

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant:	Bay Head Marina, LLC c/o Brett Thurman PO Box 15 Deer Harbor, WA 98243	S.J.C. COMMUNITY MAY 06 2013
Agent	Francine Shaw PO Box 2112 Friday Harbor, WA 98250	DEVELOPMENT & PLANNING
File No.:	PSJ000-12-0005	
Request:	Shoreline Substantial Development Permit and Shoreline Conditional Use Permit	
Parcel No:	262250019	
Location:	San Juan Island	
Summary of Proposal:	Bulkhead, Boat Launch Relocation, Landfill	
Shoreline Designation:	Rural	
Hearing Date:	4/19/13	
Application Policies and Regulations:	San Juan County Shoreline Master Program	
Decision:	Bulkhead and Boat Launch Approved subject to conditions, landfill denied without prejudice.	

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

3 Phil Olbrechts, Hearing Examiner

S.J.C. COMMUNITY

MAY 06 2013

DEVELOPMENT & PLANNING

4 RE: Bay Head Marina

5 Shoreline Substantial
6 Development Permit
(PSJ000-12-0005)

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL DECISION.**

7 **INTRODUCTION**

8 The applicant has applied for approval of a shoreline substantial development permit to
9 expand an existing parking area for a marina. The parking area will be expanded up to
10 twenty feet waterward by the replacement and relocation of some existing bulkheads and
11 the placement of fill behind the bulkhead. The application also involves relocating a boat
12 ramp. The applicant has also applied for a conditional use permit to authorize the
13 landfill. The shoreline substantial development permit is approved for the replacement of
14 the bulkheads and the relocation of the boat ramp. The parking area expansion and its
15 associated landfill is denied without prejudice.

16 The application for an expanded parking area and associated landfill is denied because
17 the applicant has not demonstrated that the "no action" alternative of leaving the parking
18 area in its current condition is not feasible as required by several shoreline policies and
19 use regulations. The parking area has been in use for more than 40 years and the marina
20 is currently full of boats, strongly suggesting that the public does not have a problem
21 operating within the confines of the existing parking area. No one came forth during the
22 hearing complaining of inadequate parking space and there was no specific evidence
23 provided regarding the inability to reasonably maneuver within the parking area. The
24 applicant provided some parking design guidelines, but there was no explanation as to
25 how the current parking design fails to meet these guidelines and, more importantly, why
compliance with the guidelines is necessary for reasonable use of the parking area. Since
the denial is based upon the absence of evidence and it may be possible to show that the
parking lot cannot be reasonably used, the denial is without prejudice. The applicant is
free to apply again for the landfill shoreline and conditional use permits.

22 **TESTIMONY**

23 Lee McEnery, Community Planning and Development, stated that the application is for a
24 substantial development permit to widen the parking area at the Bay Head marina and
25 bolster the sides with bulkheads. The bulkheads are at the vegetation line, near the edge of
the gravel on site. The existing boat launch will also be moved west. The county agrees
with the proposal to move the boat launch; however, the county disagrees with the plans

1 for the bulkheads and the associated fill. The fill will make dry land where there is no dry
2 land, and the bulkheads act as retaining walls. The county recommended denial of this
3 portion of the application. There is no plan to have parking in the widened space as it is
4 merely a point of access to the boat launch. The marina was built in the 1960s. The
5 original parking lot was built on fill. The applicant conducted an archaeology report
6 which provides historical photos explaining the progression of the marina. The bulkhead,
7 retaining wall, and fill are not consistent with county regulations. Staff issued two reports:
8 the first is dated December, 2012 and the second is dated March 18, 2012.

9 Applicant Testimony

10 Francine Shaw, planner with Law Offices of Stephanie O'Day, testified that the Bay Head
11 Marina was established 42 years ago. The marina was developed at a time when there
12 were no land use regulations. The applicant purchased the marina five years ago and is
13 attempting to update the facility. Three years ago, the applicant, Mr. Thurmond, replaced
14 pilings on the marina. Recently, the county approved a shoreline exemption for the
15 property, and the applicant is waiting for the Army Corps of Engineers to approve a
16 dredging permit application. There were nine months of soil tests associated with
17 obtaining the dredge permit. Based on previous decisions, the county prefers marinas over
18 joint-use docks.

19 Ms. Shaw noted that the application for the development permit is a multi-faceted
20 proposal. First, there will be demolition, repair, and replacement of a log bulkhead and a
21 rock bulkhead. Also, the boat launch will be demolished and moved, and the existing
22 parking lot will be extended by 14ft to provide maneuverability of the access aisle. The
23 existing log bulkhead is 340ft long and has deteriorated over the years because it was built
24 of non-treated lumber. It needs to be repaired and replaced. The proposal is to reduce the
25 log bulkhead by 20ft and then extend the existing rock bulkhead. The rock bulkhead
provides more stability to the driveway area. The existing rock bulkhead is 65ft long and
3-5ft high. It will be extended to 80ft. The rock bulkhead will be made of varying rock
types and will reuse the existing rocks. 360 cubic yards of fill will be placed behind the
log bulkhead, and 140 cubic yards will be placed behind the rock bulkhead, totally 500
cubic yards.

