

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND FINAL DECISION

Applicants: Heyneman Trust
c/o Kathy Messano
1 Westerly Court
Eastsound, WA 98245

Applicants' Agent: Michael Murray
P.O. Box 10
Eastsound, WA 98245

Appellant: Saratoga Passage Partners LLC
c/o Pamela Pearce Carver
4432 95th Avenue N.E.
Bellevue, WA 98004

Appellant's Agent: Bill Weissinger
425B Caines Street
Friday Harbor, WA 98250

File No.: PAPL00-09-0002

Parcel No.: 361223007

Location: 3 Westerly Court
Orcas Island

Decision Being Appealed: "On October 7, 2009, CD&P issued a determination that the appropriate setback for TPN 361223007 is 11 feet, two inches from the top of the bank."

Date Appeal Submitted: November 13, 2009

Closing Arguments: October 6, 2010

Application Policies and Regulations: Shoreline Master Program, SJCC 18.50
Appeals, SJCC 18.80.140

Decision: The 11-foot, 2-inch setback set out by the 2009 RPA is overturned. Instead, any development will be subject to two other setbacks.

S.J.C. COMMUNITY

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DEVELOPMENT & PLANNING

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BEFORE THE HEARING EXAMINER FOR SAN JUAN COUNTY

RE: Saratoga Passage Partners LLC
Administrative Appeal
PAPL00-09-0002

APPEAL OF SHORELINE SETBACK

Summary

The 11.2 foot setback set by the 2009 RPA is overturned. Instead, any development, including decks, on 3 Westerly Court will be subject to two setbacks: (1) 30 feet from the top of the bank to prevent the need for a bulkhead; and (2) a straight-line setback connecting the most waterward points of the homes (including decks) on 1 Westerly and 25 Westerly.

The methodology employed in setting the 11.2 foot setback of the 2009 RPA was correct. However, the 2009 RPA did not take into account that authorizing a home that close to the bank would lead to the need for a bulkhead within the reasonably foreseeable future. The 30 foot setback will provide sufficient separation to avoid the need for a bulkhead. The straight-line setback was added under the discretionary authority of the County's setback averaging provisions to protect the views of the property on 25 Westerly Court.

Testimony

Mr. Weissinger made his opening statement. Mr. Weissinger noted that the Appellants are not bound by the building plans they submitted, and could build anywhere behind the setback established by CD&P. Mr. Weissinger noted that the 2009 RPA setback supplants the 2006 RPA setback.

1 Mr. Weissinger noted that the shoreline has a dramatic intrusion and extrusion on the subject
2 property, creating a need for discretion on the setting of setbacks. Mr. Weissinger highlighted
3 the discretionary language in SJCC 18.50.330(D)(2)(d), pointing out that the variance to the
4 standard 50 foot setback is discretionary and that discretion can only be exercised if existing
5 homes obstruct the view of the proposed home. Mr. Weissinger noted in the exercise of that
6 discretion that erosion potential should be considered. Mr. Weissinger also noted that the 11.2
7 foot setback was based upon the location of an illegally constructed deck. If the setback line had
8 been based upon a legally reconstructed deck, the setback would be 14.2 feet.

9 Mr. Weissinger noted that the Examiner has three options to choose from in construing SJCC
10 18.50.330(D)(2)(d): apply the plain meaning of the ordinance, which includes the discretion and
11 other interpretations already summarized; follow the methodology employed by the County
12 Commissioners in the Downsworth decision; or apply staff report methodology, which uses the
13 most seaward point of each adjoining home instead of the midpoint of each home.

14 Mr. Weissinger outlined the mandatory and discretionary provisions of SJCC 18.50.330(B). He
15 stated that there is no evidence that the staff exercised any discretion in their setting of the
16 shoreline setback. Further, if the staff did exercise discretion there's no evidence to support the
17 exercise of that discretion.

18 Both of the existing homes on the adjacent properties are dangerously close to the shoreline.
19 Under the Downsworth case, the County used the two adjoining homes to create a setback,
20 essentially making two wrongs into a right. Mr. Weissinger then reviewed the reasons he
21 believes the Examiner shouldn't follow the Downsworth decision: because it rewrites the
22 County code by ignoring the discretion and ignoring an assessment of marine view blockage; the
23 County Council ignored the distinction between "may" and "shall"; and Downsworth can be
24 distinguished under the facts around beach erosion and alignment of properties.

25 Mr. Weissinger then addressed the issue of bank erosion in this case and the need for a bulkhead
26 will be required in the reasonably foreseeable future. SJCC 18.50.330(B)(2) prohibits residential
27 shoreline development if a bulkhead will be required within the foreseeable future. He also
28 discussed the need for a tree removal plan for screening trees.

29 Mr. Weissinger argued that both houses need to block views to trigger view averaging and that it
30 has to be the house, not the decks, that block the view. A ground level deck doesn't block views.
31 The view blockage on the Messano property is at 40-45 feet.

32 Mr. Weissinger noted that the Examiner would be setting an important precedent by this
33 decision, by determining whether or not SJCC 18.50.330(B)(2)(b) would be followed according
34 to its plain meaning.

35 Mr. Weissinger presented his expert witness, Mr. Johannessen. Mr. Johannessen has published
36 well over 110 professional papers. His master thesis in 1993 included the mapping of littoral

1 drift cells along the shorelines of all of San Juan County. Mr. Johannessen has worked on
2 projects in San Juan County since 1993. He has worked for several organizations and the
3 Washington Department of Ecology. He has worked on several types of properties from no bank
4 to high bank. He has worked on entire islands and portions of islands. He has worked on several
5 bulkhead projects throughout Puget Sound and the San Juan Islands. He has done a bulkhead
6 study for the Army Corps of Engineers. He has worked in San Juan County since 1993 and he
7 has worked in his field since 1984. No one else has his extent of experience with San Juan
8 coastal property issues in his field of expertise. Mr. Johannessen walked the Messano beach and
9 viewed the property from an adjoining parcel. He reviewed Ex. 24, 25 and 26. He also looked at
10 the geotechnical report (Ex. 28), the archipelago survey, aerial photos and forage fish spawning
11 maps.

