

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE VARIANCE)	SHV2007-0010
Application for)	
)	
<i>Victoria Luhrs</i>)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant has applied for a Shoreline Variance to lawfully establish an unpermitted storage building, constructed in 1993 as a sauna. The Applicant seeks approval of a variance, which would allow the structure to remain in place and to be used, solely, as a boathouse and water recreation associated storage structure.

Decision: The Whatcom County Hearing Examiner hereby approves the requested Shoreline Variance, 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: Ms. Victoria Luhrs

Property Location: 1642 Seacrest Drive– Lummi Island, Washington 98034

Legal Description: Section 15, Township 37 North, Range 01 East, W.M.
Assessor’s Parcel No. 370115 390500

Adjacent Water Body: Hale’s Passage

Shoreline Designation: Conservancy

Shoreline of Statewide Significance: No

Zoning: Residential Rural Island (RII)

Comprehensive Plan: Rural
Subarea: Lummi Island Subarea
Authorizing Ordinances: SMP 23.50 Applicability
SMP 23.70.40 Hearing Examiner

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.44	Conservancy Shoreline Area
SMP 23.60.180	Variance Permit Criteria
SMP 23.90	General Policies and Regulations
SMP 23.100.130	Residential Use Policies and Regulations
SMP 23.110	Definitions

Applicable Critical Areas Ordinance Provisions:

WCC16.16.260 (A)	General mitigation requirements
WCC 16.16.320(A)-(F)	Geologically hazardous areas – General standards
WCC16.16.720	Habitat conservation areas – General standards
WCC16.16.740(C)-(D)	Standards – Habitat conservation area buffers

Legal Notices: Published – Notice of Application, October 17, 2007; Notices of Public Hearing, November 3, 2011 and January 5, 2012
Posted – Notice of Public Hearing January 3, 2012
Mailed – Notice of Application, October 11, 2007; Notice of Public Hearing, December 14, 2011

Hearing Date: March 14, 2012

Parties of Record

Victoria Luhrs
13457 64th Place NE
Kirkland, WA 98034

Chad Yunge, Douglas Goldthorp, Lyn Morgan-Hill
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecuting Attorney

Exhibits:

- 1 Land Use Application – Shorelines
- 1-1 Supplemental Application

- 1-2 Shoreline Permit Submittal Requirements
 - 1-3 Guidelines for Finding Property owners Necessary for Hearing Notices
 - 1-4 Customer Receipt, October 4, 2007
 - 1-5 Reasons why this variance should be approved under 23.60.180, October 3, 2007, submitted by Victoria Luhrs
 - 1-6 Statutory Warranty Deed
 - 1-7 Legal Notice of Application, Affidavit of Publication , October 17, 2007
 - 1-8 Determination of Complete Application, October 9, 2007
 - 1-9 Certification of Mailing: Notice of Application, October 11, 2007
 - 1-10 Notice of Application
 - 1-11 Property Owner Mailing Labels
 - 1-12 Letter from Victoria Luhrs, dated September 11, 2007 to Robert Martin re: request to access and copy all "Correction Notices"
- 2 Staff Report, dated October 25, 2011, submitted by Planning and Development Services
- 3 Petitioner's Hearing Brief, Shoreline Variance Permit, submitted by Victoria Luhrs, November 7, 2011, with attachments:
- 3-1 Property Data and list of exhibits
 - 3-2 Memo dated August 27, 2009 from Bobbink to Luhrs
 - 3-3 Land Use Application
 - 3-4 Site Photos, showing boat house [5 sheets, with hand-written notes]
 - 3-5 Letter dated October 30, 2007 from Luhrs to Yunge
 - 3-6 Letter dated October 26, 2007 from Neighbors and property owners on Lummi Island Yunge
 - 3-7 Residential Building Permit Application
 - 3-8 Permit Status – Tidemark 1997
 - 3-9 Correction Notice, June 14, 2000
 - 3-10 Letter dated January 5, 2000/2001 from Jeff Chalfant and Barry Wenger to Victoria Luhrs re: Shoreline Compliance
 - 3-11 Letter dated December 21, 2001 from Barry Wenger to Ms. Luhrs re: compliance
 - 3-12 Draft letter to Karen Frakes, hand dated April 16, 2002
 - 3-13 Email from Karen Frakes to Glenn Amster, July 11, 2002
 - 3-14 Transcript, July 15, 2002: Barry Wenger, Witness/Hearing Examiner exchange
 - 3-15 Hearing Examiner Conclusions of Law, 9/11/2002, page 13 of Decision
 - 3-16 Memo from McCaela Daffern to Luhrsharris, 4/27/2006 re: bank stabilization
 - 3-17 Letter dated July 6, 2007 from Luhrs to Jim Thompson
 - 3-18 Hearing Examiner Decision, SHV2010-0001, Robert and Kimberly Jackson, Applicants, pages 1 and 4
 - 3-19 DOE Letter, June 19, 1990 to Jeff McClure re: SHV1990-11261 Permit
 - 3-20 Hearing Examiner Decision, page 1, SV 5-92 James Beattie, Denial
 - 3-21 Photo, Seacrest Drive/Haley Cabin
 - 3-22 Letter from Luhrs to Robert Martin, September 11, 2007
 - 3-23 SMP 23.90, page 59

