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Hal Ferris
Chair, Bellevue Planning Commission
City of Bellevue
Post Office Box 90012
Bellevue, WA 98009

**RE: Comments on Draft Shoreline Master Program Regulations on behalf of the
Washington Sensible Shorelines Association**

Dear Chair Ferris and Planning Commissioners:

This firm represents the Washington Sensible Shorelines Association (WSSA) and this letter and attachments provide comments on the Draft Bellevue Shoreline Master Program (Draft SMP).

These comments are set forth in the three parts. First, General Comments are provided in this letter addressing overall issues. Second, this letter defines and explains Categories of Concern. Third, Detailed Comments to individual provisions in the Draft SMP regulations are attached and provided in a table format.

The Detailed Comments provide line by line analysis of the Draft SMP regulations, and are intended to be considered side by side with Draft SMP. In addition, each of the comments is grouped into one or more of the Categories of Concern for easier reference. Thus for example, comments indicating that a provision is Vague or Confusing are marked VC in the Categories of Concern column. A comment indicating that a provision interferes with Property Rights is marked PR, etc. We hope that the Categories of Concern will assist the Planning Commission and Staff to sort through the hundreds of Detailed Comments.

That is correct. The Detailed Comments consist of about 400 individually numbered comments. Some comments point to minor changes needed to clarify regulations, but a substantial number of comments explain severe problems in the Draft SMP regulations. WSSA contends that a major overhaul is needed to create a Draft SMP that fairly balances development on the shorelines and protection of property rights, while addressing the actual environmental concerns to promote clean water and healthy salmon populations.

WSSA looks forward to working with the Planning Commission to address these issues and to create a Final SMP that represents a reasonable and responsible approach to shoreline planning and regulation.

GENERAL COMMENTS

Background. WSSA has already completed the Sensible Plan that promotes a better SMP by proposing changes on key issues. These comments, of necessity, focus on the problems in the Draft SMP and build on the last two years of work by WSSA, its members, its consultants, and its legal counsel. Unfortunately, as WSSA has warned for the last year, the staff was creating a Draft SMP that is too big, too complicated, tries to do too much, and would be expensive and complex to implement. The result is even worse than expected because in many respects the Draft SMP goes beyond even the existing harsh and unfair critical area rules. The depth of the problem is reflected in the attached Detailed Comments, which number about 400. While some of the comments require minor or relatively minor clarifications, too many of the comments detail extensive problems that can only be resolved through a major overhaul and re-write of the Draft SMP.

Flawed Science. The City's own studies establish that the City's shorelines were altered long ago and will never function as a natural shoreline:

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.¹

Similar statements are made about Lake Sammamish and Phantom Lake. The Ecology Shoreline Guidelines are clear that vegetation conservation—buffers—are not required at shorelines that have already been altered. The Guidelines state: "Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures."² Consistent with this rule, Ecology approved Redmond's SMP without a buffer or vegetation conservation requirement.

Importantly, as explained by fish expert Dr. Gil Pauley, the City reports improperly applied stream and salt water science to lake shorelines. Thus, the identified ecological functions are flawed. Large woody debris will hurt, not help salmon, so planting or protecting trees on the shoreline (in hopes that they will fall in the water in 50 years) accomplishes nothing. Terrestrial insects are not a major food source for salmon in large lakes so overhanging vegetation provides no benefit. Dr. Pauley supports flow through decking on docks because the purpose of open decking is to reduce salmon predation by bass. **But, bass are a non-native fish to these lakes,** so the regulations are responding to non-native fish predation and not to natural conditions. Under natural conditions with no bass and no bass predation, the docks and shading would create no concern. When asked by the Planning Commission, the staff was unable to articulate an

¹ 2005 Best Available Science (BAS) Review, § 7.2.1, pp. 7-5 to 7-7, § 7.2.2, pp. 7-7 to 7-9 (similar statement for Lake Sammamish) § 7.2.3; *see also* Draft Shoreline Analysis Report § 5.1.3, page 79 (same statement for Lakes Washington and Sammamish).

² WAC 173-26-221(5)(a)

ecological benefit for larger setbacks. Despite these undisputed facts, the Draft SMP regulations seek to retroactively restore the existing developed shoreline into a so-called “natural” shoreline vegetated with plants and large, view-blocking trees.

