

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE SUBSTANTIAL DEVELOPMENT	)	SHR2009-0006
SHORELINE VARIANCE	)	SHV2009-0004
Application for	)	
	)	
<i>Dan and Joyce Cheney</i>	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND DECISION

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**SUMMARY OF APPLICATION AND DECISION**

Application: The Applicants are requesting approval of a Shoreline Substantial Development Permit to construct a single-family residence and associated appurtenances. The Shoreline Variance Permit is requested in order to reduce the buffer/setback from a shoreline associated wetland for the purposes of view enhancement.

Decision: The requested permits are granted, subject to conditions.

**FINDINGS OF FACT**

**INTRODUCTION**

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing.

**I.**

**PRELIMINARY INFORMATION**

Applicant: Dan and Joyce Cheney

Applicant Representative: Jeffrey McClure – RMC Architects  
1223 Railroad Avenue  
Bellingham, Washington 98225

Property Location: 2189 Northshore Road  
Bellingham, WA 98226

Legal Description: Section 25, Township 38 North, Range 03 East, W.M.  
Parcel(s) Nos. 380325 114178 and 380325 114196

Adjacent Water Body: Lake Whatcom  
Shoreline Designation: Shoreline Residential  
Shoreline of Statewide Significance: Yes  
Zoning: Residential Rural  
Comprehensive Plan: Suburban Enclave(s)  
Subarea: Lake Whatcom

Applicable Shoreline Program Provisions:

SMP 23.10	Purpose and Intent
SMP 23.20	Goals and Objectives
SMP 23.30.06	Shoreline Residential Area
SMP 23.40	Shorelines of Statewide Significance
SMP 23.50	Applicability
SMP 23.60	Shoreline Permits
SMP 23.70	Administration
SMP 23.80	Legal Provisions
SMP 23.90	General Policies and Regulations
SMP 23.100.11	Residential Policies and Regulations
SMP 23.110	Definitions

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

Legal Notices: Published – January 7, 2010  
Mailed – July 15 and December 23, 2009  
Posted – January 5, 2010

Hearing Date: January 27, 2010

Parties of Record:

Dan and Joyce Cheney  
2195 Northshore Road  
Bellingham, Washington 98226

Philip Serka  
Adelstein, Sharpe & Serka  
PO Box 5158  
Bellingham, WA 98227

Jeffrey McClure  
RMC Architects  
1223 Railroad Avenue  
Bellingham, Washington 98225

David and Thuy Tiller  
2181 Northshore Road  
Bellingham, WA 98226

Chad Yunge  
Planning and Development Services

Exhibits:

- 1 Land Use Application
  - 1-1 Supplemental Application
  - 1-2 Project Narrative
  - 1-3 Determination of Complete Application, dated July 6, 2009 and Notice of Application
  - 1-4 Property Owner labels
  - 1-5 Certificate of Mailing of Notice of Application, dated July 15, 2009
- 2 Staff Report, dated January 21, 2010
- 3 Site Plan
- 4 Aerial Map
- 5 Proposed Critical Area Buffer Mitigation Plan, dated June 2009
- 6 Certificate of Mailing, dated December 23, 2009
- 7 Legal Notice, dated January 7, 2010
- 8 Certificate of Posting, dated January 5, 2010
- 9 Email, dated January 13, 2010 from Chad Yunge requesting additional week to prepare for hearing
- 10 Request for hearing notice
- 11 David and Thuy Tiller, comment letter, dated August 13, 2009, with Site Plan attached
- 12 Order on Plaintiffs' Motion for Summary Judgment (Cheney v Tiller)

- 13 Comment Letter, dated July 30, 2009 from Steve and Sally Lackey
- 14 Letter dated September 22, 2009, from Jeffrey McClure
- 15 Memorandum, dated July 27, 2009, from Stacie Pratschner, Watersheds Staff
- 16 Site Color Photos
- 17 Letter dated October 9, 2009, from Chad Yunge to Jeffrey McClure, with McClure response, dated October 26, 2009 attached
- 18 Proposed Site Plan showing approved setback line and existing trees to remain and hazard trees approved for removal, with graphic drawings [18-1] and letter from Moonlight Tree Service, Certified Arborist [18-2] attached
- 19 Letter of Representation from Phil Serka, dated January 26, 2010
- 20 Memorandum in Support of Dan and Joyce Cheney's Application, from Philip Serka, dated January 26, 2010
- 21 Written Testimony presented by Mr. David Tiller at the public hearing
  - 21-A Superior Court Judgment and Decree, No. 36776
  - 21-B Superior Court Order on Plaintiffs' Motion for Summary Judgment, No. 07-2-00818-3  
Superior Court Order on Plaintiffs' Motion to Strike, No. 07-2-00818-3  
Superior Court Order Granting Defendants' Motion for Leave to Amend Answer and Counterclaims, No. 07-2-00818-3
  - 21-C Tiller Ingress & Egress Easement Exhibit, dated 01/31/2008
  - 21-D Proposed Site Plan
  - 21-E Colored Photo showing SE Corners of Houses- facing east
  - 21-F Colored Site Photo
- 22 Comment Letter, dated February 5, 2010 from Mr. and Mrs. Tiller
- 23 Response letter dated February 10, 2010 from Mr. Serka
- 24 Email dated January 27, 2010 from Phil Serka confirming clients concur with Staff's proposed revisions to Conditions #1 and #12 of the Staff Report

## II.

The Applicant has indicated that the Revised Staff Report is factually correct. The Applicant has stated no objection to the revised Conditions of Approval recommended by Staff. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services

Division of Whatcom County Planning and Development Services, as set forth in the Revised Staff Report, Exhibit #2, dated January 21, 2010, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

### **III.**

Neighboring property owners to the west of the Cheney parcel raised a number of concerns. Some of the concerns are outside the jurisdiction of the Hearing Examiner and are not relevant to a view enhancement.

An appropriate concern to be dealt with by the Hearing Examiner regards the potential impact from tree removal, site demolition, and construction. The Hearing Examiner has included in the Conditions of Approval a requirement that prior to the removal of the Hemlock tree in the vicinity of the corner of the proposed house, the Applicants provide a tree protection plan completed by a Certified Arborist, in order to address, amongst other issues, the possible impact on the removal of that tree on other large trees in the immediate vicinity. The Arborist's report should specifically identify any recommendations related to removal of any trees on site.

### **IV.**

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

## **CONCLUSIONS OF LAW**

### **I.**

Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Permits for the proposed construction of a single-family residence and associated appurtenances. Staff also recommends approval of the requested Shoreline Variance to reduce the buffer/setback from a shoreline associated wetland for the purposes of view enhancement.

