

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS, AND DECISION

Applicant(s):	Karl Neiders 1120 East Terrace Street, Suite 300 Seattle, WA 98122-7405	
Agent(s):	Jen-Jay Diving Inc. P.O. Box 278 Deer Harbor, WA 98243	S.J.C. DEPARTMENT OF SEP 30 2016 COMMUNITY DEVELOPMENT
File No.:	PSJ000-15-0008	
Request:	Shoreline Substantial Development Permit	
Parcel Nos:	463523012	
Location:	260 Forrest Drive, San Juan Island	
Summary of Proposal:	Application for a shoreline substantial development permit for authorization for redevelopment of an existing joint use dock.	
Land Use Designation:	Rural Residential/Conservancy	
Public Hearing:	August 18, 2016	
Application Policies and Regulations:	SJCC18.35.110-140 Fish and wildlife habitat conservation areas SJCC18.50.190 Shoreline master program – boating facilities SJCC 18.60.210 Archaeological and Historic Resources 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	
Decision:	Approved subject to conditions	

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

In the Matter of the Application of)
)
Karl Neiders) NO. PSJ000-15-0008
)
)
)
for approval of a shoreline substantial)
development permit for redevelopment of)
an existing joint use dock at 260 Forrest)
Drive, San Juan Island)

S.J.C. DEPARTMENT OF
SEP 30 2016
COMMUNITY DEVELOPMENT

SUMMARY OF DECISION

The request for shoreline substantial development permit to authorize redevelopment of an existing joint use dock serving four residentially zoned parcels located at 260 Forrest Drive, San Juan Island is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request:

Karl Neiders (Applicant) requested a shoreline substantial development permit (SSDP) to authorize redevelopment of an existing joint use dock serving four residentially zoned parcels. The existing dock, which predates the shoreline regulations, is located at 260 Forrest Drive, San Juan Island.

Hearing Date:

The San Juan County Hearing Examiner held an open record public hearing on the request on August 18, 2016. At the conclusion of the hearing, the record was held open through September 15, 2016 to allow the Applicant an opportunity to respond to comments received up to and at the public hearing. The Applicant's timely responsive comments were received September 13, 2016 and are admitted.

Testimony:

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

- Lee McEnery, San Juan County Department of Community Development
- Karl Neiders, Applicant
- Chris Betcher, Jen-Jay Diving, Inc., Applicant Representative
- Jennie Rose, Jen-Jay Diving, Inc., Applicant Representative
- Christopher Hodgkin, area resident
- Kyle Loring, Friends of the San Juans

Exhibits:

The following exhibits were admitted in the record:

1. Staff report, dated July 28, 2016
2. Application cover sheet
3. Application letter, Jen-Jay Diving Inc., dated November 2, 2015
4. Application letter with additional information, Jen-Jay Diving Inc., dated April 8, 2016
5. Dock drawings, dated March 2016 (6 pages)
6. Aerial photo of vicinity, dated 2013
7. Jen-Jay Diving Inc., Report on SJCC 18.35.130(G) Requirements, dated April 8, 2016 (8 pages)
8. SEPA Mitigated Determination of Non-Significance (MDNS), dated July 6, 2016
9. SEPA checklist (13 pages)
10. Jen-Jay Diving Inc., "Preliminary eelgrass Macro-algae Habitat Survey," dated August 14, 2015 (3 pages)
11. Joint Use Agreement (2 pages)
12. University of Washington Friday Harbor Labs Comment Letter, dated July 5, 2016
13. Department of Natural Resources Letter, dated June 23, 2016 (2 pages)
14. Legal Advertising Materials (5 pages)
15. Bryan comment letter, received July 29, 2016
16. Friends of the San Juans comment letter, dated August 16, 2016
17. Chris Hodgkin letter, submitted August 18, 2016
18. Karl Neiders response to public comment, dated September 13, 2016
19. Jen-Jay, Inc. (Applicant Consultant) response to public comment, dated September 13, 2016

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 Applicant requested a shoreline substantial development permit (SSDP) to authorize redevelopment of an existing joint use dock serving four residentially zoned parcels. The property developed with the existing dock, owned by Karl Neiders (Applicant), is located

at 260 Forrest Drive on the north side of Mitchell Bay on San Juan Island.¹ *Exhibits 1, 2, and 5.*