There are other flaws. The OHWM study was flawed and was not even accepted by the Department of Ecology. As explained in the Detailed Comments, the focus on impervious surface is largely misplaced because roof water is clean and Lakes Washington and Sammamish are receiving waters so shoreline properties are allowed to discharge water to the lakes without detention or restriction. Another problem is creating bulkhead regulations based on the flawed premise that almost all properties have bulkheads below OHW causing harm. Yet, Dallas Evans debunked this broad generalization for Lake Sammamish by personally assessing every property. The City must not impose regulations untethered to any scientific justification because to do so is inconsistent with the Shoreline Guidelines and also interferes with property rights.

The Shoreline Guidelines summarize the utilization of science by stating that local jurisdictions shall, “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.”³ At the same time, the Shoreline Guidelines recognize and respect that other information may be very important in adopting an updated SMP. The same provision of the Guidelines states as follows:

The requirement to use scientific and technical information in these guidelines **does not limit a local jurisdiction’s authority to solicit and incorporate information, experience, and anecdotal evidence provided by interested parties** as part of the master program amendment process. Such information should be solicited through the public participation process described in WAC 173-26-201(3)(b).⁴

This Planning Commission has welcomed citizen input consistent with this Guideline. The Guidelines then clarify the role of the local jurisdiction in sorting through all the information collected, including the “information, experience, and anecdotal evidence provided by interested parties.” Namely, the local jurisdiction is to make a “reasoned, objective evaluation” of the conflicting data:

Where information collected by or provided to local governments conflicts or is inconsistent, **the local government shall base master program provisions on a reasoned, objective evaluation of the relative merits of the conflicting data.**⁵

³ WAC 173-26-201(2)(a)

⁴ WAC 173-26-201(2)(a) (emphasis added)

⁵ WAC 173-26-201(2)(a)

In summary, WSSA has provided “the most current, accurate, and complete scientific or technical information.” WSSA has also provided substantial additional information that can be relied on by the Planning Commission. Finally, to the extent there is a conflict, the Commission has adequate information to support the Sensible Plan and other needed changes.

Existing Development Versus New Development. The regulations have applicability provisions stating that the regulations “apply to all development” or “apply to all residential uses and developments.” However, the regulations are not clear, or not clear enough, that many of the regulations apply only to new construction on vacant lots and not to existing homes or existing sites. Existing homes were not constructed in compliance with the newly proposed, highly detailed design and site planning regulations. This creates two highly problematic concerns. First, if not clarified, this approach would cause essentially all existing homes to become nonconforming for reasons that are both minor and potentially impossible to correct. And, this would occur despite other rules that seek to avoid nonconformities, such as setback requirements that keep existing homes conforming by “carving out” the home footprint (i.e., the footprint exception).

For example, the Draft SMP contains proposed regulations stating that residential uses “shall comply” with new rules for site planning, parking, driveways, and for a myriad of other requirements. Whether an existing home complies with the proposed rule that “parking and driveways shall be the minimum necessary” is on the one hand totally vague, but as applied to existing development, impossible to determine. The second problem is that even if clarified to apply only to new construction at existing sites, the proposed rules are still highly problematic because it is typically impossible, or at least prohibitively expensive, to change the basic site planning aspects of existing sites.

Shoreline Regulations Versus Other City Regulations. The State SMA intends the regulations in the Shoreline Master Program to act as a set of zoning regulations that address planning issues related to development. The State SMA was never intended to regulate construction level issues such as erosion control, building permit details, and other construction issues. The Draft SMP creates confusion in some places by not clarifying that these other City construction codes are not intended to be part of the SMP. Any provision that is **part of the SMP** is then part of any shoreline permit which is then subject to review by the State Department of Ecology and potential appeals to the State Shorelines Hearings Board. This improper approach transforms planning level shoreline permits into highly detailed construction permits. The proper approach is to clearly state that compliance with other City regulations is required, but that those regulations are **outside of the SMP**. The City should, however, take credit for the benefits of these construction level requirements by listing compliance with these non-shoreline regulations as an SMP policy.

