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AFTER RECORDING RETURN TO:  
SKAGIT COUNTY HEARING EXAMINER  
302 SOUTH FIRST STREET  
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON SHORELINE VARIANCE REQUEST SL 00 0565

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: GORDON and KAMI SHAW

ASSESSOR PARCEL NO: P67189

ABBREVIATED LEGAL DESCRIPTION: located on Sinclair Island, a portion of Section 9,  
Township 36 North, Range 1 East, W.M., Skagit County, Washington.

**SKAGIT COUNTY HEARING EXAMINER**  
**STATE OF WASHINGTON**

|  |                           |
|--|---------------------------|
| In the Matter of the Application of )      |                           |
| <b>GORDON AND KAMI SHAW</b> )              | SL00-0565                 |
| )  |                           |
| For a Variance from the Shore Setback )    | <b>FINDINGS OF FACT,</b>  |
| For a Residence in the Rural Designation ) | <b>CONCLUSIONS OF LAW</b> |
| On Sinclair Island. )                      | <b>AND DECISION</b>       |
| )  |                           |

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THIS MATTER, an application for variance in relation to an existing structure, came on regularly for hearing on August 29, 2001, after due notice. Daniel Downs represented the Planning and Permit Center. Gordon and Kami Shaw represented themselves.

Based on the testimony taken, the exhibits admitted and the argument made, the following is entered:

**FINDINGS OF FACT**

1. Gordon and Kami Shaw (applicants) seek a variance from the shore setback in order to legitimize an existing residence on Sinclair Island.
2. The subject property is in the southwesterly part of the island. The residence is located on Lot 8 of Ledbetter's Sinclair Tracts, a subdivision created in 1966, but containing little development. Lot 8, like the other shoreline lots in the subdivision, is relatively small, measuring approximately 140 feet by 100 feet. The 100 foot dimension is the west boundary along the shoreline of Rosario Strait. The property is within a portion of Sec.9, T36N, R1E, WM.
3. The property lies within a Rural designation under the Skagit County Shoreline Master Program (SMP). The standard shore setback for single-family residential development on such property is 50 feet from the Ordinary High Water Mark (OHWM). (See SMP Table RD.)
4. The residence consists of a small pre-existing cabin and a larger residential structure built adjacent to the cabin in 1995 -1998. The small cabin is about eight feet back from the OHWM. It was built prior to the adoption of shoreline regulations and is a non-conforming structure.
5. The new construction is an addition to the pre-existing cabin. The new residential area and the old are connected by a breezeway, created by a new overhanging roof that covers the original cabin and portions of the added structure. The added structure has two stories. At its closest point, it is 18 feet from the OHWM.

6. The original cabin had a footprint of approximately 400 square feet. With the new roof, that area has been increased to approximately 520 square feet. The new addition adds about 940 square feet.

7. There is no bank along the shore at the subject property. The waterfront is a low gradient beach consisting of sand and gravel. From the OHWM to approximately 84 feet inland, the lot is yard-like with an overstory of Douglas fir and madrona trees. These trees range from 2 inches to 28 inches in breast height diameter. The majority are over 10 inches in diameter. The remainder of the lot is also forested, with a well-developed understory of native vegetation.

8. In the northeast corner of the lot is a domestic water well drilled in 1995. Recently a community water system was approved allowing this well to be used as the source of water for both Lots 8 and 9. Lot 9, next door to the applicants' property, is owned by Marc and Deborah Schuldt who plan to build a house there in the near future. Their proposed house is already permitted and meets the standard setback. The Schuldts endorse the location of the Shaw residence. They point out that moving the Shaw residence would result in decreasing its setback from the wellhead, thus potentially increasing chances for contamination.

9. Regulations for the approved water system require that the well be at least 100 feet from the septic system drainfield. The site plan adopted puts the applicants' septic tank and drainfield onto Lot 9, outside of the 100 perimeter from the well site.

10. The applicants' property is at the edge of the forest. To the north the landscape is largely in trees. To the south is an open spit area where any man-made structures are highly visible. There is little existing development in the immediate area. Several lots to the north are cabins largely hidden in the woods. Several lots to the south is one house on the point of the spit. The applicants' residence is placed against the backdrop of trees and is of a muted color so that it tends to blend with the surroundings. Its visual impact is negligible.

11. The applicants' argument for a variance is based, in part, on the assertion, that the size of the lot, the placement of the well, and the necessary setbacks for protecting the well, impose site constraints that prevent reasonable development of the property consistent with the shore setback of 50 feet.

12. This does not appear to be an accurate statement of the facts. Using the site plan submitted by the applicants, the Staff prepared an exhibit (Exhibit 43) showing that the residential structures on the property could be moved far enough inland to meet the 50-foot shore setback and still not intrude on any required wellhead protection setback -- so long as the septic tank and drainfield remain as pictured. This is so because of a critical legal fact overlooked by the applicants; namely that for water systems of this



kind, the well-site setback requirements of SCC 12.48.090 do not forbid houses within 100 feet of wells.

