

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE SUBSTANTIAL DEVELOPMENT )	SHR2019-0004
Application for )	
)	
<b>Whatcom County Public Works</b> )	FINDINGS OF FACT,
"Stormwater Utility Work" )	CONCLUSIONS OF LAW,
)	AND DECISION

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**SUMMARY OF APPLICATION AND DECISION**

Application: Whatcom County Public Works is requesting a Shoreline Substantial Development Permit for a joint project with Birch Bay Water and Sewer District for utility work in a residential neighborhood in the Point Whitehorn area of Birch Bay in the ROW of Birch Bay Drive between Holeman Avenue and Point Whitehorn Road.

Decision: The requested permit is granted, subject to conditions.

**FINDINGS OF FACT**

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing.

I.

**PRELIMINARY INFORMATION**

Applicant: Whatcom County Public Works

Property Location: Birch Bay Dr. ROW between Holeman Ave. and Point Whitehorn Rd. [approximately 2,800 ft.]

Assessor's Parcel No. 395102 521163 [Right Of Way]

Legal Description: Within Section 02, Township 39 North, Range 01 W, W.M.

Adjacent Water Body: Birch Bay

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes

Zoning: Urban Residential [UR4]

Application Submitted: August 14, 2018

Notice of Completeness: August 28, 2018

Notice of Application: September 19, 2018

End of Comment Period: October 19, 2018

Authorizing Ordinances: SMP 23.50                      Applicability  
   SMP 23.70.010               Administration  
   SMP 23.70.030               Hearing Examiner

Applicable Shoreline Program Provisions

Chapter 90.58.020 RCW   Management and Administrative Policies

SMP 23.10.060            Critical Areas Ordinance

SMP 23.20                Goals and Objectives

SMP 23.30.020.A        Official Shoreline Map

SMP 23.30                Shoreline Designations

SMP 23.10.060.A.       Habitat Conservation Area [HCA] pursuant to WCC 16.16.700  
   and WCC16.16.740 Buffer/Setbacks

WCC 23.40.020           Management and Administrative Policies

SMP 23.60.010.A        Substantial Development Permit Criteria

SMP 23.60.170.A        Project Revision Changes in scope, area, or design

SMP 23.90.030           Ecological protection and critical areas

SMP 23.90.040           Water quality and quantity

SMP 23.90.060           Vegetation Conservation

SMP 23.90.100           Landfill and excavation

SMP 23.100.160         Utilities

SEPA Review:            Determination of Non-Significance, issued by Whatcom County  
   Planning and Development Services, May 14, 2019

Legal Notices:         Published – Bellingham Herald Notice of Hearing, May 2, 2019

  Posted – Notice of Public Hearing, May 1, 2019

  Mailed – Notice of Public Hearing, April 25, 2019

Hearing Date: May 15, 2019

Parties of Record

Kraig Olason, Stormwater Program Manager  
Whatcom County Public Works

Andrew Hicks, Shoreline Administrator  
Planning and Development Services

Exhibits:

1. Shoreline Substantial Development Master Land Use Application with attachments
  - 1-1 Project Proposal
  - 1-2 Shoreline Substantial Supplemental Application
  - 1-3 Fee Responsibility
  - 1-4 Agent Authorization
  - 1-5 Shoreline Substantial Development Application Requirements
  - 1-6 Capital Improvement Project Information Sheet – Stormwater Division
  - 1-7 PDS Comment Letter, with Project Description, April 12, 2019
2. Revised Staff Report, May 15, 2019
3. Agency Comments:
  - Natural Resources Memo, May 13, 2019
  - Letter dated, July 21, 2017 from Element Solutions to Public Works Engineer and Cascade Natural Gas Corporation-Bellingham District re: Wetland Reconnaissance for Birch Bay Drive Gas Main Extension
  - Critical Areas Memo, May 13, 2019 re: Project Approval with Conditions
4. SEPA Determination of Non-significance, issued May 14, 2019, with attached DNS Distribution List, Vicinity Map, and Environmental Checklist, with Vicinity Map [April 2019], dated March 11, 2019
5. Birch Bay Drive and Point Whitehorn Drainage Improvements Drawing Index, Notes & Vicinity Map, prepared by Whatcom County Public Works, Engineering Division, dated March 8, 2019
6. Certificate of Mailing Notice of Public Hearing, April 25, 2019
7. Certificate of Posting: Notice of Public Hearing, May 1, 2019
8. Legal Notice Public Hearing, May 2, 2019

**II.**

Whatcom County Public Works [WCPW], in a joint effort with Birch Bay Water

and Sewer District [BBWSD], is seeking approval for a Shoreline Substantial Development Permit for utility work in a residential neighborhood in the Pt. Whitehorn area of Birch Bay. WCPW and BBWSD will coordinate their respective activities to reduce construction-related impacts to the neighborhood.

