

**WHATCOM COUNTY HEARING EXAMINER**

RE: SHORELINE VARIANCE ) SHV2009-0003  
Application for )  
 )  
*Richard Westerop* ) FINDINGS OF FACT,  
 ) CONCLUSIONS OF LAW,  
 ) AND DECISION

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**SUMMARY OF APPLICATION AND DECISION**

Application: The Applicant is requesting a Shoreline Variance Permit to reduce the shore setback from an unnamed stream within the jurisdiction of the Whatcom County Shoreline Management Program (SMP) in order to construct a single-family residence.

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: Richard Westerop  
Property Location: 3742 South Bay Drive  
Whatcom County, Washington  
Legal Description: Section 22, Township 37 North, Range 04 East, W.M.  
Parcel No. 370422 074056  
Adjacent Water Body: Lake Whatcom / Unnamed Stream  
Shoreline Designation: Shoreline Residential  
Statewide Significance: Yes / No

Zoning: Residential Rural

Comprehensive Plan: Suburban Enclave

Subarea: Lake Whatcom

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 – June 25 and September 10, 2009  
Posted – September 9, 2009  
Mailed – June 22 and September 3, 2009

Hearing Date: September 23, 2009

Parties of Record:

Richard Westerop  
112 East Maple Street, Suite 101  
Bellingham, Washington 98225

Chad Yunge  
Planning and Development Services

Exhibits:

- 1 Land Use Application, with attachments
  - 1-1 Shoreline Permit Submittal Requirements
  - 1-2 Supplemental Application
  - 1-3 Project Narrative
  - 1-4 Guidelines for Finding Property Owners

- 1-5 Property Owner List
  - 1-6 Customer Receipt
  - 1-7 Statutory Warranty Deeds [May 24, 2006, February 9, 1999]
  - 1-8 Quit Claim Deeds [February 3, 1999, April 24, 1998, May 29, 1997]
  - 1-9 Statutory Warranty Deeds [May 29, 1997, June 30, 1953]
  - 1-10 Mailing Labels
  - 1-11 Notice of Application Form Letter, dated June 22, 2009
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- 2 Staff Report, dated September 1, 2009
  - 3 Aerial Site Photos
  - 4 Vicinity Map/Site Plan “Current Developable Area”
  - 5 Certificate of Mailing, dated June 23, 2009, with attached Distribution List
  - 6 Legal Notice, dated June 25, 2009
  - 7 Certificate of Mailing, dated September 3, 2009
  - 8 Certificate of Posting, dated September 9, 2009
  - 9 Legal Notice, dated September 10, 2009

## **II.**

The Applicant is requesting a Shoreline Variance Permit for the proposed reduction in the shore setback from an unnamed creek located within SMP jurisdiction from 100-feet to approximately 30 to 57-feet in order to construct a single-family residence and associated appurtenances. The proposed development is to be located approximately 120-feet from Lake Whatcom.

## **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, either in writing or at the public 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 #2, dated , September 1, 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 permit for the proposed reduction of the shore setback from an unnamed stream to approximately 30 to 57-feet for the construction of a single-family residence.

Findings of Fact and Conclusions of Law are set forth in the Staff Report, Exhibit #2, dated September 1, 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 Richard Westerop to permit the reduction in the shore setback from an unnamed stream to approximately 30 to 57-feet for the construction of a 2,500-square foot residence with associated appurtenant development to be located on Assessor's Parcel No. 370422 074056, at 3742 South Bay Drive, Whatcom County, 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 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.

4. The Applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other approvals as required by WDFW for any work within or over the creek located on the subject property. A copy of the HPA shall be submitted upon application of the required building permit.
5. A mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the stream 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.
6. 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 23<sup>rd</sup> day of September 2009.

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Michael Bobbink, Hearing Examiner



September 1, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of <b>Richard Westerop</b> for a Shoreline Variance Permit		SHV2009-00003 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 an unnamed stream within the jurisdiction of the Whatcom County Shoreline Management Program (SMP) in order to construct a single-family residence.

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

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: Mr. Richard Westerop  
112 East Maple Street, Suite 101  
Bellingham, Washington 98225

Property Location: 3742 South Bay Drive – Whatcom County, Washington

Legal Description: Section 22 Township 37 North, Range 04 East, W.M.  
Parcel #: 370422074056

Adjacent Water Body: Lake Whatcom / Unnamed Stream

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes / No

Zoning: Residential Rural

Comprehensive Plan: Suburban Enclave



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 portion of the subject property within the jurisdiction of the SMP is relatively narrow measuring approximately 60 to 65-feet in width. Application of the full 100-foot setback/buffer measured from the unnamed creek to the west of the subject property would leave insufficient area to construct a single-family residence and necessary appurtenant developments. The subject property is zoned for residential use. In addition, the guiding policy of the State Shoreline Management Act (SMA) enumerated in 90.58.020, grants preference to residential use and development along shorelines of the state as long as such development is designed and constructed to minimize adverse impacts to the shoreline environment or other public rights to such areas. As such, the application of the full 100-foot setback/buffer in this case would significantly interfere with all reasonable permitted use of the portion of the property within shoreline jurisdiction.

**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.**

23.60.03.A states that the purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in the SMP and any associated standards appended to the SMP such as CAO 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 or thwart the policy set forth in RCW 90.58.020.

As stated previously within this approval recommendation, the above-referenced policy set forth within the SMA gives preference to residential development along shorelines of the state. Due to the narrow lot width of the portion of the subject property within shoreline jurisdiction, coupled with the presence of a fish-bearing stream to the west of the site, strict implementation of the required setbacks/buffers outlined within the SMP poses an unnecessary hardship on the applicant. 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. Denial of the variance request in this case would thwart the policy of 90.58.020.

The presence of the creek to the west of the subject property, as well as the configuration of the subject property represent unique conditions not created as 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 area of the subject property is currently developed with numerous single-family residential structures and appurtenant development consistent with the proposed project. As conditioned, adverse impacts to the shoreline environment will be addressed through review and approval of a professionally-designed mitigation plan. No adverse public comments were received from

neighboring property owners nor are any use conflicts or adverse effects anticipated as a result of the 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.**

The location of the proposed residential development exceeds the minimum required setback/buffer from Lake Whatcom. As a result, the structure will be located further from the lake than many homes along the south shoreline. The applicant has limited the development footprint within shoreline jurisdiction to 2,500-square feet in size which is the maximum allowed without a variance on other lots located on the lake and the structure has been sited as far as feasible from the unnamed creek.

**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 Lake Whatcom.

**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 stream 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. There are alternative locations on the subject property where a residence could be constructed outside of the jurisdiction of the SMP; however these areas are steep and represent the only intact vegetated buffer to the creek located on the subject property. In addition, construction on the southern portion of the lot would place the structure greater than 500-feet from the shoreline. In order to obtain any view from this location, additional vegetation within the buffer of the stream would require removal. 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. The proposed residence exceeds the requisite setback as viewed from Lake Whatcom. 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

No written public comment was received during review of this permit application that was in opposition of the proposed development.

#### VI. AGENCY COMMENTS

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

#### 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 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.*
- 4. The applicant shall contact the Washington State Department of Fish and Wildlife (WDFW) and obtain a Hydraulics Project Approval (HPA) or any other approvals as required by WDFW for any work within or over the creek located on the subject property. A copy of the HPA shall be submitted upon application of the required building permit.*
- 5. A mitigation plan shall be completed by a qualified professional as defined by 23.110 to compensate for unavoidable impacts to the stream 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.*

- 6. 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