

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicants: John and Rose Beckwith
111 Promontory Drive
Eastsound, WA 98245

File No.: PSJ000-10-0006

Request: Shoreline Substantial Development Permit

Parcel No: 260144005

Location: 111 Promontory Drive
Eastsound, WA 98245

Summary of Proposal: Addition of a ramp and float to a dingy dock for boat moorage

Shoreline Designation: Conservancy

Hearing Date: November 4, 2010

Application Policies and Regulations: San Juan County Shoreline Master Program

Decision: Denied.

S.J.C. COMMUNITY

DEC 14 2010

DEVELOPMENT & PLANNING

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

3 Phil Olbrechts, Hearing Examiner

4 RE: John and Rose Beckwith	FINDINGS OF FACT, CONCLUSIONS
5 Substantial Shoreline	OF LAW AND FINAL DECISION.
6 Development Permit (PSJ000-10-0006)	

7 **INTRODUCTION**

8 The applicant has applied for a shoreline substantial development permit to expand an
9 existing dinghy dock by adding a ramp and float to create an individual dock. The
10 application is denied on the basis that the Applicants have not met their burden in
11 establishing that there is inadequate alternative commercial moorage and because
individual docks are prohibited by SJCC 18.50.190(E)(4).

12 **TESTIMONY**

13 Testimony was extensive, but was covered by the written briefs and statements
14 submitted by the parties.

15 **EXHIBITS**

16 See Exhibit List on page 7 of the staff report dated September 17, 2010, in addition to
17 the following:

18 Ex. 17-20 are Ex. 1-4 of the October 1, 2010 staff report, respectively.

19 Exhibit 21: November 4, 2010 comment letter from Beckwiths, w/ attachments
20 including "Comprehensive Reply"

21 Exhibit 22: John Beckwith statement

22 Exhibit 23: Rose Beckwith statement

23 Exhibit 24: 11/10/10 Beckwith letter

24 Exhibit 25: 11/12/10 Friends of the San Juans Response to Applicant's 11/4
hearing supplement.

25 Exhibit 26: 11/15/10 Beckwith Reply to 11/12 Friends Response.

FINDINGS OF FACT

Procedural:

1. Applicant. The applicants are John and Rose Beckwith.

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Findings, Conclusions and Decision

1 2. Hearing. The Hearing Examiner conducted a hearing on the subject
2 application on November 4, 2010. The Examiner left the record open for the Friends
3 of the San Juans to have an opportunity to respond to written materials supplied by
4 the Applicants and for the Applicants to provide more information on the waiting
5 periods and costs associated with commercial moorage. The Applicants were also
6 given an opportunity to reply to the materials submitted by Friends of the San Juans.
7 The record was closed on November 15, 2010.

8 **Substantive:**

9 3. Site and Proposal Description. The Applicants propose to add a ramp and
10 float to an existing dinghy dock. The dinghy dock is composed of a long set of stairs
11 descending a steep bank to a pier with a davit at the end, used to raise and lower the
12 dinghy. Aluminum stairs descending to the water, lying parallel to the pier, provide
13 access to the dinghy when it is in the water. A smaller wood set of stairs at the head
14 of the pier provides access to the inter-tidal area. A 22 foot boat is kept on a mooring
15 buoy nearby. The mooring buoy and dinghy system have been in use since 1998.

16 In response to concerns raised by neighbors, the applicants revised their proposal
17 to shorten the existing pier and reduce the overall size of the float. The Applicants
18 have also added grating to the float. The size of the existing pier will be reduced to
19 6x32 feet from 6x36 feet. The float will be 8x24 feet. The total area of the
20 Pier/Ramp/Float (“PRF”) is 569 square feet. More specific dimensional details on the
21 proposal are identified at Page 2 of the 10/1/10 staff report and Ex. 1.

22 4. Characteristics of the Area. The proposal is located on Dolphin Bay, on
23 Orcas Island. There is another dock near the center of the small cove, on Lot 2
24 (Gregg) and a damaged dock five lots north on the Duthie property. There are six
25 mooring buoys in the cove. Dolphin Cove is depicted in the aerial attached to Ex. 21.
The lots surrounding Dolphin Bay are owned by five property owners. The
subdivision that created the lots is identified as the Garr Subdivision and was
approved in the 1970’s.

