

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

In the Matter of the Application of)	NO. PSJ000-14-0016
Snug Harbor Associates LLC)	
)	
)	
)	Snug Harbor Marina Expansion
for Approval of Shoreline Substantial)	Decision on Request for Reconsideration
Development and Shoreline Conditional)	
<u>Use Permits</u>)	

On May 27, 2015, former San Juan County Hearing Examiner Phil Olbrechts issued a decision (Decision) denying the above-captioned applications. On June 2, 2015, the Applicant submitted a timely request for reconsideration alleging errors of law. The request was presented to the current County Hearing Examiner on June 5, 2015. The Department of Community Development issued timely notice of the request to parties of record. Several parties of record submitted comments in response to the request.

On June 16, 2015, the County's new hearing examiner issued an order¹ requesting a response to the reconsideration request from Department of Community Development Staffⁱⁱ, excluding comments from other parties, and requesting to review the complete record.¹

Having reviewed these items, the Examiner enters the following decision on reconsideration.

Jurisdiction

Pursuant to San Juan County Code (SJCC) 2.22.210.O.1, reconsideration of any decision may be granted if the following are demonstrated:

- a. Error(s) of procedure;
- b. Error(s) of law or fact; and/or
- c. Error(s) of judgment.

Standard of Review

In order to determine whether the Decision contains an error of law, the appropriate standard is the “clearly erroneous” standard of review, under which the Hearing Examiner examines the

¹ Pursuant to San Juan County Code (SJCC) 2.22.210.O.6, "Hearing Examiner's Action on Request": The hearing examiner shall consider the request for reconsideration without a hearing, but may solicit written arguments from parties of record. A decision on the request for reconsideration shall be issued within 10 business days after receipt of the request for reconsideration by the County or the last date of receipt of any written arguments, whichever is later.

entire record in light of the policy set forth in the ordinance and reverses the decision only if s/he is left with a definite and firm conviction that a mistake was made.²

Discussion

Marinas Are a Prohibited Use in the On-Site Shoreline Environments

The Decision denied the applications on the grounds that because the on-site Aquatic shoreline environment abuts a Conservancy shoreline environment, and marinas are prohibited in the Conservancy environment, therefore marinas are prohibited in the on-site Aquatic environment by operation of SJCC 18.50.190.K.6.

SJCC 18.50.190 Boating facilities (including docks, piers, and recreational floats).

Notwithstanding any other provision of this code, all docks, floats, piers or other moorage structures in village and hamlet activity centers, including any breakwater attendant to such moorage structures, except those regulated under subsection (G) of this section (residential docks) shall be prohibited. This provision shall not affect the ability of an applicant to obtain required approvals to repair, replace, enhance, modify, or enlarge any existing dock, float, pier or other moorage structure in a manner consistent with existing law.

...

K. Regulations by Environment.

...

4. Conservancy [shoreline environment]. Boat launches, marine railways, and boathouses associated with them, may be allowed as conditional uses only. Other boating facilities serving single-family residences and community docks shall be permitted in these environments subject to the policies and regulations of this SMP. Marinas shall not be permitted.

...

6. Aquatic. Marina facilities, docks, and boat launches which are shoreline dependent shall be permitted in the aquatic environment subject to the policies and regulations of this SMP and to the regulations by environment applicable to the abutting shoreline area. Where a proposed boating facility abuts more than one shoreline environment, the policies and regulations of the most restrictive abutting environment shall govern.

On reconsideration, the Applicant argues that marinas are allowed in the Aquatic environment, and that the only expansion proposed would be located in the Aquatic environment, so the proposed expansion should be allowed. This reading of the ordinance would render the last sentence of SJCC 18.80.100.K.6 meaningless and it cannot be accepted.

Expansion of Legally Nonconforming Use

There is no dispute that the existing marina is legally nonconforming with respect to its location in a Conservancy shoreline environment.

The Applicant argues that the legally nonconforming marina use should be allowed to expand through the application of SSJC 18.80.100.J.1.b, which establishes that expansion of

² *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894 (2004), citing *Schofield v. Spokane County*, 96 Wn.App 581, 586 (1999); see *Buttnick v. Seattle*, 105 Wn.2d 857 (1986).

nonconforming [shoreline] use is a shoreline conditional use. On reconsideration, the Applicant contends that the County's former Hearing Examiner committed an error of law in considering expansion of the legally nonconforming marina under the provisions of SJCC 18.40.310.F rather than under SJCC 18.80.100.J.1.b.

