

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Gerhard Rohloff
18931 Bear Creek Road
Las Gatos, CA 95033

Agent Francine Shaw
PO Box 2112
Friday Harbor, WA 98250

File No.: PSJ000-12-0017

Request: Shoreline Substantial Development Permit

Parcel No: 461451038

Location: 529 Neil Bay Drive, San Juan Island

Summary of Proposal: Joint Use Dock

Shoreline Designation: Rural Residential

Hearing Date: June 12, 2013

Application Policies and Regulations: Shoreline Master Program

Decision: Approved with conditions.

1 **BEFORE THE HEARING EXAMINER**
2 **FOR THE COUNTY OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

4

<p>5 RE: Gerhard Rohloff</p> <p>6 Shoreline Substantial</p> <p>7 Development Permit</p> <p>(PSJ000-12-00017)</p>	<p>FINDINGS OF FACT, CONCLUSIONS</p> <p>OF LAW AND FINAL DECISION ON</p> <p>REHEARING.</p>
--	---

8 **INTRODUCTION**

9 The applicant has applied for approval of a Shoreline Substantial Development
10 Permit to build a joint use dock on San Juan Island. The application is approved.

11 The application for the same dock as a single-user dock was denied on the basis that
12 there was adequate and feasible alternative moorage and the applicant had not
13 sufficiently demonstrated that existing moorage is not adequate or feasible. Upon
14 appeal to the Shoreline Hearings Board, the applicant and San Juan County entered
15 into a settlement agreement whereby the parties agreed to a second hearing before the
16 examiner for an opportunity to provide additional evidence on the adequacy of
17 existing and alternative moorage. On the rehearing, the applicant has now marginally
18 demonstrated that denial of the application would cause the applicant to continue to
19 drag a dingy across kelp beds located at his property, which could cause more
20 environmental damage than building the proposed joint use dock. For this reason, the
21 applicant has established that existing and alternative moorage is not adequate or
22 feasible.

23 This decision purposely avoids addressing the issue of whether Friday Harbor
24 moorage is not adequate and feasible alternative moorage because of the arguably
25 lengthy boating and driving distances from the north end of San Juan Island to the
Port of Friday Harbor. The applicant provided some compelling testimony from Mr.
Pat O'Day that the boating and driving time between the north end of the island is
what many people would find to be unreasonably long. However, the travel times
asserted by Mr. O'Day conflict with shorter travel times found in at least one other
shoreline case involving properties located at roughly the same distance from the Port
of Friday Harbor as well as the travel times asserted by the applicant's attorney on the
original application on this matter. Further, even if Mr. O'Day's travel times prove to
be the more accurate, it is still debatable whether these travel times are long enough
to render the Port of Friday Harbor inadequate and infeasible as alternative moorage.
In point of fact, as discussed in the prior decision on this application, prior shoreline

1 cases strongly suggest that the boating and driving distances to the Port of Friday
Harbor marina are adequate and feasible.

2 This adequacy and feasibility of the Port of Friday Harbor as alternative moorage is a
3 hugely significant issue for San Juan Island. If the Port of Friday Harbor is found
4 adequate and feasible for the applicant's property, the marina is likely adequate and
5 feasible for every other shoreline property on San Juan Island, since few San Juan
6 island properties are located further from the marina than that of the applicant. In
7 short, a finding of adequacy for the applicant's property would set a precedent for
8 denial that would be very difficult for any other San Juan Island dock applicant to
overcome. Given the significance of this precedent, the issue of adequacy needs to be
zealously represented on both sides where more complete evidence can be provided
on the travel times and other inconveniences associated with boat travel from the Port
of Friday Harbor to the north end of San Juan Island.

9 TESTIMONY

10 Staff Testimony

11 Lee McEnery, Community Development and Planning, stated that the hearing
12 examiner denied the original Rohloff dock proposal in March, 2013. This denial was
13 appealed to the Shoreline Hearings Board. In the form of a settlement offer, the
14 applicant's agent offered an alternative proposal. Staff has provided no
15 recommendation with the proposal, but the staff report provides background and
analysis of the offer.

16 Rene Beliveau, CDP Director, testified that the agreement entered into by CDP and
17 the applicant's attorney provides that staff makes no recommendations regarding
18 denial or approval of the settlement offer. The staff report provides basic background
19 which is consistent with hearing examiner rules and policies. The applicant has
provided additional information since the time that the staff report was prepared.
Staff has not analyzed this additional information.

20 Applicant Testimony

21 Stephanie O'Day, representing Gerhard Rohloff, stated that Mr. Rohloff originally
22 submitted an application for a single-user dock in Neil Bay. The dock was denied
23 because it was analyzed differently than a joint-use dock. San Juan County Code
24 allows single-user docks, but, at the same time, discourages them to avoid the
25 proliferation of over-water structures. Mr. Rohloff appealed the denial of his
proposal in March, 2013. At this time, Mr. Rohloff began discussing the possibility
of a joint-use dock with his neighbors, the Jacobsons. In April, the first settlement
conference was held with county staff to discuss the joint-use dock proposal. Mr.
Rohloff, Mr. Beliveau, and two attorneys signed a settlement agreement.
Subsequently, Mr. Rohloff and the Jacobsons signed a joint-use agreement with

1 measures to create an easement for the Jacobsons to reach the proposed dock from
2 their property. The Jacobsons' property is immediately west of the Rohloff property.
3 Mr. Rohloff has waived his right to have a determination of his appeal by the
4 Shoreline Hearings Board within 180 days. In regard to a mooring buoy being a
5 viable alternative to a dock, at the Rohloff site, currently, there is a small
6 kayak/dinghy pier that was approved several years ago which is 12ft above zero tide.
7 This elevation makes it inaccessible at most tides. There is no place on the beach to
8 moor a dinghy or kayak. Currently, Mr. Rohloff uses an elaborate pulley system to
9 use a boat at his site, but this method is damaging the sub-strait. A port is not an
10 alternative because of the Neil Bay location. It takes approximately 2.5 hours to
11 reach the subject site by boat from Friday Harbor. The port of Friday Harbor has told
12 Mr. Rohloff that the port is fully subscribed in the summer months. In an email, the
13 Friday Harbor Master noted that there are four slips available for year-round
14 moorage. However, the available ports are still too far from the north-end of San
15 Juan Island.

