

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Anne L. Shorett Credit Shelter 5 Trust, et al. 6 7 Shoreline Substantial 8 Development Permit (PSJ000-09-0002)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION. S.J.C. COMMUNITY MAR 23 2010
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DEVELOPMENT & PLANNING

9 **INTRODUCTION**

10 The applicants have applied for approval of a Shoreline Substantial Development
11 Permit to build a joint use dock on Horseshoe Bay serving four parcels, but only three
12 users. The four lots are Lots 73, 90, 91 and 93 in the Yacht Haven subdivision, and
they are currently owned by three parties, who are the applicants. The Examiner
approves the permit subject to conditions.

13 **SUMMARY OF TESTIMONY**

14 Julie Thompson, senior planner, described the project site and noted that the position
15 of the dock was changed a little bit as a result of input from the Department of
16 Archaeology and Historic Preservation (“Archaeology”). The County and applicant
17 are awaiting additional approval/comment from Archaeology. She agreed with the
18 Hearing Examiner (“Examiner”) that compliance with Archaeology’s conditions of
19 approval should be included as a condition recommended by staff of approval. She
20 noted that the instant proposal is better than the previous ones submitted by the
21 applicants, which were denied. She added that eelgrass is not found within 25 feet of
the proposed location of the dock based on a survey done in 2006 as part of the HPA
of applicants’ previous application. She noted that 25 feet is the cutoff for the
Department of Fish and Wildlife (“WDFW”); however, she could not elaborate on
shading impacts that could possibly be caused by the proposed dock on nearby
eelgrass from such distance.

22
23 Stephanie O’Day, attorney for the applicants, introduced Francine Shaw, a land use
24 planner who is working with Ms. O’Day on this application on behalf of the
applicants.

25 Ms. Shaw testified that the property on which the dock is proposed is located on
Horseshoe Bay, and it has two shoreline designations: rural residential from the
ordinary high water mark (“OHWM”) landwards, and conservancy from the OHWM
seawards. She noted that a residential dock is permitted on both designations. She
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1 added that although there are three applicants, there are four parcels tied to the
2 proposed dock. Eventually, the applicant that owns two of the four parcels intends to
3 develop one of the parcels for his children. She provided history of the previous
4 applications and the reason for their denial: available moorage, single-user dock, and
5 lack of a single family residence (“SFR”) or progress towards developing one. She
6 also briefly alluded to the Volk dock joint-use condition and its impact on applicant
7 Dagg and Enselman.

8 Ms. O’Day argued that the instant application was not the same as the applicants’
9 previous applications. She noted that the affected parcels and applicants are different,
10 as is moorage availability. She added that the proposed dock is less than half the
11 maximum size allowed under the County code and explained that 30-foot boats are
12 the standard in the region because of the conditions of the waters. She noted that
13 eelgrass studies are usually good for five years. She explained that given the swing
14 radius required, buoys were not a feasible alternative because of the number of
15 existing buoys in the bay and impacts on navigable waters. Furthermore, having
16 buoys required the use of dinghies, which could impact surf smelt spawning habitat
17 and shoreline having archaeological significance. Plus, there would be no place to
18 access a dinghy because the shoreline is composed of steep banks, not a beach that
19 one can walk on. As for slip availability at the Port of Friday Harbor (“Port”), there’s
20 only one 30-foot slip available and all others would have to be on a waiting list. She
21 noted that parking is a problem at the Port because it provides only 100 stalls for 500
22 slips. Street parking is not an alternative because it is limited to two hours, which is
23 not enough for how long it usually takes for boating. Fuel cost of running the boat
24 from the Port to the properties would also be very high. For all these reasons, she
25 argued that the Port was not a “feasible” alternative as defined in the County code.

16 Applicant Judson Shorett testified that he grew up at Yacht Haven during the
17 summers and that he owns Lot 43, in addition to other properties in the area. He
18 added that Shorett Trust, which is for the benefit of his children and grandchildren,
19 owns Lot 73 and that he plans on constructing a residence there. To that end, County
20 approval for a shoreline variance on a setback has been obtained. He testified that he
21 owns a 23-foot boat for various water activities, including fishing and crabbing. He
22 added that having a dock near the property was important to him because of safety; he
23 wanted to avoid certain waters. He identified nearby locations where crabbing and
24 fishing are very good. He explained that he has tried to get mooring at Roche Harbor,
25 but it is a five-year waiting list, and circumstances change during a five-year wait.
Snug Harbor was excluded as a possible alternative because of slip size, shallow
water conditions, and security. The Port presents difficulties because of distance,
parking, and the lead time it would require to use the boat. Price of gas is also a
concern. He described the use he had envisioned for the dock as well as the kind of
boat he would like to moor thereon. He added that safety, again, was an issue with
smaller boats in the waters around the County because of tide changes and winds that
could muster up some big waves.

