

**TO: Planning Commission, City of Bellevue**

**Oct. 26, 2011**

**FROM: Martin Nizlek, Bd. Member on Behalf of WSSA**

**RE: Setbacks, Vegetation, and Related Shoreline Issues**

The purpose of this memorandum is to provide input to your deliberations on the above topics. WSSA has previously provided information and recommendations. These are referenced for you and additional topics are discussed.

## **I. Summary of WSSA Findings and Conclusions**

At the City Hearing on May 25th of this year, WSSA provided a resource CD of relevant information. Among these resources are the presentations and reference materials submitted to the Commission during your deliberation process. In summary, WSSA's findings include:

1. Nearly all City shorelines have been fully developed under a 25 foot setback which has been in existence since adoption of the 1973 SMP.
2. Residents have made major investments to create and maintain these properties and they should be assured continued use, including maintenance, replacement, and expansion that results in no net loss of ecologic functions.
3. Insufficient justification for increasing the 25 ft. setback has been provided in a clearly defined, scientifically supported fashion.
4. 40% or more of shoreline properties would be negatively impacted by increasing the existing setback by another 25 ft.
5. In the WAC Guidelines setbacks and vegetation areas are listed as "measures that may be implemented". Their size and composition are not legislated.
6. The WAC also contains provisions discouraging the creation of isolated wildlife habitat. The rash of recent attacks and sightings of dangerous and nuisance animals supports this restraint. The City should not increase private property owners or itself to increased liability by further encouragement.
7. Lakeshore owners have preserved natural features such as trees and undeveloped areas in an exemplary fashion when compared to other City neighborhoods. Under current tree retention standards, we will continue to preserve a far greater number of trees than almost all Bellevue neighborhoods. Additional measures requiring more trees are not justified.

8. Vegetation and related requirements, as proposed, would cause liability (trees vulnerable to toppling), loss of value (reduced views), or loss of privacy (fencing limitations or access requirements). Likewise regulations should not, without unequivocal justification, alter neighborhood character.
9. Under the proposed code, 60% of the shore front would be vegetated. Recent staff presentations indicate use of the remainder of the shorefront would also be regulated. As discussed below, reasonable use of the shoreline should not be denied single family uses.
10. Existing codes currently manage **maximum lot coverage** and **percent impervious surface** and **disposition of rain water**. These existing regulations are sufficient and no additional restrictions should be placed on shoreline residents.

## II. WSSA Recommendations

WSSA previously provided the Commission copies of WSSA's "Sensible Shoreline Plan". The Commissioners should review pages 11-17 of that document which are pertinent to the discussion tonight (Oct. 26<sup>th</sup>).

WSSA also provided Draft SMP Comments from attorney Charlie Klinge. Please refer to pages 37 to 62 (Comments 134 to 243) related to Residential Structure Setback, Landscape Development, and Vegetation Conservation.

WSSA is supporting, and asking the Commission to support, the following:

### 1. STANDARD BUILDING SETBACK FROM OHWM – 25 Feet.

The 25 ft. building setback should apply to buildings only, and not to other structures such as built-in BBQs, constructed fireplaces, stairs, patios, etc. The building setback should apply to all new construction meaning tear downs, additions, or new homes on vacant lots, except as follows:

- a. As an alternative to the standard minimum 25-foot building setback from OHWM, the building setback shall be at a line parallel to OHWM at the face of an existing single-family residence. [**Note:** The purpose of this provision is to allow existing single family residences that are closer than 25 feet from OHWM to be remodeled, completely replaced (tear down), or expanded behind the existing established setback line. This provision serves the same purpose as the footprint exception, but the footprint exception is too restrictive in prohibiting tear downs and is too awkward in limiting expansion to existing dimensions.]

## 2. EXISTING RESIDENCES AND APPURTENANT STRUCTURES.

Single-family residences and appurtenant structures that are used for a conforming use, but that do not meet the standards of this SMP for setbacks and all other regulations shall be considered conforming structures. [Note: The purpose of this provision is to recognize Substitute Senate Bill 5451—that existing structures are conforming despite changes in the regulations. However, WSSA will be proposing new language for regulating Existing Development that will serve a similar purpose to the Draft SMP provisions on Nonconforming Uses and Structures.]

