

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE VARIANCE ) SHV2009-0006  
Application for )  
)  
*Delcia Dinnetz* ) 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: Delcia Dinnetz

Applicant Representative: Heidi Joostens – JWR Design.

Property Location: 4111 Sucia Drive  
Ferndale, Washington

Legal Description: Section 08, Township 38 North, Range 01 West, W.M.  
Parcel No. 380108 423015

Adjacent Water Body: Georgia Strait

Shoreline Designation: Shoreline Residential

Statewide Significance: No

Zoning: Residential Rural

Comprehensive Plan: Suburban Enclaves

Subarea: Lummi Island Subarea

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 – December 3, 2009  
Posted – December 3, 2009  
Mailed – August 13 and November 20, 2009

Hearing Date: December 16, 2009

Parties of Record:

Delcia Dinnetz  
4111 Sucia Drive  
Ferndale, Washington 98248

Heidi Joostens – JWR Design.  
104 Front Street  
Lynden, Washington 98264

Chad Yunge  
Planning and Development Services

Exhibits:

1 Land Use Application

- 1-1 Supplemental Application
- 1-2 Personal Representative's Quit Claim Deed
- 1-3 Project Narrative
- 1-4 Assessor's Records
- 1-5 County's Form Letter Notice of Application
- 1-6 Determination of Completeness, dated August 12, 2009
- 1-7 Neighboring Property Owner Addresses
- 1-8 Certificate of Mailing, dated August 13, 2009
  
- 2 Revised Site Plan
  
- 3 Aerial Photo
  
- 4 Certificate of Mailing of Notice of Hearing, dated November 20, 2009
  
- 5 Certificate of Posting, dated December 3, 2009
  
- 6 Legal Notice, dated December 3, 2009
  
- 7 Staff Report, dated December 14, 2009
  
- 8 Agency Comments
  
- 9 Public Comments

**II.**

Delcia Dinnetz is seeking approval of a Shoreline Variance to reduce the shore setback from Georgia Strait in order to construct a single-family residence and associated appurtenant developments.

**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 Staff Report, Exhibit #7, dated December 14, 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.

Whatcom County Shoreline Planner has recommended approval of the requested Shoreline Variance Permit for the proposed reduction from Georgia Strait for the construction of a single-family residence and associated appurtenant developments.

Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit #7, dated December 14, 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. 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 Delcia Dinnetz to reduce the shore setback and construct a single-family residence and associated appurtenant developments to be located on Assessor's Parcel No. 380108 423015, at 4111 Sucia Drive, Ferndale, Washington. The permits are granted subject to the following conditions:

1. The use, location and size of the improvements on the site as indicated on the revised site plan, dated August 7, 2009, 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 proposed single-family residence shall not exceed 30-feet in height as measured from average existing grade to the peak of the structure.
3. The remaining setback area between the proposed residence and the existing shoreline shall be re-vegetated upon completion of the construction, preferably with native plant species. No impervious materials, including gravel, is allowed within the remaining shore setback area.
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. Prior to application of the required building permit, the applicant shall retain a Washington State Licensed Surveyor to establish the landward extent of the VE Flood Zone on the subject property and to determine the Base Flood Elevation (BFE) on the remainder of the subject property in order to facilitate the flood review pursuant to Title 17. Please contact Travis Bouma at the Whatcom County River and Flood Department (360-676-6876) for more information.
6. The design of the proposed developments shall comply with all applicable Whatcom County Development Standards. A site plan shall be submitted with the required building permit applicant that illustrates a driveway design demonstrating that vehicles can enter the travel way in a forward motion. The applicant shall also make application for a Revocable Encroachment Permit from the Engineering Services Division of Whatcom County Public Works to verify the existing access off Sucia Drive. A paved apron may be required pursuant to applicable development standards. Please Contact Sanja Barasic at Engineering Services (360-676-6730) for more information.
7. 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 16<sup>th</sup> day of December 2009.

