

SAN JUAN COUNTY
HEARING EXAMINER

S.J.C. COMMUNITY

FINDINGS, CONCLUSIONS AND DECISION

AUG 11 2010

DEVELOPMENT & PLANNING

Applicants: John Gray
116 155th St SE
Lynnwood, WA 98087

File No: HE 38-09 (09SJ009) remanded to the County by the SHB

Request: Shoreline Substantial Development Permit (SSDP)

Location: Decatur Island, tax parcel 152842001 and joint use with 152813002

Summary of Proposal: The SHB ordered issuance of a decision approving the proposal

Shoreline Designation: Rural Farm Forest

Applicable Policies and Regulations: RCW 90.58 Shoreline Management Act (SMA)
SJCC 18.50 Shoreline Master Program (SMP)

Decision: Approve the proposal as conditioned in the attached SHB decision. The entire Shorelines Hearings Board decision SHB No. 10-001, dated July 2, 2010, including the Findings of Fact and Conclusions of Law, is adopted by reference, and is attached.

Decision

The proposed SSDP request for a dock (as described in the 12/2/2009 staff report) is approved subject to the following conditions. Development authorized by this permit shall commence within two years of the date of approval and shall be complete within five years of the date of approval.

1. This property and any successor in interest shall allow joint use of the dock by the neighboring parcel (currently owned by Fields), tax parcel 152813002, subject to reasonable terms and conditions. If the owners of 152813002 or any successor constructs a dock of their own or enters into another joint use agreement, this condition shall expire. The joint use requirement shall be recorded as a deed restriction on the Gray property.
2. The applicant shall comply with the terms of any Hydraulic Project Approval issued by the Washington Department of Fish and Wildlife.

DONE this 9th day of August, 2010.


Phil Olbrechts, Hearing Examiner

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

S.J.C. COMMUNITY

JUL 06 2010

DEVELOPMENT & PLANNING

JOHN GRAY,

Petitioner,

v.

SAN JUAN COUNTY,

Respondent.

SHB NO. 10-001

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

The Shorelines Hearings Board held a hearing in this matter on May 27, 2010, in Friday Harbor, Washington. Andrea McNamara Doyle, Chair, William H. Lynch, and Simon Kihia comprised the Board.¹ Administrative Appeals Judge Phyllis Macleod presided over the hearing. Petitioner John Gray represented himself *pro se*. Deputy Prosecuting Attorney Jonathan W. Cain represented San Juan County (County).

The Board received sworn testimony of witnesses, exhibits, and argument on behalf of the parties. Having fully considered this record, the Board enters the following:

FINDINGS OF FACT

1.

Mr. Gray owns residential property on the Southwest end of Decatur Island in San Juan County. He has owned this property since 1987 and has a home on the property. The property is low-lying, no-bank waterfront. The beach has a gentle slope but contains some big rocks. Although the property has only about a two percent slope down from the house towards the

¹ Pursuant to the authority of RCW 90.58.185, this case was heard by a three-member panel of the Board.
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1 beach, there is an abrupt drop of about one and one-half feet from the end of the lawn down to
2 the beach. The property is designated as Rural Farm Forest under the San Juan County Shoreline
3 Master Program (SJSMP). *Gray Testimony, Exs. R-1, R-6.*

4 2.

5 On August 18, 2009, Mr. Gray filed an application for a substantial development permit
6 with San Juan County. *Exs. R-2, R-8.* The proposed project consists of four steel pilings, a
7 gangway, and five floats. The pilings are 10 inches by 25 feet to 35 feet in length. The gangway
8 is 4 feet by 20 feet and will extend onto the float by 2 feet. Each float is 5 feet 11 and one-half
9 inches wide by 18 feet long. The gangway surface will be 100 percent grated, and the floats will
10 be 33 percent grated for light penetration. The total length of the project is 110 feet from Mean
11 High Water to the end of the floats. *Exs. R-3, R-6, R-8.* The proposed dock is consistent with
12 the length and area standards for single-user docks. *Exs. R-1, R-19.* The County considers Mr.
13 Gray's proposal to be a dock proposal, rather than just a proposal for a float because his proposal
14 includes a concrete landing area. *McEnery Testimony.*

15 3.

