

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant(s):	King's Ransome Cove, LLC Francine Shaw P.O. Box 2112 Friday Harbor, WA 98250	S.J.C. COMMUNITY DEC 05 2012
File No.:	PLPALT-12-0001	DEVELOPMENT & PLANNING
Request:	Plat Alteration	
Parcel No:	461550014, 462212001, 462221002, 462221003, 462221004	
Location:	Henry Island	
Summary of Proposal:	Re-arranging lot lines and including new parcels in plat.	
Land Use Designation:	Residential Rural – Upland Conservancy - Shoreline	
Hearing Date:	November 14, 2012	
Application Policies and Regulations:	SJCC 18.70.080	
Decision:	Approved with conditions.	

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

Phil Olbrechts, Hearing Examiner

RE: Kings Ransome Cove, LLC Plat Alteration (PLPALT-12-0001)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.
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INTRODUCTION

The Applicants have applied for approval of a plat alteration of a long plat subdivided in 1946 to re-arrange the boundaries between two lots; bring two un-platted adjacent parcels into the existing Smuggler's Rowe subdivision on Henry Island. The application is approved with conditions.

TESTIMONY

Staff Testimony

Lee McEnery, San Juan County planner, summarized the Staff Report (Ex. 1). She described the proposal as a rearrangement of lot lines and bringing in two un-platted adjacent parcels into an existing subdivision. Ms. McEnery testified moving the lot lines around didn't create any problems. She stated there are no minimum sizes or lot design standards. This is a plat alteration with no land division occurring. There are four existing lots that are being rearranged. Because there is no land division, Staff argues the land division standards don't apply and there is no need to establish building setback or envelopes and no discussion of moorage and docks. Therefore, none of those are discussed further in the conditions. The dock issue doesn't exist because there are no land divisions. Staff believes the issues related to land division should not be shown on the plat map. The former simple lot division that created two of the lots had a no build area. Ms. McEnery stated the plat map did not need to show the no build area because the building setbacks mimic the same thing. The existing shoreline common area will remain. Staff recommends approval with conditions.

Applicant Testimony

Stephanie O'Day, attorney/agent for King Ransome Cove, presented a new map that alters Lot 14 by increasing it and deletes the side yard setbacks the County did not feel was necessary for the map (Ex. 2). The new map keeps the 50 foot setback and a revised larger common area. Ms. O'Day also entered three new exhibits into the record including a memorandum describing why setbacks and common areas should be shown on the face of the plat (Ex. 3) and two former hearing examiner decisions regarding plat alterations (Ex. 4 and 5). Ms. O'Day described the proposed project.

The Applicant owns all the property in question, both inside and outside the plat. The plat alteration would provide continuity. There is a point on Henry Island that is not part of the subdivision. The proposal would bring these properties in to the subdivision.

Ms. O'Day stated the issues under consideration were whether it is appropriate to place a common area on the shoreline and setbacks on the plat. Ms. O'Day stated that she had argued this issue on both sides recently. There are new shoreline regulations, critical areas regulations and setbacks coming and no one knows what they are. Under current code, setbacks on plats are grandfathered in. This may change. The Applicant wants to establish setbacks. They have three children and want each of their children to be able to have homes out on the point.

Ms. O'Day stated the legal question is whether or not it is appropriate to have setbacks shown on the face of the plat. If not for the plat alterations code, this would be a boundary line modification (BLM). However, the County requires any BLM associated with a plat to be treated as a plat alteration subject to all plat requirements under SJCC 18.70.030(4). The subdivision alteration (SJCC 18.70.080) requires these to comply with the SMP (SJCC 18.50) and RCW 58.17.330 for common areas and setback standards. The County has always applied it this way. Ms. O'Day stated she was on the other side of this issue in 2005 and that the Hearing Examiner at the time required common areas and setbacks in accordance with the plat requirements (Ex. 4, page 5, Items 8-11). Ms. O'Day said the same thing happened in 2012 with a plat alteration (Ex. 5). There are many other examples.

Ms. O'Day stated the only reason the County didn't want shoreline setbacks was for the same reason the Applicant did want them. The issue is vesting and the effects of new and as yet unknown code requirements. In response to a question from the Examiner, Ms. O'Day stated there is a current exemption in the Shoreline Master Program that allows vesting of shoreline setbacks for existing plats (SJCC 18.50.330(B)(19)).

