

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE VARIANCE) SHV2009-0005
Application for)
)
Dee Alspach) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant requests approval of a Shoreline Variance Permit to reduce the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments.

Decision: The requested permit is 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: Dee Alspach

Applicant Representative: Gerald Veltkamp – Homeward Designs, Inc.

Property Location: 649 Freeman Lane
Point Roberts, Washington

Legal Description: Section 09 Township 40 North, Range 03 West, W.M.
Assessor’s Parcel No. 405309 480528

Adjacent Water Body: Georgia Strait

Shoreline Designation: Shoreline Residential

Statewide Significance: No
Zoning: Residential Rural
Comprehensive Plan: Resort/Recreational Subdivisions
Subarea: Point Roberts

Authorizing Ordinances: SMP 23.50 Applicability
SMP 23.70 Administration

Applicable Shoreline Program Provisions:
SMP 23.20 Goals and Objectives
SMP 23.30.06 Shoreline Residential Area
SMP 23.60.03 Variance Permit Criteria
SMP 23.90 General Policies & Regulations
SMP 23.100.11 Residential Policies & Regulations
SMP 23.110 Definitions

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

Legal Notices: Published – October 1, 2009
Posted – September 30, 2009
Mailed – July 15 and September 25, 2009

Hearing Date: October 14, 2009

Parties of Record:

Dee Alspach
229 – 4th Avenue
New Westminster, BC V3L 1N5
Canada

Gerald Veltkamp
Homeward Designs, Inc.
204 6th Street
Lynden, Washington 98264

Chad Yunge
Planning and Development Services

Copy of Decision mailed to:

David and Wendy Kitts
649 Marine Drive
Point Roberts, WA 98281

Mr. and Mrs. W.V. Hobart
PO Box 294
Point Roberts, WA 98281

Exhibits:

- 1 Land Use Application, with attachments
 - 1-1 Supplemental Application
 - 1-2 Shoreline Permit Submittal Requirements
 - 1-3 Letter of Complete Application, dated July 6, 2009
 - 1-4 Form letter to property owners
 - 1-5 Property owner mailing labels
- 2 Revised Staff Report, dated September 15, 2009
- 3 Agency Comments
- 4 Comment Letters
- 5 Aerial Map
- 6 Revised Site Plan
- 7 Certificate of Mailing of Notice of Application, dated July 15, 2009
- 8 Certificate of Mailing of Notice of Public Hearing, dated September 25, 2009
- 9 Certificate of Posting, dated September 30, 2009
- 10 Legal Notice, dated October 1, 2009

II.

The Applicant is requesting a Shoreline Variance to reduce the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments on property located at 649 Freeman Lane, in Point Roberts, Washington.

III.

The Applicant has indicated that the Staff Report is factually correct. The Applicant stated no objection to the Conditions of Approval recommended by Staff. There was no public comment on this matter at the hearing. The Findings of Fact and Conclusions of Law of the Shoreline Planner of the Land Use Services Division of Whatcom County Planning and Development Services, as set forth in the Revised Staff Report, Exhibit #2, dated September 15, 2009, a copy of which is attached hereto, are adopted and incorporated herein by this reference.

IV.

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

CONCLUSIONS OF LAW

I.

The Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Variance Permit for the proposed reduction in the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments.

Findings of Fact and Conclusions of Law are set forth in the Revised Staff Report, dated September 15, 2009, Exhibit #2 in the Hearing Examiner's file. 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 Variance Permit is hereby granted to Dee Alspach to reduce the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments on Assessor's Parcel No. 405309 480528, property located at 649 Freeman Lane, Point Roberts, Washington. The permit is granted subject to the following conditions:

1. The use, location and size of the improvements on the site as indicated on site plan shall not be modified or changed in any way without further review by the Shoreline Administrator and approval of the Whatcom Hearing Examiner, except as modified by this approval.
2. The building area within the jurisdiction of the Whatcom County Shoreline Management Program shall not exceed 2,500-square feet in size.
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 or 25-feet as measured from average grade to the midpoint of the highest gable, whichever is more restrictive.
4. The Applicant shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property. The building permit will be reviewed pursuant to 23.60.01.A to ensure consistency with this variance approval and any other applicable provisions of the Whatcom County Shoreline Management Program.
5. The design of the proposed single-family residence shall comply with the required standards of the Whatcom County Flood Ordinance (Title 17). Such standards will be reviewed pursuant to the above-referenced building permit application. An Endangered Species Act (ESA) checklist is available from Whatcom County Planning & Development Services to assist in compliance with the ESA review.
6. The design of the proposed developments shall comply with all applicable Whatcom County Development Standards. The proposed garage shall maintain a minimum distance of 12-feet from the eastern property line.
7. A mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the marine shoreline buffer area as a result of future residential construction. The plan shall be submitted 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.
8. 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 14th day of October 2009.

Michael Bobbink, Hearing Examiner



REVISED

September 15, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of Dee Alspach for a Shoreline Variance Permit		SHV2009-00005 FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
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I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

Application: The applicant requests approval of a shoreline variance permit to reduce the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments.

Recommendation: Staff recommends approval of the requested Shoreline Variance Permit subject to the conditions of approval.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Dee Alspach
229 – 4th Avenue
New Westminster, British Columbia Canada V3L 1N5

Applicant Representative: Gerald Veltkamp – Homeward Designs, Inc.
204 6th Street
Lynden, Washington 98264

Property Location: 649 Freeman Lane – Whatcom County, Washington

Legal Description: Section 09 Township 40 North, Range 03 West, W.M.
Parcel #: 405309480528

Adjacent Water Body: Georgia Strait

Shoreline Designation: Shoreline Residential

Statewide Significance: No

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

B. PROCEDURAL INFORMATION

Authorizing Ordinances: SMP 23.50 Applicability
SMP 23.70 Administration

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.06	Shoreline Residential Area
SMP 23.60.03	Variance Permit Criteria
SMP 23.90	General Policies & Regulations
SMP 23.100.11	Residential Policies & Regulations
SMP 23.110	Definitions

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

III. FINDINGS AND CONCLUSIONS

The applicant is requesting approval of a shoreline variance permit to reduce the prescriptive shore setback from 150-feet to approximately 82-feet, as measured from the ordinary high water mark (OHWM) of Georgia Strait, to construct a single-family residence and associated appurtenant developments.

The subject property is currently developed with a small cabin structure measuring approximately 900-square feet in size. Access to the property is via a graveled apron from Freeman Lane to the east and the remainder of the 12,000-square foot lot consists of maintained lawn and landscaping. The new residence is proposed no closer to the shoreline of Georgia Strait than the existing structure. The footprint of the proposed residence measures approximately 1,462-feet in size. The proposal also includes development of a detached garage structure along Freeman Lane measuring approximately 480-square feet in size. This structure will be accessed via a new 10-foot wide gravel driveway off Freeman Lane. The total development footprint of the proposed structures and developments are less than 2,500-square feet in size.

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. The marine waters of Georgia Strait are classified as a Habitat Conservation Area (HCA) pursuant to 16.16.700 and according to 16.16.740, have a prescribed buffer / setback of 150-feet as measured landward on a horizontal plane from the OHWM. The subject property meets the definition of a non-conforming lot pursuant to 23.110 and therefore is eligible for permitting pursuant to 23.50.07.K.1 without application of a shoreline variance if the proposed building area does not exceed 2,500-square feet and is located as far away from the shoreline as feasible. The applicant has applied for a shoreline variance based on a the hardship of view impacts as permitting via the above-referenced code provisions would result in a structure located further landward than the adjacent residences.

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.

In order for the requested variance to be approved, the proposal must satisfy the criteria of section 23.60.03 of the Shoreline Management Program (SMP). 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 all reasonable permitted use of the property.

