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July 16, 2014

Joe Burcar
Shoreline Planner
Shorelands & Environmental Assistance Program
Washington Dept. of Ecology - Northwest Region
3190 - 160th SE
Bellevue, WA 98008-5452

Michael Podowski
Department of Planning and Development
PO Box 94745
Seattle, WA 98124-4745

Re: City of Seattle Shoreline Master Program - DOE required change to SMC 23.60.382 and 23.60A.502

Dear Joe and Mike:

This is to follow up on my call to Joe. I represent Alexandria Real Estate Equities ("ARE"), which through subsidiaries owns what is popularly known as the Lake Union Steam Plant, HydroHouse, and property at 1165 Eastlake Ave. E. (Properties are shown on Ex. 1)

ARE is one of the world's largest providers of space to the biomedical research and development industry. The Lake Union Steam Plant is currently headquarters for Zymogenetics, a major biomedical R&D company. HydroHouse is currently occupied by Irwin's Café. 1165 Eastlake has a Master Use Permit (MUP) issued in 2010 to permit remodeling of the Gunn Building which is currently on the site and development of the remainder of the site with a new research/office building. The Lake Union Steam Plant and HydroHouse are designated Seattle Landmarks. The City's Department of Neighborhoods has concluded that the Gunn Building does not meet the criteria for designation as a City Landmark. In order to comply with the City's current seismic codes, ARE has determined that it will need to replace the pilings under the Gunn Building, and is currently seeking an amendment to its MUP to allow it to rebuild the Gunn from its foundations. ARE is negotiating with a potential tenant which would use the new building at 1165 Eastlake for office and biomedical research and development laboratories.

As can be seen from Exhibit 1, each of these properties is within the shoreline. The Lake Union Steam Plant and HydroHouse are within the Urban Maritime (UM) shoreline environment. The

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northeastern 10 feet of 1165 Eastlake is within the UM environment, but the bulk of the property is within Urban Stable (US) shoreline environment under the old shoreline master program and will be in the Urban Commercial (UC) shoreline environment under the new shoreline master program.

These three properties are unique – perhaps the only such properties in the City. The buildings on the property were built on piles, over water, in the first two decades of the 20th Century. Subsequently, the City constructed the Fairview Avenue Trestle to the west of the buildings, effectively cutting them off from the rest of Lake Union and making water-dependent use of the buildings impossible.[1] In DPD Code Interpretation No. 05-001 (Ex. 2) the City determined that the 1165 Eastlake Avenue East property is an "upland" lot under the City's shoreline master program and, that as a result, uses permitted on upland lots would be permitted on that property. ARE relied on Interpretation No. 05-001 in acquiring the 1165 Eastlake property, because its intended uses of the property – R&D laboratories and offices – would not be permitted on waterfront lots under the old shoreline master program.

In short, these three properties are both "upland" lots and have "overwater" development. The first draft of the new shoreline master program prohibited uses over water except as specifically allowed. It would have prohibited both the current uses of the Steam Plant and HydroHouse and the intended uses of portions of the 1165 Eastlake property within parts of the existing Gunn Building or its replacement. While the existing uses of the Steam Plant and HydroHouse would be vested, the code as originally drafted would have precluded future redevelopment that altered those uses.

In response to ARE's concerns, the City amended the draft shoreline master program to make clear that restrictions on over-water uses applied only to waterfront lots. See, Ex. 3 (excerpt of December 1, 2012 memo from Ketil Freeman to Councilmembers Conlin, Burgess, and O'Brien).

We are concerned that DOE's required changes 18-B and 25-B would once again potentially make the existing uses of the Steam Plant and HydroHouse and the intended uses of 1165 Eastlake not permitted uses.[2] While SMC 23.60A.383 provides that offices, research and

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[1] The one exception is that there is a small rowing club in the bottom story of HydroHouse. Rowers can access Lake Union under the Fairview Avenue trestle from HydroHouse because rowers are low enough to the water to pass under the trestle. There is no similar opportunity from either the Steam Plant or the Gunn Building on 1165 Eastlake, and the rowing club would not by itself make HydroHouse an economically viable property.