With respect to the common area, the existing common area is proposed to be expanded. They eliminated side yard setbacks because there was no real reason to keep them. There is a no build area that was part of the simple subdivision. This no build area protects a meadow. The Applicant plans to maintain that protection. These meadows are sensitive areas regulated under (SJCC 18.70.060.(B)(10)).

Ms. O'Day stated there are two existing docks on the property and the Applicant is fine with a condition that prohibits new docks. The Applicant wants to see the setbacks, common area and no built area to remain and would welcome a condition that limits the number of docks to the existing docks. There are no roads on Henry Island. There are no public roads, airstrip or public landing.

Francine Shaw, is a land use planner working with Mr. O'Day. Ms. Shaw stated the land they are bringing in would bring continuity into the subdivision by including an

area that had been a gap. The subdivision is oddly shaped with lots that are not contiguous. It was platted in 1946.

Staff Rebuttal

Lee McEnery, stated that this project is especially not a land division. The definition of a land division talks about dividing parcels. No land is divided here and therefore the County did not treat it as such. As to the concept of a BLM being a plat alteration, yes it does say that in the code but there is a conflict in the code. Ms. McEnery said she had contacted the Prosecutor's Office. She stated that the Prosecutor said if an alteration created or deleted parcels then it needed to be treated as a parcel alteration. If it did not, then it should be treated as a BLM. She said the County had treated this way since 1999 on the advice of the Prosecutor's Office (Ex. 6). She stated the Klondike project was a different example because there were so many lots with so many changes involved.

Ms. O'Day stated that she believed the legal weight is on the Hearing Examiner determination and not the Prosecutor's opinion. There is nothing that would preclude the Applicant from including setbacks on the face of the plat.

In response to the Examiner, Ms. McEnery stated the County has preliminary and final plats and that one of the Staff's recommended conditions of approval requires the Applicant to create a final map. Ms. McEnery stated there is no final fee for plat alterations. The process is one step with the Hearing Examiner giving approval. The final is administrative.

Ms. O'Day stated with respect to infrastructure, there is a well for three lots and a water system. The requirement for sewer system is only to prove feasibility. There is no requirement for power. There are no roads. The County required proof of water and septic as part of the plat alteration. They do not require these for BLM.

Ms. McEnery stated the requested conditions of approval ensure adequate infrastructure. Preliminary subdivisions don't require a survey. Final subdivisions do require a survey. Also in response to the Examiner, Ms. McEnery stated she had neglected to request a condition of approval that required compliance with Staff Report Item 11 on Page 4. Ms. O'Day stated the Applicant had no objection to adding such a condition.

EXHIBITS

The following exhibits were entered into the record during the hearing:

- Exhibit 1 - Staff Report dated October 30, 2012 and attached "Application Materials",
- Exhibit 2 - Revised Plat Map,

It is undisputed that the proposal qualifies as a boundary line modification and that the modification affects a plotted lot line. The only issue subject to debate is whether the boundary line modification must be processed as a plat alteration. On its face, SJCC 18.70.030(4) clearly requires boundary line modifications that affect platted lot lines to be processed as plat alterations. However, in a 1999 memo submitted by Staff, the Prosecuting Attorney's Office concluded that such modifications are not subject to plat alteration review because lot line adjustments are exempt from alteration review by state law under RCW 58.17.215.

The Prosecuting Attorney memo provided by Staff (Ex. 6) does not identify what subdivision language was interpreted. The County's subdivision regulations were amended two years after the memo, so it's possible that the language was changed after issuance of the Prosecuting Attorney's opinion. At hearing, Staff testified that this interpretation was re-affirmed to them by a member of the Prosecuting Attorney's office via telephone in a conversation about the present project.

Nonetheless a decision issued by a former examiner in a 2006 decision, HE 13-06, unequivocally concluded that SJCC 18.70.030(4) requires plat alteration review, including application of plat alteration review criteria, to all boundary line modifications. Consequently, even if there were some ambiguity to SJCC 18.70.030(4), the Examiner would be compelled to follow the precedent set by the 2006 decision unless it was clearly in error.

