CITY OF
BAINBRIDGE ISLAND

Planning Commission
Regularly Scheduled Meeting Minutes
Thursday, January 11, 2018

CALL TO ORDER – Call to Order, Agenda Review, Conflict Disclosure
PUBLIC COMMENT – Accept public comment on off agenda items
ELECTION OF PLANNING COMMISSION CHAIRPERSON
SHORELINE MASTER PROGRAM AMENDMENT – Study Session
BUSINESS/INDUSTRIAL REGULATION REVIEW – Study Session
NEW/OLD BUSINESS
ADJOURN

CALL TO ORDER – Call to Order, Agenda Review, Conflict Disclosure
Chair J. Mack Pearl called the meeting to order at 7:07 PM. Planning Commissioners in attendance were Jon Quitslund, William Chester, Michael Killion, Lisa Macchio, Kimberly McCormick Osmond and Don Doman. City Staff present were Planning Director Gary Christensen, Senior City Planners Jennifer Sutton and Christy Carr and Administrative Specialist Jane Rasely who monitored recording and prepared minutes.

The agenda was reviewed. There were not any conflicts disclosed.

PUBLIC COMMENT – Accept public comment on off agenda items
None.

ELECTION OF PLANNING COMMISSION CHAIRPERSON

> **Motion: I move to let Mack continue and he can hand over to Bill when the SMP switches to other activities later this year and then the two of them decide what's the right time.**
> **Killion/Quitslund: Passed Unanimously**

SHORELINE MASTER PROGRAM AMENDMENT – Study Session
Senior City Planner Christy Carr updated the Planning Commission on the Critical Areas Ordinance (public workshop on January 30, 2018). The Shoreline Master Program Draft Workplan was presented (see attached).

Commissioner Macchio asked Ms. Carr to direct a citizen who shared his property valuation decrease with them to the gentleman at the Kitsap County Assessor's Office who has information on the valuation process the County used.

Public Comment
Michael Zigich, Citizen – Thanked Ms. Carr for the information and asked why the City had the authority to tell an owner what they could do on their property.

M.C. Halvorson, Citizen – Asked for and received copies of the documents provided.

BUSINESS/INDUSTRIAL REGULATION REVIEW – Study Session
Senior City Planner Jennifer Sutton presented a summary of the conversation around Business/Industrial regulations over the past nine months.

Public Comment
Terry McGuire, Citizen – Appreciated all the outreach and community meetings and spoke in favor of allowing outdoor dog kennels in the Business/Industrial Zone.

Charles Schmid, Citizen – Had concerns about the planning for Day Road Industrial Park.

NEW/OLD BUSINESS
The six-month building moratorium, Hwy 305 pedestrian bridge, Island Center Subarea Plan Steering Committee and Council Advance were presented by Planning Director Gary Christensen.

ADJOURN
The meeting was adjourned at 9:28 PM.

Approved by:

J. Mack Pearl, Chair

Jane Rasely, Administrative Specialist

CITY OF
BAINBRIDGE ISLAND

Planning Commission Regular Meeting
January 11, 2018 7:00 – 9:00 PM

Name (PLEASE PRINT)	E-Mail	Join ListServ	Speak Tonight ?	Subject
Matt Glenn	matthew.h.glenn@gmail.com	Y		
Helen + Jeff Glenn	helen.m.glenn@gmail.com	Y		
Kim CHINN	KMCHP900@gmail.com	Y		
M. C. Halvorsen	mchalvorsen@hotmail.com	Y		
M. SEBASTIAN	MSEBIAN@COMCAST.NET		N	
CHARLES SCHMID	ceschmid@att.net		Y	
Nancy Schaf			N	
Doug HANSMANN	doug.hansmann@gmail.com		N	SMP
Terry McGuire	tmcguire419@msn.com	Y		B/I uses

City of Bainbridge Island Shoreline Master Program Amendment
January 11, 2018 Planning Commission Meeting

Agenda Topics

1. Critical Areas Ordinance – adoption status, Ecology input to date
2. General themes – review/discuss
3. Nonconforming structures – revisit time permitting

CITY OF BAINBRIDGE ISLAND

DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

MEMORANDUM

Date: January 11, 2018

To: Planning Commission

From: Christy Carr, AICP
Senior Planner

Subject: SMP Amendment – Guiding Themes

The following themes are those which have been identified by staff, project applicants and others as the most in need of review and revision. As stated in the November 30, 2017 draft work plan, although the Planning Commission and City Council may consider policy decisions as they arise throughout the process, **significant policy changes are not anticipated as part of the amendment.** Exceptions may include the optional approach to nonconforming structures and any revisions to specific regulations or performance standards (see item 2 and 7, below). These could result in a change in intent of the SMP rather than changes only in its implementation. Such changes would more than likely trigger the need for review and potential revision to SMP background documents, such as the Cumulative Impacts Analysis.

The draft workplan (attached) has been updated to assign each proposed topic to consider to one or more of these guiding themes, summarized below. The intent is for the Planning Commission to arrive at consensus on this list and for staff to revise specific language only as it pertains to one or more of the themes.

1. **Existing structures:** WAC 173-27-080 includes definitions and standards for nonconforming development that apply when a local program does not contain locally adopted standards (see attached for reference). The City's SMP refers to nonconforming structures as "existing development" (see SMP Section 4.2). This section has a "general" section and is then divided into specific types of structures (e.g., primary structures, accessory structures, aquatic structures), each of which have different provisions for expansion/alteration. In addition to improving the overall clarity of the section, several questions have been addressed by staff and project applicants:
    a. Which parts of the SMP apply to existing, nonconforming structures, if any?
    b. What triggers the requirement to comply with the SMP for existing, nonconforming structures? This needs to be specific to avoid misinterpretation, inconsistency of application or default to "most restrictive" clause.
    c. Can someone tear down their entire house (100%) (or accessory/appurtenant structure) and rebuild in the same footprint? Should there be a threshold (e.g., up to 50% square footage or percent value)?

d. Does the City want to retain the current thresholds on expansion of existing, nonconforming structures (only landward, no more than 25%, once in lifetime of structure)?
e. What are clear definitions of applicable terms and which ones should be used: alteration, expansion, remodel, redevelopment, etc.?

2. **Non-conforming structures (term itself):** Although a well-established concept in land use, regulating nonconforming uses and development is a contentious issue. The word "nonconforming" has raised concerns and confusion among property owners. Home owners are worried about having a "nonconforming" label on their property. Their concerns and questions include: Can they repair and maintain their house? Will homeowners insurance cost more? Will they be able to get a loan for house repairs or improvements? Will potential buyers be able to get a mortgage? RCW 90.58.620 states that new or amended SMPs approved by Ecology after September 1, 2011 may include provisions that allow "legally established residential structures and appurtenant structures that are used for a conforming use to be considered a conforming structure even though they do not meet SMP standards for setbacks, buffers, yards, area, bulk, height or density" (See SMP Handbook, starting on page 6 for background). During its update process, the City did not use this optional approach to nonconforming structures. If the City wants to consider this optional approach, a new strategy for regulating existing structures needs to be developed. Note, some provisions for nonconforming structures may no longer apply, which could necessitate the requirement for a shoreline variance in some circumstances.

3. **Vegetation management – Existing landscaping ("established yard"):** Staff, shoreline property owners and vegetation maintenance providers continue to struggle with what can or cannot be done in terms of existing landscaping. There are endless variations on what shoreline property owners may consider their "yard" and what constitutes "normal or routine maintenance" or "ongoing maintenance." Clarity is needed as to if/when/which vegetation management provisions apply to existing landscaping.

4. **Vegetation management – other:** A number of vegetation management regulations need to be simplified and clarified, and with that, some policy direction is needed. Examples include: removal of significant trees, "1/3-2/3" provision where a structure is allowed to encroach into up to 1/3 of Zone 2 of the shoreline buffer with the remaining 2/3 of Zone 2 (and all of Zone 1) planted with native vegetation.

5. **Consistency with no net loss standard:** The current conditions of the shorelines, including existing development, are the starting point or baseline for determining no net loss. Regulations and provisions need to be reviewed for consistency with the no net loss standard. For example, do any vegetation management regulations result in "restoration" vs. "mitigation" for identified impacts. Examples of means to achieve the no net loss standard would also be helpful for project applicants and qualified professionals completing site specific impact analysis reports to "demystify" the concept of no net loss.

6. **Integration of other codes/policies (stormwater, climate change):** The City's stormwater regulations have been updated since the SMP update (BIMC 15.20). These should be integrated. A direct discharge criteria should be considered and consistency with the Single-Family Mitigation Manual should needs improvement. The Planning Commission may want to consider acknowledging sea level rise and climate change impacts.

