

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant/Appellants: Don and Marion Gerard
393 Nina Lane
Eastsound, WA 98245

File No.: PAPL00-10-0001

Request: Appeal of Short Plat Denial

Parcel No: 271124001

Location: 393 Nina Lane
Orca Island

Shoreline Designation: Eastsound Residential

Hearing: June 3, 2010; Site visit on June 30, 2010

Decision: The denial is affirmed.

S.J.C. COMMUNITY

JUL 19 2010

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Don and Marion Gerard

5 Appeal of Short Plat
6 (08SP003)

**FINDINGS OF FACT, CONCLUSIONS
7 OF LAW AND FINAL DECISION.**

8 **INTRODUCTION**

9 The applicants have appealed the San Juan Community Development and Planning
10 Department's April 5, 2010 denial of the preliminary short plat of Gerard Shores,
11 which proposed a three-lot short subdivision for existing residential development and
12 future commercial uses. The Examiner AFFIRMS the Director's denial of the
13 preliminary short plat as submitted on the basis that it is unlikely and/or unduly
14 speculative that the lots created by the short subdivision will be buildable. The
15 property could be divided into two lots with an existing residence on each if the
16 County sufficiently relaxes its rebuild/repair limitations¹ on nonconforming airport
17 hazards.

18 **TESTIMONY**

19 Stephanie O'Day represented the Gerards in the plat application and presented at the
20 hearing. Ms. O'Day mentioned that the Gerards had another application to lift the
21 Zone 5 airport overlay with the County Council. However, this application was
22 denied in a 4-2 vote and is on appeal in the superior court.

23 The Gerards asked Ms. O'Day's law firm to assist them with the future development
24 of their property, which they have owned since 1967. The property is located at the
25 north end of the Eastsound Subarea Plan, just off the airport, on Orcas Island and is
about 3.5 acres. The Gerard property is zoned Eastsound Residential, one unit per
acre, which typically would allow the property to be subdivided into three units for
residential use. However, because the property is located in the airport overlay zone,
Ms. O'Day admitted that new residential use is not permissible.

Ms. O'Day reviewed the history of the uses on the property. She stated that in 1967,
it had one single-family residence and one mobile home. No land use laws were
enacted at that time. A barn was located on the east side of the property, and a garage
was located on the north east side. In 1971 the Shoreline Management Act was
adopted; in 1990 the Growth Management Act was adopted; in 1992 the Eastsound

¹ Ms. Shaw testified that the County Council is favorably inclined to amend the airport hazard nonconforming use provisions.

1 Subarea Plan was updated to include the Gerard property; in 1996 the property was
2 down-zoned to allow three units per acre whereas before the zoning allowed seven
3 units per acre; and in 1992 the wetlands critical areas ordinance was adopted to
4 require a 150-foot buffer for category I wetlands. The property has an estuarial
5 wetland, though Ms. O'Day pointed out that there is a letter from Paul Anderson with
6 the Department of Ecology that suggests a reduced buffer might be possible due to
7 existing development degrading the buffer. Preferred uses under Zone 5 airport
8 overlay include aviation-preferred uses, industrial, utility storage, and nonretail
9 commercial uses. According to Ms. O'Day, new residential development is
10 prohibited under zone 5, except in a couple of named subdivisions, Grasselvania and
11 Arrowview.²

12 Ms. O'Day has stated that her clients have gone to great lengths to demonstrate why
13 the subdivision should be approved. Ms. O'Day remarked in her years of practice,
14 she has never seen a property encumbered by so many layers of regulation, including
15 shoreline setback requirements, wetland buffers, and airport overlays.