2. The proposal would modify and update an existing single user dock serving only the subject property (TPN 463523012) into a joint use dock serving four parcels in common ownership (TPNs 463523011, 463524003, 463524004) all accessible from Forrest Drive on the Yacht Haven peninsula. Three of the parcels contain residences; one is undeveloped. Built between 1971 and 1977, the existing dock predates the adoption of the County's shoreline master program (SMP). Presently, it is legally nonconforming as to size, because its overall length from the ordinary high water mark (OHWM) is 147 feet and its surface area is 1,419 square feet, exceeding current standards for a single user dock. The dock is in poor condition, having exceeded its useful life, and needs to be replaced. The application materials included a draft joint use agreement that would run with the land and provide for physical access to the dock from all four lots. *Exhibits 1, 4, and 11; Neiders Testimony.*
3. Watercraft currently owned by the Applicant include: a 24-foot Bayliner, currently at Roche Harbor; a 23-foot fishing boat, kept at the dock on-site; and a 16-foot aluminum boat, also kept at the dock. The Applicant also owns an amphibious plane, stored outside the islands, and indicated that he plans to sell the Bayliner and replace it with a larger boat of approximately 35 feet. *Exhibit 1; Neiders Testimony.*
4. The site's shoreline has a Rural Residential shoreline environment designation is above the OHWM. The upland portion of the site within 200 feet of the OHWM is designated Conservancy shoreline environment. Below the extreme low tide, the shoreline is designated as an Aquatic shoreline environment. *Exhibit 1.*
5. The proposal would retain the existing 75-foot long pier, which was built to accommodate a former owner's commercial fishing vessels. The plan would increase the size of the ramp and floats, reconfigure the floats, remove creosote piles, and replace them with steel stub piles. The existing ramp two feet, eight inches wide by 34 feet long would be replaced with a four-foot wide by 40-foot long ramp, increasing ramp area by approximately 65 square feet. The existing single float measuring eight by 48 feet would be replaced with two new floats measuring eight by 50 each placed in an L-shape. The floats would have fully grated surfaces and HDPE pipe floatation; design of the floats would include float stops at the waterward end of the ramp. The piles anchoring the floats would be provided with beam stops at least one foot above the substrate to prevent grounding during low tides. Anchors and rodes would secure the seaward float. The square footage of the proposed floats would increase approximately 416 over the existing condition, not counting ramp overlap. The proposed dock would total 1912.5 square feet in area, increasing by 485.6 square feet over the existing facility. The overall length of the structure would increase by 22 feet, to 170 feet, extending to the minus two foot contour. The ramp and float surfaces are proposed to be grated. The project would

¹ The property is known as Tax Parcel No. 463523012. *Exhibit 1.*

remove two creosote pilings and would add 10 new steel pilings securing the dock. The proposed piles would be truncated underneath the floats, serving as stops; no piles would protrude vertically above the floats, which would make the dock accessible by floatplanes. *Exhibits 1, 3, 4, and 5.*

6. The San Juan County shoreline regulations establish maximum dimensions for joint use docks that allow a joint-use community dock (including the pier, ramp, and float) associated with more than two single-family residences of up to 2,000 square feet in total area, and total length (including the pier, ramp, and float) of up to 300 feet seaward of the OHWM. *San Juan County Code (SJCC) 18.50.190.G.2.C.*
7. Planning Staff submitted that, designed to serve four lots, the proposed facility's dimensions are consistent with the shoreline regulations. *Exhibit 1; McEnery Testimony.*
8. The Applicant indicated that the purpose of enlarging the dock while replacing it is to allow the family and friends to participate in recreational crabbing and fishing and to allow moorage of larger boats with more range. The proposed configuration would allow moorage for up to three 40-foot boats and would allow occasional access to the dock by the Applicant's seaplane. The proposed joint use dock agreement contains provisions addressing repairs and maintenance. *Exhibits 3, 4, and 11; Neiders Testimony.*
9. Investigation of commercial moorage availability was not required by the Department of Community Development because the site contains an existing dock and the proposal is a modification of an existing private facility. *Exhibit 1; McEnery Testimony.*
10. The Applicant a professionally prepared preliminary eelgrass and macro algae habitat survey. Based on an underwater site visit, the survey determined the substrate below project is a solid rock on shore leading to mud under water. Vegetation occupied less than one percent of the substrate in the survey area. No eelgrass was found. No significant numbers of vertebrates or invertebrates were observed. As described by the Applicant consultant, "it's a desert down there." *Exhibit 10; Betcher Testimony.*
11. The Applicant submitted an analysis of the proposal's compliance with applicable provisions of the County's critical areas and shoreline regulations. Addressing the general standards for shoreline modifications SJCC 18.35.130.G, this report concluded that impacts of the modification on salt water habitat would be minimized through design, installation methods, and compliance with applicable state and local regulations. The existing solid ramp and float in deteriorating condition would be replaced with fully grated ramp and floats, allowing light transmittance, and the piles would be fitted with beam stops to prevent grounding during low tides. In increasing the length of the dock and thus providing moorage in deeper water, the proposal further minimizes impacts to saltwater habitats. Removal of creosote pile and replacement with steel pile would remove existing contaminant sources and replace them with materials with a longer useful life, extending the period between replacement or maintenance impacts. Of habitats and species regulated the County's fish and wildlife habitat conservation area

