

MEMORANDUM

August 7, 2006

TO: Local/Regional REALTOR® GADs
FROM: Bill Clarke
RE: Overview of Key Shoreline Master Program Issues

I. INTRODUCTION

In 2003, the Department of Ecology (Ecology) adopted new Shoreline Guidelines (Guidelines) to implement the Shoreline Management Act (SMA). This was the first comprehensive update to the Guidelines since they were initially adopted in the 1970's. Under the SMA, the Guidelines are the basis for local Shoreline Master Programs (SMP), which are adopted by local governments and then forwarded to Ecology for approval. The Guidelines contain requirements for establishing shoreline designations, uses, and development regulations, as well as other objectives for shoreline use and protection. Local governments throughout Washington State are in the process of amending local SMPs. The SMA Resource Manuals provided by Washington REALTORS® includes the schedule established by the Legislature for SMP updates.

While the process of revising SMPs is only beginning, the new Guidelines and early draft SMP revisions include a number of issues of importance to REALTORS® and their clients. This memo provides an overview of those issues.

II. KEY SHORELINE MASTER PROGRAM ISSUES

A. *Shoreline Designations, Policies, & Uses*

The Guidelines require each SMP to establish six specific environment designations: Natural, Rural Conservancy, Aquatic, High Intensity, Urban Conservancy, and Shoreline Residential. Each of these designations will have descriptions of policies, uses, and regulations. The allowed uses and designation criteria are provided for each of these environments in WAC 173-26-211.

In addition to these six designations, local governments may develop a different system of designating shoreline environments, may retain the environmental designation system in the existing SMP, or may establish parallel environmental designations where designations are divided based on a physical feature such as a bluff or railroad. WAC 173-26-211(c).

The Guidelines require that the shoreline environmental designations, and the policies, uses, and regulations that follow be consistent with the local comprehensive plan. WAC 173-26-191. This requirement is based on provisions of both the SMA and Growth Management Act (GMA), which provides that:

For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

RCW 90.58.480(1).

In reviewing proposed SMP revisions, ensure that the shoreline environmental designations are consistent with the zoning density and uses in the comprehensive plan. Thus, areas designated for residential development or mixed-use development including residential should be designated a Shoreline Residential or High Intensity. Areas zoned for residential development cannot be assigned a shoreline designation, use restrictions, or development regulations that would conflict with the residential development planned for that area in the comprehensive plan.

In addition, SMPs should be consistent with the standards in the Guidelines for residential development at WAC 173-26-241(3)(j). It is important to note the SMA states "Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures . . . "

The SMPs should also be consistent with Ecology's shoreline development regulations in WAC Chapter 173-27. While the Guidelines discuss appropriate uses and policies, Ecology's shoreline regulations provided specific requirements for shoreline permit applications, criteria for obtaining variances, criteria for approval of shoreline conditional use permits, and other issues.

The local development regulations must be at least as stringent as the regulations in WAC Chapter 173-27. If local SMPs provide different standards, then additional permit review under this regulation may be necessary. Thus, some local SMPs incorporate these regulations by reference rather than creating new regulations that may conflict.

B. New Opportunities for Housing

Local SMPs function as a planning tool that can be used to reshape and redevelop waterfront areas. In many cities, revised SMPs will include consideration of how formerly industrial waterfront urban areas should be used in the future. In many areas, water dependent businesses no longer exist or have moved upland to sites that are less environmentally sensitive. The transition from old to new shoreline uses in these urban areas provides an opportunity for housing as a part of mixed use shoreline development that also includes retail, commercial, and public access. The transformation of urban waterfront areas can already been seen in the planning or construction stage in cities such as Bremerton and Bellingham.

The new housing opportunities in shoreline areas is consistent with demographic trends that show retirement age people downsizing to smaller housing units, thus making their family home available. Each local SMP amendment process should include a consideration of how under-utilized urban waterfronts should be redeveloped to increase housing and revitalize shoreline areas.