16 Ms. O'Day stated that the subdivision code presupposes divisions are for residential
17 purposes. Ms. O'Day stated that the County's position has been that subdivisions are
18 not allowed for commercial purposes, but Ms. O'Day maintained that the code is
19 silent with respect to commercial subdivisions and that they are not expressly
20 prohibited. Ms. O'Day pointed to SJCC 18.70.010(b), which states that the chapter
21 applies to all divisions of land and includes procedures for all types of land division.
22 Nowhere, according to Ms. O'Day, does it say subdivisions are for residential
23 purposes only. Ms. O'Day also pointed out that the procedures for binding site plans,
24 which require the applicant to do identically what the Gerards have done in this
25 application, provide an alternative for commercial-zoned and industrial-zoned
property subdivisions. The binding site plan regulations are not available to the
Gerards here because, as Ms. O'Day pointed out, the property is residentially zoned
rather than having a commercial or industrial zoning designation. Finally, Ms. O'Day
argued that the area south of the Gerards property requires a minimum parcel size of
20,000 square feet and prohibits single-family residential, so one can infer that
subdivisions for commercial use are contemplated by the code.

Ms. O'Day stated that the Eastsound Subarea Plan and Zone 5 of the airport overlay
allow three residential parcels. The code is silent with respect to maximum number
of parcels in a commercial subdivision, and there is no minimum lot size requirement.

Ms. Francine Shaw also presented on behalf of the Gerards. Ms. Shaw stated that the
Shorrett family succeeded in invalidating a San Juan County conservation design
standard in Skagit County Superior Court based upon the *Sims* case. Ms. Shaw stated

² Spelled phonetically.

1 that she asked that the conservation area be deleted from the staff report, but it was
not done.

2 Ms. Shaw stated that she has been assisting the Gerards with their application for
3 several years. About four years ago, a County moratorium existed, and the Gerards
4 could not process their application. San Juan County lifted the moratorium the day
before a hearing on the matter.

5 Ms. Shaw stated that the Gerards' primary purpose was to gift land to their three
6 children, which would ideally be for residential use, but under current regulations the
Gerards understand that is not possible.

7 According to Ms. Shaw, the Eastsound Subarea Plan, the Shoreline Master Program
8 and the Airport Overlay Zone 5 regulations combine to allow a little commercial
9 development on the land. The Subarea Plan provides that if not specifically listed, the
10 commercial use may be obtained with a conditional use permit. Ms. Shaw stated that
11 a possible use would be for a "mini storage" for kayaks because it works with the
Subarea Plan and Shoreline regulations, which has to have a component tying it to the
12 water. Ms. Shaw stated she has not gone through an exhaustive search of potential
uses, but she believes boat repair may also be a potential option.

13 Ms. Shaw contested the County's position that there has to be shoreline set aside for
14 all three lots because that requirement applies to residential subdivisions, not
commercial. Ms. Shaw also addressed the Category I buffer of 150 feet, stating that
15 Earthworks and Paul Anderson from the Department of Ecology met on site a year
ago and determined it was a degraded buffer that could be reduced. Ms. Shaw noted
16 the Gerards have not formally requested a decreased buffer pursuant the process
outlined in the code.

17 Ms. Shaw stated that there is a site plan related to the sewage design in the
18 application materials and that there is an area for the septic system. She stated that
19 the site plan does not show parking because the Gerards do not know what the use
will be, but she believed that a two-story building with parking underneath or shared
20 parking was possible. The Examiner asked whether subdivision would require
encroachment into the buffer for access. Ms. Shaw confirmed that it would.

21 Upon completion of the proposed subdivision, Lot 1 will have a residence
22 (nonconforming) and commercial use, Lot 2 will have the main home, and Lot 3 the
commercial use. According to current code, the mobile home on lot 1 may not be
23 repaired, but the County Council recommended (?) an amendment of the code to
address reconstruction of nonconforming structures in the airport overlay. Ms. Shaw
24 also pointed out that there is no requirement for a shoreline setback for commercial
25 uses.

Mr. Gerard stated that he owned the property since before the airport was even paved,
but that he has enjoyed the airport and planes. Nevertheless, the airport overlay was

1 sudden, and Mr. Gerard never knew of these regulations before they were enacted.
2 Mr. Gerard confirmed that his intent is not to sell the property, but to subdivide it for
3 his three children. Mr. Gerard remarked that all the regulations make his property
4 almost useless.

