

BEFORE THE HEARING EXAMINER
FOR THE COUNTY OF SAN JUAN

SEP 16 2010

Phil Olbrechts, Hearing Examiner

DEVELOPMENT & PLANNING

RE: Diller Family Trust Shoreline Substantial Development Permit (04SJ014)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.
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INTRODUCTION

The Applicants have applied for expansion of Islander Lopez Marina. The Examiner denies the application.

This was a very difficult case. The Applicant’s proposal may very well meet code criteria, but the Applicant did not present sufficient evidence to establish this. Friends of the San Juans (“Friends”) presented several credible scientific studies that established at least as a general proposition that eelgrass patches of any size have ecological value and that mitigation by transplantation is of dubious effectiveness. With this fairly compelling evidence in the record, the Applicant should have either produced more compelling studies establishing contrary conclusions and/or a thorough and credible rebuttal by a qualified expert. Instead, the Applicant based its rebuttal upon a newspaper article, some photographs and unsubstantiated theories of eelgrass patch propagation. The Applicant did initially establish, through the conclusions of an expert, that the eelgrass at the project site will not support endangered fish habitat. These conclusions fell short of establishing that the eelgrass had no ecological value subject to protection by shoreline policies and regulations.

In addition to establishing that the eelgrass at the site merits protection, Friends also mentioned in both its pre-hearing and post-hearing comments that the Applicant should have surveyed¹ the surrounding area to determine if there was a more environmentally compatible location for the marina expansion. The Applicant never acknowledged this issue. This was a significant and fatal oversight. Given the unknowns in eelgrass transplantation, avoidance is a far more preferable alternative. Given the Applicant’s evidence that there is more eelgrass in the near shore areas and less in the deeper areas, it is especially notable that the Applicant provided no explanation for why expanding further waterward would not be a better alternative to

¹ In suggesting that a “survey” should have been done of adjoining areas, the Examiner is not requiring a fully detailed eelgrass survey. A general discussion of the suitability of alternative locations would suffice if sufficiently credible.

1 expanding parallel to the shoreline. It may be impossible, for economic or legal
2 reasons, to expand further waterward. There may even be more eelgrass located
3 waterward. There may be any number of reasons why a waterward expansion is not
4 appropriate in this case, but no reason was provided.

5 When an application suffers from gaps in necessary information, they can often be
6 filled by conditions requiring additional study. Unfortunately, the gaps of this
7 application are too large and significant to delegate to staff review and approval. The
8 unresolved issues of this case, in particular the adequacy of the transplantation
9 mitigation and the potential alternative design, needs a full public airing with clear
10 avenues for public appeal. Further, the Applicant was given two post-hearing
11 opportunities to respond to the written materials of Friends. During the hearing, the
12 Examiner specifically recommended that the Applicant use its marine biologist to
13 address the written materials from Friends. The equities of this case do not justify
14 giving the Applicant a third opportunity to address the deficiencies of the application
15 through the conditions of approval.

16 SUMMARY OF TESTIMONY

17 The Applicant, Diller Family Trust, for Islander Lopez Expansion is requesting
18 approval to expand the existing marina located in Fisherman Bay, Lopez Island,
19 Washington State.

20 According the Diller Family Trust representative, Bob Query, this matter is being
21 revisited from an originally submitted request to Shannon Fitzgerald, planner, in
22 2004. According to Mr. Query the previous application languished, during which
23 time the environmental impact to eel grass become a concern to Friends of the San
24 Juans. The Applicants are now resubmitting with a modified proposal allowing for
25 eelgrass transplantation with a reduced expansion. Finger floats are no longer
included in the proposal. Mr. Query clarified that the docks may be 6 or 8 feet wide,
depending on grating requirements. Mr. Query noted that grating was not proposed
because the eelgrass would be transplanted. Mr. Query noted that the applicant owns
all the property frontage along the expansion so view impacts would not affect others.
Mr. Query noted that lights on the floats would be only twelve inches high. Lock
boxes would be the highest structures on the floats. Mr. Query noted that the slips
would be marketed locally as permanent slips. He stated that the Dillers would find it
difficult from a business perspective to be bound to a percentage of permanent
moorage. Transient rental brings in more per foot during high season, but permanent
moorage is necessary to maintain revenues during the off-season. The marina will
cater to 15-foot to 36-foot boats. Mr. Query also noted that the project would have a
positive impact by reducing boat moorage.

Mr. Query identified the differences in eelgrass between the 2001 and 2005 eelgrass
surveys, showing that eelgrass had diminished in size. Mr. Query also showed in
Exhibit 13 that there was not any eelgrass at several points in the bay. Mr. Query
noted that there was not sufficient eelgrass for herring spawning or forage fish hiding

1 in the area of the marina. The Examiner asked if this conclusion was based upon
2 expert opinion and Mr. Query noted it was addressed in the report. Mr. Query noted
3 that 4,000 square feet of eelgrass was transplanted at the Twin Bridges area close to
4 Anacortes. Mr. Query does not know if there are herring in the bay. He noted that
5 fisherman have told him there are not.

6 Mr. Query introduced Ex. 15, which shows forage fish areas. Kyle Loring, from
7 Friends, explained that "allspawn" on Ex. 15 is surfsmelt and sandlance. The
8 outerline is the eelgrass outerline that Friends surveyed for San Juan County. If there
9 is not an outerline, there is no eelgrass. Mr. Query noted that the proposed dock is
10 located outside the outerline in the bay. Mr. Query was unable to clarify where the
11 eelgrass would be transplanted.

12 According to Lee McEnery noted that there currently exists a motel, restaurant, camp
13 ground, and pool at the project site. According to the Applicants, their request to add
14 an L-shaped extension to the marina with 50 additional slips will only require more
15 parking spaces near the S.W. corner of the dock, and parking would take place on the
16 N.E. corner of the Diller properties as recommended and approved by the city. No
17 other changes are proposed. Lee McEnery stated that the concerns from Friends of
18 the Sound were indeed understandable and that the application could have been
19 clearer about the proposal. Ms. McEnery agreed that the application was well suited
20 for additional moorage and recommends approval.

