

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE VARIANCE) SHV2007-0004
Application for)
)
Rhyon Caldwell) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: Rhyon Caldwell is seeking approval of a Shoreline Variance to reduce the prescriptive shore setback from the marine shoreline and top of the unstable marine bluff to accommodate development of a single-family residence and necessary appurtenant developments.

Decision: Whatcom County Hearing Examiner 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: Mr. Rhyon Caldwell
Property Location: 429 Bluff Road – Point Roberts, Washington
Legal Description: Section 04, Township 40 North, Range 03 West, W.M.
Parcel No. 405304 415244
Adjacent Water Body: Strait of Georgia
Shoreline Designation: Rural
Statewide Significance: No

Zoning: Rural Residential
Comprehensive Plan: Resort/Recreational Subdivisions
Subarea: Point Roberts

Applicable Shoreline Management Program (SMP) Provisions:

SMP 23.10	Purposes
SMP 23.20	Goals and Objectives
SMP 23.30.43	Rural Shoreline Designation
SMP 23.50	Applicability
SMP 23.60.180	Variance Permit Criteria
SMP 23.70	Administration
SMP 23.80	Legal Provisions
SMP 23.90	General Policies and Regulations
SMP 23.100	Shoreline Use Policies and Regulations
SMP 23.110	Definitions

SEPA Review: The proposal is categorically exempt from the State Environmental Policy Act per WAC 197-11-800(1)(b)(i).

Legal Notices: Published – August 1 and December 5, 2001 and January 31, 2002
Posted – January 31, 2002
Mailed – April 11, 2007 and January 22, 2010

Hearing Dates: February 10 and 24, and March 1, 2010
January 19 and February 16, 2011

Parties of Record:

Rhyon Caldwell
402 Bluff Road
Point Roberts, WA 98281

Bradley Swanson and Douglas Robertson on behalf of
Rhyon Calwelll
900 Dupont Street
Bellingham, WA 98225

Robert Carmichael and Simi Jain on behalf of
Tim Footman and J.A.Reid
1700 D Street
Bellingham, WA 98227

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Tyler Schroeder, Doug Goldthorp, Chad Yunge
Planning and Development Services

Exhibits:

- 1 Land Use Application
 - 1-1 Customer Receipt
 - 1-2 Letter dated May 13, 2009, from Brad Swanson re: withdrawal of Caldwell Application, SHV2007-0003
 - 1-3 Statutory Warranty Deed
 - 1-4 Notice of Application
 - 1-5 Application Processing Track
 - 1-6 Application Checklist, dated April 3, 2007
 - 1-7 Distribution List
 - 1-8 Distribution List Notice
 - 1-9 Letter of Complete Application, dated April 2, 2007
 - 1-10 Copy of Mailing Labels – properties within 1000-ft radius
 - 1-11 Email Correspondence betw Yunge and Magner re: comment letters

- 2 Letter dated May 13, 2009, from Brad Swanson re: withdrawal of Caldwell Application, SHV2007-0003, with attachments
 - 2-1 Letter dated April 27, 2009 from Whatcom County to Rhyon Caldwell, denying Application, SHV2007-0003
 - 2-2 Letter dated April 27, 2009, from Whatcom County to Rhyon Caldwell re: Lot Consolidation
 - 2-3 Certified Mail Receipts

- 3 Staff Report, dated February 1, 2010

- 4 Motion for Continuance, from Robert Carmichael, representing J.A. and Pat Reid and Tim and Judith Footman, dated February 4, 2010
 - 4-1 Declaration of Robert A. Carmichael in Support of Motion for Continuance, dated February 4, 2010, with email from Tyler Schroeder to Rhyon Caldwell, dated November 19, 2007, attached
 - 4-2 Declaration of J.A. Reid in Support of Motion for Continuance, dated February 4, 2010

- 4-3 Declaration of Karen Reich in Support of Motion for Continuance, dated February 4, 2010
- 4-4 Declaration of Sabrina England in Support of Motion for Continuance, dated February 4, 2010
- 4-5 Notice of Appearance of Parties of Record J.A. and Pat Reid and Tim and Judith Footman, dated February 4, 2010, signed by Robert A. Carmichael
- 5 Letter dated January 20, 2009, from Chad Yunge to Rhyon Caldwell re: request for additional information
- 6 Letter dated November 26, 2008, from Chad Yunge to Rhyon Caldwell re: request for time extension for review of applications
- 7 Structural Engineering Report, dated October 22, 2008, from MJH Engineering prepared for Rhyon Caldwell
- 8 Letter dated February 9, 2009, from Brad Swanson to Chad Yunge with attached Western Geotechnical Consultants Response to County Memorandum, dated February 5, 2009 [County Memorandum from Doug Goldthorp, dated January 16, 2009 is not attached]
- 9 Letter dated October 23, 2008 from Rhyon Caldwell to Doug Goldthorp with attachments:
 - 9-1 Memorandum dated January 16, 2009 from Doug Goldthorp to Chad Yunge re: Geotechnical Assessment
 - 9-2 Western Geotechnical Consultants, Addendum to Report, dated October 15, 2008
- 10 Lummi Nation Tribal Historic Preservation Office Fax Transmittal Sheet, dated February 4, 2010 with attachments:
 - 10-1 Letter dated February 4, 2010 from Lummi Nation Tribal Historic Preservation Deputy Compliance Officer to Chad Yunge
 - 10-2 Letter dated April 24, 2007, from Lummi Nation Tribal Historic Preservation Deputy Compliance Officer to Jim Thompson
 - 10-3 Letter dated January 21, 2010 from Whatcom County Hearing Examiner to Tim and Judith Footman
- 11 Agency Comments
 - 11-1 Letter dated April 24, 2007, from the Lummi Nation Tribal Historic Preservation Deputy Compliance Officer to Jim Thompson
 - 11-2 Critical Areas Review Memo dated November 6, 2006, from Lyn Morgan Hill to Phil Martinez re: OSS application
 - 11-3 Memorandum from Doug Goldthorp to Jim Thompson, dated April 25, 2007 re: Caldwell Request for Variance of Shore Setback for SFR
 - 11-4 Letter dated May 8, 2007, from Lyn Morgan Hill to Mr. Caldwell re: Critical Area Requirements

- 11-5 Email from Goldthorp to Yunge, dated October 18, 2007 re: review of Western Geotechnical Consultant's September 11, 2007, report
- 11-6 Memorandum dated October 19, 2007, from Goldthorp to Tyler Schroeder re: Caldwell Variance Critical Areas Geohazards Review
- 11-7 Memorandum, dated May 2007, from Goldthorp to Jim Thompson re: Caldwell Variance of Shore Setback for SFR
- 11-8 Email dated October 18, 2007 from Goldthorp to Yunge re: Caldwell Shoreline Variance Application

- 12 Geotechnical Report by Western Geotechnical Consultants, Inc., submitted on October 5, 2007 by Rhyon Caldwell