The new boat ramp location is necessary because the current set-up does not give proper
access for boats and cars. The staff report contends that the proposal is not repair and
maintenance, but, rather, new development. However, nothing new is being introduced on
site, and the applicant is merely modifying what already exists. The code allows
modification of existing development. The county claimed that the log and rock bulkheads
are retaining walls; however, both features operate both as bulkheads and retaining walls.
The bulkheads help with soil retention due to wave action. In regard to code section
18.50.070, the applicant is attempting to minimize the impact for shore stabilization by
using logs and only widening the existing access point. In regard to drainage, the applicant
hired an engineer to prepare a drainage plan. The parking lot slopes to the north so
stormwater runoff is not directed into the marina basin. Instead, runoff goes to the
adjacent road and infiltrates into the soil which is considered treatment. Thus, the

1 topography of the property provides stormwater controls. In regard to the land fill, there
2 are varying code requirements for landfills that are specific to marinas. The criterion says
3 that landfills should not be permitted to create parking areas for marinas unless “no
4 feasible alternative exists.” There is no other feasible alternative to expand the parking lot
5 access aisle rather than land filling. Currently, there is already parking areas to the north
6 so no expansion can occur that way.

7 According to Ms. Shaw, the access point needs to be widened to function. No additional
8 pollution will be created by expanding seaward because the marina will not be adding slips
9 or creating new parking stalls. In regard to vegetation, there is no vegetation, besides
10 native grasses, where the bulkheads are being extended and the access point widened.
11 Before the marina was built, there also was no vegetation based on historic photos. The
12 applicant provided a mitigation plan for pickleweed in the boat launch area. Pickleweed is
13 a salt-marsh protected plant. The existing pickleweed will be moved from the new boat
14 launch location, to the previous location. The Department of Fish and Wildlife approved
15 this mitigation plan. In regard to public welfare under the SMP, the applicant believes
16 providing safe and convenient access is a benefit to the public. The code requires a wider
17 access aisle than currently exists. In regard to parking, the parking serves the boat ramp
18 and marina. All parking will remain in the landward area of the marina. The entire site
19 lies within the shoreline area, and there is no upland site area for parking available. The
20 existing landscaping along the adjacent road complies with the county’s landscaping
21 standards for parking areas. There are not many plant options that are salt water tolerant.
22 Widening the access aisle makes the area safer for pedestrian traffic.

23 Stephanie O’Day stated that, to build the original facility, a jetty was built out and the
24 marina was dredged. Since then, the marina has filled back in with silt and needs to be
25 dredged again. It has been a man-made project from the beginning, thus the marina is not
a pristine ecosystem. There is no eel grass or spawning grounds. No parking spaces will
be added. The bulkheads will not be very high. The applicant will get no monetary gain
from these proposed updates. All changes are for safety reasons. If the applicant received
a repair and maintenance permit, the bulkheads could be rebuilt, in the same place, without
going through the long hearing process and having to obtain expensive reports. However,
the applicant wants to ensure safety and convenience for the public. Ms. O’Day add that
no construction will be seaward of the ordinary high water mark.

Ms. Shaw noted an error in the staff report, page 3 (section 18.50.190) where it states the
boat launch will be “60ft from its current position.” This should read “80ft.”

EXHIBITS

All 17 exhibits identified in the exhibit list of the attached to the March 18, 2013 staff
report were admitted into the record at the hearing. In addition, the following exhibits
were also admitted during the hearing:

Exhibit 13 April 17, 2013 letter from Ms. O’Day
Exhibit 14 Engineered drawings

FINDINGS OF FACT

Procedural:

1. Applicant. The applicant is Bay Head Marina, LLC.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on April 19, 2013. A site visit was also conducted on 4/19/13.

Substantive:

3. Site and Proposal Description. The applicants have applied for approval of a Shoreline Substantial Development Permit and Conditional Use permit to expand the existing parking area for a marina by replacing dilapidated bulkheads with new bulkheads up to twenty feet waterward of the existing bulkhead locations. The proposed expansion of parking area will increase the existing 15,600 square feet of impervious surface by 4,540 square feet.

The site is developed as a marina for long-term and permanent moorage. The marina offers about 74 moorage spaces, a boat launch and a parking area for its tenants. There is also a rock jetty/breakwater that was built long ago to protect the marina from wave energy. The parking area was created from landfill composed of dredging materials from the marina about 42 years ago before San Juan County had adopted any shoreline regulations. The parking area is about 320 feet long and varies from 32 feet to 45 feet in width. A single boat launch is currently located in the middle of the parking area.

