

EXHIBIT 1



SAN JUAN COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

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STAFF REPORT TO THE HEARING EXAMINER

REPORT DATE: August 1, 2018

HEARING DATE: August 15, 2018

TO: Hearing Examiner

FROM: Julie Thompson, Planner III

RE: PAPL00-18-0002, Appeal of PPROV0-17-0066 for a vacation rental permit

APPELLANTS: Thomas C. Evans
c/o Madison Park Law Offices
4020 East Madison Street, Suite 210
Seattle, WA 98122

Box Bay Shellfish Farm, LLC
c/o Thomas C. Evans
4020 Madison Street, Suite 210
Seattle, WA 98122

APPLICANT: Dan and Cheryl Stabbert
2629 NW 54th Street #201
Seattle, WA 98107

APPLICANT'S AGENT: Foster Pepper PLLC
Jeremy M. Eckert
1111 Third Avenue, Suite 3000
Seattle, WA 98101

SUBMITTED: PAPL0018-0002 was submitted on March 30, 2018, Exhibit 2

LOCATION: 2318 Obstruction Pass Road, Orcas Island, TPN 161650403

Subject of Appeal: The appellant is appealing the decision on PPROV0-17-0066, provisional use permit approval for a vacation rental permit to a neighboring property. The provisional use permit was issued

on March 12, 2018.

SJCC 18.80.140 Appeals

D. Time Period and Procedure for Filing Appeals.

1. Appeals to the hearing examiner must be filed (and appeal fees paid) within 21 calendar days following the date of the written decision being appealed; and

The appeal was filed and the fee paid on March 29, 2018. The provisional use permit was approved on March 12, 2018. The appeal period was up on April 2, 2018 so the appeal was filed in a timely manner.

2. Appeals of a SEPA threshold determination or an FEIS must be filed within 21 days following the date of the threshold determination or FEIS.

This is not an appeal of a SEPA determination. Vacation rental applications are exempt from SEPA review.

3. All appeals shall be delivered to the director by mail, personal delivery, or fax, and received before 4:30 p.m. on the due date of the appeal period. Applicable appeal fees must be paid at the time of delivery to the director for the appeal to be accepted.

The appeal and its fee was received before 4:30 p.m. prior to the end of the appeal period.

4. For the purposes of computing the time for filing an appeal, the date of the decision being appealed shall not be included. If the last day of the appeal period is a Saturday, Sunday, or a day excluded by RCW 1.16.050 as a legal holiday for the County, the filing must be completed on the next business day (RCW 36A.21.080).

5. Content of Appeal. Appeals must be in writing, be accompanied by an appeal fee, and contain the following information:

- a. Appellant's name, address and phone number;

This information is included.

- b. Appellant's statement describing standing to appeal (i.e., how he or she is affected by or interested in the decision);

The appellant describes his standing to appeal on page 2, number 2, of the appeal as follows:

"Evans—would be directly and significantly adversely impacted by Stabbert Vacation Rental by Owner (VRBP) in multiple ways, which are all set out in detail in the numerous objections previously submitted to San Juan County (SJC) and are attached hereto. In summary, these impacts include severe traffic conflicts by adding up to 18 renter occupants each likely making use of Obstruction Pass Road on a regular basis where said road is privately maintained, can accommodate only one vehicle in one direction at a time without side-line stand by; noise emanating up and out of the Stabbert property from vacationers whose use of Stabbert property amounts to noise emanating from a megaphone vortex given the

configuration of box Bay, encroachment on privately owned Evans property including privately owned 300 square foot landing at the foot of the entrance to the privately owned joint use dock; trespassers attempting to use the privately owned joint use dock and difficulties in keeping trespassers off the dock. The dock is the centerpiece of the Stabbert VRBO property and Evans will have to, without protective measures such as a locked gate and no trespass signs, constantly restrain trespassers. Renters are also likely to be attracted to use the privately owned dock by advertising depicting the property with the dock at center. Unless large no. 18pt. type is included in all advertisements stating the dock is not available for use, potential renters will naturally believe Stabbert owns the joint use dock and it will be available for their use.”

