

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE CONDITIONAL USE	)	SHC2008-0009
ZONING VARIANCE	)	VAR2008-0004
Application for	)	
	)	
<i>Fred and Donna Bullock</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 Conditional Use Permit and a Zoning Variance to expand a nonconforming residence by adding a 402 square foot garage. The Applicants are requesting reduction of the required 20-foot front-yard zoning setback to 15-feet to accommodate the location of the garage. The existing residential structure is located approximately 43-feet from the Ordinary High Water Mark (OHWM) of Hale’s Passage and approximately 10-feet from the top of the bluff.

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: Fred and Donna Bullock

Property Location: 2090 S. Nugent Road – Lummi Island, Washington

Assessor’s Parcel No. 370110-006523

Adjacent Water Body: Hale Passage

Shoreline Designation: Rural

Statewide Significance: No

Zoning: Rural Residential Island (RRI)

Comprehensive Plan: Rural

Subarea: Lummi Island Subarea

Authorizing Ordinances:	SMP 23.70.40	Hearing Examiner
	SMP 23.50	Applicability
	WCC 20.84.100	Variances
	WCC 20.92	Hearing Examiner
	WCC 20.80.200	Setback Requirements

Applicable Shoreline Program Provisions

SMP 23.20	Goals and Objectives
SMP 23.30.40.43	Rural Shoreline Area
SMP 23.40	Shorelines of State-wide Significance
SMP 23.60.190	Shoreline Conditional Use Criteria
SMP 23.90	General Policies & Regulations
SMP 23.100.130	Residential
SMP 23.110	Definitions

SEPA Review: SEPA - Exempt

Legal Notices: Published – May 26, 2008, February 20 and May 14, 2009  
Posted – May 12, 2009  
Mailed – May 8, 2009

Hearing Date: May 27, 2009

Parties of Record:

Fred and Donna Bullock  
2328 – 214<sup>th</sup> Place SW  
Brier, WA 98036

Jesse Stoner  
1629 Fruitland Drive  
Bellingham, WA 98226

Brenda Wilson and Sam McDaniel  
Planning and Development Services

Exhibits:

- 1 Land Use Application
  - 1-1 Supplemental Application
  - 1-2 Deed
  - 1-3 Receipt
  - 1-4 Sewage Disposal System Construction Permit
  - 1-5 Form letter and memo
  - 1-6 Mailing Labels
  - 1-7 Letter of Completeness, dated May 22, 2009
  - 1-8 Email requesting hearing date
- 2 Legal, dated May 26, 2008 and February 20, 2009
- 3 SEPA Checklist
- 4 Certificate of Mailing, dated May 8, 2009
- 5 Certificate of Posting, dated May 12, 2009
- 6 Legal, dated May 14, 2009
- 7 Site Plan
- 8 Even larger site plan
- 9 Vicinity Map
- 10 Aerial Map
- 11 Zoning Map
- 12 Northwest Ecological Services, dated January 21, 2008 re: Ordinary High Water Mark Determination
- 13 GeoTest, dated February 21, 2008 re: Slope Evaluation
- 14 Certified copy of Land Use Application for Zoning Variance
- 15 Staff Report, dated May 19, 2009, with Agency Comments attached

## **II.**

The Applicants are requesting a Shoreline Conditional Use Permit and Zoning Variance to expand a nonconforming residence by adding a 402-square foot garage. The Zoning Variance is required in order to reduce the front yard zoning setback to 15-feet to accommodate the location of the garage.

## **III.**

The Applicants have indicated that the Staff Report is factually correct. The Applicants 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 Staff Report, Exhibit #15, dated May 19, 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 and Zoning Planners have recommended approval of the requested shoreline and zoning permits for the proposed expansion of an existing nonconforming residence by adding a 402-square foot garage and reducing the front yard setback to 15-feet to accommodate its location.

Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit #15, dated May 19, 2009. 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 and with the Zoning Variance Criteria of WCC 20.84.120 (1 through 3). 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 Conditional Use Permit and Zoning Variance Permit are hereby granted to Fred and Donna Bullock to expand an existing nonconforming residence by adding a 402-square foot garage and reducing the front yard setback to 15-feet to accommodate its location. The property in question is located at 2090 South Nugent Road, Lummi Island, Washington. The permits are granted subject to the following conditions:

1. Construction shall conform to the site plan, design, configuration, size and location that have been approved for this permit. Any alteration of the approved design shall require additional review by the Whatcom County Hearing Examiner.
2. This permit does not release the Applicant from the requirements of any other Federal, State or local law or regulations and does not authorize work on property that the Applicant does not own unless written permission is provided to the County by the affected property owner.
3. A Building Permit is required from Whatcom County Building Services prior to commencement of the proposed development activities.
4. If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907) LNTHPO (384-2298) and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LHTHPO Department (384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.
5. Disposal of construction and demolition debris shall be completed in accordance with the requirements of Whatcom County PDS, the Northwest Air Pollution Authority (NWAPA), and DOE.
6. Washington State Department of Ecology Water Quality Standards shall be maintained.
7. Prior to issuance of a building permit from Whatcom County, the Applicant shall provide a cultural resource site assessment. The site assessment shall be conducted by a professional archaeologist or historic preservation professional, as applicable, to determine the presence of significant historic or archaeological resources. The fee for the services of the professional archaeologist or historic preservation professional shall be paid by the landowner or responsible party. The applicant shall submit a minimum of five (5) copies of the site assessment to the Shoreline Administrator for distribution to the applicable parties for review.
8. The Applicant shall comply with all of the requirements of the Whatcom County Health Department, as identified in the memorandum from the Environmental Health Specialist, dated March 10, 2009, unless modified by the Whatcom County Health Department or appealed to the

appropriate agency.

9. The Applicant shall comply with all of the requirements of the Lummi Indian Business Council unless modified by the Lummi Indian Business Council or appealed to the appropriate agency.
10. The Applicant shall comply with all of the requirements of the Whatcom County Engineering Services Division, as identified in the memorandum dated September 18, 2008, unless modified by the Whatcom Engineering Services Division, or appealed to the appropriate agency.
11. Vegetation removal shall be kept to the minimum necessary to accommodate the approved development. Upon completion of the project, the applicant shall re-vegetate disturbed areas as soon as possible.
12. Construction shall commence within two years of the effective date of the Shoreline Conditional Use Permit 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. Permit authorization shall terminate five years after the effective date of the Shoreline Conditional Use Permit 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 27<sup>th</sup> day of May 2008.

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Michael Bobbink, Hearing Examiner



May 19, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of :		SHC2008-00007 & VAR2008-00004
<b>Fred &amp; Donna Bullock</b>		FIDINGS, CONCLUSIONS, and
For a Shoreline Conditional Use Permit & Zoning		RECOMMENDATIONS
Variance		

I. SUMMARY OF APPLICATION AND RECOMMENDATIONS

**Application:** The applicant is requesting approval of a Shoreline Conditional Use and a Zoning Variance to expand a nonconforming residence by adding a 402 square foot garage. The applicant is requesting reduction of the required 20-foot front-yard zoning setback to 15-feet to accommodate the location of the garage. The existing residential structure is located approximately 43-feet from the Ordinary High Water Mark (OHWM) of Hale's Passage and approximately 10-feet from top of the bluff.

**Recommendation:** Staff recommends approval of the Shoreline Conditional Use Permit and Zoning Variance subject to the conditions outlined within this staff report.

