

1 landward of Zone 1 and extends no further than the depth of the Shoreline Buffer, as
2 established by the Category. SMP at 82, § 4.1.3.6.3. In addition, the City's Critical Areas
3 Ordinance allows the Director to increase buffer widths, up to 50% greater than the
4 applicable buffer to protect known locations of endangered, threatened, or state monitored
5 or priority species for which a habitat management plan indicates a larger buffer is needed.
6 These terms are also defined in the SMP. SMP at 286, Appendix B-8(C)(4)(b).

7
8 The Board sympathizes with Petitioners' objection to the complexity of parcel-by-
9 parcel buffer designation criteria. However, in the Board's experience, buffer regulation
10 requires weighing numerous factors. Property owners often demand site-specific analysis.
11 When Kitsap County updated its critical areas regulations, the Kitsap Association of
12 Property Owners (KAPO), represented by Dr. Don Flora on the County's technical advisory
13 committee, opposed uniform buffer requirements and called for site-specific measures.¹⁵³ In
14 *Hood Canal Environmental Council v. Kitsap County*, CPSGMHB 06-3-0012c, Final
15 Decision and Order (August 28, 2006) at 35, the Board noted:

16
17 KAPO presents science (or a critique of the County's documents) which
18 supports site-specific protections, pointing out that the County's own BAS
19 indicates the superiority of site-specific measures. For KAPO, especially
20 where homes, lawns and gardens, shopping malls and parking lots, docks
21 and shoreline armoring create a variety of impacts on the resource to be
22 protected, "universal buffers" are unsupportable. KAPO argues that BAS
23 requires the County to eliminate uniform buffer requirements in the built
24 environment and find a more fine-tuned and site-specific mechanism for
protecting critical areas.

25 In *Hood Canal*, Kitsap County chose a uniform buffer approach, in part because it
26 was administratively feasible. *Id.* at 36. Similarly, in *DOE/CTED v. City of Kent*, CPSGMHB
27 Case No. 05-3-0034, Final Decision and Order (April 19, 2006) at 31, the City of Kent's BAS
28 consultant advised the City that a site-specific evaluation of each wetland/buffer complex
29 would allow the most effective and tailored regulation to protect functions and values, but
30 would be impracticable. The City of Kent opted for a uniform approach.
31
32

¹⁵³ *Hood Canal v. Kitsap County*, CPSGMHB 06-3-0012c, Final Decision and Order (August 28, 2006) at 31-32.

1 Bainbridge Island's SMP, by contrast, adopts criteria allowing the marine buffers to
2 be tailored to the "physical and geomorphic characteristics of the property," coupled with
3 adjustment for protection of species for which a habitat management plan indicates a larger
4 buffer is needed. In choosing the site-specific approach, the City necessarily created a more
5 detailed system than a blanket buffer size.¹⁵⁴ The criteria appear to the Board to be clearly
6 drawn. While more complex to administer, the buffer system adopted in the SMP is bounded
7 by reasonable and established criteria that citizens and the Shoreline Administrator should
8 be able to apply.
9

10 **The Board finds** Petitioners have not met their burden on this issue.

11
12 **f. Preservation of Significant Trees**

13 PRSM objects that SMP § 4.1.3.5.6 allows the City's Shoreline Administrator to
14 require retention of "significant trees" but without providing any criteria in the SMP to guide
15 the Administrator's determination as to which trees are significant. PRSM Brief at 52.¹⁵⁵ The
16 City at hearing pointed to its tree ordinance, codified in the zoning code, which defines a
17 significant tree.¹⁵⁶
18

19 The Board notes the SMP vegetation management provisions require retention of
20 significant trees in the shoreline jurisdiction, SMP §§ 4.1.3.5.4.a and 4.1.3.5.6, unless
21 removal is specifically allowed under other exceptions of SMP provisions. SMP at 79, 80.
22 There is no undue discretion granted the Administrator with respect to retention of
23 significant trees.
24

25 **The Board finds** no insufficiency of scope or detail in the SMP provisions concerning
26 significant trees.
27

28 ¹⁵⁴ The Board recognizes the GMA requirement for best available science in buffer designation for critical
29 areas is not at issue here.

30 ¹⁵⁵ PRSM refers to SMP § 4.1.3.1.6, but the intention is clearly SMP § 4.1.3.5.6, as the City's Response
31 recognizes. The Board prefers to address the question on the merits rather than dismiss for technical flaws.
32 We trust the parties will grant the Board the same courtesy if they find scriveners' errors in the Board's
decision.

¹⁵⁶ BIMC 18.36.030(223): "Significant tree" means: (a) an evergreen tree 10 inches in diameter or greater,
measured four and one-half feet above existing grade, or (b) a deciduous tree 12 inches in diameter or
greater, measured four and one-half feet above existing grade; or (c) all trees located within a required critical
area buffer as defined in Chapter 16.20 BIMC.