1 Applicant Gosta Dagg testified that he owns two lots in the Yacht Haven
2 neighborhood. He has been in the area since 1982. One of the lots has a SFR built,
3 and he is planning on building on the other lot for his son. He testified that he sold
4 his last boat because it had to be moored to a buoy in Garrison Bay where the wind
5 was very strong. He plans on buying another boat. His boating habits include
6 visiting primarily Sidney and on occasion Victoria. He noted that mooring in at the
7 Port would add 2.5 hours or so to such trips. Being able to go out on the water on a
8 moment's notice to watch boats, which he enjoys very much, would not be possible if
9 he moored at the Port. A round trip would take up to five hours. He added that
10 during short trips, he actually uses the boat like a vehicle to get around. He
11 elaborated on his attempts to get a dock. He testified that he did not know that the
12 Volk dock had a condition for joint use with his property. To access the Volk dock
13 from his property, however, he would have to travel a distance of about three football
14 fields over fairly high bank with primitive access at best.

9 Applicant Larry Enselman testified that he owns one lot, on which he will be building
10 a SFR soon. He owns a 23-foot fishing style boat, which he stores at an indoor
11 facility at Anacortes. He uses it as an alternative to taking the ferry. He explained
12 that on a summer weekend, it takes him about 1.5 hours to travel from Anacortes to
13 his property using his boat compared to 4 to 5 hours it would take using the ferry after
14 wait time is factored in. He uses his boat to fish, crab, and visit various locations and
15 friends in the island. He commented that mooring at the Port would not work for him
16 because of lack of parking during the Summer. He does not have a car, his property
17 is in the other side of the island, there is a lack of slip availability, and the cost of
18 running the boat from the Port to his property is prohibitive.

15 Ms. O'Day explained that although the previous Dagg/Enselman application for a
16 dock was denied by the County and affirmed by the Shoreline Hearing Board
17 ("SHB") based on Finding and Conclusion that the applicants have the legal right to
18 use the Volk dock, that Finding and Conclusion was overturned in Superior Court.
19 She noted the code provision providing for single use, joint use, and community
20 docks, as well as the order of preference for each. She pointed to the decision by the
21 previous Examiner, who noted that a proposal for a multiple-user dock may have had
22 a better chance for approval. She added that the County has made great progress in
23 its management and requirements for joint-use agreements since the Volk dock. She
24 noted that adequate access through the project property would be included in the
25 applicants' joint-use agreement. She described the proposed dock, with graded float
directed north to south to minimize shading. She explained that the surrounding
waters are heavily traveled. She noted that this area of the island has been successful
in avoiding the porcupine effect and that this would probably be the last dock given
the exposure and weather conditions on the west side of the island. Finally, she
added that existing facilities and alternative moorage are not adequate or feasible as
the testimony of the applicants indicated. She summarized the definition of feasible
in the code as it relates to the instant project as an "alternative that attains most or all
of the basic objectives of that project, and can be accomplished in a reasonable

1 amount of time.” She noted the requirement in the SMA and SMP to balance
2 between property rights and protection of marine resources.

3 Tim Blanchard of Common Sense Alliance expressed his desire to respond to the
4 letter submitted by Friends of San Juans (“FSJ”). According to him, said letter asks
5 the Examiner to ignore the basic premise of the SMA and the County’s SMP. He
6 noted that there is no outright provision for “no docks,” but for “carefully planned
7 ones.” He expressed his opinion that the applicants’ proposed dock was carefully
8 planned to minimize impact on the environment. He criticized the FSJ for casting
9 “bald aspersions” against the applicants.

7 Tim Gambrell, applicants’ neighbor, testified in support of the application. He noted
8 that the dock would not cause “visual blight” or any impact to neighboring properties.
9 Given Mr. Dagg’s advanced age, he opined that he should not be using a dinghy.
10 Instead, a dock would be a good option.

