

WHATCOM COUNTY HEARING EXAMINER

RE: SHORELINE SUBSTANTIAL DEVELOPMENT )	SHR2011-0013
SHORELINE VARIANCE )	SHV2011-0001
Application for )	
)	
<i>William and Carol Ryan</i> )	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND DECISION

**SUMMARY OF APPLICATION AND DECISION**

Application: The Applicant is requesting approval of a Shoreline Substantial Development Permit and a Shoreline Variance to remove an existing residential dock and replace it with a new one at 95-feet in total length (walkway, ramp and float) from the OHWM at 1747 Edgewater Lane on Lake Whatcom. In addition, the Applicant is requesting relief (variances) from the following: 1) the 60-foot maximum length standard for new dock development – due to shallow water levels at the site; 2) the 4-foot maximum walkway width standard – due to safety concerns; and 3) the 6-foot maximum float width standard – due to stability and ramp run-out concerns.

Decision: A Shoreline Variance and Shoreline Substantial Development Permit are granted, allowing a dock with a total length of 91-feet, 4-feet in width, ending in a float, 15-feet by 8-feet.

**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: William and Carol Ryan

Property Location: 1747 Edgewater Lane, Bellingham, WA 98229

Legal Description: Section 26 Township 38 North, Range 03 East, W.M.  
Assessor's Parcel No. 380326-060360

Adjacent Water Body: Lake Whatcom

Shoreline Designation: Shoreline Residential

Statewide Significance: Yes

Zoning: Residential Rural (RR-5A)

Authorizing Ordinances: SMP 23.50                   Applicability  
SMP 23.70.010                   Administration  
SMP 23.70.030                   Hearing Examiner

Applicable Shoreline Program Provisions:

SMP 23.20                   Goals and Objectives  
SMP 23.30.020               Official Shoreline Map  
SMP 23.30.060               Shoreline Residential Area Designation  
SMP 23.40                   Shorelines of Statewide Significance  
SMP 23.60.010               Substantial Development Permit Criteria  
SMP 23.60.030               Variance Permit Criteria  
SMP 23.90                   General Policies & Regulations  
SMP 23.100.090              Moorage: Docks, Piers and Mooring Buoys  
SMP 23.110                   Definitions

SEPA Review: Optional DNS Notice of Application issued June 1, 2011  
Determination of Non-Significance (DNS) issued November 17, 2011

Legal Notices:           Published – Notice of Applications, June 1 and October 13, 2011  
Notice of Public Hearing, November 24, 2011  
Posted – Notice of Public Hearing, November 25, 2011  
Mailed – Notice of Application, June 1, 2011  
Notice of Public Hearing, November 21, 2011

Hearing Date:           December 7, 2011

Parties of Record:

William and Carol Ryan  
960 Krystal Pond Lane  
Bellingham, WA 98226

William A. Haynes, PE  
Ashton Engineering, Inc.  
5867 Crystal Springs Lane  
Bellingham, WA 98226

Bryan Sehmel  
Planning and Development Services

Exhibits:

- 1 Land Use Application
  - 1-1 Fee Responsibility
  - 1-2 Supplemental Application, SHV2011-0001
  - 1-3 Supplemental Application, SHR2011-0013
  - 1-4 Project Narrative
  - 1-5 Customer Receipt, legal notice [SHR]
  - 1-6 Representative Authorization
  - 1-7 Property Owners – 1,000 feet
  - 1-8 Bargain and Sale Deed
  - 1-9 Customer Receipt, SEPA, SHV, Legal Notice
  - 1-10 Notice of Application and Optional DNS Process
  - 1-11 Distribution List
  - 1-12 Letter of Complete Application, May 23, 2011
  - 1-13 Change of property owner within 1,000-ft
- 2 Staff Report, November 22, 2011
- 3 Aerial Site Photos (3 sheets)
- 4 Site Plans, May 5, 2011
- 5 SEPA DNS, November 17, 2011
- 6 DNR Comment Letter, November 22, 2011, with attached comments from William Haynes and Bryan Sehmel, dated November 28, 2011
- 7 ReSources for Sustainable Communities' Comment Letter, November 1, 2011
- 8 Certificate of Mailing, Notice of Application, June 1, 2011
- 9 Legal Notice of Application, June 1, 2011 [SHV]
- 10 Legal Notice of Application, October 13, 2011 [SHR]
- 11 Certificate of Mailing, Notice of Public Hearing, November 21, 2011
- 12 Legal Notice of Public Hearing, November 24, 2011
- 13 Certificate of Posting, Notice of Public Hearing, November 25, 2011

- 14 Two statement letters from neighboring property owners [Shannon and Ziels] stating they will not share or use the Applicants' dock
- 15 Revised Site Plan, dated December 6, 2011, prepared by Ashton Engineering, Inc.
- 16 2 graphs showing percentage rankings and maximum, average, and minimum for lake level data, 1999-2005 and 1987-1998, prepared by City of Bellingham, Public Works

## II.

The Applicants are requesting approval of shoreline permits to remove an existing dock and replace it with a new dock, 95-feet in total length (walkway, ramp and float) from the OHWM.

## III.

The Shoreline Administrator for Whatcom County Planning and Development Services has recommended approval of a modified dock 87-feet in length. The Applicants also requested a Shoreline Variance to increase the width of the dock from 4-feet to 5-feet, based on "safety concerns," and an increase in the 6-foot maximum float width standard from 6-feet to 8-feet. The Shoreline Administrator has recommended approval of a Shoreline Variance and Shoreline Substantial Development Permit which would allow a dock, 87-feet in length and 4-feet in width, ending in a float, 8-feet in width, but only 15-feet in length.

