

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS, AND DECISION

Applicant(s): Stephen and Nancy Schaefer
650 Deer Point Road
Olga, WA 98279

John and Coralee Dey
1129 Deer Point Road
Olga, WA 98279

Agent(s): Jeff Otis
393 Bobbyann Road
Eastsound, WA 98245

File No.: PSJ000-16-0002

Request: Shoreline Substantial Development Permit

Parcel Nos: 161551012 and 161551013

Location: 650 Deer Point Road, Orcas Island

Summary of Proposal: Application for a shoreline substantial development permit for authorization to construct a joint use dock

Land Use Designation: Rural Farm Forest

Public Hearing: ~~March 17, 2016~~ August 18, 2016 *es*

Application Policies and Regulations: SJCC18.35.110-140 Fish and wildlife habitat conservation areas
SJCC18.50.190 Shoreline master program – boating facilities
SJCC18.80.020 Application requirements
SJCC18.80.030 Public notice of applications and comment
SJCC18.80.050 SEPA implementation rules
SJCC18.80.110 Shoreline permit and exemption procedures
SJCC 18.35.055-070 Geologically Hazardous Areas

Decision: Approved subject to conditions

S.J.C. DEPARTMENT OF

SEP 09 2016

COMMUNITY DEVELOPMENT

**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY**

In the Matter of the Application of)
)
Stephen and Nancy Schaefer and)
John and Coralee Dey)
)
for approval of a shoreline substantial)
development permit to construct a joint)
use dock at 650 Deer Point Road on)
Orcas Island)

NO. PSJ000-16-0002

S.J.C. DEPARTMENT OF
SEP 09 2016
COMMUNITY DEVELOPMENT

SUMMARY OF DECISION

The request for shoreline substantial development permit to authorize construction of a joint use dock serving two parcels located on Deer Point Road, Orcas Island is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request:

Stephen and Nancy Schaefer and John and Coralee Dey (Applicants) requested a shoreline substantial development permit (SSDP) to authorize construction of a joint use dock composed of a pier, ramp, and float located at 650 Deer Point Road, Orcas Island. The proposed dock would serve two residentially zoned parcels.

Hearing Date:

The San Juan County Hearing Examiner held an open record public hearing on the request on August 18, 2016. On the record, the Applicants consented to extending the decision issuance timeline by five business days.

Testimony:

At the open record public hearing, the following individuals presented testimony under oath:

Lee McEnery, Planner, San Juan County Department of Community Development
Jeff Otis, Applicant Representative
Stephen Schaefer, Applicant
John Dey, Applicant
Kyle Loring, Friends of the San Juans

Exhibits:

The following exhibits were admitted in the record:

1. Staff report, dated August 1, 2016

2. Application
3. Summary of proposal, Otis, dated April 13, 2015 (20 pages)
4. Dock drawings, dated March 9, 2016 (8 pages)
5. Deer Point long subdivision map (2 pages)
6. Aerial photo vicinity map
7. Aerial photo, eagle and eelgrass
8. Aerial photo, drift sector
9. SEPA Mitigated Determination of Non-Significance (MDNS), dated July 6, 2016
10. SEPA Checklist (17 pages)
11. Inquiries to commercial moorage facilities (6 pages)
12. Deer Point HOA letter, dated January 5, 2016
13. Inquiries to neighbors, dated January 25, 2016 (5 pages)
14. Habitat and Assessment Report, dated March 30, 2016 (37 pages)
15. Appendix A, to Habitat and Assessment Report: Geotechnical Report (9 pages)
16. Estimate of planting plan costs, dated April 6, 2016 (2 pages)
17. Jen-Jay Inc. Preliminary Eelgrass Macro Algae Habitat Survey, dated January 9, 2016 (3 pages)
18. GW White Surveying, OHWM location (3 pages)
19. Marine Mammal Monitoring Plan, dated April 2016 (7 pages)
20. Joint use agreement (8 pages) including Exhibit A, space assignment
21. University of Washington Friday Harbor Labs comment letter, dated July 5, 2016 (2 pages)
22. Department of Natural Resources letter regarding lease, dated June 29, 2016 (2 pages)
23. Legal ad information (6 pages)
24. Otis response letter to University of Washington Friday Harbor Labs comment letter, dated July 20, 2016 (4 pages)
25. "Effect of a proposed dock installation on kelp and eelgrass beds near Center Island," dated July 26, 2011 (48 pages)
26. Jen-Jay Biological Opinion, dated April 2014 (4 pages)
27. Shannon and Wilson, "Effect of a proposed dock installation on kelp and eelgrass beds near Cliff Island," dated September 12, 2014 (13 pages)
28. Shannon and Wilson, "Effect of a proposed dock installation on kelp and eelgrass beds near Center Island," dated December 21, 2012 (4 pages)

