

**THE HEARING EXAMINER OF THE CITY OF BELLINGHAM  
WHATCOM COUNTY, WASHINGTON**

IN RE:

HE-10-PL-018

**CITY OF BELLINGHAM PARKS AND  
RECREATION DEPARTMENT,  
Applicant  
Boulevard/Cornwall Over-water  
Walkway**

**FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER**

## **SHR2010-00028 / Shoreline Conditional Use Permit**

**DAWN STURWOLD, HEARING EXAMINER**

THIS MATTER came before the Bellingham Hearing Examiner for hearing on the 17<sup>th</sup> day of November 2010 on the application of the City of Bellingham Parks and Recreation Department for a Shoreline Conditional Use Permit (CUP) to construct an over-water walkway in Bellingham Bay between Cornwall Avenue and Boulevard Park.

Testimony was received from Steve Sundin, Planning and Community Development Department; Leslie Bryson and Gina Austin, Parks and Recreation Department; Derek Koellmann, Anchor QEA, Project Consultant; Mark Bennett, 1537 Humboldt Street; Wendy Harris, 3925 E. Connecticut Street; Frances Badgett, 2514 West Street; Geoff Middaugh, 206 Highland Drive; Tim Paxton, 2120 Ellis Street; and John Blethen, 1123 Railroad Avenue.

In addition to the Bellingham Municipal Code (BMC) and Comprehensive Plan, the following documents were considered as part of the record: See Exhibit List.

1           The public comment period was held open until January 7, 2011. Response to  
2 additional public comments from the City was received through January 21, 2011.

3           A motion was filed on January 5, 2011 by Wendy Harris, et.al., to remand the  
4 application to the City of Bellingham for development of additional information and  
5 analysis. The City responded to this motion on January 21, 2011.

6

7           I. FINDINGS OF FACT

8           Proposal

9           1.       The City of Bellingham Parks and Recreation Department filed an application  
10 for a Shoreline Substantial Development Permit and Shoreline CUP to construct an  
11 over-water walkway from the Cornwall Landfill site to Boulevard Park in Bellingham.  
12 The application was filed on June 11, 2010.

13           2.       The proposal includes construction of a pedestrian and bicycle walkway over a  
14 portion of Bellingham Bay, approximately 2,350 feet long, about 14 – 18.5 feet wide,  
15 and about eight feet above the mean higher high water elevation. It would include  
16 approximately 1,500 square feet of grated decking to allow light penetration to bed-  
17 lands near the shore, approximately 96 steel pilings about 24 inches wide, railings, low-  
18 level lighting, approximately 600 cubic yards of material placed at the Boulevard Park  
19 abutment, approximately 800 cubic yards of material placed at the Cornwall abutment  
20 along with additional material for slope and bank protection, and construction of wing  
21 walls at both ends. The landing at Boulevard Park would be approximately 5,600  
22 square feet in area. The landing at Cornwall would be approximately 12,300 square feet  
23 in area. The project also includes demolition and removal of an existing 877 square  
24 foot timber pier, a 2,455 square foot timber wharf, and 96 creosote pilings. Concrete  
25 rip-rap in the water near the Cornwall abutment would also be removed.

26           3.       The proposed walkway would extend from the southern end of the Cornwall  
27 Landfill, west of Boulevard Street and immediately south of a line even with Palm  
28 Street if it was extended to the northwest, to the northern end of the lower portion of

1 Boulevard Park, north of a line even with Olive Street if it was extended to the  
2 northwest.

3 4. The walkway would connect existing and future trails along the shoreline.

5 Process

6 5. Prior to the application submittal the project has undergone review by the  
7 Bellingham Greenways Advisory Committee, the Bellingham Parks Board, the  
8 Bellingham Planning Commission, the Bellingham City Council, and various agencies.  
9 Opportunities for public review and comment have been included within the processes  
10 of these agencies.

11 6. The proposed over-water walkway is included as a potential or future project in  
12 the 2002 Parks, Recreation and Open Space Plan, and the 2008 update to that plan, the  
13 2004 Waterfront Futures Group Vision and Framework Plan, the 2006 City of  
14 Bellingham Comprehensive Plan, the Waterfront District Master Plan, including the  
15 Draft Environmental Impact Statement (EIS), both Supplemental EIS's and the Final  
16 EIS, the draft 2009 Shoreline Master Program (SMP), which has been approved by the  
17 City of Bellingham and is awaiting Department of Ecology (DOE) approval, and the  
18 Waterfront District Preliminary Sub-Area Plan of 2010.

19 7. The proposed walkway has been identified in waterfront and parks and  
20 recreation planning processes, as well as the proposed 2009 SMP as an improvement to  
21 recreational and waterfront access to the shorelines. It is intended to link Boulevard  
22 Park to the Waterfront District and to become a part of the Coast Millennium Trail, a  
23 corridor of on and off-street pedestrian and bicycle facilities between Skagit County and  
24 British Columbia.

25 8. The proposal requires permits from other agencies. A Joint Aquatics Resource  
26 Permit application (JARPA) was filed on June 11, 2010. The materials submitted for  
27 the JARPA permit were submitted in support of the Shoreline CUP as well.

9. Additional permits required for the proposal include a 401 Water Quality Certification from the DOE, Hydraulic Project approval from the Department of Fish and Wildlife (WDFW), Aquatic Resource Use Authorization from the Department of Natural Resources (DNR), an Individual Permit from the U.S. Coast Guard, a Section 106 Concurrence from the Department of Archaeology and Historic Preservation, an Endangered Species Act Concurrence from the U.S. Fish and Wildlife and National Marine Fisheries Service, National Environmental Policy Act (NEPA) Compliance from the FHWA, Critical Area Permit for the abutments, and Building and Stormwater permits from the City of Bellingham.

10. A Mitigated Determination of Non-Significance (MDNS) pursuant to the State Environmental Policy Act (SEPA) was issued by the City's Responsible Official on September 29, 2010.

11. On November 1, 2010 the City issued a Notice of Public Hearing for the proposal.

12. Shoreline CUP proposals are regulated by the City's SMP. The proposal is also located in an area regulated by the City's Critical Areas Ordinance (CAO), BMC 16.55, and must comply with the requirements of that ordinance.

13. In 2009, the City approved a new SMP but it has not yet been approved by the DOE, and is not yet in effect. The 1989 SMP applies to this project.

14. Shoreline permits are issued by the Director of the Planning and Community Development Department. Shoreline CUPs must be approved by the Hearing Examiner after a public hearing. The Hearing Examiner's decision is forwarded to the DOE for final approval.

15. A Shoreline CUP is a Type IIIA review process pursuant to BMC 21.10.040D.

## Regulations

16. Shoreline CUPs are regulated by Section 13 of the SMP. It reads as follows:

### Section 13: CONDITIONAL USES:

1           A. The purpose of the Conditional Use provision is to provide more control  
2 and flexibility for implementing the regulations of the Master Program. It is realized  
3 that many activities, if properly designed and controlled, can exist on the shorelines  
4 without detriment to the shoreline area.

5           B. All applications for conditional uses shall comply with the provisions of  
6 the Washington Administrative Code 173-14-140.

7           C. An applicant for a Substantial Development Permit, which requires a  
8 Conditional Use Permit shall submit applications for both permits simultaneously.

9           D. Conditional Use Permit applications shall be considered by the Board of  
10 Adjustment at a public hearing, except for over-water, water-enjoyment uses proposed  
11 in the Urban Multi-Use Environment, in accordance with Section 25 (C) 4c, which shall  
12 be considered by the City Council. In addition to the notice requirement in RCW 90-  
13 58.140, notice of such public hearing shall be published no less than ten days prior to  
14 the date of the hearing.

15           E. Prior to the granting of a Conditional Use Permit, the Board, or City  
16 Council where applicable, must find that:

1. The conditions spelled out in the Master Program have been met.
2. The use will cause no unreasonable adverse effects on the environment or other uses.
3. The use will not interfere with the public use of public shorelines.
4. Design of the site will be compatible with the surroundings.
5. The proposed use will not be contrary to the purpose and intent of the environment designation in which it is located and the general intent of the Master Program.

16           The Board, or City Council where applicable, may require additional  
17 conditions as are necessary to insure proper compliance with the intent and purpose of  
18 the environment designation and Master Program or to insure protection of the  
19 surrounding environment and uses.

20           F. Any Conditional Use Permit granted by the City must be  
21 forwarded to the Department of Ecology for its approval or approval with conditions or  
22 denial.

23           17. BMC 2.56.050B(10) provides that the Hearing Examiner hears and decides  
24 Shoreline CUPs in lieu of the Board of Adjustment or City Council.

25           18. The proposed over-water walkway is located in Area 6 of the South Hill  
26 Neighborhood and Area 21 of the Central Business District (CBD). Area 6 of the South  
27 Hill Neighborhood is designated Public, Parks, Open Space/School. A Special  
28 Condition is shoreline. Area 21 of the CBD is designated Industrial/Waterfront Mixed  
29 Use, Marine. Special regulations state that the Marine Industrial designation is in effect

1 until a Master Development Plan (MDP) is adopted. Once the MDP is adopted, area  
2 zoning is Waterfront Mixed Use as specified in the MDP.

3 19. The Shoreline designations for the project, north to south, are Urban Maritime,  
4 Conservancy III and Conservancy II.

