

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE CONDITIONAL USE)	SHC2013-0002
Application for)	
)	
<i>Whatcom County Public Works</i>)	FINDINGS OF FACT,
<i>Maintenance Division</i>)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: Whatcom County is proposing to initiate beach nourishment along various segments of the 2,100 ft. long Maple Beach seawall immediately south of the Canadian border, in Point Roberts, to stabilize the beach and prevent undermining of the seawall footing. Nourishment includes 700 cubic yards of 1 ¾ inch washed rock along 800 linear feet of the seawall.

Decision: The requested 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: Whatcom County Public Works, Maintenance Division

Property Location: 0 Bay View Drive, Pt. Roberts, Washington

Legal Description: Within Section 35, Township 41 North, Range 03 West, W.M.

Adjacent Water Body: Boundary Bay

Shoreline Designation: Urban Resort, Shoreline Residential, and Aquatic

Statewide Significance: No

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 23.60.040	Conditional Use Permit Criteria
SMP 23.90	General Policies & Regulations

SEPA Review: Determination of Non-Significance (DNS), issued by Whatcom County Planning and Development Services on April 8, 2013.

Legal Notices: Notice of Application, Published – March 1, 2013
Notice of Public Hearing, Published – June 13, 2013
Notice of Public Hearing, Posted – June 12, 2013
Notice of Application, Mailed – March 1, 2013
Notice of Public Hearing, Mailed – June 7, 2013

Hearing Date: June 26, 2013

Parties of Record

Brian Mankle, Maintenance
Public Works, Smith Road

Steve Fox, Bridge and Hydraulic Planner
Public Works, Commercial Street, Suite 301

Sam McDaniel, Shorelines Planner
Planning and Development Services

Carol Fowler
51 Bay View Drive
Point Roberts, WA 98281

Exhibits

- 1 Land Use Application with attachments
 - 1-1 Fee Responsibility
 - 1-2 Supplemental Application
 - 1-3 Project Description
 - 1-4 Notice of Application and Optional NDS Distribution List, March 1, 2013
 - 1-5 PDS Comment Form Letter to Property Owners, Feb 22, 2013
 - 1-6 Determination of Completeness, February 13, 2013
 - 1-7 Property Owners Mailing Labels
- 2 Staff Report, dated June 26, 2013
- 3 Agency Comments

- 4 Vicinity Map
- 5 Figure 2: Construction Plan and Section
- 6 Aerial Site Photo
- 7 SEPA DNS, April 8, 2013, with SEPA Checklist attached
- 8 Public Comments
- 9 Maple Beach, Point Roberts, Shoreline Reach Analysis-Final Report, prepared by Coastal Geologic Services, August 15, 2005
- 10 Certificate of Mailing Notice of Application, March 1, 2013
- 11 Legal Notice of Application, March 1, 2013
- 12 Certificate of Mailing, Notice of Public Hearing, June 7, 2013
- 13 Certificate of Posting, Notice of Public Hearing, June 12, 2013
- 14 Legal Notice of Public Hearing, June 13, 2013

II.

Whatcom County is proposing to initiate a Point Roberts beach nourishment program along various segments of the 2,100 feet of Maple Beach seawall, immediately south of the Canadian border, in order to stabilize the beach and prevent undermining of the seawall footing. The proposed beach nourishment program includes 700 cubic yards of 1 ¾ inch washed rock along 800 linear feet of the seawall.

III.

The Applicant has indicated that the Staff Report is factually correct. The Applicant stated no objection to the Conditions of Approval recommended by Staff. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Staff Report, Exhibit No. 2, dated June 26, 2013, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

A number of written public comment letters were received by Staff during the comment period and a neighboring property owner also spoke at the hearing voicing these concerns regarding the proposed beach nourishment program. The Watershed Ecologist for Whatcom County Public Works addressed the concerns in an email to the Maple Beach Community, dated March 15, 2013, Exhibit No. 8 in the Hearing Examiner file. And at the public hearing, the Hearing Examiner noted Staff's written response and concurred with Mr. Fox's comments.

