

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

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|---------------------------------------|---|------------------------|
| Applicant(s): | William Bangs II and Margaret Bangs 828 Pine Ridge Knolls Fullerton, CA 92835 | |
| Agent: | Jeff Otis 393 Bobbyann Road Eastsound, WA 98245 | |
| File No.: | PSJREV-13-0003 | S.J.C. COMMUNITY |
| Request: | Shoreline Permit Revision | MAR 28 2014 |
| Parcel No: | 260524002 | DEVELOPMENT & PLANNING |
| Location: | 2277 Deer Harbor Road Orcas Island | |
| Summary of Proposal: | An application for a revision to a shoreline permit | |
| Land Use Designation: | Not identified in staff report | |
| Public Hearing: | March 12, 2014 | |
| Application Policies and Regulations: | WAC 173-27-100 SJCC 18.80.110(M) | |
| Decision: | Approved. | |

1 **BEFORE THE HEARING EXAMINER FOR THE COUNTY**
2 **OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

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| 4 RE: William Bans II and Margaret Bangs | FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION. |
| 5 Shoreline Permit Revision 6 (PSJREV-13-0003) | S.J.C. COMMUNITY MAR 28 2014 |

7 **INTRODUCTION**

8 The applicants have applied for a revision to a 1973 shoreline permit to increase the
9 size of a single-family dock by 3%. The revision is approved subject to the condition
10 that the applicant shall prepare an assessment of kelp impacts by a qualified biologist
11 that contains recommendations to mitigate kelp impacts to the maximum extent
 feasible as required by the County's critical area regulations.

12 **TESTIMONY**

13 Lee McEnery, Community Development and Planning, submitted two comment
14 letters (Exhibits 4 and 5). She noted that the application is to revise an existing dock
15 permit. The original shoreline permit was granted in 1973. The revision would
16 reconfigure the layout and increase the size of the applicant's dock by a very small
17 amount. The dock would still be smaller than the single-family dock standard. Staff
18 recommends approval of the application. She is not sure whether the float extends
 over a kelp bed because the boundary is not delineated well in the survey. Kelp is
 addressed in the marine habitat regulations, but there has always been confusion
 regarding mitigation because kelp is not a scientific term and it encompasses several
 different types of vegetation.

19 Jeff Otis, representing applicant, testified that there is one area to the north of the
20 float that is 30 percent kelp. It is his understanding, based on testimony of biological
21 experts in previous dock hearings, that higher density kelps are where protection is
22 needed because they are the primary habitats. This 30 percent area is an isolated one
23 and is surrounding by 1 and 5 percent kelp density areas. Mr. Otis met with a
24 Department of Fisheries biologist, Doug Thompson, the week of March 5th.
25 According to Mr. Otis, Mr. Thompson believes this dock revision is a good thing
 because the existing floats are not light permeable or graded. The new float will be
 narrower and will be light permeable. They did not discuss kelp, but Mr. Otis
 believes Mr. Thompson was aware there is kelp as he did review the survey. The
 total increase in area of the dock is 3 percent (from 571ft to 592ft).

1 Stephanie O'Day stated that the County needs to create standards to deal with kelp as
2 there is kelp everywhere in the water. Any shoreline construction will face the issue
3 of kelp beds. A San Juan County policy would be very helpful for creating
4 application materials.

5 Janet Alderton stated that, in the new Critical Area Ordinances, kelp is designated as
6 a critical habitat.

7 Kyle Loring, Friends of the San Juans, stated that the current CAO, SJCC 18.30.160,
8 identifies kelp and eel grass in the same lot. The ordinance does provide mitigation
9 sequences for applicants. The Code does not distinguish between kelp beds at
10 different densities.

11 Mr. Otis stated that a previous project was approved because the kelp density was
12 very low. He agreed to email the case name to the Hearing Examiner.

13 EXHIBITS

- 14 Ex. 1: Staff Report
15 Ex. 2: Request for revision
16 Ex. 3: Regional shore site plan
17 Ex. 4: Letter from the Somervilles
18 Ex. 5: 2/25/14 letter from Dennis Cavil

19 FINDINGS OF FACT

20 Procedural:

- 21 1. Applicant. The applicants are William Bangs II and Margaret Bangs.
22 2. Hearing. The Hearing Examiner conducted a hearing on the subject
23 application at 10:00 am on March 12, 2014.

24 Substantive:

- 25 3. Site and Proposal Description. The applicants have applied for a revision
to a 1973 shoreline permit to increase the size of a single-family dock by 3% at 2277
Deer Harbor Road, Orcas Island. The applicants propose to change the layout of the
existing dock and to extend it a bit further seaward to prevent grounding at low tides.
The highest ramp and the fixed pier would be retained. The lower ramp and the float
would change, as shown in the drawings. New construction would have surface
grating to allow better light penetration.
4. Characteristics of the Area. As shown in the aerial photographs of the
application, the surrounding neighborhood is rural and residential in nature.

1 5. Adverse Impacts of Proposed Use. Significant adverse impacts are not
2 anticipated given the modest size of the proposed expansion. The proposed dock will
3 be largely located at the same location with only a 3% increase in area and there is no
4 eelgrass in the vicinity. Given that the currently solid wooden floats will be replaced
5 by grated floats, it is likely that overall the proposed design will improve upon the
6 impacts created by the current dock.

