

WHATCOM COUNTY HEARING EXAMINER

RE: Shoreline Substantial Development)	SHR2012-0014
Shoreline Conditional Use)	SHC2012-0016
Application for)	
)	
Whatcom County Public Works)	FINDINGS OF FACT,
Stormwater Division)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: Whatcom County Public Works is proposing stormwater infrastructure and treatment improvements in the Cottonwood Beach north subbasin of Birch Bay to address capacity, flooding, and water quality issues. Elements include installing new pipe and catch basins along Cedar Avenue and Birch Bay Drive, installing a new outfall on the beach off Cedar Avenue, and removing an existing outfall.

Decision: The requested permits are 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 – Stormwater Division

Property Location: Approximately 8100 Block of Birch Bay Drive

Legal Description: Within Section 24, Township 40 North, Range 01 West, W.M.

Adjacent Water Body: Birch Bay

Shoreline Designation: Shoreline Residential, Urban Conservancy, & Aquatic

Statewide Significance: No

Zoning: Urban Residential Mix

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 23.60.010 Substantial Development Permit Criteria
SMP 23.60.040 Conditional Use Permit Criteria
SMP 23.90 General Policies & Regulations
SMP 23.100.16 Utilities

SEPA Review: Determination of Non-Significance (DNS) issued by Whatcom County Planning and Development Services on December 27, 2012.

Legal Notices: Published – Notice of Application, November 15, 2012
Notice of Public Hearing, February 21, 2013

Posted – Notice of Public Hearing, February 20, 2013

Mailed – Notice of Application, November 16, 2012
Notice of Public Hearing, February 15, 2013

Hearing Date: March 6, 2013

Parties of Record

Kraig Olason
County Public Works, Stormwater Division

Sam McDaniel
Planning and Development Services

Exhibits

1. Land Use Application with attachments
1-1 Supplemental Applications

- 1-2 County Land Disturbance Application
- 1-3 Project Narrative
- 1-4 PDS Form Letter/Comment, Notice of Application/SEPA-Optional
- 1-5 Determination of Completeness, November 2, 2012
- 1-6 Address Labels
- 1-7 Easement, March 19, 1949
- 1-8 PDS Document Tracking Checklist Form

- 2 Staff Report, March 6, 2013

- 3 Agency Comments
 - ~ Flood Review, Dec 14, 2012
 - ~ Watersheds, December 11, 2012
 - ~ Critical Areas Review, November 21, 2012

- 4 SEPA DNS, issued December 27, 2012, with attached Distribution List

- 5 Comment Letter, stamped receive Dec 14, 2012

- 6 Graph showing derelict concrete material to be removed

- 7 Cottonwood Drainage Plan Site Design

- 8 Drainage Improvements – Engineer Review Sheets

- 9 Biological Evaluation, prepared by County Public Works, October 22, 2012

- 10 Certificate of Mailing, Notice of Application, November 16, 2012

- 11 Legal Notice of Application, November 15, 2012

- 12 Certificate of Mailing Notice of Public Hearing, February 15, 2013

- 13 Certificate of Posting, Notice of Public Hearing, February 20, 2013

- 14 Legal Notice of Public Hearing, February 21, 2013

II.

Whatcom County Public Works requests a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit for the proposed improvements to the stormwater infrastructure and treatment in the Cottonwood Beach north subbasin of Birch Bay.

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.

There was no public comment on this matter at the hearing. 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 March 6, 2013, a copy of which is attached hereto, 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 Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Permits for the proposed improvements to the treatment and infrastructure of stormwater in the Cottonwood Beach North Subbasin of Birch Bay.

The Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit No. 2, dated March 6, 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 Substantial Development Permit and Shoreline Conditional Use Permit are hereby granted to Whatcom County Public Works, Stormwater Division for the proposed improvements to stormwater treatment and infrastructure along Cedar Avenue and Birch Bay Drive, in the Cottonwood Beach North Sub-basin of Birch Bay, property located on Assessor's Parcel No. 405124 308138, Blaine, Washington. The permits are 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, 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 **Watersheds** memo dated December 11, 2012 unless modified by the technical administrator or appealed to the appropriate agency.
6. The Applicant shall comply with the **Division of River & Flood** conditions dated December 14, 2012 unless modified by the technical administrator or appealed to the appropriate agency.
7. The project shall comply with all applicable Federal, State, and local laws and regulations.
8. 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.
9. Construction shall commence within two years of the effective date of the shoreline variances and substantial development 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 6th day of March 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



EXHIBIT
#2

J.E. "Sam" Ryan
Director

RECEIVED

MAR 06 2013

WHATCOM COUNTY
HEARING EXAMINER

March 6, 2013

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

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

SHR2012-00014 & SHC2012-00016
FINDINGS, CONCLUSIONS, AND
RECOMMENDATIONS

I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

Application:

Whatcom County Public Works is proposing stormwater infrastructure and treatment improvements in the Cottonwood Beach North subbasin of Birch Bay to address capacity, flooding, and water quality issues. Elements include installing new pipe and catch basins along Cedar Avenue and Birch Bay Drive, installing a new outfall on the beach off Cedar Avenue, and removing an existing outfall.

Recommendation:

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

II. PRELIMINARY INFORMATION

Applicant:

Whatcom County Public Works
322 N. Commercial St., Suite 301
Bellingham, WA 98225

Property Location:

Approximately 8100 Block of Birch Bay Drive

Legal Description:

Within Section 24, Township 40 North, Range 01 West, W.M.

Adjacent Water Body:

Birch Bay

Shoreline Designation:

Shoreline Residential, Urban Conservancy, & Aquatic

Statewide Significance:

No

Zoning:

Urban Residential Mix

Authorizing Ordinances:

SMP 23.50	Applicability
SMP 23.70.010	Administration
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Applicable Shoreline Program Provisions:

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SMP 23.60.040	Conditional Use Permit Criteria
SMP 23.90	General Policies & Regulations
SMP 23.100.16	Utilities

SEPA Review:

Determination of Non-Significance (DNS) issued by Whatcom County Planning and Development Services on December 27, 2012.

III. FINDINGS

Whatcom County Public Works is proposing stormwater infrastructure and treatment improvements in the Cottonwood Beach North subbasin of Birch Bay to address capacity, flooding, and water quality issues. Elements include installing new pipe and catch basins along Cedar Avenue and Birch Bay Drive, installing a new outfall on the beach off Cedar Avenue, and removing an existing outfall on the beach across from 8214 Birch Bay Drive. As compensatory mitigation for project impacts, a derelict concrete pier and footing will be removed.

The Cottonwood Beach North subbasin is approximately 157 acres in size and includes agricultural lands in the upper basin and residential development in the lower basin. Land in the project area is zoned URM6. Surface water in the basin originates in a large pasture/forested wetland area south of Lincoln road and drains through a network of field ditches that outfall to the Cottonwood Beach North subbasin drainage system at Anderson Road. Flow is conveyed through a natural open channel in Halverson Park to Cedar Avenue. The stream exits Halverson Park through a 240inch concrete pipe that flows to a buried vault in Cedar Avenue. A 24-inch pipe leads from the vault to an open sump where flow is split into two pipes, an 18-inch concrete and a 24-inch concrete capped with an HDPE tee, that outfall on the beach at Birch Bay. The 24-inch outfall has a history of backing up and damaging Birch Bay Drive.

The proposed project reroutes flow from Halverson Park away from the open sump and directly down Cedar Avenue in a new pipe that outfalls low on the beach off the intersection of Birch Bay Drive and Cedar Avenue. Stormwater collected in the open sump will also be rerouted to the new pipe down Cedar Avenue. The existing 24-inch outfall on the beach will be removed and plugged at Birch Bay Drive. The existing 18 inch outfall will remain in place to convey runoff originating downhill of the open sump. Several catch basins will be installed along Birch Bay Drive to reroute drainage from the 24-inch pipe to the 18-inch pipe.

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

The proposal requires approval of a Shoreline Substantial Development Permit pursuant to 23.60.01.A. Additionally, the proposal requires approval via Shoreline Conditional Use. Based on review of the submitted application materials, it has been determined that this permit decision requires a public hearing pursuant to 23.60.13.