### III.

The Applicant has indicated that the Revised Staff Report is factually and accurately correct. The Applicant stated no objection to the modified Conditions of Approval recommended by Staff. There was no public comment on this matter at the hearing. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Revised Staff Report, Exhibit No. 2, dated May 15, 2019, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

### IV.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

## **CONCLUSIONS OF LAW**

### I.

The Whatcom County Shoreline Administrator has recommended approval of the requested Shoreline Substantial Development Permit for the proposed utility work to improve stormwater conveyance system to improve drainage and reduce localized flooding and erosion.

The Findings of Fact and Conclusions of Law are set forth in the modified Staff Report, Exhibit No. 2 in the Hearing Examiner file, dated March 15, 2019. Subject to the Conditions of Approval recommended by Staff, the Hearing Examiner also

concludes that the proposal is consistent with the Goals, Policies, and Purpose of the Shoreline Management Act, RCW 90.58, and with the Goals and Policies of the Whatcom County Shoreline Management Program. The Conclusions of Law adopted by Staff in the Revised Staff Report are incorporated herein as Conclusions of Law.

## II.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

### **DECISION**

A Shoreline Substantial Development Permit is hereby granted to Whatcom County Public Works for utility work to improve stormwater conveyance system to improve drainage and reduce localized flooding and erosion in the Birch Bay Drive ROW between Holeman Avenue and Pt. Whitehorn Road, Assessor's Parcel No. 395102 521163, Birch Bay, Washington. The permit is granted subject to the following conditions:

1. The proposed shoreline developments shall be consistent with the scope and site plan stamped "Shoreline Approved" on May 13th, 2019 for this shoreline substantial development permit. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline Administrator.
2. Issuance of this shoreline permit does not release the applicant from any other Local, State, regional or Federal statutes or regulations applicable to the proposed development.
3. Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.
4. Best Management Practices (BMPs) will be required in order to address any construction related impacts to water quality, the shoreline, and/or existing habitat.
5. Washington State Department of Ecology Water Quality Standards shall be maintained.

6. The project shall not result in significant degradation of ground or surface waters and shall be completed during periods of dry weather.
7. A temporary erosion and sediment control (TESC) plan shall be provided for all proposed landfill and excavation activities.
8. Any change in project scope, area or design shall be submitted immediately to a Shoreline Administrator to determine if the change constitutes a revision pursuant to WCC 23.60.170.A.
9. No clearing of vegetation is permitted outside of the designated work area shown on the approved site plans.
10. All ground disturbing activities shall be monitored by an archaeologist with a monitoring plan approved by the Department of Archaeology and Historic Preservation.
11. Construction shall be commenced within two (2) years of the effective date of this shoreline exemption, as defined by 23.60.190(A)(3), and shall be completed in five (5) years. The Shoreline Administrator may grant a single extension for a period of not more than one (1) year based on a showing of good cause. Such request must be filed with the Shoreline Administrator before the expiration date described above.
12. All work will be constructed in the identified right-of-ways for Point Whitehorn Road and Birch Bay Drive, per the approved site plan.
13. BMP's will be installed to control stormwater runoff in the work area during construction.
14. All debris material will be disposed of at an approved off-site facility.
15. Any landscape plantings or vegetation installed shall use plant species native to the Pacific Northwest.
16. If any work occurs outside of the approved work site, additional review is required.

### **NOTICE**

In addition to incurring civil liability under Shoreline Management Program Section 23.80.20 and RCW 90.58.210, pursuant to RCW 90.58.220 any person found to have willfully engaged in activities on shorelines of the state in violation of the provisions of the act or the Shoreline Management Program or other regulations adopted pursuant thereto shall be guilty of a gross misdemeanor and shall be punished by a fine of not less than \$25 or more than \$1,000 or by imprisonment in the county jail for not more than 90 days, or by both such fine and

imprisonment; provided that the fine for the third and all subsequent violations in any five year period shall not be less than \$500 nor more than \$10,000. Any person who willfully violates any court order, regulatory order or injunction issued pursuant to the Shoreline Management Program shall be subject to a fine of not more than \$5,000, imprisonment in the county jail for not more than 90 days, or both.