The Applicants have not objected to denial of the Variance requesting additional width and there is no evidence in the record which would support a hardship on the Applicants if required to meet the current maximum dock width standard of 4-feet.

The Applicant has also not objected to modification of the 8-foot by 20-foot float at the end of the dock to an 8-foot by 15-foot float. Allowing a float, 8-feet in width, is an increase of 2-feet over the standard maximum width, but with the reduction of the proposed float from 20-feet to 15-feet, the square footage of the float would remain at 120-square feet and would not create any additional adverse impacts.

There was no public comment on this matter at the hearing. One written comment was received expressing concern about cumulative impacts. This concern was addressed by Staff in the Staff Report and the Hearing Examiner concurs in Staff's conclusion that there is no evidence of significant environmental impacts from the granting of a Shoreline Variance for dock length where needed in order to reach a minimally functional water depth.

## IV.

The Applicant does object to the limitation of the dock length to 87-feet. As indicated in the Staff Report, the water level of Lake Whatcom is regulated by the City of Bellingham with the intent to maintain the lake level at a minimum of 311.5-feet above mean sea level, as a winter

low-water level, and 314.5-feet above mean sea level, as a summer high-water level.

The Applicant has established that the actual low-water level of the lake during the last winter went below 311.5-feet on 12 occasions.

A dock which is allowed to extend into the lake is considered adequate for moorage of a reasonable recreation vessel when there is 2.5-feet of water at the water ward edge of a dock. At 311.5-feet, above mean sea level, the lake is 2.5-feet deep, at 91-feet from the OHWM on the Applicants' property.

Generally, Shoreline Staff, the Hearing Examiner, and the Department of Ecology have approved recreational docks at a length which allows 2.5-feet of water at the typical winter low-water level in the lake of 311.5-feet. Where the lake level falls below 311.5-feet, the depth of water available for moorage of a vessel at the end of the dock is reduced an equivalent amount below 2.5-feet. The record indicates that the lowest level in the last year was 310.87-inches. At this level, the water depth at the end of the dock/ float would be thirteen one-hundredths of an inch below 2-feet.

The Applicant's Engineer testified that a dock, 95-feet in length, as sought by the Applicant, would maintain the approximate 2.5-feet of water depth at the lowest level recorded for the lake in the last year. The Engineer testifies that, if a dock is allowed to be built to a length which would allow 2.5-feet of water when the lake height was 311-feet even, the dock would need to be 95-feet in length. The Engineer has also testified that, using the 311.5-foot level, a dock 91-feet in length would be required to have a water depth of 2.5-feet.

There is no evidence in the record that a dock of 95-feet or of 91-feet would result in meaningful adverse impacts, as compared to a dock of 87-feet in length. The Staff Report indicates in numerous places Staff's conclusion that the cumulative effect of allowing residential docks on the lake to extend into the lake far enough to have 2.5-feet of water depth at a lake level of 311.5-feet is not expected to adversely affect ecological processes or the functions of the habitat conservation area landward of the Ordinary High Water Mark of the lake.

## V.

Except as set forth above, the Findings of Fact in the Staff Report, Exhibit #2, dated November 22, 2011, a copy of which is attached hereto, are accurate and are adopted by the Hearing Examiner as Findings of Fact herein.

## VI.

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 Shoreline Administrator for Whatcom County Planning and Development Services has recommended approval of a Shoreline Variance to increase the dock length and to allow modification of the proposed float at the end of the dock from the maximum allowed 20-feet in length and 6-feet in width to 15-feet in length and 8-feet in width, and has recommended denial of the requested Shoreline Variance to increase the width of the dock beyond 4-feet.

The Hearing Examiner concurs with the Conclusions of Law reached by Staff, but concludes that the additional lake level data submitted by the Applicant's Engineer at the hearing establishes that a dock with an overall length of 91-feet is required to allow 2.5-feet of water depth for moorage when the lake level is 311.5-feet. Since the unwritten standard used for dock variances in Lake Whatcom has for sometime been the granting of a Variance which allows a dock length resulting in 2.5-feet of water depth at 311.5-feet above mean sea level, the Hearing Examiner concludes that granting a variance allowing a dock of 91-feet in length is consistent with this long-standing policy. There is no evidence that limiting this Applicant's dock to the length required to meet this standard would result in a hardship on the Applicant. A Shoreline Variance in this case should allow a dock, 91-feet in length.

### II.

Other than as modified above, the Hearing Examiner adopts the Conclusions of Law reached by Staff and should approve a Shoreline Variance and Shoreline Substantial Development Permit for a dock, 91-feet in length, 4-feet in width, ending in a float of 8-feet in width and 15-feet in length.

### III.

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

## DECISION

The Whatcom County Hearing Examiner hereby grants a Shoreline Substantial Development Permit and Shoreline Variance to William and Carol Ryan, permitting a variance to allow construction of a dock and float with an overall length of 91-feet, as measured from the OHWM, with the dock width limited to 4-feet, ending in a float, 8-feet by 15-feet, on residential property located at 1747 Edgewater Lane, Bellingham, Washington. The permits are granted subject to the following conditions:

1. All work shall be consistent with the approved site plan and approved project scope in both size and location. A revised site plan incorporating the conditions of approval shall

be submitted to – and approved by – the Shoreline Administrator prior to starting work; this will become the approved site plan. Any additional alteration of the approved project proposal shall require additional review by the Shoreline Administrator. If substantive modifications are proposed, a revision may be required to be approved by the Whatcom County Hearing Examiner and the Washington State Department of Ecology (DOE).