16 Mr. Gray will not moor a boat at the dock. It is designed for loading and unloading
17 purposes only. He owns a small fishing skiff, which he stores on his property, but this skiff will
18 not be kept at the dock. There are three other waterfront property owners without docks or floats
19 in the vicinity. Two of these property owners entered into a joint use agreement to use another
20 neighbor's dinghy floats. The Fields, the nearby property owners who do not have a joint use
21 agreement with another neighbor, currently access their property by Mr. Gray's beach. No

1 neighbors are interested in pursuing a joint use dock with Mr. Gray. No neighbors have objected
2 to Mr. Gray's proposed dock. *Gray Testimony, Exs. P-1, P-5B-5S, R-3, R-10.*

3
4 4.

5 There is no ferry service to Decatur Island. The property must be accessed by boat or by
6 air. Mr. Gray has been accessing his property by the Island Express water taxi, which lands and
7 loads/unloads at his beach. The water taxi is no longer a viable option for Mr. Gray because he
8 understands it is going out of business. *Gray Testimony, Ex. P-27.* In the more distant past, Mr.
9 Gray has accessed his property by attaching his boat to a mooring buoy. Mr. Gray does not
10 believe it is feasible for him to access his property by using a mooring buoy because he must
11 wade through water, and then walk through mud, over slippery vegetation, and around large
12 rocks before he is on the level surface of his lawn. Mr. Gray has significant problems with his
13 balance as a result of chemotherapy and believes this should be considered in evaluating the
14 reasonableness of his proposed project. He is interested in having a stable area for loading and
15 unloading when he accesses and departs his property. Mr. Gray is also concerned about potential
16 environmental harm caused by using the buoy because the buoy is located over eelgrass and the
17 buoy may scour the eelgrass. *Gray Testimony.*

18 5.

19 Once Mr. Gray reaches his Decatur Island property, he facilitates water access for
20 recreational purposes by attaching some floats to old pilings at the end of his property. *Gray*
21 *Testimony, Ex. P-20.* The existing floats and pilings are old and deteriorating. *Gray Testimony,*
Exs. P-10, P-11, P-21. Mr. Gray must walk across a narrow plank in order to step down from

his yard to the floats. *Gray Testimony, Ex. P-23.* When the tide is low and the weather is calm,
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1 the beach extends a considerable distance before reaching the water. For much of the time, a
2 boat would bottom out if it attempted to moor at the floats off his property. *Gray Testimony, Ex.*
3 *P-25.*

4 6.

5 On August 4, 2009, Mr. Gray hired Jen-Jay, Inc. to determine the distance from the
6 approximate line of Mean High Water to the landward edge of an eelgrass bed. Jen-Jay, Inc.
7 determined this distance was 146 feet.² *Exs. P-5T, P-6.*

8 7.

9 Mr. Gray submitted a State Environmental Policy Act (SEPA) checklist on August 19,
10 2009. *Ex. R-5.* A Determination of Non-Significance was issued for the proposed dock on
11 October 14, 2009. *Ex. R-10.*

12 8.

13 Mr. Gray submitted a Joint Aquatic Resources Permit Application (JARPA) to the
14 Washington State Department of Fish and Wildlife for the purpose of obtaining a Hydraulics
15 Project Approval (HPA). *Ex. R-8.* He also submitted an Application Form for Regional General
16 Permit 6 (RGP 6) approval from the United States Army Corps of Engineers. *Ex. R-9.* There is
17 nothing in the record indicating that he obtained either of these approvals.

18
19
20 ² Mr. Gray contends that the work performed by Jen-Jay, Inc. is an eelgrass survey. *Gray Testimony.* The County
21 disagrees with this contention because an eelgrass survey produces a map that shows the location of the eelgrass.
The Department of Fish and Wildlife will often require an eelgrass survey before issuing a hydraulic project
approval. The County does not believe that eelgrass presents a stumbling block to Mr. Gray's proposal. *McEnergy
Testimony.*

1 9.

2 The San Juan County Hearing Examiner found that the proposal complied with SEPA
3 requirements but denied Petitioner's application on the basis that Mr. Gray failed to prove that
4 existing facilities are not adequate or feasible under San Juan County Code (SJCC)
5 §18.50.190(G)(5). *Ex. R-10*.

6 10.

7 Conflicting testimony was provided regarding the availability of alternative facilities on
8 Decatur Island. Ms. McEnery, a San Juan County planner, testified that a county boat ramp was
9 located at Decatur Head. She was unsure if any parking was available at Decatur Head.

