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Before Hearing Examiner
Gary N. McLean

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

In the Matter of Shoreline Substantial)
Development Permit Application filed by)
the San Juan County)
)
PUBLIC WORKS DEPARTMENT,)
Applicant,)
)
for the)
)
DEER HARBOR HAMLET TRAIL)
PROJECT)
)
[Project: to construct pedestrian trail entirely)
within county right-of-way, leading from the)
Deer Harbor Hamlet center to the Deer Harbor)
Bridge on Channel Road, on Orcas Island])
_____)

S.J.C. DEPARTMENT OF
MAY 01 2018
COMMUNITY DEVELOPMENT

File No. PSJ000-17-00014

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION APPROVING
SHORELINE SUBSTANTIAL
DEVELOPMENT PERMIT**

I. SUMMARY OF DECISION.

The Shoreline Substantial Development Permit application submitted on behalf of the San Juan County Public Works Department is approved.

The proposed project is subject to compliance with all applicable development, design, building code, engineering and other regulations, including without limitation those requiring verification of performance, inspections, and maintenance associated with conditions or mitigation measures that might be imposed consistent with this Decision or any subsequent approval issued by any state or federal agency or county department with jurisdiction over a particular aspect of the Project as the development review and possible construction processes unfold.

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DECISION – APPROVING SHORELINE
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CONSTRUCT PORTIONS OF DEER HARBOR
PEDESTRIAN TRAIL IN THE SHORELINE AREA,
ON ORCAS ISLAND – PSJ000-17-0014**

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II. PROJECT DESCRIPTION.

The San Juan County Public Works Department submitted the pending shoreline application to construct a pedestrian pathway, also referenced as a trail, adjacent to existing County roads, that will be entirely within existing County right-of-way. The trail would improve pedestrian safety in the Deer Harbor area, providing a path between the Deer Harbor Hamlet center and the Deer Harbor Bridge, on Orcas Island in San Juan County. This application applies to portions of the trail that would be located within the designated shoreline jurisdiction. The Staff Report explains that portions of the trail that will not be within the shoreline jurisdiction are not subject to additional land use approvals under applicable provisions of the San Juan County Code. The trail route is depicted on Exhibits 6, 7, and 11.

III. RELEVANT CODE PROVISIONS.

The pending application was accepted and reviewed under provisions of the County's recently updated Shoreline Master Program, which took effect in late 2017.

Jurisdiction: Under SJCC 18.80.020, at Table 8.1, the Hearing Examiner is given the authority to hold open-record pre-decision public hearings and issue decisions regarding shoreline permits, including shoreline substantial development permits, shoreline conditional use permits, and shoreline variances.

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."

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1
2 **Requirement and Review Criteria for a Shoreline Substantial Development**
3 **Permit:** "Substantial Development" is defined in RCW 90.58.030(3)(e) and SJCC
4 18.20.190. There is no dispute that the pending project meets the definition for a
5 'substantial development.' Substantial developments proposed in shoreline areas of San
6 Juan County require a Substantial Development Permit. See SJCC 18.50.060(A) and Table
7 18.50.600. The approval criteria for a Shoreline Substantial Development Permit
8 application is set forth in SJCC 18.80.110(H), which reads as follows:

9
10 **18.80.110(H). Criteria for Approval of Substantial Development Permits.**

11 1. A shoreline substantial development permit will be granted by the County if the applicant
12 demonstrates the proposal is:

- 13 a. Consistent with the policies of the SMA, Chapter 90.58 RCW and Chapters 173-
14 26 and 173-27 WAC, as amended;
- 15 b. Consistent with the policies and regulations of this SMP;
- 16 c. Consistent with other applicable sections of this code; and
- 17 d. Consistent with the goals and policies of the Comprehensive Plan.

18 2. The conditions specified by the hearing examiner to make the proposal consistent with
19 the SMP and to mitigate or avoid adverse impacts to shoreline ecological functions will be
20 attached to the permit.

21 **Review Criteria for the Department of Ecology:** Finally, if the Examiner approves
22 or denies the Shoreline Permit, such decision must be forwarded to the Department of
23 Ecology and the Attorney General, for state review and any appeals of the Shoreline Permit,
24 in accord with Washington Shoreline Management regulations found in WAC 173-27-130.
25 This Decision is subject to review and approval, approval with conditions, or denial by the
26 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 173-27-150¹. The San Juan County review criteria for the

¹ 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.