5 20. Section 24 of the SMP provides regulations applicable to the Urban Maritime  
6 environment. It states:

7 **Section 24 – URBAN MARITIME ENVIRONMENT:**

8 A. **DEFINITION:** *Areas proximate to navigable waters and are suitable for  
water borne commerce or other water dependent use.*

9 B. **PURPOSE AND INTENT:** *The purpose of the Urban Maritime  
Environment is to reserve areas of land use activities that require proximity to  
navigable waters.*

10 C. **REGULATIONS**

11 1. **Permitted uses must be:**

- 12 a. *Water-dependent, or*
- 13 b. *Publicly owned waterfront recreational uses, which make  
14 use of a unique shoreline resource such as a waterfront  
15 park, view, tower, public pathway, public maritime  
interpretive display, or aquarium.*
- 16 c. *Required public access features. The above uses are  
17 permitted on over-water construction.*

18 2. *Non-water dependent uses, excluding residences, may be  
19 permitted as accessory uses provided they functionally support a  
20 permitted use. Accessory uses must be vacated if the primary use  
21 they support is vacated. Uses permitted as accessory uses shall  
22 not be built on over-water construction in the Urban Maritime  
23 Environment.*

24 3. *Conditional Uses: Water enjoyment uses may be permitted as  
25 conditional uses on land above the ordinary high water mark in  
26 the Urban Maritime Environment provided they meet all other  
27 ordinances, codes and regulations and provided they meet the  
28 following conditions:*

- 29 a. *The proposed development provides continuous public  
access at the water's edge.*
- 30 b. *The proposed use does not interfere or restrict existing or  
permitted water-dependent uses. Water-dependent  
commercial and industrial uses have primary over water-  
enjoyment uses in the Urban Maritime Environment.*

1           *Other conditions as set by the Direction of the Planning and Economic  
2           Development. Water enjoyment uses except for publicly owned waterfront  
3           recreational uses may not be built on over-water construction in the Urban  
Maritime Environment.*

4       21. Section 21 of the SMP provides regulations applicable to the Conservancy III  
5           environment. It states:

6           **Section 21: CONSERVANCY ENVIRONMENT III:**

7           A. *DEFINITION: Areas which offer unique opportunity for the citizens of  
Bellingham to enjoy visual access to the shorelines and water.*

8           B. *PURPOSE AND INTENT: The purpose of the Conservancy  
Environment III is to preserve those areas which do not have physical limitations and  
are not uniquely natural, but which offer views of the water from public property and/or  
substantial numbers of residential properties.*

9           C. *REGULATIONS: No fills, hard surfacing, permanent structures, or  
storage shall be located within 25 feet of the ordinary high water mark, unless  
permitted by Section 26 of this ordinance.*

10           *Any development undertaken on the shorelines of a Conservancy III  
Environment shall be designed so that the highest point of any structure will be  
no higher than the level of the nearest adjacent upland public street right-of-way  
which is relatively parallel to the shoreline.*

11       22. Section 20 of the SMP provides regulations applicable to the Conservancy II  
12           environment. It states:

13           **Section 20: CONSERVANCY ENVIRONMENT II:**

14           A. *DEFINITION: Areas which offer unique opportunity for the citizens of  
Bellingham to enjoy physical access to the shorelines and water.*

15           B. *PURPOSE AND INTENT: The purpose of the Conservancy  
Environment II is to preserve those areas which do not have physical limitations and are  
not uniquely natural, but offer opportunities for the general public to enjoy the  
shorelines of the City, whether said shorelines be natural or intensively developed.*

16           C. *REGULATIONS: No clearing within 50 feet of the ordinary high water  
mark. No fills, hard surfacing, permanent structures or storage shall be located within  
100 feet of the ordinary high water mark or clearing within 50 feet of the ordinary high  
water mark, unless permitted by Section 26 of this ordinance or the following:*

17           *CONDITIONAL USES: Setback may be reduced to 50 feet if the proposed  
development is of the nature and design that it takes advantage of and enhances  
the physical access to the shorelines for the general public.*

1       23. Section 26 of the SMP provides general regulations applicable to the Urban  
2       Maritime, Conservancy III and Conservancy II environments. Subsection A of this  
3       section provides for exceptions to setbacks and in-water activities as follows:

4       Section 26: GENERAL REGULATIONS:

5       A. *The following activities are allowed within the setbacks required in  
6       Section 18 through 25 of this ordinance or in any water body, EXCEPT in a Natural  
7       Environment.*

- 8       1. *Road, railroad, and utility construction necessary to span the  
9       shorelines to facilitate the circulation or utility network of the  
10       City.*
- 11       2. *Development necessary to facilitate public access subject to the  
12       following:*
  - 13       a. *Structures necessary to facilitate public access shall be  
14       designed so as not to impair the function of the water  
15       body.*
  - 16       b. *Public access development within a required setback  
17       shall be limited to pedestrian or bicycle access.*
  - 18       c. *Public access development shall consider and protect  
19       adjacent private properties.*
- 20       3. *Bulkheads necessary to protect property from erosion; must  
21       conform to regulations pertaining to bulkheads contained herein.*
- 22       4. *Landscaping:*
  - 23       a. *Contour alterations resulting from site preparation shall  
24       not be substantially different from existing contours.*
  - 25       b. *Landscaping materials shall be used which will prevent  
26       soil erosion.*
  - 27       c. *Existing natural vegetation shall be used when feasible.*
  - 28       d. *Land, which is cleared of natural vegetation, shall be  
29       replanted as soon as possible. The landscaping plantings  
30       shall emphasize the plant species on the State of  
31       Washington Department of Wildlife and Department of  
32       Fisheries list of recommended plants.*
- 33       5. *Minor channel improvements necessary to maintain the carrying  
34       capacity of the waterway. Alteration of channel route is  
35       prohibited except in connection with road or railroad  
36       construction necessary to span the shoreline.*
  - 37       a. *Dredging and bulkheading activities shall conform to  
38       pertinent regulations contained herein.*
  - 39       b. *Removal of incompatible debris and/or structures is  
40       permitted.*

- c. *When brush and bramble vegetation is removed it shall be replaced by grasses, shrubbery, and/or trees.*
- d. *Dead trees or trees which are presently in danger of falling due to erosion may be removed provided such trees are cut at or near ground level and the roots are allowed to remain.*

6. *Materials may be placed within the water body for the purpose of enhancing fish production or migration. Such activity must be approved by the State Departments of Fisheries or Wildlife.*

*Over-water construction including: Piers docks, floats, breakwaters, jetties and groins are permitted within Urban I, Urban Maritime and Urban Multi-Use Environments and those areas of Conservancy I designation located from the north section line of Section 14 Township 37 north, Range 2 east northerly to the south right-of-way line of Willow Road and from the extended north line of Lot 7, Block 3, Division No. 2 northerly to the southerly line of Cowgill Avenue extended westerly subject to pertinent provisions contained herein.*

24. Subsection G of Section 26 of the SMP provides for public access as follows:

*G. PUBLIC ACCESS: Public access shall be encouraged wherever possible. The Bellingham Open Space Plan shall be used as a guideline for where access is most desirable.*

1. *No development shall block or interfere with the normal public use of or public access to publicly owned shorelines and water bodies.*
2. *All developments shall be designed to protect and enhance views and visual access to the water and shorelines.*
3. *All developments, including recreational, multi-family residential, commercial or industrial, located along public shorelines or unique shoreline areas shall be required to provide view corridors, public accessways, trail easements or other amenities upon a determination by the City that the action would enhance public enjoyment of the shoreline, not unduly conflict with the proposed use, adjacent uses or public safety nor adversely impact the shoreline environment and is consistent with the City of Bellingham Open Space Plan.*
4. *Any required public access easement shall be of a size and design appropriate to the site, size, and general nature of the proposed development. Such easements shall be recorded on a property deed or face of a plat as a condition running in perpetuity with the land.*

5. *Signs which indicate the public's right of access shall be installed as required by the Director of Planning and Economic Development Department.*
6. *Public use on private property which is a condition of a shoreline permit may be limited to daylight hours or otherwise restricted to prevent use conflicts.*
7. *Where possible, public access sites shall have direct and easy access from the street.*
8. *Public access may be considered unfeasible and not be required where;*
  - a. *Unavoidable hazards to the public in gaining access exist.*
  - b. *Inherent security requirements of the use cannot be satisfied.*
  - c. *Unavoidable interference with the use would occur.*
  - d. *The cost of providing the access is unreasonably disproportionate to the total cost of the proposed development.*
  - e. *Where damage to the natural ecology of the area would result and could not be mitigated.*
  - f. *In the above, the applicant shall first demonstrate and the City shall determine that all reasonable alternatives have been exhausted, including but not limited to 1) maintaining a gate and limiting hours of use, or modifying operations and scheduling 2) designed separation of uses and activities, i.e. fences, terracing, use of one-way glazings, hedges, landscaping, etc. 3) provision of or contribution to an access at a site geographically separated from the proposal.*
9. *Public access to the shoreline shall be required on all public property, except as indicated above or as follows:*
  - a. *In harbor areas completely occupied by water-dependent uses.*
  - b. *In street ends or waterways occupied by water-dependent uses under permit or lease.*
10. *On property where public access is infeasible, the applicant may be permitted to provide off-site public access in the form of view platform, interpretive display or other public access enhancement consistent with the Open Space Plan in lieu of on-site access.*
11. *Required public access sites shall be fully developed and available for public use at the time of occupancy of the development unless the required public access site is on an*

1                    undeveloped segment of a trail route designated in the  
2                    Bellingham Open Space Plan. In this case, the required public  
3                    access shall be fully developed and available for use when the  
4                    trail segment is developed.

5                    12. Where public access is not required on-site due to one of the  
6                    factors cited in 8 or 9 above, a payment in lieu may be required  
7                    prior to permit approval to provide a similar or equivalent  
8                    amenity.

9                    13. "Required public access" shall include not less than a pedestrian  
10                    bicycle pathway of suitable surfacing and standards to meet the  
11                    intended purpose, adequate signage to inform the public of the  
12                    public access, design features and landscaping to make the  
13                    facility in harmony with the shoreline setting, and where  
14                    appropriate, facilities which are designed to meet the anticipated  
15                    use including use by disabled persons.