The only reason the 2006 decision would be found clearly in error is if it violated state law. It does not violate state law. If Chapter 58.17 RCW mandates that boundary line adjustments be exempt from subdivision review, then such modifications should be construed as exempt if they can in any way be construed in that manner. RCW 58.17.040 provides that Chapter 58.17 RCW is inapplicable to boundary line modifications (called lot line adjustments in Chapter 58.17 RCW). There is nothing to suggest that Chapter 58.17 RCW was intended to preempt the ability of counties to regulate land divisions and indeed many provisions of Chapter 58.17 RCW expressly delegate subdivision regulation to local regulation. Consequently, Chapter 58.17 RCW is not construed as prohibiting a county from adopting its own review procedures for land divisions to which 58.17 RCW does not apply. San Juan County was free to adopt stricter boundary line modifications than required by state law and it did so by adopting SJCC 18.70.030(4).

Based on the foregoing conclusion, the plat must comply with the plat alteration criteria. SJCC 18.70.080(A)(4) establishes the criteria for approval. Applicable criteria are quoted below and applied to the application with corresponding conclusions of law.

SJCC 18.70.080(A)(1): *Alterations of subdivisions shall be processed in accordance with RCW 58.17.060 and 58.17.215 through 58.17.218. Alteration applications shall contain the signatures of the majority of those persons having an ownership interest*

in lots, tracts, parcels, sites or divisions in the subject subdivision or portion to be altered.

If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof (RCW 58.17.215).

4. The Applicants own all lots subject to consolidation. According to the staff report, there are no restrictive covenants violated by this alteration and no evidence has been presented to the contrary.

SJCC 18.70.080(A)(2): *Notice and Public Hearing. Notice of alterations shall be consistent with the notice provisions (SJCC 18.80.030) of this code. Mailing notifications shall also include owners of each lot or parcel of property within the subdivision to be altered. A public hearing (SJCC 18.80.040) shall be required for long subdivision alteration proposals.*

5. The staff report states that these notice requirements were followed.

SJCC 18.70.080(A)(4)(a): *The application meets the requirements of this chapter, and complies with the applicable policies and requirements of RCW 58.17.330, the Shoreline Master Program, the State Environmental Policy Act, and the Comprehensive Plan*

6. The County Council has authorized the hearing examiner to make a final decision on the application as authorized by RCW 58.17.330. The Comprehensive Plan does not directly address plat alterations. The 2006 hearing examiner decision, HE 13-06, COL No. 10, concluded that boundary line modifications should be processed as lot line adjustments, which are subject to all of the requirements of Chapter 18.70 SJCC, including the subdivision design and development standards of SJCC 18.70.060¹.

¹ The Hearing Examiner also noted in COL No. 9 of HE 13-06 that boundary line modifications should be treated as new subdivisions. This is considered inapplicable dicta because it was not necessary to the Examiner's ultimate conclusion that boundary line adjustments must be processed as plat alterations, which in turn means they are subject to the subdivision review standards. In his reasoning, in HE 13-06 the Examiner did not address how to apply subdivision standards that expressly only applied to "new" subdivisions and the Examiner probably did not have these provisions in mind when he was determining whether to treat a boundary line modification as a plat alteration. Indeed from a policy standpoint it would make no sense to apply SJCC provisions that expressly state they are only to apply to "new subdivisions" to boundary line adjustments. The County Council clearly did not want to have these type of subdivision regulations to apply to relatively minor development projects such as building permit applications and boundary line modifications. Shoreline common areas in particular can create major problems if applied to land use proposals other than subdivisions. The continuity of a shoreline common area along the waterfront of a subdivision can be severely impaired if the width of

Since staff has not evaluated the proposal for consistency with SJCC 18.70.060, a condition of approval will require the Applicant to demonstrate to staff that the proposal complies with SJCC 18.70.060. A SEPA DNS was issued for the proposal. Compliance with the Shoreline Master Program is discussed below to the extent pertinent. As discussed in the application of SJCC 18.50.330(B)(6), requirements that apply to “new land divisions” or the like do not apply to plat alterations. As conditioned, the criterion quoted above is satisfied.

Normally it would not be appropriate to delegate to staff though the conditions of approval a finding of consistency with all applicable shoreline and subdivision design standards. However, given that the requested lot modification is a relatively minor proposal with no discernible consistency issues with applicable development standards, the issues left to be resolved by staff are sufficiently limited and narrow in scope to be appropriate in his instance.