“Box Bay Shellfish Farm LL is partially located in Box Bay, immediately in front of the Stabbert property and has been a shellfish (oyster) farm since 2009. Its sole purpose is to serve the community on a charitable purpose basis by giving away oysters free to charitable dinners and events. It grows large non-commercial amounts of oysters in the areas indicated above and uses them for charitable purposes only. This includes giving bulk supplies to local farm to table programs, allowing students to come and see how a real oyster grow operation works, and allowing specific invitee neighbors including Stabbert to come and take for free as many oysters as they want. Finally, the oysters are sometimes used as a “sentinel” monitoring point for the SJC Health Department. During red tide season samples of Box Bay oysters are given to the Health Department to test for red tide. Given Box Bay’s location—where several large flows of waters converge—it is an ideal location for testing. VRBO residents are already invading the Box Bay growth area. A VRBO was recently granted to the Bea property—just to the East of Evans property—and during the summer months VRBP renters are frequently seen on the privately owned Evans tidelands where the oysters are stepped on in their grow cages. In some cases outright theft of tideland based plastic grow cages has occurred. No trespassing signs were placed at the entrance to Evans grow area tidelands but are regularly been ignored. A potential problem with the future exists as to grow cages tied to the Evans side of the dock. Adding 18 renters to this same area, where problems are already being experience from just one VRBO (Bea) is guaranteed to negatively impact Box Bay, indeed, it will put Box Bay’s future grow viability in question.”

- c. Identification of the decision which is the subject of the appeal, including date of the decision being appealed;

This information is included on page one of the appeal.

- d. Appellant’s statement of grounds for appeal and the facts upon which the appeal is based;

This information is included in the appeal and reviewed in Statement of Grounds for Appeal, below.

- e. The relief sought, including the specific nature and extent; and

The relief sought is included in the appeal and is included in Relief Sought, Nature, and Extent, below.

- f. A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.

This is included on page 8 of the appeal.

STANDING TO APPEAL: Staff review of standing to appeal criteria is provided in italics. Pursuant to SJCC 18.80.140(C)(3), appeals to the hearing examiner may be initiated by:

1. The applicant;

The appellant is not the applicant.

2. Any recipient of the notice of application (see SJCC 18.80.030);

The appellant received notification of the application. See Bate stamped page 37 of the application.

3. Any person who submitted written comments to the director concerning the application; and

The appellant submitted written comments to San Juan County Department of Community Development on numerous occasions with differing subject lines.

The appellant's detailed statement describing both his and Box Bay Shellfish Farm LLCs' standing to appeal is located in the appeal on page 2, Number 2.

4. Any aggrieved person.

The appellant has standing to appeal based on his written comments.

DECISION BEING APPEALED: Provisional use permit PPROVO-17-0066 is an approval to use the single family residence on tax parcel number 161650403 as a four-bedroom vacation rental for periods of less than thirty days. The permit was issued on March 12, 2018

BACKGROUND:

1) December 11, 2017, the applicant submitted a provisional use permit application (PPROVO-17-0066) for a vacation rental permit on tax parcel number (TPN) 161650403 located at 2318 Obstruction Pass Road on Orcas Island. The property is 1.32 acres. The applicant also owns a neighboring property to the north, TPN 161643003, which shares the same driveway and address. They also applied for a vacation rental on that property in PPROVO-17-0065 which is also subject to another appeal submitted by the same appellants, PAPL00-18-0001.

2) A majority of TPN 161650403 is in the Rural Farm Forest shoreline designation, with a small area in the north east corner lying outside the shoreline but in the Rural Farm Forest upland designation.

3) San Juan County Code (SJCC) Table 18.30.040 lists the allowable and prohibited uses in the rural, resource, and special land use designations. Vacation rental is permitted with a provisional use permit in the Rural Farm Forest upland land use designation.

4) On March 12, 2018, provisional use permit PPROVO-17-0066 was approved by the San Juan County

Department of Community Development after finding that SJCC 18.40.270, Vacation (short-term) rentals of residences or accessory dwelling units performance standards; SJCC 18.80.020, Project permit applications—Procedures; SJCC 18.80.030, Notice of project permit applications, public comment, and notice of hearing; and SJCC 18.80.080, Permit procedures for provisional uses were all complied with.

5) SJCC Table 18.50.600 lists shoreline development, uses, structures and activities by designation. Under the Residential Development section, vacation rentals in the Rural Farm Forest shoreline designation require a shoreline substantial development permit. There is no development proposed on this property as the development already exists. Use of an existing residence for a vacation rental is exempt from the need for a shoreline substantial development permit.

