SAN JUAN COUNTY
HEARING EXAMINER

FINDINGS, CONCLUSIONS AND FINAL DECISION

Applicant(s):	Michael and Jeanne Skott 2195 Deer Harbor Road Eastsound, WA 98254
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File No.:	PSJ000-09-0003
Parcel Nos:	260524004
Location:	2195 Deer Harbor Road Eastsound, WA 98254
Summary of Proposal:	The applicants have applied for approval of a Shoreline Substantial Development Permit to obtain an after-the-fact permit for an existing dock consisting of a deck landing, ramp, and float.
Shoreline Designation:	Rural Farm Forestry
Public Hearing:	April 1, 2010
Application Policies and Regulations:	Shoreline Master Program, SJCC 18.50 SJCC 18.50.020 SJCC 18.50.190 SJCC 18.50.340
Decision:	The proposal is denied.

BEFORE THE HEARING EXAMINER
FOR THE COUNTY OF SAN JUAN

Phil Olbrechts, Hearing Examiner

RE: Michael and Jeanne Skott Shoreline Substantial Development Permit (PSJ000-09-0003)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.**

INTRODUCTION

The Applicants have applied for approval of a Shoreline Substantial Development Permit to obtain an after-the-fact permit for an existing float and a new ramp. The Examiner denies the application for failing to demonstrate inadequate alternative moorage and failing to demonstrate that the float has been designed to make use of the natural site configuration to the greatest possible degree. The Examiner also finds that, if approved, the dock does not qualify as a joint user dock for purposes of the dimensional requirements of SJCC 1850.190(G) (2)(b) and also that grating would be required to mitigate impacts caused by shading.

SUMMARY OF TESTIMONY

Ron McDowell, a neighbor, testified that the dock is very well used and it's a benefit to the neighborhood. He owns a dock next door.

Francine Shaw testified that if a dock has been in the water for more than three years that the statute of limitations runs and that's why the Department of Fish and Wildlife doesn't require a hydraulic permit.

Ms. Thompson noted that the exemption application requires the Applicant to write why the project is exempt. The Applicant had just put down that they were requesting minor repair and did not mention in the exemption application that they were seeking approval for placement of the float. Ms. Thompson noted that the value of the float was not at issue for determining whether an exemption was required in 1995, but rather what it would cost to build it. Ms. Thompson noted that the Shoreline Management Act only applies to lots within the shoreline jurisdiction and that the upland lot is outside the shoreline jurisdiction. She noted that the County has always interpreted the joint use provisions as only applying to lots within the shoreline jurisdiction. In 1995 if the Skotts had applied for a permit for placement of the float, they would have had to consider environmental impacts under shoreline permit review and SEPA. If the Applicants were to request a new dock permit they would

have to show that there is no alternative moorage available. Ms. Thompson noted that instead of mooring their boats on the dock the Skotts could trailer their boats.

Francine Shaw noted that boats around 30 feet can't be stored on a trailer. Their boat weights over 18 tons and can't be pulled. Ms. Shaw believed that SEPA would not have been required for the dock. The closest marina is West Sound and they're full. Dinghies aren't stored at West Sound. West Sound is two miles away. Deer Harbor is much further.

The Examiner left the record open for up to two weeks to determine if additional information is necessary.

EXHIBITS

Exhibit No. 1	Staff report dated March 3, 2010.
Exhibit No. 2	Request for review dated March 3, 2010.
Exhibit No. 3	Application materials dated December 8, 2009.
Exhibit No. 4	Legal ad dated March 10, 2010.
Exhibit No. 5	3/29/09 email fr Francine Shaw to Julie Thomson
Exhibit No. 6	Nine letters of support
Exhibit No. 7	December 8, 2009 Application
Exhibit No. 8	Applicant Rebuttal to Staff
Exhibit No. 9	Telephone notes from Francine Shaw
Exhibit No. 10	Photo of the beach
Exhibit No. 11	4/21/10 email from Phil Olbrechts to Julie Thompson
Exhibit No. 12	5/24/10 Memo from Julie Thompson to Phil Olbrechts with email attachment
Exhibit No. 13	Email string from Phil Olbrechts to Francine Shaw and Julie Thompson dated June 4, 2010.
Exhibit No. 14	Email from Francine Shaw to Julie Thompson dated May 10, 2010.
Exhibit No. 15	Email from Francine Shaw to Phil Olbrechts dated October 18, 2010.
Exhibit No. 16	Applicant's Revised Description and Regulatory Analysis dated 9/23/10.
Exhibit No. 17	Revised staff report dated 9/27/10.
Exhibit No. 18	Biological Evaluation

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicants are Michael and Jeanne Skott.

