

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Leo Lambiel
668 Olga Road
Eastsound, WA 98245

Agent Fred Klein
545 Sunset Avenue
Eastsound, WA 98245

File No.: PSJ000-12-0001

Request: Shoreline Conditional Use Permit

Parcel No: 272450002

Location: 668 Olga Road
Eastsound, WA 98245

Summary of Proposal: Art Installation.

Shoreline Designation: Rural Farm Forest

Hearing Date: June 13, 2012

Application Policies and Regulations: SJCC 18.80.110(J)(4)

Decision: Approved with conditions.

S.J.C. COMMUNITY

JUL 16 2012

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: Leo Lambiel

5 Shoreline Conditional Use
6 Permit
7 (PSJ000-12-0001)

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

S.J.C. COMMUNITY

JUL 16 2012

8 **INTRODUCTION**

DEVELOPMENT & PLANNING

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10 The Applicant has applied for an after-the-fact shoreline conditional use permit to
11 construct an art installation composed of a "Greek Temple Ruin" with a height of
12 approximately 21 feet and associated grotto seaward of his shoreline residence on
13 Orcas Island off of East Sound. The application is approved.

14 A major issue in this application is whether the proposal complies with SJCC
15 18.50.330(E)(1), which requires that all residential accessory uses may not be located
16 seaward of residences. It is uncontested that the proposed art installation is located
17 seaward of the Lambiel residence. However, the County has issued an administrative
18 determination that a variance to SJCC 18.50.330(E)(1) is not required if the
19 Applicant acquires a conditional use permit. This necessarily implies that the
20 proposal is in compliance with SJCC 18.50.330(E)(1) if it is processed as a
21 conditional use. The County is bound to this administrative determination and the
22 project is determined to be in compliance with SJCC 18.50.330(E)(1).

18 **TESTIMONY**

19 Richard Aramburu stated that the permit has received multiple letters of support
20 (around 31) from a variety of people on and off the island. The permit is for a
21 shoreline conditional use. Originally, the applicant asked San Juan to exempt the
22 construction from permit. However, a work of art is not a named use within the San
23 Juan County Shoreline Master Program. The project is in a rural-residential district
24 and is an accessory-use to Mr. Lambiel's residence. The Greek Temple was crafted in
25 an old tree-well. The art is located on private property and is not substantially visible
from the water or Olga Road. The environmental impacts are insubstantial. The
applicant believes the art is consistent with the Shoreline Master Program. The
Shoreline Act is designed to allow people to develop along the shoreline. Mr.
Lambiel did not know he needed a permit for the project.

1 Fred Klein, the Applicant's architect, testified that the idea of the grotto was
2 influenced by late-renaissance exploration of the natural world. Traditionally, a grotto
3 is underground and hidden, thus it needs some form of a marker. Classical ruins
4 became popular markers as they were physical metaphors for the folly of man's
5 leaving his mark on nature (architectural folly). The Lambiel Grotto is a
6 contemporary example of the historic form and includes a chamber for people to
7 inquire to the oracle of Orcas. It is an experiential work of art. The letter of
8 opposition was from neighbors on the very limit of the 300 ft. public notice area. The
9 opposition's property is 3-4 parcels away. There is question to the actual intentions of
10 the opposition letter. The highest portion of the Temple is just below the street level
11 of the adjacent road. The Temple is also shielded by vegetation. The home adjoining
12 to the south is landward of the Temple, and that property's line of sight to the water is
13 not hindered.

14 Elaine Phipps commented that Mr. Lambiel is very environmentally concerned. Mr.
15 Lambiel protects the nature around his home and accommodates vegetation when
16 building around his home.

17 J. Wilcum stated he is the only adjacent neighbor to Mr. Lambiel. The Temple is well
18 covered with trees and cannot be seen from the water. He believes San Juan should
19 focus on more pertinent issues than this permit.

20 Chris Laws, San Juan County Code Enforcement Officer, testified that he believed
21 that the project still violated SJCC 18.50.330(E)(1), which prohibits residential
22 accessory structures from being located seaward of the most landward extent of the
23 residence. The Examiner left the record open for Mr. Aramburu to provide a written
24 response to this position.

25 Several other people also testified in favor of the proposal, noting the beauty of the
project and the other artwork at Mr. Lambiel's home, how Mr. Lambiel has made his
art available for viewing by the San Juan County community, and that his work
provides a substantial contribution to the arts and culture of County. Several persons
also noted that Mr. Lambiel should not have to incur the time and expense associated
with a shoreline permit and that a permit serves no purpose.