21 Kyle Loring of Friends of the San Juans testified that expansions of marinas that
22 decrease the need for private docks is generally a positive development. He noted
23 that the application does not contain enough information to adequately assess
24 impacts. He felt that the 2005 survey was too outdated and that the proposed
25 mitigation does not follow the mitigation hierarchy required by the critical areas
ordinance. He noted that the applicant has not demonstrated whether a different
configuration would create less impacts. He also noted that the proposal did not
include grating and that he has never seen an application without grating. Permanent
mooring should be required to reduce private docks. Mr. Loring noted that there has
been no evaluation of substrate or wave action at the transplant site to evaluate
whether transplantation would be successful. As to salmon habitat, Mr. Loring noted
that the concern is not only full grown salmon but juvenile salmon as well. Mr.
Loring requested that the County request additional information from the Applicant
and reopen the hearing for additional discussion of impacts. Mr. Loring stated that
the additional information needed is an updated eelgrass survey and an analysis of
configuration alternatives.

Mr. Query noted that it is not the fault of the Applicant that its eelgrass surveys are
outdated. It is because the permit has languished in the County. Mr. Query noted
that WDFW will accept eelgrass surveys in winter under certain conditions and he
would like to research that issue. In response to questions from the Examiner, Mr.
Query said that his biological expert, Mr. Belcher, could provide an explanation for
any differences that would be anticipated from the survey being done in May (outside

1 the time period recommended by WDFW) and in June (within the recommended
2 WDFW timeframe). Mr. Query clarified that the Applicant is not proposing grating
unless required.

3 The Examiner advised Mr. Query that Friends had loaded the record with a
4 significant amount of information that lead the Examiner to question the effectiveness
5 of the proposed mitigation. The Examiner stated it would be very useful for Mr.
6 Query to have his expert address the issues raised by Friends. The Examiner noted
that Mr. Query's expert analysis was fairly abbreviated so it was difficult to get
information from it.

7 Allen Shayo presented a code enforcement report indicating that no changes can take
8 place while any code enforcement allegations exist. There is in fact an existing
9 violation in the NW corner of the bay, in which a shed has been identified in violation
10 of County code must be removed before further development can proceed.
According to Mr. Shayo, the Applicant and the County agreed to move the shed.
Therefore he recommends approval of the permit if the Applicants remove the shed.

11 RECORD

12 At the close of the hearing, the Hearing Examiner granted the Applicant three weeks
13 to respond to the materials provided by Friends and provide past examiner decisions
14 on eelgrass impacts, who would then be given one week to respond, at which time the
15 Applicant would be given a chance to respond. The Applicant submitted its materials
on July 27, 2010. There was a delay in forwarding this to Friends, so the Examiner
16 allowed Friends to submit its response on August 5, 2010. The Applicant submitted a
reply on August 20, 2010.

17 EXHIBITS

- 18 Exhibit No. 1 Staff report, submitted by Lee McEnery on 3/18/10, with
19 attachments
20 Exhibit No. 2 3/25/10 Friends of the San Juans email with attachments
21 Exhibit No. 3 3/30/10 Code Enforcement Agreement
22 Exhibit No. 4 Photograph of the bay serving as a map
23 Exhibit No. 5 New proposal for L shaped marina extensions
24 Exhibit No. 6 "Existing Conditions" survey
25 Exhibit No. 7 Plot Plan of Islander Resort, dated 4/14/93, drawn by licensed
architect, Edward Weinstein
26 Exhibit No. 8 Aerial Photo depicting parking
27 Exhibit No. 9 Aerial Photo depicting Diller ownerships
28 Exhibit No. 10 Preliminary Eelgrass Macroalgae Habitat Survey by Jen-Jay
Diving, Inc., dated 6/18/01
29 Exhibit No. 11 Intermediate Eelgrass Macroalgae Habitat Survey by Jen-Jay
Diving, Inc., dated 6/7/05
30 Exhibit No. 12 Site plan: Original 2001 proposal and Proposal with 2005 eelgrass

- 1 Exhibit No. 13 Aerial depicting buoys and associated mooring inspections forms
 2 Exhibit No. 14 3/31/10 email from Chris Betcher to Bob Querry with May, 2002
 Marina Mirror article "Todd Inlet Eelgrass Transplants Successful"
 3 Exhibit No. 15 Parcel map depicting herring spawning grounds
 4 Exhibit No. 16 April 17, 2009 memo from San Juan Marine Resources Committee
 5 Exhibit No. 17 July 27, 2010 letter from Bob Querry to Examiner
 6 Exhibit No. 18 Eelgrass survey dated May 5, 2010
 7 Exhibit No. 19 7/18/10 letter from Jerry Miller to Bob Querry
 8 Exhibit No. 20 Hearing Examiner decisions
 9 Exhibit No. 21 August 5, 2010 Email, Friends of the San Juans Response
 10 Exhibit No. 22 Email chain "Lopez Islander Marina," Phil Olbrechts, June 1, 2010
 11 Exhibit No. 23 Email chain "Diller Associates," Bob Querry, July 19, 2010
 12 Exhibit No. 24 Email chain "Diller Exemption," Lee McEnery, July 21, 2010
 13 Exhibit No. 25 Email chain "Islander Marina Expansion," Bob Querry, August 3,
 2010
 14 Exhibit No. 26 Email chain "Friends of the San Juans response to Islander Marina
 supplement, 04SJ014," Bob Querry, August 19, 2010
 15 Exhibit No. 27 Email chain "Diller Associates Marina," Bob Querry, August 20,
 2010
 16 Exhibit No. 28 Email chain "Lopez Islander Marina Expansion," Lee McEnery,
 August 20, 2010

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicant is the Islander Lopez Corporation.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on April 1, 2010.

