

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE VARIANCE)	SHV2013-0004
Application for)	
)	
Forest Payne and Maria Llobet)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicants request approval of a Shoreline Variance Permit to relieve the shore setback from Lake Whatcom and Smith Creek in order to construct a new single-family residence and appurtenant developments. The proposed single-family residence and detached garage are also located within an alluvial fan geohazard area.

Decision: The requested Shoreline Variance request 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: Forest Payne and Maria Llobet

Property Location: 3253 Northshore Road
Bellingham, Washington 98226

Assessor's Parcel No. 370405 451514

Adjacent Water Body: Lake Whatcom

Shoreline Designation: Rural

Shoreline of Statewide Significance: Yes

Authorizing Ordinances: SMP 23.50 Applicability
 SMP 23.70 Administration

Applicable Shoreline Program Provisions:

SMP 23.10 Purpose and Intent
SMP 23.20 Goals and Objectives
SMP 23.30 Shoreline Jurisdiction and Area Designations
SMP 23.50 Applicability
SMP 23.60 Shoreline Permits
SMP 23.70 Administration
SMP 23.80 Legal Provisions
SMP 23.90 General Policies and Regulations
SMP 23.100.100 Residential Policies and Regulations
SMP 23.110 Definitions

SEPA Review: Categorically Exempt pursuant to WAC 197-11-800(1)(b)(i).

Legal Notices: Published – Notice of Application, July 29, 2013
 Notice of Public Hearing, May 8, 2014

 Mailed – Notice of Application, July 29, 2013
 Notice of Public Hearing, May 2, 2014

Hearing Date: May 21, 2014

Parties of Record:

Forest Payne and Maria Llobet
7908 14th Avenue SW
Seattle, WA 98106

Wendy Steffensen and Steve Harvey
RESources for Sustainable Communities
2309 Meridian Street
Bellingham, WA 98225

Laura Leigh Brakke<lbrakke@hotmail.com>

Diane Smith
1234 Chuckanut Crest
Bellingham, WA 98229

Andrew Hicks
Planning and Development Services

Exhibits:

- 1 Land Use Application with attachments
 - 1-1 Supplemental Application
 - 1-2 Fee Responsibility
 - 1-3 Letter dated Sept 25, 2013 re: Request for Additional Information
 - 1-4 Tree Canopy Legend
 - 1-5 Site Photo
 - 1-6 PDS Guidelines
 - 1-7 Project Description Letter dated June 25, 2013
 - 1-8 Customer Receipts [Legal Notice, SHV App,]
 - 1-9 Determination of Completeness, July 24, 2013
 - 1-10 PDS Form Comment Letter, July 29, 2013: Notice of Application
 - 1-11 Mailing Labels
 - 1-12 PDS Tracking Checklist
- 2 Staff Report, dated May 8, 2014
- 3 Agency Comments: Watersheds office, Nov 15, 2013; Geology, Oct 9, 2013; Critical Areas and Mitigation, March 19, 2014
- 4 Public Comment Letter, dated May 19, 2014
- 5 Aerial Site Photos
- 6 Revised Site Plan, dated Nov 7, 2013, with Shoreline and Stormwater Approval [stamped]
- 7 TESC Plan, Nov 3, 2013, stamped Erosion & Sediment Control Plan Approved
- 8 Distribution List: Notice of Application, July 29, 2013
- 9 Alluvial Fan Hazard Assessment Report, prepared by GeoTest, May 21, 2013
- 10 Revision to Mitigation Addendum to Critical Areas Report, prepared by Welch Ecological Services, March 3, 2014
- 11 Critical Areas Report, prepared by Welch Ecological Services, May 17, 2013
- 12 Bellingham Herald Tear Sheet, Notice of Application, July 29, 2013
- 13 Certificate of Mailing, Notice of Application, July 29, 2013
- 14 Certificate of Mailing Notice of Public Hearing, May 2, 2014
- 15 Legal Notice of Public Hearing, May 8, 2014
- 16 Site Survey, Dec 2011
- 17 Comment Letter of Concern, dated May 15, 2014
- 18 Staff Report Addendum, May 14, 2014

- 19 RESources Comment letter, dated August 28, 2013
- 20 Memo from Erin Page, Critical Areas, dated May 13, 2014 re: Critical Areas Response to comments received from RESources, August 28, 2013
- 21 Memo, dated May 13, 2014 from Michael Kershner, Watersheds Office, to Andrew Hicks re: RESources letter, dated August 28, 2013

II.