10 Kyle Loring, staff attorney with FSJ, requested a copy of the decision when issued
11 and a copy of Mr. Blanchard’s comment letter. He disputed that FSJ was casting
12 dispersions against the applicants. He noted that FSJ’s comments suggest that boats
13 and docks can cause impact to shorelines and can leak oil, as is well documented in
14 the literature about impacts from boats. FSJ did not accuse anybody of throwing
15 trash all over their property. He noted testimony about 12 to 15 youngsters playing
16 on the beach and questioned the impact it would have on surf smelt spawning, as
17 opposed to dragging and beaching the dinghy. He compared the impacts of a
18 permanent dock to those resulting from occasional responsible use of the beach and
19 suggested that a truly concerned person would opt for the latter. He added that
20 testimony merely showed that a dock would be convenient rather than necessary. He
21 explained that the docks are in fact on public waters and public land, which justifies
22 the SMA strict criteria and policy against shoreline development everywhere. He
23 noted that the County code has very strict criteria for approving docks, and that
24 caselaw shows that there’s no inherent right to a dock in the County or state wide. He
25 questioned whether there was sufficient information in the record to determine
whether approval criteria could be met. More information on the applicants’ boat was
necessary to comply with the code’s limit on dock size to that required for the use to
be made. He argued that the definition of “feasible” proffered by Ms. O’Day is not
applicable to the instant case. He added that the instant application is for a dock used
for SFR and that each of the criteria for approval of the same must be met regardless
of whether it is a single or joint-use dock. He explained that hydraulic project
approval and Army Corps of Engineers approval and an indication that there will be
no impact does not equate to there actually being no impact. The WDFW, which
issues hydraulic project approval and has never denied one in the County, has
testified that its no-net-loss criteria is in fact guidance, and that it cannot meet those
criteria given other constraints on its permitting authority. He questioned whether
buoy maximum capacity had been reached at the Horseshoe Bay. He noted that users
associated with the Shorett Trust were not clearly identified and that SHB’s decision
had held that the Port was a feasible alternative. Besides, he doubts the applicants

1 have even applied for slips at the local marinas before filing the instant application for
2 a dock. He added that feasible alternative should not be measured against the
3 objectives of a specific application because it could potentially lead to manipulation
4 of the said objectives by applicants to render any alternative virtually impossible to
5 meet. Citing to caselaw, he argued that the primary purpose of the SMA is to protect
6 the shoreline, not use by SFR. In response to the Examiner's question about giving
7 positive consideration to this application because it will lock up all parcels and result
8 in no additional docks in the future, Mr. Loring noted that that was probably the same
9 argument and reason behind the approval of the Volk dock, which failed to serve such
10 purpose as it should have limited dock applications associated with three of the four
11 parcels being discussed. He expects such trend to continue, as property owners with
12 joint use agreements try to break them and apply for their own docks.

8 Bill Wright of Citizens Alliance for Property Rights testified that the only means of
9 getting to the island is either by air or water. He noted that the ferry system is public
10 and unreliable because it fails frequently. He added that when the Orcas dock was
11 unsuitable for ferry operations, the only way to get on and off the island was with
12 your private boat. He testified that eelgrass is an invasive species and perennial that
13 dies off in the year and comes back the next, and that there is no science behind the
14 argument that "we're in the close proximity of eelgrass."

13 Ms. O'Day noted that the circumstances surrounding the Volk dock and the instant
14 application is vastly different. The Volk dock approval did not require that a joint-
15 use agreement be executed and recorded, merely that the dock be shared with the
16 neighbors. In addition, access to the Volk dock was not properly considered. She
17 noted that the current code does not prohibit docks and does not state that they should
18 only be approved when necessary. According to her, FSJ's arguments were
19 addressed by the court in the Hughes project. She concluded by noting that even as a
20 three-user dock, it was half of the maximum size allowed.

18 EXHIBITS

19 Exhibit No. 1 Staff report, submitted by Julie Thompson on 2/18/10
20 Exhibit No. 2 Request for review, submitted by Julie Thompson on 1/19/10
21 Exhibit No. 3 DNS, submitted by Julie Thompson on 1/20/10
22 Exhibit No. 4 Application materials, submitted by Applicant on 11/19/09
23 Exhibit No. 5 Comment letter, submitted by the Department of Architecture
24 and Historical Preservation on 2/2/10
25 Exhibit No. 6 Comment letter, submitted by Declaration of Mike Ahrenius on
26 2/17/10
27 Exhibit No. 7 HPA, submitted by Applicant on 2/18/10
28 Exhibit No. 8 Notice of Application and Hearing, submitted by Julie Thompson
29 on 1/12/10
30 Exhibit No. 9 Declaration of Posting, Mailing, submitted by Applicant on
31 1/20/10
32 Exhibit No. 10 Submitted by Friends of San Juan on 2/24/10

