

## **WSSA Position Paper - Bellevue Shoreline Management Program Delivered to the City Planning Commission July 14, 2010**

WSSA, the Washington Sensible Shoreline Association, provides this document to the City of Bellevue Planning Commission to supplement material that has been submitted throughout the SMP update process. Our March 24th forum, attended by most of the Commission and many shoreline residents, delved into many of our concerns<sup>1</sup>. In subsequent conversations with Commission members, requests for more specific input were made. The recent release of draft SMP policies and code also prompt this submission.

Following discussion of what we see as the primary goals for the SMP, our position on major elements is provided. A specific critique of the staff draft document will be provided soon, as well.

To begin, we find it necessary to comment, once again, on the City's process. In May staff released a broad and overly restrictive draft set of policies and regulations. Subsequently, and without discussion of the draft material, a very specific set of "options" were presented as representative of acceptable treatments of private property shorelines. They are not. Without delving into the specifics of the guiding policies and supporting science, it was not appropriate to move to this level of specifics. We urge that your Commission consider the principles needed to guide the process. WSSA supplies the following discussion to further such an approach.

### **Basic SMP Goals**

WSSA has established the following basic goals with respect to the City of Bellevue SMP.

#### **The SMP should:**

- result in a program that is clear, concise, effective, consistent, and equitable,
- be compliant with the SMA and WAC Shoreline Guidelines,
- recognize that shorelines are not critical areas, but some shorelines can contain critical areas,
- protect existing development and private property rights,
- be founded on lake specific, peer-reviewed science,
- recognize that Bellevue's lake shorelines are essentially fully developed,
- accept that Bellevue's shoreline acreage is only a small proportion of the watershed and thus contributes but a small proportion of the impacts to our lakes,

---

<sup>1</sup> WSSA has prepared video DVD's of the March meeting and will supply these to those commissioners not present at the meeting or any other commissioners requesting a copy.

- address non-shoreline , upland impacts to our lakes, insisting that these impacts not be treated in an isolated or token fashion,
- not disproportionately penalize a minority of residents, but rather offer incentives and education, and
- assure that the City is held to the same standards and requirements as residents.

## **Specific Issue Positions**

### ***Protection of Existing Properties -***

A tremendous investment has been made by lakeshore property owners. These investments must be protected by allowing homeowners to maintain their properties. The City SMP needs to allow the normal maintenance and repair exemption set forth in State regulations. The current City Code limits the maintenance and repair exemption for nonconforming development, shoreline stabilization, and moorage. These limitations are not justified.

State regulations recognize that replacement may be a common method of maintenance and repair, and City Code needs to be strengthened to protect the ability of property owners to maintain and repair structures under broad circumstances without imposing obstacles that curtail this right.

The principle of protecting existing property extends to docks, piers, bulkheads, appurtenant structures, and other property features, even where a site has only been partially developed. This protection also applies on a larger scale, for example, to elements unique to the City's character. Non-residential properties, such as Vasa Park, Bellefield Office Park, and Meydenbauer Bay are part of that character and should be retained and protected. Consistent with this recommendation, we will include Vasa Park in our comments on the draft SMP, and we understand MBNA (Meydenbauer Bay Neighbors Association) will be submitting separate comments for the designations affecting the Meydenbauer Bay Park.

### ***Expansion of Existing Single Family Residences -***

Single family residences are exempt under the SMA and expansion of such residences is also exempt, which means no additional permitting requirements should be required beyond normal building permits. Like maintenance and repair, the City's Code currently contains severe limitations on even minor expansions of existing residences anywhere within 50 feet of OHWM, even though a substantial number of homes are legally built within that area and owners have a reasonable expectation of normal expansion options. The current draft SMP contains no basis to conclude that such

expansions will harm shoreline ecological functions, so there is no basis to restrict construction.