7. **Specific regulations or performance standards:** While staff does not recommend any changes to current thresholds or performance standards, the Planning Commission may want to review and consider revisions to specific regulations. Any revisions would likely trigger the need to review and update background documents (e.g., Cumulative Impacts Analysis). Examples include:
    a. Limits/requirements on bulkhead repair/replacement (SMP Section 6.2)
    b. Prohibition of docks (SMP Section 6.3)
    c. Buffer widths (SMP Section 4.1.3; Table 4-3)
    d. Limit on liveaboards (SMP Section 5.3)
    e. New construction limit lines for Manzanita and Fletcher Bays (Special Area Maps)

8. **Mitigation manual:** The mitigation manual needs to be updated to reflect current standards of other agencies (e.g., US Army Corps of Engineers), provide alternatives for impervious surface impacts and improve consistency/integration with the text of the SMP.

9. **Applicability:** The applicability of the SMP in general needs to be clarified. The use of terms such as "development, use or activity," "human activity," "whether it requires a permit or not," among others, is confusing. Complexity and redundancy could be reduced by eliminating the applicability subsection in every section of the SMP.

10. **Improve clarity, simplify and reduce complexity; correct errors and omissions**

Planning Commission Action:

- **Review and revise as needed list of guiding themes, above**
- **Finalize work plan within context of guiding themes**

SMP Amendment Proposed Work Plan
November 30, 2017 – Updated January 11, 2018

The following summary of proposed revisions was developed by staff based on topics and issues identified through implementation and permit review since July 2014. The focus of these revisions is largely housekeeping in nature: clerical (correction/consistency), implementation efficiency (clarification/simplification) and integration (of other codes/policies). Revisions are anticipated in almost every section; however, a section is not listed below if only clerical or implementation efficiency revisions are anticipated. **Although the Planning Commission and City Council may consider policy decisions as they arise throughout the process, significant policy changes are not anticipated as part of the amendment.** With some exceptions that may be considered, the amendment is not intended to change the intent of the SMP, but rather to significantly improve its implementation. All revisions must demonstrate consistency with all goals, policies, and designation criteria as well as the background documents of the SMP.

SMP Section	Topic	Summary of Proposed Topics to Consider	Guiding Theme(s)
4.1.5	Critical Areas	Integration of BIMC 16.20 pending Council adoption	6,10
Appendix B	Critical Areas	Integration of BIMC 16.20 pending Council adoption	6,10
4.2.1	Existing Development (Nonconforming)	Nonconforming Uses, Nonconforming Lots, and Existing Development • Revisit optional approach to consider legally existing structures as conforming structures • Clarify applicability of "most restrictive" clause • Clarify difference between existing (nonconforming) structure and nonconforming use • Clarify consistency between general regulations and specific regulations (SMP 4.2.1.4) • Correct "entirely contained within the building" error (SMP 4.2.1.6.3.1.2.c) • Clarify that existing structures destroyed by natural disasters can be replaced if meeting geologically hazardous area provisions (SMP 4.2.1.6.1.2) • Revisit/clarify single family primary structures alteration/expansion (SMP 4.2.1.6.3.2) – applies only to within shoreline buffer, provide definition of landward, clarify "building configuration," 25 percent of existing building footprint, clarify building area vs. development area, clarify what "bulk dimensions" and "lifetime" mean • Correct numbering structure of SMP 4.2.1.6.5; clarify non-essential residential accessory structures • Clarify SMP 4.2.1.7 – Encumbered and Nonconforming Lots – provide definition of redevelopment, clarify if it applies to critical areas or just critical area buffers, clarify what building area means, clarify if applicant can reduce buffers first (e.g., landslide hazard buffer) before being considered encumbered • Ensure consistency of SMP 4.2.1.7.1.e with critical areas section • Improve consistency of SMP 4.2.1.8 – Aquatic Structures – with Single Family Mitigation Manual • Clarify SMP 4.2.1.8.1 – what is included in "materials and standards"? • Clarify SMP 4.2.1.8.2 – where does it apply and to what?	1,2,5, 9,10

SMP Section	Topic	Summary of Proposed Topics to Consider	Guiding Theme(s)
		• Provide clarity/detail in SMP 4.2.1.8.1.a – what are thresholds for when conditional use permit required?	
4.0	Table 4-1 Table 4-2 Table 4-3	Table 4-1 (Use and Modification Table) • Clarify footnotes (revisit #22 re: mixed use physical separation) • Correct inconsistencies between table and text (e.g., subdivisions) • Revisit requirement for shoreline conditional use permit for all retaining walls • Clarify primary vs. accessory utilities • Clarify allowance of overwater structures when used as public trails Table 4-2 (Dimensional Standards) • Address missing footnotes (#5 and 7) • Clarify utilities setbacks Table 4-3 (Buffers) • Revise for improved readability and ease of administration • Clarify when "expands to include existing native vegetation applies" • Clarify that all shallow lots (<200 feet deep) are assigned narrower buffer • Clarify how buffer is measured for high bluff properties (i.e., what is between Zone 1 at OHWM and top of bluff) • Clarify criteria for Category A and B lots • Add figure reference and reference to Section 4.1.3 • Clarify what geomorphic classes are or where information about them is located • **No change in required buffer widths is anticipated**	10
4.1.2	Environmental Impacts	• Clarify that mitigation follows a sequence/"when mitigation is required" language – if an impact cannot be avoided, mitigation is required • Simplify and clarify applicability section, clarify "development, use, activity" • Move vegetation management regulations to Section 4.1.3 (e.g., 4.1.2.5, Revegetation Standards) • Clarify and emphasize that either use of the Single-Family Mitigation Manual or submittal of a site-specific impact analysis is required; clarify when manual can be used • Delete references that don't exist • Revisit "in perpetuity" requirement when mitigation is required (SMP 4.1.2.7) • Clarify mitigation and monitoring requirements (SMP 4.1.2.8), consider threshold (e.g., not required for > $1000) for performance, mitigation/monitoring • Clarify that new impervious surface area requires mitigation (only mentioned in Single-Family Mitigation Manual); better tie to manual	5,8,9,10

SMP Section	Topic	Summary of Proposed Topics to Consider	Guiding Theme(s)
		• Consider new language that requires prioritizing where mitigation planting is located – has to go where it will have most ecological benefit	

4.1.3	Vegetation Management	• Relocate and revise, if needed, vegetation management-related regulations from SMP 4.1.2.5
		  ○ SMP 4.1.2.5.1 – Revegetation Standards – improve clarity
		  ○ SMP 4.1.2.5.3 – Clarify what "altered or reduced" means; when applicable?
		  ○ SMP 4.1.2.5.4 – Revise for clarity; remove requirement for offsite mitigation to be in Zone 1
		• Clarify applicability section, non-retroactive nature of regulations
		• Clarify which requirements apply to new development vs. existing development
		• SMP 4.1.3.4 – Exceptions – clarify what is allowed without City review or approval, replace this section with tree and vegetation regulations (including exemption for yard and garden activities) from critical areas ordinance, remove requirement to leave downed hazard tree on site (if left, considered sufficient mitigation)
		• SMP 4.1.3.5 – Create new section that just explains establishment of shoreline buffers (2 options); revisit HMP requirement and review process; remove references to documents that don't exist or consider programmatic approach to vegetation maintenance by City or other land managers (SOP manual, also referenced in SMP 4.1.3.7)
		• Provide mechanism for some level of significant tree removal (e.g., develop significant tree removal criteria)
		• Revisit requirements for vegetation removal/replacement outside shoreline buffer (native and non-native, significant trees)
		• SMP 4.1.3.6 – Clarify "1/3 2/3" provision; applicable to new development only?
		• SMP 4.1.3.7 – Clarify applicability, provide consistency with other vegetation maintenance provisions, define "modified area," delete minor pruning section, refer to critical areas tree and vegetation regulations, revisit requirement for clearing permit, clarify connection to SMP 4.1.4, Land Modification, as referenced, clarify utilities
		• SMP 4.1.3.7.2 – Consolidate with new section relating to just shoreline buffers, clarify what "dimensions altered" means, clarify requirement for when Zone 1 must be restored
		• SMP 4.1.3.7.3 – Clarify what "minimum necessary for public use" means, improve connection to Single-Family Mitigation Manual, clarify whether stairs need to be grated and type of mitigation required if not grated
		• SMP 4.1.3.8.1 and 3 – Revise entire sections for clarity; **no changes to size thresholds anticipated**
		• SMP 4.1.3.8.4 – View maintenance – clarify and simplify; reference critical areas tree and vegetation requirements?, delete requirement for Bluff Management Plan
			3,4,5,7, 8,9,10