1 **g. Exceptions to Native Vegetation Requirement**

2 Petitioners complain that SMP § 4.1.3.5.5¹⁵⁷ authorizes the Shoreline Administrator
3 to allow exceptions to planting of native vegetation if the Administrator is convinced that it
4 will serve the same ecological function as native plants, without defining what ecological
5 functions native plants are supposed to serve. PRSM Brief at 53. However, the City points
6 out that same SMP section specifically states that other plant species (non-native) may be
7 approved that are “similar to the associated native species in diversity, type, density, wildlife
8 habitat value, water quality characteristics, and slope stabilizing qualities, excluding
9 noxious/invasive species” according to a qualified professional. City Brief at 30. “Ecological
10 functions” are further defined in the SMP to include “habitat diversity and food chain support
11 for fish and wildlife, ground water recharge and discharge, high primary productivity, low
12 flow stream water contribution, sediment stabilization and erosion control, storm and water
13 quality enhancement through biofiltration and retention of sediments, nutrients, and
14 toxicants.” SMP at 235.

15
16
17 There should be no confusion about what the term “ecological functions” entails and
18 the types of characteristics the Administrator will consider with respect to non-native plants.
19 The SMP provisions are consistent with WAC 173-26-221(5), which addresses shoreline
20 vegetation conservation requirements for SMPs. The commonly recognized functions of
21 shoreline vegetation in protecting shoreline ecology are listed in WAC 173-26-221(5)(b).
22 Petitioners have provided no evidence that appropriate plant lists are unavailable¹⁵⁸ or
23 would be arbitrarily administered.
24

25 **The Board finds** petitioners have failed to demonstrate the SMP is insufficient in
26 scope and detail with respect to non-native plants.
27
28
29

30 ¹⁵⁷ PRSM refers to SMP § 4.1.3.1.5, but the intention is clearly SMP § 4.1.3.5.5.

31 ¹⁵⁸ Knowledgeable home gardeners are familiar with plant lists from local nurseries or regional university
32 horticultural programs identifying native plants and non-natives that serve particular functions, such as
absorbing stormwater in swales or raingardens, stabilizing bluffs and hillsides, or supporting birds, butterflies,
frogs, and other wildlife. The qualified professionals who will advise the Administrator concerning the functional
equivalency of ornamental plants for specific purposes will surely have access to or develop such lists.

1 **h. Discontinued Nonconforming Use**

2 PRSM asserts the SMP definition of nonconforming development at SMP page 248 is
3 confusing. PRSM Brief at 53. The SMP defines the term “nonconforming development” in
4 accordance with WAC 173-27-080(1) as a “shoreline use or structure” lawfully constructed
5 or established prior to the effective date of the applicable SMP provision and which no
6 longer conforms. PRSM contends this makes unclear whether discontinuing *use* of a
7 nonconforming *structure*, like a single family residence in case of damage or non-use (SMP
8 § 4.2.1), would result in loss of the ability to resume residential use in a nonconforming
9 home.
10

11 The SMP provisions distinguish between nonconforming *uses*, which may be
12 discontinued and cannot be re-established following a twelve month period, and
13 nonconforming residential *structures* which can be reconstructed if damaged or destroyed.
14 SMP §§ 4.2.1.3.3, 4.2.1.3.5, 4.2.1.3.7, 4.2.1.5.2. Under the Bainbridge SMP, single family
15 residential use is a conforming use in every upland designation except Natural. See Table
16 4-1, SMP p. 41. In addition, the SMP allows non-conforming uses, which would include
17 multi-family and accessory dwelling units in some designations and single family homes in
18 Natural designations, to be re-established if operated within a nonconforming structure that
19 is damaged or destroyed and the reconstruction takes place within the required time period.
20 SMP § 4.2.1.5.2. Thus, the ability to resume residential uses in a nonconforming home/
21 structure is not jeopardized.
22

23 PRSM raises the same concern in complaining that SMP § 4.2.1.5.2: “Once
24 discontinued, re-establishment of nonconforming uses located in the shoreline jurisdiction
25 *shall be restricted*,” creates an “undefined limitation.” PRSM Brief at 52.
26

27 SMP, p. 122, § 4.2.1.3.5 is the section on Policies (Relating to Nonconforming Uses,
28 Nonconforming Lots, and Existing Development). The next page, SMP, p. 123, § 4.2.1.5.2,
29 Regulations - Nonconforming Uses, explains what is meant by the term “restricted:”
30

31 If a nonconforming use is discontinued for twelve (12) consecutive months,
32 any subsequent use shall be conforming; except that if a nonconforming use
is operated within a nonconforming structure that is accidentally damaged or
destroyed and reconstruction is proposed under Section 4.2.1.6.1(3), then

1 the use may be reestablished within the same time period as the
2 reconstruction for the nonconforming structure pursuant to Section 4.2.1.4(2).

3 The SMP is clear: if the *use* is non-conforming,¹⁵⁹ re-establishment of a discontinued use is
4 prohibited after a twelve-month period except under the circumstances of accidental
5 damage and reconstruction of a nonconforming *structure*.
6

7 **The Board finds** Petitioners have not met their burden on this issue.

8
9 **i. Inaccurate Internal References**

10 Finally, PRSM contends the SMP is insufficient in scope and detail by inaccurately
11 cross-referencing SMP or other city code provisions. PRSM Brief at 53. For instance, SMP §
12 4.1.2.4.3 refers to the site-specific analysis required in accordance with section § 4.1.2.9,
13 but section § 4.1.2.9 does not exist.

