

**Theresa Rice**

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**From:** Gary Tripp [garytripp@ix.netcom.com]  
**Sent:** Sunday, April 07, 2013 12:34 PM  
**To:** PCD  
**Subject:** Lack of State SMA Support for SMP and SMP's Regulation by Personal Tastes Rather than Science  
**Attachments:** 2013 MISCONCEPTIONS AND PERSONAL TASTE RULE BAINBRIDGE SMP by Young.docx; 2013 PERSONAL TASTE DRIVES THE SMP by Young.docx

**From:** Linda Young [lawfulpatterns@msn.com](mailto:lawfulpatterns@msn.com)

Given the voluminous nature of the proposed SMP (more than 350 pages), as well as the State SMA and the DOE Guidelines (together, approximately 150 pages), it is possible that all City Council members have not had the opportunity to do a detailed, line-by-line comparison of these documents. Accordingly, I have done such an analysis in an effort to understand the proposed SMP.

What struck me in doing this detailed analysis was how much personal taste has enveloped the SMP, particularly when compared to the SMA and DOE Guidelines, which focus almost exclusively on scientific justification.

I enclose for your review:

1. A very readable short analysis entitled "Personal Taste Drives the SMP," and
2. A much longer, frankly boring, document with legal citations for the person who wants to wade through the details and the 'nitty gritty', entitled "Misconceptions and Personal Taste Rule Bainbridge SMP, Not Law & Science."

Thank you for considering these important new findings.

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**PERSONAL TASTE DRIVES THE SMP,  
NOT THE STATE SMA OR SCIENCE**

**Many Critical SMP Provisions are Neither Mandated Nor Sanctioned by the Washington SMA.**

There is no explicit State SMA mandate or support for the following critical provisions of the SMP:

1. The phase-out of the right of residential use associated with houses that do not, cannot due to lot size, conform to the SMP's set back, buffer zone, and lot coverage requirements;
2. The phase-out of the right of residential use by (a) lack of occupancy for 12 months, (b) refusal of right to repair or rebuild following a casualty that was the owner's fault; and/or (c) failure to meet the very tight and unrealistic time schedule established by the SMP after a casualty;
3. The requirement that, in exchange for a single-family building permit, a private property owner must, at the discretion of the Planning Department, dedicate land or an easement for public access, as well as possible physical structures;
4. The prohibition of measures, and/or the excessive regulation that makes it virtually impossible, to protect existing structures from the forces of nature such as erosion and flood, wind and waves, which SMP action may be designed to achieve the City's goal of phasing-out residential use of the shoreline;
5. The City's use of utility easements and road rights-of-way on private land to establish public access to the shoreline;
6. The application of re-vegetation requirements based on property "activities," as distinguished from developmental "uses", a new category established by the SMP;
7. The mandate of "native" vegetation on a homeowner's lot when its use is not justified by science for ecological preservation; there may be proof that non-native vegetation would serve any environmental purpose just as well;
8. The blanket application of re-vegetation requirements to all residential properties, whether or not this re-vegetation serves any ecological preservation function;
9. The application of vegetation standards for purely aesthetic purposes – that is, to hide the view of private homes from the public which, presumably, would find the view offensive;
10. The establishment by the City of a priority for public water views from a mere utility or other easement or from a right-of-way (State law only protects public views from public land) ; the SMP makes the water view from that non-fee-simple location superior to a property owner's rights to develop and to his own private views ;

11. The establishment of blanket setbacks, lot coverage restrictions, and buffer zones in sizes that are potentially greater than required for ecological preservation, and which may, rather, serve the City's aesthetic purpose of shielding the view of private homes from the public navigating on the water, in the belief that this view would be distasteful to the public;

12. The lack of any constitutional weighing of the burden imposed by these SMP restrictions against the public benefit – real or assumed -derived from these measures;

13. The lack of any consideration as to whether the multiple zoning and SMP provisions effectively deprive the private property owner of "any viable use" of his property, as prohibited by the State SMA; and/or

14. The virtual lack of any accommodations to avoid the "unnecessary impact" of these restrictions on a private party's ability to develop and use his land as required by the State SMA.

Attached to this summary of issues is a detailed – and admittedly boring – comparison of precise SMP, SMA and DOE Guideline provisions with specific citations. Should you wish to delve into the 'nitty gritty', please do so. While lengthy, it does not cover constitutional "taking" issues in any depth due to time constraints; that is a topic that would necessitate far more pages than I suspect you have the personal time and interest to read at this juncture.

