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Before Hearing Examiner
Gary N. McLean

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

**S.J.C. DEPARTMENT OF
OCT 19 2018
COMMUNITY DEVELOPMENT**

In the Matter of the Shoreline Substantial)
Development filed by)
)
MICHAEL AND KAREN COMBS,)
Applicant)
)
[Project: To convert an existing pier and davit)
into a single-user dock along the shore of the)
applicant's almost 5-acre property, located at)
109 Westerly Court, on the southwest side of)
Orcas Island])

File No. PSJ000-17-0009
**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION APPROVING A
SHORELINE SUBSTANTIAL
DEVELOPMENT PERMIT
APPLICATION, SUBJECT TO
CONDITIONS**

I. SUMMARY OF DECISION.

The Shoreline Substantial Development Permit application submitted by Michael and Karen Combs to convert an existing pier and davit into a single-user dock along the shore of the applicants' almost 5-acre property on Orcas Island is approved subject to conditions.

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.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
DECISION – APPROVING SUBSTANTIAL
DEVELOPMENT PERMIT TO CONVERT EXISTING
PIER INTO A SINGLE USER DOCK – PSJ000-17-0009**

**GARY N. MCLEAN
SAN JUAN COUNTY HEARING EXAMINER**

1 regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;

2 2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter
3 18.50 SJCC;

4 3. Consistent with this chapter;

5 4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);

6 5. Consistent with the goals and policies of the Comprehensive Plan; and

7 6. All conditions specified by the hearing examiner to make the proposal consistent with
8 the master program and to mitigate or avoid adverse impacts are attached to the permit.

9 ***Review Criteria for the Department of Ecology:*** Finally, if the Examiner approves
10 or denies the Shoreline Permit, such decision must be forwarded to the Department of
11 Ecology and the Attorney General, for state review and any appeals of the Shoreline Permit,
12 in accord with Washington Shoreline Management regulations found in WAC 173-27-130.
13 This Decision is subject to review and approval, approval with conditions, or denial by the
14 Washington Department of Ecology within thirty days of submittal by the County. WAC
15 173-27-130, and -200. Ecology's review criteria for Shoreline Substantial Development are
16 found at WAC 173-27-150. The San Juan County review criteria for the requested shoreline
17 permit is consistent with and substantially similar to those that will be used by the Department
18 of Ecology.

19 III. RECORD.

20 The Record for the matter includes all application materials and exhibits marked and
21 numbered during the course of the public hearing. Copies of all materials in the record and
22 a digital audio recording of the open-record hearing conducted for this application are
23 maintained by the Community Development Department.

24 ***Exhibits:*** Before the public hearing, County staff issued a Staff Report (*Exhibit 1*)
25 dated June 8, 2018, which included 19 exhibits, numbered and described as Exhibits 1
26 through 19 on pages 14 and 15 of the Staff Report. Without objection, the Staff Report and
the following exhibits attached and referenced therein were accepted by the Examiner as part
of the Record:

1. Staff report
2. Application cover sheet
3. June 23, 2017 summary of proposal, Jeff Otis, 14 pages
4. October 5, 2017 email from staff to Mr. Otis

5. October 17, 2017 email from Mr. Otis
6. Aerial photo vicinity map
7. April 10, 2017 dock drawings, 9 pages
8. SEPA MDNS
9. SEPA Checklist
10. Inquiries to commercial moorage facilities, 6 pages
11. October 6, 2016 Preliminary Eelgrass Macro Algae Habitat Survey, 3 pages
12. May 23, 2017 Critical Areas report, Jen-Jay Diving, 27 pages
13. May 23, 2017 Kelp Monitoring and Contingency Plan, Jen-Jay Diving, 9 pages
14. Marine Mammal Monitoring Plan, 9 pages
15. August 11, 2017 UW FHL comment letter
16. October 30, 2017 Evans comment email
17. Hearing Examiner decision on 06SJ006, Anders pier
18. Legal ad information, 6 pages
19. 06SJ006 application and project description

At the public hearing, the following additional items were accepted and entered into the record:

20. Digital video presentation, narrated by Mr. Combs at the hearing, showing davit attached to end of pier, distance from top of pier to beach below, and vicinity; photos from May of 2006; and
21. Photo of “elevator lift” for some dock facilities.