II. PRELIMINARY INFORMATION

**A. BACKGROUND INFORMATION**

**Applicant:** Fred & Donna Bullock

**Property Location:** 2090 S. Nugent Road. – Lummi Island, Washington

**Assessor's Parcel No:** 370110-006523

**Adjacent Water Body:** Hale Passage

**Shoreline Designation:** Rural

**Statewide Significance:** No

**Zoning:** Rural Residential Island (RRI)

**Comprehensive Plan:** Rural



Subarea: Lummi Island Subarea

## B. PROCEDURAL INFORMATION

Authorizing Ordinances:	SMP 23.70.40	Hearing Examiner
	SMP 23.50	Applicability
	WCC 20.84.100	Variances
	WCC 20.92	Hearing Examiner
	WCC 20.80.200	Setback Requirements

### Applicable Shoreline Program Provisions

SMP 23.20	Goals and Objectives
SMP 23.30.40.43	Rural Shoreline Area
SMP 23.40	Shorelines of State-wide Significance
SMP 23.60.190	Shoreline Conditional Use Criteria
SMP 23.90	General Policies & Regulations
SMP 23.100.130	Residential
SMP 23.110	Definitions

SEPA REVIEW: SEPA - Exempt

## III. FINDINGS AND CONCLUSIONS

The applicant is requesting approval of a Shoreline Conditional Use Permit to expand an existing, non-conforming residential structure by the addition of a 402 square foot garage to the north side of the residence. The existing residential structure is located approximately 43-feet from the Ordinary High Water Mark (OHWM) of Hale's Passage and approximately 10-feet from top of the bluff. **The applicant is requesting a Zoning Variance permit to reduce the front-yard setback from 20-ft. to 15 to locate the proposed garage.**

The subject property is located at 2090 S Nugent Road, on Lummi Island, along the body of Hale Passage. The property is irregularly shaped and is approximately 27,000 square feet in size. The existing single family residence is setback 10 feet from the top of the slope. The nonconforming residence has a foot print of 308 square feet and an appurtenant deck with a foot print of approximately 300 square feet. The slope is approximately 27 feet in height and slopes down to the east at approximately a rate of 1H:1V (horizontal:vertical). The slope is heavily vegetated with brush and occasional fir trees up to thirty inches in diameter.

According to the Whatcom County Zoning Map, the subject site is zoned Rural Residential Island. Chapter 20.34.051 states that one single-family dwelling unit per lot is permitted in the Rural zoning designation. Pursuant to the Whatcom County Shoreline Management Program, the subject property is designated a Rural Shoreline Area. Policies for Rural Shoreline Areas indicate that new development should protect or enhance the area character by limiting building density and height, providing ample shore setbacks and open space, and promoting visual harmony. The proposed development activities on the property appear to comply with the policies and regulations specified under the applicable zoning and shoreline designations.

Construction of a single-family residence and associated appurtenant structures are permitted by Shoreline Statement of Exemption per 23.50.32(g); however expansion of a non-conforming residence requires a Shoreline Conditional Use Permit pursuant to 23.50.91 as long as the enlargement or expansion does not extend either further waterward than the existing structure or further into the minimum side yard setback. Based on the review of the submitted site plan, the proposal complies with the above restrictions.

In order for a Shoreline Conditional Use Permit to be approved, the proposal must satisfy the criteria of section 23.60.192 of the Program. These criteria are set forth and discussed below.

#### A. CONDITIONAL USE PERMIT CRITERIA

##### **A. That the proposed use will be consistent with the policies of RCW 90.58.020 and this Program.**

The Shoreline Management Act (SMA) of 1971, at RCW 90.58.020 indicates:

*“... uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses....”*

Residential development is a preferred use of the shoreline within the Rural shoreline designation pursuant to the SMA and SMP. The proposed structure will be located wholly on the upland portion of the subject property and will not be further water-ward than the existing structure or within the side yard setback. The project has been reviewed for compliance with the Whatcom County Critical Areas Ordinance (CAO) and it has been determined by CAO staff that the proposal will not result in additional adverse environmental impacts on the subject property. Furthermore, the project is categorically exempt from SEPA review. With consideration of these findings, staff finds the project to be consistent with the policies of RCW 90.58.020 and the SMP.

##### **B. That the proposed use will not interfere with normal public use of public shorelines.**

The proposed development will occur entirely upon private upland property, and does not involve any work at or waterward of OHWM. The property is currently in residential use, and this use will continue. No new uses will be introduced. The project has no apparent impact to existing public access and should not interfere with the enjoyment of the adjacent marine waters.

