

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: George and Susan Swindells
1400 SE 8th St.
Bellevue, WA 98004

Agent Francine Shaw
PO Box 2112
Friday Harbor, WA 98250

File No.: PSJ000-13-0005

Request: Shoreline Substantial Development Permit

Parcel No: 361823001, 361824002, 361821002, 361824001,
361821002

Location: 640 Spirit Cove Lane, San Juan Island

Summary of Proposal: Community Dock

Shoreline Designation: Conservancy

Hearing Date: July 18, 2013

Application Policies and Regulations: Shoreline Master Program

Decision: Approval with conditions.

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

Phil Olbrechts, Hearing Examiner

RE: George and Susan Swindells Shoreline Substantial Development Permit (PSJ000-13-0005)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.
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INTRODUCTION

The applicants have applied for approval of a Shoreline Substantial Development Permit to build a community dock serving five parcels on the north shore of San Juan Island. The application is approved subject to conditions.

TESTIMONY

Note: This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary for this final decision. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner or an indication of what information is significant to this decision.

Julie Thompson, senior San Juan County planner, stated the application is for a joint-use dock being utilized by five parties. The parties are the Swindells and a few select individuals from the Lummi Tribe. The tribe members would have access to the dock in order to reach the cemetery near the site. The dock size is changing from the original proposal to make it shorter. Paul Anderson, Department of Ecology, requested that the ordinary high water mark be verified. This verification was completed, and Mr. Anderson approved of the results. Staff is recommending approval of the application as it meets the requirements for a joint-use dock. In regard to adequate alternative moorage, there are four families involved in this dock and finding moorage for four boats at Friday Harbor would be difficult.

Applicant Testimony

Erin Anderson, representing the applicants, testified that the dock would serve four residential parcels and one non-residential parcel. The dock will be built on Theodore Swindells' property. Mr. George Swindells owns two of the other parcels, and Ms. Elizabeth Holsey owns another. The dock will be built in Spirit Cove. The dock would be used as moorage for 21, 36, 40, and 42 foot boats. The new dock would

1 complete dock access for the parcels in Spirit Cove because the parcels to the west
2 are fully subscribed to an existing dock. The applicants asked to be added to the
3 existing dock, but the owners do not wish to expand it. Additionally, there is another
4 dock around the point used by neighbors to the east, but it is fully subscribed as well.
5 In regard to adequate, feasible, alternative moorage, the applicants inquired at Roche
6 Harbor, Snug Harbor, and Friday Harbor. All three harbors stated that there is not
7 adequate moorage, in correspondence. There is not adequate moorage within the
8 cove because the size of the boats would require large swing radiuses on the buoys.
9 This could potentially block access to the cove. An experienced dock engineer
10 created the proposed design. Two eel grass surveys were completed that included
11 both divers and videotaping. The most recent survey was conducted in 2009. This
12 survey found the nearest eel grass bed was 29ft away from the proposed dock. The
13 applicants do not anticipate eel grass cropping up closer to the dock because it
14 becomes bedrock. This assumption will be verified during the HPA process by Fish
15 and Wildlife.

16 Stephanie O'Day, applicant's representative, noted that the water is 15ft deep at the
17 dock so it is not conducive to eel grass.

18 Erin Anderson, applicant's representative, added that there is some macro-algae
19 growth at the site, but the biological evaluation found the dock would have minimal
20 impacts. A drainage plan was prepared for a gravel trail. The trail was designed to
21 have minimal environmental impacts. The project was designed to go above and
22 beyond meeting county code. The dock will use non-glare paints, be made of natural
23 materials, no pile driving, a marine animal monitoring program, work in the fish
24 window, and utilize gravel package material to support algae growth. The dock size
25 has been reduced to ensure no negative impacts to the environment. There are three
pieces of the dock: (1) fixed pier portion, (2) gangway portion, and (3) the floating
dock. Francine Shaw stated that the applicants have redesigned the dock to meet
county standards. San Juan County Code limits the dock to 2,000sqft in area and
300ft in length. The applicants have reduced the length of the dock to meet the area
requirements. The area of the fixed pier was miscalculated in the original proposal.
The float will be reduced from 80ft to 70ft. The new dock design will be 1,996sqft.
Stephanie O'Day noted that Francine Shaw found the discrepancy in dock size, and
the change was not mandated by an outside source.

21 Erin Anderson testified that the Shoreline Management Act has three policies. First,
22 water dependent uses are preferred uses of the shoreline. Second, environmental
23 protection must be top priority. Third, public access should be considered when
24 making shoreline decisions. The dock will not inhibit public uses of the cove. San
25 Juan County Shoreline Management focuses on protecting the environment and
stopping the proliferation of docks. The County prefers community docks over two-
person, joint-use docks. The proposed dock should be considered a community dock
because it encompasses five parcels. The dock will moor four boats. Both Roche and
Snugg Harbors have years-long waitlist for moorage. At Friday Harbor, there are 500
boat slips, but only 80 parking spaces. The proposed dock has been designed to

1 decrease its visibility in order to meet aesthetic concerns. The Comprehensive Plan
2 does not require potential archaeological sites to be protected from growth; instead,
3 the plan states that the applicants must consult with the Department of Archaeology
4 and Historic Preservation and use a professional archaeologist to identify areas that
5 contain potential invaluable archaeological data. The applicants used Steve Kennedy,
6 a well known marine archaeologist, to determine the best placement of the dock. The
7 Dept of Archaeology and Historic Preservation concurred with Mr. Kennedy's
8 findings and the dock proposal. In addition, the applicants are instituting a cultural
9 resources monitoring program. The County has reviewed the cultural resource
10 analysis along with the Army Corp of Engineers. All environmental concerns and
11 impacts have been explored and mitigated in the proposal. The float is in a very deep
12 part of the cove, resulting in minimal impact to algae. In regard to salmon, the
13 project was analyzed as if there was a salmon presence, despite no site specific study
14 stating salmon utilize the area. There would be no adverse effect to salmon spawning
15 by the project.

16 In regard to aesthetic impacts, Ms. Anderson cited the Horseshoe Bay decision as
17 mandating that being the first dock in a pristine area is not grounds for permit denial.
18 This joint-use dock will prevent the "porcupine" effect from happening at Spirit
19 Cove. In regard to salmon, the height of the dock will reduce the shading effect.
20 Stephanie O'Day testified that the subject property is 47 acres. It was previously
21 owned by an Indian woman named Pearl Little. The land was homesteaded in 1899
22 and passed from generation to generation. The Swindells property was part of the
23 Pearl Little Estate. There is a 2-acre parcel which belongs to the Spirit Cove
24 Cemetery Association. The dock to the west (OJ community dock) was approved to
25 serve five lots. In regard to the cemetery, there is a sealed list of people allowed to
visit the cemetery from the Lummi Tribe. The dock will not be built near the
cemetery. The Swindells have owned the property since 2001 and have been
wonderful caretakers of the land. Permitted visitors will be granted access to the
dock to visit the cemetery. There are extreme currents around the North Shore, and
the coast is not conducive to buoying boats. She cited the *Slaughter* case as an
example of the Shoreline Hearings Board concurrence that buoying is not an
alternative moorage option in this area. In regard to Friday Harbor moorage, the
harbormaster indicated that there is not any open moorage, currently. During the
summer, occupancy is normally full. Year-round moorage is only granted to 30ft or
larger boats. Commercial moorage on San Juan Island is generally fully subscribed in
the summer. The parking in Friday Harbor is abhorrent. There is little parking in
both the port and town areas. A port commissioner noted that Friday Harbor is not a
feasible alternative for someone living on the northend of the island. People who live
on the northend want to fish and crab on the northend. It takes a huge amount of time
to travel from Friday Harbor to the northend by boat.

George Swindells stated he contacted the Lummi nation when he bought his land to
ensure they had access to the cemetery. He takes care of the cemetery and ensures it
is well maintained. He protects the wetland areas as well. The proposed dock will be
over 40ft from the cemetery line.

1 Elizabeth Swindells Holsey noted that she is George Swindells' daughter. She is a
2 sailor and spent nine summers on Lopez Island. She wishes to buy a 41ft Newport,
3 but it is difficult to find moorage because Roche and Snugg Harbor are full. Ted
4 Swindells testified that he is an avid fisherman. The drive to Friday Harbor combined
5 with boating from Friday Harbor to the northend creates a huge environmental
6 impact. It is not a feasible option. The dock will help provide access to the island for
7 children from Camp Nor'Wester.