In the granting of all shoreline substantial development and 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 shoreline conditional use permits were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

IV. CONCLUSIONS

Substantial Development Permit Criteria

A substantial development permit shall be 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 23.60.020.2 (23.60.010.A).

According to 23.60.010.B, in order to be approved, the decision maker must find that the proposal is consistent with the following criteria:

1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance under SMP 23.60.030;
2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated;

General and use-specific policies and regulations are found within Sections 23.90 and 23.100 respectively. Applicable policies and regulations associated with the proposed development are listed and discussed below:

23.90.03 Ecological Protection and Critical Areas

23.90.03.A Policies

1. Shoreline use and development should be carried out in a manner that prevents or mitigates adverse impacts so that the resulting ecological condition does not become worse than the current condition. This means assuring no net loss of ecological functions and processes and protecting critical areas designated in WCC 16.16, in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property. Permitted uses shall be designed and conducted to minimize, in so far as practical, any resultant damage to the ecology and environment (RCW 90.58.020). Shoreline ecological functions that should be protected include, but are not limited to, fish and wildlife habitat, food chain support, and water temperature maintenance. Shoreline processes that should be protected include, but are not limited to, water flow; littoral drift; erosion and accretion; infiltration; ground water recharge and discharge; sediment delivery, transport, and storage; large woody debris recruitment; organic matter input; nutrient and pathogen removal; and stream channel formation/maintenance.
2. In assessing the potential for net loss of ecological functions or processes, project-specific and cumulative impacts should be considered.
3. Development standards for density, frontage, setbacks, impervious surface, shoreline stabilization, vegetation conservation, buffers, critical areas, and water quality should protect existing shoreline ecological functions and processes. During permit review, the Administrator should consider the expected impacts associated with proposed shoreline development when assessing compliance with this policy.

23.90.03.B Regulations

1. Mitigation Sequencing - To comply with the policies of SMP 23.90.03.A, a shoreline permit applicant or project proponent shall demonstrate all reasonable efforts have been taken to provide sufficient mitigation such that the activity does not have significant adverse impacts. Mitigation shall occur in the following prioritized order:
 - a. Avoiding the adverse impact altogether by not taking a certain action or parts of an action, or moving the action.
 - b. Minimizing adverse impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts.
 - c. Rectifying the adverse impact by repairing, rehabilitating or restoring the affected environment.
 - d. Reducing or eliminating the adverse impact over time by preservation and maintenance operations during the life of action.

- e. Compensating for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures.
2. Because of its incorporation by reference herein under Section 23.10.06.A. above, the provisions of the Whatcom County Critical Areas Ordinance, WCC 16.16, shall apply to any use, alteration or development within shoreline jurisdiction whether or not a shoreline permit or written statement of exemption is required. Unless otherwise stated, no development shall be constructed, located, extended, modified, converted, or altered, or land divided without full compliance with WCC 16.16 and the Program, provided that alteration for a water-oriented use may be allowed in accordance with WCC 16.16.225.B.3. Within shoreline jurisdiction, the regulations of WCC 16.16 shall be liberally construed together with the Program to give full effect to the objectives and purposes of the provisions of the Program and Act.
3. Unless otherwise stated, critical area buffers shall be protected and/or enhanced pursuant to this Program and WCC 16.16.
7. The cumulative effects of individual development proposals shall be identified and evaluated to assure that no net loss standards are achieved.

Comment:

The proposed development is consistent with the Ecological Protection and Critical Areas policies and regulations as conditioned by this staff recommendation. The project will be conducted within Whatcom County's Right-of-way. Work along the marine shoreline includes removing an existing poorly functioning 24-inch outfall and placing a new 36-inch diameter high density polyethylene (HDPE) tee at Cottonwood Beach. The replacement outfall has been designed to convey a 100-year event, to be self-flushing, and to minimize impacts to littoral drift. The new outfall will be approximately 285 feet southeast of the existing outfall and extend approximately 32 feet further waterward of the existing outfall. An anchoring system will be installed for the new outfall. All areas disturbed to access the beach will be stabilized and replanted with native dune grass.