Another opportunity for housing exists in remaining undeveloped shoreline lots. Many shoreline areas of Washington State have shoreline lots that were created under existing or prior SMPs, and are in areas where shoreline use is predominantly residential. It is also important to identify these types of areas so that shoreline development regulations allow housing that is compatible with existing housing the same shoreline area.

One of the first steps in the SMP revision process is for each local government to conduct an inventory and analysis of existing shoreline conditions. In this phase, housing opportunities, whether on existing unbuilt lots or through urban shoreline redevelopment should be identified so that appropriate shoreline designations are assigned, and use policies and regulations established.

C. Height Limitations and View Protection

The SMA includes the following provision on height limitation:

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

RCW 90.58.320.

The policies of the SMA, at RCW 90.58.020, also include protection of aesthetic values of shorelines. The Shorelines Hearings Board has used the

following test to evaluate whether a proposed project would violate the height or view protections of the SMA:

(1) The building or structure must not obstruct the view of a substantial number of residences; (2) the residences must be on or in an area adjoining the project area; (3) the building or structure must exceed 35 feet in height; and (4) there must be an obstruction of view. *Alexander et al. v. City of Port Angeles et al.*, SHB No. 03-027 & 028 (2003).

In the Alexander case, the Board determined that construction of a convention center that blocked shoreline views from homes did not obstruct views in violation of the SMA because “the majority of the views will still be accessible,” and that the project did “not materially reduce the water views.”

The Guidelines also state that local SMPs should include

. . . provisions, such as maximum height limits, setbacks, and view corridors, to minimize the impacts to existing views from public property or substantial numbers of residences. Where there is an irreconcilable conflict between water-dependent shoreline uses or physical public access and maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority, unless there is a compelling reason to the contrary.

WAC 173-26-221(d)(iv).

Protection of shoreline views is also part of visual public access. See WAC 173-26-221(4). Under this section of the Guidelines, the SMP shall “minimize, insofar as is practical, interference with the public’s use of the water.”

In some cases, SMPs will have height limitations that exceed thirty-five feet for certain shoreline uses such as cranes, antennas, hotels, or mixed-use structures such as condominiums. Other SMPs will establish protected shoreline view corridors to maintain views of certain shoreline features, or will adopt development regulations requiring a certain percent of the shoreline lot width remain open to preserve view corridors.

The height and view protection provisions in an SMP should be reviewed to determine if they are consistent with the intended uses for the area. In some areas, shoreline views have been reduced or eliminated and thus view protections should reflect the existing impaired views. In other areas, residential neighborhoods, parks, or other public places may have unimpaired shoreline views that should be protected.

D. Public Access

The policies of the SMA include policies to “increase access to publicly-owned areas of the shoreline,” and “increase recreational opportunities for the public in the shoreline.” RCW 90.58.020.

The Guidelines contain a specific section on public access at WAC 173-26-221(4). This section requires protecting public access to public shorelines. It does not require private landowners to provide access to the public. The key concept of the public access section is that the local SMP should identify needs and opportunities for public access, and integrate those needs with the transportation and recreation elements of the comprehensive plan. The public access component of a local SMP can also utilize existing public access planning done by public ports or other entities.

While the thrust of the public access section of the Guidelines focuses on public access to public shorelines, the Guidelines also state that local SMPs should include standards for dedication and improvement of public access for certain shoreline uses, including subdivision of land into more than four parcels. However, this is not required if the local government develops a more effective public access plan, public access is infeasible due to safety, or if public access would be unconstitutional. The construction of a single family residence is not subject to the public access provisions. WAC 173-221-221(4)(c) and (d).

The constitutional protections referred to in the public access section of the Guidelines are discussed more explicitly in the section of the Guidelines providing governing principles. This section states:

The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.

Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.

A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, "State of Washington, Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," first published in February 1992. The attorney general is required to review and update this process on at least an annual basis to maintain consistency with changes in case law by RCW 36.70A.370.