NOTICE OF ADMINISTRATIVE APPEAL PROCEDURES  
FROM FINAL DECISIONS OF  
THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the Applicant, any opponent of record, or any County department.

Appeals to the shoreline hearings board of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use permit may be filed by the applicant/proponent or any aggrieved party pursuant to RCW 90.58.180 within 21 days of filing the Final Decision by Whatcom County with the Department of Ecology.

Whatcom County Council shall consider an appeal of a decision on a shoreline substantial development permit, shoreline variance or shoreline conditional use only when the applicant/proponent waives his/her right to a single appeal to the shoreline hearings board. Such waivers shall be filed with the County in writing concurrent with a notice of appeal within 10 days of a final action. When an applicant/proponent has waived his/her right to a single appeal, such appeals shall be processed in accordance with the appeal procedures of WCC 23.60.150.H and shall be an open record hearing before the Hearing Examiner.

More detailed information about appeal procedures is contained in the Shoreline Management Program at WCC 23.60.150. Whatcom County Code can be viewed online at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 16<sup>th</sup> day of May 2019.

*Michael Bobbink*

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Michael Bobbink, Hearing Examiner



Revised May 15, 2019

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of		SHR2019-00004
<b>Whatcom County Public Works</b> for		FINDINGS, CONCLUSIONS, AND
a Shoreline Substantial Development		RECOMMENDATIONS
Permit		

**I. SUMMARY OF APPLICATION AND RECOMMENDATION**

Application: The project is a joint effort by Whatcom County Public Works (WCPW) and Birch Bay Water and Sewer District (BBWSD) for utility work in a residential neighborhood in the Point Whitehorn area of Birch Bay. WCPW proposes to improve the stormwater conveyance system to improve drainage and reduce localized flooding and erosion. BBWSD proposes to abandon an older 4-inch water main on the northwest side of Birch Bay Dr. and reconnect residential service to the existing newer 8-inch main on the southeast side of the street.

Recommendation: Staff recommends conditional approval of the substantial development permit.

**II. PRELIMINARY INFORMATION**

Applicant: Whatcom County Public Works  
c/o Kraig Olason  
322 N. Commercial Street, Suite 301  
Bellingham, WA 98225

Property Location: Birch Bay Dr. ROW between Holeman Ave. and  
Pt. Whitehorn Rd. (approximately 2,800 ft.)

Legal Description: Section 02, Township 39N, Range 01W, W.M.



Parcel #: 395102521163 (Right of Way)

Adjacent Water Body: Birch Bay

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes

Zoning: Urban Residential (UR4)

Application Submitted: August 14, 2018

Notice of Completeness: August 28, 2018

Notice of Application: September 19, 2018

End of Comment Period: October 19, 2018

SEPA Review: Whatcom County issued a Determination of Non-Significance (DNS) on May 13, 2019.

### **III. PROJECT SUMMARY**

**Proposal:** The project is a joint effort by Whatcom County Public Works (WCPW) and the Birch Bay Water and Sewer District (BBWSD) for utility work in a residential neighborhood in the Pt. Whitehorn area of Birch Bay. WCPW and BBWSD will coordinate their respective activities to reduce construction-related impacts to the neighborhood.

WCPW proposes to improve the stormwater conveyance system to improve drainage and reduce localized flooding and erosion. This project has been identified as a priority in the Birch Point, Terrell Creek Urban Area, and Point Whitehorn Subwatershed Master Plan and is included in the 6-year Capital Improvement Program for the Birch Bay Watershed and Aquatic Resources Management (BBWARM) District.

The proposed drainage improvement project has been designed to convey the 100-year storm event and involves replacement of existing structures and installation of new structures. Work will occur adjacent to the paved road surface and within areas previously disturbed for road construction and utility installation.

1. Replace 608 linear feet of existing 12-inch diameter pipe with 12-inch diameter PVC pipe.
2. Replace 1,384 linear feet of existing 12-inch diameter pipe with 18-inch diameter PVC pipe.

3. Replace 600 linear feet of existing 12-inch diameter pipe with 24-inch diameter PVC pipe.
4. Replace 120 linear feet of drainage ditch with 24-inch diameter PVC pipe.
5. Replace/Install catch basins:
  - a. 21 Type 1L catch basins
  - b. Type T-PVC catch basins
  - c. Type II catch basins
6. Abandon the failed outfall.

The BBWSD proposes to abandon an older 4-inch water main on the northwest side of Birch Bay Dr. and reconnect residential service to the existing newer 8-inch main on the southeast side of the street. BBWSD will push 20 service lines under Birch Bay Dr. to connect homes on the northwest side of the road to the 8-inch main.