Compensation for possible sediment transport impacts resulting from the additional length of the outfall includes the removal of a derelict concrete pier and footing located at Cottonwood beach at the eastern end of the Cotton wood Beach North parking area. The pier and footing is approximately 450 square feet in size and extends approximately 45 feet waterward from the parking area and terminates approximately 6 feet below MHHW. The pier will be removed via an excavator on the road and the area will be replanted with dune grass.

Overall the impacts associated with the project will be temporary in nature and will most likely be mitigated for with installation of BMP's. Therefore staff feels the proposal complies with the Ecological Protection and Critical Areas policies and regulations.

23.90.04 Water Quality and Quantity

23.90.04.A Policies

1. The location, construction, operation, and maintenance of all shoreline uses and developments should maintain or enhance the quantity and quality of surface and ground water over the long term.
2. Shoreline use and development should minimize the need for chemical fertilizers, pesticides or other similar chemical treatments to prevent contamination of surface and ground water and/or soils, and adverse effects on shoreline ecological functions and values.
3. Appropriate buffers along all wetlands, streams, lakes, and marine water bodies should be provided and maintained in a manner that avoids the need for chemical treatment.

23.90.04.B Regulations

1. Shoreline use and development shall incorporate measures to protect and maintain surface and ground water quantity and quality in accordance with all applicable laws.
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 sediment control (TESC) plan, or administrative conditions.
5. All materials that may come in contact with water shall be constructed of materials, such as untreated wood, concrete, approved plastic composites or steel, that will not adversely affect water quality or aquatic plants or animals. Materials used for decking or other structural components shall be approved by applicable state agencies for contact with water to avoid discharge of pollutants from wave splash, rain, or runoff. Wood treated with creosote, copper chromium arsenic or pentachlorophenol is prohibited in or above shoreline water bodies.

Comment:

The proposed development is consistent with the Water Quality and Quantity policies and regulations as conditioned by this staff recommendation. The proposal is a project being conducted by Whatcom County Public Works as part of Birch Bay Watershed and Aquatic Resources Management District (BBWARM) Program. BBWARM is undertaking capital improvements projects improve stormwater systems to protect water quality and reduce the risk of flooding.

23.90.06 Vegetation Conservation

23.90.06.A Policies

1. Where new developments and/or uses are proposed, native shoreline vegetation should be conserved to maintain shoreline ecological functions and/or processes and mitigate the direct, indirect and/or cumulative impacts of shoreline development, wherever feasible. Important functions of shoreline vegetation include, but are not limited to:
 - a. Providing shade necessary to maintain water temperatures required by salmonids, forage fish, and other aquatic biota.
 - b. Regulating microclimate in riparian and nearshore areas.
 - c. Providing organic inputs necessary for aquatic life, including providing food in the form of various insects and other benthic macro invertebrates.
 - d. Stabilizing banks, minimizing erosion and sedimentation, and reducing the occurrence/severity of landslides.
 - e. Reducing fine sediment input into the aquatic environment by minimizing erosion, aiding infiltration, and retaining runoff.
 - f. Improving water quality through filtration and vegetative uptake of nutrients and pollutants.
 - g. Providing a source of large woody debris to moderate flows, create hydraulic roughness, form pools, and increase aquatic diversity for salmonids and other species.
 - h. Providing habitat for wildlife, including connectivity for travel and migration corridors.

23.90.06.B Regulations

1. Shoreline developments shall comply with the vegetation conservation policies of this Program through compliance with the critical area standards of WCC 16.16.335, 16.16.360, 16.16.630 and 16.16.740 for protection and maintenance of critical area and buffer vegetation.
2. Where compliance with SMP 23.90.06.B.1 is not feasible or required, new developments shall be required to develop and implement a vegetation management plan. When required, vegetation

management plans shall be prepared by a qualified professional and shall be consistent with the requirements in WCC 16.16.260.B and .C, provided that the Administrator may establish prescriptive standards for vegetation conservation and management as an alternative to requiring a specific plan for a development. Vegetation management plans shall describe actions that will be implemented to ensure that buffer areas provide ecological functions equivalent to a dense native vegetation community to the extent possible given the area that is feasibly available. Required vegetation shall be maintained over the life of the use and/or development by means of a conservation easement or similar legal instrument recorded with the Whatcom County Auditor.