2. The overall length of the dock shall not exceed 91-feet as measured from the OHWM of Lake Whatcom to the water ward extent of the accessory float. The width of the walkway shall not exceed 4-feet and the float shall not exceed 8-feet in width and 15-feet in length.
3. The Applicant shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property.
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. A copy of the HPA shall be submitted upon application of the required building permit.
5. The proposed ramps and walkway surfaces shall be constructed of decking designed to allow maximum light penetration in these near shore areas. Materials to be used shall be clearly identified on the construction plans submitted as part of the pending building permit application.
6. The use of heavy machinery shall be limited to use via floating barge. No heavy machinery shall be used in upland areas or on the bed lands of Lake Whatcom unless reviewed and approved by the Shoreline Administrator.
7. The dock shall be constructed of materials that will not adversely affect water quality or aquatic plants and animals over the long term. Materials used for submerged portions that may come into contact with water shall be approved by applicable State agencies for use in water to avoid discharge of pollutants from wave splash, rain or runoff. Wood treated with creosote, pentachlorophenol or other similarly toxic materials is prohibited.
8. Best Management Practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved Temporary Erosion and Sedimentation Control (TESC) Plan reviewed and approved by the Shoreline Administrator, or administrative conditions associated with the pending building permit application measures.
9. The dock shall be marked with reflectors, or otherwise identified to prevent unnecessarily hazardous conditions for water surface users during the day or night. Exterior finish shall be generally non-reflective.

10. Storage of fuel, oils, and other toxic materials is prohibited on docks and piers except portable containers when provided with secondary containment.
11. Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.
12. The project shall comply with all applicable Federal, State, and local laws and regulations.
13. The project shall adhere to Washington State Department of Ecology (DOE) water quality and all other applicable water quality standards. Quality of ground and surface waters shall not be significantly degraded. The proposed work shall be completed during periods of dry weather (as appropriate) and in accordance with best management practices for erosion and sedimentation control. Such measures shall be maintained throughout the duration of the project.
14. 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 (360-676-6907), LNTHPO (360-384-2298), 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 LNTHPO Dept. (360-384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.
15. Construction shall commence within two years of the effective date of the shoreline variances and substantial development 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.
16. The Applicant shall contact the Shoreline Administrator upon completion of the work to schedule a final inspection, ensuring compliance with the scope and conditions of this permit.

#### 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 calendar days of the date of the written 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.

Any party of record may request a closed record review of the Hearing Examiner's Decision, issued under SMP 23.60.15.H.4, by the County Council. Such an appeal shall be filed with the County Council on forms supplied by the County within ten (10) calendar days of the written decision. If appeal is made to the County Council, notice of appeal shall be provided to all parties of record at least fifteen (15) days prior to consideration by the County Council. The Council shall meet to review the Hearing Examiner's decision within twenty-one (21) days of transmittal thereof, at which time it may approve or disapprove the application, or remand the matter to the Hearing Examiner.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830 and Section 23.60.15.H. 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 2011.



\_\_\_\_\_  
Michael Bobbink, Hearing Examiner

**WHATCOM COUNTY**  
Planning & Development Services  
5280 Northwest Drive  
Bellingham, WA 98226-9097  
360-676-6907, TTY 800-833-6384  
360-738-2525 Fax



**J.E. "Sam" Ryan**  
Director

EXHIBIT  
#2

RECEIVED

NOV 28 2011

November 22, 2011

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

WHATCOM COUNTY  
HEARING EXAMINER

**STAFF REPORT**

The application of <b>William and Carol Ryan</b> for a Shoreline Variance and a Shoreline Substantial Development Permit		SHV2011-00001
		SHR2011-00013
		FINDINGS, CONCLUSIONS, AND
		RECOMMENDATIONS

**I. SUMMARY OF APPLICATION AND RECOMMENDATIONS**

Application:

The applicant is requesting approval to remove an existing residential dock and replace it with a new one at 95-feet in total length (walkway, ramp and float) from the OHWM at 1747 Edgewater Lane on Lake Whatcom. In addition, the applicant is requesting relief (variances) from the following: 1) The 60-foot maximum length standard for new dock development – due to shallow water levels at the site; 2) The 4-foot maximum walkway width standard – due to safety concerns; and 3) The 6-foot maximum float width standard – due to stability and ramp runout concerns.

Recommendation:

Staff recommends approval of an 87-foot long dock with a 4-foot wide walkway and an 8-foot by 15-foot float, subject to the conditions of approval.

**II. PRELIMINARY INFORMATION**

**Applicant:** William and Carol Ryan  
960 Krystal Pond Lane  
Bellingham, WA 98226

**Applicant Representative:** William A. Haynes, PE  
Ashton Engineering, Inc.  
5867 Crystal Springs Lane  
Bellingham, WA 98226

**Property Location:** 1747 Edgewater Lane, Bellingham, WA 98229

**Legal Description:** Section 26 Township 38 North, Range 03 East, W.M.  
Parcel #: 380326-060360

**Adjacent Water Body:** Lake Whatcom

**Shoreline Designation:** Shoreline Residential

**Statewide Significance:** Yes

**Zoning:** Residential Rural (RR-5A)

Authorizing Ordinances: SMP 23.50 Applicability  
SMP 23.70.010 Administration  
SMP 23.70.030 Hearing Examiner