[2] The City made similar changes to 23.60A.402 (UG Environment) and 23.60A.482 (UI Environment), presumably to ensure that if there are any similar situations in those environments, they were also covered. ARE has no knowledge of a similar property that is both "upland" and developed "over water" in the UG or UI Environment, but

development laboratories and eating and drinking establishments are permitted uses on "upland" lots, SMC 23.60A.382.A.2.b as proposed to be amended, provides that "uses overwater are regulated in Section 23.60A.384." Section 23.60A.384.A would not permit office use, because the office use is not accessory to a "water-dependent or water-related use located on the same lot." Research and development is not a permitted use under either 23.60A.384 or 23.60A.090.

We do not believe anyone intends to either prohibit the existing uses of the Steam Plant and HydroHouse or the intended use of the 1165 Eastlake property. We believe the solution is to amend the proposed change to SMC 23.60A.382.A.2.b to say:

b. Uses overwater on waterfront lots are regulated in Section 23.60A.384.

There may be other solutions that would equally avoid placing a cloud over the permitted uses of these three unique properties. I would be happy to discuss this issue with you further. I would urge DOE and the City to agree on a fix for this problem, however, that leaves the three "upland" but "overwater" parcels available for the full range of permitted upland uses.

Thank you for your consideration of this issue.

Sincerely,

GRAHAM & DUNN PC

Elaine L. Spencer

ELS/hr
Enclosures
cc: Esther Handy (w/ Encl)
Maggie Glowacki (w/Encl)
Ketil Freeman (w/Encl)
John Cox (w/o Encl)
Jackie Clem (w/o Encl)
m39547-2198681.docx

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there may be one. DOE's required changes 21-B and 23-B are subject to the same objection as ARE is raising regarding changes 18-B and 25-B.

EXHIBIT 1

Exhibit 1

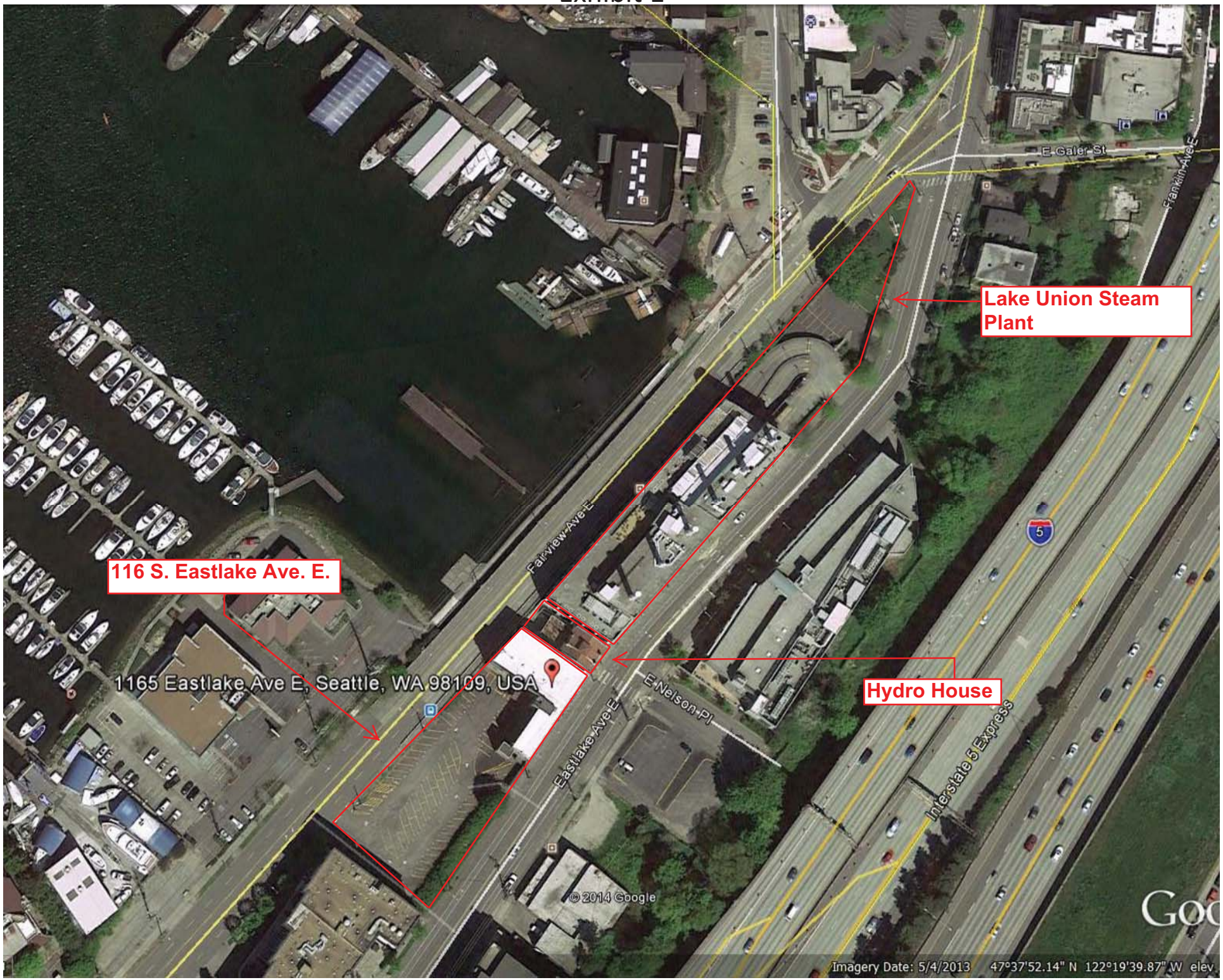
Lake Union Steam Plant
116 S. Eastlake Ave. E.
1165 Eastlake Ave E, Seattle, WA 98109, USA
Hydro House
E Galer St
Franklin Ave E
Fairview Ave E
E Nelson Pl
Eastlake Ave E
Interstate 5 Express
5
© 2014 Google
Imagery Date: 5/4/2013 47°37'52.14" N 122°19'39.87" W elev

