BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY SAN JUAN COUNTY TO V. NORMAN CARPENTER JAMES R. SISLEY, ARTHUR L. MALMGREN AND NANCY MALMGREN, Appellants, v. SAN JUAN COUNTY AND V. NORMAN CARPENTER, Respondents.	SHB Nos. 79-5 and 79-36 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a substantial development permit issued by San Juan County to V. Norman Carpenter, came on for hearing before the Shorelines Hearings Board, Nat W. Washington, Chairman, Chris Smith, David Akana, Delmon Anderson and Richard A. O'Neal, on December 13 and 14, 1979 at Westsound, Orcas Island. Hearing examiner William A. Harrison presided.

Appellants James R. Sisley and Nancy L. Malmgren appeared and

represented themselves; respondent V. Norman Carpenter was represented by his attorney, Duncan A. Bonjorni; respondent San Juan County was represented by its Prosecuting Attorney, E. H. Knapp, Jr. Reporter Marilyn Hoban recorded the proceedings.

Having heard the testimony, having examined the exhibits, having viewed the site of the proposed development, having heard legal argument, and being fully advised, the Shorelines Hearings Board makes the following

FINDINGS OF FACT

I

This matter arises in Deer Harbor, a small, southerly facing sheltered bay near the west tip of Orcas Island in San Juan County.

In October of 1972, respondent Carpenter filed with San Juan County an application for a substantial development permit under the Shoreline Management Act of 1971, chapter 90.58 RCW. The proposed development consisted of a 94-slip marina at the head of Deer Harbor. It would embrace 6-1/2 acres, 3-1/2 acres of state owned aquatic land, managed by the State Department of Natural Resources, and three acres of privately owned tidelands and uplands. The planned structure would involve piling, finger piers and docks extending some 600 feet into the Harbor. The contemplated upland support facilities included 27 parking spaces, an office and boat launching ramp.

The following events, inter alia, have since transpired:

1. On October 12 and 19, 1972, notice of Carpenter's application for substantial development permit was published in an approved legal newspaper, the Friday Harbor Journal.

2. On December 15, 1972, the Board of San Juan County

Commissioners granted to Carpenter the substantial development permit (No. SJ-25) for which he applied.

3. On February 21, 1973, the State Department of Ecology (DOE) filed a timely request for review of the Carpenter permit before the Shorelines Hearings Board. This matter, SHB No. 52, was disposed of without litigation through our entry of the consent order presented by DOE, Carpenter and San Juan County on May 23, 1973. That order dealt only with the septic tank and drainfield system and required DOE and County approval of it.

4. On July 3, 1973, after due application, notice and comment, the U.S. Army, Corps of Engineers, issued its permit for the proposed development.

5. On December 1, 1972, Carpenter applied for lease of state aquatic lands. On August 15, 1973, Carpenter telephoned the State Department of Natural Resources to request permission to drive piling on state owned aquatic lands. An official of the Department of Natural Resources orally granted permission to drive the piling. Carpenter drove all piling required for the marina. The Department of Natural Resources issued a lease to Carpenter (No. 10033) on December 7, 1973, although the lease encompassed only the landward 2/3 (approximately) of the area applied for.

6. On March 21 and 28, 1974, notice of an action was published as provided in RCW 43.21C.080 of the State Environmental Policy Act (SEPA). Publication was in the Friday Harbor Journal.

7. On May 18, 1974, the appellants in this matter and others, filed a class action against Carpenter and San Juan County in the Superior Court for San Juan County. By stipulation of the parties all permits were suspended and the matter remanded to the Board of San Juan County Commissioners for determination whether an environmental impact statement (EIS) was required for the proposed development under SEPA, chapter 43.21C RCW. Following notice and hearing the Board of San Juan County Commissioners voted 2-1 on March 3, 1975, that an EIS need not be prepared. The Superior Court for San Juan County, upon review, dismissed the action against Carpenter and San Juan County on November 24, 1975.