16                    Where required public access is located on a trail route indicated  
17                    in the City of Bellingham Open Space Plan, the accessway shall  
18                    connect to adjoining trail sections including access points and  
19                    vistas, either existing or planned. If the required access does not  
20                    connect to a continuous public trail, the required access shall  
21                    connect to a public right-of-way.

22                    Future actions by the applicant shall not diminish the usefulness or value of the  
23                    public access site.

24                    25. Section 27 of the SMP provides general use regulations. Subsection N of that  
25                    section provides regulations for the installation of piers, docks and floats as follows:

26                    N. PIERS: The following regulations shall apply to the installation of all  
27                    piers, docks, and floats on the shorelines of the City.

28                    1. Piers, docks or floats shall be constructed so as to cause  
29                    minimum interference with the public use of the water surface  
30                    and shoreline, and so as to cause no undue harm to adjacent  
31                    properties.

32                    2. Prior to the granting of a permit for a pier, dock or float, the  
33                    effect of that structure upon adjacent shorelines shall be  
34                    determined by the Director of the Bellingham Planning and  
35                    Economic Development Department and the disposition of the  
36                    permit shall reflect such determination.

37                    3. Where feasible pile or floating piers and docks shall be used  
38                    instead of rip-rapped or bulkheaded supports.

39                    4. Piers, docks, or floats within 200 feet of the point of entrance of a  
40                    freshwater stream into marine waters shall not interfere with or

endanger the migration of anadromous fish species nor be constructed over estuarine mudflats which are exposed at mean lower low tide.

5. *No covered moorage or boathouses shall be constructed on the shorelines except in an authorized marina.*

*Use of treated wood on Lake Whatcom: Piles, floats or other members in direct contact with the water on Lake Whatcom shall not be treated or coated with paint, pentachlorophenol, arsenate compounds, creosote or other preservative treatment. Wooden members situated above the water may be constructed of factory applied copper arsenate providing it is approved by the U.S. Environmental Protection Agency (EPA) for the purpose and the EPA regulations for its use are adhered to. No field application of paint, preservative treatment or other chemical is permitted over the water of Lake Whatcom or in a location where water run-off could enter the lake.*

10 26. Subsection 27P provides regulations for the development of recreational  
11 facilities on the shorelines as follows:

P. *RECREATION: The following regulations shall apply to the development of all recreational facilities on the shorelines of the City.*

1. *Recreational development shall be designed to minimize adverse effects on the natural amenities of the shoreline while enhancing its recreational value and protecting the public health and safety.*
2. *Public recreational development shall recognize the wide variety of recreational needs and desires.*

*Commercial recreational development shall conform to regulations contained herein relating to commercial development.*

19 27. BMC 16.55.200 provides review criteria for activities in critical areas. It states:

### **16.55.200 - Review Criteria**

*A. Any alteration to a Critical Area, unless otherwise provided for in this Chapter, shall be reviewed and approved, approved with conditions, or denied based on the proposal's ability to comply with all of the following criteria:*

1. The proposal minimizes the impact on Critical Areas in accordance with Mitigation Sequencing [Section 16.55.250];
2. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
3. The proposal is consistent with the general purposes of this Chapter and the public interest;
4. Any alterations permitted to the Critical Area are mitigated in accordance with Mitigation Plan Requirements [Section 16.55.260] and additional requirements as outlined in specific Critical Area sections;

1           5. *The proposal protects the Critical Area functions and values*  
2           *consistent with the best available science and results in no net loss of*  
3           *Critical Area functions and values; and*  
4           6. *The proposal is consistent with other applicable regulations and*  
5           *standards.*

6           B. *The City may condition the proposed activity as necessary to mitigate*  
7           *impacts to Critical Areas and to conform to the standards required by this*  
8           *Chapter.*

9           C. *Except as provided for by this Chapter, any project that cannot*  
10           *adequately mitigate its impacts to Critical Areas in the sequencing order of*  
11           *preferences in Section 16.55.250 shall be denied.*

12           28. BMC 16.55.250 requires mitigation sequencing as follows:

13           16.55.250 - Mitigation Sequencing

14           Applicants shall demonstrate that all reasonable efforts have been examined  
15           with the intent to avoid and minimize impacts to Critical Areas. When an  
16           alteration to a Critical Area is proposed, applicants shall follow the mitigation  
17           sequential order of preference below:

18           A. *Avoiding the impact altogether by not taking a certain action or parts of*  
19           *an action;*

20           B. *Minimizing impacts by limiting the degree or magnitude of the action*  
21           *and its implementation, by using appropriate technology, or by taking*  
22           *affirmative steps, such as project redesign, relocation, or timing, to avoid or*  
23           *reduce impacts;*

24           C. *Rectifying the impact to wetlands, critical aquifer recharge areas,*  
25           *frequently flooded areas, and habitat conservation areas by repairing,*  
26           *rehabilitating, or restoring the affected environment to the historical conditions*  
27           *or the conditions existing at the time of the initiation of the project;*

28           D. *Minimizing or eliminating the hazard by restoring or stabilizing the*  
29           *hazard area through engineered or other methods;*

30           E. *Reducing or eliminating the impact or hazard over time by preservation*  
31           *and maintenance operations during the life of the action;*

32           F. *Compensating for the impact to wetlands, critical aquifer recharge*  
33           *areas, frequently flooded areas, and habitat conservation areas by replacing,*  
34           *enhancing, or providing substitute resources or environments; and*

35           G. *Monitoring the hazard or other required mitigation and taking remedial*  
36           *action when necessary.*

37           Mitigation for individual actions may include a combination of the above  
38           measures.

39           29. BMC 16.55.260 requires mitigation plans to have the following elements:

1                   16.55.260 - Mitigation Plan Requirements

2                   When mitigation is required, the applicant shall submit a mitigation plan as part  
3                   of the Critical Area report. The mitigation plan shall include:

4                   A.     Prepared by a qualified professional specializing in the type of Critical  
5                   Area.

6                   B.     Report requirements:

7                   1.     Detailed summary of the project, including the impacts to the  
8                   Critical Area, and the proposed mitigation to compensate for lost  
9                   functions and values to appear in the beginning of the report.

10                  2.     Rationale for selecting the mitigation site.

11                  3.     Complete site characterization of the proposed mitigation site to  
12                  include parcel size, ownership, soils, vegetation, hydrology, topography,  
13                  and wildlife.

14                  4.     Goals, objectives, performance standards and dates of  
15                  completion of the mitigation proposal.

16                  5.     Report and maps of the Critical Area to be impacted. (If it is a  
17                  wetland, the report must include a functional assessment – see Section  
18                  16.55.280).

19                  6.     Monitoring, maintenance, and contingency plan. The monitoring  
20                  schedule (dates, frequencies and protocols) must be included and a  
21                  monitoring report submitted accordingly. Monitoring and maintenance  
22                  shall be required for at least five years unless otherwise stipulated by  
23                  another government agency.

24                  7.     Map of development, with scale, shown in relation to Critical  
25                  Area.

26                  8.     Financial guarantees ("surety") for 150 percent of the total costs  
27                  to ensure the mitigation plan is fully implemented, including, but not  
28                  limited to, the required monitoring and maintenance periods.

29                  30. Washington Administrative Code (WAC) 173-27-160(3) provides for the  
30                  authorization of conditional uses on the shorelines of the state for those uses not  
1                  classified or set forth in the applicable master program provided the applicant  
2                  demonstrates consistency with the requirements of WAC 173-27-160 and the  
3                  requirements for conditional uses contained in the master program.

4                  31. WAC 173-27-160 provides as follows:

5                   Review criteria for conditional use permits.

6                   The purpose of a conditional use permit is to provide a system within the master  
7                  program which allows flexibility in the application of use regulations in a

1 manner consistent with the policies of RCW 90.58.020. In authorizing a  
2 conditional use, special conditions may be attached to the permit by local  
3 government or the department to prevent undesirable effects of the proposed use  
4 and/or to assure consistency of the project with the act and the local master  
5 program.

6 (1) Uses which are classified or set forth in the applicable master program as  
7 conditional uses may be authorized provided that the applicant demonstrates all  
8 of the following:

9 (a) That the proposed use is consistent with the policies of RCW 90.58.020  
10 and the master program;

11 (b) That the proposed use will not interfere with the normal public use of  
12 public shorelines;

13 (c) That the proposed use of the site and design of the project is compatible  
14 with other authorized uses within the area and with uses planned for the area  
15 under the comprehensive plan and shoreline master program;

16 (d) That the proposed use will cause no significant adverse effects to the  
17 shoreline environment in which it is to be located; and

18 (e) That the public interest suffers no substantial detrimental effect.

19 (2) In the granting of all conditional use permits, consideration shall be  
20 given to the cumulative impact of additional requests for like actions in the area.  
21 For example, if conditional use permits were granted for other developments in  
22 the area where similar circumstances exist, the total of the conditional uses  
23 shall also remain consistent with the policies of RCW 90.58.020 and shall not  
24 produce substantial adverse effects to the shoreline environment.

25 (3) Other uses which are not classified or set forth in the applicable master  
26 program may be authorized as conditional uses provided the applicant can  
27 demonstrate consistency with the requirements of this section and the  
28 requirements for conditional uses contained in the master program.

29 (4) Uses which are specifically prohibited by the master program may not be  
30 authorized pursuant to either subsection (1) or (2) of this section.

32. Over water construction of publicly owned recreational uses are permitted in the  
33 Urban Maritime environment in accordance with SMP Section 24C.