10 Mr. Grifo, representing Barry and Robin Jacobson, noted that the Jacobsons are
11 excited to have access to a dock from their property. The Jacobsons have never
12 considered keeping a boat at Friday Harbor because of the distance from Neil Bay.
13 The Jacobsons are environmentally conscience and would not participate in this
14 proposal if they believed it would be detrimental to the surrounding water habitats.
15 The dock proposal includes light-penetrating grating which protects the existing water
16 habitats. Mr. Rohloff has granted the Jacobsons an easement across his property to
17 reach the new dock. The option to buy-in to the dock runs with the land. The joint-
18 use agreement is binding on the Jacobson parcel forever.

15 Pat O'Day stated that he has been a resident and landowner at the north-end of San
16 Juan Island since 1980. The area has developed greatly since 1980 because of the
17 beautiful water and shelter from the southeast winds. To travel by boat from Friday
18 Harbor to Neil Bay, Mr. Rohloff would have to navigate the dangerous southeast and
19 southwest winds, according to Mr. O'Day. Mr. Rohloff should not have to travel
20 such great distance to enjoy recreational water activities near his property. It would
21 take approximately three hours to reach Mr. Rohloff's property from Friday Harbor,
22 and he would have to travel through substantial waves and rough traffic water. There
23 is no safety dock to pull into between Neil Bay and Friday Harbor.

21 Bob Wells noted that he has lived at the north-end for 37 years. He crabs, fishes, and
22 does other recreational activities at the north-end. The waters are some of the best
23 crabbing waters on the islands. Roche Harbor, at the north-end, is the most protected
24 harbor in San Juan. He has been an avid scuba diver since 1972 and is also a
25 commercial diver. Professionally, he has completed many eel grass surveys and
microalgae studies for the State of Washington. Mr. Wells has done two studies at
the Rohloff property. The channels that an individual travels to reach the north-end
of the island often become extremely turbulent. Many times, boaters cannot deduce
the level of turbulence until they are already on the water. In Mr. Wells' opinion,
Friday Harbor is not a feasible port for someone who owns property on the north-end

1 of the island. In addition to the turbulent boating path, the parking around Friday
2 Harbor is very limited. Also, the roads and parking spaces are very narrow so
3 vehicles large enough to hold boating equipment struggle to navigate the area. In
4 regard to Mr. Rohloff's current pulley system, there is underwater growth where the
5 system comes out of the water. When Mr. Rohloff retrieves his skiff, he is damaging
6 the surface bottom. The microalgae are harmed during the process. The proposed
7 dock would hold Mr. Rohloff's off the bottom surface, thus it has much less
8 detrimental impact. Mr. Wells designed the dock to be 100 percent light-permeable.
9 The 30ft float will also be completely light-permeable. The design includes stops
10 which keep the float off the sub-strait. By utilizing the dock and mooring buoy, Mr.
11 Rohloff can avoid prop-scour during low tides. Removing the unpermitted stairs and
12 building the dock will improve the environment on the site in Mr. Wells' opinion.
13 Mr. Rohloff's boat has a motor that comes all the way out of the water.

14 Mr. Wells has studied marine biology on his own and has taken several courses in the
15 subject, but he does not have a degree in the subject. He has been approved to do
16 underwater studies by a member of the Washington Department of Fisheries. He has
17 done over 40 eelgrass studies. The current dragging method utilized by Mr. Rohloff
18 damages the laminaria by ripping it out. Fish spawn in the area in addition to using it
19 as cover. There is a 13ft tide extreme for the north-end area. Additionally, Mr. Wells
20 believes Mr. Rohloff's pulley system is physically dangerous for a person to use.

21 Gerhard Rohloff stated that he previously had an eagles nest on his property, but it
22 fell. He decided to build a professional, aluminum nest in an attempt to protect the
23 eagles the next time they nest. Nature is very important to him, and he would not
24 build this dock if it was environmentally detrimental. He has been a member of the
25 Sierra Club for over 21 years.

Stephanie O'Day added that joint-use docks are reviewed differently than single-use
docks. Many previous joint-use dock applications have been approved. The joint-use
agreement will run with the land. This proposal should not be treated any differently
than other approved joint-use docks. The port of Friday Harbor is infeasible for use
by north-enders. She noted the Shorett II decision where a single-use dock was
denied in Shorett I, but approved in the subsequent decision process when the dock
became joint-use.