- 3-24 2001 Topographical Map-Site building locations
- 3-25 "top of bank" site plan for new home, May 1999
- 3-26 Precision Construction – Price Estimate, July 10, 2002
- 3-27 Survey "top of bank"
- 3-28 Photo showing boathouse at Sunrise Cove, LI

- 4 Zoning Map and Aerial Map

- 5 Site Photos [4-sheets, with handwritten notes]

- 6 Aerial Site Photos (2)

- 7 Site Plan and Vicinity Map/Topo Map

- 8 Legal Notice of Hearing, Affidavit of Publication, November 3, 2011

- 9 Staff Report, dated August 19, 2009 with attachments
 - 9-1 Agency Comments
 - 9-2 Letter October 26, 2007 from Neighbors and property owners on Lummi Island
 - 9-3 Hearing Examiner Decision, APL2000-0011, Victoria Luhrs, Appellant, Sept 11, 2002
 - 9-4 Council Decision on Appeal, December 31, 2002 [cover letter, January 7, 2003
 - 9-5 Superior Court, Order on Land Use Petition, Luhrs v. Whatcom County, No.03-2-00195-0, September 17, 2004
 - 9-6 Email communication: Chad Yunge/Victoria Luhrs/Staff

- 10 Memo, dated August 27, 2009 from Luhrs to Bobbink re: request for continuance

- 11 Memo from Bobbink to Luhrs, Aug 27, 2009 re: Applicant's request that Hearing Examiner recluse himself

- 12 Before Shorelines Hearings Board, Order on Summary Judgment, SHB No. 03-022, Naveen Jain and Auradha Jain v. WA State DOE and City of Medina, March 18, 2004

- 13 Email from Luhrs to Bobbink, April 22, 2009 re: April 17, 2009 memo with attached LUPA Decision and Order, No. 08-2-02403-1, Superior Court, Snohomish County, Luhrs vs. Whatcom County, October 13, 2008

- 14 Transcript, APL00-0011, Hearing July 15, 2002

- 15 Email communication, Luhrs, Magner, Yunge, Buckingham, Rodabough

- 16 Memo, May 12, 2009 from Bobbink to Luhrs, re: Luhrs' Request , dated April 22, 2009

- 17 Memo, April 17, 2009, from Bobbink to Luhrs re: Luhrs' April 2, 2009 Request
- 18 Email communication, Yung, Magner, Luhrs, Buckingham
- 19 Certificate of Mailing Notice of Hearing, November 18, 2009; September 22, 2009
- 20 PDS Application Processing Track, October 9, 2007 and October 11, 2007
- 21 Email communication betw Ms. Luhrs and Ms. Magner, November 15, 2011, re: re-scheduling hearing
- 22 Certificate of Mailing, Notice of Public Hearing, December 14, 2011
- 23 Certificate of Posting, Notice of Public Hearing, January 3, 2012
- 24 Legal Notice of Public Hearing, January 5, 2012
- 25 Email, comments from Fred and Linda Kinney, dated January 15, 2012 re: V. Luhrs Variance Hearing
- 26 Email letter from Allison Luhrs to Judge Michael Bobbink, March 11, 2012 re: Luhrs Boathouse Variance Hearing
- 27 Settlement Agreement and Release, dated December 20, 2010 [Whatcom County] and January 4, 2011 [Victoria Luhrs]
- 28 Documents, with hand-written comments, submitted by Ms. Luhrs at public hearing on March 14, 2012:
 - 28-1 Letter dated September 5, 2007 from Ms. Luhrs to Robert Martin
 - 28-2 Hearing Examiner Approval Decision, SHV2007-0004: Rhyon Caldwell
 - 28-3 Photos showing boathouses within ¼ mile of Seacrest Drive
 - 28-4 Order on Land Use Petition, No. 03-2-00195-0
 - 28-5 Photos showing log boathouse construction on site
- 29 Memorandum, dated March 21, 2012, from Royce Buckingham to Michael Bobbink, with attachments
 - 29-1 Order on Summary Judgment, SHB No. 03-022
 - 29-2 Order Granting Summary Judgment and Dismissing Appeal, SHB No. 05-015

II.