14 The City argues these are not errors requiring remand. City Brief at 30. The City
15 attorney at hearing stated the codification process allows for correction of scribes' errors.
16 The omission of submittal requirements for the site specific analyses required to ensure no
17 net loss of shoreline functions can be remedied by issuance of an informal or promulgated
18 administrative policy containing applicable submittal requirements (citing RCW 36.70B.070
19 (2)).¹⁶⁰

20
21 The Board reads SMP § 4.1.2.4 as providing the parameters for implementation of
22 the no net loss standard. All shoreline development, uses, and activities must utilize a
23 required mitigation sequence, utilize effective erosion control methods, minimize adverse
24 impacts to sensitive environmental areas and functions, and minimize the need for shore
25 stabilization in the future in order to achieve no net loss. The lack of submittal requirements
26 in the SMP does not diminish the sufficiency of detail or delegate undue discretion to the
27 Administrator.
28

29
30 ¹⁵⁹ As set forth above, residential use is a conforming use in most of Bainbridge Island's shoreline
designations.

31 ¹⁶⁰ The Board notes Ecology recommended that the City move all of its submittal requirements into its
32 administrative manual where its submittal requirements for all other permits are kept. Ex. 2092, Bainbridge
Island City Council Meeting, Nov. 20, 2013, Ryan Ericson, p. 23, line 11. See also, SMP 4.0.1(10): "Submittal
requirements for all shoreline development permits or shoreline exemptions are in BMIC Title 2 and the
Administrative Manual."

1 **The Board finds** the SMP inaccuracies identified by Petitioners do not constitute a
2 violation of WAC 173-26-191(2)(a)(ii)(A) or provide grounds for a remand.

3
4 **Conclusions for Legal Issue V**

5 Mere allegations that the SMP will be administered arbitrarily or capriciously are
6 insufficient to meet a petitioner's burden of proof. Mere allegations of vagueness or lack of
7 clarity similarly fail to meet a petitioner's burden of proof. The burden of proof required to be
8 met by PRSM is to show (a) by clear and convincing evidence that the provisions as they
9 relate to shorelines of statewide significance are inconsistent with the policy of RCW
10 90.58.020 and the applicable guidelines; or (b) the provisions as they relate to shorelines
11 are clearly erroneous in view of the entire record.

12 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
13 establish the SMP fails to attain the level of clarity required or results in an excessive
14 delegation of discretion to regulators, in violation of RCW 90.58.900 or WAC 173-26-
15 191(2)(a)(ii).

16
17
18 **Legal Issue VI – Consistency with Comprehensive Plan and Development Regulations**

19 **VI-1. Whether the SMP was adopted without considering costs and benefits to**
20 **property owners as required by the Economic Element of the**
21 **comprehensive plan or the overriding principle of preserving marine**
22 **views. PFR 61(a).**

23 This issue has apparently been abandoned by PRSM and the Realtors. Neither of
24 the opening briefs addresses the comprehensive plan provisions referenced in the issue
25 statement. Legal Issue VI-1 is **abandoned** and is **dismissed**.

26
27 **VI-2. Whether the City is not in compliance with RCW 90.58.080(4)(a)¹⁶¹ and RCW**
28 **36.70A.480 because the updated SMP is inconsistent with comprehensive**
29 **plan and development regulations adopted under RCW 36.70A in that uses**
30

31
32 ¹⁶¹ RCW 90.58.080(4)(a) addresses the seven-year review of master programs which is required *after* the scheduled update which is the subject of the present appeal. The purpose of that review is "to assure that the master program complies with the applicable law and guidelines in effect at the time of the review." The Petitioners' brief does not discuss this statute, which in any event is inapplicable, and any challenge on this basis is deemed abandoned.

1 allowed in the City's zoning regulations are prohibited in the SMP
2 designations and uses prohibited in the zoning code are allowed in the SMP
3 designations. PFR 61 (b) – (m). Together with VI-4. Whether the hazard trees
4 provisions of the SMP conflict with Comprehensive Plan and development
5 regulations regarding nuisances and incompatible use of land. PFR 61(o).

6 **Applicable Law**

7 **RCW 36.70A.480(3)(a)** provides:

8 The policies, goals and provisions of chapter 90.58 RCW and applicable
9 guidelines shall be the sole basis for determining compliance of a shoreline
10 master program with this chapter [GMA] except as the shoreline master
11 program is required to comply with the *internal consistency provisions of*
12 *RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.* (emphasis
13 added)

14 **Discussion and Analysis**

15 The scope of the Board's review of an adopted and approved SMP is limited. RCW
16 90.58.190(2)(b) provides, for shorelines:

17 If the appeal to the growth management hearings board concerns *shorelines*,
18 the growth management hearings board shall review the proposed master
19 program or amendment **solely** for compliance with the requirements of this
20 chapter, the policy of RCW 90.58.020 and the applicable guidelines, the
21 *internal consistency provisions of RCW 36.70A.070, 36.70A.040(4),*
22 *35.63.125, and 35A.63.105,* and chapter 43.21C RCW as it relates to the
23 adoption of master programs and amendments under chapter 90.58 RCW.
(Emphasis added)