2. Hearing. The Hearing Examiner conducted a hearing on the subject application on April 1, 2010. The Examiner left the record open two additional weeks to determine if additional information would be necessary. He emailed the parties on April 21, 2010 requesting additional information, specifically advising that

specified code criteria should be assessed for a new float and ramp, not in the context of one already constructed. The Applicant requested clarification by email dated May 10, 2010 and this was submitted to the Examiner by memo from Julie Thompson dated May 24, 2010. The Examiner responded by email dated June 2, 2010. On September 27, 2010 the County and the Applicant submitted the requested information to the Examiner. A biological evaluation was also submitted on or about that date.

Substantive:

3. Site and Proposal Description. The Applicants wish to obtain an after-the-fact permit for an existing dock consisting of a deck landing, ramp, and float. The site is located at 2195 Deer Harbor Road, parcel 260524004. This 4.47 acre parcel is developed with a single-family residence and an accessory dwelling unit. It is located on Massacre Bay at the north end of West Sound on Orcas Island. It slopes gently toward the water and is an open field surrounded by a dense cover of trees.

In 1995, the Applicants obtained a 20'x 24' section of float that was being replaced on the Massacre Bay Subdivision Community Dock. They placed it along the shoreline of their property near their existing deck at the top of the bank. The deck is nonconforming by today's code since it is built seaward of the most landward point of the house. In this application, the deck acts like a pier in providing the transition from land to the ramp. It is not clear whether a permit was received for the deck.

Also in 1995, the Applicants received approval for repair and maintenance of the moorage float as a Shoreline Exemption (File No. 95XMP002) of the County's Shoreline Master Program. Shortly after obtaining the float, the Applicants added a ramp to access the float from the bank. No permits were applied for or approved for the placement of the float, ramp and ramp transition plate.

The dock serves two parcels, both owned by the Applicants. One of the parcels is an upland parcel and is outside the 200 foot jurisdiction of the Shoreline Management Act, Chapter 90.58 RCW ("SMA"). The total area of the deck landing, ramp, and float is 839 square feet. The total length does not exceed 76.25 feet.

The dock consists of the following components:

- 12' X 13'-6" Wooden Deck Landing = 159.96 sq. ft.
- 37' X 3'-10" Wooden Ramp = 141.71 sq. ft.
- 3'- 4" X 3' -10" Wooden Ramp Transition Plate = 12.75 sq. ft.
- 10' - 3" X 8' Wooden Ramp Landing = 82 sq. ft.
- 20' X 24' Wooden Float = 480 sq. ft.
- 3' - 10" X 3' Ramp Overlap = 11.49 sq. ft.

4. Characteristics of the Area. The surrounding neighborhood is mostly developed for residential use. There are numerous other docks in the vicinity, including both neighboring parcels.

5. Adverse Impacts of Proposed Use. A DNS was issued for the proposal and no comment or appeal was received. In addition, a total of four agencies were notified of this development proposal and comments were requested. No comments were received. The Applicant's "Detailed Project Description and Regulatory Analysis", revised September 23, 2010, provides a good and accurate outline of the environmental sensitivities of the project site, reflecting the findings of the Applicant's biological evaluation. The Project Description provides that no removal of any terrestrial or aquatic vegetation or wildlife habitat was necessary to locate the float section on site or to construct the ramp section, at least to the extent that no vegetation or habitat currently exists at the site and it is not possible to know what was present when the float was placed. The float also uses anchors, as opposed to piles, which eliminates the need for pile driving and adverse impacts associated with that activity.