35. The Conservancy II and III environment regulations in the SMP do not provide  
36 for over water construction, except as provided in Section 26A of the SMP which  
37 allows development necessary to facilitate public access.

39. The proposed over water walkway falls within the definition of "water  
40 enjoyment use" as provided in SMP Section 4.

35. The Conservancy II and III environment regulations in the SMP neither classify as conditional uses nor specifically prohibit over water public recreational facilities.

36. The Bellingham Planning and Community Development Director determined that the proposal qualified for a Shoreline Conditional Use Permit subject to satisfaction of the criteria specified in SMP Section 13 and WAC 173-27-160-3.

## Technical Reports

37. The Applicant submitted reports prepared by consultants Anchor QEA, LLC, including a Shoreline Master Program Consistency Report, a Mitigation Report dated June 2010, a Revised Mitigation Report dated November, 2010, a Biological Assessment, a Post-Construction Eelgrass Assessment for Taylor Avenue Dock, a No Development Alternative Analysis Memorandum dated January 21, 2011 and a Memorandum evaluating potential impacts of the proposal to the common loon, dated January 20, 2011.

38. The Applicant also submitted a Technical Memorandum prepared by Coast & Harbor Engineering entitled "Coastal Engineering Analysis and Assistance with Design Boulevard Park Gravel Beach, Bellingham, Washington.

39. A White Paper entitled, "Overwater Structures: Marine Issues," by Barbara Nightingale and Charles A. Simenstad of the University of Washington dated June 2001 was also submitted.

40. A Feasibility Report for the proposal was prepared by Reid Middleton dated September, 2009.

## SEPA

41. The MDNS for the proposal included several conditions, including: 1) installation of grated decking on walkway bents that cover bed-lands up to a depth of 15 feet Mean Lower Low Water (MLLW); 2) replacement of removed trees greater than six inches diameter at breast height at a ratio of 2:1 with similar or native species

1 within the shoreline jurisdiction within Boulevard Park; 3) provision of a shoreline  
2 erosion and sediment transport evaluation based on the proposed alignment of the  
3 walkway prior to public notice of the public hearing; 4) approval of a revised Mitigation  
4 and Monitoring Plan that includes elements pertaining to acquisition of pre-project  
5 baseline data on macro-algae presence along the proposed centerline of the walkway  
6 and post project eelgrass colonization at each end of the walkway consistent with  
7 WDFW guidelines by the WDFW, DNR and City of Bellingham prior to issuance of  
8 building permits for site work except for exploratory borings; 5) submittal and approval  
9 of a staging and construction access plan for each of the two abutments prior to site  
10 work building permits except for exploratory borings; and 6) implementation of  
11 mitigation and monitoring as required by other agencies.

12 42. The MDNS conditions have been satisfied or incorporated into the proposal.  
13 Grated decking is proposed over depths up to 15 feet to allow eelgrass the opportunity  
14 to colonize and establish beyond its existing footprint. Removed trees would be  
15 replaced as provided in MDNS Condition No. 2. A shoreline erosion and sediment  
16 transport evaluation was provided on November 2, 2010. Mitigation and monitoring as  
17 approved by other agencies with jurisdiction will be required. A staging and  
18 construction access plan is required to control hours of operation and heavy equipment  
19 trips through Boulevard Park and Cornwall Avenue.  
20

21  
22 Existing Conditions

23 43. The north end of the proposed walkway is the site of an historic municipal  
24 landfill operated by the City of Bellingham. It has been occupied by industrial uses,  
25 including log storage and processing by Georgia Pacific (GP), since closure of the  
26 landfill. The landfill has been listed as a Model Toxics Control Act (MTCA) site and is  
27 under a consent decree/agreed order executed by the DOE. The property is currently  
28 vacant. A remedial investigation and feasibility study is underway for cleanup  
29

1 activities, habitat creation and public access improvements. The property will be owned  
2 by the City of Bellingham and developed consistent with the cleanup plan.

3 44. Between the north and south abutments the adjacent shoreline contains large  
4 boulders and rip-rap to stabilize the BNSF railroad grade located along the shoreline.  
5 Eelgrass is present along the entire stretch of shoreline within the project area and has  
6 established itself between ~2 and ~10 MLLW.

7 45. The South Bay Trail, a public recreational trail, is located along the shoreline  
8 approximately 100 feet upland from the Ordinary High Water Mark (OHWM),  
9 averaging 40 feet in elevation above the OHWM. The trail is heavily vegetated,  
10 limiting marine views from the trail. It connects downtown Bellingham and Boulevard  
11 Park. The railroad tracks are located between the trail and the shoreline, cutting off  
12 access from the trail to the water.

13 46. Data sheets describing existing conditions along the stretch of shoreline from the  
14 Cornwall landfill to Boulevard Park are contained in ***Exhibit D*** to the Staff Report.  
15 These data sheets describe the fish and wildlife species, vegetation, soils, geological  
16 conditions, structures, and other physical attributes of the shoreline areas.

17 47. The south end of the walkway is located at Boulevard Park. An existing pier,  
18 wharf and associated pilings are currently inaccessible due to safety concerns. These  
19 features will be removed as part of the proposal.  
20

21  
22 Shoreline Functions

23 48. City Planning staff expects that the natural processes existing at the project site,  
24 including wave energy, tidal currents, long-shore drift, sediment transport and natural or  
25 ambient light patterns will be maintained with construction of the proposal. Removal of  
26 the existing pier, wharf, pilings and concrete material, as proposed, is expected to  
27 reintroduce some of the natural processes that do not currently exist at the site.

28 49. City Planning staff also expects that existing habitat structure present at the site,  
29 including an accretion beach at Boulevard Park, extensive eelgrass beds, near-shore

1 substrate of sand, gravel and cobble and a gently sloping inter-tidal area along the  
2 railroad grade will be maintained with the project, with an opportunity for improvement  
3 over existing conditions.

4 50. A function analysis for the existing Cornwall landfill shoreline area indicates  
5 that most functions are at least partially impaired. The hydrologic function is partially  
6 impaired with shoreline armoring. Shoreline vegetation is impaired and absent in most  
7 areas, with non-native species dominant where vegetation is present. The terrestrial  
8 habitat function is impaired. Intertidal habitat function is impaired in most locations,  
9 but moderate to high at the toe of the Cornwall Avenue beach. The shallow and  
10 deepwater habitat functions at a moderate to high level, with shallow water habitat  
11 limited. The existing functions are limited by the old landfill with sediment and  
12 groundwater contamination and rip-rap armoring of the shoreline. The functions are  
13 sustainable with enhancements.

14 51. The function analysis for the Conservancy III section of shoreline indicates that  
15 existing functions are slightly impaired. The hydrologic function is slightly impaired by  
16 rip-rap at the base of the railroad tracks. The shoreline vegetation function is slightly  
17 impaired by invasive species and reduced canopy. The terrestrial habitat is slightly  
18 impaired with limited connectivity. The intertidal habitat is slightly impaired by rip-  
19 rap. Shallow and deepwater habitat functions at a moderate to high level, with high  
20 function for offshore winter bird habitat.

21 52. The function analysis for the Boulevard Park section of shoreline, the  
22 Conservancy II environment, indicates that functions are impaired to slightly impaired.  
23 The hydrologic function is slightly impaired by rip-rap. Shoreline vegetation is  
24 impaired to slightly impaired with a dominance of lawn and native shrubs and trees  
25 interspersed along the boardwalk. Terrestrial habitat is impaired to slightly impaired  
26 with poor cover and connectivity. Intertidal habitat is impaired in areas with rip-rap and  
27 armoring, and functioning in areas without armoring. Shallow and deep water habitat  
28 functions at a moderate to high level with high fish spawning in pocket beaches.

1 Functions are limited by rip-rap and armoring, a risk of off shore toxic contamination,  
2 limited shoreline vegetation and existing active park uses.

3 53. City Planning staff has concluded that the design of the project is consistent with  
4 best available science (BAS) and is expected to result in no net loss of shoreline  
5 ecological function.

6

7 Conditional Use Criteria and Compliance

8 54. One of the criteria specified in WAC 173-27-160 is consistency with the policies  
9 set forth in the Revised Code of Washington (RCW) 90.58.020. This section of the  
10 SMA provides that it is the policy of the state to provide for the management of  
11 shorelines of the state by planning for and fostering all reasonable and appropriate uses,  
12 to insure the development of shorelines in a manner which allows for limited reduction  
13 of rights of the public in navigable waters but promotes and enhances the public  
14 interest. Uses that protect the statewide interest over local interest, preserve the natural  
15 character of the shoreline, result in long term over short term benefit, protect the  
16 resources and ecology of the shoreline, increase public access to publicly owned areas  
17 of the shoreline, increase recreational opportunities for the public, and provide for any  
18 other element defined in RCW 90.58.100, in that order, are given preference. The  
19 public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines  
20 are to be preserved to the greatest extent feasible consistent with the best interests of the  
21 state and people generally. Alterations of the natural condition for single-family  
22 residences, ports, shoreline recreational uses including parks, piers, marinas and  
23 improvements facilitating public access to shorelines, and developments dependent on  
24 shoreline location are given priority. Uses in the shorelines are to be designed and  
25 conducted to minimize, as practical, damage to the ecology and environment of the  
26 shoreline area and interference with the public's use of the water.

27 55. The proposed walkway is designed to provide a unique public access  
28 recreational opportunity for citizens from all parts of Washington State. It is anticipated  
29

1 that it will provide an attraction similar to Taylor Dock for residents and visitors alike.  
2 It is anticipated that it will become a link in a trail system that will extend from Skagit  
3 County to British Columbia. It has also been designed to protect priority habitat for  
4 federally and state listed salmonids, including extensive eelgrass beds within the project  
5 area. The proposal will promote the statewide interest in the shorelines.