10 *McEnery Testimony*. Mr. Gray testified that there is no county ramp at Decatur Head and that
11 this area is completely private. The Decatur Shores Community Association regularly asks non-
12 association members not to use their dock. Mr. Gray landed there once with his mother and
13 young son during a low tide and was cursed at by the dock master. A county ramp is located at
14 Davis Bay, but there is no parking there. People can only be dropped off or picked up at the
15 Davis Bay ramp. People who have parked their cars along the road leading to the Davis Bay
16 ramp have had their cars hit on occasion by other vehicles. It is about a three and one-half mile
17 hike from Mr. Gray's property to the Davis Bay ramp. *Gray Testimony, Ex. P-5B*. The Board
18 believes Mr. Gray is more familiar with the available facilities on Decatur Island and therefore
19 finds his testimony regarding available alternate facilities more credible.

20 11.

21 At the hearing, Mr. Gray indicated it would be acceptable if the Board decided he could
repair or replace his current float system. The pilings and floats were on the property when Mr.
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1 Gray purchased it. *Gray Testimony*. The County asserts that the repair provisions do not apply
2 because the pilings have largely deteriorated. The County also introduced evidence of historic
3 photographs that do not show floats extending into the water from Mr. Gray's property. *Exs. R-*
4 *12, R-14, R-16*. Mr. Gray indicated he sometimes stores his floats on the uplands of his property
5 or at a nearby commercial facility and may not have re-installed the floats at the time the photos
6 were taken. *Gray Testimony*. The County planner was unaware that Mr. Gray used floats on his
7 property until the day of the hearing. *McEnery Testimony*. Floats and pilings have historically
8 been used by property owners along that section of beach. *Ex. P-14. See also Ex. P-26.*

9 12.

10 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

11 **CONCLUSIONS OF LAW**

12 1.

13 The Board has jurisdiction over this matter pursuant to RCW 90.58.180. The Petitioner
14 has the burden of proof. *RCW 90.58.140(7)*. The scope and standard of review for this matter is
15 *de novo. WAC 461-08-500(1)*.

16 2.

17 Mr. Gray intends to access his property from the water by loading and unloading from his
18 proposed concrete platform, ramp, and float. He insists that his proposed project is not for a
19 dock. He argues the proposed project is only for a float and does not include moorage. A
20 "dock" is defined under the SJCC as a "structure that abuts the shoreline and is used as a landing
21 or moorage place for commercial and pleasure craft. A dock typically consists of a pier, ramp,
and float." *SJCC §18.20.040 (emphasis added)*. The Board concludes that Mr. Gray's proposed

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1 project is for a dock as that term is defined in the SJCC because it does have a concrete landing
2 area affixed to the upland, and moorage is not a necessary requirement under the definition for a
3 dock.

4 3.

5 The issue before the Board is whether Mr. Gray's application to construct a dock is
6 consistent with the State Shoreline Management Act and the San Juan County Shoreline Master
7 Program, specifically SJCC §18.50.190(G)(5).

8 4.

9 Development of a dock for single-family residential purposes requires a shoreline
10 substantial development permit or an exemption issued by the County. *SJCC §18.50.190(G)(4)*.
11 Because no statement of exemption was issued by the County, and Mr. Gray's proposal is for
12 development of a dock for single-family residential purposes, a substantial development permit
13 is required.

14 5.

15 The SJCC sets forth a standard for approval of applications for docks and piers associated
16 with single-family residences. It provides:

- 17 Applications for nonexempt docks and piers associated with single-family residences
18 shall not be approved until:
- 19 a. It can be shown by the applicant that existing facilities are not adequate or feasible for
20 use;
 - b. Alternative moorage is not adequate or feasible; and
 - c. The applicant shall have the burden of providing the information requested for in
21 subsections (A) and (B) of this section, and shall provide this information in a manner
prescribed by the administrator.

SJCC §18.50.190(G)(5).

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6.

Mr. Gray contends that the term “existing facilities,” as used in SJCC §18.50.190(G)(5), applies only to moorage and that he is exempt from the restrictions in that subsection. The Board has already concluded that his proposed project is for the establishment of a dock, and likewise concludes that this section of the SJCC is applicable to his proposed project.

7.

