

# **WSSA PROPOSED PRINCIPLES AND RULES FOR BELLEVUE SHORELINE MASTER PROGRAM**

## **SECOND INSTALLMENT (9/22/2010)**

The Washington Sensible Shorelines Association provides the following as a second installment of proposed principles and rules for the Bellevue Shoreline Master Program. WSSA seeks to synthesize the complicated issues into proposed principles and rules that: (a) are responsive to the concerns of the public and the Association; and, (b) ensures reasonable regulation of shoreline properties while also protecting the shoreline environments of Lake Washington, Lake Sammamish, and Phantom Lake.

The following summarizes the proposed principles and rules provided in the First Installment:

- **Exempt Activities Shall Be Subject to Objective Standards That Achieve No Net Loss in the Aggregate**
- **Existing Bulkheads and Other Shoreline Stabilization Features For Single Family Properties Can Be Repaired or Replaced Without Restrictions Based on Major or Minor Repairs**
- **New or Expanded Bulkheads and Other Shoreline Stabilization Features For Single Family Properties Can Also Be Constructed With Additional Standards**

The following summarizes proposed principles and rules provided in this Second Installment:

- **Agree With Staff Position that Lakes are Not Designated As Critical Areas, While Other Critical Areas Within Shoreline Jurisdiction Should Be Designated**
- **Disagree That Areas Flooded Once Every 100 Years Qualify as “Frequently Flooded Areas” – These Areas Should Not be Designated as Critical Areas**
- **Agree With Staff Position Generally That Existing Landscaping May Be Maintained and In Some Cases Modified, But The Regulations Should Allow Modifications Consistent with Existing Uses**
- **New Vegetation Conservation Requirements Should Not Be Imposed on Existing Developed Properties (Beyond Existing Requirements)**
- **Vegetation Restoration Requirements Should Not Be Imposed on Redevelopment of Existing Developed Properties**

The following provides additional detail describing and defining these proposed principles and rules for this Second Installment. This summary builds on the detailed information previously provided to the City Staff and Planning Commission which will be supplemented as additional topics come before the Commission.

## OVERVIEW

Please note that important issues are not resolved at this time, and must be resolved before WSSA will support any proposed SMP. Two unresolved issues noted last time were: (1) clear and predictable standards for measuring no net loss of shoreline ecological functions; and, (2) a fair ordinary high water mark for Lake Sammamish and Phantom Lake that discounts the unnatural, high water level caused by lack of outfall maintenance. Another unresolved issue, not noted before, requires some explanation.

The Staff Report states that: "The SMP working draft presented to the Commission at the May 12, 2010 study session **continues to be our starting point for policy and regulatory discussion.**" The Working Draft SMP released last spring proposed **242 policies** and then outlined well over 100 subjects for regulations with over 70 subjects indicating that standards would be developed later. As a preliminary matter, a document with 242 policies and over 100 regulations is substantially more complicated than needed and will create serious problems in attempting to create a final approved document that is understandable, internally consistent, and actually what is desired. The complications in trying to implement such a hugely complicated set of policies and regulations may defeat the central purposes of the SMP. The City should take a step back and focus on a couple dozens policies and then narrow the number of regulations down dramatically.

Nevertheless, despite the inherent complexity of 242 policies, WSSA provided substantial input to the Planning Commission and Staff regarding these policies, seeking to clarify and refine them to promote a more workable final product. Staff has yet to respond to WSSA's input and no time has been scheduled for the Planning Commission to discuss the draft policies in the response to the citizen input from WSSA. Yet, now the Staff in its reports to the Planning Commission cite the working draft policies as support for a certain regulatory direction, even though the policies are in draft format only, have never been adopted by the Planning Commission, and with WSSA's concerns unresolved. WSSA will not accept that a certain regulatory direction is preordained by unadopted policies, and it is clear that all these policies and regulations will need to be considered anew after detailed regulations are generated.

In addition, as explained in the WSSA's First Installment, the SMP needs to recognize and respect the distinction between **exempt** activities and those that clearly require one of several types of **permits**. Exempt activities should proceed **without** complex application requirements that only add to the cost and delay in constructing needed improvements that will have no adverse impact on the shoreline environment. For the activities that require shoreline permits under the law, the City should adopt clear standards that make approval predictable, and avoid ad hoc decision making that leads to uncertainty, increases cost, and causes delay.