 5. Adverse Impacts of Proposed Use. The project has potentially negative
impacts to kelp and marginal view impacts as discussed below:

 A. Kelp. The proposal may significantly and adversely affect kelp.

 The Applicant’s preliminary eelgrass and microalgae habitat survey identify
the presence of kelp underneath the proposed float. Friends of the San Juans notes in
their preliminary comments and their response brief, Ex. 4 and 25, that the kelp
serves as habitat for rockfish, species of which have been listed under the
Endangered Species Act as threatened and endangered. Kelp beds are identified as a
critical area protected by the County’s critical area regulations. See SJCC
18.30.160(A)(5)(a). Kelp also serves as habitat for endangered salmon. Friends also
submitted studies that conclude that overwater structures can damage kelp habitat by

1 blocking the transmittal of light. See Attachments to Ex. 25: Mumford, *Kelp and*
2 *Eelgrass in Puget Sound*, p. 14; Friends, *Assessment and Protection of Kelp Project*,
3 p. 3;

4 Friends makes a very convincing argument that kelp should be protected to
5 the same extent as eelgrass. However, this is apparently the first time that kelp
6 protection has been raised as an issue in a shoreline permit. There is apparently no
7 prior San Juan County Examiner decision addressing the issue and it has not been
8 addressed in any decision issued by the Washington State Shoreline Hearings Board.
9 Given that there was no opposing expert or scientific evidence provided on this
10 important issue, the Examiner will not make a finding at this time that impacts to
11 kelp are sufficient, on their own, to justify denial of the project. It is unknown
12 whether the amount of kelp at the site is significant or whether the proposal will
13 significantly impact the kelp given the proposed grating and the relatively modest
14 size of the proposal. However, the scientific evidence submitted by Friends certainly
15 creates a reasonable possibility that kelp should be given the same level of protection
16 as eelgrass. If the project site contained eelgrass instead of kelp, there is little
17 question that it would have to be denied. Since the Applicants have the burden of
18 proof on their application, it was up to them to establish that their project would not
19 harm eelgrass. The Applicants provided no scientific studies or expert testimony on
20 kelp impacts. The Applicants defense was wholly anecdotal and was not sufficient to
21 credibly refute the scientific studies and regulations presented by Friends. The
22 Applicants have not proven that their project will not significantly and adversely
23 affect kelp.

24 B. Scenic Views. The proposal would moderately impair scenic views. As
25 shown in the 11x17 aerial photograph attached to Ex. 21, the proposal will be located
in a small cove where any addition of an overwater structure would intrude into the
natural character of the cove. A neighboring property owner, Debra Madan, wrote
that the proposal would be built in front of her home and obstruct her view. See Ex.
15. She noted that the Applicants' dingy dock had been approved on the premise
that it would create a minimal sight intrusion and that this would not be the case with
the new proposal. The staff report concludes that Ms. Madan's comments are
"echoed" by Finding of Fact No. 19 of the *Beckwith* 1998 decision (97SJ033) that
approved the dingy dock. Finding No. 19 provides that the dingy dock "is
reasonable in size, scale and location" and that a joint use dock "would provide a
significantly more intrusive structure". Despite the staff report's support of Ms.
Madan's position, the 10/1/10 report still concludes elsewhere that the proposal will
not substantially interfere with scenic views because of the existing dock and another
dock nearby to the north. The Examiner finds that the project will create moderate
scenic view impacts that are not determinative on their own but should be considered
when assessing project impacts.

6. Marina Waiting Periods. As discussed below in Conclusion of Law No. 25, there
are several Shoreline Hearing Board and Hearing Examiner opinions that have the
waiting periods for marinas throughout the San Juan Islands, including Orcas Island.

1 Despite the apparently widespread availability of this information, the Applicants
2 state that they were unable to acquire the waiting periods for any of the ten marinas
3 they investigated on Orcas Island. See Ex. 24, p 3-6 and attached contacts summary.
The Applicants claim that the marinas cannot predict when space will become
available and they found no marina who told them they had a waiting list.