This Shoreline Variance comes before the Hearing Examiner at the end of a long and complicated enforcement action regarding the Applicant's shoreline property. On September 11, 2002, this Hearing Examiner issued a Decision regarding the Applicant's Appeal of a

Planning and Development Services' Enforcement Action regarding the Applicant's property [File No. APL2000-0011]. This Hearing Examiner Decision was then appealed to the Whatcom County Council, which upheld the Decision [Council File No. AB2002-348, dated October 8, 2002], except for one modification. The modification required the Appellant to remove the structure, which is the subject of this Appeal, or obtain a Shoreline Variance to legally establish it.

The Applicant, herein, appealed the County Council Decision to Whatcom County Superior Court. The Whatcom County Superior Court, in a Decision, dated September 17, 2004, upheld the Decision of the Whatcom County Council.

After the issuance of the September 17, 2004, Order by Superior Court Judge Steven Mura, upholding the Whatcom County Council Decision, Applicant Luhrs, Whatcom County Planning and Development Services, and the Washington State Department of Ecology were involved in lengthy Settlement negotiations. The resulting Settlement Agreement, finalized in January 2011, granted Applicant Luhrs an Exemption from a Shoreline Management Program Substantial Development Permit and allowed the placement of a shoreline revetment structure on the beach at the toe of the bluff, fronting the Applicant's lot. This Settlement Agreement finally resolved the ongoing issues raised by the Applicant's unpermitted construction of a shore defense works. It is worth noting that both the Hearing Examiner and the Whatcom County Council determined that a permanent solid revetment structure at the toe of the bluff on the Appellant's property violated the Whatcom County Shoreline Master Program and the Shoreline Management Act. This Decision was upheld by Superior Court and the Hearing Examiner presumes that the Settlement Agreement was reached after the Applicant appealed the Superior Court Decision. In any case, on December 28, 2010, the County signed a Settlement Agreement, granting a Shoreline Exemption for the revetment or bulkhead work, but requiring the Applicant to remove the greenhouse located at the top of the bluff and to either remove the log structure which is the subject of this Shoreline Variance Application, or apply for a Shoreline Variance to legally establish the structure.

The Applicant states that the greenhouse has been removed pursuant to the Settlement Agreement and this Shoreline Variance Application is to carry out the portion of the Settlement Agreement associated with the sauna/boathouse structure.

III.

The Applicant has removed a deck from the front of the structure which is the subject of this Application. The chimney and heating system installed, as part of the unpermitted construction of the building originally as a sauna, has been removed. The Petitioner states that the structure will be used only as a boathouse storage building, including the storage of an inflatable boat, a canoe, and associated boat-related accessories. Possible accessories could include oars or paddles, life jackets, perhaps an outboard motor associated with the use of the inflatable boat, and other equipment used for water-related recreational activities. Such activities could include crabbing or fishing, and the building could be used for the storage of

crab pots and other fishing equipment, etc.

IV.

The structure sought to be used as a boathouse/storage building was constructed on the northeast portion of the property on a flat bench or bowl area created by old slide activity on a high bluff further landward of the structure. The structure is on a low bluff above the approved revetment. The approval of the revetment was based, at least in part, on a conclusion that the bluffs on-site are unstable and that the revetment was necessary to stabilize the bluff and protect existing legal structures built on-site.

V.

The original Hearing Examiner Decision in Appeal, APL2000-0011, recognized that the area, where the "boathouse/storage" structure is located, raised complicated factual and legal issues. The area where the structure is located is just above a low shore front bluff and some distance from the toe of the upper bluff face that was established after historic slide activity in this area.

The Hearing Examiner addressed this issue in the Appeal Decision, in Findings of Fact II and III, and the relevant parts of these findings are set forth below, as follows:

II.

...

The southern third of the bank is a little more complicated. A clear top of the bank, between 60- and 70-feet vertical, continues along this portion of the parcel but strikes significantly away from the water as compared to the top of the bank on the other two-thirds of the parcel. This third of the parcel contains a steep bank from the Ordinary High Water Mark, which is between 15- and approximately 30-feet in height. Behind this lower steep area is a large, relatively flat area, designated on Exhibit #31 as an "old slide area." A preponderance of the evidence shows that this area in fact did result from prior slide activity. Along the southern property line, this old slide area, which could be characterized in a non-technical manner as a "bowl" or "bench," rises from approximately 20-feet above sea level at the top of the lower steep bank area to approximately 45-feet above sea level at the west end of the slide area while traversing an area approximately 120-feet horizontal. Thereafter, there is another steep bluff face, which rises from 45-feet to 78-feet in height over a horizontal distance of approximately 40-feet. Above the top of the overall bank is a relatively flat area that slopes gently away from the water to Seacrest Drive. This upper area of the parcel between the top of the bank

and Seacrest Drive is the location of a shop/garage building, a residence, and a greenhouse with a deck. The residence itself is legally constructed and is located approximately 70-feet west of the top of the bluff on its front side and approximately 30-feet north of the top of the bluff on its north side. The shop/garage structure is located approximately 15-feet from the top of the upper bluff area on the southern portion of the parcel.