- 13 Comment Letter, dated April 19, 2007 from Jim Aitchison

- 14 Comment Letter, dated April 21, 2007, from Tracy Ann Roberts

- 15 Comment Letter, dated April 23, 2007, from Tim and Judith Footman, with attachments
 - 15-1 Update Concerning Slope Stability Report, presented on August 6, 2002, from Northwest HydroGeo Consultants
 - 15-2 SMP, Chapter 23.110 Definitions, page 169
 - 15-3 Slope Stability Study for a Site Located at Point Roberts, dated August 6, 2002, prepared by Northwest HydroGeo Consultants
 - 15-4 Landslide Risk to Property at 416 Sunset Drive, Point Roberts, WA, prepared by S. Graham Engineering and Geology, Inc., for M. Tim Footman, Property Owner, dated October 25, 2003
 - 15-5 Photo, with handwritten description "Picture Early 60's showing landside with Original home on Footman property"
 - 15-6 Plat of Williams Beach, prepared by USKH, Marshall Hetlet, P.L.S.
 - 15-7 Critical Areas Ordinance, Habitat Conservation Areas, one sheet/front & back, updated 11/13/06
 - 15-8 SMP, Title 23, Chapter 23.90.60 with yellow highlighting and Lyn Morgan-Hill Critical Areas Memo, dated 11/06/2006 re: OSS Application attached
 - 15-9 Assessor's Records for Rhyon Caldwell properties
 - 15-10 Comment letter from Donald Meyer
 - 15-11 Petition re: objection to the road vacation and building permit application filed on Caldwell property
 - 15-12 Letter of Representation, dated April 26, 2007, from Robert Carmichael to Jim Thompson, objecting to the Caldwell Application for a Shoreline Variance
 - 15-13 Letter of Representation, dated July 16, 2002, from Robert Carmichael to Bruce Mills and Roland Middleton re: objection to Caldwell petition to vacate county road and to any permit application to build on Caldwell property

- 16 Caldwell Trail Permit, #3003-00013 for Driveway Access for Single Family Residence

- 17 Caldwell Address Assignment Report, dated August 31, 2002
- 18 Revocable Encroachment Permit Application for Installation of a septic line, dated May 25, 2006
- 19 Vicinity Map
- 20 Aerial Site Photos
- 21 Plan of Topography for Lots 1 and 2, dated March 27, 2009
- 22 Revised Site Plan, dated June 18, 2009
- 23 Revised Site Plan, dated June 18, 2009, with handwritten notes indicating Line of Shoreline Jurisdiction (200-ft from OHWM as determined by WCPDS)
- 24 Site Plan, dated February 2, 2009, with handwritten "Meeting Notes"
- 25 1961 Aerial Site Photo
- 26 1977 Aerial Site Photo
- 27 Zoning Map
- 28 Legal Notice of Application, dated April 11, 2007
- 29 Certificate of Mailing of Notice of Application, dated April 11, 2007
- 30 Certificate of Mailing of Notice of Public Hearing, dated January 22, 2010
- 31 Certificate of Posting, dated January 26, 2010
- 32 Legal Notice of Public Hearing, dated January 28, 2010
- 33 Email from Rhyon Caldwell, dated February 8, 2010 opposing Motion Requesting Continuation of Hearing
- 34 Letter, not dated, but stamped received on February 9, 2010, from Point Roberts Water District No. 4, re: water main fronting on Applicant's property, with attached construction standards, "Criteria for Sewage Works Design and Sewers," December 1998
- 35 Email requesting exhibits dated February 12, 2010 from Karen Reich

- 36 Slope Stability Report, Update with Photos, dated February 18, 2010, by Northwest HydroGeo Consultants
- 37 Email, dated February 22, 2010, from Rhyon Caldwell re: Voluntary Statement Attachment
- 38 Review of Technical Studies Relating to Lots 1 and 2, dated February 20, 2010, from S. Graham Engineering and Geology, Inc.
- 39 Email dated February 22, 2010, from Karen Reich re: Exhibit 1-3, Deed information
- 40 Email from Rhyon Caldwell to Parties, dated February 23, 2010 re: “Misleading information with S. Graham’s Engineer Report
- 41 Memorandum in Opposition to Caldwell Shoreline Variance Application, submitted by Robert Carmichael, dated February 23, 2010
- 42 Documents [1 through 19] to be included in the official Hearing Examiner record, submitted by ZenderThurston, with cover letter dated February 23, 2010
- 43 Declaration of Sabrina England in Support of Memorandum in Opposition to Caldwell Shoreline Variance Application, dated February 23, 2010, with attachment “Exhibit A,” Whatcom County Assessor’s real property information for tax parcel number 405304 415224 (Lot 1); “Exhibit B,” Whatcom County Assessor’s real property information for tax parcel number 405304 414250 (Lot 2); “Exhibit C,” Statutory Warranty Deed, dated August 6, 2002
- 44 Cases for Hearing Examiner
- 44-1 Wriston and Wahkiakum County v. WA State DOE, SHB No. 05-005
 - 44-2 Garrett v. WA State DOE and Save Lake Sammamish v. WA State DOE and Garrett, and the City of Sammamish, SHB No. 03-031 and 03-032
 - 44-3 Lux Homes, LLC v. WA State DOE, SHB No. 04-025
 - 44-4 The City of Olympia v. John Drebeck et al, 156 Wn.2d 289; 126 P.3d 802; 2006 Wash., No. 75270-2
 - 44-5 St. Clair v. Skagit County, 43 Wn.App.122; 715 P.2d 165; 1986 Wash. App., No. 13477-9-I
 - 44-6 Toskey v. City of Sammamish, and WA State DOE, SHB No. 07-008
 - 44-7 Butler v. Ferry County and WA State DOE, SHB No. 07-029
 - 44-8 Rech v. San Juan County, and WA State DOE, SHB No. 07-035
 - 44-9 Buechel v. Dept. of Ecology, 125 Wn.2d 196; 884 P.2d 910; 1994 Wash. No. 61039-8
- 45 Letter dated February 23, 2010 from Western Geotechnical Consultants, Inc. re: Response to S. Graham Report