The closest eelgrass is 10 feet north of the dock, composed of an eelgrass bed. Another eelgrass bed is located 150 feet south of the dock. Staff correctly points out, and the Applicant does not disagree, that eelgrass may have been present at the float location when the Applicant's initially placed the float in front of their property. Staff takes the position that it's not possible to evaluate eelgrass impacts when it's not known whether eelgrass was present at the site. However, the same could be said for any site. Given the mobile nature of eelgrass (see *Diller, infra*), a site that currently has no eelgrass may have had it at some point in the past. The eelgrass may have even been removed illegally at some point. Certainly, the County does not make applicants undertake a historical review of eelgrass beds at a proposed site and then prohibit any development in an area that had eelgrass at some point in the past. Although the Skott proposal is distinguishable from a typical application because it's "after-the-fact", the Skotts can easily eliminate that status by removing the float and then applying to put it back. There is no benefit to requiring such a pointless exercise. There is also no apparent way to logically incorporate the past presence of eelgrass into permitting review, even for eelgrass that may have been illegally removed. At least for inadvertent or good faith removals of eelgrass, the code enforcement process and its fines and restoration remedies is the most appropriate means of addressing illegal removal of eelgrass. For purposes of this permit review, the float and ramp site will be construed as devoid of any eelgrass.

Although the design of the ramp and float and the site characteristics don't appear to trigger any significant environmental concerns, there still remains the shading issue. Shading can kill existing eelgrass, prevent new eelgrass from taking root and alter the migration patterns of endangered fish and increase their mortality by subjecting them to the increased predation associated with deeper waters. *See, e.g.,* San Juan Examiner Decision *Diller Family Trust* (04SJ014), FOF 5(A); *Fladseth v. Mason County,* Finding of Fact No. 18, SHB No. 05-026. The biological evaluation

acknowledges that shading can be adverse, but then concludes that is not something that can be addressed because the proposal is an after-the-fact application. The fact that the Applicant has already built the float without required permits absolutely does not in any way reduce his obligation to mitigate all adverse impacts. The mitigation required for any float of this size in probably every hearing examiner decision and shoreline hearings board decision over the last few years includes grating to mitigate against the impacts of shading. If approved, the subject float would also be subject to this mitigation requirement.

As mitigated with shading, the project would not create any significant adverse environmental impacts.

CONCLUSIONS OF LAW

Procedural:

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

Substantive:

2. Shoreline Designation. The subject property is designated as Rural Farm Forestry.

3. Comprehensive Plan and Zoning Designations. The subject property is designated as Rural Farm Forest, and the existing land use is developed as a single family residence and accessory dwelling unit.

4. Compliance with Notice Requirements. According to the staff report, the application was advertised in accordance with RCW 90.58.140, WAC 173-27-110 and the San Juan County Code Sections 18.80 and 18.50 by publishing the notice on 1/13/10 and mailing and posting on 03/01/10.

5. Joint Use Status of Dock. The Examiner concludes that the proposed dock is a single-user dock for purposes of SJCC 18.50.190(G)(2) because one of the two lots participating in the joint use is an upland lot. By email dated June 2, 2010 the Examiner issued an interlocutory order concluding that the proposal qualified as a joint use for purposes of SJCC 18.50.190(G)(2) (b). Julie Thompson, on behalf of San Juan County, submitted a memo dated June 4, 2010 to the Examiner questioning this ruling. The Examiner forwarded this memo to the Applicant by email dated June 4, 2010. The email stated that the Examiner was treating the June 4, 2010 memo as a request for reconsideration and invited a response from the Applicant due within a week. The Applicant provided no response. The Examiner reverses his interlocutory

order and concludes that lots outside the shoreline jurisdiction may not be used to establish joint use for purposes of SJCC 18.50.190(G)(2) (b).

The difficulty on this issue stems from the fact that nothing in SJCC 18.50.190(G)(2) (b) limits joint use to waterfront lots. This is in stark contrast to SJCC 18.50.190(C)(8) and 18.50.340(G), which limits joint use to waterfront lots through the definition of a community dock, and SJCC 18.50.190(5)(b), which also limits joint use requirements in subdivisions to waterfront lots. Other jurisdictions, such as Mason County, Bainbridge Island and Pierce County clearly expressly limit their definition of joint use docks to waterfront lots. See MCC 7.08.010; BIMC 16.12.030(A) and PCC 20.56.010(J). Given this regulatory context, it is arguably reasonable to conclude that if the County Council intended to limit joint use to waterfront lots for SJCC 18.50.190(G)(2) (b), it would have expressly done so.