WAC 173-26-186(5). The Attorney General Memorandum was updated in December 2003 and is included in Tab 7 of the REALTORS® Shoreline Resource Manual.

Overall, public access is best addressed through a comprehensive planning process conducted by the local government that considers the variety of shoreline access and aesthetic values. Shoreline access can be characterized as either physical, such as actual shoreline beach access or boat ramps, or visual, such as the use of viewing platforms. For large mixed-use or commercial projects, public access can often be protected or improved through project design by incorporating shoreline access elements into the project itself.

E. Protection of Shorelines vs. Restoration of Shorelines

The SMA clearly authorizes the alteration of the natural condition of the shoreline: “Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures . . .” RCW 90.58.020. The Guidelines state that “[SMPs] shall contain policies and regulations to assure, at a minimum, no net loss of ecological functions necessary to sustain shoreline natural resources . . .” WAC 173-26-201(2)(c).

The Guidelines establish the following principles for shoreline protection and restoration:

1. Each SMP shall include policies and regulations designed to achieve no net loss of shoreline ecological functions. WAC 173-26-186(8)(b).
2. The no net loss standard applies to shoreline development that is required to obtain permits, exempt development, and cumulative impacts. WAC 173-26-186(8)(ii); (8)(d).
3. SMP regulations and mitigation standards shall ensure that each permitted develop will not cause a net loss of shoreline ecological functions. WAC 173-26-186(8)(b)(i).
4. If shorelines have impaired ecological functions, the SMP must include goals and policies that provide for restoration of impaired ecological functions, and such restoration should include use of nonregulatory programs. WAC 173-26-186(8)(c).
5. The no net loss requirement applicable to shoreline uses, and the restoration plan must be consistent with all relevant constitutional and legal limitations on the regulation of private property. WAC 173-26-186(b)(i).

Ecology has described the “no net loss” standard as “a final result that is no worse than maintaining the current level of environmental resource productivity or ‘no net loss.’” *What Does No Net Loss Mean*, Ecology Draft Publication No. 04-06-020, p. 3. (See REALTORS® SMA Resource Manual, Tab 6)

Thus, no net loss of ecological function is a requirement for each shoreline permit, and for the local SMP overall.

In contrast, restoration of shoreline conditions is not required of an applicant seeking a shoreline permit, but rather, is a planning obligation of the local government. This means that the local government should identify areas with impaired shoreline ecological functions, discuss non-regulatory methods to restore those functions, and identify funding source for such restoration efforts. Constitutional limitations also enter into the restoration issue, as it is questionable whether a property owner could be required to restore shoreline conditions caused by a prior owner or developer.

E. Non-Conforming Uses and Structures

A nonconforming structure is a structure that has a use that is authorized under the applicable zoning or use regulations, but which has height, bulk, or dimensional attributes that no longer comply with subsequently adopted development regulations. "A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998). In general, nonconforming uses are allowed to remain, but '[t]he policy of zoning legislation is to phase out a nonconforming use.' " *Id* at 7, see also *City of University Place v. McGuire*, 102 Wn.App. 658, 668-670, 9 P.3d 918,924 - 925 (Wn.App, 2000).

Ecology's shoreline regulations have a section on non-conforming use and development standards that apply if the local SMP does not include specific non conforming use provisions. Ecology's non conforming use regulations are the minimum standards. Local government standards could be, but need not be, more stringent. The non conforming use provisions in Ecology's shoreline regulations are as follows:

(1) "Nonconforming use or development" means a shoreline use or development, which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program.

(2) Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

(3) Uses and developments that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses. Such uses shall not be enlarged or expanded, except that

nonconforming single-family residences that are located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main structure or by the addition of normal appurtenances as defined in WAC 173-27-040 (2)(g) upon approval of a conditional use permit.

(4) A use which is listed as a conditional use but which existed prior to adoption of the master program or any relevant amendment and for which a conditional use permit has not been obtained shall be considered a nonconforming use. A use which is listed as a conditional use but which existed prior to the applicability of the master program to the site and for which a conditional use permit has not been obtained shall be considered a nonconforming use.

