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Before Hearing Examiner
Gary N. McLean

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

**SJC DEPARTMENT OF
APR 06 2020
COMMUNITY DEVELOPMENT**

In the Matter of a Shoreline Variance)
Application filed by)

DALE AND JANELLE WILTON,)

Applicant,)

REQUEST: *Variance from an aesthetic setback)
required by SJCC 18.50.540, to allow a single-)
family residence closer than 100 feet from the)
Ordinary High Water Mark (OHWM) on Shaw)
Island)*

File No. PSJVAR-19-0001

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION APPROVING
SHORELINE VARIANCE**

I. SUMMARY OF DECISION.

The Wilton's requested Shoreline Variance to from an aesthetic setback required by SJCC 18.50.540.C to allow a single-family residence closer than 100 feet from the Ordinary High-Water Mark (OHWM) on Shaw Island is approved, subject to Conditions of Approval that are based upon evidence in the Record.

II. RELEVANT CODE PROVISIONS.

Shoreline Regulations: The County's Shoreline Master Plan/Program (SMP) is comprised of Chapter 18.50 of the San Juan County Unified Development Code (UDC), together with Element 3 of the County's Comprehensive Plan, the official maps and common descriptions of shoreline designation boundaries that do not follow property lines (Ordinance 1-2016, Exhibit D), Section 2(B) Figures 130-6, 130-7 of the Eastsound Subarea Plan, SJCC 18.30.480, the Eastsound Waterfront Access Plan, and SJCC 18.80.110. *See SJCC 18.50.020(A)*. The County's current SMP and shoreline regulations took effect on October

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
DECISION – APPROVING SHORELINE VARIANCE
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1 30, 2017, and apply for purposes of this application, which was filed in March of 2019. (Staff
2 Report, page 4).

3 **Request for Shoreline Variance:** The applicants are constructing a single-family
4 house on their property, Lot 25 in the Neck Point Coves Subdivision, which is along the
5 shoreline of Shaw Island, identified as Tax Parcel Number 263050025000 in San Juan
6 County. The County's shoreline regulations include an aesthetic setback requirement, which
7 reads: "If a lot has screening vegetation within 50 feet of the OHWM the aesthetic setback is
8 50 feet from the top of the bank. In all other cases, the aesthetic setback is 100 feet from the
9 top of the bank." SJCC 18.50.540.C.3. For reasons explained in the application materials
10 and the Staff Report, the applicants seek this variance to reduce the required aesthetic setback
11 to between 33 and 44 feet from the OHWM.

12 **Approval Criteria for Shoreline Variance:** The procedures for review of shoreline
13 applications are contained in Chapter 18.80.110 of the county's code, with the Criteria for
14 Approval of a Shoreline Variance found in SJCC 18.80.110(I), which reads as follows:

15 I. Shoreline Variances.

16 1. Variances are strictly limited to granting relief from specific bulk, dimensional, or performance
17 standards set forth in this SMP. Variances may be approved where there are extraordinary or unique
18 circumstances related to the property and the strict implementation of the SMP will impose
19 unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020.

20 2. Variances or exemptions granted from the provisions of other local regulations will not be construed
21 to constitute variances from the provisions of this SMP.

22 3. The location of the proposed project will determine which of the following two sets of variance
23 criteria are to be considered. Variances from the provisions of this SMP may be granted when the
24 applicant has proven that one of the following sets of criteria has been met:

25 a. Variances for development located landward of the ordinary high-water mark (OHWM) except
26 within those areas designated as wetlands pursuant to Chapter 173-22 WAC may be authorized if
the applicant can demonstrate all of the following:

i. That the strict application of the bulk, dimensional, or performance standards set forth in
this SMP precludes or significantly interferes with reasonable use of the property that is not
otherwise prohibited by the SMP;

ii. That the hardship is specifically related to the property, is the result of unique conditions
such as irregular lot shape, size, or natural features, is not, for example, from deed restrictions
or the applicant's own actions and results from the application of specific provisions of the
SMP;

iii. That the design of the project is compatible with other allowed activities in the current
land use designation and will not cause adverse effects to adjacent properties or shoreline
ecological functions;

1 iv. That the requested variance does not constitute a grant of special privilege that cannot be
2 enjoyed by other property owners in the area, and it is the minimum necessary to afford relief;
and

3 v. That the public interest will suffer no substantial detrimental effect; or

4 b. Variances for development that will be located either waterward of the OHWM or within
5 wetlands designated under Chapter 173-22 WAC may be authorized provided the applicant can
demonstrate all of the following:

6 i. Strict application of the bulk, dimensional, or performance standards set forth in the SMP
precludes a reasonable use of the property not otherwise prohibited by it;

7 ii. The proposal is consistent with subsections (I)(3)(a)(i) through (v) of this section; and

8 iii. Public rights of navigation and use of the shorelines will not be adversely affected.

9 4. The cumulative impact of additional requests for like actions will be reviewed. For example, if
10 variances were granted to other developments or uses where similar circumstances exist, the total of
the variances shall also remain consistent with the policies of RCW 90.58.020 and shall result in no
11 net loss of shoreline ecological functions.

12 5. Requests to vary the use of a shoreline area are processed as a shoreline conditional use permit rather
than a shoreline variance. Uses that are prohibited by the SMP may not be authorized by a variance or
13 a conditional use permit.

14 6. Filing of variances with and review by the WDOE are described in subsection (G)(5) of this section.

15 7. Shoreline variance applications must include adequate information to demonstrate compliance with
the variance criteria. Applications must include at least the following information as applicable:

16 a. The items listed in SJCC 18.80.020(C) along with photos of the site and a detailed site plan
showing:

17 i. The location of frequently flooded areas and FIRM panel numbers within the proposed
18 development area;

19 ii. Geologically hazardous areas in or within 200 feet of the proposed development area;

20 iii. The field located OHWM on the site, and wetlands areas in or within 300 feet of the
proposed development area and fish and wildlife habitat conservation areas in or within 200
21 feet of the proposed development area;

22 iv. The location of any golden eagle nests in or within 1,000 feet of the proposed development
area; and

23 v. The location of any peregrine falcon or great blue heron nests in or within one-quarter mile
24 of the proposed development area;

1 b. Any related project documents such as applications to other agencies or environmental
documents prepared pursuant to the State Environmental Policy Act (SEPA);

2 c. Required critical area reports, delineations, and the best available science (BAS) documents
supporting the proposal;

3 d. A copy of proposed or approved stormwater and erosion control plans as required by
4 SJCC 18.60.060 and 18.60.070;

5 e. A narrative describing anticipated adverse impacts to the shoreline ecological functions and
6 critical areas, based on best available science, and that explains how the proposal meets the
shoreline variance approval criteria;

7 f. If necessary, mitigation, monitoring and adaptive management plans meeting the requirements
8 of SJCC 18.50.140, 18.50.150 and 18.50.160 for mitigating any adverse impacts or harm, and
demonstrating how the proposal results in no net loss of shoreline ecological functions;

9 g. A cost estimate prepared by a qualified professional, for implementing mitigation and
monitoring plans; and

10 h. A financial guarantee equal to the cost of implementing the mitigation and monitoring plus an
11 additional 15 percent. This guarantee and the associated agreement must meet the requirements of
SJCC 18.80.200.

12
13 **Jurisdiction:** In this matter, the applicants submitted the pending variance
14 application. (*Ex. 1*). Under SJCC 18.80.110(E)(2), the Hearing Examiner is given the
15 authority to hear and approve, approve with conditions, or deny variances from the provisions
16 of the SMP following receipt of the recommendations of the director, based upon the criteria
17 found in SJCC 18.80.110(I), as set forth above. The record does not show that the applicants
18 appealed the County's Stop Work Order (*Ex. 6*) issued with respect to their building permit
19 (*Ex. 5*), which could have been done under SJCC 18.100.130, as specifically noted on the
20 face of the Stop Work Order itself, so that issue – the Stop Work Order – is not before the
Examiner. Similarly, no one, including without limitation the variance opponents who
participated in this hearing process and/or the Department of Ecology, submitted a timely
appeal of the building permit issued for the applicants' new house to the hearing examiner,
which could have been done under SJCC 18.80.140(B)(11). Accordingly, challenges and
collateral attacks regarding the building permit are not before the Examiner and would be
rejected by Washington courts.¹

21 **Burden of Proof:** Under SJCC 18.80.010(A), "Shoreline Permits" are specifically
22 listed as "Project Permits" covered by the provisions of SJCC Chapter 18.80 re: application,

23 ¹ *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014); *Samuel's Furniture v. Dep't of Ecology*,
24 147 Wn.2d 440, 54 P.3d 1194 (2002).