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- 1 Exhibit No. 11 Submitted by Stephanie Johnson O'Day on 3/2/10
- 2 Exhibit No. 12 Joint Use Map
- 3 Exhibit No. 13 Aerial Photograph
- 4 Exhibit No. 14 Comment letter submitted by O'Day on 3/3/10
- 5 Exhibit No. 15 UDC, 3/20/2003 - SJCC Chapter 18.20- Definitions
- 6 Exhibit No. 16 Jonathan Cain letter to O'Day - 4/30/07
- 7 Exhibit No. 17 Email from Tammy Hayes - 2/24/10
- 8 Exhibit No. 18 Richard Shorett letter to O'Day - 3/2/10
- 9 Exhibit No. 19 Aerial shot of Horseshoe Bay - 8/07
- 10 Exhibit No. 20 Comment letter submitted by the Petersons on 3/3/10
- 11 Exhibit No. 21 Photographs submitted by Mr. Dagg
- 12 Exhibit No. 22 Comment letter submitted by Sandstrom on 3/3/10
- 13 Exhibit No. 23 Volk Pleadings
- 14 Exhibit No. 24 Comment letter submitted by Common Sense Alliance on 3/4/10
- 15 Exhibit No. 25 Declaration by Donald Eaton - 3/3/10

FINDINGS OF FACT

Procedural:

1. Applicant. The applicants are Anne L. Shorett Credit Shelter Trust, Gosta and Carole Dagg, and Larry and Kathryn Enselman.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on March 4, 2010.

Substantive:

3. Site and Proposal Description. The applicants propose to build a joint use dock on Lot 73 of the Yacht Haven subdivision. The dock would be located on the east side of Horseshoe Bay, and serve the following four parcels: 463650073, 462650090, 462650091 and 462650093. The dock is designed for four thirty-foot boats. The project site is jointly owned by Richard Shorett and the Anne L. Shorett Credit Shelter Trust, but Richard Shorett is not a party to this application. Larry and Kathryn Enselman own parcel 462650093. Gosta and Carole Dagg own parcels 462650090 and 462650091. Lots 90, 91 and 93 are contiguous lots located on the southeast side of Shorett Drive, across the road from lot 73. Because the Dagg's own two parcels, the project is really only a three-party dock.

The dock will consist of:

1. One 4-foot x 4-foot concrete landing pad (16 square feet) located at the head of the pier which will be constructed by hand;
2. Two fixed pier sections, one 4 feet x 35 feet and the other 4 feet x 30 feet (260 sq. ft.);
3. One 4-foot x 35-foot fully grated ramp (140 sq. ft.);
4. One 4-foot x 10-foot ramp landing float (40 sq. ft.);

1 5. One 8-foot x 60-foot moorage float with 60% light penetrating grating (480 sq.
ft.); and

2 6. Ten 12-inch galvanized steel piles.

3 The total square footage will be 920 sq. ft. and the total length is approximately 119
4 feet. A survey on eelgrass conducted in 2006 as part of a previous application for a
5 dock by one of the applicants shows that eelgrass is found approximately 25 feet
6 away from the float of the proposed dock, but not directly under it.

7 In 2006, brothers Richard and Judson Shorett applied for a dock at this location. The
8 application was denied on the basis that existing facilities for boat moorage were
9 adequate and available and that no residential construction was planned for the parcel.
10 Also in 2006, Gosta Dagg and Larry Enselman applied for a two-user joint-use dock
11 to serve Lots 90, 91, and 93 of the Yacht Haven subdivision. This dock would have
12 been located on the opposite side of the peninsula, in Garrison Bay, on the property
13 line between two of the lots. This proposal was denied by both the Hearing Examiner
14 and the Shoreline Hearings Board because the applicants had failed to show that
15 existing facilities were not adequate or feasible. An appeal was subsequently heard
16 by superior court and the finding and conclusion that the Dagg and Enselman had a
17 legal right to use the Volk dock was reversed. The court decided that Dagg and
18 Enselman are not, as a matter of law, able to obtain access to the dock on the Volk
19 property, because the owners of the Volk dock may remove the dock rather than
20 granting access.

21 Lot 73 is currently undeveloped except for a parking area, a path to the proposed dock
22 site, and a small rock stabilizing wall. This development was approved by shoreline
23 exemption 07XMP010. This lot has also received a variance to construct a SFR 25
24 feet from the top of the bank. The other lots associated with this application either
25 have a SFR built or are making substantive progress towards having one built.

4. Characteristics of the Area. The property is located within the Yacht
Haven subdivision, a residential area. The majority of parcels in the neighborhood
are developed for a single-family use. There are a few docks serving this area.

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 seven agencies and
groups were notified of this development proposal and comments were requested.
The Washington State Department of Archaeology and Historic Preservation
("Archaeology") reviewed the archaeology report and found it did not identify the
location of the proposed dock. Archaeology did not review the area so it could not
approve the proposal. Further site investigation has since been done and
archaeological or cultural resources were identified. The location and design of the
proposed dock were modified in response. Furthermore, approval will be conditioned
on compliance with Archaeology's conditions and requirements.

