

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE VARIANCE ) SHV2009-0002  
Application for )  
)  
*Marc and Jodi Haggen* ) FINDINGS OF FACT,  
) CONCLUSIONS OF LAW,  
) AND DECISION

---

**SUMMARY OF APPLICATION AND DECISION**

Application: The Applicant is requesting approval of a Shoreline Variance Permit to expand an existing roof by 140 square feet waterward of the existing residential foundation wall.

Decision: The Hearing Examiner grants 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: Marc and Jodi Haggen  
Property Location: 1900 Northshore Road  
Bellingham, Washington  
Legal Description: Within Section 26, Township 38N, Range 03E, W.M.  
Assessor’s Parcel Number 380326 255250  
Adjacent Water Body: Lake Whatcom  
Shoreline Designation: Shoreline Residential  
Statewide Significance: Yes

Zoning: RR/2 (Residential Rural 2 Dwellings per Acre)

Subarea: Lake Whatcom

SEPA Review: The proposal is Categorical Exempt from the State Environmental Policy Act (SEPA) per WAC 197-11-800

Authorizing Ordinances: SMP 23.70.03 Hearing Examiner  
SMP 23.50.01 Applicability

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.06	Shoreline Residential Area
SMP 23.40	Shorelines of Statewide Significance
SMP23.50.I	Non-Conforming Development
SMP23.60.03	Variance Permit Criteria
SMP 23.90	General Policies and Regulations
SMP 23.100.130	Residential
SMP 23.90.13.C	Setbacks

Legal Notices: Published – June 5 and December 31, 2009  
Posted – December 30, 2009  
Mailed – December 23, 2009

Hearing Date: January 13, 2010

Parties of Record:

Marc & Jodi Haggen  
2211 Rimland Drive  
Bellingham, WA 98226

Andrew Kryzsiak  
520 14<sup>th</sup> Street  
Bellingham, WA 98225

Seth Woolson  
Chmelik Sitkin & Davis, P.S.  
1500 Railroad Avenue  
Bellingham, WA 98225

Sam McDaniel  
Planning and Development Services

Exhibits:

- 1 Land Use Application
  - 1-1 Supplemental Application
  - 1-2 Letter dated May 20, 2009, from Andrew Krzysiek, re: project proposal
  - 1-3 Determination of Complete Application, dated May 14, 2009
  - 1-4 Distribution List and Notice of Application, dated June 5, 2009
  - 1-5 Whatcom Land and Title
  - 1-6 Property Owner List
  - 1-7 Title Insurance Info
- 2 Staff Report, dated January 6, 2010
- 3 Site Aerial Photo
- 4 Vicinity Plat
- 5 Zoning Map
- 6 Record of Survey
- 7 Site Plan
- 8 Legal Notice of Application, dated June 5, 2009
- 9 Certificate of Mailing of Public Hearing, dated December 23, 2009
- 10 Certificate of Posting, dated December 30, 2009
- 11 Legal Notice, dated December 31, 2009
- 12 Notice of Representation, Seth Woolson, January 11, 2010
- 13 Site Plan referred to during Architect's presentation
- 14 Letter of authorization, dated January 11, 2010, from Marc and Jodi Haggen
- 15 Memorandum, dated January 19, 2010, from Sam McDaniel re: View Enhancement Analysis
- 16 Letter, dated January 19, 2010, from Seth Woolson re: Haggen, SHV2009-0002
- 17 Letter, dated January 22, 2010, from Seth Woolson re: Response to Whatcom County's January 19, 2010 memorandum

- 18 Letter, dated February 2, 2010, from Seth Woolson request clarification re: Hearing Examiner's Proposed Conditions of Approval
- 19 Memorandum, dated February 8, 2010 from Sam McDaniel re: Conditions of Approval

## **II.**

The Applicants are the owners of a Lake Whatcom waterfront lot in an area of urban-intensity residential development and addressed as 1900 Northshore Road, Bellingham, Washington. The lot is approximately 28,000 square feet in size. The southern edge of the lot abuts Lake Whatcom. The existing residence was remodel and expanded, pursuant to a Shoreline Conditional Use Permit in 2009.