1 notice, review and appeal requirements for the County's Unified Development Code, which
2 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:

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

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

9 **Review Criteria for the Department of Ecology:** Finally, if the Examiner approves
10 or denies the Shoreline Variance, 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
Washington Department of Ecology. Ecology's review criteria for Shoreline Variances are
found at WAC 173-27-170². The San Juan County review criteria for the requested shoreline

14 ² WAC 173-27-170

Review criteria for variance permits.

15 The purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards set forth in
16 the applicable master program where there are extraordinary circumstances relating to the physical character or configuration of property
such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set
forth in RCW 90.58.020.

17 (1) Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated
in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public
interest shall suffer no substantial detrimental effect.

18 (2) Variance permits for development and/or uses that will be located landward of the ordinary high water mark (OHWM), as defined in
RCW 90.58.030 (2)(c), and/or landward of any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant
can demonstrate all of the following:

19 (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or
significantly interferes with, reasonable use of the property;

20 (b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such
as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or
the applicant's own actions;

21 (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the
comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;

22 (d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;

(e) That the variance requested is the minimum necessary to afford relief; and

(f) That the public interest will suffer no substantial detrimental effect.

23 (3) Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM), as defined in
RCW 90.58.030 (2)(c), or within any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can
demonstrate all of the following:

24 (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all
reasonable use of the property;

(b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section; and

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND**
26 **DECISION – APPROVING SHORELINE VARIANCE**
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McLeanLaw@me.com

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

3 **III. RECORD.**

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 **Exhibits:** The Staff Report, prepared by DCD Director Erika Shook, dated June 14,
8 2019, for the pending application (13 pages), and the following Exhibits, are included as part
9 of the Record for this matter. The complete list is provided below:

- 10 1. Shoreline Variance Application materials;
 - 11 1A. Mitigation Plan, prepared by Water & Land Natural Resource Consulting, LLC;
 - 12 1B. Fish and Wildlife Habitat Conservation Areas Report, prepared by WLNRC;
 - 13 1C. Wetland Delineation and OHWM Determination, prepared by WLNRC;
- 14 2. Dept. of Ecology Comment Letter regarding the Wilton Property, including review
15 of wetland and OHWM boundaries;
- 16 3. Request for review, inviting comments from agencies and others regarding the
17 variance application;
- 18 4A. Affidavit of mailing and posting;
- 19 4B. Notice of publication;
- 20 5. Building Permit for the applicant's house, permit no. BUILD-18-0091;
- 21 6. Stop Work Order;
- 22 7. Friday Harbor Labs, written comment regarding the variance application;
- 23 8. Packet of additional written comments received by the County after issuance of the
24 Staff Report, submitted to the Examiner at the public hearing (about 200 pages);
- 25 9. Copy of email message from the Mr. Brogan, attorney for the applicant, noting
26 jurisdictional question based on *Nykreim* case;
10. Lance Whetman comment, printout of portion of Shoreline permit manual available
on Dept. of Ecology website; and
11. Applicants' packet of post-hearing written responses to public hearing comments,
including those found in Exhibit 8, submitted by the applicants' representative in accord

22 (c) That the public rights of navigation and use of the shorelines will not be adversely affected.

23 (4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in
24 the area. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total
of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the
shoreline environment.

(5) Variances from the use regulations of the master program are prohibited.

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND
26 DECISION – APPROVING SHORELINE VARIANCE
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McLeanLaw@ms.com

1 with direction provided at the public hearing.

2 **Hearing Testimony, written comments:** The following individuals presented
3 testimony under oath at the duly noticed open record public hearing for this matter:

- 4 1. Erika Shook, AICP, Director of the San Juan County Department of Community
5 Development;
- 6 2. Jennifer Thomas, MES, wetland scientist, with Water & Land Natural Resource
7 Consulting, LLC, retained by the applicants to prepare a Fish and Wildlife Habitat
8 Conservation Areas report and a Mitigation Plan as well as to complete the
9 Shoreline Variance application on their behalf (See Exs. 1, 1A, 1B, 1C), served
10 as applicant's primary hearing representative, coordinated preparation of
11 applicants' post-hearing responses to comments (Ex. 11);
- 12 3. Dale Wilton, applicant;
- 13 4. Janelle Wilton, applicant;
- 14 5. Jennifer Barcelos, attorney for Friends of the San Juans (FOSJ), summarized
concerns included as part of Ex. 8;
- 11 6. Lance Whetman, legal intern for FOSJ;
- 12 7. Stephanie Buffam, Executive Director, FOSJ;
- 13 8. Tyler Gazecki, neighbor of applicants' property, lives in existing house on parcel
just west of applicants' property;
- 14 9. Lynn Bahrych, attorney, member of FOSJ; and
- 10 10. John Gresseth, applicants' architect.

15 The Examiner has had a full and fair opportunity to consider all evidence and
16 testimony submitted as part of the record, reviewed and researched relevant codes and
caselaw, and is fully advised. Accordingly, this Decision is now in order.

17 **IV. FINDINGS OF FACT.**

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

19 1. All statements of fact included in any other section of this Decision, are hereby
20 incorporated by reference and adopted as Findings of Fact supporting this Decision and the
21 attached Conditions of Approval.

22 2. In December of 2016, the applicants, Dale and Janelle Wilton, became the owners of
23 a 1.3-acre property located along the Neck Point Cove shoreline area on Shaw Island,
24 identified as tax parcel no. 263050025000 at 258 Sylvan Circle. (*Staff Report, Project Data;*
San Juan County Assessor website, online Deed and Sales History for the Wilton's property).

1 3. There is no credible dispute that long before the applicants purchased their property,
2 the lot had an existing fill pad and driveway developed on the site. The driveway and fill pad
3 generally run along the east side of the lot. The Staff Report explains that the fill pad and
4 driveway were likely constructed at some point in the 1960s. There is also an upland area on
5 the lot where a septic system was installed in the 1980s, located over on the northwest side
6 of the Wilton's property. (*Staff Report, page 4*). There is also a small upland area in the
7 south portion of the lot near the roadway, with mature trees and undisturbed vegetation, all
8 of which is encumbered by wetland buffers and is not already connected to the existing septic
9 system located across the wetland area to the north.

10 4. In April of 2018, the applicants submitted materials to obtain a building permit to
11 construct a single-family residence on their lot. The building permit application was subject
12 to the County's updated shoreline master program, which took effect in October of 2017.
13 Single family residences are considered a priority use under the County's Shoreline Master
14 Program, provided they are constructed in a manner consistent with shoreline ecology. (*See*
15 *SJCC 18.50.010.A.1, Purpose of the County's SMP*).

16 5. The Wilton's building permit was approved and issued on July 31, 2018. (*Staff*
17 *Report, page 4; Ex. 5, Building Permit for the applicant's house, permit no. BUILD-18-*
18 *0091*). The building permit authorized construction of a single-family house on the existing
19 fill pad on the northeast portion of the lot, leaving the septic system where it is already
20 located. The building permit was subject to appeal to the hearing examiner. *SJCC*
21 *18.80.140(B)(11)*. There is no dispute that no one appealed the Wilton's building permit.

22 6. The Staff Report explains that the County's building permit application review
23 included review of a FEMA Fish and Wildlife Habitat Assessment for development within
24 the floodplain and a cultural resources review, among other things. (*Staff Report, page 4*).

