Before Hearing Examiner
Gary N. McLean

BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY

S.J.C. DEPARTMENT OF
NOV 22 2017
COMMUNITY DEVELOPMENT

In the Matter of Shoreline Substantial Development and Permit Application filed by **ORCAS ISLAND YACHT CLUB,** Applicant, PROJECT: *To attach 3 (three) floats to the existing Orcas Island Yacht Club dock for a seasonal youth sailing program, known as the "Float Placement Project".*	**File No. PSJ000-17-0010** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION APPROVING SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT**

I. SUMMARY OF DECISION.

The Shoreline Substantial Development Permit for the Orcas Island Yacht Club's "Float Placement Project" proposal to attach 3 (three) floats to their existing dock for use in conjunction with a seasonal youth sailing program is approved, subject to Conditions of Approval that are based upon evidence in the Record and the unchallenged MDNS issued for the project.

II. LOCATION and PROJECT DESCRIPTION.

The existing Orcas Island Yacht Club ("OIYC") dock facility is located on tax parcel no. 260434012, across from 876 Deer Harbor Road, along a "Rural" designated shoreline area in the northeast portion of West Sound on Orcas Island. The upland land use designation is West Sound Activity Center.

The applicants propose to place 3 floats along the ramp of the existing OIYC dock. One float would be on the east side of the ramp, while the other two floats would be

attached to the west side of the ramp. The floats will be attached to the existing dock with line, eye-bolts and cleats. The proposed floats, including their proposed size and location, are shown on the dock drawings that are included in the Record as *Exhibit 3*.

There is no dispute that the existing OIYC dock is a legal use, and that the dock functions as a private marina. Accordingly, staff reviewed the pending proposal under the marina criteria of the boating facilities section of the County's Shoreline Master Program ("SMP"). The existing dock provides moorage to Yacht Club members, sailing students, local residents, and visitors, reducing demand for individual, private docks in the area. Amenities on the attached upland property include member parking and social activities. The application materials and the Staff Report credibly explain how the pending application, as conditioned, will be consistent with and promote goals and policies found in the County's SMP, all in compliance with shoreline regulations that implement such program.

III. RELEVANT CODE PROVISIONS.

The San Juan County Code includes a specific, unambiguous, and clearly-captioned code section addressing "Shoreline Permit and Exemption Procedures," found at SJCC 18.80.110. Relevant portions read as follows:

> **18.80.110 Shoreline permit and exemption procedures.**
> A. Purpose and Applicability.
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> 1. This section includes the procedures necessary to ensure that the provisions of the Shoreline Master Program (Element 3 of the Comprehensive Plan and Chapter 18.50 SJCC) are implemented and enforced, and to ensure that all persons affected by the master program are treated in a fair and equitable manner.
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> 2. This section applies to all lands and waters within the jurisdiction of the master program and to all persons and agencies as described in Chapter 18.50 SJCC.
>
> 3. The following are referred to as "shoreline permits" and are subject to this review process:
> a. <u>Shoreline substantial development permits</u>.
>
> [...]
>
> E. Decisionmaking Authority. <u>The hearing examiner has authority to take the following actions:</u>
> <u>1. Based upon the criteria in subsection (H) of this section, hear and issue or deny</u>

shoreline permits following receipt of the recommendations of the administrator, and to impose conditions of approval on such permits[.]

[...]

H. Criteria for Approval of Substantial Development Permits. A shoreline substantial development permit shall be granted by the County only when the applicant meets his burden of proving that the proposal is:
1. Consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;
2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC;
3. Consistent with this chapter;
4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);
5. Consistent with the goals and policies of the Comprehensive Plan; and
6. All conditions specified by the hearing examiner to make the proposal consistent with the master program and to mitigate or avoid adverse impacts are attached to the permit.

[...]

N. Rescission of Shoreline Permits. Any shoreline permit may be rescinded by the hearing examiner pursuant to RCW 90.58.140(8) upon the finding that the permittee has failed to comply with the terms and conditions thereof. In the event that the permittee is denied a required sewage disposal, building, or other permit necessary for the project in question, the shoreline permit may be rescinded by the hearing examiner. In the event a shoreline permit is rescinded by the hearing examiner, the permittee shall be notified by certified mail. Copies of the examiner's final action shall be filed with the Washington Department of Ecology.

Drawn from the previously provided portions of the San Juan County Shoreline Master Program code provisions, and other applicable provisions of the County's Unified Development Code found in Title 18 SJCC, of which the SMP is a portion, the following topics are worth highlighting in this Decision.

Jurisdiction: As shown above, under SJCC 18.80.110(E), the Hearing Examiner is given the authority to hold public hearings and issue or deny shoreline permits, based upon the criteria in SJCC 18.80.110(H).