EXHIBITS

The exhibits, testimony and hearing examiner decision of the original application for
the single-user dock of this case are admitted into and considered a part of this
administrative record. In addition, the following exhibits were admitted at the June
12, 2013 rehearing:

Exhibit 1 Staff report

Exhibit 2 settlement agreement

Exhibit 3 Memo from Stephanie O'Day dated June 11, 2013 w/ attachments

1 Exhibit 4 colored 8x11 photos of the project site
2 Exhibit 5 tide charts

3 FINDINGS OF FACT

4 **Procedural:**

- 5 1. Applicant. The applicant is Gerhard Rohloff.
6 2. Hearing. The Hearing Examiner conducted a rehearing on the subject
7 application at 10:00 am on June 12, 2013.

8 **Substantive:**

9 3. Site and Proposal Description. The applicant proposes to construct a joint use
10 dock on lot 38 of the Neil Bay long subdivision on the northern end of San Juan
11 Island. The dock would have a 6' x 30' pier, a 3' x 30' ramp and a 8' x 32' float. Pairs
12 of pilings would be located at the seaward end of the pier, and each end of the float.
13 The dock would be 526 square feet in area and 86 feet in length as measured from the
ordinary high water mark. An existing 4' x 8' pier platform, referenced as a kayak
dock, supports the landward end of the pier. Different amounts of light-permeable
grating would be used on the pier, ramp and float.

14 The pilings will be made of steel such that they will be structurally sound. ACZA
15 pressure treated wood will be used to construct the structural portions of the dock.
16 The pilings have a minimum clearance of at least 2.5 feet at EHHW. The piles which
17 support the float incorporate stops to prevent the float from grounding. The float tubs
18 will be constructed of foam encased entirely in a molded plastic. No overhead
19 wiring, plumbing or structures will be placed upon the dock. The pier will not
extend waterward of the extreme low tide contour. There is no dock lighting
proposed. The dock will blend visually with the background as it will remain
unpainted and in a natural condition resembling earth tones. The dock is set back a
minimum of ten feet from all side property lines.

20 The proposed dock qualifies as a joint use dock because of the proposed joint use
21 dock agreement with the Jacobsons, attached as Ex. 3 to the memo of Stephanie
22 O'Day (Ex. 3 of this administrative record). The agreement prohibits the Jacobsons
or any successors in interest to their property from constructing a dock on their
property and gives them an option to use the applicant's dock instead.

23 4. Characteristics of the Area. Neal Bay is a shallow bay heavily developed
24 with docks. The Rohloff property is located at the mouth of the bay.

25 5. Adverse Impacts of Proposed Use. There are no significant adverse
impacts associated with the proposal. A Determination of Non-significance was
issued for the proposal and no comments were received regarding the DNS.

1 The site is within a drift sector (SJ-2) but the float is small and is likely to have little
2 impact on littoral drift. Water quality will not be impacted because Neal Bay has
3 active water circulation and flushing. A marine habitat survey was submitted with the
4 application that indicated that no eel grass is present in the immediate vicinity of the
5 dock expansion. The survey showed laminaria so orientation and surface grating are
6 proposed to mitigate any potential impacts, though none are expected. The proposed
7 dock is not expected to interfere with navigation along the shoreline as the size of the
8 dock meets the dimensional regulations and is not located within a navigation
9 channel. In addition, the proposal is not expected to substantially interfere with
10 scenic views as there are already many docks in the vicinity nor is it expected to
11 impede public access to the shoreline.

12 Bob Wells, a person who has prepared more than 40 eelgrass surveys for the
13 Washington State Department of Fish and Wildlife and who has training in shoreline
14 aquatic habitat, testified on rehearing that prop scour would not damage the laminaria
15 beds at the project site because the dock would allow the applicant's boat to be
16 moored at a sufficient depth to avoid that problem. Further, Mr. Wells testified that
17 the current practice of the applicant with existing moorage in dragging a skiff up to
18 100 feet across exposed laminaria beds causes damage to the laminaria. Mr. Wells is
19 not a fisheries biologist and he does not hold any degree in the biological sciences.
20 However, he provided the only site specific testimony on the impacts of prop scour
21 and he does have significant experience in working with and delineating aquatic
22 habitat. Friends of the San Juans provided some evidence in the original hearing on
23 tidal elevations and the proximity of the draft of the applicant's boat to laminaria
24 beds, but Mr. Wells presented the only site specific opinion on whether this proximity
25 could generate harmful prop scour. No one was present at the rehearing to question
Mr. Wells credentials or expertise on this issue. Given the absence of any contrary
evidence, the opinion of Mr. Wells on the impacts of prop scour is found to be
determinative.

18 Cumulative impacts are not an issue. The parcel one of the last parcels in Neal Bay
19 that does not have any dock access. The proposal will not serve as a precedent that
20 sets off a "porcupine effect" and the addition of one more dock to this heavily
21 developed shoreline will not create any discernible cumulative impact from an
22 aesthetic or environmental standpoint.

22 6. Existing and Alternative Moorage. Existing moorage is challenging and difficult
23 to use. Existing moorage is currently comprised of beach access stairs and a kayak
24 dock, which was constructed in 2001. The kayak dock is located thirteen feet above
25 ground level. Because of this height, the dock is inaccessible except during extreme
high tide. Mr. Rohloff added a set of aluminum stairs to extend from the kayak deck
to the beach below. The aluminum stairs have not been authorized by San Juan
County. The shallow depth of Neil Bay results in low tides that require Mr. Rohloff
to land his dingy up to 100 feet away from his dock. Mr. Rohloff must use a pulley

1 system to drag his boat across the beach floor and up the steep bank when the tides
2 are not high enough to reach the kayak pier.