29. Army Corps letter of permission, dated July 19, 2016 (7 pages)
30. WDFW HPA, dated July 27, 2016
31. Email from planning staff to Otis, regarding trail and stairs (site plan and stability), dated July 29, 2016
32. Land Use Disturbance and Impervious Surface Worksheet, completed by Applicant (2 pages)
33. Response to Staff Report by Applicant, dated August 16, 2016, prepared by Otis Land Use Consulting (4 pages) with attachments:
 - A. Addendum to Habitat Assessment Report, prepared by Marine Surveys and Assessments, dated August 15, 2016 (6 pages plus cover letter)
 - B. Addendum of Geology Assessment, prepared by Stratum Group, dated August 15, 2016 (2 pages)
 - C. Description of Path and Stairway Construction, prepared by Stephen Schaefer (undated, 1 page)
 - D. San Juan County Community Development & Planning Certification of Compliance (Stormwater Management Minimum Requirement #2), signed August 3, 2016
 - E. Land Use Disturbance and Impervious Surface Worksheet, completed by Applicant (1 page)
 - F. Annotated Photos (2) of dock and stairs, taken by Applicants
 - G. Schaefer/Dey Path and Stairs Site Plan (1 page)
34. Photos (2) of the shoreline of the subject property, taken by the Applicants
35. Article, "Alternative Materials Study Shows Little Decrease in Shading," submitted by Kyle Loring, December 2012
36. Document, "Final Report: Field Assessment and Simulation of Shading from Alternative Dock Construction Materials," by Dr. Clark Alexander, Skidaway Institute of Oceanography, March 18, 2012 (6 pages)

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicants requested a shoreline substantial development permit (SSDP) to authorize construction of a joint use dock composed of a pier, ramp, and float. The property on which the dock is proposed (subject property) is located at 650 Deer Point Road, Orcas

Island.¹ It is owned by Stephen and Nancy Schaefer (Applicants), who have entered into a joint use agreement with John and Coralee Dey (Applicants) who own and reside at 1129 Deer Point Road, the parcel to the south. The agreement would run with the land and provide physical access to the dock for the Schaefers, Deys, and future successors in interest in both properties. It would permanently limit the 605 feet of the subject parcels' combined shoreline to only one dock for the life of the facility. *Exhibits 1, 2, 3, and 6.*

2. The proposed dock site is situated east of Lieberhaven Resort on Obstruction Pass, Orcas Island. The beach is rocky with a steep bank. The two parcels were created through the Deer Point subdivision, recorded in 1975. On the Schaefer parcel there is a path to the beach with a retaining wall on its uphill side, ending at stairs leading to the beach. There is no pedestrian access to the beach on the Dey parcel because of the high bank. Both parcels have mooring buoys. *Exhibits 1, 3, and 5; Otis Testimony.*
3. The bank along the Dey shoreline is up to 80 feet in height and cannot be traversed to reach the water. Due to the combination of large boulders in the shoreline and currents/tidal action, it is dangerous to attempt to load gear and people into a dinghy for access to a boat moored on-site. The Applicants both indicated that they have had extensive damage to dinghies from attempting to access their boats from the Schaefer shoreline. When they have managed to get to the mooring bouys, they have motored to a public marina to load guests and gear only to find there is no room at the marinas, making boat use unfeasible. *Exhibit 3; Dey Testimony; Schaefer Testimony.*
4. Between them, the Applicants presently own two boats. The Schaefers keep a 40-foot trawler on a buoy during boating season and at Rosario in winter. Rosario, which is in the process of proposing changes to the marina, does not have consistently and predictably available off-season moorage. The Schaefers' trawler is used for day trips around the islands and occasional overnight trips; they intend to purchase a 16-foot aluminum boat for crabbing and boating. The Deys keep a 30-foot fishing boat on the buoy during boating season and trailer it in a storage lot during winter. When in the water, the Dey boat is used primarily for day trips among the islands, fishing, and crabbing. Due to the unpredictability of obtaining moorage at nearby marinas and the difficulties inherent in landing, storing, and maneuvering a dinghy to and from their mooring buoy and across the rocky shoreline, the Deys have not put their boat in the water this year. *Exhibits 4 and 13; Dey Testimony; Schaefer Testimony.*
5. In order to more fully utilize their waterfront properties, the Applicants propose to construct a dock to serve their two adjacent parcels. The proposed dock would be composed of a pier, ramp, and float fully depicted in the drawings in the record at Exhibit 4. The proposed pier bends near the end, leading to a three-foot, nine-inch by 44-foot ramp and an eight- by 50-foot float, all secured by pilings. The 50-foot float length was sized to accommodate the existing 40-foot and 30-foot boats with adequate draft and

¹ The subject property is known as Tax Parcel 161551012; the adjacent parcel to be served is Tax Parcel 161551013. *Exhibit 1.*

room for dinghies and guests. As designed, the dock would measure 1,080 square feet and would terminate 176 feet from the ordinary high water mark, ending 10 feet seaward of the extreme low tide contour. Because of the bend in the pier, the facility length is 191 feet. Total height would be 18 feet above mean low low water (MLLW). The proposal calls for pilings because anchors would not work on the rocky, deep bottom in typical currents. The base of the pier would be placed three feet above the extreme high tide of 11 feet. Steel pilings supporting the float would be ten feet higher than extreme high tide elevation. Float stops would not be necessary to prevent grounding during low tides because at least six feet of water should remain between the float and the substrate even in extreme low tides. The float tubs would be fully enclosed. No utilities, lighting, overnight commercial moorage, floatplane use, or structures on the dock are proposed. Both mooring buoys are proposed to remain if the dock is approved. No site preparation is needed to install proposed improvements. Materials and construction equipment for dock construction would be barged to the site. Construction debris would be retained in a dumpster on the barge and removed after completion. *Exhibits 1, 2, 3, 4, and 14; Otis Testimony.*

