



PACIFIC LEGAL FOUNDATION

August 21, 2013

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VIA EMAIL

Re: City of Bainbridge Island's Proposed Shoreline
Master Program Update Public comment

Dear Ms. Nightingale:

Pacific Legal Foundation (PLF) has been contacted by several property owners who will be affected by the City of Bainbridge Island's (COBI) proposed Shoreline Master Program update (SMP). Based on our review of the SMP, it is our opinion that several of the program's proposed regulatory standards will violate the constitutionally protected property rights of shoreline home owners. We are aware that many potential constitutional violations have been addressed in other public comments and incorporate those comments by reference. The purpose of this letter is to discuss three particularly problematic aspects of the city's proposed SMP that may result in litigation, exposing both COBI and the State to liability.

First, the proposed SMP imposes "enhancement and restoration" conditions on all new development/use of shoreline lots. As proposed, the conditions will violate the U.S. Supreme Court's recent decision, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). In broad terms, the *Koontz* decision holds that the government cannot use the permit process to force landowners to give up land, money, or any other property as the "price" of obtaining development approval. A violation of *Koontz* can result in invalidation of the ordinance, award of damages against COBI and/or the state, and/or an award of just compensation.

Second, the proposed SMP declares all existing structures and uses within newly expanded buffer zones "nonconforming." The city planners/council members who support this designation believe that there is no difference between a "pre-existing conforming structure" and a "nonconforming structure." They are incorrect. The city's proposed SMP

exposes hundreds of landowners to significant harm for no good reason—the nonconforming designation carries legal consequences that burden one’s rights in the land and harm its value. The proposed regulations do not advance any public purpose that cannot be achieved without the offending designation.

And third, the proposed SMP seeks to regulate all human activities that are not subject to permit through an undefined application and approval process. The city’s scheme goes far beyond the regulatory processes set out by the Shoreline management Act (SMA), and gives the city unlimited discretion to interfere with the private affairs of shoreline landowners. This letter discusses the due process and takings ramifications of the city’s proposed scheme.

EXPERTISE OF PACIFIC LEGAL FOUNDATION

PLF was founded over 40 years ago and is widely recognized as the largest and most experienced legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court and Washington Supreme Court in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g., Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586, __ L. Ed.2d __ (2013); *Arkansas Game & Fish Comm’n v. United States*, __ U.S. __, 133 S. Ct. 511, __ L. Ed.2d __ (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598 (2010); *Dickgieser v. State*, 153 Wn.2d 530 (2005); *Manufactured Hous. Communities of Wash. v. State*, 142 Wn.2d 347 (2000); *Guimont v. Clarke*, 121 Wn 2d 586 (1993); *Robinson v. City of Seattle*, 119 Wn.2d 34 (1992); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1 (1992); and *R/L Associates v. City of Seattle*, 113 Wn.2d 402 (1989).

PLF attorneys are familiar with property rights issues arising from Washington’s SMA and Growth Management Act (GMA). Attorneys in PLF’s Pacific Northwest Center in Bellevue have participated as lead counsel or amicus curiae in numerous landmark land use cases in Washington State, including *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384 (2011); *Thurston County v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329 (2008); *Kitsap Alliance of Prop. Owners v. Cent. Wash.*

Growth Mgmt. Hearings Bd., 152 Wn. App. 190 (2009); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649 (2008); *Futurewise v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 (2007); *Swinomish Indian Tribal Cmty. v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415 (2007); *City of Olympia v. Drebeck*, 156 Wn.2d 289 (2006); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740 (2002); *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30 (2001); *Honesty in Environmental Analysis and Legislation v. Central Washington Growth Management Hearing Board*, 96 Wn. App. 522 (1999).

PLF is well-positioned to offer constructive comments on the legal shortcomings of the proposed SMP based on its extensive experience litigating in defense of constitutionally protected property rights.

I

ECOLOGY MUST MODIFY OR REJECT A PROPOSAL THAT IS INCONSISTENT WITH CONSTITUTIONAL LIMITATIONS ON THE REGULATION OF PRIVATE PROPERTY

Ecology has a duty to modify or reject a proposed shoreline standard that violates the constitutional limitations of the regulation of private property.¹ The SMA mandates that SMPs comply with the State and Federal Constitutions' limitations on the regulation of private property: "Planning policies [of the SMA] should be pursued through the regulation of development of private property **only to an extent that is consistent with all relevant constitutional and other legal limitations . . . on the regulation of private property.**"² That mandate is one of the "foundational concepts" and "governing principles" of the SMA.³ Thus, Ecology is authorized to modify or reject a proposal on the basis that it does

¹ *Citizens for Rational Shoreline Planning v. Whatcom County (CRSP)*, 172 Wn.2d 384, 391-93 (2011). COBI's findings and conclusions are not entitled to any deference during Ecology's review of the proposed SMP. RCW 90.58.090(7); *CRSP*, 172 Wn.2d at 392.