According to the Shoreline Management Act, “development” is the construction or exterior alteration of structures, dredging, drilling, dumping, filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level (RCW 90.58.030(3)(a)). Since the proposal does not include new development, no such permits or approvals are required.

6) A prehearing conference was held by conference call on May 23, 2018 which included the applicant and his representatives, the appellant, the SJC Hearing Examiner, the director of the Department of Community Development, and the staff planner. That call resulted in a schedule for the submittal of responses, motions and/or briefings to all parties and to the Hearing Examiner. Issues that had not been identified in the original appeal were not allowed to be included. The submittals were for clarification of the original issues and responses to those clarifications. The schedule was as follows:

Evans clarification of issues	June 11, 2018
Eckert response to clarification	June 13, 2018
Dispositive motion from Eckert	June 15, 2018
Evans response to dispositive motions	June 29, 2018
Evans and Eckert Briefings/Final Reply	July 11, 2018
Staff report to the Hearing Examiner due	August 1, 2018
Appeal hearings	August 15, 2018 at 10:00

7) The clarification of issues by the appellant was confusing as he used the vacation rental performance standards adopted by the County Council on March 13, 2018 which became effective March 27, 2018 and are codified at SJCC 18.40.275. The applicable code for the Stabbert’s permit is SJCC 18.40.270. Additional analysis of the clarification was not provided by staff.

8) The director gave notice of the appeal hearing as provided in SJCC 18.80.030(C) on July 18, 2018.

STATEMENT OF GROUNDS FOR APPEAL:

Attached to this appeal is the complete record in this proceeding, including Evans/Box Bay’s objections to this permit. These documents, which are Bates Stamped for ease of access, identify objections, issues

and legal support. During the hearing on this matter the Bates pages will be referenced along with the specific issue. In very summary non-total form these include:

- a) SJC did not include nearly enough private property warning signs or direction signs to make sure VRBO's did not trespass especially on Box Bay grow areas.

Staff response: *On Bates stamped page 004 of the staff report, item 22 quotes performance standard SJCC 18.40.270(K) which says:*

"The owner or lessee of the vacation rental shall provide notice to the tenants regarding rules of conduct and their responsibility not to trespass on private property or to create disturbances. If there is an easement that provides access to the shoreline, this shall be indicated on a map or the easement shall be marked; if there is no access, this shall be indicated together with a warning not to trespass."

The Decision and Permit Conditions begin on Bates stamped page 016 of the staff report. Condition number 9 requires:

"The rules of conduct and a map clearly depicting the property boundaries of the vacation rental shall be prominently displayed in the rental. The map shall indicate if there is an easement that provides access to the shoreline. If so, the boundaries of the easement shall be clearly defined; if there is no access, this shall be indicated together with a warning not to trespass."

Thus, San Juan County has included sufficient information to the permit holder to inform clients where the property boundaries are and to warn clients not to trespass. Nothing in the code requires warning signs or direction signs as part of a vacation rental permit.

- b) The joint use dock was clearly intended to benefit Stabbert/Evans only, and does not allow or even suggest that renters paying money to Stabbert are allowed to use this dock at Evans/Box Bay expense. This is completely self-serving and makes Evans have to pay expenses including significant tax levy, repair cost, initial investment of \$90,000 all so Stabbert can profit at Evans' direct expense. Evans pays significant real estate taxes attributed to the dock. Evans has to pay (and has paid) ½ of repair costs due to storms.

Staff response: *The joint use dock shared by the Stabbert's and the Evans' is a private dock with a private agreement between them. The County is not a party to that agreement and has no control over how it is used. That is a civil matter between the joint use parties.*

- c) Allowing Stabbert's renters will push Evans/Box Bay off the dock—Evans/Box Bay is guaranteed sole and exclusive use of the South ½ of the dock and float. If Stabbert is allowed to put his renters on the dock his renters will undoubtedly (*sic*) take up and use Evans/Box Bay's skiff tie up area and Evans will have no way of controlling without confronting the up to 18 renters who come expecting to be able to use the dock.