The proposed roof expansion would expand the existing roof by 140 square feet. The new roof area would be waterward of the existing foundation wall and would cover part of an existing patio/deck area. The existing structure is a legal nonconforming structure because parts of the existing house and all of the deck/patio structure encroach upon the 100-foot critical area and shoreline setback applicable under Whatcom County's current Shoreline Management Program.

The current deck structure on the waterward end of the residence was constructed over a larger concrete patio area.

Most of the increased roof coverage will be in an area of roughly 10-feet by 14-feet covering the west end of the existing deck. No new walls are proposed. The roofing material itself will be out of clear, translucent, hard plastic materials, which will allow light to filter in during daylight hours and a view of the night sky during the night. As part of the proposed and approved remodel and expansion of the existing nonconforming residential structure, the Applicants have removed approximately 40 to 50-square feet of the concrete slab, reducing impervious surfaces on this site and thereby minimizing adverse impacts associated with impervious surfaces. The proposed new roof area will not increase the impervious surface coverage of the lot because it will cover existing impervious surface. Stormwater runoff from the increased roof will be captured by tight-line to a dispersion vault which will allow retention and treatment of stormwater runoff from impervious areas not currently being treated.

The record indicates no adverse impacts of any kind to Lake Whatcom or to the 100-foot shoreline critical area setback will result from the minor expansion of the roof area sought by the Applicants. The proposed modest roof expansion would have a net positive impact on the quality of stormwater runoff.

## **III.**

The Applicants' home is in a residential area which is fully developed with larger lakefront homes on lots which appear to be from 20,000 to 30,000 square feet each.

Some of the homes in the area are located closer to the lake than the Applicants' home and some have covered deck area waterward of the residence.

The home to the east of the Applicants' is setback approximately equivalent to the Applicants' home. The proposed roof expansion on the western side of the Applicants' house will not be visible to the closest homes on the east side.

The home on the west side of the Applicants' home is setback further than the Applicants' and any expansion of the Applicants' home waterward would have the potential of affecting the views from this home. The Applicants' home sits waterward of a common setback line drawn between the two adjacent homes on either side. Due to existing vegetation, the roof expansion will not be visible to the homes on either side nearest to the Applicants' home. Even if the expansion were visible, a small 140-square foot area of translucent covering over the west end of the deck would not have any kind of significant impact on the views of any of the residences in this area. No residents in the area commented on the project.

#### IV.

The roof extension requested by the Applicants will enhance their enjoyment of the views from and the use of their deck by providing a **small** covered outside viewing area on the lake side of their home.

#### V.

Denying the proposed roof extension would not provide any public benefit or cause any adverse impacts. Overall, the proposed work above and around the deck should have a minor, positive impact on stormwater runoff quality. The proposed roof expansion will enhance the ability of the Applicants to enjoy the view amenities associated with their residential use of this shoreline property without having a negative impact on the view amenities of any of the surrounding properties.

#### VI.

Whatcom County Planning and Development Services has recommended denial based on their conclusion that the proposed development does not meet the Variance Criteria and is not eligible for a variance based on view enhancement.

#### VII.

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

## CONCLUSIONS OF LAW

### I.

The Applicants' home is legal nonconforming residential development. The development is nonconforming because the current residence does not meet the 100-foot setback from the Ordinary High Water Mark of the lake. The residential use is conforming and is a use favored under the Shoreline Management Act. The Applicants' lot is a conforming lot because it is in excess of 20,000 square feet.

### II.

The Applicants are requesting a Shoreline Variance to expand the roofline of the residence waterward of the existing roofline and building foundation.

Existing nonconforming structures may be expanded with a Shoreline Variance and nonconforming single-family residences may be expanded without a variance under certain conditions. WCC 23.50.07.E

The expansion of nonconforming single-family residences is covered by WCC 23.50.07.I, which reads as follows:

#### 23.50.07 Non-Conforming Development

- I. Enlargement or expansion of single-family residences by the addition of space to the main structure or by the addition of normal appurtenances as defined in Chapter 11 that would increase the nonconformity and/or encroach further into areas where new structures or developments would not now be allowed under the Program may be approved by conditional use permit if all of the following criteria are met:
  1. The structure must be located landward of the ordinary high water mark.
  2. The enlargement, expansion or addition shall not extend either further waterward than the existing primary residential structure (not appurtenance), further into the minimum side yard setback, or further into any critical area established by WCC 16.16 than the existing structure. **Encroachments that extend waterward of the existing residential foundation walls or further into a critical area, or the minimum required side yard setback require a variance.** [Emphasis added].

