

Theresa Rice

From: Bainbridge Shoreline Homeowners [bi.shoreline@gmail.com]
Sent: Wednesday, June 27, 2012 8:26 AM
To: Council
Cc: PCD
Subject: Mitigation vs. Restoration in the SMP Update
Attachments: BSH - Mackie Restoration vs Restoration.pdf

I am sending the attached letter on behalf of the board of directors of Bainbridge Shoreline Homeowners. As you can see, language in our proposed SMP Update is being used as an example of what not to do in CLE (continuing legal education) classes sponsored by the Washington State Bar Association.

Ken Sethney, Board Member
Bainbridge Shoreline Homeowners

June 27, 2012

To: Bainbridge Island City Council

From: Bainbridge Shoreline Homeowners
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Mitigation vs. Restoration: state and federal law vs. good intentions

The slide show attached below was prepared for a Continuing Legal Education course titled Mitigation vs. Restoration: Testing the legal limits. It was presented by Alexander W. "Sandy" Mackie of Perkins Coie LLP in Seattle.

Following a brief introduction, Mr. Mackie uses Bainbridge Island as an example (see slides 12-17). He asks his students, all practicing attorneys, whether our city's draft SMP update looks more like mitigation (within allowable rules) or restoration (going beyond mitigation to serve a public purpose).

Let's start with slides 2-4 where key points are supported by references to court decisions:

- We cannot single out the individual to bear the burdens of society.
- When government moves onto private property to solve a public problem a heightened scrutiny must be present.

And then, slides 5-7, with references to state law:

- Definition: "mitigation" — fix a problem you created.
- Definition: "restoration" — fix a problem created by others.
- What is the base from which we measure change?
 - Shoreline Management Act — no net loss
 - Growth Management Act — protect critical areas

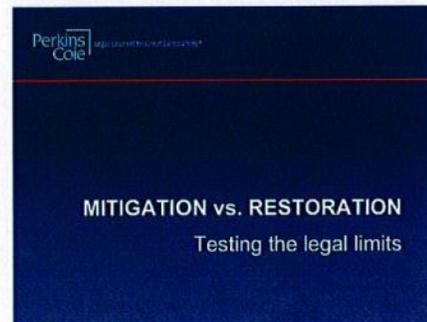
The bottom line is that "protection" not "restoration" is the standard.

Looking at Bainbridge Island, Mackie asks his students whether the proposed "Riparian Protection Zone" would require re-vegetation of previously un-vegetated areas, "planted to obtain 65% native vegetation coverage within 10 years, consisting of a mix of native trees and shrubs or other approved native vegetation."

The proposed regulations would generously allow "construction of one pervious surface trail for non-motorized use, provided the trail is no wider than four (4) feet and the vegetation trimming is limited to four (4) feet on either side of the trail."

He then asks his students whether this would pass the mitigation test? One doesn't have to be an attorney to answer, "no, this is clearly a requirement for restoration." As such, it opens our city to avoidable lawsuits by shoreline homeowners who want to protect their homes and gardens from unconstitutional takings and/or violations of the U.S. Constitution's equal protections clause.

We thank Mr. Mackie for sharing this presentation.



MITIGATION vs. RESTORATION

Testing the legal limits

We Cannot Single Out the Individual to Bear the Burdens of Society

If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

One of the principal purposes of the Takings Clause is "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." [citation omitted].

Nollan v. California Coastal Comm., 483 U.S. 825, 835-36, 107 S. Ct. 3141, 97 L. Ed. 2d. 677 (1987), emphasis supplied.

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When Government Moves Onto Private Property to Solve a Public Problem a Heightened Scrutiny is Present

- *Dolan* (encroaching on property for public purpose)—requirements—in addition to nexus
 - Rough proportionality to project impact
 - Individualized determination required
 - Burden of proof on local government

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When Government Moves Onto Private Property to Solve a Public Problem a Heightened Scrutiny is Present

- *Isla Verde v. Camas*—dedicated open space for wildlife protection
 - Requires particularized determination
 - Burden is on the government
 - After 2002 local governments "know such requirements are unlawful" for damage purposes under Chapter 64.40 RCW
- See *Isla Verde Intern. Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 196 P.3d 719 (2008)

