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By Email (council@bainbridgewa.gov) and Hand Delivery

Bainbridge Island City Council

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Re: SMP Consistency Analysis
(January 11, 2011, ICF International to City Staff and Herrera)

Dear Council Members:

The purpose of this letter is to provide comment on behalf of the Bainbridge Shoreline Homeowners. I have been asked to comment on the City's "Consistency Analysis." For reasons set out herein, the Consistency Analysis prepared by ICF International is incomplete, and applies the wrong standards in certain respects. Because it is a base document, it should be corrected. Until corrected, the public cannot meaningfully comment nor can the City Staff and involved citizens prepare an updated Shoreline Master Program consistent with all requirements.

I was part of the legal team that struck down what were called the "SMA Rules," the predecessor to the current Guidelines codified at WAC Chapter 173-26 ("the State Guidelines" or "the Guidelines"). I helped negotiate the new Guidelines. I am familiar with the intent and purpose of the Guidelines as signed off by the parties to the litigation contesting the SMA Rules. With that background, I am familiar with the process and requirements for a compliant and useful Consistency Analysis.

CONSISTENCY INVOLVES MORE THAN CONSIDERATION OF THE STATE GUIDELINES.

The fundamental flaw of the City's Consistency Analysis is that it limits itself only to a "checklist" comparing the existing SMP against the State Guidelines. If there is language in the existing SMP that does not exactly match the language of the Guidelines, the current SMP is considered "partially consistent" or "not consistent" by its authors. No reference is made except to the State Guidelines.

This approach is flawed for at least three reasons. One, the Shoreline Management Act ("SMA") has primacy over the Guidelines, so the language of that law and related case

interpretations must be considered. See WAC 176-27-181(1) ("The guidelines are subordinate to the Act."), Two, the Consistency Analysis employs too narrow a perspective. By law, consistency must also include an examination of the local government's comprehensive plan and development regulations adopted under the Growth Management Act. See RCW 90.58.080(4)(b). Three, the Consistency Analysis presupposes that the Shoreline Master Program must be updated if the language in a current draft does not "match" the Guidelines. To the contrary, a local jurisdiction is required to make amendments to the Master Program only when "deemed necessary to reflect changing local circumstances, new information or approved data." WAC 173-26-090.

When updating an SMP, the Guidelines allow "local governments substantial discretion to adopt master programs reflecting local circumstances" WAC 173-26-171(3)(a). True, a local government is also required to make amendments to the Master Program necessary to comply with the requirements of RCW 90.58.080 and any "applicable guidelines issued by the Department" (RCW 90.58.080). However, WAC 173-26-090 and WAC 173-26-171(3)(a) are part of the "applicable guidelines." The Consistency Analysis leaps over WAC 173-26-090 and WAC 173-26-171 to presuppose amendments are required because the current SMP does not include or match all language in the Guidelines. It makes no consideration of local circumstances or other factors. This is not the correct approach.

NEW CASE DECISIONS SUPERSEDE.

Case law has superseded some of the State Guidelines. For example, the Guidelines' somewhat unfriendly attitude towards docks and residential protection is not consistent with the Washington State Supreme Court's interpretation of the SMA as set out in a number of cases, including *Biggers v. City of Bainbridge Island*.

SMA also recognized 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 shorelines. This conclusion is illustrated by the SMA's provisions requiring prompt adoption of SMPs and shoreline structure permit processing.

Biggers, 162 Wn.2d at 693-695, 697-699.

THE CONSISTENCY ANALYSIS FOR CRITICAL AREAS USES THE WRONG STANDARD.

The City Council is referred to the Consistency Analysis, p.5. Therein, the analysis states that for critical areas within shorelines, the stated SMP must "provide a level of protection to critical areas within the shoreline area that is at least equal to that provided by the local government's existing critical areas regulations adopted pursuant to the GMA for comparable

areas other than shorelines.” This is not the correct standard. The Legislature has changed the standard. See EHB 1653 adopted in 2010. The 2010 law states that an updated SMP shall provide a level of protection of 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(6). Assurance of “no net loss” does not mean “just use the CAO.”

THE STATE GUIDELINES PROVIDE A BALANCE AND ARE NOT PRECLUSIVE OF SHORELINE USE AND DEVELOPMENT.

The SMA allows “alterations of the natural condition of the shoreline” for certain uses and imposes a mandatory duty that Ecology “recognize” such alterations. RCW 90.58.020. These include preferred or water-dependent uses such as single-family homes. The Guidelines explicitly state that the SMA controls over the Guidelines. The Guidelines recognize the inherent “balance” between protection and use and development of the shorelines:

The act calls for the accommodation of “all reasonable and appropriate uses” consistent with “protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life” and consistent with “public rights of navigation.” The act’s policy of achieving both shoreline utilization and protection is reflected in the provision that “permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public’s use of the water.”
RCW 90.58.020.

WAC 173-27-276(2).

SUMMARY OF COMMENTS.

A compliant Consistency Analysis requires reasoned judgment as to how to apply the Guidelines in the context of local circumstance to achieve balance. As the City Council can see, a Consistency Analysis must look beyond the State Guidelines to how the SMA has been interpreted and applied through the years. In addition, it must look at the Comprehensive Plan (and its policies) and implementing development regulations, for example, stormwater controls, the local government’s substantive SEPA regulations, clearing regulations, zoning, etc. All of these laws come in to play to see if an SMP truly needs to be revised or not to reflect changes in local circumstances or new information or improved data.

There is no legal or logical basis to change an SMP, particularly one which was adopted in 1996 by Bainbridge Island 25 years after the SMA was enacted in 1971, to simply try to

“match language” in the Guidelines. The process is one to review and measure amendments based upon documented need and justification to make a change taking into account any changing local circumstances.

Bainbridge Shoreline Homeowners is unaware of any document produced by the City to date justifying changes to the SMP based upon changing local circumstances, new information or improved data. An audit of the existing regulatory system (“cause-and-effect analysis”) and whether it needs to be changed via adoption of a new or substantially updated SMP is in order. This must occur in the opinion of the Shoreline Homeowners before the City Council turns to considering language for a new SMP, if an update is shown to be truly needed based upon the required factors.

Thank you for your kind attention to these comments.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE



Dennis D. Reynolds

cc: Bainbridge Shoreline Homeowners
Bainbridge Island Planning Commission (by email)
Ryan Ericson (by email)

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