

From: [Gary Tripp](#)
To: [*Bainbridge Defense Fund](#)
Subject: IMPACT OF THE PROPOSED SMP ON THE LIVELIHOOD OF LOCAL REALTORS
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To: the City Council

Before voting on April 10, please consider the impact of the SMP on the livelihood of all local realtors. This legislation will have a long-lasting and significant impact on their incomes and lives.

Please read the attached summary which, as a retired bank attorney, I prepared to alert people to the very real danger that the SMP poses to local realtors.

Thank you for your time and attention to this matter,

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**WHAT IF ALL WATERFRONT DEALS DRIED UP?
THE PROPOSED SMP AND ITS IMPACT ON THE SHORELINE MARKET & REALTOR INCOME**

On April 10, 2013 the City will have its final hearing on the proposed Shoreline Management Plan that will have a permanent impact on the Bainbridge shoreline market and its realtors. Since the regulations are more than 300 pages long, with various highly technical terms, as well as ill-defined conceptual phrases, it seemed to me that local realtors might appreciate a short overview. As a retired attorney, I can tell you that this document is awkward and lacking in many basic, but critical, legal definitions. That means that this document will lead to a variety of interpretations by Planning Department staff, reflecting their personal biases and lack of expertise.

Realtors need to ask themselves: "What if waterfront deals dried up? Am I comfortably set up with a nest egg to fund my future needs? Am I prepared to face the financial challenge?" For, the proposed SMP has many, many facets that will enormously impact the waterfront real estate market and the individual lives and income of realtors.

**THE BIGGEST DANGER:
THE CITY'S GOAL TO PHASE OUT THE RESIDENTIAL FOOTPRINT/USE AND INCREASE
PUBLIC RECREATIONAL USE.**

The Stated Goals and Policies of the SMP: Reduce Residential Use, Increase Public Recreational Use.

The City's goals, repeatedly stated in the SMP, are to decrease the size and view of residential use and structures and increase public access and use. That purpose is clear from the designation of public recreational use as the "preferred use" for this land and residential use as the "non-conforming" or "existing" use that is, according to their stated goals, to be "ultimately, over time... phased-out." Elsewhere there are references to residential uses 'ceasing.'

Whereas the SMP says that public use of (private) shoreline land and public water views must be "promoted" and "enhanced," nowhere does it say that residential development must be promoted or enhanced. Rather, the City merely acknowledges that it must "*recognize* legally established primary residential structures and allow them to be maintained, repaired, remodeled and *in some cases* expanded...., But the City gives private residences no priority and *often no permission to build or rebuild*. The SMP's stated goals and policies repeatedly burden and limit a private homeowner's residential rights, all in favor of public use, all under the guise of environmental protection. It appears that increasing public residential use of this land is as big a priority as, or even bigger than, ensuring "no net loss to ecological functions."

INCREASING PUBLIC ACCESS OVER AND ON PRIVATE PROPERTY

Homeowners' Use of His Property Becomes Subordinate to Public Use of His Property.

The City's goals include the following: "(To) regulate the design, construction and operation of permitted uses in the shorelines... to minimize, insofar as practical, *interference with the public's use* of the water." Going beyond just the water, the SMP provides that "(p)ublic access includes the ability of the general public to *reach, touch, and enjoy the water's edge...* and to view the water and the shoreline from *adjacent locations*." Clearly, the "water's edge" is the beach, and the "adjacent locations" are the homeowner's private property. In a clear statement of the City's priorities, the SMP states that "*Shoreline development, uses and activities should not unreasonably impair or detract from the public's physical and visual access to the water. Development provisions, such as height limits, setbacks and view corridors, should be utilized to minimize impacts to existing views from public property... Physical public access shall have priority over maintenance of views...*" Through the SMP, the City Council is giving away the use of private property to the general public.

The SMP makes a homeowner's water views subservient to public access and water views as follows: "**Public physical access shall have priority over maintenance of views from adjacent properties...**" In the arena of remodeling or building, the City will "(c)onsider **public access, both visual and physical, as a condition of**

approval for any new... shoreline development..." And elsewhere, "The public's physical shoreline access is a priority over maintenance of adjacent shoreline properties' shoreline views."