WSSA will provide more information in the future about another important concept—the difference between regulations and non-regulatory programs. The SMP should include both. The draft SMP appears to be exclusively focused on regulations, without any attention to non-regulatory programs, and the Shoreline Guidelines make it clear that the City should **not** be seeking to impose restoration through regulations, but rather should be using non-regulatory programs to achieve restoration goals.

## DESIGNATION OF CRITICAL AREAS

There has been no dispute that the **updated SMP** would exclusively govern critical areas that are located within the jurisdiction of the Shoreline Management Act (SMA)—the regulated shorelines plus 200 feet of the upland area (called “shorelands” by the SMA).

WSSA’s has met with Staff, reviewed the Staff Report for the September 22<sup>nd</sup> Planning Commission, and sought additional clarification regarding Staff’s position regarding designation of critical areas. Our understanding is that Staff’s position is that the Lakes should **not** be designated as critical areas, but rather that traditional critical areas within 200 feet of the Lakes, including streams, wetlands and steep slopes, should be designated as critical areas. WSSA agrees with this conceptual approach as explained by Staff.

However, Staff has indicated that dry land that is within the 100 year flood area or otherwise mapped by FEMA should be designated as critical area. State law authorizes the designation of “frequently flooded areas” as regulated “critical areas.” WSSA’s position is that it is inappropriate to designate dry land that might flood **once in 100 years** as a critical “frequently flooded area.”

- **Agree With Staff Position that Lakes are Not Designated As Critical Areas, While Other Critical Areas Within Shoreline Jurisdiction Should Be Designated**
  - Staff has confirmed that the lakes themselves, Lake Washington, Lake Sammamish, and Phantom Lake are not recommended to be designated as critical areas.
  - Critical areas within shoreline jurisdiction, meaning within 200 feet of the Ordinary High Water Mark, would be designated as critical areas, namely streams, wetlands, and geological hazard areas.
  - The final regulations will still need to be considered for these areas.
  - These designated critical areas should be mapped in the SMP to provide notice to property owners which will avoid confusion and conflict later.
- **Disagree That Areas Flooded Once Every 100 Years Qualify as “Frequently Flooded Areas” – These Areas Should Not be Designated as Critical Areas**
  - Staff position is that so called flood hazard areas should be designated as critical areas along the shorefront.
  - The current critical area regulations identify “Areas of Special Flood Hazard” as critical areas and designate the following two areas:
    - Land Subject to One-Hundred-Year Flood. “The land in the floodplain subject to the flood having a one percent chance or greater of being equaled or exceeded in any given year.” The code also defines this as the Base Flood Elevation or BFE.

- Areas Identified on the Flood Insurance Rate Map(s). The City refers to the new 2005 FEMA maps, which are still in dispute.
- Designating land that will flood only **once every 100 years** is overbroad and fails to qualify as “**frequently flooded areas**” to be designated as critical areas under the GMA. Otherwise, the GMA restricts critical area designation simply because it is a shoreline.
- The information in the current Staff Report is broad in nature so the exact nature of the impact on private property is unknown until specific regulations are proposed.
- Citations: RCW 36.70A.030(5), .480(5).

## VEGETATION CONSERVATION AND RESTORATION

**Quasi-Agreement with Staff On Existing Landscaping.** WSSA's has met with Staff, reviewed the Staff Report for the September 22<sup>nd</sup> Planning Commission meeting, and sought additional clarification regarding Staff's position regarding vegetation conservation. Staff's position appears to take a different, more flexible approach to existing landscaping than is applied, for example, to wetland buffers. The proposed approach seems to accept that maintenance of existing landscaping for shoreline properties needs to allow modification to landscaping—changing grass to plants, replacement of plants—different than the “no touch without a permit” approach applied to wetland buffers. WSSA supports that concept, but the detailed regulations to ensure acceptable implementation of that concept, and WSSA's position is that a broad array of yard changes should be allowed.