² WAC 173-26-186(5); RCW 90.58.020.

³ *Citizens for Rational Shoreline Planning v. Whatcom County*, Ecology Supp. Br. at 18-19, (Jan. 31, 2011).

not adequately protect property rights.⁴ A failure to modify or reject a proposal that violates the Constitution will expose the state to liability.⁵ It may also expose the city to liability.⁶

II

THE PROPOSED SMP'S BUFFER CONDITIONS VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

COBI's proposed SMP contains numerous mandatory permit conditions (*e.g.*, vegetation conservation areas, enhancement, restoration) that violate the doctrine of unconstitutional conditions. Development conditions—often called “exactions”—are subject to heightened constitutional scrutiny under the “essential nexus” and “rough proportionality” tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as reaffirmed by *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). The nexus and rough proportionality tests operate to confine exactions to only those conditions necessary to mitigate for impacts *caused by the proposed development*. A demand that does not satisfy those tests is unlawful, unconstitutional, and can expose the city and/or state to liability.

The reason why exactions are subject to heightened scrutiny is because government has such broad discretion in the permitting process that it becomes all too easy to compel a property owner into giving up rights that are protected by the Constitution (*i.e.*, the right to just compensation for a taking of private property):

[L]and-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

⁴ RCW 90.58.090(2)-(6); *CRSP*, 172 Wn.2d at 391-92.

⁵ *CRSP*, 172 Wn.2d at 393; *Orion Corp. v. State of Washington*, 109 Wn.2d 621, 643 (1987).

⁶ *Dunlap v. City of Nooksack*, No. 63747-9-I slip op. (Div. I, Oct. 25, 2010).

government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation.⁷

The proposed SMP seeks to exact multiple unconstitutional conditions from landowners, including:

- the dedication of a perpetual conservation easement;
- adoption of vegetation/revegetation retention standards;
- permanent retention of vegetation as instructed by the city;
- perpetual dedication of labor and services (requirement to nurture and maintain plants both on- and off-site);
- dedication of money to pay to replace any vegetation that may die for any reason; and
- provision of an easement to government agents for a minimum of 5 years to enter upon property to assure that city-dictated plants are properly nurtured and maintained.⁸

These conditions are triggered by any application for new development, use, or activity within the 200-foot shoreline jurisdiction that either “disturbs” native vegetation or vegetation in a buffer.⁹

It is well-established by state and federal cases that buffers and vegetation retention areas constitute a public use of private property and must, therefore, comply with constitutional limitations on takings. *Nollan*, *Dolan*, and *Koontz* require that COBI and Ecology demonstrate that the SMP conditions satisfy the nexus and proportionality tests. To do that, COBI and Ecology must show that any condition(s) placed on a proposed development, use, or activity—for example, the proposed 65% vegetation canopy requirement—is necessary to mitigate for an identified impact of the proposal and is proportional to the portion of the public harm that is attributable to the landowner’s development proposal.

COBI and Ecology have not and cannot satisfy the nexus and proportionality tests based on the city’s scientific record. According to the U.S. Supreme Court, the government cannot

⁷ *Koontz*, slip op. at 7.

⁸ SMP 4.1.2.

⁹ SMP 4.1.2.5(1); SMP 4.1.1.2; SMP 4.1.2.4(2).

rely on generalized studies because such connections are “too lax to adequately protect [a property owner’s] right to just compensation if her property is taken for a public purpose.”¹⁰

The Constitution simply does not allow COBI to do what the city wants its SMP to accomplish: to force shoreline landowners into dedicating large portions of their property into conservation areas intended to mitigate for the general public’s impact (*i.e.*, runoff from city streets) on shorelines. Such a scheme violates the most basic principle of the Takings Clause, which is to protect the property owner from being singled out 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 (1960).

III

THE NONCONFORMING USES/STRUCTURES PROVISIONS ARE IRRATIONAL AND VIOLATE DUE PROCESS

COBI’s proposed SMP also violates the Due Process Clauses of the state and federal constitutions by designating lawfully existing homes “nonconforming” due to the fact that the established uses and/or structures will not conform to the city’s proposed expansions to its vegetation conservation buffers.¹¹ The city misunderstands and misuses the term nonconforming in a manner that is arbitrary, irrational, and harmful to hundreds of existing homeowners.