6. A draft joint use agreement was submitted, which runs with the land and provides physical access to the dock for both users. *Exhibit 20.* The Applicants inquired of additional adjacent property owners, but no others were interested. *Exhibit 13.* There are no existing moorage facilities in the vicinity capable of being expanded to provide access for the Applicants. *Exhibit 3.* The proposal is supported by the Deer Point Owners Association. *Exhibit 12.*
7. An improved path to the water was built on the Schaefer parcel in 2013. Supported on the uphill side by a retaining wall, the path is cut into the steep bank terminating with two sets of stairs at the beach. The upper set of stairs is composed of wood on pier blocks; the lower set is stone and concrete. The existing stairs are well screened from neighboring properties and from view from the water by existing vegetation and the use of materials that blend well. The total height of the beach access structure after adding the extension would exceed 15 feet. The instant application incorporated the request for approval of the existing stairs into the instant proceedings. A two-foot by four-foot extension is proposed in the instant project to connect the access structure to the dock; no disturbance of upland areas would be required to install the extension, which would go in over exposed rock. Improvements proposed include wood steps embedded into the path, hand railings, and slope stabilization using wooden planks to minimize erosion on the hillside. None of the proposed improvements requires tree removal or vegetation disturbance. *Exhibits 1, 3, 4, 31, 33, and 34.*
8. Pursuant to the San Juan County Shoreline Master Program (SMP), the shoreline on the subject properties is designated as a Rural Farm Forest shoreline designation. Joint use docks and beach access structures are allowed in this shoreline designation upon shoreline substantial development permit review and approval. *Exhibit 1; San Juan County Code (SJCC) 18.50.*

9. Consistent with the requirement of the SMP, the Applicants investigated the availability of commercial moorage at all marinas on Orcas Island including Rosario Resort, Lieber Haven Resort, Brandt's Landing Marina, West Sound, Cayou Quay, Deer Harbor, and Bay Head. The specific inquiries and results are included in the record at Exhibit 11. After reviewing the submitted investigation details, County Planning Staff determined that the responses from the marinas was a good illustration of the "*temporal dimension of availability*" discussed by the Shorelines Hearings Board in a previous San Juan County appeal (Stanford v. San Juan County, SHB No. 06-004), which describes that the answer depends on when you ask and how immediately action is taken upon receiving a reply indicating availability. Waiting to hear from another, preferable facility can often cause availability at a less desired marina to be lost. Planning Staff concluded that the SMP and department policies do not provide a sufficient structure for evaluating availability of commercial moorage and recommended approval of the instant application based on the Applicants' demonstration of inquiry. *Exhibits 1 and 11; McEnergy Testimony.*
10. The County database shows that protected species in the project vicinity include salmon, red sea urchin, Puget Sound rockfish, steelhead, killer whales, and eelgrass. Protected upland species include Townsend's big eared bat and bald eagle. The subject property is known to contain a bald eagle nest which is subject to federal regulation but no longer regulated by the County. The Applicant submitted a professionally prepared Habitat Assessment Report, which reviewed the project's potential impacts on habitats and species of significance. The habitat report concluded that the proposal "may affect but is not likely to adversely affect" Chinook, rockfish, steelhead, bull trout, and killer whale. As mitigation for impacts, the habitat report determined that removal of invasive Scotchbroom from the shoreline area and replacement with native species plantings wherever soil is thereby disturbed is recommended. *Exhibits 3, 7, 14, and 16.*
11. The Applicants have already begun the removal of Scotchbroom from the shoreline area around the existing path and stairs. Native species plantings would be selected from the list in the habitat report. Three years of monitoring is proposed to satisfy SJCC 18.50.040.G.10, with photo documentation of survival and plant establishment provided at the end of each growing season for three years. Within the three-year period, any plants that do not survive would be replaced. *Exhibits 3 and 14; See Exhibit 14, page 35; Otis Testimony.*
12. The Applicants submitted professionally prepared eelgrass/macroalgae habitat survey, which reviewed the underwater conditions in the project area. The survey concluded that the bottom is characterized by rock from 36 inches near the shore to mud and smaller 24-inch rock farther waterward. A mixture of macroalgae was found to be present, comprised of more than ten different species including Laminaria, with up to 70% cover. Two small patches of eelgrass were found within the survey area. No vertebrate or invertebrate species were observed in significant numbers. The survey concluded that rock sizing on the substrate was not consistent with forage fish habitat. *Exhibit 17.*

13. The proposed dock was designed with materials and orientation intended to avoid and minimize impacts to macroalgae, kelp, critical areas, and species of interest in the project vicinity. Its location was selected to provide maximum possible depth to prevent grounding at low tides. As proposed, the facility would be setback at least 35 feet from the nearest small patch of eelgrass to the west. It would maximize light penetration to the substrate through the use of grated decking and a north-south orientation. The proposed pilings would provide a hard substrate for the colonization of macroalgae and shellfish. Upland revegetation mitigation is proposed to compensate for all project impacts. *Exhibits 3, 4, and 14.*