1 A comment letter and testimony from Friends of San Juans (“FSJ”) were received
2 expressing concerns with the proposed project. FSJ argues that the proposed dock is
3 inconsistent with SMA policies because it would extend a dock into a relatively
4 undeveloped bay even though the applicants have other options for shoreline access.
5 The SMA, however, does not prohibit development of the state's shorelines. *May v.*
6 *Robertson*, 153 Wn. App. 57, 218 P.3d 211 (2009). Rather, it calls for “coordinated
7 planning” that recognizes and protects private property rights consistent with the
8 public interest. *Id.* To achieve these goals, the act provides for a variety of shoreline
9 environments with a varying range of intensity of uses. *Id.* The shoreline designation
10 by the County for the proposed project site permits the construction of docks to serve
11 SFR. Furthermore, the proposed dock, which would be the second one in Horseshoe
12 Bay, would result in all parcels in the north side of the island to be tied up to a dock
13 use agreement resulting in no new dock in the area for the foreseeable future (barring
14 a significant change in law or policy). Also, there is no requirement that a proposed
15 dock be denied due to lack of necessity.

16 Next, FSJ argues that the proposed project’s cumulative impacts render it inconsistent
17 with the SMA and SMP. The proposal is for a three party / four parcel joint use dock,
18 and favorable consideration vis-à-vis cumulative impact should be afforded,
19 especially because it should be the last new dock in the area by tying up all remaining
20 parcels that could be considered for a dock under the present regulations. For the
21 same reasons, concerns about the porcupine effect from the proposed dock are
22 minimized. The size of the proposed dock is less than half of the maximum allowed,
23 which minimizes both visual and aesthetics impacts. Given the existing dock that is
24 much larger and longer across the bay, the proposed one does not detract from the
25 visual and aesthetic qualities of the location. It is strategically located to be outside
the eelgrass “buffer zone” and at a location deep enough to minimize its seaward
intrusion while achieving the applicants intended use. A dock is allowed at the
proposed site as long as the strict criteria for approval (see below) are met. It is
unrealistic to expect that a new dock and uses associated therewith will not have *any*
impact. The small size, the minimal intrusion seaward, the associated multi-party
joint use agreement, and the resulting curtailing of future docks in the area appear to
formulate the proposed project into a reasonable balance between the objectives of
the applicants and protection of the shoreline and environment contemplated in the
SMA and SMP.

21 CONCLUSIONS OF LAW

22 Procedural:

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

Substantive:

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Findings, Conclusions and Decision

1 2. Shoreline Designation. The subject property is designated as Rural Residential/Conservancy.

2 3. Comprehensive Plan and Zoning Designations. The subject property is
3 designated as Rural Residential, and the existing land use is undeveloped.

4 4. Compliance with Notice Requirements. According to the staff report, the
5 application was advertised in accordance with RCW 90.58.140, WAC 173-27-110
6 and the San Juan County Code Sections 18.80 and 18.50 by publishing the notice on
01/20/10, mailing on 01/15/10 and posting on 01/18/10.

7 5. Permit Review Criteria. SJCC 18.50.190(K)(3) and (4) permit docks
8 serving SFRs in rural residential and conservancy shoreline designations subject to
9 the policies and regulations of the SMP. Although the subject parcels do not all have
10 existing SFRs, the criterion can be met if a SFR is imminent. *See Hughes v. SHB*,
11 San Juan County Superior Court case no. 08-2-05185-5 (2009). According to the
12 County, parcels that do not yet have a SFR have filed various permits to satisfy the
13 requirement for being considered “imminent.” SJCC 18.50.190(G)(4) requires a
14 shoreline substantial development permit for development of docks on lots intended
15 for single-family development unless exempt. No exemptions apply to this project.
16 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.

17 **RCW 90.58.020 Use Preferences**

18 *This policy (Shoreline Management Act policy) is designed to insure the development*
19 *of these shorelines (of the state) in a manner which, while allowing for limited*
20 *reduction of rights of the public in the navigable waters, will promote and enhance*
21 *the public interest. This policy contemplates protecting against adverse effects to the*
22 *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.

