

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS, AND DECISION

Applicant(s): Christy and Scott Hensrude
6130 Maltby Road
Woodinville, WA 98072-8343

Agent: Francine Shaw
Law Office of Stephanie Johnson O'Day
PO Box 2112
Friday Harbor, WA 98250

File No.: PSJ000-15-0005

Request: Shoreline Substantial Development Permit and
Shoreline Conditional Use Permit

Parcel No: 463522001

Location: 220 Arbutus Lane, Friday Harbor, off Yacht Haven Road,
San Juan Island

Summary of Proposal: Application for shoreline substantial development and
shoreline conditional use permits to allow construction of a
pool house within the 200 foot shoreline jurisdiction

Land Use Designation: Rural Residential

Public Hearing: December 17, 2015

Application Policies and SJCC 18.80.110 Shoreline permit/exemption regs
SJCC 18.50.050 Archaeological and historic resources

Decision: Approved subject to conditions

S.J.C. DEPARTMENT OF

JAN 05 2016

COMMUNITY DEVELOPMENT

- a) Detailed project description, Applicant Narrative
 - b) Site Plan, August 2015
 - c) Applicant cover letter from Francine Shaw, August 26, 2015
 - d) San Juan County GIS Polaris Parcel Search Map, indicating subject property
 - e) Notice Applicant and Hearing, publish date October 28, 2015
 - f) Applicant Affidavit of mailing notice, signed October 21, 2015
 - g) San Juan County Polaris GIS map showing properties noticed
 - h) Public notice mailing list from Applicant
3. Public comments including:
- a) UW Friday Harbor Labs, November 1, 2015
 - b) Washington Department of Archeology and Historic Preservation, November 2, 2015
 - c) Tammi Smart, Lummi Nation, November 2, 2015
4. Applicant Memorandum regarding recommended condition 2, December 17, 2015, with attachments:
- a) Email from Nadine Cook, san Juan County Community Development, August 17, 2015
 - b) San Juan County Code 18.50.050
 - c) (duplicate) Washington Department of Archeology and Historic Preservation, November 2, 2015
 - d) Gretchen Kaehler/DAHP email, December 9, 2015
 - e) Lee McEnery email, November 2, 2015
 - f) Tamela Smart, Lummi Nation email, December 16, 2015
 - g) Memorandum of Understanding: Washington State Department of Archeology and Historic Preservation and San Juan County, effective date November 15, 2006
 - h) Archeological, Historical, and Cultural Resources Policy, Island County
5. Copies of three color photographs of/from the pool house location

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 shoreline substantial development and shoreline conditional use permits to authorize the construction of an approximately 2,000 square foot pool house as an accessory structure associated with the single-family residence 220 Arbutus Lane, Friday Harbor, on San Juan Island.¹ *Exhibits 1 and 2.*

¹ The legal description of the subject property is a portion of the northwest quarter of Section 35, Township 36 North, Range 4 West, WM, San Juan County; also known as tax parcel number 463522001. *Exhibit 2a.*

2. The 5.5-acre subject property is irregularly shaped, extending south from Yacht Haven Road. Its southern terminus is a high banked promontory sticking out into Mitchell Bay with water on three sides. The site is developed with a single-family residence and accessory buildings, a dock, a marine railway, and a boathouse. Abutting residentially zoned parcels to the north and east, the subject property has a Rural Residential land use designation. The existing single-family residence is built at the southern tip of the property, with views of the Bay. Surrounding parcels are developed with single-family residences or are vacant. *Exhibits 1, 2a, 2b, and 2d.*
3. The subject property, due to its location in San Juan County, is designated as a critical aquifer recharge area. No other critical areas are found within the proposed development envelope. *Exhibit 1.* A wetland has been identified on the northern portion of the subject property, more than 500 feet from the proposed development envelope. The proposed building location is within the buffer of an identified bald eagle's nest; however, no trees known to serve as perches for eagles would be affected. Such trees in the vicinity are along the shoreline, seaward of the residence. The subject property is not an archeological site and is not within the buffer any known archeological site. *Exhibit 2a.*
4. The proposal would allow construction of an approximately 40- by 50-foot pool house, 16 feet or less in height, which would encompass a 25,000 gallon in-ground pool, a wet bar, and a bathroom. Approximately 3,000 of the site would be cleared and graded. The location of the proposed structure near the bend in the south property line is underlain primarily by bedrock. Maximum excavation is expected to be six to seven feet deep. Two hundred cubic yards of fill would be brought in to increase existing grade and allow an eight-foot deep pool. Temporary erosion control measures implemented through the building permit process would prevent erosion of the fill material during construction. Proposed infrastructure includes fans to remove moisture from within the structure, connection from the existing septic system to the proposed bathroom, and some exterior lighting between the residence and the pool house. For the initial fill of the pool, 25,000 gallons of water would be hauled in to the site. Thereafter, pool levels would be maintained by the existing on-site domestic well. *Exhibits 1 and 2a; Shaw Testimony.*
5. The location of the proposed pool house is approximately 150 feet landward of the ordinary high water mark (OHWM) of adjacent Mitchell Bay, at the highest point of the subject property. The proposal is therefore subject to the jurisdiction of the Shoreline Management Act as implemented through the County's adopted shoreline master program, specifically policies and regulations applicable to residential uses. On-site areas up to 200 feet landward of the OHWM are designated Rural Residential shoreline environment, while areas water ward of the OHWM are designated Conservancy shoreline environment. All proposed improvements would be within the Rural Residential shoreline environment. *Exhibits 1 and 2a.*
6. The proposed pool house is considered an accessory structure to the single-family residence and, therefore, a residential use for shoreline management purposes. Pool

