



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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September 24, 2008

The Honorable Carl Weimer, Chairman  
Whatcom County Council  
311 Grand Avenue, Suite 105  
Bellingham, WA 98225-4038

Re: Whatcom County Shoreline Master Program Comprehensive Amendment  
(Ordinance # 2007-017 – Proposed Revisions)

Dear Chairman Weimer:

Having participated in the recent hearing and related efforts to bring the subject ordinance into conformance with the approved Shoreline Master Program (SMP) dated August 8, 2008, I would like to address several issues that were raised and the related controversy.

First, let me thank you for the county's continued partnership with the Washington Department of Ecology. We appreciate the collaborative approach the county used with state, local and federal governments, tribes, farmers, builders and environmental groups in developing the state's first countywide SMP update. The result is exceptional in terms of the process, the broad-based approval and the new rules themselves. Governments throughout the state can look to Whatcom County for guidance on how to do it right.

After years of working cooperatively and openly with you and various groups, we found it surprising and unfortunate that two groups that were engaged throughout the process of updating both the Critical Areas Ordinance and Shoreline Master Program chose to publicly attack minor parts of the SMP. The result of their approach was to needlessly stir up anxiety and fear among the county's shoreline property owners. We are disappointed that they failed to raise their questions about the intent or meaning of the specific SMP language with county and state staff for discussion and resolution during the review process, especially for their objections to language that had been in the draft document for at least one to three years.

We welcome the opportunity to clarify language in the SMP to improve it further, and we sincerely hope that these groups will again join the rest of the partners as we move together to implementation.



The changes required by our department to bring the SMP into compliance with the Shoreline Management Act, Chapter 90.58 RCW, and to implement the Washington Administrative Code (WAC) appear to be the focus of controversy. However, we note that one of the primary objections to the new SMP provisions is centered on Ch 23.50.07(F), *Non-conforming Development*, language that remained unchanged throughout the long county process and was not affected by our department's required revisions. The subject provision states:

Non-conforming structures that are destroyed by fire, explosion, flood, or other casualty may be restored or replaced in kind if there is no feasible alternative that allows for compliance with the provisions of this Program; provided that, the following are met:

1. The reconstruction process is commenced within eighteen (18) months of the date of such damage; and
2. The reconstruction does not expand, enlarge, or otherwise increase the non-conformity, except as provided for in subsection (E) above or (H) and (I) below" [underlining added]

The concern repeatedly expressed at the September 9 ordinance hearing was that a single-family residence could not be rebuilt in the same location if it burned down or was otherwise destroyed by some calamity. County staff and I clearly stated at the hearing that was not, and has never been the intent of this provision. We pointed out that single-family residences are a priority, conforming use under the SMP and can be rebuilt in the same location in conformance with the other provisions of the same chapter. For *non-conforming structures*, section I referenced above states:

Enlargement or expansion of single family residences by the addition of space to the main structure or by the addition of normal appurtenances as defined in Chapter 11 that would increase the non-conformity and/or encroach further into areas where new structures or developments would not now be allowed under the Program may be approved by conditional use permit if all of the following criteria are met:

1. The structure must be located landward of the ordinary high water mark.
2. The enlargement, expansion or addition shall not extend either further waterward than the existing structure, further into the minimum side yard setback, or further into any critical area established by WCC 16.16 than the existing structure. Encroachments that extend waterward or further into a critical area, or the minimum required side yard setback require a variance.
3. The area between the non-conforming structure and the shoreline and/or critical area shall meet the vegetation conservation standards of SMP 23.90.06.