24 RCW 90.58.190(2)(c) provides:

25 If the appeal to the growth management hearings board concerns a *shoreline*
26 *of statewide significance*, the board shall uphold the decision by the
27 department unless the board, by clear and convincing evidence, determines
28 that the decision of the department is *inconsistent with the policy of RCW*
29 *90.58.020 and the applicable guidelines.* (Emphasis added)

30 The City asserts the Board lacks jurisdiction under RCW 90.58.190(2)(c) to review
31 any of the SSWS provisions of the SMP for comprehensive plan or GMA development
32 regulation consistency. City Brief at 32. Of the various inconsistencies listed by PRSM, only
the rebuilding of the Lynwood Center pier appears to the Board to possibly involve a

1 shoreline of statewide significance. However, as the City points out, the pier is within the
2 Urban designation where such a use is permitted.¹⁶² Thus, if there were a basis for the
3 Board's review, there is no inconsistency with the Comprehensive Plan's allowance of that
4 project.

5 For the rest of PRSM's concerns, the Board looks to the scope of review for
6 provisions concerning shorelines. Here the statute allows the Board to apply "the internal
7 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105."
8 RCW 36.70A.070 requires that all elements of a comprehensive plan be internally
9 consistent but says nothing about development regulations. The other cited statutes – RCW
10 36.70A.040(4), 35.63.125, and 35A.63.105 – do not apply to cities and counties originally
11 required to plan under the GMA. In *Snohomish County Farm Bureau v. Snohomish County*
12 (*SCFB I*), GMHB Case No. 12-3-0008, Final Decision and Order (March 14, 2013) at 23, the
13 Board concluded that the scope of review set forth in RCW 90.58.190(2)(b) does not
14 provide for Board review of consistency between SMP plan or regulatory provisions and
15 GMA development regulations for GMA initially-planning cities.

16 PRSM's reply brief notes the Board's comment in the *SCFB I* case: "it is unlikely the
17 Legislature intended to exempt GMA's initially-planning counties and cities" from the
18 requirement for regulatory consistency. PRSM Reply at 18. However, since the Board's
19 *SCFB I* decision the Court of Appeals has ruled the Board is not at liberty to construe the
20 statute according to an assumed legislative intent. The court explains:¹⁶³

21 If the plain meaning of a statute is unambiguous, we must apply that plain
22 meaning as an expression of legislative intent without considering extrinsic
23 sources. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). We
24 do not rewrite unambiguous statutory language under the guise of
25 interpretation. *Cerrilo v. Esparza*, 158 Wn. 2d 194, 201, 142 P.3d, 155
26 (2006). And we do not add language to an unambiguous statute even if we
27 believe the legislature 'intended something else but did not adequately
28 express it.' *Kilian v. Atkinson*, 147 Wn. 2d, 16, 20, 50 P. 3d 638 (2002).

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¹⁶² SMP Table 4-1 at 39 and 41.

¹⁶³ *Protect the Peninsula's Future v. Growth Management Hearings Board*, Case No. 45459-9-II, 2015 Wn.
App. LEXIS 332, February 18, 2015, p. 10-11.

1 In the present case, all of PRSM's inconsistency allegations except (i) trails and (m)
2 Lynnwood Center pier are based on City development regulations, not comprehensive plan
3 provisions. PRSM Brief at 54-57.¹⁶⁴ PRSM has simply not alleged a statute within the
4 Board's jurisdiction which would encompass violations resulting from inconsistencies
5 between SMP policies or regulations and GMA development regulations.
6

7 In any event, PRSM has not met its burden to demonstrate regulatory inconsistency.
8 The SMP states: "These designations form an overlay for addressing shoreline
9 considerations to the City's land use regulations." SMP, p. 22, §3.1.¹⁶⁵ Thus, allowing a use
10 or conditional use in the zoning code and prohibiting it in some shoreline designations is not
11 an inconsistency but is precisely the kind of additional protection of fragile shoreline
12 resources that an overlay to upland zoning requires.¹⁶⁶ Conversely, allowing water-oriented
13 uses in the shoreline may be appropriate even where a comparable non-water-oriented use
14 is prohibited in the zoning code. For example, trails are identified in SMP §§ 5.8.5.1.b and
15 5.8.5.3 as examples of water-related recreational facilities and may be allowed in the
16 shoreline jurisdiction although prohibited in the zoning. SMP at 177-78. Merely reciting
17 differences between the master program and the zoning code does not demonstrate internal
18 inconsistency.
19

20 **The Board finds** Petitioners allegations concerning regulatory inconsistency do not
21 fall within the scope of the Board's review under the statutes relied on in the legal issues.
22

23 **VI-3. Whether the SMP provisions conflict with the Park District's**
24 **comprehensive plan which is incorporated in the City's Comprehensive**
25 **Plan. PFR 61 (n) (i) – (v).**

26
27 ¹⁶⁴ The same is true of PRSM's concern about hazard trees, Legal Issue VI-4. PRSM states SMP § 4.1.3.4.3
28 (c) requires them to be retained on site for wildlife habitat, which conflicts with development regulations
29 regarding nuisances and incompatible use of land. PRSM Brief at 57. PRSM fails to cite the conflicting
30 regulations, and the Board will not address the matter.