**With No State Law or Scientific Support for Many of the SMP's Excessive Regulations, the Logical Conclusion Can be Drawn that the SMP is Driven by Personal Tastes and Preferences.**

The desire to phase out residential use in the shoreline would appear to be driven by a belief that this land should, instead, be used for public recreational purposes, which Bainbridge views as a "preferred use." Excessive setbacks and buffer zones that may go far beyond anything required for ecological purposes reinforces the desire to reduce the physical presence of private residence in the shoreline area. Other things that evidence that the SMP is driven by the personal tastes of its drafters: (1) lot coverage/maximum building area sizes that are fixed, rather than proportional to the size of the lot as State law provides; and (2) the extremely modest increase in size that is allowed in a remodel or rebuild following a casualty – both of which are tied to the "footprint" of the older structure - without regard to how a particular older size might not meet the needs of a contemporary family, and without consideration of the actual ecological impact that a larger size might, or might no, have on the environment. They clearly prefer small houses that either cannot be seen, or are seen only in a much reduced size, by the public.

"Native" vegetation in profuse amounts – amounts in excess of what may serve any ecological purpose – leads to the conclusion that the SMP drafters really like the view of native vegetation, that they prefer it to the sight of 'non-native' vegetation. Only "native vegetation" is mandated by the SMP, rather than other 'non-native' vegetation that may serve an ecological function just as well, but which may be more pleasing to the individual property owners. From this, the conclusion can easily be drawn that the SMP drafters have drawn regulations based on their personal taste for native vegetation, and their preference for it over other types.

And going where no statute has gone before – by forcing homeowners to screen their houses because the view would supposedly be distasteful to the public – without any attempted scientific justification or ecological basis – this just as strongly reinforces the concept that the SMP drafters have codified their own personal aesthetics in the SMP.

**The Lack of State Law Mandate and/or Support for the SMP, as Written, is an Open Invitation to Litigation.**

A comparison of the proposed SMP, the State SMA and the DOE Guidelines forces the conclusion that the City is presenting a very large number of new and bold challenges to what have long been considered private property rights. These are precisely the rights that are usually resolved in the higher courts rather than at the trial court level, and only after litigation that is broad in scope and lengthy in time.

A summary of just some of the bigger issues presented by the SMP include the following:

1. Does a local government, without express State law mandate or sanction, have the power to phase-out “residential use” – as distinguished from residential structures – for a significant number of properties in an area zoned for residential use without scientific proof of any ecological preservation need for such a radical action?
2. Does a local government, without express State law mandate or sanction, have the power to impose restrictions on a private property owner that go beyond what can be justified by public health, safety or ecological preservation?
3. Does a local government, without express State law mandate or sanction, have the power to impose restrictions on a private property owner that are based solely on the City Council’s aesthetic tastes?
4. And, of course, there is the biggest of all legal issues: Does the burden imposed by the myriad of SMP restrictions on traditional rights of property ownership, not supported by State mandate or law, amount to a City “taking” for which “just compensation” must be paid?

**Litigation Against COBI, Without State Assistance, is a Virtual “Sure Thing.”**

The frustration, anger and resolve most recently displayed by those Bainbridge property owners affected by the SMP would appear to ensure that there will be litigation against COBI. And, without regard to the emotional intensity around this issue, the very real impact on the SMP on the fair market value of shoreline properties would be so devastating that it is in the financial interest of every waterfront private property owner to fund measures to thwart this legislation.

The lack of any State SMA or DOE Guidelines support for the above-listed actions will also virtually ensure that the State does not render any financial or other assistance to the City. Because the SMP measures go so far beyond what is mandated, authorized or even suggested by the State SMA, there is no real potential that the State would be sued for COBI’s SMP requirements.

Given the heavy load of constitutional issues relating to the conflict between private property rights public rights, as well as to the extent of a local government's "police powers", the scope of this litigation would be far-ranging and complex. Inasmuch as many of these issues have major precedential value to the citizens of other communities in our State, it is possible that civil rights groups may be willing to render assistance to the Bainbridge homeowners. And, since the issues raised by the COBI SMP would be most appropriately resolved by a higher court, the City would be funding a very high profile and lengthy litigation process.

**How Would the City Fund this Litigation – Especially with Decreased Property Tax Revenues and Other Development Projects Currently Underway?**

From a practical standpoint, the City is not in a good financial position to fund this litigation. Property taxes have, of course, declined steeply during the recent recession. While the real estate market seems to be just starting to recover, the SMP would have a profound negative impact on shoreline property values (a subject covered in depth in my other recent analysis). The State implicitly acknowledges that negative impact that the SMA – which is not as severe and far-reaching as the SMP – has on fair market value. RCW 90-58-280 proves: "The restrictions imposed by this chapter shall be considered by the county assessor in establishing the fair market value of the property." Restrictions on private property rights *rarely, if ever*, being considered to be economically beneficial, the obvious inference from this paragraph is that the potential impact of these land use restrictions will decrease the fair market value of property.

While not all shoreline property owners are wealthy, it does appear that there are a significant number of property owners with adequate financial resources to fund the litigation. Also, as mentioned above, the possibility of additional funding from civil rights organizations and citizens groups from other communities that would be affected by a ruling, is not to be discounted.