EXHIBIT 2

Exhibit 2

INTERPRETATION OF THE DIRECTOR
PURSUANT TO SEATTLE MUNICIPAL CODE TITLE 23

Regarding the Use of the

Property at

1165 Eastlake Avenue East

DPD Interpretation No. 05-001

(Project No. 2502275)

Background

This interpretation was requested by attorney Brent Carson of Buck & Gordon, on behalf of a client who is under contract to purchase the subject property. The issue raised is whether the property qualifies as an "upland lot" rather than a "waterfront lot" for purposes of the Seattle Shoreline Master Program, codified at Chapter 23.60 of the Seattle Municipal Code. In general, use and development regulations for waterfront lots are more restrictive than that apply to upland lots. At Mr. Carson's request, notice of this request for interpretation was mailed to the owners and residents of all properties within 300 feet, approximately 160 recipients.

Findings of Fact

1. The property at 1165 Eastlake Avenue East consists of Lots 3 through 7, Block 11, East Park Addition, and Lots 15 through 19, Block 68, Lake Union Shore Lands. This property, King County Assessor's Parcel No. 216390-0955, has an area of approximately 33,000 square feet, according to the Assessor's estimate. Approximately ¼ of the property, at its northeastern edge, is developed with a structure, the Gunn Building, built in 1909. The remainder of the property is in use as surface parking. The property extends from Eastlake Avenue East to Fairview Avenue East, with approximately 300 feet of frontage on each of those rights-of-way. Most of the site is in a C2-65 zone (Commercial-2, subject to a 65-foot height limit) and about ¾ of the property is within the Shoreline Overlay District. (The southwest ¼ of the property, more or less, is outside of the Shoreline District.) The portion within the Shoreline District is predominantly within a US (Urban Stable) shoreline environment. A strip of the property, approximately 7 feet wide along the northeast property line, is in a UM (Urban Maritime) shoreline environment and an IC-45 (Industrial/Commercial) zone.

2. The City's GIS (computer) mapping system shows the water's edge as in or under the Fairview Avenue North right-of-way, approximately 10 feet from the lot line

of the property at 1165 Eastlake Avenue East and the adjacent Zymogenetics property to the northeast, the former steam plant, at 1241 Eastlake Avenue East. The Zymogenetics property is within the UM shoreline environment and the IC-45 zone. The structures on both properties extend to the margin of the Fairview Avenue North right-of-way. When visiting the site, a DPD staff member observed that the water actually extends to the foundations of the buildings on these two sites. The Fairview Avenue North roadway is elevated and built on piles. The DPD staff member observed that there is approximately 8 feet of clearance between the surface of the water and the roadway above.