14. A professionally prepared geotechnical report submitted by the Applicants concluded that the boulder lag shoreline is very stable and not subject to wave driven movement. At the time the staff report was issued, Planning Staff concluded that there was insufficient information in the site plan and narrative to determine whether there was reason for concern regarding a potential future need for armoring at the base of the stairs. The geotechnical report stated that the “the base of the bluff over time will drive some additional sloughing that will reach the trail...,” raising the question of whether there could be future need for shoreline stabilization to protect the trail and stairs. Staff requested that evidence be presented at hearing showing that the trail and stairs would be consistent with SJCC 18.35.130-3.K and G. *Exhibits 1 and 15.*

15. The Applicants submitted a supplemental habitat assessment addressing specifically the impacts of the previous breach access structure construction. The supplemental report concluded that the path and stairs avoided and minimized impacts on the bluff, stating:

Given the absence of critical habitat and presence of one listed species (Bald eagle) found on the bluff where the existing trail and stairs were constructed, the low impact construction methods (no trees removed), and the proposed mitigation in the original report, we determine that the trail and stairs constructed at the project site have no effects on the habitat and species in the area. Again the only vegetation displaced was the invasive Scotchbroom. The existing trail and stairs [are] not expected to impact the shoreline or marine environment below the bluff. Furthermore, the existing trail and stairs provide necessary safe use and access of the shoreline for property owners and enhance the habitat of a bluff that is heavily infested with the invasive species, Scotchbroom.

Exhibits 33 and 33.A.

16. The Applicants also submitted a supplemental geotechnical report addressing Planning Staff's questions about potential sloughing requiring shoreline armoring the future. The geotechnical addendum states:

Construction of shore protection to stop any minor erosion is not necessary and will not be needed to protect the trail. If at some time in the far future

sloughing does reach the trail, it would be more practical to realign the trail than build a shoreline protection structure. I do not anticipate that trail realignment would be needed for a very long time (many decades or more). ... The stair landing is located on an existing large boulder. The landing and stairs are stable and do not require shoreline stabilization and I do not anticipate that any stabilization will be needed in the future at this site.

Exhibits 33 and 33.B. In addition, the Applicants' representative noted that wood cribbing installed along the uphill side of the path is of cedar planking, and that because the slope is dry, this cribbing is expected to last a long time; however, if it were to deteriorate, it would be replaced as needed. *Exhibit 33.*

17. The Applicants submitted the impervious surfaces worksheet required in order to obtain Public Works review and approval of stormwater provisions. The total of impervious surface area proposed, including existing and proposed improvements, is 2,850 square feet including the dock, ramp, float, and stairway. *Exhibits 32 and 33.E.*
18. Obstruction Pass is relatively narrow with strong currents that may attain three to seven knots; the location provides strong flushing action. The subject parcels are located at the beginning of a drift sector; however, with no evidence of landslides or sloughing on-site and the very stable boulder lag beach, there is low potential for impact to littoral drift. The submitted geotechnical report determined the proposal would have no impact on shoreline geologic processes. *Exhibits 3, 8, and 15.*
19. The subject shoreline is not located within a known archeological buffer zone. *Exhibits 1 and 3.*
20. The tidelands and upland areas on-site are not public but are privately owned. Approval would not impact public access to the shoreline. *Exhibits 3 and 4.*
21. The Department of Natural Resources submitted a June 29, 2016 letter stating no aquatic lease is required for construction of the project. *Exhibit 22.*
22. The U.S. Army Corps of Engineers provided a July 19, 2016 letter of permission for the proposal, indicating lack of concern by the federal agency for impacts to navigation. *Exhibit 29.*
23. The Washington State Department of Fish and Wildlife (WDFW) issued hydraulic project approval (HPA) for the waterward portions of the proposal, with permission extending through March 1, 2019. The HPA contains provisions with which the Applicants must comply, governing restrictions on in-water work windows (timing), compliance with plans approved by WDFW, pre-construction notification, fish kill/water quality notification, erosion control, restrictions on construction materials, pile driving, and construction cleanup. *Exhibit 30.*

24. Pursuant to the State Environmental Policy Act (SEPA), San Juan County was designated lead agency for review of the proposal's probable, significant, adverse environmental impacts. A mitigated determination of non-significance (MDNS) was issued on July 6, 2016. No comments were received. The following mitigation measures were imposed by the MDNS:
1. The proposal shall maximize light penetration (thereby avoiding impacts caused by shading) with deck grating, float orientation, and minimized size.
 2. BMPs shall prevent erosion and sediments from entering the marine waters.
 3. Equipment used for installation of the proposal shall be maintained to be leak-free while on the site.
 4. During dock construction, equipment engines shall not be idled unnecessarily.
 5. Dock components shall be built with materials suitable for kelp attachment and remain year-round to allow growth/attachment of kelp and filter-feeding organisms.
 6. The proposal shall comply with all applicable state, federal, and San Juan County codes.

Exhibits 1, 9, and 10.