3 For the original application, the applicant identified three commercial marinas. It is
4 unclear from the record whether any other marinas could serve the project area, but
5 given no evidence to the contrary the three marinas assessed by the applicant are
6 found to be the only commercial marinas available for the project site. It is
7 undisputed that Roche Harbor, the closest marina, has a 10-12 year waiting list. A
8 letter from Snug Harbor, located 7.5 miles from the project site, notes that two 32 foot
9 slips are available, but they are not suitable for a sailboat or power boat with a deeper
10 draft. See Ex. 5 of original application. The letter also states that there is very little
11 turnover in the slips and it is unlikely any more slips will be available in the near
12 future. The applicant asserts that their boat has a four foot draft that is not compatible
13 with the two available slips and there is no evidence to the contrary.

14 The applicant also asserts that moorage in the Port of Friday harbor is not reasonable
15 or feasible. The applicant's attorney testified at the original hearing that the driving
16 time to the Friday Harbor marina, located 11 miles from the project site, is a half hour
17 and that the boating time back to the applicant's property is an hour. Mr. O'Day
18 testified during rehearing that the boating trip would take three hours and would
19 involve dangerous headwinds. In *Shorett v. San Juan County*, SHB No. 06-039, the
20 Hearings Board determined that the travel time to property that appears to be located
21 a small distance further from the Port of Friday Harbor than the subject property was
22 an hour and a half.

23 CONCLUSIONS OF LAW

24 **Procedural:**

25 1. Authority of Hearing Examiner. Shoreline Substantial Development
permit applications are reviewed and processed by Development Services Department
staff, and the Hearing Examiner, after conducting an open-record public hearing,
renders a decision on the shoreline permit. SJCC18.80.110(E).

26 **Substantive:**

27 2. Shoreline Designation. The subject property is designated as Rural
Residential.

28 3. Permit Review Criteria. SJCC 18.50.190(K)(3) permits docks serving
single family homes in the Rural Residential shoreline designation subject to the
policies and regulations of the SMP. SJCC 18.50.190(G)(4) requires a shoreline
substantial development permit for development of docks on lots intended for single-
family development unless exempt. No exemptions apply to this project. SJCC
18.80.110(H) establishes the criteria for approval of shoreline substantial
development permits. The criteria include the policies of the Shoreline Management
Act (Chapter 90.58 RCW), the policies and use regulations of the San Juan County

1 Shoreline Master Program, and the requirements of the San Juan Municipal Code and
2 Comprehensive Plan. As noted in SJCC 18.50.010(A), Element 3 of the San Juan
3 County Comprehensive Plan comprises the policies of the San Juan County Shoreline
4 Master Program. The applicable policies and regulations are quoted in italics below
5 and applied through conclusions of law.

6 **RCW 90.58.020 Use Preferences**

7 *This policy (Shoreline Management Act policy) is designed to insure the development*
8 *of these shorelines (of the state) in a manner which, while allowing for limited*
9 *reduction of rights of the public in the navigable waters, will promote and enhance*
10 *the public interest. This policy contemplates protecting against adverse effects to the*
11 *public health, the land and its vegetation and wildlife, and the waters of the state and*
12 *their aquatic life, while protecting generally public rights of navigation and corollary*
13 *rights incidental thereto.*

14 4. As determined in Finding of Fact No. 5, the proposal will not interfere
15 with navigation and the proposal will not create any significant adverse
16 environmental impacts. For all these reasons the proposal is in the public interest and
17 is consistent with the policy

18 **RCW 90.58.020(1)¹**

19 *Recognize and protect the statewide interest over local interest;*

20 5. The statewide interest is protected. The project minimizes environmental
21 impacts through its design (most notably grating) and location (away from eelgrass
22 beds) while facilitating shoreline access.

23 **RCW 90.58.020(2)**

24 *Preserve the natural character of the shoreline;*

25 6. As previously noted, the project minimizes environmental impacts through
its design (most notably grating) and location (away from eelgrass beds). As a result,
the natural character of the shoreline should be preserved.

RCW 90.58.020(3)

Result in long term over short term benefit;

7. The proposal facilitates shoreline access with no corresponding significant
adverse impacts. Under these conditions approval results in long term over short
term benefit.

¹ RCW 90.58.020(1)-(6) applies to shorelines of statewide significance. Section 3.4.F of the San Juan
County Comprehensive Plan identifies all saltwater surrounding the islands of San Juan County as
shorelines of statewide significance. The policies of 90.58.020(1)-(6) are mirrored in the policies of
Section 3.4.F of the Comprehensive Plan and for the reasons provided in assessment of RCW
90.58.020, the Examiner also finds consistency with the policies of Section 3.4.F.

1 **RCW 90.58.020(4)**

2 *Protect the resources and ecology of the shoreline;*

3 8. The project minimizes adverse impacts through its design and location.
4 As a result, the resources and ecology of the shoreline should be adequately
5 protected.

6 **RCW 90.58.020(5)**

7 *Increase public access to publicly owned areas of the shorelines;*

8 9. Access to the proposed dock will be on private shoreline, as a result, it will
9 not impact public access to a publicly owned area of the shoreline.

10 **RCW 90.58.020(6)**

11 *Increase recreational opportunities for the public in the shoreline;*

12 10. The proposed dock will provide increased private recreational
13 opportunities on the shoreline, but as the shoreline area in question is not public, there
14 will be no impact in public use of the shoreline as a result.

15 **San Juan County Code Regulations**

16 **SJCC 18.50.190(B)(1):** *Boating facilities shall be designed to minimize adverse
17 impacts on marine life and the shore process corridor and its operating systems.*

18 11. As determined in Finding of Fact No. 5, the proposal will not create any
19 significant adverse impacts to the shoreline environment, which includes marine life
20 and shore processes and operating systems.