8. In June, 1976, Carpenter began to construct docks and slips as well as upland portions of the marina. Appellants here and others appealed the decision of the Superior Court for San Juan County and the matter was certified by the Court of

Appeals to the Supreme Court. Prior to the decision of the Supreme Court docks and slips were completed coincident with the extent of the DNR lease (No. 10033, supra at paragraph 5) which covers approximately 2/3 of the total docks and slips proposed for development.

9. On September 22, 1977, the Supreme Court unanimously ruled that the decision not to prepare an EIS was clearly erroneous. The cause was remanded to the Board of San Juan County Commissioners for preparation of an EIS. Sisley v. San Juan County and Carpenter, 89 Wash.2d 78, 569 P.2d 712 (1977).

10. Thereafter a draft EIS was prepared, notice was given, comments were received from government agencies and individuals, and a final EIS was prepared.

11. On August 22, 1978, after notice, the Board of San Juan County Commissioners convened a public hearing on Orcas Island "to review the permits issued and make a determination whether said permits should be renewed and extended".

12. On September 25, 1978 the Board of San Juan County Commissioners adopted a "Resolution" (128-1978) approving the EIS and declaring the original substantial development permit (December 15, 1972, paragraph 2, supra) to be "renewed and extended". This Resolution is now before us for review as SHB No. 79-5.

13. On June 19, 1979, after notice published May 30 and June 6 in the Friday Harbor Journal and mailed on May 24, 1979 to appellants, the Board of San Juan County Commissioners conducted another public hearing on the proposed marina.

14. On June 19, 1979, the Board of San Juan County Commissioners granted a second shoreline substantial development permit (No. 25SJ72) to Carpenter. This permit is now before us for review as SHB No. 79-36.

II

The development as proposed is set forth in the text and illustrations of Section 5.E. of the draft EIS.

III

The proposed marina would provide only permanent moorage for year around storage of pleasure craft. This is a use having a low level of

human activity relative to transient moorage. There is a substantial need for permanent moorage in the San Juan Islands. One estimate is that, in 1966, demand exceeded supply by 427 moorages and, in 1980, will exceed supply by 1200 moorages.

A marina such as the one proposed would meet this demand by concentrating moorages at a single location. This would be less environmentally harmful and less obstructive to navigation than individual piers associated with private homes.

Deer Harbor's eastern shore is presently the site of a large marina and resort catering to transient boaters. Historically, the Harbor has seen considerable commercial use. In 1859 Louis Cayou was stationed in Deer Harbor by Hudson's Bay Company to obtain venison for sale in Victoria. The name Deer Harbor is derived from this. In 1914 Louis' son, Henry Cayou, established the Deer Harbor Fish Cannery on the site where the Carpenter marina is proposed. This cannery continued in operation until 1951. In 1920, another cannery was built on the east side of the Harbor and operated for a few years. In 1946 a saw mill was built at the point where the county road crosses the tidal lagoon at the northerly end of the Harbor. The mill continued in operation until 1970 and its remains are still present.

The factors which have made Deer Harbor suitable for water-related commercial use in the past are likewise conducive to construction of a marina with minimum environmental disruption. Because the Harbor waters are deep, no dredging or excavation is required. Because the Harbor's high western flank protects it from the prevailing west

winds, no breakwaters are required. An established county road passes through the on-shore portion of the site.

The proposed floating docks (connected to the bottom only by the piling which secures them) pose no danger to and may enhance marine life. The evidence was not persuasive that the proposed marina would have a significant adverse effect on shorebirds or waterfowl. Although water surface occupied by the proposed marina would be unnavigable, the marina is a water dependent use which by its nature fosters more public access to the water than it denies. The channel entrance to the northerly tidal lagoon would be decreased to approximately 290 feet clearance between the proposed marina and appellant's private moorage lying opposite. Discharge of sewage and oil from boats using the marina does pose a potential problem to water quality and marine life.

The proposed marina would place in the Harbor, at some 250 yards distance from appellant's seasonal residence, a row of pleasure craft. Some of these will be sailboats whose masts will be superimposed on appellant's view of the Olympic Mountains on those days when the mountains are visible. Appellants contended but did not establish that the addition of these pleasure craft to their view would reduce the value of their property.