Mandated "Public Access" Across Private Land Can Involve Many Things:

The SMP mandates homeowner "dedication of land, easement and/or a physical improvement" that provides a view and/or a "physical approach" to the water. Specifically, the "public access" required by the City is enumerated to include and/or all of the following:

- (1) Paths at least 10 feet wide across the "private" property to the beach (that path could be "a walkway, trail, bikeway or corridor"), which may not necessarily be dirt, but may be required to be constructed of "pervious material";
- (2) Public parking adjacent to the private property;
- (3) Picnic tables and benches – especially on property adjacent to road ends;
- (4) Public restrooms and trash cans for "public uses...that attract a substantial number of people";
- (5) "Viewpoint, park, deck, observation tower, pier, boat launching ramp, dock or pier area or other..." area providing access and/or a view (note: new docks, piers and floats are prohibited for *private* use, but may be provided on private land for *public* use); and/or
- (6) Special access and accommodations for person with disabilities.

Are homeowners supposed to fund and manage (1) through (6)? If so, what an incredible obligation that would be.

No City Protections Against the Public Straying Onto or Using Other "Private" Areas for Unpleasant Functions.

There is no consideration given in the SMP to what typically occurs around public access areas – people straying off the path and using adjacent areas for any and all things. Especially if public restrooms are not provided at the beach, there is a distinct potential for people going behind trees and bushes on the private property to relieve themselves. And it is common knowledge that trash is not always properly disposed of, especially if no trash cans are provided. These aspects of "public access" issues are inadequately dealt with in the City's regulations; rather, it appears that they become the problem of the private property homeowner to deal with.

Under the Guise of Ecological Protection, the SMP Actually Increases the Probability of Ecological Damage Because It Increases Public Use.

When has increased public access actually served to protect the ecology from damage? Experience tells us that more people walking over native vegetation and using beaches actually disturbs/damages the environment. Why is a supposed environmental protection statute increasing the potential for harm? The SMP puts the burden of shoreline mitigation, stabilization and restoration on the private landowner who wants to change his house or build anew, with no responsibility accorded to the municipal government that is increasing the danger to the environment.

Improving Public Views by Degrading/Eliminating Private Views.

The SMP has many provisions that require a homeowner to provide landscaping that will screen any view of his house and other structures, as well as his parking area, from public view. In particular, the SMP's "revegetation" standard requires the planting and maintenance of tall trees every 20 feet in front of the homeowner's water views. It also allows only modest trimming (after City pre-approval) of native vegetation to preserve his views. This screening involves hiding the view of the house – from view locations, from the beach and from the sea; obviously, though, if they can't see you from the beach or the water, you can't see them or the beach or the water...

HOW THE CITY REDUCES RESIDENTIAL USE ON THE SHORELINE

By Making Shoreline Property Less Appealing to Prospective Buyers and Current Landowners.

The following policies and regulations will most likely make living on the Bainbridge shoreline unappealing:

- (1) Giving the general public access and use of a private homeowner's land as described above involves a loss of personal privacy, peace and quiet, as well as views of undisturbed nature;

- (2) Reducing/minimizing/eliminating views of the beach and the water for the homeowner, whether by vegetation screening (including trees every 20 feet in front of the ocean view and “vegetation canopies” over 65% of the front shoreline zone), or restrictions that force new development to be located farther away from the water;
- (3) By prohibiting any landfill that would raise the elevation of a house and, thus, give it a better ocean view;
- (4) By reducing the feeling of light and air, whether by requiring native vegetation “vegetation canopies” covering most of the property or by other methods to screen homeowner activities such as parking;
- (5) By prohibiting any new private docks, piers or floats, strictly regulating the repair of existing ones, and prohibiting any new boathouses in Zone 1 closest to the water (thereby increasing the difficulty of launching a boat into the water);
- (6) By making Planning Department approval of any modification or expansion of an existing house or new construction extremely difficult and expensive to obtain;
- (7) By reducing the possible size of a house to what may today be considered small, through increased setbacks, height limitations and a maximum total square footage “building area.”
- (8) By reducing the potential usable area of a lot for functional activities/structures by “open space” requirements;
- (9) By restricting the type of parking permitted on a property and its precise location;
- (10) By requiring of the homeowner a written commitment to native landscaping “in perpetuity”, with this commitment required to be made a part of *his property title and secured for at least 5 years by a surety bond, monitored by periodic City inspections and detailed in annual reports that must be filed by the homeowner and his “qualified professional” to the City;*
- (11) By making routine gardening with native vegetation subject to City pre-approval of all plantings and their precise location, as well as virtually any pruning, trimming, removal and replacement, as well as *weeding*; and
- (12) By requiring City pre-approval for non-development ‘things’ that a homeowner typically puts on his property (see below);
- (13) By requiring expensive restoration of the land in some cases from damage that may have occurred years ago, or over a period of years, long before the owner acquired the property – not just mitigation of the impact of the homeowner’s proposed new construction.