## 3. VEGETATION CONSERVATION AREA PROVISIONS NEED TO BE ELIMINATED.

The Vegetation Conservation Area (VCA) provisions as proposed at 20.25E.065 (and all other provisions and references to them) need to be eliminated. As explained above, the combined requirements of the existing restrictions applicable to lot coverage by structures (35%), impervious surfaces (50%), and tree retention (30% of diameter inches of significant trees) already provide substantial and sufficient protection in the shoreline area. Therefore, additional VCA requirements are unnecessary, duplicative, and onerous.

### **III. Important Related Issues and Recommendations**

Since development of the Sensible Plan recommendations, a series of issues and information have arisen that relate to your deliberations on this topic. These include the following; each being discussed below:

- OHWM and FEMA Floodplain Considerations
- Administration of Shoreline Use
- Rational Treatment of Neighborhoods

Ordinary High Water Level & Flooding – Members of WSSA’s board have met with City, County, State, and federal officials to clarify and understand the relation of these agency activities and requirements. Details of this meeting, and WSSA’s conclusions, are summarized in Appendix A.

Pertinent to tonight’s discussion, WSSA makes the following findings and recommendations to the Commission:

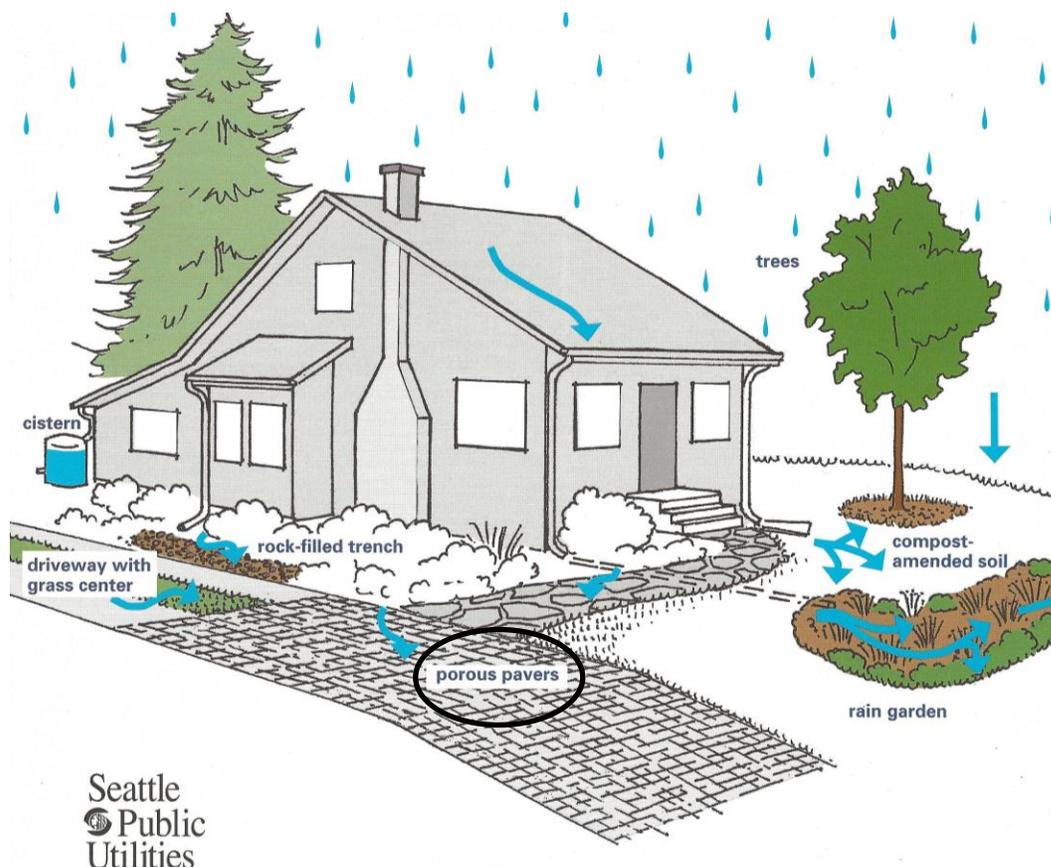
1. The OHWM on both Lake Sammamish and Phantom Lake have been altered by poor outflow management. These are beyond the responsibility and control of residents and there are no assurances of their correction. Requiring that setbacks be measured from

these artificial levels will constitute taking of private property. On Lake Sammamish, the 27 ft. (NGVD) level, and on Phantom the 261 ft. level, should be used for all permitting except determination of bulkhead locations.