21 **SJCC 18.50.190(B)(2):** *Boating facilities shall be designed to make use of the
22 natural site configuration to the greatest possible degree.*

23 12. The proposed location of the dock would enable use of the existing stairs.
24 Locating the dock elsewhere would require new stairs that in turn would involve a
25 significant amount of vegetation and tree removal and excavation. Even discounting
the stair factor, there is no better location apparent for the dock that would be more
compatible with natural site configuration. Given these factors, the dock has been
designed to make use of the natural site configuration to the greatest possible degree.

SJCC 18.50.190(B)(3): *All boating facilities shall comply with the design criteria
established by the State Department of Fish and Wildlife relative to disruption of
currents, restrictions of tidal prisms, flushing characteristics, and fish passage to the
extent that those criteria are consistent with protection of the shore process corridor
and its operating systems.*

13. As noted in the environmental checklist, Ex. 3 of the original application, hydraulic permit approval from the Washington State Department of Fish and Wildlife (“WDFW”) is required for the proposal. In order to acquire hydraulic permit approval, the Applicants had to comply with all applicable WDFW shoreline regulations.

SJCC 18.50.190(B)(4): *Areas with poor flushing action shall not be considered for overnight or long term moorage facilities.*

14. As determined in Finding of Fact No. 5, the site has good flushing action.

SJCC 18.50.190(B)(5): *In general, only one form of moorage or other structure for boat access to the water shall be allowed on a single parcel: a dock or a marine railway or a boat launch ramp may be permitted subject to the applicable provisions of this code. (A mooring buoy may be allowed in conjunction with another form of moorage.) However, multiple forms of moorage or other structures for boat access to the water may be allowed on a single parcel if:*

a. Each form of boat access to water serves a public or commercial recreational use, provides public access, is a part of a marina facility, or serves an historic camp or historic resort; or

b. The location proposed for multiple boat access structures is common area owned by or dedicated by easement to the joint use of the owners of at least 10 waterfront parcels.

15. The proposed dock will be the only form of moorage available to serve the project site.

SJCC 18.50.190(B)(6): *Structures on piers and docks shall be prohibited, except as provided for marinas in subsection (H) of this section.*

16. No structures are proposed on the dock.

SJCC 18.50.190(C)(1): *Multiple use and expansion of existing facilities are preferred over construction of new docks and piers.*

17. The proposal is for joint-use.

SJCC 18.50.190(C)(2): *Mooring buoys shall be preferred over docks and piers on all marine shorelines except in the cases of port, commercial, or industrial development in the urban environment.*

18. The criterion above asserts a preference for mooring buoys and does not mandate their use for all shorelines. In this particular case a mooring buoy is not the best form of moorage from an ecological standpoint because it entails the damage to laminaria beds via the applicant’s practices of dragging his dinghy across exposed laminaria beds to reach the mooring buoy.

1 **SJCC 18.50.190(C)(3):** *Moorage floats, unattached to a pier or float, are preferred*
2 *over docks and piers.*

3 19. A mooring float is not environmentally ideal for the reasons stated in
4 Conclusion of Law No. 18.

5 **SJCC 18.50.190(C)(4):** *Every application for a substantial development permit for a*
6 *dock or pier construction shall be evaluated on the basis of multiple considerations,*
7 *including but not limited to the potential impacts on littoral drift, sand movement,*
8 *water circulation and quality, fish and wildlife, navigation, scenic views, and public*
9 *access to the shoreline.*

10 20. The considerations identified above are all addressed in Finding of Fact
11 No. 5.

12 **SJCC 18.50.190(C)(5):** *Docks or piers which can reasonably be expected to*
13 *interfere with the normal erosion-accretion process associated with feeder bluffs*
14 *shall not be permitted.*

15 21. There are no feeder bluffs on the subject site.

16 **SJCC 18.50.190(C)(6):** *Abandoned or unsafe docks and piers shall be removed or*
17 *repaired promptly by the owner. Where any such structure constitutes a hazard to the*
18 *public, the County may, following notice to the owner, abate the structure if the*
19 *owner fails to do so within a reasonable time and may impose a lien on the related*
20 *shoreline property in an amount equal to the cost of the abatement.*

21 22. There are no docks or piers present at the site.

22 **SJCC 18.50.190(C)(7):** *Unless otherwise approved by shoreline conditional use*
23 *permit, boats moored at residential docks shall not be used for commercial overnight*
24 *accommodations.*

25 23. No such use is being proposed by the applicant.

SJCC 18.50.190(C)(8): *Use of a dock for regular float plane access and moorage*
shall be allowed only by shoreline conditional use permit and shall be allowed only at
commercial or public moorage facilities or at private community docks.

24 24. No such use is being proposed by applicant.

25 **SJCC 18.50.190(D)(1)-(11): General Design and Construction Standards**

1. Pilings must be structurally sound prior to placement in the water.

1 2. Chemically treated or coated piles, floats, or other structural members in direct
2 contact with the water shall be as approved by the Environmental Protection
3 Agency.

4 3. Pilings employed in piers or any other structure shall have a minimum vertical
5 clearance of one foot above extreme high water.

6 4. All floats shall include stops which serve to keep the bottom off tidelands at low
7 tide.

8 5. When plastics or other nonbiodegradable materials are used in float, pier, or
9 dock construction, full containment features in the design of the structures shall
10 be required.

11 6. Overhead wiring or plumbing is not permitted on piers or docks.