**Uncertain Aspects.** However, other aspects of Staff approach are not so clear and/or create concerns. Generally, the approach appears to be that in the “absence of a development proposal,” the existing landscaping may be maintained including some modifications. But, confusing words are added that make the final intention uncertain. The same Key Concept No. 4 also says that the existing landscaping must be “lawfully established” and maintained to “the condition and appearance” as “they existed prior to the adoption of the code,” and that pruning must be “according to City standards.” WSSA is concerned that these words could result in highly complicated regulations that are completely unworkable and overly restrictive when applied to existing landscaped yards in situations that otherwise do not require permits.

**Concern with Preserving “Native Vegetation” on Existing Developed Sites.** Furthermore, the Staff recommended approach is that maintaining existing landscaping is subject to Key Concepts No. 1 and No 3, that is, limited by the need to preserve existing areas of “native vegetation” (to be defined) and a new tree retention requirement. WSSA is concerned by the concept of creating an entirely new regulated plant micro-ecosystem that apparently is intended to apply to portions (maybe only a few square feet) of existing developed lots. Any such intent is fraught with complications and concerns. Key Concept No. 2 appears to be a moderating rule with the possibility of removing native vegetation up to 60% with mitigation, but very few sites have enough “native vegetation” left to even need to consider removing 60% to get access to the lakes so the benefit is minimal.

**Expansion of Current 25 Foot Buffer to a 50 Foot Vegetation Conservation Area is Unsupported.** The current critical area regulations contain a 25 foot buffer and an additional 25 foot building setback from the buffer, for a total 50 foot setback. Based on the limited feedback by the Commission, Staff is working off the Commission's direction of a 50 foot "setback" with options to reduce the setback. However, it is important to recognize that the Staff approach is now seeking "vegetation conservation" requirements in the **full 50 foot setback area**, where the existing regulations only regulate vegetation in **the first 25 foot area**. Staff could not answer the question as to what ecological benefits are gained from an expansion of the setback, and yet now Staff is expanding the "quasi-buffer" vegetation conservation area to 50 feet. (Note: WSSA was not provided adequate time for consideration and adoption of a position on the setback recommendations and will provide further input at a later time.)

**Vegetation Restoration/Enhancement Should Not be Imposed on Redevelopment of Single-Family Properties.** The basic approach by Staff appears to be to require vegetation restoration or enhancement on any project deemed to be redevelopment of existing single family properties, and redevelopment would appear to include minor additions, patio and deck additions, as well as tear downs. In doing so, the Staff position incorrectly applies the "no net loss" standard, and instead seeks to impose a standard of enhancement ("return to natural conditions") that is unsupported by the SMA, the Shoreline Guidelines, and protection of property rights. For example, the Staff Report explains:

Shorelines that are devoid of native vegetation or covered by structures, concrete, and pavers simply cannot contribute to this crucial interaction between land and water in the same manner less developed shorelines can.

That is correct, but Staff then appears to make the wrong conclusion. Staff's approach is to require the existing properties to restore/enhance the native vegetation **to recreate long lost ecological functions** merely because the properties are constructing a minor or major project. That approach is improper. The existing developed areas, as admitted by Staff, **provide little or no ecological functions**, and therefore **modifications to the existing properties will not result in net loss of shoreline ecological functions**. Recall that the City's Best Available Science Report states:

The riparian shoreline of Lake Washington is highly altered from its historic state. Current and likely future land-use practices preclude the possibility of the shoreline functioning as a natural shoreline to benefit salmonids.

The exact same conclusion is made for Lake Sammamish and a similar conclusion is made for Phantom Lake.<sup>1</sup> The "no net loss" standard looks at impacts caused by projects, and does not look at the mere existence of a project, regardless of impacts, as ground to impose restoration/enhancement. The Shoreline Guidelines expressly agree with this approach. First, the Shoreline Guidelines recognize that the general requirement for "Vegetation Conservation" cannot be fairly applied to existing development: "Like other master program provisions,

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<sup>1</sup> 2005 Best Available Science (BAS) Review, § 7.2.1 pp. 7-5 to 7-7, § 7.2.2 pp. 7-7 to 7-9 (Lake Sammamish) § 7.2.3 pp. 7-9 to 7-10 (Phantom Lake, no anadromous fish); see also Draft Shoreline Analysis Report § 5.1.3, page 79 (same statement for Lakes Washington and Sammamish).

vegetation conservation standards do not apply retroactively to existing uses and structures.” WAC 173-26-221(5)(a). Second, the Shoreline Guidelines require restoration requirements **through non-regulatory programs** (including voluntary programs), and do not require or condone imposition of restoration/enhancement through regulations. WAC 173-26-186(8)(c).