IV

The EIS contains a discussion of five alternatives to the proposed action (EIS, pp. 86-87). The discussion is sufficiently detailed to permit a comparative evaluation of the proposed action and each alternative, including the "no-action" alternative.

Existing environmental conditions are discussed as well as the proposal's impact on the environment. (EIS, pp. 21-82). Both the human and physical environment are considered. Conclusions are supported by both a reference bibliography (EIS, p. 89) and observations or tests made at the site. E.g., EIS, pp. 22, 29, 41, and 43).

V

The Shoreline Master Program adopted by San Juan County was approved by the State Department of Ecology in October, 1976. WAC 173-19-360. The Master Program designates the shoreline area at the subject site "Suburban" to the line of ordinary high tide and "Aquatic" from that line seaward. (San Juan County Shoreline Master Program Designated Environments Map, Exhibit A-15). Marinas are a permitted use in the Suburban and Aquatic environments where the two abut. Master Program, Sec. 5.13 Marinas, p.44 Regulations by Environment. A policy for marinas states:

> Boat storage should be designed to optimize the trade-offs between the number of boats served and the impacts on the natural and visual environments. (Master Program, Sec. 5.13, Marinas Policy No. 4, p. 43).

VI

San Juan County Commissioner James R. Klauder participated in the issuance of both the Resolution (128-1978) and second substantial development permit (No. 25SH72) for the Carpenter marina. Commissioner Klauder, as a private citizen, owns and operates an insurance office on Orcas Island.

In early 1977, Mr. Carpenter purchased a homeowners policy from

Mr. Klauder. Upon issuance of the Supreme Court decision in Sisley v. San Juan County, supra, in September, 1977, Mr. Klauder advised Mr. Carpenter to cancel the policy and insure elsewhere so as to dispel even the appearance of conflict. The policy was cancelled prior to the San Juan County Commissioners' consideration of the Carpenter marina following the Supreme Court's decision and remand. Mr. Carpenter has purchased no further insurance from Mr. Klauder.

Mr. Klauder sold an automobile insurance policy, in 1975, to a partner of Mr. Carpenter in the marina project, a Mr. McBriar. This policy remains in effect.

Mr. Klauder sold an insurance policy on rented real estate, upon which a claim was filed with directions to send the proceeds to Mr. Sisley, appellant in this matter. This policy was canceled in May, 1979.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

Appellants raise five objections to the County's approval of the Carpenter marina: 1) the Resolution (128-1978, September 25, 1978) is unlawful and void, 2) the public communication process carried out by the County is inadequate, 3) the EIS is inadequate, 4) the approval is contrary to the Master Program, the Shoreline Management Act, and the substantive protection afforded by SEPA and 5) Commissioner Klauder's participation in the approval violated the appearance of fairness

doctrine. We now consider these in turn.

I

The Resolution (128-1978, September 25, 1978) of the Board of San Juan County Commissioners which purported to renew and extend the original substantial development permit (No. SJ-25, December 15, 1972) is invalid for that purpose and does not constitute a new substantial development permit.

Although it did not so state expressly, we conclude that the Supreme Court's decision in Sisley v. San Juan County, supra, invalidated the original substantial development permit (No. SJ-25, December 15, 1972) as an action taken without an EIS where one is required. See Byers v. Board of Clallam County Commissioners, 84 Wash.2d 796, 529 P.2d 823 (1974) and ASARCO, Inc. v. Air Quality Coalition, et al. 92 Wash.2d. 685, 601 P.2d. 501 (1979).[1] By written motion, dated March 23, 1978, and denied at hearing, respondent San Juan County sought to dismiss this review of the Resolution by asserting RCW 90.58.180 authorizes review of "the granting, denying or rescinding of a permit on the shorelines of this state" within thirty (30) days of the date of filing of that permit. "The permit in questions [sic], SJ-25, was granted December 15, 1972. Petitioners have failed to make timely application for review by this

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1. It follows that the conditions incorporated into permit SJ-25 by our Order on Stipulation in SHB No. 52 (entered May 23, 1973) are now invalid also.

Shorelines Hearings Board . . .". We conclude that we have jurisdiction to review the Resolution in question and that the original, invalidated substantial development permit (No. SJ-25) cannot be revived in the fashion attempted by the Resolution.

