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February 5, 2013

By Email (council@bainbridgewa.gov) Only
City Council Members
City of Bainbridge Island
280 Madison Avenue North
Bainbridge Island, WA 98110

Re: February 6, 2013 Workshop (Port Madison / Nonconforming)

Dear Council Members:

My firm represents Mr. Ken Wakazuru. Mr. Wakazuru owns property on Point Monroe, Bainbridge Island which is developed with a single-family residence and appurtenant structures. He also owns a legal lot of record on which he intends to construct a new residence. He has submitted the required applications to develop that property. The purpose of this letter is to provide a legal construct for Council decision-making; other citizens will provide comment as well. Ms. Leann McDonald will also comment on behalf of Mr. Wakazuru.

Recommendations

(1) Specify that all existing shoreline homes, appurtenant structures, and residential uses, including lawns, landscaping and recreational uses, are authorized and conforming.

(2) Allow redevelopment, incremental expansion and repair of existing structures via insertion of a policy statement declaring that such development is not considered a threat to the aquatic environment if done in compliance with specified Best Management Practices.

(3) Recognize the benefits of local and regional restoration projects when considering "no net loss," especially in the context of minor repair, expansion or alteration of existing shoreline residential structures.

(4) Impose no new generic buffers or vegetation set asides on the built environment.

(5) For undeveloped residential parcels allow a site-specific process in lieu of compliance with any generic buffer[1] or set aside consistent with existing required mitigation sequencing concepts (except avoidance).

[1] The State Guidelines make it clear that SMPs "shall contain requirements for buffer area zones around wetlands within shoreline jurisdiction" (WAC 173-26-221(2)(a)(ii)(D)), but they contain no such mandatory requirement for "critical freshwater habitats" or the nearshore marine area. *Compare* WAC 173-26-221(2)(c)(i)(B) with 221(2)(c)(iv).

Justification for Recommendations.

Context is required for the City Council to make reasoned choices. Single-family residential shoreline homes and associated residential uses are not a threat; to the contrary, they are a preferred use in the shoreline environment. This basic point has been overlooked by Staff and the Planning Commission.

When the Shoreline Management Act was passed, the Legislature was considering two initiatives – the Shoreline Protections Act, which gave state agencies much more control over environmental protection, and the Shoreline Management Act, which looked to a balanced approach to shoreline use and protection. The Shoreline Management Act prevailed. It is the SMA that controls.

The SMA allows preferred or exempt development on or near critical areas. The SMA unequivocally allows "construction **on shorelands** by an owner … of a single-family residence … for his or her own use …." RCW 90.58.030(3)(e)(v) (emphasis supplied). The term "**shorelands**" includes "… **all wetlands** … associated with tidal waters." RCW 90.58.030(2)(d).

Further, the SMA explicitly allows "alterations of the natural condition of the shorelines and shorelands of the state, which **shall be recognized** by the Department." RCW 90.58.020 (emphasis supplied). Permitted alterations include "single-family residences …." *See* RCW 90.58.020.

In short, construction of single-family home is a preferred shoreline use and can even if sited in critical areas located within SMA jurisdiction. Instead of collaterally attacking state policies, the Council must direct Staff to embrace them.

(1) SSB 5451.

In 2011, the Washington Legislature enacted Substitute Senate Bill 5451 ("SSB 5451") (Chapter 323, Laws of 2011) which allows local government to exempt existing shoreline homes and appurtenant structures from new use regulations such as setbacks or buffers.

SB 5451 was initiated by citizens through their respective Senators and was sponsored by both Democrats and Republicans.[2] Unlike other amendments relating to shorelines and property rights, the public testimony was unilaterally supportive without any public testimony in opposition.[3] Importantly, the entire spectrum of people and entities voiced support of this bill: Department of Ecology, Washington Realtors, Association of Washington Business, Futurewise,

[2] Ranker (D), Ericksen (R), Pridemore (D), Harper (D), Carrell (R), Hobbs (D), Rockefeller (D), Tom (D), White (D), and Shin (D).