Findings of Fact and Conclusions of Law are set forth in the Revised Staff Report, Exhibit #2, dated January 21, 2010. Subject to the Conditions of Approval recommended by Staff, the Hearing Examiner also concludes that the proposal is consistent with the Goals, Policies, and Purpose of the Shoreline Management Act, RCW 90.58, and with the Goals and Policies of the Whatcom County Shoreline Management Program. The Conclusions of Law adopted by Staff in the Staff Report are incorporated herein as Conclusions of Law.

### **II.**

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

## DECISION

A Shoreline Substantial Development Permit and Shoreline Variance Permit are hereby granted to Dan and Joyce Cheney to construct a single-family residence and associated appurtenances. The Shoreline Variance Permit hereby grants relief to reduce the buffer/setback from a shoreline associated wetland for the purposes of view enhancement on property located at 2195 Northshore Road, Bellingham, Washington. The permits are granted subject to the following conditions:

1. The use, location and size of the improvements on the site are as indicated on the revised site plan, dated October 22, 2009. The revised site plan, as modified and conditioned by this approval, shall not be modified or changed in any way without additional review by the Whatcom County Shoreline Administrator. If proposed changes are determined by the Administrator to be substantive pursuant to 23.60.17 of the Shoreline Management Program, then a revision application will be required for review by the Whatcom County Hearing Examiner and the Washington State Department of Ecology as necessary.
2. The Applicant/Proponent shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property including any clearing and/or grading. The building permit will require additional review by the Whatcom County Shoreline Administrator to determine compliance with conditions of these shoreline permits prior to issuance of the building permit.
3. The proposed single-family residence shall not exceed 30-feet in height as measured from average existing grade to the peak of the structure. The portions of the detached garage structure shall not exceed 15-feet from average existing grade to the peak of the structure. Elevation drawings clearly demonstrating compliance with the above height restrictions shall be included with the required plan set associated with the building permit application.
4. Landfill and excavation shall be limited to the minimum necessary to accommodate the dig out/backfill of the proposed foundations, and construction of the approved appurtenant developments within the jurisdiction of the Whatcom County Shoreline Management Program. All remaining excavated materials shall be removed from the subject property and disposed of at an approved location through review of a land disturbance permit application to be applied for concurrently with the required building permit.
5. A final mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the shoreline buffer area as a result of the location of the future residence as well as anticipated impacts caused by construction of the residence. The final plan shall include impacts associated with construction of the proposed footpath and footbridge in the buffer area as well as areas associated with demolition of the existing cabin structure where no new development is proposed. The impact should also include the loss of the four black cottonwoods authorized for removal by this permit. The plan shall be submitted and approved by County Staff at the time of the above-referenced building permit application. The plan shall be consistent with the mitigation standards enumerated within the Whatcom County

Critical Areas Ordinance and shall include measures for monitoring and maintenance. Chemical treatment of the remaining buffer/setback areas shall be prohibited.

6. Wire-backed silt/construction exclusion fencing shall be installed as close to the proposed development area as feasible prior to any clearing and/or grading activity on the subject property in order to minimize inadvertent damage to remaining buffer areas during construction. Such fencing shall be installed in accordance with applicable Whatcom County Development Standards and will require inspection by County Watershed Staff prior to commencement of construction or demolition activity. No use of heavy equipment, staging of construction materials, stockpiled soils or any other activity is allowed within the buffer area during construction. The proposed location of the above-referenced fencing shall be included on a Temporary Erosion and Sedimentation Control (TESC) Plan to be submitted with the required building permit application. The TESC Plan shall include Best Management Practices (BMPs) proposed to ensure exposed sediments are contained throughout the duration of the construction process.
7. A tree canopy retention plan shall be provided on the site plan submitted with the required building permit in accordance with WCC 20.80.735(2)(d)(iv)(a). The site plan shall also include impervious surface calculations associated with the footprints of any structure, overhangs greater than 3-feet, paved, concrete or graveled areas, patios, driveways, and parking areas. Areas of proposed impervious surfaces shall not exceed 2,500-square feet or 20% of the surface area of the lot; whichever is greater. Stormwater generated as a result of the proposed development shall be routed to an infiltration trench or other approved treatment system. Design of such structures shall be included with the building permit application for review by County Watershed Staff. Location of such structures is prohibited within the remaining buffer/setback areas.
8. Clearing activity is prohibited in the drainage swale/ditch-line along the eastern property line.
9. If pervious surfaces are proposed, an inspection of the sub-base is required by County Watershed Staff prior to installation of the top course. Inspection of the top course is required prior to final inspection of the building permit. Installation of pervious technologies shall be done in accordance with manufacturer specifications.
10. Clearing activity as defined in WCC 20.97.054 resulting in exposed soil conditions and exceeding 500-square feet in area, are prohibited during the wet season (October 1 – May 31).
11. A Revocable Encroachment Permit from Whatcom County Public Works – Engineering Division is required prior to any work within County right-of-way along Northshore Road. A paved apron is required for new access point pursuant to applicable County Development Standards. Note that a sight distance analysis may be required by a certified surveyor or engineer to ensure the proposed access point is safe.

12. A tree protection plan shall be completed by a Washington State Certified Arborist prior to the removal of any of the large trees onsite. The plan shall ensure that remaining large trees in close proximity to the proposed residence are protected during the tree removal, demolition, and construction phase of the project. Any recommendations by the tree protection plan shall be incorporated as conditions of the building and demolition permits. If any view windowing or other pruning is proposed, such information shall also be included within the arborist assessment for review by the Shoreline Administrator. If additional trees are determined to be hazardous in the future and proposed for removal, such removal shall require review and approval by the Shoreline Administrator pursuant to 23.50.01 of the Shoreline Management Program.
13. The four (4) black cottonwoods identified as hazard trees along the shoreline of Lake Whatcom and authorized for removal by this permit application shall be flagged with orange tape for inspection by the Whatcom County Shoreline Administrator prior to removal. The existing yellow flagging shall be removed from the property to avoid any confusion. Upon installation of the required flagging, the Applicant/Proponent shall contact the Whatcom County Shoreline Administrator for a visual inspection prior to tree removal. Only those trees authorized for removal by this permit approval shall be shown on the building permit site plan as proposed for removal to avoid any confusion.
14. A notice on title shall be recorded with the County Auditor's Office that notifies future owners of the subject property of required buffer/setback areas on the subject property. Contact the Whatcom County Shoreline Administrator for the form necessary for recording. The notice on title shall be filed prior to building permit issuance.
15. Authorization to conduct development activities shall terminate five (5) years after the effective date, as defined in 23.60.19.A.3, of this shoreline variance, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit and notice of the proposed extension is given to parties of record and the Department of Ecology. Construction shall commence within two years of the effective date of the Shoreline Variance as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.

