

Non-Conforming Development

Considerations for Shoreline Master Program Updates



Wash State Supreme Court
Rhod-a-zalea v. Snohomish County

“While some states’ authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington’s enabling acts are silent regarding the regulation of nonconforming uses.”

“Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution.” (emphasis added)

SMA LEGAL CONCEPT

"Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

WAC 173-27-080 EXAMPLE

- **WAC 173-27-080 Nonconforming use and development standards.** When nonconforming use and development standards do not exist in the applicable master program, the following definitions and standards shall apply:
 - (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.
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 - (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.

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USES AND/OR STRUCTURES

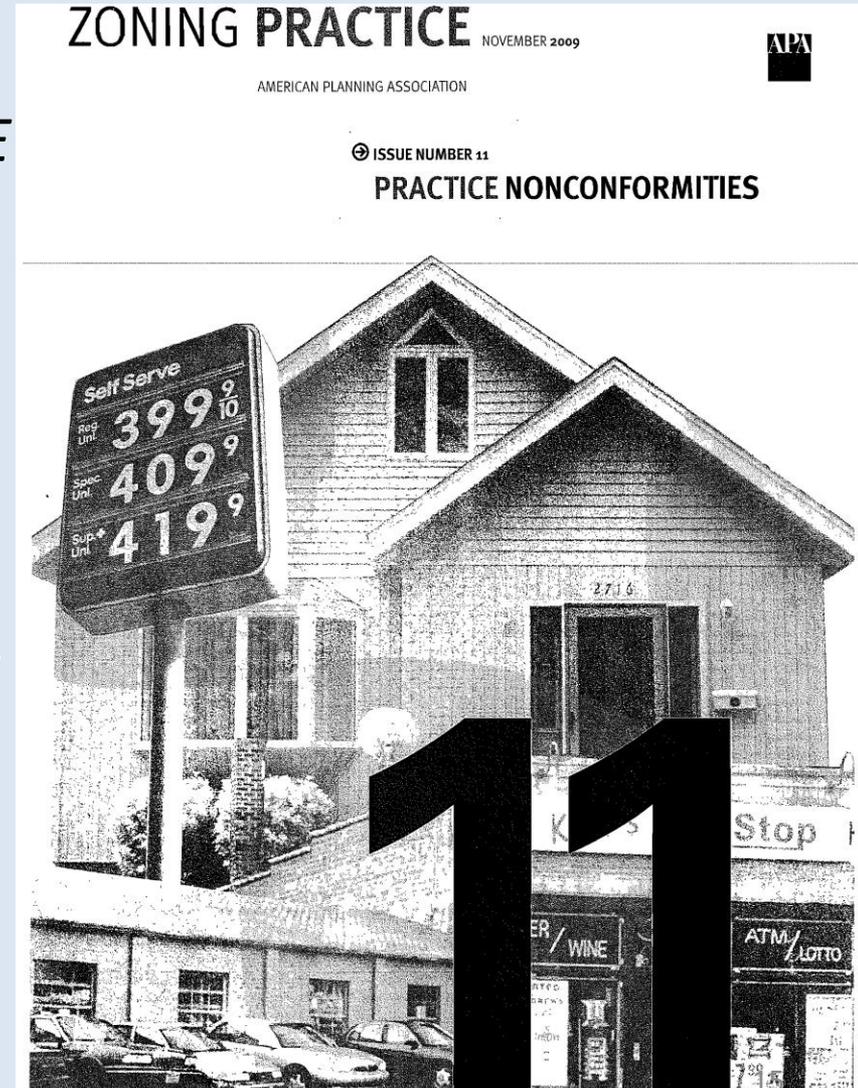
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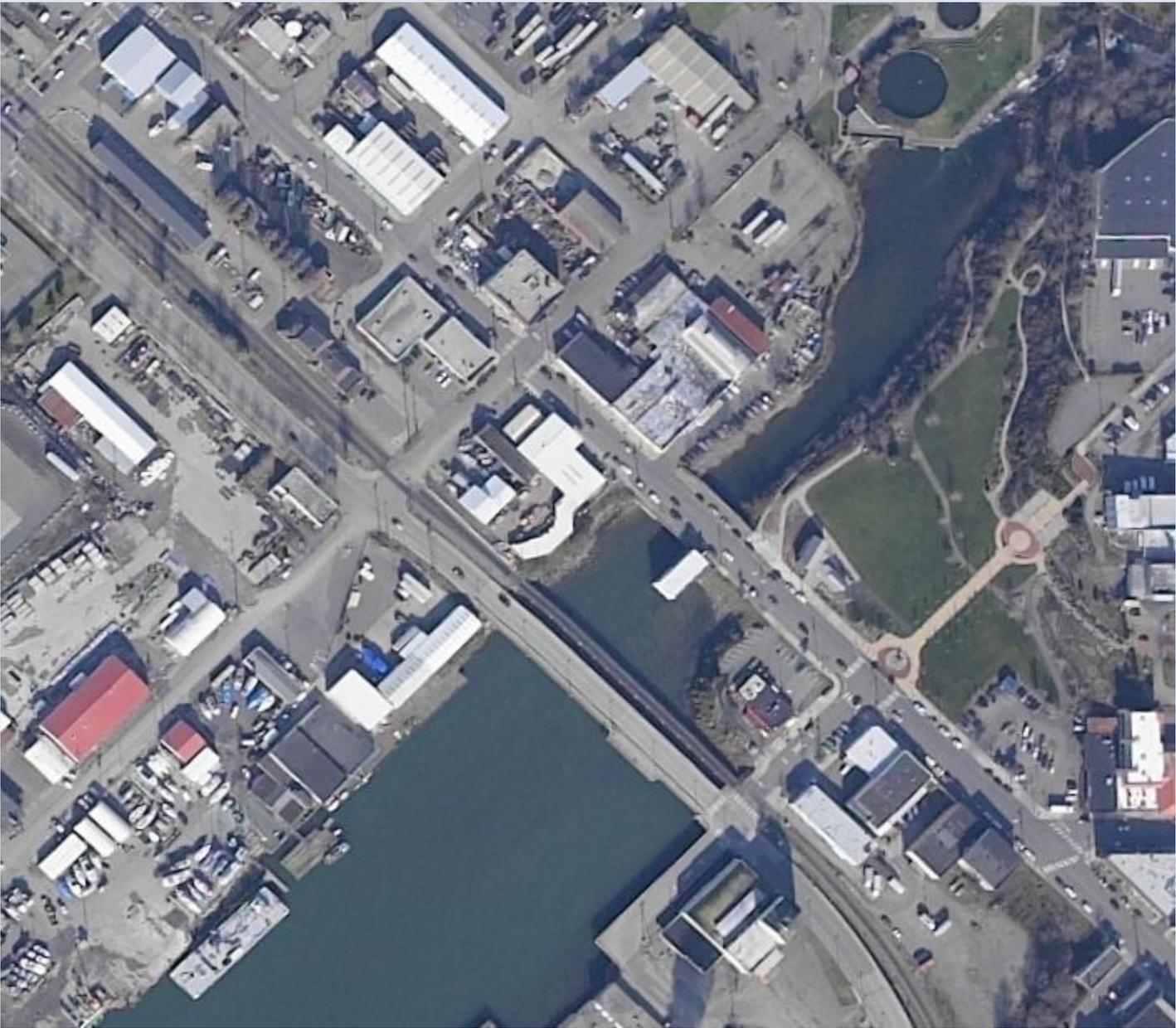
Distinguishing Between Detrimental and Benign Nonconformities

