

**SAN JUAN COUNTY  
HEARING EXAMINER**

**ORDER GRANTING APPEAL**

Appellants: Kathy Messano, Trustee  
Heyneman Family Trust

Agent: Michael Murray

File No.: PAPL00-09-0003

Request: Appeal Denial of Shoreline Exemption for Stairs

Parcel No: 361223007

Location: 3 Westerly Court, Orcas Island

Comprehensive Plan Designation: Rural Farm Forest

Shoreline Designation: Rural Farm Forest

Hearing: May 6, 2010

Decision: The appeal is granted.

S.J.C. COMMUNITY

AUG 05 2010

DEVELOPMENT & PLANNING

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

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| RE: Heyneman Family Trust,<br>Kathy Marie Messano<br><br>Appeal of Denial of Shoreline<br>Exemption<br>(PAPL00-09-0002) | <b>ORDER GRANTING APPEAL</b> |
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**BACKGROUND**

This case has an unusual procedural history, so a brief summary is warranted as it appears that there are some misconceptions on the authority of the Examiner in this case. The subject appeal was originally scheduled for hearing on May 6, 2010. At that time the Appellant's legal representative, Michael Murray, testified that San Juan County had decided to support the granting of the appeal. Mr. Murray noted that the County also agreed to refund the Appellant's appeal fees. There was little time to discuss the matter further. Staff then re-noted the hearing to July 1, 2010 for further discussion.

Prior to the July 1, 2010 hearings, the Examiner conducted a site visit on the subject property for the subject appeal as well as an appeal concerning a proposed shoreline setback on the property (PAPL00-09-002). At the site the Examiner understood Mr. Murray to advise that there was no reason to address the subject shoreline exemption because the County had agreed to grant the exemption. At the July 1, 2010 hearing, the Examiner inquired why the stairway exemption was scheduled for hearing when the County had agreed to grant the exemption and understood the response to be that the parties wanted a formal disposition. The Examiner distributed a proposed Order of Dismissal to the parties on August 3, 2010. The Appellant responded with a proposed order that sustained the Appeal instead of dismissing it, on the sole basis that the parties were in agreement that it should be sustained. From the proposed order it became apparent that the County had not reversed its position by issuing a formal exemption decision,<sup>1</sup> but instead requested that the Examiner sustain the appeal.

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<sup>1</sup> To be clear, the Examiner does not suggest that issuing an approval would have been appropriate. The County correctly addressed this situation by simply asking the Examiner to grant the appeal. However, the County has already engaged in the practice of reversing its exemption decision in this case and the Examiner had understood that it had done so again.

## EXHIBITS

1. February 17, 2010 Staff Report.
2. November 11, 2009 Appeal with exhibits.
3. February 26, 2010 letter from Bill Weissenger regarding continuance.
4. March 2, 2010 letter from Michael Murray regarding continuance.
5. March 2, 2010 letter from Bill Weissenger regarding continuance.

## FINDINGS AND CONCLUSIONS

1. Agreed Disposition of Parties Cannot Serve as Basis for Decision. The Appellant and Examiner have engaged in a series of miscommunications based upon different assumptions on how the case would be disposed. The Appellant apparently believes that the Examiner can grant an appeal solely because the County and Appellant have agreed that the appeal should be granted. If correct, this would render the site visit and any further evidentiary hearing unnecessary.

The Appellant's apparent belief in this regard is certainly reasonable, since it is common practice for courts to sign off on stipulated orders with only a cursory glance at the merits of the settlement. However, the authority of a hearing examiner is much more limited than that of a court of law. Unlike a court, a hearing examiner has no inherent authority, and only has that authority expressly granted by statute and ordinance and those additional powers impliedly necessary to carry out its responsibilities. *See, LeJeune v. Clallam County*, 64 Wn. App. 257 (1992); *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984); *Exendine v. City of Sammamish* 127 Wn. App. 574, 113 P.3d 494 (2005).

The Examiner has no express or implied authority to enter stipulated orders. SJCC 2.22.030 tasks the Examiner with interpreting, reviewing, and implementing land use regulations as provided by ordinance. There is no code authority to waive code requirements because the parties have agreed that they have complied. Consequently, agreement of the parties is not a sufficient basis to issue a decision. The Examiner must also determine whether the agreement is consistent with the SJCC. In order to make this determination, the Examiner must still receive evidence, such as site visits, when necessary.

It is also of significance that land use cases are unique in that they address issues not only between the parties to the appeal, but to third parties as well. It is unlikely that the County Councilmembers ever intended to give the Examiner the authority to waive regulations designed to protect the general public, merely because the parties to an appeal agreed they do not have to be followed.

2. Factual Findings. The Examiner finds as follows:

1 A Stairway less than fifteen feet in height. As depicted in Ex. 8 to the  
2 Appellant's November 11, 2009 appeal, the proposed stairs are only 11.8 feet in  
height from ground level to the topmost railing.

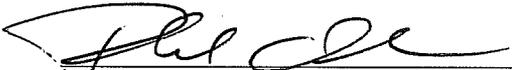
3 B. 3 Westerly Court Not Accessible from 1 Westerly Court. As shown in  
4 Exhibit 7(a) to the Appellant's November 11, 2009 appeal, there is no reasonable  
pedestrian beach access between 1 and 3 Westerly Court due to rocky topography.

5 3. Stairway Qualifies for Shoreline Exemption. SJCC 18.50.020(G)(3) governs the  
6 criteria for a shoreline exemption for beach stairs. The County denied the exemption  
7 noncompliance with two criteria: SJCC 18.50.020(G)(3)(e) (stairs only allowed when  
8 no other beach access available); and SJCC 18.50.020(G)(3)(f) (stairs may only have  
9 a maximum height of 15 feet). On the beach access criterion, the County staff  
10 concluded that there was other beach access available because the Appellant owned  
11 adjoining property with a staircase. There is some dispute as to whether the adjoining  
12 parcels are owned by the same person or entity. This issue does not need to be  
13 reached because, as found in Paragraph 2(B) above, rocky topography prevents  
14 access from the adjoining lot (1 Westerly Court). The Examiner concludes that the  
15 proposed staircase satisfies SJCC 18.50.020(G)(3)(e). The Examiner also finds that  
16 the proposal satisfies SJCC 18.50.020(G)(3)(f) because the staircase is 11.8 feet in  
height, which is below the 15-foot maximum height imposed by SJCC  
18.50.020(G)(3)(f). The record does not contain any information on compliance  
with the remaining criteria of SJCC 18.50.020(G)(3). However, given staff's support  
of the appeal and the fact that staff only identified potential noncompliance with  
SJCC 18.50.020(G)(3)(e) and (f), the Examiner concludes that staff did not have any  
compliance issues with the remaining criteria. The Examiner concludes that the  
proposed stairs comply with all the criteria of SJCC 18.50.020(G)(3).

### 17 DECISION

18 The subject appeal is granted and the shoreline exemption for the stairs depicted in  
19 Ex. 8 of the Appellant's November 11, 2009 appeal is approved.

20 Dated this 4th day of August, 2010.

21   
22 Phil A. Olbrechts  
23 San Juan County Hearing Examiner  
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1 **Effective Date, Appeal Right, and Valuation Notices**

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3 Hearing examiner decisions become effective when mailed or such later date in  
4 accordance with the laws and ordinance requirements governing the matter under  
5 consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be

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

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

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