3. For purposes of Seattle's Shoreline Master Program, "waterfront lot" is defined, at Seattle Municipal Code Section 23.60.924, as:

> **a lot any portion of which is offshore of or abuts upon the ordinary high water mark or mean high water mark and any other lot or parcel partially or entirely within the Shoreline District which is not separated as of March 17, 1977, from the water by a street, arterial, highway, railroad right-of-way, or government-owned or controlled property which prevents access to and use of the water. Vacation or relocation of a legal right-of-way after March 17, 1977, shall convert a lot which was an upland lot because of the existence of such right-of-way into a waterfront lot. For purposes of determining the appropriate use and development standards applicable to developments in railroad or street rights-of-way, the railroad or street right-of-way shall be considered to be a waterfront lot unless separated from the water by another railroad or street right-of-way.**

4. "Upland lot" is defined, in the same code section, as:

> **a lot wholly or partly within the shoreline district which is separated as of March 17, 1977, from the water by a street, arterial, highway, railroad right-of-way or government-controlled property which prevents access to and use of the water.**

5. Uses permitted on waterfront lots are listed in Section 23.60.600. Non-water-related commercial uses, such as most retail businesses, restaurants and entertainment uses, are only permitted if certain amenities are provided, in addition to "regulated public access." Qualifying amenities, listed at Section 23.60.600 C2, include facilities for moorage or reconstruction of historic vessels, terminal facilities for cruise ships, harbor tour boats or foot passenger ferries, moorage for commercial fishing vessels, facilities for a maritime museum or waterfront interpretive center, saltwater moorage for recreational vessels, a major public open space with walkways benches and picnic tables along the water frontage, or "other facilities or amenities similar to those listed above which provide an opportunity for substantial numbers of people to enjoy the shoreline, when approved by the Director."

6. Uses prohibited on waterfront lots in the US environment are listed at Section 23.60.606. (Among the prohibited uses are research and development laboratories and ground-level offices in the Lake Union area.)

7. Uses permitted on upland lots in the US environment are listed at Section 23.60.608. Non-water-dependent uses such as restaurants and entertainment uses, allowed on waterfront lots only with the provision of qualifying amenities, are permitted outright on upland lots, without those amenities. Many other commercial uses, such as research and development laboratories and ground-level offices in the Lake Union area, are listed as permitted uses.

8. Standards for regulated public access are found at Section 23.60.160. The objective, as stated in that section, is to provide view and/or physical approach to public waters by the public. The minimum regulated public access consists of a walkway to a waterfront use area or an area where the water and water activities can be observed. "There shall be no significant blockage of the view from this viewpoint." The code provision does provide an exception, at Section 23.60.160 H 3 b (4), where public access "cannot be developed to satisfy the public interest in providing a recreational, historical, cultural, scientific or educational opportunity or view."

9. In Seattle's Comprehensive Plan, goal LG89 for the shoreline is to "locate all non-water-dependent uses upland to optimize shoreline use and access." A "non-water-dependent use," by definition at Section 23.60.928, is a use that "is not water-dependent or water-related in that access to the water or to water-dependent uses is not required for its operation, even if the aesthetics of a waterfront location may increase profitability...."

10. Among the "area objectives" listed in the Comprehensive Plan, for Lake Union and Portage Bay, are:
    - Retain the working character of Lake Union by reserving those areas of the lake's shorelines that are suitable for water-dependent uses for the use of marine businesses....
    - Allow a greater mix of uses, including non-water-dependent uses providing public access, in those areas that are not being preserved for water-dependent uses.
    - Provide a maximum amount of public access in locations that do not conflict with water-dependent manufacturing uses.
    - Provide for some open water and protect views of the Lake and Bay....

11. In 1992, under Project No. 9206301 and Permit No. 666842, the use of the first floor of the building at 1165 Eastlake Avenue East was changed from school and administrative offices to indoor participant sports and recreation, an entertainment use. This project did not include a shoreline conditional use component, as would be required under Section 23.60.122 D to convert one nonconforming use to another use not otherwise permitted in a shoreline environment. There is no record that any of the amenities listed in Section 23.60.600 C 2 were provided, as would normally be required for a new entertainment use on a waterfront lot in a US shoreline environment.

