

WHATCOM COUNTY HEARING EXAMINER

re: The application of **Whatcom County Public Works** for a for a Shoreline Substantial Development Permit & Shoreline Conditional Use Permit

SHR2021-00014
SHC2021-00011

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: Replace existing timber bridge over Lake Samish with a three span concrete bridge on a drilled shaft foundation in the same location.

Decision: The requested Shoreline Substantial Development and Conditional Use Permit are granted, subject to the conditions of approval.

INTRODUCTION

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

FINDINGS OF FACT

I.

PRELIMINARY INFORMATION

Applicant: Whatcom County Public Works
Represented by: Steve Fox
322 N. Commercial Street, Suite 301
Bellingham, WA 98225

Property Location: N. Lake Samish Dr. Bridge

Legal Description: Section 27, Township 37N, Range 03E, W.M.
Parcel #: 3703270000044170

Adjacent Water Body: Lake Samish

Shoreline Designation: Conservancy (north side of bridge) & Shoreline Residential (south side of bridge)

Statewide Significance: No

Zoning: ROS, RR2, R5A

Authorizing Ordinances, inclusive but not only:

1. Revised Code of Washington (RCW) 36.70B, Local Project Review
2. RCW 43.21C, State Environmental Policy Act ("SEPA")
3. RCW 90.58, Shoreline Management Act ("SMA")
4. Washington Administrative Code (WAC), Chapter 173-27, Shoreline Management Permit and Enforcement Procedures
5. WAC Chapter 197-11, State Environmental Policy Act Rules
6. Whatcom County Code (WCC), Title 2, Administration and Personnel
 - a. Chapter 2.11 – Hearing Examiner
 - b. Chapter 2.33 – Permit Review Procedures
7. WCC, Title 12, Roads and Bridges
 - a. 12.08, Development Standards
8. WCC, Title 16, Environment
 - a. 16.08, SEPA Adoption
9. WCC, Title 20, Official Whatcom County Zoning Ordinance
10. WCC, Title 22, Whatcom County Project Permit Procedures
11. WCC, Title 23, Shoreline Management Program
 - a. SMP 23.20 Goals and Objectives
 - b. SMP 23.30.020 Official Shoreline Map
 - c. SMP 23.30 Shoreline Designations
 - d. SMP 23.40 Shoreline of Statewide Significance
 - e. SMP 23.50 Applicability
 - f. SMP 23.60.010 Substantial Development Permit Criteria
 - g. SMP 23.60.130 Public Hearings
 - h. SMP 23.70.010 Administration
 - i. SMP 23.70.030 Hearing Examiner
 - j. SMP 23.90 General Policies & Regulations
 - k. SMP 23.100.150 Conditional Use Permit Requirement
12. Whatcom County Comprehensive Plan
13. Business Rules of the Whatcom County Hearing Examiner (BRWCHE)

SEPA Review: Whatcom County issued a Determination of Non-Significance (DNS)

on June 14, 2021, under SEP2020-00113

Legal Notices: Published – Notice of Public Hearing, June 16, 2021
Posted – Notice of Public Hearing, June 14, 2021
Mailed – Notice of Public Hearing, June 7, 2021

Hearing Date: June 30, 2021

Parties of Record:

Andrew Hicks, Shorelines Administrator
Whatcom County (“WC”) Planning & Development
5280 Northwest Drive
Bellingham, WA 98226

Michael Kershner, Planner
WC Planning & Development
5280 Northwest Drive
Bellingham, WA 98226

Erin Page, Planner
WC Planning & Development
5280 Northwest Drive
Bellingham, WA 98226

Steve Fox, Senior Planner
WC Public Works
322 N Commercial Street, Ste 210
Bellingham, WA 98225

Doug Burghart, Project Engineer
WC Public Works
322 N Commercial Street, Ste 210
Bellingham, WA 98225

Jerry Johnson
935 W. Lake Samish Dr.
Bellingham, WA 98229

Exhibits:

1. SHR2020-00014 – Application
2. SHC2020-00011 – Application
3. Site Plans

4. Wetland Delineation Report
5. Habitat Management Plan
6. Habitat Management Plan Appendices
7. ESA Report
8. Stormwater Report
9. SEPA Checklist
10. PDS Stormwater Memo
11. Flood Memo
12. Approved Site Plans
13. DNS – Distribution Packet
14. Legal Notice to Bellingham Herald
15. Certificate of Posting of Public Hearing and Application
16. REVISED Staff Report and Recommendation
17. REVISED CAO Hearing Memo
18. Approved Revised Mitigation Sequencing analysis
19. Approved Buffer Mitigation Plan

II.

Whatcom County Public Works is proposing to replace the existing five-span, 250' long by 30' wide timber bridge with a new 267' long by 43' wide concrete bridge in the same footprint. The new bridge is composed of pre-stressed concrete girders supported by a drilled shaft foundation. The substructure would be composed of four piers, two located in Lake Samish, and two that form the north and south abutments. Each pier would be made of two, drilled shaft concrete piles supporting a concrete pile cap, and the abutments are skirted by concrete wing walls and curtain walls. Improvements to the roadway both north and south of the bridge is included in the construction scope, as is relocation of sewer, power, and cable utilities. No added vehicle capacity is proposed.

III.

The representative of the WC Planning & Development staff indicated the report had

been revised the day before and was accurate. The representative of the Applicant indicated that the Staff Report is factually correct, and they had reviewed it. The Applicant stated no objection to the Conditions of Approval recommended by Staff.

IV.

WCC 2.11.220 allows the Hearing Examiner to issue subpoenas and compel attendance of witnesses— but in this case no party requested the Hearing Examiner to compel a witness to appear in person and be cross examined. There was public comment at the Hearing. The only public comment was received, reviewed, and addressed by the parties at the hearing. No written comments were submitted.

V.

BRWCHE §2.4 grants parties the right to object to evidence and to cross-examine. In the case at hand, with full knowledge of the evidence being admitted, no objection was made any of the 19 exhibits that were admitted into the record. Admitted Exhibit 1-19 are deemed to be factually accurate in regard to the facts represented therein.

VI.

The Findings of Fact of Whatcom County Planning and Development Services, as set forth in the Staff Report, dated June 30, 2021, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

VII.

Any Conclusion of Law 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 Criteria

The Substantial Development Permit is 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 23.60.022 [see 23.60.010.A]. Staff reviewed this proposal for consistency with WCC 23.40.030, 23.60.030, and the policies applicable to this shoreline designation, and found that this specific proposal conforms to the policies and statutes for shorelines of this type.

Shoreline Conditional Use Criteria

Before approving the proposed Application for a Shoreline Conditional Use Permit, the decision maker shall ensure that there is adequate evidence showing that the use meets the 5 criteria in WCC 23.60.040(B)(1-5), in addition to meeting the other more general requirements outlined in WCC 23.60.040.

II.

The Whatcom County Shoreline Administrator has recommended approval of the requested Shoreline Substantial Development Permit and Shoreline Conditional Use Permit for the proposed replacement of the existing timber bridge over Lake Samish with a three span concrete bridge in the same location.

There is nothing in the record which would indicate either the facts or the conclusions of law, as set forth in the Staff Report, were incorrect or failed to properly support the approval of the requested Shoreline Substantial Development Permit and Shoreline Conditional Use Permits. The conclusions of law set forth in the Staff Report are adopted and incorporated herein by this reference as Conclusions of Law, as the Hearing Examiner that concludes the application meets the ordinance criteria if subjected to conditions.

III.