### **"No" on Non-Conformity -**

Protection of existing properties and private property rights are threatened if the SMP contains language that labels existing structures as non-conforming. Any code provisions creating "Nonconforming Development" must be avoided. The goal must be to make it clear that existing buildings, property features, and developments, such as Vasa Park are not to be declared to be nonconforming. The City has authorized building these structures for decades, and so to simply declare those same structures and uses illegal and subject to removal or to harsh rules for maintenance, remodel, or expansion would be both capricious and arbitrary.

### **Balance Consistency and Recognition of Local Need -**

A general goal for the SMP should be clear, consistent regulations. This can most effectively be achieved by treating as many shoreline properties similarly within the code as possible. Shoreline designations facilitate this. We encourage that each designation contain all applicable policies and code. This will eliminate confusion and misinterpretation.

While the general goal must be balanced throughout the code against the unique needs of each lake, it is important to not sacrifice, for specific circumstances, the overall need for consistency. We point out opportunities to achieve this balance below.

### **No Net Loss of Ecological Functions (NNL), Shoreline Restoration, and Shoreline Maintenance -**

While the State Guidelines call for "No Net Loss of Ecological Functions", these functions are primarily in the domain of streams and wetlands, not fully developed urban shorelines. As important, WSSA has demonstrated, through professional scientific testimony, that near-shore function has been confused with stream function. WSSA has also provided information showing that docks, vegetation, and bulkheads neither cause nor solve the issues used to establish the current regulations. Clearly, shorelines are not critical areas simply because they are shorelines.

The City must reform its current regulations to ensure that code requirements and conditions of approval are limited to mitigation of actual harm to protected, identified shoreline ecological functions. The code cannot impose restoration and enhancement requirements under the guise of regulation. And, as pointed out below, those entering the permitting process should be provided a clear understanding of actual requirements versus "incentivized" features versus "encouraged" aspects of the program.

Therefore, coupled with the following rationale, it is WSSA's position that shoreline maintenance (of ecological functions) be the standard applied to actions within the shoreline setback, not restorative actions.

### **Ordinary High Water Mark (OHWM) and Water Level Control -**

The OHWM is a critical datum and must be considered in relation to water level control. Water elevation and consequential flood potential not only affect shoreline development but insurance and property values as well. Traditional methods define the OHWM based on changes in shoreline characteristics and vegetation.

The SMP must recognize the authority of the State in setting OHWM, and not attempt to create a confusing, and ultimately unenforceable 'administrative' OHWM. State law (RCW 90.58.030(2)(b).) defines OHWM based on the vegetation line, or mean high water if no vegetation line exists, as that condition existed on June 1, 1971 "as it may naturally change thereafter." That means artificially caused changes do not affect the OHWM.

Unfortunately, lake water levels are being allowed to fluctuate arbitrarily. Government agencies are failing to control lake water levels<sup>2</sup> (the exception being Lake WA) and the line which characterizes high water is being allowed to artificially shift continually upland. Ultimately, this will result in an unnatural conversion of property to a wetland status. Historic information needs to be used to re-establish the OHWM as required by state law, and City staff or City consultants cannot pick and choose other techniques to suit their needs<sup>3</sup>.

Lake Sammamish and Phantom Lake should be treated similar to Lake WA with respect to water level control. Water levels on these lakes MUST be managed more actively and effectively to assure minimal flood potential as on Lake WA where the locks accomplish this control. The Commission's support in urging this is requested.

Projects such as the County's Willowmoor Reach project<sup>4</sup> in the Sammamish River (which drains Lake Sammamish) must provide a balance between environmental goals while assuring NO NET INCREASE IN OHWM or FLOOD POTENTIAL or UNNATURALLY

---

<sup>2</sup> WSSA has conducted independent studies of Lake Sammamish and Phantom Lake. These efforts have established a clear degradation to the systems that drain these lakes. WSSA requests to present this material for consideration in the SMP update process.