Burden of Proof: Under SJCC 18.80.010(A), "Shoreline Permits" are specifically listed as "Project Permits" covered by the provisions of SJCC Chapter 18.80 re: application, notice, review and appeal requirements for the County's Unified Development Code, which is found in Title 18 of the SJCC and includes Chapter 18.50, the County's Shoreline Master

Program. SJCC 18.80.040(B) reads as follows:

> *"[t]he burden of proof is on the project permit applicant. The project permit application must be supported by evidence that it is consistent with the applicable state law, County development regulations, the Comprehensive Plan, and the applicant meets his burden of proving that any significant adverse environmental impacts have been adequately analyzed and addressed."*

Standard of Review: SJCC 2.22.210(H) explains that "for an application to be approved, a preponderance of the evidence presented at the hearing must support the conclusion that the application meets the legal decision criteria that apply."

Shoreline Regulations: The County's Shoreline Master Plan/Program (SMP) and its code provisions effectuating the SMP were recently amended, following review and approval by the San Juan County Council. For purposes of permit processing, this project vested and was reviewed under the County's "old", yet-to-be-updated shoreline regulations. Provisions that apply to review of this application are noted below.

SJCC 18.50.010(A), reads as follows:

> *"This chapter [18.50] of the Unified Development Code, together with Element 3 of the Comprehensive Plan and SJCC 18.80.110(I)(3), 18.80.110(J)(4) and 18.80.120(D), is the Shoreline Master Program for San Juan County, Washington."*

So, for review of this permit application, the County's SMP provisions are those codified in SJCC Chapter 18.50, together with Element 3 of the Comprehensive Plan collectively known as the "SJC Shoreline Master Program" or "SMP."[1]

Review Criteria for a Shoreline Substantial Development Permit: "Substantial Development" is defined in RCW 90.58.030(3)(e) and SJCC 18.20.190, and means any development of which the total cost or fair market value exceeds $6,416[2] or any development which materially interferes with the normal public use of the water or shorelines of the state. Substantial developments proposed in shoreline areas of San Juan

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[1] See SJCC 18.50.010(B), which reads: *"The short title of this chapter (18.50) and Element 3 of the Comprehensive Plan is the "SJC Shoreline Master Program" or "SMP."*

[2] This figure is the current figure posted on the Department of Ecology's Shoreline Master Program website, which is based upon the initial statutory $5,000.00 threshold, adjusted for inflation by the state Office of Financial Management on a 5-year cycle, adjusted on September 15, 2012 to $6,416. On September 2, 2017 the substantial development threshold was increased to $7,047.

County require a Substantial Development Permit. SJCC 18.80.110(H). Again, the approval criteria for a Shoreline Substantial Development Permit application is set forth in SJCC 18.80.110(H), which reads as follows:

> **18.80.110(H). Criteria for Approval of Substantial Development Permits.** A shoreline substantial development permit shall be granted by the County only when the applicant meets his burden of proving that the proposal is:
>
> 1. Consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;
>
> 2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC;
>
> 3. Consistent with this chapter;
>
> 4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);
>
> 5. Consistent with the goals and policies of the Comprehensive Plan; and
>
> 6. All conditions specified by the hearing examiner to make the proposal consistent with the master program and to mitigate or avoid adverse impacts are attached to the permit.

Review Criteria for the Department of Ecology: Finally, if the Examiner approves or denies the Shoreline Permit, such decision must be forwarded to the Department of Ecology and the Attorney General, for state review and any appeals of the Shoreline Permit, in accord with Washington Shoreline Management regulations found in WAC 173-27-130. This Decision is subject to review and approval, approval with conditions, or denial by the Washington Department of Ecology within thirty days of submittal by the County. WAC 173-27-130, and -200. Ecology's review criteria for Shoreline Substantial Development Permits is found at WAC 173-27-150[3]. The San Juan County review criteria for the requested shoreline permit is consistent with and substantially similar to those that will be

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[3] **WAC 173-27-150**
Review criteria for substantial development permits.
(1) A substantial development permit shall be granted only when the development proposed is consistent with:
(a) The policies and procedures of the act;
(b) The provisions of this regulation; and
(c) The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
(2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

used by the Department of Ecology.

IV. RECORD AND EXHIBITS; SUMMARY OF PUBLIC HEARING

Exhibits entered into evidence as part of the record, and an audio recording of the public hearing, are maintained by the San Juan County Department of Community Development, in accord with applicable law.

Hearing Testimony: The following individuals presented testimony under oath at the duly noticed open record public hearing held on October 25, 2017:

1. Lee McEnery, Planner III for San Juan County, who reviewed the application materials and prepared the Staff Report for the pending application;

2. Jenny Rose, with Jen-Jay, Inc., the applicant's Environmental Consultant and primary representative at the public hearing, noted that the most recent eelgrass survey for the site is good for 2 years, and that the OIYC has already received approval from the Army Corps of Engineers, in the form of a letter she introduced into the Record as *Exhibit 24;*

3. Chris Betcher, a Marine Biologist with Jen-Jay, Inc., testified for the applicant regarding the thorough nature of eelgrass survey work done for the project, and its design, which was adjusted to avoid eelgrass located in the vicinity;

4. Burke Thomas, Vice Commodore of the OIYC, testified for the applicant regarding the Club's youth sailing program operations, and how the new floats will benefit such activities;

5. Robert Brunius, former OIYC Commodore, testified for the applicant, noted that the junior sailing program is a 501(c)(3) organization, which benefits young people, and provides environmental benefits, because sailboats use less fuel than power boats, and more people learning to sail could reduce the number of people who opt for power boats;

6. Steve Burno, an Orcas Island resident, testified that he fully supports the application, and that he appreciates the public access the club provides for his family and other locals who want to enjoy sailing opportunities;

7. Scott Boye, Coach of the University of Washington Sailing Team, testified for the applicant, described sailing competitions that make use of the OIYC dock

facility, how the youth-sailing programs improve safety for young sailors, and that the new floats will provide for better supervision of pupils by instructors who will be able to keep groups together as they rig boats and prepare for lessons.

