

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicants: Ben and Julie Wolff
2929 1st Ave., #1100
Seattle, WA 98121 Wolff

Agent: Otis Land Use Consulting
393 Bobbyann Road
Eastsound, WA 98245

File No: HE35-08 (08SJ002)

Request: Shoreline Substantial Development Permit (SSDP)

Location: 768 Elliott Road
Lopez Island, WA 8261

Parcel Nos: 140624005

Summary of Proposal: The applicants request a SSDP to build a dock.

Shoreline Designation: Rural Farm Forest

Public Hearing: After reviewing the report of the Community Development and Planning Department a public hearing was held on July 16, 2008.

Applicable Policies and Regulations: RCW 90.58 Shoreline Management Act (SMA)
SJCC 18.50 Shoreline Master Program (SMP)
SJCC 18.80.110(H) SSDP Criteria

Decision: Denied

Findings of Fact

1. The property owned by Mr. and Mrs. Wolff upon which they wish to place a dock (TPN 140624005) is located in eastern Lopez Island adjacent to and south of Jasper Bay. Jasper Bay is generally a flat muddy bay with rocks.
2. A permitted mooring buoy owned by and used by Mr. and Mrs. Wolff is located in Jasper Bay. There are two other buoys that are unregistered with unknown ownerships.
3. As of the date of the hearing Mr. and Mrs. Wolff were in the process of building a house and guesthouse on the parcel. They own an adjoining parcel (TPN 140624006).
4. Another adjoining parcel (TPN 140624007) is owned by Jasper Point LLC. That entity consists exclusively of Mr. and Mrs. Wolff. The May 7 and June 18 hearings were continued at the applicants' request so that they could purchase the third parcel now owned by Jasper Point LLC.
5. The northern part of TPN 140624005, including Jasper Bay, is a public shoreline.
6. In January 2008 Mr. and Mrs. Wolff submitted a proposal for a single family dock. The original application was for a small dock to access the mooring buoy in Jasper Bay. The applicants have a 20-foot boat that is kept either moored at the buoy or on their property on a trailer. They have recently purchased a 28-foot boat. According to a statement on July 7, 2008 the small dock is to be used primarily for loading and unloading and tie up for a dinghy with the principal boat moorage being at the buoy.
7. The 20-foot boat is often kept on a trailer and launched off property when the Wolffs wish to use it and moor it to the buoy. The primary request is to access the buoy from the Wolffs' property. There are difficulties in accessing the buoy from the shore.
8. At 331 square feet and 51 feet in length the proposed dock is smaller than the size and dimension standards for a single family dock. The proposed dock is not located in an area of appreciable shore drift and is not in a mapped forage fish habitat area. It is doubtful that there would be interference with littoral drift. There is no eelgrass according to the July 5, 2007 habitat survey. There is no expectation of interference with navigation from this proposed dock location.
9. On July 7, 2008 a draft joint-use agreement was submitted to staff. There was no property description submitted with the draft agreement. The agreement contained the two lots owned by Mr. and Mrs. Wolff along with a third lot recently purchased by Jasper Point LLC. There were other omissions from the

draft joint-use agreement and it was not reviewed or approved by the Prosecuting Attorney's office.

10. The proposed joint-use agreement covers the three lots consisting of approximately 25 acres. There are two existing residences on the three lots and approximately 1,300 lineal feet of shoreline. The property is located in the RFF-5 Comprehensive Plan designation which allows the potential of a five-lot creation. The proposed joint-use agreement would restrict the 25 acres and 1,300 lineal feet to one dock, presumably in perpetuity.
11. Near the conclusion of the public hearing on July 16 the Friends of San Juan County (FOSJ) were authorized to submit a post-hearing brief regarding the legal effect of the proposed joint-use agreement on SJCC 18.50.190(G)(5). The applicants' agent was allowed time to respond to the FOSJ brief. Both parties submitted the briefing in a timely manner, (Ex 6, 7) and the record was complete upon their submission. Both briefs addressed the issue quite well.
12. The legal issue briefed by FOSJ and Mr. and Mrs. Wolff's agent is predicated on the validity of a joint-use agreement. Since the three properties are owned by the same person (married couple) there is no legally valid joint-use proposal relating to the dock. The issue of balancing preferences under these facts is not presented.
13. Simply put, this is a request for a single family dock. It is the Wolffs' burden to show that existing facilities (generally on-site moorages etc.) are not adequate or feasible and that alternative moorages (generally reasonably available commercial moorages) are not adequate or feasible.
14. The evidence concerning existing facilities shows that Mr. and Mrs. Wolff have used the mooring buoy for over three years. It apparently has been in use by someone since 2002. Two other mooring buoys are being used in the vicinity although they are unregistered. While the Wolffs have shown that use of a dinghy is often difficult, they have not shown that it is now not adequate or feasible, (see Conclusions of Law Nos. 5, 6).
15. The Wolffs presented evidence that two people called Spencer's Marina and indicated that as of approximately July 1 no slips were available and the time involved in the waiting list was undetermined. Staff testified that their discussion with Spencer's Landing Marina indicated availability in the near future and sporadic slip availability during the application period. Additionally, the manager indicated that if Mr. and Mrs. Wolff were to get on the wait list they would be essentially first in line. As shown in Conclusion of Law No. 7 a reasonable time frame to obtain a commercial slip is within the parameters of the evidence in this case.
16. There are few docks in the area. Even a small dock like this one would cause visual impacts to the shoreline where none currently exist.