DRAFT

SMP Section	Topic	Summary of Proposed Topics to Consider	Guiding Theme(s)
		• SMP 4.1.3.11 – Shoreline Structure Setback View Requirements – Clarify applicability, relocate option to build in Zone 2 language, correct figure references, simplify language, clarify what constitutes "most waterward point"	
4.1.4	Land Modification	• Eliminate requirement for clearing permit for "all clearing" to allow for nominal landscaping activities (e.g., 25 cubic yards/200 square foot thresholds) • Clarify language, better integrate with other sections	9,10
4.1.6	Water Quality and Stormwater Management	• Integrate new (2016) stormwater regulations (BIMC 15.20) • Add direct discharge criteria (i.e., when is one allowed? Considered necessary?) • Update wood treatment regulations per agency guidelines • Improve consistency with Single-Family Mitigation Manual	6,10
Appendix D	Single-Family Mitigation Manual	• Better integrate into code language – when it can be used and how it relates to vegetation management requirements • Provide alternatives to rain garden for new impervious surface area; clarify where rain garden must be located when required (inside or outside shoreline buffer) • Update per current agency guidance/requirements (e.g. Corps of Engineers, WDFW)	4,5,6, 8,9,10
5.3	Boating Facilities	• Revisit liveaboard threshold (currently 10 percent) • Revisit management and operations (implementation)	8,10
6.3	Overwater Structures	• Improve consistency with Single-Family Mitigation Manual and other agency mitigation requirements • Clarify grammar in prohibitions section • Clarify length thresholds (how to determine) • Clarify buoy density	7,8,9,10
8.0	Definitions	• Add missing definitions (e.g., significant tree, alteration, redevelopment) • Clarify definitions	10
Appendix A	Shoreline Designation Map	• Correct inconsistencies between paper and GIS maps (one identified) • Correct error (one identified) • **No changes to shoreline designations anticipated other than corrections**	10
Appendix E	Special Area Maps	• Include corrected maps • Consider construction limit lines for Manzanita Bay and Fletcher Bay	7,10
All	Global edits	• Clerical and implementation efficiency edits anticipated in every section	10
--	Climate Change/Sea Level Rise	• Incorporate climate adaptation/sea level rise into goals, policies and regulations.	6
5.2	Aquaculture	• To be included in amendment pending outcome of current limited amendment.	7,10

WAC 173-27-080

Nonconforming use and development standards.

Local governments typically develop their own approaches to addressing nonconforming use and development. This section is intended to apply if a shoreline master program does not contain locally adopted 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) Definitions.

(a) "Nonconforming use" means an existing shoreline use that was lawfully established prior to the effective date of the act or the applicable master program, but which does not conform to present use regulations due to subsequent changes to the master program.

(b) "Nonconforming development" or "nonconforming structure" means an existing structure that was lawfully constructed at the time it was built but is no longer fully consistent with present regulations such as setbacks, buffers or yards; area; bulk; height or density standards due to subsequent changes to the master program.

(c) "Nonconforming lot" means a lot that met dimensional requirements of the applicable master program at the time of its establishment but now contains less than the required width, depth or area due to subsequent changes to the master program.

(2) Nonconforming structures.

(a) Structures that were legally established and are used for a conforming use but are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may continue as legal nonconforming structures and may be maintained and repaired.

(b) Nonconforming structures may be enlarged or expanded provided that said enlargement meets the applicable provisions of the master program. In the absence of other more specific regulations, proposed expansion shall not increase the extent of nonconformity by further encroaching upon or extending into areas where construction would not be allowed for new structures, unless a shoreline variance permit is obtained.

(c) 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.

(d) 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.

(e) In the absence of other more specific regulations, 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:

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

(ii) 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.

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

(g) 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 two years of the date the damage occurred.

(3) Nonconforming uses.

(a) Uses that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses.

(b) In the absence of other more specific regulations in the master program, such uses shall not be enlarged or expanded, except upon approval of a conditional use permit.

(c) 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 unless reestablishment of the use is authorized through a conditional use permit which must be applied for within the two-year period. Water-dependent uses should not be considered discontinued when they are inactive due to dormancy, or where the use includes phased or rotational operations as part of typical operations. A use authorized pursuant to subsection (2)(e) of this section shall be considered a conforming use for purposes of this section.

(4) Nonconforming lot. A nonconforming lot 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.

[Statutory Authority: Chapter **90.58** RCW. WSR 17-17-016 (Order 15-06), § 173-27-080, filed 8/7/17, effective 9/7/17. Statutory Authority: RCW **90.58.140**(3) and [90.58].200. WSR 96-20-075 (Order 95-17), § 173-27-080, filed 9/30/96, effective 10/31/96.]

Chapter 14
Legally Existing Uses and Development

Phase 3, Task 3.4 and 3.5
Shoreline Master Program Planning Process

Introduction

Many of Washington's 28,000 miles of shorelines are developed. Container ships dock and unload at port facilities. Marinas provide in-water and dry storage for recreational and commercial boats. Public parks offer swimming beaches and boat docks. Single family homes and multifamily buildings offer their residents sunset views and quick access to the water. Commercial buildings feature retail shops and restaurants.

Uses and development that are within shoreline jurisdiction (see SMP Handbook Chapter 5) fall under the authority of the Shoreline Management Act (SMA), which is enacted through local Shoreline Master Programs (SMP). As local governments update their SMPs and approve new regulations, questions arise about what will happen to existing structures and uses along shorelines.

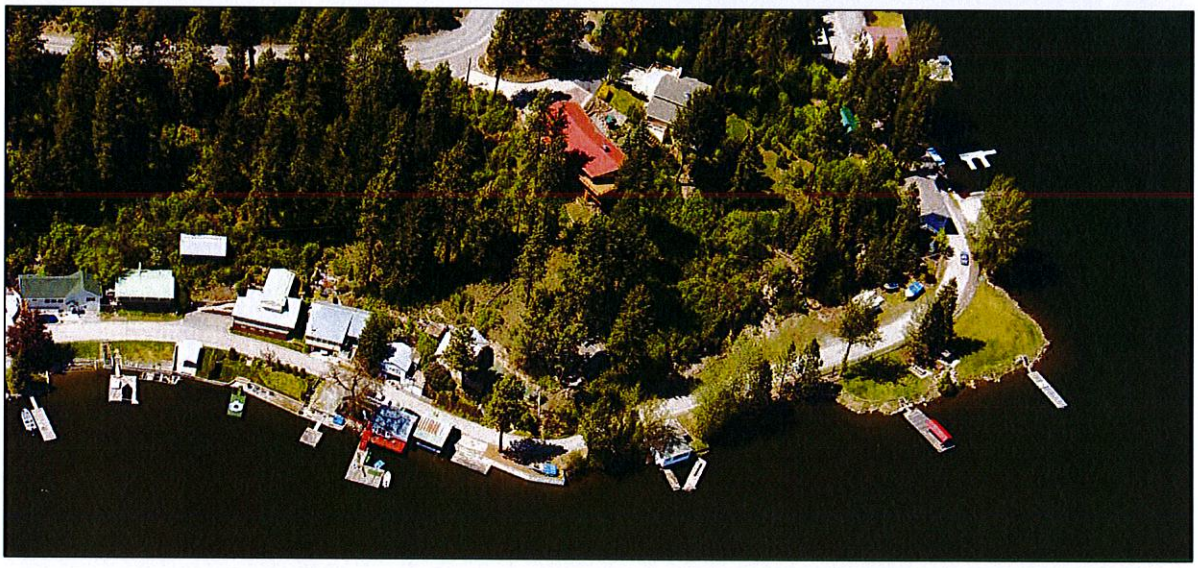

Figure 1: The Spokane County SMP considers legally established residential structures like these on Newman Lake as conforming, even though they may not meet standards for buffers, setbacks, yards, area, height, bulk or density. See "Optional Approach" later in this document. (Washington Coastal Atlas photo.)

Publication Number: 11-06-010

6/11; rev. 8/13, 10/17

Legally existing uses and development may continue

Existing legally established structures and uses are typically allowed to continue with the approval of updated SMPs. That means they can continue to exist, be used, maintained and repaired. That's the case even if the updated SMPs include regulations that would not allow new uses or development to be configured or built exactly as existing ones.

For example, under updated SMPs, new buildings may need to be further away from the water, new development projects may need to retain some vegetation onsite, or new aquaculture projects may need to be a specific distance from aquatic vegetation. However, existing legal development and uses can remain in place. Homeowners can continue to live in their houses and grow vegetables in their gardens. Shellfish operations can continue to grow seafood.

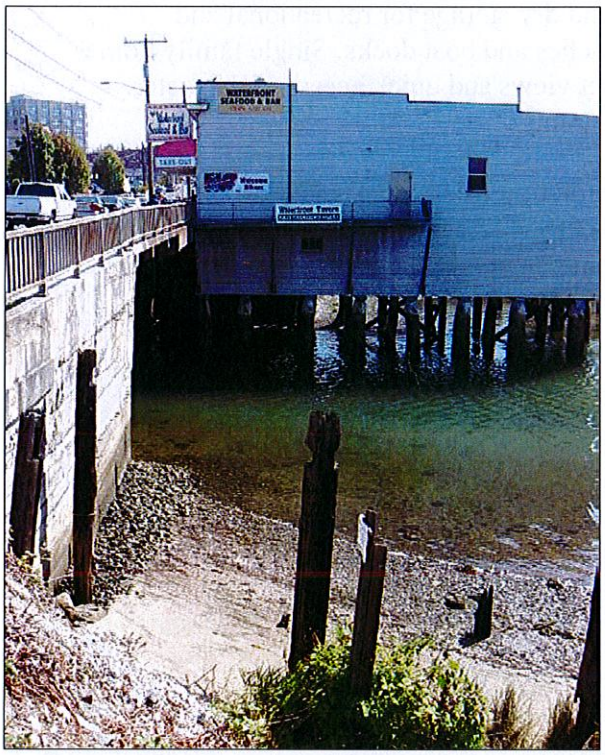

Figure 2: The Waterfront Tavern bar and grill on the Whatcom Waterway in Bellingham is a legal nonconforming use and structure.