A. The City Misuses the Term “Nonconforming”

The SMP states that the purpose of declaring existing homes and residential uses nonconforming 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.”¹² The stated goal of the program is to *encourage* owners

¹⁰ *Dolan*, 512 U.S. at 389.

¹¹ SMP 4.2.1.

¹² SMP 4.2.1.2 (“Goal”).

bring their structures into conformity with the city's new buffer and vegetation retention standards over time, as the owner proposes changes to the structure.¹³

The city's understanding of what nonconforming means is at odds with the well-settled legal definition for the designation. According to Washington's Supreme Court, a structure/use is declared "nonconforming" if it is legislatively determined to be "disfavored" and is to be "extinguished" over time:¹⁴

The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. **The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that conditions should be reduced to conformity as completely and as speedily as possible with due regard to the special interests of those concerned, and where suppression is not feasible without working substantial injustice, that there shall be accomplished 'the greatest possible amelioration of the offending use which justice to that use permits.'**¹⁵

If COBI's statement of policy is to be taken at face value, then it appears that the city confused the term "conforming" with "nonconforming." The law recognizes that lawfully-established structures are vested property rights and may continue regardless of later enacted land use laws. When an owner eventually files a development application, he or she may be required to bring the structure into compliance with current rules. The stated purpose of COBI's proposed "nonconforming use" provisions can and will be achieved without tagging lawfully established residences with an offensive and harmful designation.

B. A "Nonconforming" Designation is Harmful to Property Values

Placing a nonconforming designation on lawfully established residential structures/uses will impact the property values. Obviously, the market for a home will be artificially depressed if it is designated nonconforming. Several years ago, when Thurston County

¹³ SMP 4.2.1.2.

¹⁴ *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty.*, 136 Wn.2d 1, 7 (1998)

¹⁵ *Rhod-A-Zalea*, 136 Wn.2d at 7 (quoting *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 221, 242 P.2d 505 (1952)); see also *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 649, 30 P.3d 453 (2001).

was considering including a nonconforming use designation in its critical areas ordinance, the county conducted a telephone survey to determine some of the effects that a nonconforming designation would have on property owners. The county's findings suggested that property owners whose homes are deemed nonconforming may incur significant financial hardship.

A nonconforming designation will also have secondary impacts on affected homeowners. For example, while insurance is generally available for nonconforming structures and uses, the contract terms are substantially different from those available to owners of "conforming" property. Insurers may require secondary policies to insure against the hazard that causes nonconforming status. And several insurers may limit relief to cash settlement (rather than replacement) which is generally substantially less than the benefits available to similarly situated homeowners.

Home loans and refinancing opportunities are similarly restricted. Generally, loans available for nonconforming properties are restricted and may cost more than loans available to similarly situated, but conforming properties. Many banks require loans at higher interest rates, additional insurance, or provide limited loan products.

It is wholly unnecessary to visit these financial hardships on the owners of lawfully established residences as a regulatory tool intended to encourage the owners to adopt expanded buffers and vegetation retention standards at some point in the future when they file applications for new development.

C. Application of Lawful Existing Structures/Uses Violates Anti-Retroactivity Standards

COBI's desire to designate existing homes nonconforming is arbitrary, irrational, and unlawful. The sole basis for the designation is that the structure/use does not conform to the city's new buffer/vegetation retention standards.¹⁶ The proposed SMP contains contradictory provisions about whether the new buffer/vegetation retention requirements are retroactive. At least three times, the city's program states that the newly expanded buffer/vegetation retention standards do not apply retroactively to lawfully established structures and uses.¹⁷ But, the "applicability" provision of the nonconforming use

¹⁶ SMP 4.2.1.1 ("Applicability").

¹⁷ SMP 4.2.1.2 ("Goal") ("Existing structures and uses that do not conform to this Program **are not required to meet its requirements**, unless the owner

regulations gives retroactive effect to the new buffer/vegetation retention requirements, stating that the city's nonconforming use regulations apply to lawfully established residential structures and uses "**which do not conform to present regulations or standards of the Master Program.**"¹⁸

The city's proposed nonconforming use regulations present Ecology with several problems that must be resolved before the program can be adopted. The city wants its program to have retroactive effect. Subsection 4.2.1.1 states that, if a lawfully established structure or use does not conform to the city's newly proposed buffers/vegetation retention standards, then it will be given an offensive and harmful designation. That is a direct application of new land use regulations to an existing structure/use. Such a scheme creates a retroactive burden on shoreline property owners' vested property rights in violation of the state and federal constitutions.¹⁹