houses are not a residential use listed as an exempt residential appurtenance, and therefore it requires approval of a shoreline conditional use permit. *San Juan County Code (SJCC) 18.50.160*. In addition, the County Code defines any development within shoreline jurisdiction exceeding \$2,500.00 in value to be substantial development. *SJCC 18.20, S definitions*. The proposed pool house would exceed that threshold and therefore a shoreline substantial development permit is also required. *SJCC 18.50.020.E.2 and E.3*.

7. A stormwater management plan would be submitted with the building permit application, to include best management practices for managing erosion during construction for the protection of both ground water and marine water quality. *Exhibit 2a*.
8. There is no public shoreline access from the site, and no public views of the shoreline from the site. The proposed improvements would be set back about 150 feet from the shoreline at the top of a high marine bank. No impacts to views from surrounding parcels are anticipated. *Exhibits 1, 2a, and 2d*.
9. No new roads, driveways, or other pollution generating surfaces are proposed. Pool chemical products including chlorine would be stored on-site inside the pool house and used consistent with manufacturer guidelines, rendering the possibility of spills into marine waters virtually non-existent. *Exhibits 2a and 2b; Shaw Testimony*.
10. Significant mature vegetation exists on-site. *Exhibits 2d and 5*. No vegetation removal along the marine bank or the shoreline is proposed. Mature trees would be retained between the pool house, which would be set back from the top of the bank, and the shoreline. Construction would not dramatically alter the view of the property from the shoreline or the Bay. *Exhibits 2b and 5; Shaw Testimony; McEnery Testimony*.
11. The proposal does not include or require parking, public access, signage, agriculture, aquaculture, any in-water work such as boating, moorage, breakwaters, or bulkheads, commercial or industrial development, dredging, forest management, solid waste disposal, mineral extraction, beach access, utilities, or transportation facilities, and so does not trigger review of SMP policies and regulations relating to these uses/activities. *Exhibits 2 and 2a*.
12. As a residential accessory structure, the proposal is exempt from SEPA review pursuant to WAC 197-11-800(1)(a). *Exhibit 1*.
13. The application was submitted September 1, 2015 and determined to be complete on the same day. Notice of application and of the public hearing date was posted on-site and mailed to surrounding property owners on October 21, 2015 and published on October 28, 2015. *Exhibits 1, 2e, 2f, 2g, and 2h*.
14. Notice of application and public hearing was sent to public agencies for comment. UW Friday Harbor Labs submitted comments noting that the proposed pool house could be

placed outside the shoreline and that the Applicant should therefore be required to show justification for placement within shoreline jurisdiction. *Exhibit 3a*. The Washington State Department of Archaeology and Historic Preservation (DAHP) submitted comments indicating the site has high potential for archeological resources because it is within 2,000 feet of eight precontact archeological sites requesting that an archaeological survey be required. *Exhibit 3b*. The Lummi Nation commented that the proposal is near recorded archaeology sites and an archaeological assessment should be required prior to ground disturbing activities. *Exhibit 3c*.