Applicable Shoreline Program Provisions:

SMP 23.20	Goals and Objectives
SMP 23.30.020	Official Shoreline Map
SMP 23.30.060	Shoreline Residential Area Designation
SMP 23.40	Shorelines of Statewide Significance
SMP 23.60.010	Substantial Development Permit Criteria
SMP 23.60.030	Variance Permit Criteria
SMP 23.90	General Policies & Regulations
SMP 23.100.090	Moorage: Docks, Piers and Mooring Buoys
SMP 23.110	Definitions

SEPA Review: Optional DNS notice of application issued June 1, 2011  
Determination of Non-Significance (DNS) issued November 17, 2011

**III. FINDINGS**

The applicant is requesting approval to remove an existing wooden dock atop concrete footings and replace it with a new steel-pile residential dock for personal recreational use at 1747 Edgewater Lane on Lake Whatcom. In addition, the applicant is requesting relief (variances) from the following:

- 1) The 60-foot maximum length standard for new dock development (23.100.090.B.7) due to shallow water levels at the site;
- 2) The 4-foot maximum walkway width standard (23.100.090.B.8.a) due to safety concerns; and
- 3) The 6-foot maximum float width standard (23.100.090.B.8.a) due to stability and ramp runoff concerns.

The overall proposed length of the walkway, ramp, and float from the ordinary high water mark (OHWM) – the face of the existing bulkhead – is 95-feet. It includes an elevated pier-on-piling walkway at 5-feet in width and 80-feet in length with ramps at each end measuring 3-feet by 10-feet. The onshore ramp would provide access to the proposed walkway, while the offshore ramp would provide access to a proposed 8-foot by 16-foot float perpendicular to the walkway (“L-shaped”).

The applicant proposes to use equipment mounted on a barge and a work boat with piles being driven with either an impact or vibratory hammer. A total of six steel pilings are proposed along the centerline of the dock with another two proposed to retain the float. The walkway is proposed to be constructed of thru-flow grated decking at a height of 2.6-feet (317.1-feet) above the OHWM (314.5-feet) of Lake Whatcom with the two piles restraining the float at 4.5-feet (319.0-feet) above the OHWM.

The subject property is relatively flat and consists of a single-family residence constructed in approximately 1966. Existing shoreline developments include a wooden dock extending into Lake Whatcom at about 373 square-feet in size. The dimensions are approximately 5-feet in width and 67-feet in length from the OHWM with a 14-foot segment extending northward beginning approximately 31-feet from the OHWM.

Additional relevant shoreline developments include a concrete bulkhead along the shoreline and two concrete stem walls extending out into the Lake approximately 33-feet to 35-feet. The stem walls appear to have historically been part of the foundation of a now-gone boathouse and are now acting as breakwaters. The applicant proposes to remove the northwestern wall while retaining the southeastern wall.

For shoreline substantial developments and variances to be approved, the proposals must satisfy the criteria of 23.60.010 and 23.60.030 respectively, as addressed below. If the substantial development and variance requests are all approved, the applicant will still be required to submit a building permit prior to construction of the dock.

## IV. CONCLUSIONS

### Substantial Development Permit Criteria

A substantial development permit shall be required for all proposed use and development of shorelines unless the proposal is specifically exempt from such requirements pursuant to one or more of the listed exemptions in 23.60.020.2 (23.60.010.A). According to the applicant, the fair market value of the proposed dock development exceeds the \$10,000.00 threshold (stated at about \$70,000.00) necessary for the dock to qualify for review via an exemption from substantial development permitting (23.60.020.2.H.1). As such, a substantial development permit is required.

According to 23.60.010.B, in order to be approved, the decision maker must find that the proposal is consistent with the following criteria:

1. All regulations of the SMP appropriate to the shoreline designation and the type of use or development proposed shall be met, except those bulk and dimensional standards that have been modified by approval of a shoreline variance under SMP 23.60.030;
2. All policies of the SMP appropriate to the shoreline area designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated; and
3. For projects located on shorelines of statewide significance, the policies of Chapter 4 shall be also adhered to.

General and use-specific policies and regulations associated with residential dock development are found within Sections 23.90 and 23.100.090 respectively. Consideration shall also be given to the cumulative environmental impact of additional requests for like actions in the area (23.60.010.C – See page 9).

**As designed and conditioned, the proposal is consistent with all applicable policies and regulations.** Specific policies and regulations are addressed as appropriate below or reflected in the recommended conditions of approval.

### Existing Facilities and Shared Moorage

Prior to development of a new freshwater dock for a residential lot, the applicant shall demonstrate that 1) Existing facilities in the vicinity, including marinas and shared moorage, are not adequate or feasible for use, and 2) The applicant has contacted abutting property owners and none have indicated a willingness to share an existing dock or develop a shared moorage in conjunction with the applicant. (23.100.090.B.2). Shared moorage facilities are preferred over single-user moorage where feasible, especially where water use conflicts exist or are predictable (23.100.090.A.3).

The applicant has not shown that existing facilities in the vicinity are inadequate or infeasible for use. The closest public boat launch facility is at Bloedel-Donovan Park in the City of Bellingham at about 2.3 miles away (about 6-minutes driving time). However, the policies of the Shoreline Management Act (RCW 90.58.020) recognize private docks as a reasonable permitted use for waterfront property where such structures can be completed without adverse impacts to the public in terms of ecology, navigation, et cetera. The SMP additionally recognizes that, if allowed under the provisions of the SMP, dock length sufficient to provide adequate depth for moorage is a reasonable use on shoreline lots owned for residential or private recreational use (23.100.090.B.7.a).