Ecology and local governments do not expect most existing development and uses to be eliminated from the shoreline after new SMP regulations are adopted. In some cases, existing buildings may be expanded, although there may be limits to the size of the addition, the total square footage, or new impervious surfaces. Local governments may determine that certain development should be eliminated – for example, dilapidated buildings in hazard areas such as steep eroding slopes, older uses that are not compatible with surrounding uses, or abandoned structures.

If uses and development are abandoned, they cannot be brought back into use without conforming to the current regulations. Abandonment should be defined in the SMP. The SMP also should direct how illegal or abandoned uses and structures should be legalized through permits or eliminated through enforcement actions. See additional discussion on abandonment.

There are different ways to address continuance and expansion of buildings, structures and uses that don't quite meet the new SMP regulations. This guidance discusses ways local SMPs can address existing development.

Publication Number: 11-06-010 6/11; rev. 8/13, 10/17

No net loss starts with existing uses and development

The updated SMPs must include policies and regulations to achieve "no net loss" of shoreline ecological functions. The current conditions of the shorelines, including existing development, are the starting point or baseline for determining no net loss.

It will be important to know what shoreline development looks like when options for managing existing development are considered. Are shoreline lots big or small? Are lots mostly covered by impervious surfaces? Are there big lawns? Is native vegetation present? Is the shoreline armored with bulkheads? Are there in-water uses? Keep in mind that shoreline jurisdiction includes both land and water, and nonconforming uses and development may be in either or both areas.

The no net loss goal needs to be part of the decision-making process regarding future development – new development and expansion or renovation of existing development. Local governments need to consider how the impacts of future development will be mitigated.

Cities with densely developed shorelines may have fewer opportunities for achieving no net loss than cities or counties with less developed shorelines. With a densely developed shoreline, large buffers or setbacks may not be appropriate or feasible for various reasons -- small lots cannot accommodate them; large buffers would include many structures and impervious surfaces that interfere with buffer functions; regulations regarding structures within buffers could be complicated.

Mitigating expansion

If the SMP allows existing uses and structures to expand, how will the impacts of the expansion be mitigated? How will no net loss be achieved?

- Is there room on the lots to plant native vegetation?
- Are rain gardens and other low impact development techniques feasible to mitigate stormwater impacts?
- Do wind and wave conditions allow for removal of bulkheads?
- Are there sites within the city for off-site mitigation if no space is available onsite? In some small cities, there are limited opportunities for off-site mitigation.

Publication Number: 11-06-010 6/11; rev. 8/13, 10/17

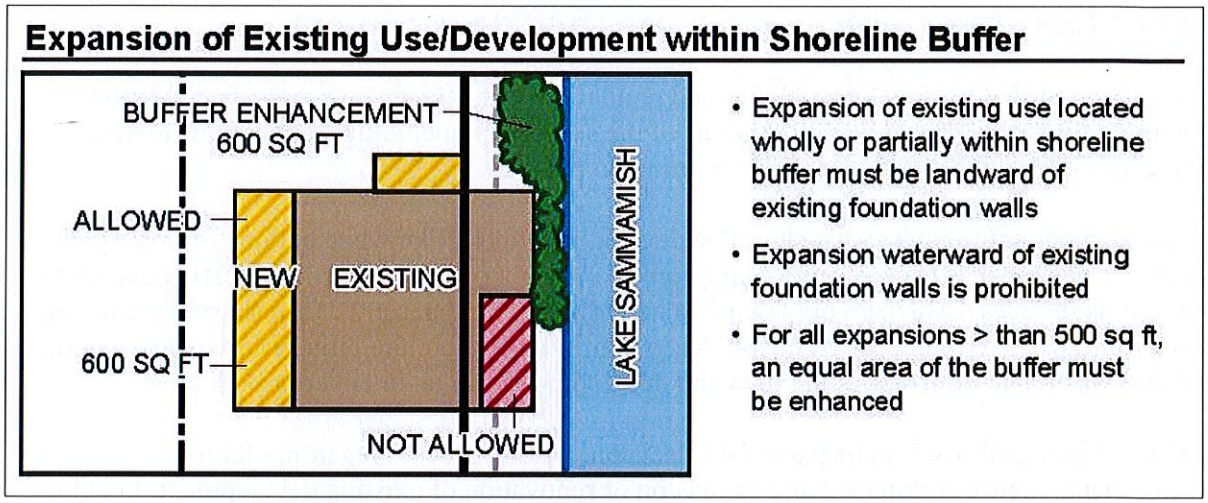

Figure 3: The City of Issaquah allows expansion of existing uses and development within the Lake Sammamish shoreline buffer only landward of existing foundation walls. Buffers must be enhanced for expansions greater than 500 square feet.

If new impacts cannot be avoided or mitigated, the no net loss standard may be difficult to achieve. Ecology cannot approve draft SMPs unless policies and regulations are designed to achieve no net loss.

Traditional and optional approach

SMPs, like zoning codes, have typically categorized uses and structures that are not consistent with new regulations as "nonconforming" development. During the past few years, some local governments have opted to classify existing structures as conforming even though new SMP regulations would typically create nonconforming structures. This section discusses both the traditional and optional approach.

As with all significant SMP decisions, local governments should keep a record of their decisions regarding the chosen approach and why that approach was chosen. This is part of building a good record discussed in Chapter 3, "Shoreline Master Program Updates." Providing a record of decisions will help during Ecology's review process.

Traditional approach

Traditionally, uses and structures that are not consistent with the new regulations have been categorized as "nonconforming" development. Nonconforming uses and development were lawfully constructed or established, but do not conform to current land use regulations or standards. The regulation of nonconforming uses and development is an established concept, beginning early in the 20th century, when municipalities started enacting zoning regulations.

After the SMA became law and SMPs were developed, the concept of nonconforming uses and development carried over to shorelines regulations. Not all of the SMPs adopted in the 1970s and early 1980s included clear provisions for nonconforming development. To ensure clarity,

Ecology adopted nonconforming development regulations in 1986 in the former WAC 173-14. The regulations were revised and then incorporated in the updated WAC 173-27-080 in 1996 and revised again in 2017.

WAC 173-27-080 applies at the local level only if the local SMP does not address nonconforming development.

The term, "nonconforming use" often includes both uses and development or structures. This guidance refers to use, development or structures, and lots.

- A **use** is nonconforming if it does not conform to current regulations. Examples include a commercial use within an area designated for residential uses, or a mining operation in a shoreline environment that allows mining, but the operation does not comply with current regulations for best management practices.
- A **development or structure** is nonconforming if it is located or configured in ways that do not meet current standards. A common example along shorelines is a single-family residence that does not meet current setback standards. In these cases, the **use** is consistent with the shoreline regulations, but the **structure** does not meet one or more standards in the existing regulations. Piers and docks that are larger than the current regulations allow also are examples of nonconforming structures.
- **Lots** that were legally established prior to the effective date of the current SMP and do not conform to the current lot size standards also are nonconforming.

Many SMPs define nonconforming structures, uses and lots; address expansion, changes in use, and rebuilding after fire or natural disaster; and set timelines for permitting, reconstruction and abandonment.

Although a well-established concept in land use, regulating nonconforming uses and development sometimes is a contentious issue during SMP updates. The word "nonconforming" has raised concerns and confusion among property owners. Home owners seem to be the most worried about having a "nonconforming" label on their property. Their concerns and questions include:

- Can they repair and maintain their house?
- Will homeowners insurance cost more?
- Will they be able to get a loan for house repairs or improvements?
- Will potential buyers be able to get a mortgage?

Other property or business owners wonder if they can continue the existing use, such as a retail shop, or will they need to close and move. Can aquaculture sites that have not been cultured or farmed for a year or more continue as aquaculture operations?

Nonconforming uses and development are discussed in more detail later in this document.

Optional approach

Some local governments are using different approaches as they update their SMPs. They would allow existing structures, particularly single family residences, to continue as conforming structures even though new shoreline setbacks, buffers, and other regulations in their Shoreline Master Programs would typically create nonconforming structures.

Non-traditional approaches to existing structures include:

- Excluding the footprint of the existing structures from the buffer or setback. Depending on the size of the buffer, it may wrap around the sides and rear of the structure but will not include the structure. On some urban shorelines, significant amounts of trees and vegetation exist behind houses, away from the water. Larger buffers may be appropriate in these areas.

- Stating in the SMP that certain structures, such as single family residences, or all legally-established existing structures, are conforming structures.

