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MEMORANDUM

TO: Bainbridge City Council
Planning Commission, City of Bainbridge Island

FROM: Point Monroe Lagoon Homeowners Association

DATE: June 19, 2012

RE: Conforming v. Nonconforming Uses

Introduction.

The vast majority of the shoreline of Bainbridge Island is in private ownership and is occupied by single family residences (SFRS) and their appurtenant structures. Under the proposed Shoreline Management Program (SMP) the Planning Commission (PC) is recommending to the City Council (CC) that it classify a significant majority of the SFRS along the shoreline of Bainbridge Island as nonconforming due to limitations in lot size. Described otherwise, if the proposed SMP is adopted a majority of the existing SFRS will be considered incompliance with the new SMP and applicable zoning codes. A vast majority of the waterfront homeowners want to have their properties classified conforming.

The Washington Legislature provided local governments with a way out of this conundrum.

Pursuant to Senate Substitute Bill No. 5451 (SSB 5451) passed last year (which amended RCW 90.58) the PC could have drafted the SMP to provide that all residential structures and appurtenant structures that were once legally established but would now otherwise be classified as nonconforming could be classified as conforming under the new SMP. The CC should take advantage of this opportunity.

The PC in its deliberations over the SMP reviewed whether or not to classify the majority of the residential properties as conforming versus nonconforming and decided against it. One of the reasons given by the PC members for this action is that there is a long history of case law and analysis dealing with nonconforming land use and that there was accordingly no need to classify the properties and their homes as conforming. With all respect due the discussions of the PC, the members of the Point Monroe Lagoon Homeowners Association, Inc. (PMLHOA) strongly recommend to the CC that it not adopt the recommendation of the PC for the SMP on this

important issue and that the SMP be amended to provide that 100% of SFRS and their appurtenant structures be classified as conforming by the new SMP.

The PC in their proposed SMP has come close to calling these SFRs conforming. Most SFRs are non-conforming because they are located within the proposed buffer zone. All homes on the Spit are non-conforming. Under the language of the proposed SMP the PC adopted the policy that non-conforming SFRs and their primary appurtenant structures may be repaired and replaced. By calling these SFRs non-conforming, the PC cut the legs from underneath its policy decision in a way that is in conflict with the 150+ years of land use law that requires non-conforming uses or structures to, overtime, be made conforming or disappear. In order to be consistent with both the historical common law precedent and the proposed policy of the City pertaining to waterfront SFRs, all waterfront SFRs should be designated conforming.

Otherwise, the CC is setting up an internal conflict within the SPM that creates an ambiguity. Ambiguity invariably leads to disputes and litigation that will needlessly drain the City's limited resources.

Discussion.

The shoreline communities and counties in Washington State are in the middle of the process of reviewing and updating their SMP's. The vast majority of the shoreline within these communities and counties (and within the state of Washington altogether) is privately owned. The vast majority of the privately owned property is occupied by SFRS and their appurtenant structures. Most of these land owners have their homes on small lots close to the ordinary high watermark (OHWM). These homes and the size of their lots were originally legal in size and location, and complied with applicable zoning regulations.

Over time, the homeowners have seen their lots, homes and appurtenant structures rezoned under new zoning laws which have included SMP's. The result in the vast majority of incidences has been that these homeowners have seen their properties go from being in compliance with the applicable zoning codes and regulations to becoming noncompliant. Now the majority of the homeowners along the shoreline have seen their lots and SFRS classified as nonconforming.

In 2011 the legislature, aware that the vast majority of waterfront homeowners in Washington State might now find their properties and improvements classified as nonconforming under updated SMP's, addressed the issue. The probable reason for the legislative action was the tension between the actions of these local communities in rezoning a majority of the shoreline SFRS as nonconforming and the statutorily enumerated preference for SFRS and their appurtenant structures along the shoreline. See RCW 90.58.020 which specifically provides the SFRS and their appurtenances (unqualified and not limited in scope or definition) are a priority use of the shoreline.

As will be discussed below, the proposed SMP's of the shoreline counties and communities which classify the existing lots SFRS and appurtenant structures as nonconforming constitute a direct attack on this legislatively established priority use which would ultimately end with the elimination and removal of all nonconforming SFRS and appurtenances from lots which could not be made conforming.

With this danger to shoreline residential property owners in mind, the legislature adopted SSB 5451 which passed unanimously in the senate and by a greater than 75% majority in the house. The strength of the approval of SSB 5451 in both houses of the Washington legislature evidences the very strong legislative direction that local communities and counties give strong consideration to the legislation in adoption of its provisions so that the priority property rights of the homeowners along the shore can be maintained.

SSB 5451 provides:

• that residential structures and appurtenances (unlimited in scope of any kind) located on lots which were once conforming, but which would now be considered nonconforming, may be considered conforming for all purposes.