### **NOTICE**

In addition to incurring civil liability under Shoreline Management Program Section 23.80.20 and RCW 90.58.210, pursuant to RCW 90.58.220 any person found to have willfully engaged in activities on shorelines of the state in violation of the provisions of the act or the Shoreline Management Program or other regulations adopted pursuant thereto shall be guilty of a



gross misdemeanor and shall be punished by a fine of not less than \$25 or more than \$1,000 or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment; provided that the fine for the third and all subsequent violations in any five year period shall not be less than \$500 nor more than \$10,000. Any person who willfully violates any court order, regulatory order or injunction issued pursuant to the Shoreline Management Program shall be subject to a fine of not more than \$5,000, imprisonment in the county jail for not more than 90 days, or both.

NOTICE OF ADMINISTRATIVE APPEAL PROCEDURES  
FROM FINAL DECISIONS OF  
THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any opponent of record, or any County department. Appeal to County Council. Within ten business days of the date of the 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.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. 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 19<sup>th</sup> day of February 2010.

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Michael Bobbink, Hearing Examiner



January 21, 2010

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of <b>Dan and Joyce Cheney</b> for a Shoreline Substantial Development and Shoreline Variance Permit	SHR2009-00006, SHV2009-00004 FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
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I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

Application: The applicant requests approval of a shoreline substantial development permit to construct a single-family residence and associated appurtenances. In addition, the applicant requests approval of a shoreline variance permit to reduce the buffer/setback from a shoreline associated wetland for the purposes of view enhancement.

Recommendation: Staff recommends approval of the requested permits subject to modifications and conditions outlined within this staff report.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Dan and Joyce Cheney  
2195 Northshore Road  
Bellingham, Washington 98226

Applicant Representative: Jeffrey McClure – RMC Architects  
1223 Railroad Avenue  
Bellingham, Washington 98225

Property Location: 2189 Northshore Road

Legal Description: Section 25 Township 38 North, Range 03 East, W.M.  
Parcel(s) #: 380325114178, 380325114196

Adjacent Water Body: Lake Whatcom

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes  
 Zoning: Residential Rural  
 Comprehensive Plan: Suburban Enclave(s)  
 Subarea: Lake Whatcom

**B. PROCEDURAL INFORMATION**

Applicable Shoreline Program Provisions:

SMP 23.10	Purpose and Intent
SMP 23.20	Goals and Objectives
SMP 23.30.06	Shoreline Residential Area
SMP 23.40	Shorelines of Statewide Significance
SMP 23.50	Applicability
SMP 23.60	Shoreline Permits
SMP 23.70	Administration
SMP 23.80	Legal Provisions
SMP 23.90	General Policies and Regulations
SMP 23.100.11	Residential Policies and Regulations
SMP 23.110	Definitions

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

III. FINDINGS

The applicant is requesting approval of a shoreline substantial development permit to construct a new single-family residence and associated appurtenant developments on a residential lot located on Lake Whatcom. In addition, the applicant requests approval of a shoreline variance to reduce the required buffer/setback from the edge of a shoreline associated wetland on the subject property. The purpose of the variance request is based on the applicant’s desire to enhance the view of Lake Whatcom from the proposed residential structure.

Lake Whatcom is a shoreline of statewide significance pursuant to 23.40.02.A of the Whatcom County SMP.

The subject property consists of a relatively long and narrow lot measuring 60-feet in width along the shoreline of Lake Whatcom by approximately 278-feet in length as measured from the shoreline to the north where the property fronts along Northshore Road. Total square footage of the upland portions of the subject property measure approximately 16, 680 – square feet. The adjacent parcel to the east is currently developed with a single-family residence currently owned and occupied by the applicants. A single-family residence is currently being constructed on the adjacent lot the west. The property is on a slope that grades downhill from Northshore Road to Lake Whatcom. A rock outcrop is located near the southern end of the property which drops steeply to the shoreline of Lake Whatcom. An abandoned railroad grade bisects the subject property and creates a flat area through the northern central portion of the property. A derelict former cabin structure, measuring approximately 600-square feet in size, is located south of the

former railroad grade near the top of the rock outcrop which is located approximately 18-feet above Lake Whatcom. The area between the cabin structure and the shoreline is heavily wooded and overgrown with a mixture of native and non-native understory vegetation. The northern portion of the property is overgrown with younger trees and understory vegetation and likely has been historically impacted by the construction of Northshore Road and the former railroad operations.

An assessment of critical areas was conducted on the subject property Pacific Ecological Consultants (PEC) dated June 2009. According to the PEC report, a wetland was delineated along the southern end of the subject property between the existing rock outcrop and the shoreline of Lake Whatcom. The wetland was rated as a Category III with a habitat score of 11. Lake Whatcom was also identified as habitat conservation area (HCA). A drainage ditch is located along the eastern property boundary; however according to PEC and critical area staff, is not a regulated HCA.

Proposed developments within SMP jurisdiction include construction of a single-family residence with a development foot print of 2,280 – square feet. The structure will consist of a main floor and a partial walk-out basement. A deck is proposed along the south side of the main floor measuring approximately 130-square feet in size. In addition, the applicant proposes an at-grade patio area along the southern side of the walk-out basement measuring approximately 230-square feet in size. The proposed residence, including the deck and patio areas, occupies a total development footprint of approximately 2,510 – square feet. In order to access the shoreline of Lake Whatcom, a 3-foot wide footpath is proposed from the residence down to an elevated walkway across the wetland to the lake. The applicant also proposes a detached 2-car garage along the northeastern portion of the property. The proposed garage also includes a partial walk-out basement and has a development footprint of approximately 690-square feet. The 200-foot shoreline jurisdiction includes approximately 2/3 of the proposed garage structure. Remaining developments proposed within shoreline jurisdiction include footpaths leading from the garage to the residence.

According to the applicant, the proposed developments will require a total grading amount (excavation and landfill) of approximately 870-cubic yards (704 cubic yards excavation, 166- cubic yards landfill). A majority of the excavation is associated with the dig out required to accommodate the walk-out levels of both the main residential structure and the detached garage. The PEC report identifies a total impact of 1,044 – square feet to existing intact buffer/setback areas from Lake Whatcom and the shoreline associated wetland on the subject property. These areas are dominated by a canopy of Douglas fir and western red cedar with a subordinate of red alder. The shrub layer is dominated by salal on the south side of the existing cabin structure with a mix of Himalayan blackberry, salmonberry, and vine maple on the north side of the cabin. Sword fern dominates the herbaceous layer. A dense cover of English ivy is found over the ground and growing on the trunks of most trees. With exception of the Himalayan blackberry and English ivy, the areas of impact consist of native trees, shrubs and groundcover species. Additional impacts were identified by staff during the course of the review relating to the construction of the proposed footpath through the buffer/setback area as well as impacts to the existing wetland as a result of the proposed elevated walkway construction.

