

WHATCOM COUNTY HEARING EXAMINER

RE Shoreline Substantial Development Permit) SHR2019-0006
Shoreline Variance Permit) SHV2019-0001
)
South Bay Trust) Findings of Fact,
) Conclusions of Law,
) and Decision

SUMMARY OF APPLICATION AND DECISION

Application: The applicant requests approval of a Shoreline Substantial Development permit and Shoreline Variance to construct a new 82'-4" single family residential dock. Additionally, the proposal includes a 4' wide walkway with stairs to provide access to the shoreline from the residence.

Decision: The requested Shoreline Substantial Development Permit and Shoreline Variance 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: South Bay Trust – Paul Denton Trustee

Property Location: 3678 South Bay Drive
Sedro-Woolley, WA 98284

Assessor's Parcel No. 370421-488156

Zoning: Rural

Total Acreage: 3.85 Acres

Adjacent Water Body: Lake Whatcom

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes

Authorizing Ordinances:

1. Revised Code of Washington [RCW] 36.70, Planning Enabling Act
2. RCW 90.58, Shoreline Management Act of 1971
3. Whatcom County Comprehensive Plan
4. Whatcom County Code, Title 2, Chapter 2.33 – Permit Review Procedures
5. Whatcom County Code, Title 12.08, Development Standards
6. State Environmental Policy Act (SEPA)
7. Washington Administrative Code Chapter 197-11
8. Whatcom County Environmental Policy Administration Chapter 16.08
9. Whatcom County Code, Title 20, Official Whatcom County Zoning Ordinance
10. Whatcom County Code Title 22, Whatcom County Project Permit Procedures
11. Whatcom County Code Title 23, Shoreline Management Program

SEPA Review: Determination of Non-significance (DNS) issued by Whatcom County PDS on February 10, 2020 under SEP2019-00053.

Legal Notices: Mailed – Notice of Application & Hearing, January 28, 2020
Published – Notice of Hearing, February 6, 2020
Posted – Notice of Application & Hearing, February 10, 2020

Hearing Date: February 19, 2020

Parties of Record

Paul Denton, Trustee
602-1205 Hastings Street W
Vancouver, BC V6E 4T7

William Haynes, Agent
810 Maple Ridge
Everson, WA 98247

Andrew Hicks
Shoreline Administrator
Whatcom County Planning & Development Services

Admitted Exhibits:

1. Shoreline Substantial Development Master Land Use Application with attachments
 - 1-1 Shoreline Substantial Supplemental Application
 - 1-2 PDS Guidelines for Finding Property Owners for Hearing Notices
 - 1-3 Fee Responsibility
 - 1-4 Agent Authorization
 - 1-5 Project Narrative
 - 1-6 Determination of Completeness, dated August 12, 2019
 - 1-7 PDS Comment Letter, with Project Description, October 8, 2019
 - 1-8 Legal Notice of Application, October 8, 2019
 - 1-9 Notice of Application, September 27, 2019
2. Staff Report, February 12, 2020
3. Agency Comments:
 - Engineering Technician Memo, July 29, 2019
 - Wetlands & Habitat Conservation Areas, Nov 27, 2019
4. Public Comment: Letter re: neighboring property no desire to share dock
5. Habitat Conservation Area Assessment, prepared by Welch Ecological Services, LLC, June 3, 2019
6. Vicinity Map: Subject Area
7. Proposed Site Plan, Aston Engineering, Inc., dated July 2018
8. Certificate of Mailing Notice of Public Hearing, dated January 28, 2020
9. Bellingham Herald Legal Notice of Public Hearing, February 6, 2020
10. Certificate of Posting: Notice of Public Hearing, February 10, 2020

II.