(5) A structure for which a variance has been issued shall be considered a legal nonconforming structure and the requirements of this section shall apply as they apply to preexisting nonconformities.

(6) A structure which is being or has been used for a nonconforming use may be used for a different nonconforming use only upon the approval of a conditional use permit. A conditional use permit may be approved only upon a finding that:

(a) No reasonable alternative conforming use is practical; and

(b) The proposed use will be at least as consistent with the policies and provisions of the act and the master program and as compatible with the uses in the area as the preexisting use.

In addition, such conditions may be attached to the permit as are deemed necessary to assure compliance with the above findings, the requirements of the master program and the Shoreline Management Act and to assure that the use will not become a nuisance or a hazard.

(7) A nonconforming structure which is moved any distance must be brought into conformance with the applicable master program and the act.

(8) If a nonconforming development is damaged to an extent not exceeding seventy-five percent of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.

(9) If a nonconforming use is discontinued for twelve consecutive months or for twelve months during any two-year period, the nonconforming rights shall expire and any subsequent use shall be conforming. A use authorized pursuant to subsection (6) of this section shall be considered a conforming use for purposes of this section.

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

WAC 173-27-080.

A number of these provisions with possible impacts on housing issues deserve special emphasis. In general, SMP revisions that result in homes being nonconforming uses or structures should be avoided. This is because the nonconforming status makes expansion, repair, or reconstruction difficult, and because the policy of nonconformity is to phase out the nonconforming attribute. Assuming that existing houses become nonconforming structures, it should be noted that homes can still be expanded or remodeled, just as long as the expansion does not increase the nonconformity. For example, assume that a revised SMP increases the shoreline setback, resulting in the water side of a house being nonconforming because it is within the new setback. The house can still be expanded on the landward side, because such an expansion would not increase the nonconformity.

F. Relationship to Critical Areas Designated Under GMA

The issue regarding the relationship between SMA protections and GMA critical areas arose originally when the Central Puget Sound Growth Management Hearings Board concluded “that shorelines of state-wide significance are critical areas subject to both the GMA and the SMA.” *Everett Shorelines Coalition et al. v. Everett and Ecology*, CPSGMHB No. 02-3-0009c (2003). The Legislature responded, rejecting this conclusion as described in a recent Attorney General Opinion:

The Legislature responded to the *Everett* decision with the adoption of ESHB 1933. Laws of 2003, ch. 321. The Legislature explicitly repudiated the Board’s conclusion that shorelines of statewide significance are categorically critical areas which must be protected both under the SMA and GMA. Laws of 2003, ch. 321, § 1; RCW 90.58.030 (Notes – Findings). As amended by the 2003 Legislature, the GMA now provides that, “Shoreline master programs shall provide a level of protection to critical

areas . . . that is at least equal to the level of protection provided to critical areas by the local government's critical area ordinances". RCW 36.70A.480(4). This protection occurs as of the date the Department of Ecology approves a local government's shoreline master program incorporating the critical area segment. RCW 36.70A.480(3)(a). The 2003 Legislature also added language providing that "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 based on the definition of critical areas provided by RCW 36.70A.030(5)". RCW 36.70A.480(5).

2006 AGO No. 2, at 5. (Tab 9 of REALTORS® SMA Resource Manual).

Under the new law, as explained by the AGO, protection of critical areas that are designated within a shoreline are done solely through the SMP, and must have a level of protection equal to that provided in the CAO.

It is important to note that the protections of an SMP, and how they compare to CAO standards is an iterative process. For example, an SMP could provide greater protections, and even restoration efforts in certain areas, to balance out more intensive uses elsewhere, thereby meeting the overall "no net loss" standard. The "no net loss" standard in the Shoreline Guidelines and the "protect functions and values" phrase from the GMA critical areas section should be viewed as essentially the same, at least until there is some authority otherwise.