

From: m.c. halvorsen [mailto:teddy2halle@yahoo.com]
Sent: Thursday, December 01, 2011 4:37 PM
To: Glowacki, Margaret
Subject: Second Draft of Seattle's SMP

Dear Ms. Glowacki:

I have read the above referenced subject and it is a big improvement over the first one. However, I find that there are certain issues on which I have comments that would apply to more than one section. Rather than repeating these suggestions, I will discuss them first and when I reach the sections to which they apply, I will reference back to the general discussion.

Topic 1: Federal Waters

The waters of Puget Sound are federal waters and are under federal jurisdiction. The United States Supreme Court, the final arbiter of what is the law in the United States, in "Propeller Genessee Chief v. Fitzhugh" 12 Howard 443 (1851) states that the test of whether a body of water is federal is navigability. In other words, any navigable body of water is a federal body of water.

In "United States v. Rio Grande Irrigation Co" 174 U.S. 690, the U.S. Supreme Court states that navigable waters of the United States are under federal jurisdiction.

In "Escanabaw and Lake Michigan Transportation Company v. the City of Chicago" 107 U.S. 678 (1881) the United States Supreme Court stated that if federal law and state law conflicted, federal law prevailed.

In "Governor of Georgia v. Madrazo" 26 U.S. 110, the United States Supreme Court stated that conflicts arising over federal waters was specifically reserved to the United States' Federal Court by the United States Constitution, 2nd section, Article 3.

Thus, the City of Seattle uses the federal waters of all of Puget Sound but the jurisdiction rests with the federal government.

Topic 2: Ordinary High Water and Mean High Water

The concept that the government's ownership of the navigable waters extended to Ordinary High Water developed in the English Common Law in the time of King Henry VIII in the 16th century and came to this country through that Law. In King Henry's time mean high water applied only to salt waters but from Topic 1, we can see that the United States Supreme Court extended that concept to all navigable waters. Ordinary High Water is not always a fixed point but rather a guess or estimate. In the 20th Century, the Coast and Geodetic Survey Commission was created. This governmental organization studied the tides over an 18.5 year period, noting the tides twice a day,

They averaged out the highs and lows of the tides and established mean high water, which is what the federal government recognizes. Any permit from the Army corps of Engineers will be to mean high water. There is a United States Supreme court case, whose name I do not have at present but can obtain if you so desire, that stated that mean high water replaced ordinary high water as to the government's interest in the water. I do not know why no one in the State of Washington does not know this as it is well established back east but that seems to be the case. One problem is that when the Washington State Constitution was drawn up before the establishment of the Coast and Geodetic Survey Commission and its Article XVII states that the interest in the waters around the state is to Ordinary High Water and the case law of "Austin v. Bellingham" 69 Wash 677 (1912), a Washington State Supreme Court case of 1912 quoted the language of the Washington State Constitution, but that case also predated the Coast and Geodetic Survey tables. Thus, the City must use mean high water as its benchmark and cannot go above that in any requirements it puts forth.

Topic 3: Public Access

Compared to Topic 1 and Topic 2, Topic 3 is relatively new having been decided by the United States Supreme Court in 1987. The case is "Nollan v. California Coastal Commission" 483 U.S. 825 and involved public access. The California Coastal Commission required as a condition of the Nollans obtaining a permit to build, that the Nollans give a public easement. The United States Supreme court stated that giving a public easement had nothing to do with the building permit and it was being used to accomplish some other public policy. The Court further said that states or cities could not use a permit requirement that was not necessary to completion of the project. The States or cities could use their right of eminent domain to accomplish that objective but could not just use the permit requirement to grant public access. Therefore, the City of Seattle cannot require that subdivisions or any other development project to give public access because public access is not necessary for the development.

I do not know the origination of this obsession regarding excessive public access, which is unnecessary and overdone. Most cities understand that if they grant access, they are incurring liability and they limit that liability to access through a city park where they know there are good facilities, good parking and safe access to the water. In addition, there is garbage pickup and the parks are supervised by a Park District. Seattle has beautiful parks and very ample access to the water. Why the city wants to incur liability by giving access to areas that have no facilities, no parking, dubious to dangerous access to the water, no garbage pickup and no supervision is beyond my comprehension. Places like that become places where people dump their garbage and drug deals take place. Be all that as it may, the point is that you cannot give all this public access tied to granting a permit because the United States Supreme Court has ruled it unconstitutional.