25. The SSDP application and supporting information were submitted on April 16, 2016. *Exhibit 2.* Notice of the application was published on July 6, 2016. It was posted on-site, mailed to owners of property within 300 feet, and published. *Exhibits 1 and 23.*
26. The University of Washington Friday Harbor Labs submitted a comment letter with questions on the completeness of the commercial moorage investigation; the cumulative effects of a first dock in the area; and how the kelp and other macroalgae would be affected long-term. They also expressed concern that the stairs to the beach may cause a request for armoring to protect them and suggested that mooring buoys have impacts and their removal could mitigate effects of the dock construction. *Exhibit 21.*
27. A representative of Friends of the San Juans appeared at hearing, offering testimony and articles addressing concerns about the proposed kelp impacts. He noted that kelp is protected critical habitat and argued that the County's critical areas ordinance required in-kind compensation for impacts to *Laminaria* from pile driving. He contended that upland revegetation would not provide the same functions as are provided by kelp, which include habitat for abalone, urchins, and rockfish, which species would not use upland native plantings for habitat. He also contended that current scientific thinking is questioning the true value of grated decking and challenged that it does not increase light reaching macroalgae dramatically. *Loring Testimony; Exhibits 35 and 36.*
28. With regard to in-kind compensation as suggested by the Friends of the San Juans, Planning Staff stated that the code at SJCC 18.35.113 that addresses types of Fish and Wildlife Habitat Conservation Areas (FWHCA) is ambiguous. Kelp and eelgrass beds

are named, but kelp is a generic term and it is not clear which species is intended. Staff asserted that the design and proposed mitigation are adequate for the purposes of the FWHCA protection provisions. *McEnery Testimony*.

29. In response to both the Friends of the San Juans and the UW Friday Harbor Labs concerns, the Applicants' representative noted that the Army Corps and WDFW are agencies mandated to protect the habitat of sensitive species and that both agencies have issued permits. The Army Corps has required upland planting and sees it as viable mitigation for in-water impacts. He noted that according to the underwater habitat survey, only 20% of the kelp within the survey area was *Laminaria*. The Applicants' biological assessment concluded that the proposal, including upland revegetation, would result in no net loss of habitat. *Otis Testimony*. The Applicants offered excerpts of studies from other San Juan County shoreline projects that also found that grated decking and careful design adequately mitigated impacts to kelp. *Exhibits 25, 26, 27, and 28*. One Applicant offered that the facility is proposed in a reasonable depth of water and that due to the north/south orientation, the resulting shading would pass quickly rather than linger over many hours. Further, the type of grating selected for the project is of the highest quality, intended to minimize project impacts. *Schaefer Testimony*.
30. After considering all testimony, comment, and evidence submitted, Planning Staff recommended approval with conditions. *McEnery Testimony; Exhibit 1*. The Applicants waived objection to the recommended conditions but noted that float stops were not proposed and therefore condition 13 is not necessary. *Otis Testimony*.

CONCLUSIONS

Jurisdiction:

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline substantial development permit pursuant to Chapter 36.70.970 of the Revised Code of Washington and Chapters 2.22 and 18.80 of the San Juan County Code.

Criteria for Review:

Pursuant to SJCC 18.80.110.H, a shoreline substantial development permit shall be granted only when the applicant meets the burden of proving that the proposal is:

1. Consistent with the policies of the Shoreline Management Act and its implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as amended;
2. Consistent with the policies and regulations of the Shoreline Master Program in Chapter 18.50 SJCC;
3. Consistent with this chapter;
4. Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);
5. Consistent with the goals and policies of the Comprehensive Plan; and

6. All conditions specified by the hearing examiner to make the proposal consistent with the master program and to mitigate or avoid adverse impacts are attached to the permit.

Applicable Provisions of the San Juan County Code:

SJCC 18.35.025 Critical Areas – Applicability

A. Applicability to Uses and Structures within the Shorelines of the State. Notwithstanding any provision in this code to the contrary, any use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the County’s development regulations to protect critical areas shall be regulated consistent with RCW 36.70A.480(3)(c). Such uses or structures may continue as a conforming use and may be redeveloped or modified if the redevelopment or modification is consistent with Chapter 18.50 SJCC and either: (1) the proposed redevelopment or modification will result in no net loss of shoreline ecological functions; or (2) the redevelopment or modification is consistent with SJCC 18.35.020 through 18.35.140. If the applicant chooses to pursue option (1), the application materials for required project or development permits must include information sufficient to demonstrate no net loss of shoreline ecological functions. For purposes of this subsection, an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. For purposes of this subsection, “agricultural activity” has the same meaning as defined in RCW 90.58.065.

SJCC 18.35.130 Fish and Wildlife Habitat Conservation Areas

Pursuant to SJCC 18.35.130 Table-3(k), the construction of trails, stairs, or raised walkways is allowed in the aquatic portion of an FWHCA provided that the improvement:

- i. Is designed to direct sheet flow runoff into adjacent vegetation;
- ii. Does not exceed five feet in width;
- iii. Is constructed of nontoxic materials;
- iv. Does not include the placement of fill;
- v. Is consistent with the applicable requirements of subsection (E) of this section; and
- vi. For areas within shoreline jurisdiction, the improvement is consistent with the requirements of Chapter 18.50 SJCC and subsection (G) of this section.

SJCC 18.35.130.G, Standards and Requirements for Shoreline Modifications

Shoreline modifications, including shoreline stabilization measures, are allowed within and over aquatic FWHCAs and their buffers subject to this section and Chapter 18.50 SJCC. These requirements remain in effect until they are replaced with an approved comprehensive update of the Shoreline Master Program. Unless specifically allowed by this section and Chapter 18.50 SJCC, construction of new shoreline modifications is prohibited.