The Examiner held the Record open after the public hearing in order to allow the applicants to confer with their dock design consultants and respond to questions raised at the hearing, generally regarding the feasibility of removing the dock from the water during the winter / off-season months. In the month following the hearing, the Examiner received copies of the applicants’ supplemental materials, an email from their application consultant, Mr. Otis, forwarding a copy of a letter from Waterfront Construction. Copies of these materials are included in the Record, to be maintained and marked as Exhibit 22.

Hearing Testimony: The following individuals presented testimony under oath at the duly noticed open record public hearing held on June 27, 2018:

1. Colin Maycock, the assigned Planner for San Juan County, who prepared the Staff Report for the pending application;

2. Jeff Otis, the applicant's Agent and project Consultant; and
3. Michael Combs, the applicant.

Mr. Maycock opened the hearing with a summary of the Staff Report, the staff process in reviewing the matter and consideration of comments received, concluding with their recommendation to approve the application, subject to conditions. Mr. Otis and Mr. Combs described the current pier and davit system used by prior owners, but found to be not as convenient or sufficiently safe for the current owners, the Combs'. They narrated a short digital video presentation showing the existing pier conditions, its elevation, ladder, and other design features that the Combs' do not find sufficient to meet their needs, or intent to access a boat that will be connected to a buoy.

Upon consideration of all the evidence, testimony, codes, policies, regulations and other information contained in the file, the undersigned Examiner issues the following Findings, Conclusions, and Decision.

IV. FINDINGS OF FACT.

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

1. Any statements contained in any 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. For reasons explained in the Staff Report and in this Decision, the application merits approval.

Description of Proposal

3. The project address is 109 Westerly Court, on the southwest side of Orcas Island. The property is just about 5-acres in size and is identified as tax parcel number 361222005. *Staff Report, page 1.*
4. *Exhibit 3* is a 14-page letter with numerous attachments submitted to the County's Department of Community Development by the applicant's land use consultant, Mr. Otis. That exhibit, along with Ex. 5, provides a thorough summary of the proposal at issue, and explains how the applicant believes the project and dock design conform to all applicable approval criteria. The Staff Report generally accepted assertions and positions explained by applicant representatives.
5. The applicants propose to reconfigure the existing pier and davit located on their

1 property into a single-user dock composed of a pier, ramp and float as shown on the proposed
2 dock drawings (*Exhibit 7*). Most of the narrow section of the existing pier would remain,
3 supported by new piles, while the wider seaward part of the pier would be removed. The
4 new pier would measure 3' x 20'. A 3'7" x 44' ramp would descend from the pier to an 8' x
5 24' float, placed perpendicular to the ramp. The float would be secured by piles with overhead
6 beams. The piles also guide the float and ramp so they can be raised out of the water to the
7 level of the pier. A winch and hoist system on top of the overhead beams would elevate the
8 float and ramp.

6. The structure would be considered a single-user dock.

7. The Staff Report explains that the proposed dock would be 409 square feet and will
8 terminate 68 feet waterward from the ordinary high-water mark.

9 8. The Staff Report devotes significant discussion to the applicant's inquiries made to
10 marinas and other moorage opportunities in the area. In sum, the applicant's search could
11 have been more direct, and the recommendation on the topic could have been more concrete,
12 but the fact remains, none of the area marinas answered that moorage is readily available for
13 the applicants. Obviously, waiting lists and patience could make it possible over time, but
14 the old county codes are not specific on this subject, so the Record is absent information
15 sufficient to deny the application because some feel the applicants should have to just wait
16 for moorage to eventually come available at area marinas.

14 9. The application materials and environmental reports for the project explain design
15 considerations, construction management practices, and ongoing monitoring efforts that will
16 be undertaken to ensure that the project avoids or mitigates potential impacts on the
17 environment. The MDNS and Conditions of Approval impose many of these measures as
18 requirements for the project.

17 ***Review process.***

18 10. As noted above, the pending application was filed in late June of 2017, so the "old"
19 county shoreline codes apply in this matter.

20 11. An initial Notice of Application was published on or about August 9, 2017. The
21 public hearing was first noticed on March 8, 2018, and scheduled to occur on March 28th.
22 The hearing was postponed to provide the applicant more time to respond to questions. A
23 second notice of hearing was issued on or about June 6th for the hearing that occurred on June
24 27th. *Staff Report, page 5; Ex. 18, Legal Ad information.* Consistent with county codes, the
25 applicants notified owners/residents of properties within 300-feet of the site of their pending
26 application. *Ex. 18.*

12. One neighbor submitted a written comment, expressing concerns about visual impacts, navigation risks, and the effects of winter currents. *Ex. 16*. Staff responded by generally explaining that visual impacts will be minimal, as there is already an existing pier on the shoreline, which will be shortened to add the ramp and float; that alleged navigation impacts are not an issue because the surrounding body of water, President Channel, is so wide and deep that boat traffic can find a way to go around and avoid the ramp/float facility; and that dock maintenance is the owner's problem, so winter currents and problems arising from same are the owner's responsibility. *Staff Report, page 6*.