4 The Examiner understands that the Applicants are at the mercy of the marinas to
5 acquire information on waiting periods, but their findings aren't consistent with the
6 information applicants have been able to acquire for similar permit applications.
7 Also, if all the marinas do not have any long term moorage currently available, it is
8 difficult to reconcile the fact that they operate on a "first come, first serve" basis (as
9 asserted by the Applicants) without keeping waiting lists. It is also difficult to
10 understand why a marina that doesn't currently have space available wouldn't tell a
11 potential tenant of when space is expected to become available. "We have nothing
for you now and don't bother asking when we do" doesn't come across as a very
effective business practice. It is also noteworthy that a neighbor, Debra Madan, was
told by Westsound Marina that they currently had slips available. See Ex. 15. The
applicants were unable to contact Westsound Marina. See Ex. 24, "Supplemental
Marina Contacts Summary".

12 Rule 2.6 of the Hearing Examiner rules provide that a land use application must meet
13 permit criteria by a "preponderance of the evidence". For purposes of alternative
14 moorage, the Applicants have the burden of proving by a preponderance of evidence
15 that commercial moorage is unavailable or unlikely to become available within a
16 reasonable waiting period. See Stanford, SHB No. 06-004, at Conclusion No. IX;
17 SJCC 18.50.190(G)(5)©. Nothing in the record even suggests that commercial
18 moorage is not available within a reasonable amount of time. The Applicants
19 identified a few marinas that only provide for transient moorage. Transient moorage
20 could not be reasonably considered alternative moorage, given the uncertainties of
availability from season to season. For long term moorage, however, the Applicants
have provided no evidence that moorage is not available within the next few months.
Given that the Applicants have the burden of proof and the other factors discussed
above, the Examiner concludes that the Applicants have not met their burden in
establishing the absence of alternative moorage available within a reasonable amount
of time.

21 CONCLUSIONS OF LAW

22 **Procedural:**

23 1. Authority of Hearing Examiner. The Hearing Examiner, after conducting an
24 open-record public hearing, renders a final decision on shoreline substantial
25 development permits. SJCC18.80.110(E); Section 3.70 of the San Juan County
Charter.

Substantive:

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1 2. Shoreline Designation. The subject property is designated as Conservancy.

2 3. Permit Review Criteria. SJCC 18.50.190(K)(4) authorizes docks in the
3 Conservancy designation. SJCC 18.50.020(E)(2) requires a shoreline substantial
4 development permit for all substantial development within the jurisdiction of the
5 Shoreline Management Act (Chapter 90.58 RCW, "SMA"). SJCC 18.80.110(H)
6 establishes the criteria for approval. SJCC 18.20.190 defines "substantial
7 development" as any development that exceeds \$2,500 in value. The proposal is over
8 \$2,500 in fair market value and located with the jurisdiction of the SMA. SJCC
9 18.80.110(H) outlines the criteria for approval of a shoreline substantial development
10 permit. It requires consistency with the SMA and associated regulations, with the
11 County's shoreline master program, Chapter 18.80 SJCC and consistent with other
12 applicable provisions of the San Juan County Code and the San Juan County
13 Comprehensive Plan. Applicable code provisions are quoted below and applied with
14 corresponding conclusions law.

11 **RCW 90.58.020 Use Preferences**

12 *This policy (Shoreline Management Act policy) is designed to insure the development*
13 *of these shorelines (of the state) in a manner which, while allowing for limited*
14 *reduction of rights of the public in the navigable waters, will promote and enhance*
15 *the public interest. This policy contemplates protecting against adverse effects to the*
16 *public health, the land and its vegetation and wildlife, and the waters of the state and*
17 *their aquatic life, while protecting generally public rights of navigation and corollary*
18 *rights incidental thereto.*

17 4. The project may harm kelp and has marginal scenic view impacts while
18 alternative adequate moorage may be reasonably available and existing moorage is
19 marginally adequate. On balance, the project is not consistent with the general goals
20 of the Shoreline Management Act.

20 **RCW 90.58.020(1)**

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

21 5. The proposal would intrude into a small cove in a conservancy environment and
22 would potentially adversely affect kelp. It does not support the statewide interest
23 over local interest.