A determination under SJCC §18.50.190(G)(5) requires consideration of how the dock will be used. *Bellevue Farm Owners Association v. Shorelines Hearings Board*, 100 Wn. App. 341, 359, 997 P.2d 380 (2000). The Board has defined the test for “adequate or feasible” as “enough or good enough for what is required or needed,” “barely satisfactory,” “suitable,” or “capable of being used.” *Stanford v. San Juan County*, SHB No. 06-004 (2006), pp. 8-9 (citing *Inskeep v. San Juan County*, SHB No. 98-033 (1999)). These criteria must be construed in a manner consistent with the policies of the Shorelines Management Act as to what is a reasonable and appropriate use. A permit applicant for a private dock does not meet these criteria by showing that the private dock is more convenient to access and use than other facilities in the area. *Close v. San Juan County*, SHB No. 99-021 (2000), p. 5. The standard for what is adequate or feasible is based on an objective standard, not on the desires of a particular applicant. *Northrop v. Klickitat County*, SHB No. 92-40 (1993), p. 8.

8.

The Board agrees with San Juan County’s conclusion that Mr. Gray’s physical condition is not a factor in evaluating his dock request. The Board has previously ruled that the age and

health of an applicant are not a factor in evaluating whether a shoreline variance should be
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1 granted. *Severns v. City of Seattle*, SHB No. 91-30 (1991)(holding that: “Entitlement to a
2 variance depends on the hardships imposed by the character of the property itself, [citation
3 omitted], and is not related to the age or agility of the applicant.”). All shoreline property owners
4 are aging, and most would have family or friends who are elderly or have young children, or who
5 have some physical limitations. The life of a dock can extend well beyond the lifetime of an
6 individual property owner. The Board, therefore, reviews Mr. Gray’s proposed project in light of
7 the character of his property, the purpose of the proposal, and the feasibility of alternatives to
8 access this property without regard to his own physical limitations.

9 9.

10 The Board has previously drawn a distinction between islands with ferry service or a
11 community dock and those islands that had neither. This distinction is appropriate because it is
12 often highly relevant when evaluating the adequacy or feasibility of alternatives in light of the
13 purpose of the proposed facility. In recognition of San Juan County’s policy to control the
14 proliferation of docks, the Board has frequently denied docks on islands served by ferries and
15 with available commercial moorage space, even when the proposed dock is for joint-use. *See*,
16 e.g., *Shorett v. San Juan County*, SHB No. 06-038 (2007). In *Hart v. San Juan County*, SHB No.
17 83-7 (1983), the Board denied a substantial development permit for a joint use dock on Friday
18 Island, which has no ferry service, because the island has a community dock.

19 In *Eklund v. San Juan County*, SHB No. 99-029 (2000), the Board authorized the
20 issuance of a substantial development permit for a joint use dock on Henry Island despite the fact
21 that the property owners had access to a mooring buoy. Henry Island is not served by the ferries

and there are no public mooring facilities or dock. The Board found that as the sole access point

1 for intended year round use, a buoy was inadequate. Similarly, in *Bishop v. San Juan County*,
2 SHB No. 99-034 (2000), the Board restated its holding in *Eklund* that a mooring buoy was
3 inadequate as the sole access point to Henry Island. The Board granted a substantial
4 development permit for the dock, but only on the condition that the permit make joint use
5 mandatory for certain lots.

6 10.

7 The Board denied a substantial development permit for a dock on Henry Island under a
8 different set of facts. *Culver v. San Juan County*, SHB No. 98-39 (1999). Mr. Culver had a
9 primitive dock consisting of log floats topped by narrow planks that extended about 70 feet into
10 Nelson Bay. The Board found that the proposed dock would only marginally improve Mr.
11 Culver's access to his lot. The Board noted that Mr. Culver could upgrade his primitive dock
12 without a permit so long as it did not extend further out into the bay. The Board also determined
13 that the joint agreement Mr. Culver entered into with his neighbors did not run with the land. In
14 addition, the Board found that Mr. Culver had an additional burden because his property was
15 designated a Conservancy Environment.

16 11.

17 The Board concludes that Mr. Gray does not have adequate or feasible alternatives to
18 access his property on Decatur Island. There is no ferry service or public dock on Decatur
19 Island. The county boat ramp at Davis Bay has no place to park a car. This is different than the
20 parking situation the Board faced in *Stanford v. San Juan County*, SHB No. 06-004 (2006),
21 where parking at a marina on a ferry-served island was "tight" during peak summer months. The

mooring buoy, which Mr. Gray has occasionally used in the past, raises potential environmental

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1 concerns and is not adequate for loading and unloading for island access. Future use of the
2 marine taxi service appears to be very questionable because of the shaky finances of that
3 business.