Staff response: *The County has no authority over the use of the dock. That is a civil matter between the joint users.*

- d) Stabbert's reasoning, incorporated by SJC into its decision making, for allowing so many renters is flawed, and a direct violation of the Fourteenth Amendment requiring equal protection of the law. Stabbert/SJC actually opine that the users of the Stabbert properties will only be "high end" (rich) persons who can afford to pay for "high end" rentals. (For this, see p 9, top of page). To make matters worse Stabbert also claims "highenders" don't "party" as much and are naturally quieter. The fact that an applicant would urge a government agency to actually base a land use decision on a presumption about the wealthy vs. other individuals is outrageous and would be a civil rights violation were SJC to accept it. This sort of thinking has no place in government decision making yet that's exactly the way the applicant sees it.

Staff response: *The paragraph that the appellants refer to as being incorporated into San Juan County's decision making was merely a quote from a comment submitted by the applicants. What it actually said was:*

"iii. The high end rental agencies do background checks on the guests who may also have been rated by other venues that they have rented in the past."

That sentence had no bearing on the decision made as that is not a performance standard for vacation rentals in SJCC 18.40.270 nor a permit procedure for provisional uses in SJCC 18.80.080.

- e) These VRBO's are not categorically or otherwise exempt from obtaining a Shoreline Management Permit (SMP). While SJC admits if someone presented at the permit counter with plans to build a single family residence (SFR) and use it as a VRBO at the same time, this would require a SMP permit, it denies that an SMP permit is necessary when the structure is turned into a completely different use. **Use matters**, under the law, it's the land **use** that determines permitting and nowhere in the Shoreline Management Act (SMA) is a VRBO categorically exemption.

Staff response: *Since there is no such thing as a Shoreline Management Permit, staff presumes the appellant is referring to a Shoreline Substantial Development Permit (SSDP). "Shoreline development" is defined in SJCC 18.20.190 as:*

"A use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals, bulkheading; driving of piling; placing of obstructions; or any project of permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to Chapter 90.58 RCW at any stage of water level (RCW 90.58.030; WAC 173-27-030)."

A SSDP is required when any of the above activities are going to be undertaken. In this case, there is no development proposed as the development already exists.

- f) Noise, glare from lights at night, and late night partying will all emanate directly up and into Evans living area. Although the Evans living area appears to be non-existent as to the Stabbert property it is hidden behind a slender row of trees and is in fact directly above the Stabbert property. The Stabbert property is literally under the nose of the Evans property.

Staff response: *SJCC 18.40.270(B), one of the performance standards for vacation rentals, states that the use shall be operated in a way that will prevent unreasonable disturbances to area*

residents. Staff analysis of that standard states that noise and trespassing impacts could be as much as that associated with normal residential use of the site. Possible disturbances should be mitigated by conditions limiting the number of occupants to 9. The conditions should also require posting the rules of conduct specifically mentioning that trespassing is not allowed, property lines will be identified, and that the neighbors will be provided with a 24-hour local contact phone number. The contact is also required to keep a written log of complaints. See Bates stamped page 003.

The final condition of approval, number 18 on Bates stamped page 017 states that if the conditions of approval are not complied with, the resulting impacts may change a typical residential area to one with frequent incidents of trespass, noise, and traffic from strangers who have no investment in maintaining civil relations with neighbors. For this reason, it is emphasized that failure to comply with conditions of approval is grounds for revocation of this permit.

- g) The decision ignores that Evans owns outright and Box Bay uses for its private purposes the 300 sq. ft. platform at the entrance to the dock. This area was given to Evans by Jacobsen (previous owner) as part of the agreement for a joint use dock. Having 18 renters puts Evans zodiac skiff maintained on the property, its nets and other water related items at direct risk for damage, theft or illegal use, and the SJC decision does nothing to prevent this.

Staff response: *San Juan County is not a party to the joint use dock agreement and has no authority to regulate its use. It is a civil matter between the joint users.*

- h) The staff report and decision treats Evans as if his dock interests are really public interests and that Evans has an obligation to allow members of the public to use this joint use dock, even though Evans paid in excess of \$90,000 (*sic*) for the construction, several thousand dollars for the occasional repairs made necessary by wind damage, and the very significant amount of real estate tax attributable to the dock (some estimate that a dock adds as much as \$500,000 of value to the assessors valuation).

Staff response: *Dock use issues are not County issues.*

- i) On page 10, last paragraph, SJC claims that "The Washington Supreme Court has ruled that VRBO is not commercial" and therefore since the word "commercial" is used once in the joint use agreement, along with multiple other words describing limitations, VRBO use is allowed because (so goes the argument) if the word "commercial" is used then anything and everything that is non-commercial including VRBO must be allowed. Very oddly, a "Washington State Supreme court Case" is then cited, *Wilkinson v. Chiwawa Communities Association*. Since this case is not properly cited a little digging into the Washington Supreme Court Report is necessary.