Substantive:

3. Site and Proposal Description. The Applicant proposes the expansion of Islander Lopez Marina. A string of floats in an L shape (about 454 feet long and 3,623 square feet in area) would extend from the southwest point of the existing docks and would provide about 50 additional moorage spaces for boats up to 20 to 30 feet in length. The floats may be illuminated by 12-inch-tall lighting. Parking would be on the parcel to the north, 252241002, in the northeast corner adjacent to Normandy Lane, which is already used for parking. The parking site accommodates 150 vehicles, and staff have determined that this is sufficient to meet the parking needs of the project. There is no evidence to the contrary. No additional clearing or grading is needed to park here. For the parking area, the Applicant proposes 2,850 square feet of landscaping composed of 20 landscaped areas that are each at least 10 feet x 20 feet in area. The landscape details are presented in the 3/11/05 letter from Bob Querry in Exhibit 1. No other changes to the marina or resort operation are proposed. Building materials will include the following: The gangway ramp is

1 constructed of welded aluminum square tube and channel frame with the entire deck
2 surface grated. The guide piles will be standard wall galvanized steel pipe. The float
3 system is constructed of polystyrene foam fully encapsulated in reinforced concrete,
4 with treated wood secured by galvanized thru-rods.

5 The Islander Lopez Marina offers transient and permanent moorage at the existing
6 marina docks, a restaurant on the waterfront, lodging, swimming pool and campsites
7 in the upland. The marina currently has 52 slips and additional side-tie moorage.
8 The parking area can accommodate at least 150 vehicles and no additional clearing or
9 grading will be necessary for additional parking. There are several parcels associated
10 with the marina and resort, two of which are directly involved in this proposal.

11 The marina expansion will utilize the following concrete float modules:

12 1. The new West Dock: an 8-foot-wide x 300-foot-long float (2,400 square
13 feet) oriented in a north-south direction, attached to the west end of the existing east-
14 west oriented marginal walkway, extending toward the south.

15 a. Eleven (11) each 3-foot-3-inch-wide x 26-foot-long finger floats
16 (1,287 square feet) oriented east-west and attached to the east side of the above
17 walkway.

18 b. Anchored by nine (9) each 16-inch-diameter steel pile, spaced 30'
19 O.C.

20 2. A new 8-foot-wide x 154-foot-long (1,232 square feet) side-tie moorage
21 float, attached to the south end of the West walkway described in #1 above, oriented
22 east-west, extending to the east.

23 a. Anchored by (6) each 16-inch-diameter steel pile, spaced 30'O.C.

24 4. Characteristics of the Area. The marina lies in Fisherman's Bay off of
25 Fisherman Bay Road, just south of Lopez Village, adjacent to another marina (Islands
Marine Center). The county road bisects the property. There are four other large
docks within Fisherman Bay, and a few smaller ones as well.

5. Adverse Impacts of Proposed Use. Several adverse impacts were raised in
this case. The most significant are addressed below:

A. Eelgrass. The issue of primary concern to Friends is impacts to eelgrass.
A June 7, 2005 survey found 16 eelgrass patches under the proposed expansion. Nine
of these patches were represented by one or two individual shoots. The remaining
seven locations were patches that composed a total area of approximately 140 square
feet with areas of individual patches ranging from 2 to 70 square feet. The proposal
will be located within the critical habitat for Puget Sound Chinook Salmon
Evolutionary Significant Unit designated by the National Marine Fisheries Service.

1 Eelgrass provides cover for rearing, migrating and maturing Chinook salmon and
2 their prey. The Applicant's ESA Informal Consultation, concludes that the amount of
3 eelgrass at the project site is insufficient to serve as a Primary Constituent Element
(PCE). There is no evidence to the contrary and the Examiner finds that the eelgrass
at the site does not serve as endangered fish habitat.

4 Appendix A to the ESA Consultation, p. 2, Ex. 1, acknowledges that existing eelgrass
5 may be adversely affected by the shading created by the proposal. It is undisputed
6 that the proposal will harm the eelgrass and the Examiner finds accordingly. To
7 mitigate these impacts, the Consultation proposes a 150-square-foot eelgrass
mitigation site located more than 30 feet from the proposal. The eelgrass at the
proposal site will be transplanted to this area.

8 Friends offered numerous comments on eelgrass impacts in a March 25, 2010
9 submission, Ex. 2. They noted that alternative locations should have been examined
10 for the marina that avoided eelgrass impacts. They also noted that alternative
11 mitigation such as grating should have been considered and that transplantation is a
12 last resort form of mitigation under San Juan's critical area regulations. They pointed
13 out that the Applicant's eelgrass analysis does not address whether the proposed
transplant location is suitable for eelgrass survival. Friends also found it disturbing
that the application materials did not provide a site plan outlining the proposed use
(essentially the location of the finger floats) and that the eelgrass survey was
outdated.

14 The significance of eelgrass and the strategies to minimize impacts is well
15 summarized in a recent Shoreline Hearing Board case, *Walker and Seidl v. San Juan*
16 *County*, SHB No. 09-012. Findings 15, 17 and 18 are quoted below:

17 15.

18 *Eelgrass is an important form of littoral vegetation that occurs in*
19 *relatively shallow waters. Eelgrass serves a wide variety of ecological*
20 *functions in nearshore ecosystems. It produces fuel for nearshore food*
21 *webs and provides critical three dimensional structures for marine*
22 *organisms to use. Shellfish use eelgrass beds as habitat and juvenile*
23 *salmonids use eelgrass beds as migratory corridors. Ex. I-36, p. 5.*
24 *Eelgrass is widespread in the San Juan Islands and it is not a rare or*
25 *threatened plant. Around 41 percent of the shorelines in San Juan County*
contain eelgrass. Bodensteiner Testimony. Eelgrass is light sensitive and
structures that shade eelgrass can have an impact on its vitality and/or
survival. Ex. I-42, p. 2; Bodensteiner Testimony; Betcher Testimony;
Leitner Testimony.

17 17.