In the main Draft, my comments are as follows:

Page 12, line 9 Change ordinary high water to mean high water.

Page 14, line 9 The Duwamish River is not actually a saltwater body but a transitional one because fresh water mixes with salt water as far as TB3 (5.5 miles upstream) and then becomes a freshwater body of water.

Page 26, line 11-13 The time allowed to commence the project of 2 years is unrealistic and granting only 1 extension is unnecessarily strict. When I repaired my bulkhead, it took me four years to obtain my permits but because I couldn't work in water for another six months, it was 4 1/2 years before I could do any work through no fault of mine. At that time, thankfully, you could renew for 2 year intervals as long as you were engaged in the process. I believe it should be the same as one cannot work in the water 9 months of the year. I did manage to finish the repair in just about 5 years.

Page 32, line 1 Topic 2

Page 33, lines 6-7 Replacement is commenced within 12 months after demolition is not enough time to get permits and new plans. Property on the water may have to wait 9 months and there may be delays. I feel 2 years at the least should be the new standard.

Page 44, lines 12-28 Topic 3. This is unconstitutional.

Page 45, All Topic 3. This is unconstitutional.

Page 46, lines 1-18 Topic 3.

Page 47, lines 22-28 View Corridors. Topic 3. The whole Section is unconstitutional.

Page 48, All Topic 3.

Page 49, lines 1-3 Topic 3.

Page 73, lines 8-28 Topic 3. Unconstitutional. In addition this places restrictions on marinas that would either put existing marinas out of business or discourage other

December 15, 2011

Margaret Glowacki
Senior Land Use Planner
Department of Planning and Development
City of Seattle
700 5th Avenue, Suite 2000
Seattle, WA 98124-4019

Dear Margaret Glowacki:

Thank you for requesting comments on the Shoreline Master Program Update second draft. Thank you also for your cooperation on changes from the first draft of the Shoreline Master Program Update.

I would like to offer the following suggestions:

23.60.164. I .4 Standards for regulated public access

23.60.164. I .4 change to "A maximum of one regulated public access will be not required for less than every 3,500 linear feet of shoreline".

26.60.196 Standard for bridges, overwater and tunnels

23.60.164.E. Impacts on ecological functions including, but not limited to, add "all bridge road drains shall not empty into the water;" Please see the attached information from November 2011 issue of *Pacific Fishing*, Oregon State University study, "Salmon Dying? It may be because of brake pads from your truck" by Jason Sandahl.

23.60.486 Height in the UI Environment

23.60.486 .B. 2 ____ may be authorized by the Director up to 55 feet in the Ship Canal ____ Change to "60 feet in the Ship Canal". Please see the attached picture of an indoor boat storage building. If the City of Seattle is going to encourage the increase of recreational moorage by 2,068,606 square feet (72%--table 14) between 2008 and 2030 as projected in COMPARISON OF LAND SUPPLY AND DEMAND FOR WATER-DEPENDENT AND WATER-RELATED USES by Property Counselors, the indoor boat storage buildings will be an important factor in the growth. In order to have an economic unit for indoor storage operation, I have been advised by experts that you must be able to store the boats four high. To build a structure that will store boats four high, the building must be at least 60 feet high.

23.60.486 .B. d The remaining 80 percent of the lot is preserved through a covenant____ I have been advised that "Restrictive covenants have nothing to do with zoning or government regulations." Restrictive covenants encumber the property, making the property more difficult to sell. The owner of the property will have a more difficult time borrowing money for improvements or a buyer will have more problems borrowing money to buy the property. Please remove all of 23.60.486.B.d. The restrictive covenant does not belong in this Chapter.

23.60.494 Regulated public access in the UI Environment

Public access should not be required in the UI Environment. Public access is not a DOE requirement. With public access in an industrial environment there are safety, parking, drug, homeless people, law enforcement and other issues that are not conducive to public access. The Cities of Tacoma, Anacortes as well as other cities do not encourage public access in the industrial areas. The City of Seattle should not place their citizens at risk in an industrial public access environment. Public access requirements are also very expensive. A required public access requirement may prevent the economic viability of a project and result in a failure of the planned improvement to go forward. I know of one public access requirement that required over \$440,000 of private industrial waterfront property be dedicated to the public access location. The improvements needed were in addition to the value of the property.