25 7A. The Staff Report and Ms. Shook's testimony established that the building permit was
26 issued following a SEPA environmental determination made pursuant to WAC-197-11-
800(1)(b)(i), that the Wilton's single-family residential construction project is/was exempt
from review under the State Environmental Policy Act. The Staff Report explains that the
single-family residence is designed to be located on the existing fill pad that was created in
the 1960s. As the fill pad itself is not a wetland and is considered "upland", the proposed
development is not on "lands covered by water". These determinations were made at the
time the building permit was issued, which was not appealed.

7B. County-issued building permits implicitly demonstrate that the permits received were
sufficient. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, Par. 25, 175
P.3d 1050 (2008), citing RCW 90.58.140. The County could not issue a building permit if
the permits were in violation of the SMA or of the County's SMP. (*Id.*; *See WAC 173-27-*
140). In issuing the building permit, the County effectively determined that the Wilton's

1 house construction project was in total compliance with the existing law. (*Id.*) If any
2 neighbors, project opponents, or even the Department of Ecology believed that the County-
3 issued building permit was improperly issued, then such party was/is required to file an
4 appeal under LUPA. (*Id.*)

5 7C. The San Juan County Department of Community Development and Planning issued
6 the building permit, which was subject to appeal to a hearing examiner. SJCC
7 18.80.140(B)(11). Only a decision by the hearing examiner qualifies as a land use decision
8 that is subject to appeal under LUPA. Because none of the parties essentially opposing the
9 Wilton building permit submitted an appeal to the hearing examiner as they could have done,
10 the examiner did not issue a final determination, and they failed to obtain a land use decision
11 under LUPA. The Washington Supreme Court is very clear – subsequent challenges of such
12 permit must be rejected.

13 7D. For the most part, opponents to the requested variance raised arguments, issues, and
14 factual disputes that might have supported an appeal of the building permit issued for the
15 Wilton's house. Again, no one appealed the building permit.

16 7E. This variance application process cannot be used as a forum to make collateral attacks
17 on the building permit and underlying determinations made by County staff in order to issue
18 such permit. Washington courts have clearly rejected equitable arguments, including
19 allegations of mistakes in previous permit reviews and the like, as a way to avoid finality in
20 land use decisions that are not appealed in a timely manner.

21 ***Site conditions.***

22 8. The Wilton's property is a 1.3-acre parcel, lot 25 of the Neck Point Cove subdivision,
23 which is partially forested and generally level with a slight slope down towards Neck Point
24 Cove. Site conditions are accurately and completely described in detail in the Fish and
25 Wildlife Habitat Conservation Area Report by Water and Land Natural Resource Consulting,
26 LLC dated March 15, 2019 (*Exhibit 1B*). To the north of the parcel is a common area owned
by the Neck Point Cove Association. The common area is a shoreline saltmarsh associated
with Neck Point Cove/Wasp Passage. The lot to the east is undeveloped, and the lot to the
west is developed with a single-family residence, where Mr. Gazecki lives. The site is almost
entirely encumbered with a Category I estuarine wetland (*Exhibit 1C*). The lot has an existing
fill pad and driveway that are surrounded by wetland. The fill pad is contained by a rip-rap
bulkhead on two sides. There is a small 17,850 square ft. non-wetland portion of the site
where the septic system is located. The septic system was placed on the site in the 1980s.
The fill pad and the driveway have existed on the site for decades, likely constructed in the
1960s, and pre-dating critical area and shoreline regulations. (*Staff Report, page 4*).

9. There is no dispute that virtually all of the Wilton's lot is encumbered by wetland,

wetland buffers or shoreline aesthetic setbacks. (*Ex. 1C; Staff Report*).

10. The Staff Report generally summarizes wetland and upland conditions on the Wilton property as follows:

“There is a Category I Estuarine wetland on the site. The wetland requires a 75-foot water quality buffer and a 225-foot habitat buffer (reference Exhibit 1C of the staff report). The proposed development is proposed to be located on a non-wetland fill pad that pre-dates critical areas and shoreline regulations. The determination that the fill pad and driveway were not wetlands was made at the time that BUILDG-18-0091 was issued. (Staff Report, page 10; Ex. 1C, Wetland Delineation and OHWM Determination, prepared by Water & Land Natural Resource Consulting, LLC).

11. The fill pad where the building permit authorized construction of the Wilton’s house is located within wetland buffers, and the project cannot meet the minimum buffer requirements normally required by County critical area codes, including SJCC 18.35.130. (*Staff Report, page 10*). The determination as to where the house should be located on the lot was made at the time the building permit was issued. Again, the building permit was not appealed.

Events leading up to Variance application.

12. After the building permit was issued, the applicants’ contractors began construction work on the property at some point in the Fall of 2018.

13. The Staff Report explains that in early January of 2019, Tina Whitman, Science Director for the Friends of the San Juans, requested information about the development from San Juan County staff and noted that the construction of the foundation appeared to be near the high tide mark. Upon review of the permit documents and air photos by County staff, it appeared that Ordinary High-Water Mark (“OHWM”) was not correctly depicted on the building plans and it appeared that the structure did not meet the required setback from the OHWM. So, on January 10, 2019, Erika Shook, the Director of the San Juan County Department of Community Development, conducted a site visit and posted a stop work order on the site. (*Staff Report, page 4; Testimony of Ms. Shook*).

14. Ms. Shook’s Staff Report explains that in addition to the incorrect location of the OHWM, the building plans failed to disclose freshwater and saltwater wetlands on and adjacent to the site. The wetlands are not mapped on the County Potential Wetland Map. (*Staff Report, page 4*).

15. The Stop Work Order, and an explanatory letter, are included in the record as *Exhibit 6*. The order specified that the following “conditions” must be satisfied before work would

1 be permitted to resume: “1) Submittal of plans showing that the proposed structure meets the
2 setback of 100 feet from the OHWM; and 2) Submittal of a Fish and Wildlife Habitat
3 Conservation Area (FWHCA) Habitat Assessment report that correctly identifies adjacent
4 estuarine wetland, identifies impacts to the estuarine wetland and proposes mitigation
5 sufficient to have no net loss of habitat functions and values.”

6 16. The applicants subsequently submitted an OHWM delineation conducted by a
7 qualified professional, included in the record as *Exhibit 1C*. The OHWM determination was
8 reviewed by the Department of Ecology, which provided a final determination, making a
9 small modification (*Exhibit 2*). The small adjustment made in the final OHWM
10 determination by the Department of Ecology has no material effect on consideration of this
11 variance request. (*Testimony of Ms. Shook*). On the Wilton’s property, the OHWM follows
12 the boundary of the associated estuarine wetland, which is between 33 and 44 feet from the
13 house now under construction.

14 17. The County’s shoreline regulations include an aesthetic setback requirement, which
15 reads: “*If a lot has screening vegetation within 50 feet of the OHWM the aesthetic setback is*
16 *50 feet from the top of the bank. In all other cases, the aesthetic setback is 100 feet from the*
17 *top of the bank.*” SJCC 18.50.540.C.3. For reasons explained in the application materials
18 and the Staff Report, the applicants seek this variance to reduce the required aesthetic setback
19 to between 33 and 44 feet from the OHWM.

20 18. The applicants submitted this application for a shoreline variance requesting relief
21 from the aesthetic setback on March 15, 2019 (*Exhibit 1*).

22 19. This pending variance application is exempt from SEPA review pursuant to WAC
23 197-11-800(6)(e) which exempts certain land use decisions, including “(e) Granting of
24 variance based on special circumstances, not including economic hardship, applicable to the
25 subject property, such as size, shape, topography, location or surroundings and not resulting
26 in any change in land use or density.”

20. In any event, the professional wetland reports and other environmental documentation
in the record are sufficient to fully inform the Examiner and other decision-makers on
relevant issues to ensure that the Variance can be approved and/or conditioned so as to
comply with all approval criteria, including without limitation that there will be no net loss
of habitat functions and values.

Mitigation Plan

21. SJCC 18.50.140(A), captioned “Mitigation of adverse impacts to shoreline ecological
functions,” provides that: Shoreline development, land uses, structures and activities must
meet the no net loss requirement of WAC 173-26-186(8)(b)[no net loss of shoreline

1 ecological functions]; and that “If project proposals do not comply with the critical area
2 protections in SJCC 18.50.130, applicants must submit a mitigation sequence analysis to the
department.”