1. General Standards.
 - a. Definitions. Definitions applicable to this subsection (G) are found in RCW 90.58.030 and WAC 173-26-020 and 173-27-030.
 - b. Mitigation Sequencing. Per WAC 173-26-201(2)(e), adverse impacts associated with new, expanded or replacement shoreline modifications must be mitigated consistent

with the requirements of SJCC 18.35.020 through 18.35.050 and the following mitigation sequence:

- i. Avoiding the impact altogether by not taking the action or part of the action.
- ii. Minimizing impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce impacts.
- iii. Rectifying the impact by using appropriate technology or by repairing, rehabilitating or restoring the affected environment.
- iv. Reducing or eliminating the impact over time by preservation and maintenance operations.
- v. Compensating for the impact by replacing, enhancing or providing substitute resources or environments.

Monitoring the impact and compensation projects and taking appropriate corrective measures.

SJCC 18.50.190 Boating facilities (including docks, piers, and recreational floats).

Notwithstanding any other provision of this code, all docks, floats, piers or other moorage structures in village and hamlet activity centers, including any breakwater attendant to such moorage structures, except those regulated under subsection (G) of this section (residential docks) shall be prohibited. This provision shall not affect the ability of an applicant to obtain required approvals to repair, replace, enhance, modify, or enlarge any existing dock, float, pier or other moorage structure in a manner consistent with existing law.

A. Exemptions. Docks, as specified in SJCC 18.50.020(F), are exempt from the requirement for a shoreline substantial development permit pursuant to RCW 90.58.030(3)(e)(vii) and WAC 173-27-040(2)(h).

B. General Regulations.

1. Boating facilities shall be designed to minimize adverse impacts on marine life and the shore process corridor and its operating systems.
2. Boating facilities shall be designed to make use of the natural site configuration to the greatest possible degree.
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.
4. Areas with poor flushing action shall not be considered for overnight or long term moorage facilities.
5. In general, only one form of moorage or other structure for boat access to the water shall be allowed on a single parcel: a dock or a marine railway or a boat launch ramp may be permitted subject to the applicable provisions of this code. (A mooring buoy may be allowed in conjunction with another form of moorage.) However, multiple forms of moorage or other structures for boat access to the water may be allowed on a single parcel if:

- a. Each form of boat access to water serves a public or commercial recreational use, provides public access, is a part of a marina facility, or serves an historic camp or historic resort; or
 - b. The location proposed for multiple boat access structures is common area owned by or dedicated by easement to the joint use of the owners of at least 10 waterfront parcels.
6. Structures on piers and docks shall be prohibited, except as provided for marinas in subsection (H) of this section.
- C. General Regulations – Docks, Piers, and Recreational Floats.
1. Multiple use and expansion of existing facilities are preferred over construction of new docks and piers.
 2. Mooring buoys shall be preferred over docks and piers on all marine shorelines except in the cases of port, commercial, or industrial development in the urban environment.
 3. Moorage floats, unattached to a pier or floating dock, are preferred over docks and piers.
 4. Every application for a substantial development permit for dock or pier construction shall be evaluated on the basis of multiple considerations, including but not necessarily limited to the potential impacts on littoral drift, sand movement, water circulation and quality, fish and wildlife, navigation, scenic views, and public access to the shoreline.
 5. Docks or piers which can reasonably be expected to interfere with the normal erosion-accretion process associated with feeder bluffs shall not be permitted.
 6. Abandoned or unsafe docks and piers shall be removed or repaired promptly by the owner. Where any such structure constitutes a hazard to the public, the County may, following notice to the owner, abate the structure if the owner fails to do so within a reasonable time and may impose a lien on the related shoreline property in an amount equal to the cost of the abatement.
 7. Unless otherwise approved by shoreline conditional use permit, boats moored at residential docks shall not be used for commercial overnight accommodations.
 8. Use of a dock for regular float plane access and moorage shall be allowed only by shoreline conditional use permit and shall be allowed only at commercial or public moorage facilities or at private community docks.
- D. Regulations – General Design and Construction Standards.
1. Pilings must be structurally sound prior to placement in the water.
 2. Chemically treated or coated piles, floats, or other structural members in direct contact with the water shall be as approved by the Environmental Protection Agency.
 3. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high water.
 4. All floats shall include stops which serve to keep the bottom off tidelands at low tide.

5. When plastics or other nonbiodegradable materials are used in float, pier, or dock construction, full containment features in the design of the structures shall be required.
6. Overhead wiring or plumbing is not permitted on piers or docks.
7. New boathouses or covered moorages are prohibited on floats, piers, and docks. Other structures on floats, piers, and docks shall be limited to three feet in height.
8. A pier shall not extend offshore farther than 50 feet beyond the extreme low tide contour.
9. Dock lighting shall be designed to shine downward, be of a low wattage, and shall not exceed a height of three feet above the dock surface.
10. All construction-related debris shall be disposed of properly and legally. Any debris that enters the water shall be removed promptly. Where feasible, floats shall be secured with anchored cables in place of pilings.
11. Materials used in dock construction shall be of a color and finish that will blend visually with the background.

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G. Regulations – Residential Docks.