The City Imposes Potential Forfeiture of Right to Use or to Rebuild and Increases the Risk of Home Loss by Nature Disaster.

The SMP contains a number of ill-defined, vague provisions that would appear to give the City the power to extinguish a homeowner’s rights in the following ways:

- (1) By regulations that appear to require forfeiture of residential use if a house is not rebuilt within 1 year after a casualty, unless the homeowner can prove to the City’s satisfaction that the delay was not his fault;
- (2) By regulations that prohibit rebuilding a house if the cause of a casualty was an act of the homeowner;
- (3) By regulations that may cause the forfeiture of residential use if a house is not used for a continuous 12-month period (i.e., a vacation or weekend home);
- (4) By regulations that appear to ban the reconstruction of any vacation or weekend home after a casualty; and/or
- (5) By increasing the risk of home loss by nature’s fury by severely limiting or outright banning common protective measures such as riprap, bulkheads, any protective “armoring” of a home being rebuilt after a casualty, erosion and flood control measures.

WHEN THE SMP APPLIES

The SMP Covers “Uses and Activities” Far Beyond Construction; Its Meanings are Vague & Ambiguous.

The coverage of the SMP is broad and ambiguous. The vagueness of its language gives the City the ability to construe its applicability to many situations that homeowners would never expect would be subject to City restriction. This is where future interpretations by the Planning Department of vague language come into play. In particular, the SMP says:

(1) ***"All uses, even those not meeting the definition of development, are subject to the provisions and development regulations of this SMP, even though a permit may not be required."*** While this provides little guidance as to when a homeowner must get pre-approval from the City, there are a few other areas where SMP coverage is a great deal more obvious:

- (2) Whenever a homeowner wants to make any change to his house, no matter how small;
- (3) Whenever a property owner wants to build a new house;
- (4) Whenever a property owner wants to repair or rebuild his house following a casualty such as a fire, or flood;
- (5) Whenever a landowner wants to grade any portion of his land, add landfill, or clear vegetation;
- (6) Whenever a property owner wants to re-landscape his yard;
- (7) Whenever a homeowner wants to trim, prune, or remove native vegetation in his yard;
- (8) Whenever a homeowner wants to pull weeds (*no, I am not making this up!* : "noxious and invasive weeds can only be removed after reference to Kitsap County Noxious and Invasive Weeds legislation and City pre-approval);
- (9) Whenever the homeowner engages in putting things on the land such as footpaths (there is a maximum width of 4 feet), security lighting for parking (its position is regulated so as to avoid a glare for the public view), steps, and/or stairs (in addition to a maximum 4 foot width, there are maximum total size/length limitations);
- (10) Whenever the homeowner wants to install an "accessory structure" such as a gardening shed, a storage shed or a boat house; and/or
- (11) Whenever there is ***any "change" in the "uses or activities"*** of a property (there is no explanation of what this means, leaving the City with the power to determine this as it will).

POTENTIAL IMPACT ON BUYERS & LENDERS

1. Disclosure Obligations of Sellers & Realtors: Fraught with Danger.

Clearly, the extensive SMP mandates and restrictions are material issues that need to be disclosed to any prospective buyer. But how do you frame the disclosure to protect the seller and realtors without killing a deal? Too little disclosure is risky, but a very detailed summary of the SMP restrictions is daunting and most likely will put off the buyer. At a minimum the Disclosure Statement probably needs to inform that the shoreline property is regulated by the City's SMP and that construction and/or landscaping and/or any work involving the soil or vegetation is restricted by the City, "whether or not any permit is required."