No one appeared at the public hearing to offer sworn testimony or evidence in opposition to the application, despite several invitations for members of the audience to come to the microphone and offer their testimony regarding the application. No one submitted a timely appeal of the MDNS issued for the project.

Exhibits: The following Exhibits are included as part of the Record for this matter:

1. Staff Report, prepared by Ms. McEnery, dated October 2, 2017, for the pending application (14 pages);

2. Application cover sheet, showing application fees paid and received on July 3, 2017;

3. Dock drawings (4 pages);

4. Aerial photo vicinity map;

5. Aerial photo, forage fish, surf smelt;

6. Aerial photo, drift sector, left to right;

7. SEPA Mitigated Determination of Nonsignificance (MDNS) issued for the project on August 9, 2017, which details 13 specific, binding, mitigation measures or conditions of approval for the proposal;
   *(The MDNS was not appealed – SJCC 18.80.140(A) provides that a SEPA threshold determination like the MDNS issued for this project may be appealed within 21 days of issuance.)

8. SEPA Checklist for the project, signed by Burke Thomas, Vice Commodore on June 15, 2017 (14 pages);

9 Habitat and Assessment Report, labeled "San Juan County Critical Areas Report" for "Orcas Island Yacht Club (Sail Orcas) Float Placement", originally dated May 1, 2017, prepared by Jen-Jay, Inc., of Deer Harbor, Washington, Amended September 21, 2017, with Chris Betcher listed as contact person (47 pages);

10. December 16, 2015 Preliminary Eelgrass Macro Algae Habitat Survey, 6 pages (includes dock drawings);

11. August 11, 2017 University of Washington, Friday Harbor Labs comment letter;

12. August 7, 2017 Department of Ecology comment letter (2 pages);

13. August 7, 2017 Department of Fish and Wildlife comment letter;

14. August 21, 2017 comment letter from Catherine Bryant (11 pages);

15. August 31, 2017 corrections to comment letter from Ms. Bryant (2 pages);

16. PSJREV-14-0005 Revision to shoreline permit (5 pages);

17. August 27, 2014 staff report for PSJREV-14-0005 (9 pages);

18. Legal ad, posting, and public notice information and confirmation (6 pages);

19. 14SJ84 RR shoreline permit;

20. January 15, 1988 staff report for 14SJ84RR;

21. Jen-Jay Diving Inc. September 13, 2017 Eelgrass Habitat Survey;

22. September 6, 2017 Catherine Bryant comment letter (4 pages);

23. *Reserved*[4].

[4] Materials identified by this number are not included as part of the Record for this matter, because they were not filed in a timely manner. The author, Ms. Bryant, did not comply with applicable filing deadlines to pursue an appeal of the SEPA MDNS issued for the project, and she also failed to submit a timely written response to an Order to Show Cause why her appeal should not be dismissed, which she confirmed on the record at the beginning of the public hearing for this matter. Based on her admission, and the fact that no timely written response to the Show Cause Order was ever received by the County, the Examiner confirmed that he was without jurisdiction to consider any appeal of the MDNS, and granted the County's written Motion to Dismiss her untimely appeal. Copies of Ms. Bryant's untimely materials, the County's Motion to Dismiss, and the Order to Show Cause, are all maintained in File No. PAPL00-17-0008. During the public comment portion of the public hearing, Ms. Bryant was present in the room but chose not to provide any sworn testimony at the hearing regarding the application, despite several opportunities to do so.

24. June 24, 2016 letter from the Army Corps of Engineers, authorizing OIYC's application to modify its existing dock in West Sound (Orcas Island), San Juan County, Washington, based on the information applicant provided, and as depicted in drawings dated March 2016, from the previous "T" dock alignment to the straight-line dock that now exists on the site. This Exhibit was entered into the Record by the applicant's environmental consultant/representative, Ms. Rose. As directed by the Examiner during the public hearing, she submitted a true and correct copy of the letter and drawings from the Corps, as .pdf documents, directed by email to Ms. McEnery on the day following the hearing. *(Letter is 3 pages, attached Drawings referenced in letter are 4 pages);* and

25. "Sail Orcas" Junior Sailing Historical Enrollment figures, total number of classes by month of registration for the years 2011 – 2017, submitted by Mr. Brunius, the former OIYC Commodore.