[3] 2011 SB 5451 Senate Bill Report (Feb. 16, 2011); 2011 SB 5451 Senate Bill Report (Feb. 21, 2011); 2011 SSB House Bill Report (Apr. 5, 2011); and 2011 SSB 5451 Senate Bill Report (Apr. 5, 2011).

People for Puget Sound, Common Sense Alliance, Senator Ranker, and the Association of Washington Cities.[4]

The public comments were succinctly summarized as expressing a desire to eliminate the term "nonconforming use" as it applies to residential structures because of the detrimental implications:

> PRO: Currently, if a shoreline buffer changes, under the local master program your residential structure could be considered nonconforming. This bill gets rid of the term nonconforming use as it applies to residential structures. With local master program updates happening in communities, the overriding issue being discussed is nonconforming use and what it means to homeowners. The expressed concerns about the label of nonconforming use have been about the ability for homeowners to acquire insurance and mortgages, as well as sell their homes. This term should be extinguished. **The bill removes the stigma of nonconforming use which will alleviate the concerns for homeowners, and it will improve the ability to update the master programs.**

(Emphasis added in bold). [5]

Ultimately, the 2011 SSB 5451 was passed unanimously by the Senate (48-0) and with little opposition in the House (77-19).[6]

The City Council has full discretion to apply SSB 5451, plus take into account local circumstances. *See* WAC 173-26-090. Most of Bainbridge Island's shoreline is highly built out with single-family homes and approximately 60% of the shoreline is armored. Shielding off existing development from new regulations is more a recognition of existing circumstances than anything else. It should not be defined as a "conforming" versus "nonconforming" analysis or debate. Fundamentally, it is simply recognizing that new buffers do not apply to the built environment because they serve no purpose.

Kitsap County decided to implement SSB 5451 in its updated SMP. *See* **Attachment 1** (excerpt from Ordinance No. 502-2013).

Expanding on the last point, the State Guidelines specify that new regulations logically apply only to undeveloped land: "While the master program is a comprehensive use regulation

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[4] *Id.*

[5] 2011 SSB 5451 (Apr. 5, 2011); *see also* 2011 SSB House Bill Report (Apr. 5, 2011) (describing similar public testimony that was unopposed).

[6] 2011 SSB 5451 Final Bill Report (July 22, 2011).

applicable to all land and water areas within the jurisdiction described in the act, its effect is generally on future development and changes in land use." *See* WAC 173-26-192(2)(a)(iii)(A).

"No net loss" is a prospective concept. Retroactively declaring existing development nonconforming has no gain for the aquatic environment and does nothing to achieve "no net loss." Recognizing this basic concept, the Guidelines correctly wall off existing development from the reach of such new buffers or set asides to avoid a "nonconforming" status: "Like other master program provisions, vegetation conservation standards **do not apply retroactively** to existing uses and structures." WAC 173-26-221(5)(A) (emphasis supplied).

(2) Nonconforming.

The City Council needs to be better advised on the doctrine of nonconforming use and the legal effect of the language proposed by the Planning Commission, supported by the January 2, 2013 Staff Report.

I am addressing basic and established legal concepts, not mere "words." A practicable definition of "nonconforming" is "illegal but tolerated for now." The nonconforming label is an invitation over time to force citizens to give up use of their property in favor of "restoration" of the shorelines. The Washington legislature recognized that nonconforming is a "stigma" when it enacted SSB 5451. *See infra,* p.4.

It is not correct that a nonconforming label must be imposed, or that the difference between conforming or nonconforming is "only a semantic change" as claimed by Staff in its June 11, 2012 memo to the City Council, at page 4. *See also* staff memo, January 2, 2013 at page 4. Ecology agrees that "the 2003 guidelines do not require the City to classify properties as nonconforming." *See* Ex.F, January 2, 2013 Staff Report, p.1.