6 56. The proposal has been designed to protect and maintain the natural features,  
7 resources and ecology of the shoreline, including the habitat areas. Removal of existing  
8 pollution generating and unsafe structures will improve the natural features of the area.

9 57. The proposed walkway will increase recreational opportunities for the public in  
10 the shoreline.

11 58. WAC 173-27-160(2) provides that consideration shall be given to the  
12 cumulative impacts of additional requests for like actions in the area in the granting of a  
13 conditional use permit. This section explains that the total of the conditional uses that  
14 would be granted for developments in the area where similar circumstances exist must  
15 also remain consistent with the policies of RCW 90.58.020 and shall not produce  
16 substantial adverse effects to the shoreline environment.

17 59. Over-water structures are permitted within the Urban Maritime environment at  
18 the north end of the proposed walkway. Conditional use permits are not required for  
19 similar proposals in this area.

20 60. The shoreline area within the Conservancy II environment in the area of the  
21 proposal is owned by the City of Bellingham and managed as Boulevard Park. Nearly  
22 all shorelines within the City that are designated Conservancy II are public parks or  
23 public access area controlled by the City. Additional over-water public access facilities  
24 are not included in any planning documents for the area and none are proposed.

25 61. The proposed walkway is entirely over water within the Conservancy III  
26 environment located between the Cornwall landfill area and Boulevard Park. This area  
27 is the only Conservancy III environment within the City. Shoreline development within  
28 this stretch is nearly impossible due to the location of the BNSF railroad tracks and

1 South Bay trail adjacent to the shoreline and steep slopes. The northern portion of  
2 Boulevard Park is located at the top of the slope east of this area, adjacent to State  
3 Street. The bed-lands in this area are owned by DNR. It is not anticipated that any  
4 additional similar developments could be proposed in this area.

5 62. To the south of Boulevard Park Taylor Dock has been reconstructed over water,  
6 linking the park to pedestrian trails to the south leading to Fairhaven.

7 63. It is unlikely that any additional requests for conditional use permits for  
8 developments similar to the proposal will be made that would result in cumulative  
9 impacts to the shoreline.

10 64. WAC 173-27-160(1)(b) provides that a proposed conditional use must not  
11 interfere with the normal public use of public shorelines. SMP 13E(3) provides that the  
12 proposed conditional use must not interfere with the public use of public shorelines.  
13 The proposal will provide an enhanced opportunity for public use of the shoreline by  
14 extending public access over additional shoreline area, and linking existing and  
15 proposed trails and recreational areas. It will not interfere with existing public use of  
16 public shorelines.

17 65. WAC 173-27-160(1)(c) and SMP 13E(4) require that the proposed conditional  
18 use and design be compatible with the surroundings and other authorized uses within  
19 and planned for the area. The proposed walkway will complement existing public  
20 access facilities at Boulevard Park, connect the park to planned trail amenities, and  
21 further the implementation of habitat, shoreline, waterfront and public park and  
22 recreation improvement plans contained in the City's Comprehensive Plan, Waterfront  
23 plans, and proposed Shoreline plans. The proposal will be compatible with its  
24 surroundings and existing and planned improvements in the area.

26 66. WAC 173-27-160(1)(d) and SMP 13E(2) require that the proposed conditional  
27 use cause no significant adverse effects to the shoreline environment in which it is  
28 located or other uses. The walkway, as designed and conditioned, will allow  
29 approximately 70% of light transmission into near-shore areas where eelgrass is present.

1       Grated decking will be installed on panels that extend out to 15 feet MLLW. Eelgrass  
2       does not typically establish or colonize beyond a depth of 15 feet MLLW. Pilings are  
3       24-inch galvanized steel approximately 10 feet apart within the bed-lands, aligned in a  
4       perpendicular orientation, predominantly in water deeper than 15 MLLW. The  
5       walkway is aligned within several degrees of north/south. The base is approximately  
6       eight feet above the elevation of Mean Higher High Water (MHHW). Low level  
7       lighting will be installed along railings and directed inwards towards the deck panels,  
8       except in areas with grated decking. Nearly all of the material at the Boulevard Park  
9       abutment, and all of the material at the Cornwall abutment will be placed above the  
10      MHHW elevation. Construction will occur during work windows established by  
11      WDFW and U.S. Army Corps of Engineers (USACE). Pilings will be installed at low  
12      or slack tide in intertidal areas with vibratory hammer. These design features are  
13      intended to comply with BAS to minimize adverse impacts to salmonids, forage fish,  
14      and shellfish, and their habitats and food sources, from shading, pilings, armoring, and  
15      lighting. The design complies with recommendations of BAS documents, including the  
16      2001 white paper, "Overwater Structures: Marine Issues", "Land Use Planning for  
17      Salmon, Steelhead and Trout", October, 2009 by WDFW, "Protection of Marine  
18      Riparian Functions in Puget Sound", June, 2009 by Washington Sea Grant, and "Non-  
19      Fishing Impacts to Essential Fish Habitat and Recommended Conservation Measures",  
20      August, 2003 by the National Oceanic and Atmospheric Administration (NOAA). With  
21      the incorporation of these design elements the proposal will not cause unreasonable or  
22      significant adverse effects on the environment or other uses. The proposal also includes  
23      removal of features that are detrimental to the environment, including creosote treated  
24      pilings, 3,300 square feet of pier/wharf that shades the intertidal area and is unsafe, a  
25      wall supporting the existing pier and concrete rip-rap in the water. Removal of these  
26      structures will improve the environment over the existing conditions.

27      67.     WAC 173-27-160(1)(e) provides that the public interest suffer no substantial  
28      detrimental effect from the proposed conditional use. The proposal is a public access  
29  
30

1 project that will serve the public interest. The public interest will not suffer any  
2 detrimental effects from the proposed use.

3 68. SMP Section 13E(5) provides that the proposed conditional use must not be  
4 contrary to the purpose and intent of the environment designation in which it is located  
5 and the general intent of the Master Program. The general intent of the SMP is to  
6 coordinate the regulation of shoreline uses so as to insure uses which result in long-term  
7 over short-term benefit, protect the resources and ecology of the shorelines, increase  
8 both visual and physical public access to the shorelines, and accommodate water  
9 dependent uses. The purpose and intent of the Conservancy II environment is to  
10 preserve those areas that do not have physical limitations and are not uniquely natural,  
11 but offer opportunities for the general public to enjoy the shorelines of the City. The  
12 purpose and intent of the Conservancy III environment is to preserve those areas which  
13 do not have physical limitations and are not uniquely natural, but which offer views of  
14 the water from public property and/or substantial numbers of residential properties.  
15 Public recreation and public access uses are specifically permitted in Conservancy II  
16 and III designations. The purpose and intent of the Urban Maritime Environment is to  
17 reserve areas of land use activities that require proximity to navigable waters.

18 Waterfront recreational uses such as waterfront parks, views, towers, public pathways,  
19 public maritime interpretive displays and aquariums, and over water public access  
20 features are specifically permitted uses within the Urban Maritime Environment. The  
21 proposed walkway is not contrary to the purpose and intent of the Conservancy II and  
22 III and Urban Maritime designations and the general intent of the Master Program.

23 69. WAC 173-27-160(1)(a) and SMP Section 13E(1) require that the proposed  
24 conditional use satisfy the conditions of the SMP and that it be consistent with the  
25 policies of the SMP.

26 70. Relevant policies of the SMP include policies relating to piers, bulkheads,  
27 landfills, shoreline protection and recreation. The SMP encourages the cooperative use  
28 of piers, docks and floats, provides that they should be constructed so as to cause

1 minimum interference with the public use of the water surface and shoreline, provides  
2 that the effect of the structure upon adjacent shorelines should be determined by the  
3 Department of Planning and Economic Development prior to granting a permit,  
4 discourages the use of preservative treated wood in direct contact with the water in the  
5 Lake Whatcom watershed, and reserves over water construction on piers, docks and  
6 floats for water oriented uses and where feasible they should provide public access.

7 71. Bulkhead policies of the SMP provide that the effect of the bulkhead on adjacent  
8 properties should be determined by the Planning Department, that they should not be  
9 allowed for the purpose of creating land, and that they should not adversely affect  
10 public access to public shorelines.

11 72. Landfill policies provide that they should contribute to attainment of SMP goals,  
12 they should be vegetated or otherwise protected from erosion, they should not result in  
13 water surface reduction except for water dependent or public uses, they should not pose  
14 a potential threat to water quality, and they should blend with existing topography.

15 73. Shoreline protection policies include prohibition of incompatible structures and  
16 fills, and bank stabilization conformance to bulkhead policies.

17 74. Recreation policies of the SMP provide that the procurement and public use of  
18 shorelines which provide a locally unique opportunity for public recreation should be  
19 encouraged, that recreational development should be designed to minimize adverse  
20 effects on the natural amenities of the shoreline while enhancing its recreational value  
21 and protecting the public health and safety, that the recreational and educational  
22 benefits of natural shorelines should be considered in recreational planning, that  
23 recreational planning and development should recognize the wide variety of recreational  
24 needs and desires, and that the applicable objectives stated and actions recommended in  
25 the City of Bellingham Open Space Plan should be pursued through SMP requirements  
26 and by the ongoing acquisition of property and development of public access along  
27 shoreline trail routes identified in the Open Space Plan.

1       75. The proposed walkway is consistent with the SMP policies relating to piers,  
2 bulkheads, landfill, shoreline protection and recreation.