The Examiner has had a full and fair opportunity to consider all evidence and testimony submitted as part of the record, has reviewed and researched relevant codes and caselaw, and is fully advised. This Decision was delayed in order to confirm the correct version of County codes that should be addressed in reviewing this matter, given that the recent SMA updates to codes and policies are gradually replacing older versions of the code on online resources available to the Examiner. The Examiner hereby confirms that he has reviewed and written this decision by applying the County codes for Shoreline permits in effect at the time the underlying application vested, primarily those found in SJCC 18.80.110(H)(1-6). Accordingly, this Decision is now in order.

V. FINDINGS OF FACT.

Based on the Record, the Examiner issues the following findings of fact:

1. All statements of fact, assessments of credibility, or determinations on the weight of evidence as described in any other section of this Decision, are hereby incorporated by reference and adopted as Findings of Fact supporting this Decision and the attached Conditions of Approval.

2. In early July of this year, Orcas Island Yacht Club submitted an application to place three new floats alongside the club's existing dock on Orcas Island, for use in conjunction with its youth sailing program known as "Sail Orcas". *(See Exhibit 2, Application cover sheet, showing application fees paid and received on July 3, 2017).*

3. The application materials included thorough environmental reports analyzing

potential impacts, all of which support mitigation measures included for the project under the MDNS and incorporated as conditions of approval imposed by this Decision, including without limitation Eelgrass/Macro Algae Habitat Surveys from December of 2016 and September of 2017, used to support a 47 page Habitat and Assessment Report, originally dated May of 2017, amended in September of 2017. *(See Exhibits 9 and 10).*

4. County staff received the application materials and determined that they were complete on or about August 3, 2017, with public notice of the application published, mailed, and posted onsite shortly thereafter. *(Exhibit 18, final page, Notices of Applications and Public Hearings, published on August 9, 2017).*

5. The Staff Report and Ms. McEnery's testimony confirmed that applicable notice, mailing, publication and other relevant procedural requirements were satisfied.

6. As noted above, the applicant proposes to place 3 floats along the ramp of the existing Orcas Island Yacht Club dock, in a size and configuration as depicted in *Exhibit 3*. The two floats that will be attached to the west side of the dock will be 16 feet wide and 70 feet long, with one at 30 feet, and the other at 40 feet in length; the other, third, float will be 16 feet wide and 40 feet long. *(Ex. 3, Orcas Island Yacht Club Dock Project drawings, Proposed Plan View, Sheet 2 of 4).* The three floats will total 1,760 square feet. (2 west floats, combined, measuring 16 x 70, and 1 single east float, measuring 16 x 40).

7. The floats will be fabricated elsewhere and towed to the site. The float decks will be fully grated. *Staff Report, page 2.*

8. Orcas Island Yacht Club (OIYC), the dock owner, offers summer sailing lessons. The summer sailing program is called "Sail Orcas". The club owns various models of 16' dinghies, all suitable for learning to sail. In sailing season (March 1 – November 1), the dinghies will be kept on the proposed floats for easy entry into the water. Out of season, the dinghies will be stored on the upland property across the road. *Staff Report; Testimony of OIYC witnesses.*

9. Some aerial photos included in the record show similar floats already attached to the dock, seemingly in the same location and for the same purpose. The Staff Report indicates that in winter, those floats were stored in the water to the southeast, between the Yacht Club dock and the West Sound Marina. In summer they were used at the OIYC dock. Those floats are old and were placed without the benefit of a shoreline permit. *Staff Report.* These 'old' floats are not the subject of this permit, and are not authorized or "grandfathered" by this Decision. Several written comments regarding the application raised concerns about the preexisting, unpermitted floats, and the previous "T" shaped dock configuration. Those issues have been adequately addressed, refuted, or resolved, and are not relevant in issuing

the pending decision.

10. For instance, a photograph of the current, approved dock configuration – generally running in a straight line instead of a "T" – is shown on *Exhibit 9, page 11, Figure 1.* In response to written comments generally questioning whether the current yacht club dock configuration has been reviewed by the Army Corps of Engineers, the applicant's environmental consultant, Ms. Rose, submitted a June 24, 2016 letter from the Army Corps of Engineers, authorizing OIYC's application to modify its existing dock in West Sound (Orcas Island), San Juan County, Washington, based on the information applicant provided, and as depicted in drawings dated March 2016, from the previous "T" dock alignment to the straight-line dock that now exists on the site. *(Exhibit 24, Letter is 3 pages, attached Drawings referenced in letter are 4 pages).*

11. The Staff Report emphasizes that this is not considered an after the fact application, because new management for the yacht club now proposes a fresh start with modern float construction in compliance with proper permit processes. The old floats shall be disposed of in a proper manner.

12. The Staff Report indicates that the floats will be located in relatively shallow, less navigable water. The record establishes that the immediate area around the proposed floats is easily used by sailing dinghies, like those proposed for use in the Sail Orcas sailing classes. The most seaward west floats will terminate around the 12' contour and extend landward to the minus 5' contour. The east float ends the same place, but starts around the minus 7' contour. *Staff Report; Ex. 3*

13. The Staff Report credibly summarizes the OIYC dock configuration and development history, noting that the existing dock was originally permitted by shoreline substantial development permit No. 14SJ84, which was subsequently revised in permit 14SJ84R, and again in permit 14SJ84RR to enlarge the dock.