12 7. New boathouses or covered moorages are prohibited on floats, piers, and
13 docks. Other structures on floats, piers, and docks shall be limited to three feet in
14 height.

15 8. A pier shall not extend offshore farther than 50 feet beyond the extreme low
16 tide contour.

17 9. Dock lighting shall be designed to shine downward, be of a low wattage, and
18 shall not exceed a height of three feet above the dock surface.

19 10. All construction-related debris shall be disposed of properly and legally. Any
20 debris that enters the water shall be removed promptly. Where feasible, floats
21 shall be secured with anchored cables in place of pilings.

22 11. Materials used in dock construction shall be of a color and finish that will
23 blend visually with the background.

24 25. The proposal complies with all design standards quoted above. As
25 depicted in the design drawings, Ex. 2 of the original application, the pilings will be
26 made of steel such that they will be structurally sound. ACZA pressure treated wood
27 will be used to construct the structural portions of the dock. The proposed pilings
28 have a minimum clearance of at least 2.5 feet at EHHW. The piles that support the
29 float incorporate stops to prevent the float from grounding. The float tubs will be
30 constructed of foam encased entirely in a molded plastic. No overhead wiring,
31 plumbing or structures will be placed upon the dock. As proposed in the design
32 drawings, Ex. 2 of the original application, the pier does not extend waterward of the
33 extreme low tide contour. There is no dock lighting proposed. If approved, the
34 proposal could be conditioned for the proper disposal of construction debris. The
35 proposal will blend visually with the background as it will remain unpainted and in a
36 natural condition resembling earth tones.

1 **SJCC 18.50.190(G)(2)(a):** *The maximum dimensions for a joint-use dock (including*
2 *the pier, ramp, and float) associated with two single-family residences shall not*
3 *exceed 1,400 square feet in area. In addition, the length of the dock (including the*
4 *pier, ramp, and float) may not extend more than 200 feet in length seaward of the*
ordinary high water mark. Docks exceeding these dimensions may only be authorized
by variance.

5 26. The dock meets these criteria, as it will be approximately 526 square feet
6 in area and 86 feet in length measured seaward from the ordinary high water mark.

7 **SJCC 18.50.190(G)(2)(d):** *Maximum length and width of a ramp, pier, or dock shall*
8 *be the minimum necessary to accomplish moorage for the intended boating use.*

9 27. There is no information that addresses this criterion in the record. The
10 criterion is not addressed in the application or the staff report. If approved the
11 applicant would have to demonstrate compliance with this criterion.

12 **SJCC 18.50.190(G)(3):** *Docks shall be set back a minimum of 10 feet from side*
13 *property lines. However, a joint use community dock may be located adjacent to or*
14 *upon a side property line when mutually agreed to by contract or by covenant with*
the owners of the adjacent property. A copy of such covenant or contract must be
recorded with the County auditor and filed with the approved permit to run with the
title to both properties involved.

15 28. The dock is set back a minimum of ten feet from all side property lines.

16 **SJCC 18.50.190(G)(5):** *Applications for nonexempt docks and piers associated with*
17 *single-family residences shall not be approved until:*

- 18 a. *It can be shown by the applicant that existing facilities are not adequate*
19 *or feasible for use;*
20 b. *Alternative moorage is not adequate or feasible; and*
21 c. *The applicant shall have the burden of providing the information*
22 *requested for in subsections (a) and (b) of this section, and shall provide*
this information in a manner prescribed by the administrator.

23 29. The criteria above are met. Existing and alternative moorage is not
24 adequate and feasible for use.

25 A. Past Decisions

There is a wealth of administrative and judicial decisions that provide interpretive
guidance on alternative moorage:

In *Innskeep v. San Juan County*, SHB No. 98-033 (1999), the Hearings Board
interpreted the test in SJCC 18.50.190(G)(5) to require a showing that “existing

1 facilities, alternative moorage and alternative sites are not ‘enough or good enough
2 for what is required or needed’, ‘barely satisfactory,’ ‘suitable’, or ‘capable of being
used.’” (citations omitted).

3 In *Culver v. San Juan County*, SHB No. 98-039, the Hearings Board found a
4 primitive dock composed of a log float to provide adequate existing moorage. The
5 existing dock was located in Nelson Bay, a shallow water body located over mudflats
6 on the east side of Henry Island. During low tides, the log floats grounded and the
7 applicant had to drag a dinghy across mudflats that were so thick they pulled off his
boots. The Board denied the application, in part because the applicant was only able
to show that the proposed dock would “marginally improve” boat access, since
mudflats would still have to be traversed during the lowest tides.

8 In *Close v. San Juan County*, SHB No. 99-021 (2000), the Hearings Board
9 determined that a dock applicant for a shoreline permit does not meet the criteria by
10 showing that a private dock is more convenient to access and use than other facilities
in the area.

11 In *TG Dynamics Group II, LLC v. San Juan County*, SHB No. 08-030, the Shoreline
12 Hearings Board noted adequacy or feasibility of existing facilities and alternative
13 moorage must be evaluated in the context of all the relevant considerations related to
14 a particular proposal, including but not limited to potential impacts on littoral drift,
15 sand movement, water circulation and quality, fish and wildlife, navigation, scenic
16 views and public access to the shoreline. *TG Dynamics* involved a community dock
17 serving a four lot subdivision on Shaw Island. The applicant testified that the waiting
18 list for the only marina on Shaw Island was one to two years. The Hearings Board
19 found that, as mitigated, the project did not create any adverse impacts to
environmental or aesthetic resources and that it did not disrupt navigation.
Importantly, the Hearings Board did not find that mooring buoys qualified as a
suitable alternative because the mud flats contained surf spawning habitat that would
be disrupted by the dragging of boats to access the buoy. The Hearings Board also
determined that a waiting list of one to two years for the marina was not a reasonable
or appropriate use for a four lot short subdivision.