3. The area between the non-conforming structure and the shoreline and/or critical area shall meet the vegetation conservation standards of SMP 23.90.06.
4. The remodel or expansion will not cause adverse impacts to shoreline ecological functions and/or processes.

The enlargement or expansion of a nonconforming residential structure can be done without a variance, subject to conditional use approval, if the conditions set forth in paragraphs 1 through 4, as set forth above, are met. Proposed expansion waterward of the existing foundation walls of a nonconforming structure can be approved by obtaining a variance. [WCC 23.50.07.I.2, see above].

The expansion proposed by the Applicants meets the criteria for enlargement or expansion of a single-family residence in paragraphs 1, 3, and 4 of Section I of WCC 23.50.07.I.

Since the expansion will extend waterward and further into the shoreline's critical area than the existing residential foundation walls, the proposed expansion requires a Variance, and can be allowed only if it is consistent with the Variance Criteria.

### **III.**

In addressing the applicability of the view enhancement sections of the Variance Criteria, Whatcom County Planning and Development Services Staff concluded that the proposed waterward expansion of an existing nonconforming residence was not entitled to use view enhancement as a factor to be considered as part of a variance request, stating:

“The variance process for a view hardship is limited to new residential development on lots that are 20,000 square feet in size or less, and located in areas of dense residential development where nonconforming residences on either side of the proposed development may pose a view hardship.”

The Planning Staff conclusion is based on an erroneous interpretation of the applicable portions of Whatcom County Shoreline Management Program. Paragraph I of WCC 23.50.07, set forth above, specifically, allows for the expansion of existing nonconforming single-family residences if four criteria are met. In this case, the four criteria can be met if the proposed waterward expansion of the existing residence obtains a Variance.

New single-family development on nonconforming lots (those with less than 20,000 square feet) is covered by WCC 23.50.07.K. This section allows new single-family residential development to encroach on the shoreline setback without a variance if the criteria set forth in paragraph K are met, including a requirement that the setback encroachment allowed without a variance not extend waterward of the common line setback, measured in accordance with

Appendix F of the Shoreline Management Program.

Paragraph K does not apply to the expansion of existing nonconforming residences and the criteria in paragraph I, which do apply to existing nonconforming residential structures, do not require conformity to the common line setback described in Appendix F. In fact, the Common Line Setback Criteria in Appendix F only applies to new single-family residential development on nonconforming lots that encroaches on the shoreline setback without a variance. There is nothing in section K which prohibits an applicant seeking approval for a variance for new single-family development on a nonconforming lot which would allow construction waterward of the common line setback as measured in accordance with Appendix F if approved.

**IV.**

These Applicants are entitled to approval of the proposed waterward expansion of the roofline on their existing nonconforming residence if they obtain a variance pursuant to WCC 23.60.03.

The Purpose of the Variance Section is set forth in WCC 23.60.03.A, as follows:

23.60.03 Variance Permit Criteria

- A. The purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in this Program and any associated standards appended to this Program such as critical areas buffer requirements where there are extraordinary or unique circumstances relating to the property such that the strict implementation of this Program would impose **unnecessary** hardships on the applicant/proponent or thwart the policy set forth in RCW 90.58.020. Use restrictions may not be varied. [Emphasis added].

These Applicants are seeking relief from the specific dimensional requirements of the program, that is, from the 100-foot shoreline setback. Variances are allowed where there are “extraordinary or unique circumstances” relating to the property and where strict implementation of the setback would impose “unnecessary hardships” on the applicant. In this case, the hardship imposed is a minor hardship and would normally not support the granting of a variance. However, the hardship in this case is “unnecessary” in that the strict implementation of the setback serves no legitimate public interest and unnecessarily restricts the Applicants’ enjoyment of their property. The fact that denial of this minor waterward expansion of the roof on the Applicants’ home has either no impact or a positive impact on the public health, safety, and welfare makes the approval of the requested Shoreline Variance Permit consistent with WCC 23.50.08.A, which reads as follows:

23.50.08 Property Rights

- A. Decisions on shoreline permits and/or approvals shall recognize all relevant constitutional and other legal limitations on the regulation of private property. Findings shall assure that conditions imposed relate to the governmental authority and responsibility to protect the public health, safety, and welfare, are consistent with the purposes of the Act, **and are roughly proportional to the expected impact.** (Emphasis added).