3 22. Because the approved building site, i.e. the fill pad located in the northeast corner of
4 the property, is encumbered by wetland buffers, it cannot meet the minimum buffer
5 requirements normally applied under SJCC 18.35.130, county critical area standards. (*Staff*
6 *Report, page 10*). To demonstrate their ability to comply with the SJCC 18.50.140(A)
referenced above, the applicants submitted a Mitigation Plan prepared by Water & Land
Natural Resource Consulting LLC, dated March 15, 2019 (*Exhibit 1A*).

7 23. Staff credibly determined that the Mitigation Plan document prepared by the Water
8 & Land professionals (*Ex. 1B*) is consistent with the mitigation sequencing analysis
requirements found in SJCC 18.50.140(A), which reads as follows:

9 *B. Mitigation measures must be applied in the following sequence. The applicant must*
10 *demonstrate that each mitigation action is not feasible or applicable before proceeding to*
11 *the next option or action:*

- 12 1. *Avoiding the impact altogether by not taking certain action or parts of an action;*
- 13 2. *Minimizing impacts by limiting the degree or magnitude of the action and its*
14 *implementation by using appropriate technology or by taking affirmative steps to avoid*
15 *or reduce impacts;*
- 16 3. *Rectifying the impact by repairing, rehabilitating, or restoring the affected*
17 *environment;*
- 18 4. *Reducing or eliminating the impact over time by preservation and maintenance*
19 *operations;*
- 20 5. *Compensating for the impact by replacing or providing substitute resources or*
21 *environments; and monitoring the impact and compensation projects, and taking*
22 *appropriate corrective measures; and*
- 23 6. *Monitoring the impact and the compensation projects and taking appropriate*
24 *corrective measures.*

25 24. The Staff Report, on page 11, relies on findings provided in the Mitigation Plan report
26 (*Ex. 1A*), and credibly offers the following explanations and findings that establish the merits
and potential effectiveness of the applicants’ proposed Mitigation Plan:

27 *The fill pad is the only possible location on site on which to build a residence. Siting the*
28 *proposed residence on the existing fill pad avoids direct impact to wetlands. The fill pad is*
29 *the only location on the site that avoids wetland impact. Locating the residence anywhere*
30 *else on the site would require direct wetland impacts to the on-site Category I estuarine*
31 *wetland. (Emphasis added.*

32 *There is a small upland area where the septic system (installed in 1982) is located. Because*
33 *the septic system is there, it is not a feasible location to place the Wilton residence. The soil*
34 *in the fill pad is not acceptable septic system material. In addition, accessing this upland*

1 area would require crossing the wetland, and removing both the septic system and existing
2 native vegetation. This would result in more environmental damage and degradation than
3 locating the proposed residence on the fill pad, which, prior to disturbance, was vegetated
4 with non-native pasture grasses. There is no other location on site on which to locate a septic
5 system.

6 There is no way to shift the residence further south to accommodate the 100-foot aesthetic
7 setback, or to locate it elsewhere on the site, doing so would result in direct impacts to the
8 wetlands on site and would not meet the 'no net loss' requirement of SJCC 18.50.140. The
9 residence is proposed in the center of the fill pad which allows access for construction
10 equipment outside of wetland areas.

11 The mitigation proposed to screen the residence will also improve the functions and values
12 of the wetland buffers. The proposed trees and understory will provide additional
13 overhanging vegetation to provide shade and leaf litter to the wetland and shoreline, and
14 will provide additional habitat for terrestrial fauna."

15 25. Based on the record as discussed in this Decision, the Examiner finds and concludes
16 that the Mitigation Plan, with its specific plant materials and plant locations, is sufficient to
17 ensure that the requested aesthetic setback variance will not result in a net loss of shoreline,
18 wetland, or critical area habitat functions or values.

19 **Summary of issues raised by opponents.**

20 26. The house approved in the building permit will be a two-story home, with the first
21 story located on a standard foundation 3 feet above flood elevation. Despite comments at the
22 public hearing alleging that the foundation has been partially constructed in some way
23 violating applicable codes and requirements, the foundation for the Wilton project has been
24 inspected by San Juan County Community Development building code officials and deemed
25 to meet Universal Building Code (UBC) requirements of San Juan County. (*Testimony of
26 Ms. Shook*).

27 27. To address foundation questions raised in public testimony and written comments,
28 the applicant's written response materials (*Ex. 11*) include an explanation that the purpose of
29 drain ports used around the foundation is preventative; in the event of flooding, the ports will
30 allow flood waters to pass through the foundation of the home, thereby lessening potential
31 damage from flooding to the structure of the home. The ports will be screened and are
32 designed to prevent stranding of aquatic species during flood events. The foundation was
33 designed to conform with the FEMA Technical publication "Openings in Foundation Walls
34 and Walls of Enclosures, Below Elevated Buildings in Special Flood Hazard Areas in
35 accordance with the National Flood Insurance Program" Technical Bulletin 1, August 2018.

36 28. A large portion of public testimony and written materials submitted by opponents
37 focused on concerns that the Wilton house project will have adverse impacts on an adjacent

1 habitat restoration area. However, in issuing its building permit for the Wilton's house
2 project on July 31, 2018, the county found no conflict between construction of a single-family
3 residence at this location, and the salmonid habitat in the project vicinity. Any challenges
4 that such impacts could result should have been raised in an appeal of the building permit.

5 29. The proposed residence is being built on a pre-existing fill pad, avoiding wetland
6 impacts. The location, depth, and type of fill are documented in a geotechnical report
7 prepared for the Wiltons by GeoTest in September of 2017, and were found to meet county
8 code requirements. (*GeoTest report, Appendix A to Ex. 1B*). Comments asserting that the
9 fill pad should be characterized as wetland and not upland were not credible or supported by
10 professional reports of comparable weight to those included in the application materials.
11 Again, the County's determination that the fill pad is upland and not wetland was made at the
12 time the building permit was issued. Arguments to the contrary are now untimely and must
13 be rejected.

14 30. Again, contrary to some comments, there is no credible dispute that the fill pad where
15 the new house is being constructed is upland and is located landward of the OHWM
16 confirmed by the Department of Ecology. Thus, the fill pad is designated Rural Farm Forest,
17 and a single-family residence is expressly permitted within the Rural Farm Forest shoreline
18 environment, as either a shoreline exemption or a substantial development. *See SJCC*
19 *18.50.600*. The County made the shoreline exemption determination at the time it issued the
20 Wilton's building permit. As explained elsewhere in this decision, that determination is not
21 subject to collateral challenges, review or modification as part of this variance application.

22 31. Much was made of small trees, less than 6 inches in diameter, removed by the
23 applicants at some point from an area identified as TPZ-1 on the fill pad where the house is
24 now under construction. The Staff Report and Mitigation Plan explain how the much more
25 substantial planting materials called for, and as will be required in the conditions of approval,
26 will be more than appropriate to and will go beyond mitigating loss of one or several small
27 trees previously on the site. The Mitigation Plan calls for substantial visual screening, that
28 was not previously part of the project. This screening will include understory enhancement
29 and planting of Quaking Aspen. By using the existing fill pad as the site for the new house,
30 the project retains much larger existing trees and plant materials located on other parts of the
31 property and will avoid the need to disturb the wetland areas on-site.

32 32. Comments and suggestions that the Variance should be used as a means to modify
33 the building permit and order moving the designated construction site to some other portion
34 of the property other than the existing fill pad would all entail impacts to wetlands, or their
35 buffers.

36 33. The pending variance is requested from the strict application of shoreline aesthetic
setbacks to allow reasonable use of the property. As proposed, the residence is sited in the

1 only location on site that does not directly impact wetlands and has the least impact to wetland
2 buffers, and their ecological structure and function. The applicant's written response to public
3 comments (*Ex. 11*) credibly reasons: "Put another way – it is ecologically preferable to
4 remove non-native grasses on fill – and replace them with a home that has a 1500 square foot
5 footprint than to remove native trees, shrubs and understory in wetlands or their buffers of
6 existing mature native vegetation. As sited, the residence cannot meet the shoreline aesthetic
setbacks at SJCC 18.50.540C 3 & 4. The mitigation plan is intended to offset this fact by
proposing aesthetic screening in three separate areas of the site. The planting areas were
chosen to screen the proposed residence from view from adjacent properties, as well as to
enhance the existing structure and function of the native vegetation on site."