...

III.

...

Within the 'bench' or 'bowl' area between the two steep areas of the bank near the southern property line, the appellants constructed a sauna and deck. According to the appellants, this structure was constructed in the spring of 1993. This building is a 10-foot x 10-foot log structure with a deck. This structure, using Exhibit 31 as a reference, is located approximately 40-feet from the Ordinary High Water Mark and approximately 25-feet to the top of the steep part of the lower bluff located north of the stairs. There is approximately 60-feet of gently sloping old slide area between the western end of the sauna/boathouse structure and the bottom of the steep bank structure to the west.

The Hearing Examiner is relying on the Findings of Fact set forth in the Appeal Decision as part of the record in this Shoreline Variance Application.

Depending on how this site is seen, the setback for a boathouse structure would be either 25-feet from the top of the bottom bank, right above the revetment, or 25-feet from the top of the bank landward of the bench or bowl created by the historic slide. It is not clear from the record as to whether or not the boathouse structure is setback 25-feet from the top of the lower bank. However, the Settlement Agreement and the Decision by Judge Mura and the Whatcom County Council all require a variance to allow the boathouse structure, or its removal.

VI.

The structure is currently being used only as a boathouse and water recreation-related storage building. As pointed out by the Applicant, it would be very difficult to use the boats and related water recreation equipment if it was required to be stored on the 70-feet to 80-feet high portion of the bluff where the house is located.

Since the County and Department of Ecology have granted a Shoreline Exemption and allowed construction of a revetment, some of the issues regarding bank stability have been

addressed. However, as set forth in the original Hearing Examiner Decision in Appeal, APL2000-0011, significant factors regarding the stability of the bank were not related to wave action at the toe of the bank, but were instead related to water-induced erosion of the unconsolidated materials in the bluff that sits upon a clay base.

VII.

The Hearing Examiner, in the Decision on Appeal, APL2000-0011, noted that it did not appear that any of the structures on site were in imminent danger of damage due to erosion; that the greenhouse structure, itself, was most likely to be affected by erosion caused by wave action at the toe of the bluff; and, further, that the boathouse structure was not in imminent danger of damage or destruction caused by wave erosion.

This Appeal Decision by the Hearing Examiner noted that there was bluff instability related to groundwater action on the property.

VIII.

County Planning and Development Services has recommended denial of the requested Shoreline Variance. In the Staff Report, Exhibit No. 2 in the Hearing Examiner file, the Planning Department points out that aside from this storage building, uses on the property include a two-story single-family residence with attached garage and an attached deck, a detached garage with a second story studio and deck, and a 530-square foot former residential cabin utilized for storage. Staff correctly points out that even without the requested boathouse building, the Applicant has significant use of the property.

The Staff Report then goes on to argue that a variance for this building cannot be granted, based on WAC 173-27-170(3)(a) and a Shoreline Hearings Board Decision [See Footnote 1; below]. Relying on the WAC section and the Shoreline Hearings Board Decision, Staff then

1 Jain v State of Washington, Department of Ecology, and City of Medina, SHB No. 03-022, Order on Summary Judgment. In the *Jain Decision*, the Shoreline Hearings Board entered an Order on Summary Judgment on an Appeal filed by Petitioners Jain of a denial of a Shoreline Variance by the Department of Ecology. This variance would have allowed the extension of a 100-foot long pier by 40-feet. The facts supporting the requested variance are not set forth in the Order on Summary Judgment. However, the Shoreline Hearings Board concluded that the variance request for a structure waterward of the Ordinary High Water Mark could not be approved under WAC 173-27-170(3)(a), because denial of the variance does not preclude "... all reasonable use of the property ..." As will be noted, this is not the WAC section that applies to the variance which is the subject of this permit application. However, the Hearing Examiner would note that this is also not the criteria routinely applied by Whatcom County and the Department of Ecology to a request for a variance for dock construction. Under the *Jain Decision*, no variances would be allowed for docks which exceed the length set forth in the Master Program if the Applicants for the variance had any other reasonable use of their property. In fact, Whatcom County and the Department of Ecology has, and still does, routinely approve variances to allow docks to extend to a water depth which would allow reasonable use of the dock for boat moorage and other water-related recreational activity. It is not clear why Planning would cite the *Jain Case*, in this case, eight years after the Decision was reached, while having routinely approved variances for docks on properties where there was significant reasonable upland development and use over that eight year period.

concludes that the requested variance does not meet any of the criteria and that the variance should be denied. Staff also argues that the requested variance, which would legalize the existing boathouse structure, does not meet the critical areas requirements of WCC 16.16.