- By V.Gail Easley and David A. Theriaque
- *REGULATIONS ROUTINELY CHANGE OVERTIME*
- *ZONING BASIS*
- *GRANDFATHERED OR NOT?*
- *USES AND STRUCTURES*
- *DETRIMENTAL OR BENIGN*
- *APPROACHES:*
 - *PROHIBITING/LIMITING EXPANSION*
 - *ABANDONMENT*
 - *DAMAGE/REBUILDING LIMITS*
 - *AMORTIZING*
 - *LAW CHANGE – MIXED DEVELOPMENT/URBAN VIILLAGE*





Whatcom Waterway – Heavy Industrial Conversion to Water-Oriented and Mixed Use



Whatcom Waterway



Whatcom Waterway



Whatcom Waterway



Whatcom Waterway





Whatcom
Waterway













Whatcom Waterway

Squalicum Estuary





Squalicum Estuary



Squalicum Estuary





•Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act; provided that, non-conforming single family residences may be expanded without a variance where the provisions of SMP 23.50.07.I apply and, provided further, that non-conforming structures with conforming uses within commercial or mixed-use developments may be expanded or enlarged within the existing building footprint as a conditional use pursuant to Ch 23.100.05.B1(e).

010524-113412





Birch Bay



Birch Bay

SINGLE-FAMILY RESIDENTIAL

State Policy Enunciated

- This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life...”
- “Priority Use” under SMA - RCW 90.58.020 together with water-oriented uses.
- “...shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area...”