5 Finally, Ms. Shaw mentioned the concurrency analysis and stated that the County
6 never denies land use permits for lack of concurrency. The arterials leading up to the
7 property, however, do not meet current LOS standards.

8 Lee McEnergy, the land use planner on this application, stated that with respect to
9 concurrency, Public Works feels the roads adequately serve the development despite
10 the numbers revealing a lack of concurrency. Typically Ms. McEnergy has Public
11 Works write an additional letter stating that the roads do not meet concurrency but
12 adequately serve the property. Ms. McEnergy stated that the County is not making an
13 issue of concurrency on this application.

14 Ms. McEnergy stated that the primary opposition to the application is that it will force
15 waivers if the lots are approved, and they will be very difficult to use. Lots with
16 additional restrictions will result in successors arguing with the County later down the
17 line.

18 Ms. McEnergy affirmed that the County's position is that the code only allows for
19 residential subdivisions.

20 Ms. O'Day stated that her clients were willing to stipulate that any approval does not
21 in any way allow blanket uses. The Gerards must follow San Juan County Code and
22 permitting processes if approval is granted.

23 EXHIBITS

- 24 1 - May 25, 2010 - Report from Linda
- 25 2 - Staff Report Dated March 30, 2010
- 3 3 - Letter from Stephanie Johnson, August 18
- 4 4 - December 15, 2009 Letter from Stephanie Johnson
- 5 5 - GIS Maps
- 6 6 - Wetland Delineation from Earthworks dated February 24, 2009
- 7 7 - Response to Request for Review Checklist
- 8 8 - Health Review Application
- 9 9 - Sewage Map
- 10 10 - Letter from Carter Timmerman
- 11 11 - Email from Tim Shaw
- 12 12 - Memo from Shireene Hale dated June 30, 2009
- 13 13 - Email from Francine Shaw dated June 2, 2009
- 14 14 - Memo from John Van Lund dated May 18, 2009
- 15 15 - SEPA Comment letter from DOE dated May 15, 2009
- 16 16 - SEPA Comment letter from DOE dated June 11, 2009

- 17 - Concurrency Analysis
- 18 - Letter from Chris Ledgerwood dated May 14, 2009
- 19 - Request for Review dated May 8, 2009
- 20 - Letter from Paul Kamin dated May 25, 2009
- 21 - Letter from Bea vonTobel dated May 28, 2009
- 22 - Email from Lee McEnery dated July 8, 2009
- 23 - Appeal from Stephanie Johnson
- 24 - Letter to John Cain dated January 27, 2010
- 25 - Section 18.40.032
- 26 - Email from Lee McEnery dated July 8, 2009
- 27 - Letter from Stephanie Johnson dated December 15, 2009
- 28 - Email from Francine Shaw, dated September 23, 2009
- 29 - Email from Francine Shaw dated March 30, 2010
- 30 - March 16, 2010 ruling from Skagit County Superior Court
- 31 - Memo from Shireene Hale dated June 30, 2009
- 32 - Policies/Procedures/Interpretations on New Impervious Surfaces for Stormwater
- 33 - Letter from Mark Tompkins dated May 23, 2007
- 34 - Sewage Design Application
- 35 - Figure 5 Aircraft Accident Safety Zones
- 36 - FAA Airspace Zone
- 37 - Short Subdivision Plat Map
- 38 - Rebuttal from Stephanie Johnson
- 39 - June 2008 Aerial Photo
- 40 - Gerard Property Aerial Photo

FINDINGS OF FACT

Procedural:

1. Applicant. The applicants are Don and Marion Gerard, represented by Francine Shaw of the Law Office of Stephanie O'Day.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on June 3, 2010. The record was left open to June 30, 2010 for a site visit. Francine Shaw and the applicants were present at the site visit.