Nontraditional approaches for existing development must be:

- Limited to legally established structures only.

- Not applied to uses that would not be allowed under the new SMP. Such uses should not be included in a nontraditional approach for existing development.

- Not applied to over water residences, except for floating homes that were legally established or permitted prior to January 1, 2011, and floating on-water residences, as discussed below. New over water residences are not allowed under the SMP Guidelines. Therefore, existing over water residences other than floating homes and floating on-water residences established according to the SMA are nonconforming uses and nonconforming structures.

Amendments to the SMA

The State Legislature in recent years responded to concerns of shoreline residential property owners about the potential nonconforming status of their property and approved bills regarding residential structures. The bills amended the SMA.

1) RCW 90.58.620 states that new or amended SMPs approved by Ecology after September 1, 2011 may include provisions that allow:

> (a) Legally established residential structures and appurtenant structures that are used for a conforming use to be considered a conforming structure even though they do not meet SMP standards for setbacks, buffers, yards, area, bulk, height or density;

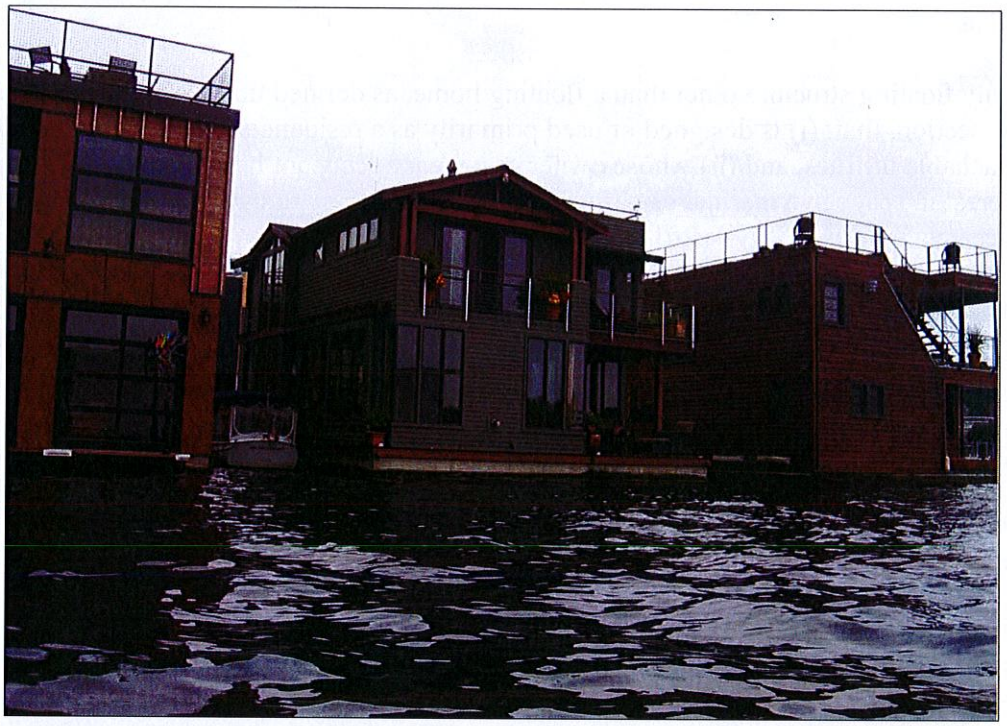

Figure 4: These floating homes in the City of Seattle are connected to city water and sewer and must meet building code requirements. (City of Seattle photo.)

(b) Redevelopment, expansion, change with the class of occupancy, or replacement of the residential structure if consistent with the SMP, including the provisions for no net loss of shoreline ecological functions.

For the purposes of this section, appurtenant structures are garages, sheds and other legally established structures, but not bulkheads and other shoreline modifications and over water structures. The legislation does not restrict master programs from limiting redevelopment, expansion or replacement of over water structures in hazardous areas such as floodplains and geologically hazardous areas.

2) RCW 90.58.270 was amended to address floating homes. The Legislature recognizes that existing floating homes "are an important cultural amenity and element of our maritime history." This amendment states that a floating home that is permitted or legally established prior to January 1, 2011, must be classified as a conforming preferred use [RCW 90.58.270(5)(a)].

> 'Floating home' means a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed [RCW 90.58.270(5)(b)(ii)].

As a conforming preferred use, a floating home and its moorage can have only reasonable conditions and mitigation applied that will not preclude maintenance, repair, replacement and remodeling.

3) The Legislature also amended RCW 90.58.270 to address floating on-water residences. These are defined as

> (A)ny floating structure other than a floating home, as defined under subsection (5) of this section, that: (i) Is designed or used primarily as a residence on the water and has detachable utilities; and (ii) whose owner or primary occupant has held an ownership interest in space in a marina, or has held a lease or sublease to use space in a marina, since a date prior to July 1, 2014.

Floating on-water residences legally established prior to July 1, 2014, must be considered a conforming use. These residences must be accommodated through SMP regulations that will not preclude maintenance, repair, replacement and remodeling.

Questions to address

Ecology will require SMP regulatory language that is clear and precise and, at a minimum, include regulations to address the questions listed below. Otherwise, these issues will inevitably arise during implementation of the SMP. Regulations are needed to ensure consistency in treatment of these conforming structures so that the SMP does not default to WAC 173-27-080, Ecology's regulation for nonconforming development.

- Does the approach apply throughout shoreline jurisdiction or in specific environment designations or shoreline reaches only? It may not be appropriate in all shoreline areas.
- Is it limited to single family residences? Are appurtenances such as garages included? Are other residential-related uses such as sheds, driveways, or tennis courts included?
- Are water-related uses and nonwater oriented uses included?
- Are there clear procedures and criteria for considering when expansion of these conforming structures would be allowed? Can the footprint be expanded? Will additional stories be allowed? Are there specific limits to expansion such as percent of existing square footage, maximum impervious surface, maximum square footage, etc.? Expansions toward the water, over the water or in the water should generally not be allowed.
- Will replacement in the event of a disaster such as a fire or earthquake be allowed? Is replacement limited to the footprint prior to the disaster?
- Will replacement for other reasons be allowed?
- Are expansions of structures on old fills that were placed waterward of the OHWM allowed or only allowed upland of the structure?

- How is view blockage from adjacent residences and upland streets and aesthetic consequences along the shoreline reach addressed?

- What mitigation will be required for expansion? This could include removing bulkheads, adding vegetation, improving stormwater facilities, or other measures. Mitigation measures should be carefully reviewed during the permit process to ensure they mitigate the impacts of the development.

- Are there regulations regarding retention and replacement of trees and other vegetation within buffers or elsewhere on the property?

- What setbacks and buffers will be put in place?

- What can be built in the buffer or setback?

- If expansion will be allowed, how will the no net loss standard be met? How will ecological functions be retained or enhanced?

- How will abandoned structures be addressed?

- Is a shoreline conditional use permit or variance required for expansion? Under what circumstances?

A generalized statement in the SMP that simply says that all existing structures are conforming, or that simply excludes all existing structures from the buffer, and does not address the issues above, is not likely to be consistent with the no net loss standard.

Other things that local governments should think about:

- How would these alternative approaches within shoreline jurisdiction mesh with the nonconforming standards and other provisions of the zoning code, flood ordinances, building codes, and with the critical areas ordinance?

- Under some circumstances, local governments may determine certain structures to be nonconforming. For example, in some marine reaches, summer vacation cabins have been allowed in the past, but are now determined to be in hazardous slide areas. Local government may decide to designate such structures as nonconforming and not allow further expansion. In hazardous areas such as floodways, replacement of substantially damaged or destroyed structures may be required to be located out of the hazard area or in an area of significantly lower risk.

Nonconforming language needed

All SMPS need language addressing nonconforming uses and development. Why would local governments that choose the nontraditional options need nonconforming language in the SMP?

- Some uses, structures and lots may still be nonconforming. Over water residences except for certain floating homes, as discussed above, are nonconforming uses and nonconforming structures. Uses that would not be allowed under the SMP are nonconforming uses; for example, a factory in a shoreline residential environment designation is nonconforming. Lots that do not meet the standards of the SMP are nonconforming lots.

- Variances may create nonconforming structures. The SMP should set the parameters for new development and redevelopment. Local government will need to decide whether any use or development that is outside those parameters and requires a variance will be nonconforming and will meet the no net loss requirement.

- The nonconforming language in WAC 173-27-080 will apply to any nonconforming uses, structures and lots if the SMP does not include nonconforming language.

The rest of this document provides background information on regulation of nonconforming uses and development in Washington. It includes the Department of Ecology standards for nonconforming uses and development, reviews relevant court and board cases, and provides examples of custom nonconforming provisions in Shoreline Master Programs (SMP) that Ecology has approved.

Washington statutes

Within the general framework of the Constitution and case law, Washington State local governments have significant flexibility for defining and addressing nonconforming uses and development. Historically, nonconforming uses and development have not been addressed by State legislation in Washington.