NO NET LOSS OF ECOLOGICAL FUNCTIONS

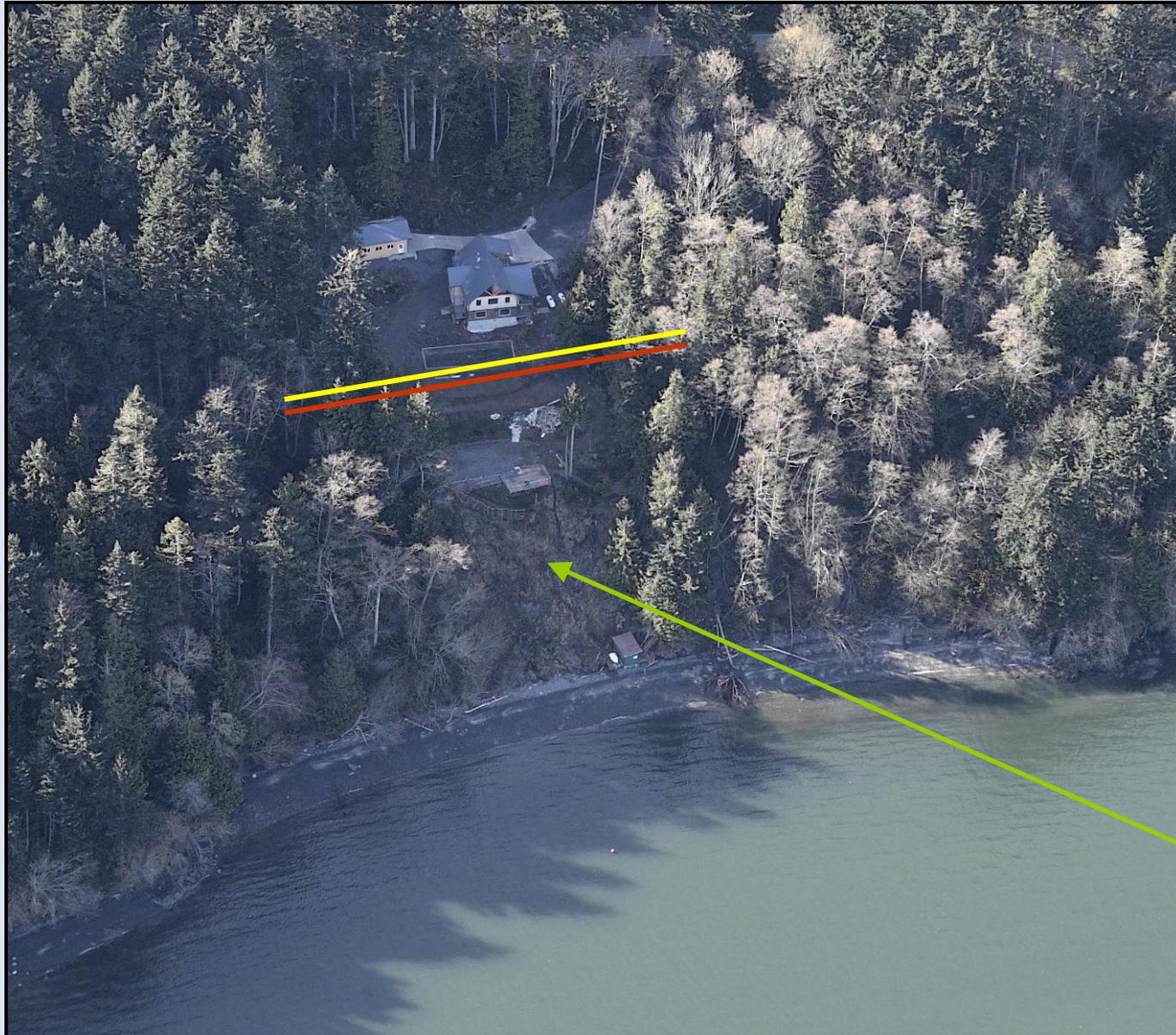
- Hydrologic: Transporting and stabilizing sediment, attenuating wave and tidal energy, removing excessive nutrients and toxic compounds; recruitment, redistribution and reduction of woody debris and other organic material.
- Vegetation: Maintaining temperature; removing excessive nutrients and toxic compound, attenuating wave energy, sediment removal and stabilization; and providing woody debris and other organic matter.
- Habitat for aquatic and shoreline-dependent birds, invertebrates, mammals; amphibians; and anadromous and resident native fish: Habitat functions may include, but are not limited to, space or conditions for reproduction, resting, hiding and migration; and food production and delivery.



SETBACKS AND BUFFERS (key points)

- Same Buffers for CAO & SMP
 - Streams: 150 feet / 100 ft / 50 ft
 - Lakes: 100 feet (all from OHWM)
 - Marine: 150 feet

Flexibility through 5 mechanisms



- 150 ft Marine Buffer (red line)

- 10 ft setback (yellow line)