The express regulatory arguments made by the County in its June 4, 2010 memo are not persuasive. Ms. Thompson references SJCC 18.50.020(A), which provides that Shoreline Master Program Regulations only apply within areas subject to the jurisdiction of the Shoreline Management Act. Ms. Thompson takes the position that lots located outside shoreline jurisdiction cannot be used for establishing joint use within shoreline jurisdiction. This is based upon the necessary premise that the lots outside SMA jurisdiction are being regulated by the SMA for establishing joint use within SMA jurisdiction. This is a dubious premise, given that the only restrictions on development are occurring on the joint use dock itself, which is wholly within shoreline jurisdiction. The owner of a lot outside the shoreline jurisdiction in a joint use arrangement simply has a use right for a dock within shoreline jurisdiction. This right is not that distinguishable from the rights of a property owner outside SMA jurisdiction to use a marina. .

Even if the lots outside of the SMA jurisdiction are considered part of the joint use project, the SMP would still apply because a portion of the project is within the shoreline jurisdiction. SJCC 18.50.020(A) provides that the SMP applies to developments and uses outside SMA jurisdictional lands if a portion of the project is located within jurisdictional lands and the upland portion is found to adversely affect the shoreline environment. If the upland lot of this case is considered to be a part of the project, then it would have to be considered to create potential adverse shoreline impacts since it generates more use of the shoreline through the joint use dock.

In her June 4, 2010 memo Ms. Thompson also references Policy 3.5.C(11) of the SMP. This policy encourages joint use of docks in order to avoid the "porcupine effect" created by multiple single user docks. The policy is clearly oriented towards reducing the number of docks along the shoreline. It's not self evident how an expansive interpretation of the joint use definition would result in any significant increase in the number of docks. One could conclude that the greatest impact would be that waterfront owners would be less likely to enter into joint use agreements amongst themselves if upland parcels are available to qualify for joint-use dimensions. However, the "porcupine

policy" gives a preference to joint use of waterfront docks, meaning that waterfront owners would have to first demonstrate that joint use is not available amongst waterfront lots prior to using an upland lot for this purpose. If no waterfront lots are available for joint use and all other shoreline standards are satisfied, the lot owner could then choose to either build a single user dock or enter into a joint user arrangement with an upland lot. In general, the net result would be no increase in the number of docks, just an increase in the number of docks that are joint use docks.

Although the legal citations used by the County do not prove very compelling by themselves, the County does conclude its June 4, 2010 memo with the very significant point that authorizing joint use dimensions for this application "opens the county up to 4,950 docks of extreme size." Ms. Thompson had also testified that the County has always taken the position that joint use doesn't apply to upland lots. It's not clear how many additional joint use docks would appear in place of single user docks as a result of including upland lots in joint use docks, but any new significant amount of such docks could create a substantial difference to the aesthetics and environmental resources of the shoreline. The photos provided by the Applicant of the subject float expose how visually dramatic the difference in size is between single user and joint use docks. The environmental impacts of the increase in shading caused by the joint use docks can also be significant. The cumulative impacts of the Examiner's interpretation of SJCC 18.50.190(G)(2) (b) can have a dramatic impact on the aesthetics and environmental resources of San Juan County shorelines. For these reasons, a reconsideration of the Examiners 6/2/10 ruling on SJCC 18.50.190(G)(2)(b) is warranted.

There are several shoreline polices that justify the County's interpretation of SJCC 18.50.190(G)(2)(b). Perhaps most significant is San Juan Comprehensive Plan Policy 3.5.C(11), which provides that "to reduce the demand for single-user docks, multiple-user docks should be encouraged through construction and dimensional incentives." Given that the County's development regulations are required to implement the requirements of the comprehensive plan and that SJCC 18.50.190(G)(2)(b) is the only San Juan County development regulation that addresses the size of joint use structures, one reasonable conclusion is that SJCC 18.50.190(G)(2) (b) was designed to reduce the demand for single-user docks, which in turn suggests that the intent was to limit it to waterfront properties. There are also the numerous shoreline policies that require protection of shoreline wildlife and habitat as well as shoreline views and aesthetics. *See, e.g.,* San Juan County Comprehensive Plan Policy 3.2.A(1), 3.2.A(2), 3.2.A(3), 3.5.C(1), 3.5.C(4), 3.4.F(3)(c) As discussed in the Findings of Fact, docks create significant impacts on aquatic resources by threatening both eelgrass and adversely altering the migration patterns of endangered fish. These impacts are created by shading and it is reasonable to conclude that as the amount of shading increases with larger docks, there is also an increase in adverse impacts resulting from the shading. Further, as noted in the *Diller* decision, eelgrass is mobile and shading may prevent eelgrass from taking root.