- 46 Caldwell site photo – referenced in Mr. Caldwell’s testimony on February 24, 2010
- 47 Caldwell site plan – referenced in Mr. Caldwell’s testimony on February 24, 2010
- 48 Second Survey of Caldwell Site
- 49 Letter dated November 26, 2008 from Chad Yunge to Rhyon Caldwell re: active status of permits
- 50 Color photos (6) submitted by Tracey Roberts in support of her testimony
- 51 Appraisal of a Vacant Parcel of Land as of April 30, 2002, located at xxx W. Bluff Road, Point Roberts, WA, by Olen Miller, letter dated February 23, 2010
- 52 Cover Letter, dated March 1, 2010, from Karen Reich, with documents attached:
- 52-1 1928 Plat of Williams Beach
 - 52-2 Signature page of Steve Graham’s Report, dated February 20, 2010
 - 52-3 Declaration of J.A. and Pat Reid, dated February 23, 2010
 - 52-4 WAC 173-27-170
 - 52-5 Excerpts from WCC Title 20, 20.80.680, 20.97.440 and 20.97.443
 - 52-6 Excerpts from WCC Title 23, 23.60, 23.90, 23.100.70, 23.100.150, 23.110
 - 52-7 History of Assessor’s Tax Parcel Numbers
 - 52-8 S. Graham Engineering and Geology, Inc., dated February 28, 2010, re: Review of Western Geotechnical Consultants, Inc. Response dated February 5, 2010
 - 52-9 Four pages of Site Photos (in color), dated February 27, 2010, submitted with S. Graham Report, dated February 28, 2010
 - 52-10 Site Drawings, submitted with S. Graham Report
- 53 Olen Earl Miller III Vitae
- 54 Amendment to Mr. Miller’s Appraisal Report, dated February 27, 2010
- 55 Footman Objections and Concerns, with *All Point Bulletin*, page 1 and 2, dated February 2010 attached as Exhibit 55-1
- 56 Email correspondence from Chad Yunge to Parties, dated March 2, 2010 regarding Plat of Williams Beach ROW, information requested by Hearing Examiner, with plat map attached
- 57 Email correspondence to Parties, dated March 2, 2010, from Hearing Examiner granting request to cancel March 3 hearing date, put Appeal on hold, and schedule status review on April 21, 2010

- 58 Email correspondence re: Status review date and scheduling January 2011 hearing date
- 59 Western Geotechnical Consultants, Inc. Final Report – Geotechnical Investigation, dated October 20, 2010
- 60 Plat of Williams Beach
- 61 Parties of Record Reids’ and Footmans’ Motion for Issuance of Subpoena and Subpoena Duces Tecum, dated December 13, 2010, by Robert Carmichael and Simi Jain, Zender Thurston, P.S.
- 62 Memorandum dated December 15, 2010 from Michael Bobbink to Parties of Record re: Response to Motion [Exhibit 61]
- 63 Certificate of Service, dated December 22, 2010 by Whatcom County Sheriff for service upon Jerry White
- 64 Geotechnical Review of Planned Development, dated January 10, 2011, prepared by Robinson Noble, Inc., Charles Couvrette, Principal Engineer
- 65 Review of WGC Report, dated October 20, 2010, relating to Lots 1 and 2 (Block 1), Plat of Williams Beach, Point Roberts, dated January 9, 2011, prepared by S. Graham Engineering and Geology, Inc.
- 66 Letter dated January 24, 2000, from Sean Caldwell to Jeff Chalfant
- 67 Email from Steve Graham to Bob Carmichael re: driveway access
- 68 Charles Couvrette Vitae
- 69 Steve Graham Vitae
- 70 Cover letter, dated January 10, 2011, from Karen Reich, Zender Thurston
- 71 Response to Robinson Noble January 10, 2011 Report, dated January 17, 2011, from Western Geotechnical Consultants, Inc.
- 72 Email from Karen Reich, January 11, 2011 with attachments:
72-1 Memorandum, January 10, 2011 from Simi Jain and Bob Carmichael re: Ownership of County Right-of-Way
72-2 Plat of Williams Beach (Exhibit 1 of memo)
72-3 Statutory Warranty Deeds (Exhibit 2 of memo)
- 73 Wendy Harris comments of objection to proposed variance, not dated

- 74 Point Roberts Realty – purchase and sale agreement, pages 1 thru 75
- 75 Western Geotechnical Graph (F=1.131)
- 76 Applicant’s Brief in Support of Variance Approval, submitted on behalf of Mr. Caldwell, by Douglas Robertson, dated February 15, 2011
- 77 W. Thomas Follis Appraisal “A” [Mr. Carmichael’s “A”]
- 78 W. Thomas Follis Appraisal “B” [Mr. Carmichael’s “B”]
- 79 Mr. Graham’s Series of figures (6-sheets)
- 80 Graph (F=0.905) failure rate =.9 [Mr. Graham’s testimony, model 100 years from now]
- 81 Graph (F=0.787) failure rate =.7 [Mr. Graham’s testimony, model 100 years from now]
- 82 Graph (F=1.070) failure rate = 1 [Mr. Graham’s testimony]
- 83 Declaration of Tim Footman, dated February 16, 2011
- 84 Copy of 1998 SMP, 23.90, plus setback chart, in effect at time of application
- 85 Mr. Hammer, Western Geotechnical Consultants, Inc.’s Response to Recent Stability Calculations, dated February 14, 2011
- 86 Paper copy of Mr. Carmichael’s closing presentation
- 87 Applicant’s Response to Opponent’s Reference to SMP 20.90.61, submitted by Douglas Robertson, dated February 22, 2011
- 88 Post Hearing Memorandum in Opposition to Caldwell Shoreline Variance Application, submitted by Robert Carmichael, dated February 22, 2011, with attachments
- 88-1 Letter dated February 22, 2011, from Robinson Noble re: Review of WGC letter, dated February 14, 2011
- 88-2 Letter dated February 19, 2011, from S. Graham Engineering re: Responses to WGC Report, dated February 14, 2011
- 88-3 Case Law [ten documents, indexed as follows:
1. D&S Ventures and Derek Hoyte, v. State of WA, DOE, and Clark Co
 2. Loren and Jeannie Fladseth v. Mason Co, and Northshore Neighbors for an Uncluttered Shoreline
 3. William Hagen et al. v. Bolcom Mills

4. Jefferson Co, et al, and Protect Ludlow Bay Committee, Inc. et al, v. Seattle Yacht Club
5. National Bank of Tacoma, v. Thurston Johnson et al., dba Johnson & Clark Lumber Co
6. Northwest Supermarkets, Inc., v. Roland A. Crabtree et al.
7. The Rainier Avenue Corporation, v. The City of Seattle
8. Raleigh-Hayward Co, v. Clinton C. Hull et al.
9. William E. Turner et al., v. Ralph F. Davisson et al.
10. Jeff and Erin Wriston and Wahkiakum Co, v. State of WA, DOE

89 Stipulation and Waiver signed by all Parties

II.

The Applicant is requesting relief from required shoreline setbacks as set forth in the Whatcom County Shoreline Master Program. The Master Program requires a setback of 45-feet from the top of an unstable bluff with a slope exceeding 30%.

The modification to the setback sought by the Applicant will allow construction within 25-feet to 30-feet of the Ordinary High Water Mark. The proposed residential structure would be located just below the top of the bluff.

III.

