

From: [Bainbridge Defense Fund](#)
To: [*Bainbridge Defense Fund](#)
Subject: SMP - Linda Young's Constitutional Analysis for DOE
Date: Friday, August 23, 2013 11:21:26 AM
Attachments: [Cover Ltr to AG & DOE.docx](#)
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[Single-Family Residential Analysis - SMP.docx](#)

Linda Young has spent over 1000 hours researching and writing her Single-Family Residential Analysis of constitutional issues. Few of you will read all **100 pages** but you can get a good flavor of the content by reading the **Cover Letter to the AG & DOE**

We all owe Linda Young a great vote of thanks for her tireless work, in-depth research and expert analysis. She has produced a road map for the countless legal battles that will result from Bainbridge's SMP and highlighted the constitutional violations which will be forced on all of us by the SMP. Yes, all of us! This SMP will occupy the time, attention and money of the staff, City Council and every citizen who will be paying taxes for this 10 or 20 years legal battle. Money and attention which would be better spent on roads and fixing the real environmental problems of the stormwater runoff.

Even if you can't read it all, please send Linda a thank you note. lawfulpatterns@msn.com

Gary Tripp
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From: Linda Young lawfulpatterns@msn.com

I finally, finally finished my 99-page 'beast' and sent it off to Barbara Nightingale Tuesday afternoon. Yesterday I was semi-brain dead so I neglected to send you a prompt copy – sorry about that. Today was spent trying to catch up on long-put-off household shopping and errands. Somehow the magic fairies didn't step in and take care of these things while I was busy playing lawyer...

Didn't we get the most wonderful letter out of Brian Hodges?!!! I am absolutely thrilled by his support for our cause. I just finished reading it this morning and have kept going back over it – we simply could not have asked for more... After sending this email to you, I intend to email Brian and see if he would give his permission for us to forward his letter to the AG's Office, following the same dissemination as my analysis.

I sent my piece to (1) AG Bob Ferguson; (2) Sonia Wolfman in the AG's Ecology Section who had sent a no-response response to my Official Protest of the SMP submission; (3) the Office of the AG Ombudsman – since Tim Ford has gone over to the legislature; (4) Peter Skowlund at the DOE – who is cc'd on a whole bunch of DOE internal letters that my husband found on the internet (of no particular value except to get a feeling for the power structure), and, of course, (5) Barbara Nightingale. Is there anyone else you think I should send this to? Are there any other lawyers who you know of, who are likely to get involved in this whole debacle – especially any who would be intending to sue? Since my paper is somewhat of a road map to the SMP, it could save people a whole lot of time finding for the strange places where the City has put the provisions that are *inconsistent with state law*... I also intend to

update my shorter concept list with the cites I didn't have when Gary first put it out for public use.

Anyhow, if you have *any* difficulty sleeping, I highly recommend this piece.

Linda

**PAPER ORIGINAL OF THIS LETTER WITH SIGNATURES
SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

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August 19, 2013

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Re: Comments on Bainbridge Island SMP, Which Was Submitted
for DOE Approval on June 7, 2013

Dear Sirs and Madams:

Attached hereto is an analysis of the Bainbridge Island SMP, which SMP was submitted to the DOE for approval on or about June 7, 2013. This analysis identifies and recites most, if not all, of the SMP violations of state and federal law. It is inexplicable why the City Council and the Planning Department are proceeding with this constitutionally-flawed SMP, given that most of the issues identified have already been fully litigated – all the way to the U.S. Supreme Court. I hereby request

that both the DOE and the State Attorney General's Office review the enclosed analysis and look at the SMP, so as to provide the constitutional review that is implicitly required by the State SMA's insistence that environmental protection be achieved "***while, at the same time, recognizing and protecting private property rights.***" RCW 90.58.020

It is fully understood that the Office of the Attorney General may not have the resources to read every SMP that is submitted to the DOE. But this is the one SMP you *must* read. It is too dangerous for everyone involved in the regulation of land use to ignore.

This is not a generic SMP; this is an *explosive SMP*. It contains examples of virtually every kind of Fifth Amendment taking scenario ruled on by the U.S. Supreme Court. It contains at least seven different "unconditional conditions" as defined by the *Nollan, Dolan* and *Koontz* cases. To get a construction permit, a homeowner must sign and record a title restriction that bans the property from having any bulkhead for 100 years. The SMP regulates not merely land "use," but also, as a separate category, any and all "activities" that take place on shoreline private property – and it requires City pre-approval of them. This will have a "chilling effect" on the exercise of personal liberties, including freedom of association. City pre-approval must be obtained for even the most minor, routine garden and home "maintenance." Punishment for something as simple as weeding without a permit can result in a late application fee three times higher than the normal fee, and/or a \$1,000 a day penalty for each day that the weeded area is not "restored" with all-native vegetation. Refusal to replant even a small area that previously had weeds can result in being prosecuted for a *misdemeanor*, plus 30 days in jail and a \$1,000 fine, *plus* the homeowner must replant with native vegetation "200% times" the original area to be replanted; it is unclear whether, in this situation one has to continue paying the \$1,000/day fine from the date of the order to restore until compliance. The SMP labels the use of all existing homes a "nonconforming use" and it actively promotes the phasing out of the use of existing homes. If a homeowner leaves his home unoccupied for 12 months, he loses the right to use that home – even if he was caring for a dying parent in another place. If a home is destroyed by other than "natural causes" – i.e., an accident – the owner cannot repair or rebuild it. *These provisions, and others, constitute punishment for personal conduct without the requirement of any – let alone significant - damage to anyone else, or even to the environment; further, these provisions provide no right to trial or other hearing prior to taking the owner's right to use his home.* New development is banned in a number of areas whose suitability for construction is attested to by their 80-90% existing development – a *Lucas* taking. The right of any single-family homeowner to have any overwater structure is taken for at least 75% of the Island's shoreline homes. Stairs to the beach are banned over an arbitrary square footage that will not enable people on our higher bluffs to reach their beaches. Bulkheads are banned in many areas, especially those where people need them the most – feeder bluffs. It is proposed that the public use *utility easements* over homeowner's land to get to the beach; these easements, by their limited scope, cannot be used for public access and they do not run all the way to the beach – the City is encouraging public trespass on private land. And there is so much more.

The SMA and DOE Guidelines carefully mandate environmental protection *consistent with the protection of private property rights*; the Guidelines mandate this in at least 17 places. Nevertheless, the City's drafters prepared this SMP with an all-too-visible lack of concern for compliance with the Constitution or its case law. Similarly, the City Council did not make any compromises in response to huge public outcry from shoreline homeowners. Despite rallies, marches and widespread hearings attendance and comments by shoreline homeowners, the Council refused to vote on a single measure proposed by the homeowners. Only once did the Council *seem* to respond – after much protest, it agreed to remove the term "nonconforming development" from the Nonconforming Use section; but, the teeth of the provision were still left – that 'existing structures

that do not conform' were to be, over time, phased out. And, after all public hearings were over, the City Council and/or staff inserted yet one more definition of something no one would ever think to look for - "existing development." In a back-door maneuver it defined all existing development nonconforming; This is the term that was substituted for "nonconforming development" in the Nonconforming Use section - so the SMP is back where it started. Despite a great deal of controversy, many hearings, many marches and much shoreline homeowner outcry, the City has never wavered in its commitment to this unconstitutional SMP.

The hundreds of Bainbridge shoreline residents believe in the environment and its protection, and are good stewards of it. The DOE has concluded that the main source of Puget Sound pollution from Bainbridge is from old commercial and industrial uses and *from the street run-off that the City simply refuses to address*. There is no constitutional basis for the degree of micromanagement that the City would impose on the shoreline and its residents and there is no constitutional justification for taking away our homes for conduct that is harmless.

The State Attorney General's Office simply *must* give this SMP a review. Without your assistance, there will be the need for far too many lawsuits. This SMP violates not just private property rights, but also the individual's personal rights to be free from prosecution where no significant damage occurred, or could have occurred from his conduct, the right to a trial or hearing in which to defend his conduct; and to be free of punishment that is disproportionate to the offense. People will not, and cannot, accept the stripping away of these personal due process rights, or the taking of their private property rights. Given the sheer volume of constitutional violations and that the shoreline homeowners have been pushed into a corner by the City's refusal to compromise or change anything, the residents will have absolutely no choice but to litigate. Without review now by the Attorney General's Office, it would take years of litigation to undo the constitutional wrongs done by the Bainbridge SMP. It would be an unfortunate waste of resources on the part of all parties that would be involved.

This analysis is probably a good road map of the path that this inevitable litigation will follow. We need your help to *make* the City listen to the Constitution and the case law to avert very expensive and *needless* lawsuits.

Please help us.

Very truly yours,

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Enc.:
"Legal Reasons Why the Bainbridge Island SMP
Should Not Be Approved by the State"

**LEGAL REASONS WHY THE BAINBRIDGE ISLAND SMP
SHOULD NOT BE APPROVED BY THE STATE**

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Where’s the Balance?

**LEGAL REASONS WHY THE BAINBRIDGE ISLAND SMP
SHOULD NOT BE APPROVED BY THE STATE**

I. THERE ARE TWO COMMON THREADS RUNNING THROUGHOUT THE SMP:

(1) DRACONIAN PUNISHMENT FOR PERSONAL CONDUCT WHERE THERE ISN'T ANY PROOF OF DAMAGE AND WHERE THERE IS NO RIGHT TO TRIAL; AND

(2) REQUIRED CITY PRE-APPROVAL FOR ANY ACTIVITY INVOLVING YOUR LAND OR YOUR HOUSE, EVEN ROUTINE GARDENING AND HOME MAINTENANCE.

THESE ARE SERIOUS VIOLATIONS OF PEOPLE'S CONSTITUTIONAL RIGHTS.

The SMP takes away a homeowner's right to use his existing home if he leaves it unoccupied for 12 consecutive months. SMP 4.2.1.5.2 The SMP refuses to let a homeowner repair or rebuild his house if it is damaged or destroyed by something other than "natural causes" – that is, by *accident*. SMP 1.3.5 If the owner of an existing home, seriously damaged in a natural disaster, cannot repair it within one year of construction start, the City takes his right to ever use the house again. SMP 4.2.1.4.2 If a homeowner changes out a few plants in his existing garden, the SMP requires that this area – or a greater one – be stripped of all non-indigenous vegetation and be re-planted with native vegetation. SMP 4.1.3.7.1(a) If you don't get a permit before you remove *any* vegetation – even so much as a *weed* - you are guilty of a "civil infraction" and subject to fines under the Municipal Code and to a "cumulative civil penalty in the amount of \$1,000 per day." SMP 7.2.3.1 and 7.2.7 and 7.2.9, emphasis added. If you are stubborn and refuse to "restore" the weeded area, you are guilty of a *misdemeanor* and can be sent to *jail for 30 days*, have to pay a \$1,000 fine, and have to replant "200% times [sic] the impacted area." SMP 7.2.9

Unfortunately, there are more instances like this in the Bainbridge SMP and they all have two common threads: (1) regulatory micromanagement at a level only justifiable if you are operating a nuclear power plant; and (2) punishment of personal conduct that is innocent – innocent in the sense that it doesn't even have to (and it probably doesn't) result in *any harm* – to anyone or anything. These are completely contrary to traditional principles of American justice. *We require the actual threat of serious damage for a government to have the power to regulate personal conduct. We require damage, significant damage, before we impose severe punishment. And we require a right to trial.*

These are all constitutional guarantees we are so accustomed to that we take them for granted. But these are the guarantees that are missing from the Bainbridge SMP. While there are many violations of private *property* rights in the SMP, what I consider even more egregious than these are the violations of individual's *personal* rights under the Constitution.

II. THIS SMP IS DIFFERENT – IT GOES WAY TOO FAR.

The Bainbridge SMP is *really big* – you probably noticed – 373 pages. And it has far-reaching negative implications – for the shoreline homeowners, the City, the State and even the off-water citizens of Bainbridge. Because it goes way too far...

'Goes way too far' – this doesn't seem like a great legal objection. But actually, in the case of the Bainbridge SMP, it is. The Supreme Courts – U.S. and Washington State – both have terminology for this concept that sound a lot more lawyerly, but they mean the same thing – ***these kind of regulations are “unduly burdensome,” “overly oppressive,” “violations of substantive due process,” “arbitrary and capricious,” “ultra vires,” a “Fifth Amendment taking,” “unconstitutional,” and “invalid.”***

The City Council refused to stop at any point and make changes to respond to the concerns and needs of shoreline homeowners. They truly felt that these regulations would save the earth. But their desire was to take all of this land and turn it into a public park – some City Council members actually said this. In their passion, these people – including City planners - refused to take into consideration that this land is not public land, where the government can ban any kind of activity on it at all. This land is private property and it is owned by people who live under, and whose rights are protected by, a constitution.

It is for these reasons that I beg that the State Attorney General's Office engage in a constitutional review of this SMP. This runaway train needs a brakeman, and that's what the AG's Office can be. ***To be consistent with the SMA and the DOE Guidelines, an SMP must respect private property owner's constitutional rights – both the SMA and the DOE Guidelines say so. To be valid, an SMP must be consistent with the U.S. Constitution. An SMP that is consistent with state law, but inconsistent with the Constitution, is unlawful and if this SMP is approved by the DOE, it can expose the State to considerable liability. A consistency review that does not include a constitutional review is failing to abide by these principles and, more importantly, it is doing nothing to avoid a predictable disaster.***

I'd like to let you into a secret about the Bainbridge “consistency” review. Throughout this voluminous SMP, there different places that discuss the same thing in complete conflict. In one provision, the SMP pays lip service to state law and says what it's supposed to say to be consistent. This is in the most obvious place in the document. Then, there are the other places, or “exceptions” to things like ‘exemptions’ from the SMP where the City has put in the exact opposite of what the state requires. These are usually much harder to find, or they are contained in language that just doesn't make much sense – until you get the background on what the Planning Department or the City Council has told people. And how this works is – ***SMP 4.6 is a governing rule of construction for the whole document that says when two provisions collide, the more restrictive one shall prevail.*** So, while the SMP may say that it doesn't apply to the maintenance of existing gardens, but it then has all kinds of requirements for City pre-approvals to trim, prune, top, remove or clear anything, these ‘more restrictive’ provisions apply. Hence, while Bainbridge *said* its SMP was consistent, *it really wasn't*.

The requirement of a constitutional review is implicit in the SMA and DOE Guidelines. The SMA establishes as its goal, environmental preservation “while at the same time, recognizing and protecting private rights...” RCW 90.58.020, emphasis added. In no less than 17 places, the DOE Guidelines caution local governments about respecting private property rights. Lawyers' footprints are all over the ***DOE Guidelines***, and it very explicitly state that: “Local government should use a process designed to assure that proposed regulatory or administrative actions ***do not unconstitutionally infringe upon private property rights.***” WAC 173-26-186 (5), emphasis supplied. They say that:

Local government may find it necessary to regulate existing uses to avoid severe harm to public health and safety or the environment and ***in doing so should be***

cognizant of constitutional and other legal limitations on the regulation of private property.

WAC 173-26-191(2)(a)(iii)(A), emphasis supplied.

Overall, the SMA and DOE Guidelines mandate that local government design and implement land use policies “in a manner consistent with all relevant and other legal limitations on the regulation of private property.” WAC 173-26-186 (8)(b)(i). That private property rights must always be respected is inherent in the Guidelines admission that: “[s]ome master programs 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(1)(a), emphasis supplied.

The U.S. Supreme Court has emphasized that mere lip service to private property rights is not enough. Justice Scalia in the *Nollan* case observed that: “We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.” *Nollan v. California Coastal Commission*, 483 U.S. 825, at 841 (1987), emphasis supplied.

III. SMP PUNISHMENT: THE TAKING OF PERSONAL DUE PROCESS RIGHTS.

This may seem a little early in the game to be talking about SMP punishments, but these regulations “shock the conscience.” Few homeowners probably even *noticed* Section 7.0 of the SMP, let alone *read it*. I know I hadn’t until a few days ago – quite late in the process. And I don’t even know what to say...

The City makes a whole lot of things unlawful:

It is *unlawful* for any person to:

1. Initiate or *maintain*, or cause to be initiated or maintained, the use, construction, placement, *removal*, alteration, or demolition of any structure, land, *vegetation* or property within the city limits *without first obtaining permits or authorizations* required by this Master Program, or in a manner that violates the terms or conditions of such permits or authorizations.

SMP 7.2.3.1, emphasis added.

So, it is unlawful to maintain any land and to remove any vegetation – regardless of how little – without City pre-approval. This means even weeding, since “vegetation” includes weeds. There is no threshold amount that must be pulled before your action becomes unlawful – anything will do if you didn’t get a permit or an authorization in advance.

And it is unlawful to maintain any house – *maintain, not build* – this means something as simple as replacing a broken window – without City approval. Suppose it’s winter, on a weekend and a window got broken – all the way through – by house-bound kids; do you really have to (a) endure winter air while you wait until Monday morning to do anything; (b) take time off from work to go to City Hall and fill out an application and pay a fee; and (c) wait for City approval – all before you can go to Ace Hardware and fix the window? From a due process standpoint, what rational basis underlies this requirement? What *nexus* is there between a broken window and the environment, other than your family gets an ‘up-close and personal experience’ with winter air while you jump through City hoops?!”

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If you go ahead – as common sense and your family both tell you – and replace the window on Saturday and apply for the permit on Monday, you will be shocked by how expensive it is to fix a broken window. The SMP provides that “[a]fter the fact application fees shall be triple the amount established by City Council resolution.” SMP 7.2.4 (Incidentally, this also means that the Planning Department is overriding the City Council’s explicit setting of penalty amounts. Isn’t this outside the staff’s authority, since City Council action is required in the first place to set these amounts?) Or would you be denied a permit and, instead, be cited with a civil infraction and whopping fine?

So, all of these minor things are unlawful: they are “civil infractions” – “subject to enforcement and fines as provided in BIMC 1.26.035.” SMP 7.27 *However,*

[i]n addition to any civil infraction fine...or other available sanction or remedial procedure, any person engaging in conduct made unlawful by this Program shall be subject to a cumulative civil penalty in the amount of \$1,000 per day for each violation from the date set for compliance until the date of compliance.”

SMP 7.2.9 If you pull weeds, the SMP mandates ‘restoration of the affected area,’ so the \$1,000 a day would run, presumably, from the date of the order until the area is replanted with native vegetation. But even if that is *only* one day, *is this really a punishment that fits the crime?*

Most draconian of all – punishment for refusing to restore the area where you pulled the weed:

Any person...that knowingly and willfully refuses to complete a required restoration...shall be guilty of a ***misdemeanor punishable by not more than 30 days in jail and/or not more than a \$1,000 fine and provide shoreline restoration...at a rate of 200% times the impacted area.***

SMP 7.2.9, emphasis added. So, if you’re stubborn and convinced you have constitutional rights and you think you are going to commit an act of ‘civil disobedience,’ think hard – do you really want to spend 30 days in *jail*!!!! Also, anyone who violates the SMP again within 12 months commits yet *another* misdemeanor. SMP 7.2.8

Minor things involving maintenance of the house or garden should not – and I believe, constitutionally, *cannot* - be subject to this kind of micromanagement and these absolutely disproportionate, irrational fines. The SMP punishment provisions are a shining example of what courts call “arbitrary and capricious” regulations. They are so “unduly burdensome/oppressive” and just plain outrageous that they constitute violations of the Due Process Clauses of the Constitution.

IV. LIST OF CITY “REVIEW” AND “APPROVAL” REQUIREMENTS NOT RELATED TO CONSTRUCTION.

A. Non -Permit *Permit* Requirements.

The SMP specifies that certain things that do not require a “permit” do, in fact, require City “reviews” and/or “approvals.” The punishment provisions cited above apply to an individual’s failure to obtain permits or “authorizations.” Obviously, the word “authorization” covers a lot more ground than “permit.” Throughout the SMP, there are lots of instances where you can see that the drafters have maintained strict control over all the decision-making that involves shoreline land, all without specifically calling anything a “permit.” It would appear, from a recent comment by a City

Council member that she – and perhaps others on the Council - is laboring under the illusion that the Planning Department has not imposed any new burdensome “permit” requirements on the shoreline homeowners.

And they haven't - at least, not under that name. But they have created a huge new catalog of situations that require 'requests' and 'applications,' that require 'review' and 'assessment' and submissions of documents, with everything to be done 'to the satisfaction of the planner.' The drafters' use of the thesaurus is admirable! Our Planning Department has a long history of conducting things solely in writing and for a fee; there is little possibility this practice will change now when the City is so strapped for money. So, when you have to file documents with a planner – however the process is described – and make a “request” and/or you are described as an “applicant,” and you cannot do whatever you want to do until a planner has read it, there is absolutely no difference between this and a “permit.” You have to submit a lot of paperwork, the planner makes a decision and you pay a fee. How is this different?”

The plain truth is, if you don't get one of these “authorizations,” you are just as subject to being hit with a civil infraction and fined and/or sent to jail as if you failed to get a permit. Here are some of the “authorizations” required by the City:

1. “**Proposed**... use, or **activities** within shorelines of statewide significance **shall be reviewed** in accordance with preferred policies listed in 4.1.1.3. The Administrator may reduce, alter, or **deny** proposed...use, or **activity** to satisfy the preferred policy.” SMP 4.1.1.2, emphasis added. So, if the planner is 'reviewing' the proposed activity and he has the authority to deny your 'request,' this is a *permit requirement*. Incidentally, as discussed below, the SMP definition of “activity” fails to narrow the scope of the ones that require pre-approval.

2. The “potential” for “**new activities**” to cause adverse impacts must be “**assessed**” in SMP 4.1.2.3.4 - one assumes by a planner.

3. While “**proposed activities**” are ostensibly just subject to just 'review and assessment,' the SMP provides that “[i]f a proposed shoreline...use or activity is **determined by the Administrator** to result in significant short-term, long term or cumulative adverse environmental impacts lacking appropriate compensatory mitigation, it shall be sufficient reason for the Administrator to deny a *permit*.” SMP 4.1.2.4.2(b), emphasis added. So, the drafter who has been so very careful to avoid calling the review of activities a “permit” – well, he finally slipped and used that word here.

4. Criteria to be used “[i]n **reviewing and approving** shoreline...use or **activity**” is set forth in SMP 4.1.2.4.2

5. While the removal of a hazard tree is said to be “exempt” from SMP regulations, that is so only so long as “a report from an arborist or other qualified professional demonstrates **to the satisfaction of the Administrator** that trimming is not sufficient to address the hazard.” SMP 4.1.2.4(c), emphasis added. So, in fact, a report must be submitted to the Planning Department and a planner must review this plan and make a decision as to whether or not he is “satisfied” – this qualifies as a “pre-approval.”

6. Either (a) “an annotated list of proposed plants and their spacing specifications and locations” or (b) a planting plan prepared by a qualified professional or prepared by the “*applicant*” using the single-family residential mitigation manual – “**shall be submitted for approval prior to**

vegetation disturbance.” Very specifically, this provision states that “[t]his includes invasive species removal” (aka ‘weeding’). SMP 4.1.2.5.1(a) So, before removing anything, a planting plan must be submitted to the Planning Department for the replacement native vegetation. Please note that any “minor clearing” – i.e., removal of vegetation – requires a clearing permit under SMP 4.1.3.5.8

7. “When **vegetation mitigation is required for new...uses, or activities, the mitigation plan** shall include new plantings...” SMP 4.1.2.5.4 So, a “mitigation plan” is required for new activities when they will result in the need for vegetation mitigation. A mitigation plan implicitly requires submittal to the Planning Department, review by the Planning Department and *approval* by the Planning Department.

8. The SMP requires that “[t]he **quality and quantity** of...replaced, enhanced or substituted resources shall be **the same or better...**” SMP 4.1.2.6.4(a). *This implies that someone is evaluating the “quality and quantity” of vegetation, and approving or disapproving it.* This is an approval requirement.

9. “**Vegetation clearing, or grading,** may not be undertaken within the shoreline jurisdiction without **prior review and approval** by the Administrator, unless otherwise exempt under Section 4.1.3.4, Regulations – Exceptions.” SMP 4.1.3.5.2, emphasis added. While that SMP Section 4.1.3.4 ostensibly says that one may ‘enhance’ the buffer zone by removing noxious and invasive weeds, it then says “*provided*” and this is where there are SMP requirements for consultation with the County regarding those weeds and the SMP replanting requirements kick in. So, it would appear implicit that an individual’s application for approval of a planting plan involves an approval of the *removal* of what is there *now...* Fine gradations to one side, the bottom line is that there is paperwork involved with pulling weeds.

10. Inherently, the Planning Department must approve or deny any proposed alternative to the shoreline buffer dimensions that may be proposed by “**the applicant**” under SMP 4.1.3.5.3(a)(i).

11. Any required Habitat Management Plan “shall be reviewed by the Administrator...The Administrator may **approve**, approve with conditions, **or deny the request.**” SMP 4.1.3.5(a)(ii)

12. If “**the applicant**” demonstrates that alternate measures or procedures [for “**all activities**”] are equal or superior in accomplishing the purpose and intent of the Vegetation Management Section...”, then the applicant does not have to “perform” activities in compliance with the standards in that section. SMP 4.1.3.5.4(b), emphasis added. Since there is an *applicant* who is demonstrating something, he must be demonstrating something to a *planner for the purpose of approving* the “alternate measures or procedures” for the *activities he has proposed*. This is an approval application.

13. An “**approved**” clearing permit must be obtained before any “**minor vegetation removal** outside the shoreline buffer or site-specific vegetation management area on a *developed property not associated with new construction...provided* [t]he Administrator may grant *approval*” if it meets the requirements and limitations set forth in this provision. SMP 4.1.3.5.8, emphasis added. A distinction without a difference? Either the planner approves a clearing permit for minor vegetation removal under 4.1.3.4 or he approves of said clearing under SMP 4.1.3.5.8 – but that

section also says that you need a clearing permit. Confusing, but the bottom line seems to be *you need planner approval, whatever you call removing vegetation.*

14. All monitoring and inspections by the City or by qualified professionals who must submit reports to the City, **inherently contain the element of City approval** or rejection, and the right of the City to require modifications to the particular land use plan. For a specific list of monitoring and inspections, see the section below on The Right to Exclude Others/Privacy.

15. **A clearing permit must be obtained for: (a) “any changes from the existing landscape to a different landscaping use or activity”** SMP 4.1.3.7(a); (b) “trimming, shaping, thinning or pruning” SMP 4.1.3.7(b); (c) tree or vegetation removal associated with new construction SMP 4.1.3.7(c); and (d) vegetation removal in the buffer zone or site-specific vegetation management area around sewer facilities, storm drains, water meters, and paths. SMP 4.1.3.7(d).

16. **“Minor clearing, grading or construction”** within the buffer zone or site-specific vegetation management area must have the “approval of the Administrator.” Specifically, the following activities within these areas must be approved by the Planning Department: (a) **“maintenance of existing residential landscaping;”** (b) a “trail to the shoreline” that must be no more than 4 feet wide, unless more is needed for handicapped or public access; (c) non-habitable structures such as a “boat house/deck/patio and/or stairway” within certain established parameters; (d) “limited removal of trees or vegetation...for maintenance of a pre-existing view...or to establish a view for a new primary structure” so long as **“the applicant demonstrates to the satisfaction of the Administrator** that the vegetation removal is the minimum necessary...” and various other qualifications; (e) the **“applicant”** must submit to the planner in connection with the planner’s approval of vegetation removal, “an approved Bluff Management Plan” – so here is the requirement of an *approval required for an approval*. The potential grounds for denying a **“request or condition approval for** vegetation alteration proposals for view management” are also set forth in this same section - SMP 4.1.3.8.

B. The Regulation of All Home and Garden “Activities” and “Maintenance.” This is Constitutionally Overbroad and It Will Have a “Chilling Effect” on Doing Anything.

As just seen, all “activity” on the shoreline requires pre-approval by the City. This is an unconstitutionally broad net that covers anything a human being does on this land. The SMP’s definition of “activity” does nothing to limit the scope of regulation. **“Activity – Human activity associated with the use of land or resources.”** SMP 8.0, Definitions. One would assume that this is limited to activity outside the house, but that might not even be true since, after all, the house sits on the land and the SMP purports to regulate all activity on the land. Clearly, these SMP provisions are constitutionally “overbroad” and therefore invalid.

In similar fashion, the SMP purports to regulate all **“maintenance”** and **“management”** of shoreline property. “All shoreline development and activity shall be located, designed, constructed and **managed** in a manner that avoids, minimizes and/or mitigates adverse impacts to the shoreline environment.” SMP 4.1.2.1, emphasis added. The SMP’s goal is to “[m]inimize impacts of shoreline development, uses and **activities** on the environment during all phases of development (e.g. design, construction, and **management.**” The SMP’s policy is to “[e]nsure, *through appropriate monitoring and enforcement measures* that all required **conditions** are met, and improvements are installed and **properly maintained.**” SMP 4.1.2.3, emphasis added. The SMP intends to “provide” “comprehensive **management strategies for shoreline areas...**” SMP 4.1.2.3.5 This is so that:

All shoreline **development, use and activities**, including preferred uses, and uses that are exempt from a shoreline substantial [use] permit, shall be located, designed, constructed, and **maintained** in a manner that protects ecological functions and ecosystem-wide processes.

SMP 4.1.2.4.1

As for what constitutes “maintenance” or “management, once again the SMP’s definitions are of no assistance. “Maintenance” sends you to “Normal Maintenance and “Normal Repair.” These read as follows:

Normal Maintenance – Those usual acts to prevent a decline, lapse or cessation from a lawfully established condition...

Normal Repair – To restore a structure or development to a lawfully established state comparable to its original condition within a reasonable period after decay or partial destruction, except where repair involves total replacement which is not common practice, or causes substantial adverse effects to the shoreline resource or environment. This does not include any *activities* that change the character, scope or size of the original structure or development beyond the original design.

SMP 8.0, Definitions.

A simple google search for activities deemed to constitute “maintenance” of a house unearths advice for new homeowners that includes the trimming of shrubs and trees “so that they clear the foundation, exterior walls, and roof of the house. Shrubbery that’s too close to the house can promote the growth of mildew, mold and algae, particularly during warmer weather. Root growth can damage foundations. Limbs can scrape paint on siding and trim.” *Home Maintenance Guide*, University Federal Credit Union, Austin, TX 2005-2013.

Later in this analysis there is a very detailed discussion of the very severe restrictions on the trimming of vegetation and the removal of dead vegetation, which the SMP intends to be left as wildlife habitat. This home maintenance guide touches on some issues that I raise later: mildew, mold and algae are not just things that damage the structural elements of a house – they are health risks. Many people are allergic to mold and mildew – everyone in my family is. Lung functioning decreases severely from allergies and allergies can be life-threatening. Yet the SMP wants “screening” of the house from public view, since the City believes that boaters on the water find the view of houses on the shoreline displeasing and regulatory power is given to planners to require such screening. And this screening can be required very close to a house, thereby impacting the health of its residents. SMP 4.1.2.1.

Cut-back of any parts of a tree are severely regulated by the SMP (see Vegetation section below). Most likely, given its fervor for the limbs and branches, cutting any roots would, without a doubt, never be permitted by planners. The price for lack of what this institute considers routine maintenance is the slow destruction of the house foundation – which greatly affects the fair market value of one’s home, especially since no subsequent purchaser can do nothing about the problem either. Similarly, this article recommends annual termite service to protect the house: from the SMP’s bans on pesticides in the shoreline, it’s not clear that you can *have* a termite man spray to kill termites which, after all, *love* the marine environment and its houses. By taking away the

homeowner's right to protect his property from the elements, the SMP is engaging in a whole series of minuscule Fifth Amendment takings.

And then there is the hassle factor: the SMP would require that a homeowner get a non-permit 'approval' to perform routine caulking around doors and windows – which is, after all, done to reduce the amount of energy used to heat the home in cold weather, which is clearly pro-environment. Or fixing a broken window. Or painting the house. Or cleaning out the gutters? Just think of all the applications the homeowner must submit just to be allowed to perform routine maintenance...

But it's not as if the homeowner can dare to skip the process. Remember the punishment provisions. Under those provisions it is unlawful to maintain a house without prior permit or "authorization." (Or a garden – the extensive garden discussion later in this piece covers this in exhaustive detail.) Penalties range from the late application fee that is 3x greater than for an on-time application to the imposition of a civil infraction or misdemeanor if you've done something else without a permit within the previous 12 months.

The bottom line is that these overbroad regulatory nets, severe restrictions, and draconian penalties will have a "chilling effect" on all activities of shoreline residents, even those that may, in fact, be beneficial to the environment.

V. "PHASING OUT" ALL EXISTING SHORELINE HOMES.

A. The City Enunciates its Goal to Get Rid of All Existing Homes.

The DOE Guidelines contain a basic principle that SMP provisions shall not apply to "existing uses and structures." This principle is most strongly enunciated in its vegetation section: "**Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures.**" WAC 173-26-221(5)(a), emphasis added.

The Bainbridge SMP pays lip service to State requirements by reciting that its purpose is "to recognize legally established primary residential structures, and to allow them to be maintained, repaired, remodeled, replaced and in some cases expanded in conformance with these rules." SMP 4.2.1.2 That said, in the same section the SMP goes on to say that:

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, with due regard to unique site conditions and property rights.

It is further the purpose of this program to ultimately, over time, have uses and commercial structures conform to the provisions of this program. **Over time, uses... that do not conform to the standards of this program should be phased out as uses cease or redevelopment of structures occurs.**

Note: Existing structures and uses that do not conform to this program are not required to meet its requirements, unless the owner proposes changes to a structure or use that would require review under this Program.

SMP 4.2.1.2, emphasis added.

Please note the first line of this quote again: "Residential structures that do not conform to this program should, over time... conform." In its definition of "existing development" –

added by staff after City Council passage - the SMP labels all existing homes and the use of existing homes 'nonconforming' While this provision ostensibly confines its phase-out of existing homes to the situation where the owner proposes to structurally alter them, elsewhere the SMP actively mandates the 'phase-out' when the homeowner does, or doesn't do, certain things or when certain uncontrollable events occur.

Having said that existing houses could be remodeled, or replaced – which implies without being subject to SMP requirements, the Bainbridge SMP then says that they *are* subject to the SMP if, in fact, the owner *does* propose a change to the structure. This is one of those direct inconsistencies that can only be reconciled by use of the rule of construction contained in SMP 4.6, which requires that the more restrictive of them prevail. **Thus, the permissive treatment of existing structures and uses is trounced by the requirement that any change to an existing home must conform to the SMP requirements. As such, the Bainbridge SMP is not consistent with State law.**

The Bainbridge SMP continues in the next policy section 4.2.1.3 to pay lip service to the concept that existing houses can be remodeled or replaced, etc., etc. But then we get to the contradictions: ***“Nonconforming uses shall not be altered or expanded in any way that increases the nonconformity.”*** SMP 4.2.1.5.1, emphasis added. Of course, expanding an existing home is going to 'expand the nonconformity'; so this basically bans alterations and expansions of existing homes, completely contrary to what the SMP just said. And, because of the governing rule of construction, SMP 4.6, this more restrictive provision – the ban on alterations and expansions – prevails. Also, please note that this provision supposedly relates to a 'use,' but when it speaks to 'altering' or 'expanding,' that sounds so much more like what you do to a structure.