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Definitions: Mitigation

Fix a problem you created

- (1) **Avoiding** the impact altogether by not taking a certain action or parts of an action;
- (2) **Minimizing impacts** by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
- (3) **Rectifying** the impact by repairing, rehabilitating, or **restoring the affected environment**;
- (4) **Reducing or eliminating** the impact over time by preservation and maintenance operations during the life of the action;
- (5) **Compensating** for the impact by replacing, enhancing, or providing substitute resources or environments; and/or
- (6) **Monitoring** the impact and taking appropriate corrective measure

WAC 197-11-768

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Definitions: Restoration

Fix a problem created by others

"Restore," "restoration" or "ecological restoration" means the **reestablishment or upgrading of impaired ecological shoreline processes or functions**. This may be accomplished through measures including, but not limited to, revegetation, removal of intrusive shoreline structures and removal or treatment of toxic materials. Restoration does not imply a requirement for returning the shoreline area to aboriginal or pre-European settlement conditions.

WAC 173-26-020(31)

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What is the Base From Which We Measure Change?

- Legislation sets the benchmarks for SMA and GMA
 - SMA—No net loss
 - Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that assures **no net loss of shoreline ecological functions** necessary to sustain shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW 90.58.060. RCW 36.70A.480(5)
 - GMA—"protect" critical area (Not preclude activity, which was in the original GMA bill and changed the next year)
 - Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007) ("Do no harm" in LTCA lands)
- Protection not restoration is the standard

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Working Standards—On Site

- Condition has reasonable connection to problem caused by the project under review—nexus
- Condition is roughly proportional to the problem sought to be solved—proportionality
- Reasonable necessity proven by particularized determination—burden on local governments
 - Applicable to condition to be protected
 - Shade streams where appropriate, but not eelgrass or nearshore
 - Appropriate to the circumstance
 - Buffers require naturally functioning conditions
 - Buffer does not cross the road

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Examples of Regulatory Requirements in Question

- Whatcom County
 - All near shore habitat is critical area (to 20 meters or 66 foot depth)
 - All marine critical areas require 150-foot buffer
 - All buffers require vegetative replanting to native conditions
 - Nonconforming use limitations

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Whatcom County—Birch Bay



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Whatcom County



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Restoration Science City of Bainbridge RPZ + Buffer

- Because the functions provided by a riparian area are fundamental to maintaining a healthy functioning marine nearshore, it is recommended that the City designate a riparian protection zone (RPZ) with more restricted uses and assign a separate marine shoreline buffer to protect the RPZ.
 - This would be done to protect such areas that are currently intact, and
 - to establish an RPZ where such areas do not currently exist such as when properties re-develop, remodel or otherwise expand development.
- The RPZ would be treated as a *conservation area to preserve the essential relationship between nearshore and shoreline ecological functions.*

Herrera report August 11, 2011 (on SMP update website)

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Draft Revegetation Requirement For New Development or Redevelopment

a. Zone 1 shall be planted to obtain **65% native vegetation coverage within 10 years**, consisting of a mix of native trees and shrubs or other approved native vegetation ... (50 foot typical along entire shoreline frontage)

For single-family residential property, construction of one pervious surface trail for non-motorized use, provided the trail is no wider than four (4) feet and the vegetation trimming is limited to four (4) feet on either side of the trail;

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Bainbridge RPZ in Practice Does it pass the mitigation test?

- New development or redevelopment
 - Naturally functioning conditions do not exist
 - Properties typically developed to the water
 - Assume any new development meets the no net loss test from existing conditions without the buffers
- Look at three examples and see if you see the permit program fostering
 - Mitigation—within allowable rules or
 - Restoration—going beyond mitigation to serve a public purpose

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Bainbridge RPZ How does this work in practice?

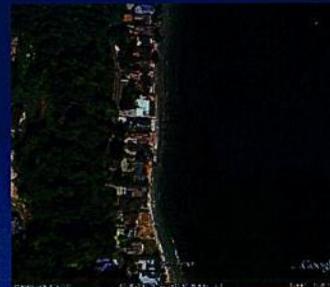


South
Shore

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Bainbridge RPZ How does this work in practice?



East
Shore

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Bainbridge RPZ How does this work in practice?