The subject property consists of Lot 1 and Lot 2 of the Williams Beach Addition of Point Roberts, originally platted on May 12, 1890. The original Shoreline Variance request submitted by the Applicant requested variances for a residence on each of the two lots. However, Whatcom County Planning and Development Services [Planning] determined that the lots in question were consolidated according to the applicable provisions of the Whatcom County Zoning Ordinance and constituted a single lot for the purposes of use or development. The Applicant chose not to appeal the Determination that the lots were consolidated and amended the variance request to seek a Shoreline Variance for a single residence with a footprint of approximately 1250-square feet to be located on Lot 1 (the southerly of the two lots). The Shoreline Variance also seeks approval for the placement of a septic tank just below the top of the bluff on Lot 2. The drainfield for the proposed septic tank would be located offsite and outside of shoreline jurisdiction.

The site plan for the current proposal is set forth on Exhibit 23 of the Hearing Examiner file. This site plan shows a setback of 25-feet from the southern end of the building footprint and 30-feet from the northern end of the building footprint, as measured from the Ordinary High Water Mark delineated by the Shoreline Administrator.

IV.

The proposal entails a moderate-sized single-family residence constructed on the upper part of an unstable and eroding bluff. The bluff is approximately 45-feet in height and borders the Gulf of Georgia on the west side of Point Roberts. The upper stratum of the face of the bluff is unstable due to the unconsolidated nature of the soils. The toe of the bluff, at the Ordinary High Water Mark, is subject to erosion from tidal and storm action. This area of Point Roberts is open to a long reach of open water in Georgia Strait and subject to wind and wave action from the northwest, west, and the southwest. The estimated recession rate at the bottom of the bluff is 2-inches to 4-inches a year. Using the middle figure of 3-inches, the bluff would recede 25-feet in 100 plus or minus years.

Without a Shoreline Variance, no structural development would be possible on this site. After lot consolidation, the site is approximately 7,130 square feet and is similar in size to a number of other lots in the area, including both shoreline lots and lots landward of the shoreline lots. Virtually all of the shoreline lots for a considerable length of beach to the north have already been developed with single-family residences. Most, if not all, lots to the north have some kind of shoreline armoring, including cement bulkheads, designed to protect the existing structures.

The waterfront parcel to the north contains a residence [Reid's] located at the bottom of the bluff, very near or at the Ordinary High Water Mark. The owners of this residence object to construction on the subject parcels, expressing concern that this will add additional instability which may adversely impact their residence. Their lot has armoring at the toe of the bluff designed to impede erosion and protect their home.

The owners [Footman's] of the property and large home to the east of the subject property have strenuously objected to the proposed Shoreline Variance. The construction of a single-family residence on the subject property would obstruct much of the Footman's existing, excellent, saltwater view across the Applicant's property, west to the Gulf of Georgia.

The Applicant's property is separated from the Footman property by an unopened public right-of-way, West Bluff Road. Members of the public testified that they use this unopened, but County-owned right-of-way for recreational walking and have expressed opposition to the proposed variance on the grounds that the proposed residential structure would block a portion of one of the few good saltwater views availability to the public in this area. The proposed construction would block approximately 50% of the view available across the subject property, but would not affect the view to the west, from the right-of-way across Lot 2.

V.

There was extensive written and oral expert testimony in this case. As is often the case, when Parties with opposing interests hire experts to support their position, conflicting expert opinions are rendered. The experts included professionals licensed as Geotechnical Engineers, a

Hydrologist, a Structural Engineer, and a Geologist. The record contains a number of documents evaluating and re-evaluating the work of the various experts.

In addition to professional studies and testimonies presented by the Applicant and by opponents to the requested Shoreline Variance, this matter has been reviewed from the beginning by Douglas Goldthorp, a licensed Geologist, working for Whatcom County. In addition to reading all of the expert written materials submitted, Mr. Goldthorp sat through the many hours of the hearing conducted in regard to this Shoreline Variance request.

Based on all of the information presented to the Hearing Examiner, the Hearing Examiner has come to the following factual conclusions, some of which are pretty much agreed to by all of the experts and others which were the subject of strong disagreement:

- It is generally agreed by all of the Parties that the shoreline bluff in question is unstable and subject to ongoing erosion. There is evidence of relatively shallow slumps or slides along the face of the bluff both on the subject property and on similar properties along this bluff. There was a significant shallow slide at the top of the bluff on the subject property approximately 40-years ago.
- There is surface instability due to the nature of the soils in the top layer, which all of the Geologists confirmed, has a low cohesive value.
- The weight of the evidence establishes that, by placing the proposed residence on cement piles which go well into the bottom layer of soils, consisting of clay materials with a high cohesive value, the requested residence would not significantly add to the instability of the slope. Since the slope recession is based on erosive wave action at the toe of the slope, construction of the house will not increase the rate of recession.
- The preponderance of the evidence indicates that placing the proposed home on deep-set pilings is actually likely to increase the stability of the upper layers of geological material by increasing the cohesion through adhesion.
- There is no evidence in the file that construction of the residence, with a pile-type foundation, designed by Structural Engineers, and approved by the County, will have any adverse affect on shoreline ecology or processes.
- Even though the subject property is an unstable slope and is slowly receding due to wave-induced erosion, construction of the proposed residence, subject to final design approval, will not have adverse impacts on slope stability or natural shoreline processes and will have

a design life between 75 years and 100 years, even without the protection of the toe of the slope with a bulkhead or other shoreline armoring. This conclusion reflects the opinion given by the County's Geologist, Douglas Goldthorp, at the close of the hearing process. As indicated by Mr. Goldthorp, a review by him of the specific structural design of the residence and proposed development will be required at the building permit stage and will require his approval.

VI.

The subject property was purchased by the Applicant in 2002. The purchase price was \$40,000. The broker required both the buyer and seller to sign an Addendum to the Purchase and Sales Agreement. The Addendum is dated April 2, 2002, Exhibit No. 74 in the Hearing Examiner file. Pursuant to the Addendum, both Parties acknowledged that no assurance or claim that the lots would qualify for building purposes was given. It further acknowledges that the purchaser intended to seek development approval for the lots and that, if the lots were in fact approved for development, the value of the lots would be significantly higher than the purchase price.

The purchaser indicated that he had reviewed the Shoreline Variance Approval for the Gleason property, located a few lots to the north of the subject property, before purchase.

The purchaser was aware that he might not be able to obtain the necessary permits for construction of a structure on this site, but believed, at least partially based on the Gleason Shoreline Variance, that there was a reasonable chance that the lots could be developed. The price paid for the property reflected both the potential that development would not be allowed on the site and the seller's desire for a quick sale.

The language set forth in the Addendum, regarding the potential for development, was prepared by the broker. It is reasonable to conclude that, at least in part, the Addendum, which released contingencies and allowed the sale to proceed, was designed to protect the broker from potential legal action or complaints from either the sellers or the purchasers based upon a future denial to the right to develop or future approval of development of the subject property. The broker further testified that the property was never held out to be or advertised as non-buildable and that the sellers were motivated by a desire for a quick sale.