<sup>3</sup> In 2004 the City had a consultant prepare a study of Lake Sammamish's OHWM. Using samples taken along the shoreline at 27 Bellevue properties, the consultant found the average elevation to be 31.32 feet at a 95% confidence level. The City chose to add two standard deviations (or .44 feet) to this average, raising the level to 31.76 feet. The reason presented by the City for this action, in lay terms, was to assure that any future applicant's actual OHWM, if a detailed survey were conducted, would be below 31.76 feet. WSSA disagrees with this action. The average value of 31.32 feet would have been more consistent with values quoted by agencies such as the Corps of Engineers who cite 30.59 feet as the lake's OHWM. By using a higher elevation than necessary, the City would inappropriately force an applicant's requested improvement further upland than is justifiable.

<sup>4</sup> <http://www.kingcounty.gov/environment/waterandland/flooding/willowmoor.aspx>

CREATED WETLANDS. Similarly, neglect by the City to control in-flows and out-flows on Phantom Lake must be corrected before imposing SMP restrictions on residents.

The most serious implication of WSSA's studies of lake water levels is the potential for flooding and loss of property. City staff, who are not professional engineers, and who lack professional engineering expertise, have been requiring permit applicants, as a condition of approval, to remove protective shoreline devices such as bulkheads and upland revetments. Specific instances have been documented where these changes subsequently caused property damage and loss of shoreline when subjected to typical winter storms. This is not acceptable. These situations must be rectified as part of the SMP process.

### ***Docks & Piers -***

Changes are needed to provisions on recreational docks to recognize the exemption for maintenance and repair, and to bring the City regulations into consistency with the practices of the Army Corps of Engineers (Corps) regulatory system. Duplicating permitting processes controlled by state and federal agencies is needlessly burdensome. Embedding other agency regulations in local code, other than by acknowledgement of jurisdiction eventually results in inconsistency when those agencies subsequently alter their regulations.

The federal government and the Washington State Department of Fish and Wildlife (WDFW) both have regulatory power for protecting fish, so the City should take a secondary role following the lead of those agencies, rather than creating a duplicative review system. Approval by the Corps and WDFW should be deemed as a conclusion that environmental impacts are eliminated or mitigated, without the need for additional City requirements.

Establishing the size and configuration of piers and docks should be left to the higher reviewing agencies, tailored to site specific needs and other practical considerations. For example, pier length must be variable to reach navigable water depth. Establishing these standards and the associated process of implementing them should reference the standards of the appropriate governing body, and not be embedded in the local SMP.

### ***Bulkheads Vs Other Armoring -***

Bulkheads, which by definition sit at or below the OHWM, serve multiple purposes, but the most important is protection of existing shoreline development. Existing shoreline stabilization devices should be protected and maintained and not arbitrarily required to be removed.

Upland revetments, such as rockeries above the OHWM, are more aesthetic in nature and must be distinguished from bulkheads. However, if the City (or other agency) fails to control high water levels, upland revetments may be misconstrued as bulkheads.

Referring to them as bulkheads and perhaps requiring their removal is both unwise and unjust.

New or expanded bulkheads should be allowed as long as their design abates alleged negative consequences of vertical faced "walls". Battered/slant-faced designs or use of energy deflecting rip-rap designs should be accepted. Softer shoreline treatments should be listed as options, and perhaps encouraged with education and voluntary incentive programs.

Maintenance of both existing and new shoreline protective "devices" as well as upland revetments is essential.

Changes are required to respect exemptions for maintenance and repair and a separate exemption for normal protective bulkheads protecting single family residences and their appurtenant structures. This requires the removal of the current difference in rules for minor repairs versus major repairs, and allowance of replacement as an option to ensure protection of property.

Code amendments are needed to implement the State regulations on this subject and to eliminate the 'major' versus 'minor' approach. Code amendments should be added to protect replacement by defining that a replacement structure that is comparable to, though not precisely the same as the original structure, shall not be considered an expansion.

### ***Buffers/ Vegetation Management Areas -***

The City's code should eliminate buffers or vegetation conservation areas. The State Act does not mandate them and WSSA has provided scientific information showing traditional lawns and landscaping are more effective.