The Applicants are the owners of a 9,620-square foot lot, located on the shoreline, on the north side of Lake Whatcom, and within the alluvial fan of Smith Creek.

The area is currently zoned Rural Five Acre. The small, existing waterfront lot is nonconforming, and variances, from the 150-foot habitat conservation area abutting Smith Creek and the 100-foot habitat conservation area abutting the shoreline of Lake Whatcom, are required to facilitate construction of a modest single-family residence and garage on the site.

The Applicant is proposing a two-story home with a footprint of approximately 900-square feet, plus a covered deck, a garage, and pervious surface driveway. The total impervious surfaces proposed for the lot are less than 2,000-square feet.

The habitat conservation areas are defined and regulated by the Whatcom County Critical Areas Ordinance and the required setbacks are within the shoreline jurisdiction of Lake Whatcom and Smith Creek.

The lot in question consists mainly of grass lawn, with the addition of three significant habitat trees with a hedgerow of native trees lining the southern border, and two large Douglas fir trees along with a new hedgerow of arbor vitae cedars along the northern property boundary. The remainder of the lot is level with open grassy vegetation and no understory or shrub layer. Shoreline vegetation is lacking and characterized by

lawn to the top of the bank at an existing bulkhead. The northwest corner of the property along the shoreline is scoured. As part of the mitigation plan, there will be, approximately, 300-square feet of plantings, including 31 individual native plants and trees, from an approved plant schedule installed by the Applicants. Additionally, 100-square feet of woody debris has been placed along the shore, adjacent to the existing bulkhead, to help with erosion that exists as a result of the bulkhead.

Additional mitigation includes the removal of 50-square feet of Japanese knotweed, an invasive species, from the shoreline along the southern boundary, and the removal of English Ivy, another invasive species, and restoration within the Smith Creek buffer.

300-square feet of proposed plantings will be located at the ends of the bulkhead, along the Lake Whatcom shoreline and near the house, in a manner designed to provide for interception of roof runoff. Additionally, the two large cedar trees will be maintained onsite and only one large fir tree will be removed. The mitigation plan needs to be revised to mitigate for the loss of the single Douglas fir removed in order to allow siting of the house.

In addition to providing runoff containment, the proposed plantings will create new wildlife habitat in an area which currently consists of lawn.

The proposed mitigation is designed to fully mitigate, without a net loss of ecological functions, for the reduction in the required 110-foot setback from Lake Whatcom to 80-feet and for the reduction in the 150-foot habitat conservation area abutting Smith Creek.

III.

In order to address impacts from the proposed setback reductions and from the location of the home within an alluvial floodplain, the Applicant obtained a Biological Critical Areas Report [Final Report, Exhibit 10 in the Hearing Examiner's file] and a

Geological Hazard Assessment, prepared by a licensed Geologist.

The initial Critical Areas Report was rejected as inadequate and on March 3, 2014, a Revised Mitigation Addendum to the Critical Areas Report was provided by Welch Ecological Services and ultimately approved by Shorelines, Critical Areas, and the Watersheds Office.

The Geological Assessment, regarding the alluvial fan, and Smith Creek debris flow and flooding issues, was reviewed and approved by the Whatcom County Geologist. It should be noted that Smith Creek, in this area where it enters into Lake Whatcom, is now constrained on both sides by a large levy that extends from the mouth of Smith Creek several hundred feet upstream. From toe to toe, between these separate dikes, the levy is about 50-feet wide. The top of the levy is about 15-feet wide and about 15-feet tall. Smith Creek was straightened and the levy constructed after a couple of major debris flows and flood incidents, the latest of which was in 1983. The existence of the levy, and work done within the creek after the last major flood and debris event, has significantly reduced the possibility of severe debris flow or flooding on the subject property. The Geological Assessment indicated that it would be advisable to retain the two major cedars onsite and to place the house in its proposed location shoreward of these cedars. The cedars, themselves, would help protect the home should an unanticipated large flood event/debris flow actually breach the levies and reach the subject property. The Geological Assessment concluded as follows:

However, in our opinion, the proposed new structure, due to the existing site features and proposed mitigation measures, is at a sufficiently low risk of the subject alluvial fan hazards to warrant construction of the residence.