**City Council: Stop! This is Your Last Chance to Avoid a Very Costly Mistake.**

The scheduled April 10 final vote on the SMP is a critical moment for the City of Bainbridge. This is its last chance to avoid financial disaster. Why cling to land use measures that go so far beyond anything mandated or sanctioned by the State or science?

This is a very important decision for the City Council. Please make it with every consideration of the financial impact on all of the local constituencies affected – the realtors, the local construction industry, and local retailers – all of which were described in previous analyses. And make it with every consideration of the impact that the litigation spawned by the SMP will have on the City's financial resources and its ability to focus on, and fund, other prized community development projects.

By

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**MISCONCEPTIONS AND PERSONAL TASTE RULE BAINBRIDGE SMP,  
NOT LAW & SCIENCE**

**Many SMP Goals and Policies Are Not Supported by, or Are At Odds with, the Goals and Policies of the State SMA**

Some City Council members appear to harbor various misconceptions about the SMP, in particular, that:

1. The WA State SMA mandates everything that is contained in the Bainbridge SMP, which is, in fact, very far from true;
2. The WA State SMA authorizes many critical SMP provisions; in fact, the State specifically cautions careful consideration in these areas so as to avoid unconstitutional infringements on the rights of private property owners; and
3. The SMP is based purely on science; in fact, many provisions of the SMP are based instead on personal aesthetic tastes.

**THE BIGGEST PROBLEM WITH THE SMP:  
IT GOES TOO FAR INTO UNCHARTERED CONSTITUTIONAL TERRITORY  
WITHOUT STATE SUPPORT.**

The biggest problem with the new COBI SMP is that it steps too far out into constitutional “takings” territory with scant to no support from the State shoreline management laws. This is a problem because it raises the question of how far the local government’s “police powers” stretch. While protecting the ecology is now essentially added to the list of police powers by the State SMA, where actions by COBI go beyond what can be justified by science, these actions are in litigation country.

Viewed simplistically, there is a hierarchy of power bases. The local government has less power to regulate private actions than the State has. The State government has less power to regulate private actions than the federal government has. So, when the new SMP isn’t able to use State authority to back its challenges to the federal rights of private citizens, it is in a whole bunch of trouble. Since the whole topic of environmental protection versus private property rights is a relatively new one, it generates a lot more litigation than older principles. If one of the SMP’s goals is to provide a platform on which to test “police powers” versus constitutional rights, it has succeeded in spades.

Time constraints have precluded both a “takings” constitutional analysis and the presentation of many other SMP provisions that raise questions about a local government’s power – on its own – to infringe upon the private property owner’s traditional constitutional rights. Suffice it to say, the issues set forth below barely scratch the surface of the SMP’s major challenges to private property rights.

**SMP MEASURES TO “PHASE OUT” SHORELINE RESIDENTIAL USES  
NOT MANDATED OR AUTHORIZED BY STATE LAW**

**The SMP Goal of Phasing Out “Non-conforming”/“Existing” Residential Structures and “Non-Conforming [Residential] Uses” of Shoreline Private Property Is Not Mandated, Authorized or Sanctioned by the State SMA or the DOE Guidelines.**

The Bainbridge SMP specifically expresses the intention to “phase out” all residential structures built before Nov. 1996, regardless of house size or location on the lot, and to phase out not just those structures, but also the right of residential use by private property owners. Section 4.32.1.2 of the SMP provides that: “Over time, uses...that do not conform to the standards of this program should be phased out as uses cease...”

The original SMP designated both structures built before Nov. 1996 as “non-conforming”, and the residential use of properties that do not conform to the new SMP regulations as “non-conforming.” SMP Section 4.2.1.1 defines “nonconforming uses”, for purposes of the SMP as: “shoreline uses...that were lawfully established prior to the effective date of the initial adoption of the Master Program (November 26, 1996)...but which do not conform to present regulations or standards of the Master Program.” In addition, Section 4.2.1.4.1 refers to “nonconforming uses” as those: “...that...existed prior to... November 26, 1996...but which do not meet the specific standards of this Program, may be continued subject to the provisions of this section...”

While the City Council later agreed to delete the term “non-conforming development” and substitute the term “existing development” for it, the SMP designation of the “residential use” as “non-conforming” still remains and, by application of the SMP “Nonconforming Use” Section 4.2 as discussed below, can result in many serious repercussions for the shoreline landowner.

The State SMA evidences a serious concern for the constitutional rights of property owners to use their land as they see fit, so long as the use is “reasonable and appropriate” and is “consistent with ‘protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life.’” (DOE Guidelines at p. 27 – WAC 173-26-176) Nowhere does the State statute or do the DOE Guidelines mandate, or even address the possibility of ‘phasing out’ residential uses because of non-compliance with SMA or local government master program requirements.