Denying a variance request where there is either no impact, or may be a positive impact on the public health, safety, and welfare is inconsistent with paragraph A, above, because the legal limitations placed on the Applicants' use and enjoyment of their property is not roughly proportional to the expected impact (no adverse impact). Regulations which are facially constitutional can be found to be unconstitutional as applied. WCC 23.08.A clearly expresses the Legislative intent that limitations on the use and enjoyment of private property be reasonably related to the protection of the public health, safety and welfare.

V.

In order to approve the variance, it must be consistent with the requirements set forth in WCC 23.60.03.D, applied in light of WCC 23.60.03.F, which specifically allows a variance request to be based on an applicant's desire to enhance a view, and which reads as follows:

23.60.03 Variance Permit Criteria

- F. Other factors that may be considered in the review of variance requests include the conservation of valuable natural resources and the protection of views from nearby roads, surrounding properties and public areas; provided, the criteria of SMP 23.60.03.D are first met. **In addition, variance requests based on the applicant's/proponent's desire to enhance the view from the subject development may be granted where there are no likely detrimental effects to existing or future users, other features or shoreline ecological functions and/or processes,** and where reasonable alternatives of equal or greater consistency with this Program are not available. In platted residential areas, variances shall not be granted that allow a greater height or lesser shore setback than what is typical for the immediate block or area. (Emphasis added).

Without the statutory authorization to take into account a property owners' desire to enhance their views as a factor to be considered in determining a variance request, this variance

would be denied. Paragraph F allows the granting of a variance based on view enhancement where there is general compliance with the Variance Criteria of paragraph D, and subject to the specific limitations in paragraph F. In this case, there are no likely detrimental effects to shoreline ecological functions and processes, to the public interest, or to surrounding property owners. This is a platted residential area and the variance cannot be granted if it allows a lesser setback than what is typical for the immediate block or area. The setback allowed by the granting of this variance would not give these Applicants an atypical setback.

Denying the Applicants' variance request under these circumstances, would preclude a reasonable use based only on the strict application of the Program in a case where there are no known or expected adverse impacts. Granting the application would enhance the Applicants' enjoyment of the views available from the existing nonconforming residential development and is consistent with WCC 23.60.03 F.

## **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**

The requested Shoreline Variance Permit is granted to Marc and Jodi Haggen allowing for the reduction in the shoreline setback in order to expand an existing roofline by approximately 140-square feet on the waterward side of the existing foundational wall of the single-family residence located at 1900 Northshore Road, Bellingham, Washington. The permit is granted subject to the following conditions:

1. Storm-water run-off from the expanded roof area shall be diverted to the existing dispersion vault in a manner satisfactory to Whatcom County Public Works.
2. The development on this site shall conform with the application request and be limited to approximately 140-square feet of new clear polycarbonate roofing material over area of the existing deck as shown on the site plan submitted and marked as Exhibit No. 7 in the Hearing Examiner's file.
3. The use, location and size of the improvements on the site as indicated on site plan shall not be modified or changed without further review by the Shoreline Administrator, approval of the Whatcom Hearing Examiner, and review by the Department of Ecology.
4. The Applicant shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property.
5. Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.

6. The project shall comply with all applicable Federal, State, and local laws and regulations.
7. 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 16<sup>th</sup> day of February 2010.

---

Michael Bobbink, Hearing Examiner

**WHATCOM COUNTY  
PLANNING & DEVELOPMENT  
SERVICES**  
5280 Northwest Drive  
Bellingham, WA 98226



**David Stalheim  
Director**  
  
**J.E. "Sam" Ryan  
Assistant Director**

January 6, 2010

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of <b>Marc &amp; Jodi Haggen</b> for a Shoreline Variance Permit		SHV2009-00002 FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
--	--	--

SUMMARY OF APPLICATION AND DECISION

Application: The applicant is requesting approval of a Shoreline Variance Permit to expand an existing roof by 140 square feet waterward of the existing residential foundation wall.

