

**SAN JUAN COUNTY
HEARING EXAMINER**

ADMINISTRATIVE APPEAL

Appellants: Friends of the San Juans
Applicant/Property Owner: 1281 and 1657 Yacht Haven, LLC
File No.: PAPL00-13-0001
Request: Appeal of Shoreline Exemption
Parcel No: 462650027
Location: 1657 Yacht Haven Road, San Juan Island
Comprehensive Plan Designation: Rural Residential
Shoreline Designation: Rural Residential
Hearing: 11/13/13. & 11/21/13
Decision: Appeal sustained, exemption determination revoked.

S.J.C. COMMUNITY

DEC 11 2013

DEVELOPMENT & PLANNING

1 clause in the hearing notice that the recordings of this hearing are available for public
2 review and anyone who demands a right of cross-examination of any of the expert
3 witnesses will have to file a motion explaining the necessity prior to the hearing.

4 TESTIMONY

5 Since this case was resolved on legal grounds, a summary of testimony has not been
6 completed. A summary of the first day has been completed and a summary of the
7 entire hearing will be completed should the applicants apply for a shoreline
8 substantial development permit. Copies of the summary will be made available to the
9 parties upon request to facilitate preparation for a shoreline substantial development
10 hearing.

11 EXHIBITS

12 The following constitutes most of the exhibits admitted on day one of the hearing. As
13 with the summary of testimony, since this case was resolved on legal grounds the
14 entire exhibit list is not provided.

- 15 Exhibit 1: Notice of Appeal
- 16 Exhibit 2: Motion to Dismiss on Sept. 4, 2013
- 17 Exhibit 3: Friends Response to Motion
- 18 Exhibit 4: Laufer Reply to Motion
- 19 Exhibit 5: Order Denying the Motion
- 20 Exhibit 6: Staff Report
- 21 Exhibit 7: Geo Tech Report
- 22 Exhibit 8: Friends Witness Exhibit List
- 23 Exhibit 9: Laufer Witness Exhibit List
- 24 Exhibit 10: Laufer Motion for Pre-Hearing Conference
- 25 Exhibit 11: Applicant's Hearing Brief
- 26 Exhibit 12: Appellant's Hearing Brief
- 27 Exhibit 13: Pre-Hearing E-mail Correspondence Between all Parties
- 28 Exhibit 14: Four photographs for Mr. Johannessen
- 29 Exhibit 15: NOAA tide charts
- 30 Exhibit 16: Colored site plan

31 The applicant and appellant exhibit notebooks were also each admitted into the record.

32 FINDINGS OF FACT

33 Procedural:

34 1. Applicant. The applicant is 1281 and 1651 Yacht Haven LLC, referred to as
35 "Laufer" in this decision.

36 2. Appellant. FOSJ.

1 3. Hearing. The Hearing Examiner conducted a hearing on the subject
2 application on November 13, 2013, which was continued to November 21, 2013. On
3 November 21, 2013 the record was left open through November 25, 2013 to give
4 FOSJ an opportunity to review and comment on some exhibits. Written closings of
5 the appellant and applicant were also due on November 25, 2013.

6 **Substantive:**

7 4. Appeal Description. FOSJ has filed an appeal of a County determination
8 that a residential bulkhead extension proposed by the applicant is exempt from review
9 under a shoreline substantial development permit application.

10 The applicant submitted an application for the shoreline exemption on 5/23/13 for
11 construction of a “two tiered rock bulkhead to protect an existing single family
12 residence and beach access stairs pursuant to Section 18.50.020(F.2.c) and WAC
13 173-27-040(2.c).” The application was approved by County staff on August 1, 2013.
14 FOSJ filed its appeal of the exemption approval on 8/22/13.

15 The applicant describes the bulkhead extension as a two-tiered rockery structure and
16 asserts that the upper tier is necessary for the functionality of the lower tier, which is
17 located at the toe of the shoreline banks on the subject lot. The upper and lower tiers
18 connect to the upper and lower tiers of the Woodman bulkhead, which adjoins the
19 subject property to the north. The lower tier of the Laufer extension² will be 38’ long,
20 and lies near the OHWM, indirectly below the top of the stairs, but not directly below
21 the house. Its southerly end terminates at exposed bedrock, which appears to already
22 protect the southerly part of the property. The upper tier of the Laufer extension will
23 be 55’ long, extending from the northerly property line. It is shown bisecting the
24 stairs and terminating about 2/3 of the way to the southerly property line. The upper
25 tier is more than 10’ away from and higher in elevation than the lower tier located
near the water. It is physically separate from the lower tier.