- House in compliance

- Lower road and clearing within buffer is non-comforming

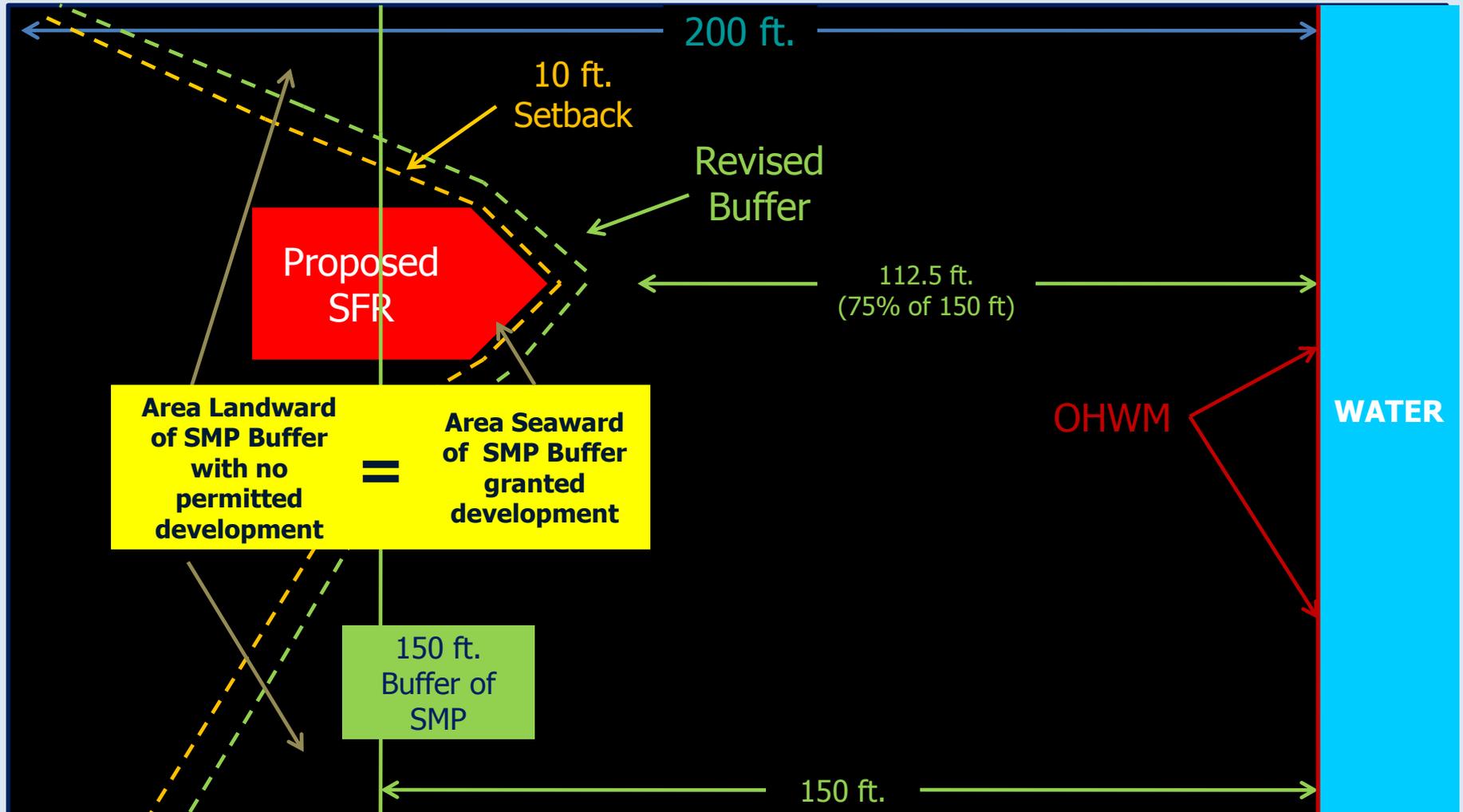
- Slope below stripped of vegetation and destabilized