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

following:

DECISION

Both a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit are hereby granted to Whatcom County Public Works. 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 June 21, 2021 for this shoreline substantial development permit and shoreline conditional use 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. *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. 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. *Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
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. *The bridge shall be constructed of materials that will not adversely affect water quality or aquatic plants and animals over the long term. Elements within or over water shall be constructed of materials approved by applicable state agencies for use in water for both submerged portions and other components to avoid discharge of pollutants from splash, rain, or runoff. Wood or pilings treated with creosote, pentachlorophenol or other similarly toxic materials are prohibited. Preferred materials are concrete and steel.*
8. *Construction shall be scheduled for that time of year when seasonal conditions (weather, streamflow) permit optimum feasible protection of shoreline ecological functions and processes.*

9. *As needed, fish exclusion with turbidity curtains will be installed prior to any in water work and shall remain until the project is complete. If a change in this best management practice is necessary, please consult with staff on alternative methodologies.*
10. *Any change in impacts shall result in a submittal of a revised HCA and Wetland mitigation plan authored by a qualified biologist. The revised report shall include engineered plans that include the location of all critical areas, buffers, and proposed mitigation areas and best management practices. The revised mitigation plan shall be complete to the criteria outlined in WCC 16.16.260, 16.16.690 and 16.16.750.*
11. *Prior to the onset of work, contractor or Public Works shall submit via email an inventory of the vegetation to be removed, including the total area affected (Square footage) how many trees will be felled in the following DBH range: 0-12" DBH and >12" DBH, as well the number of shrubs and forbs.*
12. *All trees greater than 12" DBH shall be mitigated for at a 4:1 ratio. Trees less than 12" DBH shall be mitigated at a 2:1 replacement: removal ratio.*
13. *All creosote lined pilings shall be discarded to an area with a permit to take chemically treated wood.*
14. *The mitigation must be installed within 180 days of completion of construction. An as-built plan shall be submitted to the County for approval within 30 days of installation. The as-built shall include photographs of the mitigation area, nursery plant receipts, a site plan showing the location of the mitigation, and a brief narrative of the installation. It shall be approved in conjunction with an on-site as-built inspection per WCC 16.16.260(C)(1-3).*
15. *Following the as-built report approval, a mitigation report will be required for a period of five years on the 1st, 2nd, 3rd and 5th year after installation showing that mitigation is meeting its approved criteria.*
16. *Best Management Practices (BMPs) will be required in order to address any construction related impacts to water quality, the shoreline, and/or existing habitat.*
17. *Prior to construction, a meeting shall be held with Critical Areas staff, hired contractors and Public Works engineering staff to discuss best management practices, final design and construction plans, and details of the approved buffer mitigation plan-A set of final design plans shall be presented to Critical Areas staff prior to the meeting date.*
18. *Prior to construction, the applicant shall submit all USACE and WDFW aquatic permits to Whatcom County Natural Resources staff.*

19. *Applicant shall pay all review fees associated with MIT2021-00043, SHR2020-00014 and SHC2020-00011.*
20. *Activities which expose more than 500 sq. ft. of soil are prohibited from October 1 through May 31, unless they are consistent with WCC 20.80.735(2)(d)(i).*
21. *Stormwater from this development shall be managed in a way that does not adversely impact critical areas, downstream property/development, or existing stormwater infrastructure.*
22. *Should any soils be exposed as part of this project, adequate Erosion and Sedimentation Control (ESC) measures shall be installed to prevent sediment laden water from entering neighboring properties, surface drainages (i.e. ditches), and critical areas.*
23. *All associated building materials located below the BFE must be water resistant.*
24. *Should archaeological resources (e.g. shell midden, animal 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 (Stephanie Jolivette, Local Government Archaeologist 360-628-2755) and the Lummi Nation Tribal Historic Preservation Office (Lena Tso, THPO 360-961-7752; Tamela Smart, Deputy THPO 360-927-2944) 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.*
25. *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 until the State provides notice to proceed. 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" (DAHP).*
26. *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 PENTALTIES

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 23.60.190(A)(1) 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 23.60.190(A)(2) 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; or for shoreline permit applications and revisions which are subject to appeal to the State Shoreline Hearings Board within 21 days pursuant to 23.60.150(E), RCW 90.58.180, and WAC 461-08.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22.05 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 5th day of July 2021.



Rajeev D. Majumdar, Hearing Examiner *Pro-Tem*