4 12.

5 Mr. Gray's proposed dock essentially permits the system he has been using, but in a more
6 stable form. The new dock will have a concrete landing, a more secure gangway connection
7 from the landing to the floats, and more support will be provided to the floats. No environmental
8 concerns have been identified with this project, and the County concedes that eelgrass is not an
9 issue with this proposed project. In addition, the proposed dock is consistent with the length and
10 area standards for single-user docks.

11 13.

12 The Board is concerned, however, about the lack of a joint use dock agreement associated
13 with this proposal. Mr. Gray has made a concerted attempt to get support from neighboring
14 properties for a joint use dock but has not identified anyone who is interested. Two of the three
15 other nearby waterfront property owners without docks or floats in the vicinity entered into a
16 joint use agreement to use another neighbor's dinghy floats. Single-user docks are disfavored in
17 San Juan County and can potentially lead to a "porcupine effect" of numerous docks projecting
18 from the shoreline. While failure to obtain a joint use agreement with other property owners
19 after a good faith effort does not justify approval of a single-user dock, neither does it mandate
20 disapproval.

14.

In *Save our Shaw v. San Juan County*, SHB No. 96-36 (Summary Judgment and Order of Dismissal, 1996), SHB No. 94-62 (Order on Motions for Summary Judgment, 1995), the Board required the insertion of a permit condition requiring joint use to the applicant's dock by the owner of the neighboring parcel on reasonable terms and conditions, including reasonable compensation for access if access is requested by land. The Board believes it is appropriate to require a similar condition on Mr. Gray's permit approval. Mr. Gray's dock approval would be subject to a joint use requirement allowing neighboring property owners, the Fields, joint use should they request it. The condition would provide that the Gray dock must be made available for joint use upon request by the Fields under reasonable terms and conditions.³ The requirement to allow joint use of the approved dock should be recorded as a deed restriction on the Gray property.

15.

Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

³ This burden on the Gray property does not limit or control future access decisions on the Fields' site. It does not affect the existing informal arrangement whereby the Fields access their property via Mr. Gray's beach. Should the Fields elect at some point in the future to seek alternative access, such as through their own dock, any such application would be evaluated under the terms of San Juan County Code 18.50.190(G)(5) based facts relevant to their proposal. *See Dagg v. San Juan County*, San Juan County Superior Court No. 07-2-05153-9, Decision with Findings and Conclusions (August 7, 2009).

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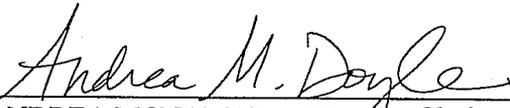
1 ORDER

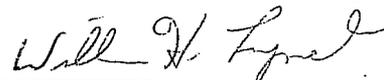
2 The County's denial of Mr. Gray's shoreline substantial development permit (SSDP) is
3 REVERSED, and the application is REMANDED to San Juan County for issuance of an SSDP
4 consistent with the foregoing ruling of the board, and including the following conditions:

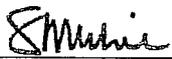
- 5 1. The County shall include a permit condition requiring Mr. Gray and any successor in
6 interest to allow joint use of the approved dock by the neighboring parcel owned by
7 the Fields on reasonable terms and conditions. This condition will expire by its own
8 terms if the Fields or any successor to the Fields constructs a dock facility of their
9 own or enters into another joint use agreement. This condition should require that the
10 joint use provision be recorded as a deed restriction on the Gray property.
- 11 2. The Substantial Development Permit shall require that the Applicant comply with the
12 terms of any Hydraulic Project Approval issued by the Washington Department of
13 Fish and Wildlife.

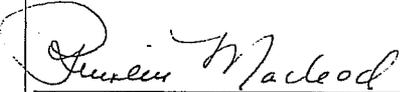
14 SO ORDERED this 2nd day of July, 2010.

15 SHORELINES HEARINGS BOARD

16 
17 ANDREA MCNAMARA DOYLE, Chair

18 
19 WILLIAM H. LYNCH, Member

20 
21 SIMON KIHIA, Member

22 
23 Phyllis Macleod
24 Administrative Appeals Judge
25 Presiding

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