

WHATCOM COUNTY HEARING EXAMINER

re: The application of **Evan Keating** for a Shoreline Substantial Development Permit and Shoreline Variance Permit

SHR2019-00016; and
SHV2019-00004

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 126-ft. 8-in. single family residential dock.

Decision: The requested Shoreline Substantial Development Permit and Shoreline Variance Permit is granted, subject to conditions.

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.

FINDINGS OF FACT

I.

PRELIMINARY INFORMATION

Applicant: Evan Keating
c/o William A. Haynes, PE
Ashton Engineering, Inc.

Property Location: 2297 Northshore Road
Bellingham, WA 98226

Assessor's Parcel No. 380325 200434

Legal Description: Within Section 25, Township 38N, Range 03E, W.M.

Adjacent Water Body: Lake Whatcom

Shoreline Designation: Shoreline Residential

Shoreline Significance: Yes

SEPA Review: Determination of Non-significance [DNS] issued by Whatcom County PDS on March 19, 2020 under SEP2019-0111

Notice Information: Application Submitted: December 10, 2019
Notice of Completeness: December 24, 2019
Notice of Application: January 23, 2020
Comment Period Ended: February 24, 2020

Applicable Shoreline Program Provisions:

WCC 23.50	Applicability
WCC 23.70	Administrator
WCC 23.20	Goals and Objectives
WCC 23.30	Shoreline Jurisdiction & Area Designations
WCC 23.40	Shoreline of Statewide Significance
WCC 23.60.170	Substantial Development Permit Criteria
WCC 23.60.030	Variance Permit Criteria
WCC 23.60.130	Public Hearings
WCC 23.90	General Policies and Regulations
WCC 23.90.130	Bulk and Dimensional Requirements
WCC 23.100.090	Moorage: Docks, Piers and Mooring Buoys
WCC 23.110	Definitions

Legal Notices: Mailed – Notice of Application & Hearing, July 8, 2020
Published – Notice of Hearing, July 16, 2020
Posted – Notice of Application & Hearing, July 16, 2020

Hearing Date: July 29, 2020

Parties of Record

Evan Keating
2297 Northshore Road
Bellingham, WA 98226

William Haynes, Agent
Ashton Engineering, Inc.
PO Box 5665
Bellingham, WA 98227

Andrew Hicks, Shoreline Administrator
Whatcom County Planning & Development Services

Erin Page, Critical Areas Planner
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 Customer Receipt, dated 12/10/2019
 - 1-6 Shoreline Variance Master Land Use Application
 - 1-7 Shoreline Variance Supplemental Application
 - 1-8 Fee Responsibility
 - 1-9 Agent Authorization
 - 1-10 Customer Receipt, dated 12/10/2019
 - 1-11 Project Proposal: Keating Pier and Float
 - 1-12 Aston Engineering, Inc. Preliminary Site Plan & Elevation Design, 11-29-2019
 - 1-13 Easement for Boat Launch Access, 5/29/2015
 - 1-14 Determination of Completeness, dated December 24, 2019
 - 1-15 PDS Comment Form Letter with Notice of Application, dated Jan. 23, 2020 with attached Notice of Application & Optional SEPA DNS
 - 1-16 Certificate of Mailing Notice of Application
2. Staff Report, July 22, 2020
3. SEPA Environmental Checklist, SEPA 2019-00111, Customer Receipt, 12/10/2019
4. Agency Comments
 - Public Works Engineering, River & Flood Division, Flood Review Engineering Technician Memo, December 18, 2019, with attached DFIRM
5. Public Comment: Neighbor confirmed they do not want to share their pier and dock with neighbors.
6. Habitat Conservation Area Assessment for Evan Keating and Bill Haynes, PE,

prepared by Perry Welch P.W.S., Welch Ecological Services, LLC, dated November 29, 2019

7. Certificate of Mailing Notice of Public Hearing, dated July 16, 2020
8. Bellingham Herald Legal Notice of Public Hearing, July 16, 2020
9. Certificate of Posting: Notice of Public Hearing, July 16, 2020

II.

The Applicant is requesting approval of a shoreline substantial development permit and shoreline variance to construct a new single-family residential dock. The dock will include a fixed pier with two gangways, a float, and a boat lift. The overall length of the proposed dock is 123-ft-8-in., as measured from the Ordinary High-Water Mark [OHWM]. The 90-ft. long pier will be connected to the upland by a 3-ft X 15-ft. fully grated gangway. At the terminus of the pier, the 6-ftX20-ft float will be connected by another 3-ft.x15-ft fully grated aluminum gangway.

III.

Whatcom County Planning & Development Technical Review Committee has recommended approval of the Shoreline Administrator's Staff Report, requesting the Shoreline Substantial Development Permit and Shoreline Variance Permit with conditions, and issued an entitled "Findings, Conclusions, and Recommendations," dated July 22, 2020 (herein "Staff Report").