In addition to the above-referenced impacts to the buffer/setback area, the applicants propose removal of numerous trees within the buffer/setback for the purpose of view enhancement and the fear that some of the trees may represent a hazard to the structure in the future. The plans illustrate the removal of several large conifers including a 20-inch diameter western hemlock, and three western red cedars with a diameter of 24, 16, and 12-inche diameters. It is important to note that the site plan does not depict all of the trees proposed for removal. Staff requested that the applicant flag all trees proposed for removal on the subject property. Upon inspection of the

flagging, it was determined that the applicant proposes removal of all black cottonwood trees on to the south of the proposed residence. The applicant submitted an undated letter from Mr. John Hymas, a certified arborist of Moonlight Tree Service (MTS) outlining general observations made by MTS during a site inspection to the subject property in August of 2008. Mr. Hymas describes a large cottonwood tree that uprooted on the subject property in 2005 and struck the applicants existing residence to the east of the subject property. The tree that fell was greater than five feet wide at the butt and over 100-feet tall according to Mr. Hymas. Mr. Hymas investigated a clump of trees located within 10-feet of Lake Whatcom which consist of cottonwoods, alders and willow species. The largest of the trees are cottonwoods ranging from 80 to 100-feet tall with diameters of 14 to 21-inches. According to Mr. Hymas, the trees were healthy with no visible defects and only minor storm damage. Mr. Hymas recommends that the cottonwood trees be removed and replaced with other native trees.

According to 23.90.13, shore setbacks within jurisdiction of the SMP are determined based on the buffering standards outlined within the Whatcom County Critical Areas Ordinance (CAO) incorporated by reference within the SMP pursuant to 23.10.06.A. According to 16.16.630.D.3, the standard buffer width for the wetland on the subject property is 80-feet from the delineated wetland edge. The buffer from the ordinary high water mark (OHWM) of Lake Whatcom is 100-feet pursuant to 16.16.740.C. Application of both buffers in this case would result in a setback of approximately 120-feet from Lake Whatcom.

According to the applicants, a 15-foot utility easement bisects the central portion of the subject property running east/west. The presence of this utility easement, along with the prescriptive setbacks discussed above, leave inadequate space to construct a single-family residence according to the applicants. The area located north of the utility easement would be located approximately 165-feet from Lake Whatcom, and according to the applicants, would afford little to no view of the lake. The applicants request approval of a variance to reduce the buffer/setback from the wetland from 80-feet to 25-feet and the buffer/setback from Lake Whatcom from 100-feet to 55-feet.

#### IV. CONCLUSIONS

##### **Shoreline Substantial Development**

Section 23.60.01.A states that a substantial development permit shall be required for all proposed use and development of shorelines unless the proposal is specifically exempt from such requirements pursuant to one or more of the listed exemptions outlined in 23.60.02.2. According to the applicant, total grading amounts will exceed 250-cubic yards in order to facilitate the project proposal. As such, the project exceeds the threshold for exempt review and a substantial development permit is required.

According to 23.60.01.B, in order to be approved, the decision maker must find that the proposal is consistent with the following criteria:

1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance under SMP 23.60.03;
2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated; and

3. For projects located on shorelines of statewide significance, the policies of Chapter 4 shall be also adhered to.

In addition to the above criteria, 23.60.01.C states that in the granting of all shoreline substantial development permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if shoreline substantial development permits were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

General and use-specific policies and regulations associated with residential developments are found within Sections 23.90 and 23.100.11, respectively. The following policies and regulations are appropriate for the type of use and development being proposed:

### **Ecological Protection and Critical Areas**

#### **23.90.03.A Policies**

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

#### **23.90.03.B Regulations**

- Mitigation Sequencing - To comply with the policies of SMP 23.90.03.A, a shoreline permit applicant or project proponent shall demonstrate all reasonable efforts have been taken to provide sufficient mitigation such that the activity does not have significant adverse impacts. Mitigation shall occur in the following prioritized order:

1. Avoiding the adverse impact altogether by not taking a certain action or parts of an action, or moving the action.
  2. Minimizing adverse impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology and engineering, or by taking affirmative steps to avoid or reduce adverse impacts.
  3. Rectifying the adverse impact by repairing, rehabilitating or restoring the affected environment.
  4. Reducing or eliminating the adverse impact over time by preservation and maintenance operations during the life of action.
  5. Compensating for the adverse impact by replacing, enhancing, or providing similar substitute resources or environments and monitoring the adverse impact and the mitigation project and taking appropriate corrective measures.
- Because of its incorporation by reference herein under Section 23.10.06.A. above ,the provisions of the Whatcom County Critical Areas Ordinance, WCC 16.16, shall apply to any use, alteration or development within shoreline jurisdiction whether or not a shoreline permit or written statement of exemption is required. Unless otherwise stated, no development shall be constructed, located, extended, modified, converted, or altered, or land divided without full compliance with WCC 16.16 and the Program, provided that alteration for a water-oriented use may be allowed in accordance with WCC 16.16.225.B.3. Within shoreline jurisdiction, the regulations of WCC 16.16 shall be liberally construed together with the Program to give full effect to the objectives and purposes of the provisions of the Program and Act.
  - Unless otherwise stated, critical area buffers shall be protected and/or enhanced pursuant to this Program and WCC 16.16.
  - The cumulative effects of individual development proposals shall be identified and evaluated to assure that no net loss standards are achieved.
  - Whenever the administrator issues a determination or recommendation and/or conditions of approval on a proposal, which will result in the denial or substantial alteration of a proposed action, such determinations will be provided in writing stating the relationship(s) between the ecological factors, the proposed action and the condition(s).