Incorporation of Outside Materials. Numerous provisions directly or indirectly incorporate rules, guidelines, or other reference material that exist outside of the SMP. Some of these references are to other City codes (previously adopted by ordinance), but many other references are to City standards or guidelines (not adopted by ordinance) and even to non-City materials.

See list attached as Appendix 1. Then, many of these provisions add the phrase “now or hereafter amended.” This approach is flawed for numerous reasons. The City is not complying with the specific requirements in State law for including other documents by reference, namely the other documents must be consistent with the Shoreline Guidelines and comply with the following:

Shoreline master programs may include other policies and regulations by referencing a specific, dated edition. When including referenced regulations within a master program, local governments shall ensure that the public has an opportunity to participate in the formulation of the regulations or in their incorporation into the master program, as called for in WAC 173-26-201 (3)(b)(i). In the approval process the department will review the referenced development regulation sections as part of the master program. A copy of the referenced regulations shall be submitted to the department with the proposed master program or amendment. If the development regulation is amended, the edition referenced within the master program will still be the operative regulation in the master program. Changing the referenced regulations in the master program to the new edition will require a master program amendment.⁶

The Draft SMP does not cite a specific dated edition. The other documents are not available as part of the SMP Update process, which interferes with public participation. Incorporating future amendments, “or hereafter amended,” is not allowed because that would require SMP amendments approved by Ecology. The Growth Management Hearings Board has ruled that the City must determine that incorporated materials comply with the Shoreline Guidelines. Another problem is that some of these incorporated materials have never been previously reviewed by the Planning Commission or City Council, and so careful review is necessary. Finally, some of the incorporated materials are in the form of “guidelines” and not rules so trying to apply them as SMP regulations is flawed. As just noted, some references to other City regulations and possibly engineering standards can be corrected by making it clear that those regulations are **outside of the SMP**. However, many other guidelines and materials cannot be corrected in that manner. As explained in the detailed comments, many of these incorporated guidelines and materials simply add confusion and complication, and should be eliminated.

SEPA Comments. These comments and all other comments by WSSA also constitute comments to the undated SEPA determination, specifically the Determination of Non-Significance. The SEPA DNS references the Draft and Final Critical Areas EIS, but those documents incorporate the flawed science complained about herein, and overstate the impacts on shoreline functions. The SEPA Determination is flawed by failing to make any connection between the Critical Areas EIS and the Shoreline Master Program. At a minimum, some

⁶ WAC 173-26-191(2)(b)

analysis would be needed to conclude that the environmental impacts related to the SMP are fully addressed in the Critical Areas EIS, but no analysis is provided. No additional comments will be made at this time, due to this inherent flaw.

Comments for the Record. Under separate cover, WSSA is resubmitting a disk of dozens of documents previously submitted to the Planning Commission or City Council along with an index to ensure that all such documents are considered part of the City's official record of materials in the SMP Update process.⁷ WSSA hereby incorporates by reference every document submitted, and all verbal comments delivered, at any Planning Commission or City Council meeting related to the SMP Update process, including but not limited to, all such written and oral comments made at any meeting with Shoreline Master Program Update or similar reference on the Agenda. WSSA also hereby incorporates by reference letters from the undersigned to the Planning Commission and/or City Council regarding the 2006 code amendments, which complained about the impropriety of that process and the lack of any effort to ensure public involvement by any shoreline property owners.

CATEGORIES OF CONCERN

This section explains Categories of Concern. The Detailed Comments in the attached table are notated by reference to these Categories of Concern as a shorthand way to classify the types of problems. Any comment that has two or more categories of concern listed should merit special attention, but even a single concern needs to be addressed.

Avoid Vague or Confusing Regulations (VC). A key principle of land use regulations is clarity. The regulations should be clear enough for citizens to understand, and should not be written in planner-speak that can only be deciphered by consultants and attorneys, if at all. Vague and confusing regulations increase permitting costs and delays as consultants and City staff attempt to figure out what to do. Confusing also applies to those regulations that are inherently complicated. Vague or confusing rules cause inconsistent implementation as different staff people come to different conclusions about the proper interpretation. Regulations can be so vague as to violate constitutional principles of due process and fairness. Regulations identified as Vague or Confusing will be designated as VC.