20 In *Gray v. San Juan County*, SHB No. 10-001, the Shoreline Hearings Board
21 Examiner granted the request for a single user dock due to a lack of adequate or
22 feasible alternatives for moorage in that there is no commercial marina or ferry
service available on Decatur Island and the one available public dock had no parking.

23 In *Shorett v. San Juan County*, SHB No. 06-039, the Hearings Board was not
24 persuaded by testimony from the Applicant that a three to nine month waiting list for
25 a marina slip at the Port of Friday Harbor Marina was inadequate and infeasible. In
that case the drive time to the marina was 23 minutes and the boating time was an
hour to an hour and a half. Despite these distances and the waiting list, the Board
concluded that the applicant had both adequate and feasible alternative moorage at the

1 marina, in addition to adequate existing moorage, and on this basis denied the shoreline permit application for a proposed dock.

2 In the *Shorett Credit Shelter Trust* examiner decision, PSJ000-09-0002, the examiner
3 found compliance with the alternative moorage criteria for a joint use dock where the
4 applicant demonstrated that although there were commercial marinas on San Juan
5 Island within a reasonable distance of the Applicant's parcel, the waiting period was
6 for an unreasonable amount of time (five years) and the slip size and water depth
7 could not accommodate the size of the applicant's boat.

8 In the *Green* examiner decision, PSJ000-10-0005, the examiner determined that the
9 applicant failed to meet its burden of establishing inadequate alternative commercial
10 moorage on San Juan Island because the applicant provided no information on this
11 issue.

12 In the *Skott* examiner decision, PSJ000-09-0003, the examiner determined that the
13 applicants had failed to establish the inadequacy of alternative moorage on Orcas
14 Island because the applicants provided no information on waiting periods for nearby
15 commercial marinas. There was no indication that the applicants had even inquired
16 about waiting periods, despite the fact that the Examiner left the record open for this
17 purpose.

18 In *Stanford v. San Juan County*, SHB No. 06-004, the Hearings Board concluded
19 there are four commercial marinas on Orcas Island: Cayou Quay, Deer Harbor
20 Marina, West Sound Marina and Bay Head Marina. The marinas were located two to
21 eleven miles from the proposed joint use dock. Deer Harbor Marina and Cayou Quay
22 both had moorage available at the time of or within a week after the hearing on June
23 28, 2006. Bay Head had moorage available for three months, with side ties available
24 afterwards. The Hearings Board concluded that the applicants had multiple
25 opportunities to obtain commercial moorage and that they had failed to meet their
burden of demonstrating that commercial moorage is unavailable or unlikely to come
available within a reasonable waiting period.

Inadequate parking was also addressed in the *Stanford* decision. The Board noted
that the guideline frequently used for the motor vehicle parking at marinas is one
parking space for every two berths and that Deer Harbor Marina had 21 parking spots
for 125 slips. The Board concluded that parking at Deer Harbor was "*difficult, but not impossible*". The Board further concluded that
"*absent extreme circumstances such that boat owners would not have access to their
boats on a recurring basis, the Board concludes that parking is ordinarily a matter of
convenience*" and that "*some difficulty finding a nearby parking space for a few
months a year does not prohibit access to a boat so as to justify a private dock...*"

In the *Beckwith* examiner decision, PSJ000-10-0006, it was determined that the
applicants failed to meet their burden of proof in establishing the availability of
adequate moorage. The applicants did not provide any information on waiting

1 periods for any marinas and asserted they were unable to do so because the marinas
2 did not provide them with the requested information.

3 In *Hamell* PSJ000-11-0009, for a dock on Orcas Island the applicants contacted West
4 Sound Marina, Bellport/Deer Harbor Marina and Cayou Quay Marina and were told
5 that moorage during the summer months is very tight to full. The decision noted that
6 it was entirely unclear whether the Applicants could acquire summer moorage in a
7 nearby marina by simply placing themselves on a waiting list. The examiner noted
8 that if such lists were available and of reasonable length (less than a year), it would
9 have been entirely reasonable to require them to reserve a slip every year in advance.
10 However, although the evidence presented by the applicants would not usually be
11 sufficient to establish inadequate alternative moorage, the special circumstances of
12 the case were found to merit a different result. As discussed in the *TG Dynamics*
13 Shoreline Hearings Board decision, the assessment of alternative moorage takes into
14 consideration a wide range of relevant factors. It was found to be significant that the
15 dock would not create any adverse impacts and would replace a larger dock. For
16 those reasons the commercial marinas in the vicinity were found to not provide for
17 adequate alternative moorage because summer moorage is usually full or “very tight”.