14. The existing dock was established by 14SJ084RR *(Exhibit 19),* which was revised by PSJREV-14-0005 *(Exhibit 16).* The 2014 revision altered the configuration by moving the T-float to be in line with the dock, improving its usability. The 2016 aerial photos of the dock in a T configuration (with the un-permitted dinghy floats) were taken prior to the re-alignment of the terminal float.

15. The dock configuration was revised by PSJ000-14-0005, which rotated the perpendicular end float to be in line with the pier and ramp. The dock's over-water area remained the same but the re-orientation changed its length as measured from the OHWM.

16. As noted above, the existing dock functions as a private marina, so it was reviewed

under the marina criteria of the boating facilities section of the Shoreline Master Program. The dock provides moorage to Yacht Club members, and access to waterborne activities along the shoreline area for members, sailing students, and others, many of whom are local residents and visitors. Amenities on the attached upland property include member parking and social activities. *Staff Report; Testimony of witnesses at the public hearing.*

17. The County GIS critical area maps show the presence of Chinook salmon, Dungeness crab, forage fish and surf smelt spawning, as well as a drift sector (L to R). These Fish and Wildlife Habitat Conservation Areas are addressed in the May 1, 2017 Habitat Assessment Report by Jen-Jay Diving, Inc. *(Exhibit 9).*

18. The December 16, 2015 eelgrass survey performed by Jen-Jay Diving, Inc *(Exhibit 10)* documented two patches of eelgrass near, but not under, the proposed east float. The float is designed to be at least 25 feet from the eelgrass. In response to county feedback, and some written comments regarding the application, the applicant commissioned an additional, more current, eelgrass survey that was performed on or about September 13, 2017, when eelgrass is known to be more prevalent *(Exhibit 21).* The updated, September 2017 survey, similarly documented two small patches of eelgrass that were located more than 25 feet away to the northeast the east float. Mr. Betcher testified at the public hearing to confirm his diving work undertaken to complete both eelgrass surveys.

19. In sum, both the winter and summer eelgrass dive surveys confirmed that the float placement will be at least 25 feet from where eelgrass is known to grow in the surrounding waters. No one offered any credible evidence to contradict or disprove the eelgrass survey findings, which were based on Mr. Betcher's diving observations in December of 2016 and September of 2017.

20. Following review and consideration of all environmental documentation submitted as part of the application, including a SEPA Checklist *(Ex. 8)* completed by Burke Thomas, OIYC's Vice Commodore, County officials issued a SEPA Mitigated Determination of Non-Significance (MDNS) for the proposal on August 9, 2017. *(Exhibit 7).*

21. The MDNS includes 13 specific mitigation measures that are intended to avoid or minimize potential adverse impacts on the environment, particularly aquatic aspects of the environment. *(See Ex. 7, MDNS).*

22. The face of the MDNS notification issued by the County specified that the deadline for comments regarding the MDNS was August 23, 2017, and the deadline for any appeals of the MDNS expired on September 13, 2017. *(See Ex. 7, MDNS).*

23. The County received no comments regarding the MDNS. *(Staff Report, page 5,*

finding 22).

24. Because no agency or person submitted comments regarding the MDNS, no party had standing to appeal the determination. In any event, no one submitted a timely appeal of the MDNS issued for the Captain's Landing project.

25. By operation of WAC 197-11-545 (re: Effect of no comment), if a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency may assume that the consulted agency has no information relating to the potential impact of the proposal as it relates to the consulted agency's jurisdiction or special expertise; further, lack of comment by other agencies or members of the public on environmental documents within the applicable time period shall be construed as lack of objection to the county's environmental analysis. Again, the record establishes that the no one submitted any comments regarding the MDNS, and the county's SEPA determination was not appealed – SJCC 18.80.140(A) provides that a SEPA threshold determination like the MDNS issued for this project may be appealed within 21 days of issuance. Even if someone submitted a timely appeal, they would not have had standing to pursue an appeal, because no one submitted timely comments regarding the determination before the August 23rd deadline for such comments.

26. All 13 of the unchallenged mitigation measures included in the MDNS are supported by evidence in the Record, reasonable, and capable of being accomplished. Accordingly, as recommended by Staff and fully supported by Applicant witnesses who testified at the public hearing, they are all included as Conditions of Approval for the pending Shoreline Permit.

27. At the hearing, Applicant witnesses credibly and convincingly described how the float placement design reflects the best available environmental information, particularly with respect to how the float placement is expressly designed to avoid eelgrass impacts by keeping all portions of the new floats at least 25 feet away from the nearest known eelgrass locations.

28. The Staff Report credibly provides responses to written comments received regarding the pending application. None of the written comments raised issues that serve as a basis to deny the pending application.