The shoreline regulations also provide ample justification for favoring joint use of waterfront lots over upland lots. RCW 90.58.020 requires priority to be given to appurtenant structures of waterfront lots, which would include their docks. The County's interpretation of SJCC 18.50.190(G)(2)(b) is consistent with this principle, enabling waterfront owners to enjoy the shoreline access rights normally considered to be a part of waterfront ownership while excluding upland lots where no such rights are anticipated or given any priority under the SMA.

As is evident from the discussion above, there is a significant degree of ambiguity on how to interpret SJCC 18.50.190(G)(2)(b). In balancing these issues, it is important to recognize that the primary purpose of the SMA is to protect the state's shorelines as fully as possible, and this priority takes precedence over protecting private property rights. *Lund v. DOE,* 93 Wn. App. 329 (1998). Given this priority, the environmental impacts caused by the potential proliferation of joint use docks through the inclusion of upland parcels is determinative. The Examiner construes "joint use dock" in SJCC 18.50.190(G)(2)(b) as only applying to docks that provide shoreline access to two waterfront lots. This interpretation protects environmental resources by providing incentives to decrease the number of waterfront docks as contemplated by Policy 3.5.C(11) while also reducing the size of docks overall by preventing additional opportunities for joint use docks via participation of upland lots. Aesthetics are also protected and the long standing interpretation of the County is not disrupted.

The Examiner has engaged in a lengthy analysis of the joint use issue to demonstrate that it is not as clear as County staff apparently believe. The County should seriously consider an interim amendment that clarifies whether or not a joint use dock can be created with only one participating waterfront lot under SJCC 18.50.190(G)(2)(b). RCW 90.58.590, recently adopted, allows counties to make interim amendments to its shoreline regulations without prior state approval. Amendments that clarify existing ordinances may be applied retroactively. *See Sprint International Communications Corp. v. Department of Revenue*, 154 Wn. App. 926, 938-39 (2010).

6. Permit Review Criteria. SJCC 18.50.190(K)(3) and (4) permit docks serving single family residences in Rural Farm Forest shoreline designations subject to the policies and regulations of the SMP. SJCC 18.50.190(G)(4) requires a shoreline substantial development permit for development of docks on lots intended for single-family development unless exempt. No exemptions apply to this project. SJCC 18.80.110(H) establishes the criteria for approval of shoreline substantial development permits. The criteria include the policies of the Shoreline Management Act (Chapter 90.58 RCW), the policies and use regulations of the San Juan County Shoreline Master Program, and the requirements of the San Juan County Municipal Code and Comprehensive Plan. As noted in SJCC 18.50.010(A), Element 3 of the San Juan County Comprehensive Plan comprises the policies of the San Juan County Shoreline Master Program. The applicable policies and regulations are quoted in italics below and applied through conclusions of law.

RCW 90.58.020 Use Preferences

This policy (Shoreline Management Act policy) is designed to insure the development of these shorelines (of the state) in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance 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.

7. The project will not interfere with public access to the shoreline because it is located in a bay and its size is relatively small and short compared to nearby docks. As conditioned with grating, the project will not create any significant adverse environmental impacts. However, as shall be discussed the Applicants have no demonstrated that there is no adequate or feasible alternative moorage available. Avoidance should always be exercised over mitigation when reasonably possible. Given the possibility that construction of the dock could be avoided by use of a reasonably available marina, the proposal cannot be construed as serving the public interest.

RCW 90.58.020(1)[1]

Recognize and protect the statewide interest over local interest;

8. The statewide interest is not protected because it is unclear whether a reasonable alternative (a reasonably available marina) is available.

RCW 90.58.020(2)

Preserve the natural character of the shoreline;

9. Grating for the float will serve to preserve natural character by preserving underwater light characteristics and the resultant impacts on fish and aquatic habitat. However, the project cannot be said to preserve natural character if it is allowed to proceed when alternative moorage is reasonably available.