Inconsistent With Shoreline Guidelines (I). The City's preparation of the Draft SMP is guided by the Shoreline Guidelines WAC Chapter 173-26, Part III. However, some provisions in the Draft SMP are inconsistent with, or misread, the Shoreline Guidelines in a manner that creates unnecessary and excessive regulations that go beyond what is required or are otherwise problematic. Some provision are inconsistent with the Shoreline Management Act. Regulations that are inconsistent with the Act or Shoreline Guidelines are marked as I.

⁷ To the extent any document on the disk was not previously, WSSA intends that it also be made a part of the record. And, to the extent a document was previously submitted, but is not on the disk, WSSA intends that those other documents also be part of the record.

Respect Exempt Activities (Ex). State law recognizes the following as **exempt activities**: maintenance and repair, construction and renovation of owner occupied single family homes and appurtenances, bulkheads for single family properties, and new or expanded dock expansions costing no more than \$10,000. State law recognizes that these activities will not cause adverse impacts on the shoreline and should go forward without additional permitting hurdles. **Exempt activities** should be exempt from the expensive and time consuming shoreline permit requirements, although these activities must still obtain building permits and comply with standard construction requirements such as erosion control. The Draft SMP does not respect the distinction between **exempt activities** and those that clearly require one of several types of **shoreline 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 measurable adverse impact on the shoreline environment. Regulations that interfere with Exempt Activities are marked as **Ex**.

Avoid Expensive Permitting Requirements (\$). Another problem with land use regulations occurs when new studies are required that add to the expense and delay in obtaining permits. Special studies that require biologists or engineers cost thousands of dollars each. Then, the City fees to review special studies quickly increase into the thousands because the City charges substantial hourly rates to review applications. A home addition, bulkhead replacement, or dock renovation should not require dozens of hours of City staff time and costs to homeowners of potentially \$10,000 or more in consultant and City fees. For example, requiring expensive studies for **exempt activities** improperly imposes permitting burdens that State law has precluded. In addition, the Shoreline Guidelines specifically declare that **exempt activities** need not demonstrate any net loss of ecological resources on a project basis, which is the only purpose of special studies. Regulations that add arbitrary and unnecessary expense are marked as **\$**.

Unnecessary Micromanaging (M). Some provisions are not tethered to any substantial basis and become unnecessary micromanaging of building or site design, or other issues. These provisions may not be confusing, but they are simply overreaching and make design difficult without any substantial benefit for the shoreline. Regulations that constitute unnecessary micromanaging are marked as **M**.

Improper Incorporation of Outside Materials (Inc). Numerous provisions directly or indirectly incorporate rules, guidelines, or other reference material that exist outside of the SMP. Some of these references are to other City codes (adopted by ordinance), but some references are to non-City materials. Then, many of these provisions add the phrase "now or hereafter amended." This approach is flawed for numerous reasons as set forth above. Incorporation of outside materials is designated as **Inc**.

Avoid Interference with Property Rights (PR). Shoreline property owners have vested property rights, based on decades of prior City policies and actions, that their homes could be maintained and renovated based on Bellevue's standards. These clear and long held expectations, combined with the lack of any showing of harm, strongly supports the continued right to use and enjoy these properties without interference. Protection of property rights

requires that regulations must be tied to a specific, identified impact of a development on the public. A generalized or assumed impact is insufficient to support conditions on development. Put another way, there must be a **nexus** between the impact and the mitigating condition and the mitigating condition must be **roughly proportional** to the impact. Without these required connections, mitigation measures become unconstitutional government “extortion” according to the United States Supreme Court.⁸ Additionally, the regulations cannot go so far as to prevent reasonable development of property, which is partly measured in comparison with the development allowed by similarly situated properties. Regulations that interfere with property rights are marked as **PR**.

DETAILED COMMENTS

The attached Detailed Comments (Appendix 2) only review the Draft SMP regulations and not the Policies or the Restoration Plan. WSSA agrees with statements made by Planning Commissioners that the Policies need to be reconsidered after decisions are made on the regulations. WSSA’s position is that the Policies are far too detailed. If the Policies were general and much shorter, then the possibility of conflicts would arise rarely and make the drafting of Policies far easier. The Restoration Plan is important, but will be addressed by others or at a later time. However, one note is needed here. The Restoration Plan recognizes that restoration will “primarily” occur on public property, but also by private owners taking voluntary actions or “through re-development proposals.” (p. 2) This last reference could indicate an intention to make restoration mandatory, but that is inconsistent with the Shoreline Guidelines and property rights because only mitigation can be required, not restoration.