7 One issue that will have to be addressed in the conditions of approval is kelp. The
8 dive surveys submitted by the applicant reveal that the new float will extend into an
9 area of 30% kelp. The current float is limited to an area of 5% kelp. Kelp beds are
10 identified as a critical area protected by the County's critical area regulations. See
11 SJCC 18.30.160(A)(5)(a). As determined in the Examiner *Beckwith* decision,
12 PSJ000-10-0006 and reaffirmed in the *Odlin Park* decision, PSJ000-13-0006, kelp
13 serves as habitat for protected aquatic species and docks can damage that habitat by
14 blocking light. In the Examiner *Swindell* decision, PSJ000-13-0005, a dock was
15 allowed to be constructed over kelp beds because the National Marine Fisheries
16 Service had determined that proposed grating would adequately protect underlying
17 kelp. Similarly, in the Examiner *Bryan, Haugen and Ruhnke* decision a dock was
18 authorized over a kelp bed because the applicant's expert determined that the grated
19 dock would not adversely affect the type of kelp located at the dock site. The expert
20 in part based his opinion upon the proliferation of the same type of kelp at other dock
21 sites in the vicinity.

22 The record of this application contains no evaluation of kelp impacts. Although the
23 scale of the dock expansion is minor and the grating will likely improve upon kelp
24 impacts, it cannot be concluded that the expansion area itself will not adversely
25 impact kelp. A minor re-orientation of the float could potentially yield substantial
positive results, given that kelp concentrations are significantly less immediately to
the south of the float. The conditions of approval will require an assessment of kelp
impacts by a qualified biologist with an adverse impacts mitigated "to the maximum
extent feasible" as required by SJCC 18.30.160(B)(1)(a).

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. Shoreline substantial development permit
revisions are subject to approval by the Hearing Examiner after conducting a public
hearing. SJCC 18.80.110(M).

Substantive:

2. Permit Review Criteria. SJCC 18.80.110(M)(2), quoted in italics below, governs
the criteria for approval of revisions to shoreline permits.

1 **SJCC 18.80.110(M)(2):** *If the hearing examiner determines that the proposed*
2 *changes are within the scope and intent of the original permit, as defined by WAC*
3 *173-27-100(2), the revision shall be granted.*

4 **WAC 173-27-100(2):** *'Within the scope and intent of the original permit' means all*
5 *of the following:*

6 *(a) No additional over water construction is involved except that pier, dock, or float*
7 *construction may be increased by five hundred square feet or ten percent from the*
8 *provisions of the original permit, whichever is less;*

9 *(b) Ground area coverage and height may be increased a maximum of ten percent*
10 *from the provisions of the original permit;*

11 *(c) The revised permit does not authorize development to exceed height, lot coverage,*
12 *setback, or any other requirements of the applicable master program except as*
13 *authorized under a variance granted as the original permit or a part thereof;*

14 *(d) Additional or revised landscaping is consistent with any conditions attached to the*
15 *original permit and with the applicable master program;*

16 *(e) The use authorized pursuant to the original permit is not changed; and*

17 *(f) No adverse environmental impact will be caused by the project revision.*

18 3. The proposed revision meets all of the criterion above. The proposed revision
19 only increases over water construction area by 3% and less than 500 square feet.
20 There is no increase in ground area coverage or height. The proposed dock will still
21 be under the maximum area authorized for single-dock construction and also
22 complies with all other shoreline master program requirements. The use is not
23 changed by the revision and no additional landscaping is not required or proposed.
24 As determined in Finding of Fact No. 5, there are no adverse impacts associated with
25 the proposal.

DECISION

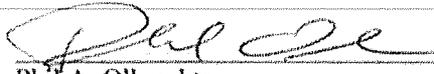
The revision is approved, subject to the following conditions:

1. The site plan submitted for the revision shall become the revised site plan.
2. The applicants shall schedule a site inspection with staff upon completion of the project to verify compliance with this decision and applicable regulations.
3. The applicants shall hire a qualified biologist to prepare an analysis of project impacts to kelp. The analysis shall contain recommended mitigation and design revisions as necessary to minimize adverse impacts "to the maximum extent feasible" as required by SJCC 18.30.160(B)(1)(a). Mitigation shall follow the mitigation sequencing required by SJCC 18.30.160(B)(1)(a). Staff may require

1 peer review at the expense of the applicant of the kelp analysis as determined
2 necessary to verify the findings of the biologist.

- 3 4. Failure to comply with any terms or conditions of this permit may result in its
4 revocation.

5 Dated this 25th day of March 2014.

6 
7 Phil A. Olbrechts

8 San Juan County Hearing Examiner

9 **Effective Date, Appeal Right, and Valuation Notices**

10 Hearing examiner decisions become effective when mailed or such later date in
11 accordance with the laws and ordinance requirements governing the matter under
12 consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be
13 subject to review and approval by the Washington Department of Ecology pursuant to
14 RCW 90.58.140, WAC 173-27-130, and SJCC 18.80.110.

15 This land use decision is final and in accordance with Section 3.70 of the San Juan
16 County Charter. Such decisions are not subject to administrative appeal to the San
17 Juan County Council. See also, SJCC 2.22.100.

18 Depending on the subject matter, this decision may be appealable to the San Juan
19 County Superior Court or to the Washington State Shorelines Hearings Board. State
20 law provides short deadlines and strict procedures for appeals, and failure to timely
21 comply with filing and service requirement may result in dismissal of the appeal. See
22 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
23 promptly review appeal deadlines and procedural requirements and consult with a
24 private attorney.

25 Affected property owners may request a change in valuation for property tax purposes
notwithstanding any program of revaluation.