RCW 90.58.020(3)

Result in long term over short term benefit;

10. Approving a dock when alternative moorage is reasonably available would definitely serve short term as opposed to long term benefit.

RCW 90.58.020(4)

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

Protect the resources and ecology of the shoreline;

11. Approving a dock when alternative moorage is reasonably available does not protect the resources and ecology of the shoreline since mitigation is given priority over reasonably available avoidance. .

RCW 90.58.020(5)
Increase public access to publicly owned areas of the shorelines;

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

RCW 90.58.020(6)
Increase recreational opportunities for the public in the shoreline;

13. The proposed dock will preserve and enhance private recreational opportunities on the shoreline, but as the shoreline area in question is not public, there will be no impact in public use of the shoreline as a result.

San Juan County Code Regulations

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

14. As discussed in the Findings of Fact, as mitigated with grating the proposal will have minimal adverse impacts and is, therefore, designed to minimize adverse impact son marine life and the shore process corridor and its operating systems. According to the staff report, the use of anchors instead of pilings will minimize impacts to the shore process. The criterion is satisfied.

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

15. No evidence was provided as to whether the criterion is satisfied. This is not a major issue, but should have been addressed. It is recognized that allowance should be made for the (apparently) nonconforming deck, but even if the deck is allowed as a connection point, the orientation of the ramp and float with this connection should have been assessed for compatibility with the natural site configuration. There is insufficient information to evaluate compliance with the criterion.

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

16. Compliance with this criterion is usually accomplished via a hydraulic permit approval ("HPA") from the Department of Fish and Wildlife (WDFW). However, the WDFW has a three year Statute of Limitations after which they do not require HPA approval for existing docks. This application is for a dock that has been in place for over 13 years. WDFW does not issue after-the-fact permits. Given the compliance with WDFW standards is left to WDFW and WDFW does not require hydraulic permit approval for after-the-fact projects, the Examiner must conclude that WDFW's approach is correct and that no compliance is required for the Skotts' project.

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

17. According to staff, the area where the location of the project near the head of Massacre Bay likely does not suffer from poor flushing action.

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

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

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

18. The project will result in no more than one form of moorage or other structure for boat access to the water on the subject parcels.

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

19. No structures are proposed.

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

20. This proposal is a request for expansion of an existing un-permitted single-user deck landing through the addition of a moorage float, ramp, ramp float and ramp transition plate. According to testimony received, the Applicants contacted

the neighboring parcel owners to inquire as the availability of using other existing docks through a joint use agreement. They were unsuccessful. The Applicants also inquired as to the availability of slips within nearby marinas. None were currently available.

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

21. The major issue here is that there is no access to the upland portion of the parcel from the beach without a dock and ramp. There is no place to land a dinghy on the Applicant's property. The use of a mooring buoy would not solve this issue.

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

22. As stated above, although moorage floats are preferred, like buoys, use of a moorage float will not solve the issue of access to the upland portion of the parcel.

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

23. This does not appear to be an area of littoral drift as this location is rocky, not sandy. The dock does not cover enough area to have an adverse impact on water circulation. The dock itself will be made of materials that do not cause water quality problems. Potential impacts could come from the vessels that use the dock should they leak fluids or otherwise cause discharges to the water, but the same is true for any dock used for mooring boats. If such a criterion were to be a reasonable cause for denying docks, no dock could ever be approved. Fish and wildlife habitat has been considered and design, location and direction adjusted to minimize impacts. Because the dock will is a ramp and float, impact on scenic views, if any, should be minimal. Navigation and public access have been considered and addressed above.

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

24. Staff has concluded this area is not a feeder bluff.

SJCC 18.50.190(C)(6): *Abandoned or unsafe docks and piers shall be removed or repaired promptly by the owner. Where any such structure constitutes a hazard to the public, the County may, following notice to the owner, abate the structure if the*

owner fails to do so within a reasonable time and may impose a lien on the related shoreline property in an amount equal to the cost of the abatement.

25. There are none present at the proposed site.

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

26. No such use is being proposed by Applicants.

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

27. Again, no such use is being proposed by Applicants.

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

28. As conditioned, the proposal will comply with all design standards required by SJCC 18.50.190(D)(1)-(11) according to the staff report. However, it appears as though that the floats are not equipped with stops to keep the bottom off tidelands during low tide. According to Applicant, even during the low tides, the float will not ground because of the depth where it is located. The code clearly requires *all* floats to have stops; therefore, approval will be conditioned accordingly. The code similarly requires that full containment features must be included in the design when any plastics or nonbiodegradable materials are included in the design of the structure. Approval will be conditioned accordingly. Also, any future lighting on the dock must comply with development regulations.