During construction, the roads will remain open with intermittent lane closures managed by flaggers. Access will be provided from Birch Bay Dr., Pt. Whitehorn Rd., and Holeman Ave. Staging will occur on the road shoulders. The estimated cost of construction is approximately \$747,000.

**Project Goals:** The purpose of the project is to reduce flooding and improve conveyance by upsizing drain pipes, replacing catch basins, and connecting residential yard drains. Additionally, the project will abandon a failed outfall on the shoreline bluff between 7009 and 7011 Birch Bay Dr. and re-route drainage to the upgraded drainage system. This will reduce the risk of future bluff failures. Reconnecting the residential lines to the newer 8-inch main will improve potable water reliability and delivery. Conducting both projects collaboratively will minimize construction-related impacts to the neighborhood.

**Site Description:** The project area is a residential neighborhood with single family homes. The existing stormwater conveyance system comprises catch basins, 12-inch diameter storm drain pipe, and ditches adjacent to the roadways. Stormwater is conveyed north along Birch Bay Dr., outfalling at the shoreline bluff or continuing down Birch Bay Dr. to the intersection of Pt. Whitehorn Rd. A cross culvert delivers flow to a ditch on the north side of Terrell Rd. (a private road for the BBWSD wastewater treatment plant). The ditch outfalls to a wetland-stream complex that is a tributary to Terrell Creek.

The existing water mains are an older 4-inch line and a newer 8-inch line parallel to the road on the northwest and southeast sides of Birch Bay Dr., respectively. These mains connect to adjacent homes through existing residential connections.

#### **IV. CODE ANALYSIS**

Shoreline Master Program (SMP) jurisdiction means those lands extending landward for 200 feet in all directions as measured on a horizontal plane from the Ordinary High Water Mark (OHWM); floodways and contiguous floodplain areas landward 200 feet from such floodways; and all wetlands and river deltas associated with the streams, lakes and tidal waters which are subject to the provisions of Chapter 90.58 RCW. The Critical Areas Ordinance (CAO) is incorporated by reference into the SMP pursuant to WCC 23.10.060.

According to the Official Shoreline Map, WCC 23.30.020.A, the upland portion of the subject site is located within the Shoreline Residential shoreline designation. As provided in WCC 23.90.130, shoreline buffers within jurisdiction of the SMP are determined based on the standards contained in the CAO. Birch Bay is classified as Habitat Conservation Areas (HCA) pursuant to WCC 16.16.700 and according to WCC 16.16.740, marine shorelines have a prescribed buffer of 150-feet as measured landward on a horizontal plane from the OHWM. Additional setback requirements are provided in WCC 16.16.265, but those requirements are not applicable to this project, as there are no above ground structures being proposed that would be subject to such setback requirements.

Birch Bay, from Birch Point to Point Whitehorn, is identified as a shoreline of statewide significance pursuant to WCC 23.40.020. In accordance with RCW 90.58.020, the following management and administrative policies apply to all shorelines of statewide significance in unincorporated Whatcom County, as defined in RCW 90.58.030(2)(e) and identified in WCC 23.40.020. Consistent with the policy contained in RCW 90.58.020, preference shall be given to the uses that are consistent with the statewide interest in such shorelines. These are uses that:

- A. Recognize and protect the statewide interest over local interest.
- B. Preserve the natural character of the shoreline.
- C. Result in long-term over short-term benefit.
- D. Protect the resources and ecology of the shoreline.
- E. Increase public access to publicly owned areas of the shoreline.
- F. Increase recreational opportunities for the public in the shoreline.
- G. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

Staff has concluded that the proposed utility retrofit is consistent with the policies for shorelines of statewide significance. The proposed project is for maintenance and repair of existing utilities. Additionally, staff finds that the project will not result in any significant adverse impacts that will not be mitigated for if all of the recommended conditions are adhered to.

Pursuant to WCC 23.60.010.A, a substantial development permit shall be required for all proposed use and development of shorelines unless the proposal is specifically exempt from such requirements pursuant to one or more of the listed exemptions in WCC 23.60.022. According to the applicant, the fair market value of the project exceeds the \$7,047 threshold necessary for the project to qualify for review via an exemption from substantial development permitting (WCC 23.60.022.A). As such, a substantial development permit is required.

For shoreline substantial developments to be approved, the proposals must satisfy the criteria of WCC 23.60.010, as addressed below.