12 On his site visit on May 4, 2010, Mr. Johannessen observed that the Messano property has a
13 crescent shaped pocket beach. A pocket beach is between two rocky headlands. Exhibit 1 shows
14 the pocket beach, which is the north two-thirds of 1 Westerly (subject property), the Carver
15 property and a portion of the parcel adjoining the north property line of the Carver property. The
16 northern point of the pocket beach isn't visible on Exhibit 1, but is visible on Exhibit 2. Within
17 the pocket beach, there's a very limited amount of sediment on the beach. Most of the beach has
18 bedrock showing in the lower portions. There's some cobble, fist-sized material dominating in
19 the middle portions of the beach that isn't moving around much. These materials were
20 imbricated, meaning that they are leaning landward due to wave action pushing it on shore.
21 There's a very narrow active sediment band on the upper beach two to four feet wide. There's
22 very little sediment to absorb the energy of wave action. The site is exposed to 15 to 20 mile
23 open water distance (a fetch) from the west to northwest so it can be exposed to high energy
24 wave action. That's not the predominant southerly wind direction so this high wave action is not
25 an everyday occurrence. There's a four mile fetch from the southwest, where high winds
26 originate. There was only one small piece of wood on the beach, so no driftwood to absorb
energy. The bank itself is composed of bedrock and glacial sediment above. The bedrock varies
in height above the beach elevation 3 to 5 feet above the ground level of the upper beach. The
bedrock is only three feet high on the northern portion of the parcel, where the home will be
built. Glacial sediment dominates the building area. Bedrock gets higher to the south. The
mean higher high water appears to be at the lower level of the bedrock and storm waves can
easily get to be three to four feet on the property and high tide can be several feet above the lower
most rock at the bank. Waves certainly reach the glacial sediment numerous times during the
winter and cause erosion. Mr. Johannessen observed evidence of several small landslides and
scarfing on the shoreline bank along the sediment as well as recent erosion. Scarfing refers to
where you see a steep unvegetated bank face with a lip of vegetation above that. There was a
large amount of seepage along the bank face, especially on the northern part, moss growing on
the bedrock along with bedrock. The bedrock is a very old geologic unit, more than 300 million
years old and has gone through numerous geologic events that have created an unusual amount of
fracturing as compared to the rest of the island.

Mr. Johannessen testified that while the bedrock is itself stable, some erosion of the bedrock face

1 exists. Waves are reaching the upper bank and causing erosion of the sediment and recession of
2 the upper bank. There are a lot of hydrophilic plants growing, showing that seepage is occurring
3 through most of the year. The trees present have roots growing into the bedrock, weakening it.
4 Higher up on the bank, small 10-16 inch diameter trees exist. The shape of the trees is such that
5 the trees lean toward the water and then correct and grow vertically, which Mr. Johannessen
6 stated is evidence of soil creep. Soil creep means that over time the soil moves gradually
7 downhill. The trees slowly correct this movement by growing vertically.

8 Mr. Johannessen stated that glacial sediment is impervious to groundwater and surface water
9 infiltration, so water flows over the bedrock and underneath the soils above, which can lead to
10 greater landslide hazards.

11 Moving upslope, Mr. Johannessen observed the upper slope through the fence of the Carver
12 property. He noticed that there was significant fill added to the outer portion of the uplands. Mr.
13 Johannessen believed it was a significant amount of weight that should not have been added
14 because it can cause significant damage to trees in the area. Mr. Johannessen also observed that
15 the Geotech report stated that this area was saturated, which can destabilize the soils and lead to
16 potential landslides. Mr. Johannessen stated that he would classify the area as an unstable,
17 eroding bank. While not highly unstable in a geological sense, it is eroding.

18 Mr. Johannessen discussed sea level rise. The Army Corps of Engineers uses projections of the
19 Intergovernmental Panel on Climate Change (IPCC). The IPCC projects sea level rise under 2
20 feet by 2100. The Army Corps of Engineers uses these projections with some adjustments for
21 Washington State. Mr. Johannessen testified that the IPCC projections likely do not take into
22 account the rate of ice shelf loss, but more recent projections have been higher than 2 feet, with
23 some scientists projecting up to a 2-meter rise.

24 Mr. Johannessen discussed bulkheads in general, which are designed to stop erosion of a bluff.
25 Bulkheads can be harmful to adjacent properties and shoreline habitat. If bulkhead goes in at the
26 toe of a bluff, typically some sediment is lost in the construction process, which is referred to as
replacement loss. Any wall has to have an end, and so waves can cause increased erosion around
the ends of the wall. If a bulkhead were constructed on the subject property, Mr. Johannessen
believed it would very likely result in a greater wave energy hitting the Carver property. Also
Mr. Johannessen stated that the walls can reflect wave energy back onto the beach seaward of the
structure, which can scour beach sediment that is then deposited elsewhere. Also construction of
a bulkhead usually produces a change in vegetation, but there is no vegetation on the subject
property.

Mr. Johannessen also discussed the effects of bulkhead construction on eelgrass, which is less
certain or measureable because the eelgrass is further from the site. However, Mr. Johannessen
stated that if stopping erosion of sand from the bank is the purpose of the bulkhead, it may result
in a loss of the sandy or silty beds needed to grow eelgrass. Mr. Johannessen also stated that if a
bulkhead were constructed, it could cause a loss of approximately 5 to 10 feet of fish spawning

1 area.

2 Mr. Johannessen referred to SJCC 18.50.330(b), which provides that residential structures
3 requiring bulkheads in the “foreseeable future” are prohibited. Mr. Johannessen opined that if
4 residents would build an 11-foot, 2-inch setback, a bulkhead would be needed in the foreseeable
5 future. When asked whether there was some point at which the distance from the shore would be
6 safe and where bulkhead construction would not be needed in the foreseeable future, Mr.
7 Johannessen responded that between 30 feet and 45 feet would be safe. Short of 30 feet, Mr.
8 Johannessen stated that bulkhead would be required in the foreseeable future.

9 Mr. Johannessen understood the meaning of the term “foreseeable future” to be the life of the
10 structure of the building proposed, which would be 50 to 100 years for residences. Mr.
11 Johannessen stated that other jurisdictions use a time period of 75 years. Mr. Johannessen stated
12 that the 45-foot setback required to avoid construction of the bulkhead would need to include
13 decks and other structures as well as the house and would be measured from any one point based
14 on the curve of the shoreline. Mr. Johannessen stated that it would be possible to engineer the
15 foundation of the home to protect against erosion in the foreseeable future if it would be dug
16 deep enough.

17 Mr. Johannessen also discussed groundwater seepage on the site, which acts as a lubricant. The
18 seepage occurs at a high rate, especially considering the site visit was in May. Mr. Johannessen
19 referred to Exhibits 20 and 21 to point out the small amount of erosion, landsliding and scarfing
20 that could be seen or inferred from the photo. Mr. Johannessen also pointed out that small
21 grasses in 2007 disappeared in the 2009 photo. Most of vegetation present did not, in Mr.
22 Johannessen’s view, demonstrate stability because it was low-growing and quickly spread out.

23 Mr. Johannessen also examined Exhibit 31, which depicted some rocks behind the log, and
24 Exhibit 32, in which not as many rocks were shown. The absence of the rocks, which were four
25 to seven inches in size, indicated that a large amount of wave energy was hitting the beach in
26 order to move the rocks.