4. Vegetation clearing shall be limited to the minimum necessary to accommodate approved shoreline development.

Comment:

The proposed project is consistent with the above vegetation conservation policies and regulations. Limited areas of dune grass will be impacted to gain access to remove the existing outfall and construct the new outfall. These areas will be immediately stabilized and restored with native dune grasses. The proposed clearing is limited to the necessary the approved shoreline development.

23.90.10 Landfill and Excavation

23.90.10.A Policies

1. Landfill and excavation should only be permitted to the minimum extent necessary to accommodate an approved shoreline use or development and with assurance of no net loss of shoreline ecological functions and processes. Enhancement and voluntary restoration of landforms and habitat are encouraged.
2. Landfill in water bodies, floodways, and/or wetlands should not be permitted for creation of new uplands, unless it is part of an approved ecological restoration activity. Landfill should be permitted in limited instances to restore uplands where recent erosion has rapidly reduced upland area, to build beaches and protective berms for shore stabilization or recreation, to restore or enhance degraded shoreline ecological functions and processes, or to moderately elevate low uplands to make such uplands more suitable for purposes consistent with this Program.

23.90.10.B Regulations

1. Landfill and excavation shall be minimized to the maximum extent practicable and allowed only along with approved shoreline use and development activities that are consistent with this Program.
2. Landfill and excavation within wetlands or waterward of the ordinary high water mark shall only be permitted in limited instances for the following purposes only, with due consideration given to specific site conditions, and only along with approved shoreline use and development activities that are consistent with this Program:
 - a. Port development for water-dependent uses where other upland alternatives or structural solutions, including pile or pier supports are infeasible.
 - b. Expansion or alteration of transportation facilities of statewide significance currently located on the shoreline where alternatives to fill are infeasible.
 - c. Ecological restoration or enhancement such as beach nourishment, habitat creation, or bank restoration when consistent with an approved restoration plan.
 - d. Maintenance of lawfully established development.
 - e. Development of shore stabilization projects, flood control and instream structures.

Except for landfill for county-approved ecological restoration, fill and excavation waterward of the OHWM or in a wetland may only be authorized as a conditional use.

6. Landfills, beach nourishment and excavation shall be designed to blend physically and visually with existing topography whenever possible, so as not to interfere with long term appropriate use including lawful access and enjoyment of scenery.
7. Perimeter banks shall generally be sloped no steeper than 1 foot vertical for every 3 feet horizontal unless a specific engineering analysis has been provided, and the Administrator determines that the landfill blends physically and visually with existing topography.
8. A temporary erosion and sediment control (TESC) plan shall be provided for all proposed landfill and excavation activities.

Comment:

The applicant is proposing fill and excavation waterward of OHWM and as such the proposal is subject to the conditional use criteria. The conditional use criteria are discussed later within this staff report. This recommendation of approval has been conditioned that the applicant submit a Temporary Erosion and Sedimentation control plan prior to initiating ground disturbing activities. The amount of fill and excavation is the minimum necessary to accommodate the desired outcome.

23.100.16 Utilities

Utility development in shoreline areas shall be subject to the policies and regulations of this Section and Chapter 9. These policies and regulations apply to both public and private utilities.

23.100.16.A Utilities – Policies

1. New public or private utilities should be located inland from the land/water interface, preferably out of the shoreline jurisdiction, unless:
 - a. Perpendicular water crossings are unavoidable; or
 - b. Utilities are required for authorized shoreline uses consistent with this Program.
2. Utilities should be located and designed to avoid public recreation and public access areas and significant natural, historic, archaeological or cultural resources.
3. Utilities should be located, designed, constructed, and operated to result in no net loss of shoreline ecological functions and processes with appropriate mitigation as provided in SMP 23.90.03.
4. All utility development should be consistent with and coordinated with all local government and state planning, including comprehensive plans and single purpose plans to meet the needs of future populations in areas planned to accommodate growth. Site planning and rights-of-way for utility development should provide for compatible multiple uses such as shore access, trails, and recreation or other appropriate use whenever possible; utility right-of-way acquisition should also be coordinated with transportation and recreation planning.
5. Utilities should be located in existing rights-of-way and corridors whenever possible.
6. Utilities serving new development should be located underground, wherever possible.
7. Development of pipelines and cables on aquatic lands and tidelands, particularly those running roughly parallel to the shoreline, and development of facilities that may require periodic maintenance which would disrupt shoreline ecological functions should be discouraged except where no other feasible alternative exists. When permitted, provisions shall assure that the facilities do not result in a net loss of shoreline ecological functions or significant impacts to other shoreline resources and values.