IX.

No members of the public testified on the request for the Shoreline Variance at the public hearing. Whatcom County Planning and Development Services did receive a petition after Notice of Application. The petition was received October 26, 2007, and was signed by several property owners in the area of the subject property, supporting the Shoreline Variance proposal.

X.

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.

When first addressing the issue of what is now proposed as a boathouse storage building in 2002, APL2000-0011, the Hearing Examiner addressed this structure, noting in the Decision, Conclusion of Law No. II, page 12, that this building was required to meet setback requirements, even if it was Exempt from the requirement for a Shoreline Substantial Development Permit. Later in that Conclusion, page 13, the Hearing Examiner stated as follows:

The sauna/boathouse and attached deck is located on a large and relatively level bench area which probably resulted from an old slide. The bank along the Luhrs' property is geologically unstable. However, the record contains insufficient evidence to determine if the sauna/boathouse structure is located in an area that is currently geologically hazardous. The lower steep bluff arising directly from the beach to the sauna/boathouse and deck is in excess of ten feet in height and has a grade in excess of thirty feet. For this reason, it could be argued that the sauna/boathouse is located on the face of an unstable geologically hazardous slope. (See SMP 23.90.61) However, if the slope is measured from the toe of the slope to the back of the old slide area, this slope is less than thirty (30) percent and would not be consistent with the definition for geologically hazardous slope. From the back of the old slide area, the bank climbs steeply from approximately 45-feet to approximately 80-feet in height. The actual slope from the toe of the bank (beach) near the southern end of the bulkhead to the top of the bluff near the garage is

in excess of forty (40) percent.

Legitimate arguments can be made by both sides as to whether or not this bench area, which encompasses approximately 10,000 square feet, is on the face of an unstable and geologically hazardous bluff or, is located between a low bluff rising from the beach to the beginning of the bench and the second bluff starting at the end of this old slide area and rising steeply to approximately 80-feet in height. The purpose of regulations regarding geologically unstable bluffs is the protection of human life and property and of natural shoreline processes. A sauna structure can be located in numerous other places on the property, including areas outside of shoreline jurisdiction. However, a boathouse type structure would not be of much use to the applicants if it could not be located in approximately its current position on the old slide area. **The appellants should be allowed a boathouse structure on this old slide area if they can obtain a geotechnical report stamped and signed by a Licensed Professional Engineer indicating the site chosen is appropriate taking into account geological hazards, and if the location meets all of the other applicable shoreline requirements including setbacks.** [Emphasis added].

The Hearing Examiner addressed the boathouse structure in the Decision, as follows:

“.... The sauna/boathouse has been constructed on an inactive slide area on the face of a designated geologically unstable bluff. This structure must be moved to the uplands unless the Applicant obtains a Geotechnical Report, signed and stamped by a Licensed Professional Engineer, Indicating that a chosen location on an inactive slide area is not hazardous from a geological perspective. Additionally, any structure located in this area must comply with all other applicable shoreline regulations, including setbacks.”

The Whatcom County Council in their Decision on appeal of the Hearing Examiner's Decision quoted, above, stated in reference to the sauna/boathouse building, as follows:

“.... The decision of the Hearing Examiner is reversed on Whatcom County Planning and Development Services' appeal, APL2002-348A, as the Hearing Examiner committed an error of law when he determined that the sauna could remain in its present location without a setback variance. Ms. Luhrs is required to obtain a Shoreline Substantial Development Permit for the sauna, unless [it is] moved outside of shoreline jurisdiction. If the sauna is to remain within shoreline jurisdiction, it must meet applicable shoreline setbacks and cannot remain in its present position on the face of a geologically

unstable bluff.”

The County Council Decision mischaracterizes the Hearing Examiner’s Decision to the degree that it misses language of the Hearing Examiner requiring the sauna building to meet applicable setbacks. The Settlement Agreement overturned the Hearing Examiner’s Decision, the County Council’s Decision, and Superior Court’s Decision that a solid bulkhead revetment type of structure was not allowed at the toe of the bluff on the Applicant’s property. The Settlement Agreement allows for the possibility that the Hearing Examiner will grant a variance to allow what was the sauna structure to remain in its current location as a boathouse/water recreation storage building.

II.

Planning’s recommended denial of the Shoreline Variance request was based on WAC 173-27-170(3) read in conjunction with a Shorelines Hearings Board Decision in *Jain v Ecology*, SHB No. 03-022. The Shorelines Hearings Board in *Jain* concluded that when a local Master Program is inconsistent with the WAC standard, the language in the WAC is controlling.