The SMP's definition of nonconforming development, which remained even after the City was forced by huge protest to remove the *use* of it in the Nonconforming Use Section 4.2, reads as follows:

Nonconforming Development – **A shoreline use** or structure which was lawfully constructed or **established prior to the effective date of the Shoreline Management Act/SMP provision, and which no longer conforms to the applicable shoreline provisions...**

SMP 8.0, Definitions, emphasis added.

The SMP fails to have a separate definition of “nonconforming use,” but in the post-enactment, staff-added definition of “**existing development**” the SMP says that all existing shoreline structures, even though they may have been lawfully established at the time they were constructed, “**do not conform** to the provisions in the 1996 Shoreline Master Program, as amended by ordinance xx [sic] on xx xx,, [sic], 2013.” And, included in both the “nonconforming development” definition and the “existing development” definition is the notion that not only is a *structure “development,” and the structure is nonconforming, but also that the use of an existing structure is a nonconforming use.*” SMP 8.0 Definitions. While it's all a bit messy from the standpoint of the language, the City's message is clear – existing homes are to be gotten rid of.

[Sidebar: This new substantive definition that makes the use of an existing development nonconforming, was *added by staff, without public notice, hearing or further City Council approval, after the City Council ostensibly approved the SMP on May 15, 2013 and before it was submitted to the DOE as if it had been properly enacted.* By itself, the expression “existing development” is so readily understood that it requires no definition; so there can be no other reason for 'defining' the term than to manipulate the substance of the nonconforming use provisions. While the City was forced

by public outcry to remove the term “nonconforming development” from Section 4.2, the staff left it in the definitional section and reintroduced it again, through the back door, by way of adding this new definition.

I said that the City Council *ostensibly approved the SMP* because the resolution passed for this purpose actually failed to state that the City Council was, *in fact, passing* the SMP – it only said that *it intended to pass* the SMP. In addition, this resolution failed to actually attach the document to which it applied, let alone any of its appendices; the City Council discussed this but then decided it was alright. Be that as it may, the action by staff of making any substantive changes to the SMP – and ***the City’s action in giving carte blanche authority to staff to make substantive changes, as it now seems to contend, without following the requirements of public notice and hearing constitutes an ultra vires action by staff, as well as an unlawful delegation of City Council authority to staff for the purpose of making substantive changes.*** While the power for mere ‘clean-up’ – making *non-substantive* changes - can be delegated to staff after passage of a regulation, the insertion of a substantive provision that labels use of an existing home ‘nonconforming’ is *scarcely non-substantive.*]

Regardless of when or why these definitions were put into the SMP, it is entirely inappropriate to label “nonconforming” a use that is entirely consistent with its zoning - as is the case of residential use of a single-family home in an area zoned for ‘single-family residential.’ *It is a subversion of the zoning process to label a use “nonconforming” when the use does, in fact, conform to its zoning.* In zoning terminology, “use” means *how the structure is used, not how old the structure is or whether it conforms to current law.* “Use” for residential purposes means either “single-family residential” or “multi-family residential.” The use of a structure for single-family residential purposes in an area zoned “single-family residential” is a *conforming use*, regardless of the age of the house. The Bainbridge SMP violates basic zoning law principles by its deliberate misuse of this term.

These two definitions clearly set out that the nonconforming label can be applied to *all homes existing before May 15, 2013* because some particular “applicable provision” of the new SMP relates to them.

A shoreline use or structure which was lawfully constructed or established prior [to] the effective date of the applicable Shoreline Management Act/SMP provision and which no longer conforms to the applicable shoreline provisions...”

“Nonconforming Development” definition in SMP 8.0.

This “applicable SMP provision” net catches all structures that were built prior to this SMP – that is, prior to May 15, 2013.

We all recognize that the purpose of labeling something “nonconforming” is, after all, to extinguish that thing – whether it be a structure or a use. This is precisely why this designation has such a dramatic negative effect on a property’s value and salability. **But the state legislature never authorized the wholesale removal of all pre-2013 homes, whether “over time” or immediately, and certainly not on the unconstitutional bases set forth by the Bainbridge SMP. Nor did the state legislature authorize that homeowners be required to relocate their homes in order to be compliant with an SMP. The DOE Guidelines specifically say that an SMP’s provisions are not to be applied to “existing uses and structures.” WAC 173-26-221(5)(a)**

B. The DOE Guidelines and “Fundamental Principles of Fairness” Prohibit This Kind of Regulatory Application to Existing Uses and Structures.

The DOE Guidelines provide as follows:

Like other **master plan provisions**, vegetation conservation standards **do not apply retroactively to existing uses and structures**.

WAC 173-26-221(5)(a), emphasis added. *The sole legislative ambit of the SMA was the regulation of growth, new development.* There is no specific delegation of any authority to apply any master program provisions retroactively, and it cannot be inferred that this was its intent, since there is a historical dislike of retroactive laws, which is based on what constitutional law calls the “fundamental principles of fairness.” These principles relate to the concept that the an individual must be given forewarning of what conduct is unlawful so that he can change it and avoid punishment. These “fundamental principles” hold that imposing punishment on someone for conduct that was not unlawful *at the time* is unfair. Those “fundamental principles of fairness” must be invoked where existing homes are involved; the punishment meted out for being “nonconforming” is just too draconian.

The Bainbridge SMP nonconforming use regulations involve such significant financial and life-changing consequences that it falls within the purview of the U.S. Supreme Court case of *Eastern Enterprises*. Ruling on the permissibility of imposing liability for the health care costs of retired miners on a corporate successor-in-interest the Court held as follows:

While we do not question Congress’ power to address that problem, the solution it crafted improperly placed a *severe, disproportionate and extremely retroactive burden* on Eastern. Accordingly, we conclude that the Coal Act’s allocation of liability to Eastern *violates the Takings Clause...*

Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998), emphasis added.

C. No Proof of Significant Harm From Single-Family Residential Use; “Preferred” and “Priority” Ratings from the State Legislature and the DOE Guidelines.

The City was unable to find any scientific studies to show that single-family residential use does any significant damage to the environment. In fact, it would seem that there just aren’t any studies that show any significant environmental damage by single-family residential use. That’s undoubtedly why the SMA in its legislative findings gave single-family residential use not just “preferred,” but also “priority” status. The SMA specifically says that the criteria for getting these ratings are the “control of pollution and prevention of damage to the natural environment.” RCW 90.58.020

The only pollution problems on Bainbridge are from the old creosote plant, other previous commercial/industrial uses and the City’s stubborn refusal to take care of run-off from the streets into the Puget Sound. Please note that *the City’s SMP does not include any self-regulation: it fails to place any requirements on the City of Bainbridge Island to clean up any of the pollution problems existing at any properties owned or co-owned by the City.* **The City’s failure to identify its own pollution problems and impose mitigation requirements on itself to address them is a serious failure to adhere to the SMA and the DOE Guidelines.**

As for single-family damage to the shoreline, no enormous ecological devastation is apparent to me as I look out the window at our land and our neighbors’; if anything, the Bainbridge shoreline is still exceedingly beautiful, despite having homes that are decades old. There is an eagle perched on my float – the same place that sea lions come to sunbathe and rest. There is a lovely little river otter that seems to like our garden as a pathway to water. Recently, my husband and I had a tough time shooing off some very aggressive Canada geese from coming up close to the house and pooping on

our lawn – we let them have the land closer to the water, but now they’ve clearly decided they want more territory. Yes, this land would make a nice public park. But this is **our home**. My husband and I paid for it, have lovingly cared for it, and we will fight with all we have to keep it.

D. “Nonconforming” Label Covers All Waterfront Properties Currently in Existence: What Zoning Law Precedent Exists to Extinguish a *Majority Residential Use*?

There is absolutely no authority in zoning law for a city to get rid of a *majority use* that is not posing a danger of significant harm to anyone or anything, like these homes. The previous use of nonconforming zoning labels has been to make an area that was already relatively consistent, over time, *entirely* consistent. One of the stated goals of this SMP is to phase out nonconforming uses – i.e., uses of existing homes – and to “minimize the number of existing structures that would not conform to buffer dimensional standards.” SMP 4.1.3.3.6 Please note that this latter nonconforming use cite is from the “Vegetation Management” section of the SMP – somewhere you wouldn’t necessarily think to look for provisions abolishing nonconforming uses. But, having paid lip service to allowing existing structures to remain in the appropriate nonconforming use section, the drafters did away with this right here in the vegetation section. And, since SMP Section 4.6 says that the more restrictive provision prevails, existing homes must be eliminated. If there weren’t so many bans and restrictions on new development, one would think this was a law drafted by contractors to require all new construction...

No power was delegated to the City to do this by the State. And there is no precedent anywhere in the history of lawful zoning practices to sustain this exercise of governmental power.

E. SMA Specifically Prohibits the Combined Use of the SMP and Zoning to “Take All Viable Uses” of a Property; Bainbridge SMP Violates the SMA by Doing So.

The DOE Guidelines incorporate a concept from the U.S. Supreme Court *Lucas* case law:

...when considered together and applied 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).

After someone has had his right to use his existing home taken away by the City, it is not clear when – *or even if* - he can ever get it back. The SMP merely provides that “[o]nce discontinued, re-establishment of nonconforming uses located in the shoreline jurisdiction shall be restricted.” SMP 4.2.1.3.5, emphasis added. In what way *restricted*? It is a violation of due process for such a regulation, which deprives an owner of his most valuable possession – his home – not to specify precisely how he can regain the right to use it.

With respect to a home that has been unoccupied for 12 consecutive months – and *not* with respect to either of the other situations where nonconforming use is extinguished, the Bainbridge SMP merely says that once a nonconforming use of a shoreline home ceases, ‘any subsequent use shall be conforming.’ SMP 4.2.1.5.2 “Conforming” to exactly *which* provisions of the SMP? *All of them*? Suppose that the lot is too short to comply with the new, bigger buffer zone; does that mean you can never use your house or property again?

The DOE Guidelines mandate that SMPs have hardship provisions, as follows:

“[e]ach master program shall contain provisions to allow for the varying of the application of use regulations of the program...to insure that *strict implementation of a program will not create unnecessary hardships...*

WAC 173-26-191(2)(a) Notwithstanding this DOE mandate, the Bainbridge SMP nonconforming use regulations do not contain any hardship provisions.

While the conditions that trigger the extinguishment of a shoreline nonconforming use are set forth in great detail by the SMP, there is absolutely no detail on how a person regains use of his *home* and, under the Due Process Clause of the Constitution, there *must be*. There is simply no description of how you get your property rights back if your house burns down because you left a pot on the stove and a flame still burning low... Nor is there any information on how you get the right to rebuild your house back if you either fail to meet the City’s deadlines or if there was a criminal act involved in your house casualty. *These are serious omissions, that seem to infer that there is no right to re-establish the use of a property after the nonconforming use has been extinguished.*

If, indeed, this is true, there can be no doubt that this is a Fifth Amendment ‘taking’ without due process and just compensation. Even in 1945, the U.S. Supreme Court in the *General Motors* case decided:

The courts have held that the **deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.** Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete of all or most of his interest in the subject matter to amount to a taking.

United States v. General Motors Corporation, 323 U.S. 373, 9th para, (1945).

Would relocation of the house really make the house “conforming” again? From a theoretical viewpoint, one would think that if a dispossessed homeowner had his house picked up off its foundation and moved in accordance with the new setbacks, he should be legally entitled to move back into his house. However, the SMP does not actually say that this is the appropriate remedy for nonconformity. Since the provision deals with *use rather than structure*, there is considerable room for ambiguity, and so there is with the SMP’s profound silence on the topic.

Does this mean that a single planner in the Bainbridge Planning Department, in his sole discretion, can make a decision of such magnitude? The ambiguity of this language, the lack of guidelines for staff or the homeowner, and the implicit sole discretion vested in the planner- all these things constitute violations of the property owner’s due process rights. In short, before the City can take a family’s home, the Fifth and Fourteenth Amendments require some type of legal proceeding in which the owner can protect his constitutional rights; the Bainbridge SMP fails badly with this. If a sole planner can, actually, make this decision, the groundwork is solidly laid for bribery and extortion. If a homeowner’s right to use his existing home can *never* be regained, which is a fair inference from the SMP provisions recited above, the owner has been deprived of property without due process and without just compensation.

Even if a homeowner may have the right to build a new home and demolish the old one in accordance with new regulations, this does not negate the fact that the money he must spend to re-establish the use of ‘his’ land is taken by the City. The most recent *Koontz* case confirms that the appropriation of *money* for a public purpose is just as valid a Fifth Amendment taking as an

interest in property. *Koontz v. St. John's Water Management District No. 11-147*, 570 U.S. _____ (June 25, 2013)(official reporter pagination not available yet).

F. Nonconforming Use Phase-Out is Not Authorized by any SMA Delegation of Power: the State Carefully Limited its Ambit to New Construction.

Even a cursory review of the SMA goals and purposes reveals that the SMA specifically limits its application to new construction: it talks only about the “ever increasing pressures of *additional uses* [that] are being placed on the shorelines...” RCW 90.58.020. Neither the SMA’s legislative findings, nor its purposes, nor its goals contain any reference to existing homes. As such, there can be no inference that the SMA has delegated any power to the City to zone existing homes nonconforming and/or to phase them out just because they were built before the new SMP.

In the *Biggers case*, the Washington Supreme Court held that local governments *must* have power delegated them by the State to regulate shoreline land use because “[l]ocal governments do *not* possess any inherent constitutional police power over state shoreline use.” *Biggers v. City of Bainbridge Island*, 162 Wn. 2d 683, at para. 23 (2007).

While the DOE Guidelines merely acknowledged the possibility that there may be “some circumstances” where existing homes “may become nonconforming” under the SMP, they give absolutely no guidance on how that would happen, nor do they even *suggest* that it such a thing be done. But, it is critical to note, that even then, the DOE Guidelines mandate that SMPs should have provisions to address the situation in a manner “consistent with constitutional and other legal limitations.” WAC 173-26-191(2)(a)(iii)(A)

G. SMP ‘Nonconforming’ Label Constitutes the Retroactive Application of the SMP on Existing Structures, Which is Prohibited by the DOE Guidelines and “Fundamental Principles of Fairness.”

The SMA specifically excludes from its definition of “substantial development” the following: “normal maintenance or repair of existing structures or developments, including damage by accident, fire, or elements.” RCW 90.58.030(3)(e)(i). The DOE Guidelines clearly acknowledge the SMA prohibition on retroactive application of the statute by stating that “***Like other master program provisions***, vegetation conservation standards [i.e., SMA/SMP regulations] **do not apply retroactively to existing uses and structures...**” WAC 173-26-221(5)(a)

The City’s action in labeling all existing waterfront properties “nonconforming” inherently involves applying the SMP retroactively to existing homes. That is, there would be no basis for the designation of these houses as “nonconforming” unless the City had compared the requirements of the new SMP with what was previously required and found the existing houses previously built to be deficient – aka “nonconforming” and/or the use of an existing home to be nonconforming. This comparison is, in fact, specifically referred to in the latter portion of the SMP definition of “nonconforming” as meaning any house “...constructed or established prior to the effective date of the applicable Shoreline Management Act/SMP provision, and *which no longer conforms to the applicable shoreline provisions.*” SMP §4.2.1.2, emphasis supplied.

In *Eastern Enterprises*, the U.S. Supreme Court expressed its striking down of a federal law with retroactive application in yet another manner that is suggestive of the *Armstrong* Equal Protection Clause holding.

When...[a] solution **singles out** certain employers **to bear a burden** that is **substantial in amount**, based on employers’ conduct far in the past, and unrelated

to any commitment that the employers made or to any injury they caused, *the governmental action implicates fundamental principles of fairness underlying the Takings Clause*. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to *Eastern* effects an **unconstitutional taking**.

Eastern, at 537, emphasis added. In the case of Bainbridge, imposing the heavy burden of relocating an existing house or demolishing it and building anew would constitute a Fifth Amendment taking under the Supreme Court's reasoning in the *Eastern* case.

H. The Taking of Your Home as Punishment for Personal Conduct Without Damage or a Right to Trial: This is What "Phasing Out" of Nonconforming Use Really Is.

1. There Must be a Right to Trial Where Punishment is Meted Out: The SMP Fails to Provide One - a Violation of the Constitution's Due Process Clause.

Framed as it is, the SMP taking of the right to use an existing home is punishment for personal conduct. The situations in which this can occur are: (1) if a homeowner leaves his house unoccupied for 12 consecutive months - SMP 4.1.5.2; (2) if his house is damaged or destroyed by an accident - that is, not by "natural causes" - SMP 1.3.5; (3) if he fails to meet the very tight deadlines set by the City for rebuilding after a casualty - SMP 4.2.1.4; and (4) if he engages in some criminal act that leads to a casualty in which his house is damaged or destroyed - SMP 4.2.1.6.3(a).

There are some basic legal principles taught every lawyer in his or her first year of law school - one of them is this: where punishment is to be meted out for personal conduct, there must be a trial in which the individual can defend himself. You even have this right to trial for a *traffic ticket*! So why wouldn't you have it before someone takes away the right to use your home? This basic principle is something that the City's drafters appear to have forgotten, for there is no right to trial anywhere in the Bainbridge SMP process.

2. There is No Lawful Punishment Without Proof of Significant Damage; And Any 'Punishment Must Fit the Crime.' The SMP Violates Basic Due Process Rights.

An essential element of any punishable offense is *damage*, and not just any damage - *significant damage*. As they say, 'no harm, no foul.' There must be actual, scientific proof of significant damage. This is what is meant by the "burden of proof."

So, precisely what damage, environmental or otherwise, is done when someone leaves his home unoccupied for 12 consecutive months? What damage is done to anyone or anything, other than the homeowner, if an accident destroys his home? What damage occurs when someone doesn't manage to meet all the tight deadlines set out by the City and doesn't manage to finish rebuilding their house within one year - or even *two*? There is no obvious foreseeable damage of any magnitude to anything or anyone. Without damage, under the American system of justice, there can be no punishment.

If we even assume, just for purposes of argument, that there was some damage to the environment from these things, this punishment is radically disproportionate to the amount of any damage one could even imagine. Perhaps the yard got overgrown with "invasive" weeds while a homeowner was away so long; perhaps some surrounding vegetation got singed - or even burned - by the accidental fire that destroyed the house. Maybe the neighbors are upset because the house and yard have looked really bad for such a long time... Whatever the 'damage' to the environment, the

taking of a person's right to use his home is far, far greater. Looking backward from the punishment inflicted, the taking of one's home is such a severe punishment that, surely, the offense must have been something like operating a toxic waste dump, or maybe a small nuclear power plant. But these are *single-family residences; they have "preferred" and "priority" ratings from the State*. Taking away someone's home amounts to radically disproportionate punishment, punishment that is completely "arbitrary and capricious," as courts say and, therefore, invalid.

Even where there's a crime involved on the house's destruction, this kind of punishment isn't justified. For one thing, the SMP may actually be inflicting punishment on someone who is not guilty – the spouse who wants to rebuild *her* home. In the United States, unlike North Korea, we do not punish someone for another person's acts. That's what the Bainbridge SMP would be doing if it prohibited the *spouse* of a criminal from rebuilding their home. But this is precisely what the SMP does. Just as important, this is punishment for a criminal act: to the extent that the act was made unlawful by the state, the City's jurisdiction to punish is pre-empted by the state.

I. If Extinguishment of the Use is Not Punishment for Personal Conduct, It May be Punishment for Preconceived Notions of Environmental Damage From Residential Use – Notions That Lack Any Scientific Support.

1. Washington Supreme Court Requires Proof of More than "Theoretical Harm": There Must be Proof of "Actual, Demonstrated Harm" to Justify Restriction on Use.

There would appear to be only two logical reasons for the City to attempt to extinguish the rights of all current shoreline homeowners to use their homes: (1) because the City erroneously believes that single-family residential use is damaging the environment; or (2) the City wants to facilitate the creation of ecological preserves and/or quasi-public parks without paying for them.

In its major shoreline case involving the City of Bainbridge Island, the Washington Supreme Court criticized unsubstantiated allegations of harm to the shoreline, such as: "*may harm* the shoreline habitat." The Court held that "[t]his rationale cites *potential* harm rather than *actual, demonstrated harm*. ***Standing alone, theoretical harm is not enough to deny private property owners fundamental access to the application review process or protection and use of their property.***" *Biggers v. City of Bainbridge Island*, 162Wn. 2d 683, 684, emphasis added.

2. Agricultural Studies Certainly Don't Prove Residential Damage, But This is the Only Proof the City Has Provided.

Rather than provide evidence of residential shoreline damage, the City's has sought to substantiate its taking of private property rights through the use of studies on the environmental impact of *cattle feed lots* and *commercial crop growing*. This amounts to a complete misapplication of scientific data; this is not a demonstration of harm from *residential* use. These studies were used precisely because there was no study the City could find to substantiate that *any* harm – let alone *significant* harm - resulted from residential use of shoreline property.

No studies have been presented to prove that the clearing of native vegetation and replanting with non-indigenous vegetation – in many cases, *decades ago* – is currently doing, or ever did, any damage to the environment. The strict requirements for only *native* vegetation, and tons of it, are not substantiated by any proof that native vegetation serves environmental purposes any better than non-indigenous vegetation. If deep roots are required for shoreline stabilization, the soil is oblivious to whether the roots of a tree come from a native tree or a so-called non-indigenous tree.

To be valid, a regulation must have a rational basis – a foundation in science. To be lawful, a land use restriction must be grounded in proof that a particular use is “...injurious to the health, morals, or safety of the community...” *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962). Blanket allegations without any actual proof are insufficient to meet this charge, as stated by the Washington Supreme Court. Unless and until damage to the shoreline is conclusively proved by scientific studies to be resulting from *single-family residential use*, the prevention of this use is not legally justifiable – in short, the SMP’s nonconforming use regulation are invalid for lack of a rational basis.

As for comparing us to cattle in feed lots, and our residential use to commercial crop growing – well, not exactly. Obviously, most of us are not as big as cattle, we do not live outdoors, or in the density of a herd, and our personal wastes are treated by either septic tank or sewer system before being discharged into the environment. If our discharge of human waste is not treated so as to ensure no environmental damage, the proper course of action is for the City to work with the County Health Department – which has jurisdiction over these matters - not to throw people off their property. We people do not trample vegetation like a herd of cattle, nor do we constantly clear an area of all vegetation by eating it. Using a commercial crop pesticide contamination study as a substitute for a residential garden contamination study is quite inappropriate; shoreline residents do not have to use many, if any, pesticides on vegetation because none of us are attempting to make a living by raising crops in great abundance. We’re talking here about single-family residential.

In short, the City of Bainbridge does not provide any relevant data to dispute the State’s “preferred” and “priority” ratings. Without this, *the City has no police power to take away anyone’s right to use their existing home.*”

J. Cost for Existing Homes to Comply With the New SMP is “Unduly Oppressive,” Constituting a Substantive Due Process Violation and a ‘Taking’ Under Washington Law.

The cost to comply with the Bainbridge SMP is far greater than it is for any other type of nonconforming conversion. The transition of, say, a duplex into a single-family home may require only a few relatively cheap changes in construction, or a family may be able to live in the structure without making any changes at all – i.e., using one of the two units for a mother-in-law, a grown child or as a home office. Upgrading a plumbing or electrical system may cost just a few thousand dollars.

By contrast, since the SMP spans more than 350 pages, *the potential economic burden to comply with all of its regulations may be staggering! Can the City really mean that you have to pick up your house off its foundation and relocate it further away from the water? What can you do if your lot isn’t big enough to comply with the SMP buffer requirements? Do you completely lose the right to ever use your property again? What about ‘revegetation’ – do you have to completely pull out all your landscaping and replant with native vegetation the City likes? Do you have to post a surety bond for five years or more just for landscaping, as new construction requires? Why isn’t the amount of this surety bond given anywhere? Do I have to sign and record a conservation easement the way you do with a new house? Do I have to sign and record a title restriction against ever having a bulkhead – even though the State clearly says I can have a bulkhead to protect an existing house? Do you have to get all of those nine special reports by professionals on habitat – they cost a bundle!?*

In short, if pursued literally, the cost of compliance with the Bainbridge SMP for existing homes would be what the U.S. Supreme Court has always called “unduly burdensome,” resulting in either invalidation if the regulations are also “arbitrary and capricious” or a Fifth Amendment taking if they are rational. The Washington State Supreme Court does the same thing, but with slightly

different terminology, when regulations are “unduly oppressive,” it will find a “substantive due process violation” and a ‘taking’ under the Washington State Constitution’s counterpart of the Fifth Amendment. Constitutional law has always involved a balancing of the benefit to the public against the burden imposed on the private individual. Where the burden is too heavy, the measure is deemed unconstitutional. One of the factors which would be considered by a court would be the existence of a hardship provision. **The DOE Guidelines require that SMPs contain “... provisions to ensure that strict implementation of a program will not create unnecessary hardship.”** WAC 173-26-191(2)(a), emphasis added. Nevertheless, **there are none in the Bainbridge SMP**, at least insofar as existing homes are concerned: the City’s goal to rid the shoreline of them is dramatically illustrated.

K. Immediate Impact of Nonconforming Status on Salability and Market Value: “Interference with Investment-Backed Expectations,” Which the Supreme Court in *Penn Central* Held Could Amount to a Fifth Amendment Taking.

Potential buyers don’t even want to look at a house that is zoned “nonconforming.” Banks have policies against making loans for any nonconforming property (I know – I was a bank attorney). They mean a lot of governmental red tape to bring a house back into ‘conformity.’ Also, because this term clearly signals that a lot of money will be required to fix the nonconforming problem – signaled because the homeowner hasn’t fixed it yet – a prospective buyer isn’t willing to pay top dollar, or even ‘middle dollar.’ So, when the City labels all homes existing on the shoreline “nonconforming,” it has an immediate impact on market value and salability. Even before the May 15, 2013 City Council approval of the SMP, I had personal knowledge of a number of very interested buyers who sadly walked away from what they thought were very good properties – all because of the SMP. On July 26, 2013 the local weekend publication called “98110” carried a piece about the local real estate market. Sales in the lower and middle levels of the market were up nicely, but the higher end – where shoreline properties are – had dropped off by more than 50%. Instead of the 9 sales that had happened by this time last July, so far this year we have only had 4 transactions. There were no statistics on market values at the upper end, but when there are few buyers around for a particular price level, usually your *price* has to go down to catch one.

If a buyer cannot get financing because a bank won’t lend against a nonconforming property, a transaction can easily fall through. This means you need an all-cash buyer for your waterfront property; and there aren’t a whole lot of those out there. In addition to a person with cash, you need to find someone who doesn’t want to remodel and add any significant amount of space - because there are real limitations on expanding an existing house and it has to be *away from the water, as does all new construction* – something that most waterfront buyers *aren’t* going to want to do.

And the nonconforming status isn’t something that can be fixed by just selling the property to another; the SMP specifically states that this status runs with the land and survives any transfer of title. SMP 4.2.1.5.4 Worse yet, so too would a prohibition against use of the property that was taken as punishment for violating one of the nonconforming ‘offenses.’ When the City takes away the right to use an existing house for residential purposes, that taking will literally suck all of the value out of a property. Without any regulatory road map to show a prospective buyer precisely *how* to become *conforming*, only a very carefree – or crazy – person would buy this kind of property. One has to wonder if this could be the City’s actual intent – to drive away buyers and get the prices so low that the City can afford to buy shoreline land dirt cheap - that is, unless the City can get it for free...

The nonconforming regulations of the Bainbridge SMP clearly fit the following description from the Attorney General's Memorandum: "...so severe in their impact that they are the functional equivalent of an exercise of the government's power of eminent domain." *State of Washington, Office of the Attorney General, Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property*, December 2006, p. 4, final paragraph, emphasis added.

L. If No Rational Basis to the Nonconforming Use Regulations, They are Invalid Under Well-Established Principles of Constitutional Law.

There is a long-standing rule of constitutional law: to be lawful, a regulation must have a rational basis. Thus, where there is no valid scientific basis for the notion that single-family residential use is doing any significant harm to the environment, it may be concluded that there may be no rational basis for these regulations. Certainly, taking away the use of existing homes without any rational basis, is what the courts call "arbitrary and capricious" – and, therefore, "invalid." That leaves one very obvious and rational basis for the regulation – the desire to have an extensive ecological preserve/public park on the shoreline. However rational and laudable this goal may be, to paraphrase the Supreme Court in *Nollan* – 'if the government wants this so badly, they can pay for it.'

1. SMP Taking of the Right to Use a House if Not Occupied for 12 Months Might be Rational in a Business Setting, but Not in a Single-Family Residential Setting.

SMP 4.2.1.5.2 reads as follows: "If a nonconforming use is discontinued for twelve (12) consecutive months, any subsequent use shall be conforming..." In a business setting, an unoccupied space *may* mean that the company's use of the structure has ceased/has been abandoned. But this isn't rational in the single-family residential setting; and under well-established principles of constitutional law, to be valid, a regulation must be *rational*. There are all kinds of reasons why a homeowner might be away from his house for a year, and none of them mean he is never coming back. Suppose you go to help out your elderly mother in Spokane, and you end up staying for more than a year. Suppose you get a job assignment in another state that is only going to be for 18 months – and then you will be coming right back. Suppose you have to go into the hospital, and then into convalescent and rehab facilities for a very serious illness; but you definitely intend to go home – you are *longing* to go home afterwards... Where is the logic – or the equity – in taking from these people their legal right to come back home?

Anyone who doubts that this measure is irrational should consider the following: *If the City really believed that single-family residential use was harming the environment, it would be rewarding people for staying away from home, not punishing them.* To the extent that laws tend to encourage or discourage certain kinds of behavior, this regulation will cause most shoreline homeowners to spend *more* time on Bainbridge, something the SMP drafters may *not* have intended...

And, finally, we should note that **the common law does not allow the abandonment of real property – the fee simple, complete ownership of real property.** Private interests such as tenancies can be abandoned, and they routinely are. But even in this era of people walking away from their below-market and below-mortgage balance loans, the only 'abandonment' the law recognizes is actually a foreclosure for failure to pay the mortgage or a forfeiture for non-payment of property taxes. In both of these processes – unlike the SMP - there are ample due process safeguards. If the SMP takes the right to use an existing home, it must – because of the Constitution – provide a right to trial or a hearing that contain all the due process protections afforded any, and every, citizen of the United States.

As an aside, the original practical, feudal reason for the prohibition of real property abandonment might have been that the lord of the manor must continue to pay homage to his king, by hook or by crook; this hasn't actually changed a bit. After all, if land is taken by the City, there is no one to pay property taxes on it – so the share of each remaining property taxpayer must be increased proportionally to pay for city services.

2. What Rational Purpose is Served by Keeping a Homeowner From Rebuilding a House That Was Destroyed by Accident?

Insurance statistics reflect that the major cause of house damage and destruction is an accident, whether a fire that is caused in the kitchen by forgetting to turn off the light under a pan, or by a water heater exploding or the like. The SMP denies permission to re-build an existing home when it has been destroyed by something other than “natural causes.” SMP 1.3.5. *Why? What rational purpose is served by this prohibition other than effecting a public taking of private property?*

Will this prohibition make people more careful? Probably not. Since “accidents” are, by definition, unintentional acts and people are not capable of perfection, this regulation can have no impact on the number of accidents that occur. *Thus far, American jurisprudence has refused to impose strict liability in the vast majority of cases involving accidents; only when dealing with extremely dangerous substances does the law even contemplate this kind of liability. Household accidents simply do not rise to the level of conduct for which strict liability can be imposed under our system of justice – and it most certainly can only be imposed when the offending party has been afforded the right to trial and other due process guarantees, which the SMP fails utterly to provide.*

In short, there is no obvious and rational purpose that comes to mind to explain this prohibition other than the obvious illegitimate one – an attempt by the City to get the use of private property for the public without having to pay for it.

3. What Rational Purpose is Served by Different, Tighter Regulations on Rebuilding an Existing House After a Casualty? Aren't These Really Just 'Gotcha's'?

The Bainbridge SMP only gives the homeowner two years from the time of a casualty to file for a construction permit to rebuild the house and one year to rebuild the house in its entirety from the date of starting construction. The SMP provision reads as follows:

A complete application for any reconstruction under this section must be submitted within two (2) years of the date of damage or removal, and upon approval of the application, redevelopment must be completed within one (1) year of the commencement of the reconstruction. A one (1) year extension may be granted, provided that a written request is submitted no later than twenty-one (21) days prior to either deadline and provided that the owner is not responsible for the delay.

SMP §4.2.1.4.2, emphasis supplied.

Why? Only one thing is clear in these regulations- the City is imposing a lot of deadlines that it might be easy for a homeowner to miss, shell-shocked and scrambling as he undoubtedly would be after losing his home. Think of all the things a person in this situation has to do: find somewhere for the family to live, replace possessions that were lost in the casualty, fight with the insurance company over proceeds, line up additional bank – or other – financing to pay for the rebuilding, and still go to work.

Notice all the hoops one must jump through with these regulations. First, whether an application is truly “complete” is something that the Planning Department has the sole discretion to determine; so while you might have submitted an application within two years of the damage, if it is not a “complete” application, you could lose your right to rebuild. Yes, you can get an extension of the time to complete your application, but only if you had submitted your request for an extension soon enough, which might only happen if the Planning Department is prompt in getting back to you and telling you that your application is not complete. But there is nothing in the SMP to require that the Planning Department actually *be* prompt about anything...

Assuming you clear the application hurdle, and you get permission to rebuild, you only have *one year* to rebuild your house. How realistic is that? We all know that contractors *promise* to be done in a year, but they very rarely are. Construction *always* takes longer than expected, and it is probably an impossibility to prove that any delay was not, at least in some part, the fault of the homeowner since we all change our minds about things. The notion that the Planning Department has the sole discretion to determine whether any delay in the project completion is the fault of the homeowner, who is up against an unrealistic deadline, is tantamount to a denial of due process.

As a reference point, it is interesting to note that the SMA gives a homeowner up to five (5) years to complete a project, with a one-year extension possible if a request is filed any time before the substantial development permit expires, based simply on “reasonable factors.” RCW 90.58-143(3). The issue of any homeowner fault in causing a construction delay is not an element in the state extension provisions – as it shouldn’t be; a ‘search for the guilty’ is a criminal process which has no place in a planning department .

There would appear to be no logical reasons why someone on the shoreline has to rebuild his house within these tight time frames. What is so special, or different, about the shoreline that construction must be accomplished so quickly? Without a valid reason for distinguishing between shoreline homeowners and other homeowners, this different standard constitutes a violation of the Equal Protection Clause of the U.S. Constitution. Once again, the only logical reason appears to be an illegitimate one –this is a ‘gotcha’ provision to enable a local government to take the use of private land without having to pay for it.

When the City extinguishes a homeowner’s right to rebuild/finish rebuilding his existing home after a casualty if he fails to meet the tight City deadlines, it is exacting a valuable property right. It is taking what the U.S. Supreme Court calls a fundamental right of ownership – the right to possess one’s property. And, when a property right is taken by a municipality, the U.S. Supreme Court in the *Nollan* case provides that the municipality must justify the lawfulness of its taking by (a) proving a *nexus* between the exaction and foreseeable damage caused by the proposed construction; and (b) proving that the exaction is *proportional* to the foreseeable damage of the proposed construction. The Bainbridge SMP flunks these constitutional tests. A delay in submitting paperwork or in completing construction has absolutely no nexus to damage from the proposed rebuild. Nor does it result in any *separate* damage to the environment; weeds may sprout on the job site, but they do no actual harm to the environment. As such, the magnitude of this taking dwarfs the size of any ‘damage’ to the environment.