6 Public Comments

7 Mr. O'Day testified that he has been involved in the previous three property
8 transactions of the subject site. The Swindells have been the best caretakers of the
9 property since Pearl Little. They have beautified and preserved the site. The pristine
10 beach will be maintained because the proposed dock will be at a rocky point. The
11 dock will take nothing away from the aesthetics of the property. The Swindells have
12 been very generous to the community. The family deserves this dock as they have
13 gone above and beyond to protect the environment and add to the overall community.
14 Eric Parsons stated that he owns the property immediately to the west of the
15 Swindells' property, and his property looks out on Spirit Cove. His property is served
16 by the OJ Community Dock. He supports the project and believes it will minimize
17 the chance of the "porcupine" effect in Spirit Cove.

18 Samuel Hopewell, Friends of the San Juans, said that Friends has five concerns with
19 the application. First, the applicants have failed to demonstrate alternative mooring
20 facilities are not feasible or adequate. Second, the project is out of scale with a dock
21 and a driveway. Third, the applicants failed to show that environmental impacts will
22 be minimized. Fourth, it is unclear if cultural resources will be protected, despite
23 this being required by the comprehensive plan. Fifth, the project would impose
24 unwarranted aesthetic impacts. Friends takes issue with the fact that the project was
25 revised so recently (within the past 48 hours). Recent revisions resulted in difficulty
for the public to participate in the hearing. The applicants did not show that there is
no moorage available at Friday Harbor. Friends contacted Friday Harbor in late June.
The harbormaster stated that there were available slips for all four of the applicants'
boats, according to Mr. Hopewell. Additionally, more slips will be opening in the fall
of 2013. Inconvenience of parking and travel time cannot be used as an argument
against Friday Harbor mooring. Moreover, the applicants did not demonstrate that
mooring buoys are not a feasible option. The application concedes that at least five
mooring buoys can be installed in Spirit Cove, thus there is room to moor the
applicants' four boats. The SMP prioritizes buoys over docks. In regard to the dock
and driveway, these items are out of scale. The dimensions of the construction were
chosen to accommodate the applicants' electric cart. The SMP mandates that the
length of docks should be the minimum necessary to accomplish moorage for the
intended boating use. The planned fixed pier, gangway, and dock are too wide at
8.5ft wide. This width is to accommodate an electric turntable for an electric cart.
Mr. Hopewell has not reviewed the new site plan, but he does not believe the width

1 was changed. The proposal needs to be amended to meet the SMP mandate of
2 minimum length necessary. The planned driveway is not necessary to accomplish
3 moorage of boats. Furthermore, the application fails to establish that the driveway is
4 necessary for the intended cart access. The application demonstrates that the
driveway could be reduced in size by 25 percent. The immense driveway will require
large amounts of fill and many dump trucks to complete. The driveway should be
reduced from 8ft to 6ft wide.

5 According to Mr. Hopewell, in regard to environmental impacts, the applicants failed
6 to establish these impacts would be minimized and eel grass avoided during
7 construction. Spirit Cove holds eel grass beds, kelp, macro-algae, forage fish, and
8 other natural species; however, the application does not contain completed biological
9 surveys of the project area. The last survey was conducted five years ago. The dock
10 will float over macro-algae, kelp, and be near an existing eel grass bed. The water
11 depths in the proposed dock area are conducive to eel grass beds. The applicants plan
12 a follow-up survey in 2013 which suggests the applicants realize eel grass could be
13 affected by the project. In regard to cultural resources, the applicant has failed to
14 demonstrate that the archaeological and cultural resources of Spirit Cove would be
15 protected for future study. Spirit Cove Uplands hosts a documented archaeological
16 site. The project area overlaps with this documented site. Little subservice
17 investigation of the site area has occurred, and the application notes that at least one
18 archaeological feature would be buried by the driveway. The Comprehensive Plan
19 requires that archaeological areas be protected for study. The massive, permanent
driveway would make future study very difficult, if not impossible. In regard to
aesthetic impacts, the application lowers the aesthetic value of Spirit Cove. Public
views would be impacted by the construction of the dock. The site is a popular
destination in large part because it is undeveloped and boasts exceptional views and a
place for recreational activities. In regard to eel grass depths, 15ft is conducive to eel
grass. Studies have shown eel grass at depths as high as 20ft or greater in areas
around San Juan Island. Additionally, there have been no recent studies to determine
what eel grass setbacks will be necessary. The existence of an archaeological site is
not singular grounds for dismissal of an application, but the Comprehensive Plan
states the site should be preserved for study.

20 Stephanie Buffum, Executive Director for Friends of the San Juans, testified that the
21 public needs time to review the new application materials submitted at the hearing.
22 She added that the Lummi tribes are not the only tribes with usual and custom fishing
23 rights in the San Juan Islands. There has been no acknowledgment or comments from
24 these other tribes in the area. The water in the area is well used by boats, canoes, and
25 other recreational items. Ms. Buffum lives on Shaw Island and accesses San Juan by
boat. She does not need a parking space because she uses her boat to come and go.
The SMP does not ask that the adequacy of a parking lot be reviewed when assessing
a moorage facility. By utilizing a moorage buoy and a moorage facility, no car is
necessary. In the past, Ms. Buffum has commuted from 45 minutes to over three
hours to reach her dock. In regard to aesthetic impacts, Spirit Cove is one of the last,
pristine areas of the northside. The area is part of the designated scenic byway and

1 needs to be preserved for future viewers. In regard to biology, there is forage fish
2 utilization in the area. Additionally, the Washington State Department of Natural
3 Resources has stated that eel grass can grow out to 20ft depths. The Department also
4 mandates a best management practice of 45 percent grading for docks. It is
5 impossible to achieve 100 percent grading because of infrastructure and stabilization
6 needs.

7 Gordon Peterson commented that he supports the project. He is a lifetime boater and
8 spends 300-500 hours boating around the island every year. Mooring buoys are not
9 practical, especially as people are often moving items to and from their boats. Four
10 mooring buoys outside Spirit Cove would cause serious navigational problems.
11 Utilizing dingys to reach the buoys can have negative environmental impacts because
12 the dingys are dragged along the beach. He believes that Friends of the San Juans has
13 not shown consistency in their dock views and argues that the politics of the
14 organization skews its comments. Friends of the San Juans allowed a similar dock to
15 be built on Shaw Island without contesting its construction.

16 Stephanie Buffum responded to Mr. Peterson's comments, noting that the dock on
17 Shaw Island (the Ellis Dock) was joint-use and had significant amounts of property
18 associated with it. The Ellis dock was built by a Friends board member.

19 Steve Buck stated that he believes docks are necessary for boating. He does not think
20 docks are aesthetically displeasing, but he argues they are an essential part of the
21 boating community on San Juan Island. Much of the island is not conducive to docks
22 because of the nature of the water. If a person does not want to see a dock, he/she
23 should move to an area where docks are prohibited. People who are willing to incur
24 the expense of building a dock should be allowed as long as environmental impacts
25 are mitigated. Docks are better for the environment than anchors which tear up the
sea floor. Docks increase property values, thus increasing tax money for the county.
The Swindells have been valuable members of the community and should be treated
fairly. Buoys are not a safe alternative to docks because the waters are very swift in
the area. The use of buoys would create a safety concern, especially with four in one
area.

Anna Myers noted that she agrees with the members of Friends of San Juans' requests
because of the archaeological value of the site. Her great grandfather is buried in the
cemetery on the site. She submitted an affidavit from her great grandmother, a
member of the Jamestown S'Klallam Tribe. According to Ms. Myers, a member of
the Army Corp of Engineers told her the project will cause harm to the cemetery.
The tribal liaison also told Ms. Myers the dock should not be built. The project will
create instability in the bank which will threaten the cemetery.

Steve Belluomini testified that he supports this application and commends the effort
put into the project by the Swindells. The application is very specific and thorough.
The site is located near some of the swiftest and most dangerous waters around the
San Juans. Mooring buoys are not feasible in these types of waters and would create

1 dangerous situations. Mr. Belluomini moored his boat in Friday Harbor for over
2 eight years and claimed it was a very difficult situation. There are very few moorage
3 opportunities in the Harbor for boats over 30ft. The demand for moorage exceeds the
4 availability. It would be dangerous to put a mooring buoy both in and out of Spirit
5 Cove. Even inside the cove, the boat would be subject to the vortex created by the
6 currents outside.