Based on Staff’s reading of the *Jain* Decision and Staff’s conclusion that WAC 173-27-170(3) applied and was inconsistent with the Whatcom County Program, Staff concluded that the WAC language in 173-27-170(3) applied to this Variance Application.

Based on WAC 173-27-170(3), Planning Staff concluded that a Shoreline Variance could not be granted because the Applicant had some reasonable use of her property without the requested variance. The Hearing Examiner concurs that the Applicant has a reasonable use of her property without the variance and that the variance is not necessary to ensure a reasonable use of the Applicant’s property. As the Hearing Examiner stated in the public hearing, this strict interpretation of Shoreline Regulations regarding Shoreline Variances would preclude almost any variance and was inconsistent with both the Planning Department’s handling of Shoreline Variances, the Hearing Examiner’s handling of Shoreline Variances, and the handling of Shoreline Variances by the Department of Ecology. Shoreline Variances have historically been issued for structures, both landward and waterward of the Ordinary High Water Mark, even though the Applicants had reasonable use of their property without a variance.

Staff also suggested that the current applicable WAC is different than the one that was in effect and applied to this 2007 Shoreline Variance Application. The Hearing Examiner’s research leads the Hearing Examiner to believe WAC 173-27-170, which is in effect at this time, has been in effect since October 31, 1996, and that no change in the WAC language has occurred which would support the new and very stringent interpretation urged by Staff in this Shoreline Variance. At no other point in the Hearing Examiner’s recollection, has Staff indicated that a Shoreline Variance was to be denied in all cases where the property owner had reasonable use of the property without the variance.

After review of WAC 173-27-170(3)(a), which was applied by Staff to recommend

denial of this variance, the Hearing Examiner determined that in fact Staff had misread WAC 173-27-170 and had applied to this variance, which requests a reduction in the landward setback from the Ordinary High Water Mark, the wrong standard. WAC 173-27-170(3), reads in its entirety as follows:

(3) Variance permits for development and/or uses **that will be located waterward** of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(b), or within any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following: [emphasis added]

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property;

(b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section; and

(c) That the public rights of navigation and use of the shorelines will not be adversely affected.

As can be seen from the above language, Staff has applied language regarding variances for uses waterward of the Ordinary High Water Mark to this application for a variance for a location landward of the Ordinary High Water Mark. In actuality, WAC 173-27-170(2)(a) is the appropriate WAC to deal with this kind of a variance proposal, and reads as follows:

WAC 173-27-170

(2) Variance permits for development and/or uses that will be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(b), and or/or landward of any wetland as defined in RCW 90.58.030(2)(h), may be authorized provided the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;

This language differs slightly from the language used in the Whatcom County Shoreline Master Program, which, in Section 23.60.183(a) allows a variance, where:

(a) the strict application of the bulk or dimensional criteria set forth in this Program precludes or significantly interferes with a reasonable permitted use of the property.

The above portion of this Conclusion of Law was written prior to a post-hearing memorandum, filed by Whatcom County Planning and Development Services on March 21, 2012, Exhibit No. 29 in the Hearing Examiner file. In this legal memorandum, Planning addresses this Shoreline Variance Application in reference to the appropriate WAC Standard found in WAC 173-27-170(2)(a), set forth above. Planning addresses the appropriate WAC Standard and acknowledges (in a footnote) Planning erred in quoting the waterward standard in the Staff Report. However, Planning maintains the position that the result from using the more lenient and appropriate standard for landward development still should result in denial of the variance application.

To summarize, the language for a variance landward of the Ordinary High Water Mark as used in WAC 173-27-170(3) allows a variance providing the Applicant can demonstrate that strict application of the standards “precludes all reasonable use of the property.”

The WAC in Standard 173-27-170, for variance landward of the Ordinary High Water Mark, replaces the word “all” with the word “a” and allows a variance where the applicant can show strict application of the standards ... “precludes, or significantly interferes with, reasonable use of the property.”

The Whatcom County Shoreline Management Program for variances, in general, allows a variance where it can be shown that strict application of the standards precludes or significantly interferes with a reasonable permitted use of the property.

This Section of the Whatcom County Program is identical with the language in WAC 173-27-170(2)(a), with one exception, it leaves out the “a” in front of reasonable permitted use. It should be noted that the Whatcom County Shoreline Management Program was approved by the Department of Ecology in 1998 and that the current WAC regarding Shoreline Variances, WAC 173-27-170, has been in effect since October 31, 1996.