The Department of Ecology’s SMA Guidelines make at least ten different references to the rights of private property owners and government’s responsibility to act in ways that are ‘consistent with constitutional and other legal limitations that protect private property.’<sup>1</sup> The fact that the State recognizes these individual property rights as potentially trumping the government’s ecological goals is poignantly illustrated by the following admission that : **“Some master program policies may not be fully attainable by regulatory means due to the constitutional and other legal limitations on the regulation of private property.”** (WAC 173-26-191(a)).

The DOE Guidelines state: “Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.” Immediately following this admonition, the DOE refers local governments to the following analysis: “State of Washington, Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to **Avoid Unconstitutional Takings of Private Property.**” (WAC 173-26-186 at p. 32)

**The Shoreline Residential Use That Can Never Become “Conforming” Because the Lot Size is Too Small: Potential Elimination of Only Permitted Use.**

It is possible that a “nonconforming” residential use in the shoreline can never become “conforming” because even a new house could not conform to the SMP setbacks and buffer zone requirements due to a lot size that is too small.

If the homeowner in this situation loses his “existing structure” (the new term for ‘nonconforming’) by casualty, he would be prohibited from building a new house because it, also, could not conform to the SMP requirements.

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<sup>1</sup> WAC pp. 28, 30, 32, 33, 35, 38, 40, 41, 47, 56, 60, 105

Or, as described below, if a homeowner in this situation has his right to use his existing house forfeited by the City for failure to use it for 12 months (see below) he would completely lose all permissible right to use his land. And, even if he could sell the property, which would be difficult with an existing structure that does not conform to the SMP, the right of residential use could not be revived by that transfer. Section 4.2.1.5.4 provides: "Change of ownership...of a...use shall not affect its... status..."

**SMP Forfeitures of Residential Use Rights in Certain Circumstances Far Exceed Anything Mandated, Approved or Even Suggested by the State SMA.**

One must admit – in areas zoned "Single-Family Residential" - it would seem difficult to extinguish the rights of a significant number of homeowners to use their properties for single-family residential purposes, assuming that their houses conform with all laws other than the SMP (in an area zoned exclusively for single-family residences). But that is precisely what Bainbridge is attempting to do, once again breaking completely new grounds – or, some would say, well- established laws.

Forfeitures of the right to use is the main way in which the SMP's goals and policies to "phase out" residential structures on the shoreline and to cause residential uses to "cease" is accomplished. It is relatively clear that a very significant number of existing residential structures – perhaps the majority - were built prior to November 1996. Zoning law generally targets the minority use in an area for extinction by use of the "non-conforming" label. Here, in regulations that are not, ostensibly, zoning regulations, the City targets a majority use for extinction. This is a rather unique approach to land use, to say the least.

SMP Section 4.2.1.5.2 provides as follows: ***"If a nonconforming use is discontinued for twelve (12) consecutive months, any subsequent use shall be conforming..."***

The SMP also seizes upon casualty loss of an existing structure to extinguish a homeowner's residential use right. First, if the casualty is the fault of the homeowner, the SMP denies him a permit to rebuild. (Sections 4.2.1.4.2 and 4.2.1.6.1.3a) Regardless of whether there is any related insurance fraud, this punishment for negligence or intentional act is nowhere mandated or condoned by the State SMA or DOE Guidelines. One has to seriously wonder whether the deprivation of private constitutional property rights based on an act that may not be a violation of any civil or criminal laws, is a legitimate exercise of the City's police power. Further, even if such an act was criminal, other different penalties are prescribed by State law for arson; given the exclusive State jurisdiction for punishment of criminal acts, it would appear that the City would be violating State law by assessing additional penalties for the same act.

In a homeowner no-fault casualty situation, the extinction of a homeowner's right to residential use following a casualty can occur if he does not start or finish construction fast enough to satisfy the City's stringent, unrealistically tight time table. By the interplay of SMP Sections 4.2.1.6.3 and 4.2.1.4.2 ***a homeowner must not only apply for a construction permit within two years after a casualty (without consideration as to whether any insurance proceeds owing are, in fact, in his hands as well as additional financing or personal monies needed to complete the rebuilding) and complete the re-build within one year of the date it is begun.*** The requirement of getting your hands on insurance proceeds and/or arranging for additional construction financing/funding within two years may, or may not, be do-able; but the SMP has no provision for any relief from this "unnecessary hardship". The second requirement that rebuilding be completed from one year the day it was started flies in the face of construction reality: virtually *nothing* can be rebuilt in that period of time. As for the ostensible relief provision, that says the homeowner can have a one-year extension for building so long as he applies for

it before the end of the first year, the relief could prove to be completely illusory since the Planning Department can deny the extension if it 'determines' in an exercise of its sole discretion that the delay was the fault of the homeowner.

***There is absolutely no provision in the Washington SMA or the DOE Guidelines to support the City's draconian extinction of a homeowner's right to further use his property for residential purposes simply because the owner cannot rebuild in accordance with a time table that established by the City that cannot be justified by any compelling public interest.***

The City has no compelling public interest or logical reason for insisting upon this unrealistic time schedule for rebuilding after a casualty. The only perceivable purpose for these provisions is to facilitate the City's goal of phasing out shoreline property owners' right to ever use his land again.