Indeed, from a practical perspective, COBI's desire to declare lawfully-existing homes nonconforming in areas zoned for residential use is antithetical to the concept of zoning and makes no sense. A municipality may declare a use nonconforming where it causes a nuisance to other landowners due to its location—that circumstance is the quintessential "pig in the parlor instead of the barnyard" problem discussed in *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). What the city proposes is something very different: to declare a lawful residential structure nonconforming because the land it

proposes changes to a structure or use that would require review under this Program."); SMP 4.1.3.4 ("Vegetation management 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."); SMP 8.0 (Definitions - "Nonconforming Development") (Defining "nonconforming development" as a "shoreline use or structure which was lawfully constructed or established prior the effective date of the applicable Shoreline Management Act/SMP provision, and **which no longer conforms to the applicable shoreline provisions.**"); *see also* WAC 173-26-221(5)(a) ("Like other master program provisions, **vegetation conservation standards do not apply retroactively to existing uses and structures[.]**").

¹⁸ SMP 4.2.1.1 ("Applicability").

¹⁹ *In re F.D. Processing, Inc.*, 119 Wn.2d 452 (1992); *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994).

occupies—while zoned for residential use—has been targeted by the city for public use as a conservation easement (to filter runoff from city streets). That is a misuse of the city’s zoning authority. It is irrational. It is inconsistent with U.S. Supreme Court precedent. And, more importantly, it is unnecessarily harmful to the affected home owners.

IV

THE CITY GOES TOO FAR BY SEEKING TO REGULATE AND CONTROL ALL “HUMAN ACTIVITY” ON PRIVATE SHORELINE PROPERTY

COBI’s proposed SMP invents an arbitrary, permit-like procedure granting the city authority to control all “**activity**” occurring on private shoreline property “**whether a permit is required or not.**”²⁰ Section 4.1.2 requires landowners to apply for a city approval before engaging in any “activity” that could result in disturbance of vegetation (including removal of invasive weeds) within the shoreline jurisdiction.²¹ The word “activity” is so poorly defined, that it could conceivably include anything a person does on his or her land (*e.g.*, a picnic table, a political rally, replacing an old rhododendron, renting a “bouncy house” for a birthday party, portaging a kayak to the water, etc.).²² Indeed, the entire “approval” scheme (including the application, approval, and appeals process) is left undefined by the proposed SMP.²³ The program does not even indicate what an “approval of activity” document would be called, or whether it is appealable—it does, however, contemplate issuance of a legally binding document that imposes conditions on the property owner (*e.g.*, mandatory dedication of a conservation easement, planting requirements, enhancement and restoration, etc.).²⁴

²⁰ SMP 4.1.2.4(2); SMP 4.1.2.5(1).

²¹ SMP 4.1.2.5(1).

²² SMP 8.0 (“Definitions”) (Defining “activity” as “Human activity associated with the use of land or resources.”).

²³ SMP 4.1.2.5(1) (citing BIMC 15.18). The proposed regulations states that, before engaging in an activity, landowners to submit an “application” that contains substantially the same information that would be required for a land clearing permit.

²⁴ SMP 4.1.2.5(1)-(5).

There is simply no statutory foundation in the SMA or Ecology's guidelines for the city to regulate "human activity" through a non-permit approval process. The SMA recognizes four types of shoreline approvals: (1) a substantial development permit, (2) an exemption, (3) a conditional use permit, or (4) a variance.²⁵ These categories, in turn, tell all parties who the ultimate decision maker is and what venue will have jurisdiction to hear an appeal.²⁶

The city's undefined "activity approval" process is wholly arbitrary. The term "activity" is so broad and poorly-defined that it could conceivably include just about any behavior or occurrence on a shoreline property. The term "approval" is undefined. The standards for approval/denial of an activity are not addressed. Ecology's oversight/review of a decision is unknown. In other words, the city seeks to grant itself unlimited discretion to control all human activity on private shoreline property. Such unlimited discretion violates due process—at the very least—and must be stricken from the proposed program.

CONCLUSION

Almost a century ago, Justice Oliver Wendell Holmes famously warned, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). COBI's desire to restore and enhance the shoreline environment is just such a public desire. And the city's proposed SMP provides the type of short cut for the city to commandeer private property that Justice Holmes cautioned against. PLF urges Ecology to reject COBI's proposed SMP, or to propose substantial modifications that will respect the rights of the Island's shoreline property owners.

Sincerely,

BRIAN T. HODGES
Managing Attorney

²⁵ RCW 90.58.100, .140.

²⁶ RCW 90.58.180.