

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant(s): Pt. Thompson House, LLC
171 Island View Circle
Elgin, SC 29045

Law Offices of Stephanie Johnson O'Day
Francine Shaw
PO Box 2112
Friday Harbor, WA 98250

File No.: PSJVAR-12-0001

Request: Shoreline Variance

Parcel No: 170750001

Location: East of Telfer Lane
Orcas Island

Summary of Proposal: Variance to SJCC 18.50.330(D)(2).

Land Use Designation: Rural Residential

Public Hearing: June 13, 2012

Application Policies and Regulations: SJCC 18.80.110(I)(3)

Decision: The application is approved.

[S.J.C. COMMUNITY

JUL 03 2012

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Pt. Thompson House, LLC 5 Shoreline Variance 6 (PSJVAR-12-0001)	7 FINDINGS OF FACT, CONCLUSIONS 8 OF LAW AND FINAL DECISION
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9 **INTRODUCTION**

10 The Applicant has applied for a shoreline variance to a shoreline setback. SJCC
11 18.50.330(D)(2) requires a fifty foot setback from the ordinary high water mark
12 (“OHWM”) or top of bank, whichever is greater. The Applicant seeks to build a
13 home 20 feet from the top of a bank. The variance request is approved.

14 **TESTIMONY**

15 Lee McEnery, senior San Juan County planner, stated that the application is for a
16 shoreline variance permit to adjust the setback standards of a residence on Telfer
17 Lane, Orcas Island. The proposal is to build a house, despite the size and shape of the
18 property not meeting the necessary setback standards. Staff has recommended
19 approval of the application. The home will be viewable from the shoreline.

20 The applicant’s agent, Francine Shaw, testified that the property was originally
21 subdivided in 1928 and then re-divided in 1958. At that time, San Juan County had no
22 shoreline setback laws to be used for configuring the lot. A majority of the property is
23 a bay inlet with a steep slope covered in vegetation. The normally required 50 ft. set-
24 back leaves only a small buildable area that is not large enough to build a septic or
25 drain field. The house will be setback approximately 169 ft. from the water. A
26 setback variance from the road would have placed the septic system very close to the
27 water, which is against the desires of the Shoreline Master Program. The building will
28 be 960 sq ft. with a garage on the bottom level and an apartment on the top level. A
29 stormwater plan was submitted with the proposal because of an eel bed located in the
30 front of the property. There is a topographical map attached to the proposal. The area
31 is not a geological hazardous area so no specific setback is required from the bank.

32 **EXHIBITS**

33 The exhibits identified in the cover sheet “Exhibits for Pt. Thompson House LLC”,
34 attached to the May 29, 2012 staff report, are all admitted into the record.

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicant is Pt. Thompson House, LLC.
2. Hearing. The Hearing Examiner conducted a hearing on the subject application on June 13, 2012 at 10:00 am in the San Juan County Council meeting chambers.

Substantive:

3. Site and Proposal Description. The Applicant has applied for a shoreline variance to a shoreline setback. SJCC 18.50.330(D)(2) requires a fifty foot setback from the ordinary high water mark ("OHWM") or top of bank, whichever is greater. The Applicant seeks to build a single-family home 20 feet from the top of the bank. Without the variance, the only buildable area remaining after application of the shoreline and front yard setbacks is a triangular wedge 20 feet wide as depicted in the site plan of Ex. 3. The wedge area is only large enough to accommodate a septic drain field and driveway for the project. As noted in the staff report, building the home into the front yard setback would require the displacement of the drain field closer to the OHWM, which would be contrary to shoreline policies, presumably because the placement of drain fields close to the shoreline can adversely affect water quality.

The proposed single-family home is a combined dwelling unit and garage consisting of a 24'x40' footprint (960 square feet) and a 40'x24' foot gravel driveway (960 square feet). The parcel was created prior to the adoption of any shoreline setback regulations.

4. Characteristics of the Area. The parcels to the south, west and east are developed residential properties. Many of the lots in the vicinity are as small as the subject lot. The Strait of George is to the north. Much of the area is heavily treed.

5. Adverse Impacts of Proposed Use. There are no adverse impacts discernible from the record. With the proposed variance the proposed home will still be 140¹ feet from the OHWM, which far exceeds the fifty foot setback that would apply in the absence of the bank. As noted by the Applicant in the application materials, the Applicant has prepared a stormwater management plan that will prevent sediment from reaching an off-shore eelgrass bed and few trees will be removed by the proposal. The staff report also identifies an approved construction pollution prevention plan. Given the large distance from the OHWM, the stormwater management plan and construction pollution plan, the minor tree removal and the

¹ The staff report concludes there is a 140 foot separate from the OHWM while the application materials, Ex. 3, assert a 169 foot separation. The difference between the two measurements is immaterial, as either distance is substantial in relation to assessing impacts to water quality.

1 absence of any evidence to the contrary, more likely than not the proposal will not
2 adversely affect water quality or aquatic habitat.

3 The bank is not protected by the County's critical areas ordinance as a geologically
4 hazardous area and the staff report notes that the slope is "apparently stable" so no
5 issues of slope stability are present. The record does not contain any information on
6 view impacts, except for a reference in the staff report to the fact the home on one of
7 the adjoining properties is setback 100 feet from the top of the bank. Given the
8 absence of any opposition to the requested variance and the 100 foot separation from
9 the bank on one of the two adjoining properties, it is determined that more likely than
10 not the proposal will not result in any adverse view impacts to adjoining properties.
11 The staff report also notes that since the area is heavily treed it is unlikely that the
12 home will be seen from the water.