Substantive:

3. Project Background. The applicants submitted an application for a three-lot short subdivision, 07SP005, in April 2007. This application was not fully processed due to the County's moratorium prohibiting the division of property within the Eastsound UGA. The application presently before the Examiner was submitted in 2008, 08SP003, with virtually the same design as the 2007 application. The applicants also requested a Redesignation (amendment of the official maps) to remove the Airport Zone 5 overlay from the property. In February 2010, the Planning Commission recommended that the County Council deny the request. The County Council denied the request in March 2010.

1 4. Site and Proposal Description. The current proposal is to create three lots.
2 The proposed plat map is located in an attachment to Francine Shaw's December 15,
3 2009 letter to Lee McEnery, Land Use Planner. Lot 1, the western-most lot, would
4 provide a "commercial building area" in the shoreline (shown as cross-hatching on
5 the plat), lying within 75 feet of the Ordinary High Water Mark (OHWM). Most of
6 Lot 1 lies within Zone 5 of the airport overlay district, but a home already exists on
7 this lot and is considered a non-conforming use/structure. The boundary of Zone 5 of
8 the airport overlay district runs north-south through Lot 1, such that the existing
9 house is located partially within Zone 5. The area lying outside Zone 5 is
10 approximately 38 feet wide on the west margin of the property.

11
12 Lot 2 contains the existing main residence. No additional development is proposed in
13 Lot 2.

14 Lot 3, the eastern-most lot closest to the airport, would provide a commercial building
15 area, also shown on the plat as a cross-hatched area, lying within 75 feet of the
16 OHWM. All of Lot 3 lies within Zone 5 of the airport overlay district. An existing
17 garage lies on the east boundary.

18 All lots must be accessed through a single driveway, which runs through a designated
19 Category I wetland and its 150-foot buffer located in Lot 1. In a letter dated June 11,
20 2009, Paul Anderson, the Department of Ecology Wetland Specialist responsible for
21 San Juan County, stated that, although SJCC 18.30.150(E) provides a 150-foot buffer
22 for Category I wetlands, he believed the existing improvements on Lot 3 already
23 represent a degraded buffer. Mr. Anderson believed that limited development within
24 this improved area on Lot 3 would not significantly impair wetland functions in
25 Wetland B because it is already partially developed with the driveway, garage,
garden, and lawn. Mr. Anderson further believed that construction of one additional
"residence"³ within the improved area on Lot 3 was feasible if low impact
development is used, along with other measures such as screening vegetation and use
of a conservation easement.

The proposed site is located at 393 Nina Lane, Eastsound, Washington. The majority
of the lots are located within Zone 5⁴ of the airport overlay district, which is the area
immediately adjacent to the airport and runway. SJCC 18.40.032(F). According to
staff, the site is level, bounded on the north by driftwood berm, no-bank waterfront.
The southerly part of the site is open, low-lying, saturated pasture-type land (a
Category I wetland), which is bisected by the access road. The north half of the site
is a FEMA flood zone. The south half is shown in the Coastal Zone Atlas as a flood
zone. The shoreline has the designation of Eastsound Residential and is subject to the

³ Although Mr. Anderson stated that an additional residence was feasible, the Zone 5 airport overlay district clearly does not permit residential development. SJCC 18.40.032(F)(2).

⁴ This is with the exception of the western 38-foot margin of Lot 1.

1 regulations of the Shoreline Master Program. The upland area is Eastsound
2 Residential, subject to the regulations of the Eastsound Subarea Plan. The existing lot
is approximately 3.48 acres.

3 5. Characteristics of the Area. The neighborhood is one of smaller shoreline
4 lots developed with waterfront homes to the west, the Eastsound airport to the east,
5 and undeveloped wetland to the south. Access is by Nina Lane, from the north end of
Blanchard Road. This is property is located at the very end of Nina Lane.

6 CONCLUSIONS OF LAW

7 **Procedural:**

8 1. Authority of Hearing Examiner. Appeals of short subdivision application
9 decisions are reviewed by the Hearing Examiner, after conducting an open-record
public hearing, pursuant to SJCC18.80.140(B)(4).