SJCC 18.50.190(G)(2)(a): *The maximum dimensions for a dock (including the pier, ramp, and float) associated with a single-family residence shall not exceed 700 total square feet in area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 115 feet in length seaward of the ordinary high water mark.*

29. As previously discussed, the proposed dock is a single user dock for purposes of SJCC 18.50.190(G)(2). The dimensions of the existing structure exceed the 700 square foot maximum for a single user dock. The float itself is 480 square feet. The dock size must be reduced to meet the requirements of a single-user dock. The approval will be conditioned accordingly.

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

30. The Applicants have indicated that their intended use is for 30-foot boats. According to the evidence provided by Applicants, the length and width of the dock is the minimum necessary to moor a 30-foot boat without grounding during low tides.

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

31. This criterion is met.

SJCC 18.50.190(G)(4): *Development of a dock on a lot intended for single-family residential development shall require a shoreline substantial permit or a statement of exemption issued by the County.*

32. This application is intended to comply with this regulation, after-the-fact.

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

a. It can be shown by the Applicant that existing facilities are not adequate or feasible for use;

b. Alternative moorage is not adequate or feasible; and

c. The Applicant shall have the burden of providing the information requested for in subsections (a) and (b) of this section, and shall provide this information in a manner prescribed by the administrator.

33. The Applicants have adequate and feasible alternative moorage available for their property. The criterion quoted above is not met.

On the alternative moorage requirement, there is a wealth of administrative and judicial decisions that provide interpretive guidance. Since the Examiner has not yet addressed this issue in depth, now is a good opportunity to review some of the more recent and pertinent decisions on the issue.

In *Innskeep v. San Juan County*, SHB No. 98-033 (1999), the Hearings Board interpreted the test in SJCC 18.50.190.G.5 to require a showing that "existing facilities, alternative moorage and alternative sites are not 'enough or good enough for what is required or needed', 'barely satisfactory,' 'suitable', or 'capable of being used.'" (citations omitted).

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

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

In *Gray v. San Juan County* (May 27, 2010, 09SJ009). The Hearing Examiner granted the request for a single user dock because on Decatur Island due to a lack of adequate or feasible alternatives for moorage in that there is no commercial marina or ferry service available on Decatur Island and a joint use dock was not available.

In *Shorett v. San Juan County*, SHB No. 06-039, the Hearings Board was not persuaded by testimony from the Applicant that a three to nine month waiting list rendered a marina 23 minutes away reasonable. The Hearings Board concluded that a marina with a waiting list provides adequate alternative moorage if the waiting period is reasonable. Since the Applicant had both adequate and feasible alternative moorage at a marina and adequate and feasible existing facilities, the Board upheld the denial of their application. These *Shorett* conclusions were sustained upon superior court review.

More recently, approval for a joint use dock request was granted by the San Juan County Hearing Examiner when the Applicant met the burden of proof demonstrating a lack of adequate and feasible alternatives. The Applicant demonstrated that although there were commercial marinas within a reasonable distance of the Applicant's parcel, the lengthy (five-year) waiting list, slip size and water depth made each of these marinas inadequate for the Applicant's needs. The Applicant also demonstrated safety concerns regarding moorage at buoys and detached floats. *Shorett v. San Juan County* (PSJ000-09-002).

In this case the Applicant testified that the only other alternative moorage is at the Westsound Marina or the Deer Harbor Marina. The Westsound Marina is the closest commercial marina to the Skotts at two miles from the subject parcels. Testimony did not indicate distance to the Deer Harbor Marina from the subject parcels. The

Applicant's agent indicated the Westsound Marina was full. There was no testimony provided as to when or if moorage would become available. The Skotts' application noted a telephone conversation between the Applicant's agent and Mark Boman regarding Deer Harbor Marina on September 23, 2010. Mr. Boman is reported to have said there are no slips of an appropriate size to accommodate Michael Skott's sailboat. It is unclear whether Mr. Boman was referring to present moorage opportunities or whether the entire marina had no slips that could accommodate Mr. Skott's sailboat.