12. Also in 1992, under Project No. 9203369 and Permit No. 667403, research and development laboratory use was established in the neighboring building at 1241 Eastlake Avenue East. The MUP decision approving that use stated in part:

> **This property is within the Industrial Commercial (IC 45') zone and the Urban Maritime (UM) shoreline environment. The Steam Plant structure is constructed partially over the waters of Lake Union. This property is unique in that although it fronts on Lake Union and is partially over water, it is an upland lot because Fairview Avenue East is located between the Steam Plant and the open waters of Lake Union.**

Conclusions

1. The subject property has some qualities both of waterfront and upland lots, in that it abuts the waters of Lake Union, and yet is effectively separated from the lake by the intervening roadway.

2. For waterfront properties, Seattle's Shoreline Master Program and Seattle's Comprehensive Plan favor uses that provide public access to the water, or uses that by their nature require access to the water for their operation. In this case, the location of the Fairview Avenue roadway blocks both visual and physical access for the public, and also precludes the sort of access that would be needed for effective operation of water-dependent uses. For example, the lack of overhead clearance would preclude moorage activities adjacent to the site, even if such activities were approved in the right-of-way, under the road, by the Seattle Department of Transportation. It also would not be feasible, for example, to provide any of the amenities listed in Section 23.60.600 C2, or any of the features of regulated public access listed in Section 23.60.160, due to the intervening arterial.

3. In short, due to the intervening elevated roadway, the property in question is not suited for the uses favored for waterfront lots in the US shoreline environment on Lake Union. Rather, its relationship to the lake is functionally the same as any other upland lot, physically separated from the lake by a right-of-way.

4. In previous projects, both at 1165 Eastlake Avenue East and on the neighboring property, similarly situated with respect to the lake and the Fairview Avenue North roadway, the properties were regulated as upland lots rather than waterfront lots, based on this reasoning.

Precedent!

Decision

For purposes of the use and development standards of Seattle's Shoreline Master Program, the property at 1165 Eastlake Avenue East is an upland lot rather than a waterfront lot.

Entered this ____ day of June, 2005.

_____

Andrew S. McKim
Land Use Planner – Supervisor

EXHIBIT 3

Exhibit 3

Legislative Department
Seattle City Council
Memorandum

Date: December1, 2012

To: Richard Conlin, Chair
Tim Burgess, Vice Chair
Mike O'Brien, Member
Planning, Land Use and Sustainability (PLUS) Committee

From: Ketil Freeman, Council Central Staff

Subject: Council Bill 117585 – Shoreline Master Program Update

Introduction:

The Shoreline Management Act (SMA) was enacted in 1972 and establishes three policy focus areas: 1) preservation of the shoreline for preferred uses, such as water-dependent and water-related commercial and industrial uses; 2) environmental protection and; 3) public access to the shoreline. Jurisdictions, like Seattle, containing state shorelines are required to adopt and periodically update Shoreline Master Programs (SMPs) to implement the policies of the SMA. Seattle last updated its SMP in 1987.

Council Bill 117585 contains the proposed SMP update. The SMP update is comprised of the following: land use regulations that apply in an overlay zone for the shoreline; land use regulations for shoreline-related environmentally critical areas; shoreline goals and policies adopted into the Land Use Element of the Comprehensive Plan; and a non-regulatory Shoreline Restoration and Enhancement Plan.

This memo:

- Identifies the content of a second substitute bill and
- Sets out amendment language for clarifying and substantive amendments.

Second Substitute Council Bill:

Staff has prepared a second substitute bill that makes non-substantive changes to C.B. 117585, as amended on October 26th. Changes include corrected spelling, punctuation, and cross-references; section renumbering; and other changes that do not change the effect or intent of proposed regulations or Comprehensive Plan goals and policies. Changes are in a redlined line-in / line-out format.

Moving a substitute will give the Committee a cleaner base bill for future amendments.

Next Steps:

On December 12th the Committee will discuss and vote on any amendments related to the suite of issues associated with residential uses over water and take up the remainder of issues not discussed on December 3rd.