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Michael Bobbink, Hearing Examiner



December 14, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of <b>Delcia Dinnetz</b> for a Shoreline Variance Permit		SHV2009-00006 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: Delcia Dinnetz  
4111 Sucia Drive  
Ferndale, Washington 98248

Applicant Representative: Heidi Joostens – JWR Design.  
104 Front Street  
Lynden, Washington 98264

Property Location: 4111 Sucia Drive

Legal Description: Section 08 Township 38 North, Range 01 West, W.M.  
Parcel #: 380108423015

Adjacent Water Body: Georgia Strait

Shoreline Designation: Shoreline Residential

Statewide Significance: No

Zoning: Residential Rural

Comprehensive Plan: Suburban Enclaves

Subarea: Lummi Island Subarea

**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 shore setback from 110-feet to 46-feet, as measured from the waterward face of an existing bulkhead along Georgia Strait, to construct a single-family residence and associated appurtenant developments.

The subject property is currently developed with a single-family residence located approximately 25 to 30-feet from the bulkhead. According to the applicants, the overall project goal is to re-develop the property with a new residence further from the shoreline to reduce damage to the structure by storms while still providing for a location on the property that enhances the view of Georgia Strait. Construction of a new home at 110-feet would substantially alter the applicant’s view due to the close proximity of adjacent homes to the north and south and thus the purpose of the variance.

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 at 110-feet.

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 75 to 80-feet landward of the waterfront facades 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 Sucia Drive are developed at a distance closer to the shoreline than proposed by the applicants.

Section 23.60.03.F states that variance requests can be based on the applicant's desire to enhance the view from the subject development and may be granted where there are no likely detrimental effects to existing or future users, other features or shoreline ecological functions and processes, and where reasonable alternatives. It is the opinion of staff that the proposed project is consistent with the above provisions.

**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 view hardship discussed in 23.60.03.A is a result of historic property development patterns starting prior to the adoption of the State Shoreline Management Act in the early 1970s and prior to the adoption of the first Whatcom County Shoreline Management Program (SMP) in 1976. The hardship is not a result of the applicant's own actions.

**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 proposed residence will be located further from the shoreline than the existing residence on the property and further landward than the adjacent homes in the area. The size and configuration of the home is consistent with other residential structures in the area. No adverse effects to adjacent properties or to the shoreline environment were identified during review of the project proposal.

**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. Similar variance requests have been supported by staff in the past as long as the setback reduction does not represent an impact to shoreline ecological functions and processes which the current proposal does not. Staff believes that the proposed reduction to the shore setback represents a good compromise between view impacts while locating the structure outside of the high energy flood zone as identified on available Flood Insurance Maps. The additional setback from the shoreline also allows more area to allow buffering functions to occur.

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

No substantial detrimental effects to the public interest were identified by staff during review of the project.

**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.**

No adverse impacts were identified in association with the proposed project that would require mitigating measures other than short term impacts addressed by the recommended permit conditions.

**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 August 18, 2009, the following comment was received from Mr. Jerry Schumm of 4068 Sucia Drive:

*Enclosed is a completed copy of your August 12, 2009 letter regarding the Dinnetz Shoreline Variance Application. You can rest assured that the Sandy Point Community will file a lawsuit against the county if it passes this proposal. We will all seek damages.*

On August 19, 2009, the following comment was received from Mr. John Lind and Ms. Nancy Lind of 4133 Matia Drive:

*Good luck to the applicants pursuing their dreams through your bureaucratic nightmare.*

#### VI. AGENCY COMMENTS

On September 30, 2009, the following comments were received from Ms. Sanja Barisic representing Whatcom County Public Works – Division of Engineering:

*An approved turnaround shall be provided on the site so that vehicles can enter the travel way in a forward motion. The site plan shall clearly show this area and shall be submitted for review at the time of building permit application.*

*The applicant shall obtain a Revocable Encroachment Permit from the Engineering Services to verify the existing access. A Paved apron may be required for the access point pursuant to Whatcom County Development Standards.*