7 34. Though a follow-up letter (*included as part of Ex. 8*) rescinded her support for the
8 requested variance, generally noting concerns on topics that should have been raised in an
9 appeal of the building permit – which never happened – Dr. Dethier of the University of
Washington Friday Harbor Labs submitted a letter addressing the variance application that is
included in the record as *Exhibit 7*, which reads in relevant part as follows:

10 "This is a complex and controversial proposal that evidently has a long history that I was
11 unaware of. As far as I can tell, given the written materials and maps supplied, the current
12 building plan (along with its mitigation measures and monitoring) are a reasonable solution
13 to the question of how to build a home on this lot while minimizing environmental impacts.
14 The substantive damage to the site was done long ago by whoever built the 'fill pad' and
15 ditch. Trying to build anywhere else would clearly worsen the situation in terms of creating
16 new impacts to the wetlands on the lot. As far as I can determine, completing this home
should have negligible impacts on marine resources. It will be critical for all construction
and machinery to be confined to the fill pad and driveway. The screening plan is very good
idea that will help with the aesthetic impacts of this house. The monitoring plan is an
essential piece of the application and I hope that there will be follow-up by the county on
this plan."

17 35. Dr. Dethier was correct the first time, in her letter quoted above. Based on the record,
18 including without limitation the Fish and Wildlife Habitat Conservation Areas Report
19 prepared by qualified professionals with WLNRC, dated March 15, 2019 (*Ex. 1B*), and the
20 geotech report prepared by a licensed geologist and professional engineer from GeoTest
21 Services, Inc., included in the record as *Appendix A* to the FWHCA Report (*Ex. 1B*), the
22 Examiner finds that trying to build anywhere else besides the existing fill pad would clearly
23 worsen the situation in terms of creating new impacts to the wetlands on the Wilton's lot.
24 Completing the home on the existing fill pad should have negligible impacts on marine
resources, if all applicable building permit requirements and stormwater control measures are
followed. As Dr. Dethier wrote, the screening plan described in the Mitigation Plan is a very
good idea that will help with the aesthetic impacts of the Wilton's house, and will be
especially beneficial for Mr. Gazecki. The monitoring plan is an essential piece of the
application and is included as a condition of approval for this variance. County staff should

1 strictly follow-up to ensure all building permit requirements and conditions of approval
2 included as part of this variance are satisfied.

3 36. Due to site constraints, building on the existing fill pad location requires a variance
4 to grant relief from the shoreline aesthetic setback found in SJCC 18.50.540.C. The variance
5 application materials include a reasonable and appropriate mitigation plan to offset the visual
6 impacts of a new residential structure on adjacent properties. The Staff Report confirms that
7 the proposed mitigation plan meets San Juan County code requirements. (*Staff Report, pages*
8 *10-11*).

9 37. The existing fill pad is the only location on site that meets mitigation sequencing by
10 entirely avoiding impacts to the Category I wetland on the site. Building a single-family
11 residence at any other location on site would result in more damage to the wetland and/or its
12 buffer, and the ecological structure, functions and values of the site.

13 38. Several comments suggested that the Wilton's could building their home on "Area 3"
14 as designated in the Geotest report, which is the area where the existing septic system is
15 located. Accessing the septic tank area would require filling a portion of the Category I
16 wetland, and removing mature native forest, shrub, and understory, as well as removing, and
17 unfortunately possibly damaging, the septic system itself. This is not a viable building
18 location because it fails to avoid direct wetland impacts and would result in significantly
19 more damage – to both the wetland and its buffer – than the fill-pad building site location
20 approved in the Wilton's building permit.

21 39. As noted above, extensive written materials and public testimony expressed concerns
22 with potential impacts on the Neck Point Coastal March Restoration project at Neck Point
23 Coves. The restoration project included re-establishing a more natural and effective channel
24 in the estuarine wetland, described as a 'ditch' by several witnesses, intended to increase
25 access to habitat for foraging juvenile salmonids, and to increase the availability of insect
26 prey, among other things. (*See discussion in and resource materials cited in the FWHCA*
report submitted by Water & Land Natural Resource Consulting, Ex. 1B, at pages 7-9; Ex.
8, restoration project materials submitted by project opponents).

40. The applicants' application materials and their written responses to public comments
(*Ex. 11*) fully recognize the importance of the salmonid habitat in the vicinity of their house
construction site. By issuing a building permit for the site on July 31, 2018 the county found
no conflict between construction of a single-family residence at this location, and the
salmonid habitat in the project vicinity. The proposed residence is being built on fill,
avoiding wetland impacts. No fill is needed to access the construction site, as would be the
case if the house and/or the septic system (and possible lines connecting to such system)
was/were moved to some other location. The location, depth, and type of fill were all
documented in a geotechnical report prepared for the Wiltons by GeoTest in September of

1 2017 (*GeoTest report, Appendix A to Ex. 1B*) and found to meet county code requirements.

2 41. Opposition comments that allege illegal construction in regulated wetlands are
3 factually unsupported, and legally barred, because the applicants began construction of a
4 single-family residence with a building permit in hand. They did not 'build on an unpermitted
5 section of the parcel' as claimed in some comments.

6 42. By asking for relief from the aesthetic setback requirements set forth in SJCC
7 18.50.540.C 3 & 4, the applicants are seeking to create a visual screen between the proposed
8 residence and adjacent properties. They are seeking to meet the intent of the aesthetic
9 screening setback by planting appropriate native species selected based on growing
10 conditions on the site. The proposed residence will still be located within 33 to 44 feet from
11 the OHWM. This condition is a constraint of the lot and is the reason that the applicants are
12 requesting a Variance from the otherwise applicable aesthetic setback.

13 43. By avoiding impacts to the Category I wetland on site, there are no direct impacts as
14 a result of this proposal. While some comments raised concerns regarding future construction
15 noise, increases in water turbidity, and increases in stormwater runoff, the applicants'
16 response materials correctly point out that the wetland restoration project at Neck Cove
17 resulted in direct impacts to the Category I wetland that far exceed anything that is proposed
18 by construction of the 1,500 square foot footprint of the Wilton residence on existing fill.
19 The Neck Cove restoration project required grading and extensive labor and construction
20 activity directly inside the wetland itself, with associated direct impacts from turbidity and
21 sedimentation related to construction. In contrast, construction of the Wilton residence
22 results in no direct impact to the wetland.

23 44. The applicants fully recognize the importance of the salmonid habitat located within
24 the estuarine wetland at Neck Point Cove. (*Ex. 11, applicants' response to comments*). This
25 habitat is discussed at length in *Ex. 1B*, the Fish and Wildlife Habitat Conservation Areas
26 report submitted by WLNRC in March 2019 as part of the Variance application. The
conclusion of that report is that there will be 'no net loss to the functions and values of either
critical areas, or Fish and Wildlife Habitat Conservation Areas on site or in the project
vicinity' (*Ex. 1B, FWHCA, prepared by WLNRC, March 2019, at page 15*).

27 45. Despite their sincere comments and arguments that should have been raised in a
28 timely appeal of the building permit, no individual or government agency invited to comment
29 on the variance application offered any evidence or information of sufficient weight to rebut
30 or materially challenge the findings and analysis provided in the Staff Report, the application
31 materials, or the applicant's Mitigation Plan, including without limitation the supporting
32 environmental analyses and recommendations that are included as part of the Record. (*See*
33 *Exhibits 1, 1A, 1B, and 1C*).

1 ***The pending application satisfies all approval criteria and merits approval.***

2 46. The Staff Report and the application materials included as part of the Record include
3 facts and analysis that comprise far more than a preponderance of evidence to establish that
4 the pending Shoreline Variance application satisfies, and in many respects, promotes or
5 implements, applicable provisions of the County's Shoreline Master Program, particularly its
6 purpose statement that recognizes Single family residences as a priority use under the
7 County's SMP, provided they are constructed in a manner consistent with shoreline ecology.
(See SJCC 18.50.010.A.1, Purpose of the County's SMP). The Mitigation Plan and
8 conditions of approval imposed as part of this variance will ensure that the Wilton house will
9 be developed in a manner consistent with shoreline ecology.