23 **RCW 90.58.020(2)**

24 *Preserve the natural character of the shoreline;*

25 6. The addition of the proposal to the existing structure would marginally alter the
natural character of the shoreline by introducing an additional overwater structure
into a small cove.

1 **RCW 90.58.020(3)**

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

3 7. The proposal would intrude into a small cove in a conservancy environment and
4 would block passage of light to kelp beds. The Applicants already have a marginally
5 functional dingy access and there may be alternative commercial moorage available.
6 The proposal does not support long term over short term benefit.

7 **RCW 90.58.020(4)**

8 *Protect the resources and ecology of the shoreline;*

9 8. The project may adversely affect kelp beds. The proposal does not protect the
10 resources and ecology of the shoreline.

11 **RCW 90.58.020(5)**

12 *Increase public access to publicly owned areas of the shorelines;*

13 9. The project does not pertain to a publicly owned area of the shoreline.

14 **RCW 90.58.020(6)**

15 *Increase recreational opportunities for the public in the shoreline;*

16 10. The project does not pertain to a publicly owned area of the shoreline.

17 **San Juan County Code Regulations**

18 **SJCC 18.50.190(B)(1):** *Boating facilities shall be designed to minimize adverse
19 impacts on marine life and the shore process corridor and its operating systems.*

20 11. The proposal may adversely impact kelp, which serves as habitat to
21 endangered rock fish. The proposal does not meet the criterion above.

22 **SJCC 18.50.190(B)(2):** *Boating facilities shall be designed to make use of the
23 natural site configuration to the greatest possible degree.*

24 12. The criterion is satisfied. The currently existing structure has already been
25 found to satisfy the criterion in the 1998 *Beckwith* Examiner decision (97SJ033).
There does not appear to be any more suitable location for the proposed
addition/expansion.

SJCC 18.50.190(B)(3): *All boating facilities shall comply with the design criteria
established by the State Department of Fish and Wildlife relative to disruption of
currents, restrictions of tidal prisms, flushing characteristics, and fish passage to the
extent that those criteria are consistent with protection of the shore process corridor
and its operating systems.*

1 13. The proposal if approved would be required to meet these design criteria
standards as a condition of approval.

2 **SJCC 18.50.190(C)(1):** *Multiple use and expansion of existing facilities are*
3 *preferred over construction of new docks and piers.*

4 14. For the same reasons identified in Finding of Fact No. 19(d) of the 1998
5 *Beckwith* decision, the project area is not suitable for a joint use dock. The
6 Applicants have also sufficiently demonstrated that they have attempted to reach a
7 joint use arrangement with their neighbors. Given these factors, the preference for
8 joint use facilities expressed above should not weigh heavily against the application.
9 Similarly, the preference for expansion of existing facilities should also not be a
significant factor in support of the application, because the “expansion” is actually a
conversion from a dingy dock to a boat dock and because the small scale of the
existing facility was a significant factor in its 1998 approval.

10 **SJCC 18.50.190(C)(2):** *Mooring buoys shall be preferred over docks and piers on all*
11 *marine shorelines except in the cases of port, commercial, or industrial development*
in the urban environment.

12 15. Given the adverse impacts associated with the proposal (kelp and scenic
13 views) and the potential for alternative moorage, the preference for mooring buoys
should prevail in this application.

14 **SJCC 18.50.190(C)(3):** *Moorage floats, unattached to a pier or float, are preferred*
15 *over docks and piers.*

16 16. For the reasons stated in the preceding conclusion of law, the existing
17 moorage facilities are the preferred use for the project area.

18 **SJCC 18.50.190(C)(4):** *Every application for a substantial development permit for a*
19 *dock or pier construction shall be evaluated on the basis of multiple considerations,*
20 *including but not limited to the potential impacts on littoral drift, sand movement,*
water circulation and quality, fish and wildlife, navigation, scenic views, and public
access to the shoreline.

21 17. The staff report finds that there is no evidence of littoral drift, navigation
22 or water quality issues with the project and there is no evidence to the contrary. As
23 noted previously, there are marginal scenic view issues associated with the proposal
24 and there is the potential for adverse impacts to kelp. Due to the potential kelp
impacts, the criterion above is not met.