As conditioned and modified, the proposed development is consistent with the above policies and regulations. Complete avoidance of the shore setback/buffer appears to be possible between Northshore Road and the utility easement running through the central portion of the property. A residence at this distance would afford little view of Lake Whatcom due to the proximity of adjacent residential structures to the east and west of the subject property and the applicants are seeking relief from complete avoidance through application of a shoreline variance discussed later within this staff report. An existing cabin structure with a footprint measuring approximately 600-square feet in size is located within the setback/buffer from Lake Whatcom and the associated wetland. In addition, a filled area consisting of concrete and asphalt is located north of the cabin, also within the existing buffer/setback area. These developments represent existing adverse impacts to existing buffers/setbacks on the subject property. The applicants have minimized impacts from the proposed residence by locating the structure further away from the lake and wetland. In addition, this administrator has discussed additional reductions with the applicant's representative to further reduce the proposed deck and patio area. The purpose of the additional reduction is to avoid damaging several large conifers located to the south, southwest of the proposed residence. If the applicants were to

propose a replacement of the existing cabin structure, it is unlikely that these trees would survive the impacts from construction due to the proximity of the root structures to a new foundation installation in this area. Finally, a conceptual mitigation plan has been reviewed and approved by staff to enhance the remaining buffer areas to compensate for the area of existing buffer impact as a result of the proposed development. This approval recommendation has been conditioned that a final plan be submitted for approval prior to issuance of a building permit. The plan shall include compensation for impacts associated with the proposed footpath and boardwalk within the buffer/setback area and through the wetland. In addition, additional areas shall be included for enhancement along the east and west property lines as these areas will likely be impacted during the construction phase of the project. Such areas are depicted on the site plan approved by this administrator. Approval of the final mitigation plan along with necessary assurances to demonstrate the success of such mitigation, should result in no net loss of ecological function to the wetland/shoreline of Lake Whatcom. As such, approval of additional requests for like actions should not result in a cumulative adverse impact.

## **Water Quality and Quantity**

### **23.90.04.A Policies**

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

### **23.90.04.B Regulations**

- Shoreline use and development shall incorporate measures to protect and maintain surface and ground water quantity and quality in accordance with all applicable laws.
- New development shall provide stormwater management facilities designed, constructed, and maintained in accordance with the current stormwater management standards. Deviations from these standards may be approved where it can be demonstrated that off-site facilities would provide better treatment, or where common retention, detention and/or water quality facilities meeting such standards have been approved as part of a comprehensive stormwater management plan.
- Best management practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved temporary erosion and sediment control (TESC) plan, or administrative conditions.

The proposed project is consistent with the above water quality policies and regulations. The subject property is located within a Watershed Special Management Area according to the



Official Zoning Ordinance (Title 20). As such, stormwater generated from the subject property will require treatment through a infiltration trench or other approved stormwater management facility. This approval recommendation has been conditioned that such stormwater infrastructure be located outside of the remaining buffer/setback areas to avoid additional disturbance to these areas. In addition, a condition has been added to require a temporary erosion and sedimentation control (TESC) plan be submitted with the required building permit application for review and approval by county watershed staff. The TESC plan shall outline appropriate best management practices (BMPs) to control the potential for sedimentation from runoff during the construction phase of the project. Ground disturbing activity within the Lake Whatcom Watershed is limited to the dry season which will also help limit sedimentation during construction. Erosion control inspections by watershed staff are also required during construction.

Use of chemical fertilizers to maintain the remaining buffer areas on the subject property is prohibited.

## **Vegetation Conservation**

### **23.90.06.A Policies**

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

### **23.90.06.B Regulations**

- Shoreline developments shall comply with the vegetation conservation policies of this Program through compliance with the critical area standards of WCC 16.16.335, 16.16.360, 16.16.630 and 16.16.740 for protection and maintenance of critical area and buffer vegetation.
- Where compliance with SMP 23.90.06.B.1 is not feasible or required, new developments shall be required to develop and implement a vegetation management plan. When required, vegetation management plans shall be prepared by a qualified professional and shall be consistent with the requirements in WCC 16.16.260.B and .C, provided that the Administrator may establish prescriptive standards for vegetation conservation and management as an alternative to requiring a specific plan for a development. Vegetation management plans shall describe actions that will be implemented to ensure that buffer areas provide ecological functions equivalent to a dense native vegetation community to the extent possible given the area that is feasibly available. Required vegetation shall be maintained over the life of the use and/or development by means of a conservation easement or similar legal instrument recorded with the Whatcom County Auditor.
- Vegetation clearing shall be limited to the minimum necessary to accommodate approved shoreline development.
- Removal of noxious weeds and/or invasive species shall be incorporated in vegetation management plans, as necessary, to facilitate establishment of a stable community of native plants.

The proposed project is consistent with the above-referenced policies and regulations. The applicant has proposed removal of numerous trees within the remaining buffer between the proposed residence and the shoreline. Upon staff review of the arborist letter, only the four (4) large black cottonwoods along the southeast corner of the property are authorized for removal at this time. Conservation of the large conifers on the subject property is required. In order to avoid damage to these trees during construction, the permit recommendation has been recommended to have a tree protection plan completed by a certified arborist. The arborist will make recommendations on how best to protect the trees during the construction and long-term use of the site. If any additional view windowing is proposed, such information shall also be included within the arborist assessment for review by the Shoreline Administrator. A condition has also been recommended to install exclusion fencing between the area of construction and the remaining buffer area to help insure such areas are protected during construction.

## **Landfill and Excavation**

### **23.90.10.A Policies**

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

recreation, to restore or enhance degraded shoreline ecological functions and processes, or to moderately elevate low uplands to make such uplands more suitable for purposes consistent with this Program.

- Landfills and excavation should be located and developed so that water quality, hydrologic and runoff patterns are not altered.
- The predicted economic benefits of landfills and excavation should be weighed against long term cumulative impacts on ecological processes and functions.

#### **23.90.10.B Regulations**

- Landfill and excavation shall be minimized to the maximum extent practicable and allowed only along with approved shoreline use and development activities that are consistent with this Program.
- Landfill and excavation within wetlands or waterward of the ordinary high water mark shall only be permitted in limited instances for the following purposes only, with due consideration given to specific site conditions, and only along with approved shoreline use and development activities that are consistent with this Program:
  - Port development for water-dependent uses where other upland alternatives or structural solutions, including pile or pier supports are infeasible.
  - Expansion or alteration of transportation facilities of statewide significance currently located on the shoreline where alternatives to fill are infeasible.
  - Ecological restoration or enhancement such as beach nourishment, habitat creation, or bank restoration when consistent with an approved restoration plan.
  - Maintenance of lawfully established development.
  - Development of shore stabilization projects, flood control and instream structures.
  - Except for landfill for county-approved ecological restoration, fill and excavation waterward of the OHWM or in a wetland may only be authorized as a conditional use.
- Landfills, beach nourishment and excavation shall be designed to blend physically and visually with existing topography whenever possible, so as not to interfere with long term appropriate use including lawful access and enjoyment of scenery.
- Perimeter banks shall generally be sloped no steeper than 1 foot vertical for every 3 feet horizontal unless a specific engineering analysis has been provided, and the Administrator determines that the landfill blends physically and visually with existing topography.
- A temporary erosion and sediment control (TESC) plan shall be provided for all proposed landfill and excavation activities.

No fill or excavation within waterbodies is proposed nor approved as part of this project proposal. The extent of excavation on the property is limited to those areas necessary to accommodate the proposed walk-out levels of the residence and detached garage. Landfill shall be kept to the minimum necessary to backfill the proposed foundations and to construct the approved appurtenant developments. All other excavated materials shall be hauled off-site to an approved dump site through a land disturbance permit to be applied for with the required building permit. Excess excavated materials shall not be spread on-site. A TESC plan is required to be submitted with the building permit application as discussed previously.