23.100.16.B Utilities – Regulations

23.100.16.B.1 Design and Operation

a. Water Systems:

- (1) Components of water systems which are not water-dependent shall be located away from shoreline jurisdiction unless alternative locations, including alternative technology, are demonstrated to be infeasible and it is demonstrated that the facilities do not result in a net loss of shoreline ecological functions and processes or significant adverse impacts to other shoreline resources and values such as parks and recreation facilities, public access and archaeological, historic, and cultural resources, and aesthetic resources.
- (2) Private and public intake facilities, and wells on shorelines should be located where there will be no net loss in ecological functions or adverse impacts upon shoreline resources, values, natural features, or other users.
- (3) Desalinization facilities shall be located consistent with critical area regulations and buffers, except for water-dependent components such as water intakes.

Comment:

Utility development is permitted subject to the policies and regulations of the Program. The proposed project reroutes flow from Halverson Park away from the open sump and directly down Cedar Avenue in a new pipe that outfalls low on the beach off the intersection of Birch Bay Drive and Cedar Avenue. Stormwater collected in the open sump will also be rerouted to the new pipe down Cedar Avenue. The existing 24-inch outfall on the beach will be removed and plugged at Birch Bay Drive. The existing 18 inch outfall will remain in place to convey runoff originating downhill of the open sump. Several catch basins will be installed along Birch Bay Drive to reroute drainage from the 24-inch pipe to the 18-inch pipe.

Approximately 50 feet of the existing water line will be affected, starting just west of Cedar Avenue and continuing to a point just past the intersection of Cedar Avenue and Birch Bay Drive. A portion of water line on Cedar Ave. will also be replaced. The new waterline will be a minimum of 1.5 feet below the invert elevation where it passes under the proposed 36 inch drainage pipe. The County will work with BBWSD to coordinate this effort to occur shortly before or in conjunction with the drainage construction project. No additional site coverage is proposed as a result of the project. The proposal will actually eliminate approximately 450 square feet of impervious surface with the removal of a derelict pier.

SHORELINE 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.

SMP 23.100.16 indicates Utility development is permitted, subject to policies and regulations. Accordingly, both the SMA and SMP consider the proposed use of the property to be reasonable, otherwise this specific development would be prohibited. The development proposal is a replacement of existing stormwater facilities to improve water quality and reduce flood risk to residential developments in the area. Staff finds the record demonstrates the project proposal satisfies this criterion of the SMP.

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

No interference with normal public use of public shorelines was identified by this administrator during review of the proposed sewer line extension project other than some minor view interference during construction. Any such impacts are temporary and considered minor by this administrator.

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.

The area surrounding the proposed project location is currently developed for residential purposes. The proposed stormwater retrofit will reduce potential flooding impacts that impact existing residential developments. As the portions of the proposed project within shoreline jurisdiction are subsurface, no concerns regarding design compatibility are applicable.

23.60.04.B.4. That the proposed use will not cause adverse effects to the shoreline environment in which it is to be located.

As stated previously within this staff report, the proposal has been designed to minimize impacts to the shoreline environment. Temporary impacts to shoreline associated wetlands are will occur as complete avoidance of these features is not feasible according to the applicant. Disturbed areas used for access will be restored upon completion of the utility work by planting native dune grass. The placement of the new longer outfall may have minor impact on sediment transport. As an attempt to compensate for this the applicant is removing a derelict pier and footing that is approximately 450 square feet in size and extends approximately 45 feet waterward from the parking area and terminates approximately 6 feet below MHHW. Impacts to the shoreline will be of temporary in nature and should not result in long term adverse effects to the shoreline environment.

23.60.04.B.5. That the public interest suffers no substantial detrimental effect.