25 **SJCC 18.50.190(C)(6):** *Structures on piers and docks shall be prohibited, except as*
provided for marinas in subsection (H) of this section.

18. No structures have been proposed.

1 **SJCC 18.50.190(E)(4):** *All waterfront subdivisions approved after the adoption of*
2 *this SMP shall include or provide for construction of a single joint-use moorage*
3 *facility by the lot owners if moorage is desired by the owners, in a designated,*
4 *reserved area of the waterfront. Identification of a moorage site shall not be*
5 *construed to indicate that a shoreline permit will be granted for that site.*
6 *Subdivisions located where it would be physically impossible to construct such a*
7 *facility shall be exempt from this provision. Individual docks and piers shall be*
8 *prohibited; however, the County may authorize more than one moorage facility if a*
9 *single facility would be inappropriate or undesirable given the specific site and*
10 *marine conditions. A legal easement must be dedicated to all lot owners for access to*
11 *joint-use facilities.*

12 19. The criterion above prohibits individual docks on subdivisions approved “after
13 the adoption of the SMP”. It is uncontested that the subdivision serving as the site of
14 the proposal was approved “after the adoption of the SMP”. Since the proposal is for
15 an individual dock, it is not consistent with SJCC 18.50.190(E)(4).

16 The Applicants correctly point out that in his decision on the Green shoreline
17 application, PSJ000-10-0005, the Examiner determined that a similar prohibition on
18 waterfront subdivisions, SJCC 18.80.330(B)(10), only applies during subdivision
19 review. The Examiner based that decision upon the Examiner decision approving the
20 dingy dock currently serving as moorage by the Applicants, *Beckwith*, HE 05-98
21 (97SJ033). The finding in the *Beckwith* decision must be overturned because it is
22 contrary to the interpretation of the Shoreline Hearings Board (“SHB”), a higher
23 decision making authority. As identified in the briefing by Friends of the San Juans,
24 the SHB determined that the prohibition on individual docks in SJCC 18.50.190(E)(4)
25 applies even after the subdivision is approved. *See Save Our Shaw*, SHB No. 94-62.

One distinguishing feature from *Save Our Shaw* is that it was issued prior to *Chelan*
County v. Nykreim, 146 Wn.2d 904 (2002). *Nykreim* stands for the proposition that
once a permit is issued and its appeal period has lapsed, it cannot be revoked or
challenged for noncompliance with code criteria. The Examiner in the 1998
Beckwith decision construed the new subdivision restrictions as only applying during
subdivision review. If this construction is correct, then the finality principles of
Nykreim probably would prevent the application of the new subdivision regulations to
subsequent development. However, the *Save Our Shaw* decision was based upon the
portion of SJCC 18.80.330(B)(10) that provides that “individual docks and piers shall
be prohibited.” This language does not expressly provide that it only applies during
subdivision review. Interpreting this clause as only applying during subdivision
review would lead to the absurd consequence that individual docks would be barred
during subdivision review but then allowed immediately after approval. There is no
rational reason for such a result. Further, interpreting SJCC 18.80.330(B)(10) as
barring individual docks for new subdivisions would not result in any unfair lack of
notice to subsequent property owners as discussed in the 1998 *Beckwith* decision.
SJCC 18.80.330(B)(10), the regulation itself, provides the notice necessary to apprise

1 property owners of their development rights. The *Save Our Shaw* interpretation
2 would survive *Nykreim*. SJCC 18.80.330(B)(10) prohibits individual docks for
3 subdivisions approved after its adoption.

4 **SJCC 18.50.190(D)(1)-(11): General Design and Construction Standards**

5 20. The proposal has been designed to meet all of the design standards stated.

6 **SJCC 18.50.190(G)(2)(a):** *The maximum dimensions for a dock (including the pier,*
7 *ramp, and float) associated with a single-family residence shall not exceed 700 total*
8 *square feet in area. In addition, the length of the dock (including the pier, ramp, and*
9 *float) may not extend more than 115 feet in length seaward of the ordinary high water*
10 *mark. Docks exceeding these dimensions may only be authorized by variance.*

11 21. The proposal meets the requirements above.