(FWHCA) regulations, only Puget Sound Chinook Salmon were identified within 200 feet of the project's action area. The report determined the likely impacts to salmon included: potential ground of the construction barge; potential entry of deleterious materials into marine waters during construction; turbidity during construction and use; shading of the substrate from the moorage system and boats; and construction noise. The report proposed conservation measures, including work conducted during appropriate tides and work windows, to minimize these potential impacts. Such measures would be implemented through the Washington State Department of Fish and Wildlife hydraulic project approval (HPA) permit process. Due to distance from the project site, no adverse impacts are expected to forage fish habitat or to eelgrass. The report concluded that the project may affect but is not likely to adversely affect Puget Sound Chinook Salmon and that the proposal would result in no net loss of shoreline ecological function. *Exhibit 7; Betcher Testimony.*

12. Planning Staff accepted these consultant reports as adequately addressing the requirements for FWHCA assessment. Staff noted that in proposing a joint use dock that would effectively prevent three new individual docks, the project further minimizes impacts. Because no net loss of shoreline functions is expected, Staff noted that no compensation for impacts and no monitoring are required. *Exhibit 1; McEnery.*
13. With regard to the additional standards for docks at SJCC 18.35.130.G.2, the proposal is to modify an existing dock retaining the existing pier, with new floats in the immediate proximity of the existing float. Staff determined that analysis of alternate alignment or location was not required. No net loss of shoreline functions was demonstrated, above. The SEPA checklist, an eelgrass and macro algae survey, and a habitat survey report were submitted addressing all protected habitats and species in the project vicinity. Because no upland construction is proposed, no stormwater and erosion control report is necessary. *Exhibits 1, 7, and 10.*
14. The subject property is not in a drift sector and nothing in the record suggests impacts to littoral drift or water quality at the existing dock site. Although heavily developed, this portion of Mitchell Bay is not known to have poor flushing action and the site is not within the navigation channel. The proposed modifications to the existing dock would only increase its length by 22 feet and are not expected to interfere with navigation. The proposal would minimally increase an existing dock and proposes stub piles; no interference with scenic views is expected. The facility is located on private property; approval would not impede public access to the shoreline. *Exhibits 1 and 6.*
15. 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. Comply with all applicable state, federal and San Juan County codes.

Exhibits 1 and 8.

16. The SSDP application and supporting information were submitted on November 2, 2015 and April 8, 2016. *Exhibits 3 and 4.* 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 14.*
17. The University of Washington Friday Harbor Labs submitted comment that the project was justified both in terms of meeting state and federal requirements and a projected overall low impact. *Exhibit 12.*
18. Christopher Hodgkin, member of the public who owns property on the north side of the entrance to Mitchell Bay, opposed approval. Testifying that everything that goes in and out of the bay can be seen and heard from his property, he urged that the applications be denied as to float plane use. Mr. Hodgkin also objected to approval of a joint use dock when all four properties are under common ownership, arguing that such an interpretation is not consistent with the spirit of the SMP, that it has been ruled to be a fiction by the Shoreline Hearings Board, and that it favors the wealthy. He argued that under staff's interpretation, properties don't even have to be contiguous. He disputed that approval would reduce proliferation of docks because the parcels are under one ownership. Mr. Hodgkin was especially concerned about float plane use, which was not mentioned in application and therefore was not properly noticed. He argued that noise from floatplanes is not the same as noise from boats; it is much more intrusive. He testified that there are bald eagle nests that would be within 1,000 feet of a float plane's path into the Bay, which he asserted is only 1,320 feet wide. He argued a federal permit may be required to operate a floatplane in Mitchell Bay and testified that he doesn't want the driven from his property. *Hodgkin Testimony; Exhibit 17.*
19. The Friends of the San Juans sent a representative to the hearing. After hearing testimony about float plane use, the representative conceded that floatplane use is not a primary concern due to its speculative nature; however, he argued that any floatplane use

