

**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

Agent Francine Shaw
PO Box 2112
Friday Harbor, WA 98250

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 and 9/11/13 on rehearing

Application Policies and Regulations: San Juan County Shoreline Master Program

Decision: Approved with conditions.

S.J.C. COMMUNITY

SEP 26 2013

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Bay Head Marina

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

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

S.J.C. COMMUNITY

7 **INTRODUCTION**

SEP 26 2013

8 Upon rehearing, the proposal is approved with conditions.

DEVELOPMENT & PLANNING

9 The applicant initially applied for approval of a shoreline substantial development permit
10 and conditional use permit to expand an existing parking area for a marina. The parking
11 area was to be expanded up to twenty feet waterward by the replacement and relocation
12 of some existing bulkheads and the placement of fill behind the bulkhead. The
13 application also involved relocating a boat ramp. The application included a request for a
14 conditional use permit to authorize the landfill. The shoreline substantial development
15 permit was approved for the replacement of the bulkheads and the relocation of the boat
16 ramp. The parking area expansion and its associated landfill were denied without
17 prejudice, essentially because the applicant did not establish that the current parking
18 configuration is not feasible and/or reasonable. The applicant appealed the denial and the
19 County and applicant entered into a settlement agreement whereby the applicant would
20 be granted a rehearing in lieu of reapplication in order to address the feasibility of the
21 current parking configuration. In the rehearing the applicant amply demonstrated that the
22 current parking configuration is not feasible or safe.

18 **TESTIMONY**

19 The testimony of the April 19, 2013 hearing on the initial application is incorporated into
20 the record of this rehearing as if set forth in full. The testimony summarized below is that
21 presented at the September 11, 2013 rehearing.

22 Applicant Testimony

23 Stephanie O'Day stated that in the initial hearing, the reconstruction of the wooden
24 bulkhead was approved, along with changing the location of the barge landing. However,
25 the hearing examiner denied the request to fill land for the parking lot extension. The
applicant chose to appeal the decision rather than submit a new application which would
have been very expensive. Subsequently, the applicant attended a settlement meeting with
the County to discuss the reasonableness of the fill. The applicant provided the County
with new information, including a survey of the existing project and new location of the

1 fill, information from the Fire Marshall, and code requirements regarding parking lots.
2 The County decided it was reasonable to remand the application. The hearing examiner is
3 not bound by the settlement agreement.

4 Ms. O'Day noted that the applicant has obtained a county permit to dredge the marina and
5 is simply waiting for the Army Corp to issue a final permit. Exhibit 1 depicts the site and
6 shows current aisle width ranges from 12 to 26ft. The parking expansion is not for any
7 monetary gain; instead, it is for safety reasons. Currently, there is a 25ft radius curve, but
8 County code requires 50ft. Even with the fill, the parking lot will not be able to meet this
9 requirement, but the difference will be lowered. The new radius curve will be 35ft. The
10 Fire Marshall concurred that it would be useful to have this additional width. It is difficult
11 for larger vehicles to both enter and exit the marina. The dredging project is very
12 expensive and time consuming. It will utilize geotubes, placed on land in the parking lot,
13 to funnel and filter the water. Mr. Thurmond, the property owner, hired a geotechnical
14 engineer to ensure no environmental harm would be done during the dredging process.

15 Greg Bronn, civil engineer, testified that he worked for San Juan County for over eight
16 years doing development review and now works as a private consulting engineer. He has
17 experience with parking lot design and layout. San Juan County Code addresses parking
18 specifications in several sections including 6.5 and 18.60.120. The aisle width of a parking
19 lot is the area where cars do not actually park. Width standards are set to ensure
20 movability in parking lots. San Juan has a 26ft width standard for 90 degree parking
21 spaces. The existing conditions do not meet these standards and go as low as 12ft wide.
22 Proper aisle width ensures safety for pedestrians and cars in parking lots. The new
23 proposal has aisle widths ranging from 24 to 44ft wide which is a great improvement. The
24 additional aisle width near the boat ramp is necessary to prepare a boat for launching. The
25 proposed aisle width is not excessive for the proposed uses. The area opposite from the
entrance will only have 24ft width because of the topography. In regard to the entrance
radius, 50ft is the standard for San Juan County (18.60.100). The greatest radius possible
for this proposal, given the water constraints, is 35ft. This radius is a significant
improvement over the current conditions. The new radius will alleviate many safety
concerns.