The subject property is zoned for residential use and therefore development of a single-family residence and necessary appurtenances represents a reasonable permitted use of the subject property. Application of the full 150-foot prescribed shore setback leaves inadequate space to construct a residence and appurtenant developments.

Application of the non-conforming lot development provisions found in 23.50.07.K would result in a 2,500-square foot building area located approximately 50-feet landward of the adjacent residential structures to the north and south. At this distance, it is the opinion of staff that a view hardship would exist given the fact that nearly all of the lots located along Freeman Lane are developed at the same distance from OHWM as the proposed residence.

23.60.03.D.2 That the hardship described in 23.60.03.A 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 twice the size as the adjacent developed properties and historically was two lots prior to being subject to lot consolidation. The relatively large size of the lot compared to others along Freeman Lane creates the stated hardship of view impact to the applicant as new construction on non-conforming lots are subject to shore setbacks as far back as feasible from the shoreline while not exceeding a maximum building area of 2,500-square feet. The width of the lot in this case, pushes the building area farther from the shoreline and thus creates a greater impact on views. Therefore, the hardship is based on lot size and application of the applicable provisions of the SMP to new construction on a non-conforming lot, and not from the applicant's own actions.

This approval recommendation has been conditioned that a mitigation plan be developed in association with the required development permit, which is a condition of this variance approval. Such a mitigation plan will ensure a no net loss of shoreline ecological functions and processes as a result of the proposed residential development.

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 area of the subject property is currently developed with numerous small cabin structures and single-family residences at or near the same distance as the proposed new residence. A majority of the area proposed for development is currently developed or maintained as lawn and landscaping.

A mitigation plan is required as a condition of this approval recommendation. Such a mitigation plan will be required prior to issuance of development permits on the subject property and will demonstrate that approval of the proposed new residence will not result in a net loss of shoreline ecological functions and/or processes.

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.

Authorization of the proposed variance does not constitute a grant of special privilege not enjoyed by other properties in the area. The subject property is one of the only "double-lots" on Freeman Lane. If other property owners wish to remove old structures for replacement with new residences, they would likely be permitted utilizing the same common-line setback criteria as proposed by the applicant as the non-conforming lot provisions of 23.50.07.K does not allow for construction waterward of the common-line setback as illustrated in Appendix F of the SMP.

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

With proper mitigation as conditioned, no detrimental effects are anticipated nor were adverse comments received during the requisite public comment period.

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 Georgia Strait.

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

This approval recommendation has been conditioned to address the above variance criteria. A mitigation plan shall be professionally designed to compensate for any unavoidable impacts to the 150-foot buffer encroachment as a result of the requested variance.

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.

The applicant requests approval of the shoreline variance based on desire to enhance the view from the future single-family residence. The proposed location is in an area already impacted by clearing and maintenance of turf. No mature vegetation would require removal in order to construct the home and a mitigation plan will be developed to enhance other areas of the property to compensate for any lost shoreline ecological function. Based on the above, no detrimental effects to shoreline ecological functions or processes will occur.

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.

As stated previously within this staff report, no net loss to shoreline ecological functions or processes is anticipated as a result of the proposed residential development as conditioned. As such, approvals for additional requests where similar circumstances exist should not produce significant adverse effects to the shoreline environment or other users.

V. PUBLIC COMMENTS

On July 21, 2009, the following comment was received from Mr. Rod Matheson:

We support the application as it makes perfect sense given the profile of our cabins along the waterfront.

On July 23, 2009, the following comment was received from Mrs. Mona Carlile:

Hopefully this dwelling will be one-story and not excessive in size as have recently been built on Freeman's Beach.

On July 30, 2009, the following comments were received from Mr. and Mrs. W.V. Hobart:

We only ask that the new structure stays within the existing height restrictions (25-feet) in order that the view we now enjoy will not be obstructed. Also, we need assurance that the new structure is constructed on existing footprint.