29. The Staff Report credibly summarizes the staff review conducted regarding the pending application, and how the new floats, if installed and maintained in compliance with the recommended conditions of approval, can be placed on the OIYC dock in compliance with all applicable County codes and regulations, including without limitation those found in SJCC 18.50.190 regarding boating facilities, including docks. *Staff Report, pages 6 – 11.*

30. The Staff Report credibly summarizes the substantial evidence in the record that establishes how the pending application complies with the County's critical areas regulations, particularly those found in SJCC 18.35.025, including the limitation that existing legal docks can be modified if the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. This section applies because the existing dock predates the critical area regulations and is being modified or redeveloped. The May 1, 2017 Critical Areas Report *(Exhibit 9)* concludes on pages 15 (forage fish, eelgrass), 17 (Chinook salmon) and 18 (Dungeness crab), that ***there will be no net loss of shoreline ecological functions and values*** for surf smelt, forage fish, Chinook salmon, eelgrass and Dungeness crab. *Staff Report, at pages 5 and 6.*

31. The thorough and credible environmental documentation that is included in this Record does not include evidence or information that would serve as a basis to conclude that the relatively small float project would have any significant, adverse environmental impacts that cannot be appropriately mitigated as provided by law. Accordingly, there is no basis to deny the project under SEPA.

32. No individual or government agency invited to comment on the project application offered any credible evidence or information that would rebut or materially challenge the findings and analysis provided in applicant's most updated environmental reports and analysis and project design and installation recommendations that are included as part of the Record.

Merits of the project.

33. The Staff Report and the materials included as part of the Record, including without limitation *Exhibits 3, 7, 8, 9, 10, and 21,* include facts and analysis that comprise far more than a preponderance of evidence to establish that the pending Shoreline application satisfies, and in many respects, promotes or implements, applicable provisions of the County's Comprehensive Plan.

34. Substantial evidence in the record, including without limitation the application materials, environmental reports, and testimony by Applicant representatives, fully support Staff's conclusions in the Staff Report, explaining that the proposed project satisfactorily complies with applicable county code provisions, and/or can be mitigated through conditions set forth in the MDNS issued for this project, to minimize, reduce, or prevent any probable, significant, adverse, environmental impacts associated with the project.

35. For instance, *there is substantial, credible, and unrebutted information in the application materials to demonstrate that no net loss of shoreline ecological functions will*

occur. These materials include, without limitation, the May 1, 2017 Critical Areas Report *(Exhibit 9)*, which concludes on pages 15 (re: forage fish, eelgrass), 17 (re: Chinook salmon) and 18 (re: Dungeness crab), that ***there will be no net loss of shoreline ecological functions and values*** for surf smelt, forage fish, Chinook salmon, eelgrass and Dungeness crab. *Staff Report, at pages 5 and 6; Exhibit 9.*

36. The OIYC dock, which generally operates as a marina, already exists. So, permitting the three new floats and keeping the dock facility as a viable, appropriately constructed, and environmentally-sensitive provider of moorage space for area residents and visitors, including sailing class students – is reasonable and fully consistent with Comprehensive Plan Policy 3.5.C regarding Boating Facilities, including without limitation the following subsections:

> 1. Locate, design and construct boating facilities to minimize adverse effects upon, and to protect all forms of aquatic, littoral or terrestrial life including animals, fish, shellfish, birds and plants, their habitats and their migratory routes;
>
> 3. The location, design, configuration and height of boathouses, piers, ramps, and docks should both accommodate the proposed use and minimize obstructions to views from the surrounding area;
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> 4. Boating facilities should be designed to optimize the trade-offs between the number of boats served and the impacts on the natural and visual environments;
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> 5. In providing boating facilities, the capacity of the shoreline site to absorb the impact should be considered;
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> 9. In many cases, a combination of fixed and floating structures on the same dock may be desirable given tidal currents, habitat protection and topography, and should be considered;
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> 11. To spare San Juan County from the so-called "porcupine effect" created by dozens of individual private docks and piers on the same shoreline, preference should be given to the joint use of a single structure by several waterfront property owners, as opposed to the construction of several individual structures;
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> 14. Expansion or repair of existing facilities should be encouraged over construction of new docks and piers;
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> 15. To reduce the demand for single-user docks, multiple-user docks should be encouraged through construction and dimensional incentives;
>
> 16. To reduce the cumulative environmental impact of individual docks on the shorelines of the county and to provide moorage opportunities for inland and shoreline residents, encourage marina development that includes allocations of at least half the available moorage space to permanent, rather than transient, moorage, subject to compliance with other applicable policies and regulations;

19. Marina development should minimize the consumption of limited shoreline resources. To accomplish this the following is preferred:

a. The expansion of existing marinas over the addition of new marina sites; and

20. Multiple use, and where practical public access, should be provided for in the design of every commercial marina.

37. The probable, significant, adverse environmental impacts of the proposal can be minimized and fully addressed through implementation of the mitigation measures identified in the County's unchallenged MDNS issued for the proposal. The MDNS is fully supported by unrebutted, credible, environmental studies and documentation, including without limitation the environmental checklist and supporting environmental reports provided for the project.