Scope

The applicant is requesting approval of a shoreline substantial development permit and shoreline variance to construct a new single-family residential dock. The proposed dock would include a fixed pier with two gangways, a float, and a boat lift. The overall length of the proposed dock would be 82'-4", as measured from the

Ordinary High-Water Mark (OHWM). The 62' long pier would be connected to the upland by a 3'x12' fully grated gangway. At the terminus of the pier, the float will be connected by another 3'x12' fully grated gangway. The proposed dock would generally oriented in a north-south direction to reduce nearshore shading. The pier and float will be supported and anchored by bare steel pipe piles and a boat lift would be installed near the end of the proposed pier.

It is also proposed by the applicant that due to the shallow water depths at the site and the minimum water depths required for operation of a boat lift and mooring float, that the waterward end of the proposed structures be more than 60' beyond the OHWM contour. The landward end of such a proposal would allow the float to be located at a low water depth of -2.35'. The Applicant proposed three alternative float sizes 6'x20', 7'x17', and 8'x15' (See Ex. 7).

In addition to the dock, the applicant seeks approval for a 4' wide walkway, which includes a 12' long stairway, to provide access from an existing gravel access road to the shoreline.

The proposed gangways, pier, float, and boat lift do not conform to the dimensional standards provided in WCC 23.100.090.B.7(c).

III.

Staff Report

Whatcom County & Planning has recommended approval of the requested Shoreline Substantial Development Permit and Shoreline Variance with conditions, and issued a staff report entitled "Findings, Conclusions, and Recommendations," dated February 12, 2020 (herein "Staff Report").

The Applicant has indicated that the Staff Report is factually correct and agreed with all the recommendations save one. At the hearing the applicant's agent made an oral request to modify staff recommended Condition No. 8 to allow for use of the alternative proposed float sizes. The Applicant otherwise stated no objection to the Conditions of Approval recommended by Staff.

No public comment was taken at the hearing.

The Findings and Conclusions of Whatcom County as set forth in the Staff Report, Exhibit No. 2, dated February 12, 2020, a copy of which is attached hereto, are hereby adopted as findings of fact by the Hearing Examiner and incorporated herein by this reference.

IV.

Facts admitted from float-related testimony

Both parties of record testified about Condition #8.

The County approved the use of only a 6'x20' float in a north-south orientation order to minimize impacts on nearshore areas and avoid reduction in ambient light level, and as those are the presumptive maximum dimensions, and presumptive mandatory orientation, under WCC 23.100.090(B)(8)(a) and (c) for achieving that purpose without a variance.

The 6'x20' float dimension oriented to the north-south, creates a very short runoff on the gangway from the pier, with the gangway extending halfway across the narrow width of the float, which is a safety issue with that orientation.

The step slope and tree line casts a great deal of shade on that area of the water.

Applicant was willing to use decking material on the float which would allow 60% or greater passage of light in order to avoid reductions in ambient light levels, and the County was not opposed to such a proposal.

V.

Any Conclusion of Law made below 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.

Substantial Development Permit

The proposed Application for a Substantial Development Permit to authorize the construction of new single-family residential dock can be approved if it is consistent with the Substantial Development Permit Criteria of WCC 23.60.010(B) (1 through 3), unless

it is exempt. This project is not exempt. Subject to the Conditions of Approval attached hereto, the proposed use is consistent with the Substantial Development Permit Criteria, and a Substantial Development Permit should be granted with those conditions.

II.

Shoreline Variance

The proposed Application for a Substantial Development Permit requires a Shoreline Variance because the proposed gangways, pier, float, and boat lift do not conform to the dimensional standards provided in the WCC.

As authorized under WCC 23.60.030(A), the purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in the Shoreline Master Program (SMP) and any associated standards appended to the SMP such as critical areas buffer requirements where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the SMP would impose unnecessary hardships on the applicant/proponent or thwart the policy set forth in RCW 90.58.020.

Pursuant to WCC 23.60.030(B), A variance will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020, and where extraordinary circumstances shall be shown, and the public interest shall suffer no substantial detrimental effect. For a variance to be authorized a proposal must be consistent with the criteria outlined in 23.60.030(D)(1 through 7), and the Hearing Examiner must consider the cumulative environmental impact of additional requests for like actions in the area as required by WCC 23.60.030(G).