The site currently contains some dilapidated log and rock bulkheads that are barely recognizable as bulkheads. The log bulkhead is 340 feet long and no longer provides support or erosion protection for the parking area. The proposal involves removing the log bulkhead and replacing it with a new 325 foot log bulkhead that will be located up to twenty feet waterward of the existing bulkhead and will not exceed three feet in height. The new bulkhead will be located about one foot landward from the ordinary high water mark ("OHWM"). Stockpiled gravel and clean gravel will be used as fill behind the log bulkhead and clean crushed gravel will be used for surface material.

The rock bulkhead is approximately 65 feet long and five to six feet high. The new rock bulkhead will be relocated one foot landward of the OHWM and will extend an additional twelve to fifteen feet waterward onto the west side of the pier for a total length of just under 80 feet. It will not exceed six to seven feet above grade and will extend five to fifteen feet waterward of the currently existing rock bulkhead.

The existing boat ramp will be removed and relocated about 80 feet west of its current position near the center of the proposed log bulkhead. It will be about 20 to

1 25 feet in width and surfaced with clean washed gravel. Dimensions of the new boat
ramp will not exceed the current boat ramp.

2 Approximately 500 cubic yards of fill will be used to fill the area between the
3 existing bulkhead and those proposed. The landfill material will be obtained from an
4 on island source and may consist entirely of gravel and fill dirt, or may include
5 dredge spoils from a future maintenance dredge of the marina basin recently approved
6 by San Juan County. An in-depth study has been conducted by GEOTEST of the soil
7 on the seafloor and no contaminants were found. A dump truck will bring the fill
8 material onto the site and it will be set in place and compacted by a backhoe. If de-
watered dredge spoils are used, they will be placed on shore by a crane mounted
9 barge after dewatering on the barge. The surface material or the new parking area
10 will be gravel.

11 4. Necessity of Bulkhead to Protect Parking Area. The applicant's had a
12 geotechnical report prepared for the proposal, Ex. 2. The report concludes that log
13 and rock bulkheads are necessary to protect the parking area and are the most
14 reasonable methods for doing so. Given that the parking area extends all the way to
15 the currently existing bulkheads and those bulkheads appear to have been damaged by
16 wave action over time, the geotechnical report is credible on this conclusion.

17 5. Adverse Impacts of Proposed Use. There are no significant adverse
18 impacts associated with the proposal. The parking area will be modestly expanded
19 into an existing 74 slip marina that is almost fully enclosed by a large rock jetty. The
20 number of parking spaces will not be increased by the proposal, so no significant
21 impacts with an increase in use are anticipated. A habitat management plan has been
22 prepared for the proposal. Written by an environmental consulting firm, the report
23 concludes that the proposal will not reduce ecological functions and environmental
24 conditions if recommended mitigation measures are implemented. Compliance with
25 those mitigation measures is made a condition of approval. The habitat management
plan, Ex. 2 to the Staff Report Addendum, concludes that shore-drift is negligible
within the marina because of the jetty, so it is determined that the proposal will not
have any significant impacts to shore drift. The marina is not located within a Class I
beach and the project site does not contain any feeder bluffs. An eelgrass survey
reveals no eelgrass within the vicinity of the proposal.

21 A stormwater site plan was prepared and approved for San Juan County for the
22 proposal as required by the Washington State Department of Ecology Stormwater
23 Plan. However, the amount of impervious surface created by the proposal did not
24 trigger any treatment requirements and the report makes no conclusions as to
25 protection of water quality. From this analysis it cannot be determined that the
increase in impervious surface poses no threat of adverse impacts to water quality and
the proposal will be conditioned for further analysis on this issue.

6. Necessity of Landfill. The applicant asserts that the expansion of the parking area
is necessary because the access aisle is not wide enough to allow the turning radius

1 for the launching and loading of boats. The applicant provides various parking lot
2 design standards but does not provide any analysis of how and whether the current
3 design fails to meet those standards. More important, there is no evidence presented
4 on the problems currently associated with lack of adequate turning radius. The
5 parking facility has been in use for over forty years and the marina is currently well
6 used, which strongly suggests that the space is adequate. There are on testimonials
7 from boat owners about the difficulties they have encountered in the use of the site, or
8 any persons who have come forward stating they do not use the site because of
9 inadequate parking. There was no engineering analysis or other narrative presented
10 that demonstrated the difficulties in launching and loading a boat. For these reasons,
11 it is determined that there is insufficient evidence in the record to support any finding
12 that more space is reasonably necessary for the operations of the parking lot.

8 CONCLUSIONS OF LAW

9 Procedural:

10 1. Authority of Hearing Examiner. The Hearing Examiner, after conducting
11 an open-record public hearing, is authorized to issue a final decision on shoreline
12 substantial development permits. SJCC18.80.110(E).

13 Substantive:

14 2. Shoreline Designation. The subject property is designated as Rural.

15 3. Zoning Designation. The subject property is designated as Orcas Village
16 Residential.