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1 requested shoreline permit is consistent with and substantially similar to those that will be
2 used by the Department of Ecology.

3 **IV. RECORD AND EXHIBITS.**

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

7 **Hearing Testimony:** The following individuals presented testimony under oath at
8 the duly noticed open record public hearing held on March 28, 2018:

- 9 1. Lee McEnery, Planner III for San Juan County, who prepared the Staff Report
10 for the pending application;
- 11 2. Jeff Sharp, Engineering Tech in the San Juan County Public Works Department,
12 who represented the Project Applicant, at the public hearing; and
- 13 3. Wes Heinmiller, local property owner.

14 **Exhibits:** The following exhibits were accepted into the record as numbered,
15 identified and described below:

- 16 1. **Staff Report**, dated March 13, 2018, prepared by County Planner, Lee McEnery;
- 17 2. Application cover sheet;
- 18 3. Supplemental information;
- 19 4. Clearing and grading information;
- 20 5. SSDP Requirements, 2 pages;
- 21 6. Aerial photo vicinity map, trail path drawn in black;
- 22 7. Comprehensive Plan land use designations map, trail path drawn in black;
- 23 8. Clearing and grading exhibit map;
- 24 9. Construction plans map;
- 25 10. Roadside photos, 2 pages;
- 26 11. Shoreline permit exhibit (plan view and cross sections), 8 pages;
12. Land use disturbance and impervious surface worksheet, 2 pages;

(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.

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13. Deer Harbor Trail – no net loss determination, December 19, 2017, 8 pages;
14. DAHP October 9, 2017 letter and IDP, 2 pages;
15. November 16, 2017 Ruthie Dougherty (Land Bank) email, 2 pages;
16. November 29, 2017 Public Works memo, 6 pages;
17. UW, Friday Harbor Labs, January 12, 2018 comment letter;
18. Health and Community Services' January 29, 2018 comment email;
19. Pamela Kyle, DHPRC comment email, January 12, 2018;
20. Legal ad information, 4 pages;
21. Correspondence; and
22. Stormwater and construction plan, October 18, 2018.

V. FINDINGS OF FACT.

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

1. Any statements contained in a previous or following sections of this Decision that are deemed to be Findings of Fact are hereby adopted as such and incorporated by reference.

2. In this matter, the San Juan County Public Works Department is seeking approval of a shoreline permit required under the County's Shoreline Master Program (SMP) to construct portions of a pedestrian pathway, also called a trail, that would link the Deer Harbor Hamlet area to the Deer Harbor Bridge. The full scope and proposed design for the County's project is provided in *Exhibits 6 - 11*. At the south end of the proposed trail/pathway, portions of the project would be in a "Rural" shoreline designation, near the Deer Harbor Resort. At the north end of the proposed trail, near the Deer Harbor Bridge along Channel Road, some of the area is covered by the "Conservancy" shoreline designation. Trails such as that proposed herein are specifically permitted in both of these shoreline designations. (*See SJCC 18.50.550, and Table at SJCC 18.50.600 detailing uses permitted in various shoreline designations, specifically "Public Pedestrian Trails"*).

3. Previous site visits to the Deer Harbor area by the Examiner, and illustrations and photos of the existing site conditions included in the record as *Ex. 10*, establish that pedestrians are currently required to use public roadways, informal shoulders, or other non-designated pedestrian paths, to walk from the south end of the Deer Harbor Resort area up to the bridge on Channel Road. The proposed new pathway would improve pedestrian safety in the area, by providing a specially-designated path for foot traffic in the area,

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1 eliminating many car vs. pedestrian conflicts that can occur as things now stand.

2 4. At the public hearing, Ms. McEnery and the Public Works Department
3 representative, Mr. Sharp, offered credible and un rebutted testimony explaining several key
4 facts that justify the project and approval of the requested shoreline permit, including
5 without limitation: the trail will essentially serve as a sidewalk along existing roadway,
6 comprised of fine gravel, with an approved drainage plan, conditioned to comply with
7 archaeological resource discovery conditions, using a design that a qualified professional
8 has found will result in no net loss of shoreline functions and values.