2. Relative to the mandate that FEMA enforce the Biologic Opinion (BiOp) ruling, there are 3 alternatives which the City can pursue for approval. Currently the City has filed under an option that would require each applicant to prepare separate, costly, environmental studies. Upon completion of the SMP, an application can and should be made to FEMA for approval of the SMP as sufficient regulation to meet the FEMA's standard of **No Net Loss from Existing Conditions**. (This is called FEMA's Door #2)

Administration of Shoreline Landscape Features - A very restrictive use of the area along the shoreline has been discussed by staff. Their focus continues to assume all shorelines are critical areas. For example, their interpretation of what constitutes compaction of soil and what constitutes "structure" would restrict normal use. Reasonable activity must be allowed adjacent to shorelines. Boating activity, ranging from canoes and kayaks on beaches to access for boats should be accommodated.

Today more than 20% of properties have **boat ramps**, using Lake Sammamish as an example. These range from metal rails, to paved strips, to permeable blocks. There are limited points at which boats can be transported to and removed from the lake. Ramps should be allowed, especially porous grid designs similar to the depiction in this recent Seattle document, below.



Rational Treatment of Neighborhoods and Residents - The current draft SMP would treat Newport Shores differently than properties located on other City lakes. **Why?** We fail to see the difference between a bulkhead on a canal or one protecting a home, say, in the Rosemont neighborhood. Yet Newport Shores would not have the additional 25 ft. of restraint that non-canal areas would face. This is unjust and illogical. All shorelines should have the same setback, if they are not critical areas.

Second, a transition provision should be included in the updated SMP. In adopting the 2006 CAO, the City declared all shorelines as critical areas. We now know they are not. Consideration should be given those residents who've undertaken development activity under the Critical Areas Ordinance. These property owners should not have to install CAO improvements that would not be required under the SMP. If already installed, and they are willing to remove them at their expense, they should be allowed to do so.

### **Summation and Closure**

There are a number of reasons that the City should not alter the current, 1973 SMP's 25 ft. setback (which was extended to 50 ft. under the 2006 CAO). Alteration would provide restrictions that are not mandated by the State and needlessly create non-conformity issues for many. Preserving ecologic functions from today's baseline, and assuring its maintenance cumulatively, can be achieved by less restrictive means than current proposed. Finally, there most assuredly would be impacts to both property values and the City's revenue base from the proposed SMP. We encourage you to seek independent information on these issues prior to your final decisions.

We appreciate the Commissions consideration and inclusion of these recommendations. Should clarification be needed, WSSA representatives will be present at your meeting.

Thank you on behalf of WSSA,



Marty Nizlek

## APPENDIX A

### WSSA Summary of Sept. 30, 2011 Meeting with “Water” Agencies

On Sept. 30<sup>th</sup> members of WSSA met with City, County, State, and federal (FEMA & Corps) officials regarding: (A) floodplain designations on several City lakes, and (B) the recent requirements that FEMA enforce habitat regulations along shorelines subject to flooding. Following is a topical summary of the meeting information and WSSA’s perspective of its relevance to the current SMP process.

#### *Issue - Floodplain for Lake Sammamish –*

FEMA currently uses a base flood elevation (BFE) of 33 feet NGVD (i.e., 36.56’ or 36.6’ NAVD). FEMA is in its preliminary review stage of a re-mapping effort and is using a King County Flood Study for the Sammamish River that ends at Lake Sammamish. The Study indicates that the 100 year floodplain at the Lake might be a bit lower at 36.3 ft. NAVD, but if finalized, it won’t be official for years due to the fight over the levee policy. Also, this re-mapping will likely make changes within Marymoor Park. No further analysis is anticipated for Lake Sammamish. If FEMA did so, the result might be higher in some areas due to fetch wave action.