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 Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Conditional Use Permit for the proposed beach nourishment program along various segments of Maple Beach seawall in Point Roberts, Washington.

Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit No. 2, dated June 26, 2013. 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. The Conclusions of Law adopted by Staff in the Staff Report are incorporated herein as Conclusions of Law.

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 Conditional Use Permit is hereby granted to Whatcom County Public Works, Maintenance Division for beach nourishment along segments of the 2,100-feet of Maple Beach Seawall, immediately south of the Canadian Border, Bay View Drive, Point Roberts, Washington. 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. 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 Applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other approvals as required 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 conditions, the more restrictive standards shall apply.*
- 3. Best Management Practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved Temporary Erosion and Sedimentation Control (TESC) Plan reviewed and approved by the Shoreline Administrator, or administrative conditions associated with the pending building permit application measures.*

4. *Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
5. *The Applicant shall comply with the **Division of River & Flood** conditions dated March 7, 2013, unless modified by the technical administrator or appealed to the appropriate agency.*
6. *The project shall comply with all applicable Federal, State, and local laws and regulations.*
7. *If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (360-676-6907), LNTHPO (360-384-2298), and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LNTHPO Dept. (360-384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.*
8. *Construction shall commence within two years of the effective date of the permit 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 2nd day of July 2013.



Michael Bobbink, Hearing Examiner

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



J.E. "Sam" Ryan
Director

EXHIBIT
#2

June 26, 2013

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of
Whatcom County Public Works
for a Shoreline Conditional Use Permit

SHC2013-00002

FINDINGS, CONCLUSIONS, AND
RECOMMENDATIONS

I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

Application: Whatcom County is proposing to initiate beach nourishment along various segments of the 2,100 ft. long Maple Beach seawall immediately south of the Canadian border in Point Roberts, to stabilize the beach and prevent undermining of the seawall footing. Nourishment includes 700 cubic yards of 1 ¾ inch washed rock along 800 linear feet of the seawall.

Recommendation: Staff recommends approval of the requested developments, subject to the conditions of approval.

II. PRELIMINARY INFORMATION

Applicant: Whatcom County Public Works
901 W Smith Road
Bellingham, WA 98226

Property Location: 0 Bay View Drive, Pt. Roberts, Washington

Legal Description: Within Section 35, Township 41 North, Range 03 West, W.M.

Adjacent Water Body: Boundary Bay

Shoreline Designation: Urban Resort, Shoreline Residential, & Aquatic

Statewide Significance: No

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 23.60.040 Conditional Use Permit Criteria

SEPA Review:

Determination of Non-Significance (DNS) issued by Whatcom County Planning and Development Services on April 8, 2013.

III. FINDINGS

Whatcom County Public Works is proposing to conduct beach nourishment along various segments of the 2,100 ft. long Maple Beach seawall immediately south of the Canadian border in Point Roberts, to stabilize the beach and prevent undermining of the seawall footing. The existing seawall is a six foot tall vertical concrete wall on a spread footing that is located on the backshore area and upper high tide beach. A mixed sand and gravel beach lays waterward of the seawall, and Bay View Drive abuts the seawall on the landward side.

Using dump trucks and a rubber tired loader from the roadway, County maintenance crews will place a total of 700 cubic yards of 1 ¾ inch washed rock along approximately 800 linear feet of wall.

According to the Official Shoreline Map (Map) as outlined in 23.30.02.A, the subject site is located within the Urban Resort, Shoreline Residential and Aquatic shoreline designations.

The proposal aims to maintain an existing lawfully established structure. As such, pursuant to 23.60.020.2.B, the applicant has made application for a Shoreline Statement of Exemption to conduct "Maintenance and Repair" activities.

