

**SAN JUAN COUNTY  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS AND DECISION**

Applicant: Michael Skott  
2234 Deer Harbor Road  
Orcas Island

File No.: PVAR00-14-0001

Request: Variance

Parcel No: 260513005

Location: 2234 Deer Harbor Road  
Orcas Island

Summary of Proposal: Variance to ADU separation requirement from principal residence

Land Use Designation: Rural Farm Forest

Hearing Date: May 14, 2014

Application Policies and Regulations: SJCC 18.80.100(E) et. seq.

Decision: Approved.

S.J.C. COMMUNITY

MAY 29 2014

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Michael Skott 5 Variance 6 (PVAR00-14-0001)	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</b>  S.J.C. COMMUNITY  MAY 29 2014
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8 **INTRODUCTION**

9 The applicant seeks an after-the-fact variance to SJCC 18.40.240(G)(2), which  
10 requires that an accessory dwelling unit (“ADU”) be located within 100 feet of its  
11 primary residence or 150 feet upon a determination by staff that the greater distance  
12 would reduce adverse impacts. The accessory dwelling unit on the subject property is  
13 located 185 feet from its principal residence. The variance is approved.

14 In summary, the variance is approved because denial would necessitate the placement  
15 of an ADU (if one were to still be built) within the well protection zones of three  
16 shallow wells. County health regulations would permit such development to occur,  
17 but the applicants have raised a prima facie showing that shallow wells have a  
18 relatively high risk of contamination from proximate development. In the absence of  
19 any qualified testimony that an additional single family home built close to the wells  
20 would not create a significant health risk, it must be concluded that siting an ADU  
21 within 100 or 150 feet of the primary residence is not an appropriate location given  
22 the proximity of the shallow wells. When public health comes into play, decisions  
23 must err on the side of caution.

24 It should also be recognized that the additional separation at issue is 35 feet.  
25 Although the proposal marginally meets variance criteria, it likely would meet the  
standards for acquiring administrative approval of 150 foot separation. This modest  
increase in separation creates significant public health benefit in that it enables the  
construction of the ADU on the only level spot on the forested steep slopes to the  
east, away from the critical areas on the west side of the property and providing  
forested separation (good for infiltration) between the ADU and the shallow wells.

23 **TESTIMONY**

24 Staff

25 Julie Thompson stated that the application is for a variance from the 100ft setback  
standard between the main house and the accessory dwelling unit. The applicant

Variance

1 believes there is no other place to locate the accessory dwelling unit except where it is  
2 currently located which is 200ft away from the main house. The applicant built the  
3 main house and the accessory dwelling unit without permits, and the rules have  
4 changed since he constructed the buildings without permits. County recommends  
5 denial of the application for this reason.

#### 4 Applicant

5 Mr. Michael Skott, applicant, testified that he has lived on the property for thirty  
6 years. He received a permit for the barn building which is considered the primary  
7 residence. He received a permit in 1996 for the septic system that serves the building  
8 on the hill. He also received a septic permit for the barn building. The majority of the  
9 property is wetlands with three ponds and a creek. There are two wells on the site  
10 with one serving the barn and another serving a different site (the Fralick well).  
11 Behind the barn building, there is a septic system which has drain fields and a sloping  
12 area. There is an access road to the accessory building on top of the hill. Behind the  
13 accessory building, there are 5 acres of wood on a steep incline. He did not receive a  
14 permit for the accessory dwelling unit. Mr. Skott brought the permit issue to the  
15 attention of the County as he is trying to clear up issues with the property. The other  
16 areas spacious enough for the guest house were too close to the wells and could cause  
17 drainage and contamination issues. The property is seven acres. There are two fields  
18 on either sides of the residence. The area near the well serving the Fralick property  
19 (the western well) is very wet. Mr. Skott's property backs Turtle Back Mountain. The  
20 mountain's watershed drains onto his property. The Fralick well is a 5ft deep dug-  
21 well, thus it attracts surface water. Mr. Skott's well is 18ft deep with gravel at the  
22 bottom and no screening. The property is very deep in the back with a 50 percent  
23 increase in incline. Mr. Skott has invested 360,000 dollars in developing his property.  
24 The principal residence was built in 1994. The accessory dwelling unit was built in  
25 1996. Both wells (the southern well) existed before Mr. Skott bought the property.  
On the aerial site plan, there is a third well, the southern-most well, which is on a  
different property.