Residential policies and regulations associated are found within 23.100.11. Applicable residential policies and regulations associated with the proposed development are listed and discussed below:

#### 23.100.11.A Residential – Policies

- Single-family residences are designated in RCW 90.58 as a priority use in those limited instances when authorization is given for alterations of the natural condition of shorelines of the state.
- Structures or development for uses accessory to residential use should preserve shoreline open space, be visually and physically compatible with adjacent cultural and shoreline features, be reasonable in size and purpose, and result in no net loss of shoreline ecological functions and processes.
- New residential development should be planned and built in accordance with the policies and regulations in 23.90.03 and to minimize the need for shoreline stabilization and flood hazard reduction measures.
- Measures to conserve native vegetation along shorelines should be required for all residential development. Vegetation conservation may include avoidance or minimization of clearing or grading, restoration of areas of native vegetation, and/or control of invasive or non-native vegetation.

#### 23.100.11.B Residential – Regulations

##### 23.100.11.B.1 Location and Design

- New residential development shall assure that the development will not require shoreline stabilization. Prior to approval, geotechnical analysis of the site and shoreline characteristics shall demonstrate that shoreline stabilization is unlikely to be necessary; setbacks from steep slopes, bluffs, landslide hazard areas, seismic hazard areas, riparian and marine shoreline erosion areas shall be sufficient to protect structures during the life of the structure (100 years); and impacts to adjacent, downslope or downcurrent properties are not likely to occur. The greater setback resulting from this regulation or 23.90.13 shall apply.
- Residential structures, accessory uses and related facilities shall be designed and located so as to minimize view obstructions to and from shorelines and water bodies.
- Minimum required setbacks from shorelines and side property lines, maximum height limits and open space requirements are contained in 23.90.13 – Setback, Height and Open Space Standards for Shoreline Development.

##### 23.100.11.B.2 Accessory Uses

- Accessory development common to residences includes, but is not limited to, recreational moorage (mooring buoys, docks and floats), garages and shops, parking areas, water craft storage, shoreline stabilization, fences, cabanas, tennis courts, swimming pools, saunas, antennas, decks, walkways and landscaping.
- Such development shall not be located in required shoreline setbacks where feasible and where a shoreline location is not necessary, and shall be prohibited over the water unless clearly water-dependent such as moorage for recreational or personal use.

Based on staff review of the proposed project, it has been determined that shore defense is unlikely to be necessary in the future to protect the proposed residence. No other geohazardous conditions were identified on the property during staff review of the project. With exception of the shore setback/buffer from Lake Whatcom and the associated wetland of which the applicant has requested relief through a variance, the proposed residence shall meet the remaining bulk and dimensional requirements for residential development as conditioned.

### **Shoreline Variance**

According to 23.60.03, the purpose of a variance is to grant relief to specific bulk or dimensional requirements set for the SMP and any associated standards appended to the SMP such as critical areas buffer requirements 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/proponent or thwart the policy set forth in RCW 90.58.020. A variance 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.

According to 23.60.03.D, variances may be authorized, provided the applicant/proponent can demonstrate all of the following criteria:

1. That the strict application of the bulk or dimensional criteria set forth in the SMP precludes or significantly interferes with reasonable permitted use of the property;
2. That the hardship described in 23.60.03.A is specifically related to the property, and is the result of conditions such as irregular lot shape, size, or natural features and not, for example, from the applicants own actions;
3. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects on adjacent properties or the shoreline environment;
4. 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;
5. That the public interest will suffer no substantial detrimental effect;
6. That the public rights of navigation and use of the shorelines will not be materially interfered with by the granting of the variance; and
7. Mitigation is provided to offset unavoidable adverse impacts caused by the proposed development or use.

Staff responses are numbered accordingly below:

1. The subject property is zoned for residential development and as such, construction of a single-family residence and necessary appurtenant developments represents a reasonable permitted use of the subject property. As stated previously, the proximity of Lake Whatcom to the subject property along with the presence of a shoreline associated wetland along Lake Whatcom, the prescriptive buffer/setback from lake would be approximately 120-feet if the SMP provisions

were strictly applied. This would leave a remaining area of approximately 9,600 – square feet between the buffer/setback and Northshore Road.

The applicant depicts a required setback from Northshore Road as 35-feet; however according to 20.80.230.3, such setback could be reduced to 20-feet utilizing the shoreline flip provision. Sideyard setbacks of 5-feet along the east and west property lines also apply. Strict application of these setbacks would leave an area of approximately 7,000-square feet.

According to the applicant, a 15-foot wide utility easement bisects the subject property east/west which further encumbers the subject property. According to the applicant, the location of this easement can not be significantly re-located which leaves a building area of approximately 1,500-square feet on south side of said easement overlooking Lake Whatcom and a building area of approximately 4,500-square feet.

The applicant states in the shoreline application materials that “an access easement serves the site at approximately the midpoint, which dictates the location of the proposed residence and garage. “ Based on review of the site plan, the applicants propose to access the property by development of a new driveway and circulation area along the northern property boundary to Northshore Road. A second “service/emergency medical access” is proposed on the above-referenced easement across the neighboring property to the west. Based on conversations by this Administrator and the Whatcom County Fire Marshals Office, no such emergency access is required to construct the proposed residence as the proposed access off Northshore Road is less than 200-feet from the proposed residence. It is thus concluded that the presence of the access easement is not a factor encumbering the location of the residence from a regulatory perspective.

Based on the above information, there does appear to be enough area located outside of applicable setbacks and utility easements on the subject property to develop a single-family residence and appurtenant developments; however this Administrator does acknowledge that such development would be located approximately 165 to 170-feet from Lake Whatcom. Section 23.60.03.F states that a variance request may be granted on the applicants desire to enhance the view from the subject development where there are likely detrimental effects to exiting or future users, other features or shoreline ecological functions and/or processes, and where reasonable alternatives of equal or greater consistency with the SMP are not available. Based on this regulatory provision, it is the determination of this administrator that strict application of the SMP in this case does significantly interfere with the residential use and enjoyment of the property as such structure would require a location of 165 to 170-feet from the shoreline and adjacent properties are developed with large residential structures much closer to the shoreline.

No detrimental effects to existing or future users were identified by this Administrator in compliance with the language enumerated in 23.60.03.F as the location of the proposed development is outside of any known geologic hazard and/or frequently flooded areas. The question as to whether or not the proposal represents likely detrimental effects to shoreline ecological functions and/or processes is discussed previously within this staff report.