In March 2010, the Legislature amended the Growth Management Act (GMA) regarding existing uses in shoreline areas. Critical areas regulations adopted under the GMA remain in effect within shoreline jurisdiction until Ecology adopts a comprehensive SMP update or SMP amendment specifically related to critical areas [RCW 36.70A.480(3)(b)].

Until Ecology acts as stated above, a legally existing structure and use in shoreline jurisdiction and established prior to local critical areas regulations may continue as a conforming use and be redeveloped or modified under the following conditions:

- Proposed redevelopment or modification is consistent with the local master program.
- The local government determines that the proposal will result in no net loss of shoreline ecological functions. Local government can waive this requirement if the proposal is consistent with the master program and the critical areas regulations.

Ecology shoreline regulations

The WAC regulations about nonconforming uses and development, revised in 2017, apply at the local level only if the local SMP does not address them. These standards reflect the basic policy expressed in several Washington court decisions and the policy of the SMA to provide for preferred uses and protect shoreline habitat.

For purposes of shoreline management under the SMA, nonconforming use and nonconforming development are defined in WAC 173-27-080(1) as:

> (a) "Nonconforming use" means an existing shoreline use that was lawfully established prior to the effective date of the act or the applicable master program, but which does not conform to present use regulations due to subsequent changes to the master program.
>
> (b) "Nonconforming development" or "nonconforming structure" means an existing structure that was lawfully constructed at the time it was built but is no longer fully consistent with present regulations such as setbacks, buffers or yards; area; bulk; height or density standards due to subsequent changes to the master program.

The WAC also addresses nonconforming lots:

(c) "Nonconforming lot" means a lot that met dimensional requirements of the applicable master program at the time of its establishment but now contains less than the required width, depth or area due to subsequent changes to the master program.

The WAC nonconforming regulations are provided below.

WAC 173-27-080
Nonconforming use and development standards

Local governments typically develop their own approaches to addressing nonconforming use and development. This section is intended to apply if a shoreline master program does not contain locally adopted 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) Definitions.

(a) "Nonconforming use" means an existing shoreline use that was lawfully established prior to the effective date of the act or the applicable master program, but which does not conform to present use regulations due to subsequent changes to the master program.

(b) "Nonconforming development" or "nonconforming structure" means an existing structure that was lawfully constructed at the time it was built but is no longer fully consistent with present regulations such as setbacks, buffers or yards; area; bulk; height or density standards due to subsequent changes to the master program.

(c) "Nonconforming lot" means a lot that met dimensional requirements of the applicable master program at the time of its establishment but now contains less than the required width, depth or area due to subsequent changes to the master program.

(2) Nonconforming structures.

(a) Structures that were legally established and are used for a conforming use but are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may continue as legal nonconforming structures and may be maintained and repaired.

(b) Nonconforming structures may be enlarged or expanded provided that said enlargement meets the applicable provisions of the master program. In the absence of other more specific regulations, proposed expansion shall not increase the extent of nonconformity by further encroaching upon or extending into areas where construction would not be allowed for new structures, unless a shoreline variance permit is obtained.

(c) 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.

(d) 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.

(e) In the absence of other more specific regulations, 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:

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

(ii) 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.

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

(g) 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 two years of the date the damage occurred.

(3) Nonconforming uses.

(a) Uses that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses.

(b) In the absence of other more specific regulations in the master program, such uses shall not be enlarged or expanded, except upon approval of a conditional use permit.

(c) 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 unless reestablishment of the use is authorized through a conditional use permit which must be applied for within the two-year period. Water-dependent uses should not be considered discontinued when they are inactive due to dormancy, or where the use includes phased or rotational operations as part of typical operations. A use authorized pursuant to subsection (2)(e) of this section shall be considered a conforming use for purposes of this section.

(4) Nonconforming lot. A nonconforming lot 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.

Nonconforming uses and development in an SMP

SMPS should include provisions to address local government decisions that determine uses and properties are nonconforming (WAC 173-26-191(2)(a)(iii)(A). Ecology does not expect, nor is it asking, local governments to eliminate legal, existing nonconforming uses and development from shorelines. Some nonconforming uses and structures within shoreline jurisdiction have existed for many years.

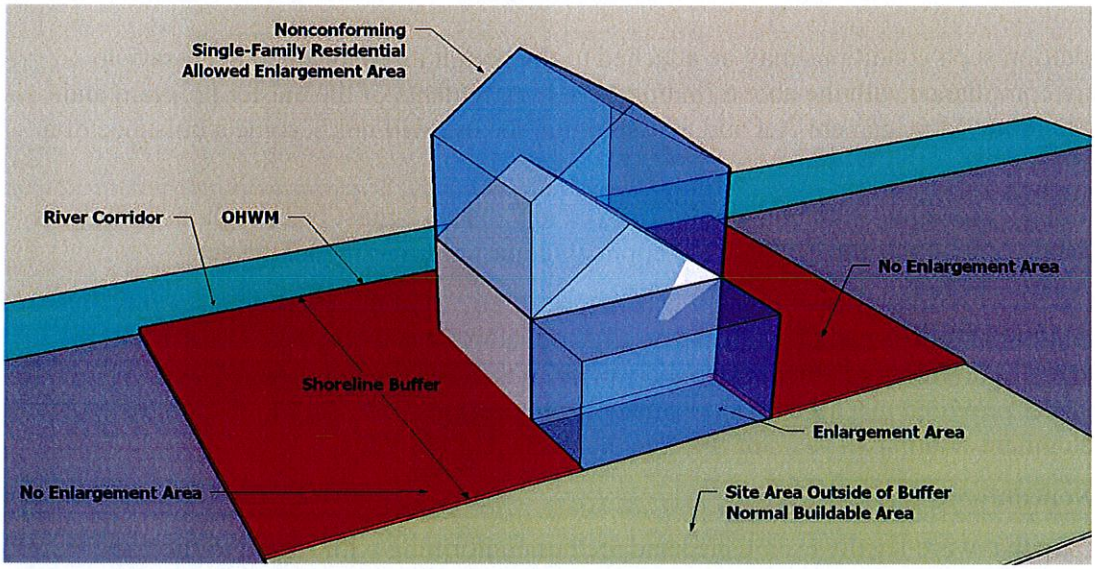

Figure 5: This graphic from the City of Spokane SMP shows that expansion or enlargement of the main nonconforming structure is allowed with addition of space above the building footprint or onto or behind the side that is farthest from the ordinary high water mark.

Options for addressing nonconforming situations include:

- Use the nonconforming standards in WAC 173-27-080.
- Use some provisions of WAC 173-27-080 and revise others to meet local needs.
- Write new nonconforming provisions.
- Use the same nonconforming provisions that are in the local zoning code. This will provide consistent treatment of nonconforming uses and development within and outside shoreline jurisdiction.

If your SMP does not include regulations regarding nonconforming development, WAC 173-27-080 will apply within your municipality's shoreline jurisdiction.

General sideboards

SMP language should be within the parameters of case law on nonconforming development. (For your convenience, some of those cases are discussed below.) The basic general sideboards for nonconforming regulations include:

Figure 6: Due to its over water location, KGY radio in the city of Olympia is a nonconforming structure. However, it can continue to operate in this location on Budd Inlet. (Kim Van Zwalenburg photo.)

- Legal, existing nonconforming uses and development may continue.
- Owners of nonconforming structures that wish to expand the structure may be able to do so if they do not increase the nonconformity. For example, a house partially within the buffer could be expanded outside the buffer.
- Local governments should develop use regulations considering the information in their shoreline inventory and characterization and avoid creating nonconforming development as much as possible. Local governments should assign environment designations and develop use regulations with the existing pattern of shoreline uses in mind. Incentives or other programs may be used to accommodate existing development while still meeting no net loss.
- Local governments have the right to terminate nonconforming development. On occasion, an existing use may have a high potential for use conflicts, such as a fuel storage facility within a city's wellhead protection zone. In these cases, a specific time

may be set for the use to be amortized and removed.

- As reflected in case law, local governments may adopt regulations to phase out nonconforming development over time. More commonly, phasing out is accomplished by adopting disincentives such as strict limits on change of use or expansion.

- SMPs need to cover the breadth of the nonconforming provisions that are in WAC 173-27-080 including those listed below. (The questions for conforming structures should also be considered for nonconforming structures.)

  - Definitions.
  - Structures – maintenance and repair, expansion, moving the structure.
  - Uses – expansion, change in use.
  - Reconstruction after damage, including timelines for permitting and reconstruction. Ecology suggests that SMPs include criteria to avoid reconstruction in hazard areas.
  - Abandonment.
  - Undeveloped lots.

The nonconforming provisions in an SMP should distinguish nonconforming uses from nonconforming structures. A nonconforming structure may contain a conforming use. For example, a single family residence in a Shoreline Residential environment is a conforming use. If it is located within the shoreline buffer, it is a nonconforming structure but still a conforming use.

Abandonment

Abandonment generally refers to ending a nonconforming use or stopping the utilization of a nonconforming structure for a set period of time or number of months within a set period of time. When abandonment occurs, the nonconforming rights expire and subsequent use must conform to the SMP regulations now in place.