31 ¹⁶⁵ In *Samson v. City of Bainbridge Island*, CPSCMHB Case No. 04-3-0013, Final Decision and Order
32 (January 19, 2005) at 22, the Board concluded that the City was not prohibited from adopting particularized
regulations for certain shoreline areas and compared these shoreline regulations to "overlay zones, subarea
plans, and similar mechanisms to tailor regulations to particular situations, *even where the underlying zoning
or classification may remain the same.*" (emphasis added)

¹⁶⁶ These include PRSM's regulatory inconsistency allegations concerning (a) agriculture, (c) government
facilities, (e) mining and quarrying, (f) solid waste disposal, (g) golf courses, (h) nonwater-oriented recreational
development, (j) multifamily units, (k) single family homes in Island Conservancy, and (l) parking (primary).

1 **Discussion and Analysis**

2 PRSM contends SMP provisions prohibiting various shoreline structures conflict with
3 the Park District's comprehensive plan for proposed improvements. PRSM Brief at 57. The
4 City responds that some of the specific improvements called out by PRSM are permitted or
5 conditional uses in the SMP and others may be located upland of the shoreline jurisdiction.
6 City Brief, at 35-36. There is thus no inconsistency, the City asserts.¹⁶⁷ PRSM states the
7 Park District plan is incorporated in the City's comprehensive plan, and the City has not
8 challenged the assertion. The SMP provisions referenced by PRSM are development
9 regulations from the Shoreline Use Tables, SMP Table 4-1.
10

11 Assuming, *arguendo*, that the Parks plan is a comprehensive plan component within
12 the scope of the Board's SMP review for consistency, the Board finds that all the Park
13 District properties at issue are in the Island Conservancy designation, except Blakely Harbor
14 Park which is located in part in the Natural designation. The listed parks provide water-
15 oriented active or passive recreational use. Use of the term "water-oriented" refers to any
16 combination of water-dependent, water-related and/or water-enjoyment uses and serves as
17 an all-encompassing definition for priority uses under the SMA. SMP at 261. Water-
18 enjoyment uses, in turn, include recreational uses, or other uses facilitating public access to
19 the shoreline as a primary characteristic of the use. Primary water-enjoyment uses "may
20 include, but are not limited to, *parks*, piers, and other improvements facilitating public
21 access to shorelines of the state." SMP at 261.
22

- 23
- 24 • Site bridging – proposed for Blakely Harbor Park. Park Comp Plan App. at 8.
25 Although SMP § 6.3.4 prohibits overwater structures in Priority Aquatic
26

27 ¹⁶⁷ WAC 173-26-211(3) provides guidance for ensuring consistency between shoreline environmental
28 designations and the local comprehensive plan:

29 In order for shoreline designation provisions, local comprehensive plan land use designations and
30 development regulations to be internally consistent, all three of the conditions below should be met:

- 31 (a) Provisions not precluding one another. ... To meet this criteria, the provisions of both the
32 comprehensive plan and the master program must be able to be met....
- (b) Use compatibility. Land use policies and regulations should protect preferred shoreline uses from
being impacted by incompatible uses. The intent is to prevent water-oriented uses, especially water-
dependent uses, from being restricted on shoreline areas because of impacts to nearby non-water-
oriented uses....
- (c) Sufficient infrastructure. Infrastructure and services provided in the comprehensive plan should be
sufficient to support allowed shoreline uses.

1 designations and adjacent to the Natural designation, trails are permitted. SMP at
2 44, Table 4-1. Because passive recreational development and structures
3 accessory to passive use are allowed in the Priority Aquatic designation and
4 public trails are permitted, site bridging at jetties would be allowed. SMP at 177-
5 78, §5.8.5.

- 6 • Boardwalks and viewpoints – proposed for Blakely Harbor Park and Hawley Cove
7 Park. Park Comp Plan App. at 8, 11. For the Island Conservancy designation,
8 boardwalks and viewpoints would be considered either “Active Recreational
9 Development,” which is a conditional use, or “Passive Recreational
10 Development,” which is permitted. SMP at 41;§ SMP 5.8.5. Boardwalks and
11 viewpoints would be considered water-enjoyment uses because they provide for
12 recreational and aesthetic enjoyment of the shoreline, which is a priority use of
13 the shoreline. SMP at 177-78, § 5.8.5; SMP at 261.
- 14 • Restroom remodels at Fay Bainbridge Park, permanent restrooms for Blakely
15 Harbor Park, compost toilet for Hidden Cove Park. For Island Conservancy,
16 upland appurtenant structures that support water-oriented active or passive
17 recreational uses are considered accessory uses, which are permitted along with
18 a primary recreational use. SMP at 38, 46, Table 4-1. The record does not reflect
19 whether the restrooms at these parks are located within the shoreline jurisdiction.
- 20 • Barracks improvements at Fort Ward Park and re-adaptation of generator building
21 at Blakely Harbor Park. Unspecified improvements to the barracks and generator
22 building would be evaluated according to the criteria for existing development in
23 SMP § 4.2.1.6. Namely, to the extent that the structures are existing development
24 (nonconforming due to location within shoreline buffers), they may be maintained,
25 repaired, renovated, or remodeled provided that the changes would not alter or
26 increase the nonconformity.¹⁶⁸

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¹⁶⁸ The Park District comprehensive plan expressly acknowledges that its improvement proposals will be subject to approval by permitting agencies. Park District Comprehensive Plan App. at 008, 011.