These nonconforming confiscations of the right to possess one’s property also fall within the definition of a ‘substantive due process violation’ because they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Kawaoka v. City of Arroyo Grande*, 17 F. 3d 1227, 1234 (9th Circuit, 1994). Thus, where a government action, like this is “...so arbitrary as to violate due process – this is the end of the

enquiry. No amount of compensation can authorize such action.” *Lingle v. Chevron*, 544 U.S. 528, para. 24 (2005).

4. Taking of the Right to Rebuild if a Homeowner’s Criminal Act Was Involved in the Casualty Constitutes Additional Punishment for the Crime, Which May be Pre-empted by State Law.

State law allows rebuilding an existing house after a casualty, with no exceptions or qualifications. The Bainbridge SMP is completely inconsistent with State law when prohibits rebuilding of any “structures that are destroyed due to a criminal act initiated by the property owner.” SMP 4.2.1.6.1.2(a)

This taking of the right to repair or rebuild would punish not just the property owner who engaged in the crime, but any other people who have called this their home – the wife, the children, maybe even elderly parents – who may be completely innocent. Punishing other members of the family for one person’s crime is something we never do under our American justice system. Only in despotic countries like North Korea does this happen. Surely neither the City of Bainbridge Island nor the State of Washington wants to engage in this kind of governmental conduct...

Also, the City may lack the jurisdiction to impose punishment for the criminal act. If the act is criminal under state law, as most crimes are, then state has sole jurisdiction over the crime and its punishment. So the SMP regulations would be completely pre-empted by State criminal law in that area. And, unlike civil provisions that award compensatory damages to crime victims, the SMP confers no restitution right on a third party by its provisions. In short, the SMP’s attempt to take the right to rebuild an existing home in this situation – whether from a criminal or from a spouse who is completely innocent of any crime - is fraught with jurisdictional, as well as constitutional problems.

5. Where the Only Rational Purpose Served by Taking the Use of Existing Homes is to Get a Free Ecological Reserve/Park, the SMP Provisions Constitute a Fifth Amendment Taking.

Since these regulations cannot be based on the police power because of the lack of any proven danger being posed by single-family residential use to anyone or anything, and since the SMA does not delegate any power to the City to zone these homes nonconforming, the only governmental power left by which the City can deprive the shoreline homeowners the use of their homes is the power of eminent domain. The desire expressed by some City Council members to remove all existing homes from the shoreline and to create a huge public park with this land, may – by itself, not be irrational - this is a valid goal. It is only the *method* by which the City is attempting to achieve that goal that is unlawful. What the U.S. Supreme Court said about the California Coastal Commission’s attempt to take a public easement from the Nollans is just as applicable to the City and its shoreline homeowners :

The [Coastal] Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its ‘comprehensive program,’ if it wishes by using its power of eminent domain for this ‘public purpose,’ ... but if it wants an easement across the Nollans’ property, *it must pay for it.*

Nollan v. California Coastal Commission, 483 U.S. 825, 841 (1987), emphasis added.

6. How Would the Public Benefit From the City Taking the Owners' Right to Use or Rebuild Their Existing Home? By The Creation of Open Space.

The City would receive a definite benefit from eliminating private owners' use of shoreline property. With no one to protest public trespass, effective parks would be created, allowing free access to, and use of, private beaches. While the City would not hold official title to the properties, that is immaterial to the public who are able to use the land as if it were, in fact, public property.

With time, existing structures would most likely become neglected, given the lack of incentive to keep them maintained when they can't be used. And the City has prepared for this: "***Abandoned and/or neglected structures which cause adverse visual impacts... should be removed or restored to a useable condition.***" SMP 3.3.1.3.11, emphasis supplied. Please note that the City can order the removal of an abandoned structure even if it isn't 'neglected'; so, even if the house is properly maintained and looks good, the City has the power to have it removed if it causes "adverse visual impacts." *What is that but permission for a planner to order a house removed if he just doesn't like the style of the house – or the look of any house on the shoreline?*

Given the lack of incentive attending the lack of the right to use the house, it is far more likely that a 'homeowner' would demolish the structure – or permit its destruction by the City – than fix it up. Over time the clear result of these regulations is the creation of open space, all without paying a dime – or so the City must be hoping.

7. If Taking the Right to Use Property is for the Purpose of Restoring the Land, it Amounts to a Violation of the Equal Protection Clause, a Fifth Amendment Taking of Property, and a Violation of the DOE Guidelines, Which Prohibit Use of "Regulatory Measures" to Accomplish Restoration.

What is phased out by the City through its nonconforming use provisions is one of the three fundamental attributes of property ownership, as such is established by the U.S. Supreme Court – this regulation takes "the right to possess" one's land. Given the lack of any explanation as to precisely how the use – i.e., possession – of one's land can be re-established, the most likely inference from this restriction is that the taking is permanent.

If the SMP extinguishment of use is *not* punishment for personal conduct, as it is framed, but rather, the taking is for the purpose of restoring the land to its original "pre-European settlement" condition, under the U.S. Supreme Court case of *Armstrong*, this amounts to a violation of the Equal Protection Clause and a Fifth Amendment taking. *Armstrong* is most notably known for its holding that:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, next to last page of majority opinion, (1960).

In addition, the use of regulatory measures to achieve restoration is inconsistent with the DOE Guidelines, which preclude their use to achieve this goal. In its restoration provisions, the Guidelines recite how local governments shall accomplish this goal. The Guidelines mandate that *only 'no net loss' of ecological functions can be achieved through regulations.* WAC 173-26-186(8)(b)(i) and (ii). To achieve *restoration*, the Guidelines mandate that:

[m]aster program provisions shall identify existing policies and programs that contribute to planned restoration goals... These master program elements regarding restoration should ***make real and meaningful use of*** established or funded ***nonregulatory policies and programs that contribute to restoration of ecological functions...***

WAC 173-26-186(c), emphasis supplied. Thus, where the Bainbridge SMP uses its regulations – whether it be the nonconforming use regulations or its so-called ‘mitigation’ measures following construction – to the extent that these regulations are used to achieve *restoration*, they are in direct conflict with the DOE Guidelines and, thus, they violate the Equal Protection Clause and the Fifth Amendment of the U.S. Constitution.

Long ago, the U.S. Supreme Court uttered words still repeated today in decisions:

A strong public desire to improve the public condition [will not] warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922), emphasis added.

VI. BULKHEADS: SMP TAKING OF THE RIGHT TO PROTECT ONE’S PROPERTY. NO GOVERNMENT HAS THAT POWER; THIS IS A FIFTH AMENDMENT TAKING.

A. There is a Fundamental, Constitutional Right to Protect One’s Property.

The basis of all governmental power – whether it be federal, state or local - is the grant of “police power” to protect people’s health, safety and property. While the environment has been added within the last few decades for protection, it must be recognized that the environment is protected only to the extent that it is *beneficial* to people’s health and welfare. That is, the police power does not vest the government – any government – with the power to protect aspects of the environment that present a danger to man or his property without first protecting man and his property. This is why there are no ordinances forcing people to let bears and cougars live in their backyards. Only zoos and regulated wildlife sanctuaries, with well-designed protections for people first, are allowed to keep wild, dangerous animals. Similarly, from a legal standpoint, the forces of nature – waves, wind, erosion – can be allowed to rage, but only after a man and his property are protected from them.

Nothing in the police power allows a government – any government - to regulate in order to harm people or their property or to increase the risk to people from natural forces. This is why the SMA does not ban bulkheads or other protective armoring mechanisms: it legally cannot. And neither can the Bainbridge SMP. An individual has a fundamental and absolute, constitutional right to protect himself, his family and his property. This is why the Bainbridge bulkhead bans and repair restrictions are unlawful.

The U.S. Supreme Court long ago pronounced that it is “universally recognized” that the common law entitles shoreline homeowners “to construct works for their own protection.” *Cubbins v. Mississippi River Commission*, 241 U.S. 351, 363-364 (1916). That is, “[h]omeowners have the right to rebuild on their property and to erect structures to defend against erosion and storm damage...” *U.S. v. Milner*, 583 F. 3d 1174, 1189 (9th Circuit 2009)

There is a long line of “flooding cases” that deal extensively with the federal government’s liability for damage caused by something the government did, or didn’t do, that resulted in erosion and damage. In these cases there is actually little space devoted to the question of liability - it is treated

as a complete 'given;' the only real question in these cases relates to *when* the plaintiff should have filed his claim. *U.S. v. Lynah*, 188 U.S. 445 (1903); *U.S. v. Dickinson*, 331 U.S. 745 (1947); *Applegate v. U.S.*, 25 F. 3d 1579 (1974); *Hendler v. U.S.*, 952 1364 (Fed. Cir.1991); *Banks v. U.S.*, 314 F. 3d 1304 (2003); *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 446 F. 3d 1285 (2006). **Case law imposes government liability for what natural forces do whenever a government either (1) interferes with the natural forces, (2) doesn't stop them, or (3) keeps a private party from stopping them.**

Most recently, in a clash between environmental protection and the right of a property owner to protect his property, the Washington Supreme Court held that a man had the right to shoot endangered elk who were eating his apple crop when other measures failed. *State of Washington v. Vander Houwen*, 163 Wn. 2d 25,36 (2008). The Washington Supreme Court quoted the Wyoming Supreme Court case of *Cross v. State*, 370 P. 2d 371, 378 as follows:

We hardly think that a landowner should be compelled to waive his constitutional rights by filing a claim for damages, perhaps every month, every year, or at other intervals, and recover damages perhaps after protracted litigation.

Vander Houwen, 36, emphasis added.

The SMP also violates the State SMA takes what the Washington Supreme Court refers to as a landowner's ***constitutional right to protect his property***. It violates the SMA because it fails to "recognize[e] and protect[] private property rights." RCW 90.58.020 **The Bainbridge SMP is also in conflict with the DOE Guideline's conflict resolution priorities, which may put environmental first, but only as it is subject to private property rights.** The DOE conflict resolution provision reads as follows: "Local governments should ensure that these areas [for "protecting and restoring" the environment] are reserved *consistent with constitutional limits.*" WAC 123-76-201(d)(i), emphasis added.

There appears to be much controversy about whether bulkheads cause any significant damage to the environment. Virtually all the studies cited in support of damage are not actually studies involving *bulkheads* – they are studies involving *seawalls, which are constructed differently*. In the Puget Sound, where huge expanses of bulkheads have been in place for decades (for the Burlington Northern railroad and otherwise), we are in a living laboratory to see what effect bulkheads have, in fact, had on beaches. If the damage caused by a bulkhead was significant, beaches below bulkheads around the Puget Sound would be decimated. But they are not. And yet we still cannot conclude that they cause little damage? This would appear to be a stubborn refusal to set aside preconceived notions, even in the face of little to no evidence to support one's beliefs.

B. Loss of a Home is an "Unnecessary Hardship" When a Bulkhead Could Save It; SMA Requires Provisions to Prevent "Unnecessary Hardship," Specifically Including Bulkheads Against Erosion of Any Type. Bainbridge Bulkhead Bans Violate the SMA.

One of the biggest hardships a family can face is the loss of its home; think of the people on Whidbey Island whose shoreline homes so recently collapsed because of erosion. Within just a few hours – or even minutes – your home can be gone because of this silent killer. Silent because it works so slowly that you never even notice it –until the whole thing collapses. And you can't even know for certain how soon that is coming.

“Unnecessary hardship” is something the State Legislature has tried to guard against in drafting the SMA. Its provisions say that all SMPs *must have* provisions to make sure “that strict implementation of a program will not create unnecessary hardships...” RCW 90.58.100(5). Consistent with that principle is that “Each master program shall contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion.” RCW 90.58.100(6). The Bainbridge SMP has so many bans and conditions on bulkheads that it’s hard to understand when anyone can actually *have* one (see below). Through the SMP, the City is interfering with the homeowner’s right to protect what might be his most valuable possession, not merely from an emotional standpoint, but for most people, from a financial standpoint. ***Please notice that the SMA doesn’t have any bans or restrictions on bulkheads.***

When your home has collapsed into the ocean, it doesn’t matter to you what *type* of erosion caused it, or what kind of land it was on: you have just lost *everything* because the City wouldn’t let you have a bulkhead. *The term “feeder bluff” shouldn’t mean that you and your house must be part of what ‘feeds’ the beach.* If nothing else, think of the damage that will do to the beach and all the marine creatures – they would all be wiped out. Seriously, protecting human life and property come first; it does for the State legislature, as expressed in the SMA and so it should be for the City of Bainbridge Island. The SMA gives a mandate: people have the right to avoid the unnecessary hardship of losing their home; a family has the right to a bulkhead. And that’s just what the Washington Supreme Court said in the case against our City, *Biggers v. City of Bainbridge Island*.

While installation of bulkheads for every property on the shoreline clearly isn’t necessary, when you don’t allow a bulkhead until ‘enough dirt has been lost,’ you are playing “chicken” with people’s lives. This is undoubtedly why the SMA doesn’t even require a substantial development permit for the “[c]onstruction of the normal protective bulkheads common to single-family residences” – or for “[e]mergency construction necessary to protect property from damage by the elements.” RCW 90.58.030(3)(e)(ii) and (iii). These SMA mandates are consistent with the property owner’s “*constitutional right*” – which is what the Washington Supreme Court calls it – to protect his property with a bulkhead.

C. An Effective Ban on Bulkheads Has Already Evoked the Supreme Court’s Anger; Why Would the City – or the State – Want the Expense and Hassle of Defending Yet Another *Biggers* Case?

The Washington Supreme Court case involving our City just six years ago should have been foremost on the minds of the City drafters during their drafting of the SMP. If ever there was a ringing endorsement of an owner’s right to protect his home by erecting a bulkhead, the *Biggers* case was it. A rolling series of moratoria on development covering just three years evoked perhaps the most stinging criticisms of the City that the Supreme Court could ever make – all because the City prevented shoreline homeowners from getting *bulkheads*.

Unlike the City SMP, neither the SMA nor the Washington Supreme Court prohibits an owner from building a bulkhead to protect his property. Rather, both strongly endorse the owner’s right to protect his property. And they do not condition the right to a bulkhead on the location of the property or the type of erosion threatening the home. The Supreme Court does not allow for any weasel words or fancy footwork when it comes to an owner’s constitutional right to protect his property.

The *Biggers* case began with an examination of the authority of a local government, such as the City, to enact shoreline use regulations. The Supreme Court held that: “Local governments do *not* possess

any inherent police power over state shoreline use.” *Biggers*, para. 23. It also found that “...the provisions of the SMA...delegate only specified powers to local governments. See RCW 90.58.010 through .920.” *Biggers*, para. 30, emphasis added. The Supreme Court refused to give local governments any additional authority:

“Courts will not expand the powers of local government beyond express delegations. See *City of Spokane v. J.R. Distribs., Inc.*, 90 Wn 2d 722, 726, 585 P. 2d 784 (1978), see *Lauterbach v. City of Centralia*, 49 Wn. 2d 550,554, 304 P. 2d 656 (1956).

Biggers, para. 22. The Court referred to the State’s exclusive jurisdiction over shorelines, which is set forth in the Washington State Constitution:

Article XVII, section 1 of the Washington Constitution asserts that powers of the state, in this context, are controlling over any powers of local government. Therefore, the police power question presented in this case involves a simple, bright-line matter of jurisdiction. Under article XVII, section 1, the state has the power to regulate shorelines.

Biggers, para. 24. Further, in case there was any misunderstanding, the Court held that:

Under the Washington Constitution, local governments have no broad police power over shorelines. Neither the history of article XVII, section 1, nor its interpretation by the courts of this state suggests it allows local governments permit authority over shoreline development in violation of state law or policies, much less power to declare moratoria on shoreline development.

Biggers, para. 25, emphasis added.

In addition to lacking jurisdiction over shoreline land use because the State has *exclusive* jurisdiction over it, the Supreme Court City pointed out the part of the Washington State Constitution that invalidates local regulations that are in conflict with State law - article XVII, section 11:

“Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations **as are not in conflict with general laws.**” (Emphasis added); see also, e.g., *HSJ Dev., Inc. v. Pierce County*, 148 Wn. 2d 451, 482, 61 P. 3d 1141 (2003) (“Local jurisdictions may enact ordinances upon subjects already covered by state legislation if their enactment does not conflict with state legislation.” (citing *Lenci v. City of Seattle*, 63 Wn. 2d 664, 670, 388 P. 2d 926 (1964)).

Biggers, para. 21.

D. The Washington Supreme Court Says Even *Effective* Bans on Bulkheads Are in Conflict with the SMA.

The *Biggers* case involved moratoriums that Bainbridge was putting on bulkhead construction – resulting, effectively, in a ban on all bulkheads. The Washington Supreme Court found that:

As part of our careful management of shorelines, property owners are.. allowed to construct water-dependent facilities such as single-family residences, *bulkheads*,

and docks. **Imposition of a total moratorium conflicts with the regulatory scheme established by the SMA.**

Biggers, at para. 31, emphasis added.

Since the Supreme Court says that an effective ban on bulkheads conflicts with the SMA, an outright ban on bulkheads also conflicts with the SMA. And so do the Bainbridge restrictions on repair that serve to facilitate the destruction of a bulkhead.

The Supreme Court noted that:

The SMA contains an express “preference” for issuing such [bulkhead] permits. RCW 90.58.100(6). Thus, the SMA also requires that all SMPs contain methods to achieve “**effective and timely**” protection for shoreline landowners.”

Biggers, at para. 33, emphasis added. While the SMA was enacted quite some time ago, the Supreme Court noted that even more recently the State legislature found that bulkheads were needed:

The SMA also recognized that there is an important function performed by structures that protect shorelines. **The legislature’s 1992 amendments to the SMA further emphasized this need for certain shoreline structures to provide for the protection of the shorelines.** This conclusion is illustrated by the SMA’s provisions requiring prompt adoption of SMPs and shoreline structure permit processing.

Biggers, at para. 32. **So, just six years ago, in the case against Bainbridge Island, the Supreme Court held, based on the SMA, that a provision allowing bulkheads was a “mandatory provision” for an SMP:**

This is a mandatory provision included in each city-adopted SMP before the Department of Ecology approves: “[e]ach master program *shall* contain standards governing the protection of single-family residences and appurtenant structures against damage or loss due to shoreline erosion.” RCW 90.58.100(6)

Biggers, at para. 34. As the Supreme Court said:

In direct conflict with this constitutional principle, **the City’s moratoria** on processing applications **prohibits what state law permits.** See *HJS Dev.*, 148 Wn.2d at 482; *Rabon v. City of Seattle*, 135 Wn. 2d 278, 292 (1998).

Biggers, at para. 37. The Supreme Court rejected all notions that the City of Bainbridge Island had *any authority* to pass regulations that served to prohibit bulkheads and declared the actions by the City in the form of rolling moratoria to prevent bulkhead construction to be “**ultra vires and in conflict with the SMA’s regulatory framework.**” *Biggers*, at para. 38. And, as one final parting blow, the Supreme Court concluded that “Here, the City’s imposition of moratoria [because they served to prohibit bulkheads] was **unconstitutional and unlawful.**” *Biggers*, at para. 47.

Lest there be any doubt remaining in anyone’s mind about the Supreme Court’s opinion of this City’s actions, the *Biggers* concurring opinion by three justices characterized this as “**the city’s failure to meaningfully govern while depriving people of their ability to use or plan for the use of their property [which] was unreasonable and exceeded any constitutional authority it may have had.**” *Biggers*, at para. 50, emphasis added.

The only question remaining in anyone's mind after reading *Biggers* should be: Why does the City of Bainbridge Island think it can get away with banning bulkheads and implementing other measures designed to get rid of existing bulkheads?

E. The City Bans Bulkheads and Imposes "Unconstitutional Conditions" That Also Serve to Ban Them.

In lip service to the requirement that homeowners be allowed to protect their property, the Bainbridge SMP has a general policy statement that seems to allow bulkheads. SMP 6.1.3.1. *However...* thereafter the SMP has exhaustive lists of when and where you *cannot* have bulkheads. Once again, the governing rule of interpretation gets called into play: "Where provisions of this Master Program conflict, the more restrictive provisions shall apply unless specifically stated otherwise." SMP 4.6 Therefore, with **the bans and repair limitations being more "restrictive" than the provision that allows bulkheads, the bans and limitations prevail. This is in conflict with the SMA, which mandates that municipalities allow bulkheads, without any conditions..**

As a prerequisite to receiving a building permit, the City requires that a homeowner sign and record a title restriction that prevents the property from having a bulkhead for "the life of the development or 100 years, whichever is greater." SMP 6.1.5.4. Land cannot be subdivided unless the owner first signs a title restriction to prevent the construction of a bulkhead for the next 100 years. SMP 6.2.9.1 Similarly, the SMP prohibits any house being repaired or rebuilt after a casualty from ever having a bulkhead, which means, in accordance with City practice, that you cannot get permission to rebuild your house unless you sign and record a title restriction preventing you from having a bulkhead "for the life of the development." SMP 4.2.1.6.1.3(b).

Each of these SMP requirements of a title restriction banning a bulkhead in exchange for a building permit constitute "unconstitutional conditions" according to the Supreme Court in its latest land use case of *Koontz*:

A predicate for any unconstitutional conditions claim is that **the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.** See *Rumsfeld*, 547 U.S. at 59-60. For that reason, **we began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a per se taking.** See *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831.

Koontz v. St. John's River Water Management Dist., No. 11-1447, at p. 15 (June 25, 2013) **As you can see, while this might be a new case, the U.S. Supreme Court points out that the underlying principle can be found in the more famous *Nollan* and *Dolan* cases.**

The reason for calling a condition "unconstitutional" is that the government is forcing the individual to give up a constitutional right in order to get a governmental permit. In *Nollan* and *Dolan*, the right exacted by the government was the right to just compensation for the public access easement. Here, in each of these bulkhead situations, the City requires that an owner give up his *constitutional right to protect his property* in exchange for some City permit. These are precisely the type of "unconstitutional conditions" the U.S. Supreme Court outlaws in *Koontz*.

The City bans bulkheads against erosion, no matter how severe, that is "unrelated to water action." SMP 6.2.8.1.1(b). There is a complete ban on bulkheads in wetlands located in the shoreline jurisdiction, geologically hazardous areas and in any 'salmon spawning areas.' SMP 6.1.4.1 The problem with this last restriction is that the City acts as if there are salmon spawning areas *all*

around the Island. At least, this is the basis on which it imposes that tall trees and vegetation canopies shall be planted everywhere on the shoreline, up close to the water.

So, with all *new* bulkheads for new development banned, the City is left with banning replacement bulkheads for existing homes – where the house has an existing bulkhead but it needs to be replaced. The SMP’s absolute bans listed above apply equally to both new and replacement, so there really is no difference between the situation of new development and that of existing development, despite SMP’s references to being able to have a bulkhead to protect an existing primary structure.

While the City seems to say that you can get a bulkhead to protect an existing home on a feeder bluff (SMP 6.1.4.3)– which constitute most of the Island’s shoreline property - elsewhere the SMP provides that: “Shoreline stabilization should not be constructed waterward of feeder bluffs.” SMP 6.2.3.9 Since the latter provision is the more restrictive, under SMP 4.6, it prevails. As for getting a bulkhead in marshes, wetlands and “accretion shore forms such as spits, bars, or barrier beaches.” the SMP prohibits bulkheads for these “sensitive” shores. SMP 6.2.4.4 Elsewhere, **the City can actually require you to relocate your house rather than protect them with a bulkhead.** SMP 6.2.8.1(c) As mentioned elsewhere, the State mandates hardship relief provisions; Bainbridge doesn’t have any. **So, once again, the SMP is at odds with the SMA and the DOE Guidelines.**

F. SMP Limitations on Bulkhead Repairs Are Designed to Facilitate their Destruction by Natural Forces: This is a Violation of *Biggers*.

In addition to preventing new bulkheads, Bainbridge is trying to get rid of all *existing bulkheads – and perhaps this way, existing homes*. The City makes it clear that it doesn’t *want you to repair your bulkhead*; its stated preference is to require that you remove your bulkhead completely. The SMP provides as follows:

Where feasible, any, *failing*, harmful, unnecessary, or ineffective structures should be **removed** and shoreline ecological functions and processes should be restored consistent with the priorities of an ecosystem-wide restoration plan, and replaced using shoreline stabilization measures that result in less impact to shoreline ecological functions and processes.

SMP 6.2.3.11, emphasis added. Please remember that the SMP’s word “should” actually means “shall” unless completely infeasible. Prior to this last draft the SMP had *allowed failing bulkheads to be repaired*; now they must be *removed and replaced with soft shoreline stabilization measures*. (Or, as noted above, the City might require that you *relocate your house* rather than put in a replacement bulkhead.)

However, even if you are allowed to repair your bulkhead, **the SMP only lets you repair 50% every 5 years:**

Damaged structural stabilization may be repaired up to fifty percent (50%) of the linear length within a Five (f) year period. Repair area that exceeds fifty percent (50%) shall be considered a replacement...

SMP 6.2.6.2(b)

The problem is – bulkheads don’t just fail 50% every 5 years; they fail all at once. And then the house goes... **By not allowing you to repair the entire bulkhead, the City is aiding and**

abetting the forces of nature in destroying your bulkhead, and playing “chicken” with human lives.

Why? There is no obvious rational, let alone scientific, basis for these limitations. There is no logical reason that is not in conflict with the SMA’s mandate to allow, even expedite, the construction of bulkheads. The *only logical* reason for these repair limitations is to help Mother Nature destroy bulkheads – and, after that, homes in order to create ‘open space.’ *This is where the City – and the State – can be held liable: not just for a Fifth Amendment ‘taking,’ but also for personal injuries and death. The common law makes governments liable for such damages whenever a government does something that facilitates damage by natural forces.*

G. When Government Facilitates the Destruction of Private Property, it is Liable for the Consequences – So Says the U.S. Supreme Court.

Where something a government does, or doesn’t, do serves to cause or result in the destruction of private property by nature, the property taken is held to be a Fifth Amendment ‘taking’ for which just compensation must be paid. *U.S. v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947). That the City would be liable for all the consequences of prohibiting bulkheads and restricting repair of bulkheads – whether it be to property or person - is clearly established by this line of federal cases, discussed above in detail. As for, specifically, erosion damage – the Federal Circuit Court of Appeals in *Applegate* held that there was a Fifth Amendment taking where government action facilitated the “*gradual character of the natural erosion process to the beach-front properties.*” *Applegate v. United States*, 25 F. 3d 1579, 1582 (Fed. Cir. 1994), emphasis added.

In addition to those cases, where the U.S. Army Corps of Engineers built dams and locks to control a river, and it refused to allow the nearby fish and game preserve to draw down the level of a related lake, the federal government was held liable for the resulting overgrowth of an invasive aquatic weed that killed off other vegetation in the lake and eliminated all use of the lake for recreational purposes. There was little argument about the government’s actual liability in this situation; the bulk of the case relates to the appropriate *timing* for submitting the Fifth Amendment taking claim. *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 446 F. 3d 1285 (Fed. Cir. 2006).

While one may dismiss the hearsay anecdote about various City Council members wanting to get rid of all existing homes on the shoreline and stop any new homes from being built in order to create a public park, the SMP’s new bulkhead regulations will go a long way to accomplishing that. But banning bulkheads and limiting their repair is scarcely an appropriate way to do it. The City may envision getting the land use for ‘free,’ when in fact, its prohibitions may result in a considerable cost.

Imagine the following situation: the City refuses to let a family have a bulkhead, the feeder bluff suddenly breaks off in a huge chunk – as it recently did on Whidbey Island - some family members are killed, and the house is destroyed. Imagine that the DOE had approved a Whidbey SMP that contained these bulkhead prohibitions. A plaintiff’s attorney would most likely sue both the City and the State for wrongful death, as well as for the value of the lost home. The argument is clear-cut: the City and DOE displayed a callous indifference to the safety of people and their homes, as well as a wanton disregard for State law – either the SMA or the *Biggers* case. Nothing in life is certain, but I wouldn’t bet against liability being imposed in a rather large amount...

H. Regulations That Ban – Outright or Implicitly - Bulkheads and That Limit the Repair of Bulkheads Can Result in Significant Financial Damage Even Without a Casualty.

It doesn't matter to an insurance company what kind of erosion is going to cause your house to fall into the ocean –with or without the family. All the insurance company cares about is that your house needs a bulkhead and you can't get one - end of insurance, period. Your home could become uninsurable when you can't protect it from a foreseeable danger – or, at least, your premiums would soar.

For a home that could be rebuilt after a casualty, the denial of a bulkhead “for the life of the [new] structure” may amount to the taking of all viable use of the property. If the existing structure sits on a small lot – as many do on Bainbridge, the existing house location may be its only *possible* location. If that is so, and a house can only be safely built there if it has a bulkhead, then the denial of a bulkhead permit is a taking of the “only viable use” of the land. As such, two U.S. Supreme Court cases - *Lucas* and the *Penn Central* – and their progeny, mandate that the City must pay just compensation under the Fifth Amendment. The *Lucas* case stands for the proposition that the government does not have the right to deny a homeowner the absolute right to build on his land without exercising its power of eminent domain and paying just compensation (unless there were title limitations or conditions sufficient at the time of his purchase to ban construction on nuisance or similar grounds). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas* it was overly generous buffers that precluded Mr. Lucas' construction of houses. Here, the ban on a bulkhead can make rebuilding completely pointless; the government action takes the homeowner's constitutional right to protect his home and serves to preclude any rebuilding – this is a Fifth Amendment taking of the homeowner's property. The only powers conferred upon a local government are the powers to promote people's health, safety and property, not to promote the destruction of private property.

The U.S. Supreme Court in *Nollan* held that where new construction is involved, heightened scrutiny is required of government action, to ensure that the regulatory goal is not to take private property without the payment of just compensation.

The City-imposed prohibition of a bulkhead could take a heavy toll on the market value of a property and even on its salability. How many people will want to buy a house in a location that needs protection when they find out that they are not allowed to put in this protection? Certainly, under conservative banking principles, there is no bank that will provide financing in this situation. This places the regulation squarely within the Supreme Court's decisions in *Penn Central* and *Lingle*:

Primary among the factors to be considered in the evaluation of takings, the Supreme Court held, are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation **has interfered with distinct investment-backed expectations.**” *Ibid.* The *Penn Central* factors... have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-618 (2001)...

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), referring to *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), emphasis added.

Echoing the Supreme Court in *Lucas*, the DOE Guidelines specify that, when considered together, use policies and regulations, along with zoning and other regulations, “shall not conflict in a manner that all viable uses of the property are precluded.” WAC 173-26-211(3)(a)

If the City denies your bulkhead application, regardless of the immediacy of the predictable property destruction, that denial can amount to a complete taking of all viable use of your property.

If the lot is too small to permit relocation of the existing house to, or construction of a new house in, a safer place, or if, for financial reasons, the homeowner cannot qualify for a new construction loan, the lack of a bulkhead may mean that the house is destined for destruction in only a matter of time. *Without a bulkhead, at some point the homeowners may have to make the dangerous decisions as to whether they want to stay in their home – perhaps for a lack of money to go elsewhere – and/or when to abandon their home because the danger becomes too great.*

I. The Bottom Line: Environmental Preservation Does Not Justify Destroying People's Homes and Risking Their Lives.

To the City, protection of the environment clearly comes before protection of human life and property. This is a world view that – fortunately – is not shared by many people, and, most particularly, not by Supreme Court. Facilitating the destruction of a home by nature does not serve any SMA purpose. Destruction of a home is not justified by preventing environmental damage and it is not justified by a desire to restore the land to its original, natural state. People's lives and property are a higher priority under the U.S. Constitution than preservation of the environment.

VII. THE SMP BANS PRIVATE DOCKS, PIERS, AND FLOATS FOR AT LEAST 75% OF HOMEOWNERS.

A. Lack of *Real Science* to Support Bans and Limitations on Docks, Piers, and Floats That Will Affect Most of the Island's Boaters.

The bottom line from all the SMP regulations regarding overwater structures is that the City is taking away the right to have a dock, pier or float from most Bainbridge shoreline homeowners. So, the constitutional question is: Why? For a law to be constitutional, it must have a rational basis. And that means scientific support.

The ostensible reason given for taking away the private property right to engage in water-dependent is shade – too much of it, or the *wrong kind* of it. Supposedly, for young salmon and other kinds of fish to develop, they need shade, just not too much of it and just the *right kind of shade*. Here is where we start to get into the irrationality: the SMP requires that tall trees and vegetation canopies must be planted all around the Island, up close to the shoreline to provide shade for fish. But then they ban docks, piers and floats because they provide *too much* shade. What's the supposed difference? *The type of shade*. The City claims that: "*Manmade shade* creates artificial pockets of opportunity for the predators of young fish and unlike the shade from *overhanging* vegetation (which is encouraged by... [the] Army Corps of Engineers...), the negative impacts outweigh the benefits." SMP 6.3.7.3, emphasis added.

So, let's talk about shade. It is the product of an object passing between the sun and, in this case, the water. "Manmade shade" is no different from any other kind of shade. **In truth, there is no such thing as "manmade shade" - shade is always produced by natural forces.** You will get some areas of shade from thick overgrowth in trees that are just as dark as any shade from docks, piers or floats. The City says that the Army Corps of Engineers thinks tree shade is beneficial for young fish, and it may well be. But the City *didn't say* that the Army Corps of Engineers *didn't* like shade from overwater structures – they might have liked it, too. Besides, trees are made of wood. Docks and piers and floats are all made of wood, too. Why would there be any difference in the type of shade they make?

Further, we have tides that take fish out away from any dock, pier, float - or even tree shade - for major portions of each day. And, even if there are docks, piers, floats and trees close to the shore, in certain sunlight exposures, young fish just aren't going to have any shade from these things at any

time of the day. And, fish do not spawn or develop everywhere around the Island; they only do this in certain places that have yet to be identified by the City or any of its experts. **So, a near Island-wide ban on docks, piers and floats is simply not justified by this junk science.**

Let's talk about another SMP irrationality: *if the City really believes that small, single-use docks, piers and floats do so much damage to fish development, why is the City pushing to establish public docks all around the Island?* In the same areas it bans small, single-use docks, it not only permits public docks, but throughout the SMP the City seeks to *promote* them! Public overwater structures are a lot larger and can do a much greater degree of damage, to the extent that one believes the City's theories – so why is the City itself adding to the environmental problem?

B. SMP Taking of the Right to Use Your Property for Water-Dependent Uses is Either a 'Taking' or It is Completely Invalid – Depending on Which Supreme Court You're In.

Without any real, scientific proof that docks, piers and floats do any significant damage to the environment, the SMP regulations banning them and/or converting them to a conditional use are unlawful exactions. *Nollan* and *Dolan* don't just apply to property easements; they apply to any governmental land use exaction, which includes taking any of your *rights to use your property*. Having and using a dock, pier or float are all *rights to use your property*. So there must be a *nexus* between some actual, provable, real environmental damage and these overwater structures, and there must be a *rough proportionality* between the amount of the exaction and the damage claimed to be threatened.