EXHIBITS

Exhibits 1-7, identified in an attachment to the May 25, 2012 staff report, were all
admitted into the record at the hearing. Ex. 7, composed of the comment letters and
emails for the project, is composed of 32 letters and emails of support and one letter
of opposition in addition to an August 9, 2010 letter from Jonathan Cain, deputy San
Juan County prosecuting attorney, addressing some legal issues related to the project.
In addition to these documents, the following exhibits were also admitted at the
hearing:

Ex. 8: Letter from Rick Aramburu requesting shoreline exemption.

1 Ex. 9: June 22, 2012 letter from Rick Aramburu responding to hearing comments.

2 FINDINGS OF FACT

3 Procedural:

- 4 1. Applicant. The Applicant is Leo Lambiel.
- 5 2. Hearing. The Hearing Examiner conducted a hearing on the subject
6 application on June 13, 2012 at 10:00 am in the San Juan County Council meeting
7 chambers. The record was left open in order to provide Mr. Aramburu an opportunity
8 to respond to assertions made by the code enforcement officer that the proposal
9 violated County setback requirements. A response letter dated June 22, 2012 was
10 submitted by Mr. Aramburu.

11 Substantive:

12 3. Site and Proposal Description. The Applicant has applied for an after-the-
13 fact shoreline conditional use permit to construct an art installation composed of a
14 "Greek Temple Ruin" with a height of approximately 21 feet and associated grotto
15 seaward of his shoreline residence on Orcas Island off of East Sound. From the
16 project drawings in Ex. 3, the Ruin appears to reach a height of approximately 21 feet
17 above ground level at its tallest point. The above ground portion of the structure is a
18 hemi-spherical roof supported by eight Greek columns. Photographs and
19 architectural drawings of the structure are included in Ex. 6. The site is well
20 vegetated with several large trees that obscure views of the structure from adjoining
21 properties. The top of the structure is located below street level and the entire
22 structure is located approximately 51 feet from the ordinary high water mark of East
23 Sound.

24 4. Characteristics of the Area. The neighborhood is rural and residential in
25 nature and is heavily vegetated with large trees.

5. Adverse Impacts of Proposed Use. There are no adverse impacts
associated with the proposal. No adverse impacts are evident from the record or can
be reasonably inferred from the evidence presented. In point of fact the benefits of
the project can be considered quite substantial given the willingness of Mr. Lambiel
to share his art with the public and the significant public interest in his art as noted in
the numerous letters submitted in support of his project. The display of the artwork to
the public will also provide for more shoreline access and enjoyment of the shoreline
than would otherwise be available for this private property. Pertinent impacts are
addressed as follows:

- A. View/Aesthetic Impacts. The proposal does not impair any shoreline views
from adjoining properties or from East Sound. The photographs included in
Ex. 6 show that the structure is not visible from East Sound due to the
abundant number of trees at the project site. As testified by the project

1 architect, Fred Klein, the proposal is not visible from the adjoining street
2 because the top of the structure is below street level. He also noted that the
3 proposal does not impair line of sight to the shoreline of any adjacent
4 residences. It appears that the structure is only visible to one adjoining
5 residence (located to the southeast) and the view is very limited due to
6 shielding from numerous trees. The owner of that adjoining residence
7 testified in favor of the project.

8 B. Environmental Impacts. Staff concluded in the staff report that the project
9 will not create any adverse environmental impacts and there is no evidence to
10 the contrary. As noted by the Applicant in Ex. 6, the proposal does not result
11 in the removal in any significant amount of shoreline habitat because the
12 above-ground portion of the structure is of modest size (appears to be less
13 than 18 feet in diameter) and was designed to fill a cavity left by an up-rooted
14 old growth tree.

15 CONCLUSIONS OF LAW

16 Procedural:

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

21 Substantive:

22 2. Shoreline Designation. The shoreline designation is Rural Farm Forest.

23 3. Permit Review Criteria. As discussed in the staff report, an art installation
24 qualifies as an unspecified use in the County's shoreline master program. SJCC
25 18.50.160(A) requires a shoreline conditional use permit for unspecified uses. The
criteria for a shoreline conditional use permit are governed by SJCC 18.80.110(J)(4),
which are quoted below in italics and applied to the project via corresponding
Conclusions of Law:

SHORELINE CONDITIONAL USE CRITERIA

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

*SJCC 18.80.110(J)(4)(a): The proposed use is consistent with the policies of RCW
90.58.020 and the policies of the Shoreline Master Program;*

4. Page 4-5 of the Applicant's Shoreline Permit Application, Ex. 6, contains an
excellent analysis of applicable Shoreline Master Program policies and regulations,
Shoreline Conditional Use Permit

1 the findings and conclusions of which are adopted and incorporated by this reference
2 as if set forth in full. The policies of RCW 90.58.020 are satisfied as outlined in the
3 conclusions of law below. For the reasons identified in the Ex. 6 application and the
4 analysis of RCW 9.58.020 below, the criterion quoted above is met.