This Shoreline Variance can be approved where the strict application of the setback interferes with reasonable use of the property. The construction of a boathouse near the Ordinary High Water Mark is a permitted use of shoreline properties in the Conservancy zone. The applicable setback is 25-feet from the OHWM or from the edge of an unstable bluff. This setback is significantly less than the 75-foot setback applicable to single-family homes and appurtenant structures when this Shoreline Variance Application was filed. Allowing boathouses closer to the shoreline than homes and other appurtenant structures, clearly reflects the necessity to have this kind of shoreline dependent structure, which fosters shoreline recreational uses, near the shoreline. Reasonable use of a shoreline single-family residence includes enjoyment of shoreline related recreational uses, where possible, and significant limitations on this kind of use due to the strict application of setbacks is a hardship that can, in appropriate situations allow a Shoreline Variance.

A Shoreline Variance can be granted in this case, consistent with WAC 173-27-170(2)(a), if it is consistent with the Shoreline Variance Criteria set forth in SMP 23.60.180. Since the strict application of the 25-foot setback from the top of the higher bluff would deny the

Applicant an accessory structure which would facilitate the Applicant's enjoyment of the water-related recreational activities associated with private ownership of shoreline waterfront properties, it does significantly interfere with reasonable permitted use of the property and is consistent with SMP 23.60.183(a).

This conclusion was the same reached by the Hearing Examiner in the 2002 Decision on APL2000-0011, where it was noted then that the location of a boathouse 25-feet back from the top of the upper bank would, in fact, significantly reduce its functionality as a structure aimed at providing access to the water for water-related recreational activities. Water related recreation is a priority use under the Shoreline Management Act and allowing such a use, when it can be done without adverse impacts, is a proper balancing of the concerns about protecting shorelines ... "while at the same time, recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020

III.

The Shoreline Variance request is related to natural features on the Applicant's property, which results in the location of the residential and appurtenant structures on a high bluff, 80-feet above the beach. These natural features lead to this variance request to allow a small boathouse storage structure at an upland location where water access can reasonably be obtained, since strict application of the setback criteria would require it to be placed 25-feet from the top of an 80-foot bluff.

IV.

The Applicant has entered into the record evidence of similar structures designed to enhance water recreational activities, in the area. The Hearing Examiner concludes that the small log cabin type boathouse storage structure is compatible with other permitted activities in the area. It will not cause adverse affects to adjacent properties. There is no evidence that it would have an adverse impact on the shoreline environment itself. A different issue may be raised by the critical areas issues relating to unstable or hazardous slopes. The proposed Shoreline Variance is consistent with the criteria of SMP 23.60.183(c).

V.

The Hearing Examiner concludes that a granting of the Shoreline Variance would not constitute a grant of special privilege. Other properties in the area are entitled to similar structures where they meet the setback requirements if they can comply with the variance criteria where they could not meet the setback criteria. The requested Shoreline Variance is consistent with SMP 23.60.180(d).

VI.

There is no evidence that the public interest will suffer a substantial detrimental affect

from the approval of this Shoreline Variance. While the variance will enhance a private property owner's shoreline related recreational use and enjoyment of a waterfront property, it will not minimize, deny, or affect public uses allowed. The requested variance is consistent with SMP 23.60.183(e).

VII.

The Hearing Examiner concludes that the Shoreline Variance Request meets all of the standards for a variance set forth in Whatcom County Shoreline Management Program, subject to conditions related to critical area concerns regarding steep/hazardous slopes, and to a requirement for a Shoreline Exemption or a Shoreline Substantial Development Permit. County Staff has concluded that allowing the 10-foot by 10-foot log storage structure at its current location would be inconsistent with the Critical Areas Regulations of Chapter 16.16. As pointed out by the County, based on a recent change in State law, Critical Areas Regulations in effect at the time of this application do apply to this shoreline property.

It is not clear from the record that the actual, current location of the boathouse structure, taking into account the current revetment structure now located at the toe of the bluff, is within a geological hazardous area.

A decision as to whether or not the structure is located in a geologically hazardous area and, if it is, the existence of reasonable mitigation steps that can be taken to avoid or reduce adverse impacts, can only be made after the Applicant has obtained a geotechnical report addressing the location of the building, whether or not there will be any adverse impacts if it is in a geological hazardous area, and whether or not any adverse impacts associated with the building in its current location could be adequately mitigated.

The critical areas issues involving geo-hazards can be resolved by attaching a condition to the variance approval requiring the Applicant to provide a geotechnical report regarding the structure to the Planning Department for review by the Critical Areas Staff and, with this additional information, Critical Areas Staff can address any geo-hazard issues during the processing of the required Shoreline Exemption or Shoreline Substantial Development Permit.

VIII.

Subject to the conditions imposed by the Hearing Examiner, the Shoreline Variance should be approved.

IX.