Here, we have no proof of significant damage or even proof of a real, actual threat of damage to the environment, so taking of a private property right to use these docks, piers and structures is grossly disproportionate. Without any rational basis, the bans and conversions to conditional use amount to *arbitrary and capricious regulations*, that (a) according to the Washington Supreme Court constitute a "violation of substantive due process" and therefore constitute a taking under the Washington Constitution, or (b) according to the U.S. Supreme Court in *Lingle*, simply end the Fifth Amendment analysis because these are invalid takings. Either way, the City's regulations taking away the right, and ability, of a single-family homeowner to use his property for water-dependent uses are unsustainable.

C. SMP Bans on New and Existing Private Docks and Piers.

1. SMP Explicit Bans and Conditional Use Permit Requirements

The SMP completely bans all docks and piers in the Priority Aquatic designation and adjacent to the Natural designation. Mooring buoys and floats are also prohibited offshore from the Natural designation. SMP 6.3.4.1 **Docks and piers are only allowed in the very largest single-family designation – Residential Conservancy – as a conditional use.** SMP 6.3.5.1 Docks and piers are also only allowed in the Island Conservancy designation as a *conditional use*. SMP 6.3.5.1. Since "conditional use" means as an exception to a general rule, *most people will not be able to get – or keep – docks*. Since Residential Conservancy covers roughly $\frac{3}{4}$ of the Island's circumference, this means that *most* homeowners are having their docks and piers taken away by the SMP.

These bans are not specifically limited to new docks, piers, and floats; so, one must conclude that existing docks, piers and floats are also banned or made a conditional use.

The bottom line: 75% or more of shoreline homeowners are either prohibited from having a dock or pier, or they must hope they can get a conditional use permit for one. The SMP bans

and restrictions are inconsistent with the DOE Guidelines, which do not place any bans on them – even in critical areas. WAC 173-26-221(2)(c)(ii)(C)

The Bainbridge SMP lists as its goal with respect to “overwater structures” to “limit the *number* and size of piers, docks, and floats...” SMP 6.3.2, emphasis supplied. By the regulations that follow, one can see that the SMP means to *increase* the number of *public* docks and piers, while at the same time reducing the number of *private* facilities. The SMP allows multiple use docks and piers in designations where it bans private docks. The SMP provision states that “Joint use facilities are preferred over new, single use piers, docks and floats.” SMP 6.3.3.1

2. And an Effective Ban on Docks and Piers Anywhere a Planner Wants.

The SMP bans all docks and piers – without distinguishing between new and existing – in those areas that it describes as “where critical physical limitations exist, such as shallow, sloping bottoms; areas of frequent high wind, wave, or current exposure as depicted by charts, isometric maps, or other technical sources; or areas with high levels of accretion, or geological hazardous areas... and/or feeder bluffs...” SMP 6.3.4.2 The problem with this ban is that a single individual – a planner – has the sole, unfettered discretion to determine where these conditions exist – and these descriptions could be applied virtually *anywhere on the Island...* Just *think* of the opportunities for extortion and bribery!

In similar fashion, the planner has the discretion to determine whether a “*critical*” (how does one decide that?) saltwater habitat is under a dock or pier, so that he can ban docks and piers – both new and existing. SMP 4.1.5.5.1. As noted elsewhere, the “entirety of Bainbridge Island” is designated the recharge area for the island’s aquifers. And what constitutes a “wildlife habitat” can be something anywhere. So, the planner can, in fact, ban docks, piers and floats anywhere and *everywhere*. (Appendix B-7)

The Bainbridge SMP took the DOE Guidelines line that allows private docks in critical areas, but deleted the equitable relief portion. So, paying lip service to allowing overwater structures, the City is letting enormous expense do its work. *Compare* WAC 173-26-221(2)(c)(ii)(C) and SMP 4.1.5.5.1.. The SMP used the DOE section – but only after dropping the equitable relief qualifier “based on an unreasonable and disproportionate cost.” In other words, if you can’t afford what is an unreasonable and disproportionate cost to locate the dock somewhere other than where it is cheapest and most logical, then you can’t have a dock. This is scarcely consistent with the intent of the DOE Guidelines, or with the mandate the SMA gives that each local government should put equitable relief provisions into its SMP. **The Bainbridge SMP not only *didn’t* put in any equitable relief, it actually *removed* the equitable relief the SMA had put into this section. In doing so, the SMP has breached a major tenet of the SMA.** The DOE Guidelines specify that:

Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for conditional use and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020.

WAC 173-26-191(2)(a)(iii)(B), emphasis supplied. **Perhaps the most important SMA policy is to “recogniz[e] and protect[] private property rights consistent with the public interest.” RCW 90.58.020 The SMP is thwarting this State policy when it regulates docks in such a merciless manner.**

3. The SMP Makes All Existing Overwater Structures “Nonconforming” and Will Only Let an Owner Make Them Conforming on a Limited, Conditional Use Basis – Due Process Violation.

Once again, while the SMP pays lip service to the concept that it is not applicable to “existing uses and structures,” as required by the DOE Guidelines WAC 173-26-221(5)(a), in an entirely different section from that which relates to overwater structures – the SMP makes all existing overwater structures *nonconforming* (Section 4.2, Nonconforming Uses...), meaning that the City intends to get rid of them. As existing structures, they fall within the new definition of “existing development” – the one staff added without public notice, hearing or City Council approval after passage of the SMP.

The SMP mandates that all “[e]xisting docks, floats and buoys...shall comply with this Program’s requirements...” SMP 4. 2.1.8.1. If they are existing or they don’t comply – either way, they are ‘nonconforming.’ ***Even if owners are willing to make them conforming, this may not be possible. For, how they achieve compliance is completely in the hands of the planner - only “as an administrative conditional use, [can] an existing dock be modified, reoriented or altered within the same general location to be more consistent with the provisions of this Program.”*** SMP 4.2.1.8.1(a). Since, by definition, a conditional use is an exception to a general rule, *the general rule is that docks cannot be modified to comply with the SMP.* It is a violation of due process to (a) prohibit a use on a retroactive basis such as that set forth in *Lucas*; and, even more egregiously, (b) ***to prevent an owner from taking measures to make a nonconforming structure comply.*** As for a pier, well it appears that there isn’t even any pretense that a homeowner can have a pier, since these don’t appear in the nonconforming use language set forth above.

Oh, and yes, immediately before making compliance modification only a matter of administrative discretion, the City paid lip service to the notion that “[e]xisting docks, floats and buoys may be repaired and replaced...” But after that you do learn that only *conforming docks* can be repaired or replaced. However, since all new and existing docks, floats and buoys are either banned or available only as a conditional use in most places, it is *illusory* to represent that “existing docks, floats and buoys may be repaired and replaced.” As of the date of this analysis, the only “conforming” docks might be those that were built after May 15, 2013 when the SMP was passed. As such, there are probably only a handful of people who may be allowed to make their docks conform, but they don’t need to because their docks are *deemed to conform* by virtue of the fact that they were built after May 15. In any event, the bottom line is that most existing floats are banned or they cannot be made to conform. Because of SMP 4.6 the more restrictive provision applies to this confusing topic and the right to have a dock, float or buoy is taken from the shoreline homeowner.

4. So What’s a Person to Do? Not Use his Dock, Pier or Float? Demolish it? Then What Does He do With His Boat? Why Punish Boaters?

There’s a reason for the old joke about the two happiest days of a boater’s life – the day he buys the boat and the day he sells it. They’re expensive – to maintain and to moor. Not everybody who has a boat is rich – take my brother, who loves his boat but has been trying to sell it for the past six or seven years. The only reason there are so many spots available right now in the marinas around Bainbridge is the economy. Just to tie up costs \$8 to \$10 per foot of length – without even paying for utilities you need such as water to wash down the boat to prevent the salt water and air from damaging it. A 30 ft. boat is a pretty common boat, so that would be \$240 to 300 a month just to tie it up at a public dock. And then there are the harbor fees..

If you can’t keep your boat at home, you have just a few options. If you can afford it, and a slip is available for your size of boat, you’re fine. But if you can’t afford a public slip, or if there isn’t one

the right size for your boat, you keep on looking for slips much farther away, you sell your boat (Good luck, in this economy!), or you pull it out of the water and park it somewhere on your lot or on the edge of the road. Why do you have to go through this?

D. Just Like Bulkheads – Repair is Limited to Only 50% Every 5 Years. This is a Great Way to Destroy Things – This is Applicable to Piers, Boat Houses, Marine Railroads and Who Knows What Else...

Being allowed to repair an existing overwater structure appears is restricted to those few who are lucky enough to get a *conditional use permit to repair it* under SMP 4.2.1.8.1. Then, even if you get the conditional use permission to repair it you realize that this is a 'bait and switch' operation – you can repair, but only 50% every 5 years. The practical result of this limitation is destruction of private property by natural forces, from which the government will not allow you to protect your property. Sounds familiar, doesn't it – just like bulkheads: 'let the elements do the work...'

Except for docks and floats, repair and replacement *up to 50%* of the footprint of any existing aquatic structures, including shoreline modifications, or buildings or portions thereof within the Aquatic or Priority Aquatic designations, shall only be *done once within any five year period...* If the structure is composed of several components, then the 50% shall be calculated independently for each component.

SMP 5.2.1.8.2, emphasis added. The section is titled "Existing Residential and Commercial: Aquatic Structures and *Accessory Aquatic Structures.*" (emphasis added) Since docks and floats are excluded from this repair limitation, the section must mean piers – yes? (I love the SMP – it provides all these *fun guessing games!*) And then, what is an "*accessory aquatic structure?*" Maybe a boat house? A marine railroad? Accessory structure implies than it can be on land, or even just partly on land. The only way for people in certain areas to be able to boat at all, due to the narrowness of the water area, is the marine railroad. Made of wood, these things don't deteriorate 50% every 5 years, so this regulation is a death sentence for them. And, despite elsewhere implying that boathouses can remain close to the water, this section is saying that you can only repair 50% of them over 5 years – in other words, this section they are also destined for extinction. And, because of SMP 4.6 the more restrictive provision applies – good-bye, piers, boathouses and marine railways – and maybe even more things I haven't even thought of...

E. Retroactive Application of the SMP to Existing Structures – Docks, Piers and Floats – and an Existing Use – Boating.

As constantly discussed throughout this analysis, the DOE Guidelines provide that "...master program provisions...do not apply retroactively to existing uses and structures." WAC 173-26-221(5)(a). The U.S. Supreme Court case of *Eastern Enterprises* held that, while it did not question the Congress' power to address a particular problem, where "the solution it crafted improperly places a severe, disproportionate, and extremely retroactive burden on ...[a party]," the Court "conclude[d] that the...allocation of liability... violate[d] the Takings Clause..." *Eastern Enterprises*, at p. 538.

Boating is clearly an "existing use" and an existing dock or pier is clearly an "existing structure." The DOE Guidelines provide that SMP master plan provisions "*do not apply retroactively to existing uses and structures.*" WAC 173-26-221(5)(a), emphasis added. **By banning and radically reducing the permissible number of docks and piers, the City is applying the SMP retroactively to an existing use and existing structures: this is in conflict with the SMA and the DOE Guidelines.**

The SMA carefully limits its legislative ambit to *new construction*; as such, it cannot be viewed as conferring any authority on the City to ban or restrict “existing uses and structures.”

F. Fifth Amendment Taking Where Bans Interfere With “Investment-Backed Expectations” and Where Bans on Nuisance Grounds Were Not Possible at the Time of Purchase.

Other reasons the SMP taking of the right to have overwater structures amounts to a Fifth Amendment taking lie in the U.S. Supreme Court decisions of *Penn Central* and *Lucas*. ***Where a regulation seriously “interferes” with an “investment-backed expectation,” it can constitute a Fifth Amendment taking (Penn Central).*** Having one of these overwater structures is a valuable “residential amenity,” to use the DOE’s own words. It may be difficult for *me* to quantify the fair market value of that amenity, but I’m sure that it can be done at trial. In not just the *Penn Central* case, but also in the *Lucas* case, the U.S. Supreme Court spent a lot of time evaluating whether a landowner is entitled to rely upon his expectation that he would be able to build on, and thereby make money from, his land. The Court concluded that Mr. Lucas *was so entitled*, where he had purchased the land *prior to an effective ban* on construction and his expectations were not unreasonable, given the “background principles.” And so it is with the current case – all current shoreline homeowners purchased land with the expectation that they could have overwater structures and/or continue to use the existing ones. As stated in *Lucas*, it would be an inequitable for the law to provide that one cannot rely on any continuation of the right to use one’s land as it could be used at the time of purchase. As for what they call “confiscatory regulations,” the Court concluded that:

Any limitation so severe [that bans use of property] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners...under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, at para. 24, emphasis added.

Where the municipality had effectively banned new development on Mr. Lucas’ property *after* his purchase, and there would have been no basis under nuisance law to do so at the time of his purchase, the Supreme Court found a Fifth Amendment taking. It also described the situation – which is the same as in our case – as one where the evaluation needs to involve whether a regulation is passed to proscribe some harm or whether it is actually a regulation that seeks to confer a public benefit. Referring to the heightened scrutiny required because of municipalities’ propensity to impose unrelated or excessive exactions on property owners, the Court opined that:

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, at para. 14.

G. Bans and Elimination of Overwater Structures Violate SMA Mandate to ‘recognize and protect private property rights’ and DOE Guidelines’ Utilization” Principle.

The DOE Guidelines characterize the SMA goals as follows: “the policy goals of the act relate both to **utilization and protection** of the... shoreline...” WAC 173-26-176(2). **Please note that, for the State, “utilization” is not limited to public, rather than private, utilization.** The Guidelines provide that: “**New piers and docks shall be allowed... for water-dependent uses. As used herein, a dock associated with a single-family residence is considered a water-dependent use.**” WAC 173-26-231(3)(iii)(b). Please notice that the DOE Guidelines use the mandatory word “shall”: “new piers and docks *shall be allowed...*” and that it specifically includes single-family residential water use in the category of people for whom these docks and piers “shall be allowed.” ***There is no wiggle room in this mandatory “shall,” no confusion about single-family residential use having the right to docks and piers, and absolutely no permission or authority being given to the City of Bainbridge Island to ban or restrict private docks and piers.***

The SMP is inconsistent with these Guidelines’ principles in a number of instances, including the fact that it has removed single-family use of the water from sections that allow “water-dependent use.” The purposes of “Shoreline Residential Conservancy” say ***absolutely nothing about even letting single-family homeowners access or use the water.*** Instead, the SMP says this designation is merely “to accommodate compatible residential uses while protecting, conserving and restoring shoreline ecological functions...” *Note the complete absence of any reference to private property rights to access and use the water*

As ostensible justification for tighter regulation of the Residential Conservancy designation - which contains roughly three-quarters of all homeowners - the SMP simply recites that: “**Due to the more sensitive characteristics of these areas, a higher level of development standards is warranted.**” ***What sensitive characteristics?*** “Residential Conservancy” areas have a whole lot of people in them. These are nothing like pristine, virgin land. This land is densely populated – roughly 90% of the land has houses. The space between the homes and the water is usually cleared so that people can see the ocean and so they can engage in “people-type” activities: back-yard barbecues, lawn sports, parties with family, friends and live bands, vegetable and other gardening, water sports... This is *normal* single-family residential use and it has been going on in these areas for a long time. ***The only way there would be any “sensitive characteristics” here is if all the people were moved out and the land were restored. And that is exactly what the SMP is trying to do. The SMP is creating a complete myth about the nature of this “Residential Conservancy.***

Evidence that the SMA does not intend, or want, to limit the number of docks and piers is contained in the following admonition it gives to local governments to: “[l]ocate single-family residential uses where they can be developed... without ... displacement of water-dependent uses.” WAC 173-26-201(2)(d)(iv), emphasis supplied.

H. Private Property Owners Have a Constitutional Right to Access and Use Adjacent Water – the Courts Protect That Right.

Notwithstanding anything the SMP may say, there is a fundamental constitutional right, protected by the U.S. Supreme Court, for a landowner to access and use adjacent water. Taking of this right can be a Fifth Amendment taking: “[government] could not prevent [owners] from accessing water to which they owned rights without just compensation.” *Estate of Hage v. United States*, 687 U.S. 1281, 1290 (Fed Cir. 2012) The Washington Supreme Court has gone so far as to say that “***the owner of waterfront property should be protected in the maintenance of access to the water. That is often, in fact generally, the greatest value of the property.***” *Hudson House, Inc. v. Rozman*, 82 Wn. 2d 178, 184 (1973).

I. SMP Potential Power to Prohibit New Docks and/or Piers Anywhere on the Island.

The Bainbridge SMP provides that overwater structures can, at the discretion of the planner be “[p]rohibited at locations where critical physical limitations exist, such as shallow, sloping bottoms; areas of frequent high wind, wave, or current exposure; high littoral drift areas; or slide prone and/or feeder bluffs.” SMP 6.3.3.3(b) Different parts of this prohibition could virtually be applied to any and all parts of the Bainbridge shoreline. Accordingly, this provision simply serves to give planners the authority to prohibit a dock or pier whenever they want to. And, once again, this vesting of discretion in the individual planner can have the unintended consequence of increasing the potential for bribery or extortion.

J. Another Way to Ban Boating – Ban the Use of Boat Motors!

1. Ban on Boat Motor Use in Priority Aquatic Endangers Human Safety and Property, Effectively Banning All Boating There.

In order to bring a boat in to its mooring spot safely, a boater must have use of its motor to override the action of the tides where needed. If he lacks this control, he runs the risk of crashing into the dock or pier and injuring himself and/or his boat. Similarly, a boater must have the use of a motor to counter-act tidal action and make it safely out to sea. These facts apply to all boats – motor or sail. It is for this reason that sail boats have motors, even though they are generally much weaker than those of power boats. The ban imposed by the City on the use of motors in Priority Aquatic creates a substantial risk to personal safety.

A certain amount of risk-taking is involved in any sport, but when that risk rises to the level of serious injury to people or their property, most people back off. And so the SMP presents boaters in ‘no boat motor’ zones with a Hobson’s choice: either they break the law and use their motors to get their boats safely to, and moored at, their docks or they obey the SMP regulation and risk crashing into the dock, with resulting injury to people and boats. So what are people to do? And *why?* *The City has simply not produced any valid evidence to justify the elimination of boat motors.*

2. Ban on Boat Motor Use Constitutes a Serious Interference with Navigation Around the Island.

If the SMP is approved by the State, how will visiting boaters manage to navigate close to the shore and around the Island – as most like to do in the summer? By its imposition of a ban on the use of boat motors in certain coastal areas, the SMP has created a major interference with navigation, in which both the federal and State governments have an interest and various rights. While the jurisdictional matters are beyond my expertise, the practical impact is not.

Does the SMP impose the ban *just* on homeowners in this zone, while permitting every other boater passing through to use his motor – a clear equal protection violation - or does it impose this ban on every boater? If the latter, the interference with navigation is clear: a boater circling Bainbridge Island progresses with normal speed, then must hope to be able to drift the way he wants to go when he hits the ‘no boat motors zone’ and has to cut his motor. And he has to hope that strong tides, which occur regularly around the Island during certain times of the year, do not bring him crashing in to shore.

How will this ban be enforced? Will there be marking buoys in the water telling people to cut their engines? Will the City use a police boat to write tickets? How can the City selectively enforce this

regulation against homeowners but not passing tourists? Clearly, this prohibition constitutes a major interference with navigation, whether such navigation be ruled by federal, State or local law.

K. Effective Ban on Stairs for High Bank Homeowners Results in Taking of the Protected Right to Access Water.

As noted above, the “[government] could not prevent [owners] from accessing water to which they owned rights without just compensation.” *Estate of Hage v. United States*, 687 U.S. 1281, 1290 (Fed Cir. 2012) The Washington Supreme Court held that “***the owner of waterfront property should be protected in the maintenance of access to the water. That is often, in fact generally, the greatest value of the property.***” *Hudson House, Inc. v. Rozman*, 82 Wn. 2d 178, 184 (1973).

And yet, the Bainbridge SMP limits the maximum size of any private homeowner stairs down a bluff to a maximum of 250 square feet (SMP 4.1.3.9.2). For a number of homeowners, this has the practical effect of prohibiting them from using their own beaches; that little footage will not get them down to the beach.

The City ostensibly offers an alternative to stairs, in the form of a tram, but it is a solution that would restrict water access to only the very wealthy. While stairs up to a 60’ bank would cost approximately \$35,000, the cost of a tram for the same distance is roughly \$110,000, with repair costs roughly ten times more than for stairs. City Hall may feel that anyone who owns waterfront property is rich, but this is just not the case; but even if a landowner *is* well-to-do, he should not be forced to spend more money than is necessary to achieve access to his own land. There would appear to be no rational basis for forcing people at higher elevations to pay for a tram. The only justification given by the City for this requirement is that trams are more attractive than stairs. So, once again, the rights of a homeowner are subjected to the personal aesthetics of City Hall and the boaters’ views of the land are elevated over what is a fundamental private property right. The view of the shoreline from the water is not a view that is expressly protected by the SMA or the DOE Guidelines. The only view specifically referenced and protected by the SMA is the view *from land, not from the ocean*. In short, the City does not have the power to dictate a more expensive alternative for beach access on the sole basis of personal aesthetics..

In addition to impinging on a riparian landowner’s right to access adjacent water, the City’s limitation on the maximum square footage of stairs runs afoul of one of the basic principles of constitutional law; where a “less obtrusive alternative” is available to solve a problem, it must be used. Various people have already suggested to the City that the SMP simply specify that stairs to the beach shall be constructed in the minimum size necessary to achieve access to the beach. This would satisfy constitutional requirements; but the City Council has rejected this simple suggestion.

VIII. SMP BANS – OUTRIGHT AND EFFECTIVE – ON NEW DEVELOPMENT: A TAKING OF “ALL VIABLE USES,” WHICH REQUIRES JUST COMPENSATION UNDER LUCAS.

The Bainbridge shoreline is a very populated place. Because there are relatively few available lots for development, most of the public fury against the SMP has been confined to issues affecting the larger number of existing shoreline homeowners. But this does not mean that the outright ban imposed by the City on new development is a valid land use regulation rather than a taking that requires compensation under the Fifth Amendment. As the U.S. Supreme Court frequently holds, land use exactions should be examined with heightened scrutiny because of the tendency for local governments to impose exactions that may have no relationship to preventing or rectifying harm and more to do with acquiring a public benefit, a benefit the government should be *paying for* under the Fifth Amendment. And so it is here.

A. SMP Bans on New Development

1. DOE Guidelines Recommend Conditional Use Permits Over ‘Outright Prohibitions;’ Bainbridge Ignored the Recommendation.

The DOE Guidelines clearly anticipate that, in a well-intentioned rush to preserve attractive shoreline areas, local governments will impose bans on new development. In an attempt to fend off this impulse, the Guidelines suggest using the conditional use process “to address cumulative impacts...” And, more specifically, “...allowing a given use as a **conditional use could provide greater flexibility within the master program than if the use were prohibited outright.**” WAC a73-26-241(2)(b)(i)

The SMP imposes an outright ban on new development in three out of the seven designations: Natural, Aquatic and Priority Aquatic. New development is only allowed as a conditional use in the Island Conservancy designation. Only in two areas is residential construction allowed at all, without a special permit. SMP 5.9.5.1 While most of the Island’s shoreline is already developed, there are still bound to be a *lot* of unhappy landowners as a result of these regulations – as well as a lot of lawsuits coming to allow them to build. And, of course, there probably are quite a few homeowners who have long dreamed of remodeling their house or building a new one, who will be sorely disappointed when they are prevented from doing so by these bans.

These bans are in conflict with the DOE Guidelines, which do not preclude development *even in conservation areas*. Rather, even there, “[s]uch vegetation areas are not necessarily intended to be closed to use and development but should provide for management of vegetation in a manner adequate to ensure no net loss of ecological functions.” WAC 173-26-221(5)(b), emphasis supplied.

2. SMP Bans New Home Construction in Designations Where There Are Already a Lot of Houses: The SMA and Lucas Prohibit Taking of “All Viable Uses” in This Way.

A ban on any new development on a particular property renders that property worthless and unsalable. The U.S. Supreme Court says that any ban on new development needs to be subjected to heightened scrutiny because of the likelihood that the government is attempting to take land without paying for it.

The only legal use of land in the Bainbridge areas listed above is single-family residential; so banning the construction of new homes there amounts to a taking of the only permissible and viable use of someone’s land. This is precisely what the U.S. Supreme Court prohibits in the *Lucas* case.

The Supreme Court in *Lucas* specifically talks about the *Penn Central* holding and fact that people buy land with “investment-backed expectations” that can be the subject of Fifth Amendment takings. The U.S. Supreme Court in the *Penn Central* case set forth some alternative ways in which to evaluate whether a government has ‘taken’ a property under the Fifth Amendment. It mandated that the impact of the regulation on the property value is one consideration – the value of not just the portion of the land taken, but on the value of *all* the land. Second and very importantly, it says **that if a regulation severely “interferes” with an owner’s “investment-backed expectations” for the property, this can be a Fifth Amendment taking.** *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

In the *Lucas* case, the State adopted an effective ban on new development in certain coastal areas by designating them as “critical areas” and establishing impossibly deep buffer areas. Mr. Lucas had

purchased land there before these regulations, with the intention of developing them in a manner consistent with the neighboring properties. The U.S. Supreme Court held that the State's regulations constituted a taking under the Fifth Amendment and that just compensation was owing. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

As in *Lucas*, the quantity of existing homes in the three Bainbridge areas referenced above would seem to belie the lack of suitability of these areas for development. To the extent that the land remaining undeveloped in these areas may have been subjected to the SMP's absolute ban on new development for the sole purpose of preserving some vestige of the original unspoiled natural condition for public enjoyment – visual or physical – this land must be paid for by the City. This is, after all, private land that the owners expected to put to good economic use, whether as a residence for themselves or for resale, per the standards of *Penn Central*.

The similarity between the *Lucas* case and the Bainbridge situation is striking. There are existing residences in the areas now designated "Natural," "Aquatic," and "Priority Aquatic," and also in areas referred to as "critical areas." And it is logical to assume that all people who bought land or homes there prior to May 15, 2013 had a reasonable expectation of being able to build or remodel there. If the Bainbridge SMP is approved by the State, these people will no longer have the right to do so, or even to sell the property to someone else who can. In short, the Bainbridge SMP will have done to these property owners exactly what South Carolina did to Mr. Lucas – deprived him of all viable economic use of his property.

The prohibition against taking "all viable uses" of a property exists not just in this Supreme Court case. The prohibition against taking "all viable uses" of a property exists in the DOE Guidelines :

...when 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.

at WAC 173-26-211(3)(a), emphasis added. While the SMP might be directly addressing the interplay between zoning and SMP regulations, the principle is clearly the same as that in *Lucas*, and was no doubt inserted by lawyers for precisely that reason.

The *Lucas* case focused on the line that must be drawn between governmental exactions that are imposed to prevent or rectify a harm or noxious use, and exactions that are imposed to confer a public benefit. In the latter case, no matter how laudable the goal, just compensation must be paid where the government is exacting a public benefit from a private landowner.

...the legislature's [mere] recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.

Lucas, para. 28.

Instead, the Court's analysis included consideration of whether the particular use *could have been banned* on nuisance grounds *at the time of purchase* or whether there was a title restriction banning the activity. It concludes that "confiscatory regulations" constitute a Fifth Amendment taking where:

...regulations that prohibit all economically beneficial use of land. Any limitation so severe cannot be newly legislated or decreed (*without compensation*), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, at para. 24.

The current City Council and Planning Department appear to consider areas that were previously suitable for development as now unsuitable, even though nothing has changed in them since people were previously granted permission to build in them.

Should the Bainbridge SMP be approved by the State without change in these prohibitions, the landowners in these areas will be forced, one by one, to sue – just as Mr. Lucas did - the City, and probably the DOE for approving these bans. It would be far more efficient and economical for the State to question the area designations and the construction bans up front, at the DOE review level, than to merely pass them along so as to result in the expenditure of time and money by all sides of the litigation.

B. Effective Bans on New Development: Bans Created by Imposing Other SMP Requirements.

1. The SMP Bans New Development in Critical Area, While the DOE Guidelines Allow New Construction in These Areas.

SMP 5.9.3.6 provides that all;

“[n]ew residential development and accessory uses should be prohibited from locating in critical areas (and their conservation and management zones) including marshes, bogs, swamps, mud flats, steep or unstable slopes, floodways, fish and wildlife habitat, migratory routes and spawning areas and marine vegetation areas.”

This enumeration of land conditions could probably cover every shoreline location around the Island. Given the Planning Department's discretion in naming anything and everything a 'fish or wildlife habitat,' added to the SMP requirement that there be tall vegetation universally around the Island because it is needed by spawning fish, which implies that anywhere and everywhere around the Island *is* a fish spawning ground, this regulation can be used anytime, anywhere. How “steep” does a “steep slope” have to be – and how “unstable” before the City calls its location a “critical area?” This is the problem with using the term “critical area” so loosely – its meaning starts to disappear...

Another problem with this relates to the actual definition of the term “critical areas,” as defined in Appendix B-7. It says that it includes, among other things, “aquifer recharge areas.” Well, the Bainbridge SMP defines “the entirety of Bainbridge Island [as]... the recharge area for the island aquifers.” Appendix B-7, p. 276.

While the DOE Guidelines may promote a tighter degree of new development regulation in critical areas, it does *allow* new construction. To do otherwise would run afoul of the U.S. Supreme Court decision in *Lucas v. South Carolina* which the South Carolina town did by applying such large buffers that new development was effectively prohibited (exactly the same problem we have with the Bainbridge buffers). The U.S. Supreme Court found that this amounted to a Fifth Amendment taking because it took ‘all viable economic uses’ of the land, and government cannot do that, even in a “critical area.” When Mr. Lucas purchased the land, it was not zoned a “critical area;” subsequent

zoning, along with big buffers had the effect of prohibiting the construction of single-family homes there. The U.S. Supreme Court in *Lucas* took note of a comment made long before by the honorable Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*:

Justice Holmes recognized in *Mahon*... that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits... 260 U.S. at 414-415... **If, instead the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared."** *Ibid.*

Lucas, at para. 12,

Basic land use principles allow a government to regulate, but not to ban all use. The SMP is inconsistent with the DOE Guidelines, which reiterate the *Lucas* principle and repeat its very language: "...the master program use policies and regulations and... other use regulations should not... [operate] in a manner that all viable uses of the property are precluded." WAC 173-26-211(3)(a), emphasis added.

Neither the SMA nor the DOE Guidelines prohibit new development in critical areas; they simply mandate regulating it to attain the "no net loss" standard of environmental protection. The DOE Guidelines contain lengthy instructions on issues to be evaluated in regulating the development of critical areas, but **they do not ban it.** WAC 173-26-221(2)

To paraphrase the Washington Supreme Court, 'the local government is prohibiting something which the SMA allows.' *Biggers*, 162 Wn. 2d 683 (2007) **This regulation is in conflict with State law and is, therefore, invalid under the Washington State Constitution article XVII, section 11, as explained by the Washington Supreme Court in *Biggers*.**

2. The City Requires Excessive, Unnecessary, and Expensive Professional Reports to Discourage New Shoreline Development.

The SMP requires **nine** extremely detailed reports by people like wildlife experts and marine biologists as a prerequisite for new construction. SMP 4.1.2.9 **However, these reports can all be waived - completely - in the planner's sole discretion, without any criteria for doing so in this provision. This means that these reports really aren't necessary.** The only place where guidance is given to the public is in Appendix D: if the landowner will agree to do 'restoration plus' in accordance with this appendix, the City planner *may* wave some or all of these required reports. The fact that these reports are very expensive - there has been an estimate of \$50,000 - is confirmed in writing by Appendix D, which refers to its measures as the 'low cost solution to mitigation.' **So, the cost of completely tearing up and replacing everything in your yard, even trees, is cheaper than the cost of these environmental reports - this is what Appendix D is saying - these reports are very expensive. This is extortion, yes, but even more importantly, it shows that the only purpose of these reports is to accomplish City goals that go far beyond mitigating the environmental damage that results from new construction.** A City goal other than forcing restoration could very well be to discourage people from buying and building on Bainbridge.

Perhaps City drafters forgot that they had already completely banned new construction in critical areas (SMP 5.9.3.6) when they set out all requirements for qualified professional analyses in SMP

4.1.2.9. Or, perhaps the SMP is, once again, simply paying lip service to the DOE Guidelines in seemingly allowing construction there, while at the same time prohibiting it elsewhere. Or, perhaps this is simply the SMP's "Plan B" – if the ban on new development in critical areas is disabled by the court, the imposition of great costs will *effectively ban* new construction in critical areas.

3. SMP-Required Title Restriction on any Bulkhead for 100 Years in Exchange for a Building Permit Can Be an *Effective Ban* on any New Development in Many Places.

SMP 6.1.5.4 provides that: "All new development activities, including additions to existing structures, shall be ... designed to prevent the need for shoreline stabilization *for the life of the development or 100 years, whichever is greater.*" The City's practice is to cement this in writing by title restrictions prohibiting any bulkhead for 100 years. But who can accurately predict the weather and resulting wind, waves and erosion for the next 100 years? We have trouble predicting weather more than 7 days away... Whether caused by natural forces or by global warming, the last few decades have increased the difficulty of predicting natural conditions for any substantial period of time. So who is going to buy, or develop, a lot where the house cannot be so far from the water that you don't have to worry about erosion for 100 years: our lots just aren't that deep. In any event, a prospective buyer of waterfront property doesn't *want* to be *any* great distance from the water: it is precisely to be close to the water views that this person is buying waterfront property. As such, that buyer will stop looking for property on *Bainbridge*.

4. Potential Construction *Ban* Where It Would Affect Public Views: This is Inconsistent with Guidelines That Simply Say '*Locate the House to Minimize the Impact on Views.*'

SMP 4.2.4.5.5 could be used to block the construction of virtually *any* new shoreline house. By definition, when a new waterfront home is erected, it will block somebody's view of something, including the public's view from roads of either the ocean or the rest of the shoreline. As such, in this section the Bainbridge SMP sets out a completely impossible goal:

Development, uses and activities will be designed and operated to avoid blocking, reducing or adversely interfering with the public's existing physical and visual access to the water and shoreline...

SMP 4.2.4.5.5

The SMP also treats public views from *mere easements* as superior to the property owner's right to build. It mandates that: "The public's visual ...access provided by shoreline road ends, public utilities and rights-of-way shall not be diminished. SMP 4.2.4.5.6 The SMA and DOE Guidelines only protect views from publicly owned land, not from any easements or rights-of-way. When the state mentions protecting views from public land, it can *only, legally, mean one thing – land the complete title to which is vested in the public.* As for views of *the shoreline* - by swimmers or boaters - that the City wants to protect, this is not a view the SMA or the Guidelines even *refer to, let alone protect.*

There is a very basic principle of property law: you cannot convey to another title or rights that you do not have. This is why the City cannot use utility easements, road ends, and rights-of-way as public viewing places and cannot restrict construction because it diminishes the public's view from there. Utility easements can only be used by people from that public service provider for the sole purpose of installing and maintaining utility equipment: they do *not* allow the public to use these easements as *viewing places*. Further, most utility easements are

not even owned by the City; none of my utility service is provided by the City. Even if the City did have an easement for, say, water, the SMP simply cannot convert a limited property interest into a greater interest without exercising its power of eminent domain.