Staff has included the recommendations from the Geological Assessment as well the Revised Mitigation Plan, prepared by Welch Ecological Services, as Conditions of Approval.

Based on the entire record, Staff concluded that the requested setback reductions would be fully mitigated and that there would be no net loss of ecological functions resulting from the granting of the Shoreline Variance. The Hearing Examiner concurs in this conclusion.

IV.

The Staff Report, prepared by Whatcom County Planning and Development Services, is Exhibit No. 2 in the Hearing Examiner file; a memorandum from the Watersheds Office to Andrew Hicks, Shoreline Administrator, is Exhibit No. 3 in the Hearing Examiner file; a Staff Report Addendum, dated May 14, 2014, is Exhibit No. 18 in the Hearing Examiner file; and a memorandum from Erin Paige of Critical Areas to Andrew Hicks, dated May 13, 2014, is Exhibit No. 20 in the Hearing Examiner file; all the above contain factual findings and conclusions reached by Staff.

Except as may have been modified by the Findings of Fact set forth above, the Findings of Fact in the above listed exhibits are supported by the record as a whole, and are adopted by the Hearing Examiner as Findings of Fact herein by this reference.

V.

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

Denial of the requested Shoreline Variance would result in a hardship on the Applicant resulting from the habitat conservation area setbacks from Lake Whatcom and Smith Creek, applicable to this small, nonconforming lot. Due to the size of the lot and the significant increase in shoreline and critical areas setbacks, modest residential use of the Applicant's property cannot be obtained without a variance. The hardship results from the size of the property and its location abutting two bodies of water,

regulated under the Shoreline Management Act.

The hardship was not created by the Applicant, but instead results from significant land use regulation changes over the last 30 years and the small size of the lot.

The Applicants have obtained a professional Biological and Geological Assessment. Subject to compliance with the recommendations in these assessments, the reductions in the habitat conservation area setbacks will be fully mitigated by the Applicant and will not result in a net loss of ecological functions.

Granting of the variance is not the granting of a special privilege. Variances are made available to grant relief from the strict application of an ordinance to overcome hardships specifically related to a property and the application of the applicable ordinances. Both the Shoreline Ordinance and the Critical Areas Ordinance provide for a variance.

Habitat Conservation Areas are regulated under the Critical Areas Ordinance. WCC 16.16.270 specifically exempts preclusion of all reasonable economic use of a property due to the application of the ordinance.

The Shoreline Variance Criteria allows setback reductions for the purpose of view enhancement where there is no net loss in habitat functions.

The use proposed by the Applicants, consisting of a small home and garage, setback 80-feet from the shore of Lake Whatcom and outside the protected levies along Smith Creek, is a minimal, reasonable economic use of the property; and since there is no net loss in ecological functions due to the Biological Mitigation Plan, and little likelihood of damage to the proposed new construction in its location outside the levies of Smith Creek, and the alluvial fan, and the 150-foot setback of Smith Creek; the

requested Shoreline Variance should be granted.

II

Staff has reviewed the applicable Variance Criteria in the Staff Report and has concluded that, subject to recommended Conditions of Approval, the proposal is consistent with the Variance Criteria, and is consistent with the criteria applicable to Shorelines of Statewide Significance. The Hearing Examiner concurs in these conclusions. The requested Shoreline Variance should be granted, subject to Conditions of Approval.