**SMP 'Phasing Out' of "Non-Conforming"/"Existing Development" and Right to Residential Use Precludes All "Viable Uses" of a Shoreline Property, in Direct Violation of State Law.**

Let us say, for the sake of argument, that the City did succeed in extinguishing the right of shoreline property owners to use their land for residential purposes, the only permitted zoning use. This would constitute a specific violation of Washington State law. The DOE Guidelines specifically state: "[w]hen considered together and applied to any one piece of property, the master program, use policies and regulations and the local zoning or other use regulations should not conflict in a manner that all viable uses of the property are precluded." (WAC 173-26-211(3)(a) at p. 60)

Similarly, the DOE Guidelines provide that: "Each master program shall contain provisions to allow for the varying of the application of use regulations... ***to insure that strict implementation of a program will not create unnecessary hardship...***" (WAC 173-26-191(2) (a)(iii)(B) at p.40) Put another way, the DOE says that "***Local government shall fairly allocate the burden*** of addressing cumulative impacts" on the environment. (WAC 173-26-201 (3) (d) (iii) on p. 56)

**Prohibition of, or Stringent Limitations on, Measures to Protect Homes from Nature's Fury May be Part of the SMP's Policy of Phasing Out Residential Use On the Shoreline**

One of the most basic and most traditional property rights of a private landowner has been the right to protect his structures, especially his home, from nature's fury. While scientific analysis now recognizes that some protective structures can do ecological damage, the State SMA attempts to retain the property owner's right to protect, while moderating it to avoid environmental damage. Much bolder, the SMP in many instances simply abandons the homeowner's right to protect his home.

If an existing structure is destroyed by a casualty and the property owner is permitted to rebuild by the City, SMP Section 4.2.1.6.1.3b prohibits the homeowner from installing "shoreline armoring for the life of the new structure."

Even if necessary to protect a residence, Section 4.1.7.3.8 provides that "Flood control structures and stream channelization projects that damage...*aesthetic resources*... shall be prohibited." Of course, what constitutes "aesthetic resources" is entirely within the discretion of the Planning Department. This is definitely not sanctioned, let alone mandated, by State law.

Elsewhere in the SMP there are statements that soil erosion in areas near a residence are "beneficial" for natural processes, whereas soil erosion directly on the water's edge is negative and should be

prevented. The elevation of soil erosion near structures is nothing that is ever mandated or praised in State law.

DOE Guidelines at (p. 90) allow replacement walls or bulkheads to protect residences built before January 1, 1992. The SMP bans any new bulkheads, replacement or otherwise.

**SMP SEEKS TO ACHIEVE PUBLIC ACCESS TO THE SHORELINE  
BY ALTERNATE MEANS NOT MANDATED OR AUTHORIZED BY THE STATE SMA**

**The SMP Requirement of Land/Easement Dedication in Return for a Single Family Home Building Permit Not Authorized by State Law; the State Only Sanctions Acquisitions by Other Means.**

The City ostensibly authorizes the Planning Department to acquire private land and/or easements on private land by requiring dedication in exchange for any construction permit. Section 4.2.4 deals with general policies of public access that are not limited to multi-family residences or developments with more than four houses, and with a public access that is not restricted to public land. Rather, the SMP sets forth the strategies for acquiring public access over and to private land. Specifically, it states: *"The provisions of this section [Public Access – Visual and Physical] are intended to: ... 7. Consider public access, both visual and physical, as a condition of approval for any new private... shoreline development..."* In addition, the City intends to *"4. Expand the amount and diversity of public shoreline access opportunities and promote public access to the water via unopened road rights-of-way ("roads ends") and public utility corridors and easements..."* (p. 128)

The State specifically sets out how a municipality should acquire private land or easements and it does not condone these SMP tactics. SMA Section 90.58.240 recites that "Local governments may: (1) Acquire lands and easements within shorelines of the state by purchase, lease or gift..." or "(2) Accept grants, contributions, and appropriations from any agency, public or private, or individual..." (p. 21) It gives **no authority to require the dedication** of private land or an easement in exchange for a building permit for a single-family residence. The only instance in which the State SMA does sanction the requirement of a dedication private land or an easement is in the context of multi-family and planned developments of more than four single-family houses.