of private docks can only be reviewed under the SMP transportation regulations and transportation uses are not allowed in the Conservancy environment. Alternatively, as an undefined use, her argued that non-commercial non-regular float plane use in a Conservancy shoreline environment can only be approved by shoreline conditional use permit. The representative disagreed with Planning Staff that no alternative analysis was required in this case due to the fact that there is an existing dock, because the SMP does not distinguish between expansion of legally nonconforming and new uses when it requires alternatives analysis. Finally, Friends opposed the characterization of the proposed facility as a joint use dock when all four parcels are under the same ownership, arguing that while the County Code looks at residences, Comprehensive Plan policies speak to joint use by several owners, rather than joint use among lots. The representative argued that this dock would be oversized because there is only one owner. Friends does not oppose modernizing the existing structure, but does oppose its enlargement. *Loring Testimony; Exhibit 16.*

20. In response to public comment, Planning Staff noted that floatplane use is neither specifically proposed nor recommended for approval; rather a modified dock is proposed. She asserted that notice was consistent with requirements of SJCC 18.80.030. However, Staff also referenced earlier SSDP decisions which had concluded that non-commercial private float plane use was appropriately addressed under the boating facilities regulations, rather than transportation facilities, and that float plane use was not prohibited in the Conservancy shoreline environment. With regard to the common ownership of the four parcels, Staff testified that the regulations require consideration of separate tax parcels, not owner identity. Staff noted that eagles are no longer regulated by the county or state, and that federally nests are regulated, not perches. Planning Staff was not persuaded by the public comment offered at hearing to change their recommendation for approval nor to alter recommended conditions. *McEnery Testimony.*
21. Regarding floatplane use, the Applicant testified that his float plane is an amphibious plane, for which he has a hangar minutes from his home at Roche Harbor Airport. While he has landed in Mitchell Bay on floatplanes twice in the last five years, he has not flown his own plane there and does not intend to do so often. Prevailing winds in Mitchell Bay are often not conducive to seaplane landings. Amphibious planes are safer to land on land and their floats are more sensitive to erosion from salt water exposure than seaplanes; regular exposure to marine water would be extremely expensive in maintenance costs. The proposed underwater pilings are dangerous to amphibious planes as they can damage the floats at low tides. The Applicant indicated that the purpose of the proposed dock redesign relates to removing creosote pilings to increase the vertical view corridor and remove contaminant sources, not to facilitate plane use. While his or others' float planes may land at the proposed dock occasionally in the future, it is not anticipated to be a primary or even common use. *Neiders Testimony; Exhibits 18 and 19.*
22. Additional Applicant response to public comment was submitted, as permitted on the record, by the Applicant's consultant who submitted the following. The project was

designed to 1) upgrade the existing facility to current environmental standards, 2) allow for increased moorage associated with a community joint use dock, and 3) promote a design that minimizes the visual impacts of dock structures including dock pile. With respect to occasional float plane use and impacts to eagles, the project area falls outside regulatory buffer distances for both state and federal guidelines. WDFW Priority Habitat Species Map indicates a Bald Eagle breeding area approximately 1,708 feet from the project site. Federal guidelines regarding the use of float planes are indicated in the National Bald Eagle Management Guidelines report under Category G. Helicopters and fixed-wing aircraft, which states: *Except for authorized biologists trained in survey techniques, avoid operating aircraft within 1,000 feet of the nest during the breeding season, except where eagles have demonstrated tolerance for such activity. Exhibit 19.*

23. With respect to the arguments against joint dock use for parcels in common ownership, the Applicant asserted that his four lots can be sold to separate owners in the future, but that regardless, all four together are restricted to the one joint use dock. Otherwise, the Applicant deferred to Planning Staff's interpretation, as the administrative agents of the County charged with application and enforcement of the relevant regulations. *Exhibits 18 and 19.*

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.