13. The Staff determined that the proposal required a Fish and Wildlife Site Assessment/Habitat Management Plan under the Critical Areas Ordinance, and such a report was prepared by Earth Systems Science, Inc. The professionals who wrote the report testified at the public hearing.

14. As to environmental impacts, the report and the oral evidence showed that relocating the existing structures to a point further inland would cause a more negative environmental impact than allowing the structures to remain in the present locations.

15. The existence of the original cabin at its position within roughly eight feet of the OHWM has not, over more than 30 years, had any discernible adverse impact on natural shore processes or on the life systems of the intertidal zone. The residential addition built next to the original cabin has not altered this picture and is not likely to do so.

16. Although the expanded structure fits into the forested background, it was not necessary to cut down any trees to build it. Building a house 50 feet inland would require considerable site clearing and the loss of a number of large trees. If the existing structures were moved inland, the amount of clearing would be even greater. Trees of the size extant are used by bald eagles for resting and foraging and could potentially be nest trees in the future. There are nests on the island and the subject site is within designated eagle territory.

17. Moreover, since the original cabin is a legal non-conforming structure, there is no compulsion to move it from its original location. If then only the addition were moved inland, the result would be to increase the impacts, while leaving the existing setback non-conformity in place.

18. No threshold determination under the State Environmental Policy Act (SEPA) was made for this application because the construction of individual residential structures and the granting of variances not resulting in a change in land use or density are categorically exempt under WAC 197-11-800(1)(b)(i) and WAC 197-11-800(6)(b). In fact, the impact of this single-family residential development would be even less than normal, because the house involved is a vacation residence and is used only part of the time.

19. Based on all the evidence, the Examiner finds no basis for disapproval of the addition made to the original cabin on environmental grounds. The enlargement of the non-conforming structure on shorelines was accomplished without appreciable threat to the health, safety and general welfare of the public or the shoreline environment.



20. Numerous letters of support for this variance request were received from persons who also maintain cabins or houses on Sinclair Island. None of islanders heard from object to the applicants' residence as it is. The consensus is that the applicants have proven to be good neighbors and have shown a strong commitment to maintenance of the island's environment.

21. There were, however, a number of communications that objected to the placement of the addition and urged denial of the variance request. These, in general, were from persons involved in a family struggle over assets in the estate of Vaida Metcalf who was principal owner of a family corporation called Greenwood Shopping Center, Inc. Early on, Mrs. Metcalf and her husband were owners of Lots 8 and 9 and for years used the original cabin as a vacation residence. Her husband predeceased her, and at some point the property was transferred to the ownership of the corporation. While it was so owned, the additions to the original cabin which are the subject of this proceeding were built without benefit of permits.

22. The major argument of the opponents of the variance is that applicant Kami Shaw, while working for the corporation, was complicit in the construction work that was carried out without permit approval, and that she ought not now to benefit from this illegal course of action.

23. The preponderance of evidence is that the decision to pursue the construction work at issue without permits was that of Vaida Metcalf. The applicants, who have since come into ownership of the property, ought not to be held responsible for that choice.

24. Any conclusions herein which may be deemed a finding is hereby adopted as such.

### CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this proceeding.

2. The applicants here seek to obtain permission after-the-fact for single-family residential development undertaken on the shoreline. Single-family residences on shorelines are exempt from the requirement for a Substantial Development Permit, but must meet the dimensional standards of local master programs, such as those embodied in setbacks. RCW 90.58.030(3)(e)(vi), RCW 90.58.140(1), and (2).

3. After-the-fact permit applications are analyzed as though the questioned development did not exist. The issue is whether the development for which authorization is sought would have been allowed in the first instance. That the development is an accomplished fact carries no weight.



4. Under the Skagit County Shoreline Master Program (SMP), there are two possible methods for authorizing the development at issue. One is through use of the SMP provisions for non-conforming structures. And the other is through the variance procedure. The Examiner concludes that under either approach, the subject application should be approved.

5. Pursuant to SMP 12.02, the non-conforming structure represented by the original cabin may be continued. In general this section prohibits the enlargement of such a structure, but SMP 12.04 provides an exception, as follows:

If the Hearing Examiner . . . determines that the enlargement, extension or increase of the non-conforming . . . structures on shorelines can be accomplished without appreciable threat to the health, safety and general welfare of the public or the shoreline environment and purpose of this Program and the Act, and that to deny the enlargement, extension or increase in the non-conformity would constitute a hardship greater than the public benefit derived from denial of the non-conformity, such proposals shall be permitted . . .