10 **Substantive:**

11 2. Comprehensive Plan and Zoning Designations. The subject property is
12 designated Eastsound Residential 1 unit/acre and is subject to the regulations of the
13 Eastsound Subarea Plan. Most of the site is also designated as Zone 5 airport overlay
district. The shoreline designation is Eastsound Residential.

14 3. Permit Review Criteria. The San Juan County Code ("SJCC") governs the
15 policies and criteria for short subdivisions. SJCC 18.70.050(F) establishes the criteria
16 for approval.

17 The applicable shoreline policies, use regulations, and criteria are quoted (in italics)
and addressed below.

18 **San Juan County Code Regulations**

19 **SJCC 18.70.020(D):** *Conformity with Other Codes. Except for exempt actions*
20 *under SJCC 18.70.010(C), applications submitted under this section may be*
21 *approved or approved with conditions if the application conforms to adopted County*
and state rules and regulations, including, but not limited to:

- 22 1. *Chapter 43.21C RCW (State Environmental Policy) and San Juan County*
SEPA Rules;
- 23 2. *Chapter 58.17 RCW (Subdivisions);*
- 24 3. *Chapter 3670A RCW (Growth Management Act);*
- 25 4. *Chapter 36.70B (Local Project Review);*
5. *San Juan County Unified Development Code (this code);*
6. *San Juan County board of public health – water and sewer rules and*
regulations (SJCC Title 13);

1 7. *San Juan County Comprehensive Plan and Shoreline Master Program and*
2 *their official maps.*

3 5. The staff report notes noncompliance with several sections of the Unified
4 Development Code. As noted in SJCC 18.70.020(D)(5), the proposal must comply
5 with all provisions of the Unified Development Code for approval. The most
6 significant of those provisions will be identified below. As shall be discussed, the
7 proposed short subdivision does not comply with all provisions and, therefore, the
8 decision to deny the application is affirmed.

9 **SJCC 18.70.060(B)(4):** *All proposed lots shall provide a usable area for the*
10 *construction of a dwelling unit, approved sewage system, and an approved water*
11 *supply.*

12 **SJCC 18.50.330(B)(7):** *In all proposed land divisions and multiple-unit and*
13 *multifamily developments on shorelines the terrain, access, potential building sites,*
14 *areas appropriate for common ownership and special features of the site shall be*
15 *considered in the design of the development. Allowable densities are maximum*
16 *densities and are not guaranteed. The approved density shall be determined on a*
17 *case-by-case basis and shall be based on considerations of topography, protection of*
18 *natural resources and systems, and the intent and policies of the Shoreline*
19 *Management Act, the State Environmental Policy Act, the Comprehensive Plan, this*
20 *code and the Shoreline Master Program. The allowable density may be reduced*
21 *below the maximum if SEPA analysis or other evaluation of the site or area-wide*
22 *conditions demonstrates that adverse effects of the development at the maximum*
23 *density can be mitigated or avoided by a reduction to the approved density, and no*
24 *appropriate alternative means of mitigation is available.*

25 **SJCC 18.30.020(D)(3):** *The maximum allowed density reflects the general intent of*
26 *the Comprehensive Plan and should be allowed unless maximum density would*
27 *exceed site capabilities or unless it would thwart other applicable County*
28 *regulations. If specific site considerations dictate a lower density than that shown on*
29 *the official maps, the county shall have authority to impose a lower density. The*
30 *approved density shall be determined on a case-by-case basis and shall be based on*
31 *considerations of topography, protection of natural resources and systems, and the*
32 *intent and policies of the Shoreline Management Act, the State Environmental Policy*
33 *Act, the Comprehensive Plan, this code and this Shoreline Master Program.*

34 6. Buildable Lots. The provisions quoted above reflect the commonly
35 adopted requirement that any lots created by a subdivision must be buildable. A
36 developer should not be able to circumvent development requirements by creating
37 lots that are unbuildable and then seeking variances, reasonable use exceptions and/or
38 other waivers because they otherwise have no reasonable use of the lot they created.
39 Of course, by circumventing regulations in this fashion the underlying purposes of the
40 regulations are usually also circumvented. The requirement for buildable lots is
41 expressly required in SJCC 18.70.060(B)(4), which underlies the requirement of

1 SJCC 18.30.020(D)(3) that subdivisions not exceed site capabilities and is reflected in
2 the requirements of 18.50.330(B)(7) that authorized densities be consistent with
3 applicable development regulations.