On cross-examination, Mr. Murray pointed out the addresses of the subject property and the
neighboring properties. The subject property is 3 Westerly Court; the property immediately
to the south is 1 Westerly Court; and the Carver property is 25 Westerly Court. Mr. Johannessen
recognized that the Carver residence sits relatively close to the top of the bank. Mr. Murray
referred to Exhibit 14, Messano Carriage House dated April 28, 2009, sheet 3 of 11, which
contained a gray, shaded plot plan or an outline of the potential residence on the lot. On Exhibit
14, the vertical line on the west of the house represented the outer most corner of the deck. The
two irregular lines to the west were the property line and the 106-foot average line of the bank,
which was a measurement obtained from the county assessor for tax purposes.

Exhibit 15 is an enlargement of the plat plan. Exhibit 16 depicts the distance from the top of the
bank to the deck as 11 feet, 2 inches. The distance from the top of the bank to the house is 27.4

1 inches. The distance from the southwesterly corner of the house to the top of the bank is 64.2
2 feet in Exhibit 16. Mr. Johannessen observed from Exhibit 16 that the proposed setbacks were
3 roughly equal to the setback of the neighboring properties.

4 Mr. Murray questioned whether the properties of the Carvers and 1 Westerly Court are subject to
5 significant erosion. Mr. Johannessen answered, in a general sense, yes. The Carver property is
6 in the middle of the pocket beach. Mr. Johannessen explained that if looking at the Carver and 3
7 Westerly Court property, both would be exposed to similar waves and forces, but pointed out that
8 the bedrock surface is the lowest in the location of the proposed house on 3 Westerly Court. Mr.
9 Johannessen acknowledged that the rocky point or projection shown in Exhibit 16 would be
10 subject to considerable erosive action, but would not erode as quickly as the bank. The rocky
11 point would provide some wave protection during southerly or southwestern storms, but Mr.
12 Johannessen characterized the protection as minimal or small in reducing wave energy in
13 southern or southwestern storms, where waves would refract around the point and hit the bank of
14 the pocket beach with a small reduction in force to the southerly portion of the beach. However,
15 Mr. Johannessen stated that in westerly or northwestern storms, the property would get a
16 significant amount of impact. Mr. Johannessen restated that the bulkhead would be more likely
17 to be required at 3 Westerly Court because the glacial soils are at a lower elevation than on 25
18 Westerly Court. This sandy soil is much more easily eroded. Mr. Johannessen stated that the
19 IPCC projections were only used in analysis for 30 years into the future.

20 Mr. Murray questioned, with the increased water levels from the IPCC projections, how much
21 difference in time would there be between when bulkheads would be required on 3 Westerly and
22 25 Westerly Court? Mr. Johannessen stated that 3 Westerly Court would require protection
23 sooner, but whether talking about years or decades he could not say. If the house were
24 constructed as shown on Exhibit 16, is it likely the bulkhead would be necessary within the
25 foreseeable future (50-100 years). Mr. Johannessen also predicted that 25 Westerly Court would
26 required a bulkhead within the foreseeable future, but after 3 Westerly Court.

Mr. Johannessen stated that the most important drivers in determining when the bulkhead would
be necessary is wave erosion of the bank, loss of tree roots and binding capacity of trees due to
development, foundation cuts down into soils, and changes in groundwater and surface water due
to impervious surfaces, which all cause loss of stability. Based on site visit, Mr. Johannessen
believed some trees would have to be cut down for the building, though when asked to examine
the plat plan on Exhibits 14 and 15 and 5(c), Mr. Johannessen could not identify any trees that
had been removed in the staked areas.

The Examiner admitted Exhibits 14 through 16, with clarification that the scale shown is an
approximate scale using the overlay of the survey on the aerial photographs. An objection was
made the Exhibits should be admitted with the qualification that the building footprints can be
changed.

Mr. Johannessen stated that the bedrock of the shoreline was stable in the geological sense, but

1 not as solid as typically find around the island. Mr. Johannessen stated that soil creep is not
2 unusual or rare where there are steep slopes, but it is uncommon to see it on uplands of Orcas
3 Island. outer 5 to 8 feet appear to be steeper, and move landward 5 to 8 feet is generally not as
4 steep. Discussing the outer area 5 to 8 feet away from the bank, it is not stable soil, which could
5 have slides that are initiated from groundwater underneath.

6 When asked whether soil creep could be mitigated by providing for dewatering of the site, Mr.
7 Johannessen stated that theoretically it could get a moderate amount of water out of the site.

8 Mr. Johannessen testified it would be very had to drain the embankment. Mr. Johannessen
9 doesn't know when pad was created. He noted that it doesn't appear to be very old just by the
10 soil. He also noted that the timing of the pad construction wouldn't make much difference to his
11 opinion on the stability of the slope stability of the embankment. He also noted that the fill in the
12 location creates a significant load to the bank, which destabilizes it. Ex. 21 shows that there
13 hasn't been much loss of soil compared to Ex. 20. The arrows in Ex. 21 shows loss of upper soil,
14 immediately to the upper right and left of the drainage pipe. In addition there is some minor
15 vegetation loss in the lower portion of the drainage pipe. Mr. Johannessen didn't know if the
16 drain hose was connected to anything. He noted that it wouldn't make any difference to his
17 testimony if the drain hose were cut off from anything at the top. Mr. Johannessen noted that he
18 did see some black netting on the Messano beach and he acknowledged that this could be used to
19 prevent deer from feeding on beach vegetation and that deer could be the reason why vegetation
20 is missing and also that deer moving up and down the bank could cause some loss of soil on the
21 embankment. Mr. Johannessen noted that there was no trail or pathway on the embankment that
22 deer or humans would use to access the embankment.

23 On redirect, Mr. Johannessen stated that the most likely cause of the erosion shown in the time
24 between the photos taken as Ex. 21 and 22 is a combination of wave erosion, groundwater and
25 surface water seepage. There was no evidence of deer serving as the cause. Mr. Johannessen
26 noted that we're looking at a 50 to 75 year time frame. A two year time frame is not very
instructive of long term impacts. As to Exhibit 5(c), which shows a lot of rocks and fill on the
left side and several trees close to it, there is a concern for the health of the trees due to the filling
activity. On Ex. 16, using a normal method of measurement, the house is closer than 27 feet.
"Normal" is a geometric term using a perpendicular distance from the top of bank. It's not a
great distance, but using this method would shave a foot or more off the distance and this
difference would increase as you go further from the shoreline. Mr. Johannessen reiterated that a
bulkhead is reasonably foreseeable for the house and deck shown on Ex. 16 for 3 Westerly Court.
If a bulkhead is constructed on 3 Westerly Court it is likely to increase erosion to the north on 25
Westerly Court. It would likely cause small but significant erosion on 25 Westerly Court, which
in turn could trigger a bulkhead need for that property. Ex. 16 shows a point near the southerly
end of 75 Westerly Court with the words "top of bank" superimposed. This point contains a
crane and fishing boat. This point shelters windstorms coming from the north. Waves from the
west would affect all the properties of the pocket beach. Mr. Johannessen did not create Ex. 14-
16 and was not asked to evaluate the Carver property for the necessity of a bulkhead. 75 years

1 into the future is “reasonably foreseeable” because that is the standard used by numerous
2 jurisdictions for considering the expected life of a structure. Mr. Johannessen was shown the
3 video of Ex. 34, showing wave action on the pocket beach. Mr. Johannessen stated that this
4 video shows that the log was floating and hitting the bank.