5 During the hearing, the County's code enforcement officer questioned whether the
6 proposal is consistent with SJCC 18.50.330(E)(1), which prohibits a residential
7 accessory structure from being located seaward of the residence. The San Juan
8 County Community Development and Planning ("CDPD") Director has issued an
9 administrative determination, Ex. 2, that a variance to the provision is not required if
10 the Applicant acquires a conditional use permit for the proposal. The determination
11 that a variance to SJCC 18.50.330(E)(1) is not required impliedly includes the
12 determination that the proposal complies with SJCC 18.50.330(E)(1). This
13 determination was not appealed so the Examiner is bound to its conclusions.

14 The County's administrative determination on the applicability of SJCC
15 18.50.330(E)(1) is far from clear-cut. The record was left open for Mr. Aramburu to
16 respond to this issue, but his June 22, 2012 response does not directly address it.
17 Documentation from the County conflicts on the issue. In an August 9, 2010 legal
18 opinion issued by Jonathan Cane, deputy San Juan prosecutor, Ex. 7, Mr. Cane
19 concluded as follows:

20 *"...the Greek Temple Structure is an accessory structure. Accessory
21 structures which are not water-dependent are not permitted seaward of
22 the most landward extent of the residence pursuant to SJCC
23 18.50.330(E)(1). It appears that some or all of the Greek Temple is
24 located seaward of the most landward extent of the residence. The Greek
25 Temple may not be located in its present location without approval of a
26 shoreline variance."*

27 Relying upon this letter, Mr. Beliveau came to an arguably conflicting conclusion in
28 his November 22, 2011 response, Ex. 2, to the Applicant's request for a shoreline
29 exemption:

30 *As was previously stated by Jonathan W. Cain, Deputy Prosecuting
31 Attorney, in a letter dated August 9, 2010 to your client's former attorney,
32 Michael Murray, a Shoreline Variance is required if this is considered a
33 normal appurtenance. Alternatively, if you wish to proceed under the
34 assertion that this is a work of art, and not a normal appurtenance, then a
35 Conditional Use Permit would be required....*

36 There are a couple discrepancies between the Beliveau and Cane letters. First, Mr.
37 Cane refers to the status of the proposal as an accessory use while Mr. Beliveau
38 refers to its status as an appurtenant use. This is an important distinction. SJCC
39 18.50.330(E)(1) only applies to accessory uses and there is no question that a
40 variance would be required if the proposal indeed qualifies as an accessory use.

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1 Whether or not the project qualifies as an appurtenant use is largely irrelevant to
2 SJCC 18.50.330(E)(1), which doesn't mention the term. If the proposal qualifies as
3 a normal appurtenance to the Lambiel residence, it is exempt from a shoreline
4 substantial development permit requirements as outlined in SJCC 18.50.330(E)(2).
5 However, even if exempt as a normal appurtenance, the proposal would still have to
6 comply with 18.50.330(E)(1) and the proposal would need a variance from this
7 requirement if it fails to meet the setback standard while qualifying as an accessory
8 use.

9 The second discrepancy is that Mr. Cane concludes that a variance is necessary for
10 the project while Mr. Beliveau concludes that the Applicant can proceed with the
11 proposal by acquiring either a variance or a conditional use permit. It is uncontested
12 by all the parties that the proposal is in fact seaward of the Lambiel residence.
13 Consequently, the only way that Mr. Beliveau can conclude that a variance to SJCC
14 18.50.330(E)(1) is not necessary for the proposal is if he concluded that the proposal
15 does not qualify as an accessory use, contrary to the conclusions of Mr. Cane.

16 Whether Mr. Beliveau's interpretation of SJCC 18.50.330(E)(1) is correct or not, his
17 determination is binding in this case. His administrative determination expressly
18 provides that it is a code interpretation subject to administrative appeal under SJCC
19 18.10.030(D). No appeal has been filed within the applicable 21 day appeal
20 deadline. Since no appeal has been filed, the administrative determination cannot be
21 revoked or modified. *See Chelan County v. Nykreim*, 146 Wn.2d 904 (2002);
22 *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2005). There is room to argue that
23 Mr. Beliveau's determination was written in response to a request for exemption and
24 should, therefore, be limited in its applicability to whether the proposal is exempt
25 from shoreline substantial development permit requirements. However, his
interpretation was designed to provide guidance on how to proceed with the
application and was in fact used for that purpose. Given those factors it is reasonable
to construe the determination as including the conclusion that a variance to SJCC
18.50.330(E)(1) is not necessary for the proposal.

