buildings on the subject property exceed this limitation. This*  
16 *provides an independent reason for finding violation of SJCC 18.40.240 F.5, SJCC 18.100.030 F*  
17 *and 18.100.070 D. The subject permits, issued in violation of these Code sections, should be*  
*vacated.*

18 4.0 *SJCC 18.50.330 E.1 prohibits accessory structures which are not water-dependent*  
19 *from being located seaward of the most landward extent of the residence. The challenged permits*  
20 *authorize construction on and use of an accessory building that violates this requirement, i.e., it is*  
*located waterward of the residence.*

21 14. SJCC 18.50.330(B)(13) and SJCC 18.50.330(E)(1) were adopted subsequent to the  
22 construction of the barn structure in 1981. SJCC 18.40.310(G) requires application of WAC 173-  
23 27-080 for nonconforming structures in shoreline areas. WAC 173-27-080(2) provides that  
24 nonconforming structures may be maintained and repaired and may also be enlarged or expanded  
25 provided the alterations don’t increase the degree of nonconformity. Although not stated directly, it  
26 is clear that nonconforming uses may remain in place even though development regulations may  
change. Further, the interior alterations of the structure do not violate nonconforming use  
requirements.

5.0 *SJCC 18.50.020 prohibits substantial development on shorelines without first*

1 *obtaining a shoreline substantial development permit. SJCC 18.50.330 E.4 requires a shoreline*  
2 *conditional use permit for structures accessory to a residential structure. The applicants have*  
3 *failed to obtain the requisite shoreline conditional use permit for this accessory structure. (The*  
4 *permittees apparently claim they are exempt from shoreline permit requirements per 18.50.300 E.2,*  
5 *which exempts "normal appurtenances" from permit requirements. But exemptions are to be*  
6 *construed narrowly (SJCC 18.50.020 F) and the development here does not meet the criteria for*  
7 *"normal appurtenances" specified in that section and, therefore, the requirement for a permit*  
8 *remains in effect.) The County should not have issued the other permits in the absence of the*  
9 *required shoreline permit. Moreover, the applicant has not submitted the required certificate when*  
10 *a shoreline exemption for a residential appurtenance is claimed, as required by SJCC 18.50.020 G.*

11 15. The Supplemental Agreed Compliance Plan expressly concluded that no shoreline substantial  
12 development or conditional use permit is necessary for the ADU proposal. Relitigation of this issue  
13 is barred by *Nykreim*. The shoreline exemption certificate has been submitted, as identified in  
14 Exhibit 9, page 5.

15 6.0 *SJCC 18.40.240 F.1 provides that an ADU shall not exceed 1,000 square feet in living*  
16 *area. The ADU at issue here is larger than 1,000 square feet. Therefore, the permits were issued*  
17 *illegally and should be vacated.*

18 16. The Appellants correctly note that SJCC 18.40.240(F)(1) limit ADU's to 1,000 square feet of  
19 living area and that living area is defined as the interior space measured from the interior of the  
20 exterior walls. The Examiner does not agree, however, that living area must include all of the  
21 interior space of a structure. SJCC 18.20.010 provides that "[a]n ADU may be internal, attached or  
22 detached" (emphasis added). Under the Appellant's construction of "living space," if an ADU is  
23 integrated into a primary residence, all of the floor space of the primary residence would qualify  
24 towards the 1,000-square-foot limitation because it is all located within the exterior walls of the  
25 primary residence. Similarly, it is a common practice to add ADU's to garages or convert the  
26 second stories of garages or other storage facilities. The Appellants' interpretation would make it  
very difficult for most of these types of structures to meet the 1,000-square-foot requirement. On  
judicial review, a court will interpret SJCC 18.40.240(F)(1) in a manner that leads to unlikely,  
strained or absurd results. *Densley v. Dep't of Retirement Sys.*, 162 Wn.2d 210 (2007). Requiring  
that the entire interior of a structure be limited to 1,000 square feet because an ADU is integrated  
into is unlikely, strained and absurd. The portions of the barn structure that are not within the walls  
of the ADU (the boat barn/garage portion of the structure) do not qualify as living space.