4 A determinative factor in this appeal, therefore, is whether the lots proposed by the
5 applicant are buildable. Lot 3 will be considered first. As noted previously, all of Lot
6 3 is located within the Zone 5 Airport Overlay District. SJCC 18.40.032(F) prohibits
7 new residential development within Zone 5. The Zone 5 airport overlay district
8 regulations do not prohibit commercial uses, and in fact, prefer aviation related uses.
9 SJCC 18.40.032(F)(3). Although commercial uses generally appear to be authorized,
10 several types of commercial uses relating to high occupancies and/or dependant
11 populations are expressly prohibited including schools, public assembly uses,
12 churches, religious assembly uses, and motels and hotels.

13 The commercial focus of the Zone 5 regulations conflicts with the residential focus of
14 applicable Eastsound Subarea Plan requirements. Limited nonresidential uses are
15 allowed by the Subarea Plan, such as a day nursery, transient lodging, and religious
16 assembly. See SJCC 16.55.240(B). All of these uses are prohibited by SJCC
17 18.40.032(F)(3), which as previously discussed above prohibits high occupancy
18 and/or dependant population uses in the Zone 5 overlay.

19 The Eastsound Subarea Plan does provide that uses not identified as allowed or
20 prohibited may be allowed by a conditional use permit. See SJCC 16.55.240(B). The
21 applicant has noted that a commercial use such as kayak storage facility or boat repair
22 would be appropriate for the site. That may very well be correct, but a potential
23 conditional use for a site with so many development limitations does not provide
24 much assurance of a buildable lot. In assessing impacts through a conditional use
25 permit, the decision maker must consider impacts to the adjoining shoreline and
wetland while also trying to accommodate parking and other requirements for a
building area that is only 0.12 acres⁵ in size. Impacts to the aircraft using the
adjoining airport must also be considered. Given the small building area and the site
constraints, it cannot be concluded that "more likely than not" the property can be
developed for commercial purposes. The site limitations may also serve to limit the
discretion of the County in reviewing a conditional use permit, by placing it in a
position of having either to approve a conditional use application or to face a takings
claim on the basis that the County will not allow reasonable use of the property. For
the foregoing reasons the Examiner concludes that proposed Lot 3 exceeds site
capabilities as contemplated in SJCC 18.30.020(D)(3). Elimination of Lot 3 is also
necessary to prevent potential regulatory waivers and/or impacts to environmental
resources as contemplated in SJCC 18.50.330(B)(7).

⁵ See Ex. 37, which identifies only 0.12 acres as outside the wetland and shoreline buffers.

1 The “buildability” of Lots 1 and 2 presents other issues due to the presence of
2 nonconforming single-family homes. Were it not for the fact that the homes cannot
3 be repaired or rebuilt, they could each easily qualify as buildable lots because they
4 have already been built. If they were “normal” nonconforming uses, the allowance of
5 a lot for each home would not put the County in a position of having to grant
6 variances or other waivers because no further development would be necessary.

7 Unfortunately, the homes are not “normal” nonconforming uses. SJCC 18.40.310(I)
8 provides that a nonconforming use cannot be rebuilt, repaired or replaced when these
9 activities would constitute an airport hazard. SJCC 18.40.030(B)(5) defines an
10 airport hazard as including dwelling units at a density greater than one unit per two
11 acres. The two homes on the Gerard property exceed this density. Consequently, if
12 either of the homes needs any replacement or repair, it will have to be abandoned, and
13 the lot owner will be demanding reasonable use from the County. For reasons similar
14 to those that apply to Lot 3, there is no reasonable assurance that commercial
15 development of Lots 1 and 2 is possible without waivers or limiting discretion in the
16 conditional use process. For these reasons, the creation of Lots 1 and 2 is also
17 inconsistent with SJCC 18.30.020(D)(3) and SJCC 18.50.330(B)(7) because site
18 constraints do not provide any reasonable assurance that commercial development
19 can occur without waivers and other actions that will adversely affect environmental
20 resources and/or create airport hazards.