12 **SJCC 18.50.190(G)(2)(d):** *Maximum length and width of a ramp, pier, or dock shall*
13 *be the minimum necessary to accomplish moorage for the intended boating use.*

14 22. The Applicants successfully revised their initial application to comply
15 with the criterion above.

16 **SJCC 18.50.190(G)(3):** *Docks shall be set back a minimum of 10 feet from side*
17 *property lines. However, a joint use community dock may be located adjacent to or*
18 *upon a side property line when mutually agreed to by contract or by covenant with*
19 *the owners of the adjacent property. A copy of such covenant or contract must be*
20 *recorded with the County auditor and filed with the approved permit to run with the*
21 *title to both properties involved.*

22 23. The location of the existing structure and all proposed structures meets
23 these requirements.

24 **SJCC 18.50.190(G)(4):** *Development of a dock on a lot intended for single-family*
25 *residential development shall require a shoreline substantial permit or a statement of*
26 *exemption issued by the County.*

27 24. The Applicants have applied for a shoreline substantial development
28 permit as required.

29 **SJCC 18.50.190(G)(5):** *Applications for nonexempt docks and piers associated with*
30 *single-family residences shall not be approved until:*

- 31 a. *It can be shown by the applicant that existing facilities are not adequate*
32 *or feasible for use;*
33 b. *Alternative moorage is not adequate or feasible; and*

1 c. *The applicant shall have the burden of providing the information*
2 *requested for in subsections (a) and (b) of this section, and shall provide*
3 *this information in a manner prescribed by the administrator.*

4 25. The Applicants have not proven that there is no adequate or feasible
5 alternative moorage. To a lesser extent they have also not proven that existing
6 facilities are inadequate, although it must be recognized that there are significant
7 problems with the existing facilities.

8 On the alternative moorage requirement, there is a wealth of administrative and
9 judicial decisions that provide interpretive guidance.

10 In *Innskeep v. San Juan County*, SHB No. 98-033 (1999), the Hearings Board
11 interpreted the test in SJCC 18.50.190.G.5 to require a showing that “existing
12 facilities, alternative moorage and alternative sites are not ‘enough or good enough
13 for what is required or needed’, ‘barely satisfactory,’ ‘suitable’, or ‘capable of being
14 used.’” (citations omitted).

15 In *Close v. San Juan County*, SHB No. 99-021 (2000), the Hearings Board
16 determined that an applicant for a permit does not meet the criteria by showing that a
17 private dock is more convenient to access and use than other facilities in the area.

18 In *TG Dynamics Group II, LLC v. San Juan County*, SHB No. 08-030, the Shoreline
19 Hearings Board noted adequacy or feasibility of existing facilities and alternative
20 moorage must be evaluated in the context of all the relevant considerations related to
21 a particular proposal, including but not limited to potential impacts on littoral drift,
22 sand movement, water circulation and quality, fish and wildlife, navigation, scenic
23 views and public access to the shoreline. *TG Dynamics* involved a community dock
24 serving on a four lot subdivision on Shaw Island. The Applicant testified that the
25 waiting list for the only marina on Shaw Island was one to two years. The Hearings
26 Board found that, as mitigated, the project did not create any adverse impacts to
27 environmental or aesthetic resources and it does not disrupt navigation. Importantly,
28 the Hearings Board did not find that mooring buoys qualified as a suitable alternative
29 because the mud flats contained surf spawning habitat that would be disrupted by the
30 dragging of boats to access the buoy. The Hearings Board determined that the
31 mudflats were distinguishable from other cases in which buoys were found to be
32 suitable despite “mere inconvenience” caused by having to traverse mudflats to
33 access them. The Hearings Board also determined that a waiting list of one to two
34 years for the marina was not a reasonable or appropriate use for a four lot short
35 subdivision.

36 In *Gray v. San Juan County*, SHB No. 10-001, the Shoreline Hearings Board
37 Examiner granted the request for a single user dock due to a lack of adequate or
38 feasible alternatives for moorage in that there is no commercial marina or ferry
39 service available on Decatur Island and the one available public dock had no parking.