**Conclusion:** There will be a floodplain line/elevation for Lake Sammamish.

**Reasons:** FEMA has a recent study that FEMA, its consultant, and King County believe is valid. They are aware that the Lake has not, historically, been at such a level, but they must go by the technical studies and the level is expected to be very high (3+ ft. above OHWM) since it is a 100 year flood. Observed water levels in storms lesser than a 100 year event and flow restrictions (such as obstructions and alterations in the transition zone) are not seen as pertinent. An expensive but probably low priority analysis could be requested, but, as noted above, it might determine an even higher flood level.

#### *Issue – Flooding on Lake Sammamish and OHWM-*

King County staff has been performing analyses of flow through the weir and transition zone along the Sammamish River, the outflow for the lake. This computer modeling effort has attempted to assess, among other issues, the potential benefit to the lake’s water level if the debris and obstructions in the transition zone are removed. Staff reported this may result in a 6 inch reduction in water levels. (It’s assumed that this drop would be associated with a storm somewhat less than a 100 year event.) Also, but not discussed at this meeting, the recent County maintenance efforts below the weir have revealed new obstructions. In addition, field observation by WSSA shows both upstream and downstream impediments to flow.

**Conclusion:** Continued impact to shorelines and the OHWM can be expected if the County does not, or is prevented from, removing these river blockages. WSSA will continue to report these issues to County staff and elected officials and strive for return to “full-flow” conditions. Until the water level, under ordinary conditions, is returned to the OHWM of the Corps’ design for the weir (27 ft. NGVD), SMP regulations should not be enforced at higher levels induced by flow obstructions.

#### *Issue – BiOp Compliance -*

FEMA is enforcing a court ruling which affords municipalities 3 options for compliance with the underlying Biological Opinion, or BiOp. The 3 “doors” of choice include –

Door 1: Model Ordinance - provides a set of regulations already approved by FEMA as acceptable.

Door 2: Local Ordinance – allows custom compliance by the local jurisdiction’s regulations.

Door 3: Site by Site Compliance – where applicant studies would need to ensure no harm to habitat.

The City did not submit its regulations by Sept. 22, so the City is in Door 3 - site by site compliance.

**Conclusion:** This status will require a habitat assessment/no net loss report by an applicant in the floodplain. The City needs to consider the use of its SMP under the Door 2 option when the SMP is adopted. Property owners would likely need such a report under the City’s current rules, so this is not a new burden

**Reasons:** The SMP is a better long term solution because a property owner simply complies with the SMP and that is automatic compliance with FEMA.

Note: BiOp compliance may require some provisions about vegetation and reduced hard surfaces.

### ***Issue - Floodplain for Phantom Lake and BiOp -***

FEMA will also be formally re-mapping Phantom Lake, but are not conducting new studies. FEMA is not strongly interested in Phantom Lake under the BiOp ruling compliance mandate (see below) because Phantom Lake has no ESA salmon; though there is moderate concern with water quality.

**Conclusion:** There will be a floodplain line for Phantom Lake, but it could be altered with a LOMA, Letter of Map Amendment. WSSA/Phantom Lake Home Owners could encourage the City to do a new study, and make changes designed to lower the elevation in the Eastgate planning process by diverting water to Lake Washington. FEMA BiOp compliance would not be an issue with respect to habitat.

### ***Issue – Work Below OHWM -***

FEMA is not focused on work below the OHWM because the Corps has regulatory jurisdiction.

**Conclusion:** No special consideration is needed in the SMP.

### ***Issue – BiOp, SMP and Setbacks -***

The floodplain line will be more landward than the setback line on some properties. It depends on the final total setback selected by the City. The SMP will clearly be regulating activities in the floodplain—the SMP regulates to 200 feet from OHWM. As described below, the City will have the option, under the FEMA BiOp rules, to select one of three regulatory options. The SMP can serve as the BiOp compliance mechanism so the SMP should address the FEMA “Checklist” for BiOp compliance. Important here is that compliance means that the SMP addresses to FEMA’s satisfaction the protection of existing conditions and existing salmon habitat.

**Conclusion:** The SMP will need to flag or add a special note on the Lake Sammamish/Phantom Lake setbacks — the setback from OHWM. The note should indicate - “A greater setback may be required to comply with floodplain regulations currently established at 33 feet NGVD (36.6 ft. NAVD). Also, the SMP will need to address the BiOp issues to meet the FEMA requirements.