9 5. Mr. Sharp addressed one of the comments received during the public review
10 process, which suggested the trail should be moved along an existing trail that is located
11 much closer to the shoreline. He credibly noted that project funding sources require the
12 trail to be located within County right-of-way, so the land bank property would not qualify;
13 that moving the trail alignment closer to the shoreline would result in more potential
14 impacts to the shoreline environment; and that from an Engineering perspective, a straight
15 line alignment is favored over others that might weave around. A straight line moving
16 north along Deer Harbor Road right-of-way would be shorter for pedestrians than a
17 redesign that would wind its way through land bank property located closer to the shoreline.

18 6. In the record, the suggestion that the trail alignment should be adjusted to move
19 through the land bank property that is located closer to the shoreline (*Ex. 15*) was fully
20 addressed and respectfully declined in the form of a detailed memorandum prepared by the
21 Public Works Department (*Ex. 16*). The Public Works memo summarizes the position of
22 the applicant-department and the Trail Sub-Committee of the Deer Harbor Hamlet Planning
23 Review Committee. It credibly explains that members of the trail subcommittee
24 "*consciously observed pedestrian behavior along the stretch adjacent to the [land bank
25 property] and found that a clear majority of pedestrians prefer the straight line option
26 along the road shoulder to the [route through the land bank property].*" (*Ex. 16, page 1,
par. 2*). It concludes that: "*improvement of the existing [land bank route/trail] won't result
in a change of pedestrian behavior.*" (*Id.*).

7. The critical area report, captioned as the "*Deer Harbor Trail – No Net Loss
determination*" and included in the record as *Exhibit 13*, was not challenged, and none of
its conclusions were rebutted by any credible or qualified expert testimony at the public
hearing or elsewhere in the record. The report concludes that no net loss of shoreline
ecological functions will occur as a result of the proposed trail, which would run along
existing public right of way.

8. The critical area report also addresses the suggested re-alignment that would run
through the land-bank property, offering the following findings: "*Unfortunately the public*

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1 is apparently not currently using the [land bank] trail, people are walking along the road.
2 To improve their trail to be useable year-round by the public, would be much more
3 damaging to the shoreline environment. The [land-bank] trail runs close to the shoreline
4 and it is known locally as a seasonally soggy trail (Photo 4). It will require fill and cross-
5 drains to make it dry, and it will be a minimum of 4 ft. trail surface, plus shoulders. The
6 clear choice here is to keep the trail adjacent to the road, where the public is currently
7 walking, and where the impact to the shoreline in the aggregate is no net loss." (Ex. 13, No
8 Net Loss determination / Critical Area Report, dated December 19, 2017).

9 9. The Examiner concurs with the un rebutted findings of the qualified professional
10 who generated the No Net Loss determination, also referenced as the critical area report for
11 the project, included in the Record as Ex. 13. In sum, the suggested re-alignment to run
12 along the narrow land-bank path would involve a substantial undertaking close to the
13 shoreline area that is much more likely to generate adverse impacts on the shoreline area
14 than the proposed alignment. The proposed alignment is far more environmentally friendly
15 than the suggested redesign, because by running along existing public roadway, the new
16 sidewalk/trail/pathway will be able to direct stormwater generated by the new project into
17 existing drainage facilities, like ditches, culverts, and swales, already used by the public
18 roadway and the short portion on private property that is next to most of the proposed trail
19 alignment. See Ex. 22, Stormwater Management Plan for Deer Harbor Hamlet Trail, at
20 page 2, Background, stormwater design summaries for each section of the trail).

21 10. The Staff Report, and testimony by County witnesses, provided substantial and
22 credible evidence demonstrating the project can be accomplished so as to minimize or
23 prevent any adverse environmental impacts, through construction and thereafter.

24 11. No one submitted credible comments or evidence that would support denial of the
25 proposed shoreline permit. No one offered testimony or written comments that would
26 refute the analysis and findings regarding the project's compliance and consistency with
relevant Shoreline Codes, plans and policies, Comprehensive Plan Policies, or County
development regulations, as set forth in the Staff Report issued for this project. Substantial
evidence in the record, including the Examiner's observations while on previous site visits
to the proposed project area, fully support the analysis, findings, and recommended
conditions contained in the Staff Report.

12. Public notice regarding the permit application was provided in accord with law.
(Staff Report; Exhibit 20). The public hearing provided an opportunity for interested parties
to share their thoughts, support, questions, and concerns about the proposed project.