This is not persuasive for two reasons. First, SSJC 18.80.100.J.2 expressly states that uses which are specifically prohibited by the Shoreline Master Program shall not be authorized through a conditional use permit. Marinas are prohibited in the Conservancy environment, and when abutting a Conservancy environment, are prohibited in the on-site Aquatic environment. Therefore, as a use prohibited by application of the SMP's Regulations by Environment, the proposed marina expansion cannot be approved as a shoreline conditional use.

Second, SJCC 18.80.100.J contains no procedures regulating the expansion of non-conforming uses; it merely defines the expansion of nonconforming shoreline uses as a shoreline conditional use. Although the Applicant argues that the "zoning code" nonconforming use provisions at SJCC 18.40.310F should not apply because they are not specific to shoreline uses, the SMP specifically makes reference to the zoning code provisions at SJCC 18.80.110.K.³ There is no discussion in the ordinance of how the two nonconforming use provisions are intended to interact, but aside from intending application of the more thorough procedures/standards of 18.40. 310.F to expansion of nonconforming shoreline uses, there is no reason for the code to reference it.

Of note, the "zoning code" nonconforming use provisions do expressly reference nonconforming shoreline uses at SJCC 18.40.310.G, which states:

G. Unless specifically provided otherwise, any nonconforming structure or use under the jurisdiction of the Shoreline Master Program shall be subject to the nonconforming use provisions in WAC 173-27-080.

Nonconforming shoreline uses are also mentioned again at SJCC 18.80.120.D, which substantially mimics the above provision:

D. Shoreline Nonconforming Uses and Structures. Any nonconforming structure or use under the jurisdiction of the Shoreline Master Program [...] shall be subject to the nonconforming use provisions in WAC 173-27-080, and the applicable procedures of Chapter 18.50 SJCC and SJCC 18.80.110.

As the Decision notes, it is unclear whether WAC 173-27-080 applies, because in its preamble it states that it only applies when the applicable SMP contains no nonconforming use standards, and San Juan County's SMP contains nonconforming use definitions and appears to incorporate the nonconforming use provisions of the zoning code. However, the zoning code repeatedly

³ SJCC 18.80.110.K: K. Nonconforming Uses. Any nonconforming structure or use under the jurisdiction of the Shoreline Master Program (Chapter 18.50 SJCC) shall be subject to the nonconforming use provisions in WAC 173-27-080, and the applicable procedures of Chapter 18.50 SJCC and this section. (See also SJCC 18.40.310 and 18.80.120.) (emphasis added)

incorporates the WAC in provisions governing nonconforming shoreline uses. As noted in the Decision, if WAC 173-27-080 does apply, it would prohibit the proposed expansion.⁴

Where There Is Ambiguity, Deference To The Agency With Expertise Is Appropriate

Finally, the San Juan County Shoreline Master Program contains arguably ambiguous provisions regarding expansion of legally nonconforming marinas adjacent to Conservancy shoreline environments. Where an ordinance is ambiguous, the agency's interpretation is accorded great deference in determining legislative intent.⁵

In the original hearing, Department of Community Development Staff recommended approval of the applications. The current County Examiner asked Staff to respond to the request for reconsideration, having had the opportunity to consider its former recommendation, the Decision denying the applications, and the request for reconsideration. In their response, Staff agreed with the Decision that the use was prohibited because Conservancy shoreline environment regulations applied to the on-site Aquatic environment.

Decision

The County's current Examiner is not convinced that the Decision is based on an error of law. Reconsideration is denied.

Revised and reissued July 30, 2015.⁶

By: 

Sharon A. Rice
San Juan County Hearing Examiner

Effective Date, Appeal Right, and 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 SJCC 18.80.110.

⁴ WAC 173-27-080, Nonconforming Use and Development Standards: When nonconforming use and development standards do not exist in the applicable master program, the following definitions and standards shall apply: ... (3) Uses and developments that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses. Such uses shall not be enlarged or expanded, except that nonconforming single-family residences ...; (7) A nonconforming structure which is moved any distance must be brought into conformance with the applicable master program and the act. ...

⁵ *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628 (1994).

⁶ This decision was revised and reissued on July 30, 2015 in order to correct the appeal instructions at the end of the document. No other changes were made.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter. Such decisions are not subject to administrative appeal to the San Juan County Council. See also, 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 the 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 consult with a private attorney.

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

ⁱ The June 16, 2015 Order on Reconsideration is incorporated into the record of this reconsideration request.

ⁱⁱ The Department's June 23, 2105 memorandum in response to the order is incorporated into the record of this reconsideration request.