Buffer Adjustments

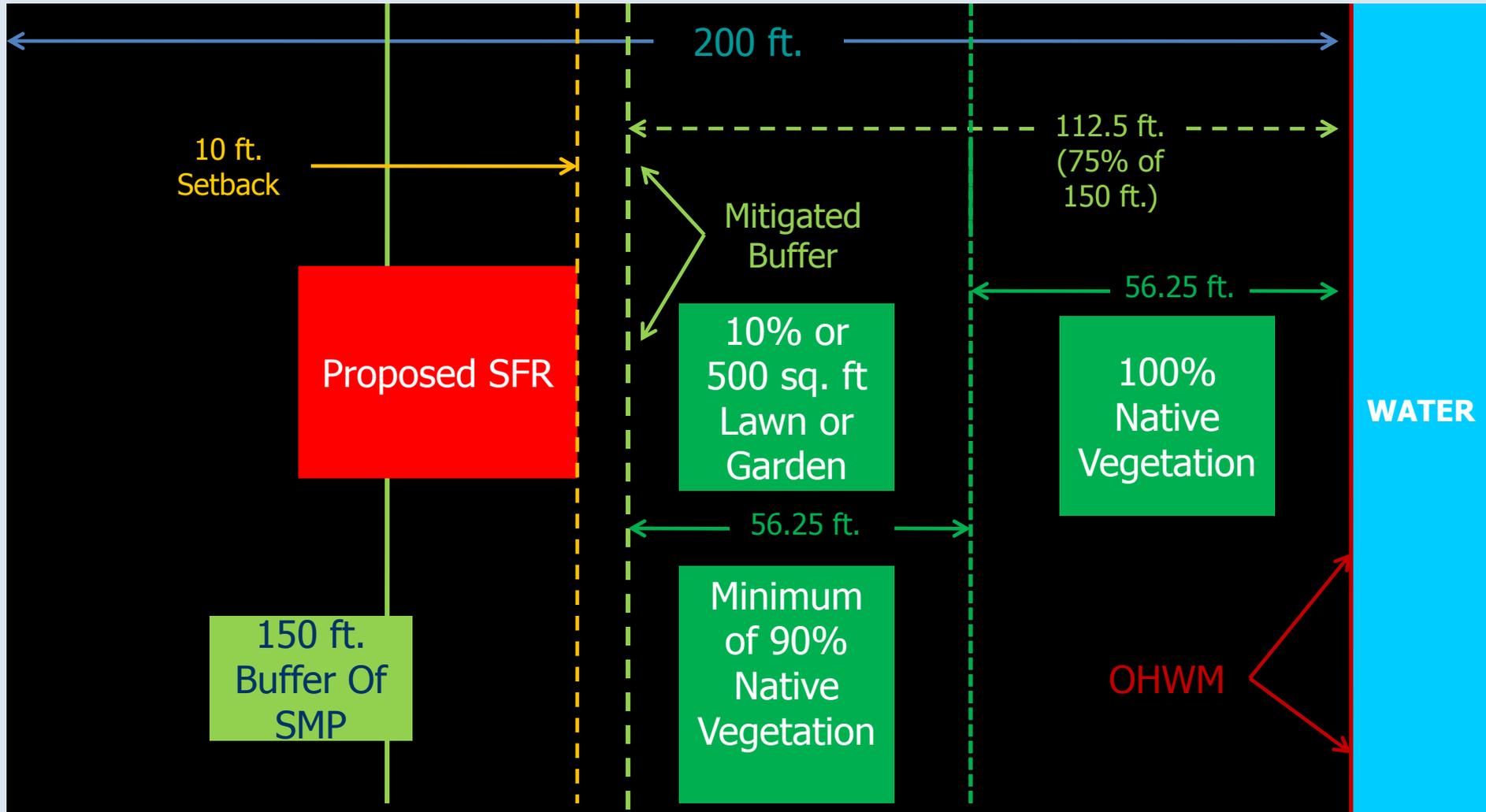
Two Mechanisms

- Averaging – administratively, consistent with criteria:
 - » Equal or greater total area
 - » Equal or better habitat function
 - » Stable slope less than 30%
 - » Width not less than 75% standard
 - Marine & river – 112.5 ft / 75 ft / 37.5 ft
 - Lakes – 75 ft
- Reduction – with avoidance, minimization & mitigation
- less than 75% requires shoreline variance

Buffer & Setback Averaging 75% Minimum No SVAR – No SCUP



Buffer & Setback Reduction 75% Minimum With Mitigation



Vegetation Management regulations for non-conforming lots

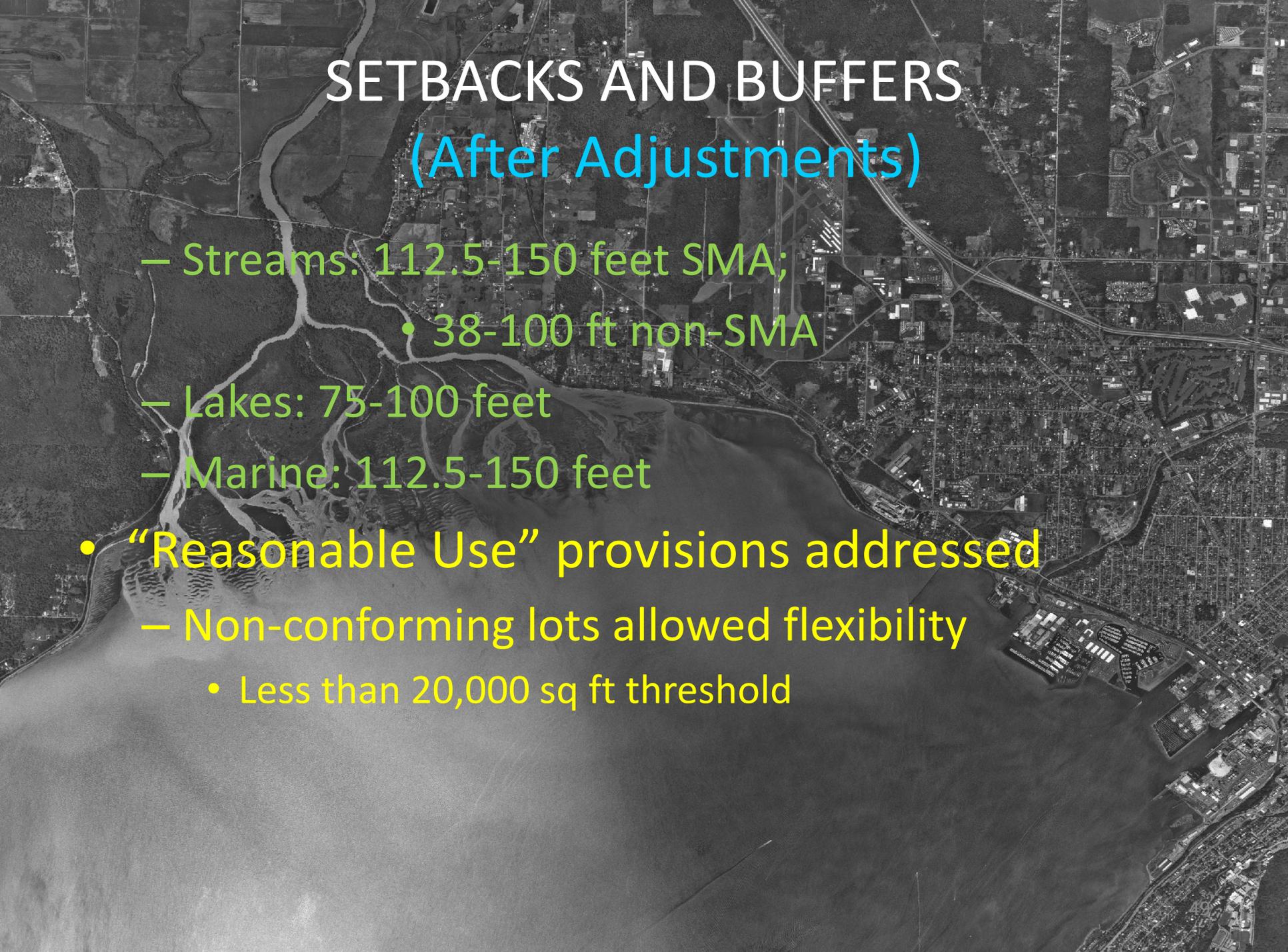
- Maximum setback/buffer feasible
- Two management zones – split equally
 - Inner – most protective nearest shore
 - Outer – more flexibility farthest from shore
 - Up to 2,500 sq ft building area – includes home, appurtenances, driveway, landscaping, etc.
 - Does not include septic drainfield system
- Clearing limited to minimum necessary to accommodate residential development

INNER MANAGEMENT ZONE

- An area consisting of the shoreward half of the available buffer.
 - Lawn or turf is prohibited. Understory consisting of native groundcover and shrubs shall be provided.
 - Native trees shall be provided.