The Addendum, on page 11 of Exhibit No. 74, titled, "Removal of Contingency," was signed on April 17, 2002, by the purchasers and contained the following language:

The undersigned purchaser hereby removes the contingencies concerning:
"FEASIBILITY CONTINGENCY"
We acknowledge that while it is our intent to try and gain approval for development of these lots and realizes [sic] these lots are located on a

medium to high bank waterfront with the higher percentage of the land being located on a slope. We have not been given any representation by Seller, Point Roberts Realty and/or Agent that these lots will qualify for building purposes, there are various issues which may prevent developing the property including but not limited to shorelines management, critical areas, Whatcom County Health Department, geo-technical geo hazards etc. We have personal [sic] inspected the property and reached our own conclusions with regards to the value and ability to gain permits to develop these lots.

VII.

The proposed single-family residence as finally designed by a Structural Engineer and reviewed and approved by the Whatcom County Geologist is very unlikely to have any adverse impacts on the Reid residence located below the building site on the lot to the north.

VIII.

Approval of the requested construction, along with plantings designed to help stabilize the subject property, will remove much, if not all, of the view from the Footman's home to the east and will have a significant impact on the value of the Footman home.

IX.

The Applicant's property is near the south end of an unstable bluff, which runs for a considerable distance to the north on the west beach of Point Roberts, bordering on the Gulf of Georgia. The record contains evidence of only one Shoreline Variance request for construction on this bluff since 1976. A Shoreline Variance [Gleason] was granted for a property approximately seven lots to the north, on April 17, 2000, based on a Planning and Development Services Department recommendation of Approval, a Hearing Examiner Decision approving the Shoreline Variance, and the acceptance of the Shoreline Variance Approval by the Department of Ecology. It is fair to say that the predominant reason there have not been a number of Shoreline Variances in this area is a result of a lack of undeveloped lots along this bluff since 1976.

The Shoreline Variance granted to the Gleason's and approved by the Department of Ecology, allowed reconstruction of a single-family residence, with a basement, on the face of the erosional bluff and within the required shore setback of the Gulf of Georgia.

The zoning of the Gleason Shoreline Variance Application lot was Urban Residential [UR3] at the time the variance was approved. This zoning allowed a development density of three units per acre. The current zoning allows only one unit per acre. As a result of shoreline development prior to the adoption of the Shoreline Management Act and as a result of a Zoning

Ordinance which in the past allowed significantly higher residential density, the area along this bluff is already extensively developed with single-family homes on modest-sized lots. The addition of a residence on the subject property is compatible with existing residential development in this area.

IX.

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.

Staff has thoroughly addressed each of the criteria which must be met in order to grant a Shoreline Setback Variance. The Shoreline Administrator for Whatcom County Planning and Development Services Department concluded that, subject to recommended Conditions of Approval set forth in the Staff Report, the proposed construction of a single-family home on the subject property meets all of the requirements for the Shoreline Variance.

The Hearing Examiner has reviewed Staff's Conclusions and, with the exception of any specific factual statements within the Conclusions that conflict with the Hearing Examiner's Findings of Fact set forth above, finds that the Shoreline Administrator has properly analyzed this Shoreline Variance Application and that the Conclusions of Law reached by Staff should be incorporated into this Decision as Conclusions of the Hearing Examiner. The Conclusions reached by Staff, on pages 3 through 6 of the Staff Report, dated February 1, 2011, Exhibit No. 3 of the Hearing Examiner file, read as follows:

CONCLUSIONS

According to Section 23.90.60, the prescriptive shore setback within a rural-designated shoreline reach for residential development is 45-feet, as measured from the bank rim or crest of a geologically unstable bank. The applicant is requesting the variance to reduce this setback to 25 to 30-feet as measured from the ordinary high water mark (OHWM) of the Strait of Georgia.

SMP Section 23.60.181 states that the purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in the SMP where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the SMP would impose unnecessary hardships on the applicant. 23.60.182 states that variances will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances,

extraordinary circumstances shall be shown, and the public interest shall suffer no substantial detrimental effect. For a Shoreline Variance landward of OHWM to be approved, the proposal must demonstrate compliance with all the criteria of section 23.60.183 of the SMP. These criteria are set forth and addressed below.

23.60.183(a) “That the strict application of the bulk or dimensional criteria in this Program precludes or significantly interferes with a reasonable permitted use of the property.”

As stated previously, the prescriptive setback within the rural shoreline designation is 45-feet as measured from the bank rim or crest of a geologically unstable bank. There is no dispute that the bluff located across the majority of the subject property meets the definition of geologically unstable. This determination was made by the applicant’s own consulting geologist with concurrence from the WCPDS staff geologist. All but a very small portion of the subject property is located waterward of the bank rim or crest of the marine bluff on the subject property. Considering that the starting point to measure the required setback is located at or beyond the eastern property boundary, the strict application of such setback certainly represents a significant interference with most any use of the subject property.

The subject property is located within the Residential Rural (RR) zone district according to Title 20. The purpose of this zone district is to maintain the low density residential character of the areas designated as Residential Rural on the Comprehensive Plan. Construction of a single-family residence represents a reasonable permitted use of property within this zone district. Other uses are permitted and listed within the RR zone district; however it appears as though these uses would also require a request for variance in order to facilitate development. It is important to note that the guiding policy gives preference to the construction of single-family residences along with other water-dependent developments if such developments do not cause adverse effects to the shoreline environment. The latter part of such policy is discussed later within this staff report and will also be contingent on future development permit review incorporating the recommended conditions outlined within this report.

23.60.183(b) “That the hardship described in 20.60.181 is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of this Program, and not, for example, from deed restrictions or the applicant’s own actions.”

The subject property lacks adequate area to construct a single-family residence while meeting the prescriptive setbacks established by the

SMP. Such hardship is based on the presence of a geologically unstable bank located across a majority of the subject property as well as the close proximity of the property to the marine shoreline. In addition, the hardship is also related to the size and shape of the property as originally configured in 1890. None of the above-referenced factors are due to the applicant's own actions.

23.60.183(c) “That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment.”

Numerous lots within the Williams Beach Plat to the north of the subject property are located along the same unstable marine bluff. A majority of these lots are currently developed with single-family residences and appurtenant developments consistent with size of the building area proposed by the applicant. In many cases, these structures are located closer to Georgia Strait than the applicant proposes. Although a majority of the structures pre-date shoreline regulations, the structures are permitted as existing non-conforming structures that in some cases, WCPDS and DOE have allowed expansions of these structures via approval of shoreline conditional use permits.

In considering the proposed variance request, staff has required that the applicant demonstrate, at least conceptually, that any future development proposal in the area of the proposed building envelope will not cause adverse effects to adjacent properties or to users of the subject development. In addition, in order for any development permit to be issued, adequate mitigating measures must be designed and installed in order to demonstrate that such development represents a no net loss of shoreline ecological functions and processes.