Neither can the Resolution constitute a new substantial development permit in that it is not substantially in the form provided for such permits by state regulation, WAC 173-14-120.

For these reasons the Resolution is void in all respects excepting its approval of the EIS.

II

Appellants contend that the public communication process carried out by the County was inadequate. We have concluded that the original substantial development permit (SJ-25, December 15, 1972) was invalidated by the Supreme Court's decision in Sisley v. San Juan County in 1977. The information which appellants had received from the County to that time, coupled with the EIS, was adequate to provide them with an informed opportunity to argue against the issuance of a subsequent substantial development permit during the renewed deliberations by the County which followed the Supreme Court's decision. The public notice provided by the County was adequate so far as the matters now before us for review.

III

Appellants challenge the adequacy of the County's EIS. The question of the adequacy of an EIS is one of law, Leschi v. State Highway Comm'n, 84 Wash.2d. 271, 525 P.2d 774 (1974). However, the

decision of the governmental agency relative to the adequacy of an EIS shall be accorded substantial weight. RCW 43.21C.090. Here the County approved the EIS.

Appellants first contend that the EIS does not discuss limiting the development of the marina and that this constitutes the "no-action" alternative. We disagree. Reducing the size of the marina is considered at p. 86 as are four other alternatives, including the "no-action" alternative of building no marina.

Appellants next contend that the EIS does not describe, discuss or fully set forth all potential adverse impacts. On the contrary, from pp. 64-82 the EIS treats the proposal's impact upon each aspect of the physical and human environment set out in the SEPA Guidelines (chapter 197-10 WAC) at WAC 197-10-444. This includes discussion of parking facilities (Sec. 7.II.C.2 at p. 74), surface water use (Sec. 7.II.C.6 at p. 76), aesthetics (Sec. 7.II.H at p. 80) and economics (Sec. 7.II. K at p. 81) contrary to appellants' contention that these were not considered.

The EIS conclusions are based upon investigations in part by the University of Washington Friday Harbor Laboratories, and upon written source material disclosed in the bibliography. We do not agree with appellant's contention that these conclusions are unsupported or based on inadequate investigations by unqualified persons.

We conclude that the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, and discussed, and that they are substantiated by supportive opinion and data.

Leschi, supra, at p. 785. We therefore conclude that the EIS is adequate.

IV

Appellants raise three specific grounds upon which the County's approval of the Carpenter marina violates one or all of the Master Program, Shoreline Management Act or substantive protection of SEPA. These are 1) that the proposed marina will not promote the public interest and will reduce appellants' view, 2) that water quality will be jeopardized by sewage and oil discharged from water craft using the marina and 3) that construction of the marina as planned would impair appellant's opportunity to lease, or the value of a lease of, state owned aquatic land between the marina site and appellant's tidelands and uplands.

1. Public interest and view. Regarding public interest, RCW 90.58.020 declares that public policy is to "[plan] for and [foster] all reasonable and appropriate uses . . . [allow] for limited reduction of rights of the public in the navigable waters" and "[protect] generally public rights of navigation and corollary rights incidental thereto". While this requires a recognition of public rights of navigation, it does not mandate a calculation of equal public benefits to be offset against private benefits. Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board, 92 Wash.2d 1, 592 P.2d 151 (1979). The reduction in public rights of navigation and corollary rights is here outweighed by the increased public access to the water afforded by the proposed marina. Construction of the proposed marina is thus reasonable and appropriate

and not contrary to the public interest.

Regarding view, we cannot conclude that the proposed marina would impair appellants' view; rather, it would change the composition of their view. Appellants did not prove that this would have a negative effect on their property value. Department of Ecology v. Pacesetter Constr. Co., 89 Wash.2d 203, 571 P.2d. 196 (1977) cited by appellants is therefore inapposite. See, Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board, supra, at pp. 5-6. The Master Program, relating to view, requires optimization of "the trade-offs between the number of boats served and the impacts on the natural and visual environments" (Sec. 5.13, Marinas, quoted in Finding of Fact IV, supra). In the context of the high demand for boat storage in San Juan County which we have found, and the relatively small change which would be effected in the composition of appellant's view, we cannot conclude that the proposed marina should be reduced or rearranged. The proposed marina will constitute the optimum trade-off between boats served and visual impact, provided that night-time illumination is provided only by low intensity, low height (18-36 inch) dock lights.