2. As stated previously, the applicant requests relief from the 120-foot shore setback in order to enhance the view from the subject development. The stated hardship is due to the prescriptive setback of 120-feet which is based on implementation of the SMP as it relates to the proximity of both Lake Whatcom and a shoreline associated wetland area along the lakeshore. These are elements outside of the control of the applicant. The site is also inhibited by the presence of a utility easement that crosses the central portion of the subject property. Puget Sound Energy (PSE) holds the easement which according to the applicant, measures five-feet on either side of

the exiting electrical lines as they cross the property. The applicant's plan to approach PSE to re-locate the lines further from the proposed residence; however the location is unlikely to be altered in any substantial way due to the location and number of homes the electrical line currently serves.

3. The area of the subject property is currently developed with numerous single-family residences and appurtenant and accessory developments, many of which are equal to or exceed the size of the proposed developments. Most if not all of the existing residential developments were constructed prior to the enactment of the current SMP regulations being reviewed pursuant to this variance request. No adverse effects to adjacent properties were identified by this Administrator during the course of the permit review that relate to the location of the proposed residence. Comments from adjacent neighbors were received; however the issues deal predominantly with civil issues relating to access easements across adjacent properties that benefit the applicants.

4. The provision that an applicant may seek relief of a variance in order to enhance a view from the subject development has been present within the SMP since at least 1998 according to this administrator. Since that time, numerous variance requests have been granted utilizing this provision as long as ecological functions and processes are protected and the location of the development does not represent a hazard for current or future users of the site per 23.60.03.F. As such, approval of the subject development as modified and conditioned by this staff report, is not believed to represent a grant of special privilege in this case.

The SMP does not outline any exact parameters as to what extent a setback can be reduced in order to afford a view. The idea of "common line setback" is often used as it is referenced within published guidance documents by the Washington State Department of Ecology (DOE) as draft language to incorporate in designing local master programs. Appendix A of the current SMP also references such a concept however it is only referenced pursuant to a process to permit a new residence on a non-conforming lot without the need for a formal variance request. In essence, it limits new development from encroachment beyond the "common line setback". Another area of the existing SMP that provides some guidance; however also associated with a different permitting process is 23.50.K.2 which limits the size of an approved building area that does not meet the prescriptive setback to 2, 500-square feet.

The extent of relief sought by the applicants is generally consistent with the above parameters. By eliminating a small portion of the proposed at-grade patio area, the proposed development is located behind the "common line setback". It is important to note that such common line was drawn between the applicants existing home to the east and the nearest corner of the home currently under construction on the adjacent lot to the west. The proposed development between the existing utility easement and the shoreline of Lake Whatcom does not exceed a footprint of 2,500 square feet.

5. With proper mitigation as conditioned, no detrimental effects are anticipated to the general public. A significant buffer will be maintained along the shoreline of Lake Whatcom and a majority of the large conifers will be preserved on the property.

6. The proposed residential use and development has no likely impacts on rights of navigation or other use of the shoreline of Lake Whatcom. A significant buffer will remain between the waters of Lake Whatcom and the subject development which should buffer the proposed development from water users.

7. This approval recommendation has been conditioned to address the above variance criteria. A final mitigation plan shall be professionally designed to compensate for any unavoidable impacts to the identified buffers as a result of the requested variance.

#### V. PUBLIC COMMENTS

On August 3, 2009, WCPDS received the following comments from Steve and Sally Lackey of 2173 Northshore Road:

*We are also a 1/10<sup>th</sup> owner of Lakeview Lane, a private road that traverses our property, terminating at our east boundary. Neither Cheneys nor prior owners of the subject property have a recorded easement to cross Lakeview Lane for access. Even so, Lakeview Lane has been used for many years, albeit infrequently, for access to the easement on TP 380325106192 (the Tiller property), which starts at the end of Lakeview Lane and extends to the subject property and its long abandoned wood shack.*

*It is therefore with relief that we note that the site development plan submitted by Cheneys for the subject property specifies that access via the easement on the Tiller property is for "Service/Emergency Medical Access". If the work "only" could be added to these terms, a limited use would be incorporated, helping to ensure that the proposed primary access from Northshore Road would indeed be used for that purpose, both now and in the future, reducing the frequency of using our private lane for access.*

On August 13, 2009, WCPDS received comments in opposition of the project proposal from David and Thuy Tiller (Tillers) of 2181 Northshore Road. The Tillers own the adjacent property to the west of the subject property. The Tillers allege that the permit application materials contain several errors and omissions that misrepresent conditions from which the applicants are seeking relief. The comments were forwarded to the applicants to address such claims, and a letter was received by the applicant's representative, Jeff McClure of RMC Architects on September 29, 2009. The issues raised by the Tillers, along with the appropriate response from Mr. McClure are briefly explained as follows:

#### Residence Footprints

The Tillers are in the process of constructing a new residence that replaced a former residential structure on their property. The application materials illustrate the former residential footprint instead of the residence currently under construction. Mr. McClure explains that at the time of permit application, the Tillers had not begun construction of the current residence. The location of the current residence under construction was utilized by staff during the course of this permit review.

The Tillers also raise an issue as to the depicted location of the current Cheney residence located immediately adjacent to the subject property to the east in that the location differs significantly from the location shown on a former site plan in 2002. Mr. McClure provided a sketch illustrating the current location of the Cheney residence which is based on a recent survey of the subject property. The depicted location of the Cheney residence appears accurate based on site investigations performed by this Administrator.

#### Access Easement

A disagreement exists between the Tillers and the Cheneys as to the actual location of the 30-



foot access easement to the subject property across the Tiller property. Both the Tillers and Mr. McClure cite a recent Whatcom County Superior Court case that resolved at least part of the on-going civil dispute.

### Utility Easement

The Tillers raise potential issues with the proposed development configuration in relation to the existing electrical power poles and associated guy wires on the subject property. According to Mr. McClure, the issues are being worked out with Puget Sound Energy (PSE).

### Setback from OHWM

The Tillers dispute the statement within the application that “many residences in the area are located 60-feet or closer to the OHWM of Lake Whatcom.” The Tillers point out that their proposed residence will be located approximately 85-feet from the OHWM of Lake Whatcom.

In addition to the above, the Tillers believe the proposed variance request should be denied as it does not meet all of the criteria for approval of a variance. Specifically, the Tillers cite 23.60.03.D.2 and claim that the sole reason for the variance request is due to the location of a utility and access easement through the subject property. Mr. McClure states that the utility and access easements are only one factor related to the request for variance. Mr. McClure cites the setbacks from OHWM and the wetland on the property as other factors related to the variance request. All of the variance criteria have been addressed by this Administrator in previous sections of this permit recommendation.