If you will just think about it, you will see why this would be so offensive for homeowners. Since utility easements run up to, and connect onto, the house, if this SMP regulation *were* effective, people could stand right outside your house – on the side where utility connections usually attach – by the bedroom window or the bathroom – to view, uh, right – the ocean. This is why the “right to exclude others” is so important, and why utility easements are so narrowly written.

5. The City Can Ban Construction Where it Will “Disturb” Native Vegetation. What Does That Mean?

The Bainbridge SMP provides that:

Development within the shoreline jurisdiction shall be located and designed to protect existing native vegetation from disturbance to the fullest extent possible...

SMP 4.1.3.5.1 What does “disturb” mean? This must mean something different than ‘removing’ vegetation, so what? What does “to the fullest extent possible” mean? *The* regulations give absolutely no definition of what it means to “disturb native vegetation” or to give any threshold amount of disturbance that can justify taking the owner’s right to possess and use his land. This vague and ambiguous language constitutes a violation of the Due Process Clause, as does the delegation – without guidelines – of any power the City may, or may not, have to a sole planner to define what it means.

The Bainbridge SMP is inconsistent with the SMA, which permits construction and environmental damage so long as the damage can be mitigated to the point where there is no net loss of ecological functions. As such, SMP 4.1.3.5.1 is unlawful under Article XVII, Section 11 of the Washington State Constitution and the Washington Supreme Court’s reasoning in *Biggers*.

IX. BUFFERS: THE CITY USED DAMAGE FROM CATTLE AND COMMERCIAL CROPS TO JUSTIFY BUFFERS FOR SINGLE-FAMILY RESIDENCES. THIS IS A MISAPPLICATION OF SCIENCE.

A. Totally Inappropriate Use of Data to ‘Prove’ Damage from Single-Family Residential Use: Cattle Feed Lot and Commercial Crop Growing Studies Are Just Not Relevant.

Because there were no studies available on any damage done by single-family residential use to the shoreline, the City established shoreline buffer sizes by using studies from cattle feed lots and commercial crop areas. Because of the very great differences between people and cattle from the standpoint of both basic anatomy and the density in which they live, this is a totally inappropriate use of what may be quite valid science. Commercial crop growing involves a use of pesticides on a level that are magnitudes higher than any residential use in the garden – if, indeed, any are used at all, given the typical Islander’s extreme sensitivity about all things environmental.

While we may all be God’s creatures, there are obvious and substantial differences in lifestyle between farm animals and people. People do not generally use the great outdoors as their toilet; rather, our waste matter is treated, whether by septic system or sewer processing, before any release into the wild. Obviously, cows do not use toilets and their waste products are not processed at any point to render them less toxic to the environment. Many farm animals are a lot bigger than people; hence, they consume more bulk and expel more waste than people. Even when an

individual farm animal is smaller than a person – let’s say a chicken – their large numbers in farm production equate to far more waste production than a typical family of four.

Further, our uses of the land differ; unconstrained animals such as sheep, cows and horses do considerable damage to the environment by virtue of the fact that they roam and graze; people may roam over their land but few graze. The large size of many farm animals and, in some their tough hooves, compress plant life; people’s feet may stomp down vegetation, but most likely do far less damage because of our relatively lighter weight and the nature of our feet/shoes, which are a lot softer than hooves.

In short, while the differences between farm animals and people may elicit some chuckling comparisons, the point is quite clear – the use of animal studies to establish a need for large – some *extremely large* (200 ft.) buffer zones is inappropriate. Farm animals do much more to damage the environment than people do and, thus, the Bainbridge buffer zones are larger than an *appropriate* scientific study would be.

The Washington Supreme Court in *Biggers* held that, with respect to the first moratorium imposed by the City of Bainbridge on new development in the shoreline, which was based merely upon an unsupported allegation of environmental damage, cannot be sustained. Specifically, the Court held: “This rationale cites *potential* harm rather than actual, demonstrated harm. Standing alone, theoretical harm is not enough to deny private property owners’ fundamental ...use of their property.” *Biggers*, section 4.

B. A City Planner Has the Sole Discretion to Radically Increase Table 4-3 Buffers.

1. *Ad Hoc* Buffer Determination Process Uses Circular Reasoning and Possibly a Planner’s ‘Gut Instinct.’

The size of buffers can be increased far beyond what is set out in SMP Table 4-3, in the sole discretion of an individual planner:

The total depth of the Shoreline Buffer is based on the shoreline designation in Table 4-3 and physical and most prominent geomorphologic characteristics of the property.

SMP 4.1.3.6.1. The SMP goes on to describe how the “maximum and minimum depth of the Shoreline Buffer will be determined by the Administrator...” SMP 4.1.3.6.3. The procedure for establishing a buffer, based on these physical characteristics of the land, in fact do not give any guidance to the planner, leaving him to make decisions based on gut instincts and personal beliefs rather than the regulations. First, whether existing vegetation covers 65% of an area is in the eye of the beholder. It is a virtual impossibility to count every piece of vegetation and measure the length of its extensions; this makes it a judgment call as to what percentage of an area is covered with existing vegetation. And then there is a basic flaw contained in the reasoning...

The so-called procedure for establishing an individual buffer zone has one fatal flaw: it relies on circular reasoning. In order to establish the depth of a buffer, you have to assess whether or not 65% of “the Shoreline Buffer Zone 1 area” has existing vegetation. SMP 4.1.3.6.3(a)(i). That is, in order to establish the actual depth of the buffer, you have to use some pre-conceived notion of the buffer size. With this confusing ‘guideline,’ a relatively new planner – or even an ‘old hand’ – is going to either use Table 4-3 as his baseline, which may not be at all accurate as such, or his ‘gut instinct’ as to what constitutes a baseline buffer. **This is not a scientific method; this is a personal judgment as to what a buffer *ought to be*.** As such, all of the SMP methods for

establishing buffer size is constitutionally impermissible – whether it is Table 4-3 that is based on studies of raising cattle or commercial crops, or the *ad hoc* determination based on an individual’s gut instinct as to what a buffer should be. **The Due Process Clause requires more of a government than this when it is taking away an individual’s right to use any portion of his land.**

2. Planner Discretion to Increase the Buffer Size by Up to 50% for Wildlife Habitat: More Circular Reasoning and Possible Use of Planner’s ‘Gut Instinct.’

In addition to his power to increase buffers under the *ad hoc* buffer establishment ‘process’, he has super powers buried in Appendix B, where you may not even notice it. ***SMP Appendix B gives the planner the power to increase the buffer by up to 50% if he believes the land contains wildlife habitat.***

Increased Buffer Provisions. The Director may increase buffer widths, up to 50% greater than the applicable buffer set in this chapter for critical areas with known locations of endangered, threatened, or state monitor or priority species for which a habitat management plan indicates a larger buffer is necessary to protect habitat values for such species. Such determination shall be based on site-specific and project-related conditions.

SMP B-8(C)(3)(d).

While Appendix B supposedly applies only to “critical areas,” throughout the SMP the term is used in so many different situations outside the technical definition that it is clear virtually *any area or parcel of land can be designated as a “critical area” – all a function of the individual planner’s personal judgment.* Nevertheless, it’s not as if the planner really has to stray too far from the actual definition of “critical area;” it’s so broad that anywhere on Bainbridge can be called a “critical area.”

“Critical areas” means aquifer recharge areas [defined by the SMP as the whole Island], fish and wildlife habitat conservation areas, frequently flooded areas, geologically hazardous areas, and wetlands.

SMP Appendix B-1.6, emphasis added.

The same flawed reasoning applies to this buffer zone establishment: it contains circular reasoning – that is, it defines something as a function of itself. Your land only becomes a critical area because it has wildlife habitat, and it only becomes a wildlife habitat area if it is located in a critical area – see the circular ‘logic’?

These two separate provisions create the potential that all buildable areas on a parcel can be devoured by the planner’s discretionary decisions. This unfettered discretion in a planner without any reasonableness limitations is a violation of due process rights under the Constitution because it can so easily lead to an abuse of power. Appendix B creates an enormous potential for planner abuse and/or extortion/bribery. When buffer designation means the difference between having somewhere to build a house and no possibility of a house at all, the leverage given the individual planner is huge.

3. Displacing Human Habitat in Favor of Animal or Plant Habitat is an Equal Protection Violation, as Well as a Taking of All Viable Use.

The U.S. Supreme Court not only prohibits the governmental taking of all viable uses of a property, it also prohibits forcing an individual to leave his land as- or create on his land - a wildlife habitat or an ecological reserve. It is a violation of the 14th Amendment Due Process Clause because it 'singles out one particular person to bear the burden that, in all fairness and equity, should be borne by the public at large.' *Armstrong*.

A rigid adherence by the City to all of these confiscatory buffers, without making any accommodations for the humans who have the paramount right to use the land, could result in an unpleasant judicial outcome, as described below in the *Lucas* and *Dunlap* cases from the U.S. Supreme Court and the Washington Court of Appeals, respectively. Rather than allowing an effective ban on new development to occur, the City would do well to consider issuing a variance...

C. The City's Use of Unreasonably Large Buffers Can Effectively Ban Any New Development: This is a *Lucas* and *Dunlap* Fifth Amendment Taking.

The buffers established by the City cover substantially all - or in some cases *all* - of the shoreline lots. Our shoreline lots generally range from 50' x 100' to 100' x 200', with buffers established at 75 to 200 feet. With setbacks in addition to the buffers, this can amount to an effective prohibition on all development. This is a violation of federal case law, in the form of several very important U.S. Supreme Court decisions.

The *Lucas* case from the U.S. Supreme Court was a buffers case. In it, the South Carolina Coastal Council had established a "baseline" that indicated the "landward-most points of erosion" during the previous 40 years. All construction was then prohibited within 20 feet landward of, and parallel to, that baseline. This is no different than the Bainbridge buffer zones, other than the fact that our buffers were not based on any relevant science, but were based upon totally different, inappropriate, uses. There, *even with relevant science being used*, the U.S. Supreme Court found a Fifth Amendment taking.

The fact that the areas in which these large buffers have been imposed are areas that are almost completely developed is significant to the U.S. Supreme Court:

The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition...So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, para. 26, final page of majority opinion (1992). These facts establish that the purpose of the regulation is not to prevent a "noxious use" of the property, which would, otherwise, be within the municipality's police power to regulate, without any requirement of just compensation.

The Supreme Court very accurately describes the SMP tug-of-war:

"The problem in this area is not one of noxiousness or harm-creating activity at all; rather, ***it is a problem of inconsistency between perfectly innocent [single-family residential] and independently desirable [public/environmental] use***". Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's ecological resources thus depends primarily upon whether the describer believes that the State's use interest in nurturing those resources is so important that any competing adjacent use must yield.

Lucas, para. 19, emphasis added.

Therefore, in the case of the Bainbridge Island shoreline, the fact that almost all of our residential areas are almost completely 'built out' and that such use is continuing to this day, is evidence that the SMP is not merely regulating a "noxious use" – that is, the SMP is not preventing any significant harm to the environment. Rather, the SMP falls within a category the Supreme Court characterizes as "benefit-conferring:"

...the distinction between "harm-preventing and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in either fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, ***in order to achieve the "benefits" of an ecological preserve.***

Lucas, para. 19, emphasis added. And so it is with the City's use of buffers: not designed to prevent a "noxious use," they clearly seek to achieve a public benefit in the form of an *ecological preserve*.

The U.S. Supreme Court in *Lucas* reiterated the concern it had expressed in *Nollan* as follows:

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that **regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of managing serious public harm.**

Lucas, at para. 13, emphasis added. And, the Court's conclusion:

We think, in short, that there are good reasons for our frequently expressed belief that ***when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.***

Lucas, at para. 14, emphasis added.

Washington Supreme Court case law has similarly concluded that when there is less prevention of public harm and more creation of a public benefit involved in a regulation, it is a 'taking' under the Washington State Constitutional equivalent of the Fifth Amendment.

In the 2010 Washington Court of Appeals case of *Dunlap*, the City had so restricted the use of the Dunlap property by buffers that the only house that could be built on it would be a total of 480 sq. ft. – a triangular house, no less. That square footage constituted only 4.4% of the entire lot. The court first cited the *Lucas* case and then noted that the Washington Supreme Court had adopted the *Lucas* reasoning in its *Guimont v. Clarke* case. It held, therefore, as follows:

Under the Lucas/Guimont analysis, if the City's regulation of the Dunlaps' property results in a total taking, the Dunlaps are entitled to just compensation, regardless of the public interest advanced in support of the restraint, unless the City can meet a rebuttal test. Under the rebuttal test, if the Dunlaps establish that the regulation of their quarter-acre tract has denied all economically viable

use of the property, the City can avoid paying compensation only by identifying “background principles of nuisance and property law that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found.” In other words, the [City] must show the proscribed use interests were not part of the owner’s title to begin with. If the Dunlaps prove a total taking and the City fails to rebut that claim, then the Dunlaps are entitled to compensation without any case-specific inquiry into the legitimacy of the public interest supporting the regulation.

Dunlap, at para. 19, emphasis added. The Court of Appeals did, in fact, find a “total taking,” based upon the facts. Because a slough ran through the middle of the property and there was a 50 ft. buffer, there was very little usable land available for a home, such that a variance was essential to the ability to build a functional-size home on the property. The court reiterated the trial court’s findings that:

residents of a 480 sq.-ft. house on the property would be unable to use the buffer for a yard, a patio, a deck, or anything else. All that would be usable would be the interior of the residence; the buffer would be right outside of the house.

Because the City had refused such a variance, the Washington Court of Appeals found a “total taking” of the quarter-acre lot. *Dunlap v. City of Nooksack*, No. 63747-9-1, (Wa. Ct. of Appeals, 2010).

Given the buffer size in comparison with the typical Bainbridge lot size, it is relatively easy to conclude that the SMP’s large buffers are designed to preclude any further new construction or expansion on the shoreline. This tactic was clearly used in both the *Lucas* and *Dunlap* cases, with the same result: absent proof of a “noxious use,” the municipality is liable for just compensation because this regulation constitutes a governmental ‘taking’ of private property. In the Bainbridge case, the quantity of existing homes and their continued use belies that any new home would engage in a “noxious use” of the land in these areas. What is, therefore, left is the City attempting to confer a benefit on the public – in the form of an open space, what the Court in *Lucas* termed an “ecological preserve.” This means that the City must pay just compensation for the land.

X. SMP VEGETATION REQUIREMENTS: FIFTH AMENDMENT TAKINGS IN MANY DIFFERENT WAYS.

A. Even if Revegetation Was Restricted to ‘Mere’ Buffers, Because of the Large Size of the Buffers, It Would Render a Large Part of the Lot Unusable.

The *Dunlap* case discussed above, with regard to buffers, addresses the situation of the typical Bainbridge lot. Because our lots are small in comparison to the respective buffer sizes, use of ‘just’ the buffers for native vegetation can mean that virtually none of the land can be used for any purpose other than growing a large crop of native vegetation. In the largest residential designation – Residential Conservancy – the 75 foot buffer can represent 75% of the lot or, at a minimum, nearly 40% of the lot. Whether you are dealing with a lot of 100 feet or 200 feet in width, or something in between, the SMP buffers represent a considerable “pressing into service” of private land for a public benefit – the effective creation of an ecological preserve.

If you are engaged in new construction, your duty to “mitigate” (actually ‘restore plus’) involves a commitment of *at least* the area that is “disturbed.” The SMP has no definition for what a “disturbance” of a lot looks like; whether it simply involves a few leaves torn off a bush is in the sole discretion of the planner. It is a violation of the property owner’s due process rights for such

unbridled discretion to be vested in a sole planner with absolutely no guidelines; this also represents an excellent opportunity for extortion or bribery to arise.

Beyond the planner's interpretation of how "*disturbed*" the land may be, and the amount of land which therefore requires mitigation, the planner also has the sole discretion to require that an area *greater than* the disturbed area be replanted. The SMP provides that: "[t]he **quality and quantity** of the replaced, enhanced, or substituted resources **shall be the same or better than the affected resources...**" SMP 4.1.2.6.4(a). emphasis added.

B. But SMP Revegetation Isn't Restricted to Just the Buffer: Native Vegetation Is Required All Over the 200-ft. Shoreline Jurisdiction.

The SMP requires dense native vegetation *all over the homeowner's lot*. First, of course, is what every property owner fears the most: the requirement that a tree be planted every 20 feet and a shrub every 5 feet right in front of your view. SMP 4.1.2.5.5(c) Zone 1 plantings must be designed to achieve a minimum 65% vegetation canopy over ten years. SMP 4.1.2.5.4(a) Zone 2 must have plantings to "increase canopy coverage...in a manner that promotes contiguous vegetated corridor that connects to the shoreline." SMP 4.1.2.5.4(b) Elsewhere, the SMP mandates that 2/3 of Zone 2 "shall be maintained in a native vegetative state." SMP 4.1.3.6.4(c) Just to make sure you understand, the SMP then reiterates: "In the Shoreline Buffer, plant in a manner that promotes a contiguous native vegetated corridor that connects to the shoreline..." SMP 4.1.2.5.4(c) And then, "**Outside of the Shoreline Buffer, [the property owner must] plant in a manner that promotes a contiguous native vegetated corridor to the shoreline...**" SMP 4.1.2.5.4(d), emphasis added. And finally, "**Outside of the Shoreline Buffer; or [a]t an offsite-location... plant to meet the standard of subsection a [the 65% vegetation canopy].**" SMP 4.1.2.5.(e) and (f). These latter provisions are rather messy, but the intent seems to be that you either achieve a **second 65% vegetation canopy over your own land – outside the buffer zones – or you do it off-site in Zone 1 on someone else's land**. Either way, **this is a whole lot of vegetation and the entire 200-ft. shoreline jurisdiction must be covered with native vegetation**.

Dense vegetation over virtually all of the landowner's property precludes use of the property for many other typical homeowner activities: lawn sports, back-yard barbecues on a deck, outdoor gatherings of family and friends, even just lying out in the yard reading a book or sunbathing. There are many possible activities that are precluded by dense vegetation – activities that pose no significant threat to the environment.

C. "Revegetation" Requires the Removal of Existing Vegetation That May Be Serving Significant Ecological Functions, Thereby Threatening the Stability and Function of the Shoreline and its Ecology.

Bainbridge does something that the SMA drafters probably never even imagined: it requires the *removal of vegetation*. The SMA speaks consistently about planting vegetation; it doesn't speak to having to remove perfectly good vegetation. Where the vegetation – including trees – that must be removed, is located in an area that needs stabilization and the existing vegetation – non-indigenous or not - is already serving that purpose, one has to wonder about the wisdom of removing it, as well as the negative impact on the land that will occur from removal of what may be mature vegetation and replacing it with younger and smaller vegetation.

But the SMP requires "replanting" – that is, pulling out what may be perfectly good vegetation simply because it is "non-indigenous." This vegetation might be quite mature and doing a good job of servicing ecological functions. So why pull it out? The only answer: *Because the SMP says so*. It

requires that wherever plants are “disturbed” (without any definition of what that means, let alone *how much* disturbance is required), that area, or a larger one, shall be replanted with native vegetation. SMP 4.1.2.5.5(a). In addition, within Zone 1 of the Shoreline Buffer, all non-indigenous plants must be removed and native trees and shrubs must be replanted to create a 65% native vegetation “canopy coverage” within 10 years. SMP 4.1.2.5.3(c). Think of the difficulty and cost to remove mature trees, even if they are non-indigenous!

D. Revegetation Takes the *Right and the Ability to Use*.

As discussed, all the dense native vegetation that must be planted all over the landowner’s lot physically prevent him from engaging in normal single-family backyard activities. And, as if that wasn’t enough, the SMP takes away his *legal right* to use the land without City pre-approval.

The Washington Supreme Court makes it very clear that a property owner’s *ability to use his land* is one of the most fundamental – and valuable – qualities of land:

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys property itself. *The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.*

Lange v. State, 86 Wn. 590 (1976), emphasis added. Please note that the Supreme Court acknowledges that an extreme and negative impact on fair market value occurs when the right to use a property is taken away. This is something that the City Council and Planning Department staff have vehemently denied; clearly, the wise men and women of the Court beg to differ. The DOE Guidelines, themselves, observe that: “[t]he prohibition of all use of shorelines also could eliminate their human utility and value.” WAC 173-26-176(2), emphasis added.

In a similar light, the U.S. Supreme Court held that:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as condemnation or physical invasion of property.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981), emphasis added.

E. Why Tall Trees and a Vegetation Canopy In Front of My View?

This is probably the greatest concern of shoreline homeowners: the taking away of wonderful ocean views. *Why? What science justifies taking what is such a great pleasure and the most valuable real estate attribute one can have?*

The City says “fish.” Young fish. The City says they need shade or they will get overheated and may die. Or maybe they won’t develop as well. ***However, the studies used by the City their points are from streams in the Midwest. Unlike the Puget Sound, streams are shallow – that’s why they heat up and fish die. Oceans, sounds – are deep and cold and they don’t heat up the way shallow waters do. Studies on streams are simply not relevant proof of the way things work in the Puget Sound.***

Secondly, while the City maintains that fish can't survive without shade, the Puget Sound has tides that take fish out, away from tree and vegetation shade for major portions of each day. So, if a lack of tree and vegetation shade kills fish, how do we have any fish in the ocean at all?

Lastly, the City asserts that fish can't live without the bugs that fall off vegetation canopies on your land. There is no scientific proof advanced by the City for this. To the contrary, some shoreline homeowners have found scientific studies that prove insects constitute the very *minutest* proportion of a fish's daily intake. Once again, the SMP is based on irrelevant science and 'junk science.' This is not enough to justify taking away a homeowner's right to have a dock.

F. "Unconstitutional Conditions" Exist in the SMP Vegetation Requirements.

1. Waivers of Constitutional Rights in Return for a Building Permit Are Fifth Amendment Takings Under *Koontz, Dolan & Nollan*.

The most recent U.S. Supreme Court case of *Koontz* reiterates the Court's grave concern about a local government's leverage in the building permit scenario:

Our decisions in those cases [*Nollan* and *Dolan*] reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. See *id.*, at 384; *Nollan*, 483 U.S., at 831. *So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.*"

Koontz, 570 U.S. ___, para. 13 (June 25, 2013)(too soon for reporter pagination), emphasis added.

Accordingly, the *Koontz* decision ties back into the *Nollan* and *Dolan* cases and finds that:

Nollan and *Dolan* ... [allow] the government to condition approval of a permit on the dedication of property to the public so long as there is a **"nexus" and "rough proportionality" between the property the government demands and the social costs of the applicant's proposal**...Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still **forbidding the government from engaging in "out-and-out... extortion"** that would thwart the Fifth Amendment right to just compensation.

Koontz, quoting *Nollan* at para. 15, emphasis added.

The *Koontz* case stands for the proposition that even when a *monetary* exaction is imposed by a government, it is subject to the nexus and proportionality tests of *Nollan* and *Dolan*.

2. Conservation Easement to Get a Building Permit.

To get a permit to build a new home under the Bainbridge SMP, the landowner has to sign and record a “conservation easement” dedicating his land *in perpetuity* to nothing but *native vegetation*. SMP 4.21.2.7.1 The conservation easement required by the City in exchange for a building permit is described as follows:

The applicant/property owner shall provide assurance *to the satisfaction of the Administrator*, that the restoration area will be maintained *in perpetuity*. The assurance can be in the form of a notice on title, **conservation easement**, or other similar mechanism as approved by the City Attorney.” (emphasis supplied)

SMP 4.1.2.7.1

If the homeowner chooses to follow the Appendix D program, as discussed below, he must also commit the land to the purpose of native vegetation. That appendix reads as follows:

Areas planted for mitigation are subject to approval by the Administrator and *shall be recorded with the County Auditor on a notice of title*, or other similar document, *prior to approval of the project*. Areas planted for mitigation are intended to be protected *in perpetuity*...

Appendix D, page 333.

Please note that for Appendix D, as for the main provisions of the SMP, this title restriction/conservation easement must be recorded with the County before the City will approve the project. This clearly establishes the non-voluntary nature of this transfer; it also makes the transfer of the easement analogous to the Nollan easement. Therefore, the constitutional takings analysis must undergo the Nollan and Dollan nexus and proportionality tests.

In agreeing to the conservation easement, the landowner also implicitly agrees with the City’s interpretation of “native vegetation” and to the sole authority of the City Planning Department to decide what and where he must plan in ‘his’ yard.

3. Appendix D – Restore or Pay Tons of Experts’ Fees: Another Unconstitutional Condition.

SMP Appendix B, “The Single-Family Residential Mitigation Manual” unabashedly offers the landowner a deal: “To give homeowners a low cost alternative for meeting the no net-loss standard,” the City is ostensibly setting forth its Appendix B. The City quite openly acknowledges that **“These mitigation options include replacement, *enhancement*, or substitution of resources...”** (Appendix B, first page) **“Enhancement” is the City’s code word for *restoration***. If the homeowner follows the requirements of this appendix, an individual planner may waive any or all of the nine different wildlife analyses that would otherwise have to be submitted to the City (SMP 4.1.2.9), at an estimated cost of \$50,000.

The same deal is offered the applicant under SMP 4.1.2.4.4:

...an applicant may choose to use the Standard Residential Mitigation Manual in *Appendix D in lieu of the site-specific impact analysis* and mitigation plan. If an applicant uses the Single Family Residential Mitigation Manual, compensatory mitigation requirements provided in the manual shall be included in the project submittal.

SMP 4.1.2.4.4 The nine qualified professional reports are what constitute what the SMP refers to as the “site-specific impact analysis and mitigation plan.” SMP 4.1.2.9

While this may *sound* like a good deal, the problem with it is that these requirements, once again, require ripping out all non-indigenous vegetation and replanting with native. This is – according to the DOE Guidelines and the Supreme Court – the imposition of an impermissible burden – the burden of restoring the land to its “aboriginal” and “pre-European settlement” state (as the Guidelines refer to land repair that exceeds even *restoration*).

The fact that a planner can waive *all* of these very detailed and expensive technical reports raises a very important question. *Are these technical reports even necessary? Or, are they required just to use as leverage to extort the landowner into something he cannot, constitutionally, be required to do – restoration* For this is what these reports represent: an unconstitutional condition. That is, the landowner waives his right to only perform *mitigation, not restoration*, in return for being relieved of his burden to pay as much as \$50,000 for a bunch of technical reports. As noted above, *Koontz* stands for the proposition that even *monetary exactions* are subject to the *nexus* and *proportionality tests* of *Dolan*. The City may be referring to this tactic when it says that it intends to have “incentive-based restoration” (SMP 4.1.8.3.5), but in the language of the U.S. Supreme Court, this kind of “incentive-based” tactic amounts to an “*unconstitutional condition.*” **This tactic is also inconsistent with the DOE Guidelines prohibition, as noted above, against using regulatory measure to accomplish restoration: “...master programs...should make...use of...nonregulatory policies and programs.”** WAC 173-26-186(8)(c), emphasis supplied. The City’s use of *regulatory* methods to achieve restoration, therefore, is “in conflict with state law” and is unlawful under Article XVII, Section 11 of the Washington State Constitution.

4. These Unconstitutional Conditions Take the Right to Use One’s Land.

What the City does by seizing the right to determine all use of the land and, in fact, mandating that dense native vegetation be planted to cover substantially all of the lot, is the equivalent of a physical occupation of the land, which is a clear Fifth Amendment taking under U.S. Supreme Court case law. The *Lingle* case has an excellent summary of the high court’s earlier takings decisions. It characterized them as follows:

Nollan and Dolan both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interests... Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.

Lingle, para. 32, emphasis added.

The Court explains that such a governmental requirement was held by these cases to be unconstitutional:

As the Court explained in Dolan, these cases involve a special application of the “doctrine of ‘unconstitutional conditions,’” which provides that “the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.”

Lingle, para. 32, emphasis added. Here, too, the landowner is required to give up his constitutional right to compensation that he is entitled to, by waiving his other constitutional right to use his land, in exchange for a building permit.

5. Koontz Echoes Nollan and Dolan in Requiring that Governmental Exactions in Return for Building Permits Must Pass the Nexus and Proportionality Tests; But the Bainbridge SMP Flunks Them.

Koontz confirms the principle that government cannot require the waiver of a constitutional right in order to get a building permit. It also stands for the proposition that a government can only exact from landowners what serves to mitigate damage from a project, in amounts that are ‘roughly equivalent’ to the damage – in other words, any City permit requirement must pass the Nollan and Dolan nexus and proportionality tests.

That there is a nexus between a replanting requirement and the fact that there are areas where vegetation has been removed or destroyed by construction, cannot be disputed. ***However, the SMP’s requirement that all non-indigenous vegetation be removed, that the City alone has the power to specify which type of vegetation and where they must be planted, as well as the density of vegetation lot coverage and over what area, which is far in excess of that damaged by the construction (since it covers the entire property) – all of these elements confirm that the SMP revegetation requirements amount to a disproportionate exaction.***

(a) Without Scientific Proof Establishing that: (i) Only the City is Qualified to Determine the Type of Vegetation Needed for Mitigation; and that (ii) There is a Real Possibility That Significant, Irreparable Damage Will Occur From Using Homeowner Selected Vegetation, then the City’s Reservation of the Exclusive Power to Select Vegetation is Beyond What a Government Can Constitutionally Mandate.

The City has an approved list of native vegetation from which a landowner can select ‘his’ garden’s plantings. As with a lot of City things, if you do exactly what the City tells you, you have fewer problems. But if you want to express yourself, creatively, in the garden, it’s more expensive: you have to get a landscape gardener involved to justify your choices of either non-indigenous vegetation or even native vegetation not on the City’s list. This is not freedom of choice or freedom of expression. This is a dictatorship.

So what qualifications does the City have to dictate what people must have in their gardens? The *provenance* of the plant list is unknown; it may, or may not, have been prepared by a planner either working alone or even with someone who may, or may not, be an expert in native vegetation. Recently, a homeowner recounted to me an episode from several years ago when a planner looked at his mandated native vegetation buffer and admitted that ‘One of these days, I’m going to have to learn about these plants...’

While the City has set itself up as the greatest vegetation expert around, with the SMP creating a virtual dictatorship with respect to all gardening decisions, *democratic principles require that the City produce scientific proof to substantiate all City gardening decisions. The Constitution requires a rational basis for all governmental actions; without that, governmental actions are termed “arbitrary and capricious” by the courts, and therefore, invalid.*

Not only must the City justify its plant mandates on a scientific basis, but constitutional principles also require that the City scientifically prove that there is such a significant danger of substantial environmental damage occurring from homeowner plant selection that the City can take away what is

the homeowner's right to select his own vegetation. To date, there has been nothing even faintly resembling anything like scientific proof to substantiate these SMP mandates.

(b) The Conservation Easement's *Eternal* Term is Beyond What a City Can Constitutionally Require.

The City-mandated conservation easement has little nexus to any problem caused by new development for the simple reason that this easement lasts *forever*. And, being a title restriction that 'runs with the land,' the easement is imposed upon not just the original landowner who built the house, but also on successors-in-interest who have absolutely no nexus to any construction damage. The term of this easement is grossly disproportionate to the amount of any damage the project caused; it does not take all eternity to repair construction damage – only planting and a few good years of weather get the job done. Quite simply, a commitment to native vegetation "in perpetuity" is overkill.

(c) The Removal of Non-Indigenous Vegetation and Replanting with Native is "Restoration" and it Exceeds All That a Government Can Require Under the Equal Protection Clause.

The DOE Guidelines set forth the limits of land 'repair' that can be required of homeowners: repair the damage done to the environment by the construction project, *not prior damage*. WAC 173-26-201(2)(e)(i)(C).

The DOE Guidelines insist that: "***Restoration does not imply a requirement for returning the shoreline area to aboriginal or pre-European settlement conditions.***" DOE Guidelines, Definition of "restoration." In other words, even for *restoration* – a higher level of land 'repair' than *mitigation* - there is no requirement for the removal of all non-indigenous vegetation, and the complete replanting with native vegetation. So, by doing precisely this, ***the Bainbridge SMP is, once again, inconsistent with the DOE Guidelines.*** For, the SMP mandates "revegetation" (the word my 'spell check' keeps asking about) with nothing but *Central Puget Sound, forest, lowland, marine, riparian native* vegetation. By doing so, *the Bainbridge SMP is clearly requiring that the land's vegetation clock be reset way back to "aboriginal" and "pre-European settlement" conditions.*

The SMP is also inconsistent with the DOE Guidelines by seeking to achieve restoration through regulation. The Guidelines set forth how restoration is to be accomplished by local governments and this list does *not* include governmental regulation. Specifically, they provide that "*These master program elements regarding restoration should make real and meaningful use of established or funded nonregulatory policies and programs.*" WAC 173-26-186(8)(c)

In the *Armstrong* case, the U.S. Supreme Court established that requiring more of just some citizens than is required of the public at large is an Equal Protection Clause violation. Its oft-repeated quote is as follows:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong, next to last paragraph of majority opinion.

(d) The Size of Buffer Zones, Without an Appropriate Scientific Basis Establishing the Need for this Size, and Without an Appropriate Scientific Method for Establishing Them, is in Excess of What Can be Constitutionally Required by a Government.

The SMP fails to scientifically establish valid buffer sizes – both those set forth in Table 4-3 based on cattle and commercial crop studies, and those that may be established *ad hoc* by the planner through methods that use circular reasoning and non-objective standards. There undoubtedly must be some kind of a buffer that would apply to single-family residential use, but it should be much less than that which is required for the far more pollutant cattle and crop uses.

Under Dolan’s proportionality test, the amount of land reserved for what the City alone calls ‘mitigation’ is greater than all the City can require under the Dolan, Nollan and Koontz criteria – greater than is allowed by the Equal Protection Clause that denies government the ability to treat shoreline homeowners any differently than upland homeowners. All that can be demanded of shoreline homeowners is the amount of land actually needed to compensate for damage done to the environment by single-family residential use.

It is the *excess* of the currently-set SMP buffers over the lesser, appropriate amount - which is yet to be determined - and which is all the City can constitutionally require, that constitutes the Fifth Amendment taking of property rights and interests. The value of that excess land ostensibly dedicated to conservation, but which in fact may be closer to being a quasi-public garden or ecological preserve, is the amount of just compensation the City owes its shoreline homeowners.

(e) Without Scientific Proof of the Need, The Amount of Vegetation Required is More Than Can Be Constitutionally Required by the City.

The *Nollan, Dolan, Armstrong* and *Koontz* cases establish that all a government can constitutionally require from its citizens when involved in construction is the fixing of any problems caused by that construction. When a regulation takes private property rights by its restrictions, this regulation must be justified by a real, provable need. The level of vegetation density required by the Bainbridge SMP is in excess of what can be constitutionally mandated by a government. . The Guidelines recognize that: “[s]ustaining different individual functions requires different widths, compositions, and densities of vegetation. The importance of the different functions, in turn, varies with the type of shoreline setting.” WAC 173-26-221(5)(b), emphasis supplied. Therefore:

“[w]oody 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), emphasis supplied. This clearly acquits the landowner in one of these areas of the need for tall trees for fish habitat preservation and, if they are not needed for shoreline stabilization, reason dictates that tall trees *not* be planted which will block the homeowner’s view. (For purposes of this discussion, we choose to ignore the issue at this point as to whether preservation of ecological functions has such a public benefit as to justify the taking of a very significant and economically valuable private property “amenity” – the ocean view.)