7
8 Bob Levinson stated that the Department of Natural Resources issued a report about
9 eel grass in the region. The report contends that the effect of beautification on eel
10 grass in the Puget Sound region has not been properly researched. Additionally, the
11 report notes that little is known about the contribution of eel grass to Puget Sound's
12 food web. Eel grass considerations are difficult because there is not enough research
13 present. Moreover, San Juan's shorelines are completely different than Puget Sound.
14 In regard to mooring buoys, Mr. Levinson's neighbor has had his boat, which is
15 moored on a buoy, turned over multiple times due to the strong winds and currents.
16 He supports the Swindells' application. He believes that Friends is keeping people
17 from even applying for docks because people are afraid of the expensive appeal
18 process. The SMP is meant to preserve the residential and recreational uses of the
19 shoreline, and this application meets those goals.

20 Robert Miller said he does not support this application. He is related to Pearl Little
21 and is a descendant of one of the Lummi chiefs buried at the cemetery on the
22 Swindells' property. Mr. Miller has a MBA with a concentration in sustainable
23 development and served 23 years in the Navy. Sustainable development requires that
24 all stakeholders be involved in the process. As a descendant of Pearl Little, he should
25 have been invited to participate in this application process. He submitted a letter
from his son (exhibit 15) which relates his son's fears that the dock will damage the
cemetery, thus ruining his relatives graves. The dock location is too close to the
cemetery. The applicants do not have accurate information about the cemetery, thus
they should not be completing construction near it. Although the applicants claim the
cemetery is approximately 2 acres, the cemetery is over 4 acres in size according to
BLAs on file with the county courts. The property's septic system was installed on
the cemetery grounds which is upsetting to descendants of those buried on the site.
Sustainable development uses benefit-cost analysis to evaluate projects. In Mr.
Miller's opinion, monetary value cannot be placed on archaeological and cultural
resources such as the cemetery. The costs for this project are far too great for it to be
approved. The Swindells have disregarded the descendants when making decisions
about the property. The cultural director of the Jamestown S'Klallam Tribe asked
that all living relatives be notified before any construction is done near the cemetery;
however, this request was not completed and descendants remain unaware of the
actions occurring on the property. Mr. Miller was not notified of the public hearing.
The Lummi Tribe may approve of the project, but other Tribes, such as the
Jamestown S'Klallam, do not agree with it.

Becca Miller stated that she has been visiting the cemetery for over 10 years along
with her husband, Robert Miller. The site is very beautiful, and Ms. Miller feels the

1 spirits of those buried there when she visits. Eagles frequent the area, as well. A
2 dock does not match the atmosphere of the site and would impair the vision that those
3 buried in the cemetery experienced. Docks lessen the serenity of the island and
4 should be avoided. Ms. Miller has never seen a boat in Spirit Cove. The Swindells
5 should use an existing dock in the area rather than build a new one. Even if the dock
6 is approved, the driveway should be denied because it will run too close to the
7 cemetery. She believes there is salmon in the area based on the presence of eagles
8 along the shore. If built, the dock will block the views from the cemetery. To be
9 fully enjoyed, the area should be left pristine.

10 Paul Wilcox said he will be constructing the dock if it is approved. The dock will be
11 built on solid bedrock, thus it will not move or vibrate. The earth will not shake so
12 there will not be threats to the bank and cemetery. The construction will not use
13 conventional pile-driving equipment; instead, a large rock drill will create the holes.
14 The pilings will be surrounded by small, angular crushed rock. In regard to the size
15 of the float, it is large to accommodate the 80ft gangway. The float must provide
16 enough buoyancy to handle the weight of the gangway. 8ft is the minimal size of a
17 safe platform on these waters. In regard to eel grass, the HPA requires a dive survey
18 which verifies the location of eel grass bed prior to beginning construction. This will
19 ensure the setback requirement is met. Grading on a fixed dock with no flotation can
20 net 60 percent, not 45 percent. On the float, 45 percent is the net amount of lighting
21 that will get through, but the dock is different.

22 Nancy Debough stated that, in 1997, she contacted the County about its lack of
23 protection for the cemetery when the property was owned by the Everetts. The
24 Swindells have been better caretakers, but the County has still failed to protect the
25 cemetery. There was a boundary-line adjustment in 2005 which added on to the
cemetery parcel. The dock will be on the parcel, but not the cemetery. The subject
site is one of the last area of archaeological significance in the region. In 1997, Judge
Hancock declared that no use may be made of the cemetery property except for
cemetery purposes. She wants the cemetery protected from development such as the
road and dock. The BLA did not increase the cemetery itself, just the parcel in which
it is located.

Becca Miller added that she believes the Swindells have been wonderful caretakers of
the property.

Staff Rebuttal

Julie Thompson reiterated that this dock application is extraordinarily different than
the Pohl application. The proposed Pohl dock faced the bay. This positioning
resulted in the neighbors having a clear view of the dock while the Pohls could not
see the dock at all. Additionally, the proposed Pohl dock location was in an area with
no docks, but the proposed Swindells' dock is one of many docks in its area.

Applicant Rebuttal

1 Stephanie O'Day submitted a packet of documents in regard to visitation rights of
2 Pearl Little's descendants (exhibit 16). According to a 1989 letter from the United
3 States Department of Interior: Bureau of Indian Affairs, the Little property is
4 considered private land and not held in trust by the U.S. government. Therefore, the
5 property is subject to normal property rights, and the descendants had no claim or
6 right to the property once it was sold. When Pearl Little died without a will, the
7 ownership of the property was contested among many parties, including the Millers
8 and Ms. Myer's mother. The property was eventually sold, and the money was
9 disbursed among several of the parties. The County requires any development on any
10 of the Little property to be reviewed by a qualified archaeologist and the Lummi
11 Tribe. The Swindells have had multiple archaeological reports completed as they've
12 developed their section of the property. Additionally, the Swindells have respected
13 the condition set by Maggie Fitzugh's deed to her daughter which mandates a 2.11
14 tract acre of land be kept as a cemetery for the Lummi ancestors. In 1997, the
15 previous owner of the Swindells' property completed a boundary line adjustment
16 which expanded the cemetery property to 4.5 acres. The reservation only runs with
17 the land that Maggie Fitzugh defined, the 2.11 acres. There has been no septic system
18 or dock on the cemetery parcel. In 1997, Judge Hancock ordered that the Lummi
19 Tribe was the affected tribe in issues dealing with the Little property, thus the Lummi
20 Tribe would be consulted before any development. In 2005, the Swindells deeded the
21 cemetery property to the Spirit Cove Cemetery Association.

14 Erin Anderson added that RCW 36.70b.080 allows the County to require additional
15 information from the application during its review process. The County asked for
16 more information regarding the size of the dock, thus the applicant provided the
17 requested details. The late submittal was not an attempt to circumvent public review.
18 The only change was to shrink the dock. In regard to availability at Friday Harbor,
19 there were two slips available one week ago, but these slips have already been rented.
20 The uncertainty of the availability at Friday Harbor makes it infeasible as an
21 alternative mooring option. There is a 6.25:1 ratio of parking spaces to slips, thus it is
22 not an adequate alternative. Water dependent uses are the preferred use of the
23 shoreline, according to the SMA. The application details the lack of environmental
24 effects from this project. Placing mooring buoys outside Spirit Cove will deny access
25 to the inner Cove because the four boats would block the entrance. The Lummi Tribe
concurs with the Army Corps of Engineers' permission to construct this dock. The
dock will provide the Lummi with enhanced access to the cemetery site. The
driveway is only 3,500sqft and will utilize geotextile fabric in its construction. There
is a cultural monitoring plan to ensure no archaeological sites are ruined. The dock
will be built on bedrock which is not compatible with eel grass. In order to moor four
boats, the dock must remain the size it is.

25 Ted Swindells noted that the water is very unsafe, and his father, who is 80 years old,
and children would not be able to navigate the waters on dingys to reach boats
moored at buoys. The carbon foot print from driving back and forth to Friday Harbor
would be very high. He asked that others respect his family and their property rights.

1 George Swindells said he does not understand the objections to the driveway. He
also added that the septic system is not close to the cemetery parcel.

2 Erin Anderson stated that this is community dock that meets the SMA standards. The
3 dock has been carefully planned to provide a service to the Swindells and Lummi
4 Tribe while maintaining the scenic views and natural environment. The County has a
lot of experience in reviewing dock applications and has approved this project.

5 In regard to Friday Harbor moorage, Ms. O'Day noted that small boats are not used
6 on the north of the island in the winter because the water is too rough. Small boats
7 are not moored year-round. There are limited permanent mooring options for larger
boats.