SJCC 18.70.080(A)(4)(b): *The application satisfactorily addresses the comments of the reviewing authorities and is in the public interest (RCW 58.17.100, 58.17.110, and 58.17.215)*

7. The Staff Report notes comments were received from the San Juan County Health and Community Services department indicating there is adequate sewer feasibility and from the King’s Ransome Cove Water System indicating there is adequate water infrastructure. The alteration is in the public interest because it enables the efficient use of platted land without creating any adverse public impacts.

SJCC 18.70.080(A)(4)(c): *Any outstanding assessments (if any land within the alteration is part of an assessment district) are equitably divided and levied against the remaining lots, parcels, or tracts, or are levied equitably on the lots resulting from the alteration; and*

8. The Staff Report states there are no assessments that will be impacted by this alteration and there is no evidence to the contrary.

SJCC 18.70.080(A)(4)(d): *Any land within the alteration that contains a dedication to the general use of persons residing within the subdivision is divided equitably*

9. The Staff Report states there are no dedications that apply to this parcel and there is no evidence to the contrary. There is a common shoreline area. However, the subject parcels are all in a single ownership.

the common area along two lots can be changed simply by modifying the boundary location between the two lots. Similarly, new common area requirements could create severe conflicts with existing development if they are triggered by a minor boundary line modification. If a reviewing court determines that the Examiners comments on “new” subdivisions in HE 13-06 does not qualify as dicta, those conclusions are overruled as clearly contrary to the provisions of the SJCC.

SJCC 18.50.330(B)(6): *In all new land divisions and multiple-unit and multifamily developments, one of the following standards shall be met:*

a. A common area of 75 feet measured landward from the ordinary high water mark shall be established along the entire waterfront of the property to be developed, and all other common area requirements of subsection (F)(2) of this section shall also be met. A minimum of one and one-quarter acres within shoreline jurisdiction shall be provided for each unit to be located within the shoreline jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction; or

b. At least 20 percent of the area within the shoreline jurisdiction shall be designated as common area, and all other common area requirements of subsection (F)(2) of this section shall also be met. A minimum of two acres within the shoreline jurisdiction shall be provided for each unit to be located within the shoreline jurisdiction. This is not a minimum lot size, however, and shall not preclude clustering of units within the shoreline jurisdiction.

10. SJCC 18.50.330(B)(6) only requires the establishment of a common area for “new land divisions”. A plat alteration that doesn’t create any new lots or tracts does not divide land. It is an alteration of lot lines for land that has already been divided. Since the proposed alteration does not involve any creation of new lots or tracts, SJCC 18.50.330(B)(6) is inapplicable. This interpretation would normally work in a plat alteration applicant’s interest, since having to incorporate new (and what would normally be greater) shoreline common areas for an application that only involves a minor shifting of lot lines could create significant problems, especially for lots with existing development.

Par. 8, p. 4 of the staff report notes that the “previous simple land division” depicts a common area seaward of the ordinary high water mark and that this should be retained. It is unclear to what subdivision was the “previous simple land division” or what SJCC regulation required shoreline setbacks at the time. The requested plat alteration does not include any express request to remove this common area, but essentially asks that this common area be expanded to include the common area set by SJCC 18.50.330(B)(6). Since the plat alteration does not involve a request to remove the 1946 common area, it should be depicted on the altered map as requested by staff².

² Requiring the retention of the currently existing shoreline common area is not entirely a clear cut legal requirement. If the common area is construed as a setback, the question of whether the common area is in fact still “currently existing” depends upon the resolution of some complicated vested rights doctrine issues. However, the common area is not a setback, but rather an existing property right that has already been granted to all subdivision lot owners. As such, it is essentially the same as commonly owned lots and/or tracts approved in a final plat.

If the common area were considered a setback, under current subdivision statutes the setback would arguably no longer be applicable if the common shoreline area was imposed by the 1946 subdivision

The retention of the currently existing common area on the plat application may ultimately work out to the benefit of the Applicant. If the new shoreline common area regulations adopted by the County Council continue to only apply to “new land divisions” or the like, the Applicant will only be subject to the currently existing common area requirements, which are significantly less onerous than those requested in this application.