The DOE Guidelines instruct local governments to take a tailored approach to conservation:

Local governments should identify which ecological processes and functions are important to the local aquatic and terrestrial ecology and conserve sufficient vegetation to maintain them.

WAC 173-26-221(5)(b). Please note the DOE's choice of words – the amount of vegetation to be required is simply “sufficient,” *not* ‘or larger than,’ as the SMP requires. Elsewhere, the Guidelines requires vegetation only where it is needed for environmental purposes; they instruct local governments to “*consider the amount of vegetated shoreline necessary to achieve ecological objectives.*” WAC 173-26-201(d)(viii), emphasis supplied. And this is, implicitly, all that the DOE Guidelines require. They do not require, or condone, vegetation in quantities beyond that which is necessary to achieve those scientific objectives

And yet the City mandates – *all around the Island* right next to the shoreline, in the view area - a tree every 20 feet, a tall bush every five, and a 65% vegetation canopy. This amounts to *excess vegetation* that does not fix any problem caused by construction. ***This is yet one more example of where the Bainbridge SMP is inconsistent with the DOE Guidelines.***

By applying the same standards to all areas around the Island, the SMP is not following the tailored approach the DOE Guidelines recommend. Instead, the Bainbridge SMP has taken a ‘quick and dirty’ approach to conservation of ecological functions – an approach that may result in excess vegetation, all at the expense of the private property rights of the homeowner.

So, what the Bainbridge SMP calls ‘mitigation, is actually *restoration and it is unconstitutional because it may lack a nexus to any construction damage and because it is disproportional.* Very few waterfront properties have, historically, had trees up close to the water, precisely so that people could see the water. But with its broad brush, the SMP requires that landowners plant trees even where none existed before construction. ***This is not ‘mitigation’ as the Supreme Court defines it because it is not addressing a problem caused by the construction – with mitigation, planting of a tree would be required only if during construction there had been the removal of a tree.***

As for mitigation v. restoration, the Planning Department does, in fact, require that larger areas be replanted than those that were, in fact, impacted by the construction project. The “Compensatory Mitigation Requirements” of Appendix D, include a penalty that has nothing to do with construction project impact. Under Table 2, if you clear grass or lawn in Zone 1, you only have to plant ½ of the “equivalent area” with native vegetation. But if you decide to clear an area already comprised of native vegetation and you don’t replant with native vegetation in Zone 1 (assuming you can even *get* City approval for that), you must plant *3 times* the cleared area with native forest and shrub vegetation. (There appears to be a slight error in the chart, but this is the most likely interpretation.) ***In short, you are penalized for having or planting “European settlement” vegetation, and rewarded for planting what the City wants – native vegetation.*** For a regulatory system to so openly display hostility to another type of vegetation is unusual, as well as unjustifiable, where the State has mandated throughout the SMA that decisions in master programs are to be based on the “best available science.”

(f) Without Scientific Proof to Support the Need, the Requirement That Only Native Vegetation be Used is Beyond What the City Can Constitutionally Require; Without a Functional Need, SMP Regulation is a Violation of First Amendment Rights of Free Expression.

Constitutional law mandates that there must be a rational basis to regulations, especially when they take away personal rights, interests and freedoms; “rational” means scientifically provable. The Bainbridge *SMP fails to provide any proof that only native vegetation can mitigation construction damage.* Common knowledge tells us that there are plenty of non-indigenous plants that can serve

the same purpose as native ones, so the City mandate of native vegetation only appears to be a matter of personal taste.

The Bainbridge SMP is so fixated on native vegetation that it even defines “enhancement,” which we all, of course, consider to be a positive thing, as “...removing non-indigenous plant...species.” SMP Definitions 8.0. Appendix D reiterates this by defining “mitigation” purely in terms of *native vegetation*: “Mitigation for vegetation cleared in the shoreline jurisdiction *requires replacement with an equivalent area of native tree and shrub plantings.*” Appendix D, page 333. The SMP’s obsession is so complete that any need for vegetation for any ecological purposes, no matter how small – even just for filling holes after weeding – must be met by native vegetation, nothing else.

In addition, the City doesn’t require just any old kind of native vegetation; the SMP is very particular about the precise *type* of native vegetation that must be planted: only native vegetation that meets the following criteria will qualify: that which is “indigenous to the *Central Puget Sound lowland ecoregion...*” SMP 8.0 Definition of “Native Vegetation,” emphasis supplied. Or, “...species that are native to the Central Puget Sound Lowland *marine riparian zone.*” SMP 4.1.3.5.5(a) So, even if a plant species were indigenous to the Puget Sound, if it wasn’t native to the *Central* area, it could not be planted; or if it was indigenous to an “*upland ecoregion,*” it could not be planted. In what section of the nursery do they sell these plants? Is the average landscape gardener *really* going to know how to meet these requirements without a whole lot of research – and a very high bill for the homeowner?

Perhaps because “native vegetation” is not a species name or other botanical designation, but rather a description based on a plant’s *historical* record, the City has a list of vegetation species that it considers to be “native,” and these are precisely what the homeowner can plant without a hassle. Without following that list, the burden is on the homeowner and/or the “qualified professional,” that the City may require him to have, to research vegetation and figure out if there is something else the homeowner might actually like and that the Planning Department might consider to be “native” and acceptable. This is quite a heavy burden to put on a homeowner.

The SMP *does* allow for some substitutions, to be approved by the City, which must serve the same purposes as the native vegetation (which sounds fair), but they cannot be “exotic.” SMP 8.0 Definition of “Native Vegetation Equivalent.” However, if a native vegetation “equivalent” serves the same functions as the native, what does it matter if it is “exotic” and gives pleasure to its homeowner? This is where you can clearly see that personal tastes are driving the Bainbridge vegetation agenda. As a practical matter, given the omnipresence throughout the SMP a “native vegetation” requirement, it would appear to be extremely difficult – if not impossible – to get anyone in the Planning Department to approve an exception to policy. Certainly, there appear to be no guidelines in this area as to when these exceptions can be approved.

Consistently throughout the SMP, one can read the clear inference that the City wants to return the shoreline to the way it looked before landowners started changing things. Why else would there be requirements for screening the view of houses? While there may be no explanation for the various references to “screening” in the SMP, the City has revealed it doesn’t want the public to have to look at them, whether from public access easements, road rights-of-way or from the water. The City considers houses on the shoreline *ugly*. Certainly, there is no ecological function served by hiding the view of houses from wild animals or from other plants or trees... And yet “the City may require modifications to the site plan and/or project... screening as deemed appropriate.” SMP 4.1.2.1. And yet, the view of land from the water is not a view specifically protected – or even mentioned – in the SMA or the DOE Guidelines. The only view that is protected is the view *from the land*. “Local master programs shall...(iii) [t]o the greatest extent feasible...protect the public’s opportunity to enjoy the

physical and aesthetic qualities of the shorelines of the state, including *views of the water...*" WAC 173-26-221(4)(b)(iii), *emphasis added*.

Additional evidence that personal tastes are driving the construction process can be found in small pockets throughout the SMP. Section 4.1.1.3.4 establishes that a Planning Department policy is to "[m]inimize development activities that interfere with the *natural functioning of the shoreline ecosystem, including but not limited to... aesthetic values...*" Somehow, it does not seem intrinsically obvious that "aesthetic values" constitute a part of the "natural functioning of the shoreline ecosystem." The other things recited in this provision do seem to be – stability, drainage and water quality – but "aesthetic values?"

The First Amendment right of free expression means not only do people have the right to capture their personalities in their garden choices, but also that a government cannot mandate – as the Soviet Union did for years, and the Bainbridge SMP is doing here – what kind of expression is aesthetically pleasing. Some people may find native vegetation more pleasing than non-indigenous, but this is not a taste that can be mandated by the government. Our democratic form of government derives its power from the people, but only for the purposes of protecting and preserving public health, safety and property. It is constitutionally impermissible to restrict artistic expression – which is present in the way people create their gardens – absent some extraordinary police power need. This simply does not exist in the case of shoreline management. So the 'native vegetation only' provisions of the SMP are unconstitutional, violations of the First Amendment.

The SMP takes the private property owner's right to engage in what a majority of people would consider free expression. Gardens can be an expression of peoples' personalities, their basic 'essence.' For many, gardening is a passion, a joy, a source of fresh fruits and vegetables for the table, as well as a source of an abundance of beautiful flowers for the house. Frequent trips to the nursery are adventures – looking to see what new plants they have. Countless hours are spent dreaming and planning about how to landscape and make one's natural surroundings as beautiful as possible: flowers and plants bring such emotional comfort and joy to mankind! And, what constitutes a beautiful garden is, as they say, in the eye of the beholder. Even if they are "non-indigenous," people in the Pacific Northwest love their Japanese maple trees, their tulips and their rhododendrons (brought from China in the 19th century)! Now, with the SMP, these are all things of the past. When the City takes total control over a homeowner's garden, it has deprived him of one of the very real pleasures of life, and a valuable personal freedom protected by the First Amendment. It is ironic that in their zeal for the environment, the SMP drafters have created a dictatorship.

The City is taking the individual land owner's right to use his 'own' land as he desires in order to satisfy the personal aesthetics of the City hierarchy. It is this kind of regulation that the Supreme Court has described as "arbitrary," with the following result: "...if a government action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is *so arbitrary as to violate due process* – this is the end of the inquiry. *No amount of compensation can authorize such action.*" *Lingle v. Chevron*, 363 F. 3d 846, para. 24, *emphasis supplied*.

Throughout the Bainbridge SMP there are various aesthetic criteria that the City seems to think it can impose on development and vegetation; they all boil down to an attempt to impose someone else's personal taste on private land and they are violations of the First Amendment.

G. The Imposition of SMP “Revegetation” Requirements on Existing Gardens: Punishment for Personal Conduct Without Any Requirement of Damage or Right to Trial. This is a Clear Violation of the SMA and the U.S. Constitution.

1. There Are Two Very Fuzzy Descriptions of the Conduct That Can Trigger the Mandated Replanting in an Existing Garden.

First the SMP says that “...vegetation standards *do not apply retroactively* to existing uses and structures” (just what the DOE Guidelines say), then it goes on to say “*unless changes or alterations are proposed.*” SMP 4.1.2.1 One would think that the “changes or alterations” phrased referred to new construction on the house – and it can; but it also means *no changes or ‘alterations’ to the garden, or else...*

Existing landscape areas may be retained within the Shoreline Buffer or Site-specific Vegetation Management Area. ***However, any changes from the existing landscape to a different landscaping use or activity will require that the modified area comply with the provisions of 4.1.3 Vegetation Management, and the intent of providing native vegetation to maintain ecological functions and processes.***

SMP 4.1.3.7 The only way for the “modified area” to comply with “the intent of providing native vegetation” is to rip out all the non-indigenous plants you just put in and to ‘revegetate’ the area with native plants. This is not just the application of routine garden “maintenance” regulations on the shoreline homeowner; this is the application of the far more oppressive “revegetation” regulations.

Vegetation replanting is required for all...uses or activities within the 200-foot shoreline jurisdiction that either alters existing native vegetation or any vegetation in the required Shoreline Buffer or Vegetation Management Areas, whether a permit is required or not. This includes invasive species removal [weeding.]

SMP 4.1.2.5.1

So, any “activity” that “alters” native vegetation – or even non-indigenous vegetation such as non-indigenous *weeds* requires *revegetation with native plants. Please notice that revegetation is triggered by any activity in the entire” 200-foot shoreline jurisdiction.*” This means that if you “alter” (whatever that means) any native vegetation anywhere in this 200 feet – most specifically, if you *weed* – you must revegetate with native vegetation.

2. The Punishment? Revegetation. The Crime? Putting in, or Taking out, or “Altering” Any Plant. Excessive Punishment for Personal Conduct That Doesn’t Even Result in Harm - and Without Providing a Right to Trial.

The imposition of the native revegetation requirements on an existing garden is punishment for harmless personal conduct – changing anything in your garden. There is no requirement that this change result in any harm to the environment, let alone an *significant* harm. Since it is framed as punishment for personal conduct, the individual must be provided with a right to some kind of trial or hearing. There is none. These are all due process violations of *personal* rights.

There is no *Nollan* nexus to new construction – there is no new construction involved. There is no building permit exchange of rights. Because no harm is required for this offense – and logically, there is probably little to none – the punishment is grossly disproportionate under *Dolan* criteria. The *Nollan*, *Dolan* and *Koontz* principles of nexus and proportionality don’t just apply to new

construction: they apply to any governmental exaction because they are universal constitutional law requirements. To be valid, any government regulation must have a rational basis and not be “unduly burdensome.”

In addition – and more importantly – there is the principle of *Loretto*. Remember, that’s the case where the City of New York required that all apartment buildings house cable television equipment, whether or not their tenants were provided with such coverage (transmission required a continual path from one building to the next). The U.S. Supreme Court found this a Fifth Amendment taking, regardless of the relatively small size of the area required for this equipment. It was a taking of the owner’s ability to use that space as he wished that was the basis of the opinion.

The legal viability of a punishable offense for the above-referenced conduct is highly suspect. As such, the imposition of revegetation requirements all over the homeowner’s 200-foot shoreline jurisdiction amounts to a pure Loretto Fifth Amendment taking.

3. The DOE Guidelines Specifically Prohibits Retroactive Application of the SMP to Existing Gardens; The City Pays Lip Service to the Principle, Then Goes Ahead and Does it Anyway.

The DOE Guidelines specifically provide that: “Like other master program provisions, vegetation conservation standards *do not apply retroactively to existing uses and structures.*” WAC 173-26-221(5)(a)

Paying lip service to the SMA, SMP 4.1.3.1 reads as follows: “[v]egetation standards shall not apply retroactively to existing lawfully established conforming and nonconforming uses and developments, *including maintenance of existing residential landscaping, such as lawns and gardens,*” But then the SMP goes right ahead and does just that. “Similar to other master program provisions, vegetation standards do not apply retroactively to existing uses and structures ***unless changes or alterations are proposed.***” SMP 4.1.3.1, emphasis added.

The SMP carves out many exceptions to the SMA mandate. In addition to the provision recited above, SMP 4.1.3.7.1(a) reiterates this SMA principle, but then it goes on to a *very significant* “***however... any changes*** from the existing landscape ***to a different landscaping use or activity will require that the modified area comply with the provisions of section 4.1.3 Vegetation Management, and the intent of maintaining native vegetation that protects ecological functions.***” SMP 4.1.3.5.5(a), emphasis supplied.

Elsewhere, the SMP mandates that: “Vegetation ***replanting is required for all*** development, ***uses, or activities within the 200-foot shoreline jurisdiction, which alters existing native vegetation, whether a permit is required or not. This includes invasive species removal.***” SMP 4.1.2.5.1, emphasis supplied. Please note that the phrase clearly indicates that non-construction related activities are covered by the SMP (i.e., outside the SMA purview and hence SMP purview) – all it takes is that the “activity” – whatever that means - “*alters existing native vegetation.*” As far as what “alters” means, once again, there is a due process violation when there is no explanation.

H. Imposition of SMP Regulations on Routine Maintenance of Existing Gardens

1. SMP Word Games: “Exempt” Maintenance Really Isn’t.

The SMP 4.1.3.1 pays lip service as follows: “[v]egetation standards shall not apply retroactively to... [the] *maintenance of existing residential landscaping, such as lawns and gardens.*” SMP 4.1.3.4.1 However, in 4.1.3.1 the SMP says that vegetation management standards *do* apply to existing

gardens when “changes or alterations are proposed [to them].” And, of course, 4.1.3.7.1(a) provides that “changes from the existing landscape to a different landscaping use or activity will require that the modified area comply with the provisions of 4.1.3, Vegetation Management.” The overall governing rule of construction, SMP 4.6, therefore kicks in and the more restrictive provisions prevail.

The SMP even goes so far as to provide a list of things that are “exempt” in 4.1.3.4.3. *However*, even as these regulations are setting out what they *refer to* as “exempt,” there are so many limitations, ‘*except’s*’ and ‘*provided’s*’ that they completely negate the ‘exempt’ status of an activity. For example, maintenance trimming is exempt – but only if the “main stem or supporting structure” is less than 3” in diameter; so all bigger plants are *not exempt*. SMP 4.1.3.4.3(a) Weed pulling (*only for “noxious or invasive weeds”*) is exempt, provided (a) you consult with the Kitsap County Noxious Weed Board; or (b) have checked the Washington State Noxious Weed List and confirmed that what you want to pull is on that list; that (c) *how* you remove the weeds is done in a manner “*consistent with best management practices*” (where on earth do you find them – or do you need to hire a qualified professional to weed?); and (d) replanting of native vegetation is done in accordance with 4.1.2.5. That sounds like a whole lot of requirements for something that is supposed to be “exempt” from requirements... But, then again, maybe weeding really *isn’t exempt*? Elsewhere the SMP says that:

[m]inor vegetation removal outside the shoreline buffer or site-specific vegetation management area on a developed property not associated with new construction may be allowed, as provided in this program *with an approved clearing permit*.

SMP 4.1.3.5.8, emphasis added. Even though it’s a *weed*, it’s still *vegetation*, and just a bit of weeding would constitute “minor vegetation removal.” Since Section 4.6 means the more restrictive provision prevails, so I *do need a clearing permit after all? And that means that weeding is not really “exempt” from SMP/SMP permit requirements.*

Please let me give you another example, which I do find funny because this is supposed to involve exigent circumstances – danger to human life and limb, and all that. It is ostensibly for that reason that the activity is labeled “exempt” by the SMP. *However*, in order to remove a *hazard tree*, you must submit either one – or two - arborist’s reports to the City along with your application for pre-approval – two if the tree is in a critical area, which is so poorly defined that it can mean absolutely anywhere on the Island. The planner must be convinced – “to his satisfaction” – that trimming is not sufficient to eliminate the hazard. If and when you get past these hurdles and you can remove the tree, the SMP does not allow it to be taken off the property; it must remain as wildlife habitat, regardless of the size of your lot. SMP 4.1.3.4.3(c) One can only hope that the tree will ‘hang in there’ long enough for you to get all the paperwork processed. The SMP might *call* this process “exempt” from the SMP, but you have to file an application and reports, pay a fee and possibly bicker with the planner – now then, ***in what way is this really the description of something that is “exempt” from SMP regulation?***

The only other “exempt” vegetation management activity is the removal of a non-hazard tree, which – of course – you can only do with some *other* regulatory agency’s approval, in that case with a permit issued by the State DNR. That’s it: this is the entire list of what the SMP says is “exempt” from SMP Vegetation Management regulations; so, as you can see, even those activities that are said to be “exempt”, *really aren’t*.

2. Under the SMP, Pulling Weeds Out of a Lawn Results in Replacing the Lawn With Native Plants.

The City cares a lot about weeding (aka “invasive species removal) – probably so much because it provides a great opportunity to force restoration with native plants. Once you’ve pulled a few weeds in a certain area, that has obviously exposed a lot of dirt – dirt that could be used for *native vegetation*. You’ve got to admit – it’s a *fertile* mind that thought up this one (sorry - I couldn’t resist the pun). So, weeding is used to trigger SMP revegetation requirements. Since few homeowners like weeds, the City just *knows* that, over time, it is going to phase out the majority of non-indigenous plants in an existing garden. Or so it thinks...

Weeds show no respect: they don’t just stay in flower beds - they can even pop up in the middle of a lawn. The City really doesn’t like lawns. The SMP ostensibly allows only 1/3 of Zone 2 to be lawn (SMP 4.1.3.6.4(b); but even that is probably trumped by the mandate that Zone 2 be used to create that “contiguous native vegetated corridor to the shoreline.” Since “contiguous” implies ‘without stopping,’ the more restrictive all-native provision would trump the permissive lawn provision. SMP 4.6 But for an existing garden with a *real* lawn, if the Bainbridge SMP is approved, every time a homeowner pulls weeds, he has to replant that area - or *maybe even a larger with native plants – right in the middle of his lawn!* SMP 4.1.2.5, plus 4.1.2.6.4(a) and 4.1.3.5.8 You can clearly see the result – if weeds continue to pop up in the lawn, and a good law-abiding citizen complies with the SMP, his lawn will slowly be wiped out by native vegetation.

The SMP has all kinds of different paperwork requirements for what it calls ‘disturbing native vegetation’ and what I call ‘weeding.’ For any area less than 200 sq. ft., you can ‘get away’ with submitting to the City “an annotated list of proposed plants and their spacing specifications.” SMP 4.1.2.5.1(a)(i). Heaven forbid you really have a ton of weeds! For more than 200 sq. ft. your “planting plan” must be prepared by a “qualified professional.” SMP 4.1.2.5.1(a)(ii) *So how much is that going to cost?!* But, when you weed, you only disturb a few inches here and a few inches there – how does one even calculate the total area that will be ‘disturbed’ by your weeding, so as to know which application form you have to submit?! Surely there should be some kind of minimum threshold below which you can weed without a permit... Maybe there should be, but clearly, there isn’t.

For those who do not share the City’s appreciation for native vegetation, the replacement native plants may be as unattractive as the weeds they want to pull out. If this is the case, ***given the hassle involved with the paperwork and compliance, this regulation may actually serve to preserve and promote the growth of noxious and invasive weeds, something that probably falls into the category of ‘unintended consequences.’***

I. SMP Excessive Vegetation Requirements Forces a Physical Occupation of Private Land by Government-Mandated Plants – a *Loretto* Fifth Amendment Taking.

The most obvious form of a governmental taking of private property is when the government physically occupies a space. This is the *General Motors* case, where the federal government took over and occupied real estate from GM for the WWII war effort. *United States v. General Motors*, 323 U.S. 373 (1945). When space on land is physically occupied by someone else’s things, an owner is obviously unable to use these areas for his own purposes. This is the problem of the shoreline homeowner because of the revegetation requirements of the Bainbridge SMP.

More recently, the Supreme Court held in *Nollan* that a government-mandated public access easement constitutes a physical occupation of private property even though that occupation may be transient, non-continual; it does not require that anyone remain continuously on the property for the physical occupation to be complete. Both *Nollan* and *Dolan* involved land-use exactions – regulatory restrictions that precluded any other use for which the owner wanted that portion of his

land. So, too, do the restrictions in the *Loretto* cable equipment case and these dense all-native vegetation restrictions in the Bainbridge SMP.

The *Lingle* Court pondered why it had never set out the justification for its holding “on numerous occasions” that the Fifth Amendment was violated when a land-use regulation “denies an owner the economically viable use of his land.” *Lingle*, para. 22. The Court concludes: **“Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.** See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. at 652 (Brennan dissenting).” *Lingle*, para. 12.

This deprivation of the ability to use your land because the City has determined, by itself, how your land will be used is precisely the U.S. Supreme Court case of *Loretto*, where New York City determined that a portion of every apartment building’s space would be occupied by cable television equipment. While the SMP exaction may be a condition of construction, where some believe that more latitude may be shown for City regulations that would otherwise effect an unconstitutional taking, the Supreme Court has actually mandated that this situation requires a *greater, heightened scrutiny because of its potential for abuse*. As such, *Nollan*, *Dolan* and *Koontz* all hold that, to be valid, any land use exaction – whether in exchange for a building permit or otherwise – must pass the *nexus* and *proportionality tests*.

In the slightly different ‘taking’ scenario presented in *Loretto*, the U.S. Supreme Court reiterated the following:

In short, when the “character of the governmental action,” *Penn Central*, 438 U.S., at 124, is **a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to “whether the action achieves an important public benefit or has only minimal economic impact on the owner.”**

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-5 (1982), emphasis added. In addition:

Such an appropriation is perhaps the most serious form of invasion of an owner’s property interests. To borrow a metaphor, cf. *Andrus v. Allard*, 444 U.S. 65-66 (1979), the government does not simply take a single “strand” from the “bundle” of property rights: it chops through the bundle, taking a slice of every strand.

Loretto, at 435. And, finally, the U.S. Supreme Court finds that:

Moreover, ***an owner suffers a special kind of injury when a stranger directly invades and occupies the owner’s property.*** As Part II-A *supra* indicates, ***property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion, literally adds insult to injury.*** See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law, 80 Harv. L.Rev. 1165, 1228. Furthermore, ***such an occupation is qualitatively more severe than a regulation of the use of property***, even a regulation that imposes affirmative duties on the owner, ***since the owner may have no control over the extent, or nature of the invasion...***

Loretto, 436, emphasis supplied.

In the Bainbridge scenario, ***where the City is determines which plants will be planted on your land, and where, the City is occupying your land with things the City wants, not what you want. And, because of the conservation easement that is written to last in perpetuity, this physical occupation of your land is permanent, one of the original elements required for a Fifth Amendment 'taking' to have occurred.***

In *Nollan*, the U.S. Supreme Court clearly set out that restrictions on use can constitute Fifth Amendment takings every bit as much as physical occupations of property. Justice Scalia and the majority vehemently disagreed with the dissenting Justice Brennan and observed as follows:

To say that the appropriation of a public easement across a landowner's premises does not constitute a taking of a property interest, but rather (as Justice Brennan contends), "a mere restriction on its use," post at 48-849, is to use words in a manner that deprives them of all their ordinary meaning.

Nollan, at 831.

The *Loretto* Court may find it distasteful that the City authorized a third party to occupy the private property; it would undoubtedly find it egregious that the City poured salt on the wound by *forcing the homeowner to even pay to have the offending items installed on his property.*

J. Through the SMP, the City Exercises Complete "Dominion and Control" Over the Shoreline: It Makes Every Decision a Homeowner Used to Make.

1. SMP Vegetation Requirements Transfer the Right to Make All Decisions Regarding Private Shoreline Property to the City; This Right is an Indicia of Ownership.

The SMP conservation easement and its vegetation requirements constitute more than a commitment in favor of native vegetation; it is a commitment to let the City make all decisions regarding the planting and maintenance of vegetation on the land, and – even more important – what uses and *activities* can be engaged in on the land. This is so because of the multitude of things that require pre-approval from the Planning Department. The SMP makes it clear that there is no latitude for the homeowner, himself, to make any decisions regarding the land.

The U.S. Supreme Court began each taking analysis in *Dolan* and *Nollan*, having easily established: "the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle*, Section III, para. 3. Stripped to its essential elements, the SMP vegetation requirements constitute a taking of total control over the use of the shoreline – which translates into the fundamental *right to use the land*, which means it is a Fifth Amendment taking that requires just compensation.

As cited above, all of the following activities require *pre-approval by the City*:

(a) The choice of the precise species of native vegetation to be planted in the garden (from the City's approved plant list);

(b) The location where each particular tree and/or shrub will be planted – even with ostensible latitude given by the City for an ocean view, the number of trees and shrubs to be planted cannot be changed, so the result of making any change to the rigid one-tree-every 20-foot requirement is a 'clumping' effect that eliminates some views to achieve others;

(c) *Whether or not* a homeowner can trim, prune, or remove any vegetation;

- (d) *How* the trimming, pruning or removal is accomplished;
- (e) *How much* any vegetation can be trimmed, pruned, topped or removed;
- (f) *Whether or not* any native vegetation can be removed or *any* part of the land cleared and exactly how much;
- (g) *What* plant or tree will replace any that is removed, along with its age and “quality”;
- (h) *Whether or not* a tree that has been removed can be moved off the property or whether it must be retained to create additional wildlife habitat – actually, after writing this, based on a pre-June 7 version of the SMP, I double-checked and now there is no decision to be made. The SMP mandates that *all* felled trees must remain on the private property to serve as habitat.

And, lastly, *most egregious of all,*

(i) *Whether any “new” use or “activity” can take place on the land, regardless of whether it causes any significant environmental damage or not.*

Proposed development, use, and *activities* within the shorelines of statewide significance shall be reviewed in accordance with preferred policies listed in 4.1.1.3. The Administrator may reduce, alter, or deny proposed development, use, or *activity* to satisfy the preferred policy.

SMP 4.1.1.2, emphasis added. Under 4.1.1.3 there are six different policies to be considered when reviewing an ‘activity pre-approval application’ (the City staunchly refuses to call these *permits*); and under 4.1.2.4 there are seven more criteria. *So, there are a total of 13 City criteria that must be considered when deciding whether I can have an outdoor party for my granddaughter. I can only wonder how long it will take to get this permission...*

2. Through the SMP The ‘Owner’ is Now, Effectively, the Tenant, and the City is Now the Landlord – A Landlord With Far More Rights Than One With an Apartment.

The person who has the right to make all property decisions is usually the owner, legally; under the SMP, that is the City. The Bainbridge SMP effectively changes the relationships of the parties: the land ‘owner’ is now a tenant who must follow all directions from his landlord – the City. The ‘owner’ is now someone who cannot do anything without the landlord’s pre-approval other than stay in the house. Except he really can’t do that either because he has vegetation management obligations and even vegetation *goals* he must achieve for the City. **The ‘owner’ must post a security deposit just like a tenant – only this one is called a surety bond.**

The SMP provides that there must be a surety bond for vegetation, as well as for construction:

Except for projects undertaken by public entities, performance or maintenance bonds or other security shall be required by the City to assure that work is completed, *monitored and maintained*. The bond/surety shall be refunded to the applicant/proponent upon completion of the mitigation activity and any required monitoring.

SMP 4.1.2.7, emphasis required.

It is significant to note that this surety bond is posted not just for proper installation of the native vegetation, but also “to assure that [vegetation] work is completed, ***monitored and maintained.***”

SMP 4.1.2.7.2, emphasis supplied. **This means that the surety bond is ensuring activities that the SMP has no authority to regulate; the SMA's only purview is regulating new development.**

The SMP surety bond provisions clearly reflect that effective ownership of shoreline property has been transferred to the City, with the surety bond serving the exact same function as a tenant's security deposit – ensuring that the property will not be harmed by the tenant, the tenant here being the one who owns a property without any right to decide how to use it.

The 'owner' is now subject to unscheduled periodic inspections by the landlord, who may not just critique his maintenance of the garden, but also require that the tenant upgrade the property to meet the *goals* the landlord has established for the poor tenant. This is not a situation that even an apartment dweller would put up with, and he wouldn't have to because the law has established a bunch of regulations on landlords to ensure a certain degree of *reasonableness* in their actions.

The shoreline property 'owner' is actually worse off than the typical apartment tenant. ***With an apartment, the landlord may only inspect the premises upon giving the tenant some reasonable amount of advance notice, unless there is an emergency situations.*** Here, without any requirement of prior notice or reasonableness, the City can inspect the private property whenever it wishes. ***And the apartment tenant does not have to submit to demands from the landlord to make continual upgrades to the property, not just repair for damages.*** Here the City has no constraints such as a reasonableness standard to get in the way of what can be excessive demands for improvements to the garden.

The final point for comparison between the shoreline 'tenant' and the apartment dweller is the payment of *rent*. ***The apartment tenant pays rent, and the shoreline 'tenant' does, too*** – in the form of pre-approval application fees, fees to maintain the surety bond, qualified professional report fees, inspection fees (*you wouldn't expect the City to do this for free, would you?*) and the cost of labor and materials to make the upgrades the City demands.

Now, doesn't this all sound like a landlord/tenant relationship to you? How can you *not* believe that effective ownership of the shoreline has been taken by the City from its owners?!

3. The Shoreline 'Landlord' Gets Away With Murder...

The individual planner has the discretion to set the amount of the bond at, literally, *any amount*. The surety bond amount must simply "provide assurance to the satisfaction of the Administrator." SMP 4.1.2.7.1 There is no reasonableness standard imposed upon a planner, nor any stated relationship between the amount of the bond and the actual cost of revegetation, should the landowner fail to perform his obligations. As such, a planner could require the posting of a multi-million dollar bond for a very rich person. This is punitive, not rationally-related. And the constitution requires rationality.

Under the reasoning of *Nollan, Dolan* and *Koontz*, the surety bond exaction is only sustainable when its exercise bears a *reasonable relationship* to a legitimate governmental goal. Said another way, ***the amount of the surety bond must be "roughly equivalent" to the cost of mitigation, not restoration, and nothing in excess of this amount. The Dolan proportionality test applies here, too, as the Koontz decision most recently said. Koontz specifically says that monetary exactions from a landowner as a condition of construction are subject to the same Nollan nexus and Dolan proportionality tests as any non-monetary exaction.***

Without a reasonableness restraint, the kind of power the planner has, may give rise to bribery or extortion. As long as the amount of the bond is unreasonably high, or its term unreasonably long, there may be a temptation for someone to circumvent the law. As it is doubtless intended, the

potentially unlimited amount of the bond confers a real choke hold over the homeowner. This amounts, once again, to extortion, an unconstitutional condition - not lawful governance.

Similar to the conservation easement for all *eternity*, the City reserves its right to force a homeowner to carry a vegetation surety bond virtually *forever*. The SMP reads:

When mitigation is required, a periodic monitoring program shall be included as a component of the required mitigation plan. To ensure the success of the required mitigation, **monitoring shall occur for a minimum duration of five years** from the date of completed development... ***The duration of monitoring period may be extended if the project performance standards set forth in the approved mitigation plan fail to be accomplished, or due to project complexity, the approved mitigation plan requires a longer period of monitoring.***

SMP 4.1.2.8.1 , emphasis supplied.

So, the monitoring and the surety bond remain in place until the planner – in his or her sole discretion – feels that the “project performance standards” have been met or, just because the project is “complex.” (*What does that mean?*) This requirement is overbroad and vests far too much discretion in individual planners. These things amount to violations of the Due Process Clause. And, once again, they increase the potential for extortion or bribery.

K. Your Yard as a Wildlife Habitat Controlled by the City: No Clearing!

The SMP gives the Planning Department the authority to require wildlife habitat restoration. Specifically, as part of its submittal requirements, every application for a building permit must include “[a] description of measures to preserve existing habitats and opportunities *to restore habitats that were degraded prior to the proposed land use activity...*” SMP 4.1.2.9.1(d) It could not be more clear that restoration, not mitigation, is being required since the provision so openly acknowledges that these habitats were degraded *before* any construction project was even proposed. As such, this is a requirement that exceeds *mitigation*, and which places the burden of restoration on only the few, in violation of the Equal Protection Clause, pursuant to the Supreme Court’s holding in *Armstrong* that such burdens can only be imposed on the public as a whole.

As we have seen above, *the size of the buffer zones can be increased by as much as 50% by the planner if he determines that there is wildlife habitat on your lot: that means a whole lot more dense vegetation.* As for the garden serving as a wildlife habitat, the City has complete control over whether or not any vegetation can be cleared and/or removed from an individual property, on the basis of whether the City thinks it’s a good idea to leave this debris for the wildlife.

The restrictions on clearing are *severe*. There can be no clearing of vegetation amounting to more than 200 sq. feet and no more than three “non-significant” trees in any three year period, with a lifetime total of only six non-significant trees; “significant trees” can never be removed anywhere, even outside the protected zones. SMP 4.1.3.5.8(a)(1) and 4.1.3.6 There is no definition of what constitutes a “significant tree,” so once again the planner has complete discretion to keep any trees he likes. Native vegetation of any kind can never be removed from the buffer zones or the vegetation management area. SMP 4.1.3.5.8(a)(ii) While “Vegetation Management Area” is capitalized as if it were a defined term, there is no such definition – rather, leaving it up to the individual planner to prohibit clearing wherever he feels there is such an area. And where there is even minor clearing, the SMP requires replanting the same, or an even greater area, with new native plants. SMP 4.1.2.5.8(iv) and 4.1.2.6.4(a) And, as noted above, when a hazard tree is removed, the City requires that it be left on the property as wildlife habitat.