3       76. An over-water walkway is permitted outright in the Urban Maritime  
4 environment. In the Urban Maritime, Conservancy II and Conservancy III  
5 environments SMP Section 26A(2) allows development within setbacks and in-water  
6 necessary to facilitate public access provided structures are designed so as not to impair  
7 the function of the water body, access is limited to pedestrians and bicycles, and the  
8 development shall consider and protect adjacent private properties. The proposed  
9 walkway is designed so as not to impair the function of the water body, it is limited to  
10 pedestrian and bicycle access, and adjacent properties are public and protected. The  
11 walkway is not otherwise limited by the provisions of Sections 20, 21 and 24 of the  
12 SMP.

13       77. SMP 26F provides that vegetation clearing within Conservancy II environments  
14 is prohibited within 50 feet of the shoreline except where necessary to provide public  
15 access and under other specified conditions. The proposal calls for the removal of  
16 several mature conifers and deciduous trees at the Boulevard Park abutment to develop  
17 the ADA accessible landing. Trees greater than six inches in diameter at breast height  
18 will be replaced at a 2:1 ratio and installed within shoreline jurisdiction within  
19 Boulevard Park.

20       78. SMP 26G provides that public access is encouraged wherever possible and that  
21 the Bellingham Open Space Plan shall be used as a guideline for where access is most  
22 desirable. The regulation provides requirements for public access as set forth in Finding  
23 of Fact No. 22 above. The proposed walkway is included in the City's Open Space  
24 Plan, will not block or interfere with the normal public use of or public access to  
25 publicly owned shorelines, is designed to protect and enhance views and visual access  
26 to the water, will indicate the public's right of access, and will connect existing and  
27 planned trail sections as indicated in the Open Space Plan.

1       79. The proposed walkway will allow navigational access to small watercraft within  
2 the project area. Currently vessels are moored in the area but they are not authorized.  
3 A lease granted by the DNR is required for the mooring of vessels within the area.  
4 Larger vessels, including typical fishing vessels used by Lummi Nation, would not be  
5 able to access the waters between the walkway and the abutting shoreline. Consultation  
6 by the City with the Lummi Nation is on-going regarding treaty rights. Resolution of  
7 this issue will be necessary prior to construction of the project but is outside the scope  
8 of the Hearing Examiner's jurisdiction in this matter. The limited reduction of  
9 navigation rights of the public is consistent with the SMA and SMP, especially in light  
10 of the enhancement of public access that will result from the proposal.

11      80. Section 27 of the SMP contains regulations applicable to the placement of  
12 bulkheads, seawalls and rip-rap, landfills, piers, and shoreline protection, among other  
13 things. The proposal is consistent with the requirements of Section 27E relating to  
14 bulkheads, seawalls and rip-rap. The effect of the proposed abutments at each end of  
15 the walkway was analyzed by Coast & Harbor Engineering, Inc. which concluded that a  
16 worst case storm event produced winds up to nearly 54 mph, originating from 240  
17 degrees, that the majority of wind comes from a southerly direction and that the site is  
18 mostly sheltered due to headlands of Boulevard Park. The analysis showed that this  
19 storm event would not change existing natural processes and that wave heights and  
20 bottom scouring that occurred in concert with wave energy would be equal to or less  
21 than those associated with existing conditions. The abutments do not create new usable  
22 land areas, do not impact access to publicly owned shorelines and will consist of large  
23 boulders and quarry spalls. The structures will be raised above the adjacent upland in  
24 order to comply with ADA requirements and to elevate the walkway above the MHHW  
25 to avoid shading impacts to eelgrass beds.

27      81. Section 27J of the SMP applies to landfills on the shorelines. The abutments do  
28 not create new, dry upland areas, but a small amount of material would be placed below  
29

1 the OHWM. The proposed placement of materials is to accommodate a public use. It  
2 complies with the requirements of Section 27J.

3 82. Section 27N of the SMP applies to the installation of piers, docks and floats.  
4 The walkway is designed to cause minimum interference with the public use of the  
5 water surface and shoreline, the effect of the structure on adjacent shorelines has been  
6 analyzed utilizing BAS and has been determined to be not significantly adverse to the  
7 environment. It is consistent with the requirements of Section 27N.

8 83. SMP Section 27P regulates the development of recreational facilities on the  
9 shorelines. It provides that public recreational development shall be designed to  
10 minimize adverse effects on the natural amenities of the shoreline while enhancing its  
11 recreational value and protecting public health and safety, and that development  
12 recognize the wide variety of recreational needs and desires. The proposal is in an area  
13 where the shorelines are not natural, but are historic landfills or have been heavily  
14 armored to prevent erosion. The proposal will enhance the existing amenities by  
15 providing public access over the water and will complete a waterfront linkage from  
16 Boulevard Park to future improvements at the Cornwall Avenue landfill site and the  
17 multi-modal trail planned along the waterfront. It is designed to minimize adverse  
18 effects on the eelgrass beds and other features of the natural environment and it  
19 enhances the recreational value of the shoreline. The removal of unsafe and degraded  
20 existing structures will protect the public health and safety.

21 84. SMP Section 27S provides regulations for shoreline protection. It requires that  
22 bank stabilization to protect property from erosion must conform to regulations relating  
23 to bulkheads. The proposal is consistent with the provisions for bulkheads.

25  
26 Critical Areas Compliance

27 85. The Critical Areas Ordinance, BMC Chapter 16.55, (CAO) also applies to the  
28 proposal. Critical Areas Permits are administered and issued by the Planning and  
29

1      Community Development Department. Compliance with the applicable provisions of  
2      the CAO is outlined below.

3      86.     BMC 16.55.200 provides that alterations to critical areas comply with the  
4      criteria specified in that section. These provisions generally require mitigation planning  
5      and sequencing, protection of the critical area functions and values consistent with  
6      BAS, consistency with the general purposes of the CAO and the public interest,  
7      consistency of other applicable regulations and standards, and demonstration that the  
8      proposal does not pose an unreasonable threat to the public health, safety and welfare.

9      87.     Requirements for mitigation sequencing are specified in BMC 16.55.250. This  
10     section provides a list of methods to reduce or eliminate impacts to critical areas in  
11     order of preference. First in the order of preference is avoiding the impact altogether by  
12     not taking a certain action or parts of an action. In this case the proposal is dependent  
13     upon crossing critical areas in order to connect the two landing sites. Not proceeding  
14     with the proposal would eliminate the opportunity to remove dilapidated and polluting  
15     structures that are harmful to the critical areas. Not constructing the proposed over  
16     water walkway would not fulfill the intended purpose of providing additional public  
17     access amenities and implementing plans resulting from public processes. This option  
18     would fail to achieve the desired public benefit.

19     88.     Public comments regarding the proposal have contested the need for the over  
20     water walkway due to the existence of the South Bay trail along the shoreline upland  
21     from the proposed walkway. The South Bay trail connects Boulevard Park with the  
22     CBD, not the waterfront. Views from the South Bay trail are limited by vegetation.  
23     Access to the water is limited by the steep slope and railroad tracks. The proposed  
24     walkway provides a different experience for the user.

25     89.     The revised mitigation report (*Exhibit K* to the Staff Report) analyzes each of  
26     the mitigation sequencing steps. The mitigation measures outlined in the report and  
27     incorporated into the project design comply with the mitigation sequencing required by  
28     BMC 16.55.250.

1 90. BMC 16.55.480 requires a critical area report for habitat conservation areas,  
2 including a habitat assessment. A Biological Assessment and Mitigation Report were  
3 prepared for the project. The report includes the elements specified in BMC 16.55.480.

4 91. BMC 16.55.490 provides performance standards for proposals impacting critical  
5 areas. Mitigation of alterations to habitat conservation areas must achieve equivalent or  
6 greater biologic and hydrologic functions and include mitigation for adverse impacts  
7 upstream or downstream of the site. Approvals must be based on BAS. The proposal  
8 will require full compliance with the Revised Mitigation Report, installation of  
9 additional grated decking, replacement of upland vegetation and observance of seasonal  
10 restrictions. The proposal is expected to result in no net loss of shoreline ecological  
11 function.

12 92. Monitoring reports were provided from the Taylor Dock project, which is  
13 similar to the proposed walkway. Eelgrass continued to colonize and expand within and  
14 outside of the project area of the Taylor Dock beyond the bi-yearly minimums  
15 established by WDFW. Similar results are expected from the proposed walkway.

16 93. Performance standards for specific habitats are provided in BMC 16.55.500.  
17 Management plans have been adopted by WDFW that recommend design elements and  
18 mitigation measures to incorporate into project designs and mitigation plans for  
19 proposals within habitat conservation areas with a primary association with  
20 endangered/threatened or sensitive species. No bald eagle nests have been documented  
21 within the project area. Work windows pertaining to anadromous fish have been  
22 specified by WDFW and USACE to be between September 1<sup>st</sup> and October 14<sup>th</sup>.  
23 Alternative alignments were considered in the September 2009 Feasibility Report by  
24 Reid Middleton and are shown in ***Exhibit N*** to the Staff Report. The proposed  
25 alignment was selected as the one that can achieve a no net loss of shoreline ecological  
26 function and is the most desirable to the general public. The proposal will not prevent  
27 the migration of salmonids within the near-shore area.  
28  
29

## Staff Recommendation

2 94. City Planning Staff has recommended approval of the Shoreline CUP subject to  
3 conditions set forth in the Staff Report. Condition No. 4 of the Staff Recommendation  
4 has been modified to request that the Hearing Examiner issue a decision irrespective of  
5 resolution of issues with the Lummi Nation. Staff has indicated that the proposal would  
6 be returned to the Hearing Examiner if resolution of these issues results in significant  
7 changes to the proposal. The recommended conditions include application of  
8 conditions of the MDNS, lighting to be directed away from the water surface in areas  
9 where grated decking exists, and grading and filling activity required to develop the  
10 abutments to not occur between October 1<sup>st</sup> and May 1<sup>st</sup>.