##### **C. That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.**

The area of the subject property is predominantly single family residence uses with a few larger single family residences and appurtenant developments. Staff finds that the proposal is compatible with permitted residential use of the area and consistent with existing structures along the shoreline in this area.

##### **D. That the proposed use will cause no unreasonable adverse effects to the shoreline environment in which it is to be located.**

The proposed development will occur entirely upon private upland property, and does not involve any work at or waterward of OHWM. The location of the proposed garage is within an area that has been altered with gravel and is used as a parking area. The project was unconditionally approved by the Whatcom County Critical Areas administrator and received conditional approval by the Whatcom County geologist. The project is categorically exempt from SEPA review.

**E. That the public interest will suffer no substantial detrimental effect.**

The subject property has been developed with the existing single-family residence since 1975 according to available aerial photographs. The proposed expansion will not displace functional buffer/setback areas. This approval recommendation has been conditioned that a building permit be obtained prior to construction activities on the property. Short-term impacts during construction will be addressed through the review and issuance of the building permit from Whatcom County Planning and Development Services (PDS). No substantial detrimental effects to the public interest were identified by staff during the review of the project.

**III. ZONING REVIEW**

**Variance Review**

In order for any variance to be approved, it must demonstrate compliance with the variance criteria of WCC 20.84.120, 1 through 3, as follows:

- 1) The granting of this variance shall not constitute a grant of special privilege, be based upon reasons of hardship caused by previous actions of the property owner, nor be granted for pecuniary reasons alone, but be granted because of special circumstances applicable to the subject property, including size, shape, topography, location or surrounding.

Comment:

Staff has no reason to believe that this variance has been requested for financial reasons, or by any previous actions of the property owners. The hardship is created simply by the topography, shape and size of the subject parcel.

This variance does not constitute a grant of special privilege because single family residential development is the primary use of property in the surrounding area.

- 2) Because of special circumstances applicable to the subject property, including size, shape, topography, location or surrounding, the strict application of the zoning ordinance is found to cause a hardship and deprive the subject property of a use or improvement otherwise allowed in the identical zoning classification

Comment:

Again, the special circumstance in this case is the size, shape and topography of the

site. It is clear that the steep slope to the east severely limits placement of a garage.

Since the design shows the placement of the garage in the most logical area of the site (in the proximity of the existing driveway and adjacent to the house as opposed to the existing deck) it does not appear that a garage could be constructed elsewhere on the property without obtaining a zoning variance due to the slope. There is no evidence that granting of the requested variance will be detrimental to the public welfare, or injurious to the property or improvements in the vicinity and zone in which the subject is situated.

**3)** Aesthetic considerations or design preferences without reference to restrictions based upon the physical characteristics of the property do not constitute sufficient hardship under this section, and the granting of this variance shall not be materially detrimental to the public welfare, or injurious to the property or improvement in the vicinity and zone in which the subject is situated.

Comment:

The proposed footprint of the garage is smaller than the average size, (402 square feet). There is no evidence to support a finding that the request is a result of design preferences or aesthetic considerations, since there are actual physical constraints on the subject site.

C. PUBLIC COMMENTS

No public comments were received during the review of this permit application.

D. AGENCY COMMENTS AND REVIEW

The **Whatcom County Health Department** submitted the following comments regarding the proposal on March 10, 2009:

*The proposed garage does not constitute an expansion. At the time of building permit application the existing on-site sewage (OSS) must be submitted so the WCHD can review that setbacks are met. If the house is ever expanded a conforming OSS will be required.*

The applicant shall comply with all of the requirements of the Whatcom County Health Department unless modified by the Whatcom County Health Department or appealed to the appropriate agency.