19 Mr. Otis, representing the applicant, submitted an exhibit depicting the elevation  
20 change on the property (Exhibit 8). Most of the elevation changes occur from the  
21 downhill side of the driveway up to the secondary unit. There is a 50 percent  
22 elevation change. Mr. Otis conducted a pre-application meeting with the County. An  
23 accessory dwelling unit is allowed on this property because the property is over 5  
24 acres. The Code requires accessory dwelling units to be placed on sites to minimize  
25 intrusion on open spaces including critical areas. The area within 100ft contains the  
most critical areas on the site. Mr. Skott has submitted his building permit  
applications. Both wells on the property are shallow, thus their recharge areas are  
immediately within the surrounding areas. There is a 110ft wetland buffer on the  
property. The site plan also depicts the drain field, forested areas, and steep slopes.  
Mr. Otis submitted the certificate of water availability for the well that serves the site  
(Exhibit 9). On page 4 of Exhibit 9, it notes that the well's static level is 5ft. It was  
pumped down to 20ft and recovered to 5ft which demonstrates it is a shallow well.

Variance

1 This is a water-table well because the water is derived from the run-off. Mr. Otis  
2 submitted the Fralick well grant of right to draw from and grant of easement (Exhibits  
3 10 and 11). The Fralicks have a legal right to the well as of 1986. The Fralick well is  
4 only 5ft deep and is a concrete encasement. The well is a water-table well. Mr. Otis  
5 submitted several excerpts from publications on shallow wells (Exhibit 12). The  
6 information provided notes that recharge areas can be affected by human activity such  
7 as paving and other development. Shallow wells are only deep enough to receive  
8 from the upper most recharge areas. The level of the well saturation is based on  
9 water-table for shallow wells. Dug wells are difficult to protect from contamination  
10 and have low yields. When possible, dug wells should be located where surface water  
11 runoff drains away from them. Sub-land covers have great impact on runoff. Shallow  
12 wells are much more easily impacted by contaminants and development. Mr. Skott's  
13 property has two fields adjacent to the two wells. If developers created hardened  
14 surfaces on the two fields, runoff will go to each of the shallow wells. The Fralick  
15 well is especially susceptible to contamination from development of the area. The  
16 accessory unit is at a higher elevation than the main building; however, the unit is  
17 200ft away from the wells so runoff is not an issue. If the unit was built in the fields  
18 adjacent to the primary residence, it would create large amounts of contaminants for  
19 the wells. Septic lines must be 25ft from wells, and sewage transmission lines must be  
20 50ft from them. These are minimum requirements, and the Health Department does  
21 not distinguish between shallow and deep wells. There is a category 3 wetland on the  
22 property that has a 110ft setback. There is a pond to the west just outside the 100ft  
23 area. If the forested areas at the back of the house were removed to build an accessory  
24 unit, there would be increased sedimentation and run-off. Currently, the trees hold the  
25 water which helps with runoff.

16 In regard to the septic systems, Mr. Otis submitted the permits for the systems, and the  
17 Health Department record of the permits (Exhibit 13). The County Health Department  
18 reviewed the permits and approved them. The permits indicate both of the houses and  
19 various utility hook-ups. It appears that the County recognized both of these  
20 buildings as legal at the time the permits were issued. Seven comment letters were  
21 submitted, and six of these letters were in support of the application. Most of these  
22 letters came from neighbors who do not believe the accessory unit causes any issues.  
23 The one letter of dissent came from someone who does not live on the Island. Mr.  
24 Otis submitted the building permit applications for the principal home and accessory  
25 unit (Exhibit 14). Currently, the accessory dwelling unit is rented. The renters will be  
displaced if the unit has to be moved. The secondary unit is not visible and has its  
own septic system. Leaving the accessory dwelling unit as it is will have the least  
impact on the property and surrounding areas. In Exhibit 7, the cross-hatched area to  
the northwest of the property is the pond. There is no other place to put the principal  
residence because of the wetlands and sloping areas. The primary residence is built on  
the most level, dry area on the property. There is not enough room for both the  
primary residence and accessory unit in the location where the accessory dwelling unit  
is now.