While it is nice to think that wild animals will have plenty of good habitat on the Island, we should also think about balancing this with *people's habitat*. This involves thinking about the constitutional rights of private property owners. Isn't it a *tad excessive* to require people to live in a dense forest-like area deliberately designed to house as much wildlife as possible, without any power to change that so as to protect themselves from predators?

The State must have anticipated that ardent environmentalists, enthused with the new power they felt the SMA gave them, might overdo things a bit. The Legislature attempted to give local governments some reminders that, as private property, shoreline land could not be used as if it were public. Hence, along with numerous cautionary statements about the constitutional rights of property owners, the SMA includes a *priority list, to be used in case of conflicts between competing goals*:

Local governments *shall*, when determining allowable uses and resolving use conflicts on shorelines within their jurisdiction, apply the following preferences and priorities in the order listed below... **(i) Reserve appropriate areas for protecting and restoring ecological functions... Local governments should ensure that these areas are reserved consistent with constitutional limits.**

WAC 173-26-201(2)(d)(i), emphasis supplied.

In the case of Bainbridge Island, the City is reserving every lot in Residential Conservancy as an ecological preserve and, quite incidentally, a residential place for people. This is inconsistent with the admonitions of the DOE Guidelines regarding "constitutional limits."

L. Dangers to Homeowners' Health, Safety and Property Are Increased by the SMP Dense Vegetation Mandate and Severe Restrictions on Clearing: a Clash of Priorities.

1. Dense Vegetation Close to the House and Restrictions on Clearing Bring Increased Risk from Predatory Wildlife, Wildlife-Carried Diseases and Wildfires

The imposition of native vegetation requirements over the entire 200-ft. shoreline jurisdiction, with little to no trimming, pruning, topping or removal possible under the SMP, leads to the creation of dense vegetation. This density is mandated overhead as well as on the ground, with the requirement that 65% of Zone 1 be covered by a 'vegetation canopy.'

While this may, or may not, be lovely to look at – depending on your personal taste – this dense vegetation creates a wonderful habitat for animals that can pose a serious danger to small children and family pets. Bainbridge Island already has some very dense vegetation areas, including its "Grand Forest" and we have thriving populations of coyotes and raccoons, as well as having had cougar and bear sightings in recent years. Even where vegetation is thinned out, coyotes and raccoons are frequently seen and are responsible, one or both species, for the decimation of the domesticated cat population in many, if not all, shoreline areas. As an island with only one bridge over the water, which has plenty of vehicle traffic to dissuade migration, predators don't leave Bainbridge; they stay and reproduce, and reproduce, and reproduce – they have virtually no predators, themselves. The fact that raccoons do, in fact, prey on family pets was vividly demonstrated some years ago when the *Bainbridge Review* ran an article about a pack of raccoons in the Country Club shoreline area luring a spaniel to the water, then circling, attacking and drowning it. Being the owner of small dogs, with a run-off stream and raccoons nearby, this story has haunted me for years as I take the dogs out into the garden at night. Having previously lived at the base of mostly unpopulated hills in California, I am all too aware of children in their own backyards being killed by coyotes and the adults attempting to rescue them being seriously injured.

The predators on our island are emboldened and show themselves in clearings, but if the homeowner can at least see the coyote from a distance, he has some time to run for the child or pet and potentially save their lives.

Wild animals may be loved for their beauty – or their ‘cuteness’ when one can’t call them beautiful – and I am *quite* an animal lover. However, wild animals do not get annual shots at the vet and they can carry the risk of rabies, lyme disease, the hanta virus, avian/bird flu – and many other diseases that can kill or make people extremely ill. To the extent that we create the perfect habitat for wild animals close to homes, we also expose human beings to the risk of the infectious diseases carried by them.

The threats posed by dense vegetation do not end with those posed by wildlife: as firemen throughout the nation know, dense vegetation and uncleared brush are “fuel for fires.” Firemen try as hard as they can to get people to clear all brush for a good distance away from their houses before ‘fire season’ – which seems to be lasting all year long in many places.

As discussed above, the SMP puts a lot of paperwork and restrictions on vegetation clearing. A clearing permit is required even for *minor* clearing. The removal of *any* vegetation – even weeds – requires a ‘pre-approval application’ that must be accompanied by a revegetation plan. SMP 4.1.2.5 The SMP places the following limitation on clearing your lot: “The minor vegetation clearing allowed within a three (3) year period will include *an area no greater than 200 square feet in area and/or no more than 3 non-significant trees per 20,000 square feet up to a maximum of six (6) trees.*” SMP 4.1.3.5 **These regulations will only increase the amount of “native” fuel for fires.** A fire really doesn’t really care if it is burning “native” or “non-native” vegetation: the result of either can be personal injury or death, as well as the destruction of private property.

So, whose health and safety is more important on private land: the animal’s or the human’s?

2. Health Problems are Aggravated by SMP Dense Vegetation Requirements, As They Reduce the Light Needed to Prevent or Treat Illnesses.

By imposing the requirement that a tree be planted every 20 feet and a shrub every 5 feet in front of the homeowner’s ocean view and that a vegetation canopy be created which will cover 65% of the property within 10 years, the City is affecting the homeowner’s health.. As we who live in the Seattle area all know, Seasonal Affect Disorder affects many people every gloomy winter, and every gloomy fall, and every gloomy spring when deep depression sets in for many people. With overcast weather, it becomes all the more important for emotional and for actual physical health that people are able to see the sun whenever it is out and to let its rays touch the skin in order to generate the Vitamin D that runs the human engine and prevents illness – both physical and mental.

Sunlight is one of the biggest sources of Vitamin D, which is needed by the body for a number of vital functions, one of which is the proper absorption of calcium. Without adequate Vitamin D, the body is unable to prevent bone loss, resulting in a very common and debilitating physical condition – osteoporosis. In addition, according to Web MD, there is evidence that Vitamin D deficiencies are associated with (a) an increased risk of death from cardiovascular disease; (b) cognitive impairment in older adults; (c) severe asthma in children; (d) cancer; (e) diabetes types 1 and 2; (f) hypertension; (g) glucose intolerance; and even (h) multiple sclerosis.

As for the value of fresh air, you only have to think of the last time you were in a city and you weren’t able to get any fresh air to be reminded of its value.

The health of individuals is of a higher priority than an attractive view of native vegetation from the ocean or from public easements. The City insistence on dense vegetation for the purpose of screening the view of houses does not rise to a level of importance that can justify any priority over human health. Besides, as discussed below, the only view protected by the SMA is the view of the water from the land, not the view of vegetation from the ocean. Accordingly, the Bainbridge SMP's restrictions forcing the blockage of light and fresh air by vegetation amount to an unconstitutional taking of property rights without just compensation.

As for the use of dense vegetation to create a good wildlife habitat – in the water or out – we need to also consider the balance to this goal. The human being is as entitled to as good a habitat as a wild animal. To date, right or wrong, no court has put the needs of wild animals above those of human beings; rather, it puts human needs ahead of those of wild animals. In reversing this order, the SMP is – pardon the pun – swimming upstream...

M. Taking of Private Land as “Open Space” Where Adjacent to Public Park to “Provide a Physical Separation” Between Public and Private Space: The Supreme Court Specifically Prohibits This in *Nollan*.

The Bainbridge SMP gives the Planning Department the right to impose use restrictions on a portion of a homeowner's land with absolutely no requirement that this is required to mitigate damage from a construction project or, indeed, that there is any ecological need at all. The only basis for this designation is its proximity to public land: under the SMP, the City can take private land for the sole purpose of “...provid[ing] a physical separation to reinforce the distinction between public and private space.” The Planning Department can either impose screening requirement as part of a landscaping plan or it can require the dedication of an open space setback recorded on plat or title. Specifically, the SMP provides that “Residential development shall be: ... (e) Designed to provide a physical separation to reinforce the distinction between public and private space. Including but not limited to: (i) Screening... (ii) Provide an open space setback recorded on plat or title...” SMP 5.9.6.1(e)

The Supreme Court does not allow the imposition of a heavy burden on private property even to achieve a significant public goal if a less obtrusive measure is available which will achieve the same purpose. Thus, in this case, a simple fence or wall between the public land and the private land would suffice to distinguish between the public and private properties. Inasmuch as this open space requirement can be levied in a context where there is no construction project even contemplated by the homeowner, there is no justification under the SMA for the regulation since there is no need to mitigate any damage.

The U.S. Supreme Court specifically addressed this situation in a less-quoted part of its *Nollan* decision. The California Coastal Commission had argued that construction of the new house would increase private use in the area immediately proximate to the public shoreline, which “might result in more disputes between the Nollans and the public as to the location of the boundary.” The Court, however, held that:

...the construction here can no more justify mandatory dedication of a sort of “buffer zone” in order to avoid boundary disputes than can the construction of an addition to a single-family house near a public street. Moreover, a buffer zone has a boundary as well, and unless the zone is a “no-man's land” that is off-limits for both neighbors ... its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land.

Nollan, fn. 6. That said, if there is no clear delineation between public and private land, as a fence or wall provides, it is likely that the private land open space will simply be used by the public as if it were public land. In accordance with *Nollan*, if the exaction does not appear reasonably likely to achieve the goal for which it was taken, the taking would be invalid. In this case, where the imposition of the open space requirement is not tied to any construction project, it appears starkly for what it is – a taking without just compensation, in violation of the Fifth Amendment.

N. The Cost of Creating and Maintaining an Ecological Conservation Area is “Unduly Burdensome/Oppressive,” to Use Supreme Court Language.

The landscaping costs that must be borne by the homeowner to satisfy the City’s insatiable desire for native vegetation are enormous, weighing far more than is permissible under the Supreme Court’s old constitutional law’s balancing test of “the benefit versus the burden.”

If SMP revegetation was only imposed on lots that had never been landscaped before, the cost of this total landscaping re-do might not be so great. However, given the relatively high level of existing homes in the Bainbridge shoreline, it is more likely that the new development is occurring on an already-landscaped site. In this case, imposing such a labor-intensive and costly process merely to eliminate all the “European settlement” plantings, seems a waste of time and money.

Consider all the costs of this new garden: (a) the cost of the surety bond that must be posted for at least five years with the City; (b) the fees associated with the landscape gardener to prepare the landscaping plan the City requires; (c) the City’s fee for processing this landscaping plan, possibly including even paying for the City’s landscape gardener to review the plan; (d) the cost of all the landowner’s “qualified professional” reports that must be submitted with respect to the environment and its wildlife; (e) the cost of the City’s wildlife expert who must review the landowner’s wildlife expert’s reports; (f) the labor cost of removing all existing non-indigenous vegetation – especially *trees*, which are notoriously difficult and expensive to remove; (g) the City’s fees for preparation and filing of the conservation easement; (h) possible sourcing costs for plants, since not every nursery may carry all ‘*Central Puget Sound lowland, forest, marine, riparian*’ types of native plants – these very particular City requirements may cause sourcing problems; (g) the actual purchase price of these plants; (i) the labor cost in having these native *trees* and plants installed; (j) the City’s inspection fee after the garden is finished but before the City will issue the occupancy permit; (k) the City’s fees for annual monitoring for at least five years; (l) the cost of the landscape gardener who must prepare any mitigation reports and new planting plans if any of the vegetation fails to survive; (m) the cost of removing and replacing any native *tree* that does not survive transplantation; (n) the City’s additional fees for interim inspections after replacement vegetation has been installed; (o) the cost of additional native vegetation and its installation cost which the City may require if the planner feels that there is no sufficient native vegetation coverage over the entire lot; (p) the cost of all non-permit ‘pre-approval applications’ that must be submitted to the City before any routine garden maintenance can be performed – i.e., trimming, pruning, topping, vegetation removal, major or minor clearing, major or minor grading; and (q) the cost of applications for permission to engage in any activities on the land. While the City may consider the finished ecological preserve to be “priceless” – as the old MasterCard ad says – the homeowner is going to be far less than pleased with the price tag.

Actually, these are not all of the new costs associated with the City’s native vegetation garden. In the past, the couple owning the house may have simply gone out into the garden together and trimmed or pruned bushes and tree branches; now they must get City pre-approval for these activities (think *application fee*) and since they must be able to ensure that such activities are performed in accordance with ANSI standards, as required, the couple is forced to hire more

“qualified professionals” to do the work. While the City may consider that all shoreline homeowners are wealthy, there are many for whom the majority of “green” is definitely in the garden – not in their wallets. And then, of course, there is the joy of figuring out if one can weed, which can even involve “consultation” with the County...

O. How the City Can Facilitate Public Enjoyment of Your Ecological Preserve: Visual and Physical Access – Do They Want Paths and Viewing Towers?

The City has seized on the SMA’s notion of “public access” as including *visual access* and run with it far beyond the boundary line. As a condition for new construction or as a condition for approval of a bulkhead, the SMP gives the City has the right to require public access onto your property. While the public may not be strolling through every *part* of ‘your’ garden, the City can give them a pretty good view of the native vegetation with a carefully constructed path. In addition to actual physical access via public paths, the SMP gives the Planning Department the right to require viewing towers, which they *could* install in a particularly nice garden that also has a good ocean view. Perhaps this is nice for the public, but this is an oppressive taking that involves an *extreme invasion of the right of privacy and the fundamental right to exclude others – visually as well as physically*.

And, of course, there’s one little problem with this: “it’s an unconstitutional condition,” under Supreme Court case law. The homeowner would be waiving his right to exclude others in return for a building permit of some type: this is also what the Justice Scalia has called ‘government extortion.’

XI. THE SMP TAKES THE HOMEOWNER’S RIGHT TO PRIVACY/ RIGHT TO EXCLUDE OTHERS.

A. City Monitoring – Periodic, Unannounced, Monitoring and Inspections – Potentially for Years and Years and Years.

1. The “Right to Exclude Others” is a Constitutional Property Right.

The Bainbridge SMP takes of one of the most fundamental of private property rights – “the right to exclude others” – which other people might actually refer to as the right to privacy. For that is what we are talking about – privacy – the ability to go home and hide from the world when life is just too demanding and crazy. It makes no difference whether the person doing the intruding is the public or the City Planning Department inspector. We all need our moments to be completely alone, or just to be alone with the people we love. We need – and the Constitution says we have the right – to decide *who* is in our world for just a little while, to regain our sanity, rest and recharge for more of the crazy old world...

The U.S. Supreme Court in the *Nollan* decision described how the American justice system protects this precious right, the right to exclude others:.

We have repeatedly held that, *as to property reserved by its owner for private use, “the right to exclude [others is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). In *Loretto*, we observed that, where governmental action results in “[a] permanent physical occupation” of the property, by the government itself or by others,...”**our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.** *id.* At 434-435.”

Nollan, at 831, emphasis added.

The *Nollan* case found a taking of the right to exclude others where others were permitted to traverse the property, “even though no particular individual is permitted to station himself permanently upon the premises.” *Nollan*, at 832. City inspections, periodic and/or annual, fit this description: they do not constitute a permanent occupation of a homeowner’s land, but they do involve the forced presence of strangers on the land.

2. City Monitoring and Inspections of Vegetation.

The SMP gives the City the right, for year after year, to enter and inspect vegetation on a private property without any restrictions on the locations that planners can traverse and without any hard-and-fast end date. As discussed above, the City gets to monitor for a *minimum of five years* after construction to assess how well native vegetation is doing in your garden and give you further ‘marching orders.’ The City gives itself inspection rights to check up on any particular area of your garden that has been ‘revegetated’ following removal of any plants.

There is monitoring to ensure that “all required conditions are met, and improvements are installed and *properly maintained*.” SMP 4.1.2.3.2, emphasis added. There is “[m]onitoring the impact and the compensation [sic] projects and taking appropriate corrective measures.” SMP 4.1.2.6.1(f) “The mitigation activity shall be monitored and *maintained* to ensure that it achieves its intended functions and values, pursuant to Section 4.1.2.7, Surety Regulations.” SMP 4.1.2.6.4(d) “The City can confirm via *site inspections, photographs*, or other evidence that the restoration actions have improved shoreline conditions.” SMP 4.1.2.6.5(b) “When mitigation is required, a periodic monitoring program shall be included as a component of the required mitigation plan.” SMP 4.1.2.8.1

The SMP doesn’t stop at having the private property monitored and evaluated just by the City. It further invades the privacy of the homeowner by providing that: “Monitoring programs may be *forwarded for review and comment to stand and/or federal resource agencies and affected tribes with jurisdiction*.” SMP 5.1.2.8.2, emphasis added. There is no requirement that the information derived from monitoring be forwarded to other agencies only if there is something seriously amiss with conditions on the property; the regulation is invasive of privacy because it is not limited to relevant agencies and it has the potential to expose the homeowner to yet more invasions of privacy in the form of monitoring from federal and/or state agencies for reasons that may be completely unrelated to vegetation replanting.

For new and replacement **shoreline stabilization projects**, there is separate monitoring of the “effectiveness of the mitigation” – which, since it involves “mitigation,” means the vegetation replanting and maintenance of the replanted area around the shoreline stabilization - in the form of annual site visit[s] by a “qualified professional” for “a *minimum*” of five years. SMP 4.1.2.8.4 *Notice that these visits must be by a qualified professional, whereas all the previous monitoring would appear to be done by City Planning Department staff. So, you have monitoring by different types of people, thereby adding to the variety of strange faces coming onto your land. This has the potential for making the homeowner feel that his privacy has been invaded all the more.*

Prior to new construction, **if a homeowner does not elect Appendix D** ‘restoration plus,’ the privacy of his property is subjected to inspections by a *variety of “qualified professionals” – potentially nine different professionals*, who must prepare the nine separate reports that make up the “site-specific impact analysis and mitigation plan.” SMP 4.1.2.9.1 In addition, there may be

inspections by the professionals who must prepare any “critical area reports” required by the Planning Department.. SMP 4.1.2.9.2

For vegetation maintenance, there is monitoring “to ensure the protection of shoreline ecological functions and ecosystem wide processes, *particularly when non-native vegetation species are used as an alternative to native vegetation.*” SMP 4.1.3.3.4

3. City Unscheduled Monitoring of Any and All Private Property to Assess Environmental Conditions.

After the last public notice and hearing on the SMP, the City gave the planners the right to monitor – i.e., inspect – *any property anywhere to check on the impact of new development anywhere – not just on your lot.* So, if your neighbor, or his neighbor, or his... had new construction, the City inspector can come around on your property to see if, and how, that is affecting *your* property. That new provision reads as follows:

Development, uses, and activities adjacent to critical areas, including...shall [sic] [be] monitor[ed] to assure that these areas are not being adversely impacted by approved development or restoration projects.

SMP 4.1.5.4 The provision may say “adjacent to critical areas,” but because the term is so ill-defined, it could mean anywhere around the Island. In other words, a City inspector could be walking over your land at any time, unannounced, unscheduled, all without your express permission.

Monitoring of mitigation may be sustainable attendant a legitimate state interest in ensuring that the land has been repaired such that there is ‘no net loss’ of ecological functions. *However, to the extent that the monitoring exceeds a reasonable time limit, beyond observing that the required vegetation has been planted, this is in excess of what can be constitutionally required.* Given that the City has no authority under its police power to regulate daily maintenance of either the garden or the house – **because no great, mortal danger has been proved to be lurking in single-family residential land use, the City has no authority to monitor a property owner’s routine vegetation or house maintenance.** The extent of the invasion onto private property constitutes an extreme violation of the owner’s right to exclude others. Being disproportionate to any legitimate purpose, under *Dolan*, this kind of monitoring amounts to a Fifth Amendment taking.

The SMP’s monitoring requirements constitute a taking of the landowner’s right to exclude others. Given that we are dealing with one of the most sensitive of personal freedoms, monitoring for five years with the power to extend monitoring indefinitely, without end, well beyond 5 years, falls into the Supreme Courts’ categories of unreasonable, excessive, “unduly burdensome,” “unduly oppressive” and unjustifiable under case law of both the U.S. Supreme Court and the Washington Supreme Court. Under the *Dolan* proportionality decision, monitoring could only be justified to the extent that its burden is ‘roughly equivalent’ to the mitigation burden; where the burden is ‘restoration plus’ and the long-term monitoring is attendant to that goal, monitoring will follow the path of restoration – a violation of the Equal Protection Clause and a Fifth Amendment taking:

The Fifth Amendment’s guarantee that private party shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these... [petitioners] to just compensation here. “

Armstrong v. United States, 364 U.S. 40, at 49. (1960)

B. SMP Measures to Achieve More Public Access: Unconstitutional Conditions and Government-Facilitated Trespass.

1. Heightened Legal Scrutiny Required When a Government Acquires a Property Interest in Private Property in Connection with a Permit Application.

The line of U.S. Supreme Court cases dealing with governmental attempts to take interests in private property all require that such attempts be examined with “heightened scrutiny” because of the distinct possibility that a government is trying to take private property without paying for it. Specifically, the *Nollan* court held that:

“We are inclined to be particularly careful...where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.”

Nollan, p. 842

The DOE Guidelines contain cautionary words for local governments in planning to provide public access: “The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.” WAC 173-26-221(4)(a).

Throughout the DOE Guidelines there is a very important qualification to the public access provisions that have omitted from the Bainbridge SMP: that public access to the water *must be to public land*. The Guidelines specifically mandate that: “The master program shall address public access *on public lands*.” WAC 173-26-221(4)(d)(i), emphasis supplied. It goes on to say: “At a minimum, the public access planning should result in... actions to be taken to develop *public shore line access to shorelines on public property*.” WAC 173-26-221(4)(c), emphasis supplied.

2. Unconstitutional Condition: Public Access for a Building Permit – Even Where Prior Public Access Was Blocked. This is an Attempt to Make Trespass Legal.

In the *Nollan* case, the exchange of public access in return for a building permit was declared a Fifth Amendment taking because the government exaction did not solve a problem created by the landowner’s construction. So the Bainbridge SMP drafters created a problem that it believed the City could solve by mandating public access.

The SMP can mandate public access for a building permit wherever the proposed development “diminishes existing public access or increases demand for public access...” SMP 4.2.4.7 While this section might be intended to apply only to subdivisions, - which would be a logical way for the demand for public beach access to be increased - the provision is not limited to them.

The legal problem with Section 4.2.4.7 is that no consideration is given by the SMP as to the legal status of the prior public access – i.e., was it legal or illegal? Trespass cannot be elevated to a legitimate property interest unless and until it complies with State law on prescriptive easements. Obviously, the City of Bainbridge lacks the power to override the State law on prescriptive easements, even where doing so might justify its attempt to gain public access to the shoreline. ***Were the DOE to allow this SMP provision to stand, it would constitute an end-run around its very own State law of prescriptive easements.***

It is obvious that the SMP intends to legitimate a use that has been illegal up to that time, since, if the prior public use had been legal, there would be no need to force the homeowner to convey an easement in this way. Simple logic highlights that the City is attempting to do exactly the same thing that the California Coastal Commission attempted in *Nollan*: get something for nothing. This is, once again, a Fifth Amendment taking that requires due process and just compensation.

3. Government-Facilitated Trespass: the Practical Implication of Public Access Just to 'the Water's Edge.'

Almost all of the Bainbridge shoreline is private property, so very little "public access" is required to reach publicly-owned beaches. And yet the SMP devotes a great deal of space to setting forth the amenities to be provided by the private property owners for "public access." In many SMP provisions it is NOT clearly established – as it is in the SMA – that the purpose of public access over private land is to reach and enjoy *public beaches*. Suspiciously absent is any assurance that, once at the water's edge, the public will not begin to use private beaches. Indeed, the SMP speaks of public access being required that would run parallel to the water's edge – in other words, where there is no public beach, the City is giving people permission to turn private land into public beaches.

Even if a dedication of land or an easement is drafted simply as running directly to the beach, the practical result will be to encourage third party use of the homeowner's entire beach. Few people go to the beach to jump in the frigid waters of the Puget Sound; most go to sunbathe or walk along the beach. So, implicit in any direct access requirement is the effective grant of permission to use the entire *private* beach.

In the most recent U.S. Supreme Court case of *Koontz*, the Court held that a governmental requirement that serves to give up a landowner's right to just compensation constitutes an "unconstitutional condition," a holding the Court found inherent in the *Nollan* decision.

In *Nollan*, the State of California owned beaches on either side of the Nollan property and wanted to provide access from one to the other – seemingly, a very reasonable goal. Nevertheless, the U.S. Supreme Court ruled that the imposition of a public access requirement to run parallel to the shoreline was not a lawful regulation because that public access had no connection to any damage created by the proposed construction project. The Court carefully noted that the *Nollan* case involved a private residence (as potentially distinguished from income property) and, as such, held as follows:

We have repeatedly held that, *as to property reserved by its owner for private use*, the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' ...*where governmental action results in "[a] permanent physical occupation of the property", by the government itself or by other... "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important... benefit or has only minimal economic impact on the owner...*

483 U.S. 831-832, emphasis supplied. The Court then confirmed that a "permanent physical occupation" did not, in fact, necessitate that people remain on the property constantly. Rather,

We think a "permanent physical occupation" has occurred, for the purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 832

C. Public Access via *Utility Easements*? No, This is Trespass Because: (1) They Are Usually Not Granted to the City; (2) They Are Limited in Purpose to Utility Service; and (3) They Don't Run All the Way to the Beach.

There is a basic principle of property law that the City of Bainbridge seems to have forgotten: you cannot convey to another person more rights in property than you have. And so it is with the City's attempt to use utility easements to gain public access to the shoreline.

Utility easements are usually not given to a city; in fact, most utility services are provided by large regional or even nationwide companies completely unrelated to the city. None of my utilities have any relationship to the City. While we might refer to these as "public utilities," this is not because they are owned by the city, but rather because a private company provides service *to the public*. Utility easements on property are given in a generic way to any and all of these companies, not to the city. So, unless the City is, in fact, the provider of a particular service for the homeowner, it has no legal right in the shoreline homeowner's land. As such, it cannot convey any interest to the public.

Utility easements are given for the explicit and limited purpose of maintaining and repairing utility equipment; they do not allow the use of them for the purpose of public beach access or as public viewing areas. Thus, the City cannot convey to the public a right that it does not have, the right to use the private land for a purpose not explicitly set forth in the easement

Finally, utility easements only go from the road to the house – they don't go to the beach. So, the City's supposed use of utility easements for access to the beach amounts to nothing more than encouraging public trespass on private land.

As for road rights-of-way, if these truly are just "rights-of-way," they have the same problems as the easements above. Even though they were given the city, they were given for a specific purpose – for roads to transport people to and from different locations on the Island. It is fairly unlikely that any of them go all the way to the beach. But, even if they did, the restricted use of the right-of-way would preclude giving the public the right of beach access for recreational purposes. So, absent language in the easement allowing public use for the specific purpose of getting to the water's edge, the City cannot convey this right to the public.

It should also be noted that even if a road right-of-way did cover land all the way to the water, it is unlikely that the easement could be used for a different purpose – public recreation. Most rights-of-way restrict the permitted use; few would allow the public to lie down on the easement and sunbathe. In addition, it should be noted that the size of a road right-of-way might not be adequate for public beach use; the so-called "public access" to the water would, in fact, represent a tacit invitation to the public to trespass beyond that easement onto the homeowner's beach.

D. Visual and Physical Public Access Take the Right to Privacy.

As discussed above, where the City requires public access across private land or even "visual access" in the form of a viewing tower or picnic tables at a road's end, there is an obvious taking of the right to exclude others and a loss of the right to privacy. These are truly basic property rights implicit in land ownership, which should not be undervalued. In *U.S. v. Orito*, the Supreme Court pointed out that: "The Constitution extends special safeguards to the privacy of the home." 413 U.S. 139, 142 (1873). That can be seen from the Court's expression in *Nollan*, "as to property reserved by its owner for private use." This is a careful crafting of language, probably indicating that the land's *private purpose* mandates a treatment different than for other purposes.

Many pursuits, especially creative ones, require solitude, quiet and a lack of distraction – writing, composing music, painting, practicing yoga, meditating and/or even just reading or engaging in serious thought. With people comes noise, a sense of being in the public eye, and visual distractions. The right to privacy/to exclude others is a very important, fundamental private property right, very necessary for one’s sanity.

E. SMP May Mandate Structural Improvements as Part of “Public Access.” Where is the Authority for This in the Law of Single-Family Residences Not Part of a Subdivision?

What constitutes “public access” is not defined in the SMA or DOE Guidelines, perhaps because it seems logical that the common meaning of the term is sufficient. The Bainbridge SMP, however, felt it necessary to define the term, and to define it in a way that includes structural improvements. Specifically, it provides as follows:

Public access shall consist of a dedication of land, easement, and/or 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 view and/or physical approach to public waters and may include interpretive centers and displays.

SMP 4.2.4.6.1. And, “[w]here views of the water or shoreline are available and physical access to the water’s edge is not present or appropriate, a public viewing area shall be provided.” SMP 4.2.4.6.3 (c).

An “observation tower” – on private land? It is difficult to imagine a more gross invasion of someone’s privacy. Looking down on a private home and all of its land, potentially observing every movement of the residents, is the one of the most egregious violation of personal rights of privacy possible. This falls into a great old constitutional law category: it is something that “shocks the conscience.” As such, with the specter of a viewing tower looming over a person’s home, there should be some limitations as to when and where this can happen; the SMP fails to do this. It is not enough to simply mandate that the homeowner plant more native vegetation up close so as to screen his view of people. SMP 4.2.4.6.3(d)

Further, the City mandates that “[p]ublic amenities that are appropriate to the level of expected use shall be provided to serve the users of a public access area, such as benches, picnic tables and sufficient public parking.” SMP 4.2.4.6.3 (e) So, if somehow the City got public access across your land, and you are unlucky enough to have a beautiful private beach that attracts a lot of people, you may have to provide public restrooms for them?! The SMP provides that:

Public facilities, *public uses* and commercial developments that attract a substantial number of people, and developments by government/public entities may be required to provide public restrooms, facilities for disposal of animal waste, and other appropriate public facilities.

SMP 4.2.4.6.3 (f), emphasis supplied. While “public uses” could be interpreted to mean that only public – i.e., municipal developments – are required to provide restrooms, it could also be interpreted to mean that enough “public uses” of your property could require you to provide public accommodations. So, first the City requires access across your land and access parallel to the ocean, and then you have to provide creature comforts for the public...

When one remembers that any one, or any combination, of these structural improvements may be required of the landowner who is constructing a single-family residence that is not part of a

development, just because his new house blocks prior public (illegal) access to the beach, it seems like an unconstitutional reach of City power. Where does the City get the authority to impose these things? These are the kind of things one would expect a public park or a multi-family complex to have to provide, but the SMP does not specifically limit its application of these impositions to them. Neither the SMA nor the DOE Guidelines makes any suggestion of requiring structural improvements from *homeowners* as part of “public access.” Maybe the City just feels that, since everyone – in their view – who lives on the water is rich, they can bear the expense of improvements for the public. But the City’s police power to protect public health, safety and property does not extend to requiring structural improvements not related to public health or safety. Where is the City’s authority for imposing these exactions?

One may view these scenarios as fanciful creations of a fertile mind; however, my experience is that, when a government gets the power to do something, it usually *does*.

XII. THE SMP TAKES MANY VALUABLE “RESIDENTIAL AMENITIES” FROM HOMEOWNERS.

“Residential amenities” is how the Doe Guidelines refers to the marketable and valuable features of a particular property. For shoreline homes, these can take many forms – from uses that one can make of the property because of its proximity to water such as boating to more sedentary pleasures that one can enjoy just from having a good water view. All “residential amenities” have distinct and significant market values, and when the City interferes with them, or takes them away, as it does in a number of ways, the City takes significant market value from the homeowner. That taking of value can constitute a Fifth Amendment taking that requires just compensation from the City.

A. Water Views Taken by SMP Dense Vegetation, New Big Buffers and Other Restrictions on Permissible House Locations Seriously Interfere with “Investment-Backed Expectations” and Result in Fifth Amendment Takings.

The most important and valuable of a shoreline property’s personal amenities is its ocean view. As any realtor will tell you, an expansive view of up-close water can be worth hundreds of thousands of dollars – or, in some locations, even more. Thus, the taking of a homeowner’s water view is both the taking of a right of personal enjoyment – a “residential amenity - and the taking of monetary value from a property.

The dense vegetation requirements and the severe buffer zones and other location restrictions of the Bainbridge SMP put it smack-dab in the middle of *Penn Central’s* reasoning. There, as in *Lucas* and *Lingle*, the U.S. Supreme Court held that when a government seriously interferes with “investment-backed expectations” that were entirely reasonable at the time of purchase, the government can be found to be guilty of a Fifth Amendment taking. Yes, it is true that a shoreline house can still be used as a residence, regardless of how much vegetation there may be in front of its view, or how far back the house is from the water, so there is still value to the property. And yes, while every diminution in value from regulations is not compensable, the difference here is that the reasons given to justify taking the waterfront views don’t stand up. The State legislature found that single-family residential use was the lightest possible environmental use of any uses – the legislature gave this use a “priority” rating. A “priority” rating does not warrant dense vegetation and setbacks based on cattle and crops.

The SMP revegetation requirements, which are applicable not just to new development property, but also to existing homes as discussed above, means a lot of tall vegetation everywhere and especially within the all-too-generous shoreline buffer zone. This buffer zone is the most valuable

part of the lot. Obviously, the farther away you are from the ocean, the harder it is to see it. And this is why we buy on the water – to be able to see it.

Having a large buffer zone imposed on your property and/or other similar restrictions on where you can locate your home, seriously impacts the value of your home. Being precluded from building in the buffer zone in any significant way will have a major impact on fair market value. Forcing the landowner to place his new house where it will not “disturb” existing native vegetation, or interfere with anyone else’s view – even the public’s view from roads – causes both emotional and economic loss. These are real estate “residential amenities” worth a lot of money. Because yes, people pay good money – a lot of it – to see and emotionally ‘feel’ the ocean. This is a logical and universal “investment-backed expectation” when one buys waterfront property.

While the City may feel that single-family residential use is pollutant, the State and the science used by the State to reach its conclusions do not support the City’s theory. And, the only ‘science’ the City could find to disprove the State was not relevant and would not be admissible in court because it was from completely different uses – cattle and crops. The City has, in short, failed its burden of proof to show that single-family residential use is other than a “priority” use. **Yes, the City has the burden of proving pollution by single-family residences – because it is taking valuable “investment-backed expectations” and the most fundamental private property right – the right to use that portion of the land adjacent to the water for construction.** The taking of these things, according to the Supreme Court cases of *Nollan*, *Dolan*, *Lucas*, *Penn Central*, *Loretto*, *Lingle*, and *Koontz* – triggers the necessity of heightened judicial scrutiny to prove that the government has not engaged in the oldest game in town – trying to get private property for nothing.

The SMP mandate that new development completely avoid any impact on others’ existing views is inconsistent with the DOE Guidelines. Rather than completely ban a particular location for a house that would give it a water view, the Guidelines provide that local governments use a variety of methods to “minimize” - not to avoid entirely - the impact of new construction on “existing views.” DOE Guidelines do not prohibit locating a house in a position where even the smallest part of it interferes with a neighbor’s views, as the SMP does.

B. Homeowner’s Water Views Are Taken by SMP-Required “Screening” Requirements so as to “Enhance” the Public’s View of Land *From the Water*.