- 1 • Storage Shed – Fay Bainbridge Park. Because there is no information about
2 where a storage shed will be located, it is impossible to discern whether the
3 shoreline jurisdiction is even applicable. However, it may qualify as an upland
4 appurtenant structure to support a water-oriented active or passive recreational
5 use, both of which are permitted accessory uses in the Island Conservancy
6 designation. SMP at 46, Table 4-1.
7
- 8 • Yurts – Fay Bainbridge Park and Fort Ward Park. Active recreational
9 development is a conditional use in the Island Conservancy designation. SMP at
10 41, Table 1. “Active Recreational Development” is a defined term that includes
11 “activities that generally require the use of constructed facilities such as
12 playgrounds, athletic fields, boat ramps, and marinas, and/or the use of
13 specialized equipment.” SMP at 252.
14
- 15 • Picnic Shelters – at Fort Ward Park and Hidden Cove Park. Picnic shelters would
16 be considered either “Active Recreational Development,” which is a conditional
17 use in the Island Conservancy designation, or a “Passive Recreational
18 Development,” which is permitted. SMP at 41, Table 4-1. SMP § 5.8.5.3
19 specifically states that facilities for water-related recreation, such as picnicking,
20 should be located near the shoreline. SMP at 178.
21
- 22 • Tent camping improvements – at Fort Ward Park. Passive Recreational
23 Development is a permitted use in the Island Conservancy designation. SMP at
24 41, Table 4-1. In addition, “Kayak/Hiking and Related Camp Site” is listed in
25 Table 4-2, Dimensional Standards, as permitted 50 feet from the OHWM. SMP at
26 60.
27

28 In sum, the improvements to shoreline parks proposed in the Park District
29 comprehensive plan are not prohibited by the SMP. **The Board finds** PRSM has failed to
30 demonstrate an inconsistency between the SMP and the Park District comprehensive plan.
31
32

1 **Conclusions for Legal Issue VI**

2 Petitioners' allegations of inconsistency between the SMP and the City's
3 comprehensive plans and development regulations are unpersuasive. The burden of proof
4 required to be met by PRSM is to show: (a) by clear and convincing evidence that the
5 provisions as they relate to shorelines of statewide significance are inconsistent with the
6 policy of RCW 90.58.020 and the applicable guidelines; (b) the provisions as they relate to
7 shorelines are clearly erroneous in view of the entire record.
8

9 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
10 establish the consistency challenges are within the Board's scope of review under RCW
11 90.58.190(2)(b) or that the challenged provisions violate RCW 36.70A.480.
12

13 **Legal Issue VII – Enforcement and Penalties**

14 **VII-1. Whether SMP 7.2 conflicts with RCW 90.58.210¹⁶⁹ and RCW 90.58.220 in**
15 **providing for a criminal penalty in circumstances not authorized by the**
16 **SMA. PFR 56, 62.**

17 **Applicable Law**

18 **RCW 90.58.220** provides (in pertinent part):

19 In addition to incurring civil liability under RCW 90.58.210, any person found
20 to have willfully engaged in activities on the shorelines of the state in violation
21 of the provisions of this chapter or any of the master programs, rules, or
22 regulations adopted pursuant thereto shall be guilty of a gross misdemeanor,
23 and shall be punished by a fine of not less than twenty-five nor more than
24 one thousand dollars or by imprisonment in the county jail for not more than
25 ninety days, or by both such fine and imprisonment: PROVIDED, That the
26 fine for the third and all subsequent violations in any five-year period shall be
27 not less than five hundred nor more than ten thousand dollars . . .

28 **Discussion and Analysis**

29 SMP §7.2.6 makes it a misdemeanor for a person to fail to complete a required
30 restoration plan while §7.2.8 states it is a misdemeanor for a person to receive a second
31 SMP violation conviction within a 12-month period. PRSM argues the SMA creates only one
32

¹⁶⁹ PRSM made no arguments regarding RCW 90.58.210 related to Issue VII-1. The allegation of a violation of that statute is deemed abandoned.

1 shoreline related crime, that being a gross misdemeanor, citing RCW 90.58.220. It states
2 the City has no authorization to create new shoreline crimes, either statutorily or by
3 implication. PRSM Brief, at 58.

4 The City argues that nothing in state law precludes it from exercising its police
5 powers to establish criminal penalties for violations of city ordinances. City Brief, at 39.

6 The Board finds no language within RCW 90.58.220 which could be interpreted to
7 preclude the City from imposing additional penalties for SMP violations. Having said that,
8 any further analysis would appear to be controlled by the Supreme Court's decision in *State*
9 *v. Kirwin*, where the court stated: "We presume an ordinance is valid unless the challenger
10 can prove the ordinance is unconstitutional."¹⁷⁰ That presumption is controlling in this
11 situation. The Board has acknowledged on numerous occasions that it has no jurisdiction to
12 consider constitutional challenges.