**SMP Use of Utility Easements and Road Right-of-Way for Public Access to the Shoreline: Not Mandated or Authorized by the State SMA and a Subversion of State Law on Easements by Prescription.**

As for the SMP's proposed acquisition of public access to the water by use of a "public utility easement," this device is also not authorized or sanctioned by State law. Indeed, inasmuch as utility easements are granted by homeowners for the limited purpose of maintaining and repairing utility equipment, it would appear illegal for the City to use them for public access to the beach. Also, in many cases the grant of the easement is not to the City, but rather to a private corporation such as a water company or a sewer company, so the City would lack the legal right to use that easement. Utility easements are usually limited to areas close to roads; they do not extend to the water, for the plain reason that the utilities service the house, not the beach. So, continuing from the restricted utility easement area to the water would constitute a public trespass, not a legal access. In addition, converting a utility easement into a physical access easement would constitute a subversion of the state law on prescriptive easements – it would by-pass the need to prove "open and notorious use" that was not consented to by the property owner over the period of years specified in the state statute. Use of any similar easement given for road

purposes, notwithstanding that the City decided to end the road at a particular spot, in order to gain access to the water would be contrary to state law for the same reasons.

SMP Section 4.2.4.6 goes on to enumerate in detail what it wants from a property owner in the way of land or an easement – either may, as the City desires, include not just land but also the construction of a “physical improvement such as a walkway, trail, bikeway, corridor, viewpoint, park, deck, observation tower, pier, boat launching ramp, dock or pier area, or other area serving as a means of viewing...” And the minimum width of an easement shall be 10 feet – although in this single context the Planning Department may consider the hardship to the homeowner if 10 feet is too great for his lot. (SMP 4.2.4.6.2)

DOE Guidelines on public access promotes “actions to be taken to develop public shoreline access to shorelines on public property” (WAC p. 81 - (4) (c))

The City appears to be breaking completely new ground when it provides that the Planning Department may, in exchange for any building permit – including one for a single-family residence - require that a property owner dedicate either a portion of his land or an easement on his land, as well as physical improvements. The only provision in State law that Nothing like this is even mentioned by the State SMA and DOE Guidelines, let alone mandated. One thing is certain: federal law has never condoned these things even in its zeal to preserve and protect the environment. It might be interesting, if it weren't so expensive to the Bainbridge taxpayers, to see how COBI would fare in court on this issue.

**Bainbridge SMP Very Vague as to Whose Beach the Public is Using When the City Gains Public Access over Private Land: State Law is Clear – the Public Must Use Public Beaches, Regardless of Access Point.**

The Bainbridge SMP is very vague throughout as to whose beach property the public may, and is intended to, access through use of the City's various subterfuges. However, inasmuch as under Washington State law private property generally extends from dry land out to a tidal mark in the ocean, it would appear logical and typical that public access using land or an easement the City has just acquired in exchange for a building permit (as discussed above), would lead the public directly down to the private property owner's beach. The SMP neglects to deal with restricting public use to public beaches.

By contrast, State law is very clear: the public must use public beaches, not private beaches, for public recreation. That is implicit in the whole State designation of private versus public property. State law, environmental or otherwise, does not condone public use of private property in situations such as this. Not even the environmental state, the Washington SMA, sanctions – let alone requires - public use of private beaches.

## WATER VIEWS

**Water Views: the SMP Makes Views from Public Rights-of-Way Superior to Those of Residential Homeowners and Prohibits Any Impairment or Damage to Those Views by Private Homeowners. By contrast, State Law Gives Landowners Priority, Subject Only to the Rights of Other Landowners.**

While the primary concern of the State environmental laws concern impacts to the ecological *functions* of the shoreline, they do provide that the State wants to preserve existing views for the public. That said, the State carefully designates residential use of shoreline property in as the “priority use,” based on constitutional principles and legal constraints. The State does not mandate or sanction making

private property views or construction locations subservient to either public views or public access, as the SMP does.

The Bainbridge SMP in Section 4.2.4.4 .3 provides that “...***Shoreline development uses*** [without distinguishing between multi-family or single-family] ***should not unreasonably impair or detract from the public’s... visual access to the water...***” Thus, no new construction could presumably be built in any public view of the water because it would “impair or detract” from that view.

The State limits the protection of public views to ‘minimizing the impacts to existing views from public property or substantial numbers of residences.’ (DOE WAC p. 82 subsection (4)(c)). Clearly, this means those of the water from public “land.” The term “public land” would seem to indicate fee simple title vested in the public, nothing less. But Bainbridge steps way out there ahead of the State and protects not just public views from public “land” but also from “shoreline roads ends, public utilities and rights-of-way...” (SMP 4.2.4.5.6)

And whereas ***the State DOE Guidelines seek to merely “minimize the*** impacts to existing views from public property”, ***the SMP boldly mandates that public views*** (aka “visual access”) from all its different protected areas ***“shall not be diminished” – as in, at all.*** (SMP 4.2.4.5.6) This mandate obviously attempts to make the public’s view, from easement territory as well as fee simple land, superior to the homeowner’s right to have views as he develops his land. In another clear announcement of its requirements, SMP Section 4.2.4.5.5 provides ***“Development, uses, and activities shall be designed and operated to avoid blocking, reducing or adversely interfering with the public’s existing... visual access to the water and shorelines...”*** Using this criteria, it would appear that virtually no new residential construction could ever occur in the shoreline because any new construction would “block, reduce or adversely interfere” with the public’s views. So, once again, Bainbridge is out front in breaking new ground without any mandate or authority from State law.