A Structural Engineering Report by MJH Engineering (MJH) was submitted by the applicant to WCPDS on October 30, 2008. According to MJH, is feasible to overcome the hazard associated with the unstable bluff on the property via a properly engineered foundation. A conceptual plan using auger cast pilings and concrete reinforced grade beams was included within the MJH report. The report was generated by Mats Harezlak, a State of Washington Registered Professional Engineer.

Western Geotechnical Consultants, Inc. (WGC) provides additional foundation details in a letter to WCPDS dated February 5, 2009. According to the WGC report, specific design analysis will be performed for each pilings proposed to support the future residential structure. The foundation elements will consist of saline resistant concrete epoxy coated re-bar and/or other materials. The

foundation design will be designed for a 100-year design life. The foundations will be constructed from the top of the bank and will involve very little land disturbance. The report also states that a storm water collection and conveyance system will be designed to control drainage from the future development and discharge such storm waters away from the marine bluff. In addition, a re-vegetation plan is proposed across the remaining areas of the subject property to remove invasive plant species and enhance the areas with native plants species the [sic] provide better slope stability than the existing conditions. The report was prepared by Ted Hammer, a State of Washington Registered Professional Engineer.

The applicant was asked a number of pointed questions based on applicable sections of the SMP of which a response was given to each in the February 5, 2009 letter by Mr. Hammer. One question relates to whether or not the future residence on the subject property would be located in a manner so that additional defense works are not likely to become necessary in the future in order to protect the home from shoreline erosion. Mr. Hammer responds by stating that the location of the future building will be located well beyond the estimated retreat of the bluff for the 100-year design life of the structure. In addition, Mr. Hammer states that they are also considering placement of the foundation piles farther back on the slope and utilizing a cantilever action for the house. Mr. Hammer states that based on his analysis, and information provided by MJH, he believes that shore defense structures will not be necessary at the site during the 100-year design life of the future residence.

The applicant provided information in the record that shows a proposed “on-site” septic system (OSS) to serve the future residence. The system includes installation of a septic tank on the face of the marine bluff on the subject property. A distribution line then extends east through County ROW to a vacant lot located outside of shoreline jurisdiction to the east along Marine Drive. It is on this property that a drainfield and reserve area is proposed. Staff has concerns regarding the location of the septic holding tank located on an unstable marine bluff for obvious public health reasons. This permit recommendation has been conditioned that the OSS be re-designed to locate the septic tank on the vacant lot where the remainder of the OSS is proposed. If such a location is not feasible, the location of the tank shall be located in an area determined by an Engineering Geologist or Geotechnical Engineer to represent a safe distance for the life of the system.

With the conditions and modifications outlined within this recommendation, staff believes that the applicant has provided sufficient information at this time to justify the above variance criteria. Fully engineered designs of the proposed structures will be required at the time of shoreline permit application for development of the residence. Such permit will be subject to the current

shoreline regulations and the remainder of the site shall include an enhancement plan that will provide better stability as recommended by Mr. Hammer but also provide habitat benefit over existing conditions. As no shore defense will be needed for the structure, no adverse impacts to shoreline on-going shore processes are anticipated.

23.60.183(d). “That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief.”

As stated previously, there are numerous lots similar in size and configuration to the subject property to the north along Georgia Strait. Such lots are located on the same marine bluff as the subject property and are developed with single-family residences, many of which are located closer to the shoreline than proposed by the applicant.

In 2002, the applicant filed a petition with WCPW for vacation of the portion of the West Bluff ROW located immediately adjacent to the property to the east. Presumably, the purpose of the request was to gain additional area for construction of a residence away from the shoreline; however the request was denied. The applicant proposes a modest building area footprint of 1,250-square feet and has located the proposed envelope as far east on the subject property as feasible utilizing the “shoreline flip” provision outlined in 20.80.230.2 which allows a front yard setback of five-feet along local access roadways.

The applicant has obtained a trail permit to develop residential access to the subject development across portions of the Pacific and West Bluff Road ROWs to the east of the subject property (Permit #2002-00013). The permit is subject to several conditions which include successful shoreline variance permitting prior to any work being completed. Note that no development may occur within shoreline jurisdiction without obtaining a shoreline permit pursuant to 23.50.20. This variance approval recommendation has been conditioned that the proposed driveway be reduced to the minimum width necessary for residential access to one lot. The trail permit was originally issued with the assumption that it would access two-lots and as such a minimum width of 14-feet was required. Access to a single lot requires a minimum width of 12-feet which is supported by this administrator for the portions of the driveway within shoreline jurisdiction. The applicant proposes a width of 20-feet which is excessive for residential access and would result in additional clearing of setback areas. The driveway shall be located as far from the bluff as feasible which shall be demonstrated prior to issuance of any future shoreline development permits to construct the residence and appurtenant developments. Mitigation for impacts to buffer vegetation will be reviewed through future required shoreline development permits and mitigation may be required for any impact to buffer vegetation. The drainfield of the

proposed OSS system has also been located outside of shoreline jurisdiction subject as proposed by the applicant and modified by staff.

With the conditions and modifications recommended by staff, the applicant has shown a diligent effort to minimize the development on the subject property by locating necessary appurtenant developments off-site and by proposing a modest home located as far as feasible from the shoreline of Georgia Strait. As such, staff believes that the applicant has requested the minimum relief necessary to facilitate the future development.

23.60.183(e) “That the public interest will suffer no substantial detrimental effect.”

Numerous public comments were received during review of the permit application which is briefly summarized later within this staff recommendation. One concern raised by many neighboring property owners was a potential loss of public access to the existing West Bluff Road ROW which has provided unobstructed views of Georgia Strait for decades. It is important to note that the WCPW denied a petition to vacate the portion of the West Bluff Road ROW in 2002. The County did grant a trail permit in 2002 that will allow a portion of the ROW to be developed with a residential driveway; however such developments should not prevent any rights of access to the general public that currently exist in the area. The future development will certainly impact views from the County ROW immediately behind the future residential structure being built; however it appears as though the northern half of the West Bluff Road ROW will remain free of obstructions and therefore views in this location will remain. The future development will certainly represent some view obstruction both from the upland as well as from the shoreline and waters of Georgia Strait; however a majority of the surrounding properties are developed with similar structures. The required shoreline development permit will address the actual design of the residence to ensure that it meets all applicable height limitations and other aesthetic criteria.

Several comments also indicated that the disturbance associated with the construction of the future residence would cause further slope instability which could affect adjacent properties. According to the applicant’s Engineering Geologist, land disturbance associated with the construction of the residential foundation will be minimal and that the proposed development will be engineered to withstand the predicted erosion rates without the need to install hardened armoring along the shoreline during the lifetime of the structure. The information was reviewed and approved by the WCPDS staff geologist.

No additional concerns affecting the public interest were identified by staff during the course of the permit review. Based on the above information, staff does not believe that the granting of the variance represents a substantial detrimental effect

to the general public interest.

Section 23.60.185 states that in the granting of all variances, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist, the total of the variances should also remain consistent with the policies of RCW 90.58.020 and should not produce significant adverse effects to the shoreline environment or other users.

