

**SAN JUAN COUNTY  
HEARING EXAMINER**

**ADMINISTRATIVE APPEAL**

Appellants: Friends of the San Juans  
Applicant/Property Owner: 1281 and 1657 Yacht Haven, LLC  
File No.: PAPL00-13-0001  
Request: Appeal of Shoreline Exemption – Request for Reconsideration  
Parcel No: 462650027  
Location: 1657 Yacht Haven Road, San Juan Island  
Comprehensive Plan Designation: Rural Residential  
Shoreline Designation: Rural Residential  
Hearing: None.  
Decision: Request for Reconsideration Denied.

S.J.C. COMMUNITY

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DEVELOPMENT & PLANNING



1 The changes in project design and project description provided significant new  
2 information on the relationship between the Laufer and Woodman bulkheads. Had  
3 this project information been included in the original application, it is very likely that  
4 both staff and the appellants would have raised WAC 197-11-040(d) as an issue. The  
appellants' prior involvement with the Woodman shoreline permits is not a sufficient  
substitute for this significant new information.

5 Even if the appellants working knowledge of the relationship between the Woodman  
6 and Laufer bulkheads put them on sufficient notice of the dispositive issue of this case,  
7 the timeliness argument still does not stand because the Notice of Appeal did in fact  
8 generally raise the issue<sup>1</sup>. As noted in the appellants' response to the reconsideration  
9 request, p. 7, pleading requirements should be liberally construed in order to facilitate  
10 proper decisions on the merits. 5.16 of the Notice of Appeal asserts that the  
11 cumulative impacts of bulkheads "along the pocket beach where the bulkhead would  
12 be constructed is inconsistent with the SMA and SMP". 5.16 correctly asserts that the  
relationship of the Woodman bulkhead to the Laufer bulkhead makes it inconsistent  
with the SMA, which would include WAC 197-11-040(d). 5.16 of the Notice of  
Appeal puts the applicants to at least as much notice of the WAC 197-11-040(d) issue  
as the appellants past work on the Woodman shoreline permit put it on notice of the  
WAC 197-11-040(d) issue.

13 On the second issue, whether the Laufer bulkhead is in fact a part of the larger  
14 Woodman bulkhead, the applicants have still been unable to point to any information<sup>2</sup>  
15 in the record that shows the projects as distinct. At the outset it is important to  
16 recognize that the applicants have the burden of proof to establish that their proposal is  
17 shoreline exempt. WAC 173-27-040(c). The applicants in this case had the burden to  
18 produce evidence sufficient to overcome the statements of their own expert in the  
Coast and Harbor report that their bulkhead formed a "continuous" bulkhead with the  
Woodman bulkhead<sup>3</sup>. It is also important to recognize that the applicants were given

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19 <sup>1</sup> The Final Decision noted that it was "uncontested" that the Notice of Appeal did not address the  
20 WAC 197-11-040(d). The appellants subsequently did contest that issue in their response to the  
21 reconsideration request. The appellants also contested the issue at p. 11 of their prehearing brief. It is  
also acknowledged that the appellants did object to consideration of the WAC 197-11-040(d) issue to  
the extent that they noted in a November 12, 2013 email that the WAC 197-11-040(d) issue was  
untimely and "*was not and is not an issue appealed by FOSJ*".

22 <sup>2</sup> The appellants have objected to the timeline that accompanies the applicants' request for  
reconsideration. That objection is sustained to the extent that any information is acquired outside the  
23 administrative record of this proceeding. Further, the examiner can take judicial notice of the  
24 Woodman examiner and shoreline hearing board decisions (including of course the contents of those  
decisions). Given these parameters, it appears that the only evidence that must be excluded is the  
hiring dates of Coast and Harbor.