1. New Shoreline Subdivisions. New subdivisions with shoreline frontage shall be required to provide community docks rather than individual, private docks, if any docks are proposed, as set forth in subsection (E) of this section.
2. Size and Dimensions of Docks, Piers, and Floats.
 - a. The maximum dimensions for a dock (including the pier, ramp, and float) associated with a single-family residence shall not exceed 700 total square feet in area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 115 feet in length seaward of the ordinary high water mark. Docks exceeding these dimensions may only be authorized by variance.
 - b. The maximum dimensions for a joint-use dock (including the pier, ramp, and float) associated with two single-family residences shall not exceed 1,400 square feet in area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 200 feet in length seaward of the ordinary high water mark. Docks exceeding these dimensions may only be authorized by variance.
 - c. The maximum dimensions for a joint-use community dock (including the pier, ramp, and float) associated with more than two single-family residences shall not exceed 2,000 square feet in total area. In addition, the length of the dock (including the pier, ramp, and float) may not extend more than 300 feet in length seaward of the ordinary high water mark. If a variance is granted to allow a dock exceeding these dimensions, its construction may only be authorized subject to the regulations for a marina.
 - d. Maximum length and width of a ramp, pier or dock shall be the minimum necessary to accomplish moorage for the intended boating use.

3. Side Yard Setbacks. Docks shall be set back a minimum of 10 feet from side property lines. However, a joint use community dock may be located adjacent to or upon a side property line when mutually agreed to by contract or by covenant with the owners of the adjacent property. A copy of such covenant or contract must be recorded with the County auditor and filed with the approved permit to run with the title to both properties involved.
4. Development of a dock on a lot intended for single-family residential purposes shall require a shoreline substantial development permit or a statement of exemption issued by the County.
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.

K. Regulations by Environment.

1. Urban. Marinas, marine railways, docks, and boat launches shall be permitted in the urban environment subject to the policies and regulations of this SMP.
2. Rural. Same as urban.
3. Rural Residential and Rural Farm-Forest. Boat launches, marine railways, and boathouses associated with them may be allowed as conditional uses only. Other boating facilities serving single-family residences, and community docks, shall be permitted in these environments subject to the policies and regulations of this SMP. Marinas shall not be permitted; however, the expansion or alteration of a marina legally established prior to the effective date of this code may be allowed subject to the policies and regulations of this SMP.
4. Conservancy. Boat launches, marine railways, and boathouses associated with them, may be allowed as conditional uses only. Other boating facilities serving single-family residences and community docks shall be permitted in these environments subject to the policies and regulations of this SMP. Marinas shall not be permitted.
5. Natural. Marinas, boat launches, docks, boathouses, and marine railways are prohibited in the natural environment.
6. Aquatic. Marina facilities, docks, and boat launches which are shoreline dependent shall be permitted in the aquatic environment subject to the policies and regulations of this SMP and to the regulations by environment applicable to the abutting shoreline area. Where a proposed boating facility abuts more than one shoreline environment, the policies and regulations of the most restrictive abutting environment shall govern.

SJCC 18.50.300 Pedestrian beach access structures.

A “beach access structure” is a set of steps or stairs or a ramp used to provide pedestrian access to the beach. A beach access structure is a normal appurtenance to single-family residence in San Juan County. Beach access structures are only defined as an exempt development under limited circumstances, pursuant to SJCC 18.50.020. All nonexempt beach access structures require a shoreline substantial development permit and must meet all of the general regulations for beach access structures.

A. Regulations.

1. Every application for a substantial development permit for a nonexempt beach access structure shall be evaluated on the basis of multiple considerations, including but not necessarily limited to the potential impacts on bank stability, the extent of vegetation removal, visual impacts, and structural stability.
2. Beach access structures which can reasonably be expected to interfere with the normal erosion accretion process associated with feeder bluffs shall not be permitted. All beach access structures must comply with the bank stability requirements of SJCC 18.50.330(B)(2).
3. Beach access structures shall not be located below the ordinary high water mark (OHWM) unless connected to an exempt or permitted structure.

SJCC 18.60.070 Storm drainage standards.

All new development and redevelopment must conform to the standards and minimum requirements set by the Washington Department of Ecology Stormwater Management Manual for Western Washington, Publication Nos. 05-10-029 through 05-10-033. In addition, the best management practices identified in the January 2005 Low Impact Development Technical Guidance Manual for Puget Sound, produced by the Puget Sound Action Team, are acceptable alternatives for managing runoff, controlling soil erosion, and maximizing and protecting recharge.

Conclusions Based on Findings:

1. As conditioned, the proposed joint use dock and official approval of the shoreline access trail and stairs would be consistent with the Shoreline Management Act (SMA). The policy of the SMA, as set forth in RCW 90.58.020, is to “provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses.” This policy “contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.” *RCW 90.58.020*. The record supports the conclusion that, as designed and conditioned to provide upland habitat improvements, the project would reduce impacts to the marine environment to the maximum extent possible and would result in no net loss of any protected habitat. Approval would not impact public access to shoreline. Compliance with the conditions imposed herein, the mitigation measures imposed in the MDNS, and requirements imposed through the HPA and any other required state and/or

federal permit processes would ensure that adverse effects to the waters of the state and to federally and locally protected species and habitats would be avoided. *Findings 1, 2, 3, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 20, 23, 28, 29, and 30.*