Pursuant to Landfill and Excavation Regulations (23.90.100.B.2) fill and excavation waterward of the OHWM for the purposes of maintaining lawfully established development may only be authorized as a conditional use. In order for a shoreline conditional use permit to be approved, the proposal must satisfy the criteria of section 23.60.040 of the SMP. These criteria are set forth and discussed below. The proposal requires an open record public hearing as it does not meet one of the exemptions listed in 23.60.13.A.

In the granting of all shoreline conditional use permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the sum of the conditional uses and their impacts should also remain consistent with the policy of RCW 90.58.020 and should not produce a significant adverse effect to the shoreline ecological functions and processes or other users.

Shoreline Conditional Use Permit:

The applicant is proposing to place beach nourishment fill below the OHWM as a measure to protect an existing seawall and road. Pursuant to 23.90.10.B.2.d, Landfill for maintenance of lawfully established development waterward of OHWM may only be authorized as a conditional use.

In order for a Shoreline Conditional Use Permit to be approved, the proposal must satisfy the criteria of section 23.60.040 of the Program. These criteria are set forth and discussed below.

23.60.04.B.1. That the proposed use will be consistent with the policy of RCW 90.58.020 and this Program.

The Shoreline Management Act of 1971, at RCW 90.58.020 indicates:

...It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses...This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life... Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area...

The existing seawall and Maple Beach Drive does not comply with the minimum 150-foot setback from OHWM as required by the SMP. However, the developments existed before the adoption of the Whatcom

County Shoreline Management Program. SMP 23.50.070.A states that lawfully established developments that existed prior to the adoption of the SMP shall be considered nonconforming and may be continued subject to the provisions the nonconforming provisions contained within the SMP (23.50.070). Section 23.60.022.B allows for maintenance and repair activities of lawfully established developments via a shoreline statement of exemption.

The proposed placement of 700 cubic yards of 1 ¾ inch washed rock along 800 linear feet of wall is a maintenance activity to abate scour that if continues could threaten the seawall and Maple Beach Roadway. The proposed use is consistent the policy of RCW 90.58.020 and the SMP.

23.60.04.B.2. That the proposed use will not interfere with normal public use of public shorelines.

The project proposal includes the installation of a approximately 700 cubic yards of 1 ¾ inch washed rock along 800 linear feet of the Maple Beach Seawall. Impacts to use of the shorelines by the public may be impacted temporarily during the operation. Equipment will be located on the roadway and utilized to place the gravel for approximatley one week. Other than this potential interruption of use of shorelines the proopsal will not interfere in the long term use of the shorline.

23.60.04.B.3. That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.

Nothing in the record demonstrates that the maintenance of the Maple Beach seawall of the continued use of Bay View Drive on the landward side of the seawall is incompatible with other permitted uses within the area.

23.60.04.B.2. That the proposed use will not cause adverse effects to the shoreline environment in which it is to be located.

The project includes work below the OHWM. Elements to minimize impacts to listed species and habitats were incorporated into the project design and schedule. No equipment will be located on the beach all activities will occur from the paved roadway. The proposal will also comply with the Terms and Conditions of NWP-13 and HPA including having a biologist survey the beach for sand lance eggs prior to construction. The Maple Beach area has been subject to shoreline recession. Whatcom County Public Works consulted with Coastal Geologic Services to study the area and report on the area and alternatives for the seawall. Coastal Geologic Services produced the report on August 15, 2005 quantifying the erosion rate and proposing alternatives. Beach nourishment was identified as the most practical and least impactful alternatives. There is no evidence that the proposal will cause adverse effects to the shoreline environment.

23.60.04.B.2. That the public interest suffers no substantial detrimental effect.

No substantial detrimental effects to the public interest were identified by staff during review of the project.

Cumulative Impact Analysis

In the granting of all shoreline conditional use permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if shoreline substantial development permits and conditional use permits were granted for other developments in the area where similar circumstances exist, the sum of the conditional uses and their impacts should also remain consistent with the policy of RCW 90.58.020 and should not produce a significant adverse effect to the shoreline ecological functions and processes or other users.

