

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicants: Ron and Sarah Rech
14640 173rd Ave. NE
Woodinville, WA 98072

Agent: Stephanie O'Day
Law Offices of Stephanie Johnson O'Day
P.O. Box 2112
Friday Harbor, WA 98250

File No: HE39-07 (07SJ001)

Request: Shoreline Variance Permit

Location: No address.
Across the street from 3499 Fisherman Bay Road
Lopez Island, WA

Parcel No: 252712008

Summary of Proposal: A shoreline variance to place a single family residence (SFR) 25 feet from the top of the existing bank on a parcel 0.40 acre in size.

Land Use Designation: Rural Farm Forest

Public Hearing: After reviewing the report of the Community Development and Planning Department public hearings were held on August 15, 2007 and October 16, 2007.

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

Decision: The application is denied.

Findings of Fact

1. The parcel is owned by Ron and Sarah Rech, Brett E. and Sara E. Nesland and Chad and Wendy Nesland. It is located on Lopez Island,
2. The property is located waterward along a stretch of 1.2 miles of Fisherman Bay Road. There is one house located on the Fisherman Bay side of the road northerly of this lot. South of the lot to where the road leaves the water there are no buildings except for a very old boat house.
3. The parcel is approximately 0.4 acre. The irregular lot ranges from 220 to 240 feet in length and approximately 10.5 feet to 60 feet in width. The bank is between 8 and 12 feet in height with a vertical drop into Fisherman Bay.
4. Prior to the purchase of the property Mr. Rech and Mr. Brett Nesland spent a day on Lopez Island looking at a variety of properties. At the public hearing on October 16, 2007 Mr. Rech stated that he was familiar with Lopez Island and had looked at a number of commercial and other properties including the one which is the subject of this request. Mr. Rech acknowledged that he discussed the subject property with Joyce Fralich, a realtor, on the day that he and Brett Nesland had viewed properties on Lopez
5. At the October 16, 2007 public hearing Ms. Fralich stated that she had given a flyer concerning the property to both Mr. Rech and Mr. Nesland. The flyer reflected that the property was for recreational use only and was “unbuildable.” Mr. Rech denied receiving such a flyer. It was undisputed that Mr. Nesland received a copy of the flyer.
6. Mr. Rech stated that Mr. Brett Nesland took care of the subsequent status investigation of the property. Immediately prior to purchase, the property was listed on the multiple listing service as “recreational only, unbuildable.” The property was also listed on the treasurer’s tax roles as “unbuildable.”
7. Prior to the purchase of the property the then owner requested a “Residential Pre-Application Site Plan” (RPA) visit. The RPA is conducted by a San Juan County building permit coordinator to determine what uses could be done with the property in question. The fee for the RPA was paid with a check signed by Mr. Brett Nesland. The RPA determined that a recreational vehicle could be placed on the lot as an “appropriate use for the site.” A copy of the RPA was forwarded to Mr. Brett Nesland.
8. The purchase price of the property in 2005 was \$81,480. The price is a reasonable one for a recreational lot on Lopez Island. It is approximately 30% of a reasonable value of a residential lot on Lopez Island.

9. Any reasonable investigation of the property would disclose that a recreational use, not a residential building lot, was expected.
10. Both the San Juan County Geo-technical Review Map and the Department of Ecology Coastal Zone Atlas indicated an unstable bluff at this property. A February 21, 2007 letter from Earth Solutions NW LLC stated that the area around the proposed house location and on the bank demonstrated that the property was not unstable and that bank fortification (June 20, 2007 letter) in the near future was not likely.
11. Letters, e-mails and testimony at the public hearings challenged the conclusion that the bluff and property were stable. A number of pictures of the property were submitted prior to and at both public hearings. The pictures show a number of trees leaning over the bank of the property and trees at the bottom of the bluff.
12. A staff member with experience and training in geology accompanied applicants' geologist on the site visit prior to the February 21, 2007 letter. Staff noticed weathering on the bank face indicative of exposure for a long period of time likely due to wave action rather than vertical displacement. Staff also noted that adjacent properties already had shoreline fortifications.
13. A local geologist, soils and wetlands expert with 11 years experience in San Juan County, Scott Rozenbaum, submitted a letter dated August 14, 2007. In that letter Mr. Rozenbaum noted small scale soil slumping along the shoreline. The erosion was described as "wave-cut". Mr. Rozenbaum concluded that because of the narrowness of the parcel and the significant wave action of Fisherman Bay, a mere 25 foot setback would lead to an inevitable armoring of the shoreline to protect the proposed SFR. That was also the conclusion of the San Juan County Community Development and Permit Department (CDPD) staff.
14. The applicants' final proposal for a SFR is found in Exhibit #3 admitted at the October 16, 2007 public hearing. The request is for a shoreline variance to allow a building within 25 feet of the bank in an area "not to exceed a 1,500 square feet footprint." A two-story house within the footprint is anticipated.
15. There are trees on the property. In order to accommodate a 1,500 square foot footprint some trees will have to be removed. Some tainted runoff going directly into Fisherman Bay is inescapable because of tree removal. Additionally, a 25 foot buffer between the residence and the bank leaves less upland area to naturally treat tainted runoff.
16. A stormwater disposal system has not been designed. The owners preferred to wait to submit plans for such system until their request for building permit.