Ecology's permitting regulations, shown above, call for nonconforming use rights to expire if the use is discontinued for 12 consecutive months or for 12 months during a two-year period [WAC 173-27-080(3)(c)]. Any subsequent use must conform to the current regulations, unless reestablishing the use is authorized through a conditional use permit that is applied for within the two-year period.

The time period for determining abandonment in updated SMPs approved by Ecology over the past few years generally ranges from six consecutive months to 18 consecutive months, or in some cases, 12 months within two years. After that, future use of the land or structures must conform to the SMP policies and regulations. Some SMPs allow for reestablishment of the nonconforming use under certain circumstances or allow the owner to request reconsideration.

WAC 173-27-080 also addresses water-dependent uses. "Water-dependent uses should not be considered discontinued when they are inactive due to dormancy, or where the use includes phased or rotational operations as part of typical operations" [WAC 173-27-080(3)(c)].

Examples

City of Arlington: The SMP terminates a nonconforming use that has been discontinued or vacated for six consecutive months or more. Future uses of the land or structure must conform to the SMP.

Yakima County: The Regional SMP states that discontinuing a nonconforming use for more than one year is presumed as intent to abandon and the use shall lose its nonconforming status unless a variance is obtained. Documentation showing that intent to abandon did not exist must be provided. Nonconforming outdoor areas that have not been used or maintained for five consecutive years lose their nonconforming status and may not be reestablished.

City of Lacey: SMP states that abandonment is presumed to occur when land or a structure is not used for a particular use for 18 consecutive months. The administrator's determination that abandonment has occurred may be appealed.

Whatcom County: SMP specifically calls out "non-agricultural non-conforming use" and states that future use must be consistent with the SMP if the use is intentionally abandoned for a period of 12 months or more.

King County: SMP allows an applicant who has lost nonconforming rights to provide documentation there was no intent to abandon the use. A statement that there was no intent to abandon the use is not considered adequate; documentation may include requests for approvals from local, state and federal agencies to reestablish the use or structure.

Snohomish County: SMP states it is not necessary to show the owner intended to abandon for the nonconforming rights to expire. Nonconforming rights expire if use is abandoned for 12 consecutive months or 12 months during a two-year period.

Dormant lands

Some uses may have periods of dormancy. Periods of dormancy are not typically abandonment. For example, for agriculture and aquaculture uses there may be times in which the land, tidelands or water area are not actively being farmed or cultured. Crops may need to be rotated, other cultivation factors may come into play, or dormant periods may be required by state or federal permits. These dormant periods may extend beyond a typical period for abandonment, as discussed above.

If shoreline uses include aquaculture, SMPs should discuss dormancy and may specify a different time period for abandonment of aquaculture operations compared with abandonment of other shoreline uses and development.

- It may be helpful to consult with state permitting agencies and growers in your area to find out typical time periods for dormancy associated with active cultivation. For example, net pens are sometimes dormant for 2 to 8 months before the pens are restocked

in order to reduce water quality impacts. This dormant period does not mean the operation has been abandoned.

- If the SMP defines abandonment for upland uses and structures differently than for aquaculture or other in-water uses, make sure to explain why that's the case.

- About 47,000 acres of state-owned aquatic lands that were sold to private parties under the Bush and Callow acts of 1895 [RCW 79.135.010] retain the right to farm shellfish, even if these aquatic lands have been dormant for many years. These aquatic lands are in the following counties: Clallam, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pacific, Pierce, San Juan, Skagit, Snohomish, and Thurston. There are some exceptions to the right to farm shellfish for subtidal lands that were not planted prior to December 31, 2001 and for aquatic lands where deed violations occurred. These aquatic lands must only be used for aquaculture. Search for Bush and Callow Act Aquatic Lands Maps at Washington Department of Natural Resources website.

Benign or detrimental nonconformities

An article in *Zoning Practice* article suggests that local governments consider whether nonconforming developments are "benign" or "detrimental" and develop separate regulations for development falling within these categories. This may help determine whether nonconformities should be terminated over time or allowed to continue. ("Distinguishing Between Detrimental and Benign Nonconformities," V. Gail Easley and David A. Theriaque, *Zoning Practice*, November 2009, Issue No. 11, American Planning Association.) However, in critical area buffers and shorelines, the cumulative impact of numerous minor or lesser impacting "benign" developments should be considered.

No net loss of ecological functions

SMPS must, over time, achieve no net loss of shoreline ecological functions. The SMP update process will include a cumulative impacts analysis and no net loss report that show how the SMP will achieve no net loss.

Nonconforming regulations must be included in those analyses. If the draft SMP would allow single family residences to be built on nonconforming lots, the analyses should reflect how no net loss will be achieved despite such development. The potential expansion of nonconforming development such as residences or other structures such as piers and docks, floating platforms, commercial or industrial buildings also should be included in the no net loss analyses.

Court cases and Shorelines Hearings Board cases

Hearings boards and courts in Washington have dealt with the nonconforming use and development issue under the Shoreline Management Act (SMA) and other land use statutes for more than three decades.

Some key points from the following Court and Shorelines Hearings Board (SHB) cases:

- Washington state laws generally do not address the regulation of nonconforming uses and development, and leave this issue primarily to local governments to resolve. (Note the 2010 changes to the GMA mentioned earlier.)
- Nonconforming development (uses and structures) is generally disfavored.
- Nonconforming development is routinely allowed to continue, at least for some time.
- A nonconforming status grants the use or development the right to continue to exist, but does not assure a right to significantly change, enlarge, expand or alter the use or development.
- Limited expansion of a nonconforming structure might be permissible because it is tied to other actions to bring the overall use into conformity (e.g., upgrade of nonconforming septic system).
- Local ordinances can terminate a nonconforming use or development that is abandoned or presents a hazard, or provide for it to cease over time.
- The language in the SMP is critical to the resolution of SHB and Court cases.

Some Court and Shorelines Hearings Board cases that are applicable to nonconforming development regulations in an SMP include those shown below.

Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1 (1988): In this case, the Washington Supreme Court supported Snohomish County's decision to require a grading permit for an existing nonconforming peat mining operation. The paragraphs below, taken from the case, discuss the theory of zoning in regards to nonconforming use and Washington State laws silence on the regulation of nonconforming use.

> 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. See 1 Robert M. Anderson, American Law of Zoning § 6.01 (Kenneth H. Young ed., 4th ed. 1996.)
>
> The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of

the police power. Id. at 220. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. Id. at 218. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. Id. Moreover, zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions. See R. SETTLE, WASHINGTON LAND USE § 2.7(d).

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. See R. SETTLE, WASHINGTON LAND USE § 2.7(d). 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. See id.

Meridian Minerals v. King County, 61 Wn. App. 195 (1991): The Washington Supreme Court supported King County's decision to withhold a permit for expansion of a nonconforming rock quarry. Language from the decision discusses nonconforming uses.

> The various owners of the Veazie Valley quarry have been allowed to continue a nonconforming use since 1958. That use can continue as long as it remains similar in kind to the use that became vested, the use at the time zoning occurred. Although railroad use of rock may have declined over the years and BNRR may be one of the last to need rock from the quarry, Washington has long adhered to the policy of phasing out nonconforming uses. Anderson; Bartz; Coleman v. Walla Walla, 44 Wn.2d 296, 266 P. 2d 1034 (1954); Cain. The generally accepted method of eliminating nonconforming uses "is to prevent any increase in the nonconformity and, when changes in the premises are contemplated . . . to compel . . . a lessening or complete suppression of the nonconformity". Anderson, at 323 (quoting 147 A.L.R. 167, at 168. The use of the quarry, not its ownership, was at issue when BALD declined to process Meridian's permit application.

City of University Place v. Brian P McGuire, 144 Wn.2d 640 (2001): Washington courts have recognized the diminishing asset doctrine as applied to mining, which is an exception to the general principle that a nonconforming use will be restricted to its original site. Regarding mining, the proper scope of a lawful nonconforming use is "the whole parcel of land owned and intended to be used by the owner at the time the zoning ordinance was promulgated." Id. at 651.

Developer McGuire wanted to grade a 1.4-acre knoll to be used as fill for a nearby development. The City of University Place denied the grading. McGuire argued the knoll was historically part of a site owned and operated by his predecessor and that he had a valid nonconforming use right to mine the knoll. The City stated that the nonconforming use either did not accrue to the knoll or had been abandoned. McGuire urged the Washington Supreme Court to adopt the doctrine of diminishing asset. This doctrine extends the boundaries of the nonconforming mining use to the

entire parcel intended to be mined at the time the zoning ordinance was enacted. The Court concurred the diminishing asset doctrine is applicable to mining operations.

Jukanovich v. Ecology, SHB No. 06-013: In this summary judgment, the Shorelines Hearings Board supported Ecology's denial of a variance for reconstruction of a house within the shoreline setback.