10 47. Substantial evidence in the record, including without limitation the application
11 materials, environmental reports, and hearing testimony, establish that the proposed project
12 satisfactorily complies with applicable county code provisions, and/or can be mitigated
13 through recommended conditions of approval, which expressly reiterate the applicants'
14 obligation to follow the Best Management Practices (BMPs) recommended in Ex. 1B, the
15 Fish and Wildlife Habitat Conservation Areas Report prepared by qualified professionals at
16 Water & Land Natural Resource Consulting, LLC.

17 48. For instance, there is substantial, credible, and un rebutted information in the record
18 and application materials to demonstrate that no net loss of shoreline ecological functions
19 will occur. These materials include, without limitation, the Fish and Wildlife Habitat
20 Conservation Areas Report and analysis prepared by qualified professionals at Water & Land
21 Natural Resource Consulting, included as part of Ex. 1B, which concludes as follows:

22 *"If implemented as proposed, construction of the Wilton residence will result in no net loss*
23 *to shoreline ecological functions to fish and wildlife habitat conservation areas or wetlands*
24 *on site or in the site vicinity. The fill pad on which the proposed residential structure is to*
25 *be located is the only location on site that will result in no net loss to wetlands or fish and*
26 *wildlife habitat conservation areas on site." (Fish and Wildlife Habitat Conservation Areas*
Report, Ex. 1B, at page 15).

27 ***The Record includes substantial evidence that the application meets requirements to***
28 ***approve the Shoreline Variance from an aesthetic setback.***

29 49. Substantial and credible evidence in the record, including without limitation
30 un rebutted findings and analysis provided in the Staff Report and the application materials,
31 establishes that the applicants have met their burden to prove that the pending variance
32 application satisfies all criteria for approval, found at SJCC 18.80.110(I).

33 50. Based on the record presented, including all other findings set forth herein, the

1 Examiner finds and concludes that extraordinary or unique circumstances related to the
2 Wilton's property and the strict implementation of the SMP (in this case, the aesthetic
3 setback) will impose unnecessary hardships on the applicant or thwart the policies set forth
4 in RCW 90.58.020. Simply put, there is no other place where a house can be built without
5 impacting wetlands, so the variance from the otherwise applicable aesthetic setback is
6 warranted, especially in this situation where the Mitigation Plan will improve the functions
7 and values of the wetland buffers on the site and provide substantial visual screening, that
8 was not previously part of the project. This screening will include understory enhancement
9 and planting of Quaking Aspen. By using the existing fill pad as the site for the new house,
10 the project retains much larger existing trees and plant materials located on other parts of the
11 property and will avoid the need to disturb the wetland areas on-site.

12 51. The proposed variance is to grant relief from the dimensional requirements of SJCC
13 18.50.540.C 3 & 4, the required aesthetic setback from the OHWM. The Category I estuarine
14 wetland encumbers the Wilton property almost entirely with wetland and wetland buffers
15 presenting a unique circumstance related to the property. As noted elsewhere, there is no area
16 on the site that is not located within wetland or wetland buffer or shoreline setbacks. The
17 strict implementation of the aesthetic setback would effectively prohibit construction on the
18 site because it would push construction of the house from the existing disturbed fill pad into
19 undisturbed areas of the wetland and/or wetland buffers. Fill to expand the developable area
20 on this lot is prohibited by SJCC 18.50.110.E and L. Prohibiting construction on the site
21 where authorized by the unchallenged building permit would deprive the property owner of
22 the reasonable use of their property. Construction in currently undisturbed wetland and/or
23 wetland buffers outside of the aesthetic setback would be counter to the policy of RCW
24 90.58.020 to protect shoreline ecological functions. These Findings, numbered 50 and 51,
25 and others included in this decision, are sufficient to establish that the requested variance
26 satisfies approval criteria found in SJCC 18.80.110(I)(1).

52. The applicants have met their burden to establish:

i. That the strict application of the bulk, dimensional, or performance standards set forth in this SMP precludes or significantly interferes with reasonable use of the property that is not otherwise prohibited by the SMP. Discussion: *The strict implementation of the aesthetic setback would effectively prohibit construction on the site because it would push construction of the residence from the existing disturbed fill pad into undisturbed areas of the wetland and/or wetland buffers. Fill to expand the developable area on this lot is prohibited by SJCC 18.50.110.E and L. Prohibiting construction on the site, where permitted under the unchallenged building permit, would deprive the property owner of the reasonable use of their property. Under the County's SMP, Development of a single-family residence is an authorized use in the Rural Farm Forest shoreline environment.*

ii. That the hardship is specifically related to the property, is the result of unique conditions such as irregular lot shape, size, or natural features, is not, for example, from deed restrictions or the applicant's own actions and results from the application of specific provisions of the SMP. Discussion: *The hardship is related to the wetlands and wetland buffers on the site, which are a unique to the site, and*

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the strict application of the provisions of the SMP.

iii. That the design of the project is compatible with other allowed activities in the current land use designation and will not cause adverse effects to adjacent properties or shoreline ecological functions. Discussion: *As noted in multiple findings above, the requested variance and house construction project has been designed or conditioned so that it will not cause adverse effects to adjacent properties, and it will result in no net loss to shoreline ecological functions to fish and wildlife habitat conservation areas or wetlands on site or in the site vicinity. As explained in the Staff Report, the size and design of the Wilton residence is compatible with other single-family houses in the Rural Farm Forest shoreline designation. The size of the residence, at 2,360 square feet and two stories, is smaller than many single-family residences in the RFF shoreline designation in San Juan County. The proposed height of the structure 26 feet, which is under the 35-foot maximum height limit required by SJCC 18.50.540(A)(3). No garage or other outbuildings are proposed. The properties adjacent to Neck Point Cove in the vicinity of the Wilton's parcel and also in the RFF shoreline designation have single family residences with a variety of sizes. The proposed residence is similar to and compatible with the sizes in the vicinity. Many of the properties listed below (identified by tax parcel numbers for lots in the Neck Point Cove area), also have outbuildings which are not included in these calculations:*

263050029000 – SFR – 3,400 square feet (one story)
263050031000 – SFR – 1,984 square feet (one story)
263050032000 – SFR – 2,438 square feet (two story)
263050044000 – SFR – 2,309 square feet (two story)
263050045000 – SFR – 648 square feet (one story)
263050047000 – SFR – 1,172 square feet (two story)

iv. That the requested variance does not constitute a grant of special privilege that cannot be enjoyed by other property owners in the area, and it is the minimum necessary to afford relief. Discussion: *The proposed variance does not constitute a grant of special privilege. The variance is necessary in order for the property owners to be able to have a single-family residence on the site similar to other single-family residences in the area. It is the minimum necessary to afford relief. No normal residential accessory structures that other properties enjoy are proposed on this site. The proposed residence would be centered on the fill pad which would allow for construction equipment to access the site without impacting wetlands.*

and

v. That the public interest will suffer no substantial detrimental effect. Discussion: *Because the Mitigation Plan for the requested variance includes planted screening features comprised of specially selected trees, understory shrubs, native grasses and the like, these materials should be able to improve the functions and values of the wetland buffers on the site. The proposed trees and understory will provide additional overhanging vegetation to provide shade and leaf litter to the wetland and shoreline and will provide additional habitat features for terrestrial fauna. In sum, the Mitigation Plan included in the conditions of approval for this variance will enhance, rather than harm, the public interest.*

53. The conditions and circumstances on the Wilton site are unusual in that there is a fill pad surrounded by wetland that pre-dates county and shoreline regulations, as well as an existing septic system that also pre-dates critical area regulations. It is not likely that there

1 are very many similar sites in the County shoreline areas, and the circumstances under which
2 this lot was created no longer exist. New lots created in the county are required to
3 demonstrate that development can meet shoreline and critical area regulations. The proposed
4 vegetative screen will reasonably and appropriately mitigate potential impacts associated
5 with the requested aesthetic setback variance. The cumulative impact to the aesthetic setback
6 of similar variances in similar circumstances where additional screening is proposed is likely
7 to be minimal. Further, as noted in multiple other findings, the granting of the variance will
8 result in no net loss of shoreline ecological functions and in fact allows development that is
9 shown to have the least possible impact of all construction site options on shoreline ecological
10 functions. The cumulative impact of other similar variances would result in no net loss of
11 shoreline ecological functions. Accordingly, the requested variance satisfies the approval
12 criteria found in SJCC 18.80.110(I)(4).