Based on review of aerial imagery, it does not appear as though there are any remaining lots in the area of the subject property that are currently undeveloped and comparable to the subject property both in size and location on a marine bluff. Therefore, the opportunity for such cumulative impact as stated in the above criteria does not exist. Even if there were available properties with similar circumstances in the area, if the same geologic and engineering analysis was conducted and conditions imposed, staff does not believe that significant adverse effects to the shoreline environment of other users would be produced.

The Hearing Examiner notes that the Applicant's Geotechnical Engineer, Mr. Hammer, stated that the location of the proposed residence will be well beyond the estimated retreat of the bluff for the 100-year design life of the structure. As noted in the Findings of Fact above, the Hearing Examiner notes that, at the projected rate of recession due to the erosion rate at the bottom of the bluff, as determined likely by the Hearing Examiner, the bluff will erode to the closest point of the proposed residence to the current Ordinary High Water Mark in 100-years. The proposed home is likely to remain stable for approximately 100-years, plus or minus. However, the proposed location is not well beyond the estimated retreat of the bluff for the 100-year design life proposed for the structure. If it is possible to structurally engineer the home in a manner in which the supporting foundation piles are setback from the waterward edge of the house, the likelihood of the structure remaining stable for 100-years or more will be increased.

Whatcom County Shoreline Master Program and implementing regulations do require the structure to be designed for a 100-year design life, and the Applicant is well aware of the fact that erosion from wave action at the toe of the bluff could threaten stability of the home in less than 100 years.

II.

The Footman's and Reid's argue that any hardship supporting a Shoreline Variance request was based on the Applicant's own action in buying a property with knowledge that there was a potential that structural development on the property may not be allowed. Such an interpretation of hardship would result in a hard and fast rule that the purchasers of nonconforming lots within shoreline jurisdiction were ineligible for a variance.

Whatcom County and the Department of Ecology have routinely approved variances to allow residential construction [a preferred use under the Shoreline Management Act] to Parties who purchased their property after the adoption of the Shoreline Management Act and regulations which made a shoreline setback variance necessary for residential development. In this case, where the evidence supports a finding that there will be no adverse impact on shoreline ecological functions or processes and would not destabilize the bluff, it would be unreasonable and unnecessary to deny the property owner a variance which will allow a use permitted outright under both the Shoreline Management Plan and local zoning ordinances. The Footman's rely on Buechel v. The Department of Ecology, 125 Wn.2d 196; 884 P.2d 910; (1994). Reliance on Buechel in this case is misplaced. The Buechel Case was based on a local [Mason County] shoreline regulation which forbid a variance if there was "any" reasonable use of the property without a variance. The Court in Buechel noted that this standard was more strict than the DOE standard found in the Washington Administrative Code and determined that the owners of the property had recreational uses and therefore could not meet the standard which allowed variances only if the failure to grant the variance deprived the owner of "any" reasonable use of his property. The Court pointed out that Mason County had, during the pendency of this case on appeal, modified their standards to leave out the word "any." The Court also pointed out that the property owner had not raised any Constitutional objections to the Ordinance, prior to Appellant review, and for that reason declined to consider potential Constitutional problems with Mason County's strict Variance Criteria.

The Variance Criteria applicable in this case allow consideration of a variance where the setback criteria "... significantly interferes with a reasonable permitted use of the property." [Emphasis added]. Since residential development is a reasonable permitted use in this shoreline jurisdiction, a variance can be considered where the other variance criteria have been met. The hardship, in this case, is a result of the small lot size and existing natural features [geologically unstable slope].

III.

The Footman's and Reid's also cited a number of decisions by Shoreline Management Hearings Boards, which have denied variances to allow structural development for, otherwise, permitted uses within shoreline jurisdiction. In those cases, where variances have been denied, the denial was based on conflicts between the proposal and the purpose and policies of the Shoreline Management Act and the applicable local Shoreline Management Program. Denials were based on an adverse impact to the public interest. There has been no showing that granting Mr. Caldwell his requested Shoreline Variance would have a substantial detrimental impact on the public interest in protecting shoreline ecology and natural processes, or on any other public interest which is appropriately considered in order to carry out the intent of the Shoreline Management Act and the policies and regulations of Whatcom County Shoreline Master Program.

The Buechel Court noted that the reasonable expectations of the purchaser of a non-conforming lot was a factor, although not "necessarily determinative," in determining what is a

reasonable use. The law in regard to the granting of shoreline variances requires a review of the totality of the circumstances on a case by case basis.

IV.

The Footman's and Reid's rely heavily on the definition of "Unbuildable Land" found in Section 23.110 of the Whatcom County Shoreline Master Program. Unbuildable land is defined as follows:

- .1 Unbuildable Land means land which is not suitable for use as building sites or for impervious road, parking, or storage areas, because of inherent hazards to structures or human activity thereon. Such lands include, but are not limited to: areas with average slopes exceeding thirty percent (30%); unstable geologic formations, as indicated by soil survey and/or past experience of movement or settling of the land; soils of low or variable shear strength or load-bearing capacity; major groundwater recharge areas; wetlands not approved for development, or areas designated formally by a State or County agency as floodways or coastal flood hazard areas.

The property owned by the Applicant does fall within the definition of "Unbuildable Land" since it has average slopes exceeding 30% and is on a geologically unstable bluff. In order to determine how the fact that the property falls within the definition of "Unbuildable Land" affects the proposed construction of a single-family residence, it is necessary to review the only Section in the Shoreline Management Plan where the term "Unbuildable Land" is used. The Staff analysis set forth in the Staff Report appropriately undertakes the required analysis on pages 7 and 8 of the Staff Report. The Staff analysis reads as follows:

The term Unbuildable Land is defined in 23.110 of the SMP as land which is not suitable for use as building sites or for impervious road, parking or storage areas, because of inherent hazards to structures or human activity thereon. Such lands include, but are not limited to: areas with average slopes exceeding thirty percent, unstable geologic formations, as indicated by soil survey and/or past experience of movement or settling of the land; soils of low or variable shear strength or load-bearing capacity; major groundwater recharge areas; wetlands not approved for development, or areas designated formally by a State or County agency as floodways or coastal flood hazard areas.

It is important to note that the term Unbuildable Land is not referenced anywhere within the main text of the 1998 SMP. It does appear again in 23.110 in definition of Open Space. Open Space is the portion of the lot area not covered by enclosed buildings, and useful for active or passive

recreation or visual enjoyment. Development such as swim or reflection pools, pedestrian or bicycle ways, tennis courts and outdoor eating space may be considered open space, together with landscaped buffer strips. Section 23.110.O.4 goes on to state the for regulatory purposes, not more than a total of 50% of the required open space for a proposal may be provided in required perimeter setback areas, *unbuildable land areas* (emphasis added), water surfaces, or impervious surfaces such as patios, paths or tennis courts. Parking areas, driveways, and outdoor storage and loading areas shall not be considered open space; nor shall tidelands or shorelands unless specifically authorized.