And, as with physical public access to the beach, the City ostensibly gives the Planning Department the authority to require that the private landowner ‘dedicate’ land or an easement that has a view in exchange for a building permit. City “policy” under SMP Section 4.2.4.4.7 is to ***“Consider public access, both visual and physical, as a condition of approval for any new private... shoreline development...”***

**The SMP Violates State Law By Elevating Public Views from Mere Easements and Rights-of-Way to a Superior Status, and by Depriving the Rights of Private Fee-Simple Land Owners to Build In That Location.**

There is clearly no ecological function which justifies maintaining the public’s view of the ocean from a less-than-fee-simple legal statue – that is, from an easement or a right-of-way – at the expense of the private landowner’s right to build a house in that public view, and to deprive the private landowner of the view that he might be able to have in that particular location.

That the SMP is driven by personal aesthetic tastes as much, or more, than ecological protection is evidenced by its requirement that private houses be screened from the public’s view, not for any stated ecological function, but one may conclude because the SMP drafters feel that the public would find the view of those houses aesthetically distasteful. (Cites, quotes)

The State SMA does not seek to protect the public from the sight of private houses; the only views the State affords protection are views of the ocean, and even in that case the protection is not absolute.

By contrast, State law is driven by the natural “functions, processes and systems” that make up the shoreline ecology; their regulation is based on the “latest science” and technology in order to protect and preserve the environment.

#### **OTHER AESTHETIC REGULATIONS WITHOUT STATE SUPPORT**

Some of the other purely aesthetic regulations in the SMP that have no scientific or State law basis are as found in Section 5.9.3.2 as follows:

1. The requirement that any new development be “visually compatible with...shoreline features [and] reasonable in size and purpose...”; and
2. The requirement that there be restricted development of side yards so as to “mitigate the effect of a ‘wall’ of structures along the shoreline and enhance public... view potential.”

Please note – this second requirement goes not to the preservation of *existing views*, which is all the State SMP protects, but to the ‘enhancement’ of ‘potential views.’ This is a very big stretch of the SMA.

#### **PUBLIC VIEWS OF HOUSES: DISFAVORED AND MAY BE HIDDEN BY SMP, NOT EVEN CONSIDERED BY STATE LAW**

##### **Personal Taste of SMP Drafters Requires That Homes Be Hidden From Public View; State Law Does Not Mandate or Condone This Type of Regulation Based Purely on Aesthetics.**

The SMP requires that a shoreline homeowner who comes under the purview of the Program must hide the view of his house with native vegetation or other screening devices acceptable to the City. There appears to be no scientific proof that any ecological function is served by this requirement. For instance, there is no evidence or assertion that fish would spawn better or tidelands teem with activity if only private homes were hidden from their view. Without such basis, the only logical inference is that the desire to conceal homes is driven by the personal aesthetics of the SMP drafters, who consider the sight of *any* houses in the waterfront area to be distasteful.

So, the SMP raises a potential issue of first impression: does a local government have the power, not justified by ecological necessity or other science, to regulate the views not of nature, but of houses? There is absolutely no support in State law or science for this SMP requirement, nor does the issue appear to even be considered. The only views the SMA and its guidelines seek to preserve are water views, and even these are protected only for other private landowners and for adjacent “public property” (inferring public ownership of the fee simple).

##### **SMP Setbacks and Buffer Zones That Are Larger Than Needed for Ecological Reasons Reflect Personal Tastes; Limitations on House Sizes More Than Necessary for Ecological Reasons Reflect More Personal Tastes; These SMP Policies Are Not Mandated, Authorized or Condoned by State Law.**

In response to questioning at a recent public hearing on the depth of City-designated “buffer zones,” the City’s consultant Herrera Associates said that the depth of buffer zone sizes were not determined by scientific evidence of ecological need - which justified only 30 feet - but rather, that their sizes were dictated by City staff “policy” -which set them at 50 feet. Since, according to the State SMA, Planning Department “policy” is supposed to be based on science but apparently is not being by COBI, the only logical inference is that personal tastes and preferences of individuals in the City’s hierarchy are being codified into the SMP. And one could also infer that this failure by the City to follow the State SMA and

Guidelines, constitutes a violation of State law. In similar fashion, one has to speculate that setbacks from the water that appear to many to be excessive from a practical standpoint – up to 150 feet – may not be based on science. Both of these SMP requirements may, in fact, be driven by personal tastes that prefer having homes pushed as far back as possible from the ocean so as to minimize the public's view of them from the ocean.

The SMP goal of using setbacks and buffer zones for aesthetic purposes, rather than ecological functions, is nowhere mandated or authorized by State law.