13
14 **The Board finds** Petitioner is unable to meet its burden of proof regarding an SMP
15 violation of RCW 90.58.220; further, constitutional claims in regards to that issue are beyond
16 the Board's jurisdiction.

17
18
19 **VII-2. Whether the City is not in compliance with RCW 90.58.140 in requiring an**
20 **unlimited surety or bond for mitigation when the Legislature specifically**
21 **amended the statute to remove that option. SMP 4.1.2.7. PFR 57.**

22 **Discussion and Analysis**

23 PRSM contends SMP § 4.1.2.7 violates RCW 90.58.140 by requiring a bond for
24 mitigation. PRSM Brief at 58-59. It states that statute was amended to delete the bond
25 requirement and, consequently, PRSM suggests the City has no authority to impose such a
26 bond. It also contends that WAC 173-26-186(8)(c) provides that restoration may only be
27 required through voluntary, "nonregulatory policies and programs."

28 PRSM's arguments are not well taken. As Ecology observes, Ecology Brief at 28-29,
29 the deleted RCW 90.58.140 language authorized a superior court to allow a permittee who
30

31
32 ¹⁷⁰ *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009), citing *City of Pasco v. Shaw*, 161 Wn.2d 450,
462, 166 P.3d 1157 (2007); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003);
Heinsma v. City of Vancouver, 144 Wn.2d 556, 561, 29 P.3d 709 (2001).

1 had been successful in defending a permit before the Shoreline Hearings Board to post a
2 bond when the SHB decision was appealed to superior court. Specifically, the amendment
3 deleted the following language from RCW 90.58.140(5)(b): "as the court deems appropriate.
4 The court may require the permittee to post bonds, in the name of the local government that
5 issued the permit, sufficient to remove the substantial development work to restore the
6 environment if the permit is ultimately disapproved by the courts, or to alter the substantial
7 development if the alteration is ultimately ordered by the courts."¹⁷¹
8

9 PRSM's "restoration" bond allegation is similarly inapt. PRSM conflates mitigation
10 with restoration. The SMP's bond requirement included in § 4.1.2.7 is a "mitigation" bond,
11 not one for "restoration." An SMP must ensure there is no net loss of ecological function
12 resulting from shoreline development. When development is allowed which would result in
13 negative impacts on ecological function, mitigation is required. The bond is imposed so that
14 the mitigation project actually results in no net loss and, on successful completion, it is
15 refunded. SMP, p. 74, § 4.1.2.7.2. Restoration, as opposed to mitigation, under the City's
16 SMP remains a voluntary program. See SMP, p. 20, § 1.4.
17

18 **The Board finds** PRSM has failed to meet its burden of proof regarding a violation of
19 RCW 90.58.140.
20

21 **Conclusions for Legal Issue VII**

22 Petitioners' allegations of violations of RCW 90.58.220 and RCW 90.58.140 are
23 unpersuasive. The burden of proof required to be met by PRSM is to show (a) by clear and
24 convincing evidence that the provisions as they relate to shorelines of statewide significance
25 are inconsistent with the policy of RCW 90.58.020 and the applicable guidelines; or (b) the
26 provisions as they relate to shorelines are clearly erroneous in view of the entire record.
27

28 **The Board finds and concludes** PRSM has failed to meet either burden of proof to
29 establish that the challenged provisions of the SMP violate RCW 90.58.220 or RCW
30 90.58.140.
31
32

¹⁷¹ Engrossed Substitute House Bill 1724, Chapter 347, Laws of 1995, Sec. 309(5)(b).

CONCLUSION

1
2 In Legal Issue I, PRSM asserts the City's procedures in adopting its SMP violated the
3 SMA, the guidelines, and its own public participation plan in numerous respects, including
4 improper notice, inadequate opportunity for and response to citizen comments, and failure
5 to assemble and utilize appropriate information. **The Board finds and concludes** PRSM
6 has failed to meet its burden of proof to establish violations of RCW 90.58.130, RCW
7 90.58.100(1), or violations of WAC 173-26-090, 173-26-100, 173-26-201(2)(a) and (3)(b)(i)
8 in regards to the City's process of developing and adopting the SMP.
9

10 In Legal Issue II, PRSM finds fault with the City's application of general provisions of
11 the SMA and guidelines. **The Board finds and concludes** PRSM failed to demonstrate
12 violations of RCW 90.58.020, 90.58.080, 90.58.090(4), 90.58.100(2), RCW 36.70A.170 and
13 .050, or violations of WAC 173-26-110, 173-26-191, or 173-26-221(2) in regards to inclusion
14 of required elements, treatment of shorelines of statewide significance, restrictions of
15 development in critical areas, or in application of its shoreline designation process.
16

17 In Legal Issue III, PRSM and Intervenor argue that numerous SMP provisions negate
18 the priority for single family residences and appurtenances granted in RCW 90.58.020 and
19 the SSDP exemption in RCW 90.58.030(3)(e). **The Board finds and concludes** PRSM and
20 Intervenor failed to establish violations of RCW 90.58.020, 90.58.030(3)(e), 90.58.140, or
21 violations of WAC 173-26-110, 173-26-191, or 173-26-221(5) in regards to the preferred
22 status of single-family residential uses, the non-retroactivity of SMP provisions, the
23 exemption from the shoreline substantial development permit for shoreline homes and
24 appurtenances, and the vegetation management standards applicable to existing homes.
25