13. The University of Washington Friday Harbor Labs submitted a written comment,
explaining that they have no concerns about impacts to marine resources. (Ex. 17).

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1 Similarly, the County's Environmental Health Manager expressed no concerns or
2 comments regarding the project. (Ex. 18). And Pamela Kyle, for the Deer Harbor Planning
3 Review Committee, wrote: "What a great read. Fantastic...!!!" (Ex. 19).

3 ***Environmental review.***

4 11. County staff determined that the pending trail proposal is exempt from SEPA under
5 WAC 197-11-800(2)(d)(ix). (Staff Report, page 8, item 13). The Examiner concurs, finds
6 and concludes that this project is categorically exempt from full SEPA review because it is
7 a minor street improvement by a public agency, specifically the addition of a pedestrian
8 walk/pathway. (See "Other minor new construction" projects covered by categorical
9 exemptions under SEPA, at WAC 197-11-800(2)(d)(ix)).

10 12. Even though the project is exempt from full SEPA review, this project has been
11 thoroughly vetted for compliance with stringent environmental protection measures found
12 in applicable County Shoreline codes and policies. Again, the un rebutted qualified expert
13 report in the record confirms that this project will result in No Net Loss of shoreline
14 ecological functions and values. (Ex. 13).

12 ***Compliance with applicable codes and shoreline policies.***

13 13. The Analysis provided in the Staff Report credibly explains how the has been
14 designed and can be constructed in compliance with applicable county development
15 regulations, including without limitation those found in SJCC 18.50.110 (re: Clearing and
16 Grading), and .550(re: SMP provisions for Transportation Facilities; and SJCC 18.60.070
17 (re: Stormwater). Staff Report, pages 2 – 5.

18 14. The Record includes credible, un rebutted and substantial evidence that the
19 application meets requirements to approve the Substantial Development Permit. (Staff
20 Report, pages 5 and 6, analysis of compliance with Criteria for Approval of SDP found in
21 SJCC 18.80.110.H).

22 15. The project promotes and is consistent with the state shoreline policies set forth in
23 the Shoreline Management Act at RCW 90.58.020(1-6). For example, the project provides
24 and protects the statewide interest in providing public access over local interests that may
25 want such venues more limited; by providing better accessibility, the project should serve
26 as a means to preserve surrounding shoreline areas from people seeking random footpaths
27 to and from the resort/hamlet area and the bridge; the improved accessibility will provide a
28 long term over a short term benefit; the project design and purpose are intended to protect
29 the resources and ecology of the surrounding shoreline; the project clearly provides a safer

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1 public access route connecting portions of the Deer Harbor community; and the project
2 increases recreational opportunities, i.e. a safe, pedestrian-friendly pathway used for
3 exercise, scenic viewing, photography, nature-watching, for local residents and the general
4 public who find themselves in the Deer Harbor area.

5 16. The project is consistent with the goals and policies in the County's Comprehensive
6 Plan, Shoreline Master Program policies, including without limitation those set forth in
7 Section 3.2.D, captioned "Public Access", and Section 3.4.O.ii, captioned "Circulation",
8 portions of which are set forth below [emphasis added by the Examiner to portions that are
9 of particular relevance to the pending permit]:

10 3.2.D Public Access

11 Goal:

12 1. To assure safe, convenient and diversified access for the public along public
13 shorelines, and to assure that the intrusions created by public access will not endanger the
14 quality of life or property of island residents, or have adverse effects on fragile ecological
15 functions of the shoreline's natural features.

16 Policies:

17 1. Provide, protect and enhance opportunities for the public to enjoy the shoreline by
18 acquisition through purchase, donation, or other agreement, or by requiring the provision of
19 physical or visual access from uplands to the water. Use public access in a manner
20 consistent with the natural shoreline character, private property rights, and public safety.

21 3. Recognize the natural limitations and characteristics of each island and consider resident
22 preferences in determining public access routes and areas on each island.

23 7. Design public access to provide for public safety and require buffers between public
24 access areas and adjacent private property to minimize potential negative impacts to private
25 property and individual privacy.

26 3.4.O.ii Circulation

Goal:

To develop safe and economical transportation systems that assure efficient movement of
people, with minimum disruption of the shoreline ecological functions and minimum conflict
between different types of users.