8 EXHIBITS

9	Exhibit 1	Staff report
10	Exhibit 2	SEPA Checklist w/ DNS
11	Exhibit 3	Request for review
12	Exhibit 4	Application materials
13	Exhibit 5	Comment letter from Anderson
14	Exhibit 6	Friends of San Juan letter submitted July 15
15	Exhibit 7	Cabell comment letter
16	Exhibit 8	Revised site plan submitted July 12
17	Exhibit 9	Revised site plan submitted July 17
18	Exhibit 10	Revised SEPA Checklist submitted July 17
19	Exhibit 11	Aerial of the North Shore
20	Exhibit 12	Aerial of the Cove area
21	Exhibit 13	Tammy Hayes email packet dated July 16
22	Exhibit 14	Emma Cepa affidavit (via Anna Myers)
23	Exhibit 15	Joe Miller dated July 16, 2013
24	Exhibit 16	Pearl Little Title History
25	Exhibit 17	Applicant's Opening Brief dated 7/29/13
	Exhibit 18	7/29/13 letter from Erin Anderson to Examiner
	Exhibit 19	7/29/13 letter from Otis to Examiner
	Exhibit 20	8/2/13 letter from Kiker to Examiner
	Exhibit 21	8/2/13 letter from Friends of the San Juans to Examiner
	Exhibit 22	Applicant's Reply Brief dated 8/7/13

23 FINDINGS OF FACT

24 Procedural:

- 25 1. Applicant. The applicants are George and Susan Swindells.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application at 10:00 am on July 18, 2013. The record was left open through August

1 7, 2013 for briefing on comparisons to the Pohl examiner decision and the record was
2 also left open through July 29, 2013 for written argument regarding revisions to the
3 dock design. A site visit was conducted on August 14, 2013.

3 **Substantive:**

4 3. Site and Proposal Description. The applicants are proposing to construct a
5 residential joint-use dock to serve five properties located along the north shore of San
6 Juan Island facing Spieden Channel. The four residential parcels served by the dock
7 are all developed for single-family residential use. The fifth parcel is a tribal cemetery.
8 All five parcels are fairly heavily forested.

9 The joint-use community dock will consist of:

- 10 • A 6-foot wide by 129-foot long fixed timber pier with fiberglass grating. The
11 timbers will be composed of treated hemlock or fir.
- 12 • Fourteen 10" diameter galvanized steel piles
- 13 • A 7-foot wide and 75-foot long grated aluminum ramp that meets ADA standards
- 14 • An electric hoist to raise and lower the ramp during inclement weather, for
15 security purposes, and during the off season when the floating dock will be
16 relocated
- 17 • A 8.5-foot wide by 70-foot long grated floating dock with two additional modules
18 (mechanical turntable and gangway landing float) that will increase the total area
19 of the floating dock to 697 square feet.
- 20 • A mechanical turntable at the southern end of the hull of the floating dock
- 21 • An 8-foot wide access trail approximately 425 feet in length necessitating 190
22 cubic yards of fill

23 The total area of the pier, ramp and float is 1,996 square feet.

24 The biological evaluation, att. A to the SEPA checklist, establishes that the area has
25 good flushing action because the project area is characterized by moderate tidally
driven currents and substantial exposure to both wind driven waves and boat wakes.

The staff report notes that the project area does not contain any feeder bluff and this
finding is taken as a verity as there is no evidence to the contrary.

4. Characteristics of the Area. The surrounding neighborhood is developed
for single-family residential use and is also fairly heavily forested. There are
numerous other docks in the vicinity.

5. Adverse Impacts of Proposed Use. There are no significant adverse
impacts associated with the proposal. Issues of major concern are addressed as
follows:

1 A. Aesthetics. The aesthetic impacts of the proposal are not significant. The most
2 compelling factor in this conclusion is simply that there is already another dock in
3 plain view, the OJ dock located on the western end of the cove. Given the very
4 subjective nature of aesthetic impacts, shoreline decisions addressing the issue
5 must establish clear benchmarks on when docks create significant aesthetic
6 impacts. For natural pockets of shoreline areas, such as the cove of this case, that
7 factor is whether any other dock disrupts the natural shoreline landscape. Since
8 the OJ dock is clearly in view, it cannot be convincingly argued that the shoreline
9 as it currently stands has the appearance of a pristine, undeveloped shoreline that
10 would be adversely affected by the presence of another dock. Beyond this, there
11 are several large homes clearly in view of the shoreline and the predominant
12 landscaping of the cove (excluding the cemetery tract), located on the applicants'
13 property, is manicured to standards that rivals the Butchart Gardens of Victoria,
14 BC. The shoreline is far from a pristine, natural state and therefore the proposed
15 dock will not create any jarring artificially encroachment.

16 It is also of significance that the dock will not result in any significant cumulative
17 impacts by serving as a precedent for additional dock development. As noted by
18 the applicants, if the community dock is approved all lots in Spirit Cove will have
19 dock access and no new docks will be authorized by County code.

20 At the request of the Examiner, the parties and others have provided extensive
21 briefing on comparisons of aesthetic impacts to the Pohl SEPA examiner decision,
22 PSJ000-12-0009. Pohl presented similar issues because it also involved a cove
23 with no docks. An EIS was required in that SEPA decision applying the same
24 shoreline aesthetic policies that apply to the shoreline permit application of this
25 case. Addressing *Pohl* was requested because consistency in the application of
aesthetic criteria is a priority given the subjective nature of the impact. Ultimately,
the *Pohl* circumstances are distinguishable on the basis that (1) another dock is in
view in this case, (2) the shoreline is more visibly developed in this case, (3) there
is no "enclave" of pristine shoreline as in *Pohl* regularly used by the public; and
(4) approval in this case will not set a precedent for further dock development of
Spirit Cove.

26 B. Kelp. Friends raises good arguments about kelp impacts, but the site specific
27 analysis of the National Marine Fish Service is more compelling and it is
28 determined that the proposal as designed will not create any significant impacts to
29 kelp.

30 Dive surveys prepared for the project show the presence of kelp at the project
31 location. Kelp is a critical area protected by the County's critical area regulations.
32 See SJCC 18.30.160(B)(3). As determined in the Examiner *Beckwith* decision,
33 PSJ000-10-0006 and reaffirmed in the *Odlin Park* decision, PSJ000-13-0006,
34 kelp serves as habitat for protected aquatic species and docks can damage that
35 habitat by blocking light. In its July 15, 2013 letter Friends argues that the grating
proposed for the project is not sufficient to mitigate against the impacts to kelp.

1 However, Friends does not reference any scientific study that concludes that
2 grating is inadequate. More importantly, the issue has been specifically
3 considered by the National Marine Fish Services (“NMFS”) in its review of the
4 project’s biological evaluation. NMFS specifically considered the fact that kelp
5 would be located at the project site and required additional grating for the dock.
6 With that additional grating (incorporated into the currently proposed design),
7 NMFS was able to conclude that “*there are insignificant long-term effects*
8 *associated with over-water structures because the new structures are fully grated*
9 *to reduce shading impact to aquatic habitat and fish*” and that the depth of the
10 waters at the float location along with its grating “*would collectively prevent the*
11 *degradation of the habitats for kelp...*” See att. H to SEPA checklist. The NMFS
12 analysis was performed by an agency with expertise on kelp impacts based upon a
13 site specific analysis. The Friends analysis was based upon general scientific
14 studies and presented by someone who is not a qualified expert on kelp impacts.
15 For these reasons, the NMFS analysis is more compelling and determinative on
16 this issue.

17
18 C. Eelgrass. An updated dive survey to confirm the absence of eelgrass will
19 be required prior to construction.

20 Like kelp, eelgrass is also protected by the County’s critical area regulations and
21 serves as significant habitat for protected aquatic species. See SJCC
22 18.30.160(B)(3). A 2008 survey shows that the nearest eelgrass beds are 29 feet
23 away, four feet further than the minimum distance recommended by the
24 Washington Department of Fish and Wildlife. However, as noted in Friends
25 briefing, exhibit 6, p. 7-8, the substrate characteristics of the project area are
similar to those of the areas occupied by eelgrass and the eelgrass beds have
significantly changed in area between 2006 and 2008 surveys. For these reasons
it is reasonably possible that those beds could have move into the project area in
the five years since the last survey was completed.