5 In re-cross, Mr. Murray asked about the trees on the westerly side of the building pad. If the fill
6 were excavated around the trees, that would be beneficial to the trees. A certified arborist would
7 be in the best position to evaluate the health of the trees. Ex. 5(c) and 14 show the footings of
8 the deck. If those footings were eliminated on the western side of the deck, there would be a
9 reduced risk to the structure. Within 75 years the deck shown on Ex. 15-17 would likely be
10 threatened by erosion of the bank. The house itself would be threatened in the same time period.
11 Mr. Johannessen also stated that this would not be his opinion for all other shorelines, because
12 many areas are bedrock top to bottom, there are other beaches that have a wide width, gentle
13 slopes etc. Mr. Johannessen stated that there are a large number of parcels on Orcas Island that
14 will need bulkheads within the reasonably foreseeable future.

15 On redirect, Mr. Johannessen noted that 3 Westerly Court has a higher risk of erosion than most
16 other Orcas Island properties due to the relatively small amount of bedrock.

17 Mr. Carver, whose wife owns the Saratoga Partners, LLC, which in turn owns the subject
18 property, then testified. He and Mrs. Carver decided to buy 25 Westerly Court because of the
19 pristine views. Since they bought their property in 2005 the owners of 3 Westerly Court built an
20 unpermitted fence to the shoreline and then built a barrier to the tidelands. The received after-
21 the-fact permits for the fence. They also did an extensive amount of grading and filling, leveling
22 a large area. On cross examination, Mr. Carver testified that he purchased his home in 2005.
23 Mr. Carver was friends with the Chambers, the prior owners of 3 Westerly Court, who told him
24 that prior to Mr. Carver’s 2005 purchase the 3 Westerly Court property was in a natural state
25 except for the portion that was landward of the garage. Mr. Carver said that a mobile home was
26 located upon the property sometime after 1966. Mr. Carver testified that the cove creates an
anomaly because of the way it dips into the shoreline. He noted that it’s a very sharp indentation.
This indentation shortens the setback. Without the indentation, the setback would be further
waterward.

Mr. Carver acknowledged that the home overlaid on Ex. 43 may not be located at the correct
location and that the home could be located more landward. The home location was based upon
the location of the white stakes depicted in Ex. 23. In redirect Mr. Carver stated that the home
overlaid on Ex. 43 did accurately depict the lack of screening of the proposed home.

Mr. Murray then made his opening comments. He noted that the Chambers were the owners of
the property at the time the survey was done and the Messanos were the contract purchasers.
Closing was contingent upon the shoreline setback and County determination that the lot was
buildable. The second paragraph of the approval letter recognized that there were no county
recognized environmentally sensitive areas. The letter identified erosion hazards and the slope

1 grade. The third paragraph identified a 50 foot setback from the shoreline bank. The letter also
2 recognized the potential for setback averaging. The setback average is depicted in the letter in
3 purple or orange (depending upon the copy). The average setback was determined by San Juan
4 County. In 2009 there was another letter from the County, H-17, that identified the location of
5 the proposed Messano homes. Mr. Murray asserted that the letter was only referencing the
6 location of the home as depicted in the site plan of the building permit application and that this
7 location meets County regulations. This letter did not in any way modify the findings made by
8 the County in its 2006 letter (Ex. H-21). The Carvers interpreted this to mean that the house was
9 going to be located relative to an eleven foot two inch setback line. The Messanos do not
10 propose to use this setback. They will build landward of the location approved in the 2006 letter.
11 The Messanos stipulate that the home will be built landward of the setback approved in the 2006
12 decision. The trees lying westerly of the 2006 approved line will be retained. The deck will be
13 constructed to wrap around or otherwise avoid affecting a tree standing at the proposed location
14 of the deck. The applicants have retained an expert to advise them on how to maintain the health
15 of the trees, how to remove damaged trees and how to keep the slopes stable.

16 Mr. Murray asked Ms. Messano to confirm that the highlighted line on Ex. 22.1 represented the
17 setback determined for the 2006 RPA. Ms. Messano testified about Ex. 22.4. She noted that she
18 acquired possession following its distribution to a large group of people on Orcas Island. She
19 and her husband only obtained it when Ed Hiser, a neighbor of the Messanos', gave it to them.
20 The letter was contained in a packet of information about white stakes that were delineating a silt
21 fence rather the setback line. The packet states that the white stakes were in fact the set back line.
22 The witness continued to testify that the packet and stakes do not identify their proposed set
23 backline. She reiterated that they had no intention of building on the line that was represented by
24 the white stake/silt fence in the Carver document.

25 Ms. Messano confirmed that the 2006 setback line was landward of all the trees on water side of
26 the property and that none would need to be removed as alleged in the documents distributed by
Carver. Ms. Messano noted that the photo distributed to neighbors by Mr. Carver, Ex. 22.8, was
a complete misrepresentation and did not accurately reflect the location of the proposed home.
Ms. Messano clarified that Ex. 22.11 identifies the location of the proposed home and 22.12
depicts the outer boundaries of the decks of the adjoining homes.

Ms. Messano testified about the prior owners of 3 Westerly Court and its prior usage.

Ms. Messano testified that Ex. 43, a photo rendition prepared by Mr. Carver, is completely
inaccurate because it shows that the screening trees would be removed, which will not happen.

Ms. Messano testified that the chained log referenced by Appellants was never intended to serve
as a bulkhead. She then provided more testimony on the history of use of the property and
current structures and other modifications to 3 Westerly Court.

Mr. Messano testified that Ex. .22 was a report submitted by Fay Chaffey upon examining the

1 property in 2009, to re-look at the 42 foot setback. This was due to the San Juan County's
2 concern that the original setback report didn't make sense and clarification was needed. Mr.
3 Messano stated that Fay Chaffey indicated she was revisiting the site to verify the proposed
4 location of the set back line. She did not state it was effecting the 2006 RPA.

5 Counsel then directed the witness to Ex. 22.4. Mr. Messano recognized it as the packet that his
6 neighbor Ed Hiser gave to him after it was had mailed to a group of people. He identified that the
7 purpose of the white stakes in the exhibit was to his knowledge identification of the silt line and
8 placement of buried water tanks. The grading contractor placed the stakes and told Mr. Messano
9 not to touch them. The witness then identified exhibit 30 as photos he had taken.

10 Mr. Murray moved onto exhibit Ex. 22.5b which is another perspective of the silt fence, where
11 there some large trees to the left of the archery target. Mr. Messano testified that the 2006 RPA
12 setback line is in the photo. Additionally, at the top of the photo is a pipe/stake with the rope
13 around it, it is represented in both photos. Further testifying that the photo of a red flag is the
14 mark of the proposed deck, as seen in exhibit 22.5c. He testified that he took this photo prior to
15 the July one site visit.