13. At the public hearing, the hearing participants responded to questions from the Examiner exploring the feasibility of removing the proposed dock/float during the winter season. The applicants' representatives requested and received additional time to submit a written response addressing the issue. Those materials are included in the Record as Exhibit 22.

14. The Staff Report includes a recommended condition 14, which reads: "*The float shall be secured with anchored cables rather than pilings unless the applicant can demonstrate that the use of anchored cables is not feasible and pilings must be used.*" The Examiner finds that *Ex. 22*, submitted on behalf of the applicants and prepared by Steve Zuvela, with Waterfront Construction, Inc., (WCI) provides a sound explanation that fully supports the proposed piles to be used for the float-winch system, and demonstrates that piles must be used as part of the project design. The Examiner concurs with WCI, and finds that use of anchored cables would not be feasible in this location, and would not provide the same ability to lift the float above the surface of the water during storm events, which occur on days well outside the winter season. The WCI letter also explains that the proposed new winch system (shown on a photo attached to *Ex. 22*) will have a lower profile and therefore have a smaller visual impact than the existing cable winch system now in place on the existing pier at the Combs' property.

15. Based on the application materials and all exhibits now included as part of the Record, the pending application merits approval, subject to compliance with all conditions in the MDNS issued for the project, and conditions included in this Decision, derived from but appropriately modifying those recommended in the Staff Report.

16. Similarly, substantial evidence in the record demonstrates how the project has been designed to comply with all applicable approval criteria, subject to conditions.

17. At the public hearing, county staff and applicant representatives credibly summarized materials included in the record that demonstrate how the proposal has been designed to satisfy applicable approval criteria. No one spoke in opposition to the project or offered any legal or factual basis that would serve as a basis to deny the application.

1 18. The Staff Report, exhibits referenced therein, and testimony by applicant witnesses at
2 the public hearing, constitutes a preponderance of evidence demonstrating that the project
3 can be accomplished so as to minimize or prevent any adverse environmental impacts,
4 through construction and thereafter.

5 19. A preponderance of evidence in the record fully supports the analysis, findings, and
6 recommendations provided in the Staff Report. Based on the record and applicable law,
7 conditions of approval have been included as part of this Decision that are reasonable and
8 capable of being accomplished.

9 20. Public notice regarding the shoreline permit application was provided in accord with
10 law. No one appeared at the hearing to oppose the application, or to challenge the
11 recommendations made in the Staff Report.

12 ***Environmental review.***

13 21. County staff determined that the project, if designed and constructed in compliance
14 with applicable county shoreline codes and development regulations and in compliance with
15 specific mitigation measures (mostly construction-management practices and post-
16 construction monitoring), would not result in any probable, significant, adverse
17 environmental impacts. The County issued a Mitigated Determination of Non-Significance
18 (MDNS) for the proposal, which included 12 mitigation measures, on or about August 9,
19 2018. *Ex. 8.* No one appealed or questioned the MDNS. *Staff Report, page 6.*

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

21 22. The Analysis provided in the Staff Report credibly explains how the project has been
22 designed and can be constructed in compliance with applicable county shoreline and
23 development regulations, including without limitation those found in SJCC 18.50.110.H.

24 23. The Record includes a preponderance of un rebutted evidence establishing that, as
25 conditioned, the application and proposed design meets requirements to approve the
26 Substantial Development Permit. (*See Staff Report, Application materials; Testimony of
applicant witnesses*).

27 24. Except as modified herein, all statements of fact and findings included in the Staff
28 Report are adopted by the Examiner as findings of fact supporting this Decision.

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V. 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, particularly Exhibits 3, 5 and 22, includes a preponderance of evidence that the pending Shoreline permit application satisfies all applicable approval criteria, including without limitation those found at SJCC 18.80.110(H).