38. The findings, recommendations and conclusions provided in the environmental documentation submitted on behalf of the applicant, are credible and well-reasoned summaries of complicated regulations, conditions, possible impacts and appropriate mitigation measures associated with the proposed project. Applicant's proposal has been designed, planned, and/or conditioned based on input from experts in various fields.

39. No one presented any testimony or evidence that would justify denial of the pending shoreline application.

40. The project promotes and is consistent with the state shoreline policies set forth in the Shoreline Management Act at RCW 90.50.020(1-6). For example, the project provides a common area for boat moorage at a marina, which can be used by inland residents and others who would not otherwise have access to the shoreline; the new floats will enhance the existing facility and its ability to serve local residents, particularly sailing class students, while preserving and protecting the natural character, resources, and ecology of the shoreline; it will provide a demonstrated, long-term benefit, and hopefully reduce the obvious pressures for more single-use boat docks in and around Orcas Island, which are disfavored in the County's SMP.

The Record includes substantial evidence that the application meets requirements to approve the Substantial Development Permit.

41. Substantial and credible evidence in the record, including without limitation all findings set forth above, unrebutted findings and analysis provided in the Staff Report, and witness testimony at the public hearing, establishes that the applicant has met its burden to prove that the pending application satisfies all criteria for approval of a Substantial Development Permit, found at SJCC 18.80.110(H). Specifically, the applicant has met its

burden to establish that: 1. The proposal is consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended; 2. The proposal is Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC; 3. The proposal is consistent with applicable provisions of SJCC chapter 18.80; 4. The proposal is consistent with the applicable sections of the SJCC code; 5. The proposal is consistent with the goals and policies of the Comprehensive Plan; and 6. The Examiner has conditioned approval of the project to make the proposal consistent with the shoreline master program and to mitigate or avoid adverse impacts.

42. Any finding or other statement of fact contained in another section of this Decision that is deemed to be a finding of fact is hereby adopted as such and incorporated by reference.

VI. CONCLUSIONS OF LAW.

1. The Record, including without limitation the County's Staff Report and Applicant's detailed supporting environmental analysis reports, includes substantial, credible and convincing proof that the Shoreline application satisfies the County's approval criteria.

2. The principal purpose of SEPA is to provide decisionmakers and the public with information about potential adverse impacts of a proposed action. *Save our Environment v. Snohomish County,* 99 Wash.2d 363, 373 (1983). "SEPA is primarily a procedural statute that requires the disclosure of environmental information. SEPA does not demand a particular substantive result in government decision making; rather it ensures that environmental values are given appropriate consideration." *Glasser v. City of Seattle,* 139 Wn. App. 728, 742 (2007). In this matter, the Record includes substantial, credible, and unrebutted evidence to support issuance of the MDNS, and the OIYC Float Placement Project proposal is fully justified under SEPA as an appropriate action that can be accomplished, as conditioned, without negative environmental impacts.

3. The state's Shoreline Management Act ("SMA") and the regulatory policies established thereunder, including those adopted by San Juan County and approved by the Department of Ecology, does/do not prohibit all development in the shoreline. Rather, its purpose is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning. *Overlake Fund v. Shoreline Hearings Bd. (State Report Title: Overlake Fund v. Shorelines Hearings Bd.),* 90 Wash. App. 746, 761, 954 P.2d 304, 312 (1998).

4. When it approved the San Juan County Shoreline Master Program, the Department of Ecology approved the County's decision to permit recreation uses, like the OIYC dock, in its waters and along some shoreline areas. It included approval of provisions that allow for maintenance and upgrades to existing shoreline uses, like the dock, through issuance of a shoreline permit. In so doing, both the County and DOE recognized that the area in which this proposal is located is an already-developed area within the county, which is suitable for recreation development. In an ideal world, we might well choose to preserve all shorelines in a natural, undisturbed state. But the Shoreline Management Act, DOE and the County understand that, in a practical world, development pressures exist and permitting a range of uses is necessary to accommodate those pressures. On the sliding scale of values contemplated by the Act and regulations, the natural condition of the shoreline portion of the OIYC dock simply does not justify effectively denying a shoreline permit for the OIYC Float Placement project, because the dock is a pre-existing, legal marina use, a long-existing recreational use that is located along a shoreline area with significant demand for the services it provides.

5. The SMA clearly contemplates a balancing approach. "[C]oordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020. The SMA also recognizes that alterations in the natural condition of the shoreline will occur with priority to be given for shoreline recreational uses like marinas. Id. The SMA does not prohibit development but attempts to ensure that development will occur in such a way to protect the public against "adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life." Id. Lastly, the SMA fosters "all reasonable and appropriate uses" of the shorelines of the state. Id.

6. As shown above, the Record establishes that the proposed Float Placement Project has been designed and can be conditioned to be accomplished in an environmentally-responsible fashion.

7. The OIYC Float Placement Project proposal furthers many of the goals of the SMA and the San Juan County SMP.

8. Any finding or other statement contained in a previous section of this Decision that is deemed to be a Conclusion of Law is hereby adopted as such and incorporated by reference.