17. The notice of hearing was published March 19, 2008 and the site was posted on March 15, 2008. Mailings occurred on March 17, 2008.
18. A Determination of Non-Significance was issued March 13, 2008. No comments were received.
19. The staff report of July 10, 2008 is incorporated herein by reference as though fully set forth. The analysis and factual statements contained in the staff report are adopted as a finding herein.
20. Any conclusion herein which may be deemed a finding is hereby adopted as such.

Conclusions of Law

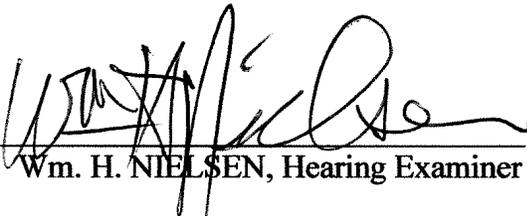
1. The Hearing Examiner has jurisdiction over the persons and subject matter of this proceeding.
2. Proper notice was given in compliance with local and state requirements.
3. The proposal has complied with the requirements of the State Environmental Policy Act.
4. Mr. Otis, staff and FOSJ submitted a number of previous hearing examiner decisions, all of which were reviewed. While each has aspects dealing with this case, fundamentally the legal analysis is driven by Shoreline Hearing Board (SHB) and Superior Court decisions regarding the Richard and Judson Shorett SSD request. Both the SHB and the Superior Court spent a great deal of time interpreting and applying the requirement of SJCC 18.50.190(G)(5). Both SHB and Superior Court commented on the strong anti-proliferation dock policy contained in the Comprehensive Plan and the SMP.
5. In *Shorett v. San Juan County* SHB 06-038 (June 7, 2007) the SHB reiterated its previous test of .190(G)(5) in Conclusion of Law No. 5, stating that the applicant does not meet the burden of proof by showing that a private dock is more convenient to access or use. In Conclusion of Law No. 6 the SHB listed the existing facilities which included a mooring buoy built on Mosquito Passage and in Horseshoe Bay. These were found to be adequate.
6. The Superior Court in its November 16, 2007 ruling upholding the SHB said that while it was true the buoys could not be used at all times, it was nonetheless not reasonable for a boat owner to expect to be able to use a boat at all times and under all conditions. The fact that accessing the boats at the buoys by use of a dinghy was somewhat difficult did not sustain the burden of proving the existing facilities were not adequate or feasible.

7. As to the second prong of the .190(G)(5) test involving offsite commercial availability, the SHB again held against the applicants' sustaining their burden of proof. The SHB stated that likely availability at the Port of Friday Harbor within a six to nine month period met the adequate and reasonable test even though it involved a 23 minutes driving time and up to a 1.5 hour boat driving time to return to the mooring buoy. The Superior Court upheld the SHB determination indicating that the six to nine month waiting period to moor a boat at a commercial marina is not unreasonable and that evidence of a single point unavailability is not sufficient to sustain the applicants' burden of proof.
8. A similar result was reached in the *Stanford v. San Juan County* SHB 06-004 (September 20, 2006) case. The evidence in that case showed multiple opportunities to obtain commercial moorage at Cayou Quay, Deer Harbor or Bay Head. The Superior Court affirmed the SHB ruling where the alternate marinas were two miles, two and one-half miles, six miles and 11 miles from the applicants' residence. The court noted that Bay Head Marina was 11 miles away with an approximate 30 minute drive along a narrow, winding road from the Stanford's residence.
9. The applicants have failed to sustain their burden of proof.
10. Any finding herein which may be deemed a conclusion is hereby adopted as such.

Decision

The shoreline substantial development application is denied.

DONE this 4th day of August, 2008.


Wm. H. NIELSEN, Hearing Examiner

Shoreline Appeal

Any appeal of the shoreline substantial development permit shall be made to the Washington State Shoreline Hearings Board pursuant to RCW 90.58.180 and the rules adopted by said hearings board.