The applicant has submitted no documentation that abutting property owners have been contacted and were not interested in developing a shared moorage. However, it should be noted, that docks have already been developed on the two adjacent properties.

### Minimum Necessary and Docks up to 60-feet

Docks shall be the minimum necessary to meet the needs of the proposed water-dependent use with private docks up to 60-feet in length allowed administratively in shallow areas where certain criteria listed under 23.100.090.B.7 are met. A variance permit is required for docks that cannot reasonably meet the standards for length included in 23.100.090.B.7.

SMP 23.100.090.B.7 limits docks, with or without floats, to the minimum necessary to provide for moorage. It limits single-family docks and floats to 40-feet in length measured perpendicularly from the OHWM and 3-feet in height above the extreme high water level. However, the Shoreline Administrator may approve, without a variance, private docks up to 60-feet in length from the OHWM,

including floats, in shallow areas 1) where a dock sized to accommodate a tender to provide access to a mooring buoy is not feasible and 2) where existing docks on adjacent properties presently extend out as far as that which is proposed, and 3) where such added length is necessary in order to allow a reasonable use of the dock, as determined based upon adjacent uses; and 4) where the extension in dock length will not adversely affect ecological processes and functions, provided the required dock length is the minimum necessary to achieve such purposes.

The applicant has indicated that the proposed 95-foot length (35-feet beyond that which can be permitted administratively) is the minimum necessary to provide for sufficient moorage during low lake levels due to shallow water conditions associated with the bathymetry of the lakebed at the subject property. The applicant has also proposed the walkway decking at a height of 2.6-feet above the high-water level of Lake Whatcom, while the two piles restraining the float are proposed at a height of 4.5-feet above high-water.

Below is an analysis of each of the four criteria listed above.

- 1) *Where a dock sized to accommodate a tender to provide access to a mooring buoy is not feasible;*

As an alternative to continued proliferation of individual private moorage, mooring buoys are preferred over docks or floats (23.100.090.A.3). The use of buoys for small craft moorage is preferred over pile or float structures because of lesser long-term impact on shore features and users; mooring buoys should be placed as close to shore as possible to minimize obstruction to navigation (23.100.090.A.8).

The applicant has submitted no documentation addressing the feasibility or infeasibility of a dock sized to accommodate a tender for access to a buoy. However, based on depth data provided by the applicant, it appears feasible that low-water level depths may be sufficient for a tender. Specifically, a 40-foot long dock would provide a high-water mooring depth of 3.85-feet and a low-water depth of 0.85-feet. A 60-foot long dock (the maximum length allowed administratively), would provide a high-water mooring depth of 4.2-feet and a low-water depth of 1.2-feet.

Despite this potential feasibility, the unique bathymetry of the subject property is not conducive to use of a tender and mooring buoy.

- 2) *Where existing docks on adjacent properties presently extend out as far as that which is proposed;*

The dock is proposed at 95-feet in length. This is similar in length, but slightly longer than the properties immediately adjacent to it. The property to the northwest appears to have a similar bathymetry to the subject property with a private dock of about 80-feet in length that was permitted in 1983. This dock is about 75-feet from the proposed dock. The property to the southeast appears to have a differing bathymetry, with a 60-foot long private dock permitted in 2001. This dock's float is about 166-feet from the proposed dock while its walkway is about 196-feet away.

- 3) *Where such added length is necessary in order to allow a reasonable use of the dock, as determined based upon adjacent uses; and*

Like the subject property, the use of adjacent properties is single-family residential, each with a private accessory dock that extends beyond the 60-foot maximum length allowed administratively. The length beyond 60-feet is requested as a result of the unique bathymetry of the lakebed, not per adjacent use. The docks on the two adjacent properties are about 75-feet and about 195-feet away from the proposed dock. As a result, there is no expected impact to the reasonable use of the proposed dock attributable to adjacent uses.

- 4) *Where the extension in dock length will not adversely affect ecological processes and functions, provided the required dock length is the minimum necessary to achieve such purposes.*

The extension in dock length (even to the requested 95-feet) is not expected to adversely affect ecological processes and functions of the habitat conservation area buffer landward of

the OHWM. The construction has been designed and conditioned that it be done from a barge and not from excavation equipment operating from the uplands or bedlands of Lake Whatcom. Minimal upland disturbance is anticipated and, if necessary, temporary erosion and sedimentation control (TESC) measures shall be illustrated on the plans provided with the pending building permit and approved by the Shoreline Administrator. Further, materials used for dock development shall be untreated in accordance with the regulations discussed herein.

The development is not expected to result in significant impacts to the nearshore environment. This is via the use of thru-flow decking, fewer piles than a traditional design (by using steel piles along its centerline), and via obtaining hydraulic project approval (HPA) through the Washington State Dept. of Fish and Wildlife (WDFW). This is expected to adequately address any impacts associated with habitat protection within the aquatic environment.

In addition, the applicant has proposed to remove one of two historical concrete stem walls currently extending 33-feet to 35-feet into the Lake and acting as a breakwater.