Policy:

3. Encourage the development of transportation alternatives to the automobile along the
shoreline including bicycle facilities, pedestrian facilities and public transportation options.

17. Except as modified herein, all statements of fact and findings included in the Staff Report are adopted herein as findings of fact supporting this Decision.

VI. CONCLUSIONS OF LAW.

1. Based on the record, particularly the County's recommendation of approval with conditions, and the applicant's input as reflected in the Staff Report and supporting exhibits, includes substantive, credible and convincing proof that the pending Shoreline application satisfies all applicable approval criteria.

2. The state's Shoreline Management Act ("SMA") and the regulatory policies established thereunder, including those adopted by the 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).

3. In this matter, the applicable Shoreline Master Program code provisions and policies expressly encourage public access along existing shoreline venues. The project will enhance accessibility and pedestrian safety along public roadways that now serve as the preferred route for both cars and walkers. A separated, specially designated pathway provided by this project will enhance public access and improve pedestrian safety in the Deer Harbor area.

4. When it approved the County's Shoreline Master Program, the Department of Ecology approved San Juan County's decision to permit enhancements and pedestrian safety improvements for public rights of way located in the shoreline area. In so doing, both the County and DOE recognized that the area in which this proposal is located is an already-developed area, which is suitable for necessary transportation infrastructure projects, and publicly accessible footpaths such as this. "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, urban 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 [a] portion of the site simply does not justify effectively denying a permit for an urban use in an urban area of the shoreline." *Overlake*, 90 Wash. App. 746, 762-63.

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1 5. As noted earlier, a final local government decision approving a Shoreline
2 Substantial Development Permit and a Shoreline Conditional (Special) Use Permit must be
3 filed with and is subject to review and approval, approval with conditions, or denial by the
4 Washington Department of Ecology. WAC 173-27-130, and -200. The record established
5 during the open-record public hearing process provides credible, un rebutted evidence and
6 recommendations that are (and should be) more than sufficient to satisfy the DOE approval
7 criteria for the Shoreline permit addressed herein.

8 6. As conditioned, the proposed pedestrian trail project will result in no net loss of
9 shoreline functions and values. The requested permit is fully supported by evidence in the
10 record and meets all applicable approval criteria. No one offered any credible information
11 or evidence that would justify denial. Therefore, the requested shoreline permit should be
12 approved.

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

15 VII. DECISION, CONDITIONS OF APPROVAL.

16 Based on the record, and for the reasons set forth above, the Shoreline Substantial
17 Development Permit for the Deer Harbor Hamlet Trail is approved, subject to the following
18 condition of approval:

19 1. The project scope, design, alignment and construction features shall be in
20 substantial compliance with design details included in the preliminary
21 project drawings included in the record as *Exhibit 11*;

22 2. All debris and other waste material resulting from construction must be
23 managed, treated or disposed in a fashion that prevents entry into any water
24 body or wetland;

25 3. All construction activities associated with the project shall be in
26 compliance with best management practices and the Stormwater
Management Plan dated November 18, 2017, included in the record as
Exhibit 22;

4. The trail construction shall be consistent with local, state and federal
standards applicable to any aspect of the project;

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5. 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;

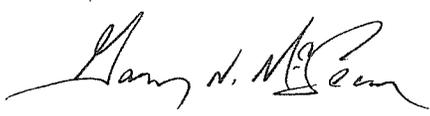
6. Immediately after construction is completed, the owner shall request that the Department of Community Development perform an inspection, for purposes of confirming compliance with this permit. The written request shall specifically reference the permit file number, PSJ000-17-0014;

7. Failure to comply with any terms or conditions of this permit may result in its revocation;

8. The Procedures for Inadvertent Discoveries of Archaeological Resources, included as part of Exhibit 14, shall be followed during construction; and

9. 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 other regulatory agency permits, licenses, approvals or leases required for the project shall be considered conditions of approval for this shoreline permit.

ISSUED this 1st Day of May, 2018



Gary N. McLean
Hearing Examiner

Effective Date, Appeals, Valuation Notices

1 Hearing Examiner decisions become effective when mailed or such later date in accordance with the laws and
2 ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming
3 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.

4 Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County
5 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.

6 Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to
7 the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for
8 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.

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

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