25 <sup>3</sup> In addition to the comments and the site design in the Coast and Harbor report, the connections  
between the Laufer and Woodman bulkheads were further supported by the evidence outlined at page  
3 of the appellants written closing argument as well as comparison of the Woodman bulkhead design  
as detailed in the Woodman examiner and SHB decisions to the Laufer design depicted in the  
application materials of this case. One point of information that needs verification (transcripts are not

1 clear direction that this was a major issue that needed to be addressed. As identified in  
2 the Final Decision of this case, the hearing examiner asked if the applicants would like  
3 to address the WAC 197-11-040(d) issue in a summary judgment motion so that the  
4 extensive time and expense of the hearing could be avoided should it be determined  
5 that the project was not exempt. The applicants declined and the examiner noted in a  
6 November 6, 2013 email that he would defer any ruling on the issue since the parties  
7 had not had an opportunity to address it. The appellants subsequently argued why  
8 they should be able to address the exemption issue even though not specifically  
9 mentioned in their Notice of Appeal at page 11 of their prehearing brief. The  
10 appellants identified the merits of the WAC 197-11-040(d) exemption issue in their  
11 opening comments at the hearing and identified the evidence supporting their position  
12 in page 3 of their written closing argument. Other than the applicant's initial  
13 November 5, 2013 email response to the examiner's November 5, 2013 email  
14 suggesting summary judgment, it does not appear that the applicants ever addressed  
15 the WAC 197-11-040(d) exemption issue, including the presentation of any evidence  
16 to meet their burden of proof that WAC 197-11-040(d) did not apply to their situation.

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18 In their briefing on reconsideration, the applicants have still been unable to point to  
19 any evidence in the record that shows that the Laufer bulkhead is separate from the  
20 Woodman bulkhead. The applicants' briefing essentially concedes that the design of  
21 the bulkheads is the same and that they were designed by the same professionals. The  
22 applicants argue that the design of the bulkhead is "common place" in San Juan  
23 County. There is nothing in the record to support this statement and there are few, if  
24 any, shoreline substantial development permits to the Examiner's knowledge that  
25 involve two tiered bulkheads as proposed by Laufer and Woodman. The applicants  
also assert that the bulkheads are separate because they are stand-alone structures that  
could exist independently of each other. There is again no evidence in the record to  
directly support this statement. More importantly, given that there is no horizontal  
integration of the boulders comprising the bulkheads evident from the design  
drawings, it appears that both the Laufer and Woodman bulkheads could each be  
sectioned into several separate units without affecting their structure stability. No one  
would seriously contend that the Woodman and Laufer bulkheads each comprise  
several separate bulkheads for this reason.

The applicants also argue that similarity in design and construction timing is  
attributable to similarities in topography, limited availability of design professionals,  
economies of shared resources and pending changes in shoreline regulations. These  
facts all support a determination that the Laufer/Woodman bulkheads are indeed one  
structure, conjoined by a multitude of circumstances that have made it more efficient  
and mutually beneficial to construct one large bulkhead as opposed to two separate  
bulkheads. As noted in the Final Decision on this matter, from an environmental  
impact standpoint there is nothing that separates the bulkheads from each other. As

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yet available) is the appellants contention in its written closing that Mr. Levinson testified that the  
projects are physically connected. Mr. Levinson testified that the two tiers of the Laufer bulkhead are  
connected, it is unclear if he testified that the Laufer and Woodman bulkheads are connected.

1 noted in the Coast and Harbor bulkhead, the “two” bulkheads form one continuous  
2 bulkhead for purposes of environmental review.

3 The appellants assert that if reconsideration is denied, the factual and legal issues  
4 raised in the appeal should still be resolved. That would not be appropriate in this case  
5 since resubmission as a shoreline substantial development application would involve  
6 potential new parties. The San Juan County Hearing Examiner Rules of Procedure do  
7 not allow the public to participate in an administrative appeal except as a witness, but  
8 this prohibition does not apply to shoreline substantial development permits. To the  
9 extent reasonably practicable, the examiner should avoid prejudging issues that could  
10 be a matter of concern to members of the public if this application is reviewed as a  
11 shoreline substantial development permit. The public should be given an opportunity  
12 to weigh in on the issues of this case before rulings are made to resolve them in a  
13 shoreline substantial development permit hearing.