23 6. The project will not interfere with public access to the shoreline because it
24 is located in a bay and its size is relatively small and short compared to nearby docks.
25 In addition, the public interest will be served by the addition of grating and
positioning the float in a north-south direction to minimize shading and provide
needed light to microalgae. Similar to the project considered by the court in *May v.*
Robertson (FSJ’s arguments to the contrary notwithstanding), this project is also
consistent with SMA policies of minimizing environmental damage and prioritizing
recreational use. 153 Wn. App. 57, 218 P.3d 211 (2009). The dock is intended to be

1 used primarily as a recreational structure that would allow family members to swim
2 from the structure and to participate in boating activities. The applicants are
3 proposing a joint-use dock rather than multiple individual docks, and the proposed
4 dock was designed to minimize environmental impacts on the shoreline. Its small
5 size and length, use of grating materials, a floating pier, and strategic location and
6 positioning should reduce shading and minimize adverse impact on eelgrass and
7 surrounding habitat.

8 **RCW 90.58.020(1)¹**

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

10 7. The statewide interest is protected. As noted above, the project minimizes
11 environmental impacts through its design, location, and restriction on the four subject
12 parcels' opportunity to develop their own individual docks. As a result, it should
13 insure shoreline development and planning in a coordinated manner while promoting
14 and enhancing the public interest and protecting private property rights.

15 **RCW 90.58.020(2)**

16 *Preserve the natural character of the shoreline;*

17 8. Again, the project minimizes environmental impacts through its design,
18 location and restriction on the four subject parcels' opportunity to develop their own
19 individual docks. As a result, the natural character of the shoreline should be
20 preserved.

21 **RCW 90.58.020(3)**

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

23 9. Again, the proposed project is a multi-party joint use dock, which will
24 eliminate four parcels and three owners' ability to develop their own individual docks
25 in the long term.

RCW 90.58.020(4)

Protect the resources and ecology of the shoreline;

10. Again, the project minimizes adverse impacts through its design, location
and restriction on the subject parcels opportunity to develop their own docks. As a
result, the resources and ecology of the shoreline should be adequately protected.

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.

1 **RCW 90.58.020(5)**

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

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

5 **RCW 90.58.020(6)**

6 *Increase recreational opportunities for the public in the shoreline;*

7 12. The proposed dock will provide increased private recreational
8 opportunities on the shoreline, but as the shoreline area in question is not public, there
9 will be no impact in public use of the shoreline as a result.

10 **San Juan County Code Regulations**

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

13 13. According to staff, this area is designated a critical biological area for
14 Pacific herring. Herring spawn mostly on the native eelgrass and the mud-bottom-
15 dwelling red alga. The eelgrass survey in 2006 identified eelgrass approximately 25
16 feet away from the float, but not directly under it. The application materials state that
17 microalgae is located under the proposed 4-foot x 30-foot pier section, but because it
18 will be elevated off the surface of the water there should be minimal shading impacts.
19 Sunlight should be able to extend below the pier and reach the seafloor. Furthermore,
20 the proposed project is located on Horseshoe Bay in the opening of Westcott Bay on
21 the northwest side of San Juan Island. The proposed new joint-use moorage dock
22 will be located approximately 600+ feet from the entrance of Westcott Bay off Hare
23 Straight. The proposed dock will not upset the shore process corridor because the
24 shoreline consists primarily of base rock transitioning into areas of mixed sand and
25 mud.

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

20 14. The dock has been specifically positioned at the northeast tip of the site,
21 on a rock outcropping, to avoid impact to the surf smelt spawning beach and
22 archaeology existing on site. It is at this location that water depth is the deepest
23 allowing for a much smaller dock than is allowed by code. It is the most suitable
24 location on site to construct the dock.

25 **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.

1 15. An HPA from the Department of Fish and Wildlife has been issued for
2 this project. The applicants will have to abide by the provisions of the HPA, which
3 includes any applicable WDFW criteria identified in SJCC 18.50.190(B)(3) upon
4 approval. FSJ argues that WDFW has never denied HPA in the County and that
5 WDFW's "not net loss" criteria are merely guidance. Nevertheless, the above
6 criterion is met by the issuance and compliance with a HPA from WDFW.

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

9 16. According to staff, the area where the project will be sited does not suffer
10 from poor flushing action.

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

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

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

23 17. The project will result in no more than one form of moorage or other
24 structure for boat access to the water on the subject parcels. Pointing to the decision
25 to deny the Shorets earlier application, FSJ argues that they already enjoy at least one
form of moorage. The Shorets earlier application did not involve the subject parcel
for the instant application. The parcels where the County and the SHB found that
moorage was already being enjoyed were different parcels, and they are not part of
this application. Similarly, the Volk dock is not on the Daggs' or Enselmans' parcels,
and it has been determined by the superior court that they do not, as a matter of law,
have a right to use. In *Dagg v. SHB*, the court reversed the SHB's summary judgment
decision that concluded that the Daggs and Enselman had a legal right to access the
Volk dock on reasonable terms. San Juan County Superior Court, Cause No. 07-2-
05153-9 (2009).

