

WHATCOM COUNTY HEARING EXAMINER

re: The application of **Lynden Public Works** for a Shoreline Substantial Development Permit and Shoreline Variance Permit

“Berthusen Park Restroom Facility”

SHR2020-0007; and
SHV2020-0003

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: Lynden Public Works seeks a Shoreline Substantial Development Permit and Shoreline Variance Permit to replace a park restroom building within the City of Lynden Berthusen Park. The project proposes the demolition of the eastern most restroom and replacing it with a CXT Precast Montrose restroom building. The restroom facility is within a Shoreline Buffer associated with Bertrand Creek and the overall roof area of the structure will be expanded from 280 SF to 570 SF.

Decision: The requested permits are 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: The City of Lynden Public Works
Property Location: Berthusen Park, 8837 Berthusen Road,
Lynden, WA 98264
Legal Description: Within Section 14, Township 40 North, Range 02 East, W.M.

Parcel Number: 400214 306442
Adjacent Water Body: Bertrand Creek
Shoreline Designation: Conservancy
Statewide Significance: No
Application Submitted: March 11, 2020
Notice of Completeness: March 23, 2020
Notice of Application: March 25, 2020
End of Comment Period: April 24, 2020

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

Applicable Shoreline Program Provisions

SMP 23.20 Goals and Objectives
SMP 23.30.020 Official Shoreline Map
SMP 23.30 Shoreline Designations
SMP 23.40 Shoreline of Statewide Significance
SMP 23.60.010 Substantial Development Permit Criteria
SMP 23.60.030 Variance Permit Criteria
SMP 23.60.130 Public Hearings
SMP 23.90 General Policies & Regulations
SMP 23.100 Shoreline Use Policies & Regulations

SEPA Review: Categorically Exempt pursuant to WAC 197-11-800(1)(a)(iv)

Legal Notices: Published – Notice of Public Hearing, July 16, 2020
 Posted – Notice of Public Hearing, July 16, 2020
 Mailed – Notice of Public Hearing, July 9, 2020

Hearing Date: July 29, 2020

Parties of Record

Steve Banham
Lynden Public Works
300 4th Street
Lynden, WA 98264

Mark Sandal

Lynden Programs Manager
300 4th Street
Lynden, WA 98264

Olivia Moseley
Reichhardt & Ebe Engineering
PO Box 978
Lynden, Washington 98264

Andrew Hicks, Shoreline Administrator
Planning and Development Services
Whatcom County

Ryan Ericson
Planning and Development Services
Whatcom County

Exhibits:

1. Shoreline Substantial Development Master Land Use Application with attachments
 - 1-1 Shoreline Substantial Supplemental Application
 - 1-2 Shoreline Variance Master Land Use Application & Supplemental Application
 - 1-3 PDS Guidelines for Finding Property Owners for Hearing Notices
 - 1-4 Fee Responsibility
 - 1-5 Agent Authorization
 - 1-6 Project Narrative
 - 1-7 Determination of Completeness, dated March 23, 2020
 - 1-8 PDS Comment Letter, with Project Description, March 25, 2020
 - 1-9 Customer Receipt, March 11, 2020
2. Staff Report, July 17, 2020
3. R&E/Reichhardt & Ebe, Engineering, Inc, Berthusen Park Restrooms – Alternatives Analysis Memorandum, prepared by Olivia Moseley, EIT, dated March 9, 2020, with attached Site Map Exhibit
4. R&E/Reichhardt & Ebe, Engineering, Inc, Berthusen Park Restrooms- Recorded Deed & Easements Memorandum, prepared by Olivia Moseley, EIT, with attached Statutory Warranty Deed, 11/18/1998
5. Natural Resources: Conservation Service: Web Soil Survey: National Cooperative Soil Survey, dated 11/1/2019 -Soil Map—Whatcom County Area, Washington, with attached maps: Bertrand Cr./Fishtrap Cr.; Bull Trout; Coho; Fall Chum; Sockeye; Winter Steelhead; and Fish Habitat Conservation Areas
6. Whatcom County Preliminary Traffic & Concurrency Information, with Trip Generation Information, prepared by Olivia Moseley, March 5, 2020

7. County Preliminary Stormwater Proposal: Berthusen Park Restrooms, with Site Plan Requirements, prepared by Olivia Moseley, March 5, 2020, and Memorandum dated March 2, 2020 re: Stormwater Evaluation of Project Area, with attached Existing Stormwater Areas, Predeveloped Storm Exhibit Map, Exhibit A; Exhibit B- Flow Charts
8. GeoEngineers: Wetland and FWHCAs Assessment and Buffer Mitigation Report: Berthusen Park Restroom Replacement, dated February 6, 2020, with attached Vicinity Map, Figure 1; Wetlands and Stream Site Plan, Figure 2; Appendix A-Site Photographs- Figure A-1, Figure A-2, Figure A-3; Appendix B-Background Data and Maps: NWI Map, Wetlands & Critical Areas Ordinance-Wetlands Map
9. Washington Department of Fish and Wildlife Priority Habitats and Species Report, 11/01/2019, with an attached WDFW Test Map, Nov. 1, 2019; Appendix C Wetland Determination Datasheets: Wetland Determination Data Form-Western Mountains, Valleys, and Coast Region; Cowardin Classes-Figure 1; Hydroperiods, Figure 2; Contributing Basin, Figure 3; Habitat, Figure 4; Washington State Water Quality Atlas/Department of Ecology: Whatcom County: Water quality improvement projects; Appendix E: Site Plans-Preliminary Site Plans, prepared by R&E, dated 3/09/2020
10. Certificate of Mailing Notice of Application dated March 25, 2020
- 11 Bellingham Herald Legal Notice of Application, March 25, 2020
12. Certificate of Posting: Notice of Public Hearing, July 15, 2020
13. Certificate of Mailing: Notice of Public Hearing, July 10, 2020
14. Legal Notice of Zoom Public Hearing, July 16, 2020

II.