### **Substantial Development Permit – Shorelines of Statewide Significance**

In accordance with the criteria of RCW 90.58.030(2)(e), the legislature designated Lake Whatcom, including the shorelands and associated wetlands, as having statewide significance (23.40.020). The statewide interest should be recognized and protected over the local interest in such shorelines. To ensure that statewide interests are protected over local interests, the County shall review all development proposals within shorelines of statewide significance for consistency with RCW 90.58.030 and the policies listed in 23.40.030. Staff has addressed applicable sections below:

- A. *Redevelopment of shorelines should be encouraged where it restores or enhances shoreline ecological functions and processes impaired by prior development activities.*

The applicant has proposed to remove an existing non-conforming dock atop concrete footings as well as one of two historical concrete stem walls extending into Lake Whatcom now acting as breakwaters.

- B. *The Washington Departments of Fish and Wildlife and Ecology, the Lummi Nation, the Nooksack Tribe, and other resources agencies should be consulted for development proposals that could affect anadromous fisheries.*

Through the notification processes of the variance, substantial development permit, and SEPA, these agencies and/or entities were notified. Further, the applicant will be required to obtain hydraulic project approval (HPA) through WDFW.

- F. *Potential short-term economic gains or convenience should be measured against potential long-term and/or costly impairment of natural features.*

The SMP expresses a preference for pursuing mooring buoys over pile dock structures with floats. In some applications, buoys would have lesser long-term impact on shore features and users. However, the SMA, SMP, and PDS policy recognize as a reasonable use, docks of sufficient length to provide adequate depth for moorage. Further, the unique bathymetry of the subject property is not conducive to a tender and mooring buoy.

### **Variance Permit Criteria**

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 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 (23.60.030.A).

A variance will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect. (23.60.030.B). In the granting of all variances, consideration shall also be given to the cumulative environmental impact of additional requests for like actions in the area (23.60.030.G – See page 9).

For a variance to be authorized waterward of the OHWM, a proposal must satisfy the criteria of 23.60.030.E (1-3) in addition to the criteria of 23.60.030.D (1-7) as follows:

E.1 – That the strict application of the bulk, dimensional or performance standards set forth in this program precludes all reasonable use of the property; and

E.2 – That the proposal is consistent with the criteria established under subsections (D)(1) through (7) of this section; and

D.1 – That the strict application of the bulk or dimensional criteria set forth in this program precludes or significantly interferes with reasonable permitted use of the property;

D.2 – That the hardship described in subsection A of this section is specifically related to the property, and is the result of 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/proponent's own actions;

D.3 – That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects on adjacent properties or the shoreline environment;

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;

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

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; and

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

E.3 – That the public rights of navigation and use of the shorelines will not be adversely affected.

### **Variance Permit Criteria with Staff Comments**

Staff responses are numbered accordingly below:

**E.1** – Although the strict application of the SMP would not preclude all reasonable use of the property, staff ultimately recommends an 87-foot long by 4-foot wide dock with an 8-foot by 15-foot float.

#### **Variance Request #1 – Dock Length**

Moorage regulations in 23.100.090 limit dock length to a maximum distance of 40-feet as measured from the OHWM to the outward extend of the dock structure including permitted accessory floats or other structures. In areas of shallow water conditions, the regulation allows the Administrator to grant additional length out to a maximum of 60-feet from OHWM. In this case, water depths at the subject property indicate that a 60-foot dock would not provide adequate depth for moorage of a typical recreational vessel during typical low-water conditions on Lake Whatcom (without use of a tender as discussed on page 4).

The applicant already has an existing single-family residence and an accessory private dock. As such, the strict application of the dimensional standards would not preclude all reasonable use of the property. However, the policies of the Shoreline Management Act (RCW 90.58.020) recognize private docks as a reasonable permitted use for waterfront property where such structures can be completed without adverse impacts to the public in terms of ecology, navigation, et cetera.

The SMP additionally recognizes that, if allowed under the provisions of the SMP, dock length sufficient to provide adequate depth for moorage is a reasonable use on shoreline lots owned for residential or private recreational use (23.100.090.B.7.a).

So, despite all reasonable use not being precluded, staff recommends that this variance request be **approved as modified** for a dock length of 87-feet.

### Variance Request #2 – Walkway Width

In order to minimize impacts on nearshore areas and avoid reduction in ambient light level, the width of docks shall be the minimum necessary and shall not exceed 4-feet in width, except where specific information on use patterns justifies a greater width (23.100.090.B.8.a).

In this case, the applicant has proposed the dimensions of the dock to be 5-feet in width (1-foot wider than can be permitted administratively) as the minimum necessary to increase the safety of users as two or more individuals pass each other on the walkway with a maximum potential fall 6-feet to the lake bottom at low-water levels. Although the SMP does not allow docks to exceed 4-feet in width (23.100.090.B.8.a), it does allow installation of safety railings. Such railings shall not exceed 36-inches in height and shall be an open framework that does not unreasonably interfere with shoreline views of adjoining properties or lawful use of water surfaces (23.100.090.B.15).

Strict application of the SMP regarding walkway width would not preclude all reasonable use of the property. As a result, staff recommends that this variance request be **denied** and the permit be conditioned that the walkway not exceed 4-feet in width.

### Variance Request #3 – Float Size

In order to minimize impacts on nearshore areas and avoid reduction in ambient light level, the width of floats shall be the minimum necessary with freshwater floats not exceeding 6-feet in width and 20-feet in length unless authorized by a variance (23.100.090.B.8.a). In this case, the applicant has proposed the float at 8-feet in width and 16-feet in length as the minimum necessary. This is 2-feet wider and 4-feet shorter than can be permitted administratively. The applicant's stated reason for the wider float perpendicular to the proposed dock was increased roll stability and greater run-off distance for the ramp.