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. When it approved the County’s Shoreline Master Program, the Department of Ecology approved San Juan County’s decision to permit expansion, redevelopment, and modification of legal non-conforming developments 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, and that use of existing developed areas in the shoreline should generally reduce pressure to develop untouched shoreline areas. 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. *Overlake*, 90 Wash. App. 746, 762-63.

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

5. 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.

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VI. DECISION, CONDITIONS OF APPROVAL.

Based on the record, and for the reasons set forth above, the Shoreline Substantial Development Permit for the Combs dock is approved, subject to the following Conditions of Approval:

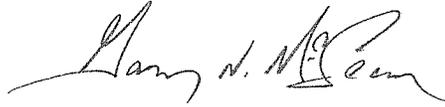
1. Subject to compliance with all applicable approvals or other permits required by the County or other jurisdictions with authority over any aspect of the Project, this permit authorizes the construction of a single-user dock serving San Juan County tax parcel No. 361222005, addressed as 109 Westerly Court, on Orcas Island, substantially as shown in the proposed dock drawings (Exhibit 7).
2. Boats moored at the new dock shall not be used for commercial overnight accommodations.
3. All mitigation measures/conditions included in the MDNS issued for the project (Ex. 8), as set forth below, shall be observed through construction and thereafter:
 - Any barge vessel used in connection with the project shall be situated so it does not ground during construction.
 - No deleterious materials shall enter the water.
 - Demolition of pier components shall occur at low tides to prevent debris from entering the water.
 - Equipment shall be maintained to be leak-free while on the site.
 - Engines shall be run only when needed.
 - Disposal of waste shall be at an approved upland disposal site.
 - Float stops shall be installed on the float guide piles to prevent grounding at low tide.
 - Installation shall be during compatible tides during daylight hours.
 - The marine mammal monitoring plan shall be followed (Exhibit 14).
 - The kelp monitoring plan shall be followed (Exhibit 13).
 - Approved in-water work windows shall be implemented and work will occur over a one-day period.
 - Spill prevention and cleanup plans shall be implemented as required by local, state and federal regulations.
 - The proposal shall comply with all applicable state, federal and San Juan County codes.
4. Pilings must be structurally sound prior to placement in the water.
5. Chemically treated piles, floats or other structural members in direct contact with the water shall comply with state and federal regulations.
6. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high water.

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7. All floats shall include stops to keep the bottom off tidelands.
8. When plastics or other non-biodegradable materials are used in a float, pier or dock construction, full containment features are required.
9. Overhead wiring and plumbing are prohibited. Other structures on piers, ramps and floats shall be limited to 3' in height.
10. Dock lighting shall be designed to shine downward, be low wattage and shall not exceed a height of 3' above the dock surface.
11. Compliance with the Marine mammal monitoring plan is required.
12. Materials used in dock construction shall be of a color and finish that will blend visually with the background. If metal is used it must be treated to comply with this requirement.
13. All debris entering the water or shoreline area shall be removed immediately and disposed of in a legal manner.
14. The pilings and winch system design shall be substantially as illustrated in the application materials and Ex. 22. Pilings are expressly authorized, because other design methods, such as the use of anchored cables rather than pilings, do not provide for the same function and level of safety/risk-avoidance (i.e. the ability to elevate the dock/float during extreme weather events which can occur any season), and are not feasible in this location.
15. Compliance with the kelp monitoring plan is required. If monitoring shows impact, the "mitigation contingency" on page 7 of the monitoring plan must be followed. (Ex. 13).
16. 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.
17. Immediately after construction is completed, the owner shall request that Community Development and Planning perform an inspection. The request shall contain the permit number "PSJ000-17-0009."
18. Failure to comply with these Conditions of Approval shall be grounds for rescission of the Shoreline Permit. As provided in SJCC 18.80.110(L), 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.
19. All development authorized by this shoreline permit shall be consistent with local, state and federal standards applicable to any aspect of the project, and the applicant shall comply with all professional report conclusions and recommendations submitted in connection with these

1 Shoreline Permit and associated approvals issued by San Juan County for this project, as
2 approved, referenced, relied-upon, and/or modified by the County. Further, the applicant shall
3 obtain any associated permit, license, or approval required by any state, federal, or other
4 regulatory body with jurisdiction over aspects of the project; and any conditions of other
5 regulatory agency permits, licenses, approvals or leases required for the project shall be
6 considered conditions of approval for this shoreline permit.

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8 ISSUED this 18th Day of October, 2018

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Gary N. McLean
Hearing Examiner

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.