Decision: Staff Recommends **denial** of the requested Shoreline Variance.

PRELIMINARY INFORMATION

Applicant:	Marc & Jodi Haggen 2211 Rimland Drive Bellingham, WA 98226
Property Location:	1900 North Shore Road Bellingham, Washington
Legal Description:	Within Section 26, Township 38N, Range 03E, W.M. Assessor's Parcel Number: 380326-255250
Adjacent Water Body:	Lake Whatcom
Shoreline Designation:	Shoreline Residential
Statewide Significance:	Yes
Zoning:	RR/2 (Residential Rural 2 Dwellings Per Acre)
Subarea:	Lake Whatcom
SEPA REVIEW:	The proposal is categorically exempt from the State Environmental Policy Act (SEPA) per WAC 197-11-800
<u>Authorizing Ordinances:</u>	SMP 23.70.03                      Hearing Examiner SMP 23.50.01                      Applicability

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.06	Shoreline Residential Area
SMP 23.40	Shorelines of Statewide Significance
SMP23.50.I	Non-Conforming Development
SMP23.60.03	Variance Permit Criteria
SMP 23.90	General Policies and Regulations
SMP 23.100.130	Residential
SMP 23.90.13.C	Setbacks

III. FINDINGS AND CONCLUSIONS

The applicant is requesting approval of a Shoreline Variance Permit to expand an existing roof by 140 square feet waterward of the existing residential foundation. The expansion would result in a covered area for the deck below.

The applicant made application for an Shoreline Conditional Use permit (SHC2009-00017) and a Shoreline Variance Permit (SHV2009-00002) for the expansion of an existing single family residence. The Shoreline Conditional Use Permit was reviewed separately and approved administratively and subsequently approved by Department of Ecology for as required by (WAC) 173-27-200. Pursuant to SMP 23.60.13 a hearing is required for the Variance permit and is respectfully submitted.

The subject property is located at 1900 North Shore Road in an area of existing residential development and is approximately 28,141 square feet in size. Lake Whatcom fronts the property on the southern edge of the property. The existing residence was remodeled and expanded in 2009. According to the permit record, a building permit was issued in 2009 (SFR2009-00156) for the interior remodel of the residence and replacement of the existing nonconforming deck to be constructed in the same configuration and location. Additionally, the applicant was approved to expand the residence through the Shoreline Conditional Use (SHC2009-00017) process outlined in 23.50.07(I). The expansion involved the creation of a 220 square foot dormer within the existing footprint and a 24 square foot expansion on the landward side of the residence. The subject site is relatively flat and the remaining vegetation on site is lawn between the existing residence and the Ordinary High Water Mark (OHWM) of Lake Whatcom County. The property is zoned Residential Rural 2 Dwellings per Acre and is designated a Shoreline Residential Area according to the Whatcom County Shoreline Management Program (SMP).

Pursuant to 23.60.19.13(C) the shore setback is obtained from WCC 16.16, Whatcom County Critical Areas Ordinance (CAO), Habitat Critical Area Buffers. Pursuant to 16.16.740(C) Lakes 20 acres and larger require a buffer extending 100-feet from the OHWM. The foundation for the nonconforming residence is 90-feet from the OHWM and runs parallel to the shoreline. Staff has determined the residence to be a nonconforming development as defined by the SMP.

Pursuant to the nonconforming provisions of SMP 23.50.07(I) Enlargement or expansion of single family residences by the addition of space to the main structure or by the addition of normal appurtenances as defined in Chapter 11 that would increase the non-conformity and/or encroach further into areas where new structures or developments would not now be allowed under the Program may be approved by conditional use permit if all of the following criteria are met:

1. The structure must be located landward of the ordinary high water mark.
2. The enlargement, expansion or addition shall not extend either further waterward than the existing primary residential structure (not appurtenance), further into the minimum side yard setback, or further into any critical area established by WCC 16.16 than the

existing structure. Encroachments that extend waterward of the existing residential foundation walls or further into a critical area, or the minimum required side yard setback require a variance.