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

On August 31, 2009, comments were received via an electronic mail transmission from Travis Bouma of the Whatcom County Pubic Works – River and Flood Division (River and Flood) by WCPDS. A Federal Emergency Management Agency (FEMA) Digital Flood Insurance Rate Map (DFIRM) was attached illustrating two Flood Zone categories on the subject property. The westernmost quarter of the subject property is located within a VE Zone with a Base Flood Elevation (BFE) of 13.0 –feet. The remainder of the subject property is located within an AE Zone with a BFE of 8-feet. It is the recommendation of River and Flood that the proposed residence be located within the less hazardous AE Zone area to avoid the VE Zone. The development is subject to review pursuant to WCC Title 17 – Flood Damage Prevention which may require review for potential impacts under the Endangered Species Act due to a recent Federal Court Ruling. Such review will be completed by River and Flood through application of the required building permit.

This permit recommendation has been conditioned that the future residence be constructed outside of the VE Zone on the subject property. Prior to application of a building permit, the applicant shall have a survey completed to ascertain the exact location of the VE Zone on the subject property.

On September 18, 2009, comments were received from Mr. Leroy Deardorff, Director of the Environmental Protection Program of the Lummi Indian Business Council. The following is a synopsis of the letter received by Mr. Deardorff. Please refer to the hard file for the entire text:

Mr. Deardorff raises issues with the depiction of OHWM on the site plans submitted by the applicants. Staff is in agreement that OHWM, as depicted by the applicant's at the toe of an existing rock revetment structure along western edge of the site is not consistent with the definition of the OHWM per 23.110 of the SMP. For the purposes of this permit review, an accurate OHWM determination was not required as the location of the proposed residence is proposed based on flood zone designations and view impacts. This permit recommendation has been conditioned that the flood zone boundaries be surveyed prior to building permit submittal to determine the exact location of the residence. Mr. Deardorff raises issues regarding tribal jurisdiction and trespass on tidelands and cites federal court rulings regarding such trespass. These issues are beyond the scope of this permit application and therefore outside of the purview of WCPDS.

Mr. Deardorff states that the Sandy Point peninsula and the subject property have a high vulnerability to natural hazards such as coastal flooding, windstorms, tsunamis, coastal erosion and earthquakes. Mr. Deardorff encourages the applicant to participate in a voluntary pre-disaster mitigation acquisition program to permanently remove existing and future structures from the property. Based on applicable Whatcom County Code, staff is in agreement that the subject property, and greater Sandy Point peninsula has been identified as susceptible to flooding and other geologic hazards such as tsunami inundation, seismic hazards and erosion. Such hazards may require quantification by a third party consultant during review of future development permits required to construct the proposed residence. While avoidance of such hazards is required pursuant to WCC, the WCPDS can not prohibit all reasonable economic use of the subject property. Unavoidable life and safety issues on the subject property will require design by third party engineers to demonstrate that the structure would withstand such forces throughout the lifetime of said structure. Such review will be triggered by application of a building permit for the future residence with WCPDS.

## 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 the revised site plan, dated August 7, 2009, 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 proposed single-family residence shall not exceed 30-feet in height as measured from average existing grade to the peak of the structure.*
3. *The remaining setback area between the proposed residence and the existing shoreline shall be re-vegetated upon completion of the construction preferably with native plant species. No impervious materials, including gravel is allowed within the remaining shore setback area.*
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. Prior to application of the required building permit, the applicant shall retain a Washington State Licensed Surveyor to establish the landward extent of the VE Flood Zone on the subject property and to determine the Base Flood Elevation (BFE) on the remainder of the subject property in order to facilitate the flood review pursuant to Title 17. Please contact Travis Bouma at the Whatcom County River and Flood Department (360-676-6876) for more information.*
6. *The design of the proposed developments shall comply with all applicable Whatcom County Development Standards. A site plan shall be submitted with the required building permit applicant that illustrates a driveway design demonstrating that vehicles can enter the travel way in a forward motion. The applicant shall also make application for a Revocable Encroachment Permit from the Engineering Services Division of Whatcom County Public Works to verify the existing access off Sucia Drive. A paved apron may be required pursuant to applicable development standards. Please Contact Sanja Barasic at Engineering Services (360-676-6730) for more information.*
7. *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