Variance

1 George Budnick, current renter, stated that the view from the accessory home is  
2 beautiful. He and his wife would be displaced if the unit is removed. There are few  
3 rental opportunities like Mr. Skott's on Orcas Island. The way the property is set-up is  
4 ideal.

5 Staff Rebuttal

6 In regard to the septic permits, Ms. Thompson noted that the County often receives  
7 septic applications with septic and other utilities marked without an actual building.  
8 In regard to the wetland buffer, she is not sure the wetland buffer would be 110ft  
9 because the application was received before the adoption of the Critical Areas  
10 Ordinance on March 31st. She is not sure if the decision would be different if the unit  
11 had not already been built.

12 Applicant Rebuttal

13 In regard to the wetland buffer, Mr. Otis testified that the 110ft would apply if  
14 reviewing the application today.

15 **EXHIBITS**

16 Exhibits 1-6, identified in a case index to the staff report, were admitted into the  
17 record during the hearing as well as the following:

18 Exhibit 7	Aerial photo with 100ft radius around the residence
19 Exhibit 8	Elevation contours for the site
20 Exhibit 9	Certificate of water availability
21 Exhibit 10	Grant of right to draw from the Fralick well
22 Exhibit 11	Grant of easement for Fralick well
23 Exhibit 12	Excerpts from publications on shallow wells
24 Exhibit 13	Sewage design application and permit
25 Exhibit 14	Building permits for the primary residence and the accessory dwelling unit

**FINDINGS OF FACT**

**Procedural:**

1. Applicant. Michael Skott.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on May 14, 2014 at 10:00 am at the Islander Bank Annex, 225 Blair Ave, Friday Harbor.

**Substantive:**

Variance

1 3. Site and Proposal Description. The applicant seeks an after-the-fact  
2 variance to SJCC 18.40.240(G)(2), which requires that an accessory dwelling unit be  
3 located within 100 feet of its primary residence. The accessory dwelling unit on the  
subject property is located 185 feet from its principal residence.

4 The subject property is 7.74 acres in size and is located at 2234 Deer Harbor Road on  
5 Orcas Island. The west half of the property is fairly level with a mix of open  
6 pastureland, wetlands and forested areas. The east half is heavily forested and steep.  
The primary residence is located in the flat area and the accessory dwelling unit is  
located on a bench on the steep slopes to the east.

7 The bench area at which the ADU is located is the only level portion of the steep  
8 slope area of the eastern half of the lot in which an ADU could be located. The  
9 western half of the property is filled with a wetland and pond. There are three shall  
10 wells located in the vicinity of the primary residence. Two of the wells are located on  
11 the applicant's property and one is located on the adjoining property to the south.  
12 The wells are characterized as shallow because they are dug (not drilled) and tap into  
13 water tables less than fifty feet deep. As shown in site plans provided by the  
applicant, Ex. 4, the entire level area of the property (west of the steep slopes) is  
entirely encumbered by well head protections zones, a pond or critical areas or critical  
area buffers (under the current critical areas ordinance).

14 4. Characteristics of the Area. The surrounding properties are residential or  
undeveloped.

15 5. Adverse Impacts of Proposed Use. There are no adverse impacts  
16 associated with the proposal. As discussed in the introduction, the applicant only  
17 seeks to increase authorized ADU separation by 35 feet. The ADU is located in a  
18 forested area, which is not visible to surrounding properties or Deer Harbor Road. As  
19 established in Ex. 12, construction near the shallow wells located at the level portions  
of the property creates a contamination risk. For this reason, the increased separation  
proposed by the applicant creates a positive health impact.

20 6. Special Circumstances. The need for the variance is created by the critical  
21 areas and shallow wells on site. The only place to build an ADU while avoiding the  
22 wells, critical areas and steep slopes is on the steep slope bench where the ADU is  
23 currently located. One of the wells is on neighboring property and the two wells on  
24 the property were established by a prior owner so the situation is not a self-created  
25 hardship. Even if the current owner had dug one of the wells, it would not be a self-  
created hardship since the owner has no control over the depth of the aquifer.

