

A WHITE PAPER

WASHINGTON'S NEW SHORELINE MASTER PROGRAM GUIDELINES: RECOMMENDATIONS FOR REALTORS®

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FORWARD

This white paper was prepared by the Perkins Coie Environment Group under the sponsorship of the Washington Association of REALTORS®. This paper addresses the legal and land use implications of new Shoreline Master Program Guidelines adopted by the State of Washington on November 29, 2000. This paper is not intended as legal advice for any particular client or any particular circumstance. Anyone seeking advice on compliance with the Shoreline Management Act should contact a qualified attorney.

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March 14, 2001

**WASHINGTON'S NEW SHORELINE MASTER PROGRAM
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Executive Summary

- **The Washington Department of Ecology has adopted new Shoreline Master Program Rules that will completely overhaul shoreline development and use regulation in Washington State.**
- **Local governments will have at least two years to implement the mandatory Rules through amended Shoreline Master Programs.**
- **The Department of Ecology claims that the new Rules are required by the Endangered Species Act and require restoration of habitat as a condition for development and use of shoreline property within 200 feet of rivers, lakes, streams, or marine waters.**
- **The new Rules will make it difficult to maintain, repair, or modify existing shoreline property uses.**
- **The new Rules regulate single family dwellings, which are now exempt from substantial development permitting.**
- **Rural shorelands will be extremely difficult to develop.**
- **Authorization for development on urban shorelands will largely be limited to water-dependent uses.**
- **The new Rules will negatively affect economic vitality, housing opportunities, property rights and our overall quality of life.**
- **Property owners should consider their options and act carefully when dealing with shoreland property transactions.**

I. Introduction and Purpose

The Washington Association of REALTORS® asked Perkins Coie, L.L.P. to review the new Shoreline Master Program Rules for Washington State and provide REALTORS® with recommendations that will help REALTORS® and their clients to foresee changes in regulation of shoreline development and use.

Because the new Shoreline Master Program Rules were only recently adopted and must now be implemented by local governments, it is difficult to predict exactly how the new guidelines will affect shoreline use and development. Consequently, the best approach is to assume that changes will be more restrictive.

This summary of the new guidelines incorporates this cautious approach with general recommendations on how the Rules will affect shoreline property. The generalizations provided in this paper are useful as a first filter on transactions involving shoreline property, but the actual application of the Rules and local Shoreline Master Programs will depend on the unique circumstances of every development or transaction. In addition, there are other land use permitting requirements such as critical areas ordinances and federal dredge and fill permits that could materially affect the value of shoreline property. We therefore recommend that any REALTOR® or client of a REALTOR® who is contemplating purchasing, selling, or developing shoreline property obtain the advice of a qualified attorney to determine how the Shoreline Management Act and other land use and environmental restrictions will affect their property.

The effect of the Rules described in this analysis is based on the assumption that the Rules are lawful. However, on behalf of the REALTORS® and additional petitioners, Perkins Coie, L.L.P. is appealing the Rules on a variety of grounds, including the allegation that the Department of Ecology exceeded its lawful authority in adopting the Rules, did not follow procedures concerning a Small Business Economic Impact Study and timely cost-benefit analysis, and imposes a restoration rather than preservation standard. This analysis is in no way a concession by the REALTORS®, Perkins Coie, L.L.P., or any of Perkins Coie's clients that the Rules are lawful and appropriate as now adopted.

II. Situation

On November 29, 2000, the Washington Department of Ecology adopted new rules governing the administration and enforcement of the Shoreline Management Act. The new rules, which are known as the Shoreline Master Program Guidelines (the "Rules"), were effective on December 31, 2000.

Under the Rules, cities and counties will have two years to update and amend their Shoreline Master Programs, which affect local comprehensive planning policies, zoning, critical areas ordinances and other land use ordinances governing land use on shoreline property.

Shoreline property is any property that

- lies within 200 feet of any marine shorelines; or
- has frontage on lakes of 20 or more acres in size; or
- has frontage on rivers and streams flowing at a rate of 20 cubic feet per second or more.

Regulated shoreline areas are measured from the ordinary high water line, but can also be measured from floodways, and may include any wetlands, flood plains, or river deltas closely associated with shorelines of the state.

Under the state's Rules, every development or use of land within the 200-foot shoreline jurisdiction must comply with the amended local Shoreline Master Programs, the Rules, and the policies of the Shoreline Management Act. Typically, this requirement is made effective by the issuance of a "substantial development permit" for any development with a fair market value exceeding \$2,500. Regulated developments usually include construction and other ground-disturbing activities.