Open space standards for shoreline development are outlined in 23.90.64 which makes reference to Table 23.90.60 to establish the minimum percentage of the site which shall be left in open space as defined in Section 23.110; provided that this requirement shall not apply to a single family residence on a legal lot of record.

Mr. Carmichael [Attorney for the neighboring property owners, the Reid's and Footman's] appears to have taken the definition out of its proper context. Single-family development on a legal lot of record is not subject to open space requirements based on the clear reading of 23.90.64. For those developments that are subject to open space requirements, 23.90.64 leads you to the definition of open space in 23.110 to determine what areas are suitable for compliance with such standards. It is here, that the regulation refers to the term unbuildable land. The absence of the term elsewhere within the regulation confirms this determination.

The omission of single-family residences from such regulations are likely associated with the guiding policy of the SMA in 90.58.020 which gives preference to single-family developments as long as such developments can be constructed in a manner that does not adversely affect the shoreline environment. The issues raised by staff during the course of the review and the subsequent information provided by the applicant are suitable to grant relief from the prescriptive setback of the subject property. Additional engineering analysis and mitigation will be required prior to further demonstrate that the future development can be accomplished without adverse impacts to the shoreline environment, adjacent properties and to the general public.

The Hearing Examiner concurs fully in the analysis of the Shoreline Administrator. Where a term is defined within the Definition Section of the local regulation, the definition is referred to only in those places where the regulatory language includes the term defined. A definition does not have any regulatory impact in and of itself, outside of the context of the regulations themselves. There is nothing in the Shoreline Management Act, the Washington

Administrative Code, or in the Whatcom County Shoreline Master Program and implementing regulations that forbids outright construction on a geologically unstable bluff.

V.

The requested use for which the Shoreline Variance is sought, residential development, is a preferred use under the Shoreline Management Act and is an outright permitted use under Whatcom County Shoreline Master Program and Zoning Ordinance. The proposed residence will not substantially affect shoreline processes and ecological functions; will not significantly adversely impact the public interest; and it will not endanger the surrounding uses. The residence will be located in an area of suburban-like residential development, with single-family homes on all three sides, and will be compatible with the existing residential community. The Applicant has shown compliance with all of the criteria for a Shoreline Variance request and the variance should be granted subject to the conditions set forth in the Staff Report.

VI.

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

Rhyon Caldwell is hereby granted a Shoreline Variance Permit to allow construction of a single-family residence and requested appurtenant development, addressed as 429 Bluff Road, Point Roberts, Washington, in accordance with the Site Plan, dated June 18, 2009, on a single parcel, consisting of Lots 1 and 2 of the Williams Beach Addition to Point Roberts, subject to the following conditions:

1. The use, location and size of the proposed building area, as indicated on the revised site plan dated June 18, 2009 and modified by WCPDS on January 29, 2010, shall not be modified or changed in any way without further review by the Whatcom County Shoreline Administrator. Any future changes that are determined by the Shoreline Administrator to be substantive pursuant to the provisions of 23.60.140 shall require an application for revision and will require additional review and approval by the Whatcom County Hearing Examiner and the Washington State Department of Ecology.
2. The Applicant shall obtain a Building Permit from the Whatcom County Planning and Development Services – Building Services Division prior to starting any development activity on the subject property.
3. Prior to application of the above required Building Permit, the Applicant shall obtain a Shoreline Substantial Development Permit or Shoreline Statement of Exemption as necessary pursuant to 23.60.01 of the current Whatcom County Shoreline Management Program.

4. Prior to issuance of a building permit, the Applicant shall bind platted Lot 1 and Lot 2 by a covenant filed with the County Auditor or by vacation of the interior lot lines. A binding covenant shall include the County as a signator to prevent removal of the covenant without the knowledge of the County pursuant to Whatcom County Code 20.83.090.
5. Prior to issuance of a building permit, a redesign of the proposed on-site septic system shall be submitted locating the septic tank on the vacant lot outside of shoreline jurisdiction where the remainder of the existing design is proposed. If locating the tank on the vacant lot is not feasible, the tank shall be located in an area determined to be stable for the life of the structure (100-years) by a Washington State Licensed Engineering Geologist or Geotechnical Engineer. Such determination shall be in writing and provide rationale for the proposed location.
6. A stormwater collection and conveyance system, as designed by a State of Washington Licensed Geotechnical or Engineering Geologist, shall be completed and approved by WCPDS prior to issuance of the above required development permits. If feasible, the stormwater system shall convey water to the east for infiltration off-site or discharge to a County ditch if approved by the Whatcom County Public Works (WCPW) – Engineering Division. If conveyance to the east is not feasible or permitted by WCPW, the design shall tightline the stormwater to the toe of the marine bluff on the subject property. A Hydraulic Project Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW) is required for those portions of the tightline system that will be located at or near the ordinary high water mark of Georgia Strait. A copy of the HPA shall be provided to WCPDS prior to issuance of the above-referenced development permits.
7. Engineered foundation and house plans stamped by a Washington State Licensed Professional Engineer with written analysis and calculations shall be submitted and approved by WCPDS. The engineering shall demonstrate the concepts proposed as part of this shoreline variance approval by MJH Engineering and Western Geotechnical Consultants. The residential structure will withstand the predicted erosion rates for a design life of 100-years for safe occupancy without the need for hardened shore defense structures for the life of the structure. The plans will be required prior to issuance of any development permit by WCPDS. If geologic conditions have changed since the approval of this variance request, an updated slope stability analysis shall also be required.
8. A mitigation plan to enhance the slope stability across the subject property shall be completed by a qualified professional as recommended by Western Geotechnical Consultants. The plan shall include monitoring and maintenance provisions to ensure success after implementation. The plan shall be installed on the property and an as-built drawing submitted and approved by WCPDS prior to final approval of the building permit. Additional mitigation may be required through review of the required shoreline development permit. Such plans can be developed simultaneously in a single submittal.

9. A professional Archaeologist shall be retained to assess the subject property regarding historical and/or cultural significance, potential impacts as a result of the proposal, and to make recommendations for preservation and/or protection of the resource. The applicant shall provide a copy of the assessment to the Whatcom County Shoreline Administrator, affected Tribes and the Washington State Department of Archaeology and Historic Preservation (DAHP) for review and approval prior to WCPDS approval of any ground disturbing activities on the subject property.
10. Construction shall be commenced within two years of the effective date, as defined in 23.60.161.C, of this shoreline variance permit approval. The Whatcom County Hearing Examiner may authorize a single extension for a period of not more than one year based on a showing of good cause, if a request for extension has been filed with the Whatcom County Shoreline Administrator before the expiration date of the shoreline variance and notice of the proposed extension is given to parties of record and the Washington State 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 18th day of March 2011.

Michael Bobbink, Hearing Examiner