26 In Legal Issue IV, PRSM and Intervenor object to SMP regulatory requirements for
27 shoreline developments and modifications that are exempt from the requirement for a
28 shoreline substantial development permit under RCW 90.56.030(3). **The Board finds and**
29 **concludes** PRSM and Intervenor failed to demonstrate violations of RCW 90.58.020,
30 90.58.030(3), 90.58.270, or violations of WAC 173-26-231(3)(a) and (b), 173-26-
31 201(2)(d)(v) regarding regulation of shoreline development, the SSDP exemptions for
32

1 docks, piers, mooring buoys, and shoreline stabilization, or provision for existing floating
2 homes.

3 Under Legal Issue V, PRSM contends the SMP is too complicated, internally
4 contradictory and lacking in essential detail to ensure implementation of the SMA policies
5 and the guidelines. The Board concurs with PRSM that several SMP provisions are poorly
6 written. However, **the Board finds and concludes** PRSM has not met its burden to
7 establish the SMP fails to attain the level of clarity required or results in an excessive
8 delegation of discretion to regulators, in violation of RCW 90.58.900 or WAC 173-26-
9 191(2)(a)(ii).

10
11 Under Legal Issue VI, PRSM asserts provisions of the SMP are inconsistent with the
12 City's comprehensive plan and development regulations. **The Board finds and concludes**
13 PRSM failed to establish the consistency challenges are within the Board's scope of review
14 under RCW 90.58.190(2)(b) or that the challenged provisions violate RCW 36.70A.480.

15
16 Under Legal Issue VII, PRSM challenges the SMP provisions for enforcement and
17 penalties. **The Board finds and concludes** PRSM has not carried its burden to establish
18 that the challenged provisions violate RCW 90.58.220 or RCW 90.58.140.

19 The legal issues raised by Petitioners are **dismissed**.

20 21 ORDER

22 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
23 parties, the Shoreline Management Act and applicable guidelines, the Growth Management
24 Act, prior Board orders and case law, having considered the arguments of the parties, and
25 having deliberated on the matter:
26

- 27 • **The Board concludes** Petitioners and Intervenor failed to provide clear and
28 convincing evidence demonstrating the challenged action, as it pertains to
29 Shorelines of Statewide Significance, was inconsistent with the policy of RCW
30 90.58.020 and the applicable guidelines in WAC 173-26.
- 31 • **The Board also concludes** Petitioners and Intervenor were unable to
32 demonstrate the challenged action, as it pertains to shorelines, failed to comply

1 with the policy of RCW 90.58.020 and the applicable guidelines, or the internal
2 consistency provisions of RCW 36.70A.070.

- 3 • The appeal is **denied** and Case No. 14-3-0012 is **dismissed**.
4

5 Entered this 6th day of April, 2015.
6

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8 
Margaret A. Pageler, Board Member

9
10 
Cheryl Pflug, Board Member

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12 
13
14 William Roehl, Board Member
15

16
17 **Note: This is a final decision and order of the Growth Management Hearings Board**
18 **issued pursuant to RCW 36.70A.300.¹⁷²**

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32 ¹⁷² A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

APPENDIX A – BAINBRIDGE ISLAND SMP SHORELINE BUFFERS

Table 4-3 Shoreline Buffer Standards Table- SMP p. 66

SHORELINE USE	UPLAND DESIGNATION					
	Natural	Island Conservancy	Shoreline Residential Conservancy	Shoreline Residential	Urban	
<p>The shoreline buffer consists of two management areas Zone 1 and Zone 2. Zone 1 is located closest to the water; it is a minimum of 30 feet in all designations, except in Natural and Island Conservancy the minimum is 50' and expands to include existing native vegetation. Zone 2 is the remaining area of the shoreline buffer.</p> <p>Category A: Low bank lots with 65% Canopy Area in Zone 1, OR spit/barrier/backshore, marsh lagoon, or rocky shores. Category B: Low bank with less than 65% Canopy Area in Zone 1, or lots with a depth < 200' or High Bluff. Geomorphic Class (i.e. low bank, High Bluff) shall be determined by Battelle 2004 Nearshore Characterization and Inventory.</p>						
Developed lots						
Category A	200'	150'	115'	75'	30'	
Category B	200'	100'[1]	75'[1]	50'[1]	30[1]	
Undeveloped lots						
	200'	150'	150'	75/150[2]	30'	
<p>1. For High bluff properties the greater distance of 50' from the top of the bluff or the standard shoreline buffer. 2. If adjacent to the Priority Aquatic designation then 150' is required.</p>						
Previous SMP Shoreline Buffers for Residential Uses – “Native Vegetation Zones” - Ex. 912, at A-1						
1996 SMP UPLAND DESIGNATION						
1996 SMP NATIVE VEGETATION ZONE for residential uses	Natural	N/A	Conservancy 100'	Rural 50'	Semi-Rural 50'	Urban 25'