16 He further testified that the survey control point was placed by Alta Surveying. That point was
17 kept as a reference point from which the set back line was determined.

18 The witness was also asked to clarify the perspective of photos already admitted as exhibits. He
19 identified as having a southerly view on top of the RPA line. He also confirmed the use of the
20 septic and which was previously addressed by Ms. Messano. He also confirmed that the Carver
21 representation was not correct, indicating that he had also conferred with the original architects
22 on the project.

23 It was the witnesses testimony that the measurement points were set by the surveyor and that the
24 westerly elevation is the wall of the house; the deck is shoreward. And that the yellow line in the
25 exhibit represents the south wall of the house, the string represents the southeast corner of the
26 house.

The witness was also testified that the gray area on the exhibit is the footprint for the Pergola but
that it has not been built.

Counsel then revisited the question of whether or not the Messano' planned to take out the trees.
Mr. Messano affirmed that there was no plan to remove the trees.

The witness was then directed to exhibit 22.10. He identified it as aerial photo obtained from the
internet on the county records site. It showed the Langley, Evans and Carver properties as well as
Three and One Westerly Court. The witness then testified that Exhibit 22.11 also depicted these
properties, and that in both of these exhibits the red blocks indicate the same footprint of their
proposed house on the permit application. He also testified that the exhibit displays an area for a

1 potential deck. And that the bank line shown was garnered from the original survey from the San
2 Juan Title Company.

3 The witness then testified in reference to said survey; which indicated that the setback line was
4 closer than eleven feet two inches. After which the witness testified that their own proposal was
5 set back from the 11 feet two inch designation and has remained the same since the 2005/2006
6 survey.

7 Exhibit 28 caused the witness to explain that he took this photo facing toward the Carver house
8 and that there is a tree screening; and that from the water you can look back at these trees and
9 still see the Carver house and his own property. At which time the photos were admitted as
10 exhibits.

11 Mr. Murray concluded with Mr. Messano.

12 Mr. Wiessenger began reviewing exhibit 18a. The witness regarded the line for the setback
13 being the same as the 2009 setback, identified in exhibit two. He never understood that it was a
14 set back line and he saw the set back line in the surveyors plan.

15 Mr. Wiessenger asked Ms. McEnery to look at exhibit 18a. He asserted to her that there is a
16 dramatic difference between the two set back lines. He asked if the department has a policy to
17 determine which set backline is correct. She indicated that they have no policy to determine this.
18 Lee McEnery went on to state that she does not recall that there was ever an inquiry into the view
19 and that the geotechnical stability study came in, but cannot confirm whether it is relevant in this
20 case.

21 Ms. McEnery testified that Jane Redfern and Fay Chaffey had the authority to make RPA
22 determinations and both have quite a bit of experience with the county. Ms. McEnery stated it
23 appeared to her that the 2009 RPA modified the setback line of the 2006 RPA but nothing else.

24 Mr. Carver testified about Exhibits 53-55, explaining that they showed that the existing Messano
25 home would not obstruct views from a home built on 3 Westerly court landward of a 50 foot
26 setback.

Exhibits¹

1. Weissinger 10/28/09 letter of appeal (including Exhibits A-G)
2. Legal ad
3. Survey map showing locations of proposed home and both methods of setback
(presented at hearing)
4. Staff report

¹ During the hearing many exhibits were prefaced with an "H", e.g. "H-16". The Exhibit list has been revised to remove the need for the prefix while still retaining the exhibit numbers.

- 1 5. Appellant Notebook
- 2 5.1 Aerial view with both (i) house outline added at different location,
3 showing where house could theoretically be built, and (ii) where current house is proposed
- 4 5.2 Aerial Photo showing extended view lines
- 5 5.3 Photo showing view lines from 50 feet from top of bank, and from a
6 location nearer to top of the bank that we think is a good compromise
- 7 5.4 View Photo #1 from Carver side
- 8 5.5 View Photo #2 from Carver side
- 9 5.6 View Photo #1 Langley side
- 10 5.7 View Photo #2 Langley side
- 11 5.8 View Photo #3 Langley side
- 12 5.9 Aerial photo showing BOCC's Downsworth line
- 13 5.10 SJC Correction Notice and Inspection Report cover page, site plan, and
14 Pages 1, 5, and 6 of plans attached to the Correction Notice
- 15 5.11 2006 Residential Preapplication Approval ("RPA") granting 42-foot
16 setback
- 17 5.12 WA Dept. of Transportation photo showing original house
- 18 5.13 Our February 12, 2010 letter to Phil Olbrechts, with attachments
- 19 5.14 Affidavit of Wilbur Chambers
- 20 5.15 Affidavit of Joan Chambers
- 21 5.16 Downsworth Hearing Examiner decision HE 59-00
- 22 5.17 Eckert v. San Juan County Hearing Examiner decision
- 23 5.18 Resolution 23-2001
- 24 5.19 Aerial photo of Downsworth lots
- 25 5.20 "Before" photo from 2007 showing drain pipe
- 26 5.21 "After" photo showing drain pipe and erosion
- 5.22 Photo showing large log afloat at bank
- 5.23 Photo showing Messano House
- 5.24 Letter from Messano: bank is corroding
- 5.25 Exhibit 1 of Messano's appeal to Board of Equalization
- 5.26 Messano's supplementary letter to Board of Equalization
- 5.27 Messano's aerial view from Board appeal, showing the original and the
recently-surveyed shoreline, showing loss
- 5.28 UDC 18.30.120 and Messano's 2006 Geotech report
- 5.29 Erosive Soils Map showing Roche Gravely Loam
- 5.30 Pages A, B, and C showing site in 2006 versus 2009
- 5.31 Photo showing the large log, with rocks added which hide the chains
- 5.32 Photo showing rocks all washed away
- 5.33 Photo showing the log in a different location, showing the armoring was
done after 7/31/09
- 5.34 Carver's video of beach action
- 5.35 Additional photos showing added soil
- 5.36 2006 Survey showing original Chambers house, with decks