4. The remodel or expansion will not cause adverse impacts to shoreline ecological functions and/or processes.

In addition to allowing a residence to be rebuilt, this provision clearly also allows expansion of an existing residence on either side, away from the water, or vertically. The exception would be if an overriding public safety, health or welfare concern came into play, such as a landslide hazard or hazardous floodway location. In addition, Ch 23.60.02.2B, *Exemptions Listed*, also allows the rebuilding of a single-family residence damaged by fire or the elements unless there is an overriding public safety, health or welfare concern:

Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. Normal maintenance includes those usual acts to prevent a decline, lapse or cessation from a lawfully established condition. Normal repair means to restore a development to a state comparable to its original condition within a reasonable period after decay or partial destruction except where repair causes substantial adverse effects to the shoreline resource or environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or the environment. [underlining added]

Admittedly, the SMP and CAO are complex documents that address a diverse array of situations and land use activities. The provisions of the approved SMP with its integrated sections from the CAO need to be read in a comprehensive and interrelated manner. Should the county seek to clarify the intent of this or any other provision, state law at WAC 173-26-140, *Shoreline master program administrative interpretation*, provides a mechanism to do so in consultation with Ecology without undergoing a formal SMP amendment.

Due to the controversy generated, the non-conforming structure provisions and how they relate to single-family residences may be one area that would benefit from such additional clarity. It is customary for local jurisdictions to use their new programs for a while and eventually package a number of minor potential amendments for a formal SMP amendment "code scrub" submittal. We would expect such a submittal from Whatcom County.

A second regulation that drew considerable attention from the audience at the ordinance hearing concerned vacant non-conforming lots (less than 20,000 square feet) that lacked an adequate building area after application of the new requirements for setback and buffers. Ch 23.50.07 (K) reads:

New single family development on non-conforming lots consisting of property under contiguous ownership less than 20,000 square feet in size and not subject to landslide hazard areas, alluvial fan hazard areas, or riverine and coastal erosion hazard areas or associated buffers as provided in WCC 16.16.310 may be allowed without a variance in accordance with the following criteria:

1. Non-conforming lots with a building area of 2,500 square feet or more available for a single family residence and normal appurtenances and unrestricted by setbacks or buffers from shorelines or critical areas shall comply with the provisions of this Program. The building area means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping.
2. Non-conforming lots that do not meet the requirement of subsection K.1 above shall provide the maximum setback and buffer dimension feasible while providing for a building area of not more than 2,500 square feet on the portion of the lot farthest from the required setback or buffer." [underlining added]

Our department required the above underlined clause replace the original language "...of at least 2,500 square feet..." to be consistent with item 1 when read together. The effect of the change is to ensure a 2,500 square feet building area is allowed regardless of the setback and buffers. For these small non-conforming lots, a shoreward building area larger than 2,500 square feet would require a shoreline variance, as the document explains in the preceding section I.

Finally, our department pointed out the need for a minor change in the section about public access requirements for public entities in Ch 23.90.08, *Public Access*. This change is necessary to comply with several state rules including WAC 173-26-221(4)(dii):

Require that shoreline development by public entities, including local government, port districts, state agencies, and public utilities, include public access measures as part of each development project, unless such access is shown to be incompatible due to reason of safety, security, or impact to the shoreline environment. [underlining added]

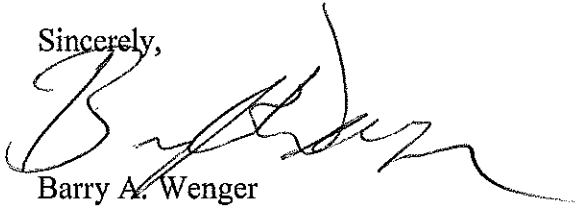
Public-funded projects on public lands are a special case in contrast to private lands. In all instances of development on private property, the requirement for public access continues to recognize all relevant constitutional and other legal limitations on the regulation of private property, including the mandatory "nexus and proportionality" tests as referenced in the SMP, Ch 23.50.08 and Ch 23.10.03.

Again, I would like to take this opportunity to commend Whatcom County for its efforts in developing the proposed Shoreline Master Program amendment. It is consistent not only with the needs of the county, but also with the policy and procedural requirements of the Shoreline Management Act and the Shoreline Master Program Guidelines.

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If you have any questions, please don't hesitate to contact me at 360-715-5220 or  
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Sincerely,



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Senior Environmental Planner

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