14 In this case it is very tempting to gloss over the technical requirements of a shoreline  
15 substantial development permit and authorize this portion of the Woodman/Laufer  
16 bulkhead through the exemption process. The impacts of the proposal, after all, have  
17 been given more consideration through the exemption appeal than they would have  
18 been given in a typical shoreline substantial development permit for a bulkhead. The  
19 differences in project review at both the local and appellate level, however, are much  
20 more than a technicality or academic question.

21 On a practical level, processing the Laufer bulkhead as a shoreline exemption as  
22 opposed to a shoreline substantial development leads to a radically different appeal  
23 process. If processed as a shoreline substantial development permit, the Shoreline  
24 Hearings Board (“SHB”) has appellate jurisdiction whereas exemption appeals go  
25 straight to superior court. *See Toandos Peninsula Association v. Jefferson County*, 32  
Wn. App. 373 (1982); Chapter 36.70C RCW. Unlike a superior court, the SHB works  
exclusively with Shoreline Management Act appeals. The SHB has extensive  
experience working with the San Juan County Shoreline Master Program as well as  
bulkheading of the pocket beach of this case, through its review of the Woodman  
appeal. Through both its statewide shoreline experience and its specific experience  
with the Woodman bulkhead, the SHB is in a far better position than the superior court  
to review the impacts of the proposal in a coordinated fashion with the rest of the  
Woodman/Laufer bulkhead. Further, the appellate review procedures are significantly  
different between superior court and SHB review, where SHB review is done de novo  
based upon the Administrative Procedure Act and shoreline exemptions are based  
upon the locally developed administrative record and reviewed under the Land Use  
Petition Act.

At the local level, as discussed in the Final Decision of this case, a shoreline  
substantial development permit review process is open to the public whereas an  
exemption is not except for an opportunity to appeal. Review of a shoreline  
substantial development permit also typically involves far more rigorous Shoreline  
Master Program staff analysis then review of an exemption. Treating the entirety of

1 the Woodman/Laufer bulkhead as one structure ensures that consistent review  
2 procedures are applied during both initial and appellate review. This consistency in  
3 review is essential to avoid the piece meal environmental review that the Shoreline  
4 Management Act is designed to avoid as discussed in the Final Decision of this case.

5 In short, review of this project as a shoreline substantial development permit is  
6 necessary to both serve important policies of the Shoreline Management Act and to  
7 ensure that the appeal of the proposal is heard by the appellate body with proper  
8 subject matter jurisdiction. These considerations are significant enough that should a  
9 reviewing court determine that the WAC 197-11-040(d) issue was not timely raised as  
10 dictated by the examiner's procedural rules, it should be considered as raised *sua*  
11 *sponte* by the examiner. Hearing Examiner Rules and Procedures I(A) provides that  
12 failure to follow the Rules and Procedures shall not serve as grounds to invalidate a  
13 decision, but the examiner is expected to apply the rules to the best of his or her  
14 ability. In this situation the examiner did as much as could be reasonably be done to  
15 apprise the applicants of the significance of the WAC 197-11-040(d) issue and to give  
16 them an opportunity to address it even though the exemption wasn't arguably  
17 identified in the Notice of Appeal. Raising this issue *sua sponte* under these  
18 circumstances, justified as necessary to serve the ends of justice, should be authorized  
19 as allowed in similar fashion for appellate courts when they raise issues not raised by  
20 the parties before them. *See Kruse v. Hemp*, 121 Wn.2d 715, 721 (1993).

21 Dated this 10th day of January 2014.

22   
23 Phil A. Olbrechts

24 County of San Juan Hearing Examiner

25 **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

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law provides short deadlines and strict procedures for appeals, and failure to timely comply with filing and service requirement 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.