D. Impervious Area. The Friends briefing, Ex. 6, p. 13, argues that the width of the
access drive to the dock can be reduced from eight to six feet, reducing 25% of its
coverage. Friends arguments in this regard are primarily focused upon
minimizing impacts to archaeological resources, but there is also a biological
component to this position as well. As noted in the SEPA checklist, the resulting
impervious surface for the two lots traversed by the access road is 22%, which is
less than the amount of impervious surface typically associated with residential
development. Although it may be possible to have a reasonably functioning
driveway that is reduced to six feet in width, the record does not establish or
reasonably suggest any corresponding significant environmental benefit. Without
any significant environmental benefit, there is no justification to regulate design
down to this level of detail.

E. Forage Fish. Impacts to forage fish need additional study and potentially
mitigation.

1 SJCC 18.30.160(B)(4) protects herring, smelt, sand lance and other forage fish
2 spawning areas as critical areas. The biological evaluation, att. L to the SEPA
3 checklist (Ex. 4), concludes that there are no documented forage fish in the
4 project area, relying upon 2007 studies. However, Friends identifies in its briefing
5 a 2013 study that identifies that a sand lance and two surf smelt were captured in
6 Spirit Cove in 2008 or 2009. *See Summary of Fish Catch Results for Spirit Cove,*
7 *2008 and 2009*, referenced in FN No. 36 of Ex. 6. Friends also identifies maps of
8 unknown origin that designates potential fish forage spawn habitat at or very near
9 the project site. The conditions of approval will require that the information
10 provided by Friends be addressed in an update to the biological evaluation along
11 with any required mitigation.

8 F. Navigation. Navigation will be minimally impacted because the dock is
9 completely located within the cove.

10 G. Littoral Drift. The staff report concludes that the project site does not experience
11 significant littoral drift or sand movement. This staff finding is taken as a verity
12 as there is no evidence to the contrary.

12 H. Protected aquatic species and habitat. Beyond the protected aquatic species and
13 protected habitat already addressed in this finding, there are no significant adverse
14 impacts to other protected aquatic species or habitat as well. The biological
15 evaluation (att. A to the SEPA checklist) and the NMFS review of the proposal
16 (att. H to SEPA checklist), Army Corps review (att. I to SEPA checklist) and
17 United States Fish and Wildlife Service review (Att. G to the SEPA checklist) all
18 concur that the proposal is unlikely to adversely affect federally protected species.
19 There is no evidence in the record to suggest that the proposal will adversely
20 affect any state or locally protected species that has not been expressly identified
21 in this finding.

18 I. Water Quality and Circulation. Water quality and circulation will not be
19 adversely impacted because the pilings are made of steel and minimally encroach
20 into project waters.

21 J. Public Access. The proposal will not impact any public access as none is located
22 at or near the project site.

22 6. Existing and Alternative Moorage. The applicants have established, barely under
23 the applicable burden of proof, that there is no adequate or feasible alternative
24 moorage. Mooring buoys are not a viable alternative because of the strong currents
25 of Spieden Channel as marginally established by the testimony of Steve Belluomini.
There is no commercial marina space available for the boats that will use the
proposed dock as marginally established by correspondence between Ms. O'Day and
Friday Harbor. These two types of moorage are addressed more specifically as
follows:

1 A. Mooring Buoys and Floats. The applicants assert that mooring buoys are
2 not a viable option because the swing radius for each of the five boats that could moor
3 at the proposed dock would apparently take up most of Spirit Cove and interfere with
4 navigation for other boats in the cove. There was no diagram provided as to how
5 much space these theoretical swing radii would take up of the cove. More
6 importantly, it's not inherently clear how five boats spaced to accommodate these
7 swing radii would substantially interfere with boats operating at speeds slow enough
8 to explore the confined space of Spirit Cove. This argument is not compelling.

9 The applicants ultimately prevail on this issue by establishing that the currents in
10 Spirit Cove are too strong for mooring buoys and floats. Part of the argument made
11 on this point, made during the hearing, was that the Shoreline Hearings Board
12 determined in *Slaughter v. San Juan County*, SHB 96-38, that mooring buoys for the
13 adjoining OJ dock was not a feasible alternative because the currents in Spieden
14 Channel “*render the use of mooring buoys difficult and dangerous*”. However, the
15 property subject to the Slaughter case fronts the Channel farm more directly than the
16 Swindell property and is not protected by a cove. For this reason, *Slaughter* is not
17 compelling on its own.

18 The only¹ direct evidence in the record that supports the applicant's position on
19 currents within Spirit Cove is the testimony of Steve Belloumini. Ms. O'Day testified
20 that in general currents are too strong on the north shore for buoys, but she did not
21 specifically identify whether this was the case within a cove such as Spirit Cove. Mr.
22 Belloumini specifically noted that the project site is located near some of the swiftest
23 and most dangerous waters of the San Juans and that it would be dangerous to put a
24 mooring buoy both in and out of Spirit Cove. He noted that even inside the cove, the
25 boat would be subject to the vortex created by the currents outside.

 Mr. Belloumini did not identify the source of his opinion, whether it was based upon
personal knowledge or expertise of San Juan waters. Mr. Belloumini also did not
present any information on his expertise on such matters. Mr. Belloumini did provide
expert testimony as a coastal geomorphologist in the examiner *Woodman* case,
PSJ000-12-0015. Mr. Belloumini's expertise cannot be taken into account because
Mr. Belloumini did not identify his background during the hearing of this case, thus
depriving Friends and other adverse parties of an opportunity to exercise their right to
cross examine expert witnesses.

 Mr. Belloumini's testimony is taken as a verity because it is consistent with the more
generally applicable testimony of Ms. O'Day and the Shoreline Hearing Board
findings in the *Slaughter* case. Unquestionably, Mr. Belloumini's testimony could

¹ The biological evaluation provides some vague information on the issue. Page 10 of the biological
evaluation, att. A to the SEPA checklist, notes that tidal currents are “moderate” at the project site but
goes on to conclude that “a short distance offshore” Spieden Channel experiences strong tidal currents.
It is unclear whether mooring buoys would be located “a short distance offshore” as contemplated in
the biological evaluation.

1 have been more complete, but under the “more likely than not” preponderance of
2 evidence standard it is the most compelling evidence in the record. Although Mr.
3 Belloumini’s testimony specifically addressed buoys, the same considerations (and
4 therefore findings) apply to mooring floats.

5 B. Commercial Moorage. As outlined in the staff report, the applicants have made a
6 thorough inquiry of all of the commercial marinas in San Juan County that could serve
7 the property and none have available moorage. Friday Harbor, however, was not that
8 straightforward. Ex. 13 documents the correspondence between Stephanie O’Day and
9 the harbormaster of Friday Harbor. The exchange is far from conclusive on the
10 availability of permanent moorage. Ms. O’Day asked when permanent moorage
11 would be available for the boats contemplated in the Swindell’s dock application. The
12 harbormaster never directly answered the question. Instead she responded that
13 currently there was no moorage available, that month to month moorage in the
14 summer months for boats over 30 feet was very limited and that month to month
15 moorage was available for all vessels after September 15. At no point did the
16 harbormaster identify whether permanent moorage would be available starting in the
17 winter months or when she reasonably anticipated an opening for permanent moorage
18 to occur. About a month prior to the Ex. 13 exchange the harbormaster had informed
19 a Friends representative that moorage was available for a 30 and 40 foot boat. See Ex.
20 6, p. 4. However, given the high demand on moorage in the summer months it is quite
21 possible that moorage availability changed between the Friends and the applicants’
22 inquiries.

23 Despite the ambiguity of the Friday Harbor response, it must be acknowledged that the
24 applicants made a good faith effort to find out if permanent moorage was available.
25 This is the most that can be reasonably expected of the applicants when tasked to
prove a negative, i.e. no moorage available. The harbormaster response is far from
compelling, but especially given that permanent moorage must be reasonably available
for the four or² five boats that would otherwise be moored in this case, it is concluded
that the “more likely than not” permanent moorage is not reasonably available within a
reasonable amount of time to serve the boats of this dock proposal.

7. Archaeological Resources. The applicants have taken adequate measures to
protect the archaeological resources of the project site.

Portions of archaeological site 45SJ53 occur within the proposed project area.
Archaeological site 45SJ53 is large and internally differentiated. It is known to
contain shell midden, food processing features, an historic cemetery, culturally-
modified trees, and a series of circular pit features that resemble pithouse or storage
pit depressions. The historic cemetery and culturally-modified trees are located in
Parcel E, north of the area where construction is proposed. The pit features are

² The dock moorage proposed for the transitory cemetery access should probably not be factored into
the number of permanent alternative moorage slots necessary for an assessment of alternative moorage.