17 4. Permit Review Criteria. SJCC 18.50.210 requires a shoreline substantial
18 development permit for development of bulkheads. SJCC 18.80.110(H) establishes
19 the criteria for approval of shoreline substantial development permits. The criteria
20 include the policies of the Shoreline Management Act (Chapter 90.58 RCW), the
21 policies and use regulations of the San Juan County Shoreline Master Program, and
22 the requirements of the San Juan Municipal Code and Comprehensive Plan. The
23 applicable policies and regulations are quoted in italics below and applied through
24 conclusions of law.

22 RCW 90.58.020 Use Preferences

23 *This policy (Shoreline Management Act policy) is designed to insure the development*
24 *of these shorelines (of the state) in a manner which, while allowing for limited*
25 *reduction of rights of the public in the navigable waters, will promote and enhance*
the public interest. 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.

1 5. The proposed parking area expansion will be located landward of the
2 OHWM and so will not adversely impact navigation. The proposed boat launch will
3 extend fewer feet waterward of the OHWM than the launch it replaces.
4 Consequently, no interference with public navigation will result from the proposal
and public access will be enhanced by creating a more usable parking and launching
area. As determined in FOF No. 5, no adverse impacts are associated with the
proposal. For all of these reasons, the policy is met.

5 **SHORELINE MANAGEMENT ACT POLICIES**

6 **RCW 90.58.020(1)¹**

7 *Recognize and protect the statewide interest over local interest;*

8 6. The project will protect upland uses while not creating any significant
9 damage to the shoreline. The statewide interest is adequately protected.

10 **RCW 90.58.020(2)**

11 *Preserve the natural character of the shoreline;*

12 7. Natural character is preserved to the extent possible by the use of logs and
13 rock instead of concrete.

14 **RCW 90.58.020(3)**

15 *Result in long term over short term benefit;*

16 8. The project provides for preservation of the shoreline without any
17 corresponding adverse impacts to environmental resources. The proposal results in
18 both long term and short term benefit.

19 **RCW 90.58.020(4)**

20 *Protect the resources and ecology of the shoreline;*

21 9. As determined in Finding of Fact No. 5 there are no significant adverse
22 impacts associated with the proposal.

23 **RCW 90.58.020(5)**

24 *Increase public access to publicly owned areas of the shorelines;*

25 10. The project does not pertain to a publicly owned area of the shoreline.

¹ RCW 90.58.020(1)-(6) applies to shorelines of statewide significance. Section 3.4.F of the San Juan County Comprehensive Plan identifies all saltwater surrounding the islands of San Juan County as shorelines of statewide significance. The policies of 90.58.020(1)-(6) are mirrored in the policies of Section 3.4.F of the Comprehensive Plan and for the reasons provided in assessment of RCW 90.58.020, the Examiner also finds consistency with the policies of Section 3.4.F.

1 **RCW 90.58.020(6)**

2 *Increase recreational opportunities for the public in the shoreline;*

3 11. Since this is a private proposal with no public impacts no public recreation
4 mitigation may be constitutionally imposed.

5 **BOAT LAUNCH REGULATIONS**

6 **SJCC 18.50.190(I)(1):** *Boat launching ramps and marine railways shall be designed
7 so as not to obstruct longshore drift.*

8 12. As determined in FOF No. 5, the proposal will not adversely affect longshore
9 drift.

10 **SJCC 18.50.190(I)(3):** *Boat launching ramps, minor accessory buildings, and haul out
11 facilities shall be designed to be in character and scale with the surrounding shoreline.*

12 13. The boat launch will replace an existing boat launch in the middle of a fully
13 developed marina. It is fully within the character and scale of the surrounding
14 shoreline.

15 **SJCC 18.50.190(I)(4):** *Boat launching ramps and marine railways shall not be
16 permitted on Class I beaches or where their presence would interrupt driftways feeding
17 Class I beaches.*

18 14. The boat launch will not be in a Class I beach.

19 **Bulkhead Regulations²**

20 **SJCC 18.50.210(A)(2):** *Nonexempt bulkheads shall be permitted only when
21 nonstructural shoreline protection, restoration, or modification techniques have been
22 shown to be ineffective and it can be shown that one or more of the following
23 conditions exists:*

- 24 *a. Serious erosion is threatening an established use on the adjacent uplands;*
- 25 *b. A bulkhead is needed and is the most reasonable method of stabilizing an
existing beach condition;*
- c. There is a demonstrated need for a bulkhead in connection with water-
dependent or water-related commerce or industry in an appropriate environment;*
- d. A bulkhead is the most desirable method for stabilizing a landfill permitted
under this master program.*

² The staff report questions whether the proposed rock and log bulkheads qualify as bulkheads because staff does not see that the bulkheads are necessary to protect the parking area from erosion. The geotechnical report has determined that without bulkheads the parking area will continue to erode. Consequently, it is determined that the log and rock bulkheads qualify as bulkheads.