Lake Washington, Lake Sammamish, and Phantom Lake should have a consistent building setback of 25 feet from the OHWM, except that the building setback should be modified to exclude the footprint of existing legally established buildings. All existing buildings are presumed to be legally established unless the City demonstrates otherwise.

Justification: Lake Washington, Lake Sammamish, and Phantom Lake are nearly completely developed with single family homes. The primary purpose of shoreline buffers/vegetation management areas is to preserve natural shoreline vegetation, but the City's Shoreline Analysis Report and consultant presentations confirmed that the shoreline is highly altered precluding the possibility of the shoreline functioning as a natural shoreline.

The intent expressed for buffers/vegetation management areas is to establish "Vegetation Conservation," but the Shoreline Guidelines specifically recognize that such provisions cannot be fairly applied to existing development: *"Like other master*

*program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures."* WAC 173-26-221(5)(a). As important, the shoreline has been developed based on a 25-foot building setback (with some exceptions), and so the intention should be consistency - continuing the existing development pattern and ensuring that all existing buildings are considered conforming.

Rules need to be established to avoid staff imposing native growth requirements when, for example, a patio or mowed lawn is being converted to an expanded building pad.

Finally, educational and voluntary incentive programs need to be developed to encourage placement of vegetation management areas. In addition, WSSA will provide you separate documentation responding to staff's justification of proposed setbacks.

### ***Effectiveness, Equity, the City as a Partner, and Transfer of Ecological Function -***

We strive, as most taxpayers would, to assure the adopted program has a net benefit and that it is equitable. The science upon which the current regulations were adopted lacked peer review, was often misquoted, or had conclusions completely reversed. Equally serious, there is no methodology established to measure attainment of specific objectives of the SMP. Measurement of NNL is a prime example.

Given the relatively small portion of the watershed that the Bellevue shoreline represents (less than 0.05% for Lake Sammamish, for example), it is imperative that equity exist within the program. A systematic, equitable approach must consider all impacts, not just shoreline property impacts.

As will be found in our response to the staff draft policies and code, we cite the need for a series of taskforce efforts to deal with specific lake and basin issues. Residents know these lakes and shorelines. Staff does not. Early and regular involvement of residents will avoid protracted and costly outcomes.

It is important that the City be a partner with residents in achieving the program's goals and in administering the program. The City cannot, as WSSA has shown, exempt itself from the very same requirements it would impose on its residents<sup>5</sup>.

Finally, WSSA has become aware that the City may be considering a program comparable to "transfer of development rights"; one possibly allowing the barter and exchange of ecological function. No such program should be considered. Such programs are administratively complex, litigation prone, and fraught with abuse and misuse. "Ecological function" has evaded clear, measurable definition particularly in fully developed urban shoreline areas, without which any such program is bound to fail. Ultimately, and most importantly, if an ecological function exists at specific locations, the SMA calls for it to be protected and not traded away to an alternate location. To

---

<sup>5</sup> Examples were provided the Commission based upon public information requests by WSSA showing instances where the City exempted itself inappropriately, declaring, for example, a complete bulkhead replacement as routine maintenance.

pursue such action violates the very heart of this endeavor, that of environmental protection.

### **Legislative Guidance -**

We ask that the Commission share our concern that the SMP must pass the litmus test of assuring protection of property rights. These are fundamental and guaranteed within our Constitution. In closing, we provide several key legislative "citations", including:

- RCW 36.70A.480(5): "Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation."
- WAC 173-26-221(5)(a) - "Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures."
- RCW 90.58.100(6): "Each master program shall contain **standards governing the protection of single family residences and appurtenant structures against damage or loss due to shoreline erosion**. The standards shall govern the issuance of substantial development permits for shoreline protection, including structural methods such as construction of bulkheads, and nonstructural methods of protection. The standards shall provide for methods which achieve effective and timely protection against loss or damage to single family residences and appurtenant structures due to shoreline erosion. The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment."

### **Closing -**

In closing, WSSA, as has your Commission, invested a significant effort to work toward a mutually acceptable, equitable shoreline program. We hope our input helps guide the achievement of such a program.