"Nonconforming" is not just a word; it is a legal status. The courts allow nonconforming uses and structures to be phased out, subject only to possible constitutional protections to recap investments via amortization: "The policy of zoning legislation is to phase out a nonconforming use."[7] *Anderson v. Island County,* 81 Wn.2d 312, 321, 501 P.2d 594 (1972) (citing *State ex rel. Smilanich v. McCollum,* 62 Wash.2d 602, 384 P.2d 358 (1963)). This is because "[n]onconforming uses are disfavored under the law." *Open Door Baptist Church v. Clark County,* 140 Wn.2d 143, 150, 995 P.2d 33 (2000).

Staff in its April 27, 2012 memo to the Council, at p.3, identifies a "concern about the misinformation that many of the shoreline homeowners have regarding nonconforming development in particular." What is really meant is that Staff thinks citizens should not be concerned. But shoreline homeowners are concerned, as the legislative history justifying

[7] *See* WASHINGTON REALTORS, *A Background Paper on the Shoreline Master Program Updates and Critical Areas Ordinance Review: Effective Participation and Comment*, Reynolds, May 2010, p.24.

enactment of SSB 5451 demonstrates. Everyone seems to see nonconforming as a stigma, except Staff.

What prompts citizen distrust is being advised on the one hand that existing uses are "not being regulated," then on the other reading the SMP which states: "Residential structures that do not conform to this program should, over time, as the owner proposes changes to the structure conform as completely as possible to this program …." (Draft, § 4.2.1.2).

SSB 5451was enacted to facilitate passage of new master programs. If the law is not implemented on Bainbridge Island, once again, the City Council places itself in an adversarial relationship with its own citizens. Logic and fair dealing should trump power and control.

Imposition of new large buffers or vegetation setbacks is the main regulatory tool that creates nonconforming uses and structures. The consequence is to make existing development nonconforming and over time force illegal restoration.[8]

Staff wants, and the Draft language dictates, that reconstruction of a lawfully constructed residential home or expansion of the "nonconforming structure" will be allowed but only if it is demonstrated that the expansion "will not result in adverse impacts to shoreline ecological functions and shoreline processes are mitigated or restored." Draft, § 4.2.1.3.9. In short, forced restoration.[9] This is a bridge too far; everyone agrees that the Shoreline Management Act cannot force restoration by shoreline owners.

(3) No Net Loss.

It is true that the "no net loss of ecological functions" concept is stated as one of the "Governing Principles" of the State Guidelines. However, the State Guidelines explicitly allow impacts to ecological functions "necessary to achieve other objectives of RCW 90.58.020," for example, priority for single-family uses and recreational moorage. *See* WAC 173-26-201(2)(C).

No net loss must be calculated with respect to the applicable ecosystem, not on an individual parcel basis. *See Tulalip Tribes v. Snohomish County*, CPSGHB, Case No. 96-3-0029. Yet the Draft applies the concept on a parcel by parcel basis.

The State Guidelines mandate recognition of public restoration or preservation projects. *See* WAC 173-26-186(8)(c). The Puget Sound Partnership ("PSP") has developed an "Action Plan," in conjunction with the Puget Sound Near Shore Ecosystem Restoration Project, which envisions significant restoration for Puget Sound over the next 25 years. The resulting net gain

[8] The SMA does not mandate forced restoration. *See Swinomish Tribal Cmty v. WWGMHB*, 161 Wn.2d 415 (2007).

[9] This is not rhetoric. The Council is directed to Section 4.1.2.5 of the Draft, which discusses vegetation replanting. Expansion or alteration of a "nonconforming residence" is required to comply with these regulations. *See* Draft, Section 4.2.1.6.3(2)(b)(iv). *See also* Draft, Section 4.2.1.6.3(5).

from these projects could more than off-set any site specific impacts from incremental redevelopment, repair or alteration of existing waterfront homes or other shoreline structures. **The Council should request analysis from staff on the extent and effect of the PSP's action plan, plus the benefits on contemplated purchases of local shoreline lands for open space.**

Thank you for your kind attention to these comments and the attachment.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis D. Reynolds

Attachment

cc: Ken Wakazuru (by email)
Kathy Cook, Director (by email KCook@bainbridgewa.gov)
Ryan Erickson, Planner (by email rericson@bainbridgewa.gov)
Leann E. McDonald (by email leannm@mac.com)

DDR/cr

ATTACHMENT 1

Chapter 5 General Regulations

5.1 Existing Development

5.1.1 Existing Uses

A. Lawfully established uses occurring as of the effective date of this Program shall be considered conforming, with the exception of existing over-water residences and non-water-oriented commercial or industrial uses, which shall be considered nonconforming.