3. The area between the non-conforming structure and the shoreline and/or critical area shall meet the vegetation conservation standards of SMP 23.90.06.
4. The remodel or expansion will not cause adverse impacts to shoreline ecological functions and/or processes.

The proposal includes expanding the Southwestern portion of the roof waterward of the existing primary residential foundation walls and therefore fails to meet criteria #2 of the nonconforming criteria 23.50.07.I and therefore requires variance approval.

#### IV. SHORELINE VARIANCE

The project proposal requires the approval of a Shoreline Variance pursuant to 23.50.07(I).2 of the SMP for the waterward expansion of a nonconforming residence. For a Shoreline Variance to be approved, the proposal must satisfy the criteria of section 23.60.03.D of the Program. These criteria are set forth and addressed below.

**23.60.03.D.1 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.**

The applicant proposes to expand an existing roof waterward of the existing residential foundation wall. The proposed roof expansion is 140 square feet in size and is located on the southwestern corner of the residence. The proposed expansion would extend 10 feet into the required shore setback as established by WCC 16.16.740 HCA Buffers. A building permit SFR2009-00156 was issued for the interior remodel of a two-story 4 Bedroom 2.5 bath home with a total interior size of more than 3,000 square feet, window replacement, and replacement of a 523 square foot deck. The interior remodel, window replacement, and the deck replacement were reviewed and approved via a Shoreline Statement of Exemption as maintenance and repair of existing lawfully established developments. Additionally on July 31, 2009 the applicant received approval via a Shoreline Conditional Use Permit (SHC2009-00017) to expand the nonconforming residence with the construction of a 220 square foot dormer within the existing house footprint and the addition of a 24 square foot expansion on the landward side of the residence. The residence is conforming with respect to the side yard setback requirements and the height requirements. Given such a home is constructed and complied with the nonconforming provisions of the SMP, staff finds the applicant may not claim that the strict application of the bulk or dimensional criteria of the program precludes or significantly interferes with a reasonable permitted use of the property.

Based upon these factors, staff finds that the site is not significantly constrained and that reasonable use of the property has been accommodated while in full compliance with applicable shoreline policies and regulations.

**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.**

**23.60.03.D.2 That the hardship described in 20.60.03.A above 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 is a regular shaped lot and is approximately 28,141 square feet in size. Lake Whatcom fronts the property on the southern edge of the property. There is a nonconforming single family residence located on site. The site is relatively flat and the remaining vegetation on site is lawn between the existing residence and the OHWM of Lake Whatcom. The required setback pursuant to 23.90.13.C is 100

feet as indicated in WCC 16.16.740 HCA Buffers. The foundation of the nonconforming residence is located 90 feet from the OHWM of Lake Whatcom. The applicant is proposing to construct a 140 square foot expansion of the existing roofline on the southwestern corner of the residence that would encroach 10 feet in to the required shore setback.

The applicant has indicated in question #5 of the supplemental application that the parcel is subject to prevailing winds, storms, as well full sun exposure throughout the year. The combination of adverse weather and shoreline setback prevent 'normal use.'

The applicant has indicated that the residence is subject to weather concerns and the weather conditions affect "normal use". While adverse weather conditions may be inconvenient, the subject site is afforded reasonable use with the presence of a 3,000+ square foot single family residence, a 523 square foot deck on the waterside of the residence, and associated residential appurtenant developments. The continued use of the single-family residence is listed as a preferred use of RCW 90.58.020. It is the opinion of staff that adverse weather conditions does not meet the criteria listed in 23.60.03.D.2. There is nothing in the application submittals that indicate that the requested variance is specifically related to the property, result of natural features, irregular lot shape, or other unique site characteristics.

Staff therefore finds that the proposal does not comply with this requirement of the SMP.

**23.60.03.D.3 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.**

The subject lot is located in the Northshore area of Lake Whatcom. The area is developed with residences that are generally the same size and scale of the subject residence. Neighboring residences in the area have decks of similar size and scale and on waterward side of the residence. There is nothing in the record or observed on the site that indicates the proposal would cause adverse effects to adjacent properties or the shoreline environment

Staff finds the requested variance complies with this section of the SMP.