15. In response to the UW Friday Harbor Labs comments, Planning Staff noted that the proposal is a residential use, which is allowable in the shoreline jurisdiction and that neither the shoreline conditional use or shoreline substantial development criteria for approval require an Applicant for a residential use or structure to provide justification showing why a given proposal must or should be placed in the shoreline jurisdiction. With regard to the DAHP and Lummi Nation comments, Planning Staff recommended a condition of approval requiring an archaeological survey be performed prior to ground disturbing activities. *McEnery Testimony; Exhibit 1*.
16. There was no public comment on the application. *Exhibit 1*.
17. Upon review of the complete application materials, Planning Staff determined that the proposal can comply with all applicable criteria in the Unified Development Code, the Comprehensive Plan, and the Shoreline Master Program with the recommended conditions, and recommended approval. *McEnery Testimony; Exhibit 1*.
18. The Applicant representative waived objection to the recommended conditions, with the exception of recommended condition 2. Citing SJCC 18.50.050.A ("...area known to be archeologically significant...") and .050.D ("... areas known to contain archeological artifacts and data..."), the Applicant representatives argued that the subject property does not fall within the scope of sites governed by the SMPs archeological provisions at SJCC 18.50.050. *Shaw Testimony; Exhibit 4*. According to County records, the subject property contains no known archeology. *Exhibit 4a*.
19. In follow up communication from the Applicant representatives with the DAHP Staff member who submitted the request to require a survey, DAHP stated: "While it is true it is not within a buffer or an arch (sic) site, the landform has an extremely high probability and there are multiple archeological sites in the vicinity. In my professional opinion, it requires a survey." *Exhibit 4d*. DAHP Staff also noted that the "parcel is designated as having the highest probability for containing archeological resources per the Statewide Archaeology Predictive model... . A survey is protection not only for the resource but for [the developer] so that they can stay in compliance with state laws for the protection of archeology and human remains and also so that they have options if archeological resources are present. ..." *Exhibit 4d*. The follow up correspondence goes on to cite RCW 27.44 and RCW 27.53.060, which require a DAHP permit prior to excavation, removing, or altering Native American remains or archeological resources in

Washington, and notes that both fines and criminal prosecution apply in cases of violation of these statutes. The DAHP Staff member engaged in this correspondence was Gretchen Kaehler, Assistant State Archeologist. *Exhibit 4d.*

20. In response to the recommended condition requiring a survey, Applicant representatives asserted that the memorandum of understanding (MOU) between DAHP and San Juan County does not mandate that a survey be required for the proposed development. The MOU, entered into by the County and DAHP in 2006, contains a section entitled Response to Development Activity. The following provisions contain language making surveys mandatory when development is proposed "within the polygon of a known archeological or historic site".² *Exhibit 4g, page 4.*
21. No language in the MOU prohibits the County from requiring surveys in areas outside such polygons. Subsection A of the "Response to Development Activity" section of the MOU reads as follows:

San Juan County shall promote preservation of identified archeological, historic, and cultural resources and shall seek to mitigate unavoidable negative impacts to cultural resources and to discourage demolition of historically significant structures.

Exhibit 4g, page 4. Only approximately six percent of the state has been surveyed for the presence of archeological, historic, and cultural artifacts. *Exhibit 4d.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline substantial development and shoreline conditional use permits 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.J.4, uses that are classified in the Shoreline Master Program as conditional uses may be authorized only if the applicant can demonstrate all of the following:

- a. The proposed use is consistent with the policies of RCW 90.58.020 and the policies of the Shoreline Master Program;
- b. The proposed use will not interfere with the normal public use of public shorelines;
- c. The proposed use of the site and design of the project is compatible with other permitted uses within the area;

² The definitional, regulatory difference, if any, between a 'polygon' or a 'buffer' of an archeological site is not identified in the record.

- d. The proposed use will cause no unreasonably adverse effects to the shoreline environment in which it is to be located;
- e. The cumulative impacts of additional requests for like actions in the area, or for other locations where similar circumstances exist, shall not produce substantial adverse effects to the shoreline environment, e.g., the total of the conditional uses shall remain consistent with the policies of RCW 90.58.020 and the Shoreline Master Program; and
- f. The public interest will suffer no substantial detrimental effect.

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 Shoreline Master Program

SJCC 18.50.050 Archaeological and historic resources

- A. When an application for a development permit is received for an area known to be archaeologically significant, the County will not take action on the application and the applicant will not initiate any excavation or development activity until the site has been inspected by a qualified archaeologist. No application will be delayed more than 10 working days for such an inspection. If the application is approved by the County, conditions will be attached reflecting the recommendations of the archaeologist regarding preservation or protection of the site.
- B. All development permits will contain a special provision advising the permit holder that if during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate vicinity of the find must be halted immediately, and the administrator must be notified at once. Activities authorized by the permit will not be delayed more than five working days for a finding of significance by the administrator, following the administrator's receipt of notification, unless the permit holder agrees to an extension of that time period.
- C. All development proposed for location adjacent to sites which are included in the state or national registers of historic places, or are determined to be eligible for listing, must be

located so as to complement the historic site. Development which degrades or destroys the historical character of such sites is not permitted.