The portions of the barn structure labeled "storage" in Exhibit 18 are not so easily excluded from  
the 1,000-square-foot limitation. A literal application of the "living area" definition, even if limited  
to the walls of the ADU portion of the structure, would include the areas marked "storage."  
However, a literal application that ignores roof slope also leads to unlikely, strained and absurd  
consequences. The SJCC 18.20.140 "living area" definition is not limited to floor area, but  
"internal space" measured from the interior of exterior walls. Consequently, in circumstances  
where the exterior walls just extend a nominal amount into the crawl space of an attic, the "living

1 space” of the ADU would include the crawl space. Given the 4:12 roof pitch requirements of the  
2 Deer Harbor Hamlet Plan, the occurrence of this situation may not be that rare. As a consequence,  
3 half of the 1,000-square-foot allotment for an ADU could be consumed by a crawl space only a few  
4 feet high. While it may be easy to conclude that the crawl space issue can be avoided by designing  
5 ADUs with no exterior walls extending into crawl spaces, this does not work very well with  
6 conversions of existing structures to ADUs. Further, there is not much public value in limiting  
7 design of new structures in this fashion to avoid a floor area requirement

8 The Heinmiller ADU exemplifies the crawl space problem, where its second story is essentially a  
9 combination of living and crawl space. The staff use of room height to distinguish between living  
10 and crawl space is a logical way to resolve the problem. As noted by staff, IRC 305.1, Exception 3  
11 (2006)<sup>4</sup> only recognizes space with room height over five feet as counting towards building code  
12 minimum room area requirements. As testified by Ms. Ward and shown in Exhibit 18<sup>5</sup>, the spaces  
13 of the ADU that are over five feet in height total less than 1,000 square feet in area.

14 7.0 *The permits are invalid because they were issued for a structure that has a roof too  
15 flat to meet the minimum pitch requirements in the Deer Harbor Hamlet Plan.*

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

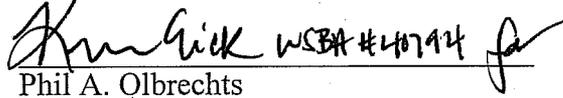
## 21 DECISION

22 The appeal is denied. The Examiner sustains the issuance of the building permit, change of use  
23 permit and ADU permit for the Heinmiller/Stameisen applications.

24 <sup>4</sup> The International Residential Code is a part of the state building code that is mandated by state law to be “in  
25 effect” in all counties and cities. See RCW 19.27.031. RCW 19.27.031 provides that the building codes shall be  
26 adopted by the State Building Code Council. The 2006 edition of the IRC was in effect when the subject  
applications vested sometime between the application date (3/10/08) and the issuance date (11/24/09). See Title  
51 WAC.

<sup>5</sup> Ex. 18 only contains computations for the shaded areas. There is an area on the second floor that contains space  
with a height over five feet that is not included in the shading. Ms. Ward testified that even if this space is  
included, the area of the ADU will not exceed 1,000 square feet. This testimony was not disputed, and the staff  
included the aforementioned unshaded area in its computations to determine that the ADU meets the 1,000 square  
foot requirement.

1 DATED this 23rd day of July, 2010.

2  
3  WSPA #40794  
4 Phil A. Olbrechts  
5 San Juan County Hearing Examiner

## 6 **Effective Date, Appeal Right, and Valuation Notices**

7 Hearing examiner decisions become effective when mailed or such later date in accordance with  
8 the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170.  
9 Before becoming effective, shoreline permits may be subject to review and approval by the  
10 Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC  
11 18.80.110.

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

15 Depending on the subject matter, this decision may be appealable to the San Juan County Superior  
16 Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines  
17 and strict procedures for appeals and failure to timely comply with filing and service requirement  
18 may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file  
19 an appeal are encouraged to promptly review appeal deadlines and procedural requirements and  
20 consult with a private attorney.

21 Affected property owners may request a change in valuation for property tax purposes  
22 notwithstanding any program of revaluation.  
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24  
25  
26