The correct cite is: *Wilkinson v Chiwawa Cmty Ass'n*, 180 Wn.d 241 (2014). The issue in *Wilkinson* are completely irrelevant to the case at hand. *Wilkinson* concerned whether a community association (Chiwawa) could amend its plat declaratory covenants so as to exclude vacation rentals. No Joint Use Agreement, no private rights documents were involved. Nothing in *Wilkinson* addressed or even came close to addressing exclusive private rights in a Joint Use Agreement including a guarantee between landowners of quiet use and enjoyment, a guarantee that the Southerly ½ of the dock was for the *exclusive* use of Evans, that the landing 300' Square

platform was for the exclusive use of Evans.

Wilkinson is also distinguishable in San Juan County, as SJC, in its Comp Plan *does* consider vacation rentals to be a commercial in nature and specifically so states:

Comp. Plan, Section B, Element 2.2.A: “Vacation rentals...of a principal, single family residential unit...should be subject to *standards similar to those for hospitality commercial establishments...*”

So it is not correct to say, in San Juan County, vacation rentals are not subject to and defined as a Commercial use—they are and are legally required to follow the same standards as “hospitality commercial establishments...”

The sentence quoted above is not a San Juan County statement but rather a quote from a letter the applicants submitted in response to the appellants’ emails. There was no mention in the County’s analysis of the application that either allowed or denied the use of the dock by vacation renters. That issue is between the dock owners. It is, however, correct to say that the County lists vacation rentals as a residential use in SJCC Table 18.30.040.

The full text of the above quoted section of the Comprehensive Plan is actually:

Comp. Plan, Section B, Element 2.2.A.12: Vacation rental (short term, i.e., of less than thirty days) of a principal, single-family residential unit or an ADU should be subject to standards similar to those for hospitality commercial establishments but should be classified as a residential use for purposes of land use regulation.

The vacation rental performance standards are similar to those for hospitality commercial establishments in that the number of guests is limited, the amount of time one can stay in a vacation rental is limited, rules of conduct are required, and state taxes need to be paid.

RELIEF SOUGHT, NATURE AND EXTENT:

1. Deny both applications without prejudice to re-application through the Shoreline Management Conditional Use application process. Include in this decision a finding that nothing, anywhere, even arguably suggests vacation rentals are categorically exempt from SMA permit requirements and follow the guidelines of the SMA which disfavor categorical exemptions and doesn’t allow for any unless specifically listed as such. (There is no exemption anywhere in the SMA, State Guidelines, or Master Program that lists vacation rental as categorically exempt).
2. Prohibit any renter use of the joint use dock, the privately owned platform, and the Evans owned access trail. Find the conditions proposed by Evans—a locked coded entry gate to the dock, all advertising clearly disclose the dock is not part of the rental and no trespassing signs are appropriate. Require advertising of any sort disclose the dock, landing and private pathway as privately owned, to use it is trespassing, and VRBO renters are to stay off.
3. Allow the posting of prominent no trespassing signs on the dock, platform and trail.
4. Require Stabbert at their expense to hire a well qualified outside contractor to install an all weather saltwater proof gate at the entry to the dock that allows access only to persons properly on the dock, with construction to be approved by Evans.

FINDINGS AND CONCLUSIONS:

1. The appeal is timely.
2. The appellants have standing pursuant to SJCC 18.80.140 via comments submitted to the department for the provisional use file PPROVO-17-0066.
3. The appellants have failed to present evidence necessary to prove to the Hearing Examiner that the Department's decision in PPROVO-17-0066 was clearly erroneous.

RECOMMENDATION:

The appeal should be denied. The Department of Community Development found that the applicants were in compliance with the applicable sections of the Unified Development Code, SJCC 18.40.270, Vacation (short-term) rentals of residences or accessory dwelling units performance standards; SJCC 18.80.020, Project permit applications—Procedures; SJCC 18.80.030, Notice of project permit applications, public comment, and notice of hearing; and SJCC 18.80.080, Permit procedures for provisional uses. The use is exempt from shoreline substantial development permit requirements because it does not meet the definition of development.