1 15. As determined in Finding of Fact No. 4, log and rock bulkheads are
2 necessary to protect the parking area from erosion. At the least, the parking area
3 qualifies as “water-related” under SJCC 18.20.230, because the parking area cannot
operate economically to serve the marina without its waterfront location.
Consequently, the bulkhead satisfies SJCC 18.50.210(A)(2)(c) above.

4 **SJCC 18.50.210(A)(3):** *Bulkheads shall not be permitted in conjunction with new*
5 *projects or development when practical alternatives are available.*

6 16. The bulkheads are necessary to protect the existing parking lot.

7 **SJCC 18.50.210(A)(4):** *Bulkheads shall be permitted on marine feeder bluffs only*
8 *where (a) a clear and significant danger to established development exists and (b)*
9 *there is reasonable cause to believe that the bulkhead will in fact arrest the bluff*
recession and will not seriously disrupt the feeder action or the driftway.

10 17. The subject “bank” is not a marine feeder bluff.

11 **SJCC 18.50.210(A)(5):** *Bulkheads constructed on Class I marine beaches shall be*
12 *located behind the berm.*

13 18. The subject beach is not a Class I marine beach.

14 **SJCC 18.50.210(A)(6):** *All bulkheads shall conform to the design requirements of*
15 *the Washington Department of Fish and Wildlife, except where such design would be*
incompatible with protection of the shore process corridor and operating systems.

16 19. As conditioned.

17 **SJCC 18.50.210(A)(7):** *Applications for bulkhead permits shall include at least the*
18 *following information:*

- 19 *a. Purpose of proposed bulkhead;*
- 20 *b. Low, normal, and high elevations, when appropriate;*
- 21 *c. Direction of net longshore drift, when appropriate;*
- 22 *d. Type of construction proposed; and*
- 23 *e. Elevation of the toe and crest of the proposed bulkhead with respect to water*
levels.

24 20. All of the required information is contained in the application materials and the
25 habitat management plan.

SJCC 18.50.210(A)(8): *Bulkheads shall be prohibited for any purpose if it will cause*
significant erosion or beach starvation.

21. The application materials from the applicant respond to this criterion by asserting
that “*the bulkheads will not create any beach starvation because the entire site beach is*

1 occupied by a gravel parking lot.” This response does not address erosion waterward of
2 the bulkheads or at the ends of the bulkheads. It is also unclear why the intertidal areas
3 waterward of the OHWM would not qualify as beaches. However, it is recognized that
4 the bulkheads will be located in a low wave energy area, such that significant erosion
impacts are unlikely. To verify, the conditions of approval will make approval of the
bulkheads contingent upon a finding by a qualified expert that the proposal will not
create significant erosion or beach starvation.

5 **Landfill Regulations**

6 **SJCC 18.50.270(A)(1):** *Landfills may be permitted only as conditional uses.*

7 22. The applicant has applied for a conditional use permit for the proposed landfill.

8 **SJCC 18.50.270(A)(2):** *The perimeters of all landfills shall include some means to*
9 *control erosion and contain sediment, such as vegetation or retaining walls.*

10 23. Bulkheads are proposed to contain the landfill.

11 **SJCC 18.50.270(A)(4):** *Applications for substantial development permits which*
12 *include landfilling shall include at least the following information:*

13 *a. Source of landfill material;*

14 *b. Physical characteristics of landfill material;*

15 *c. Proposed methods of placement and compaction;*

16 *d. Proposed surfacing material;*

17 *e. Proposed method(s) of perimeter erosion control; and*

18 *f. Proposed use of filled area.*

19
20 24. All required information was provided in the application materials and is also
21 included in FOF No. 3 of this decision.

22 **SJCC 18.50.270(B)(1):** *Urban, Rural, Rural Residential and Rural Farm-Forest.*
23 *Landfills shall be allowed in these environments subject to the policies and regulations of*
24 *this SMP; provided, that landfills shall not be permitted below the OHWM; and provided*
25 *further, landfills shall not be permitted for the sole purpose of creating additional land*
area.

1 25. The proposed landfill material does not meet the criterion above because the
2 applicant has failed to establish that the added space is necessary for the reasonable use of
the parking area.

3 The applicant takes the position that the landfill will be used for expanding the parking
4 area, so it is not being used solely for creating additional land. The applicant is apparently
5 arguing that if the created land will be used for any purpose, it meets the criterion. Of
6 course, such an interpretation renders the criterion completely meaningless. No one is
7 going to propose landfill for no reason. Even impounding some landfill to increase the
size of a lot for future sale would meet the criterion under the applicant's definition, on the
basis that the lot is being expanded for future development.