1 In *Shorett v. San Juan County*, SHB No. 06-039, the Hearings Board was not
2 persuaded by testimony from the Applicant that a three to nine month waiting list
3 rendered a marina 23 minutes away reasonable. The Hearings Board concluded that a
4 marina with a waiting list provides adequate alternative moorage if the waiting period
5 is reasonable. Since the Applicant had both adequate and feasible alternative
6 moorage at a marina and adequate and feasible existing facilities, the Board upheld
7 the denial of their application. These Shorett conclusions were sustained upon
8 superior court review.

9 In the application of the Shorett Credit Shelter Trust, PSJ000-09-0002, the Hearings
10 Examiner found compliance with the alternative moorage criteria for a joint use dock
11 where the applicant demonstrated that although there were commercial marinas on
12 San Juan Island within a reasonable distance of the Applicant's parcel, the waiting
13 period was for an unreasonable amount of time (five years) and the slip size and
14 water depth could not accommodate the size of the applicant's boat.

15 In the application of Edward and Martha Green, PSJ000-10-0005, the Hearing
16 Examiner determined that the applicant failed to meet its burden of establishing
17 inadequate alternative commercial moorage on San Juan Island because the applicant
18 provided no information on this issue.

19 In the application of Michael and Jeanne Skott, PSJ000-09-0003, the Examiner
20 determined that the applicants had failed to establish the inadequacy of alternative
21 moorage on Orcas Island because the applicants provided no information on waiting
22 periods for nearby commercial marinas. There was no indication that the applicants
23 had even inquired about waiting periods, despite the fact that the Examiner left the
24 record open for this purpose.

25 In *Stanford v. San Juan County*, SHB No. 06-004, the Hearings Board concluded
there are four commercial marinas on Orcas Island: Cayou Quay, Deer Harbor
Marina, West Sound Marina and Bay Head Marina. The marinas were located two to
eleven miles from the proposed joint use dock. Deer Harbor Marina and Cayou Quay
both had moorage available at the time of or within a week after the hearing on June
28, 2006. Bay Head had moorage available for three months, with side ties available
afterwards. The Hearings Board concluded that the applicants had multiple
opportunities to obtain commercial moorage and that they had failed to meet their
burden of demonstrating that commercial moorage is unavailable or unlikely to come
available within a reasonable waiting period.

As the cases summarized above establish, the Applicants have the burden of proof in
establishing that there is no alternative moorage available in a reasonably proximate
marina with either immediate availability or a reasonable waiting period. Indeed,
SJCC 18.50.190(G)(5)© specifically provides that the Applicants have the burden of
providing information establishing inadequate existing and alternative moorage. The
cases indicate that a waiting period of less than a year would be considered
reasonable. As shown in the "Supplemental Marina Contacts Summary" attached to

1 Ex. 21 the Applicants have made a strong effort to acquire information on
2 availability of commercial moorage. Despite these efforts, they were not able to
3 acquire information on waiting periods from any of the marinas, most notably the
4 four marinas construed as commercial marinas in the *Stanford* decision. As discussed
5 in Finding of Fact No. No. 6, this absence of information is problematical given how
6 often marinas were able to provide information on current availability and waiting
7 periods in other cases. In the *Stanford* case the record showed that three of four
8 marinas on Orcas Island had slips available four years ago. In this case the
9 Applicants were unable to get any information on availability or waiting periods or
10 three of the four same marinas. As discussed in Finding of Fact No. 6, the
11 Applicants' neighbor was able to contact Westsound Marina, one of the three the
12 Applicants couldn't reach, and was told that slips were available. Given that the
13 Applicants have the burden of proof in showing inadequate commercial moorage and
14 the past history of availability on Orcas Island as well as other islands, the Examiner
15 has no choice but to conclude that the Applicants have not established by a
16 preponderance of evidence that alternative moorage is not adequate or feasible.