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.*

18. 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.*

1 19. According to testimony received, there are no existing docks within the
2 vicinity of the project site whose owners are willing to share with the four subject
3 parcels. The Shoreetts contacted the Inskeeps to ask if they could lease space on their
4 joint-use dock. The Inskeeps responded that they were not interested in sharing space
5 on their dock. Similarly, others were contacted but they expressed no interest. As for
6 the Volk dock, the Superior Court recently declared that the Daggs and Enselmans do
7 not have the right, as a matter of law, to use the Volk dock because the Volks may
8 choose to take out the dock instead of allowing their shared use. Applicants
9 contacted the Port of Friday Harbor, Roche Harbor Resort, and Snug Harbor Resort
10 on October 26, 2009, as part of this application submittal process and asked if these
11 facilities had available moorage for boats 30 feet in size for the applicants and
12 received a negative answer. There are no existing facilities, or the possibility of
13 expansion thereof, to serve the applicants.

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

11 20. Although FSJ disputes the claim that the number of buoys at the project
12 site has reached a maximum for safety, the aerial photograph with the location of
13 existing buoys indicates otherwise. See Exhibit 19. Given the number of existing
14 buoys and the depth required to moor larger boats, the addition of four new mooring
15 buoys in Horseshoe Bay near the project site may not be prudent. The buoys would
16 have to be placed some distance from the shoreline in areas of heavy boating traffic.
17 And the buoys would interfere with navigation, which is prohibited by the SJCC.

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

18 21. As stated above, although moorage floats are preferred, like buoys, there
19 does not appear to be a safe location near the project site for them.

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

23 22. This does not appear to be an area of littoral drift as this location is rocky,
24 not sandy. The dock does not cover enough area to have an adverse impact on water
25 circulation. The dock itself will be made of materials that do not cause water quality
problems. As noted by FSJ, 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

1 wildlife habitat has been considered and design, location and direction adjusted to
2 minimize impacts. The subject location is a bald eagle flight area, so a bald eagle
3 management plan will be required prior to construction. Because the dock will be a
4 pier, ramp and float, impact on scenic views, if any, should be minimal. Not only is
5 the dock small compared to others in the area, but also most of it will be floating on
6 the water. Navigation and public access have been considered and addressed above.

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

10 23. Staff has concluded that the bluff in question is not a feeder bluff and there
11 is no evidence to the contrary.

12 **SJCC 18.50.190(C)(6):** *Abandoned or unsafe docks and piers shall be removed or*
13 *repaired promptly by the owner. Where any such structure constitutes a hazard to the*
14 *public, the County may, following notice to the owner, abate the structure if the*
15 *owner fails to do so within a reasonable time and may impose a lien on the related*
16 *shoreline property in an amount equal to the cost of the abatement.*

17 24. There are none present at the proposed site.

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

21 25. No such use is being proposed by applicants.

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

25 26. Again, no such use is being proposed by applicants.

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

27. The proposal complies with all design standards required by SJCC
28 18.50.190(D)(1)-(11) according to the staff report. However, it appears as though
29 that the floats are not equipped with stops to keep the bottom off tidelands during low
30 tide. According to applicant, even during the low tides, the float will not ground
31 because of the depth where it is located. The code clearly require *all* floats to have
32 stops; therefore, approval will be conditioned accordingly.

33 **SJCC 18.50.190(G)(2)(c):** *The maximum dimensions for a joint-use community dock*
34 *(including the pier, ramp, and float) associated with more than two single-family*
35 *residences shall not exceed 2,000 square feet in total area. In addition, the length of*

1 the dock (including the pier, ramp, and float) may not extend more than 300 feet in
2 length seaward of the ordinary high water mark. If a variance is granted to allow a
3 dock exceeding these dimensions, its construction may only be authorized subject to
4 the regulations for a marina.

5 28. The proposed pier expansion meets these criteria, as it will be
6 approximately 920 square feet and 119 feet in length.

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

9 29. The applicants have indicated that their intended use is for 30-foot boats.
10 Although FSJ argues that more information is required to determine applicants'
11 intended boating use, the code as written does not require a specific demonstration to
12 prove it. It does not require that the applicant own such a boat or have a contract to
13 purchase one prior to submitting an application. Given the small total size and short
14 length of the proposed dock, where a larger and longer one could have been allowed
15 under code, it does not appear to the Examiner that the applicants are misstating their
16 intended boating use. According to the evidence provided by applicants, the length
17 and width of the dock is the minimum necessary to moor four 30-foot boats without
18 grounding them during low tides. It is acknowledged that one or more of the
19 applicants also testified that they currently owned boats shorter than 30 feet, but the
20 difference in length did not make a material difference to the overall size of the
21 proposal.