VII. DECISION, CONDITIONS OF APPROVAL.

Based on the record, and for the reasons set forth above, the Shoreline Substantial Development Permit for the Orcas Island Yacht Club Float Placement Project is approved, subject to the following Conditions of Approval, A through Q, which are attached hereto, and incorporated herein by reference.

ISSUED this 22nd Day of November, 2017

Gary N. McLean
Hearing Examiner

CONDITIONS OF APPROVAL

Orcas Island Yacht Club Float Placement Project
Shoreline Substantial Development Permit
File No. PSJ000-17-0010

Based on the Record, and under authority of applicable county code provisions, the Examiner imposes the following Conditions of Approval on the above-referenced permit.

A. The Project shall be developed in a manner and design substantially in the form, size and as configured in project drawings depicted in *Exhibit 3*, showing two floats attached to the west side of the dock, no more than 16 feet wide and 70 feet long, with one at 30 feet long, and the other at 40 feet in length; the other, third, float will be attached to the east side of the dock, and shall be no more than16 feet wide and 40 feet long. *(Ex. 3, Orcas Island Yacht Club Dock Project drawings, Proposed Plan View, Sheet 2 of 4).*

B. The applicant shall obtain any associated permit, license, or approval required by any state, federal, or other regulatory body with jurisdiction over aspects of the project; any conditions of regulatory agency permits, licenses, approvals or leases shall be considered conditions of approval for this project.

C. The applicant shall comply with all professional report conclusions and recommendations submitted in connection with this Shoreline Permit and associated approvals issued by the San Juan County for this project, as approved, referenced, relied-upon, and/or modified by the County.

D. This permit allows the placement of three floats, for use as described in the Staff Report, secured to the existing Orcas Island Yacht Club dock located at 876 Deer Harbor Road on tax parcel No. 260434012, as shown on dock drawings included in the record as *Exhibit 3.*

E. Boats moored at the OIYC dock shall not be used for commercial overnight accommodations.

F. The applicant shall implement and comply with all of the mitigation measures listed in the MDNS issued for the project, which are restated below and incorporated herein as Conditions of Approval for this Shoreline Permit:

1. The proposal shall maximize light penetration with fully grated floats and placement at least 25' from eelgrass.
2. The work-boat shall be situated so that it does not ground during installation.
3. No deleterious materials shall enter the water during installation of the flats.
4. Equipment shall be maintained so as to be leak-free while on the site.
5. Engines shall be run only when needed.
6. Disposal of waste shall be at an approved upland disposal site.
7. Pre-fabricated components shall be used.
8. All floats shall be fully grated to reduce shading.
9. Floats shall be at least 25' from any eelgrass.
10. Installation shall be during compatible tides during daylight hours.
11. Approved in-water work windows shall be implemented and work will occur over a one-day period.

12. Spill prevention and cleanup plans shall be implemented as required by local, state and federal regulations.
13. Comply with all applicable state, federal and San Juan County codes.

G. All construction debris entering the water or shoreline area shall be removed immediately and disposed of in a legal manner.

H. Abandoned or unsafe docks and piers shall be removed or repaired promptly by the owner. Where any such structure constitutes a hazard to the public, the County may, following notice to the owner, abate the structure if the owner fails to do so within a reasonable time and may impose a lien on the related shoreline property in an amount equal to the cost of the abatement.

I. Boats moored at residential docks shall not be used for commercial overnight accommodations.

J. Use of a dock for regular float plane access and moorage shall be allowed only by shoreline conditional use permit and shall be allowed only at commercial or public moorage facilities or at private community docks.

K. All floats shall include stops which serve to keep the bottom off tidelands at low tide.

L. When plastics or other non-biodegradable materials are used in float, pier, or dock construction, full containment features in the design of the structures shall be required.

M. Overhead wiring or plumbing is not permitted on piers or docks.

N. All applicable local, state and federal permits shall be obtained prior to commencement of construction.

O. Development authorized by this permit shall commence within two years of the date of approval and shall be substantially complete within five years or the permit shall become null and void.

P. Immediately after construction is completed, the owner shall request that the Department of Community Development perform an inspection and shall reference the permit number in the request.

Q. Failure to comply with any terms or conditions of this permit may result in its revocation. Failure to Comply with These Conditions of Approval Shall Be Grounds for Rescission of the Shoreline Permit. As provided in SJCC 18.80.110(N), captioned "Rescission of Shoreline Permits," any shoreline permit may be rescinded by the hearing examiner pursuant to RCW 90.58.140(8), upon the finding that the permittee has failed to comply with the terms and conditions thereof. In addition, if the permittee is denied any other permit or authorization required by a state or federal agency with jurisdiction over aspects of the Project, the underlying shoreline permit may be rescinded.

Effective Date, Appeals, 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/or SJCC 18.80.110.

Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County Council, unless the County council has adopted, by ordinance, written procedures for the discretionary review of such decisions. See Section 4.50 of the San Juan County Home Rule Charter and 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 any 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 confer with advisors of their choosing, possibly including a private attorney.

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