**23.60.03.D.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.**

The subject site is currently developed with a single-family residence. As stated previously, it is the opinion of staff that the site is not significantly constrained or that the bulk and dimensional requirements significantly interferes with a reasonable permitted use of the property. The neighboring residences in the area are all nonconforming with respect to the shore setback and range from 50 to 85 feet from the OHWM of Lake Whatcom and all have decks of some size, configuration, covered, and uncovered on the waterward side of the residence.

As the neighboring residences are nonconforming with regard to shore setback they would be subject to the requirements of 23.50.07(l) for expansion of nonconforming residences and any waterward expansion that would extend waterward of the existing residential foundation walls would require approval through the variance process. Any reduction in the shore setback in proximity to neighbors that are equally constrained with the nonconforming provisions would appear undeserved. Furthermore, when faced with a lack of hardship or significant, meaningful constraint on the site, approving the requested variance would appear to be a grant of special privilege.

Staff therefore finds that the proposal does not comply with this requirement of the SMP.

**23.60.03.D.5 That the public interest will suffer no substantial detrimental effect.**

There is nothing in the application submittals that indicate that the public interest will suffer no substantial

detrimental effect.

**23.60.03.D.6 That the public rights of Navigation and use of the shorelines will not be materially interfered with by the granting of the variance**

The proposed residential development has no impact on rights of navigation or other use of the shoreline of Lake Whatcom.

**23.60.03.D.7 Mitigation is provided to offset unavoidable adverse impacts caused by the proposed development or use.**

No mitigation has been proposed nor would mitigation be required as the proposed roof extension would not cause new unavoidable impacts to the Habitat Conservation Buffer as there is a deck below the proposed area of roof extension.

**23.60.03.F Other factors that may be considered in the review of variance requests include the conservation of valuable natural resources and the protection of views from nearby roads, surrounding properties and public areas; provided, the criteria of SMP 23.60.03.D are first met. In addition, variance requests based on the applicant's desire to enhance the view from the subject development may be granted where there are no likely detrimental effects to existing 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.**

This particular variance would not convert additional natural resources as no new buffer would be impacted as there is a deck on the waterward side of the residence and this proposal is above a portion of that deck. No comments were received from neighboring properties regarding view concern. The proposal would not appear to pose any view blockage from roadways, surrounding properties, or public areas. However, the applicant has failed to meet all of the criteria outlined in 23.60.03.D

**23.60.03.G 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.**

Neighboring properties are nonconforming with respect to the shore setback and range from 50-85 feet from the OHWM. The granting of similar variances to the neighboring nonconforming residences in the area would increase existing nonconformities, reduce existing vegetative buffers, and cumulatively produce significant adverse effects to the shoreline environment. The totality of all potential similar variances would not appear to be consistent with the policies of RCW 90.58.020.

## V. PUBLIC COMMENTS

Staff received no public comments during the required public comment period.

## VI. AGENCY COMMENTS

The Whatcom County Watershed Administrator submitted the following comments and conditions of approval on June 29, 2009:

The proposed project will not be expanding the amount of impervious surface on the subject lot. There is currently a concrete slab porch underneath the existing deck on the waterside so the construction of a roof

over said deck will not increase the amount of impervious surfaces.

The small addition on the driveway side of the house is currently located over a gravel area. Gravel is defined as impervious surfaces so the proposed addition will also not create additional impervious surfaces.

The proposed project lies in the Lake Whatcom Watershed and is therefore subject to the following watershed conditions per Title 20.

- *Clearing activities which expose more than 500 sq. ft. of soils are prohibited during the seasonal closure period as identified in WCC 20.80.735(e).*

The Whatcom County Technical Administrator submitted the following memorandum with the following comments on June 12, 2009:

*An application for the above Shoreline Conditional Use and Shoreline Variance permits have been routed to Critical Areas Staff for conformance with WCC 16.16, Critical Areas Ordinance. After reviewing the submitted materials, Critical Areas staff has determined that there will be no wetland or habitat conservation areas impacted as a result of this proposal.*

#### VI. RECOMMENDATIONS

The proposal fails to demonstrate compliance with all of the Variance criteria listed in 23.60.03.D. Therefore, staff recommends **denial** of the request for a Shoreline Variance to extend an existing roof waterward of the existing primary residential structure.

Report prepared by:  
Sam McDaniel  
Shorelines Program Administrator