## VI. AGENCY COMMENTS

Agency comments were received from County Watershed staff as well as from Whatcom County Public Works – Engineering Division. Such comments and conditions have been incorporated as conditions of this approval recommendation.

## VII. RECOMMENDATIONS

Based on the above findings and technical review, Staff recommends approval of the request for a Shoreline Substantial Development and Shoreline Variance, subject to the following conditions of approval:

- 1. The use, location and size of the improvements on the site as indicated on the revised site plan dated October 22, 2009 site plan and as modified and conditioned by this approval, shall not be modified or changed in any way without additional review by the Whatcom County Shoreline Administrator. If proposed changes are determined by the Administrator to be substantive pursuant to 23.60.17 of the Shoreline Management Program, then a revision application will be required for review by the Whatcom County Hearing Examiner and the Washington State Department of Ecology as necessary.*
- 2. The applicant/proponent shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property including any clearing and/or grading. The building permit will require additional review by the Whatcom County Shoreline Administrator to determine compliance with conditions of these shoreline permits prior to issuance of the building permit.*

3. *The proposed single-family residence shall not exceed 30-feet in height as measured from average existing grade to the peak of the structure. The portions of the detached garage structure shall not exceed 15-feet from average existing grade to the peak of the structure. Elevation drawings clearly demonstrating compliance with the above height restrictions shall be included with the required plan set associated with the building permit application.*
4. *Landfill and excavation shall be limited to the minimum necessary to accommodate the dig out/backfill of the proposed foundations, and construction of the approved appurtenant developments within the jurisdiction of the Whatcom County Shoreline Management Program. All remaining excavated materials shall be removed from the subject property and disposed of at an approved location through review of a land disturbance permit application to be applied concurrently with the required building permit.*
5. *A final mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the shoreline buffer area as a result of the location of the future residence as well as anticipated impacts caused by construction of the residence. The final plan shall include impacts associated with construction of the proposed footpath and footbridge in the buffer area as well as areas associated with demolition of the existing cabin structure where no new development is proposed. The impact should also include the loss of the 4 black cottonwoods authorized for removal by this permit. The plan shall be submitted and approved by County staff at the time of the above-referenced building permit application. The plan shall be consistent with the mitigation standards enumerated within the Whatcom County Critical Areas Ordinance and shall include measures for monitoring and maintenance. Chemical treatment of the remaining buffer/setback areas shall be prohibited.*
6. *Wire-backed silt/construction exclusion fencing shall be installed as close to the proposed development area as feasible prior to any clearing and/or grading activity on the subject property in order to minimize inadvertent damage to remaining buffer areas during construction. Such fencing shall be installed in accordance with applicable Whatcom County Development Standards and will require inspection by County Watershed Staff prior to commencement of construction or demolition activity. No use of heavy equipment, staging of construction materials, stockpiled soils or any other activity is allowed within the buffer area during construction. The proposed location of the above-referenced fencing shall be included on a temporary erosion and sedimentation control (TESC) plan to be submitted with the required building permit application. The TESC plan shall include best management practices (BMPs) proposed to ensure exposed sediments are contained throughout the duration of the construction process.*
7. *A tree canopy retention plan shall be provided on the site plan submitted with the required building permit in accordance with WCC 20.80.735(2)(d)(iv)(a). The site plan shall also include impervious surface calculations associated with the footprints of any structure, overhangs greater than 3-feet, paved, concrete or graveled areas, patios, driveways, and parking areas. Areas of proposed impervious surfaces shall not exceed 2,500-square feet or 20% of the surface area of the lot; whichever is greater. Stormwater generated as a result of the proposed development shall be routed to an infiltration trench or other approved treatment system. Design of such structures shall be included with the building permit application for review by County Watershed Staff. Location of such structures is prohibited within the remaining buffer/setback areas.*

8. *Clearing activity is prohibited in the drainage swale/ditchline along the eastern property line.*
9. *If pervious surfaces are proposed, an inspection of the sub-base is required by County watershed staff prior to installation of the top course. Inspection of the top course is required prior to final inspection of the building permit. Installation of pervious technologies shall be done in accordance with manufacturer specifications.*
10. *Clearing activity as defined in WCC 20.97.054 resulting in exposed soil conditions and exceeding 500-square feet in area, are prohibited during the wet season (October 1 – May 31).*
11. *A Revocable Encroachment Permit from Whatcom County Public Works – Engineering Division is required prior to any work within County right of way along Northshore Road. A paved apron is required for new access point pursuant to applicable County Development Standards. Note that a sight distance analysis may be required by a certified surveyor or engineer to ensure the proposed access point is safe.*
12. *A tree protection plan shall be completed by a Washington State Certified Arborist to ensure that the remaining large trees in close proximity to the proposed residence are protected during the demolition and construction phase of the project. Any recommendations by the tree protection plan shall be incorporated as conditions of the building and demolition permits. If any view windowing or other pruning is proposed, such information shall also be included within the arborist assessment for review by the Shoreline Administrator. If additional trees are determined to be hazardous in the future and proposed for removal, such removal shall require review and approval by the Shoreline Administrator pursuant to 23.50.01 of the Shoreline Management Program.*
13. *The four (4) black cottonwoods identified as hazard trees along the shoreline of Lake Whatcom and authorized for removal by this permit application shall be flagged with orange tape for inspection by the Whatcom County Shoreline Administrator prior to removal. The existing yellow flagging shall be removed from the property to avoid any confusion. Upon installation of the required flagging, the applicant/proponent shall contact the Whatcom County Shoreline Administrator for a visual inspection prior to tree removal. Only those trees authorized for removal by this permit approval shall be shown on the building permit site plan as proposed for removal to avoid any confusion.*
14. *A notice on title shall be recorded with the County Auditor's Office that notifies future owners of the subject property of required buffer/setback areas on the subject property. Contact the Whatcom County Shoreline Administrator for the form necessary for recording. The notice on title shall be filed prior to building permit issuance.*
15. *Authorization to conduct development activities shall terminate five (5) years after the effective date, as defined in 23.60.19.A.3, of this shoreline variance, provided that the Hearing Examiner or Administrator, as appropriate, may authorize a single extension for a period of not more than one (1) year based on a showing of good cause, if a request for extension has been filed with the Hearing Examiner or Administrator, as appropriate, before the expiration date of the shoreline permit and notice of the proposed extension is given to parties of record and the Department of Ecology. Construction shall commence within two years of the effective date of the Shoreline Variance as defined by WAC 173-27-090 (3), provided that the Whatcom County Hearing Examiner may authorize a single*

*extension for a period not to exceed one year based on reasonable factors if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.*

Report prepared by:

Chad J. Yunge

Whatcom County Shorelines Administrator

Planning and Development Services – Land Use & Natural Resource