8 The provision is clearly designed to prohibit unnecessary landfill, but there is no additional
9 guidance within the shoreline use regulations as to how to further refine its meaning.
10 However, the shoreline policies make it easy to clarify the ambiguity. San Juan County
11 Comprehensive Plan Policy 3.5(H)(1) provides that landfill within shoreline areas should
12 be prohibited unless no feasible alternative exists. As determined in Finding of Fact No. 6,
13 the applicant has not established that an increase in expanded area is necessary for the
reasonable use of the parking area. For this reason, the applicant has not demonstrated that
there is no feasible alternative to the proposed expansion, the feasible alternative in this
case being the status quo.

14 It should also be noted that even if the criterion above is subject to a more flexible
15 interpretation, a shoreline substantial development permit application must be consistent
16 with all applicable shoreline use policies in addition to the use regulations. See SJCC
17 18.80.110(H). Consequently, even if the applicant's interpretation of the criterion above
18 were correct, the shoreline permit would still have to be denied because of failure to
comply with Policy 3.5A(H)(1).

19 **Miscellaneous**

20 **SJCC 18.50.070(J):** *All shoreline uses and activities must be located and designed to*
21 *minimize or prevent the need for shoreline defense and stabilization measures and flood*
22 *protection works, such as bulkheads, other bank stabilization, landfills, levees, dikes,*
groins, jetties, or substantial site regrades.

23 26. The existing parking area is already in need of shoreline stabilization. The proposed
24 expansion of the parking area does not increase the need for stabilization. As noted in the
geotechnical report, Ex. 2, without the bulkhead the parking lot will continue to erode.

25 **SJCC 18.50.090(B):** *Parking facilities must be designed and landscaped to minimize*
adverse impacts upon adjacent shoreline and abutting properties. Landscaping must

1 *consist of native vegetation and be planted before completion of the parking area in such a*
2 *manner that plantings provide effective screening within three years of project completion*
3 *and through maturity of the species.*

4 27. As approved by this decision (without the landfill), the proposal does not trigger any
5 landscaping requirements. If the expansion is approved by the applicant's re-application,
6 the proposal will probably be conditioned to include some landscaping to off-set the visual
7 impacts of increasing the parking area.

8 The staff report asserts that if the expansion is approved the landscaping standards apply to
9 the entire parking area, not just the expansion. This is a debatable issue, but it is concluded
10 that landscaping would only be required for the expansion. The parking area is
11 nonconforming as to landscaping requirements. It does not contain any landscaping.
12 WAC 173-27-080(2) provides that non-conforming uses that are nonconforming due to
13 bulk and dimensional standards may be expanded provided they do not increase the degree
14 of nonconformity. WAC 173-27-080(3) provides that nonconforming uses nonconforming
15 as to use may not be expanded. The landscape standards are more closely aligned with
16 bulk and dimensional standards as opposed to use standards. Consequently, the parking lot
17 can be expanded provided that it does not increase the degree of nonconformity. There is
18 nothing in the nonconforming use regulations that require the existing portions of a
19 development to be brought into compliance with current regulations if expansion is
20 authorized. Even if the nonconforming use provisions are inapplicable to this application,
21 the applicant could still not be required to mitigate existing deficiencies under the due
22 process/takings principles of vested rights and nexus/proportionality. If there is no
23 increase in parking area, there is no increase in landscaping nonconformity or adverse
24 aesthetic impacts and no landscaping is required.

25 If the applicant succeeds in acquiring approval of the landfill upon reapplication,
landscaping will likely be required as a condition of approval for the variance. This is
because an increase in parking area increases the degree of nonconformity by increasing
the area that must be obscured. It is difficult to segregate the landscaping required for the
expansion as opposed to that required for the existing parking, since the landscaping for
the existing parking area would be required within the expansion area. Given that the
expansion area will only comprise a small portion of the total parking area, sight obscuring
vegetation would probably only be required along the rock bulkhead. Nominally, this is
the area that would be most visible waterward of the jetty and it also has the greatest new
width to accommodate landscaping.

SJCC 18.50.130(A): *All shorelines shall be protected from degradation caused by the
modification of the land surface within the shoreline area or the adjacent uplands.*

1 28. As noted in FOF No. 5, the habitat management plan for the proposal concludes
2 that as mitigated the proposal will not reduce ecological functions and environmental
3 conditions. There is no evidence to the contrary and none can be reasonably inferred
4 given the low wave energy of the site and its current developed condition. If the
ecological functions and environmental conditions are not adversely affected, it must
be concluded that the proposal will not degrade the shoreline.

5 **SJCC 18.50.150:**

6 *A. During and after construction, all shoreline developments shall minimize any
7 increase in surface runoff through control, treatment, and release of surface water
8 runoff so that the receiving water quality and shore properties are not adversely
9 affected. Control measures include dikes, catch basins or settling ponds, oil interceptor
10 drains, grassy swales, planted buffers, and fugitive dust controls. All surface water
shall be retained on site unless discharge to road ditches or other drainage channels is
approved in writing by the County engineer.*

11 *B. All industrial, institutional, commercial, residential, recreational, and agricultural
12 uses shall adhere to all required setbacks, buffers, and standards for stormwater.
13 (Refer to shoreline use and environment designation regulations for specific limits.)*

14 *C. All shoreline development must comply with the applicable requirements of the
15 Stormwater Management Manual for the Puget Sound Basin or a County-approved
16 program that meets or exceeds the requirements of the manual.*

17 29. The existing proposal is nonconforming as to the stormwater requirements quoted
18 above. For the reasons parallel to those identified in COL No. 26, the conditions of
19 approval will limit conformance to these standards for the expansion of the parking
area. Stormwater mitigation is not required for the existing parking.