The attached Detailed Comments are in a Table with four columns. The first column provides numbering for the individual comments. The second column provides a Reference to the Code provision section number and/or page number within the Draft SMP. The page numbers are based on the separate page numbering for various sections. The third column provides the comments, but these are best understood when read side by side with the Draft SMP, otherwise the comments read alone will be a bit cryptic. The fourth column provides the notation to Categories of Concern described above and a legend is provided for the abbreviations.

Please note that the attached comments are made to the March version of the Draft SMP and the reference column uses the March version page numbers. The Staff has released a new version for the Public Hearing called May 2011 Draft SMP. Staff explained that corrections and clarifications were made to the March version to create the May Public Hearing version, but it is unfair and unrealistic to expect the public to comment on the new version after starting review of the March version. No effort has been made to reconcile changes or correct page references if any are needed. We assume that the staff can sort out any changes when staff provides the Commission with its response to comments.

⁸ *Nollan v. California Coastal Comm., Dolan v. City of Tigard.*

CONCLUSION

It should be noted that this letter and the Detailed Comments do not attempt to provide extensive legal citations because that was previously done in numerous submittals including the Review and Analysis of Major Issues document, the WSSA Installment documents, and the WSSA Sensible Plan. The main purpose here is to provide a road map for the Planning Commission to begin to understand the flaws in this highly complex regulatory scheme. The Commission needs to focus on the real impacts and reject the junk science that is being improperly relied on to attempt to justify the regulations in the Draft SMP. Once that is done, the Commission can move on to the work of fairly balancing real environmental concerns and protection of property rights. WSSA looks forward to working with the Planning Commission to create a Final SMP that represents a reasonable and responsible approach to shoreline planning and regulation.

Thank you for considering these comments and please include these letter comments as part of the record.

Sincerely,

GROEN STEPHENS & KLINGE LLP


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Attachments

cc: WSSA, attention Martin Nizlek

APPENDIX 1

**DRAFT SMP CONTAINS ABOUT 355 PAGES
(Documents listed on website as part of Draft SMP)**

**THE FOLLOWING DOCUMENTS ARE INCORPORATED INTO SMP IN
ADDITION TO THE BASE OF 355 PAGES**

**Non-Code Documents Being Incorporated into SMP, but Not Yet Reviewed by Planning Commission for
Consistency with Shoreline Guidelines:**

- Critical Area Handbook (123 pp., 64 MB)
- Pruning Guidelines (32 pp.)
- Best Management Practices of the Western Wood Preservers (not available on City website)
- Storm and Surface Water Engineering Design Standards (not listed on City website)
- Clearing and Grading Development Standards (over 100 pp.)
- Shoreline Handbook (not available on City website)
- Bellevue Urban Wildlife Habitat Functional Assessment Model (not listed on City website)
- King County Noxious Weed Program Best Management Practices (not available on City website)

**Code Chapters and Provisions Being Incorporated into SMP, but Not Yet Discussed by Planning
Commission for Consistency with Shoreline Guidelines:**

- Critical Area Overlay District (CAO)
- Land Use District Provisions
- Chapter 24.06: Storm and Surface Water Utility Code
- Chapter 23.76: Clearing and Grading Code
- Chapter 14.06: Trees, Weeds, and Vegetation

**Other Major Document Sought to Be Incorporated into SMP, but Not Yet Approved by Planning
Commission:**

- Shoreline Inventory and Characterization (pages not inc. appendices to these documents)
 - Shoreline Inventory Analysis (158 pp.)
 - Shoreline Inventory Report: Technical Appendix Vol. 1 – Wetlands (27 pp.)
 - Shoreline Inventory Report: Technical Appendix Vol. 2 – Habitat (45 pp.)

The Growth Management Hearings Board ruled that full public participation and debate was required before any portion of outside sources, including existing code provisions, could be incorporated into the proposed shoreline master program. *Citizens for Rational Shoreline Planning v. Whatcom County*, WWGMHB Case No. 08-2-0031 (2009).

APPENDIX 2