The Shoreline Master Program is a very important document for all the waterfront owners. We are at an important crossroads with the Shoreline Master Program. There have only been two new buildings larger than 5,000 square feet in the Lake Washington Ship Canal UI Environment in the past 20+ years. There are less and less WD/WR businesses operating in the Lake Washington Ship Canal UI Environment. It is important for The City of Seattle DPD to be realistic with the future of this area. Are we going to have growth, jobs and taxes for the public or stagnation? We still have 22 acres of waterfront of shoreline property along the Lake Washington Ship Canal that is underutilized. With help of the City of Seattle zoning regulations, I hope this amount of underutilized property will be reduced in the near future.

Thank you for the opportunity to comment on the Shoreline Master Program Update, second draft.

Very Truly Yours,

J.G. Ferguson, President

Ferguson Terminal Company



LAKE UNION DRYDOCK COMPANY

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Margaret Glowacki, Senior Land Use Planner
Seattle DPD
700 5th Ave, Suite 2000
Seattle, WA 98124

December 20, 2011

Re: Seattle Shorelines Master Program Update Draft 2

Dear Maggie,

While we appreciate some of the changes you made to the SMP regulations, we find there are still some important issues of concern. We're asking that you consider, and in some cases reconsider the following suggested changes which address issues that are most troubling.

23.60.036.B.3 RCW 90.58.100.5 requires Master Programs to “contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships.” The requirement that a variance can only be granted if there would otherwise be no reasonable use of the property is extreme and does not adequately provide for unusual situations. In the next few years before another revision of these regulations, many unforeseen good reasons for variance are likely to develop, and there is no good reason to eliminate choices now. Variances on use should be granted if the Director determines that the use is not conflicting with other allowed uses and is in the public interest.

23.60.090.C Accessory uses should not be confined to dry land. They must be allowed over water, particularly if the entire parcel is submerged or there is little dry land available. We have no dry land, but we obviously need accessory uses. It is hard to imagine that you really intend to prohibit accessory uses for businesses that have insufficient or no dry land. Please write an exception for parcels with little or no dry land.

23.60.124.D.1. Replacement or improvement of a nonconforming structure should not require mitigation for the original structure (ongoing), only for any increase in impact of the replaced or modified structure. If the intent is to require mitigation for the original configuration, that intent should be clearly stated. We think that would be unreasonable. We propose amending the first sentence to read, “If replacement or substantial improvement of a structure is allowed, mitigation to ecological function caused by such

action pursuant to 23.60.158 is required and shall comply with the following standards:”
That would clarify what we hope is your intent.

23.60.152.A It should be clarified that existing structures that were not designed or constructed to achieve no net loss of ecological function (and may therefore be considered nonconforming to the mitigation development standard) will not be considered nonconforming structures for the purpose of 23.60.124. At a meeting of the North Seattle Industrial Association, I believe you agreed with this in principle, but it was never clarified in the draft.

23.60.162.C.3. Our business needs the flexibility to relocate accessory uses like parking without having to reduce it by 20%. We basically need to reconfigure use of our property depending on the changing contractual demands of each job situation such as unusual temporary storage requirements. We should not be forced to live with inefficiencies just to avoid relocating parking. More importantly, we should not be precluded from performing multimillion dollar jobs just because they would require minor reconfiguration of uses on our existing facilities. We desperately need some relief from this provision, and we request that it be eliminated.

23.60.310.H also Table for section 310, line C.12.d This prohibits major vessel repair in CW environments (Waterways) The waterways platted in Lake Union were reserved under state law ”for the convenience of commerce and navigation.” Several companies, including Lake Union Drydock Company use an adjacent waterway for major vessel repair. This is indeed used for the convenience of commerce and navigation. Please change this provision to allow this use.

23.60.504.B.1 For the various uses allowed over water under 504.A, this limitation requires that “the lot depth is less than 50 feet.” It should read that “The dry land is less than 50 feet.” The exception should relate to the lack of dry land rather than the overall lot depth. Overall lot depth should have no affect on this provision.

We also request that the mitigation sequencing and shoreline restoration details be developed through a public process as part of the shorelines program, not adopted by Director’s rule without public and council review. Director’s rule adoption is for minor issues, not major impact issues such as these. We urge disclosure of all aspects and details being considered for shoreline restoration and mitigation rules including pricing of habitat units and equivalencies related to environmental effects.

We look forward to having our comments addressed and incorporated into the final draft.