22 **SJCC 18.50.190(G)(3):** *Docks shall be set back a minimum of 10 feet from side*
23 *property lines. However, a joint use community dock may be located adjacent to or*
24 *upon a side property line when mutually agreed to by contract or by covenant with*
25 *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.

30. This criterion is met. According to staff, the beginning of the dock
structure is approximately 15 feet from the neighboring property line.

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.

31. As the SHB noted in *TG Dynamics Group II, LLC v. San Juan County*,
SHB No. 08-030, adequacy or feasibility of existing facilities and alternative moorage

1 must be evaluated in the context of all the relevant considerations related to a
2 particular proposal. The proposal in that case was a new subdivision, and the SHB
3 noted that it was not a reasonable or appropriate alternative if a slip became available
4 at a marina for use by one parcel, but not to the new subdivision. Similarly, this
5 particular proposal involves three property owners and four parcels. Testimony
6 indicates that at best, the Port of Friday Harbor has but one available slip to
7 accommodate a 30-foot boat. The attorney for the applicants, Ms. Stephanie O'Day,
8 indicated during the hearing that the Port did not have an idea when more would
9 become available. Mooring possibilities at other marinas are not much better for the
10 applicants. Roche Harbor Resort has a five-year waiting list, and slip size and water
11 depth makes Snug Harbor Resort unsuitable to moor larger boats. As noted above,
12 alternative moorage such as buoys and detached floats is not an option at the project
13 site because of safety concerns. Again, as for the Volk dock as an alternative for the
14 Daggs and Enselman, the court declared that they did not have a right, as a matter of
15 law, to use it, and evidence supports the applicant's claim that reasonable access to
16 the dock cannot be had. The applicants have met criterion above.

10 **San Juan County Comprehensive Plan Element 3, Section (5)(C) Boating**
11 **Facilities:**

12 *General*

- 13 *1. Locate, design and construct boating facilities to minimize adverse effects upon,*
14 *and to protect all forms of aquatic, littoral or terrestrial life including animals, fish,*
15 *shellfish, birds and plants, their habitats and their migratory routes.*
16 *2. Protect beneficial shoreline features and processes including erosion, littoral or*
17 *riparian transport and accretion shoreforms, as well as scarce and valuable shore*
18 *features including riparian habitat and wetlands.*
19 *3. The location, design, configuration and height of boathouses, piers, ramps, and*
20 *docks should both accommodate the proposed use and minimize obstructions to views*
21 *from the surrounding area.*
22 *4. Boating facilities should be designed to optimize the trade-offs between the number*
23 *of boats served and the impacts on the natural and visual environments.*
24 *5. In providing boating facilities, the capacity of the shoreline site to absorb the*
25 *impact should be considered.*

Docks and Piers

- 20 *6. The use of mooring buoys should be encouraged in preference to either piers or*
21 *floating docks.*
22 *7. The use of floating docks should be encouraged in those areas where scenic values*
23 *are high and where serious conflicts with recreational boaters and fishermen will not*
24 *be created.*
25 *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.

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

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

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

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

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

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

32. 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, the project design, size and location should minimize environmental impacts. Four parcels will be tied to this dock, eliminating the possibility of any new docks related to them, and most importantly in the entire area. For these reasons the Examiner finds the project to be consistent with the shoreline policies applicable to this project.

DECISION

The proposed project is consistent with all the criteria for a shoreline substantial development permit. The proposal is approved subject to the conditions listed in the staff report, with the following additional condition:

1. Applicants shall comply with the Washington State Dept. of Archaeology and Historic Preservation conditions and requirements as they related to the instant project.

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- 2. Pursuant to SJCC 18.50.190 D(4), stops shall be added to all floats to keep the bottom off tidelands.
- 3. Because the subject location is a bald eagle flight area, a bald eagle management plan shall be required prior to construction.
- 4. Subject to review and approval by the County, a joint use agreement for the proposed dock shall be executed by each of the applicants binding themselves, their successor and assigns, and the parcels for perpetuity, and release from which shall be subject to reasonable conditions by the County to prevent dilution of the conditions and restrictions intended to protect the shoreline.
- 5. Applicants shall withdraw any application pending, on appeal or otherwise, with the County for a Shoreline Substantial Development for a dock, float, buoy or any other over water device or instrument.

Dated this 23rd day of March, 2010.


Phil Olbrechts
County of San Juan Hearing Examiner

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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.