2. What Most Buyers Want in a Property are Things the SMP Restricts/Prevents the Buyer from Having.

What most waterfront buyers usually want are as follows: proximity to the water for expansive views, exclusive use of the beach, the ability to have their own private dock, pier or float so they can have their boat right outside their house, to be able to remodel or build with a minimum of governmental interference, and, lastly, to have on-going use of their land with minimal governmental interference. These are things that are all prohibited or strictly regulated by the proposed Bainbridge SMP.

Enthusiastic gardeners want complete freedom to plant what they want and where, as well as how they maintain and may frequently change out plantings. They may well be dismayed by City regulations controlling precisely these 'freedoms'.

Enthusiastic boaters who want to be able to have a new dock, pier or float and easy access to the water with a new boathouse close to the beach will be disappointed to discover that the SMP prohibits all of these things.

Homeowners who love proximity to the water but also respect it and want to protect against nature's fury will be rudely surprised by the SMP's severe restrictions/outright ban on common protective measures and devices. For example, the SMP views erosion of the homeowner's land as something that is natural and "beneficial" for the environment - a homeowner must receive City approval before undertaking any measures to "interfere" with it. (By contrast, beach erosion is something that is deemed harmful to the environment and must be prevented.)

3. Probable Reaction of Potential Buyers to the Myriad of SMP Restrictions: Just Walk Away.

If there are any vague, threatening and/or expensive restrictions on the use of a property in which they may be interested, most buyers will simply walk away. At a minimum these restrictions make Bainbridge Island shoreline properties far less competitive with other shoreline locations around the Puget Sound.

4. Probable Reaction of Lenders: No Home Purchase Loans.

Just as buyers don't like restrictions on use, lenders don't either. Any restrictions on the use of a property are usually reflected on a title report. These will catch the eye of not only the buyer, but also the lender, since they impact its ability to resell the loan in the secondary market or the property upon foreclosure. Since roughly 90% of all loans are resold to Freddie Mac, Fannie Mae or the FHA, there are very few loans available from lenders that do not conform to the credit criteria of the secondary market.

5. Few Non-Conforming Loans Available for Properties with Restrictions.

Loans that do not conform to the credit criteria of the secondary market institutions are limited by state law in number and amount. Interest rates and down payment amounts are generally higher. With a tight supply of non-conforming loans, the number of buyers who will qualify, or even want to buy under these conditions, is significantly reduced.

6. The Only Real Financing for The Purchase of These Properties: All Cash or Seller Financing.

With virtually no institutional loans available to buyers for these restricted shoreline properties, sales may well be restricted to those few buyers who can bring all cash – no financing – to the table. Or, sales will be made by that limited number of sellers who can afford to offer seller financing. Obviously, there are few people who can do either of these things. This will cause a serious decline in the prices a waterfront seller can command.

7. Limited-to-No Financing Means Limited-to-No Sales.

Since there are only a few private parties to a real estate transaction who can afford to finance it completely, the availability of comparable properties with conventional financing in other Puget Sound locations will result in many fewer transactions at much reduced prices.

8. Virtually No Construction Loans or Home Equity Loans for Shoreline Properties.

Any type of loan secured by real estate is available only if there is a clear market for the re-sale of the property in the event of borrower default. If the sale of a property is problematic because of the lack of any real market or the uncertainty of value, there will be no loan based on the real estate. So, any construction that takes place on shoreline properties if the SMP passes, will have to be financed by the property owner with his own cash or made by lenders relying on, and secured by, assets other than the shoreline property.

9. No Sane Lender Would Finance any Transaction Where the Residential Use of a Property Could Be Forfeited if the Property is Unoccupied for 12 Months.

The SMP provides for forfeiture of the right to use an existing house if it is unoccupied for 12 months (undoubtedly aimed at seldom-used vacation and weekend houses). There is virtually no lender that would lend against this type of property because it could never be certain that it would be able to foreclose, market and re-sell the house within 12 months of the day the occupant leaves the house.