1 located in the vicinity of the proposed fixed pier and dock access trail construction.
2 They range in size from 1.0 to 7.0 meters in diameter, and from 0.2 to 1.0 meters
3 deep. These features appear to be prehistoric but have not been the subject of any
4 subsurface investigation, so their function is unknown. In addition to these
5 topographic features, artifacts may exist on the ground surface, hidden by forest duff.
6 For example, a large perforated net weight was discovered in 2004 lying on the
7 ground surface in Parcel E. Human skeletal remains may also be present in the project
8 area (Cultural Resource Management, January 22, 2013).

6 Ground disturbing activities for fixed-pier construction above high tide will be outside
7 the known boundary of archaeological site 45SJ53. To avoid ground penetration and
8 potential damage to cultural resource deposits, the dock access trail will be constructed
9 by placing geofabric mat over the existing ground surface, and depositing (by hand)
10 crushed rock to a depth of 1.5 feet. An archaeological monitor will be present during
11 all construction that takes place above the top of the bank elevation, to implement the
12 cultural resources *Monitoring Plan for the Swindells Dock Construction Project*
13 (January 22,2013).

11 In the event of an inadvertent discovery of skeletal human remains, all work within 20
12 meters (60 feet) of the find will be halted, and the County coroner, local law
13 enforcement, State physical anthropologist, and property owner will be notified
14 immediately. The protocol for inadvertent discovery of human skeletal remains
15 described in Appendix A of the cultural resources *Monitoring Plan* will be followed.

14 During permit application processing by the U.S. Army Corps of Engineers, the
15 cultural resources *Monitoring Plan* was submitted to the Washington State
16 Department of Archaeology & Historic Preservation (DAHP), and to the Lummi
17 Nation Tribal Historic Preservation Office Compliance Officer. DAHP replied in
18 writing to the Seattle District Corps of Engineers that they concur with a
19 Determination of No Adverse Effect on cultural resources based on the permit
20 condition requiring professional archaeological monitoring during construction
21 (DAHP letter dated February 25, 2011). The Lummi Nation Tribal Historic
22 Preservation Compliance Officer replied in writing to the Corps of Engineers that
23 "work may commence at this time with the archaeological monitoring" (personal
24 communication by e-mail from Lena A. Tso, June 23, 2011).

21 Friends has expressed concern over the fact that at least one of the storage pit
22 depressions may be located under the geotextile fabric used for the access road.
23 However, DAHP and the Lummi Tribe have both reviewed the measures taken by the
24 applicant to protect these archaeological resources and found them to be sufficient and
25 the road is designed to avoid damage to underlying resources should a need arise to
study them in the future. Nothing further will be required of the applicants on this
issue.

CONCLUSIONS OF LAW

Procedural:

1 1. Authority of Hearing Examiner. Shoreline Substantial Development
2 permit applications are reviewed and processed by Development Services Department
3 staff, and the Hearing Examiner, after conducting an open-record public hearing,
renders a decision on the shoreline permit. SJCC18.80.110(E).

4 **Substantive:**

5 2. Shoreline Designation. The subject property is designated as Rural Farm
6 Forest.

7 3. Permit Review Criteria. SJCC 18.50.190(K)(3) permits docks serving
8 single family homes in the Rural Farm Forest shoreline designation subject to the
9 policies and regulations of the SMP. SJCC 18.50.190(G)(4) requires a shoreline
10 substantial development permit for development of docks on lots intended for single-
11 family development unless exempt. No exemptions apply to this project. SJCC
12 18.80.110(H) establishes the criteria for approval of shoreline substantial
13 development permits. The criteria include the policies of the Shoreline Management
14 Act (Chapter 90.58 RCW), the policies and use regulations of the San Juan County
Shoreline Master Program, and the requirements of the San Juan Municipal Code and
Comprehensive Plan. As noted in SJCC 18.50.010(A), Element 3 of the San Juan
County Comprehensive Plan comprises the policies of the San Juan County Shoreline
Master Program. The applicable policies and regulations are quoted in italics below
and applied through conclusions of law.

15 **RCW 90.58.020 Use Preferences**

16 *This policy (Shoreline Management Act policy) is designed to insure the development*
17 *of these shorelines (of the state) in a manner which, while allowing for limited*
18 *reduction of rights of the public in the navigable waters, will promote and enhance*
19 *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.

20 4. The proposal will have a nominal impact on public navigation while as
21 determined in Finding of Fact No. 5 has no associated significant adverse impacts.
22 The proposal will also provide shoreline access for several lots and prevent³ further
dock development of Spirit Cove. For all these reasons the proposal is consistent
with the policy quoted above.

23
24
25 ³ Friends argues that further dock development could occur if the existing lots are subdivided. Since the joint use agreements will be recorded and run with the land it would appear that they would continue to apply even if subdivisions occur. However, the conditions of approval will require the joint use agreements expressly provide that no further dock construction is allowed even if the land subject to the joint use agreement is subdivided.

1 **RCW 90.58.020(1)**⁴

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

3 5. The statewide interest is protected. The project minimizes environmental
4 impacts through its design (most notably grating) and location (away from eelgrass
5 beds) while facilitating shoreline access.

6 **RCW 90.58.020(2)**

7 *Preserve the natural character of the shoreline;*

8 6. The proposal involves a modest alteration to the physical shoreline
9 through the introduction of 190 cubic yards of fill to the project site for the
10 construction of a largely at-grade access road. The pier and float portions of the
11 proposal will be primarily composed of timber framing, specifically hemlock or fir
12 for the pier. As determined in FOF No. 5, the proposal will not create any significant
13 adverse aesthetic impacts. For all these reasons it is concluded that the natural
14 character of the shoreline will be adequately preserved.

15 **RCW 90.58.020(3)**

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

17 7. The proposal facilitates shoreline access for five parcels with no
18 corresponding significant adverse impacts except for possibly boat scour impacts to
19 eelgrass. Under these conditions approval results in long term over short term
20 benefit.

21 **RCW 90.58.020(4)**

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

23 8. The project minimizes adverse impacts through its design and location.
24 As a result, the resources and ecology of the shoreline should be adequately
25 protected.

RCW 90.58.020(5)

Increase public access to publicly owned areas of the shorelines;

9. Access to the proposed dock will be on private shoreline, as a result, it will
not impact public access to a publicly owned area of the shoreline.

RCW 90.58.020(6)

⁴ 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 *Increase recreational opportunities for the public in the shoreline;*

2 10. The proposed dock will provide increased private recreational
3 opportunities on the shoreline, but as the shoreline area in question is not public, there
4 will be no impact in public use of the shoreline as a result.

5 **San Juan Comprehensive Plan Policy 3.4A:**

6 *1. Consult with the state Office of Archaeology and Historic Preservation and*
7 *professional archaeologists to identify areas containing potentially valuable*
8 *archaeological data and to establish procedures for salvaging the data.*

9 *2. Where possible, preserve sites with a high value for scientific study and/or public*
10 *observation.*

11 11. The policy is met. As determined in FOF No. 7 the applicants have
12 consulted with the Office of Archaeology and Historic Preservation and their own
13 archaeologist to identify areas containing archaeological data and the applicants have
14 put together measures (geotextile fiber, monitoring) to preserve the archaeological
15 resources for further study. Further, as determined in FOF No. 7 these measures serve
16 to adequately protect these archaeological resources for further scientific study.

17 **San Juan County Code Regulations**

18 **SJCC 18.50.190(B)(1):** *Boating facilities shall be designed to minimize adverse*
19 *impacts on marine life and the shore process corridor and its operating systems.*

20 12. The criterion is met. As determined in Finding of Fact No. 5, the proposal
21 will not create any significant adverse impacts to the shoreline environment.

22 **SJCC 18.50.190(B)(2):** *Boating facilities shall be designed to make use of the*
23 *natural site configuration to the greatest possible degree.*

24 13. The dock has been located at a point in the cove where the applicants have
25 determined eelgrass is least likely to occur or proliferate. The criterion is met.

SJCC 18.50.190(B)(3): *All boating facilities shall comply with the design criteria*
established by the State Department of Fish and Wildlife relative to disruption of
currents, restrictions of tidal prisms, flushing characteristics, and fish passage to the
extent that those criteria are consistent with protection of the shore process corridor
and its operating systems.

14. The criterion is met. Hydraulic permit approval from the Washington
State Department of Fish and Wildlife is required for the proposal. In order to
acquire hydraulic permit approval, the applicants have to comply with all applicable
WDFW shoreline regulations.