17 The Applicants correctly assert that the adequacy of alternative moorage must be
18 assessed in the context of all the relevant considerations related to a particular
19 proposal as discussed in the *TG Dynamics Group* case, summarized above. In terms
20 of environmental impacts, the impact of the proposal is less than a more typical PRF
21 application. Instead of constructing a new pier the Applicants will be shortening an
22 existing pier and adding a ramp and float. Nonetheless, the float will be placed over
23 kelp beds, which creates additional adverse environmental impacts even with the
24 proposed grating. Further, as indicated in Finding of Fact No.19 of the 1998
25 *Beckwith* decision, the current structure was found to be compliant with aesthetic
requirements because of its small size and expansion to a joint use dock "would
produce a significantly more intrusive structure." The Applicants are not proposing a
joint use dock, but the Examiner's findings on this issue reflect the aesthetic
sensitivity of the site. The cove is a small area shared by several people and any
expansion or addition of overwater structures does have significant impacts on scenic
views and recreational use of the cove. In sum, the relatively modest expansion
proposed by the Applicants does not justify a lesser burden in establishing inadequacy
of alternative commercial moorage.

The Applicants have also argued that the costs of alternative moorage are not
reasonable in relation to their recreational needs. They point out that they only need
to use their boat a few months per year and that they can only be reasonably assured
of adequately available commercial moorage if they pay for year round permanent
moorage. They also point out that permanent moorage costs are very high, and that
beyond lease rates these costs involve travel to and from the marina, both by vehicle
to get to the marina and then boating back to their residence to use the shoreline
amenities adjoining their home. The costs of using alternative commercial moorage
in relation to the size of the boat used by the Applicants and the frequency with which
they use it is indeed high. However, balanced against the moorage the Applicant's

1 currently enjoy and the scenic and environmental impacts of the proposal, the costs of
2 the alternative moorage are not unreasonable.

3 In addition to establishing that alternative moorage is not adequate or feasible the
4 Applicants must also demonstrate that their current moorage is not adequate or
5 feasible. This existing moorage is marginally adequate given the problems associated
6 with the proposed expansion. The Applicants have established that use of their
7 current moorage is highly inconvenient, difficult to use and may even be dangerous
8 under some circumstances. As discussed previously however, the *TG Dynamics*
9 *Group* case requires the consideration of environmental and other factors in the
10 evaluation of the adequacy of moorage. Given the environmental and aesthetic
11 problems associated with the proposal, the difficulties established by the Applicants
12 for current moorage are marginally not sufficient for a finding of inadequate
13 moorage.

14 **SJCC 18.50.330(B)(10):** *All new waterfront subdivisions and multifamily residential*
15 *developments shall prohibit moorage facilities other than mooring buoys, but allow*
16 *property owners to seek approval of joint-use moorage facilities to serve the entire*
17 *subdivision or development.*

18 26. In contrast to the restrictions of SJCC 18.50.190(E)(4), the provision above
19 clearly only applies during subdivision review. It requires “new” subdivisions to
20 prohibit single use docks. As noted in the 1998 *Beckwith* decision, this requirement
21 cannot be imposed retroactively after subdivision approval.

22 **SJCC 18.80.110(H) Criteria for Approval of Substantial Development Permits**

23 *A shoreline substantial development permit shall be granted by the County only when*
24 *the applicant meets his burden of proving that the proposal is:*

- 25 1. *Consistent with the policies of the Shoreline Management Act and its*
26 *implementing regulations, Chapter 90.58 RCW and Chapter 173-27 WAC, as*
27 *amended;*
- 28 2. *Consistent with the policies and regulations of the Shoreline Master Program*
29 *in Chapter 18.50 SJCC;*
- 30 3. *Consistent with this chapter;*
- 31 4. *Consistent with the applicable sections of this code (e.g., Chapter 18.60 SJCC);*
- 32 5. *Consistent with the goals and policies of the Comprehensive Plan; and*
- 33 6. *All conditions specified by the hearing examiner to make the proposal*
34 *consistent with the master program and to mitigate or avoid adverse impacts are*
35 *attached to the permit.*

36 27. As discussed in depth above, in the evaluation of individual code sections and
37 regulations, all of the above elements have not been met, and the project is not
38 consistent with the applicable policies, goals, and regulations.

DECISION

The proposed project is not consistent with all the criteria for a shoreline substantial development permit. The proposal is denied.

Dated this 9th day of December 2010.



Phil Olbrechts
County of San Juan Hearing Examiner

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