## Public Comment and Responses

13       95.     Comments from other agencies were received regarding the proposal. The  
14     Lummi Nation responded to the MDNS with comments that the proposal would  
15     preclude the exercise of treaty rights by excluding fishing in approximately 25 acres of  
16     Bellingham Bay, that the cumulative effects were not adequately addressed in the  
17     documents provided for review, that environmental justice issues were not addressed in  
18     the documents provided for review, that the design should be modified to avoid or  
19     minimize impacts to tribal fishing areas, and that compensatory mitigation is required  
20     for unavoidable impacts. The City is continuing to discuss issues raised by the Lummi  
21     Nation regarding treaty rights.  
22

23 96. WDFW commented in August 2010 regarding work window and eelgrass  
24 monitoring and mitigation. These comments and requests were incorporated into the  
25 proposal.

26 97. The USACE commented that the proposal was a bridge across navigable waters  
27 that was regulated by the Coast Guard and not the USACE.

98. Public comments were received expressing concerns regarding a number of elements of the proposal, as well as the review process. ReSources commented that the

1 walkway was not needed because there is a parallel trail on the land, that the purpose of  
2 a trail is to get from point A to point B and not to be overwater, that a cumulative  
3 impacts analysis was not done, the proposed mitigation is insufficient, that mitigation  
4 for temporary construction impacts should be included and a restoration project near the  
5 impact site should be included, impacts to eelgrass have not been adequately  
6 considered, the eelgrass reference site is within the shadow of the overwater structure,  
7 the Lummi Nation's concerns should be addressed, information was missing and it did  
8 not support the project. The City provided information regarding the shoreline erosion  
9 transportation and evaluation and updated the eelgrass survey and mitigation report  
10 after these comments were received. Additional comments by ReSources stated that  
11 there has not been an adequate discussion of mitigation sequencing as required by the  
12 CAO and that the no net loss standard would not be met because of a net increase in  
13 shaded area. The City responded to these comments that an alternatives analysis was  
14 performed, the additional shading would occur in deeper water, and there would be a  
15 net decrease in shading in the inter-tidal zone.

16 99. Wendy Harris submitted numerous comments expressing concerns regarding  
17 Lummi Nation treaty rights, impairment of public navigation, issuance of the MDNS  
18 before all studies were completed, cost of the project, lack of adequate notice, hearing  
19 the shoreline CUP application prior to issuance of a CAO permit, loss of function of the  
20 eelgrass beds, harm to the Caspian tern colony during construction, impacts on harbor  
21 seals and harlequin ducks, the need for an EIS, location of the project within MTCA  
22 sites, lack of analysis of impacts on shallow waters, lack of meaningful mitigation,  
23 communication from the project engineer only to supporters of the project, failure of the  
24 City's SMP to comply with the SMA and 2003 SMP Guidelines, and failure to address  
25 and mitigate impacts to other species. The City responded to these comments that all  
26 necessary permits and approvals, including agreement with the Lummi Nation, would  
27 be obtained, that applicable standards would be satisfied, that required reports have  
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1       been prepared or obtained, that BAS would be applied to the project, and that required  
2       notices have been issued.

3       100.   People for Puget Sound expressed concern regarding habitat and wildlife  
4       impacts, inconsistency with mitigation sequencing, and impacts to tribal access, fishing  
5       rights and navigation access. It suggests that an elevated walkway on land would create  
6       less impact and be less costly.

7       101.   Frances Badgett expressed concern that the cleanup of the project site has not  
8       been slated, the new SMP has not been completed, and regarding the lack of public  
9       process, allocation of funds, unresolved issues with the Lummi Nation treaty rights,  
10       contamination of the project site, and lack of notice for the hearing.

11       102.   Laura Leigh Brakke requested that a thorough EIS be completed for the proposal  
12       and that the outdated SMP not be used to review the project. She also expressed  
13       concern regarding the cost of and need for the proposal, the impact of driving and  
14       removing pilings in a contaminated area, lack of information regarding contamination,  
15       and impacts and limitations on public access with the proposal.

16       103.   Kevin Cournoyer expressed concerns regarding the cost of the project, that it is  
17       unnecessary and superfluous, that the hearing was not openly publicized, that an e-mail  
18       was sent to supporters of the project, that the proposal would be contaminated with  
19       toxic compounds, that signatures from the Healthy Bay Initiative were not included in  
20       the Feasibility Study, and that cleanup is not contemplated for the area.

21       104.   Tim Paxton expressed concern that the Lummi Nation has not yet approved the  
22       proposal, that mitigation to protect priority species has not been mentioned, that impact  
23       studies for priority species have not been provided, that the proposal has been  
24       misrepresented as having been voted on by the public, that the project site includes  
25       toxic waste sites, that Port commissioned studies showed cesium and tritium  
26       contamination near the site, that e-mails refer to possible ex parte communications with  
27       the Hearing Examiner, that there is a shoreline alternative to the proposal, that an  
28  
29

1 adequate EIS should be required, and that a complaint has been filed with the Federal  
2 Department of Transportation Inspector General regarding the process.

3 105. Opposition to the proposal was also expressed by William Hogan (not needed  
4 and cost), and Mark Bennett (cost).

5 106. Geoff Middaugh submitted comments in support of the proposal, including that  
6 he has continually heard strong support for the proposal as a liaison to the Parks and  
7 Recreation Advisory Board and South Hill Neighborhood Association, that he never  
8 received any comment urging not supporting the project, that the hearing record is  
9 thorough and complete, that there is overall public support for the project, that the  
10 environmental effects and mitigations are solidly developed and addressed, that the  
11 project has met decision criteria, that the project provides ecological restoration to a  
12 severely impacted area of the Bay, that the proposal is an improvement over past land  
13 uses, that it will make the habitat better, that the SEPA/NEPA analysis, biological  
14 assessment, and permitting processes are carefully coordinated, the nation to nation  
15 issues with Lummi Nation are respectfully addressed, that there is no need for an EIS  
16 and that he looks forward to the high-quality recreation experience the completed  
17 resource will provide.

18 107. Danne Neill urges support for the proposal. She indicates that she has watched  
19 the area change over a 20-year period from her home and that she uses the South Bay  
20 trail on a regular basis. She states that being on a walkway over the water provides an  
21 extremely different perspective than being on land, that the community has spent years  
22 planning and is looking forward to a new downtown waterfront, with the proposal as the  
23 first step toward revitalization of the waterfront.

24 108. John Blethen also supported the proposal. He stated that he has been involved  
25 with the project for over 10 years through the waterfront master planning process and  
26 the Greenways program, that the proposal is important economically to the City because  
27 it completes a water linkage from Fairhaven to the downtown waterfront and will serve  
28 as a first step in economic revitalization of the currently blighted downtown waterfront

1 area left vacant after the closing of the GP mill. He states that the proposal will bring  
2 thousands of people to the waterfront that has not been accessible for more than 100  
3 years and will tie Boulevard Park to a new park which will cap an existing garbage  
4 dump, and that it will be a first step in naturalizing the water's edge with soft shoring,  
5 native plants and near shore reconstruction.

6 109. The Bellingham Parks and Recreation Advisory Board commented that  
7 protection of the environment is a central aspect of the proposal, the mitigations the  
8 City proposes are appropriate and necessary, the Board fully supports the proposal and  
9 this support echoes the overwhelming support of the citizens of Bellingham, there is no  
10 substantive reason why the project should not receive a Shoreline CUP, and that the  
11 City should make a strong effort to meaningfully consult the Lummi Nation.

12 110. Additional support for the proposal was received from Dee Dee Wine (owns  
13 property immediately above the proposal, excited about improvements in the  
14 neighborhood), Harvey Schwartz (perfect eco-friendly tie in to new waterfront  
15 development, proposal is imaginative and practical; boardwalk one of best features in  
16 Bellingham), Elizabeth Kianowski (strongly support, look forward to using it),  
17 Timothy Morris (support the project), Thomas and Marilyn Olsen (strongly endorse,  
18 frequent users of South Bay trail and Taylor Dock, proposal will extend and improve  
19 the trail, improving health, complementing transportation, burnishing tourism,  
20 enhancing quality of life, and leveraging development of GP site), and Barbara Curry  
21 (wonderful project). Richard L. Sullivan stated that if the bay is cleaned-up there will  
22 be wildlife all over and we need provisions for fishing from the walkway.

24 111. Wendy Harris, Frances Badgett, Laura-Leigh Brakke, Shane Roth, and Sue  
25 Brown submitted a Motion to Remand the proposal to the Planning Department for  
26 further review, and to reopen the public hearing after additional materials were  
27 provided. The Motion was based on the lack of agreement between Lummi Nation and  
28 the City, lack of completion of CAO compliance, lack of a cumulative impact analysis,  
29 failure to resolve issues relating to toxic cleanup, problems designing an eelgrass

1 mitigation program, inadequate protection of water quality during construction, and  
2 failure to address legal performance standards.