Carl Sanders said he has worked at Bayhead Marina for twenty years as the Harbormaster.
He noted that when you turn into the Marina, the road has a blind curve which creates low
visibility. This situation makes the small turn-in radius very dangerous. He noted that
pick up trucks and SUVs typically use the parking facility as well as garbage and other
trucks. It's a busy area. In response to a question from the examiner, Mr. Sanders noted
that he doesn't get many complaints about maneuverability within the parking lot, because
it's just accepted that nothing can be done about it. He also noted that gridlock occurs on a
weekly basis during the summer months. Mr. Sanders explained the difficulties in
launching a boat under current conditions and how the proposal would facilitate water
access.

Francine Shaw, applicant's agent, identified potential locations for landscaping.

EXHIBITS

1 The 17 exhibits entered into the record for the May 5, 2013 decision are incorporated into
2 the record of this decision as if set forth in full. In addition, the following exhibits were
3 admitted during the September 11, 2013 hearing:

4 Rehearing Exhibit 1 Aug 7, 2013 Packet w/ attachments

5 Rehearing Exhibit 2 Aug 13, 2013 Letter to Lee McEnery from Stephanie O'Day w/ habitat
management plan

6 Rehearing Exhibit 3 Letter from Greg Bronn dated Sept 10

7 Rehearing Exhibit 4 Enviro 2 Flyer

FINDINGS OF FACT

Procedural:

10 Finding of Fact No. 2 of the May 5, 2013 decision is replaced with the following:

11 2. Hearing. The Hearing Examiner conducted a hearing on the subject
12 application on April 19, 2013. A site visit was also conducted on 4/19/13. A
13 rehearing was held on September 11, 2013.

Substantive:

15 Finding of Fact No. 6 of the May 5, 2016 decision is replaced with the following:

16
17 6. Necessity of Landfill. The proposed landfill is necessary to provide for
18 reasonable and safe use of the currently existing parking lot. The current parking
configuration cannot be considered feasible.

19 Some of the most compelling evidence provided by the applicant is the May 30, 2013
20 letter from Kevin O'Brien, Fire Chief of Orcas Island Fire and Rescue, Rehearing Ex.

21 1. Mr. O'Brien visited the project site and concluded that the proposed expansion of
the parking area and associated access would improve safety for both emergency
22 responders and marina users. Mr. O'Brien noted in this letter that under the current
access radius first responders would have to make multiple point turns, which costs
23 time and increases exposure on the access road.

24 As testified by Carl Sandford, current conditions create gridlock on the project site at
least once per week during summer months. It is unclear how much the proposal will
25 alleviate this problem, but the gridlock at least demonstrates that it is not uncommon
to have multiple vehicles trying to enter and exit the facility at the same time. As
shown in the photographs compiled by Ms. Shaw in her May 30, 2013 email,

1 Rehearing Ex. 1, as well as the testimony of Mr. Sandford and Mr. Bronn, the parking
2 area as currently configured provides very limited space for these multiple
3 movements. Improvements to aisle width and turning radius from the access road
4 should improve upon current conditions. As testified, San Juan parking standards
5 require a turning radius of 50 feet for the access drive and a drive aisle width of 26
6 feet. The drive aisle currently only has a 12 foot width at its narrowest point and the
7 access drive a turning radius of 25 feet.

8 CONCLUSIONS OF LAW

9 Conclusion of Law No. 25 of the May 5, 2013 decision is replaced with the following:

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

15 25. The proposed landfill meets the criterion above because the applicant has
16 demonstrated that the added space is necessary for the reasonable use of the parking area
17 as determined in Finding of Fact No. 6.