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

2. Additional Standards for Docks.

- a. Private, noncommercial docks and associated piers and floats for individual residential use, or for community use by the owners of no more than four adjacent or nearby

residences, will be permitted over critical salt and fresh water habitats if the application complies with the applicable federal and state regulations and shows that:

- i. Avoidance of impacts to critical salt and fresh water habitats by an alternative alignment or location is not feasible; and
- ii. The project, including any required mitigation, will result in no net loss of ecological functions associated with critical salt water habitat.

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.

E. Regulations – Joint-Use Community Piers, Docks, and Floats.

1. No more than one moorage facility shall be allowed as an accessory to any hotel, motel, multifamily residential development, or similar development.
2. Proposals for joint-use community piers and docks shall demonstrate and document that adequate maintenance of the structure and the associated upland area will be provided by identified responsible parties.
3. Recreational floats shall be placed offshore no farther than 200 feet beyond extreme low tide, the minus-3 fathom contour, or the line of navigation, whichever is closest to shore (WAC 332-30-148(2)).
4. All waterfront subdivisions approved after the adoption of this SMP shall include or provide for construction of a single joint-use moorage facility by the lot owners if moorage is desired by the owners, in a designated, reserved area of the waterfront. Identification of a moorage site shall not be construed to indicate that a shoreline permit will be granted for that site. Subdivisions located where it would be physically impossible to construct such a facility shall be exempt from this provision. Individual docks and piers shall be prohibited; however, the County may authorize more than one moorage facility if a single facility would be inappropriate or undesirable given the specific site and marine conditions. A legal easement must be dedicated to all lot owners for access to joint-use facilities.
5. The dimensional standards in subsection (G)(2) of this section shall apply.

...

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.

Conclusions Based on Findings

1. In the instant case, permission for floatplane access to the joint use dock is not expressly sought based on considerations relating to wind and wave conditions in Mitchell Bay and on the fact that the Applicant's amphibious plane has a hangar at Roche Harbor Airport. By the Applicant's testimony, the plane would only rarely be moored temporarily at the proposed dock. On the record presented, the undersigned is not persuaded to reverse the determination from an earlier SSDP decision that occasional private float plane use of a joint use dock is allowed under the SMP's boating facilities regulations, especially in light of the speculative nature of the potential for float plane use. *Findings 3, 5, 8, 18, 19, 20, 21, and 22.*
2. With respect to the questions of 1) whether four lots in common ownership are eligible for a joint use dock and 2) whether an existing dock may be modified without conducting an alternatives analysis prior to authorizing modest expansion of the existing facility, neither can be addressed in a vacuum without considering the specific and unique facts of this case. There is already a dock on-site. The project would only increase the length of the dock by 22 feet and the surface area of the facility by less than 500 square feet. In exchange for these modest increases in size, the legally nonconforming dock would have creosote pilings removed, all ramp and float surfaces would be fully grated, and float stops would be installed to prevent floats from grounding in low tides. The four lots in question are contiguous waterfront parcels. The submitted joint use dock agreement would effectively bind the four adjoining waterfront tax parcels to shared use of one dock in perpetuity, regardless of future ownership. The County Code does not define "joint use docks" and the joint use docks provisions at SJCC 18.50.190.E do not address the question of whether joint use requires multiple owners in addition to multiple properties. This set of facts gives rise to ambiguity as to the intent of the SMP. The Department of Community Development is the agency charged with application and enforcement of the County's shoreline regulations. The Washington State Supreme Court has held that where the regulation is "silent or ambiguous with respect to the specific issue, the

question... is whether the agency's [interpretation] is based on a permissible construction of the statute. In such cases, the interpretation of the agency charged with administering the statute is generally entitled to deference, and to sustain it we need only find that the agency's interpretation was sufficiently rational to preclude us from substituting our judgment for that of the agency."² Given the facts of this application, Staff's interpretation is rational and entitled to deference. *Findings 2, 3, 5, 8, 9, 18, 19, 20, 22, and 23.*

3. As conditioned, the proposed modification and enlargement of the existing dock to become a joint use dock serving four properties 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 contains undisputed, credible evidence that the proposal would result in no net loss of shoreline ecological function. Compliance with the conditions imposed herein, the mitigation measures imposed in the MDNS, and requirements imposed through 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, 4, 5, 8, 10, 11, 12, 13, and 14.*