For many new land uses within shoreline areas, a substantial development permit will be required, and it will contain conditions that will reflect the new and more restrictive requirements of the Rules. However, the definition of "substantial development" excludes certain developments and uses such as maintenance and repair of existing structures, construction of single family residences, construction of bulkheads that protect single family residences, and many agriculture-related facilities, operations, practices, and construction activities. **The new Rules appear to narrow or even eliminate existing substantial development permit exemptions by requiring conditional letters of exemption and other mechanisms to more directly regulate development and uses that are now exempt from permitting requirements.**

Until the Rules are further interpreted by Ecology, the Shoreline Hearings Board, the Growth Management Hearings Boards, and the courts, all parties with an interest in developing and/or using shorelands should assume that **all shoreline developments and uses must comply** with the policies of the Shoreline Management Act, the Rules, and the policies and requirements of the local Shoreline Master Programs, as amended in accordance with the Rules.

A central requirement of the new Rules is that all Shoreline Master Programs and all authorizations of shoreland use will protect and restore "ecological functions" and "ecosystem processes" as a condition for approval.

This is an extremely high environmental standard that is linked to enforcement of the Endangered Species Act (ESA). Ecological functions and ecosystem processes are also known as "properly functioning conditions" which are established in a regulatory policy developed by the National Marine Fisheries Service (NMFS). Properly Functioning Conditions present a particularly demanding regulatory standard because they are based on pristine habitat conditions in a forested environment.

In exchange for implementing properly functioning conditions through the Shoreline Management Act, NMFS and the U.S. Fish & Wildlife Service have promised Ecology that approved Shoreline Master Programs and substantial development permits will receive an "incidental take" regulatory shield that assures compliance with the ESA. How, exactly, this assurance will be provided remains to be seen.

III. Impacts on REALTORS® and Their Clients

Because the Shoreline Management Act is implemented and enforced by local governments with "guidance" from Ecology, it is impossible to precisely define the Shoreline Master Program amendments that local governments will undertake in response to the Guidelines.

Until now, the Shoreline guidelines provided a flexible framework that allowed local governments and Shoreline Master Programs to vary widely in accordance with the discretion and judgment of local governments. Ecology maintains that the new Rules preserve that flexibility with the use of "performance standards. It appears, however, that the flexibility and discretion of local governments is severely constrained if not removed under the new Rules. As such, property owners may want to take a cautious approach that treats Ecology's performance standards as mandatory conditions that will apply to all shoreline uses and developments regardless of local action. Property owners and purchasers should:

- Assume all developments and uses within the shoreland area will be regulated under Shoreline Master Programs designed to protect and restore ecological functions, ecosystem processes, and properly functioning conditions.
- Assume that repair and maintenance of existing and non-conforming shoreland uses will receive more scrutiny and the exemption for such activities will be narrowed under the Rules.

- Assume that replacement of existing and non-conforming structures will be treated as "new" and may be prohibited under the Rules.
- Assume that approval for development on rural shorelands will be very difficult to obtain
- Approval for urban development and redevelopment will be easier in comparison to rural areas, but it will come at a higher cost with large natural vegetation buffers, extensive biological review, and restoration conditions.
- Assume that any proposed shoreland uses that *are not water-dependent, water-related, or water-enjoyment uses* probably will not be approved.
- Assume that natural vegetation buffers and setbacks in shorelands will be quite large based on the "best available science". Commonly, regulators will require no touch and light-touch shoreline buffers that will severely limit the use of property within one site-potential tree height or from 100 to 200 feet from any shoreline.
- Assume that all marine construction for docks or bulkheads will rarely be allowed for new structures, and will be highly limited for repair of existing structures even when it is essential to prevent the loss of property. Replacement may be prohibited.

IV. Recommendations

As the new Rules are being implemented, property owners and investors may want to take steps to reduce uncertainty and protect investment values.

- Because the Shoreline Management Act Rules will take two or more years to actually implement, owners of and investors in shoreline property should expedite development plans and attempt to vest their projects under existing Shoreline Master Programs.
- Because the ESA is the driving force behind the new Rules, approach any transaction or investment involving shoreline property development as though it will be subject to consultation under Section 7 of the ESA.
- Closely monitor and participate in the public process for amendments to Shoreline Master Programs by local governments.

- Although the Shoreline Management Act Rules purport to achieve ESA compliance, no legal mechanism is in place yet to deliver federal regulatory assurances to local governments and holders of substantial development permits. Property owners should not assume that compliance with the Shoreline Management Act means compliance with the ESA.
- Demand that local governments obtain legally enforceable federal regulatory assurances as a pre-condition for amending Shoreline Master Programs to achieve ESA regulatory standards.
- Be certain to identify the party responsible for the completeness of any permit applications, who is to bear the cost of those applications, and who is responsible for any failure to comply with permit conditions.