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

25 The provision is clearly designed to prohibit unnecessary landfill, but there is no additional
guidance within the shoreline use regulations as to how to further refine its meaning.
However, the shoreline policies make it easy to clarify the ambiguity. San Juan County
Comprehensive Plan Policy 3.5(H)(1) provides that landfill within shoreline areas should
be prohibited unless no feasible alternative exists. As determined in Finding of Fact No. 6,
the applicant has established that an increase in expanded area is necessary for the
reasonable use of the parking area. For this reason, the criterion is met.

It should also be noted that even if the criterion above is subject to a more flexible
interpretation, a shoreline substantial development permit application must be consistent

1 with all applicable shoreline use policies in addition to the use regulations, which would
2 include Comprehensive Plan Policy 3.5(H)(1). See SJCC 18.80.110(H).

3 Conclusion of Law No. 27 of the May 5, 2013 decision is replaced with the following:

4 **SJCC 18.50.090(B):** *Parking facilities must be designed and landscaped to minimize*
5 *adverse impacts upon adjacent shoreline and abutting properties. Landscaping must*
6 *consist of native vegetation and be planted before completion of the parking area in such a*
7 *manner that plantings provide effective screening within three years of project completion*
8 *and through maturity of the species.*

9 27. No landscaping is required for the proposal. The May 5, 2013 decision noted that a
10 modest amount of landscaping may be required along the rock bulkhead if the landfill is
11 approved. However, from the site plan submitted by the applicant, Rehearing Ex. 1, it
12 appears that landscaping in this area could reduce the turning radius. For this reason no
13 landscaping will be required.

14 The staff report asserts that if the expansion is approved the landscaping standards apply to
15 the entire parking area, not just the expansion. Under constitutional due process and
16 takings requirements, the applicant can only be required to mitigate impacts created by the
17 proposed expansion. The applicant cannot be made to remedy existing deficiencies.

18 A nominal amount of landscaping could be required of the applicant because the increase
19 in parking area increases the degree of nonconformity by increasing the area that must be
20 obscured. In the May 5, 2013 decision it was noted that landscaping along the rock
21 bulkhead would be the most appropriate location for landscaping since this area would be
22 most visible waterward of the jetty and it also has the greatest new width to accommodate
23 landscaping. Notably, the rock bulkhead portion of the project appears to be the only part
24 of the applicant's proposed landscaping plan that didn't contain landscaping. See
25 Rehearing Ex. 1, "proposed parking lot expansion". There was no explanation for this
provided during the rehearing, but it does appear that landscaping along the rock bulkhead
could reduce the proposed improvements to the turning radius of the access drive. As
noted by the applicant during the hearing, landscaping along the areas proposed by the
applicant would reduce visibility to the overwater users of the marina, thereby making the
vehicles more vulnerable to theft and vandalism. Given the relatively modest increase in
parking area and the problems associated with landscaping, landscaping will not be
required for this proposal.

Conclusion of Law No. 29 of the May 5, 2013 decision is replaced with the following:

SJCC 18.50.150:

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

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

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

14 29. The May 5, 2013 decision noted that the applicant would have to establish
15 compliance with SJCC 18.50.150(A) and (B) in a reapplication hearing. It doesn't
16 appear that this compliance issue was addressed by the applicant in the rehearing,
17 except for some discussion on why the dredging operation would not adversely affect
18 water quality. The conditions of approval will require the applicant to demonstrate
19 compliance with SJCC 18.50.150(A) and (B) to the satisfaction of staff.

20 As noted in the May 5, 2013 decision, conformance to SJCC 18.50.150(A) and (B) is
21 only required for the proposed expansion area, which is acknowledged to be an area of
22 modest size. The applicant argues that compliance with the stormwater manual
23 satisfies the rest of the stormwater criteria quoted above. However, the criteria quoted
24 above contemplates more than that. SJCC 18.50.150(A) and (B) would be entirely
25 superfluous if the applicant only needed to comply with the stormwater manual. SJCC
18.50.150(A) and its focus upon water quality is particularly pertinent because the
proposal is exempt from stormwater manual treatment requirements.