As the cases summarized above establish, the Applicant has the burden of proof in establishing that there is no alternative moorage available in a reasonably proximate marina with either immediate availability or a reasonable waiting list. In this case the Applicant has provided no information on the waiting list for Deer Harbor and it is unclear whether the Westsound Marina has any slips that can accommodate the boat owned by the Skotts. This is despite the fact that the Examiner requested additional information on alternative moorage in his April 21, 2010 email (Exhibit 11). The Skotts also testified that the marinas have no moorage for their dingy, which is irrelevant to a consideration of alternative moorage. As demonstrated in the case summarized above, the adequacy of alternative moorage must be assessed in terms of available moorage for the Skott's boat, not their dingy. The Applicant has provided insufficient information to assess the adequacy of alternative moorage. Consequently, the criterion is not met[2].

San Juan County Comprehensive Plan Element 3, Section (5)(C) <u>Boating Facilities</u>:

General

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.

2. Protect beneficial shoreline features and processes including erosion, littoral or riparian transport and accretion shoreforms, as well as scarce and valuable shore features including riparian habitat and wetlands.

3. The location, design, configuration and height of boathouses, piers, ramps, and docks should both accommodate the proposed use and minimize obstructions to views from the surrounding area.

4. Boating facilities should be designed to optimize the trade-offs between the number of boats served and the impacts on the natural and visual environments.

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[2] The Applicant may well comply with the requirement that existing facilities are not adequate for use. From the testimony it appears that there is insufficient shoreline to accommodate a dingy and that the grade differential between the shore and uplands is too steep to carry a dingy down to the shoreline. However, it does not appear that there is any detailed information on how much of a grade differential exists. This issue does not have to be reached at this time because the Applicants must prove both that there is inadequate alternative moorage and inadequate existing facilities. Since the Applicant has not proven that there is inadequate alternative moorage, the issue of inadequate existing facilities doesn't need to be reached.

5. In providing boating facilities, the capacity of the shoreline site to absorb the impact should be considered.

Docks and Piers

6. The use of mooring buoys should be encouraged in preference to either piers or floating docks.

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.

8. Piers should be encouraged where there is significant littoral drift and where scenic values will not be impaired.

9. In many cases, a combination of fixed and floating structures on the same dock may be desirable given tidal currents, habitat protection and topography, and should be considered.

10. The County should attempt to identify those shorelines where littoral drift is a significant factor and where, consequently, fixed piers probably would be preferable to floating docks.

11. To spare San Juan County from the so-called "porcupine effect" created by dozens of individual private docks and piers on the same shoreline, preference should be given to the joint use of a single structure by several waterfront property owners, as opposed to the construction of several individual structures.

12. Preference should be given in waterfront subdivisions or multi-family residential development to the joint use of a single moorage facility by the owners of the subdivision lots or units, or by the homeowners association for that subdivision or development, rather than construction of individual moorage facilities. Individual docks and piers should be prohibited, provided that the county may authorize more than one moorage facility if a single facility would be inappropriate or undesirable given the specific site and marine conditions. Such developments should include identification of a site for a joint-use moorage facility and the dedication of legal access to it for each lot or unit. However, it should be recognized that identification of a site for a common moorage facility does not imply suitability for moorage or that moorage development will be approved.

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

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

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

34. The shoreline policies above essentially repeat the requirements and preferences already assessed in the use regulations, specifically that mooring buoys are generally preferred over docks, that joint-use docks are preferred over single-use docks and that environmental, aesthetic and use impacts should be minimized. As previously discussed, as conditioned the project will comply with the policies identified above.

DECISION

The proposed project is denied because there was insufficient information present to find compliance with SJCC 18.50.190(B)(2)(use of natural site configuration) and SJCC 18.50.190(G)(5)(b)(no reasonable alternative moorage available). If the Applicant had been able to demonstrate compliance with these criteria, significant alterations to the float would have been required, including reducing the dimensions of the float to those required for a single user dock and adding grating that would typically be required of a new float.

Dated this 21st day of October, 2010.

Kim Gick WSBA#40194 for
Phil Olbrechts
County of San Juan Hearing Examiner

Right of Appeal

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

> *(1) Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may, except 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)...*

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

Change in Valuation

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