In this particular instance, where the variance sought is for a use that will be located waterward of the ordinary high water mark (OHWM) may only be authorized if the applicant can demonstrate that they meet all the criteria in WCC 23.60.030(E)(1 through 3).

Subject to the Conditions of Approval attached hereto, the proposed use is consistent with all of the applicable variance criteria, and a Shoreline Variance should be granted with those conditions. This includes the granting of a potential variance to

the float dimensions, provided the applicant chooses to meet the higher standards imposed for such a variance, in order to meet the policy goals of maximally avoiding any reduction in ambient light levels (See Condition #8).

III.

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 and Shoreline Variance is hereby granted to South Bay Trust for the for the construction to construct a new 82'-4" single family residential dock and other improvements described in the Staff Report, on Assessor's Parcel No. 370421-488156, addressed as 3678 South Bay Drive, Sedro-Wooley, WA 98248. The permit is granted subject to the following conditions:

- 1. The proposed shoreline developments shall be consistent with the scope and site plan approved by this shoreline conditional use permit that is stamped "Shoreline Approved" on February 12, 2020. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline Administrator and critical areas staff.*
- 2. Issuance of this shoreline permit does not release the applicant from any other State, regional or Federal statutes or regulations applicable to the proposed development.*
- 3. The applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other requirements as determined by WDFW. A copy of the issued HPA shall be submitted along with the above required building permit to Whatcom County Planning and Development Services. Note that any additional mitigation measures imposed by WDFW shall hereby be adopted as conditions of approval pursuant to WCC 16.16.215. In the event that there is a conflict between such HPA conditions and applicable WCC, the more restrictive standards shall apply.*

4. *A copy of the approved Hydraulic Project Approval (HPA) permit must be submitted to the River and Flood Division and/or Planning and Development Services prior to start of any work.*
5. *The applicant shall obtain a building permit from the WCPDS – Building Services Division prior to any construction of the proposed dock. The building permit will require additional review by the Shoreline Administrator and critical areas staff to determine consistency with this permit approval.*
6. *The applicant acknowledges that the proposed location of the dock requires walking along the shoreline from the terminus of the walkway to access the dock. Clearing or trimming of vegetation along the shoreline is prohibited.*
7. *No clearing of vegetation is permitted. Any climbing of trees for the proposed walkway shall receive review at the building permit stage to assess the likelihood of permanent damage to the vegetation along the shoreline.*
8. *Only a single float is authorized by this approval. While the approved site plan provides multiple potential float dimensions, this authorization allows a float with a maximum width of 6' and maximum length of 20'. This is to minimize overwater shading. If the applicant uses decking material that allows for a minimum of sixty per cent (60%) light penetration of the float's decking material, then the applicant is authorized to instead build either a float with a maximum width of 7' and maximum length of 17', or a float maximum width of 8' and maximum length of 15'.*
9. *Because there is no landing proposed for the dock pier, the building permit site plan shall include a side view of the dock, including any ladders required for people to access the dock from the water. Any impacts assessed for structures may require mitigation and revised submittals under the building permit.*
10. *Applicant shall conform to all best management practices and project design elements outlined in the approved Habitat Conservation Area Assessment, "3678 South Bay Drive Habitat Conservation Area Assessment for Parcel 370421488156" authored by Perry Welch, Welch Ecological Services, cover dated June 3, 2019 and submitted on July 8, 2019.*
11. *Any mulch used on site shall be to County standards for low phosphorous and have no chemically treated components.*
12. *If any part of the proposed project is creating impact to the environment a contingency plan shall be authored by the applicant's biological consultant. The contingency plan shall tailor a different approach to offsetting critical areas losses from the construction of the project and be reviewed and approved by the Whatcom County Critical Areas staff.*