OUTER MANAGEMENT ZONE

- An area from the upland edge of the inner management zone to the outermost edge of the buffer.
- Same as inner buffer (native understory & trees), provided that on slopes of twenty-five percent (25%) or less, lawn, turf, ornamental vegetation or gardens may be allowed on up to ten percent (10%) of the area or 500 square feet, whichever is greater.
- Lawn or turf prohibited on slopes greater than twenty-five percent (25%).

An aerial photograph of a coastal town, likely in Oregon, showing a river flowing into a large bay or estuary. The town is built on a peninsula, with a grid of streets and various buildings. A large beach is visible in the foreground, and a highway runs along the coast. The image is in grayscale, with text overlaid in various colors.

SETBACKS AND BUFFERS

(After Adjustments)

- Streams: 112.5-150 feet SMA;
 - 38-100 ft non-SMA
- Lakes: 75-100 feet
- Marine: 112.5-150 feet
- “Reasonable Use” provisions addressed
 - Non-conforming lots allowed flexibility
 - Less than 20,000 sq ft threshold

SETBACKS AND BUFFERS

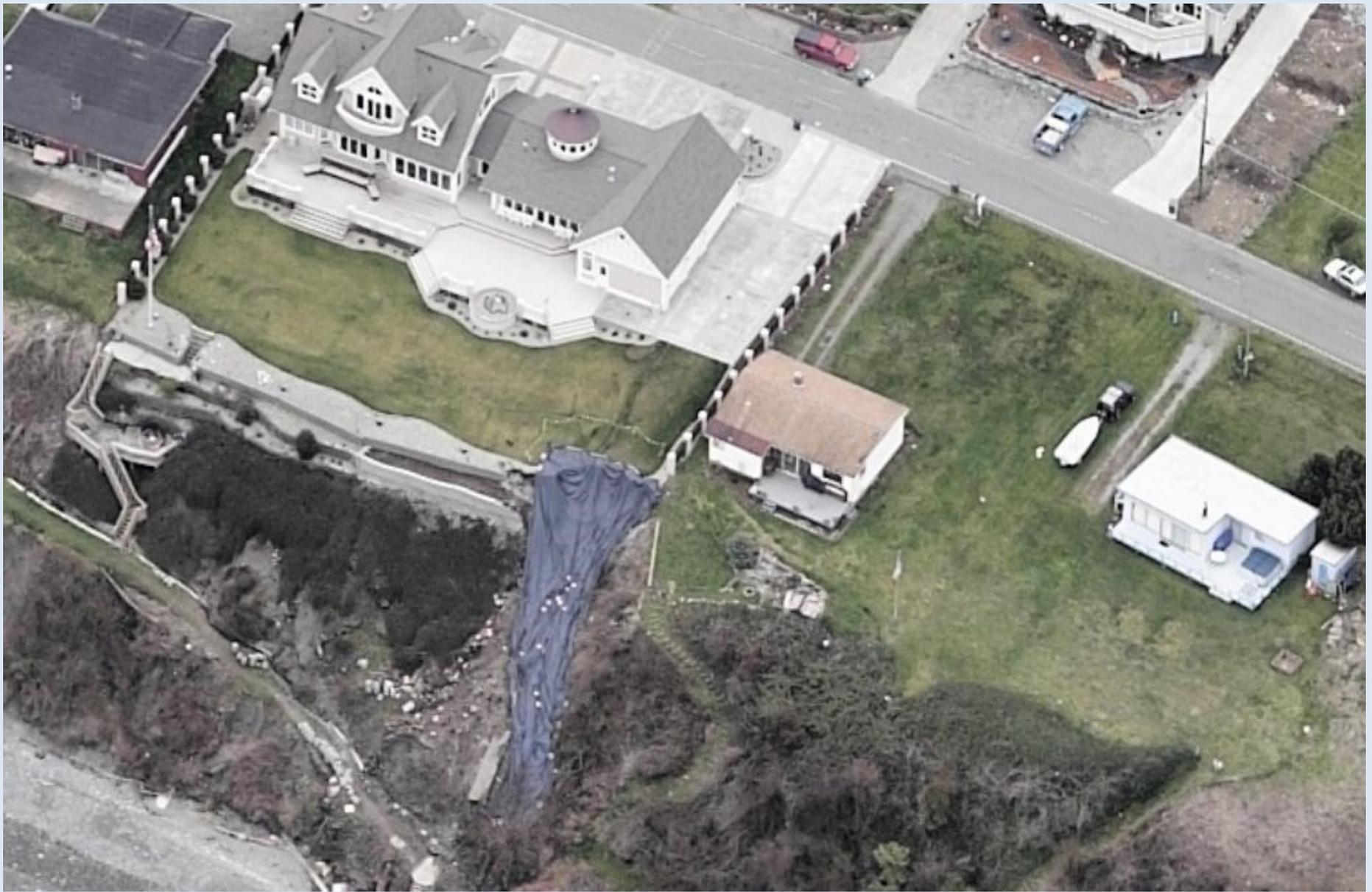
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- Lakes: 75-100 feet
- Marine: 112.5-150 feet
- “Reasonable Use” provisions addressed
 - Non-conforming lots allowed flexibility
 - Less than 20,000 sq ft threshold
 - Can’t be subject to other hazards e.g. landslide
 - Can’t meet buffer/setback and provide 2,500 sq ft building area
 - Reduced buffer/setback but the maximum feasible
 - Vegetation management requirement