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

The requested Shoreline Variance from habitat conservation areas, setback from Smith Creek and Lake Whatcom, allowing setback reductions to facilitate the construction of a single-family home and garage, with a total impervious surface area on the lot of less than 2,000 square feet is hereby granted, subject to the following conditions:

1. The Applicant shall obtain a building permit from the Whatcom County Planning and Development Services – Building Services Division prior to any development activity on the subject property.
2. Development shall conform to the Shoreline Approved Site Plan dated May 6, 2014.
3. The proposed single-family residence shall not exceed 30-feet in height as measured from average existing grade to the peak of the structure.
4. The proposed garage shall not exceed a maximum height of 15-feet as measured from the average existing grade to the peak of the structure.
5. Required mitigation shall be consistent with the planting plan, monitoring, maintenance and surety provisions outlined within the Revision to Mitigation Addendum to Critical Areas Report dated March 3, 2013 by Welch Ecological

Services. Additionally, a modified Mitigation Plan shall be provided in order to mitigate for the removal of a large Douglas fir tree within the footprint of the proposed house.

6. The owner shall record a notice on title with the County Auditor real estate records in a format approved by the Shoreline Administrator and provide a copy of the filed notice to WCPDS prior to issuance of a building permit. The notice shall state the general presence of the marina basin and the remaining buffer on the subject property, and the fact that limitations on actions in or affecting the areas exist. A copy of the approved site plan illustrating the areas shall also be filed with the notice on title.
7. An assignment of savings (AOS) must be established in accordance with WCC 16.16.260.D.1(a-g), in the amount listed in the mitigation plan x 125% (\$3,595.00) along with a signed and notarized assignment of savings form. Please refer to the County website for this form.
8. A signed agreement to maintain the mitigation site must be submitted prior to approval of a building permit. Please refer to the County website for this form.
9. The building permit to be submitted shall be consistent with the approved stormwater site plan, approved by staff on November 15, 2013.
10. The Erosion and Sedimentation Control Plan that was approved by Whatcom County on November 15, 2013 must be submitted with the building permit.
11. A specification sheet for the GrassPave permeable pavement system must be submitted at the time of building permit submittal.
12. The wood chip path shall be installed and verified by Whatcom County staff prior to granting final occupancy for the building permit.
13. All development shall conform to the recommendations provided in the Alluvial Fan Hazard Assessment Report, by Geotest, dated May 21, 2013.
14. Exterior surfaces of the proposed residence shall employ materials that minimize reflected light.
15. Interior and exterior lighting shall be designed and operated to avoid illuminating nearby properties, prevent glare on adjacent properties and to prevent hazards.
16. In the event that archaeological materials are encountered during the development of the property, an archaeologist should immediately be notified and work halted in the vicinity of the find until the materials can be inspected and assessed. At that time the appropriate persons are to be notified of the exact nature and extent of

the resource so that measures can be taken to secure them. In the event of inadvertently discovered human remains or indeterminate bones, pursuant to RCW 68.50.645 all work must stop immediately and law enforcement should be contacted. Any remains should be covered and secured against further disturbance, and communication established with the Whatcom County Sheriff's Department, an Assistant State Archaeologist at DAHP, the Lummi Nation Tribal Historic Preservation Office and the Nooksack Tribal Historic Preservation Officer.

17. Authorization to conduct development activities shall terminate five (5) years after the effective date, as defined in 23.60.19.A.3, of this shoreline variance, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit and notice of the proposed extension is given to parties of record and the Department of Ecology. Construction shall commence within two years of the effective date of the Shoreline Variance as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.

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. Appeal to County Council. Within ten calendar days of the

date of the written decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

Any party of record may request a closed record review of the Hearing Examiner's Decision, issued under SMP 23.60.15.H.4, by the County Council. Such an appeal shall be filed with the County Council on forms supplied by the County within ten (10) calendar days of the written decision. If appeal is made to the County Council, notice of appeal shall be provided to all parties of record at least fifteen (15) days prior to consideration by the County Council. The Council shall meet to review the Hearing Examiner's decision within twenty-one (21) days of transmittal thereof, at which time it may approve or disapprove the application, or remand the matter to the Hearing Examiner.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830 and Section 23.60.15.H. A copy of this document is available for review at the County Council Office. After an appeal has been filed and the Council Office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 3rd day of June 2014.



Michael Bobbink, Hearing Examiner