Port
Madison

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Puget Sound Partnership and the Mandate to Restore Puget Sound

- Puget Sound Partnership
 - Created in 2007
 - Non regulatory
 - Works through Action Agenda and targets
 - To restore a healthy Puget Sound by 2020

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<p style="text-align: center;">Puget Sound Partnership Action Agenda and Targets</p> <ul style="list-style-type: none"> 2011 in approaching the 2012 update of the Action Agenda set a variety of targets to measure how successful the agency was in achieving its goal of restoration of Puget Sound by 2020 	<p style="text-align: center;">Local Governments and PSP Restoration Targets</p> <ul style="list-style-type: none"> Estuaries—Add 7,380 acres (~12 square miles) Land cover—268 miles of riparian vegetation are restored or restoration projects are underway. ... Floodplains <ul style="list-style-type: none"> No net loss from 2011 baseline Restore 15% of degraded floodplains Shellfish beds <ul style="list-style-type: none"> A net increase 10,800 harvestable shellfish acres Includes 7,000 acres where harvest is currently prohibited Eelgrass—Add 10,000 acres (15 square miles)
<p>19 Perkins Coe</p>	<p>20 Perkins Coe</p>

<p style="text-align: center;">Pressure on Local Governments Chapter 90.71 RCW</p> <ul style="list-style-type: none"> The legislature ... intends that the partnership will <p>(c) Not have regulatory authority, nor authority to transfer the responsibility for, or implementation of, any state regulatory program, unless otherwise specifically authorized by the legislature 90.71.200 (BUT)</p> 	<p style="text-align: center;">Local Governments Called to Implement the Plan</p> <p>The legislature intends that all governmental entities within Puget Sound will exercise their existing authorities to implement the applicable provisions of the action agenda RCW 90.71.350(1)</p>
<p>21 Perkins Coe</p>	<p>22 Perkins Coe</p>

<p style="text-align: center;">"Non Regulatory" Regulatory Authority I RCW 90.71.350</p> <p>(3) In the event the council determines that an entity is in substantial noncompliance with the action agenda</p> <ul style="list-style-type: none"> notice of this finding meet and confer develop a corrective action plan hold a public meeting <p>If, after this process, the council finds that substantial noncompliance continues, recommend to the governor that the entity be ineligible for state financial assistance</p>	<p style="text-align: center;">"Non Regulatory" Regulatory Authority II Not Just Agency Process</p> <ul style="list-style-type: none"> Substantial non compliance concerns may also involve problems, conflicts, or a substantial lack of progress <ul style="list-style-type: none"> that citizens or implementing entities bring to the council The council may use conflict resolution mechanisms such as but not limited to <ul style="list-style-type: none"> technical and financial assistance facilitated discussions, and mediation to resolve the conflict
<p>23 Perkins Coe</p>	<p>24 Perkins Coe</p>

"Non Regulatory" Regulatory Authority III About as Friendly as the IRS

- The council may recommend to the governor that the entity be ineligible for state financial assistance until the substantial noncompliance is remedied.
- Instances of noncompliance shall be included in the state of the Sound report required under RCW 90.71.370.
- The council shall provide its analysis of the conflict and recommendations resolution to the governor, the legislature, and to those entities with jurisdictional authority to resolve the conflict.

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"Non Regulatory" Regulatory Authority III About as Friendly as the IRS

- (6) The council may make recommendations to the governor and appropriate committees of the senate and house of representatives for local or state administrative or legislative actions to address barriers it has identified to successfully implementing the action age
- (Does anyone remember Chelan County and the "hell no we wont go" phase of its GMA planning—until DCTED recommended a funding cut off?)
 - Nothing voluntary about it

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Local Governments and PSP Restoration Targets

- Estuaries—Add 7,380 acres (~12 square miles)
- Land cover—268 miles of riparian vegetation are restored or restoration projects are underway. ...
- Floodplains
 - No net loss from 2011 baseline
 - Restore 15% of degraded floodplains
- Shellfish beds
 - A net increase 10,800 harvestable shellfish acres
 - includes 7,000 acres where harvest is currently prohibited
- Eelgrass—Add 10,000 acres (15 square miles)