4. Characteristics of the Area. Adjoining the subject lot to the north is
shoreline property owned by the Woodmans. The immediately adjoining Woodman
lot is vacant. The shoreline lot immediately to the north of the Woodman vacant lot
is also owned by the Woodmans and is developed with their home. The two-tiered
bulkhead structure on the Woodman lot identified in FOF No. 3 for the vacant
Woodman lot has not yet been constructed. A shoreline substantial development
permit was approved for that portion of the bulkhead but the permit is currently under
appeal to the Shoreline Hearings Board (“SHB”). The Woodman bulkhead on the
vacant Woodman lot is not shoreline exempt because there is no single-family
residence located on that lot.

² Since the Woodman and Laufer bulkheads are determined to be a single-bulkhead in this decision, the applicant’s portion will be called the “Laufer extension” and the Woodmans’ portion will be referenced as the “Woodman portion” of the bulkhead.

1 This bulkhead for the Woodman vacant lot is an 80 foot extension of an existing rock
2 bulkhead located on the developed lot to the north. The extension onto the vacant lot
3 constitutes the applicants' fourth successive bulkhead development that commenced
4 at the developed Woodman lot. See *Woodman Examiner decision*, PSJ000-12-0015,
5 FOF No. 3.

6 The Laufer extension is located in a pocket beach approximately 400 feet long. See
7 applicant exhibit notebook, tab K, 10/23/13 site plan. Approval of the Laufer
8 extension would result in the complete armoring of the pocket beach. Prior to the
9 shoreline exemption application, FOSJ designated the pocket beach as among the
10 three highest priority miles of shorelines in San Juan County due to the existence of
11 surf smelt spawning habitat, Pacific herring spawning in near shore eelgrass, and
12 juvenile salmon.

13 5. Notice of Integration with Woodman Bulkhead. An arguably pertinent
14 factual issue in this appeal is whether FOSJ was given reasonable notice of the
15 subject bulkhead extension's integration with the Woodman portion of the bulkhead.
16 Although FOSJ was given some indication that there would be linkage of the
17 applicant's bulkhead to the Woodman bulkhead, this notice materially failed to give
18 FOSJ a complete picture of the extent of that integration to give FOSJ a meaningful
19 opportunity to raise the integration as an appeal issue.

20 At the time that FOSJ filed its application, the only information in the planning file on
21 the project (to the extent disclosed in this administrative record) was the exemption
22 application. See applicant notebook, tab A. The application included a five page
23 narrative that didn't mention any connection to the Woodman bulkhead. A site plan
24 in the application showed that the lower tier of the bulkhead ended on the north end
25 of the applicant's property, where the Woodman bulkhead commenced. The upper
26 tier of the applicant's bulkhead was shown as separated from the upper tier of the
27 Woodman upper tier by several feet. The proximity of the lower tiers of the
28 Woodman and subject bulkhead is the only indication in the application materials that
29 the two tiers may be connected.

30 Subsequent to the filing of the FOSJ appeal and the expiration of the appeal deadline
31 the applicants submitted a technical memorandum dated October 30, 2013 that
32 provided that when the Woodman vacant lot bulkhead extension and applicant
33 extension are completed, the resultant bulkhead "*will form a continuous bulkhead
34 across the common property line*". See *applicant exhibit notebook*, tab K. A site plan
35 accompanying the technical memorandum revised the upper tier to show it adjacent to
36 the Woodman upper tier. As a result of the new information and project revisions in
37 the technical memorandum, staff for the first time raised the question in a 11/5/2013
38 email as to whether the project was still exempt given WAC 173-27-040(1)(d), which
39 provides that a proposed development is not shoreline exempt if any portion of the
40 proposed development is not shoreline exempt. FOSJ also noted that the applicant

1 advised it after the filing of its appeal that the applicant had paid for depositions in the
2 appeal of the Woodman bulkhead, strongly suggesting that the Woodmans and the
applicant were working together in constructing a common and unified bulkhead.