13 54. Consistent with SJCC 18.80.110(E)(2), the Examiner has conditioned approval of the
14 project to make the proposal consistent with the shoreline master program and to mitigate or
15 avoid adverse impacts.

16 55. All findings, statements of fact, and analysis provided in the Staff Report, are
17 incorporated herein as findings of fact by the undersigned hearing examiner, except as
18 modified herein.

19 V. CONCLUSIONS OF LAW.

20 1. The Record, including without limitation the County's Staff Report and the
21 applicant's supporting environmental reports addressing wetlands and a Mitigation Plan
22 requiring plantings, with ongoing monitoring to ensure success of such plan, includes
23 substantial and credible evidence establishing that the Wilton's application for a Shoreline
24 Variance satisfies the County's approval criteria.

25 2. As noted above, single family residences are considered a priority use under the
26 County's Shoreline Master Program, provided they are constructed in a manner consistent
with shoreline ecology. (*See SJCC 18.50.010.A.1, Purpose of the County's SMP*).

3. Substantial evidence in the Record establishes that the Wilton's house has been
designed and conditioned to minimize, avoid, or prevent impacts on the surrounding
shoreline environment and adjacent wetlands, and will comply with appropriate BMPs during
construction.

4. The Mitigation Plan, with ongoing monitoring to ensure its success, is reasonable,
fully supported by un rebutted professional reports included in the record, and readily capable
of accomplishment. In fact, the plantings made to implement the Mitigation Plan should

1 serve to enhance the surrounding shoreline and wetland areas.

2 5. The record does not show that the applicants appealed the County's Stop Work Order
3 (*Ex. 6*) issued with respect to their building permit (*Ex. 5*), which could have been done under
4 SJCC 18.100.130, as specifically noted on the face of the Stop Work Order itself, so that
5 issue – the Stop Work Order – is not before the Examiner.

6 6. The applicants submitted the pending variance application. Accordingly, the Hearing
7 Examiner presumably has jurisdiction and authority to conduct the hearing process, issue a
8 decision and possibly condition this requested variance. Under SJCC 18.80.110(E)(2), the
9 Hearing Examiner is given the authority to hear and approve, approve with conditions, or
10 deny variances from the provisions of the SMP following receipt of the recommendations of
11 the director, based upon the criteria found in SJCC 18.80.110(I). All of the variance
12 application submittal requirements and notice requirements have been satisfied.

13 7. Except for the limited items addressed in the variance application submitted by the
14 Wilton's, i.e. a variance from an otherwise applicable aesthetic setback with implementation
15 of a Mitigation Plan that will benefit Mr. Gazecki over time with plant materials partially
16 screening views of the Wilton's new house, the Wilton's building permit stands unchallenged
17 and unchanged, and all requirements and permit requirements for construction of the house
18 remain as issued. This is because no one, including without limitation the variance opponents
19 who participated in this hearing process and/or the Department of Ecology, submitted a
20 timely appeal of the building permit issued for the applicants' new house to the hearing
21 examiner, which could have been done under SJCC 18.80.140(B)(11). Accordingly,
22 challenges and collateral attacks regarding the building permit are not before the Examiner
23 and would be rejected by Washington courts.³

24 8. The Washington Supreme Court has been very clear on situations like the one presented
25 in this instance, where a building permit has been issued and no one appealed such permit.
26 In fact, one of the most relevant rulings involved a building permit issued by San Juan
County. That case, *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014),
involved an untimely challenge to San Juan County's issuance of a garage-addition building
permit. The permit opponents did not receive notice of the permit application and grant until
the administrative appeals period had expired. The Supreme Court addressed the obvious
equitable arguments raised by the permit-opponent, some of which were generally raised by
opponents in this variance hearing process, where interested parties are concerned that they
might be required to do the impossible: i.e. to appeal a decision without actual or constructive
notice of it. On this topic, the Supreme Court ruled as follows:

³ *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014); *Samuel's Furniture v. Dep't of Ecology*,
147 Wn.2d 440, 54 P.3d 1194 (2002).

1 “While this result may seem harsh and unfair, to grant relief on these facts would be contrary
2 to the statutory scheme enacted by the legislature as well as our prior holdings. Indeed, we
3 have acknowledged a strong public policy supporting administrative deadlines and have
4 further explained that “[l]eaving land use decisions open to reconsideration long after the
5 decisions are finalized places property owners in a precarious position and undermines the
6 Legislature’s intent to provide expedited appeal procedures in a consistent, predictable and
7 timely manner.” *Chelan County v. Nykreim*, 146 Wn.2d 904, 933, 52 P.3d 1 (2002). This
8 court has faced numerous challenges to statutory time limits for appealing land use decisions
9 and has repeatedly concluded that the rules must provide certainty, predictability, and
10 finality for landowners and the government. Petitioners offer us no mechanism that would
11 permit them to assert their claim under LUPA’s statutory framework”. *Durland v. San Juan*
12 *County*, 182 Wn.2d 55, 340 P.3d 191 (2014).

13 9. In *Durland*, and in this matter, the San Juan County Department of Community
14 Development and Planning issued the building permit, which was subject to appeal to a
15 hearing examiner under SJCC 18.80.140(B)(11). Only a decision by the hearing examiner
16 qualifies as a land use decision that is subject to appeal under LUPA. Because none of the
17 parties essentially opposing the Wilton building permit filed an appeal to the hearing
18 examiner as they could have done, the examiner did not issue a final determination, and they
19 failed to obtain a land use decision under LUPA. The Supreme Court ruling is very clear –
20 subsequent challenges of such permit must be rejected.

21 10. The *Durland* decision expressly declined to recognize equitable exceptions to LUPA’s
22 exhaustion requirement because the exhaustion requirement furthers LUPA’s stated purposes
23 of promoting finality, predictability, and efficiency. The case even discusses a previous
24 decision where LUPA’s 21-day appeal window barred a citizens’ group’s challenge to a
25 construction project, despite the fact that the county mistakenly failed to provide public notice
for two public hearings on permit extensions for the project, explaining that “even illegal
decisions must be challenged in a timely, appropriate manner”.

11. This is even true for state agencies. For instance, the Washington Supreme Court has
ruled that the Department of Ecology could not collaterally challenge a local government’s
determination that a project was not within the shoreline jurisdiction by bringing independent
enforcement actions against the property owner or developer. *See Samuel’s Furniture v.*
Dep’t of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002)(because Ecology failed to file a
LUPA petition challenging a City’s land use decisions relating to the Samuel’s project within
21 days, it could no longer challenge the City’s determination that the project is not within
the shoreline jurisdiction).

12. Further, the Department of Ecology cannot collaterally challenge the county’s
issuance of a building permit by acting directly against a business/property owner. *Twin*
Bridge Marine Park, LLC v. Dep’t of Ecology, 162 Wn.2d 825, 175 P.3d 1050 (2008).

1 13. County-issued building permits implicitly demonstrate that the permits received were
2 sufficient. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, Par. 25, 175
3 P.3d 1050 (2008), citing RCW 90.58.140. And, the County could not issue a building permit
4 if the permits were in violation of the SMA or of the County's SMP. *Twin Bridge*, citing
5 *WAC 173-27-140* (“*Ipsa facto, [by issuing a building permit] the County found that Twin
6 Bridge's development was in total compliance with the existing law. If Ecology determined
7 that the County's final land use decision [building permit] was improperly issued, then the
8 agency is required to file an appeal under LUPA.*”).