1 **SJCC 18.50.190(B)(4):** *Areas with poor flushing action shall not be considered for*
overnight or long term moorage facilities.

2 15. The criterion is met. As determined in Finding of Fact No. 3, the site has
3 good flushing action.

4 **SJCC 18.50.190(B)(5):** *In general, only one form of moorage or other structure for*
5 *boat access to the water shall be allowed on a single parcel: a dock or a marine*
6 *railway or a boat launch ramp may be permitted subject to the applicable provisions*
7 *of this code. (A mooring buoy may be allowed in conjunction with another form of*
moorage.) *However, multiple forms of moorage or other structures for boat access to*

8 *a. Each form of boat access to water serves a public or commercial recreational use,*
9 *provides public access, is a part of a marina facility, or serves an historic camp or*
10 *historic resort; or*

11 *b. The location proposed for multiple boat access structures is common area owned*
12 *by or dedicated by easement to the joint use of the owners of at least 10 waterfront*
13 *parcels.*

14 16. The criterion is met. The proposed dock will be the only form of moorage
15 available to serve the project site.

16 **SJCC 18.50.190(B)(6):** *Structures on piers and docks shall be prohibited, except as*
17 *provided for marinas in subsection (H) of this section.*

18 17. The criterion is met. No structures are proposed on the dock.

19 **SJCC 18.50.190(C)(1):** *Multiple use and expansion of existing facilities are*
20 *preferred over construction of new docks and piers.*

21 18. The criterion is met. The proposal involves multiple use.

22 **SJCC 18.50.190(C)(2):** *Mooring buoys shall be preferred over docks and piers on all*
23 *marine shorelines except in the cases of port, commercial, or industrial development*
24 *in the urban environment.*

25 19. The criterion is met. As determined in FOF No. 6, mooring buoys are not
a feasible alternative for the project site due to strong currents.

SJCC 18.50.190(C)(3): *Moorage floats, unattached to a pier or float, are preferred*
over docks and piers.

20. The criterion is met. As determined in FOF No. 6, mooring floats are not
a feasible alternative for the project site due to strong currents.

1 **SJCC 18.50.190(C)(4):** *Every application for a substantial development permit for a*
2 *dock or pier construction shall be evaluated on the basis of multiple considerations,*
3 *including but not limited to the potential impacts on littoral drift, sand movement,*
4 *water circulation and quality, fish and wildlife, navigation, scenic views, and public*
5 *access to the shoreline.*

6 21. The criterion is met. The considerations identified above are all addressed
7 in Finding of Fact No. 5.

8 **SJCC 18.50.190(C)(5):** *Docks or piers which can reasonably be expected to*
9 *interfere with the normal erosion-accretion process associated with feeder bluffs*
10 *shall not be permitted.*

11 22. The criterion is met. There are no feeder bluffs on the subject site as
12 determined in FOF No. 3.

13 **SJCC 18.50.190(C)(6):** *Abandoned or unsafe docks and piers shall be removed or*
14 *repaired promptly by the owner. Where any such structure constitutes a hazard to the*
15 *public, the County may, following notice to the owner, abate the structure if the*
16 *owner fails to do so within a reasonable time and may impose a lien on the related*
17 *shoreline property in an amount equal to the cost of the abatement.*

18 23. The criterion is met. There are no docks or piers present at the project
19 site.

20 **SJCC 18.50.190(C)(7):** *Unless otherwise approved by shoreline conditional use*
21 *permit, boats moored at residential docks shall not be used for commercial overnight*
22 *accommodations.*

23 24. The criterion is met. No such use is being proposed by the Applicants.

24 **SJCC 18.50.190(C)(8):** *Use of a dock for regular float plane access and moorage*
25 *shall be allowed only by shoreline conditional use permit and shall be allowed only at*
26 *commercial or public moorage facilities or at private community docks.*

27 25. The criterion is met. No such use is being proposed by Applicants.

28 **SJCC 18.50.190(D)(1)-(11): General Design and Construction Standards**

29 *1. Pilings must be structurally sound prior to placement in the water.*

30 *2. Chemically treated or coated piles, floats, or other structural members in direct*
31 *contact with the water shall be as approved by the Environmental Protection*
32 *Agency.*

1 3. *Pilings employed in piers or any other structure shall have a minimum vertical*
2 *clearance of one foot above extreme high water.*

3 4. *All floats shall include stops which serve to keep the bottom off tidelands at low*
4 *tide.*

5 5. *When plastics or other nonbiodegradable materials are used in float, pier, or*
6 *dock construction, full containment features in the design of the structures shall*
7 *be required.*

8 6. *Overhead wiring or plumbing is not permitted on piers or docks.*

9 7. *New boathouses or covered moorages are prohibited on floats, piers, and*
10 *docks. Other structures on floats, piers, and docks shall be limited to three feet in*
11 *height.*

12 8. *A pier shall not extend offshore farther than 50 feet beyond the extreme low*
13 *tide contour.*

14 9. *Dock lighting shall be designed to shine downward, be of a low wattage, and*
15 *shall not exceed a height of three feet above the dock surface.*

16 10. *All construction-related debris shall be disposed of properly and legally. Any*
17 *debris that enters the water shall be removed promptly. Where feasible, floats*
18 *shall be secured with anchored cables in place of pilings.*

19 11. *Materials used in dock construction shall be of a color and finish that will*
20 *blend visually with the background.*

21 26. As conditioned, the criterion is met. The proposal complies with all
22 design standards quoted above. As depicted in the design drawings, Ex. 4 as revised
23 by Ex. 8 and 9, the pilings will be made of steel such that they will be structurally
24 sound. ACZA pressure treated wood will be used to construct the structural portions
25 of the dock. The proposed pilings have a minimum clearance of at least 7.5 feet at
EHHW. The applicant asserts that stops are not required due to the depth of the
waters at the project site, but the criteria above require that all docks contain stops so
stops will be made a condition of approval. The float tubs will be constructed of
foam encased entirely in a molded plastic. No overhead wiring, plumbing or
structures will be placed upon the dock. As proposed in the design drawings, Ex. 4
as revised by Ex. 8 and 9, the pier does not extend waterward of the extreme low tide
contour. The proposed dock lighting will be conditioned to comply with the lighting
standards above. The proposal is conditioned for the proper disposal of construction
debris. As shown in the application materials, the floats will be secured with mooring
anchor cables. The proposal will blend visually with the background as it will remain
unpainted and in a natural condition resembling earth tones. The conditions of

1 approval require that any painting of the dock involve non-glare paints to reduce
2 aesthetic contrast and excessive light reflection.

3 **SJCC 18.50.190(G)(2)(c):** *The maximum dimensions for a joint-use community dock*
4 *(including the pier, ramp, and float) associated with more than two single-family*
5 *residences shall not exceed 2,000 square feet in total area. In addition, the length of*
6 *the dock (including the pier, ramp, and float) may not extend more than 300 feet in*
7 *length seaward of the ordinary high water mark. If a variance is granted to allow a*
8 *dock exceeding these dimensions, its construction may only be authorized subject to*
9 *the regulations for a marina.*

10 27. The dock meets these criteria, as it will be approximately 1,996 square feet
11 in area and 268 feet in length measured seaward from the ordinary high water mark.

12 **SJCC 18.50.190(G)(2)(d):** *Maximum length and width of a ramp, pier, or dock shall*
13 *be the minimum necessary to accomplish moorage for the intended boating use.*

14 28. The record contains no information on this criterion. The staff report does
15 not address it and the application narrative simply states the criterion is met. The
16 conditions of approval will require the applicant to demonstrate to the satisfaction of
17 staff that the criterion is met. Friends has suggested that the width of the dock should
18 not be dictated by the need to accommodate a golf cart. This raises a valid issue.
19 The size of a dock is largely dictated by the recreational needs of the applicant. The
20 use of a golf cart arguably serves as an extension of that need. Given that the dock
21 had to be placed a fairly large distance from the applicants' home in order to avoid
22 eelgrass and the applicants' advanced age it is certainly appropriate to include a
23 driveway that accommodates a golf cart. However, it isn't entirely clear why a golf
24 cart is necessary to traverse the 268 feet of the dock, or at least the 70 feet of the float.
25 Given the presence of kelp underneath the dock, it is important to minimize the width
of the dock as much as possible. If the sole reason for the eight foot width of the
dock is to accommodate a golf cart, the applicants should have a compelling reason
for needing to use a golf cart on the dock. The conditions of approval will require the
applicants to justify the width and length of the dock, which can include a
consideration of the disabilities and physical needs of the applicants⁵.