2. As designed and conditioned, the proposal satisfies applicable Shoreline Master Program criteria. A joint use dock is allowed in the Rural Farm Forest shoreline environment subject to SSDP approval. The proposed dock is 1,080 square feet and 176 from the OHWM, which is within the maximum allowable dimensions. The impacts of multiple docks are avoided by serving two users who otherwise each might have had a single-user dock. Impacts to habitat are avoided and minimized by orienting the facility north/south, by using light-penetrable grating on deck surfaces, and by the use of steel piles. The Applicant's professionally prepared habitat assessment report based on site-specific study, which has not been refuted by a report of similar credential and formality, concluded that the proposal as mitigated would result in no net loss to protected habitats or species. Upland plantings would revegetate the slopes cleared of invasive species and would be monitored and dead plantings replaced for three years. Preservation and maintenance of the dock by its owners is expected. The public is benefited by conditioning private development to comply with critical area regulations, protecting resources enjoyed by many while allowing recreational access to public waters consistent with the SMP. There are no adverse impacts to navigation suggested in the record. The design and placement of the dock logically flows from the existing stair location, dictating the alignment. Due to the steepness of the slope, the stairs were necessary for access. The record demonstrates compliance with the FWHCA protection provisions of SJCC 18.35.130. The Applicants investigated commercial moorage and found that none was reliably available and accessible for use from their properties. Approval would not impact public access to shoreline. There would be no impact to littoral drift or shoreline geologic processes. The record would support the conclusion that the project as designed and conditioned is the minimum necessary to provide access to boating from the two shoreline properties. *Findings 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30.*

3. Notice and other procedural requirements were performed consistent with SJCC 18.80. Compliance with 18.60 would be ensured through the County building permit and inspection processes. The proposal was reviewed for compliance with SEPA and an MDNS was issued. Compliance with adopted regulations shows compliance with applicable Comprehensive Plan goals and policies. *Findings 24, 25, and 30.*

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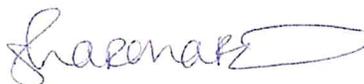
DECISION

Based on the preceding findings and conclusions, the requested shoreline substantial development permit to authorize to authorize construction of a joint use dock located at 650 Deer Point Road, Orcas Island to serve two residentially zoned parcels is **APPROVED** subject to the following conditions applicable to the Applicants, agent(s), and successor(s) in interest:

1. This permit allows the construction of a joint use dock serving tax parcels 161551012 and 161551013 as shown on the approved dock drawings in the record at Exhibit 4.
2. Boats moored at residential docks shall not be used for commercial overnight accommodations.
3. Construction and use of the facility shall comply with the mitigation measures imposed by the MDNS including:
 - a. Use of the dock for regular float plane access and moorage shall not be allowed.
 - b. The proposal shall maximize light penetration with deck grating, float orientation and minimized size.
 - c. BMPs shall prevent erosion and sediments from entering the marine waters.
 - d. Equipment used for installation of the proposal shall be maintained to be leak-free while on the site.
 - e. During dock construction, equipment engines shall not be idled unnecessarily.
 - f. Dock components shall be built with materials suitable for kelp attachment and remain year-round to allow growth/attachment of kelp and filter-feeding organisms.
 - g. Comply with all applicable state, federal and San Juan County codes.
4. Pilings must be structurally sound prior to placement in the water.
5. Chemically treated piles, floats, or other structural members in direct contact with the water shall comply with state and federal regulations.
6. Pilings employed in piers or any other structure shall have a minimum vertical clearance of one foot above extreme high water.
7. All floats shall include stops to keep the facility from resting on the tidelands during low tides.
8. When plastics or other non-biodegradable materials are used in a float, pier, or dock construction, full containment features are required.
9. Overhead wiring and plumbing are prohibited. Other structures on piers, ramps, and floats shall be limited to three feet in height.

10. Dock lighting shall be designed to shine downward, be low wattage, and shall not exceed a height of three feet above the dock surface.
11. Materials used in dock construction shall be of a color and finish that will blend visually with the background. If metal is used it must be treated to comply with this requirement.
12. All debris entering the water or shoreline area shall be removed immediately and disposed of in a legal manner.
13. The float shall be secured with anchored cables rather than pilings unless the Applicants can demonstrate that the use of anchored cables is not feasible and pilings must be used.
14. Development authorized by this permit shall commence within two years of the date of approval and shall be substantially complete within five years or the permit shall become null and void.
15. The Applicants shall record a deed restriction that provides for access to and joint use of the dock by the current owner and successors in interest of Tax Parcels 61551012 and 161551013, which tax parcels adjoin along the shoreline of Obstruction Pass, Orcas Island. The Applicants shall submit a copy of the recorded deed restriction to the Permit Center, which deed restriction shall be substantially in the form attached to this condition. The owner of the tax parcel on which the dock is located shall abide by the terms and conditions of the recorded deed restriction. Joint use and access to the dock shall be automatically conferred on the successors in interest of Tax Parcels 161551012 and 161551013. In the event agreement on reasonable terms and conditions for use cannot be reached or otherwise resolved, or in the event the owner of Tax Parcel 161551012 (the Applicant) declares by action or deed that joint use is no longer available, this permit shall immediately be deemed rescinded after notice and an opportunity to cure is provided by the County, and the dock shall be removed from the shoreline.
16. Immediately after construction is completed, the owner shall request that Community Development and Planning perform an inspection.
17. Failure to comply with any terms or conditions of this permit may result in its revocation.

Decided September 8, 2016.

By: 

Sharon A. Rice
San Juan County Hearing Examiner

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 requirements 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.