- 1 5.37 Declaration of James Slocomb
- 2 5.38 Letter from AKJ Architects
- 3 5.39 Letters from other neighbors
- 4 5.40 Example of absurd application of County's method of applying setbacks
- 5 5.41 Complete Board of Equalization Appeal
- 6 5.42 Carver's memorandum to Hearing Examiner
- 7 5.43 Drawing of house at 11-inch setback
- 8 5.44 Jim Johannessen's summary of education and experience
- 9 5.45 Letter from K&L Gates on behalf of Messano's neighbor to the south
- Langley
- 10 5.46 Appellant's appeal of deck approval, from companion appeal
- 11 5.47 Memorandum from Darryl and Pamela Carver
- 12 5.48 Letter dated 1/10/07 from Fay Chaffee to W.J. Weissinger regarding non-
- 13 binding nature of RPAs
- 14 5.49 Survey Elevations
- 15 5.50 Messano's pre-development grade sections, PD1 and PD4 (Exhibit 19)
- 16 with Darryl Carver's comments
- 17 5.51 Carriage House Deck, South Elevation
- 18 5.52 Carriage House Deck, North Elevation
- 19 5.53 Photo 3A: Photo taken during site visit by Weissinger
- 20 5.54 Photo 3B: Photo taken during site visit with reference lines added to show
- 21 position on property from which photo was taken
- 22 5.55 Photo 3C: Appellant Carver's Exhibit C, with superimposed sight line
- 23 based on photo 3B/Exhibit 53
- 24 5.56 Definition of "supplant"
- 25 5.57 Definition of "setback" and of the Geographic Feature behind which
- 26 structures are to be set back
6. Reserved
7. Reserved
8. Reserved
9. Reserved
10. Reserved
11. Reserved
12. Reserved
13. Reserved
14. Plot Plan, Foundations and Footings
15. Enlarged Plot Plan
16. Aerial photograph with survey overlay
17. 10/07/09 letter from Fay Chaffee
18. 5/10 survey
- 18.A Replaced with survey with surveyor signature
19. Grade elevation diagram
20. Assessor record

- 1 21. 3/20/06 County letter from Jane Broadwater Redfern
2 22. Kathy Marie Messano Declaration - Pending review
3 23. Ernest A. Heyneman Declaration
4 24. Geotechnical Engineering Investigation, prepared by Edison Engineering (Same
as Carver 28)
5 25. Tree Inspection letter from Dr. Brian Cleary
6 26. 8/4/09 Packet from Teri Williams
7 27. 2/2/10 letter from Darryl and Pamela Carver
8 28. Pad photograph from north
9 29. Building plans - Tree Opening in Deck Diagram
10 30. Setback line photographs
11 31. Offshore No. 1 Photograph
12 32. Offshore No. 2 Photograph
13 33. Offshore No. 3 Photograph
14 34. Offshore No. 4 Photograph
15 35. Offshore No. 5 Photograph
16 36. Offshore No. 6 Photograph
17 37. Offshore No. 7 Photograph - No Screening Trees
18 38. Offshore No. 8 Photograph
19 39. Offshore No. 9 Photograph
20 40. Offshore No. 10 Photograph
21 41. 11/23/05 Photograph of Garage
22 42. 12/08/05 Photograph of Shed
23 43. 11/23/05 Photograph of Mobile Home Pad
24 44. 12/08/05 Photograph of NW corner of Garage Drive looking NW at Mobile Home
25 Pad
26 45. 12/08/05 Photograph of Garage looking North to Carver Non-Permitted Guest
House
27 46. 11/23/05 Photograph from SW edge of bank looking east toward Garage
28 47. 11/23/05 Photograph from SW edge of bank looking NW to Carver
29 48. Email string from 7/6/10 to 8/9/10 regarding historical direction and velocity of
wind for the San Juan Islands
30 49. Map overlay of lots of Historical Wind Direction and Speed Generated Wave
Direction from the Office of Washington State Climatologist, dated 5/1/04 through 7/4/10
31 50. Second overlay of lots of Historical Wind Direction and Speed Generated Wave
Direction from the Office of Washington State Climatologist, dated 5/1/04 through 7/4/10
32

Findings of Fact

Procedural:

1. Appellant. The appellant is Saratoga Passage Partners LLC, c/o Pamela Carver ("Appellant"), represented by Bill Wiessenger.

1
2 2. Property Owner. Heyneman Trust, c/o Kathy Messano (“Applicant”), represented by
3 Michael Murray.

4 3. Hearing. Scheduling for the hearings was particularly difficult in this case. The initial
5 hearing date was March 4, 2010 and prior to the hearing date the attorneys agreed to hold the
6 hearing on May 6, 2010. At the hearing on May 6, 2010 both of the attorneys requested and was
7 granted another continuance. Michael Murray was unavailable from May 12, 2010 until after
8 May 31, 2010. Hearings in San Juan County are conducted on the first Thursday of each month.
As the first Thursday in June 2010 fell on June 3rd, to allow for sufficient time, the parties
9 decided to move the continuance hearing until July 1, 2010, the next available regularly
10 scheduled hearing date. A site visit by the Hearing Examiner and parties’ agents was scheduled
11 for June 30, 2010.

12 The hearing was held all of July 1 and had to be continued to another date for completion. Mr.
13 Weissinger’s schedule required the continued date to be held in late July. The Examiner could
14 not meet on the only mutually available date for all other parties in late July. Mr. Weissinger was
15 again unavailable during the early part of August. Therefore, the continuance hearing was
16 scheduled for August 13, 2010 at which time the testimony portion of the hearing was completed.
17 The parties agreed to do closing argument by conference call, the date to be determined by email.
18 Mr. Murray subsequently was out of the country and was not available to discuss a closing date
19 until his return on August 24, 2010. Upon his return Mr. Murray advised that he would be on
20 vacation from August 27th to September 7th. Closing arguments were finally held on October 6,
21 2010.

22 **Substantive:**

23 4. Permitting History. This appeal concerns the determination of a setback for construction of a
24 new home. The waterfront setback was initially determined in RPA 06RPA001 (“2006 RPA”) and
25 later modified by an administrative determination dated October 7, 2009 (“2009 RPA”). Applicant
26 owns two properties: the subject property and another property immediately to the south. Appellant
owns the property immediately to the north of the subject property. In the 2006 RPA, the
Department of Community Development and Planning (“CD&P”) determined that the proper
shoreline setback for the property, which was between two existing, non-conforming shoreline
houses, was a straight-line extension between the most waterward points of the two homes adjoining
the subject property. The 2006 RPA termed this a 42 foot setback, but in point of fact the setback
from the bank varied widely since the setback was a straight line and the top of the bank was
irregular. Subsequently, Applicants constructed a deck shoreward on the existing home on their
property adjacent to the subject property. They then obtained an after-the-fact permit for the deck.

In October 2009, a second “clarification site visit” was made by CD&P to the subject property and a
report issued to “clarify and modify” and “supplant” the 2006 RPA on setback issues only. Pursuant
to SJCC 18.50.330.D.2(d), which provides that if houses on adjacent lots are closer than allowed by

1 the minimum setback, the setback may be equal to the average setback of those adjacent homes,
2 CD&P took measurements “from the closest point to the top of the bank of both adjacent houses”
3 and established a new setback of 11 feet 2 inches. Ex. 17. This new setback was calculated using
4 the previously unpermitted deck that Applicants had erected on the adjacent property. Appellant
5 asserts that the recalculated setback allows Applicants to build a residence in a location that blocks
6 Appellant’s view of the water, in contravention on the intent of SJCC 18.50.330(D)(2)(d). In
7 addition, Appellants argue, the County failed to make a determination that there would be a lesser
8 environmental or visual impact before allowing a reduced setback, as required by SJCC
9 18.50.330(D)(2)(c).