On August 5, 2009, the following comments were received from Mr. and Ms. Tod and Irene Manrell:

It is our considered opinion that Whatcom County should stand in support of the application. The applicant should be allowed to construct or re-construct a building of their choice on their property without unreasonable restrictions. A new Structure should be allowed in line with adjacent buildings and should not be required to move east of the existing established building line.

Mr. and Mrs. Alspach should be supported in their application and encouraged by Whatcom County to continue their desired building program.

Whatcom County has suffered a significant economic reversal and most of the construction operators in the Point Roberts community have little or no work to perform. Whatcom County should therefore be doing everything in their power to reverse the trend and support construction projects such as this one.

On August 7, 2009, the following comments were received from Mr. David Kitts:

We hope the height restriction for the proposed building follows the 25-foot maximum. The width of the new building is confined more or less to the initial lot size. We are new residences

to the Freeman Lane Beach and have been very happy to experience the “neighborly” and friendly atmosphere of the residences in this community. Since we are located directly behind the Alspach Residence, we hope that they will have some consideration towards our relatively unobstructed view, that we have looking west out over their property to the water. We respect their wishes to build a comfortable home for their family and hope that they will also consider us and our neighbor by no spoiling the view, with their plans to build a new single-family residence on 649 Freeman Lane.

In regards to the above comments on building height, this approval recommendation has been conditioned that all development must meet the applicable height restrictions outlined within the SMP as well as Title 20 – Zoning Code, whichever is most restrictive.

VI. AGENCY COMMENTS

On August 7, 2009, the following comments were received from Ms. Sanja Barisic representing Whatcom County Public Works – Division of Engineering:

All development shall comply with the applicable Whatcom County Development Standards. The proposed driveway to the new garage shall be a minimum of 12-feet in width and topped with a minimum of 2-inches of compacted crushed rock as per Whatcom County Road Standards. The proposed garage shall be located a minimum of 12-feet from the eastern property line as illustrated on the revised site plan dated August 6, 2009.

The above comments have been incorporated as conditions of this approval recommendation. Note that the above-referenced revised site plan represent the approved plan reviewed pursuant to this permit application.

On August 12, 2009, the following comments were received from Mr. Travis Bouma representing Whatcom County Public Works – River and Flood Division:

The subject permit for parcel #405309480528 is located within a FEMA Coastal Flood Zone “V” with an undetermined Base Flood Elevation (BFE). This project will be subject to Whatcom County Flood Code (Title 17) in which more stringent building conditions/requirements will be imposed due to the fact it is located in a Coastal Flood Zone (see attached map). Flood Division would recommend moving the location of the house outside of the Flood Zone if possible. Furthermore, the Endangered Species Act (ESA) must also be addressed for any new development within a FEMA Flood Zone. This will require a review to be done to assure there is not an adverse impact to ESA and also may require the applicant to do mitigation.

The above comments have been incorporated as conditions of this approval recommendation.

VI. RECOMMENDATIONS

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

1. *The use, location and size of the improvements on the site as indicated on site plan shall not be modified or changed in any way without further review by the Shoreline Administrator and approval of the Whatcom Hearing Examiner, except as modified by this approval.*

2. *The building area within the jurisdiction of the Whatcom County Shoreline Management Program shall not exceed 2,500-square feet in size.*
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 or 25-feet as measured from average grade to the midpoint of the highest gable, whichever is more restrictive.*
4. *The applicant shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property. The building permit will be reviewed pursuant to 23.60.01.A to ensure consistency with this variance approval and any other applicable provisions of the Whatcom County Shoreline Management Program.*
5. *The design of the proposed single-family residence shall comply with the required standards of the Whatcom County Flood Ordinance (Title 17). Such standards will be reviewed pursuant to the above-referenced building permit application. An ESA checklist is available from Whatcom County Planning & Development Services to assist in compliance with the ESA review.*
6. *The design of the proposed developments shall comply with all applicable Whatcom County Development Standards. The proposed garage shall maintain a minimum distance of 12-feet from the eastern property line.*
7. *A mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the marine shoreline buffer area as a result future residential construction. The plan shall be submitted 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.*
8. *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