17. The soil type for this property has low permeability. Increased impervious surfaces and poor soil drainage will undoubtedly contribute to increased turbidity in Fisherman Bay and to further erosion of the bank.
18. There are a number of houses on the upland side of the 1.2 miles stretch of Fisherman Bay Road. Because there are no buildings and sparse trees along this section the view of Fisherman Bay is exceptional. People driving along Fisherman Bay and boaters viewing the shoreline from Fisherman Bay enjoy the same view. Construction of an SFR will necessarily reduce the view corridor. There are insufficient trees on the property to provide adequate screening to maintain anything close to the current scenic area.
19. There is a 33 foot recreational easement along the northern property line in favor of Ida Forsyth which was granted in 1975 and filed in the Auditor's office. Because of the size of the lot and the easement there is very little opportunity to site an SFR on the property.
20. On November 20, 2006 applicants received a variance from San Juan County Public Works to reduce the easement from Fisherman Bay Road centerline from 45 feet to 30 feet. Installation of guardrail along the property was a condition of the variance.
21. There is approximately a 30 foot slope from the road to the proposed SFR. While the plans are uncertain at this point, there is no question that fill for the proposed driveway will be necessary.
22. The ability to install an effective sewage disposal system is uncertain. Applicants did obtain a permit from Fisherman Bay Sewer District to allow a "sewer hookup". The status of that permit is uncertain because of a recent violation by applicants. Failure of any sewer disposal system on this property would have adverse environmental impacts to Fisherman Bay.
23. The first public hearing on this request occurred on August 15, 2007. At the applicants' request the hearing was continued after a portion of the evidence was completed. Publication of the new hearing date occurred on September 12, 2007 and mailing and posting occurred on September 11, 2007. A second public hearing was held on October 16, 2007. At the conclusion of that hearing applicants were allowed to submit a post hearing brief which was received on October 22, 2007 and incorporated into the record.
24. The staff reports of August 10, 2007, October 9, 2007 and October 15, 2007 are incorporated herein by reference as though fully set forth. The analysis and factual statements contained in the staff report are adopted as a finding herein.
25. Any conclusion herein which may be deemed a finding is hereby adopted as such.

Conclusions of Law

1. The Hearing Examiner has jurisdiction over the persons and subject matter of this proceeding.
2. Proper notice was given in compliance with local and state requirements.
3. Shoreline Variances are exempt from the requirements of the State Environmental Policy Act.
4. Shoreline variances are guided by the SMP, specifically SJCC 18.80.100(E) and by the provisions of WAC 173-27-170. The five criteria found in the SMP and five of the six criteria found in the WAC are the same. The additional WAC criterion incorporates the policy of RCW 90.58.020 and requires the public interest suffer no substantial detrimental effect. In dealing with the six criteria the applicant must sustain the burden of showing all criteria have been met.
5. The factual information submitted to at least one of the six purchasers prior to the purchase, the purchase price itself and the constructive knowledge about the potential building restrictions on the lot lead to the conclusion that the hardship involved here is one of applicants' own making.
6. As demonstrated by the record and by these findings, there are serious adverse and detrimental affects that would result from granting the variance. Extraordinary view corridors would be lessened. Adverse impacts to Fisherman Bay would be inevitable and near future armoring is likely.
7. The adverse affects of increased impervious surface, without a clear showing of the adequacy of a stormwater pollution control system and sewer disposal system that will prevent damage to Fisherman Bay, does not satisfy the burden of proof.
8. A "sewer hook up to the Fisherman Bay Sewer District" would violate the SJCC 18.60.250 prohibition against extending urban services into rural areas.
9. The applicants' attempt to distinguish "a reasonable use" from "any reasonable use" of the property is not persuasive. Applicants' claim that recreational use is not allowed on the property is not supported by San Juan Code provisions and CDPD evidence. SJCC 18.50.320(B)(3) does not restrict applicants' recreational use of the property but only their ability to include a "recreational development" on the property.
10. Each variance must be determined on the factual evidence contained in the record. Applicants' citation to *Wake* HE38-99 discloses significant factual differences from this case. In *Wake* the bank was 30 feet high. A large number of trees

provided stability to the property and adequate screening for view purposes. There was a factual finding that granting the variance would result in “no adverse impact to the shoreline.” No such finding could be made in this case.

11. The public interest would suffer substantial detrimental effects in granting this permit. The potential cumulative impacts of additional requests in this specific location, Lopez Island and San Juan County as a whole would likely produce inconsistencies with the policies of the SMA and substantial adverse effects to the shoreline environment.
12. The applicants have failed to meet their burden of proving all shoreline variance criteria are satisfied.
13. Any finding herein which may be deemed a conclusion is hereby adopted as such.

Decision

The application is denied.

DONE this _____ day of November, 2007.

Wm. H. NIELSEN, Hearing Examiner

Shoreline Appeal

Any appeal of a shoreline variance denial shall be made to the Washington State Shoreline Hearings Board pursuant to RCW 90.58.180 and the rules adopted by said hearings board.