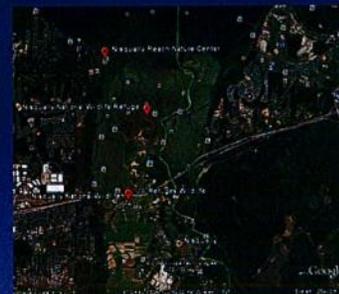
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Estuaries/Riparian Restoration Nisqually Success Story

~ 1 square mile
(640 acres)

Target restoration
of 7,380 acres or
11 square miles
Estuaries
238 miles riparian
vegetation

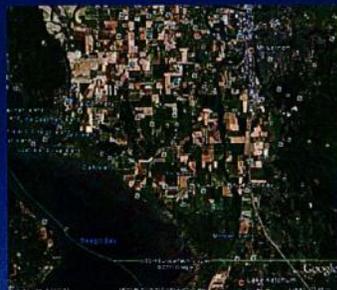


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Let's Look at Problems in the Field Estuaries—Skagit

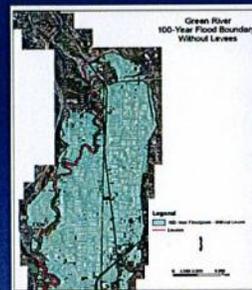
- Target 7,380 acres
- Fir Island is 9,900 acres



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Floodplain—no net loss from 2011 baseline—Levee decertification



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**Floodplain—no net loss from 2011
baseline—Tacoma/Fife**



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**Floodplain—no net loss—Burlington
Skagit area—where do we gain 15%?**



Central
Skagit
County

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**Riparian Restoration
Rivers
278-mile Target**

- Buffers depend on naturally functioning conditions
- Test for validity for local enforcement:
 - Nexus-proportionality
 - Reasonable necessity
 - Particularized determination
 - Applicable to conditions
 - Appropriate to circumstance

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**Buffers Depend on Naturally Functioning
Conditions Not Found in Urban Core Areas**

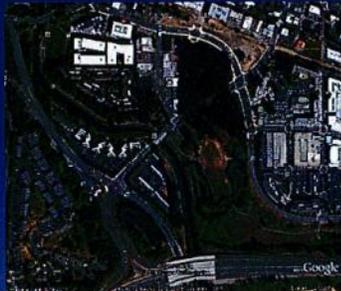


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**Buffers Depend on Naturally Functioning
Conditions Which Do Not Exist in Many Cities**

Redmond
River

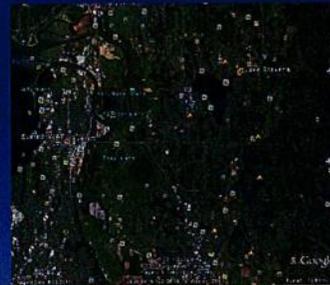


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**Buffers Depend on Naturally Functioning
Conditions Which Often Conflict With
Agricultural Uses**

Snohomish
County River
system



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Where Do We Find the Areas for Restoration and How Is It Imposed?

"If the local government used the best available science in adopting its critical areas regulations, the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules."

Honesty in Environmental Analysis and Legislation (HEAL) v. Central, 96 Wn. App. 522, 534; 979 P.2d 864 (1999).

Message: Read *HEAL* carefully

- Best available science when intruding on private property for open space buffers and vegetation restoration
 - Naturally functioning conditions present
 - Reasonable necessity-particularized determination
 - Applicable to condition
 - Appropriate to the circumstance
 - Difficult to enforce where project already meets the no net loss test

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Lesson: Mitigation is Within the Proper Realm of Lawful Exaction Restoration is Typically Not

- Restoration beyond
 - No net loss
 - Do no harm
 - Protect, not restore
- Is a public responsibility beyond the ability of local governments to command from private property owners

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Lesson

- Local governments for their shoreline restoration plans
- Puget Sound Partnership for its Puget Sound restoration targets
 - Cannot rely on local government police power to achieve the desired results
 - Restoration beyond mitigation can only be achieved through public investment and private incentives

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When Choosing to Tell Others How to Behave The First Thing is to Set a Good Example

Puget Sound Partnership headquarters at UW Center for Urban Waters on Thea Foss Waterway



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