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

21 5. The proposed structure is landward of the ordinary high water mark on private
22 property and will have no impact on public use of the shorelines.

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

25 6. As discussed in Finding of Fact No. 5, there are no adverse impacts associated
with the proposal. Since the proposal is only somewhat visible to one other property
and creates no noise, odor or other adverse impact, there should be no compatibility
problems.

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

3 7. As determined in Finding of Fact No. 5, there are no significant environmental
4 impacts associated with the proposal. The criterion is satisfied.

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

10 8. As determined in the Finding of Fact No. 5, there are no adverse impacts
11 associated with the proposal. The impacts are so minimal that even if several other
12 property owners opted to construct art installations of this magnitude, there would
13 still be no significant adverse impact to the shoreline. Further, as noted in the staff
14 report, the proposal is highly unique and it is unlikely that San Juan County will see a
15 proliferation of this type of use.

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

18 9. The project has no associated adverse impacts and provides for significant
19 cultural benefit to the San Juan County community. The public interest will not
20 suffer any detrimental effect and will in fact benefit significantly from the project.

21 **RCW 90.58.020 Use Preferences**

22 *This policy (Shoreline Management Act policy) is designed to insure the development*
23 *of these shorelines (of the state) in a manner which, while allowing for limited*
24 *reduction of rights of the public in the navigable waters, will promote and enhance*
25 *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...Alterations of the natural condition of the shorelines of the
state, in those limited instances when authorized, shall be given priority for single
family residences and their appurtenant structures, ports, shoreline recreational uses
including but not limited to parks, marinas, piers, and other improvements facilitating
public access to shorelines of the state, industrial and commercial developments
which are particularly dependent on their location on or use of the shorelines of the
state and other development that will provide an opportunity for substantial numbers
of the people to enjoy the shorelines of the state....

10. The proposal has no significant adverse impacts while substantially supporting the
public interest as outlined in Finding of Fact No. 5. The proposal is consistent with
the general purpose of the Shoreline Management Act.

1 **RCW 90.58.020(1)**

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

3 11. The proposal will not adversely affect shoreline resources while contributing to
4 the public interest as determined in Finding of Fact No. 5. The proposal is consistent
5 with the policy.

6 **RCW 90.58.020(2)**

7 *Preserve the natural character of the shoreline;*

8 12. As determined in Finding of Fact No. 5, the proposal is not visible from
9 surrounding areas and makes use of an area cleared out by an uprooted old growth
10 tree and does not involve the removal or alteration of any surrounding vegetation. The
11 natural character of the shoreline will not be affected by the proposal.

12 **RCW 90.58.020(3)**

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

14 13. The proposal will not adversely affect shoreline resources while contributing to
15 the public interest. The proposal is consistent with the policy.

16 **RCW 90.58.020(4):** *Protect the resources and ecology of the shoreline;*

17 14. As determined in Finding of Fact No. 5, the proposal will have no impact on the
18 resources and ecology of the shoreline.

19 **RCW 90.58.020(5):** *Increase public access to publicly owned areas of the
20 shorelines;*

21 15. Visual access to the shoreline will be enhanced through Mr. Lambiel's efforts to
22 display his art, located just 51 feet from the shoreline, to the public.

23 **RCW 90.58.020(6):** *Increase recreational opportunities for the public in the
24 shoreline;*

25 16. Unless art appreciation is considered public recreation, no public recreation is
included in the proposal nor could it be legally required.

DECISION

The proposal as described in Ex. 6 and in this decision is consistent with all applicable policies and criteria and is approved subject to the conditions below:

1. Construction or substantial progress toward construction of a project for which a shoreline permit is granted must be undertaken within two years after the permit approval.
2. All development authorized by a shoreline permit shall be completed within five years of the date of permit approval or the permit shall become null and void. The Applicant may request a time extension before the permit expires by making a written request to the administrator, stating the reasons.
3. Upon completion of construction, the Applicant or agent will contact the permitting department, CDPD, for an inspection.

Dated this 13th day of July, 2012.


 Phil Olbrechts
 County of San Juan Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may 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.

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.

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