In the granting of all shoreline substantial development permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if shoreline substantial development permits were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

According to 23.60.010.B, in order to be approved, the decision maker must find that the proposal is consistent with the following criteria:

1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance under SMP 23.60.030;
2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated;
3. For projects located on shorelines of statewide significance, the policies of WCC 23.40 shall also be adhered to.

General and use-specific policies and regulations are found within Sections 23.90 and 23.100 respectively. Applicable policies and regulations associated with the proposed development are listed in italics and discussed below.

The policies and regulations that are applicable to the proposed repairs/replacements and modification to existing utilities are contained in the following sections of the SMP:

- WCC 23.90.030 – Ecological protection and critical areas
- WCC 23.90.040 – Water quality and quantity

WCC 23.90.060 – Vegetation Conservation  
WCC 23.90.100 – Landfill and excavation  
WCC 23.100.160 - Utilities

*The Shoreline Administrator has reviewed this proposal against all pertinent regulations and finds that, with the recommended conditions enumerated below in Section VII of this report, the project is consistent with all SMP policies and regulations.*

*This project was reviewed by critical areas staff for conformance with the ecological protection and vegetation standards referenced above. Staff concluded that the project meets the requirements of WCC 23.60 and WCC 16.16., specifically Articles 2, 6, and 7, if the following conditions are made conditions of approval:*

- 1. All work will be constructed in the identified right of ways for Point Whitehorn Road and Birch Bay Drive, per the approved site plan.*
- 2. BMP's will be installed to control stormwater runoff in the work area during construction.*
- 3. All debris material will be disposed of at an approved off site facility.*
- 4. Any landscape plantings or vegetation installed shall use plant species native to the Pacific Northwest.*
- 5. If any work occurs outside of the approved work site, additional review is required.*

### **Cumulative Environmental Impact**

In the granting of all substantial development permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area (23.60.010.C). For example, if substantial developments were granted to other developments in the area where similar circumstances exist, the total of the substantial developments should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

*Staff has determined that the proposed utility repairs and modification project, as conditioned, would not result in any significant adverse ecological impacts. The proposed utility repairs and expansion will not create an adverse ecological impact, and additional approvals of similar utility retrofits would not create a cumulative adverse effect.*

### **V. PUBLIC COMMENTS**

No public comments were received during the public comment period for this application.

## **VI. AGENCY COMMENTS**

**Amy Dearborn, Critical Areas Planner** – Planning & Development Services: Submitted a memorandum on May 13, 2019 signing off on project approval with conditions:

## **VII. DETERMINATION**

Based on the above findings and technical review, Staff approves the request for a shoreline substantial development subject to the following conditions:

1. *The proposed shoreline developments shall be consistent with the scope and site plan stamped "Shoreline Approved" on May 13th, 2019 for this shoreline substantial development permit. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline Administrator.*
2. *Issuance of this shoreline permit does not release the applicant from any other Local, State, regional or Federal statutes or regulations applicable to the proposed development.*
3. *Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
4. *Best Management Practices (BMPs) will be required in order to address any construction related impacts to water quality, the shoreline, and/or existing habitat.*
5. *Washington State Department of Ecology Water Quality Standards shall be maintained.*
6. *The project shall not result in significant degradation of ground or surface waters and shall be completed during periods of dry weather.*
7. *A temporary erosion and sediment control (TESC) plan shall be provided for all proposed landfill and excavation activities.*
8. *Any change in project scope, area or design shall be submitted immediately to a Shoreline Administrator to determine if the change constitutes a revision pursuant to WCC 23.60.170.A.*

9. *No clearing of vegetation is permitted outside of the designated work area shown on the approved site plans.*
10. *All ground disturbing activities shall be monitored by an archaeologist with a monitoring plan approved by the Department of Archaeology and Historic Preservation.*
11. *Construction shall be commenced within two (2) years of the effective date of this shoreline exemption, as defined by 23.60.190(A)(3), and shall be completed in five (5) years. The Shoreline Administrator may grant a single extension for a period of not more than one (1) year based on a showing of good cause. Such request must be filed with the Shoreline Administrator before the expiration date described above.*
12. *All work will be constructed in the identified right of ways for Point Whitehorn Road and Birch Bay Drive, per the approved site plan.*
13. *BMP's will be installed to control stormwater runoff in the work area during construction.*
14. *All debris material will be disposed of at an approved off site facility.*
15. *Any landscape plantings or vegetation installed shall use plant species native to the Pacific Northwest.*
16. *If any work occurs outside of the approved work site, additional review is required.*

Report prepared by:

Andrew Hicks  
Whatcom County Shoreline Administrator  
Planning and Development Services