10. Virtually No Lender Would Extend a Construction Loan to Rebuild after a Casualty Where the Right to Use the Property for Residential Purposes Could Be Lost if the Re-construction is Not Completed Within 12 Months.

The SMP will allow repair and/or reconstruction after a casualty (so long as it was not the homeowner's fault) *only* if the construction is started within 2 years of the casualty and completed within only 1 year of the commencement of construction. If this is not accomplished, the City extinguishes the homeowner's right to finish and use the property for residential purposes unless the homeowner can prove to the satisfaction of the City that the delay was not his fault. As many homeowners know, it can be extremely difficult to get a contractor to finish a project within a year; the

City's mandate flies in the face of construction reality. Any lender understands this fact and will refuse to accept collateral with a use that could be forfeited mid-construction with no ability to re-sell the property for residential purposes if it forecloses.

11. Prospective Buyers Will Not Want to Count on the Ultimate Outcome of Litigation to these Problems.

If the City Council passes the SMP as proposed, only protracted litigation would potentially restore the rights of shoreline homeowners to use their property as they once did. In the meantime, uncertainty about the homeowner's ability (even as part of a group) to fund this expensive and time-consuming litigation and/or its chance of success would further reduce the marketability and/or fair market value of any shoreline homes.

IMPACT ON REALTOR INCOME

1. Larger Commissions Have Historically Been Derived from Waterfront Transactions.

There can be no doubt that, historically, waterfront homes have comprised a significant portion of realtors' commissions. With their beautiful expansive views, Bainbridge waterfront properties have generally commanded higher prices than properties farther inland. But this is a historical pattern that would probably change radically if the proposed SMP passes the City Council.

2. Significantly Fewer Shoreline Transactions With Lower Sales Prices Means Less Realtor Income.

Given the amount of greater work and higher risk of litigation from surprised buyers (who feel the disclosures they received about the SMP were inadequate), as well as lower commission income, realtors may look back fondly on the olden days before the SMP. The "big money" clients who would otherwise come looking for Bainbridge waterfront properties usually want full control of their property, with a minimum of governmental interference. No longer finding this on Bainbridge, the big money can, and will, go elsewhere. And so will realtor commissions.

The Bainbridge realtor community has a vested interest in the future of the shoreline. Some Bainbridge realtors undoubtedly even live on the shoreline and will see the fair market value of their homes decline, as well as their commission income and their ability to use their own land without City interference. What may have seemed like a great investment years ago could become an asset that cannot be borrowed against and cannot be sold without a great loss.

3. Impact of SMP on Realtors' Wallets & Lives: Work Harder for Less Money.

Some people will undoubtedly still be drawn to Bainbridge because of its easy commute and cheaper prices than the Greater Seattle area. However, once prospective buyers are here, the realtor will have a much more difficult time. It is clearly a difficult balancing act to entice a buyer to buy, while at the same time avoiding liability for non-disclosure, should a rudely surprised buyer sue. It will be a work of art to figure out a full disclosure, all the while maintaining the prospects' interest in the shoreline.

For many shoreline buyers there is no substitute for being immediately adjacent to the water; it would seem to be relatively easy to dampen enthusiasm with a detailed and accurate accounting of the SMP's impact. And, once word-of-mouth spreads the bad news about the new restrictions on the Bainbridge waterfront, fewer prospective buyers will come. With fewer potential buyers, market prices will of course decrease. The virtual lack of conventional financing and the scarcity and higher expense of non-conforming loans will winnow down the number of actual buyers even further. The likely impact of the SMP means more and harder times for realtors.

4. Realtors Should Communicate Their Views to the City Council Before It Is Too Late.

All realtors, regardless of their respective firms, have the same interest in avoiding the impact of the proposed SMP. I urge you to share thoughts among yourselves and communicate your views to the City Council before April 10, after which it will be too late.

Thank you for your time and attention,

Linda J. Young
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P.S. While I have never practiced in the state of Washington, I have a J.D. from the University of Southern California (1975) and was a former active member of the Pennsylvania, California and Texas bars. Now retired, I spent the bulk of my career in senior roles, representing banks in lending transactions and regulatory matters.