4. As conditioned, the proposal satisfies applicable Shoreline Master Program criteria. With regard to the boating facilities shoreline regulations, the existing legally nonconforming dock is allowed to be repaired, modified, and enhanced pursuant to SJCC 18.50.190 and SJCC 18.35.025.A.1. According to the record provided, the proposed design would minimize impacts to marine life and the proposal would result in no net loss of shoreline ecological function. In retaining the existing pier, the facilities is making best use of the site configuration. Development of the facility would be required to comply with the conditions imposed in the WDFW HPA permit. The record does not indicate the site has poor flushing action. The dock is proposed to serve four waterfront lots; no other moorage facilities exist or are proposed. No structures are proposed on the pier or dock. The project represents expansion and multiple use of an existing facility rather than construction of a new dock. There is no evidence of adverse impacts to littoral drift, sand movement, water circulation and quality, fish and wildlife, navigation, scenic views, public shoreline access, or the normal erosion-accretion process associated with feeder bluffs. A condition would prevent commercial overnight use. No regular float plane access is proposed. The proposed steel pilings would be structurally sound; no chemically treated piles, floats, or other structural members are proposed. Float stops are included in the design and the floats would not be able to ground. HDPE pipe is proposed for floatation. No lighting, electric service, or plumbing is proposed to the

² *Skamania County v. Columba River Gorge Comm'n*, 142 Wn.2d 30, 42 (2001)(internal citations omitted).

facility. The full length of the dock would extend only to the minus two foot elevation. Conditions would ensure no construction debris is allowed to enter the water and that the materials used would be of a color and finish that would blend visually with the background. *Findings 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 20, 21, 22, and 23.*

5. 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 5, 15, 16, and 20.*

DECISION

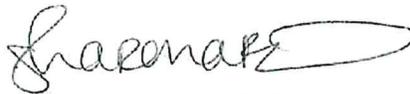
Based on the preceding findings and conclusions, the requested shoreline substantial development permit to authorize redevelopment of an existing joint use dock serving four residentially zoned parcels located at 260 Forrest Drive, San Juan Island is **APPROVED** subject to the following conditions applicable to the Applicants, agent(s), and successor(s) in interest:

1. This permit allows the enlargement and reconfiguration of an existing dock on tax parcel 463523012 according to the attached plans (Exhibit 5). The approval is subject to joint use with parcels 463523011, 463524003, and 463524004.
2. Boats moored at residential docks shall not be used for commercial overnight accommodations.
3. Use of the dock for regular float plane access and moorage as defined in the SMP shall not be allowed.
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 bottom off tidelands.
8. The proposal shall maximize light penetration with deck grating, float orientation and minimized size.
9. BMPs shall be implemented to prevent erosion and sediments from entering the marine waters.
10. Equipment used for installation of the proposal shall be maintained to be leak-free while on the site.

11. During dock construction, equipment engines shall not be idled unnecessarily.
12. 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.
13. Comply with all applicable state, federal and San Juan County codes.
14. When plastics or other non-biodegradable materials are used in a float, pier or dock construction, full containment features are required.
15. Overhead wiring and plumbing are prohibited. Other structures on piers, ramps and floats shall be limited to three feet in height.
16. Dock lighting shall be designed to shine downward, be low wattage and shall not exceed a height of three feet above the dock surface.
17. 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.
18. All debris entering the water or shoreline area shall be removed immediately and disposed of in a legal manner.
19. The floats shall be secured with anchored cables rather than pilings unless the applicant can demonstrate that the use of anchored cables is not feasible and pilings must be used.
20. 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.
21. The Applicant shall record a deed restriction that provides for access to and joint use of the dock by the current owner and its successor in interest of Tax Parcels 463523011, 463524003, and 463524004 which adjoin the tax parcel to which the dock is appurtenant (Tax Parcel 463523012) along the shoreline of Mitchell Bay, San Juan Island. The Applicant shall submit a copy of the recorded deed restriction to the Department. 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 463523011, 463524003, and 463524004. 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 463523012 (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.

22. Immediately after construction is completed, the owner shall request that Community Development perform an inspection.
23. Failure to comply with any terms or conditions of this permit may result in its revocation.

Decided September 29, 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.