3 112. The City has responded to this Motion indicating that the consultation with  
4 Lummi Nation is being overseen by the federal lead agency, the Federal Highway  
5 Administration (FHWA), which deferred lead status to the City, that if substantial  
6 revisions to the proposal are required due to other permitting processes the City would  
7 bring the project back to the Hearing Examiner for review, that the City requested that  
8 the public comment period be extended, and it was extended until January 7, 2011 after  
9 the November 17, 2010 hearing. It stated that a Shoreline CUP is the appropriate  
10 permit for this proposal and that compliance with both the SMP and the CAO is the  
11 correct process, that the information submitted for the Shoreline CUP includes the  
12 information required by the CAO and is embodied in the materials submitted for  
13 JARPA, the Biological Assessment and the initial and revised Mitigation Reports and  
14 the 2009 Feasibility Study. The response indicates that a cumulative impact analysis  
15 was conducted in accordance with WAC 173-27-160, that BAS is documented in the  
16 submitted materials, that the mitigating measures recommended have been incorporated  
17 into the design, and that there is not a lack of valid scientific information relating to the  
18 subject critical area. The City also states that it has not failed to protect the functions  
19 and values of critical areas, that the mitigation proposed will achieve no net loss of  
20 function, that species associated with the area have been identified as required by the  
21 regulations, that mitigation is sufficient and mitigation sequencing has been employed.  
22 The response also states that other agencies may require additional information and  
23 mitigation, that future remedial actions pursuant to MTCA is a separate permitting  
24 process, and that it is not necessary to remand the proposal or to reopen the public  
25 hearing.

26 113. The City also provided a No Development Alternative analysis and an  
27 evaluation of potential impacts of the proposal to the common loon, both prepared by  
28 Anchor QEA. The No Development Alternative analysis concluded that this alternative  
29

would avoid temporary and permanent impacts, including construction noise, substrate displacement, over-water structure location, and impairment of vessel traffic within the project area, that environmental betterments, including the removal of creosote-treated piles, derelict structures, early action cleanup of contaminated sediments, improvement of existing flooding issues at Boulevard Park, removal of shoreline armoring, and enhancement of the pocket beach and adjacent shoreline, would not occur, and that the project's purpose of providing an over-water pedestrian trail to link Boulevard Park to the Cornwall Landing site would not be accomplished.

114. The evaluation of potential impacts to the common loon concluded that the loon does not nest in the marine environment, but on freshwater lakes or ponds, that nests are not likely to occur within 490 feet of the project site, that the species is likely accustomed to noise due to existing train and truck traffic in the vicinity, the level of noise generated by human activities is not expected to be more significant than existing noises, and the project is not expected to adversely affect the common loon populations that may be present in the project area.

115. The Hearing Examiner is not aware of any substantive ex parte communications regarding this matter that have not been included in the public record of this proceeding, and none have been considered in the formulation of this decision. Inquiries via e-mail regarding scheduling of the public hearing and appeal fees were made or forwarded by staff.

## II. CONCLUSIONS OF LAW

1. Public notice of the proposal for the Shoreline CUP and public hearing was issued as required by provisions of the BMC and SMA.
2. Adequate opportunity for public comment was provided at the public hearing and through the extension of time for submission of additional written comment after the public hearing date.

1       3.    Submission of additional material in support of the proposal, consisting of the  
2    No Development Alternative analysis and the Common Loon evaluation does not  
3    warrant re-opening of the public hearing. These reports provided minimal new  
4    information relevant to the proposal that was not included in previous materials.

5       4.    Additional permits and review processes are required for the proposed  
6    development. Completion of these permitting processes is not required prior to  
7    issuance of a decision on the Shoreline CUP.

8       5.    Requiring resolution of issues relating to treaty rights of the Lummi Nation is  
9    beyond the scope of the Hearing Examiner's jurisdiction. The decision herein is based  
10   upon the proposal submitted by the Applicant, as modified by conditions required by  
11   the MDNS and other mitigating measures incorporated into the proposal.

12       6.    Significant modification of the proposal as a result of conditions imposed by  
13    other agencies or resolution of treaty issues may require additional review of the  
14    Shoreline CUP.

15       7.    The Applicant has adequately addressed the issues relevant to the Shoreline  
16    CUP allowing a decision on the proposal.

17       8.    Section 26G of the SMP allows public access facilities to be constructed in and  
18    over the water in Conservancy II and III environments. In and over water construction  
19    of a public walkway is a permitted use in the Urban Maritime environment. It is not  
20    clear that the proposal requires a Shoreline CUP. However, the proposal has been  
21    processed as a Shoreline CUP, the Director of Planning and Community Development  
22    has interpreted the SMP to require a Shoreline CUP for the proposal, and the Applicant  
23    has not contested the requirement. The decision contained herein assumes that a  
24    Shoreline CUP is required for the proposal but is not a determination that one is  
25    required.

27       9.    Because the City's updated SMP, approved by the City in 2009, has not yet been  
28    approved by the DOE and is not yet in effect the proposal is governed by the 1989  
29    SMP. It is also required to comply with the City's CAO.

10. A Shoreline CUP must comply with the provisions of the SMP, WAC 173-27-160, and the policies of RCW 90.58.020.

11. The Applicant has demonstrated compliance with the requirements of the SMP.

12. The Applicant has demonstrated consistency with the policies of RCW 90.58.020. The proposal is for a public use, providing recreational access to the shoreline for citizens of Bellingham and visitors from other areas, designed to protect the resources and ecology of the shoreline and restore some of the natural character of the shoreline that is not currently existing. It will limit large vessel navigation within the project area, but will result in an overall increase in public access, recreational opportunities and public benefit.

13. The Applicant has demonstrated compliance with the requirements of WAC 173-27-160(1). The proposal will not interfere with the normal public use of public shorelines. The proposal will increase public use of the shorelines. Existing public uses will remain and be enhanced. The proposed use of the site and design of the project is compatible with other authorized uses of the area and uses planned for the area. The proposal is included in planning documents adopted by the City and is part of a master plan for public access and recreation throughout the area. With required mitigation and monitoring the proposal will not cause significant adverse effects to the shoreline environment. Remedial measures included in the proposal will improve the shoreline ecology. The public interest will not suffer substantial detrimental effects from the proposal, but will be served by it.

14. The cumulative impact analysis required by WAC 173-27-160(2) for a shoreline conditional use is an analysis of cumulative impacts from similar requests for conditional uses in the area where similar circumstances exist. The Applicant has demonstrated that it is unlikely that additional requests for similar conditional uses within the same environments will be made or add cumulative impacts.

15. The Applicant has demonstrated that the proposal complies with the requirements of Section 13E of the SMP. The proposal is consistent with the purpose

1 and intent of the Urban Maritime and Conservancy II and III designations and the  
2 general intent of the SMP.

3 16. CAO permits are administered by the Planning and Community Development  
4 Department. A CAO permit is required for the abutments. It is required to comply with  
5 the requirements of the CAO. No development is permitted until compliance has been  
6 demonstrated and permits issued. The Applicant has demonstrated that the proposal can  
7 comply with the requirements of the CAO. This decision is not a determination that a  
8 CAO permit shall be issued. The Department has authority to determine compliance  
9 and require additional information and conditions, subject to appeal as provided in the  
10 CAO.

11 17. Issues of cost of the proposal and desirability of the project are outside the  
12 scope of the Hearing Examiner's authority. These issues are determined by the City  
13 administration and City Council, with input from various advisory bodies and the  
14 public.

15 18. The decision to approve, deny or condition a shoreline conditional use is based  
16 on compliance with the criteria specified in the SMA, applicable portions of the  
17 Washington Administrative Code, the SMP and the Bellingham Municipal Code.

19 19. A decision of the Hearing Examiner to approve a shoreline conditional use is  
20 forwarded to the DOE which has the final authority to approve, deny and/or condition  
21 the proposal. The decision of the DOE is subject to appeal to the Shorelines Hearings  
22 Board.

23 20. Any Finding of Fact that should be denominated a Conclusion of Law shall be  
24 deemed to be a Conclusion of Law. Any Conclusion of Law that should be  
25 denominated a Finding of Fact shall be deemed to be a Finding of Fact.

26  
27 III. ORDER

28 The Motion to Remand is denied.  
29

1           The proposed Shoreline CUP for a public access over-water walkway between  
2 the Cornwall landfill site and Boulevard Park, together with abutments at each end and  
3 removal of derelict structures and rip-rap, as described in the materials submitted in  
4 support of the proposal, is approved, subject to the following conditions:

5       1. This approval is subject to review and final determination by the Department of  
6 Ecology (DOE), which may approve, deny, or approve with conditions, all or part of the  
7 proposal.

8       2. The approved Shoreline Conditional Use Permit (CUP) shall be substantially as  
9 proposed, including the elements and features described in this decision, the attached  
10 site plan (*Exhibit A*), and/or in the Staff Report, together with any modifications  
11 necessary to comply with this Order or a decision approving or approving with  
12 conditions issued by the DOE, and minor modifications necessary to comply with  
13 approvals required by other agencies with jurisdiction. A modification shall be  
14 considered minor for purposes of this decision if it has no significant adverse effect on  
15 the public use and benefit of the proposal, compliance with the Shoreline Management  
16 Act (SMA) and Shoreline Master Program (SMP), and/or the shoreline environment. A  
17 significant realignment of the walkway, change in location of abutments, significant  
18 decrease in the height of the walkway above the water, or significant change in the  
19 decking, lighting, or in-water materials, shall not be considered a minor modification.

20       3. The use shall comply with all conditions of Mitigated Determination of Non-  
21 Significance No. SEP2010-00027, *Exhibit C* to the Staff Report.

22       4. Lighting on portions of the walkway where grated decking is located shall be  
23 directed away from the water surface.

24       5. Grading and filling activities required to develop the abutments shall not occur  
25 between October 1<sup>st</sup> and May 1<sup>st</sup> of any year.

26       6. Construction activities shall observe all required work windows prescribed by  
27 other agencies with jurisdiction.

7. All required permits and approvals shall be obtained prior to development of the use. The Applicant shall comply with all applicable regulations, or obtain variances therefrom, in the design, location, construction and operation of the use.

8. The Shoreline CUP is subject to all conditions imposed in the Substantial Development Permit issued for the proposal.

ENTERED this 4<sup>th</sup> day of February 2010.

## BELLINGHAM HEARING EXAMINER

Dawn Sturwold