21 **SJCC 18.50.190(G)(3):** *Docks shall be set back a minimum of 10 feet from side*
22 *property lines. However, a joint use community dock may be located adjacent to or*
23 *upon a side property line when mutually agreed to by contract or by covenant with*
24 *the owners of the adjacent property. A copy of such covenant or contract must be*
25 *recorded with the County auditor and filed with the approved permit to run with the*
title to both properties involved.

⁵ Paul Wilcox testified that the width of the float is necessary to provide the buoyancy to support the 80 foot gangway. This is a sufficiently compelling reason to justify the width of the float, if in fact the gangway needs to be 80 feet long and eight feet wide. The applicant needs to justify the entire length and width of the dock.

1 29. The criterion is met. The dock is set back a minimum of ten feet from all
2 side property lines.

3 **SJCC 18.50.190(G)(5):** *Applications for nonexempt docks and piers associated with*
4 *single-family residences shall not be approved until:*

- 5 a. *It can be shown by the applicant that existing facilities are not adequate*
6 *or feasible for use;*
7 b. *Alternative moorage is not adequate or feasible; and*
8 c. *The applicant shall have the burden of providing the information*
9 *requested for in subsections (a) and (b) of this section, and shall provide*
10 *this information in a manner prescribed by the administrator.*

11 30. The criterion is met. There currently are no on-site moorage facilities. As
12 determined in FOF No. 6 there is no adequate and feasible alternative or off-site
13 moorage available.

14 **San Juan County Comprehensive Plan Element 3, Section (5)(C) Boating Facilities:**

15 *General*

- 16 1. *Locate, design and construct boating facilities to minimize adverse effects upon,*
17 *and to protect all forms of aquatic, littoral or terrestrial life including animals, fish,*
18 *shellfish, birds and plants, their habitats and their migratory routes.*
19 2. *Protect beneficial shoreline features and processes including erosion, littoral or*
20 *riparian transport and accretion shoreforms, as well as scarce and valuable shore*
21 *features including riparian habitat and wetlands.*
22 3. *The location, design, configuration and height of boathouses, piers, ramps, and*
23 *docks should both accommodate the proposed use and minimize obstructions to views*
24 *from the surrounding area.*
25 4. *Boating facilities should be designed to optimize the trade-offs between the number*
of boats served and the impacts on the natural and visual environments.
5. *In providing boating facilities, the capacity of the shoreline site to absorb the*
impact should be considered.
6. *The use of mooring buoys should be encouraged in preference to either piers or*
floating docks.
7. *The use of floating docks should be encouraged in those areas where scenic values*
are high and where serious conflicts with recreational boaters and fishermen will not
be created.
8. *Piers should be encouraged where there is significant littoral drift and where*
scenic values will not be impaired.
9. *In many cases, a combination of fixed and floating structures on the same dock*
may be desirable given tidal currents, habitat protection and topography, and should
be considered.

1 10. *The County should attempt to identify those shorelines where littoral drift is a*
2 *significant factor and where, consequently, fixed piers probably would be preferable*
3 *to floating docks.*

4 11. *To spare San Juan County from the so-called "porcupine effect" created by*
5 *dozens of individual private docks and piers on the same shoreline, preference should*
6 *be given to the joint use of a single structure by several waterfront property owners,*
7 *as opposed to the construction of several individual structures.*

8 12. *Preference should be given in waterfront subdivisions or multi-family residential*
9 *development to the joint use of a single moorage facility by the owners of the*
10 *subdivision lots or units, or by the homeowners association for that subdivision or*
11 *development, rather than construction of individual moorage facilities. Individual*
12 *docks and piers should be prohibited, provided that the county may authorize more*
13 *than one moorage facility if a single facility would be inappropriate or undesirable*
14 *given the specific site and marine conditions. Such developments should include*
15 *identification of a site for a joint-use moorage facility and the dedication of legal*
16 *access to it for each lot or unit. However, it should be recognized that identification of*
17 *a site for a common moorage facility does not imply suitability for moorage or that*
18 *moorage development will be approved.*

19 13. *The capacity of the shoreline site to absorb the impacts of waste discharges from*
20 *boats and gas and oil spills should be considered in evaluating every proposed dock*
21 *or pier.*

22 14. *Expansion or repair of existing facilities should be encouraged over construction*
23 *of new docks and piers.*

24 15. *To reduce the demand for single-user docks, multiple-user docks should be*
25 *encouraged through construction and dimensional incentives.*

30. The shoreline policies above essentially repeat the requirements and preferences already assessed in the use regulations, specifically that mooring buoys are generally preferred over docks, that joint-use docks are preferred over single-use docks and that environmental, aesthetic and use impacts should be minimized. For the reasons identified in application of the shoreline regulations, the policies are generally met.

DECISION

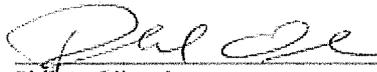
As conditioned and as proposed in Ex. 4 and revised by Ex. 8 and 9, The proposal meets all applicable shoreline policies and regulations as outlined in the conclusions of law above and is approved subject to the following conditions:

1. The dock shall be constructed as proposed in the drawings and other materials submitted with the application and subsequent revisions admitted into the record, except as the same may be modified by these conditions.
2. The applicants shall obtain all other required permits and abide by the conditions thereof.

- 1 3. The General Design and Construction Standards of SJCC 18.50.190(D) shall be
2 met.
- 3 4. Construction shall not be commenced until all relevant appeal periods have run.
- 4 5. If the applicants decide to expand the size of the dock, at least one of the parcels
5 shall be owned by a different owner and a new shoreline substantial development
6 permit shall be required.
- 7 6. Development under this permit shall commence within two years of the date of
8 permit approval and shall be substantially complete within five years thereof or the
9 permit shall become null and void.
- 10 7. Failure to comply with any terms or conditions of this permit may result in its
11 revocation.
- 12 8. Prior to any construction the applicants shall complete a new dive survey to
13 confirm the absence of eelgrass. If the eelgrass is located closer than 25 feet the
14 applicants shall mitigate eelgrass impacts as directed by staff.
- 15 9. Prior to any construction the applicants biological evaluation shall be updated to
16 address the forage fish identified by Friends as discussed in FOF No. 5 of this
17 decision. The update biological evaluation shall make recommendations for
18 mitigation as necessary to prevent any significant adverse impacts to forage fish.
- 19 10. The proposal shall comply with all mitigation and recommendations contained in
20 the reports attached to the SEPA checklist.
- 21 11. As identified in Footnote No. 3, the joint use agreement for the dock shall be
22 recorded and contain a provision that clarifies that no new docks are permitted even
23 if the property subject to the covenant is subdivided.
- 24 12. The dock shall be equipped with float stops as required by SJCC 18.50.190(D)(4).
- 25 13. Dock lighting shall comply with the requirements of SJCC 18.50.190(D)(9).
14. All construction-related debris shall be disposed of properly and legally. Any
debris that enters the water shall be removed promptly.
15. Any paint used for the dock shall be non-glare to reduce aesthetic contrast and
excessive light reflection.

1
2
3 16. The applicants shall demonstrate to the satisfaction of staff that the dock is the
4 minimum necessary to accomplish moorage for its intended use as required by
5 SJCC 18.50.190(G)(2)(d) and discussed in COL No. 28.

6
7 Dated this 30th day of August, 2013.

8
9 
10 Phil A. Olbrechts

11 County of San Juan Hearing Examiner

12
13 **Right of Appeal**

14 An appeal of this decision may be filed with the Washington State Shoreline Hearings
15 Board as governed by RCW 90.58.180, which provides, **in part**, as follows:

16 *(1) Any person aggrieved by the granting, denying, or rescinding of a*
17 *permit on shorelines of the state pursuant to RCW 90.58.140 may, except*
18 *as otherwise provided in chapter 43.21L RCW, seek review from the*
19 *shorelines hearings board by filing a petition for review within twenty-one*
20 *days of the date of filing as defined in RCW 90.58.140(6)...*

21 Reference should be made to RCW 90.58.180 in its entirety as well as the practice
22 rules of the Shoreline Hearings Board for all the requirements that apply to filing a
23 valid appeal. Failure to comply with all applicable requirements can result in
24 invalidation (dismissal) of an appeal.

25
Change in Valuation

Notice is given pursuant to RCW 36.70B.130 that property owners who are affected by this
decision may request a change in valuation for property tax purposes notwithstanding any
program of revaluation.