This 2007 Application for a Shoreline Variance is vested under the 1998 Whatcom County Shoreline Management Program. Pursuant to SMP 23.90.60, a boathouse structure in the Conservancy zone has a 25-foot setback requirement unless modified by a variance. This compares to a 75-foot setback required for a residential structure and a 50-foot setback for

general recreational development for shore-dependent structures. The significantly reduced setback for a boathouse type structure acknowledges that boathouses require a location within reasonable proximity of the water to provide adequate functionality and that water related recreational activities are a priority under the Shoreline Management Act.

The General Policies and Regulations, Chapter 23.90 of the 1998 Whatcom County Shoreline Management Program, allow Accessory Uses and related development, subject to all applicable policies and regulations of Chapter 23.100 SMP.

Furthermore, SMP 23.90.11 specifically addresses water related development as follows:

.11 Water Dependent/Water Related Uses

Preference should first be given to appropriate use and development activities which are water dependent, water related or water enjoyment activities as defined in this program ...

Recreational uses are subject to the regulations set forth in SMP 23.100.120. Recreational development in the Conservancy Designation is permitted, as in this case, where it does not required extensive structures or substantial alterations to topography.

SMP 23.100.120.12 designates private recreational development providing shoreline-related recreational activities as a preferred use which should be encouraged. SMP 23.100.120.20 addresses recreational development in hazardous and sensitive areas, and reads as follows:

.20 Hazrdous and Sensitive Areas

Recreational development requiring extensive structures, utilities and roads and/or substantial modifications of natural topography and shorelines should not be located nor expanded in hazardous or sensitive areas where damage to persons, property, and shoreline resources and processes is inevitable.

The recreational development proposed by the Applicant does not require an extensive structure or substantial modifications of the natural topography, and under appropriate conditions can be located in such areas. The conditions attached to this approval require identification of potential "... damage to persons, property, and shoreline resources and processes is inevitable."

X.

The Applicant proposes to use the 100-square foot building as a boathouse. Boathouses are defined in the Shoreline Management Program, SMP 23.110.B.7, as follows:

B.7 Boathouse means any roofed structure built onshore or offshore for storage of water craft or float planes.

Recreational Development is defined in the Shoreline Management Program in SMP 23.110.R.2, reads as follows:

R.2 Recreational Development is the modification of the natural or existing environment to accommodate recreation. This includes clearing land, earth modifications, structures and other facilities such as parks, camps, camping clubs, launch ramps, golf courses, viewpoints, paths, public access facilities, public parks and playfields, hunting blinds, wildlife enhancement (wildlife ponds are considered excavation), and other low intensity use outdoor recreation areas. Recreational homes and related subdivisions of land are considered residential; resorts, motels, hotels, recreational vehicle parks, intensive commercial outdoor or indoor recreation and other commercial enterprises are considered commercial; however, the policies and regulations of Section 23.100.120 will apply to substantial development or areas devoted to private, community or public recreation use associated with such non-recreational development.

A reading of all of the applicable Sections of the 1998 Whatcom County Shoreline Management Program makes it clear that water-related recreational uses are not only allowed, but are encouraged, and, where associated with residential development, are a preferred use, whether the recreational development is public or private.

XI.

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 Application for a Shoreline Variance to lawfully establish the current location of an unpermitted building to be used as a boathouse/water recreational storage structure on a waterfront property abutting Hale's Passage, located at 1642 Seacrest Drive, Lummi Island, Washington, is hereby approved, subject to the following conditions:

1. The Applicant shall submit a complete application for either a Shoreline Exemption or Shoreline Substantial Development Permit for the existing boathouse storage structure. The initial application shall be made within thirty days after completion of review of this Decision by the Department of Ecology, if Ecology does not deny the variance. If the application is determined to be incomplete by Staff, the Applicant shall file a complete application within thirty days of being notified by Staff of additional requirements in order to meet the complete application requirement.

2. The Applicant shall obtain and submit with the Application for a Shoreline Exemption/Shoreline Substantial Development Permit, a geotechnical report, addressing geotechnical issues resulting from the current location of the structure. The Applicant shall comply with the recommendations of the Geotechnical Consultant and with any other conditions placed upon the Applicant by Critical Areas Staff.

The Determination by Staff as to whether or not a Shoreline Exemption or Substantial Development Permit is required and the Decision by Staff on such a permit will be appealable as set forth in the Whatcom County Code and Shoreline Management Program.

Decisions of the Critical Areas Staff, after receipt of a Geotechnical Report, shall be complied with by the Applicant, or appealed to the Hearing Examiner.

Decisions issued by the Critical Areas Staff, after review of the Geotechnical Report, are appealable to the Hearing Examiner as part of an Appeal of Decision on a Shoreline Exemption, or addressed at the hearing on the Shoreline Substantial Development Permit, if one is required.

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 11th day of April 2012.



Michael Bobbink, Hearing Examiner