Conclusion of Law No. 30 of the May 5, 2013 decision is replaced with the following:

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.*

30. As conditioned, the applicant will have to demonstrate compliance with the
criterion above for the expansion area of the parking lot.

Conclusion of Law No. 31 of the May 5, 2013 decision is replaced with the following:

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

3 31. As conditioned, the applicant will have to demonstrate compliance with the
4 criterion above for the expansion area of the parking lot.

5 Conclusion of Law No. 32 of the May 5, 2013 decision is replaced with the following:

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

12 32. As determined in Finding of Fact No. 6, the applicant has demonstrated that the
13 proposed landfill is necessary for the reasonable use of the parking area and no feasible
14 alternative exists. The criterion is met.

15 The staff report questions whether the parking lot qualifies as a “water dependent” use
16 in the criterion above. However, the criterion specifically contemplates that parking
17 lots at least in some instances qualify as water dependent. In this case the parking lot is
18 necessary for the functioning of the marina and there is no other place it can be located.

19 Conclusion of Law No. 34 of the May 5, 2013 decision is replaced with the following:

20 **SJCC 18.50.340(C)(2):** *Parking areas permitted on shorelines shall be located*
21 *landward of the uses they are designed to serve, unless an alternative orientation would*
22 *reduce the adverse impacts. They shall be no larger than is absolutely necessary and,*
23 *where appropriate, shall be screened from view.*

24 34. The proposed parking expansion would be located landward of all the other
25 marina facilities. As determined in Finding of Fact No. 6, the parking area is no larger
26 than is absolutely necessary given the safety and circulation problems associated with
27 the current parking and access configuration. For the reasons identified in COL No. 27,
28 no screening will be required for the project.

29 Conclusion of Law No. 35 of the May 5, 2013 decision is replaced with the following:

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

32 35. Given that the criterion is only applicable to the parking expansion, it is apparent
33 that the added area will add to pedestrian safety by providing more space for pedestrian
34 movement.

1 Conclusion of Law No. 37 of the May 5, 2013 decision is replaced with the following:

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

8 37. For the reasons identified in COL No. 27, no landscaping will be required for the
9 project.

10 Conclusion of Law No. 38 of the May 5, 2013 decision is replaced with the following:

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

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

16 38. The criterion is met as demonstrated by the preceding conclusions of law, which
17 find consistency with all applicable shoreline regulations and policies.

18 DECISION

19 The shoreline substantial development permit and shoreline conditional use permit for
20 the proposed boat launch relocation, new bulkheads and landfill are consistent with all
21 applicable shoreline regulations and policies, as determined in the May 5, 2013 decision
22 as modified by this decision. The proposal is subject to the following conditions of
23 approval:

- 24 1. The Applicants shall obtain all other required permits and abide by the conditions
25 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.

1 7. The proposal shall comply with the recommendations of the 11/28/12 habitat
2 management plan, Ex. 2. An addendum shall be prepared for the habitat management
3 plan assessing whether the bulkheads will contribute to erosion or beach starvation¹.
4 The addendum shall contain recommendations for full mitigation of any erosion or
5 beach starvation impacts and those recommendations will apply as conditions of
6 approval to the extent determined necessary by staff.

7 8. The proposal shall comply with the recommendations of the 6/18/12 Earth
8 Solutions geotech evaluation, Ex. 2 to the staff report.

9 9. The applicant shall demonstrate compliance with SJCC 18.50.150(A) and (B) as it
10 pertains to the expanded portion of the parking lot. The applicant shall also
11 demonstrate that the expanded parking area will not result in any pollutants being
12 discharged into adjoining waters.

13 Dated this 26th day of September, 2013.

14 
15 Phil A. Olbrechts

16 San Juan County Hearing Examiner

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

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

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

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

¹ The applicant submitted a proposed addendum during the rehearing. The addendum addresses a bulkhead issue, which is beyond the scope of the rehearing as agreed upon in the settlement agreement. The sufficiency of the addendum will remain subject to staff approval and is not addressed in this decision.

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

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