18 *Despite the common occurrence of eelgrass throughout the San Juans,*
19 *scientists are concerned about significant isolated declines in eelgrass*
20 *stands at specific locations. Westcott Bay/Garrison Bay on San Juan*

1 *Island has experienced a marked and unexplained decline in eelgrass in*
2 *the past 8-10 years. Ex. I-39, p. 3. After extensive study, no direct cause*
3 *for the eelgrass decline in Westcott Bay has been identified. Ex. I-39, pp.*
4 *9-10. A number of factors are suspected to play a role in the problem, but*
5 *no direct link to dock development has emerged. Ex. I-36, p. 26 of 34;*
6 *Whitman Testimony.*

7 18.

8 *In light of the undisputed functions and values provided by eelgrass,*
9 *scientists and regulatory authorities make every effort to avoid permitting*
10 *any activity or construction that will harm eelgrass. The first strategy is to*
11 *design the project to avoid eelgrass completely. If full avoidance is not*
12 *possible, then minimizing the impact through placement choices and*
13 *design elements is the next step. Mueller Testimony. Deborah Shafer*
14 *prepared an article for the U.S. Army Corps of Engineers Seattle District*
15 *in 2002 entitled, Recommendations to Minimize Potential Impacts To*
16 *Seagrasses From Single-Family Residential Dock Structures In The*
17 *Pacific Northwest that outlines several recommended techniques: (1)*
18 *avoidance, (2) shared facilities, (3) placing the terminal platform in water*
19 *too deep to support eelgrass, (4) orienting the structure in a north-south*
20 *direction to minimize shading, (5) reducing walkway width to four feet, (6)*
21 *elevating fixed piers to allow more light to penetrate to underlying*
22 *seagrasses, (7) using devices to keep floats raised off the sediments at low*
23 *tide, (8) limiting the size of floats and placing at depths to avoid scouring*
24 *or grounding, (9) using alternative construction materials such as grated*
25 *decking, (10) using the minimum number of pilings necessary to maintain*
structural integrity, (11) removing floats seasonally. Ex. I-43.

The findings made by the Shoreline Hearings Board, above, are consistent with the evidence presented in the record and are also adopted by the Examiner.

1. Ecological Significance. The eelgrass at the project site has ecological significance even if it may not provide endangered fish habitat. The Applicant has placed emphasis upon the fact that many of the eelgrass sites are only one or two blades of grass. That accounts for nine of the 16 sites. However, other eelgrass patches are significantly larger and the total amount of eelgrass, 140 square feet, is significant even for a project of this size. Beyond this the Applicant disputes the environmental significance of these small patches because they are not sufficiently large to provide any habitat value to endangered fish. Friends provided studies, Ex. 24, attachments B and D, that show that eelgrass has ecological value beyond serving as endangered fish habitat and that at least some of these values are present no matter how small the patch. As quoted above from the *Walker* case, the Shorelines Hearings Board has also determined that eelgrass serves numerous ecological values beyond protection of endangered fish. Of equal significance is the fact that eelgrass is the only plant species in the near shore that provides habitat:

1 ...seagrasses are the only rooted organisms in the near shore region and
2 are the foundation for thousands of other taxa including vertebrate and
3 invertebrate species that use the biome for shelter, foraging sites,
4 spawning habitat and nurseries. Protecting the few seagrasses species
5 that exist is essential to the biome and will safeguard species richness,
6 biodiversity, ecosystem structure, and many ecological processes.

7 Ex. 2, att. C, p. 3.

8 For these reasons the Examiner finds that the eelgrass at the project site, even the
9 relatively small quantities, has ecological value.

10 In Ex. 17, the Applicant appears to attempt to discount the value of the eelgrass by
11 establishing that it is mobile (in the sense that its location and concentrations change
12 year to year) and will not grow in large concentrations at the project site. As noted by
13 Friends, the Applicant's comments in this regard are entirely unsubstantiated by study
14 or expert opinion. The Applicant submitted a letter from a diver, Ex. 18, but there is
15 no indication in the record that the diver is a biologist or has any training to make any
16 conclusions about eelgrass habitat beyond his current and past observations of
17 location and concentrations of eelgrass. Further, there is nothing in the record to
18 suggest that there will be any significant period of time when no eelgrass will be
19 present at the site. To the contrary, the Applicant's three surveys in 2001, 2005 and
20 2010 strongly suggest that eelgrass has persisted at the proposed site for at least a
21 decade.

22 At the request of the Examiner, the Applicant also submitted several past Examiner
23 decisions, Ex. 20, to demonstrate that prior Examiners have authorized docks over
24 small amounts of eelgrass. None of the Examiner decisions submitted by the
25 Applicant approved of a structure over eelgrass. Every single Examiner decision
 presented contains a finding that there will be no construction over eelgrass or an
 eelgrass bed and none of the eelgrass surveys or plot plans submitted in conjunction
 with the decisions show eelgrass under a proposed structure.² The decisions
 submitted by the Applicant included a shoreline exemption approval that involved the
 minor expansion of an existing dock facility that touched on the edge of an eelgrass
 bed. The exemption decision does not identify why this encroachment was
 authorized, so it is difficult to attach any significance to it.

 Of greater significance to the Applicant's position is the *Walker* decision, where the
 Shoreline Hearings Board authorized a dock over eelgrass and even allowed pilings to
 displace a portion of the bed. As discussed under Transplantation below, the decision
 was premised upon the finding that transplantation served as effective mitigation.
 The evidence presented in this case does not support that finding.

² In the Klondike decision the Applicant included a plot plan showing a dock touching on the edge of an eelgrass bed. This plot plan was for an existing dock that had been built without a permit. The dock proposed in that decision did not extend over any eelgrass.

1 2. Transplantation. The Examiner finds insufficient evidence to
2 support a finding that the transplantation proposed by the Applicant will effectively
3 mitigate eelgrass impacts. As support for their position that eelgrass transplants have
4 a dubious chance of success, Friends supplied a study of transplant survival in San
5 Diego Bay, attached as Ex. B to Ex. 2. The study involved the creation of four
6 eelgrass beds. All four beds perished within six months. Two beds were placed near
7 the mouth of the bay and two others were placed mid-bay. Transplants near the bay
8 mouth likely were killed by sediment transport and those in the mid-bay by dense
9 algal overgrowth. Of course, the conditions that killed the eelgrass in San Diego Bay
may very well not be present in Fisherman's Bay. However, the San Diego study
certainly does establish that transplanted eelgrass beds are fragile and no presumption
can be made for survival. This is reflected in the conclusions of the San Juan Marines
Resources Committee, who determined that mitigation to marine habitat areas,
including eelgrass beds, should not be allowed in lieu of avoidance. See Ex. 15.