20 The applicant argues that compliance with the stormwater manual satisfies the rest of
21 the stormwater criteria quoted above. However, the criteria quoted above
22 contemplates more than that. SJCC 18.50.150(A) and (B) would be entirely
23 superfluous if the applicant only needed to comply with the stormwater manual. SJCC
24 18.50.150(A) and its focus upon water quality is particularly pertinent because the
25 proposal is exempt from stormwater manual treatment requirements. If the applicant
chooses to reapply for an expanded parking area, it will need to present evidence that
the proposal satisfies SJCC 18.50.150(A) and (B).

SJCC 18.50.190(H)(3): *All service facilities within or associated with a marina shall
include provisions to prevent pollutants from entering the water.*

1 30. For the reasons provided in COL No. 28, the criterion above does not require any
2 analysis or mitigation for the proposed new bulkheads and boat launch, but if the applicant
3 chooses to reapply for an expansion in parking area it will have to establish that the added
4 area will not add to pollutants entering the water.

5 **SJCC 18.50.190(H)(9):** *Surface runoff from marina areas shall be controlled so that*
6 *pollutants will not be carried into water bodies.*

7 31. For the reasons provided in COL No. 28, the criterion above does not require any
8 analysis or mitigation for the proposed new bulkheads and boat launch, but if the
9 applicant chooses to reapply for an expansion in parking area it will have to establish
10 that the added area will not add to pollutants entering the water.

11 **SJCC 18.50.190(H)(11):** *Where landfill is permitted, it shall be only for the necessary*
12 *water dependent portions of the facility and shall conform to the policies and*
13 *regulations of SJCC 18.50.360 and 18.50.370. Landfill shall not be permitted for the*
14 *creation of parking areas unless no feasible alternative exists and the creation of a*
15 *parking area would be consistent with the policies of this SMP and with the public*
16 *interest.*

17 32. As determined in Finding of Fact No. 6, the applicant has not demonstrated that
18 the proposed landfill is necessary for the reasonable use of the parking area.
19 Consequently, the applicant has not demonstrated that no feasible alternative exists
20 because there is insufficient evidence to conclude that the “no action” alternative is not
21 a feasible alternative.

22 The staff report questions whether the parking lot qualifies as a “water dependent” use
23 in the criterion above. However, the criterion specifically contemplates that parking
24 lots at least in some instances qualify as water dependent. In this case the parking lot is
25 necessary for the functioning of the marina and there is no other place it can be located.
For these reasons, the landfill for the parking area expansion is determined to be
authorized under the criterion above if the applicant can establish that no feasible
alternative to the expansion exists as discussed in the preceding paragraph.

SJCC 18.50.340(C)(1): *Parking areas shall not be located on shorelines unless it can*
be shown that the parking area is an essential accessory to a permitted use and that it
could not feasibly be located on the upland site. Parking areas designed to serve ferry
terminals shall be permitted on the shorelines.

33. The criterion is satisfied. There is no other area that could accommodate the
requested expansion in parking.

SJCC 18.50.340(C)(2): *Parking areas permitted on shorelines shall be located*
landward of the uses they are designed to serve, unless an alternative orientation would

1 *reduce the adverse impacts. They shall be no larger than is absolutely necessary and,*
2 *where appropriate, shall be screened from view.*

3 34. The proposed parking expansion would be located landward of all the other
4 marina facilities. As previously concluded, the applicants have not demonstrated that
5 the added space is absolutely necessary for the marina. As also previously determined,
6 partial screening would be required for the parking if the applicants succeed in
7 acquiring approval of the expanded parking upon reapplication.

8 **SJCC 18.50.340(C)(3):** *Upland parking areas serving shoreline uses shall be linked to*
9 *those uses by safe, pedestrian accesses.*

10 35. The application materials do not contain a proposed parking area design, so it is
11 unclear whether there will be adequate provision for pedestrian access. However, given
12 that the criterion is only applicable to the parking expansion, it is probably sufficient
13 that the added area will add to pedestrian safety by providing more space for pedestrian
14 movement.

15 **SJCC 18.50.340(C)(4):** *Parking is prohibited over water.*

16 36. No parking is proposed over water.