21 7. Residential Lots. SJCC 18.70.060(B)(4) raises the unique issue that all
22 lots created in a San Juan subdivision may have to accommodate residential
23 development. It requires all lots created in a subdivision or short subdivision to
24 provide usable area for the construction of a dwelling unit. The issue does not need
25 to be reached in this decision because the Examiner has concluded that the
subdivision fails to comply with SJCC 18.30.020(D)(3) and SJCC 18.50.330(B)(7).
The Examiner would also like to give the County a better opportunity to fully address
this issue should it come up again, since it appears to be the practice of the County to
limit its subdivisions to residential development.

The County should recognize, however, that its interpretation (or at least its
regulations) is highly unusual. There is little doubt that the subdivision review
required by state law applies to industrial and commercial subdivisions.⁶ The state
definition of subdivision does not limit a subdivision to residential use. See RCW
58.17.020(1). RCW 58.17.030 provides that every subdivision shall comply with
state subdivision requirements, with the exceptions listed in RCW 58.17.040.
Notably, divisions of land involving commercial or industrial uses are not exempted
from the subdivision process, and RCW 58.17.040(4) exempts commercial and
industrial divisions when they are approved through a binding site plan, strongly

⁶ The state mandate for commercial/industrial subdivision arguably only applies to long subdivisions since cities and counties have significant latitude to develop their own regulations for short subdivisions. However, SJCC 18.70.060(B)(4) applies to both long divisions and short subdivisions and it would be difficult to justify an interpretation that differs from short to long divisions.

1 suggesting that the divisions otherwise would be subject to subdivision review. State
2 requirements are significant because they govern local subdivision regulations and
3 also because SJCC 18.70.020(E) expressly states that San Juan County's subdivision
4 regulations are not intended to supersede state controls related to the subdivision of
5 land.

6 SJCC 18.70.060(B)(4) can be reconciled with the requirements of state subdivision
7 laws in the interpretation of "usable area" for a dwelling unit. If "usable" is construed
8 as enough space outside of environmentally sensitive areas to build a home, state law
9 requirements can be observed, and the principle of limiting lots to those that have
10 reasonable uses is maintained for residential subdivisions.

11 8. Other Issues. Given the outcome of the buildable lot issue, other issues
12 such as septic compliance and residential density do not need to be reached at this
13 time. If the issue of buildable lots and commercial development (SJCC
14 18.70.060(B)(4)) can be satisfied, the remaining issues appear to be something that
15 can be worked out fairly easily between staff and the appellants.

16 DECISION

17 The Examiner affirms the Director's April 5, 2010 decision to deny the preliminary
18 short plat application.

19 Dated this ¹³16 day of July, 2010.



20 Phil Olbrechts
21 County of San Juan Hearing Examiner
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1 **Effective Date, Appeal Right, and Valuation Notices**

2 Hearing examiner decisions become effective when mailed or such later date in
3 accordance with the laws and ordinance requirements governing the matter under
4 consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be
5 subject to review and approval by the Washington Department of Ecology pursuant to
6 RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

7 This land use decision is final and in accordance with Section 3.70 of the San Juan
8 County Charter, such decisions are not subject to administrative appeal to the San
9 Juan County Council. See also, SJCC 2.22.100

10 Depending on the subject matter, this decision may be appealable to the San Juan
11 County Superior Court or to the Washington State Shorelines Hearings Board. State
12 law provides short deadlines and strict procedures for appeals and failure to timely
13 comply with filing and service requirement may result in dismissal of the appeal. See
14 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
15 promptly review appeal deadlines and procedural requirements and consult with a
16 private attorney.

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