#	General Issue	Amendment Motion/ Vote	Discussion	Proposed Amendment
				Shoreline Uses
1.	SMA use preferences and non water-dependent and water-related (WD/WR) uses in the shoreline.		Zymogenetics, a business that is in the unique situation of being both overwater but not a waterfront lot due the separation of Fairview Avenue, noted that strict interpretation of the proposed SMP could preclude their use from continuing as a conforming use. Zymogenetics is located in an Urban Maritime (UM) Environment. The proposed amendment clarifies that overwater restrictions are for uses on waterfront lots. To ensure that the proposed amendment would apply to other similarly situated properties, the amendment further clarifies that restrictions in the use tables for the Urban Commercial (UC), Urban General (UG), Urban Industrial (UI) and UM Environments apply to waterfront lots.	**23.60A.090 Identification of principal and accessory uses** A. In all shoreline environments all uses <u>on waterfront lots</u> are prohibited over water as a principal or accessory use unless the use is allowed or allowed as a special use, a shoreline conditional use or a Council conditional use in the shoreline environment where the use is proposed and the use is: **23.60A.382 Uses in the UC Environment** A. Use regulations 1. All uses are allowed, allowed as a special use, allowed as a shoreline conditional use or prohibited pursuant to Section 23.60A.090, this Section 23.60A.382 and Table A for 23.60A.382, and Section 23.60A.384. Use categories and subcategories cover all uses in that category and subcategory except when a subcategory of that use is specifically shown in Table A for 23.60A.382. 2. <u>Table A and water-dependent and water-related uses</u> <u>a. Table A and subsections 23.60A.382.C through H apply to waterfront lots.</u> <u>b.</u> If Table A for 23.60A.382 or text of Section 23.60A.382 or Section 23.60A.384 states that a use is required to be water-dependent or water-related, a use that does not have the required attribute is prohibited. 3. Regulations for specific shoreline modifications are set out in Sections 23.60A.172 through 23.60A.190. *** C. Limited commercial uses 1. The following uses are prohibited((~~-on waterfront lots~~)), except they are allowed if water-oriented or if the requirements of subsections 23.60A.382.C.2 through 23.60A.382.C.5 are met: 4. Development that includes any of the uses listed in subsection 23.60A.382.C.1 that is not water-oriented shall be in a development that includes a water-dependent use that occupies an area equal to 50 percent of the surface of the site and complies with one of the following conditions or a combination of conditions if the Director determines the combination would achieve a similar offset for siting a use that is not water-oriented((~~-on a waterfront lot~~)): D. Artist studio/dwellings, multifamily structures, and single-family dwelling units 1. Existing artist studio/dwellings, multifamily structures, and single-family dwelling units located on dry land are allowed((~~-on waterfront lots~~)) if there is no increase in the number of units. 4. New or expanded artist studio/dwellings, multifamily structures, and single-family dwelling units on dry land ((~~on waterfront lots~~)) are allowed as a shoreline conditional use if: c. The use is on a lot developed with or on a lot abutting another lot developed with a residential use((~~-on waterfront lots~~)) other than a caretaker's quarters; and E. Location of uses 1. If an office use is allowed((~~-on a waterfront lot~~)) only above the lowest floor level of the structure no more than 50 percent of the lowest floor level of the structure shall be occupied by required parking for uses in the building; F. New floating homes and floating home moorages are prohibited except as allowed under Section 23.60A.202. Uses accessory to floating homes, including storage, are allowed((~~-on waterfront lots~~)) if located 35 feet or more waterward from the OHW mark. **23.60A.402 Uses in the UG Environment** A. Use regulations 1. All uses are allowed, allowed as a special use, allowed as a shoreline conditional use or prohibited pursuant to Section 23.60A.090, this Section 23.60A.402 and Table A for 23.60A.402. Use categories and subcategories cover all uses in that category and subcategory except when a subcategory of that use is specifically shown in Table A for 23.60A.402. 2. <u>Table A and water-dependent and water-related uses</u> <u>a. Table A and subsections 23.60A.402.C through F apply to waterfront lots.</u> <u>b.</u> If Table A for 23.60A.402 or text of Section 23.60A.402 or 23.60A.404 states that a use is required to be water-dependent or water-related, a use that does not have the required attribute is prohibited. **23.60A.482 Uses in the UI Environment**