Strict application of the SMP regarding float size would not preclude all reasonable use of the property. Despite this, staff recommends **approval (as modified)** of this variance request for extra width so long as the overall square-foot coverage of the float is the same. Since the maximum allowable float size is 120 square-feet (6-feet by 20-feet), staff recommends an 8-foot by 15-foot (also 120 sq. ft.) float. This is a foot shorter than the proposed length.

**E.2** – The proposal is consistent with all seven of the criteria addressed individually below.

**D.2** – The hardship cited by the applicant in support of a longer dock is based on shallow water depths affecting the proposed dock during low-water conditions. This hardship is related specifically to the unique bathymetry of the lakebed and associated water levels at the subject property and is not the result of the applicant's own actions.

**D.3** – According to the application materials and site plan submitted by the applicant, the dock is designed for private use at a proposed length of 95-feet from the OHWM. This proposed length is longer than the docks on the two lots adjoining the subject property. Despite this, the project is expected to be compatible with other permitted activities in the area due to the private use of the proposed dock, and due to a longer length based upon the unique bathymetry of this small point extending into Lake Whatcom.

Specifically, the property to the northwest appears to have a similar bathymetry to the subject property with a private dock of about 80-feet in length that was permitted in 1983. There are about 75-feet between this dock and the proposed dock. The property to the southeast appears to have a differing bathymetry, with a 60-foot long private dock permitted in 2001. There are about 166-feet between this dock (float) and the proposed dock (about 196-feet to the walkway).

The project is also not expected to cause adverse effects on adjacent properties or to the shoreline environment. It is not expect to significantly impact the habitat conservation area buffer landward of the OHWM. The construction has been designed and conditioned that it be done from a barge and not from excavation equipment operating from the uplands or bedlands of Lake Whatcom. Minimal upland disturbance is anticipated and, if necessary, temporary erosion and sedimentation control (TESC) measures shall be illustrated on the plans provided with the pending building permit and approved by the Shoreline Administrator. Further, materials used for dock development shall be untreated in accordance with the regulations discussed herein.

As designed and conditioned, it is not expected to result in significant impacts to the nearshore environment. This is via the use of thru-flow decking, fewer piles than a traditional design (by using steel piles along its centerline), and via obtaining hydraulic project approval (HPA) through the Washington State Dept. of Fish and Wildlife (WDFW). This is expected to adequately address any impacts associated with habitat protection within the aquatic environment.

The applicant has also proposed to remove the existing wooden dock atop concrete footings as well as one of two historical concrete stem walls (estimated at 1.85 cubic yards of concrete) currently extending 33-feet to 35-feet into the Lake (now acting as breakwaters).

**D.4** – The requested variance does not constitute a grant of special privilege. Development of private docks is common along Lake Whatcom and is an allowed use in the shoreline residential designation subject to the policies and regulations of the SMP (23.100.090.C.4). In an attempt to be consistent with permit review, dock applications where similar circumstances exist are reviewed based on the same policy discussed below. In addition, this is not the first variance for dock length (e.g. SHV2009-00007) that has been issued pursuant to the 2008 SMP.

However, the requested length of 95-feet is not the minimum necessary to afford relief from the hardship in D.2 above; it exceeds that which is allowed per policy.

To determine the minimum dock length necessary to provide moorage on Lake Whatcom, PDS uses a long-standing policy pursuant to the direction of the Department of Ecology. This policy suggests that the maximum dock length should provide for approximately 2.5-feet of water at the lowest lake levels (which typically occur during the winter months). This 2.5-foot depth would provide a reasonable depth to moor a typical recreational vessel.

The water level of Lake Whatcom is regulated by the City of Bellingham which controls the majority of flow into and out of the Lake in operating its municipal water supply facility on the Lake. The lake level is allowed to rise in the summer and is drawn down in the winter to provide greater storage within the Lake during flood and high runoff events. During most typical years, the winter low-water level and summer high-water level is maintained respectively at approximately 311.5-feet and 314.5-feet above mean sea level.

No depth data was provided at the proposed 95-foot length. Instead, data was provided to 90-feet from the OHWM of a high-water depth of 5.77-feet and low-water depth of 2.77-feet. In this instance, the length at which the proposed dock would reach the 2.5-foot low-water depth (5.5-feet at high water) referenced in the above policy is at 87-feet from OHWM. As such, the minimum necessary length to afford relief is an 87-foot long dock (a 27-foot variance).

Note: Please see the discussion on page 4 regarding the potential for an even shorter dock which may be feasible (though perhaps impractical) if sized to accommodate a tender for access to a buoy.

**D.5** – The public interest – including normal public use of the shorelines and impact to shoreline functions and processes – is not expected to suffer substantial detrimental effect by granting this variance. Currently, there is a 67-foot long dock at the subject property with an 80-foot long dock immediately adjacent to it. The applicant proposes to construct a new dock at 95-feet in length, 28-feet longer than the existing dock and just 15-feet longer than the one next to it.

**D.6** – See E.3 below.

**D.7** – The applicant has proposed no specific mitigation for this project because it is not expected to cause significant adverse impacts to the habitat conservation area buffer landward of the OHWM. Thus, no nexus for requiring mitigation was identified by staff during the course of the review. In addition, any potential impacts to the habitat within the aquatic environment are expected to be adequately addressed via the HPA through the WDFW.

**E.3** – The public rights of navigation and use of the shorelines are not expected to be adversely affected (or materially interfered with) through granting of this variance. The subject property is on a small point extending into Lake Whatcom with an existing dock extending approximately 67-feet from the OHWM. Full granting of the requested variance would result in a 28-foot longer dock than the one existing. In addition, at 95-feet, the proposed dock is just 15-feet longer than the dock on the property immediately adjacent to it (northwest).