- D. Prior to the issuance of a permit in areas known to contain archaeological artifacts and data, the County requires that the developer provide for a site inspection and written evaluation by an archaeologist. Significant archaeological data or artifacts must be recovered before work begins or resumes on a project.
- E. In the event that unforeseen factors constituting an emergency as defined in RCW 90.58.030 necessitate rapid action to retrieve or preserve archaeological artifacts or data, the project may be exempted from the permit requirements of these regulations. The County shall notify the Washington Department of Ecology, the State Attorney General's Office, and the Washington Office of Archaeology and Historic Preservation of such a waiver in a timely manner.
- F. Archaeological sites located both in and outside the shoreline jurisdiction are subject to Chapter 27.44 RCW (Indian Graves and Records) and Chapter 27.53 RCW (Archaeological Sites and Records) and must comply with Chapter 25-48 WAC (Archaeological Excavation and Removal Permit) as well as the provisions of this code.
- G. Archaeological excavations are allowed subject to the provisions of this master program and applicable state laws.
- H. Identified historical or archaeological resources must be considered in park, open space, public access, and site planning, with access to such areas designed and managed so as to give maximum protection to the resource.

SJCC 18.50.080 Environmentally sensitive areas.

When located in an environmentally sensitive area overlay district or its buffer, shoreline uses and activities must be located, designed, constructed, and managed in accordance with the applicable requirements of SJCC 18.35.020 through 18.35.140, environmentally sensitive areas.

SJCC 18.50.110 Shorelines of statewide significance.

The legislature has designated all salt water surrounding the islands of San Juan County, seaward from the line of extreme low tide, as shorelines of statewide significance (RCW 90.58.030(2)(e)). Use and development of such areas is subject to compliance with policies in Element 3, Section 3.4.F of the Comprehensive Plan.

SJCC 18.50.330.E. Residential development - Accessory Use.

1. Accessory structures which are not water-dependent shall not be permitted seaward of the most landward extent of the residence. If this regulation would result in greater adverse impacts on shoreline features or resources or would conflict with other applicable regulations of this master program, the administrator may authorize by written findings and determination an alternative location without requiring a shoreline variance permit.
2. The following accessory uses and developments, when associated with an exempt single-family residence, are defined as "normal appurtenances" and are therefore exempt as provided in SJCC 18.50.020(F)(2)(g):

- a. One garage building and/or one accessory dwelling unit each of which covers no more than 1,000 square feet of land area and is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 2,000 square feet which is no taller than 16 feet above existing grade as measured along a plumb line at any point; or a combination of these uses in a single structure no larger than 1,000 square feet on each floor and no taller than 28 feet above existing grade. In no case shall an accessory dwelling unit exceed 1,000 square feet;
 - b. No more than two separate outbuildings no larger than 200 square feet each, no taller than 16 feet above average grade level, and not used for human habitation; provided, that in addition, one outbuilding for any other residential purpose may be substituted for an accessory dwelling unit or garage if the structures do not exceed size limits specified in subsection (E)(2)(a) of this section; and
 - c. Grading (excavation and fill) of up to the maximum cubic yardage allowed by state law (see WAC 173-27-040(g)) for foundations and a driveway, plus any additional grading necessary for an individual on-site sewage disposal system.
3. A shoreline substantial development permit shall be required for construction of any nonexempt accessory development on a single parcel within 200 feet of the ordinary high water mark. Construction of an accessory dwelling unit that will be used for vacation rental (short-term) or long-term rental is not exempt. Any grading in excess of the amount exempt under SJCC 18.50.020(F)(2)(g) shall be subject to substantial development permit requirements.
 4. Accessory structures which are not specified in this section as normal appurtenances to a residential use shall be permitted only as conditional uses.
 5. Vacation rental or transient occupancy of a single-family residence or an accessory dwelling unit is subject to the applicable provisions of this section, the performance standards in SJCC 18.40.270 and the permit requirements specified in UDC Tables 18.30.030 and 18.30.040.
 6. Every accessory dwelling unit in the shoreline must be located in a way that maintains the single-family appearance and shall also meet the performance standards for accessory dwelling units set forth in SJCC 18.40.240.