3 As concluded in FOF No. 6, the connection of the upper Woodman and Laufer
4 bulkhead tiers is an important factor in determining that the Woodman and Laufer
5 bulkhead extensions are part of a single structure. This and other information was not
6 present at the time the staff reviewed the applicant's shoreline application and the
7 appeal deadline expired. FOSJ could not have been reasonably expected to assert that
8 the Laufer bulkhead extension was a part of the Woodman bulkhead without this
9 information.

10 6. Single Structure. The Woodman and the applicant portions of the bulkhead
11 comprise a single structure. Both upper and lower tiers of the bulkhead structures of
12 both properties are connected. According to the applicant's own technical
13 memorandum, the bulkhead structures "*form a continuous bulkhead across the*
14 *common property line*". See applicant exhibit notebook, tab K. Further suggestive
15 of a unitary structure is the unique design features shared by the Woodman and
16 applicant bulkheads. During the hearing the applicant's experts insisted that the top
17 tier of the applicant's bulkhead was not a separate retaining wall, but rather an
18 integral part of the bulkhead necessary to protect the bottom tier from upland slope
19 failures. This represents a unique bulkhead design feature that is shared by the
adjoining Woodman bulkhead. A final common element is that the Woodman and
applicant bulkheads share the same experts and representatives in application and
design. Ultimately, the only difference between the Woodman and Laufer portions of
the bulkhead are that they are situated on separately owned properties. The invisible
line across the bulkhead that demarcates ownership between the Laufers and the
Woodmans is of no consequence from an environmental impact standpoint, which of
course is the focus of shoreline review. The applicant asserted in a November 5,
2013 email that the Woodman and applicant bulkheads are separate, but tellingly
provides no reason why. Differences in design, location, materials or even timing of
construction would all support a position that the structures are separate, but the
applicant was unable to produce any such information.

20 CONCLUSIONS OF LAW

21 **Procedural:**

22 1. Authority of Hearing Examiner. Appeals of administrative determinations
23 or interpretations made by the administrator are reviewed by the Hearing Examiner,
24 after conducting an open-record public hearing, pursuant to SJCC18.80.140(B)(8).

25 2. Scope of Appeal. This appeal is resolved on the basis that projects are not exempt
if any portion of the project is not exempt, as dictated by WAC 173-27-040(1)(d).
This issue was not raised in the FOSJ appeal and was first raised by staff in an
11/5/2013 email. It is concluded that the WAC 173-27-040(1)(d) issue can be

1 considered in this appeal because the facts that underlie the issue were not reasonably
2 made known to FOSJ until after the expiration of the appeal deadline. Even if those
3 facts had been made known to FOSJ, the issue would still be subject to review
because the applicant did not object to its consideration, even after the examiner
identified that it was not raised in the FOSJ appeal statement.

4 As ruled in prior examiner decisions, appeal issues are limited to those identified in
5 the statement of appeal. *See, e.g. Islander Resort*, PSJ000-12-0003; PAPL00-12-
6 0002. In this case it is uncontested that the WAC 173-27-040(1)(d) issue is not
7 included in the FOSJ appeal statement. However, as determined in FOF No. 5, the
8 facts pertinent to the WAC 173-27-040(1)(d) issue were not made known to FOSJ
9 prior to the expiration of the appeal period. FOSJ cannot be expected to raise an issue
in its appeal statement for facts and design revisions that aren't revealed until after the
appeal period has expired. FOSJ argued the WAC 173-27-040(1)(d) issue by raising
it in their prehearing brief, pages 10-11 as well as their written closing, p. 2. The
issue was properly raised for review.

10 Even if FOSJ had reasonable notice of the facts triggering the WAC 173-27-040(1)(d)
11 issue, the applicant waived any objection to the consideration of the issue because it
12 didn't object to its consideration on the basis that the issue wasn't included in the
Notice of Appeal.

13 **Substantive:**

14 3. Proposal Not Exempt. The proposed bulkhead is not exempt from
15 shoreline review because it is a part of a larger bulkhead structure that has portions
16 that are not shoreline exempt. The operative shoreline rule provides as follows:

17 *If any part of a proposed development is not eligible for exemption, then a*
18 *substantial development permit is required for the entire proposed*
development project.