17 **SJCC 18.50.340(C)(5):** *Parking facilities shall be designed and landscaped to*
18 *minimize adverse impacts to adjacent shorelines and properties. Landscaping shall*
19 *consist of native vegetation or species contained in an approved landscape plan.*
20 *Vegetation shall be planted in the planting season prior to completion of the parking*
21 *area. Plantings must provide effective screening within three years of project*
22 *completion and through maturity of the species.*

23 37. As previously determined, landscaping requirements only apply to the new
24 parking area and must be only imposed to the extent necessary to mitigate the impacts
25 of the new area. If the applicant succeeds in reapplying for new area, a landscape plan
consistent with the provision above requiring landscaping along the rock bulkhead will
probably be required.

26 **Conditional Use Permit**

27 **SJCC 18.80.110(J)(4):** *Uses which are classified or set forth in the Shoreline Master*
28 *Program as conditional uses may be authorized by the County provided the applicant*
29 *can demonstrate all of the following:*

30 *a. The proposed use is consistent with the policies of RCW 90.58.020 and the policies*
31 *of the Shoreline Master Program;*

1 38. The criterion is not met. As determined in previous conclusions of law, the
2 proposal fails to comply with Shoreline Master Program policies because the
3 applicant has not established that the “no action” alternative is not a feasible
4 alternative for use of the parking area.

5 **SJCC 18.80.110(J)(4)(b):** *The proposed use will not interfere with the normal public*
6 *use of public shorelines;*

7 39. The proposed expansion would be landward of the OHWM within a fully
8 developed marina so there is nothing to suggest that public use of the shorelines
9 would be impaired.

10 **SJCC 18.80.110(J)(4)(c):** *The proposed use of the site and design of the project is*
11 *compatible with other permitted uses within the area;*

12 40. The relatively modest expansion of the parking area would only have nominal
13 aesthetic impacts to adjoining properties or to those persons waterward of the
14 shoreline.

15 **SJCC 18.80.110(J)(4)(d):** *The proposed use will cause no unreasonably adverse*
16 *effects to the shoreline environment in which it is to be located;*

17 41. As discussed in Finding of Fact No. 5, there are no significant environmental
18 impacts associated with the proposal. The criterion is satisfied.

19 **SJCC 18.80.110(J)(4)(e):** *The cumulative impacts of additional requests for like*
20 *actions in the area, or for other locations where similar circumstances exist, shall not*
21 *produce substantial adverse effects to the shoreline environment, e.g., the total of the*
22 *conditional uses shall remain consistent with the policies of RCW 90.58.020 and the*
23 *Shoreline Master Program; and*

24 42. The proposal only provides for a nominal increase in the parking area of a marina
25 that is several decades old. It is unlikely that this would set a precedent for many
other marinas and even if it did, the request is of modest size and would not create
adverse impacts at a cumulative level.

SJCC 18.80.110(J)(4)(f): *The public interest will suffer no substantial detrimental*
effect.

43. There are no significant adverse impacts associated with the proposal and the
proposal facilitates the use of a marina, which in turn reduces the pressure to build
private docks. The public interest will suffer no detrimental effect and will in fact
benefit from the proposal.

DECISION

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The shoreline substantial development permit for the proposed boat launch relocation and new bulkheads is approved, however the new bulkheads must be located at the location of the existing bulkheads. The shoreline substantial development permit and conditional use permit for the proposed landfill are denied without prejudice. If the applicant succeeds in acquiring approval of the landfill upon reapplication, this decision shall be construed as approving the construction of the proposed bulkheads at the location proposed in the application materials of this decision. The approved portions of the proposal are subject to the following conditions:

1. The Applicants shall obtain all other required permits and abide by the conditions thereof.
2. Construction shall not be commenced until all relevant appeal periods have run.
3. Development under this permit shall commence within two years of the date of permit approval and shall be substantially complete within five years thereof or the permit shall become null and void.
4. Failure to comply with any terms or conditions of this permit may result in its revocation.
5. The Applicants shall schedule a site inspection upon completion in order to provide staff an opportunity to verify consistency with the proposed project design and the conditions of approval.
6. The bulkheads shall conform to the design requirements of the Washington Department of Fish and Wildlife.
7. The proposal shall comply with the recommendations of the 11/28/12 habitat management plan, Ex. 2. An addendum shall be prepared for the habitat management plan assessing whether the bulkheads will contribute to erosion or beach starvation. The addendum shall contain recommendations for full mitigation of any erosion or beach starvation impacts and those recommendations will apply as conditions of approval to the extent determined necessary by staff.
8. The proposal shall comply with the recommendations of the 6/18/12 Earth Solutions geotech evaluation, Ex. 2 to the staff report.

Dated this 5th day of May, 2013.


 Phil A. Olbrechts

 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

1 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.

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

4 Depending on the subject matter, this decision may be appealable to the San Juan
5 County Superior Court or to the Washington State shorelines hearings
6 board. State law provides short deadlines and strict procedures for appeals and
7 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
8 file an appeal are encouraged to promptly review appeal deadlines and procedural
requirements and consult with a private attorney.

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