6. The facts found above show that no appreciable environmental or health/safety/welfare threat is posed by the enlarged structure. Based on the findings, the Examiner concludes that to deny the enlargement of the non-conforming structure here would constitute a hardship greater than the public benefit derived from denial. Moreover, he concludes that permitting the enlargement would not be contrary to the purpose of the SMP or the Shorelines Management Act.

7. The public benefit gained by requiring enforcement of a 50-foot setback in this case would modest indeed. Compliance with the setback would be less desirable environmentally than enlarging the non-conforming use. While the existing non-conforming structure would remain in place, a substantial amount of tree removal would have to occur on the interior of the lot. The new house, so located, would be closer to the well and, although not in violation of regulations, this placement would increase the potential for contamination. No significant gain in terms of visual impacts would be achieved. On balance the greater public benefit is realized by the development actually undertaken.

8. The purpose of the Shoreline Management Act and of its implementing master programs is in general to foster "reasonable and appropriate uses." Such uses are those that protect against adverse effects to public health and the shoreline environment. RCW 90.58.020. In service to these statutory objectives, the aims of residential setbacks are to protect the natural shore processes and living systems, and to preserve shoreline aesthetics. A subsidiary object, when consistent with the above aims, is the safeguarding of private property. In this case, the enlargement of the non-conforming structure can



(and has) occurred in a manner that is wholly consistent with the purpose of the statute and master program.

9. Accordingly, the Examiner concludes that the subject addition to the original cabin meets the provisions of SMP 12.04 and qualifies as an exception to the prohibition against enlargement of non-conforming structures.

10. Alternatively the development at issue can be analyzed under the SMP variance criteria. For development landward of the OHWM, the criteria for approval of a variance are set forth at SMP 10.03(1). The applicant must prove:

- a. That the strict application of the bulk, dimensional or performance standards set forth in this Master Program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by this Master Program.
- b. That the hardship described above 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 Master Program and not, for example, from deed restrictions or the applicant's own actions.
- c. 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 designation.
- d. That the variance does not constitute a grant of special privilege not enjoyed by the other properties in the same area and will be the minimum necessary to afford relief.
- e. That the public interest will suffer no substantial detrimental effect.

In the granting of variance permits, the cumulative impact of additional requests for like actions in the area is to be considered.

11. In circumstances such as this where applying the standard setback would be environmentally less desirable than allowing the development for which approval is sought, the Examiner concludes that, as a matter of law, application of the setback significantly interferes with a reasonable use of the property.

12. The hardship involved is related to conditions on the property. There was (and is) an old existing non-conforming cabin. The forested portion of the lot was (and is) located behind this cabin. The applicants had nothing to do with creating these conditions. Complying with the setback would not reduce whatever impacts might be



seen as resulting from the existing non-conforming structure. But, because existing natural features would be destroyed, such compliance would add new adverse impacts not previously experienced.

13. The design of the project fits visually with the setting. It is compatible with other development nearby. There will be no adverse effects on adjacent properties or the shoreline environment.

14. Because no shoreline values have been or will be sacrificed, allowing the reduced setback will not serve as an undesirable precedent. Approval of additional requests for like actions under like circumstances would not impose adverse cumulative impacts.

15. Given the lack of cumulative effect, the granting of a variance in this case cannot be seen as a grant of special privilege. It rests of its own peculiar facts, and under the circumstances, constitutes the minimum necessary to afford relief.

16. There is no detriment to the public interest from approving this application. As noted, the project achieves the greater public benefit.

17. Accordingly all of the criteria for approval of a variance are met in this instance.

18. The keys to this case are: (a) that the development undertaken is environmentally benign; (b) that the alternative of setback compliance is more damaging; and (c) that no shoreline policies or objectives are violated by approval. All of this remains true regardless of who directed that this development be undertaken without permits. The development would have qualified for approval had it been sought prior to construction.

19. However, the Examiner feels obliged to make a cautionary comment. Whatever may have been the custom in the past, it is quite clear that now Skagit County is paying attention to what is built on Sinclair Island and intends to enforce its land use regulations fully there as it does in other parts of the County. The construction involved in this case was overseen by an experienced contractor. There was really no excuse for bypassing the County permit process. In the future, builders should be warned by this. Though it was obtained here, after-the fact approval is by no means assured as a general rule.

20. Any finding herein which may be deemed a conclusion is hereby adopted as such.



## DECISION

The addition to the non-conforming cabin is approved. The shore setback variance is approved. These approvals are made subject to the following conditions:

- (1) The applicants obtain required building permits and permission for occupancy upon successful final inspection.
- (2) The applicants shall obtain approval for their on-site sewage disposal system from the Skagit County Health Department.

*Wick Dufford*

Wick Dufford, Hearing Examiner

Date of Action: September 24, 2001

Copy Transmitted to Applicant: September 24, 2001

## RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 dates after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Planning and Permit Center within 14 days after the date of the decision, or decision on reconsideration, if applicable.