18 B. Commercial Moorage. There is no adequate or feasible commercial moorage
19 available for the project site. As determined in Finding of Fact No. 6, there are three
20 commercial marinas available for the project site. As determined in the original
21 decision, Roche Harbor and Snug Harbor marinas are not adequate or feasible
22 alternatives because they do not have slips reasonably available for moorage. Upon
23 rehearing, it is determined that the Port of Friday Harbor also does not provide
24 adequate or feasible alternative moorage. The reason for this revised conclusion is the
25 new evidence presented by the applicant on laminaria impacts. As noted in the *TG*
Dynamics decision discussed above, impacts to fish and wildlife are relevant
considerations in assessing adequacy and feasibility. As determined in Finding of Fact
No. 5 of this decision, the applicant’s current moorage results in damage to laminaria.
Given the extensive difficulties involved in mooring a boat at the Port of Friday
Harbor, if the proposal is denied it’s likely that the applicant will continue using his
existing moorage instead of investing the substantial time involved in using the Port of
Friday Harbor facilities. As a result, denial will result in damage to the laminaria beds
at the applicant’s property. This result defeats the purpose of encouraging the use of
alternative moorage, which is to protect laminaria and other aquatic resources. The
applicant’s newly added joint use of the dock further protects aquatic resources, by
assuring that a dock won’t be built upon another property as well. Given these factors,
it can no longer be concluded that the Port of Friday Harbor serves as adequate and
feasible alternative moorage.

C. Existing Moorage. For the reasons provided in the preceding paragraph, existing
moorage is not adequate or feasible. Further, Mr. Wells testified that the tidal
elevation at the end of the dock is sufficient to keep the applicant’s boat afloat during
low tides, an issue that was unresolved for the original application.

1 **San Juan County Comprehensive Plan Element 3, Section (5)(C) Boating**
2 **Facilities:**

3 *General*

- 4 1. *Locate, design and construct boating facilities to minimize adverse effects upon,*
5 *and to protect all forms of aquatic, littoral or terrestrial life including animals, fish,*
6 *shellfish, birds and plants, their habitats and their migratory routes.*
- 7 2. *Protect beneficial shoreline features and processes including erosion, littoral or*
8 *riparian transport and accretion shoreforms, as well as scarce and valuable shore*
9 *features including riparian habitat and wetlands.*
- 10 3. *The location, design, configuration and height of boathouses, piers, ramps, and*
11 *docks should both accommodate the proposed use and minimize obstructions to views*
12 *from the surrounding area.*
- 13 4. *Boating facilities should be designed to optimize the trade-offs between the number*
14 *of boats served and the impacts on the natural and visual environments.*
- 15 5. *In providing boating facilities, the capacity of the shoreline site to absorb the*
16 *impact should be considered.*
- 17 6. *The use of mooring buoys should be encouraged in preference to either piers or*
18 *floating docks.*
- 19 7. *The use of floating docks should be encouraged in those areas where scenic values*
20 *are high and where serious conflicts with recreational boaters and fishermen will not*
21 *be created.*
- 22 8. *Piers should be encouraged where there is significant littoral drift and where*
23 *scenic values will not be impaired.*
- 24 9. *In many cases, a combination of fixed and floating structures on the same dock*
25 *may be desirable given tidal currents, habitat protection and topography, and should*
be considered.
- 10 10. *The County should attempt to identify those shorelines where littoral drift is a*
11 *significant factor and where, consequently, fixed piers probably would be preferable*
12 *to floating docks.*
- 13 11. *To spare San Juan County from the so-called "porcupine effect" created by*
14 *dozens of individual private docks and piers on the same shoreline, preference should*
15 *be given to the joint use of a single structure by several waterfront property owners,*
16 *as opposed to the construction of several individual structures.*
- 17 12. *Preference should be given in waterfront subdivisions or multi-family residential*
18 *development to the joint use of a single moorage facility by the owners of the*
19 *subdivision lots or units, or by the homeowners association for that subdivision or*
20 *development, rather than construction of individual moorage facilities. Individual*
21 *docks and piers should be prohibited, provided that the county may authorize more*
22 *than one moorage facility if a single facility would be inappropriate or undesirable*
23 *given the specific site and marine conditions. Such developments should include*
24 *identification of a site for a joint-use moorage facility and the dedication of legal*
25 *access to it for each lot or unit. However, it should be recognized that identification of*
a site for a common moorage facility does not imply suitability for moorage or that
moorage development will be approved.

1 13. *The capacity of the shoreline site to absorb the impacts of waste discharges from*
2 *boats and gas and oil spills should be considered in evaluating every proposed dock*
3 *or pier.*

4 14. *Expansion or repair of existing facilities should be encouraged over construction*
5 *of new docks and piers.*

6 15. *To reduce the demand for single-user docks, multiple-user docks should be*
7 *encouraged through construction and dimensional incentives.*

8 30. The shoreline policies above essentially repeat the requirements and
9 preferences already assessed in the use regulations, specifically that mooring buoys
10 are generally preferred over docks, that joint-use docks are preferred over single-use
11 docks and that environmental, aesthetic and use impacts should be minimized. For the
12 reasons identified in application of the shoreline regulations, the policies are generally
13 met.

14 DECISION

15 The proposed dock as depicted in the application materials is approved subject to the
16 following conditions of approval:

- 17 1. The applicant shall establish to the satisfaction of staff that the length and
18 width of the proposed dock is the minimum necessary to accomplish
19 moorage for the intended boating use as required by SJCC
20 18.50.190(G)(2)(d) while concurrently avoiding adverse prop scour impacts.
21 Staff may require the applicant to provide the opinion of a qualified
22 professional to support this contention.
- 23 2. The Jacobson joint use agreement (Ex. 3 to Ex. 3) shall be executed and
24 recorded prior to construction of the proposal.
- 25 3. Failure to comply with any terms or conditions of this permit may result in
its revocation.
4. The applicants shall schedule a site inspection upon completion of the
project.

Dated this 28th day of June, 2013.


Phil A. Olbrechts

County of San Juan Hearing Examiner