10 The Applicant provided no scientific studies addressing the success of restoration
11 techniques. The Applicant also provided no assessment by a qualified expert as to
12 why and how restoration would work for this project when it did not work for the
13 projects identified in the San Diego study. The Applicant did provide a newspaper
14 article describing a successful restoration project, but there was no explanation from a
15 qualified expert correlating the conditions of success for that project with the
16 mitigation proposed for the subject proposal. There was also no opinion rendered by
17 any qualified expert to refute the contention by Friends that restoration projects are
"notoriously" unsuccessful or that there is anything unique about the proposed project
that would make it successful. The informal ESA Consultation identifies how the
eelgrass will be transplanted, but there is no discussion as to the likelihood of success
in the designated transplant area or any reference to studies that would support a
finding that the mitigation will be effective.

18 It is noteworthy that the Shoreline Hearings Board embraced restoration as a valid
19 mitigation technique at Conclusion of Law No. 20 of the *Walker* case. However, at
20 least to the extent identified in the *Walker* opinion, there was no evidence presented
21 in that case that restoration does not usually work. In this case, Friends presented the
San Diego study, which shows that restoration has problems. Given this new
information, it was incumbent upon the Applicant to address it.

22 The Applicant points out that the transplantation plan will be subject to monitoring
23 and that the Washington State Department of Wildlife (WDFW) can require whatever
24 corrective action is necessary if the mitigation is not successful. There is nothing in
25 the record to suggest that WDFW could require anything that would compensate for
the loss of eelgrass if transplantation does not work. Even dismantling the project
would provide no assurance that eelgrass would repopulate the site.

With such little assurance of success, it cannot be found that that the proposed
transplantation and monitoring plan will adequately mitigate eelgrass impacts.

1 3. Adequacy of Survey and Discussion of Alternatives. The
2 Applicant's marine survey and discussion of alternatives was inadequate. It did not
3 establish that the location of the expansion was best suited to avoid impacts to
4 eelgrass.

4 In both its prehearing and post-hearing comments, Friends asserted that the marine
5 survey was inadequate because it did not provide any information on the extent of
6 eelgrass in other areas where the project could be expanded. Friends correctly
7 asserted that without this information, it is not possible to determine whether the
8 proposed location of the expansion is most suited to avoid impacts. Friends correctly
9 noted that avoidance should have a priority over transplantation in mitigating eelgrass
10 impacts. As noted in Finding of Fact 18 of the *Walker* case, quoted above, avoidance
11 is generally recognized by scientists as the first strategy in addressing eelgrass
12 impacts. This position is certainly prudent, given the uncertainties of other forms of
13 mitigation.

10 Finding of Fact No. 24 of the *Walker* decision also contained some testimony from a
11 marine biologist, Amy Lietman, addressing the need for a comprehensive marine
12 survey. Ms. Lietman testified that it is her standard practice to survey the entire
13 property frontage of a project to determine the suitability of alternative locations for a
14 proposal. Ultimately, the Board approved the proposal in *Walker* without the
15 complete survey recommended by Ms. Lietman, but not without first considering
16 evidence on alternative locations, including the amount of eelgrass in other locations
17 and the feasibility of building elsewhere. The suitability of alternative locations was
18 clearly of significance to the Board.

16 Despite the fact that Friends raised the adequacy of the marine survey twice, the
17 Applicant never touched upon the issue. The Applicant did make some comments
18 about eelgrass not surviving in deeper waters, *see* Ex. 19, which suggests that an
19 expansion further waterward as opposed to parallel to the shoreline would have
20 avoided more eelgrass impacts. There may be very good legal, economic, biological
21 or navigational reasons why no alternative location would provide better avoidance.
22 There is no way of knowing from the record of this case, because the Applicant did
23 not address the issue.

21 Another deficiency identified by Friends was noncompliance with WDFW guidelines
22 for eelgrass surveys. Most significantly, the survey was done outside the June 1
23 through October 1 window recommended by WDFW. This timeframe represents the
24 peak season for growing eelgrass. *See* Ex. 21, att. B, p. 1815. The amount of
25 eelgrass in the survey may well under represent the amount of eelgrass that is present
in the summer months. The difference may not be substantial, given that the survey
was done just a few weeks prior to the June 1 opening date, but the Applicant
provided no information on this disparity.

1 B. Views. In its March 25, 2010 comments, Friends noted that the marina
2 expansion runs 300 feet parallel to the shoreline, thereby maximizing view
3 obstruction. There is insufficient information in the record to find that any shoreline
4 views will be significantly impaired.

5 C. Flushing Action. On “information and belief,” Friends asserts that the
6 Marina is built in an area of poor flushing action. Friends provides no further
7 evidence to support this assertion. There is insufficient information in the record to
8 find that the marina is built in an area of poor flushing action.

9 CONCLUSIONS OF LAW

10 **Procedural:**

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

15 **Substantive:**

16 2. Shoreline Designation. The subject property is designated as Urban.

17 3. Comprehensive Plan and Zoning Designations. The subject property is
18 designated as Marine Center LAMIRD, Village Commercial, and the existing land
19 use includes an existing commercial marina, restaurant, and lodging.

20 4. Compliance with Notice Requirements. According to the staff report, the
21 application was advertised in accordance with RCW 90.58.140, WAC 173-27-110,
22 and the San Juan County Code Sections 18.80 and 18.50 by publishing the notice on
23 01/27/10, mailing on 01/26/10, and posting on 01/27/10.