B. All lawfully established uses, both conforming and nonconforming may continue, and may be repaired, maintained, expanded or modified consistent with the Act and this Program.

C. Any change in use shall conform to the standards of this Program or require a Conditional Use Permit (CUP). A CUP may only be granted if no reasonable alternative use meeting the standards is practical and the proposed use will be at least as consistent with the policies and provisions of this Program and the Act and as compatible with the uses in the area as the preexisting use. Conditions may be imposed that are necessary to assure compliance with the above findings and with the requirements of this Program and the Act, to assure that the use will not become a nuisance or a hazard, and to assure that the use will not result in a net loss of the ecological function of the shoreline.

D. If a use is discontinued for twelve consecutive months or for twelve months during any two-year period, any subsequent use, if allowed, shall be water-oriented and comply with the Act and this Program.

5.1.2 Existing Structures

A. Lawfully constructed structures

1. Lawfully constructed structures, including those approved through a variance, built before the effective date of this Program shall be considered conforming, with the exception of existing over-water residences, which shall be considered nonconforming.
2. All lawfully constructed structures may continue and may be repaired or maintained in accordance with the Act and this Program.
3. Lawfully constructed conforming structures may be expanded or redeveloped in accordance with the mitigation standards of Appendix B (Mitigation Options to Achieve No Net Loss for New or Re-Development Activities) and all other applicable regulations. Such structures shall also be considered conforming.
4. In the event that a legally existing structure is damaged or destroyed by fire, explosion or other casualty, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged or destroyed, provided the application is made for the necessary permits within six months of the date the damage or destruction occurred, and the restoration is completed within two years of permit issuance or the conclusion of any appeal on the permit.
5. Any legally existing structure that is moved any distance must be brought in to conformance with the Act and this Program.

B. Existing Appurtenances to Single Family Residences. Those legally existing appurtenances that are common to existing single family residences shall be considered conforming. Such appurtenances may include garages and sheds, but shall not include bulkheads, overwater structures or other shoreline modifications.

C. Vegetation Conservation Standards of this Program shall not apply retroactively in a way which requires lawfully existing uses and developments, including residential landscaping and gardens to be removed, except as required as mitigation for new and expanded development.

5.1.3. Existing Lots

A. An undeveloped lot, tract, parcel, site, or division of land located landward of the OHWM that was created or established in accordance with local and state subdivision requirements prior to the effective date of this Program or the Act, but which does not conform to the present lot size standards, may be developed if permitted by other land use regulations so long as such development conforms to all other requirements of this Program or the Act.

B. This section does not modify the rules regarding the development of plats under RCW 58.17.170 as now or hereafter amended.

5.2 Proposed Development

5.2.1 Location

A. New development shall be located and designed to avoid or, if that is not possible, to minimize the need for new and maintenance dredging.

B. New development shall be located and designed to avoid the need for future shoreline stabilization for the life of the structure. Likewise, any new development which would require shoreline stabilization which causes significant impacts to adjacent or down-current properties shall not be allowed.

C. New development on lots constrained by depth, topography or critical areas shall be located to minimize, to the extent feasible, the need for shoreline stabilization.

D. New development on steep slopes or bluffs shall be set back sufficiently to ensure that shoreline stabilization is unlikely to be necessary during the life of the structure, as demonstrated by a geotechnical analysis.

E. Subdivision shall occur such that newly created lots will not require shoreline stabilization, using geotechnical analysis of the site and shoreline characteristics.

F. Shoreline developments must locate all non-water-oriented facilities, other than single-family residences and other preferred uses, landward of water-oriented uses, or outside shoreline jurisdiction, unless no other location is feasible.

5.2.2 Standards for Work Waterward of OHWM

A. Water-dependent in-water structures, activities, and uses are not subject to the shoreline buffers established in this Program.