2. Sewage and oil from water craft. In order to protect against adverse effects to the waters of the state, RCW 90.58.020, the proposed marina should include and use a boat holding tank sewage pump-out station. The proposed marina should also have materials for the containment of oil spills. These should be of a kind approved by the State Department of Ecology.

3. Appellant's opportunity to lease state owned aquatic land. Appellants urge that as owners of uplands and tidelands they hold a

preference right to lease the abutting state owned aquatic land. They concede that respondent Carpenter holds a similar preference right, with the two aquatic parcels subject to such rights meeting at some boundary roughly parallel to and between their opposite shores. Appellants next reason that if the proposed marina were constructed to that boundary then any future structures which appellant may construct on the adjacent aquatic land, which appellants may lease, would need to be set back from that boundary by a distance equal to the full width of a navigation channel. Such a channel for navigation, appellants argue, should straddle the boundary rather than being entirely on appellant's side. While there may be merit in this contention, the County did not act improperly in issuing its substantial development permit (No. 25SJ72, June 19, 1979) without finally resolving that contention. This is so because the administration and enforcement of leases for state aquatic lands has been accorded to the State Department of Natural Resources (DNR), see chapter 43.30 RCW, and is governed generally by Title 79 RCW, Public Lands. The DNR has not formally established the location of the boundary between the aquatic parcels in which the parties here claim preference rights. Likewise, the completion of the proposed marina will necessitate the issuance of a DNR lease of additional aquatic lands. DNR will then have the opportunity to position the proposed marina relative to the boundary that it then establishes. The positioning of the proposed marina, if any, effectuated by the DNR lease may or may not be more restrictive than the County's substantial development permit (25SJ72, June 19, 1979) now before us.

In summary, the proposed development is consistent with the Master Program and Shoreline Management Act provided that the following three conditions are observed:

1. Night-time illumination shall be provided only by low intensity low height (18-36 inch) dock lights.
2. A boat holding-tank sewage pump-out station shall be installed and used.
3. Materials for containment of oil spills, of a type approved by the State Department of Ecology, shall be maintained on the site of the marina.

The substantive protection afforded by SEPA, See Polygon Corporation v. Seattle, 90 Wash.2d 59 (1978), did not require the Board of County Commissioners to condition respondent Carpenter's proposed development, beyond the conditions imposed by the substantial development permit (No. 25 SJ72, June 19, 1979) and the three conditions set forth herein, for compliance with the Master Program and Shoreline Management Act.

V

The appropriate test under the appearance of fairness doctrine is whether a

> "disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, [would] be reasonably justified in thinking that partiality may exist?"

Swift v. Island County, 87 Wash.2d 348 (1976). See also Buell v. Bremerton, 80 Wash.2d 518 (1972).

We conclude that Commissioner Klauder's personal interest in the matter of the proposed marina is so remote and tenuous as to leave no

one reasonably justified in thinking that partiality may have existed. We therefore find no violation of the appearance of fairness doctrine by Commissioner Klauder's participation in the County's approval of the proposed marina. See Westslope Council v. Tacoma, 18 Wn. App. 328 (1977).

VI

The substantial development permit does not clearly describe the proposed development. The matter should therefore be remanded for incorporation by reference and attachment of the text and illustrations of Section 5.E. of the draft EIS which sets forth a description of the proposed development.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

This matter is remanded to respondent, San Juan County, with instructions to issue a substantial development permit in the same form as previously (No. 25SJ72, June 19, 1979); provided, however, that:

1. The text and illustrations of Section 5.E. of the draft EIS shall be incorporated by reference and attached, and

2. The three conditions set out in Conclusion of Law IV, page 15 herein, shall be added.

DATED this 7th day of February, 1980

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

CHRIS SMITH, Member

DAVID AKANA, Member

DELMON ANDERSON, Member

RICHARD A O'NEAL, Member

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