24 5. Applicability of Critical Area Regulations. Friends makes several
25 references to the Critical Areas Ordinance, SJCC 18.30.110 through 18.30.160
26 (“CAO”) in its arguments that the proposal does not adequately address eelgrass
27 impacts. There is significant ambiguity as to whether the CAO applies to this
28 application. Whether or not the CAO applies to the proposal depends upon whether
29 the eelgrass of the site qualifies as an “eelgrass bed.” This issue is left to another day,
30 when the scientific or legislative distinction between an “eelgrass bed” and “eelgrass
31 patch” can be more fully addressed in the record.

32 SJCC 18.30.110(B) requires compliance with the CAO for any proposed development
33 activity within a critical area or its buffer that is subject to a development permit or
34 approval. SJCC 18.30.160(A)(5) defines a critical area to include “[a]ll kelp and
35 eelgrass beds”. In Exhibit 17, the Applicant suggests that the concentrations of
36 eelgrass at the proposal site are not large enough to be classified as a “bed.” The
37 Applicant proposes no explanation for what would constitute the difference between

1 an eelgrass bed and a smaller area, perhaps an “eelgrass patch.” The Examiner is
2 aware from work in another jurisdiction that at least some biologists draw clear
3 distinctions between eelgrass patches and eelgrass beds. The record of this case is not
4 sufficient to create any precedent on drawing that distinction. Since the proposal does
5 not comply with shoreline policies and regulations, it is unnecessary to apply the
6 CAO at this time. However, as shall be discussed, the Shoreline Hearings Board in
7 *Walker* did interpret the County’s shoreline regulations to impose very similar
8 requirements to those of the CAO for mitigation strategies. Those areas of overlap
9 will be identified.

6 6. Permit Review Criteria. SJCC 18.80.110(H) establishes the criteria for
7 approval of shoreline substantial development permits. The criteria include the
8 policies of the Shoreline Management Act (Chapter 90.58 RCW), the policies and use
9 regulations of the San Juan County Shoreline Master Program, and the requirements
10 of the San Juan County Municipal Code and Comprehensive Plan; including SJCC
11 18.50.190 and SJCC 18.50.220. The applicable policies and regulations are quoted in
12 italics below and applied through conclusions of law.

11 **RCW 90.58.020 Use Preferences**

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

16 7. The proposal is not consistent with the policy quoted above. The policy
17 seeks to accommodate access to the waters of the state while at the same time
18 maximizing protection of environmental resources. The first and obvious way to
19 accomplish that objective is to examine all reasonable alternatives to find
20 alternative(s) that reasonably satisfy the objectives of the developer while minimizing
21 adverse environmental impacts. This underlies the priority given to avoidance as a
22 mitigation tool, as identified Finding of Fact No. 16 of the *Walker* decision. The
23 priority on avoidance is also consistent with SJCC 18.30.160(B)(1)(a) of the CAO,
24 which gives priority to avoidance for protection critical areas. Even if avoidance is
25 not reasonably possible for this proposal, the Applicant has also not demonstrated that
its proposed mitigation (transplantation) has any chance of reasonable success. Given
these circumstances, the record is insufficient to establish consistency with the policy
above.

1 **RCW 90.58.020(1)³**

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

3 8. The statewide interest is not protected due to the lack of information on
4 the effectiveness of proposed mitigation and reasonable alternatives that may better
5 protect eelgrass.

6 **RCW 90.58.020(2)**

7 *Preserve the natural character of the shoreline;*

8 9. The proposal is not consistent with the policy due to the potential for
9 destroying eelgrass habitat.

10 **RCW 90.58.020(3)**

11 *Result in long term over short term benefit;*

12 10. As discussed in the *Walker* case and identified in Ex. 2, att. D and Ex. 21,
13 att. C, eelgrass beds in some San Juan locations have disappeared over the last few
14 years. In order to maintain the long term viability of aquatic habitat, effort should be
15 made to maximize the protection of eelgrass. At the least, any proposals affecting
16 eelgrass should be evaluated with a reasonably complete understanding of impacts,
17 mitigation and alternatives. As discussed several times in this decision, that
18 information was incomplete for this case. Making decisions that affect eelgrass
19 without complete information does not support long term benefit.

20 **RCW 90.58.020(4)**

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

22 11. As addressed in the Findings of Fact and the conclusions above, the
23 Applicant has not demonstrated that eelgrass will be adequately protected.

24 **RCW 90.58.020(5)**

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

12. Access will be increased as a result of the proposal.

RCW 90.58.020(6)

Increase recreational opportunities for the public in the shoreline;

³ 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.

13. By increasing the number of slips and opportunity for moorage, the public will have an increased opportunity for use of the shoreline within Fisherman's Bay.

San Juan County Code Regulations

SJCC 18.50.190(F)(1): *Substantial development permits for docks or piers serving single commercial or industrial enterprises shall not be granted until nearby commercial and industrial enterprises have been contacted regarding their water access needs and plans. Where more than one enterprise needs and could realistically make use of a single moorage facility, permits for individual facilities shall not be granted.*

14. It does not appear that any consultation was done with adjoining commercial uses for access needs and plans.

SJCC 18.50.190(F)(2): *Commercial and industrial moorage facilities and other docks and piers consisting of more than 20 moorage spaces shall be subject also to the applicable policies and regulations of this section.*

15. The "section," SJCC 18.50.190, is applied in this decision.

SJCC 18.50.190(F)(3): *Bulk storage for gasoline, oil, and other petroleum products for any use or purpose is prohibited on piers and docks. Bulk storage means nonportable storage in fixed tanks.*

16. No storage of gasoline, oil, or other products has been proposed.

SJCC 18.50.190(F)(4): *Spill clean-up facilities shall be available for prompt response and application at all piers and docks involved in oil and hazardous products transfer.*

17. No transfer of oil or other hazardous products has been proposed.

SJCC 18.50.190(H)(1): *Dredging or filling of wetlands for the sole purpose of constructing a marina shall be prohibited.*

18. No dredging or filling has been proposed.

SJCC 18.50.190(H)(2): *No marina shall be approved for construction within one-half mile of any outfall of primary treated domestic or industrial sewage except as a conditional use.*

19. No sewer outfalls are located in the vicinity. The community sewage treatment plant is about two miles north of the village, on Lopez Road.