Raney - SFR

010524-121320





Raney - SFR





Setback/Buffer

- Reviewed as Admin CUP
- Reviewed as Variance



- Expansion allowed in this area
- Setback
- Buffer
- Restricted expansion area
- Vegetation maintenance required
- OHWM





Received

NOV 12 2009

Whatcom County PDS

400118 478356

400118 439325
7.05 ACRES

CALIFORNIA CREEK

S. JEFFERSON ST. 30' W.
BLUNT RD.

KEY
[Symbol] LAND OF PROPOSED LOT 20
[Symbol] LAND OF LOT 19 AND 20 OF P.D. 1
[Symbol] LAND OF 30' EPPY ACCT. 48181-3 PROPOSED

Lot	Area	Area
1	11.00	1.80
2	2.50	1.50
3	1.50	1.50
4	2.50	1.50
5	1.50	1.50
6	1.50	1.50
7	1.50	1.50
8	1.50	1.50
9	1.50	1.50
10	1.50	1.50
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18	1.50	1.50
19	1.50	1.50
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80	1.50	1.50
81	1.50	1.50
82	1.50	1.50
83	1.50	1.50
84	1.50	1.50
85	1.50	1.50
86	1.50	1.50
87	1.50	1.50
88	1.50	1.50
89	1.50	1.50
90	1.50	1.50
91	1.50	1.50
92	1.50	1.50
93	1.50	1.50
94	1.50	1.50
95	1.50	1.50
96	1.50	1.50
97	1.50	1.50
98	1.50	1.50
99	1.50	1.50
100	1.50	1.50

N 67°32'04" W 1463.66'

108.70'

1321.54'

20'

10'



Buffer Identification



Landward Addition

Shoreward Buffer

Louws - SFR





Mularkey

Buffers Acknowledged & Recorded

RECEIVED
AUG 12 2009
DEPT OF ECOLOGY
BELLINGHAM FIELD OFFICE

After recording return to:
Whatcom County Planning
& Development Services
Natural Resources Division
5280 Northwest Drive
Bellingham, WA 98226

PROPERTY OWNER: Craig Mullarky
RELATED AUDITOR'S FILE NO: SHC2009-00011
ADDRESS: 1540 Wall Street, Bellingham, WA 98226
ASSESSOR'S TAX PARCEL NUMBER(S): 3803274851600000
LEGAL DESCRIPTION (use legal description from current deed):
LOT 4 BLK 7-LOTS 31-32-33 BOATHOUSE BLK 1-THAT PTN OF LOTS 5-7 BLK 7-VAC GRAND
BLVD-LOTS 34 THRU 37 BOATHOUSE BLK 1 WEST GENEVA ON LAKE WHATCOM-BLK 8
LAKE WHATCOM SHORELANDS IN FRONT OF-ADJ TO OR

NOTICE ON TITLE OF CRITICAL AREAS AND RESTRICTION ON USE OR ALTERATION

This property contains critical areas, protective buffers and/or mitigation as defined by Chapter 16.16, Whatcom County Code and as identified on the attached map. The critical area(s) identified on the site were identified in association with a development proposal under permit number. Review of such application has provided information on the location of the identified critical areas and restrictions on use. Limitations on actions in or affecting the critical area and/or buffer exist. Restrictions on uses within the critical area exist until such time as the Technical Administrator approves a change in restriction and such approval is filed. Restrictions on use are identified below. This notice shall not be construed as a complete disclosure of all critical areas and associated restrictions that may apply to future use and/or development of the subject property.

Restrictions on use:

The following activities shall not be conducted within the mitigation area, critical area, and/or buffers unless approved by the Whatcom County Technical Administrator (WCC16.16.225):

- Clearing, grading, dumping, excavating, discharging or filling with any material
- Constructing, reconstructing, demolishing, or altering the size of any structure or infrastructure.
- Any other activity for which a County permit is required, excluding permits for interior remodeling
- Alteration of critical areas and/or buffers is prohibited except when authorized by WCC16.16.290 grazing of domestic animals with an approved farm plan
- Otherwise use the mitigation and/or critical areas in a manner that is inconsistent with the reservation of rights and the purposes of this notice.

<u><i>Craig Mullarky</i></u> Signature of Applicant	<u><i>Craig Mullarky</i></u> Signature of Owner
<u>Craig Mullarky</u> Print Name	<u>Craig Mullarky</u> Print Name
<u>8/10/09</u> Date	<u>8/10/09</u> Date

I certify that I know or have satisfactory evidence that Craig Mullarky is/are the person(s) who appeared before me, and said person(s) acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in this instrument.

Dated 8-11-2009



Notary Signature: Douglas W. Schoonover
Printed Name: Douglas W. Schoonover
Residing at: Bellingham, WA
My appointment expires: 12 / 1 / 2009

NON-CONFORMING LOT

(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.