• permits the replacement of over water structures not located in hazardous areas such as flood plains. (Point Monroe Drive is located in a flood zone, not a floodplain.)

The PC chose to not acknowledge or accept this legislative suggestion that nonconforming lots, their SFRS and their appurtenances be zoned conforming. Rather, based in part upon the stated long history of nonconforming case law, the PC elected to zone the vast majority of the shoreline homeowners within the community nonconforming and have their future property rights determined under the law of nonconforming properties. That is not a wise decision. It will lead to confusion in the interpretation of the SMP and will no doubt result in multiple rounds of expensive, protracted litigation between the city and the homeowners.

The law of nonconforming use is a development of common law. See Meridian Mineral Company v. King County, 61 Wn. App. 195, 207 (1991). Phasing out nonconforming use and structures is a policy goal of zoning legislation. See Anderson v. Island County, 81 Wn. App. 312, 323, 501 Pac. 2d. 594 (1972) "The generally accepted method of phasing out nonconforming uses is to prevent any increase in the nonconformity and, when changes in the premises are contemplated by the owner, to compel, so far as is expedient, a lessening or complete suppression of the nonconformity."; Bartz v. Board of Adjustment, 80 Wn. 2d 209, 218, 492 Pac. 2d 1374 (1972) ; Meridian at 207. The case law associated with the law nonconforming use is clear that the use of the property will be brought into conformance over time or the use will be terminated. See in general Zoning: Changes After Adoption of Zoning Regulations in Respect of Non-Conforming Existing Use, 147 A.L.R. 167, 168 (1943); 83 Am. Jur. 2d Zoning and Planning Sections 652, 553 (1992).

The law of nonconforming use and the stated intent of the PC in drafting the SMP to permit the repair and replacement of SFRS and their appurtenances without requiring additional mitigation (the "grandfathered rights") is in conflict with the law of nonconforming use. Subsequent interpretation of the proposed SMP, as the majority of homeowners along the shoreline of Bainbridge Island, will be subject to the perpetual confusion of case law interpreting the law of nonconforming use which is intended to terminate the use, and the intent for grandfathered rights in the draft SMP. The result will be that the interpretation of the SMP will have the dark cloud of developed case law overhanging its daily interpretation and implementation. Homeowners will see their utilization of their "grandfathered" rights strictly construed in accordance with the history of case law so that the use or structure will be eliminated over time if it cannot be brought

into conformance. Under the law of nonconforming use, grandfathered rights must overtime disappear.

If the shoreline residential lots, the SFRS and their appurtenance were defined as conforming this confusion would disappear. The case law interpreting the common law of nonconforming use would not be applicable to these properties within the SMP. The grandfathered rights would no longer be subject to the dark cloud of judicial interpretation which mandates that ultimately the grandfathered use must conform or disappear. Instead, the lots, SFRS and their appurtenances would be conforming. The SFRS and appurtenances could be replaced without having to run the gauntlet of case law regarding nonconforming use.

Permitting the majority of the homeowners to have their properties labeled as conforming would not harm the "no net loss of ecological function" goal of the SMP. As is contemplated with the draft SMP, existing SFRS and appurtenant structures could be replaced for whatever reason. This opportunity has significant health and safety attributes associated with it as old electrical systems, heating systems and septic systems are updated. The ecological function would be improved. On the other hand, any expansion of the footprint of the SFRS or the appurtenance within the buffer zone would require mitigation. If adequate mitigation could not be provided no expansion of the footprint would be permitted. Ecological function is protected.

Conclusion.

The well established law of nonconforming use mandates that nonconforming uses must come over time, be brought into conformance or disappear. The draft SMP provides that a majority of the SFRS along the shoreline are nonconforming. Under the developed case law, over time, these properties must be brought into conformance, or the use (the SFRS) must disappear or cease. Since the bulk of these lots are too small to be brought into conformance, the uses of the properties must disappear.

The draft SMP, while calling these properties nonconforming attempts to protect them by permitting the repair and replacement of the SFRS and the appurtenant structures. The interpretation and implementation of this portion of the SMP will be guided by the common law of nonconforming use as interpreted by Washington case law. Washington case law, in all instances, mandates that the nonconforming use must be brought into conformance or eliminated. There is an inherent conflict between the law of nonconforming use and the attempt of the draft SMP to permit these Bainbridge residential properties to continue in use and existence.

If the PC were to embrace the strong legislative suggestion set forth in SSB 5451, this problem would be eliminated. The law of nonconforming use would not be applicable to the SMP. Homeowners could feel comfortable that their property rights were protected and that they would have the ability to repair or replace their SFRS or appurtenances. In addition, and equally important, the goal of the SMP of protecting ecological function would not be harmed. No expansion of the conforming use within the buffer would be permitted without mitigation as provided by the SMP. It would be simple, no mitigation no expansion. The environment will remain protected.