13. *No earth work is allowed under this Shoreline Substantial Permit. All fill, grade and excavation shall be permitted under the required building permit.*
14. *Any activity as defined in WCC 20.97.054 that will result in exposed soils exceeding 500 square feet shall not be permitted from October 1st through May 31st.*
15. *Docks and floats shall not exceed 3 feet in height above the extreme highwater level.*
16. *Dock surfaces designed to allow maximum light penetration shall be used on walkways or gangplanks in nearshore areas.*
17. *Approaches to docks shall use piers or other structures to span the entire upper foreshore to the point of intersection with stable upland soils and shall be designed to avoid interference with wave refraction.*
18. *Pile spacing shall be the maximum feasible to minimize shading and avoid a "wall" effect that would block or baffle wave patterns, movement of aquatic lifeforms, or result in structure damage from driftwood impact or entrapment.*
19. *Docks in lakes providing a public water supply shall be constructed of untreated materials, such as untreated wood, approved plastic composites, concrete or steel. This condition applies to any portion of the dock that comes in contact with the water including wave splash, rain or runoff. Materials to be utilized shall be clearly identified on the construction plans required for review of the building permit.*
20. *If a dock is provided with a railing, such railing shall not exceed 36-inches in height and shall be an open framework that does not unreasonably interfere with shoreline views of adjoining properties or lawful use of water surfaces.*
21. *Moorage facilities shall be marked with reflectors, or otherwise identified to prevent unnecessarily hazardous conditions for water surface users during the day or night. Exterior finish shall be generally non-reflective.*
22. *The proposed dock shall be constructed and maintained so that no part of the dock creates hazardous conditions nor damages other shore property or natural features during predictable flood conditions. Floats shall be securely anchored.*
23. *Storage of fuel, oils, and other toxic materials is prohibited on docks and piers except portable containers when provided with secondary containment per 23.100.09.B.20.*
24. *All associated building materials located below the Base Flood Elevation must be water resistant.*

25. *The dock shall be anchored to prevent flotation, collapse and lateral movement.*
26. *Should archaeological resources (e.g. shell midden, faunal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop, and the area should be secured. The Washington State Department of Archaeology and Historic Preservation (Local Government Archaeologist 360-586-3088) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-312-2257; Tamela Smart, Deputy THPO 360-312-2253) should be contacted immediately in order to help assess the situation and to determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.*
27. *If ground disturbing activities encounter human skeletal remains during the course of construction, then all activity will cease that may cause further disturbance to those remains. The area of the find will be secured and protected from further disturbance. The finding of human skeletal remains will be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains will not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic. If the county medical examiner/coroner determines the remains are non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the future preservation, excavation, and disposition of the remains.*
28. *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.*

NOTICE OF POTENTIAL REVOCATION AND PENALTIES

This Approval is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation. Complaints regarding a violation of the conditions of this permit should be filed with Whatcom County Planning and Development Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing. Violations of this title shall constitute Class I civil

infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

FURTHER, 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. This approval does not release the applicant from any regulations and procedures required of any other public agency, or any County requirements other than the requirement to obtain a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit. This permit may be rescinded pursuant to RCW 90.58.140(8) in the event the permittee fails to comply with the terms or conditions thereof. Pursuant to Whatcom County Shoreline Management Program Section 23.60.151 this permit shall expire within two years of the date of its approval and a new permit will be required, if the permittee fails to make substantial progress toward completion of the project for which it was approved. Pursuant to Section 23.60.152 it shall expire if the project is not completed within five years of the date of the approval, unless the permittee has requested a review, and upon good cause shown, been granted an extension of the permit.

THIS PERMIT IS NOT VALID (AND NO CONSTRUCTION NOR OPERATION AUTHORIZED BY THIS PERMIT SHALL BEGIN) UNTIL THIRTY (30) DAYS AFTER THE DATE OF FILING AS DEFINED BY RCW 90.58.140(6) AND WAC 197-14-090, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN THIRTY DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED; EXCEPT AS PROVIDED IN RCW 90.58.140(5)(A)(B)(C).

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

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by

WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 20th day of February 2020.



Rajeev D. Majumdar, Hearing Examiner *Pro Tem*