Conclusions Based on Findings

1. Shoreline Conditional Use Criteria: As conditioned, the proposed residential accessory structure 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*. Pursuant to the County's Shoreline Master Program, residential uses specifically including accessory structures are allowed in the Rural Residential shoreline environment. There is no public access to the site's shoreline and approval would not affect public use of shorelines. Situated behind the most waterward corner of the residence, the accessory structure would not impact surrounding residential uses or parcels. Set significantly back from the top of the bank and more than 150 feet from the ordinary high water mark, and reviewed for compliance with applicable building and stormwater management requirements at the time of building permit, construction and use of the proposed structure would have no adverse effects on the shoreline, water quality, or habitat functions and values. The pool house would not emit noise, glare, odor, or any other nuisance emission beyond those associated with typical residential structures. Built in compliance with applicable development standards, residential accessory structures built in shoreline jurisdiction on residential parcels would not collectively result in environmental harm. The record contains no evidence suggesting harm to the public interest if built as conditioned. *Findings 2, 3, 4, 5, 6, 7, 8, 9, 10, and 17.*

2. Shoreline Substantial Development criteria: As noted above, the proposal would be consistent with the policies of the Shoreline Management Act. Evidence in the record demonstrates compliance with applicable provisions in the County's SMP as follows. With regard to provisions governing residential accessory structures, the proposed accessory building would be located landward of the landward most point of the residence. It was reviewed as a shoreline conditional use, above. No vacation rental or accessory dwelling use is proposed. The proposed location of the structure is set far back from the OHWM, from the on-site wetland, and from trees on-site known to serve as bald eagle perches; none of these trees would be removed or affected. Review at the time of building permit submittal would ensure compliance with the standards established in SJCC 18.60, including erosion control and stormwater management that would ensure protection of ground and marine water resources. Regarding applicable comprehensive plan policies: The pool house would undergo building permit review, ensuring the scope of development would not exceed the physical limits of the site. No new roads or driveways are proposed. No scenic resources would be impacted. Marine wildlife would not be affected by the project set back from the marine bank and the OHWM 150 feet. No parking or signage is proposed. The proposed residential accessory structure would not adversely affect surrounding rural residential development. Archeological resources are addressed in the next conclusion. *Findings 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 17.*
3. Pursuant to SJCC 18.50.050.A, when an application for a development permit is received for an area known to be archaeologically significant, the County will not take action on the application and the applicant will not initiate any excavation or development activity until the site has been inspected by a qualified archaeologist. In implementing this requirement, the Department of Community Development routinely notifies DAHP and appropriate tribes when an application is submitted that could affect archeological

resources. The Department does not have an archeologist on staff. The MOU cited by the Applicants confers an affirmative duty on the Department to promote preservation of and mitigate impacts to cultural resources. Given the undisputed evidence that there are eight known sites within 2,000 feet, the location of the proposed development site on a significant waterfront landform, and the opinions of a DAHP professional archeologist and a Lummi Nation Tribal Historic Preservation Office representative that a survey should be required, Planning Staff had an adequate basis for concluding that the proposed development site is in an "area known to be archaeologically significant" and conditioning approval on preparation of an archeological survey. *Findings 4, 14, 15, 18, 19, 20, 21, and 22.*

4. Notice and other procedural requirements were performed consistent with the requirements of SJCC 18.80. Compliance with applicable development standards established in SJCC 18.60 would be ensured through the building permit process. Planning Staff submitted that the proposal is consistent with the Comprehensive Plan. The proposed residential structure is exempt from SEPA. *Findings 4, 7, 12, 13, 14, 16, and 17.*

DECISION

Based on the preceding findings and conclusions, the requested shoreline substantial development and shoreline conditional use permits to authorize the construction of a pool house within the 200 foot shoreline jurisdiction associated with the single-family residence at 220 Arbutus Lane, San Juan Island are APPROVED subject to the following conditions applicable to the Applicants, agents, and successors:

1. Development of the site shall be as shown on the site plan.
2. An archaeological survey will be required prior to issuance of the building permit.
3. Exterior lighting shall be consistent with SJCC 18.35.125.A and 18.60.170.
4. Vegetative screening shall be retained between the construction site and the water in compliance with SJCC 18.35.130.B.
5. If during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate vicinity of the find must be halted immediately, and the administrator must be notified at once (SJCC 18.50.050.B.)

Decided January 4, 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.