### **SMP MANDATED STYLE AND QUANTITY OF VEGETATION: ANOTHER MATTER OF PERSONAL TASTE**

#### **Right of Homeowner to Choose Location on Lot Even Subservient to Native Vegetation, Regardless of Ecological Need for Such.**

SMP section 4.1.2.5.1 states that "Development within the shoreline jurisdiction shall be located and designed to protect existing native vegetation from disturbance to the fullest extent possible..."

Nowhere in State law is the criteria of vegetation disturbance raised to the level where it is superior to private property rights.

#### **Why Is "Native" Vegetation Required by the SMP When Non-Native Vegetation Can Accomplish the Same Ecological Purpose and the State Doesn't Mandate "Native"?**

The SMP requires blanket planting of "native vegetation" on any shoreline property in exchange for permission to make any changes to a house or to build a new one. The SMP is fixated on as much native vegetation as possible, even when no vegetation may be required at all for ecological reasons and without any showing that non-native vegetation might achieve an ecological purpose just as well and may be more aesthetically pleasing to the homeowner.

In an interesting definition of "restoration," *the DOE Guidelines state that "Restoration does not imply a requirement for returning the shoreline area to aboriginal or pre-European settlement conditions."* [WAC p. 8, Definition (31)] Surely Asian bamboo could be just as effective in stabilizing the shoreline native plants; anyone who has ever tried to get rid of it can attest to its tenacious root system.

So if not for historical reasons, upon what scientific basis does the SMP rest its mandate for native vegetation instead of permitting the homeowner to select the vegetation in his own garden? A most logical conclusion can be drawn that the personal tastes of the City hierarchy are codified in the SMP.

#### **SMP Mandates Tall Trees, Vegetation Canopies and Native Vegetation in Areas Where They May Serve No Ecological Purpose;. Neither the State SMA nor the DOE Guidelines Mandate or Sanction This Technique.**

The SMP has a blanket requirement that tall trees be planted every 20 feet in the buffer zone as part of an overall "re-vegetation" of the shoreline. (Section 4.1.2,3.5b). This requirement is applied regardless of whether it is required by the science. And "revegetation" with native plants and trees is required for all 200 feet (or less) of the homeowner's shoreline property, along with "a 65% vegetation canopy coverage" (Section 4.1.2.5.3c)

The State DOE Guidelines, however, acknowledge that trees are not always needed for ecological functions in all shoreline locations: *"Woody vegetation normally classed as trees may not be a natural*

***component of plant communities in some environments... In these instances, the width of a vegetated area necessary to achieve the full suite of vegetation-related shoreline functions may not be related to vegetation height.*** [WAC 173-26-221 (5) (b) at p. 84]

So, if trees every 20 feet in the buffer zone are not required by State law for ecological reasons, and “vegetation height” – i.e., “vegetation canopies” - may not serve any ecological function, why does the Bainbridge SMP mandate them in all buffer zones? Absent any State mandate or scientific justification, once again, the conclusion can easily be drawn that the personal tastes of the City hierarchy favor trees and native vegetation over whatever a private homeowner may like.

By contrast, the DOE Guidelines state that **“The [sole] intent of vegetation conservation is to protect and restore the ecological functions and ecosystem-wide processes performed by vegetation along shorelines.”** (WAC 173-26-221 (5) (b) at p. 83] That vegetation need not be preserved if there is no scientifically-proved ecological need for it, is a concept that seems to have escaped the SMP’s attention.

Thus, if neither shoreline stabilization nor other ecological functions are not needed in certain areas of the extremely large – 200 foot- regulated shoreline area, private homeowners should be permitted to select what they plant there.

**MANY SMP REQUIREMENTS LACK SUPPORT FROM THE STATE SMA AND FROM DOE REGULATIONS:  
MANY SMP PROVISIONS ARE BASED ON PERSONAL TASTE RATHER THAN SCIENCE**

The proposed COBI SMP, in its current form, is a piece of legislation that cannot stand up to any rigorous judicial scrutiny. While the State SMA and DOE Guidelines carefully confine their mandates to measures that are scientifically proven to prevent “the net loss of ecological functions,” the COBI SMP contains many stringent regulations that, absent scientific justification, appear to be based solely on personal aesthetics. In addition, while State law consistently mandates that local governments guide their actions with concern for the constitutional rights of private property owners and the legal limitations imposed on governments by those constitutional rights, the COBI SMP appears to accord scant mention or consideration of those principles.

Given the lack of a State legal mandate of, or support for, many critical SMP provisions, it would seem highly unlikely that Washington State would render any assistance to the City of Bainbridge in a court battle to justify the SMP and pass constitutional muster. And, since these critical and controversial portions of the SMP are neither mandated by, nor authorized by, State law, it is unlikely that Washington State would be named as a defendant in any lawsuit seeking relief from, or economic damages as a result of, the COBI SMP. The City of Bainbridge would need to shoulder the burden alone, of defending novel and unique restrictions on the rights of private property owners.

By

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