The SMP wants to improve the view that boaters on the water have of land; it imposes planting requirements on the homeowners that will block the view of his house that boaters have to look at. The word and concept used by the SMP to achieve this goal is “enhancement” of the public’s view. This word is used by the SMP as part of its goals – to not just preserve, but rather, to “enhance” public views. Oh, yes – do notice that “enhancing views” means that the City is improving the *public* view, but always at the expense of the *private* view.

“Enhancement” of the public’s view is related to those few, cryptic “screening” references. It means that the homeowner must plant dense vegetation up close to his house so that the public will not have to see it when they take in the natural beauty of the shoreline. Setting new homes farther back, away from the water is another way the SMP “enhances” the public’s view – the view of the *boating public*. But, by definition, if the public on the water can’t see the houses, the houses can’t see the water.

The only view mentioned and afforded protection by the State in the SMA and the DOE Guidelines is the view of the water *from land*. The *SMA does not protect views from the water*. Specifically, the DOE Guidelines provide that “[l]ocal master programs shall... (iii) To the greatest extent feasible...

protect the public's opportunity to enjoy the physical and aesthetic qualities of the shorelines of the state, including *views of the water...*" WAC 173-26-221(4)(b)(iii), emphasis supplied.

Without SMA or Guidelines support for protecting boaters' views of land, how does the City of Bainbridge justify these vegetation screening mandates? It does not give any legal justification for screening. Certainly, the police power does not require the hiding of houses from public view for the simple reason that it does nothing to protect or preserve people's safety, health or property.

Obviously, we are dealing with some people's aesthetic values here. I personally find many homes on the waterfront to be a delightful part of the picture: and so do many famous artists. It's the 'eye of the beholder' at work again – aesthetic preferences in the guise of environmental need. Public view enhancement is exactly what the Supreme Court cases describe as regulations that 'confer a public benefit' rather than 'prevent a public harm.' As such, these are Fifth Amendment takings.

C. "The Right to Light and Air" is a Residential Amenity With Monetary and Health-Related Value: The SMP Takes it Through the Revegetation Requirements.

The courts in the last 50 years have recognized the constitutional right of a property owner to the light and air above and on his property. By its dense and *tall* vegetation requirements, the City of Bainbridge is taking this right. This right has monetary value; in large cities with many tall skyscrapers, a property owner may sell his right for a considerable sum. We may not have any tall skyscrapers on the Bainbridge shoreline, but this right still has a very real value. Because people feel better in the presence of sunlight and fresh air, they are willing to pay more for a property with these things. So, when the light and air are cut off by tall trees and a strangling vegetation canopy, which also block any view of the ocean, the market value declines.

The City seems ignorant of these very basic principles, let alone the market value of these rights. The SMP revegetation requirements specifically take market value from a property by their density requirements. While the creation of a good wildlife habitat may be an admirable public goal, constitutionally, it *cannot be at the expense of the private property owner's habitat*. Please remember that portion of the DOE Guidelines' conflict resolution provisions that say that 'conservation areas can only be reserved subject to constitutional protections.' Those constitutional protections are protections *not* of the ecology, but rather, of the rights of private property owners. The extremeness of this City taking falls within the Supreme Court's description of one that is so 'arbitrary as to violate due process – one that no amount of compensation can justify.' *Lingle*, at para. 24.

D. The City Can Determine that "Ecological Functions Would be Compromised" by Your Proposed Vegetation Trimming And Deny Permission to Cut Any Plant Back.

A shoreline homeowner can only have ocean views so long as "...ecological functions are not *compromised*." SMP 4.1.3.3.9, emphasis supplied. The SMP has no definition of what and how much of it "compromises" ecological functions. Instead, in a gross abuse of the individual's due process rights, an individual in the Planning Department – without any apparent guidelines - has the discretion to make up that definition and to prevent the homeowner from having an ocean view.

Constitutional law does not yet allow environmental protection to be rule supreme over private property rights. Notwithstanding declarations of the importance of our "fragile" ecology and the value of the environment to the public, preservation of the environment is still 'subject to the constitutional rights of the private property owner.'

The bases for these assertions of power by the SMP – the “disturbance” of vegetation and the “compromising of ecological functions” are so ambiguous as to be invalid under basic constitutional due process principles, as noted above. Nothing in the SMA would appear to support these mandates. Without authority from the SMA, the City of Bainbridge does not have the authority emanating from its lone police power to supersede the constitutional rights of its citizens.

E. Taking of The Right to Remodel or Build a House To a Size That Meets the Needs of the Family.

The most basic goal of the SMA is to control growth – the way in which land is developed – such that ecological functions are saved from unnecessary destruction. That said, people still have ‘certain reasonable expectations of use with respect to their own property,’ as the U.S. Supreme court describes it. One of those reasonable expectations is that they can remodel or build a home to meet their family’s needs.

The Bainbridge SMP puts so many restrictions on what the City obviously considers houses that are “too big” (as characterized in an op-ed recently), that one must ask *why?* Is it purely on aesthetic grounds – since no science is given to support an environmental requirement? Or is it simply *age discrimination?*

These days the biggest population demographic – the ‘baby-boomers’ – are being labeled “the sandwich generation.” They and their homes are sandwiched between taking care of children and elderly parents. Economics or pure, unselfish love can be the reason why homeowners don’t send their parents, who can no longer care for themselves, to “those places” where elderly people can be subjected to abuse and neglect. And their children? Even if they’re grown and college-educated, they are being forced to come ‘home’ by their recession-related inability to get a job. How can people refuse their parents or their children? But how can people accommodate all of them? In anticipation of Mom and Dad coming to live with you, the topic of a house expansion may very well be on your agenda. Or even a new house better suited to multiple generations of occupants...

Recently, for some reason or other, when I walk my dogs I keep meeting people with more than two children – lots more than two children – six seems to be a number that often pops up. I look at their homes and, while they might work now, when the kids are young, I wonder how they will fare once the children become teenagers. People like this really, really need more space. And, by the time their children have become teenagers, the couple have often gone farther in their careers and they may be making the kind of money it takes to live on the shoreline. So why can’t Mom and Dad build a house – or expand an existing one – on the shoreline to fit all their ‘brood?’ It would be a form of age discrimination to force them to live elsewhere just because they have ‘too many’ children.

Under the Bainbridge SMP, if an existing home is being remodeled, there is a rigid restriction on the amount of additional square footage that can be added to the home – only 25% of the original footprint – *including* all pervious impervious surfaces such as decks and driveways and parking areas – and regardless of size of the lot or the size of the original ‘footprint’. SMP 4.2.1.6.3

As we are all aware, there remain a fair number of cabins and homes on Bainbridge that were constructed years ago when people’s perceived, and actual, need for space was much less, and there are homes that were used strictly for weekend and vacation use. These homes are, accordingly, much smaller than the typical home today. For instance, a few doors down the road from me is a house probably built in the 1930’s that is undoubtedly less than 700 square feet in area. Today such a house would not accommodate all the things (ranging from big-screen television sets to bigger beds) our society deems necessary. At the present time the house has only one occupant –

an elderly gentleman; but when his residency is over, one can scarcely imagine a family of four or five surviving in a house that only has one bathroom. Right or wrong, our societal 'needs,' or at least what we perceive to be our 'needs,' have changed since these relics of the past were built. Nevertheless, under the Bainbridge SMP, this house could only be expanded by 175 square feet, even though the lot is the same size as other, newer homes of 2500 to 3500 square feet. The owners of such a cabin, which has been lovingly maintained over the years, might be quite content to live in what we would generally call a small house these days, but they would probably need more than 875 sq. ft. to be comfortable. Is it really fair to prohibit the expansion of the home to a reasonable size just because the original footprint was so small? The cattle and crop studies don't substantiate that single-family residential use is doing any significant damage to the environment, so what legitimate public purpose is served by restricting the size of the house? No, aesthetics don't count – not so long as the First Amendment is still in place.

For new construction, the SMP restriction on the "building area" to 2500 square feet – also presumably covering impervious surfaces - constitutes the taking of most basic, natural right to use the land so long as there is no significant harm that cannot be mitigated so as to achieve 'no net loss.' The rigid square footage maximum, regardless of lot size, implies that the true reason for this taking of usable lot area has nothing to do with actual damage to the landscape, and far more to do with personal preferences of the City hierarchy. A restriction that would meet the requirements of the SMA but allow the landowner greater freedom to use his land would be tied to the lot size and to the extent to which any damage from the project could be mitigated such that no net loss of ecological functions resulted.

There appears to be no rational, scientific basis for the SMP limitations on building size - a restriction that results in what may be a house that does not suit the needs of the family. Without a rational basis that supports a *legitimate* governmental purpose, this looks like just one more attempt by the City to force people off the shoreline so as to take the use of private land without paying for it. As such, this regulation meets the Supreme Court test of "arbitrary and capricious" – and invalid.

F. And Yet More Amenities Taken...

In addition to the sales features listed above, the SMP takes away way "residential amenities" that are directly related to private property rights. These have all been discussed above in the context of property rights, but they are worth repeating in the context of fair market value. For, these are also sales features the loss of which will cause waterfront properties to lose a great deal of appeal to prospective buyers and, hence, fair market value. Some of these features are:

(a) The right to privacy/exclude others – taken by City inspectors who not only come to inspect, but to tell you what else you have to do to your land, and potentially by the public who have been given permission by the City, extorted from you in exchange for a permit of some kind, to walk not just *over* your land, but also along *your* beach.

(b) The ability to use your property for boating – that is, to get a new or keep keep an existing, dock, pier or float.

(c) The ability to get to the beach by having stairs of the necessary height.

(d) The ability to experience sunlight and fresh sea air – taken by SMP dense vegetation requirements and its severe restrictions on trimming, cutting, pruning, topping and removal of vegetation. These are 'feel good' features that have been taken by the fish.

(e) The ability to protect yourself and your family, by clearing what you consider to be substantial overgrowth that increases the danger from fire, predatory animals and animal-related diseases – taken by the City to actually *increase* the amount of wildlife habitat.

(f) The right to express yourself through your gardening, meaning planting what *you* want to plant, *where* you want to plant it, and maintaining it as *you* like.

Now, I ask you, are these people *crazy* for turning away from Bainbridge?! No, the *City* is crazy if it believes that anyone would still want a Bainbridge waterfront home under these conditions...

XIII. THE SMP ENGAGES IN ASPIRATIONAL LABELING, AND INCONSISTENT USE DESIGNATIONS – ALL TO IMPOSE STRICTER ENVIRONMENTAL REGULATIONS THAN ACCURATE DESIGNATIONS WOULD ALLOW.

A. Did the City Deliberately Use Outdated Data to Designate Areas? And Was its Labeling Aspirational, Rather Than Accurate?

The City used some aerial photographs that were more than 10 years old to designate some areas of the Island. This can scarcely be described as using the ‘best and latest technology.’ This area has experienced – as have most, if not all, areas of the Island – significant growth over this time period, rendering old photographs obsolete and completely inaccurate.

Given that the City is basing its regulations – in some cases, absolute bans on new development - on these designation labels, their accuracy is vital. The SMA and DOE Guidelines clearly articulate that care should be taken to ensure that these designations are appropriate. The Guidelines mandate that: “[t]his classification system *shall be* based on the existing use pattern, the biological and physical character of the shoreline...” WAC 173-26-211(2)(a), emphasis added. It adds that an “*up-to-date* and accurate map of the shoreline area designations must be prepared by the local government.” WAC 173-26-211(2)(b), emphasis added. Ten-year old aerial photographs are not “up-to-date” and, given the explosive growth that has taken place on the Island over the last ten years, they are not “accurate.” But a ten-year old photograph would show an area the way an environmentalist would *like* to see the area now. Whether that condition could be re-captured by restoration or whether there has simply been too much development to attain that goal is beside the point. These designations and maps of designations are required by the State to be *accurate*.

The DOE Guidelines also caution that local governments be careful to ensure that in reserving areas for “protecting and restoring ecological functions,” the “[l]ocal governments should ***ensure that these areas are reserved consistent with constitutional limits.***” WAC 173-26-201(2)(d)(i), emphasis added. And yet, many of the areas designated by the SMP for conservancy include a whole lot of single-family residential structures.

The designation of Island areas that are already 80% to 90% populated as “Natural” and “Priority Aquatic” – mandating strict regulations on use - are inaccurate. These areas are not pristine, virgin land untouched by human hands. But neither are they ‘trashed.’ This fact – that there is enough environment left to want to conserve - indicates that the people who live there love their environment and are acting as good stewards of it. To impose stifling regulations on them would be to punish them for good conduct. These people should be allowed to continue what they’re doing, because they are doing a good job. The area is what it needs to be – an accommodation of both environmental and human needs. This is precisely what the SMA requires – *a good balancing of needs, not the dismissal of the human ones*. Instead, by pushing for tighter regulation and more conservancy, the City is attempting to push out the very visible human use. The State articulates its

goals as “utilization and protection... of the shoreline” – this means utilization by humans as well as other animals. WAC 176-23-176(2)

B. Inconsistent Uses Combined in a Single Designation: An Attempt to Force Compliance With More Severe Restrictions Than Accurate Labeling Would Allow.

At first glance the Bainbridge SMP area designations look very strange: how can you put an ecological “conservation” area and a densely populated residential area in the same designation? On their face these uses appear totally inconsistent, rather like calling the entire downtown area a wildlife preserve. But when you consider the effect of the combination, you realize that, under the precautionary principles, the conservation regulations of the Guidelines will prevail over the looser residential ones.

And so it is that in a “Shoreline Residential Conservancy” area you cannot have a new dock or a pier or even a float, so in short, you cannot have a boat on your shoreline property and you lose the ability to waterski using a float. And, like all Islanders, you cannot have stairs that exceed 250 feet; so if you have a somewhat high bank, you cannot even get to the beach to enjoy sitting on, or walking along, the beach or even swimming in the ocean off your own land. By this sleight of hand, the SMP has basically taken your right and ability to engage in all water-dependent use other than swimming, or even your constitutional right to access your land, something that the SMA does not allow. If you were simply “Residential,” based on the high number of people living there, you would probably be able to engage in simple single-family residential activities – like water sports.

The worst situation is in the Priority Aquatic zone, along with a lot of other people who have lived there for a long time and have existing dock or pier, which they use for boating. Now, suddenly, you can't use your boat motor anymore, you can't boat without risking severe damage to it and you. This area has had boats for years; now suddenly they are outlawed. Of course, all your docks, piers and floats were just banned, so maybe this isn't a problem anymore... But these things are violation of the DOE Guidelines, which encourages water-dependent uses associated with single-family residences, labeling them the “preferred use.”

The DOE needs to carefully consider all designations in highly populated areas that have the effect of turning them into ecological preserves – these designations can amount to Fifth Amendment takings of property owner's right to use their land, and a taking of monetary value because it interferes with “investment-backed expectations.”

XIV. DUE PROCESS: THE SMP IS GUILTY OF VIOLATING NOT JUST PRIVATE PROPERTY RIGHTS, BUT ALSO PERSONAL RIGHTS.

A. The SMP Creates A Radically Different Legal System for the Shoreline: You Have to Ask the City for Approval Before You Can Do *Anything*. And You Can be Punished for Something That Doesn't – and Couldn't – Cause Any Significant Harm.

The American legal system is based on several fundamental principles. First, a person can do anything that is not specifically prohibited by law. Second, the language of the law must clearly set forth conduct that is prohibited. And third, punishment cannot be imposed on a person for conduct that does not result – and could not have resulted - in significant harm.

The Bainbridge SMP has re-written these rules as follows. First, a person cannot do anything without prior written permission from the City. Second, only the City knows what conduct is forbidden and what is permitted, and it can vary from case to case, depending on which planner is assigned your case. And third, punishment is imposed even though an activity does not – and could

not – result in any significant harm. In fact, punishment is meted out upon the very enactment of the SMP - on a waterfront homeowner just because he built a house, or bought a house that was built, before the Bainbridge SMP was passed; the punishment is an immediate decline in salability and, over time, fair market value, all because of the overhanging threat that the right to use this existing home will be taken away.

The new SMP legal system for the shoreline may, in theory, rest on the SMA ‘precautionary principle,’ which provides that in the absence of geological, biological and ecological information, no activity should be allowed until that information is collected. However, this principle is completely inconsistent with the Constitution and the personal liberties protected under it. The Bainbridge SMP has taken a principle that sounded relatively innocent, and embedded into a regulatory system unlike any other in the United States outside the confines of a jail or prison. The precautionary principle simply cannot be applied by Bainbridge to stifle the exercise of any and all personal liberties. No matter how worthy a goal environmental protection may be, it does not justify the extinction of personal liberty and private property rights.

As discussed above, most disturbing of all is that all “activities” that are proposed to occur on the land must be reviewed in advance by the City and can only occur if the City approves them. This can mean social gatherings in my garden: why do I have to get City approval to have a family get-together there? So I have a large family! I refuse to accept that the City has the authority to decide whether or not I can have a gathering of friends or family on my very own land! And I shouldn’t have to fill out an application and pay a fee to avoid prosecution for a “civil infraction.” I will not be complicit in the creation of a dictatorship.

B. The SMP Regulates All “Activities” on Residential Shoreline Land : This is an Unconstitutionally Broad Reach.

The Bainbridge SMP breaks new ground by extending its purview to a new category that the SMA doesn’t have: “activities.” Wherever the City recites any DOE Guidelines language that read in the original “development and uses,” the Bainbridge SMP chirps in with “and activities.” There is absolutely no doubt that the SMP intends to regulate whatever is meant by the word “activities.” But that’s the problem – no one can figure out what that means. It is a violation of constitutional due process for a regulation to contain language so “vague and ambiguous,” as the Supreme Court says, that no one can understand what it means. Yes, the SMP does give a definition: “[a]ctivity: Human activity associated with the use of land or resources.” SMP 8.0 So, we have confined the term to land use or resources use, but that’s all. The word “activity” is used 80 times in the SMP, and 51 of those times there is no qualifier that explains precisely what kind of “human activity associated with the land or resources” is meant.

It is a clear violation of due process principles, for language *not* to clearly set out what kind of conduct is punishable. The American system of justice is based on the principle that people should clearly know, in advance, what is illegal so that they can conform their actions and avoid punishment. This is an underlying notion of “fairness” and “equity. But all the SMP contains is an over-arching principle that all “activities” on the land must receive pre-approval from the City before you can engage in them:

Proposed...activities within the shorelines of statewide significance shall be reviewed in accordance with the preferred policies listed in 4.1.1.3. The Administrator may reduce, alter, or deny proposed...activity to satisfy the preferred policy.

SMP 4.1.1.2

As important, the American system of justice does not permit governmental regulation over all human activity, even when it is restricted to land use – and especially when it is relating to property *owned by that individual*. This is why the SMP's limitless regulations over not just the "use" of the land, as that word is meant in zoning law, but over "activities" not only violate private property rights but also personal rights. The Constitution is based on the Founding Fathers' belief in 'natural law' – "that all men are endowed by their Creator with certain inalienable rights" (*Declaration of Independence*) No, it isn't the Fourth of July and I'm not just making a speech – this is real – these concepts underlie all American citizens' constitutional rights. Notice the phrase "*inalienable rights*." This means that, as hard as the City may try, it cannot take away certain rights of its citizens, "and among these are life, **liberty**, and the pursuit of happiness." "Liberty" means the right to act freely, subject only to governmental action, the sole authority for which comes from the police power – that is, the power to protect and preserve public health, safety and property. What the City has created in the SMP is a system of "prior restraints" on individual action. By its draconian punishments, the SMP has what the Supreme Court calls a "chilling effect on the exercise of personal liberties." No, these things are not good – they are unlawful, because they are unconstitutional.

C. The Planner's Unfettered Discretion is a Violation of Due Process. And This Creates the Perfect Environment for Bribery and Extortion.

It's really hard to do in this country, but through the SMP, the City of Bainbridge has created a virtual dictatorship. Only in places like Nazi Germany, the old Soviet Union or in North Korea do you find this kind of rule by man, not by law.

The City has delegated full, unrestricted power to the Planning Department to decide whatever 'activities' may, or may not, be engaged in by shoreline homeowners, regardless of whether these activities have any foreseeable impact at all on the environment. In addition to the scope of regulation being unconstitutionally overbroad, the amount of discretion the City gives its planners is unconstitutional because there are no *limits*. Yes, somebody has to do the actual work of government and it is *staff*. But staff must be kept from abuse of power by little things like a "reasonableness standard." Is that so much to ask? Accountability must be had if we are to live in a democracy. That is the problem in the more than 125 instances where the SMP gives sole "discretion" to, or requires that things be done "to the satisfaction of" - the planner. Not a one says anything about the planner being required to be reasonable. This openly condones abuse of power.

In addition to the simple requirement of "reasonableness," the constitutional right of due process requires that, where discretion is delegated by the government to a department or agency, there must be specific guidelines to be followed in the exercise of that discretion. It does this not only so that an individual can know in advance what conduct is proscribed by law, but also so that persons to whom authority has been delegated cannot use their own personal opinions and tastes in making decisions. This principle also serves to thwart departmental staff's ability to make such decisions solely in return for monetary or other favors. By its lack of guidelines for, and lack of limitations on, the discretion of Planning Dept. staff, the SMP creates an atmosphere where bribery and extortion can flourish. This is not to lay any allegation of misconduct at the foot of any current Planning Department staff, but merely to point out that misconduct can easily occur where there is no accountability for one's actions.

With more than 125 occasions that the planner is given discretion, the result is that landowners are at the complete mercy of one particular planner, who may be good at his job or not so good. The guiding principles of which planners may be well aware, and which are used to make decisions, are the personal tastes and preferences of more senior members of the City hierarchy. It is likely, given

human nature, that pleasing senior people with their decisions will be a greater priority than paying any attention to the homeowners' constitutional rights.

In all the sections preceding this, we have noted all the huge decisions the planner alone can make. Whether you lose the right of your existing home. Whether you can rebuild your house after a casualty. Whether you can have a bulkhead to protect your property. Whether you can build and precisely *where* you can build. Whether you and your family can engage in any particular "activity" on your land. Whether your land becomes an official wildlife habitat, with much bigger buffer zones established by the planner. Whether you have to rip out all your landscaping and replant with native vegetation. How big a surety bond you have to post for vegetation maintenance; how long that bond must stay in place. If you are building, whether you have to spend a boatload of money on the nine very expensive "qualified professional" reports that the planner can also waive. Whether you can have a dock, pier, float or buoy where a conditional use permit can be had. Whether you can clear any vegetation around your house to keep away predatory animals, their diseases and fire danger.

There are more discretionary items, but you get the point. There is a lot of money and a lot of potential enjoyment or misery riding on these decisions. There must be checks on this power.

D. Due Process Requires Clear Forewarning: SMP Vague and Ambiguous Language Doesn't Give It.

"Vague and ambiguous" is what the supreme courts call those regulations that don't pass what they call "constitutional muster." 'Due process under the law' requires that, to be valid, a regulation must clearly spell out the consequences of one's conduct. Inasmuch as the federal concept of "due process" intends that an individual can only be punished for his conduct if he understood, in advance, that his conduct would be illegal, any language proscribing conduct must be clearly understood or no punishment can be imposed under the Due Process Clause.

Many areas of the Bainbridge SMP fall into the fatally flawed category of 'constitutionally vague and ambiguous'; there are many critical words and expressions for which there is no definition, which can mean many things to many people and for which only individual planners are given the authority to provide their own personal definitions. Throughout this analysis you have undoubtedly seen all the queries - "What does *that* mean?", etc. These are places where the City had a legal obligation to be specific, but it was not. These are violations of due process.

XV. THIS IS WAY TOO MUCH REGULATION: THE SUPREME COURTS HAVE VARIOUS WORDS FOR THIS - "FIFTH AMENDMENT TAKING," "INVERSE CONDEMNATION," DENIAL OF SUBSTANTIVE DUE PROCESS" AND/OR "INVALID."

A. Homeowners Are *Not* Operating Nuclear Power Plants; Micromanagement at This Level is Not Justifiable.

The SMP regulates new categories the state legislature either never envisioned, or never thought it had the constitutional authority to regulate. Those categories are described vaguely by the SMP as "maintenance," "management," "changes," "alterations," "modifications," and "activities." Each of these things require pre-approval from the City.

This is the level of micromanagement that is only justifiable if the homeowners were operating nuclear power plants out of their houses. Unless the activity being regulated is ultra-hazardous - such as a nuclear power plant or a refinery, or anything else that can go "boom" with huge consequences - governments are precluded from requiring pre-clearance for everything a property

owner wants to do. They are precluded by the basic principle that government only has the “police power” to regulate in order to prevent substantial harm. The DOE Guidelines say it well when they provide that:

Local governments may find it necessary to regulate existing uses ***to avoid severe harm*** to public health and safety or the environment and ***in doing so should be cognizant of constitutional and other legal limitations on the regulation of private property.***

WAC 173-26-191(1)(a), emphasis added.

The City has failed to prove, with any relevant scientific studies, that *single-family residential use – not some other kind of use – and its associated water-dependent use* do any substantial damage to the environment. Lacking this proof means the City does not have the authority, the power, to micromanage all activities on shoreline private property. What precludes such micromanagement is the Constitution’s protections of private property rights. Just what the SMA and the DOE Guidelines say – the constitutional rights of private property owners place limitations on how much government can regulate this land. If land is owned by the government, it can do just as private landowners have the right to do – make all decisions relating to the use of the land so long as they do not result in “severe harm.” But without title and without proof of the *real* threat of *severe harm*, the City does not have the legal authority to engage in these types of “confiscatory regulations,” as the *Lucas* Supreme Court referred to the type of regulation that completely ban certain activities.

B. Regulation Stops Being Regulation When There is Just Too Much of It. What it Becomes is a Fifth Amendment Taking.

The SMP micromanages, is confiscatory and it is punitive. This is not simply ‘regulation;’ this is the exercise of eminent domain at its boldest and the denial of due process at its worst. As the Supreme Court said in *Lucas*, a government simply calling an existing use harmful is not enough to justify taking away the right to engage in it. Similarly, punishing people for conduct that does not cause any “severe harm” and failing to give them a right to trial, this is something no American government has the power to do. These are the types of governmental actions the U.S. Constitution was designed to protect its citizens from.

The SMP is an attempt by the City to exercise complete dominion and control over what is private property. It purports to take the right to make any and all decisions about how this land is used. This means that the City is taking of one of the three fundamental property rights enumerated by the U.S. Supreme Court – “the right to possess” – what most of us would call “the right to use” one’s land. Under classic principles of common law, the right to make all decisions regarding land – amounts to the right to possess/use one’s land.. **When the City takes the right to make all decisions about private shoreline property, it has committed a Fifth Amendment ‘taking’ without due process and just compensation.**

C. Inverse Condemnation: The Number and Breadth of SMP Restrictions on Private Property Uses Amount to an Eminent Domain Taking.

An inverse condemnation is deemed to have occurred when a government has imposed so many restrictions on the use of a property that it virtually has no viable use and/or when the restrictions have a significant impact on the market value of the property. As discussed above, where the government has imposed a total ban on new construction in an area, the *Lucas* case finds a taking for which just compensation must be paid. Under *Nollan* the taking of a private property interest without a rational basis – i.e., without a nexus to the proposed new development - is a Fifth

Amendment taking. Under the *Biggers* case and the line of federal “flood cases,” where a government takes away your right to protect your property from destruction, this is a taking. And, under *Penn Central*, when there is serious interference with “investment-backed expectations,” this is a taking. Obviously, there is a common thread through almost all of the Bainbridge SMP regulations: they are so excessive that they represent Fifth Amendment takings.

Consistent with the State’s concern with respecting private property rights and considering the impact of the SMA on the homeowner, the DOE Guidelines notes that: “[t]he prohibition of all uses of shorelines also **could eliminate their human utility and value.**” DOE 173-26-176(2) In this vein, the DOE elsewhere mandates that, when considered together, use policies and regulations, together with zoning and other **regulations “shall not conflict in a manner that all viable uses of the property are precluded.”** DOE 173-26-211(3)(a) The DOE Guidelines specifically prohibit local governments from creating this type of situation; but this is precisely what the SMP does to some people’s land.

All of the takings listed above result in land that has little salability and a lot less value. As the Supreme Court discussed in the *Penn Central* case, people have various expectations about how they can use their land and when regulations take away any of those anticipated uses, the value of their land diminishes radically.

Where the landowner can build on the lot – or whether he can build at all- is now a function of buffer zones and setback that are not justified by the irrelevant science presented by the City. The house location is also now made subordinate to public views of the ocean from mere so-called “public” utility easements and road rights-if-way. The impact of these restrictions on the landowner’s right to an ocean view has a very serious, significant impact on the property’s fair market value.

The cost of building a shoreline house on Bainbridge has been increased exponentially by the SMP due to all the new “qualified professionals” reports required in a plethora of different categories. And the costs attributable to the SMP do not end when construction does; there are a slew of new pre-approvals to be had for everything under the sun, and they will all have some kind of fee attached. And, of course, there are the monitoring programs the City has planned, that could be on-going for year after year after year...

So, you have no right to use your land without City approval, the construction costs are horrendous, the ‘maintenance’ costs are exasperating, and you have no privacy anymore – what’s not to like?!

D. The SMP Has Already Caused a Lack of Salability...

On July 26, 2013, the Sound Publishing Co. weekend ‘rag’ called *98110* (our zip code) reported that, while the lower and middle sections of the real estate market were continuing to trend up, the number of sales transactions at the upper end of the market – where just about all shoreline properties are – had decreased by more than 50%. In 2012, by the end of the July there had been 9 sales; in 2013 there were only 4. Since prior to this time there had only been a gradual improvement in the upper-end market, the conclusion is inescapable: something happened to keep prospective buyers from buying Bainbridge shoreline property. From my owner personal experience, and the experience of others with whom I have spoken, I can tell you what that was – the realization that the Bainbridge SMP was going to pass with the bans and limitations it now contains. People simply do not want to buy property they cannot freely use.

XVI. BENEFIT V. BURDEN – THE TRADITIONAL CONSTITUTIONAL ANALYSIS.

The U.S. Supreme Court in *Dolan* has established the concept that the burden of mitigation must be roughly proportionate to the damage caused. In a way, this is what *Dolan's* proportionality test is all about: weighing the mitigation burden against the benefit of the problem solved. Viewing the SMP from this distance, it is clear that its new development bans, its bans on boating facilities and its vegetation requirements impose very heavy burdens on the private shoreline homeowner. In addition, there are on-going maintenance obligations imposed by the SMP that have nothing to do with damage from any construction project.

From a financial standpoint, all of the Bainbridge SMP regulations must inevitably lead to a need for many more Planning Department employees to process all of these pre-approvals of this and that, and to read all of these reports. Inasmuch as a property tax increase would be extremely unpopular with the Bainbridge taxpayers – especially one perceived to be for the funding of costs related solely to shoreline homes – it is more than likely that the entire cost of new staff will be charged to the shoreline homeowners in the form of paperwork fees. This is going to make weeding a very expensive activity – far more expensive than anyone will want to pay.

In addition, if the new Bainbridge SMP is approved, the cost to build on the Island would increase by several multiples. There would be numerous “qualified professional” reports that have to be prepared for all kinds of situations; as we all know, qualified professionals tend to be expensive. As noted above, whether or not all of these reports are actually *necessary* is a topic for discussion elsewhere.

In addition to the new fees imposed on garden maintenance, there will undoubtedly be applications required and fees imposed for the routine maintenance of new homes, inasmuch as the City has announced its intention to regulate them as well. As yet, though, this area has not been set forth in the same kind of detail as vegetation management, so we have no figures to enter into this equation – *yet*.

These ‘pre-approval application’ fees will represent a considerable burden on shoreline homeowners *just because they are located on the shoreline*. Clearly, these people are being treated differently than the rest of the Island’s people, making it very likely that a violation of the Equal Protection Clause has occurred. While the State Legislature has declared the shoreline to be of particular value to the public and environmental preservation to be a major goal of the SMA, whatever public benefit is deemed to be achieved by the SMP may very well be deemed to be outweighed by the very obvious, heavy burden that has been placed on the individuals making up the shoreline land ownership. Certainly, those provisions of the SMP that require restoration, rather than just mitigation of the impact of a construction project, violate the Equal Protection Clause under the reasoning of *Armstrong*. The on-going cost of this restoration – in the form of application and processing fees with the City and the numerous required reports of qualified professionals has yet to be quantified. Suffice it to say that on-going maintenance of a shoreline property has increased exponentially by the Bainbridge SMP.

All of this is presumably so that the public will have native vegetation to look at; there are probably quite a few people on Bainbridge who would not even consider the view of native vegetation to be of any particular benefit – they would appreciate the view of “European settlement” more. So, if the only reason for this multitude of regulations is to suit the personal tastes of the City hierarchy, this is just not adequate reason to validate these regulations.

SUMMARY

Where's the Balance?

The U.S. Supreme Court has long used a “balancing analysis” to evaluate the constitutionality of different laws and regulations, as well as whether a regulation constitutes a ‘taking.’ *Loretto* at p. 425. The SMA explicitly requires that there be a balance between the public benefit achieved and the private burden it imposes on individuals.

The concept of balance is inherent in the *Nollan* and *Dolan* cases from the U.S. Supreme Court. *Nollan* deals with the crossbar on the scales of justice – the nexus that is required between the regulation and the damage it seeks to remedy. *Dolan* deals with the objects on the scales, mandating some sort of rough proportionality between what is on the public benefit side and what is on the private burden side.

This is where the Bainbridge SMP fails badly. There is far more burden than there is benefit to this program – it is “unduly oppressive” to use Supreme Court terminology. The end result Bainbridge seeks is to create a shoreline area that is as close as possible to a “pre-European settlement” condition: land free of residents with as few houses as possible, without bulkheads or any other hard protective materials, without even docks, piers or floats, land consisting of dense native vegetation and teeming with wildlife of all kinds.

Whether or not this is your dream of Utopia, the City needs to come out of its reverie. The reality is that population growth has exploded within the state *and it is neither realistic nor legal to use government to force people to leave any area, no matter how treasured by city planners, or anyone else – not when these residents own the land.* This is, after all, the reason why the Growth Management Act – and the SMA – were written and it is to implement *growth management* that the State authorized the creation of SMP’s. The law is very clear: to the extent that restoration can be done, it must be done through *voluntary* effort – public and private programs funded by groups and people who are willing to *pay* for land that becomes public.

The Bainbridge SMP must be conformed to these State principles, not to some free-wheeling dream that rolls back important rights belonging to shoreline homeowners. The Bainbridge SMP must be returned for extensive revision, with explicit instructions on how to conform it to State law.

8/19/2013

About the Author

This legal analysis has been prepared by the owner of a single-family residence on the Bainbridge shoreline. While I am not a practicing land use attorney, I have spent most of my career with large law firms and large financial institutions, interpreting difficult laws and deeply involved with governmental regulations. My last job before 'retirement' (one never really retires...) was as Senior Vice President, responsible for all federal regulatory matters, as Head of Compliance for the biggest bank in Texas. During my career I took and passed the bars of three different states – Pennsylvania, California and Texas – and, if nothing else, I believe it had the benefit of continually reiterating basic legal principles with the type of breadth one only gets in law school – and on the bar exam. Some of those principles are the principles of constitutional law – principles one should never forget, no matter how immersed one becomes in any field...

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