The Applicant has indicated that the Staff Report is factually correct and agreed with all the recommendations. At the hearing the Applicant's Agent stated no objection to the Conditions of Approval recommended by Staff.

The Findings and Conclusions of Whatcom County as set forth in the Staff Report, dated July 22, 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.

There was no public comment at the Hearing.

IV.

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 complies with the Substantial Development Permit Criteria, except for the bulk and dimensional requirements for docks contained in WCC 23.100.090(B)(7), for which a shoreline variance has been requested.

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.

The Technical Review Committee has determined that subject to the following proposed conditions, the shoreline variance and shoreline substantial development permit are consistent with Whatcom County Code and recommends that the Whatcom County Hearing Examiner recommend approval of the Applicant's Shoreline Variance request to reduce to extend the length of a single-family dock 18-feet for a total over all overwater structure length of 78-feet. This variance will allow the overwater structure to span the shallow water to a depth of draft of 2.5-feet.

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 and Shoreline Variance is hereby granted to Evan Keating for the construction of a new 126-ft.8-in. single-family residential dock, with a fixed pier with two gangways, a float, and a boat lift, on Assessor's Parcel No. 380325 200434, addressed as 2297 Northshore Road, Bellingham, WA 98226. The permit is granted subject to the following conditions:

CONDITIONS ASSOCIATED WITH SHR2019-00016 AND SHV2019-00004

1. The proposed shoreline developments shall be consistent with the scope and site plan approved by this shoreline conditional use permit that is stamped "Site Plan Review Approval" and initial by the Shoreline Administrator on July 22, 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. The building permit application for the dock and removal of the mooring buoy shall be routed to critical areas staff for review of conformance with WCC 16.16.
5. At the time of building permit submittal, a mitigation permitting case will be opened to track the mitigation.
6. Removal of the mooring buoy is required prior to final approval of the dock building permit
7. Removal of any unpermitted structures in the 100-foot buffer, including any logs used for shoreline protection and firepits, shall be removed prior to final approval of the building permit
8. A mitigation plan authored by a qualified biologist is required that proposes a rectification or restoration that results in no net loss of values and functions on this area of Lake Whatcom.

9. The following is required for a complete building permit application and critical areas review:
 - a. Copy of the issued and approved Hydraulic Project Permit from Washington Department of Fish and Wildlife
 - b. Draft Conservation Easement site plan for proposed mitigation areas
 - c. Complete mitigation plan authored by a qualified consultant addressing mitigation condition above
 - d. Proposed Mitigation Assignment of Savings or Bond amount according to the Whatcom County Mitigation Bond Worksheet
 - e. Payment of all mitigation review fees
 - f. Revised site plan showing:
 - i. Approved dock design
 - ii. Accurate and exact locations and identification of all existing vegetation within the lake and associated buffer
 - iii. Protective construction measures
 - iv. Removal of the mooring buoy and fire pit (if applicable)
10. Any change in this project in design or scope shall be immediately routed to Critical Areas staff for review. Any change in this project will likely require more information and critical areas assessment submittals pursuant to WCC 16.16.255.
11. Any mulch used on site shall be to County standards for low phosphorous, and have no chemically treated components.
12. No clearing or harm of vegetation is permitted within critical areas.
13. After issuance of a building permit and after construction of the dock and installations of plantings an as built report shall be submitted that documents that the approved plantings have been installed. This form is to be emailed to epermits@co.whatcom.wa.us and should include your mitigation or Shoreline case number in the subject line. The form for the as built report can be found online at: <http://whatcomcounty.us/DocumentCenter/View/28923/As-built-Documentation-Form->. Once the as-built has been approved a portion of the funds from the assignment of savings will be released and critical areas staff will give final approval for occupancy for the dock
14. A monitoring report to show how the mitigation plantings are meeting performance standards is required for five years after the approval of the as-built. This monitoring report form can be found online at: <http://whatcomcounty.us/DocumentCenter/View/33014/Mitigation-Monitoring-Report-Form->.
15. If any part of the proposed project is creating unanticipated impacts 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.

16. Adherence to the conditions above to do not limit staff ability to add further critical areas conditions to the building permits associated with the dock.
17. 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.
18. 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.
19. 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.
20. No earth work is allowed under this Shoreline Substantial Permit. All fill, grade, and excavation shall be permitted under the required building permit.
21. 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.
22. Docks and floats shall not exceed 3 feet in height above the extreme high water level.
23. Dock surfaces designed to allow maximum light penetration shall be used on walkways or gangplanks in nearshore areas.
24. 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.
25. 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.
26. 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.

27. 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.
28. 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.
29. 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.
30. 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.
31. All associated building materials located below the Base Flood Elevation must be water resistant.
32. The dock shall be anchored to prevent flotation, collapse and lateral movement.
33. 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.
34. 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.

35. 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 6th day of August 2020



Rajeev Majumdar, Hearing Examiner *Pro-Tem*