9 14. Justice Fairhurst’s concurring opinion in the Twin Bridge case is instructive in this
10 matter, where she observed: “*A local government could knowingly or innocently issue a
11 building permit authorizing development that violates the SMA. Then, Ecology would be
12 precluded from challenging the building permit decision after 21 days expired regardless of
13 whether Ecology was notified of the issuance of the building permit. While this presents a
14 possible obstacle to ensuring the enforcement of the SMA, our role is to interpret the statutes
15 as enacted by the legislature, not to rewrite the law.*” *Twin Bridge, Concurring opinion, @
16 Par 57.*

17 15. The Washington Legislature is presumed to be familiar with its prior enactments and
18 judicial interpretations of same.⁴ And, where a legislative body leaves an enactment
19 unchanged in the face of a decision interpreting such enactment, courts can conclude that if
20 the legislative body wanted to change terms of its enactment it would have expressly amended
21 relevant language to do so rather than leave it unchanged.⁵

22 16. The Examiner notes that the Washington Legislature recently adjourned its 2020
23 session as it did in prior years following Washington Supreme Court decisions interpreting
24 and applying language in the state’s Land Use Petition Act (LUPA) – without expressly
25 amending the statute to reverse or modify precedent established by the state’s highest court.
26 Accordingly, the Examiner finds and concludes that if the Legislature wished to change the
court’s rulings mandating building permit appeals under LUPA, it would have expressly

⁴ *State v. George*, 161 Wash. 2d 203, 211, 164 P.3d 506, 510 (2007); *State v. Ose*, 156 Wash. 2d 140, 148 (2005).

⁵ *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.*, 118 Wash. 2d 488, 496-97 (1992)(Washington Legislature left a statute undisturbed in the face of a Supreme Court’s court decision interpreting and applying a specific statute. “The Legislature is presumed to be aware of judicial interpretation of its enactments”, citing *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887, 652 P.2d 948 (1982). The Supreme Court concluded that if the Legislature wished to change the court’s ruling, it would have expressly amended the language of the relevant statute rather than leave it unchanged. Because the statutory language at issue remained unchanged since the time of this court's decision, the Court was not persuaded that it should overrule clear precedent interpreting the same statutory language, which was left unchanged by the Legislature).

1 amended the language of the relevant statute rather than leave it unchanged.

2 17. Here, there is no evidence to establish that the underlying building permit was issued
3 based on misdeeds or illegal acts by the applicants or County staff. Nothing in this decision
4 should be read or construed to imply such a thing. The case discussion provided herein is
5 offered for the purpose of showing how far more compelling and extreme situations are still
6 insufficient to essentially overturn an unchallenged building permit decision.

7 18. In fact, the Examiner concludes that the facts presented in this matter would most
8 likely have resulted in the same decision made in the building permit – i.e. build only on the
9 existing fill pad, so as to prevent additional disturbance of surrounding wetlands – whether
10 such project review was part of a substantial development permit review process or other
11 approval beyond building permit review.

12 19. In this variance application process, based on clear direction from the Washington
13 Supreme Court, the Examiner must respectfully decline requests by permit opponents to
14 essentially re-write the building permit to relocate placement of the house, or to re-open
15 SEPA review for the project, among other things.

16 20. All approval criteria for the Wilton's requested shoreline variance from an aesthetic
17 setback have been satisfied, subject to conditions of approval. Accordingly, the requested
18 variance merits approval.

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

21 VI. DECISION, CONDITIONS OF APPROVAL.

22 Based on the record, and for the reasons set forth above, the Shoreline Variance from
23 an aesthetic setback for the Wilton house construction project is approved, subject to the
24 following Conditions of Approval, which are attached hereto, and incorporated herein by
25 reference.

26 ISSUED this 6th Day of April, 2020



Gary N. McLean
Hearing Examiner

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CONDITIONS OF APPROVAL

SHORELINE VARIANCE FROM AESTHETIC SETBACK

Wilton Project
258 Sylvan Circle, Shaw Island
TPN No. 263050025000
File No. PSJVAR-19-0001

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

1. Development activities on the Wilton property shall conform to the site plan approved with building permit no. BUILDG-18-0091, included in the record as *Exhibit 6*.
2. The proposed Mitigation Plan by Water & Land Natural Resource Consulting, LLC, *Exhibit 1A*, shall be implemented/planted and monitored as proposed, except the schedule may be modified by these conditions. To ensure maximum survival for plant materials addressed in the Mitigation Plan, plants should be planted in the Fall, typically around mid-October. If home construction is still ongoing at such time, planting may occur the following Spring.
3. Mitigation as-built documentation and monitoring must be completed by a qualified professional on the schedule set forth below, originally recommended in the proposed mitigation plan by Water & Land Natural Resource Consulting, LLC, *Exhibit 1A*, and revised by the Examiner due to timing issues. The deadlines and schedules included in these Conditions and the Mitigation Plan may be revised by the Director, based on delays caused by subsequent reviews or appeals of this variance. Except for the schedule modifications listed below, all other terms and requirements for the Mitigation Plan remain unchanged, as set forth in Ex. 1A
 - A) An as-built plan described in the Mitigation Plan must be submitted to the DCD Director within 30-days of planting, and if planting is not possible in the Fall of 2020, the applicant must inform the Director of such delay and submit an as-built plan within 30-days of planting in the following Spring of 2021.
 - B) An as-built report documenting mitigation measure implementation must be submitted by December 31, 2020, or within 30 days of Spring planting in 2021. Annual monitoring reports describing survival of plant materials in planting areas 1, 2, and 3 must be submitted to the DCD Director by November 1 each year following completion of all planting work, for at least five years. The Director may extend the monitoring report period and the applicant's obligation to ensure survival or replacement plants in order to fulfill the Mitigation Plan for an additional period of time, up to an additional five years, if in her judgement, circumstances

1 warrant such extension in order to ensure that the Mitigation Plan fulfills its long-term
2 purpose and objectives.

3 4. Mitigation installation activities shall occur by hand. No use of heavy or mechanized
4 equipment is allowed.

5 5. Planting area 3 appears to be partially located on a separate parcel owned by the Neck Cove
6 homeowner's association. If permission for planting is not granted for planting at the base of the rock
7 wall on the common area, an alternative location shall be submitted to the Director for her review and
8 approval. The alternative must provide equivalent screening and ecological function.

9 6. The financial guarantee in the amount of 115% of the cost estimate contained in proposed
10 mitigation plan by Water & Land Natural Resource Consulting, LLC, *Exhibit 1A* shall be submitted
11 to the Department of Community Development within 60 days of final approval by the Department
12 of Ecology. This amount is \$20,211.33.

13 7. All activities on the site shall adhere to the Best Management Practices recommended in the
14 Fish and Wildlife Habitat Conservation Areas Report by Water & Land Natural Resource Consulting,
15 LLC (*Exhibit 1B*).

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

19 9. Consistent with SJCC 18.80.110.G.5, construction or substantial progress toward
20 construction of this Project must be undertaken within two years after WDOE's date of filing.
21 Substantial progress toward construction includes letting bids, making contracts, purchase of
22 materials, utility installation and site preparation, but does not include use or development
23 inconsistent with the SMP or the terms of permit approval. However, the two-year period does not
24 include time when development could not proceed due to related administrative appeals or litigation,
25 nor include time necessary to obtain other required permits for the project from state and federal
26 agencies.

10. Consistent with SJCC 18.80.110.G.6, all development authorized by this shoreline permit
shall be completed within five years of the WDOE date of filing or the permit shall become null and
void. A permittee may request a time extension before the permit expires by making a written request
to the Director, stating the reasons. The hearing examiner will review the permit, and upon a finding
of good cause:

- a. Extend the permit for a period not to exceed one year; or
- b. Terminate the permit.

11. 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

1 the finding that the permittee has failed to comply with the terms and conditions thereof. In addition,
2 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.

3 12. Consistent with WAC 173-27-190, construction or site work authorized pursuant to this
4 variance shall not begin and is not authorized until twenty-one days from the date of filing as defined
5 in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-
one days from the date of such filing have been terminated; except as provided in
RCW 90.58.140 (5)(a) and (b).

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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.