#	General Issue	Amendment Motion/ Vote	Discussion	Proposed Amendment
				A. Use regulations 1. All uses are allowed, allowed as a special use, allowed as a shoreline conditional use or prohibited pursuant to Section 23.60A.090, this Section 23.60A.482 and Table A for 23.60A.482 and Section 23.60A.484. Use categories and subcategories cover all uses in that category and subcategory except when a subcategory of that use is specifically shown in Table A for 23.60A.482. 2. Table A and water-dependent and water-related uses a. Table A and subsections 23.60A.482.C through J apply to waterfront lots. b. If Table A for 23.60A.482 or text of Section 23.60A.482 states that a use is required to be water-dependent or water-related, a use that does not have the required attribute is prohibited. 3. Regulations for specific shoreline modifications are set out in Sections 23.60A.172 through 23.60A.190. *** **23.60A.502 Uses in the UM Environment** A. Use regulations 1. All uses are allowed, allowed as a special use, allowed as a shoreline conditional use or prohibited pursuant to Section 23.60A.090, this Section 23.60A.502 and Table A for 23.60A.502 and Section 23.60A.504. Use categories and subcategories cover all uses in that category and subcategory except when a subcategory of that use is specifically shown in Table A for 23.60A.502. 2. Table A and water-dependent and water-related uses a. Table A and subsections 23.60A.502.C through H apply to waterfront lots. b. If Table A for 23.60A.502 or text of Section 23.60A.502 or Section 23.60A.504 states that a use is required to be water-dependent or water-related, a use that does not have the required attribute is prohibited. 3. Regulations for specific shoreline modifications are set out in Sections 23.60A.172 through 23.60A.190.
2.	Offset requirements for establishing or maintaining non-preferred uses in the shoreline.		The state *Master Program Guidelines* indicate that jurisdictions should prohibit non-water oriented commercial uses from locating in the shoreline unless they provide a significant benefit relative to an SMA policy. See generally WAC 173-26-241. The proposed SMP would allow some non-water dependent uses to locate or remain in the shoreline if certain conditions are met including the SMA benefit of ecological restoration within one mile of the site of an area equal to the use in the shoreline. In Committee discussions this has been referred to as the "offset." The Lake Union Association and counsel for several property owners and	**23.60A.224 Uses in the CM Environment** *** C. Certain commercial uses 2. The uses in subsection 23.60A.224.C.1 are allowed in existing buildings within designated historic districts if: a. The use is water-oriented; or b. The use is nonwater-oriented, a water-dependent use occupying a minimum of 25 percent of the gross floor area of the building in the Shoreline District is operated on the site and ecological restoration equivalent to the area occupied by any nonwater-oriented use is provided in the Shoreline District within ((~~1 mile of~~))the same geographic area as the site. D. Meeting rooms, offices and storage are prohibited, except these uses are allowed in existing buildings within designated historic districts if: 2. A water-dependent use occupying a minimum of 25 percent of the gross floor area of the building in the Shoreline District is operated on the site and ecological restoration equivalent to the gross floor area of any nonwater oriented is provided within the Shoreline District within ((~~one mile of~~))the same geographic area as the site. **23.60A.382 Uses in the UC Environment** *** B. Certain commercial uses 3. If the use in subsection 23.60A.282.B.1 is nonwater-oriented, it is allowed as a shoreline conditional use if a water-dependent uses must occupy an area equal to 50 percent of the surface area of the site, and ecological restoration equivalent to the gross floor area of nonwater-oriented uses is ((~~required~~))provided within the Shoreline District within ((~~1 mile of~~))the same geographic area as the site. **23.60A.390 Shoreline setbacks in the UC Environment** *** D. Existing structures that would be considered nonconforming because they are located in the required shoreline setback in the UC Environment are not regulated as a nonconforming structures based on setback standards. Such structures may not be expanded in any manner in the setback but may be replaced if an area of ecological restoration equivalent to the footprint of the structure located in the shoreline setback within the Shoreline District within ((~~one mile of~~))the same geographic area as the site is provided.