SJCC 18.50.330(D)(3): *Building setbacks from shorelines must be established as conditions of preliminary plat approval in all new waterfront subdivisions and short subdivisions. A plat restriction must specify the required setbacks and all building setbacks must be shown on the face of the plat. Once a building setback line is determined, removal of trees seaward of the setback line shall be expressly limited in plat restrictions. Tree removal restrictions in subsection (B)(8) of this section will also apply.*

11. The provision does not apply since it only applies to “new waterfront subdivisions”. The proposal is not a new subdivision. It is an alteration of an existing subdivision.

identified in Finding of Fact No. 3. Under current subdivision statutes, subdivisions only vest for a period of seven years to the extent that proposed development is disclosed in the application. *See Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997); RCW 58.17.170(2); RCW 58.17.033. Therefore, under current state subdivision laws and the current SJCC, the project would actually not be subject to any shoreline common area requirements if the common area was created by the 1946 subdivision. However, the current state statutes governing vesting do not apply to the 1946 subdivision. It is unknown what vesting statutes or county ordinances, if any, were in effect in 1946. If no statutes or ordinances granted vested rights to subdivisions in 1946, it is likely that a shoreline setback in effect in 1946 would no longer apply today.

In an awkward twist in the *Noble Manor* decision, recognized as such by the courts, short subdivisions (as opposed to long subdivisions) have no expiration date on their vesting because RCW 58.17.170(2) does not apply to short subdivisions and no other statute creates an expiration date for the vesting of short subdivisions even though short subdivisions are subject to the vesting provisions of RCW 58.17.033. Consequently, if the 2012 short subdivision adjoining the 1946 subdivision set the shoreline common area at issue, that common area would be permanently vested.

This entire vesting issue is ultimately avoided in this case by construing the existing shoreline common area as an existing property right granted to all lot owners of the subdivision at final plat approval. As an existing property right, the shoreline common area is distinguishable from setbacks and other development regulations that regulate future development. The vested rights issues discussed in the preceding two paragraphs only apply to restrictions on future development. The shoreline common area is essentially the same as a tract or lot with common ownership created upon final plat approval. As an existing common area, it should be included in any plat alteration unless its removal is expressly authorized by the alteration decision.

DECISION

The plat alteration application is approved as proposed by the Applicant with the following conditions/revisions:

1. The Applicant shall demonstrate compliance with SJCC 18.70.060 and shoreline master program bulk and dimensional standards to the satisfaction of staff. Development standards expressly applying to “new land divisions”, “new subdivisions” or the like will not apply to the proposed plat alteration.
2. The plat alteration map shall remove any reference to a common area set by SJCC 18.50.330(D)(3) and shall depict the common area set by the 1946³ subdivision identified in Finding of Fact No. 3.
3. This approval shall expire if the subdivision alteration is not recorded within 60 months of the approval date. The final alteration application shall be submitted to the Community Development and Planning Department at least 60 days in advance of the expiration date.
4. All survey standards and requirements shall be complied with pursuant to SJCC 18.70.070F2.
5. The following conditions shall be shown as restrictions on the face of the plat, in addition to those restrictions and dedications required by SJCC 18.70.100:

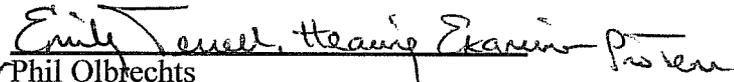
This subdivision alteration has been approved by the responsible County officials on the premise that each lot will be occupied by no more than one single-family dwelling and lawfully related outbuildings. No lot shall be otherwise occupied unless the owner can first demonstrate to the County's satisfaction that the provisions for water supply, sewage disposal, circulation, lot size and related planning consideration are adequate to serve the proposed use. Compliance with this provision shall be effected by written application to the subdivision Director who shall be responsible for coordinating the review of such requests and for making the required determination.

There may be additional private conditions, covenants or restrictions in addition to those shown on the face of this plat. Such private conditions may not be shown on plats. Any private deed restrictions are supplemental to the requirements of this Code. The County shall not be party to any private restrictions.

³Both the staff and the Applicant have acknowledged the existence of a common area set by the 1946 subdivision, but this common area does not appear to be depicted in any materials submitted into the record. The Examiner will retain jurisdiction until 12/10/12 to resolve any disputes regarding the location of the common line set in 1946; provided that no new evidence may be submitted to resolve this issue. If the shoreline common area was actually set by a subdivision approval subsequent to 1946, Condition No. 3 shall be construed as requiring the inclusion of that common area on the plat.

If during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate vicinity of the find must be halted immediately, and the Administrator must be notified at once.

Dated this 2nd day of December 2012.


for Phil Olbrechts
County of San Juan 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.

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 requirement 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.