10 The Applicant currently resides at 1 Westerly Court, the home adjoining the subject property to the
11 south. The Appellant currently resides at 25 Westerly Court, the home adjoining the subject property
12 to the north.

13 5. Appeal History and Basis. The Appellant filed the subject appeal on October 28, 2009,
14 challenging the CD&P October 7, 2009 determination that an 11 foot, two inch setback form the top
15 of the bank of the subject property is appropriate. The Appellant asserts that the 11 foot, 2 inch
16 setback is in error; the setback blocks neighboring properties’ views; and was environmentally and
17 visually improper under the SJCC. Appellant further asserts that CD&P should not have measured
18 from an illegal deck to make its setback determination. Finally, Appellant claims that the RPA site
19 plan is deficient and should not have been approved. Appellant seeks to have the 11 foot 2 inch
20 setback declared illegal, and a 50 foot setback instituted. During the course of the appeal, Appellant
21 withdrew an associated appeal, PAPL00-09-001, challenging the county permit authorizing the
22 allegedly illegal deck.

23 6. Bulkhead Potential. Jim Johannessen was a highly credible and qualified expert on
24 erosion potential for 3 Westerly Court. In his expert opinion, based upon a thorough site analysis
25 and extensive experience with San Juan County beaches and bluffs, Mr. Johannessen stated that a
26 home would have to be built between 30 feet and 45 from the top of the bank to avoid the need
for a bulkhead within the reasonably foreseeable future. Mr. Johannessen generally defined “the
reasonably foreseeable future” as 75 years based upon the anticipated life of single family
residences and the fact that this figure is used in other jurisdictions when employing this term.
There was no compelling evidence to refute the testimony of Mr. Johannessen. The Appellant
provided some evidence to show that their property was not subject to high winds, but Mr.
Johannessen had already taken this into account in his testimony. Since Mr. Johannessen was
providing testimony on behalf of the Appellant and bulkhead potential is a fairly speculative
assessment, the Examiner adopts the low end of Mr. Johannessen’s setback range and finds that
the single-family home must be located more than 30 feet from the top of the bank to avoid the
necessity of a bulkhead within the reasonably foreseeable future. Mr. Johannessen’s conclusions
are corroborated by several past comments made by the Messanos that their waterfront is
experiencing erosion. See Ex. 24-27.

7. Tree Screening. Exhibits 31-39 show an extensive amount of screening by trees located

1 between the existing building pad and the shoreline. The Applicant's proposed home will not
2 require the removal of any of these trees. The project will also be conditioned to prohibit the
3 removal of any of these trees.

4 8. View Impairment. Ex. 5.1 provides an accurate representation on the limits of marine
5 views and their relationship to different setbacks. It is clear from this exhibit that views from the
6 waterfront end of the home would not be impaired by a 50 foot setback. However, it is equally
7 clear that views from the sides of any home placed at the 50 foot setback would be extensively
8 impaired by both the homes on 1 Westerly Court and 25 Westerly Court.

9 9. Modification of 2006 RPA. The Applicant argues that the 2009 RPA does not modify the
10 setbacks of the 2006 RPA. The 2009 RPA does not support this interpretation. The 2009 RPA
11 states that it "supplants" the 2006 RPA "in terms of the setback issues only". It goes on to
12 explain that the County Code authorizes an "average setback" of adjoining homes for the subject
13 parcel and then computes that setback to be 11.2 feet. It is difficult to find any ambiguity in the
14 2009 RPA – it was clearly intended to replace the 2006 RPA setback with a setback of 11.2 feet.

11 Conclusions of Law

13 Procedural:

14 1. Authority of Hearing Examiner. Appeals of administrative determinations or interpretations
15 made by the administrator are reviewed by the Hearing Examiner, after conducting an open-record
16 public hearing, pursuant to SJCC18.80.140(B)(8).

17 Substantive:

18 2. Comprehensive Plan and Shoreline Designation. The subject property is designated Rural
19 Farm Forest in the San Juan County Comprehensive Plan and has a Shoreline Master Program
20 designation of Rural Farm Forest.

21 3. Finality of 2006 RPA. The Applicant may be correct that the 2006 RPA was a final decision
22 made by San Juan County that could not be modified by the 2009 RPA. As argued by the Applicant,
23 case law provides that if a final land use decision is not timely appealed, it is "unreviewable" by the
24 courts. *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005). Since the 2006 RPA did not
25 include a statement that it was subject to appeal, there is a question whether it constituted a "final"
26 land use decision subject to the *Habitat* ruling on finality. That question ultimately does not need to
be addressed here because the Applicant didn't appeal the 2009 RPA. By modifying the setbacks of
the 2006 RPA, as determined in FOF No. 9 of this decision, the 2009 RPA necessarily included a
determination that the 2006 RPA could be modified. The Applicant did not timely appeal this
determination. Consequently, the Applicant is barred from raising this issue under *Habitat Watch*.
The validity of the shoreline setbacks is certainly at issue in the appeal filed by the Appellants, but

1 that is limited to the appeal issues specifically identified in the Appellant's appeal, which did
2 challenge the County's determination that the 2006 RPA could be modified.

3 4. Lesser Environmental or Visual Impact. The Appellant argues that SJCC18.50.330(D)(2) (c)
4 does not allow a buffer to be reduced below 50 feet unless the administrator determines that the
5 reduction results in a lesser environmental or visual impact. The Examiner concludes that
6 SJCC18.50.330(D)(2) (c) provides a setback reduction option that is an alternative to the setback
7 averaging authorized by SJCC18.50.330(D)(2) (d) and that the Applicant was not subject to
8 SJCC18.50.330(D)(2) (c) in this case.

9 SJCC18.50.330(D)(2) (c) provides that "*a setback less than the minimums specified above may be*
10 *authorized by the administrator only if it will result in a lesser environmental or visual impact.*" The
11 "minimums specified above" are the 50 foot setback applicable to screened shorelines and 100 foot
12 setbacks applicable to unscreened shorelines. Despite the "only if" language, SJCC18.50.330(D)(2)
13 (d) goes onto authorize the administrator to modify setbacks under the setback averaging method
14 employed by San Juan County in the 2009 RPA. The question then becomes whether the setback
15 averaging exception is subject to the "lesser environmental or visual impact" language of
16 SJCC18.50.330(D)(2) (c) or whether it constitutes a separate means of reducing waterfront setbacks.
17 Given the equities of setback averaging and the strong preference of the County Council in its
18 *Downsworth* decision (San Juan County Resolution 23-2001) to apply setback averaging, the
19 Examiner concludes that SJCC18.50.330(D)(2)(d) comprises a setback reduction method that is
20 alternative too and not subject to SJCC18.50.330(D)(2) (c). Consequently, the Applicant does not
21 have to establish that a setback less than 50 feet constitutes a lesser environmental or visual impact.