13 As for cumulative impacts, given the very minor nature of the impacts of the project
14 and the fact that no other properties in the vicinity would qualify for a variance to the
15 50 foot setback as noted in the staff report, more likely than not there will be no
16 significant cumulative impacts associated with the proposal.

17 CONCLUSIONS OF LAW

18 **Procedural:**

19 1. Authority of Hearing Examiner. The Hearing Examiner issues a final
20 decision on shoreline variance applications, subject to approval by the Washington
21 State Department of Ecology. Section 3.70 of the San Juan County Charter; RCW
22 90.58.140(10).

23 **Substantive:**

24 2. Zoning Designations. The zoning and shoreline designations for the
25 project area are Rural Residential.

3. Permit Review Criteria. The criteria for variances to shoreline master
program regulations are governed by SJCC 18.80.110(I)(3), which are quoted below
and applied to the project through corresponding conclusions of law.

3. **SJCC 18.80.110(I)(3)(a)(i):** *Variances for development that will be located
landward of the ordinary high water mark (OHWM), as defined in RCW
90.58.030(2)(b), except within those areas designated as wetlands pursuant to
Chapter 173-22 WAC, may be authorized; provided, the applicant can demonstrate
all of the following:*

*i. That the strict application of the bulk, dimensional, or performance standards
set forth in the applicable master program precludes or significantly interferes with a
reasonable use of the property not otherwise prohibited by the master program. The
fact that a greater profit might result from using the property in a manner contrary to*

1 *the intent of the Shoreline Master Program is not sufficient reason for granting a*
2 *variance;*

3 4. The “reasonable use” of property has been delineated in a long line of takings and
4 substantive due process cases at both the state and federal level. *See, e.g., Buechel v.*
5 *State Dept. of Ecology*, 125 Wn.2d 196 (1994). Given that a primary purpose of a
6 variance is to avoid a substantive due process or takings challenge, case law on
7 takings and substantive due process is instructive on determining what constitutes a
8 reasonable use. As noted in the *Buechel* decision, factors considered in a substantive
9 due process assessment of reasonable use include the expectations of the property
10 owner at the time of purchase, the size of the property and its location. In this case
11 there are numerous other lots in the vicinity of similar size that are developed with
12 single-family homes. The lot is zoned for single-family use and is clearly large
13 enough to accommodate a reasonable sized single-family home. Further, no
14 significant adverse impacts are associated with the development of a single-family
15 home. Given all these factors, a reasonable use of the property is a single-family
16 home. Further, the proposed development is located landward of the OHWM as
17 required by the criterion quoted above.

18 **SJCC 18.80.110(I)(3)(a)(ii):** *That the hardship described in this section is*
19 *specifically related to the property and is the result of unique conditions such as*
20 *irregular lot shape, size, or natural features, and the application of the Shoreline*
21 *Master Program, and not, for example, from deed restrictions or the applicant’s own*
22 *actions;*

23 5. The hardship caused by the 50 foot setback results from the location of the bank
24 and the relatively small size of the lot. The lot was created before the adoption of the
25 50 foot setback and thus its small size cannot be attributable to the actions of the
property owner. The criterion is satisfied.

SJCC 18.80.110(I)(3)(a)(iii): *That the design of the project is compatible with other*
permitted activities in the area and will not cause adverse effects to adjacent
properties or the shoreline environment;

6. As determined in Finding of Fact No. 5, there are no significant adverse impacts
associated with the proposal. Further, as noted in the findings of fact, the surrounding
lots are also developed with single-family homes. The criterion is satisfied.

SJCC 18.80.110(I)(3)(iv): *That the requested variance does not constitute a grant of*
special privilege not enjoyed by the other properties in the area, and is the minimum
necessary to afford relief; and

7. The surrounding area is characterized by single-family development so no grant
of special privilege is involved. The variance is also the minimum necessary to
afford relief since the home is of very modest size and is setback as far from the
OHWM as site conditions allow.

1 **SJCC 18.80.110(3)(a)(v):** *That the public interest will suffer no substantial*
2 *detrimental effect.*

3 8. The proposal enables the minimum reasonable use of the property while not
4 creating any significant adverse impacts. For these reasons, the public interest will
5 suffer no substantial detrimental effect.

6 **SJCC 18.80.110(3)(c):** *In the granting of shoreline variances, consideration shall be*
7 *given to the cumulative impact of additional requests for like actions in the area. For*
8 *example, if variances were granted to other developments in the area where similar*
9 *circumstances exist, the total of the variances shall also remain consistent with the*
10 *policies of RCW 90.58.020 and shall not produce substantial adverse effects to the*
11 *shoreline environment.*

12 9. No significant cumulative impacts are associated with the proposal as determined
13 in Finding of Fact No. 5.

14 **DECISION**

15 The application is consistent with all applicable variance criteria and is approved
16 subject to the following condition:

- 17 1. If requested by staff, the Applicant shall schedule a site inspection with staff
18 upon completion of the project to verify compliance with this decision and
19 applicable regulations.

20 Dated this 2nd day of July, 2012.

21 

22 Phil Olbrechts
23 County of San Juan Hearing Examiner

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

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

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

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

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