As stated previously within this staff report, as conditioned, staff anticipates no net loss of shoreline ecological functions or processes as a result of the proposed project. As such, additional approvals for additional developments were similar circumstances exist, are not likely to represent a cumulative environmental impact to the shoreline consistent with the above criteria.

V. PUBLIC COMMENTS

Fifteen comments were received from property owners in the area. The comments were primarily related to concerns that the continued nourishment process is not effective and may not be the best use of tax dollars.

Whatcom County public works responded to the concerns with the following response.

Thank you for your voicing your concerns about the County beach nourishment program on Maple Beach. I understand your viewpoint that past actions have been short lived and that further addition of gravel along the face of the sea wall may not fix the ongoing erosion problem. I will attempt to address your concerns and, hopefully, explain the rationale behind our actions.

As many of you rightly pointed out, the slick vertical face of the seawall is exacerbating beach erosion along the toe. There are many examples of this cause and effect linkage on seawalls all over the world, and we are painfully aware that Maple Beach is no exception. The question is: how we deal with this legacy.

Several of you suggested installing retention structures like groins, pilings, etc. to capture littoral drift sediment and stabilize the beach. Although this works great locally, the State Department of Fish and Wildlife frowns on the practice because it tends to starve down-drift beaches of sediment. Consequently, getting a permit to install these kinds of structures is next to impossible. This leaves us with three options: building a better sea wall, removing the seawall and building a natural gravel berm, or supplementing the littoral drift by adding gravel. We have chosen the latter option because it is relatively inexpensive, easily permitted, and has proven effective in other areas.

In theory, the added gravel dissipates wave energy by moving the gravel sideways instead of using that same energy to scour downward. From your comments, I gather that gravel from past treatments has washed away fairly quickly. We will attempt to permit some larger diameter rock this time and see if it sticks around a little longer.

Thank you, again, for your comments, and for keeping an eye on the beach.

VI. AGENCY COMMENTS

The Whatcom County Division of River & Flood submitted the following comments via an email dated March 7, 2013.

The subject permits for the Maple Beach Nourishment Project has been reviewed for compliance with the flood code (Title-17) and the associated requirements of the Endangered Species Act (ESA). According to the attached flood map (DFIRM) the project is located within a Special Flood Hazard Area (SFHA) or Coastal Flood Zone V with a community determined Base Flood Elevation (BFE) of 12.0 feet (NGVD29). As such, the below conditions are required for compliance:

1. A copy of the ACOE NWP-13 permit shall be provided to the River and Flood Division demonstrating compliance with ESA 2. A copy of the WDFW HPA shall be provided to the River and Flood Division outlining the Terms and conditions as listed in the NWP-13 3. All conservation measure and Best Management Practices (BMP's) required as part of the NWP-13 and HPA shall be followed to minimize impacts to species and habitat

We have determined that the project with the above conditions met satisfies the requirements of Title-17 and the ESA. Feel free to contact our office with any questions or concerns.

VII. RECOMMENDATIONS

Based on the above findings, Staff recommends approval of the Shoreline Conditional Use Permit 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. 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 applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other approvals as required 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.*
- 3. Best management practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved temporary erosion and sedimentation control (TESC) plan reviewed and approved by the Shoreline Administrator, or administrative conditions associated with the pending building permit application measures.*
- 4. Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
- 5. The applicant shall comply with the **Division of River & Flood** conditions dated March 7, 2013, unless modified by the technical administrator or appealed to the appropriate agency.*
- 6. The project shall comply with all applicable federal, state and local laws and regulations.*
- 7. If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (360-676-6907), LNTHPO (360-384-2298), and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LNTHPO Dept. (360-384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.*
- 8. Construction shall commence within two years of the effective date of the permit 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.*

Report prepared by:

Sam McDaniel
Whatcom County Shoreline Administrator
Planning and Development Services