### **Cumulative Environmental Impact**

In the granting of all variances and substantial development permits, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area (23.60.010.C and 23.60.030.G). 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 policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

In this instance, there is a 67-foot wooden dock atop concrete footings existing at the subject property. The applicant proposes to remove the non-conforming dock and footings to construct a new steel-pile dock, the length of which is based upon the unique bathymetry of the subject property. The dock is proposed to be longer than the existing dock and now includes a float. However, the extension in dock length is not expected to adversely affect ecological processes and functions of the habitat conservation area buffer landward of the OHWM.

The construction has been designed and conditioned that it be done from a barge and not from excavation equipment operating from the uplands or bedlands of Lake Whatcom. Minimal upland disturbance is anticipated and, if necessary, temporary erosion and sedimentation control (TESC) measures shall be illustrated on the plans provided with the pending building permit and approved by the Shoreline Administrator. Further, materials used for dock development shall be untreated in accordance with the regulations discussed herein.

The development is not expected to result in significant impacts to the nearshore environment. This is via the use of thru-flow decking, fewer piles than a traditional design (by using steel piles along its centerline), and via obtaining hydraulic project approval (HPA) through the Washington State Dept. of Fish and Wildlife (WDFW). This is expected to adequately address any impacts associated with habitat protection within the aquatic environment. In addition, the applicant has proposed to remove one of two historical concrete stem walls currently extending 33-feet to 35-feet into the Lake and acting as a breakwater.

The variance request is based on the unique bathymetry of the subject property. Variance requests are rare and the cumulative environmental impact is not expected to be affected.

### **V. PUBLIC COMMENTS**

One public comment was received during review of this permit application. A copy of the comment was sent to the Hearing Examiner's Office. The concerns listed therein have been addressed in the body of this staff report.

### **VI. AGENCY COMMENTS**

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

## VII. RECOMMENDATIONS

Based on the above findings and technical review, Staff recommends the following subject to the conditions of approval below: 1) Approval of the variance request for dock length as modified to 87-feet; 2) Denial of the variance request for walkway width; 3) Approval of the variance request for float size as modified to 8-feet by 15-feet; and 4) Approval for the Shoreline Substantial Development as modified and subject to the following conditions:

### Conditions of approval:

1. *All work shall be consistent with the approved site plan and approved project scope in both size and location. A revised site plan incorporating the conditions of approval shall be submitted to -- and approved by -- the Shoreline Administrator prior to starting work; this will become the approved site plan. Any additional alteration of the approved project proposal shall require additional review by the Shoreline Administrator. If substantive modifications are proposed, a revision may be required to be approved by the Whatcom County Hearing Examiner and the Washington State Dept. of Ecology (DOE).*
2. *The overall length of the dock shall not exceed 87-feet as measured from the OHWM of Lake Whatcom to the waterward extent of the accessory float. The width of the walkway shall not exceed 4-feet and the float shall not exceed 8-feet in width and 15-feet in length.*
3. *The applicant shall obtain a building permit from the Whatcom County Building Services Division prior to any development activity on the subject property.*
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. A copy of the HPA shall be submitted upon application of the required building permit.*
5. *The proposed ramps and walkway surfaces shall be constructed of decking designed to allow maximum light penetration in these nearshore areas. Materials to be used shall be clearly identified on the construction plans submitted as part of the pending building permit application.*
6. *The use of heavy machinery shall be limited to use via floating barge. No heavy machinery shall be used in upland areas or on the bedlands of Lake Whatcom unless reviewed and approved by the Shoreline Administrator.*
7. *The dock shall be constructed of materials that will not adversely affect water quality or aquatic plants and animals over the long term. Materials used for submerged portions that may come into contact with water shall be approved by applicable state agencies for use in water to avoid discharge of pollutants from wave splash, rain or runoff. Wood treated with creosote, pentachlorophenol or other similarly toxic materials is prohibited.*
8. *Best management practices (BMPs) for control of erosion and sedimentation shall be implemented for all development in shorelines through an approved temporary erosion and sedimentation control (TESC) plan reviewed and approved by the Shoreline Administrator, or administrative conditions associated with the pending building permit application measures.*
9. *The dock shall be marked with reflectors, or otherwise identified to prevent unnecessarily hazardous conditions for water surface users during the day or night. Exterior finish shall be generally non-reflective.*
10. *Storage of fuel, oils, and other toxic materials is prohibited on docks and piers except portable containers when provided with secondary containment.*
11. *Construction and/or demolition debris shall be removed from the shoreline area upon completion of the project.*
12. *The project shall comply with all applicable federal, state and local laws and regulations.*

13. *The project shall adhere to Washington State Dept. of Ecology (DOE) water quality and all other applicable water quality standards. Quality of ground and surface waters shall not be significantly degraded. The proposed work shall be completed during periods of dry weather (as appropriate) and in accordance with best management practices for erosion and sedimentation control. Such measures shall be maintained throughout the duration of the project.*
14. *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 (360-676-6907), LNTHPO (360-384-2298), 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 LNTHPO Dept. (360-384-2298) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.*
15. *Construction shall commence within two years of the effective date of the shoreline variances and substantial development 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.*
16. *The applicant shall contact the Shoreline Administrator upon completion of the work to schedule a final inspection ensuring compliance with the scope and conditions of this permit.*

Report prepared by:

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