SJCC 18.50.190(H)(3): *All service facilities within or associated with a marina shall include provisions to prevent pollutants from entering the water.*

1 20. Pollution prevention materials have been included in the application
2 materials and can be conditioned for approval.

3 **SJCC 18.50.190(H)(4):** *Commercial covered moorages may be permitted only where*
4 *vessel construction or repair work is to be the primary activity and covered work*
areas are demonstrated to be necessary over water.

5 21. No covered moorage has been proposed.

6 **SJCC 18.50.190(H)(5):** *Marina-related structures or uses which are not in and of*
7 *themselves shoreline dependent shall not be located over water.*

8 22. This expansion proposes construction of floats for moorage, which are
9 water dependent.

10 **SJCC 18.50.190(H)(6):** *Marinas shall be sited to prevent any restrictions in the use*
11 *of commercial and recreational shellfish beds and in compliance with The*
12 *Washington Department of Health's "Environmental Health Guidelines for Marina*
Development and Operation."

13 23. The proposal does not restrict the use of shellfish beds as there are none in
14 Fisherman Bay.

15 **SJCC 18.50.190(H)(7):** *The incorporation of reasonable public use facilities into*
16 *public marina design shall be required. Marinas may include specific areas restricted*
17 *for security reasons.*

18 24. This is not a public marina.

19 **SJCC 18.50.190(H)(8):** *Marinas shall be designed to minimize their adverse effects*
20 *on the scenic qualities of the shorelines.*

21 25. The shoreline in the vicinity is currently developed with two marinas. It is
22 unknown from the application whether a waterward expansion (instead of parallel to
23 the shoreline) would create less aesthetic impact.

24 **SJCC 18.50.190(H)(9):** *Surface runoff from marina areas shall be controlled so that*
25 *pollutants will not be carried into water bodies.*

26 26. No construction on the land is planned so drainage patterns are not altered.

27 **SJCC 18.50.190(H)(10):** *Marinas shall not be permitted on Class I beaches or where*
their presence would interrupt driftways feeding Class I beaches.

28 27. There is no Class I beach on the site.

1 **SJCC 18.50.190(H)(11):** *Where landfill is permitted, it shall be only for the*
2 *necessary water dependent portions of the facility and shall conform to the policies*
3 *and regulations of SJCC 18.50.360 and 18.50.370. Landfill shall not be permitted for*
4 *the creation of parking areas unless no feasible alternative exists and the creation of*
a parking area would be consistent with the policies of this SMP and with the public
interest.

5 28. No landfill has been proposed.

6 **SJCC 18.50.190(H)(12):** *Parking areas associated with marinas shall be subject to*
7 *the policies and regulations of SJCC 18.50.340, Transportation facilities.*

8 29. As proposed, an existing parking area will be used and no actual
9 construction will occur.

10 **SJCC 18.50.190(H)(13):** *Marinas shall be subject to the general design and*
11 *construction standards for docks in subsection (D) of this section.*

12 30. Pilings will be galvanized steel, all floats will be encapsulated, pilings will
13 clear extreme high water by a foot, floats will be equipped with stops, no overhead
14 wiring or plumbing is proposed, no covered structures are proposed, dock lighting
15 will be low wattage, shining downward and less than three feet tall, debris will be
16 disposed of properly, and materials will blend with the background of the existing
17 marina. As such, all of the construction standards of subsection (D) have been met.

18 **SJCC 18.50.190(K)(1):** *Urban. Marinas, marine railways, docks, and boat launches*
19 *shall be permitted in the urban environment subject to the policies and regulations of*
20 *this SMP.*

21 31. As required, evaluation of a Substantial Shoreline Development Permit is
22 being reviewed under the regulations required above.

23 **SJCC 18.50.190(K)(6):** *Aquatic. Marina facilities, docks, and boat launches which*
24 *are shoreline dependent shall be permitted in the aquatic environment subject to the*
25 *policies and regulations of this SMP and to the regulations by environment*
applicable to the abutting shoreline area. Where a proposed boating facility abuts
more than one shoreline environment, the policies and regulations of the most
restrictive abutting environment shall govern.

32. The shoreline environment has been identified as only Urban.

Comp. Plan Element 3, Section (5)(C) Boating Facilities (1): *Locate, design and*
construct boating facilities to minimize adverse effects upon, and to protect all forms
of aquatic, littoral or terrestrial life including animals, fish, shellfish, birds and plants,
their habitats and their migratory routes.

1 33. As discussed in the Findings of Fact, the Applicant has not demonstrated
2 that the expansion has been placed in the most suitable area for avoiding adverse
3 eelgrass impacts.

4 **Comp. Plan Element 3, Section (5)(C) Boating Facilities (2):** *The location, design,*
5 *configuration and height of boathouses, piers, ramps, and docks should both*
6 *accommodate the proposed use and minimize obstructions to views from the*
7 *surrounding area.*

8 34. The Applicant has not demonstrated that view impacts are minimized.
9 The Applicant has not provided any explanation as to why a waterward expansion
10 would not be reasonable and how aesthetic impacts would differ under such an
11 alternative design. Since a waterward expansion would significantly reduce view
12 impacts from the shore, the alternative design should have been addressed in order to
13 establish that view impacts have been minimized.

14 **Comp. Plan Element 3, Section (5)(C) Boating Facilities (4):** *Boating facilities*
15 *should be designed to optimize the trade-offs between the number of boats served and*
16 *the impacts on the natural and visual environments.*

17 35. The Applicant did not identify the location of finger floats, so it is difficult
18 to determine if the floats could be arranged and/or reduced to avoid impacts to existing
19 eelgrass. Also, the Applicant has not identified or discussed alternative designs that
20 would reduce the need for trade-offs between number of boats served and
21 environmental impacts.