FOR UNDEVELOPED NON-CONFORMING LOTS – THE 2,500 Sq Ft RULE

- <20,000 SQ FT LOT
- TOO SMALL TO PROVIDE 2,500 SQ FT BUILDING AREA (BASED ON 1,500 SQ FT HOME)
- “BUILDING AREA” means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping.
- MAXIMUM SETBACK & BUFFER AREA FEASIBLE
- MUST COMPLY WITH VEGETATION STANDARDS



- Small lot provision
- Existing SFR's within 50 ft of building site
- Common setback and buffer lines
- 15 ft minimum buffer in all cases



SFR – Garage

No Nexus

Stormwater
Improvements

Setback Established

PIERS & FLOATS

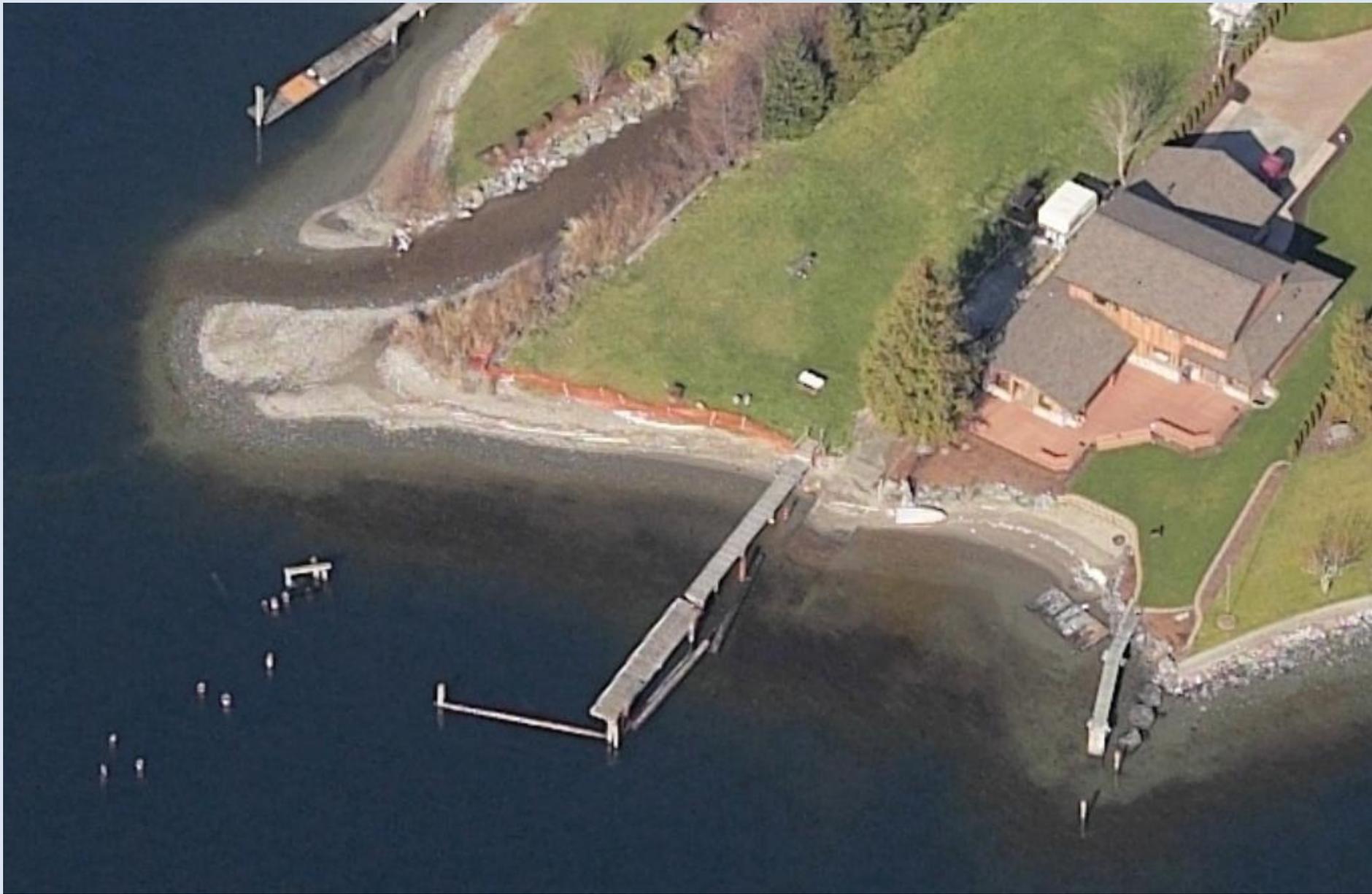
DOCKS as Non-conforming
Development

WAC 173-27-080 EXAMPLE

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



Walberger Dock



Walberger Dock



Walberger Dock



Walberger Dock



Walberger Dock

Non-conforming structures may be maintained, repaired, renovated, or remodeled to the extent that non-conformance with the standards and regulations of this Program is not increased, **provided that a non-conforming development that is moved any distance must be brought into conformance with this Program** and the Act; provided further, that as a conditional use a non-conforming dock may be modified, reoriented or altered within the same general location to be more consistent with the provisions of this SMP



TIME TO TAKE THE BULL BY THE HORNS!

GOOD LUCK!