22 5. View Impact. As argued by the Appellants, SJCC18.50.330(D)(2) (d) only authorizes setback
23 averaging if homes on adjoining lots obstruct views. As noted in FOF No. 8 of this decision, the 50
24 foot setback would significantly obstruct marine views from the sides of the proposed home.
25 Although one could argue that view lines should only be considered from the waterfront end of a
26 proposed home, it is clear from the *Downsworth* decision that the view obstruction requirements are
to be liberally construed. Marine views from the side windows of a waterfront home are an important
and significant asset of those homes. Factoring in side views facilitates the use of setback averaging
and thereby increases the opportunity for waterfront property owners to enjoy setbacks similar to
those of their neighbors. For these reasons, the Examiner finds that the homes on 1 Westerly Court
and 25 Westerly Court will obstruct views on the subject property if the 50 foot setback is applied.

6. Consistency with Applicable SMP Regulations. As asserted by the Appellants, the setback
averaging must be consistent with applicable Shoreline Master Program ("SMP") regulations, as
stated in SJCC18.50.330(D)(2) (d). One of those regulations is SJCC 18.50.330(B)(2), which
prohibits the construction of residential structures that will require bulkheads in the foreseeable
future. As determined in FOF No. 6 of this decision, the proposed home will necessitate a bulkhead
within 75 years if built within 30 feet of the top of the bank. The Examiner concludes that 75 years
constitutes the "reasonably foreseeable future" for the reasons stated by Mr. Johannessen in FOF
No. 6. The Examiner further concludes that in order to comply with SJCC 18.50.330(B)(2) and by

1 extension SJCC18.50.330(D)(2) (d), the proposed home must be built at least 30 feet from the top of
2 the bank.

3 7. Setback Averaging Methodology. The 2009 RPA correctly determined average setback as
4 intended by SJCC18.50.330(D)(2) (d). The issue is largely moot since the 30 foot setback required to
5 prevent a bulkhead exceeds the average setback. However, the issue must be addressed since
6 alternative interpretations of SJCC18.50.330(D)(2) (d) could yield setbacks that exceed 30 feet. Mr.
7 Carver is quite correct that the setback averaging applied in the 2009 RPA can yield absurd results.
8 Under the 2009 RPA methodology, new homes can acquire setbacks that are significantly smaller
9 than adjoining homes in areas with irregular banks. However, SJCC18.50.330(D)(2) (d) is fairly
10 clear and there is insufficient ambiguity to graft an interpretation that leads to more sound results.
11 SJCC18.50.330(D)(2) (d) provides that the average setback “may be equal to the average setback of
existing houses on adjacent lots”. SJCC 18.20.190 defines a setback as “the distance a structure is
placed behind a specified line or topographic feature.” Decks are not excluded from this definition
and no party identified any County code provision that exempts decks from setback requirements.
Although not expressly stated, setbacks provide the minimum distance that a structure can be placed
from a specified line or topographic feature. Consequently, the County correctly used the most
waterward points of the adjoining homes to calculate an 11.2 foot setback in the 2009 RPA.

12 8. Discretion in Setback Averaging. As the Applicant correctly pointed out, the administrator is
13 not mandated to authorize setback averaging if the criteria of SJCC18.50.330(D)(2)(d) are met.
14 SJCC18.50.330(D)(2)(d) provides that the administrator “may” authorize setback averaging. This
15 discretion should be used to prevent the absurd results discussed in the preceding Conclusion of Law.
16 Setback averaging should not result in setbacks that are less than those of both adjoining lots. There
17 is no reason for such an accommodation and it results in greater overall view impacts amongst
18 adjoining properties. The straight-line setback methodology employed in the 2006 RPA will prevent
any inequities not already addressed by the 30 foot bulkhead setback imposed in COL No. 6. By
setting an additional setback established by a straight-line between the most waterward points of the
homes on 1 Westerly Court and 25 Westerly Court, the proposed home will be located within the
view shadow (as seen from the Carver property) of the existing Messano home at 1 Westerly Court.

19 For future reference, it should be emphasized that the straight-line methodology of the 2006 RPA has
20 only been added under the discretionary authority of SJCC18.50.330(D)(2)(d) to protect the views of
21 adjoining property owners. Technically, the methodology used in the 2009 RPA was a correct
22 application of SJCC18.50.330(D)(2)(d) and should always be used as a starting point. If that
23 application then leads to potential adverse view impacts on adjoining properties, then a second
24 setback using the methodology of the 2006 RPA can be employed to mitigate those impacts.

25 9. Measurements from Illegal Deck. The Appellant’s second appeal issue, that the County
26 improperly used an illegal deck to establish an average setback, is largely moot because the Examiner
has not sustained the 11.2 foot setback that was based upon the illegal deck. However, the second
setback imposed by COL No. 8 of this decision may also be based upon the “illegal” deck. This
decision will require the COL No. 8 setback to be based upon a straight line between the most

1 waterward points of the adjoining homes. This measurement will be from the "illegal" deck of 1
2 Westerly Court if the County has not required its abatement. To the best of the Examiner's
3 recollection², the Appellant withdrew their appeal of the "illegal" deck. If that is correct and the
4 County has not required abatement, the deck will be considered valid under *Habitat Watch* and can be
5 used as a reference point for setting the COL No. 8 setback.

6 10. Deficiency of the RPA Site Plan. In their third appeal issue, the Appellants challenge the site
7 plan submitted for the 2006 RPA. Under the *Habitat Watch* decision, it is too late to challenge the
8 2006 RPA, including staff acceptance of the site plan for that 2006 RPA.

9 DECISION

10 The 11.2 foot setback set by the 2009 RPA is overturned. Instead, any development, including
11 decks, on 3 Westerly Court will be subject to two setbacks: (1) 30 feet from the top of the bank to
12 prevent the need for a bulkhead; and (2) a straight-line setback connecting the most waterward
13 points of the homes (including decks) on 1 Westerly Court and 25 Westerly Court. No screening
14 trees may be removed for the construction of the home, except to remove danger trees. Screening
15 trees are defined as those trees between the building bad currently existing on 3 Westerly Court and
16 the shoreline. Any home or structure constructed on 3 Westerly Court may not extend into either of
17 the two setbacks, except that for the 30 foot setback those portions of a deck that extend beyond its
18 footings may extend into the setback (provided the deck still complies with the straight-line
19 setback).

20 DATED this 28th day of October, 2010.



21 Phil A. Olbrechts
22 San Juan County Hearing Examiner

23
24
25 ² Due to the voluminous nature of the record the Examiner did not go through the hours of testimony to verify that
26 the deck appeal had been withdrawn. If there is any question on this issue, the Examiner will do so under a request
for reconsideration and rule accordingly.

Effective Date, Appeal Right, and Valuation Notices

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

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

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

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