The **Lummi Indian Business Council** submitted the following comments regarding the proposal on June 23, 2008:

The Lummi Nation Tribal Historic Preservation Office (LNTHPO) has facilitated an internal review of the project using records on file with the Lummi Nation's Cultural Resource Management Program. Our review indicates the following:

1. Proposed project location is within the boundaries of a State registered Archaeological

Site

2. Proposed project location is less than 1 mile of a Shoreline
3. Proposed project has the potential to adversely affect Cultural Resources

Based on the factors, it is highly likely that cultural resources are present in the proposed project area. The LNTPO recommends a professional cultural resource assessment of the proposed project area be conducted prior to the commencement of ground-disturbing activities in order to determine the presence of cultural resources and plan for their appropriate protection during all phases of the project.

The applicant shall comply with all of the requirements of the Lummi Indian Business Council unless modified by the Lummi Indian Business Council or appealed to the appropriate agency.

The **Whatcom County Engineering Services Department** submitted the following comments regarding the proposed project on September 18, 2008:

*\*\*\*\*\* All development shall comply with WC Development Standards*

1. *An approved turn around shall be provided on the site so vehicles can enter the travel way in a forward motion. Site Plan clearly showing this area shall be submitted with the building permit application for the review and approval*
2. *The applicant shall obtain a Revocable Encroachment Permit from Public Works, Engineering Services to verify existing driveway access.*
3. *No parking on S. Nugent Rd shall be permitted.*

The applicant shall comply with all of the requirements of the Whatcom County Engineering Services Department unless modified by the Whatcom County Engineering Services Department or appealed to the appropriate agency.

The **Whatcom County Critical Areas Specialist** submitted the following comments regarding the proposed project on September 12, 2008:

*There are no Critical Area impacts per VAR2008-00004. Area of proposed development is substantially developed (parking area). Critical Areas staff approves the project without reservation.*

#### IV. CONCLUSIONS AND RECOMMENDATION

Based on the above findings and technical review, Staff recommends approval of the request for a Shoreline Conditional Use and a Zoning Variance to expand a non conforming residence by the addition of a garage at 2090 South Nugent Road subject to the following conditions:

1. Construction shall conform to the site plan, design, configuration, size and location that have been approved for this permit. Any alteration of the approved design shall require additional review by the Whatcom County Hearing Examiner.
2. This permit does not release the applicant from the requirements of any other federal, state or local law or regulations and does not authorize work on property that the applicant does not own unless written permission is provided to the County by the effected property owner.

3. A Building Permit is required from Whatcom County Building Services prior to commencement of the proposed development activities.
4. If archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907) LNTHPO (384-2298) and Washington State Office of Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) and LHTHPO Department (384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.
5. Disposal of construction and demolition debris shall be completed in accordance with the requirements of Whatcom County PDS, the Northwest Air Pollution Authority (NWAPA), and DOE.
6. Washington State Department of Ecology water quality standards shall be maintained.
7. Prior to issuance of a building permit from Whatcom County, the applicant shall provide a cultural resource site assessment. The site assessment shall be conducted by a professional archaeologist or historic preservation professional, as applicable, to determine the presence of significant historic or archaeological resources. The fee for the services of the professional archaeologist or historic preservation professional shall be paid by the landowner or responsible party. The applicant shall submit a minimum of five (5) copies of the site assessment to the Shoreline Administrator for distribution to the applicable parties for review.
8. The applicant shall comply with all of the requirements of the Whatcom County Health Department unless modified by the Whatcom County Health Department or appealed to the appropriate agency.
9. The applicant shall comply with all of the requirements of the Lummi Indian Business Council unless modified by the Lummi Indian Business Council or appealed to the appropriate agency.
10. The applicant shall comply with all of the requirements of the Whatcom County Engineering Services Department unless modified by the Whatcom Engineering Services Department or appealed to the appropriate agency.
11. Vegetation removal shall be kept to the minimum necessary to accommodate the approved development. Upon completion of the project, the applicant shall re-vegetate disturbed areas as soon as possible.
12. Construction shall commence within two years of the effective date of the Shoreline Conditional Use Permit as defined by WAC 173-27-090.

Report prepared by:

Sam McDaniel  
Whatcom County Shorelines Administrator

And

Brenda Wilson  
Senior Planner