As stated previously, no long-term adverse effects to the shoreline environment is anticipated following completion of the proposed stormwater developments, nor will the proposal adversely effect existing access or other public rights to the shoreline. No adverse public comment was received by this administrator during the course of the permit review.

Cumulative Impact Analysis

In the granting of all shoreline substantial development 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 were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects 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. The proposal as conditioned appears to comply with the development standards, bulk and dimensional setbacks, vegetation conservation standards, and critical area requirements. As such, additional approvals for additional developments were similar circumstances exist, are not likely to represent a cumulative environmental impact to the shoreline.

V. PUBLIC COMMENTS

No negative public comments were received regarding the proposed development.

VI. AGENCY COMMENTS

The **Whatcom County Critical Areas Technical Administrator** submitted the following comments via a memo dated November 21, 2012.

Information for the above proposed retrofit of existing stormwater infrastructure adjacent to Birch Bay has been routed to Critical Areas staff in conformance with WCC16.16 Critical Areas Ordinance. The purpose of the retrofit is to address capacity, flooding, and water quality issues.

Measures have been incorporated into the project to avoid and minimize construction related impacts to Birch Bay. The project has been designed to achieve no net gain in the number of outfalls on the beach and no net gain in the volume of stormwater discharging to Birch Bay. Disturbed areas of the shoreline will be replanted with native Dune grass.

The above proposal has received critical area approval.

The **Whatcom County Watersheds Technical Administrator** submitted the following comments via a memo dated December 11, 2012.

I have reviewed this project for consistency with WCC 20.80.634 and 20.80.735 and have found that it is consistent with the above mentioned code under the following conditions:

- An Erosion and Sedimentation Control (ESC) Inspection shall be required at the beginning and at the end of the project. The ESC inspection at the beginning shall be performed prior to the commencement of any land disturbance activities. The ESC inspection at the end of the project shall be performed after all permanent ESC measures have been installed.

Whatcom County Division of River & Flood submitted the following comments via an email dated December 14, 2012.

The subject shoreline permits to reroute/retrofit an existing enclosed stormwater conveyance system and construct a new bioinfiltration swale to address capacity, flooding and water quality issues 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, a portion of the project crosses through a Special Flood Hazard Area (SFHA) or Flood Zones AE & VE with Base Flood Elevations (BFE's) of 11.0 and 12.0 feet (NGVD29). Based on the submitted drawings the portion of the proposed underground conveyance system within the SFHA will be located within the footprint and right of way of existing County roads and finished grades will be matched to existing grades. The proposed replacement out fall pipe location shown waterward of an existing bulkhead will be mitigated for by removing an existing outfall pipe and some derelict concrete material. Furthermore, the project will be required to obtain a federal permit (Section 404) issued by the U.S. Army Corps of Engineers (USACOE).

Given the information above and the submitted Biological Evaluation (BE) with a NLAA determination demonstrates all associated ESA requirements are being met. However, the following conditions will be required for compliance with Title-17 and the ESA:

1. The pipe outfall structure shall be anchored to prevent flotation, collapse and lateral movement.
2. The pipe outfall structure shall be designed and constructed to withstand the wave action, debris impacts and scouring associated with the Base Flood.
3. Final pipe outfall structure drawings and calculations certified by a licensed engineer must be submitted prior to approval of a building permit. If the project does not require a building permit the documentation must be submitted and approved prior to start of work.
4. The portion of the project located within the SFHA must result in a balanced cut/fill so that there is no loss of floodplain storage.
5. The project shall meet any requirements or conditions required by the shorelines administrator and the USACOE (including but not limited to mitigation activities, construct BMP's, etc).

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

VII. RECOMMENDATIONS

Based on the above findings, Staff recommends approval of the Shoreline Substantial Development 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 **Watersheds** memo dated December 11, 2012 unless modified by the technical administrator or appealed to the appropriate agency.*
6. *The applicant shall comply with the **Division of River & Flood** conditions dated December 14, 2012 unless modified by the technical administrator or appealed to the appropriate agency.*
7. *The project shall comply with all applicable federal, state and local laws and regulations.*
8. *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.*
9. *Construction shall commence within two years of the effective date of the shoreline variances and substantial development 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