1 As discussed in the introduction, it is understood that County health standards would  
2 authorize development of the ADU within the wellhead protection zones<sup>1</sup> of the site.  
3 However, the applicant has made a prima facie showing that because the wells are  
4 shallow, they are at increased risk from contamination by single-family development.  
5 Absent testimony from someone qualified to address the issue that the risk would be  
6 insignificant, one must err on the side of caution to protect public health.

7 The need to err on the side of caution is the only reason the variance is approved in  
8 this case. There are significant flaws in the position of the applicant. Notably, if the  
9 applicant is so concerned about well contamination, why did he build his primary  
10 residence in the wellhead protection zones? Some forested areas to the immediate  
11 southeast of the property could also potentially be used for ADU development,  
12 although that would involve access through the wellhead protection zones and the  
13 area may not be large enough to reasonably accommodate an ADU while also  
14 keeping associated activities outside the wellhead protection zones. Also, as noted  
15 previously, the County's health regulations would also still permit construction of the  
16 ADU within the wellhead protection zones (see Shaw email, Ex. 5), indicating that  
17 although the risk of contamination may be increased by construction in the wellhead  
18 protection zones, it might not be significant.

## 12 CONCLUSIONS OF LAW

### 13 **Procedural:**

14 1. Authority of Hearing Examiner. The hearing examiner is authorized to  
15 conduct hearings and issue final decisions on variance applications. San Juan County  
16 Code ("SJCC") 18.80.020 Table 8.1; 18.80.100(C).

### 16 **Substantive:**

17 2. Zoning Designation. Rural Farm Forest.

18 3. Permit Review Criteria. The criteria for variances are governed by SJCC  
19 18.80.100(E), which are quoted below in italics and applied via corresponding  
20 conclusions of law.

21 **SJCC 18.80.100(E)(1):** *Literal interpretation and application of provisions of this*  
22 *code would deprive the applicant of the rights commonly enjoyed by other properties*  
23 *in the same district under the terms of this code, and allowing the variance will be in*  
24 *harmony with the intent and spirit of this code;*

25 4. As determined in the findings of fact, requiring the applicant to build his  
ADU within the wellhead protection zones on his property would increase the chance

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<sup>1</sup> A wellhead protection zone is an area in which various types of structures and uses are restricted in order to protect a water source. For most types of structures and uses that are restricted, the separation for a wellhead is 100 feet. See Ex. 5, "setback" attachment to email from Francine Shaw.

1 of contamination of his water source. Other property owners are allowed to build  
2 ADUs without this trade-off. Approval of the variance would also be consistent with  
3 intent of the zoning code, since it would not create any adverse impacts as determined  
4 in Finding of Fact No. 5. The criterion is met.

5 **SJCC 18.80.100(E)(2):** *A variance is necessary for the preservation and enjoyment*  
6 *of a property right possessed by other property in the same vicinity or district, but*  
7 *which is denied to the property in question because of special circumstances on that*  
8 *property;*

9 5. As determined in FOF No. 6, the need for the variance is due to the critical areas,  
10 steep slopes and the shallow water table of the site. All of these circumstances  
11 qualify are natural features of the property and therefore qualify as special  
12 circumstances as required by the criterion above.

13 **SJCC 18.80.100(E)(3):** *That the hardship described under this subsection is*  
14 *specifically related to the property and is the result of unique conditions such as*  
15 *irregular lot shape, size, or natural features, and the application of this code, and*  
16 *not, for example, from deed restrictions or the applicant's own actions;*

17 6. The hardship is potential contamination of water supply. As concluded in  
18 the preceding conclusion of law, this hardship is caused by the natural features of the  
19 property. The criterion is met.

20 **SJCC 18.80.100(D)(4):** *The granting of the variance will not be materially*  
21 *detrimental to the public welfare or injurious to the right of other property owners in*  
22 *the vicinity; and*

23 7. As determined in FOF No. 5, there are no significant adverse impacts  
24 associated with the variance request. The criterion is met.

25 **SJCC 18.80.100(D)(5):** *The variance will not permit a use prohibited by this code in*  
*the district in which the subject property is located.*

8. ADUs are authorized in the Rural Farm Forest zone. SJCC 18.30.040.

## DECISION

The proposed variance is approved.

Dated this 29th day of May, 2014.



Phil A. Olbrechts

County of San Juan 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 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.