19 WAC 173-27-040(1)(d).

20 As determined in FOF No. 6, the Woodman and applicant bulkheads constitute a
21 single structure and hence constitute one proposed development. As noted in FOF No.
22 4, the Woodman portion of this single structure as it crosses the Woodman vacant lot
23 is not shoreline exempt, because it is not constructed to protect an upland residence.
Consequently, WAC 173-27-040(1)(d) dictates that the proposed portion of the
structure is not exempt.

24 An even more challenging issue than whether the Woodman/applicant bulkhead
25 constitutes a single structure is whether the entire Woodman/applicant bulkhead
constitutes the "proposed development" referenced in WAC 173-27-040(1)(d). If the
approved Woodman bulkhead does not constitute part of the "proposed development",

1 WAC 173-27-040(1)(d) would not apply because none of the “proposed development”
2 would be subject to shoreline substantial development permit review.

3 It is concluded that the Woodman portion of the bulkhead is a part of the “proposed
4 development” for purposes of WAC 173-27-040(1)(d). A single structure such as the
5 Woodman/applicant bulkhead should be reviewed as a whole under shoreline review.
6 The applicant is not proposing a bulkhead that only extends across the Laufer
7 property. The proposed development in this case is the extension of the Woodman
8 bulkhead across the Laufer property. A fundamental purpose of the SMA permitting
9 system is recognition that there is a need for coordinated planning to prevent the
10 inherent harm occasioned by piecemeal development of the shorelines. RCW
11 90.58.020. The courts and the SHB have made it abundantly clear that piecemeal
12 review is to be avoided in shoreline permitting. *See Merkel v. Port of Brownsville*, 8
13 Wash. App. 844 (1973); *Bhatia v. DOE*, SHB No. 95-34 (1996). This case represents
14 a classic situation of piecemeal review, where the Woodmans have been incrementally
15 increasing the length of the bulkhead across their two properties through four separate
16 applications and are now coordinating the extension of the structure in a fifth
17 application across the applicant’s property. If the applicant’s extension is approved,
18 the result will be the complete bulkheading of a 400 foot pocket beach, a stretch of
19 beach designated by FOSJ as among the three highest priority miles of shorelines in
20 San Juan County due to the existence of surf smelt spawning habitat, Pacific herring
21 spawning in near shore eelgrass, and juvenile salmon. It is appropriate in this instance
22 that a development of such environmental consequence should be subject to the public
23 review process of a shoreline substantial development permit and the appellate
24 expertise of the SHB and not hidden away in a piecemeal series of permit reviews,
25 almost half of which are handled administratively with limited or no shoreline policy
review as exemptions.

It is acknowledged that the court and shoreline opinions rejecting piecemeal
development permit review require coordinated review for proposals that functionally
serve as one project and cannot be separately developed. This fact has proven to be
determinative in assessing piecemealing issues for purposes of SEPA review. See,
e.g., *Cheney v. City of Mountlake Terrace*, 87 Wash.2d 338 (1976)(Merkel case
distinguishable because project can be developed separately from other developments
which opponents assert should be included in SEPA review). However, this case is
unique in that the arguably separate Woodman project is in fact part of the same
structure. This appears to be an issue of first impression. Given that exemptions
should be construed narrowly, WAC 173-27-040(2)(a) and SJCC 18.50.020(F)(2), and
the SMA policy against piecemeal development, the SHB or a court is likely to
conclude that the proposal should be considered as part of a shoreline substantial
development permit application.

DECISION

The proposal is not exempt from shoreline substantial development permit review by
operation of WAC 173-27-040(1)(d), because a portion of the proposed development

1 is not exempt from shoreline review. The FOSJ appeal is sustained. A shoreline
2 substantial development permit is required for the proposal.

3 Dated this 9th day of December 2013.

4 
5 Phil A. Olbrechts

6 County of San Juan Hearing Examiner
7

8
9 **Effective Date, Appeal Right, and Valuation Notices**

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

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

15 Depending on the subject matter, this decision may be appealable to the San Juan
16 County Superior Court or to the Washington State Shorelines Hearings Board. State
17 law provides short deadlines and strict procedures for appeals, and failure to timely
18 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.

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

21 **RIGHT OF RECONSIDERATION**

22 Parties to this hearing have a right to request reconsideration as outlined in SJCC
23 2.22.210(O).
24
25