- **Agree With Staff Position Generally That Existing Landscaping May Be Maintained and In Some Cases Modified, But The Regulations Should Allow Modifications Consistent with Existing Uses**
  - No restrictions are needed on modifications to existing landscaping. Property owners should be clearly authorized to modify existing landscaping vegetation without any restrictions.
  - Modification to existing landscaping vegetation will not result in net loss of shoreline ecological functions because different vegetation will not change existing conditions.
  - Pruning restrictions or other efforts to regulate gardening are unnecessary.
- **New Vegetation Conservation Requirements Should Not Be Imposed on Existing Developed Properties (Beyond Existing Requirements)**
  - The Shoreline Guidelines expressly state that: “vegetation conservation standards do not apply retroactively to existing uses and structures.”
  - The existing **single family uses** of the Bellevue lake shorelines have long been established, including homes, patios and walkways, landscaped yards, bulkheads, beaches, and docks.
  - Most existing single family uses in the City are not subject to vegetation conservation or tree retention requirements unless a clearing and grading permit is triggered, namely greater than 1,000 square feet of ground disturbance. The exceptions are those properties within critical areas or buffers.
  - Minor landscaping modifications to existing developed sites (not triggering a clearing and grading permit) will not result in net loss of shoreline ecological functions because no measurable ecological functions are being provided on the existing developed sites.
  - Creating new category of special regulation—conservation of native vegetation—is not required, is unworkable, is too complicated, and is unnecessary.
  - Citation: WAC 173-26-221(5)(a); Development Services Handout L-8: Tree Removal.

- **Vegetation Restoration Requirements Should Not Be Imposed on Redevelopment of Existing Developed Properties**

- Redevelopment, i.e. modifications to existing developed sites, will not result in net loss of shoreline ecological functions because no measurable ecological functions are being provided on the existing developed sites.
- Redevelopment includes minor additions, patio and deck additions, replacement with a new home, and landscape features beyond vegetation modification.
- The Shoreline Guidelines expressly state that: “vegetation conservation standards do not apply retroactively to existing uses and structures.”
- The Shoreline Guidelines do not require or condone imposition of restoration or enhancement requirements through regulations.
- Imposing restoration where the project causes no ecological impact violates property rights because the City cannot demonstrate the vegetation restoration is “reasonably necessary as a direct result of the proposed development.”
- Citations: WAC 173-26-221(5)(a), WAC 173-26-186(8)(c), RCW 82.02.020.

**Ecological Functions.** Finally, the following are a few comments on the science of shoreline ecological functions. The Staff when asked could not define the ecological function benefits of a larger setback. The same is true for these vegetation conservation and restoration requirements. The current approach on vegetation conservation and restoration is focused primarily on creating overhanging vegetation and tree retention/planting. But, the science underlying these requirements was thoroughly debunked at WSSA’s March presentation (see Supplemental Comments from Dr. Gil Pauley provided concurrently).

Migratory salmon in these large lakes do not rely on terrestrial insects as a food source in the same manner as trout in a small mountain lake. Any shading provided by shoreline vegetation or trees will not impact the water temperature of these large lakes—again that is primarily a stream function. Trying to preserve or plant trees is also designed to cause “large woody debris” or LWD, but that is a stream or small lake function, not a large lake function. LWD in these lakes will create bass habitat and hence increased predation on young salmon. Besides, LWD creates a boating hazard and thus cannot be tolerated in any manner without undercutting the recreational enjoyment of these Lakes intended to be protected by the Shoreline Management Act and the City’s Shoreline Master Program.

The current Staff recommendation seeks to impose a 50 foot vegetation management area plus tree retention within the entire 200 foot shoreland area. Yet, the science does not support even a 25 foot vegetation area and the rationale for tree retention is not unique to the shoreline—it is the same throughout the City. In short, no justification for these vegetation conservation and restoration requirements has been shown.