The proposed project is for the demolition of an existing restroom building with a roof area of 280 SF and installation of a CXT Precast Montrose restroom building with a roof area of 570 SF. The footprint of the existing structure is approximately 215 SF and the proposed footprint area is 433 SF. In addition to the new restroom building approximately 115 linear feet of 1-inch water service, 55 linear feet of 4-inch sanitary sewer, and 90 linear feet of underground power service will be installed.

III.

The Whatcom County Shoreline Administrator has recommended approval of the requested Shoreline Substantial Development Permit and Shoreline Variance for the proposed replacement of an existing restroom building with a roof area of 280 SF and installation of a CXT Precast Montrose restroom building with a roof area of 570 SF. The Staff Report entitled "Findings, Conclusions, and Recommendations," dated July 17, 2020,

a copy of which is attached hereto. The Applicant has indicated that the Staff Report is factually correct. The Applicant stated no objection to the Conditions of Approval recommended by Staff. There was no public comment on this matter at the hearing. The Findings of Fact contained in the Staff Report 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 Conclusions of Law are set forth in the Staff Report, Exhibit No. 2 in the Hearing Examiner file, dated July 17, 2020, are adopted and incorporated herein by this reference as Conclusions of Law. 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.

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 Permit are hereby granted to Lynden Public Works Department to replace the existing eastern most restroom of a park restroom building within Lynden Berthusen Park located on Assessor's Parcel Number 4002147 306442, addressed as 8837 Berthusen Road, Lynden, Washington. The Permit is granted subject to the following Conditions of Approval:

1. The proposed shoreline developments shall be consistent with the scope and site plans stamped "Site Plan Review Approval" and initialed by the Shoreline Administrator on July 20, 2020. Any changes to the proposed development may require additional review and approval by the Whatcom County Shoreline

Administrator and/or Whatcom County Hearing Examiner.

2. The project must be constructed in accordance with the submitted plans/drawings and supporting documentation and comply with all agency permit conditions.
3. 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.
4. Washington State Department of Ecology Water Quality Standards shall be maintained.
5. The project shall not result in significant degradation of ground or surface waters and shall be completed during periods of dry weather.
6. A commercial building permit is required for this project. It will be reviewed under the current adopted edition of the International Building Code (IBC) and must comply with all other applicable codes and ordinances adopted by Whatcom County.
7. Prior to building permit issuance, the Berthusen Park bridge must be evaluated by an engineer, to see if it meets the requirements of the International Fire Code. The bridge is required to be rated to AASHTO HB-17 Construction standards. If the bridge does not meet this standard, it may require additional structural modification or replacement.
8. Stormwater from the proposed development shall be controlled in a manner which does not degrade any critical areas or surface waters or direct water onto neighboring properties.
9. All construction debris shall be removed from the shoreline environment upon completion of the project and disposed of in accordance to all applicable regulations.
10. Mitigation Requirements:
 - a. Mitigation measures and BMPS shall be installed per the GeoEngineers Report dated February 06, 2020 and date stamped Mar 11, 2020 Titled Wetland and FWHCAs Assessment and Buffer Mitigation Report.
 - b. Recorded Conservation Easement. Prior to building permit issuance a conservation easement with mitigation form must be submitted and approved by the Natural Resource Department. The signed Conservation Easement by the Natural Resource Department must be recorded with the Whatcom County Auditor. The applicant will provide the County with the document recording _____ numbering.
<http://www.co.whatcom.wa.us/DocumentCenter/View/2192/Conservation-Easement-Including-Mitigation-PDF>
 - c. Monitoring. The monitoring period for this project is 5 years, unless an

annual report fails to meet performance standards, then an additional year is added to the period. The following spring after the approved as-built inspection begins the monitoring period. The project has been approved to use the standard Mitigation-Monitoring report form.

<http://www.co.whatcom.wa.us/DocumentCenter/View/33014/Mitigation-Monitoring-Report-Form->

- d. Mitigation Case. A mitigation case will be created at the time of building permit submittal. The case will be for the 5 years of monitoring.
 - e. As-built Mitigation Approval. The project has been approved to use the As-Built documentation form. Prior to requesting an as- built inspection <http://www.co.whatcom.wa.us/DocumentCenter/View/28923/As-built-Documentation-Form->
 - f. Fees. Applicant will pay for all outstanding fees at time of building permit issuance.
 - g. Any change in site plan shall have further review by Natural Resource staff.
 - h. 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.
11. 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 (Gretchen Kaehler, 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.
12. 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.

- 13 Construction shall be commenced within two (2) years of the effective date of this shoreline permit, 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*