Yours truly,

Jim Francis

Jim Francis

Vice President, Finance

Cc via email: Diane Sugimura, Director, DPD
Marshall Foster, Planning Director

From: Adrienne Brastad [mailto:abrastad@columbiawest.com]
Sent: Friday, December 23, 2011 10:27 AM
To: Glowacki, Margaret
Subject: 2nd Draft SMP's

Dear Maggie.,

Thank you for the additional time line for replying to the 2nd draft of the Shoreline Management Program (“SMP”). We understand that DPD has made great progress in many areas of the code for which we are most grateful.

The Lake Union Association, North Seattle Industrial Association, Northwest Marine Trade Association and the Port of Seattle have all written copious comments with which we agree and we would just like to voice our support of their letters, rather than inundating the City with duplicates of their responses.

In particular we are concerned that since the law and regulators do not favor nonconforming uses or nonconforming structures that the more code that is written, the more nonconforming uses and structures it captures; thus making it harder and more expensive for us to comply or plan for the future. We do urge you to have further discussions about this issue in particular.

Please note that I am no longer associated with Boatworld Marinas. I am now at Columbia West and included in my portfolio is Waterworks Marina (1818 Westlake Ave North). Thank you for your time and we look forward to your response.

Happy Holidays!

Adrienne Brastad
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From: mark nelson [mailto:marknelson88@hotmail.com]
Sent: Friday, December 23, 2011 2:15 PM
To: Glowacki, Margaret
Subject:

Dear Ms. Glowacki,

Thank you for the additional time line for replying to the second draft of the Shoreline Management Program. I'm very appreciative of all the progress that the DPD has made in many areas of the code.

The Lake Union Association, North Seattle Industrial Association, Northwest Marine Trade Association and the Port of Seattle have all provided considerable feedback on the latest draft; rather than add one more letter for you to read, I will just say that I agree with the content of that feedback. The Seattle Marine community is a close-knit one, and I think you will find many of the same concerns echoed throughout the letters that have already been provided to you.

Tillicum Marina, like many marinas in the area, is a small, family-run business. In these difficult economic times we need to have some latitude in how we operate if we are to survive. It is in that spirit that I request that you seriously consider the comments and suggestions of my cohorts, especially as they pertain to the Use of the property. A marina is by definition a water-dependent use. We value the lake and want to be good stewards of our environment. However, we need to balance that with the economic reality of running a business and maintaining our property. I believe that such a balance is not only possible, but beneficial for our community as a whole.

Thank you for your consideration.

Sincerely,

Mark Nelson
Tillicum Marina

From: Sam LeClercq [mailto:sleclercq@qwest.net]
Sent: Monday, December 26, 2011 12:47 PM
To: Glowacki, Margaret
Subject: Fw: Comments on 2011 Draft Shoreline Master Program

----- Original Message -----

From: Sam LeClercq
To: margret.glowacki@seattle.gov
Sent: Friday, December 23, 2011 4:36 PM
Subject: Comments on 2011 Draft Shoreline Master Program

Dear Ms Glowacki,

Thank you for the additional time line for replying to the second draft of the Shoreline Management Program. We understand the DPD has made great progress in many areas of the code for which we are grateful. But as a property owner of multiple properties on the Ship Canal and Lake Union I am still extremely concerned with the draft as it stands. I own in excess of 1,000 lineal feet of waterfront and over nine acres of land and employ directly or indirectly about 200 people on my properties. I am definitely a stake holder.

I am a member of and have worked with the Northwest Marine Trade Association, the Lake Union Association and the Seattle Yacht Club on First and Second Draft of the Shoreline Master Program. I have read comments from various property owners and groups, including the Port Of Seattle and the Lake Union Liveaboard Association,, and have concluded that the Second Draft is still a long way from acceptable in my view. Please study the comments from various stake holders and implement them in the new draft.

Of particular concern is the following;

1. Ecological mitigation
2. Nonconforming uses and nonconforming structures
3. Standards for specific uses
4. Screening of buildings used for boat storage
5. Public access
6. Repairing of creosote pilings
7. Standards for house barges/boats
8. Marina standards
9. Setbacks
10. View corridors

I urge you to continue to create a Third Draft for public comment, as many stake holders are still adversely and unjustly affected.

Sincerely,
Sam LeClercq
President, LeClercq Marine Const Inc. 1080 West Ewing St.
Manager, LeClercq Marine LLC. 1080 West Ewing St.
Manager, Nickerson Marina LLC. 1080 West Ewing Place
Manager, LeClercq LLC 2520 Westlake Ave N.
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