22 **Comp. Plan Element 3, Section (5)(C) Boating Facilities (5):** *In providing boating*
23 *facilities, the capacity of the shoreline site to absorb the impact should be considered.*

24 36. The effectiveness of the mitigation proposed by the Applicant has not
25 been discussed. Without knowing whether the mitigation will be adequate, it is not
possible to determine the extent of impact and, hence, the capacity to avoid the impact.

Comp. Plan Element 3, Section (5)(C) Docks and Piers (6): *The use of mooring*
buoys should be encouraged in preference to either piers or floating docks.

37. Although the proposal involves docks, it may reduce the need for private
single docks and piers, which is what the policy above is designed to avoid.

Comp. Plan Element 3, Section (5)(C) Docks and Piers (7): *The use of floating*
docks should be encouraged in those areas where scenic values are high and where
serious conflicts with recreational boaters and fishermen will not be created.

38. The Applicant is proposing floating docks. There are no conflicts with
boaters and fisherman discernable from the record.

1 **Comp. Plan Element 3, Section (5)(C) Docks and Piers (11):** *To spare San Juan*
2 *County from the so-called "porcupine effect" created by dozens of individual private*
3 *docks and piers on the same shoreline, preference should be given to the joint use of a*
4 *single structure by several waterfront property owners, as opposed to the construction*
5 *of several individual structures.*

6 39. The proposal may serve to reduce the demand for individual private docks.

7 **Comp. Plan Element 3, Section (5)(C) Docks and Piers (13):** *The capacity of the*
8 *shoreline site to absorb the impacts of waste discharges from boats and gas and oil*
9 *spills should be considered in evaluating every proposed dock or pier.*

10 40. The Applicant has proposed and the proposal can be conditioned to
11 include spill control plans.

12 **Comp. Plan Element 3, Section (5)(C) Docks and Piers (14):** *Expansion or*
13 *repair of existing facilities should be encouraged over construction of new docks and*
14 *piers.*

15 41. The Applicant proposes an expansion.

16 **Comp. Plan Element 3, Section (5)(C) Docks and Piers (15):** *To reduce the*
17 *demand for single-user docks, multiple-user docks should be encouraged through*
18 *construction and dimensional incentives.*

19 42. The Applicant proposes multiple-user docks.

20 **Comp. Plan Element 3, Section (5)(C) Marinas (16):** *To reduce the cumulative*
21 *environmental impact of individual docks on the shorelines of the county and to*
22 *provide moorage opportunities for inland and shoreline residents, encourage marina*
23 *development that includes allocations of at least half the available moorage space to*
24 *permanent, rather than transient, moorage, subject to compliance with other*
25 *applicable policies and regulations.*

43. The project could be conditioned to provide for permanent moorage.

Comp. Plan Element 3, Section (5)(C) Marinas (17): *Areas which have been*
identified as hazardous due to storm tides, high winds or flooding, should not be
considered as potential marina sites.

44. There is no evidence in the record that the area is hazardous to boating
activities. The fact that the marina is located in an enclosed bay makes this unlikely.

Comp. Plan Element 3, Section (5)(C) Marinas (18): *Embayments with poor*
flushing action should not be considered for marina sites.

1 45. There is no evidence to show that there is poor flushing action at the site,
2 beyond the unsubstantiated assertions made by Friends.

3 **Comp. Plan Element 3, Section (5)(C) Marinas (19):** *Marina development should*
4 *minimize the consumption of limited shoreline resources. To accomplish this the*
5 *following is preferred:*

- 6 a. *The expansion of existing marinas over the addition of new marina sites;*
- 7 b. *The provision of a reasonable proportion of permanent moorage spaces to*
8 *reduce the demand for, or proliferation of, individual docking facilities for*
- 9 *numerous private, noncommercial pleasure craft; and*
- 10 c. *The use of boat launching ramps and dry storage of recreational boats as*
11 *favorable alternatives to sheltered, year-around wet-moorage of watercraft.*

12 46. As noted previously, the proposal is for an expansion and the proposal can
13 be conditioned to provide for permanent moorage. The proposal does appear to
14 provide for year round "wet-moorage," but the policy against wet moorage is only a
15 preference in the policies and not a mandate.

16 **Comp. Plan Element 3, Section (5)(C) Marinas (20):** *Multiple use, and where*
17 *practical public access, should be provided for in the design of every commercial*
18 *marina. (Prior Code: 16.40.513, Policy 3)*

19 47. No public access or multiple use is evident from the record.

20 **Comp. Plan Element 3, Section (5)(C) Marinas (21):** *Installation and maintenance*
21 *of accessible boat sewage disposal (pump out) facilities are required*
22 *in all marinas and should be available in convenient locations to all boaters.*

23 48. If not already provided or proposed, this would be made a condition of
24 approval.

25 **DECISION**

The application is denied without prejudice. The Applicant is encouraged to reapply
if they believe they can present sufficient evidence to fill the gaps identified in this
decision.

22 For Kay Richards
23 9/14/10
24 Date for Kay for
25 Phil

22 *Phil Olbrechts* WSPA#40794 for
23 Phil Olbrechts
24 County of San Juan Hearing Examiner

1 **Right of Appeal**

2 An appeal of this decision may be filed with the Washington State Shoreline Hearings
3 Board as governed by RCW 90.58.180, which provides, **in part**, as follows:

4
5 *(1) Any person aggrieved by the granting, denying, or rescinding of a*
6 *permit on shorelines of the state pursuant to RCW 90.58.140 may, except*
7 *as otherwise provided in chapter 43.21L RCW, seek review from the*
shorelines hearings board by filing a petition for review within twenty-one
days of the date of filing as defined in RCW 90.58.140(6)...

8 Reference should be made to RCW 90.58.180 in its entirety as well as the practice
9 rules of the Shoreline Hearings Board for all the requirements that apply to filing a
10 valid appeal. Failure to comply with all applicable requirements can result in
11 invalidation (dismissal) of an appeal.

11 **Change in Valuation**

12 Notice is given pursuant to RCW 36.70B.130 that property owners who are affected by this
13 decision may request a change in valuation for property tax purposes notwithstanding any
14 program of revaluation.