> While it is true that the house has not been moved closer to the water on the ground level, nor has the footprint changed, the Board concludes that adding nearly sixteen and one-half feet of height to the house, as well as creating additional interior square footage, enlarges, intensifies, and increases the encroachment of the house within the setback. The Board agrees with Ecology that "the setback does not just define a line that runs along the ground, beyond which development is prohibited. The setback line extends up into the air as well, to include the space above the ground." 11. This interpretation is consistent with the definition of "setback" in the SCSMA which states "A required open space, specified in shoreline master programs, measured horizontally upland from and perpendicular to the ordinary high water mark." SCSMA, p. J-9. See also SCC 30.23.100(2)("every required setback shall be open and unobstructed from the ground to the sky except for trees and other natural vegetation.")

Garlick et.al. v. Eiford et.al., SHB No. 95-6: This SHB case is a relevant decision to nonconforming residential structures. The decision states that nonconforming structures and uses are disfavored. The Board approved increasing the size of the home in the setback to allow a two-car garage, although the size increase was less than requested because the Board denied an over-the-garage living space.

> While we recognize that the overall policy of the SMA favors single family residences, we believe that the establishment of setback lines which create non-conforming development in existing neighborhoods, are logically intended to phase out the residential use within the setback area. If this is not the ultimate goal, these setback requirements are of little consequence, other than to invite the piecemeal granting of variances, until the setback becomes a nullity. The WCSMP is consistent with the concept of limiting the expansion of non-conforming development. Section 23.50.92, for example, restricts repair of non-conforming developments to work which will not increase the non-conformity. Section 23.50.93 similarly restricts the reconstruction of any pre-existing non-conforming developments. It would be inconsistent with the liberal construction of the SMA to deduce from these sections that proposals to expand non-conforming residential development may be approved, based on the personal desires of the applicant.

Jefferson Cy. v. Seattle Yacht Club, 73 Wn. App. 576 (1994): The Court of Appeals remanded to the SHB the Superior Court order affirming the SHB's decision to allow a yacht club outstation at Port Ludlow Bay. The Court directed the SHB to reconsider its decision to "reconsider the proposal's compatibility with the area immediately adjacent to the proposed site without considering any nonconforming use."

> Because nonconforming uses are disfavored, and because the public policy of this state is to restrict such uses so that they may ultimately be phased out, see, e.g., Keller v. Bellingham, 20 Wn. App. 1, 9, 578 P.2d 881 (1978), aff'd, 92 Wn.2d 726, 600 P.2d 1276

(1979), we believe that nonconforming uses are not precedent for other uses. That is, a finding of compatibility cannot, in our view, be substantially based on the existence of a nonconforming use in the area in question.

Guy Fox v. Ecology, SHB NO. 00-025: In this case, the SHB overturned Ecology's denial of a conditional use permit to enclose a deck as long as the change was linked to installation of a septic system.

First, it is important to note that the enclosure of the deck will not increase the non-conformity. Accord, Gambriell v. Mason County and Ecology, SHB 91-26 (1992) (enclosure of a deck to add a dining room did not increase the nonconformity as the same area that violated the setback was not increased.) The degree to which the nonconforming structures on the Fox property will be over the water will remain the same.

Second, the area around Mr. Fox's property is highly developed with many residential homes that are either over the water or behind nonconforming bulkheads. Many of these residential developments are much further waterward and are much larger in scale than Mr. Fox's very small 10 feet by 13 feet cabin. Allowing Mr. Fox to enclose an existing deck to add a bathroom and expanded kitchen will not grant him a special privilege but will merely make his home more in conformity with the surrounding area.

Third and most importantly, there has been no evidence of any environmental harm that will result from allowing this very modest request. If there is no environmental harm, allowance of this expansion will foster "all reasonable and appropriate uses" and will recognize the preference given to single-family development. RCW 90.58.020.

Nonconforming language in updated SMPs

Local governments that have adopted comprehensive SMP updates since 2004 have addressed nonconforming development in various ways. Below are some examples. Check Ecology's Status of local Shoreline Master Programs page for links to SMPs that are approved by Ecology.

Douglas County: Adopted WAC 173-27-080 into its SMP.

City of Marysville: Incorporated the nonconforming provisions of its zoning code into its SMP. The zoning code allows nonconforming structures and uses "to continue in existence, and to be repaired, maintained, remodeled, expanded and intensified, but only to the extent expressly allowed by the provisions of this chapter. It is the purpose of the city to ultimately have all structures and uses brought into conformity with the land use codes and regulations duly adopted by the city, as the same may be amended from time to time. Nonconforming structures and uses should be phased out or brought into conformity as completely and as speedily as possible with due regard to the special interests and property rights of those concerned." (Ord. 2131, 1997). (MCC 19.44.010)

City of Monroe: Adopted WAC 173-27-080 into its SMP.

City of Port Townsend: Adopted nonconforming provisions that address the local shoreline conditions. The nonconforming chapter has separate sections for uses, standards and lots. Change of ownership, tenancy or management does not affect the use's nonconforming status. Additional development of property that includes a nonconforming use requires new uses to conform to the SMP. Nonconforming status is lost if the use is discontinued for 365 continuous days.

Nonconforming structures except for residences that are damaged one -half or more of replacement cost can be restored only if the restoration conforms to the SMP. Residences destroyed by catastrophe and in a residential zone may be reconstructed to the size, density and location that existed prior to the catastrophe. Additional provisions can be found in Port Townsend's SMP.

City of Spokane: Adopted nonconforming provisions that are similar to those in WAC 173-27-080. The SMP departs from the WAC in some instances.

For example, there is no maximum amount of damage to nonconforming single family residences, manufactured homes and mobile homes as there is for other structures. "If a nonconforming structure is damaged to an extent not exceeding 75 percent of the replacement cost of the original structure, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged, provided that application is made for the permits necessary to restore the structure within six months of the date the damage occurred, all permits are obtained, and the restoration is completed within two years of permit issuance, except that nonconforming single-family residences, manufactured homes, and mobile homes may be reconstructed regardless of the extent of damage so long as application is made within the times required by this subsection." SMC 17E.060.380.

Also, a substantial development permit is required for replacement of existing nonconforming residential buildings within the existing footprint.

Whatcom County: The County's SMP requires a variance for expansion of nonconforming structures, except for single family residences which meet certain requirements. The SMP establishes shoreline buffers of 100 to 150 feet. A small percentage of shoreline lots that are vacant are too small to meet the buffer requirements for new development. The SMP allows for development on these lots that have a building area not located in a hazard area.

The provisions from Whatcom County's SMP provided below show one approach regarding nonconforming structures and lots. Comments in the following section are from Barry Wenger, former Ecology Regional Planner at the Bellingham Field Office.

Whatcom County's Non-conforming Development provisions located at Chapter 23.50.07

D. 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.

(Comment - The above provision allows structures to be maintained, and minor location adjustments of dock/float structures, to improve consistency with the SMP without defaulting to the current standards. This approach provides an incentive for non-conforming dock owners to make environmental improvements through an administrative conditional use rather than tearing the entire structure out and applying for a shoreline variance that has little chance of approval. An administrative conditional use is only processed by staff before being sent to Ecology for final determination rather than going through a long and expensive Hearing Examiner process at the local level.)

E. 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.B.1(e).

Figure 7: The Birch Bay Bistro restaurant in Whatcom County is a legal nonconforming use and structure.

(Comment - Non-conforming residences that are located in the setback/buffer may be expanded landward, laterally or vertically within the side yard/height limits via an administrative conditional use, provided the vegetation buffer is tailored and identified for the lot, a notice recorded with the county auditor, and mitigation provided commensurate for any buffer impacts [SMP 23.50.07.I]. Expansion waterward of the existing foundation walls, into the side yard setbacks, or above the height limit requires a shoreline variance.)

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.B.1(e).

(Comment - The second part of Section E allows by conditional use conforming commercial or mixed use development within a non-conforming structure to modify or alter the shape of the structure within the same footprint to meet development needs i.e. change rooflines, add windows, etc. Section 23.100.05.B.1(e) requires public access and restoration be provided with the additional design flexibility.)

Non-conforming lots

K. 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; provided that consideration shall be given to view impacts and all single family residences approved under this section shall not extend waterward of the common-line setback as measured in accordance with Appendix F.

3. The area between the structure and the shoreline and/or critical area shall comply with the vegetation conservation standards of SMP 23.90.06.B.3.

4. Development may not take place waterward of the ordinary high water mark.

5. Facilities such as a conventional drainfield system may be allowed within critical areas or their buffers, except wetlands and buffers, outside of the building area specified above, subject to specific criteria in WCC 16.16.

(Comment - Owners of vacant lots that are too small to meet the new setbacks/buffers and are not located in a hazard area may take advantage of the provision that allows a "building area" disturbance of 2,500 square feet as far from the water as possible, unless a shoreline variance is authorized. In no case shall the new structure be located closer to the water than the existing common-line setback within 50 feet of and between the two adjacent existing residences. The tailored vegetative buffer is required to be identified and provided, a notice recorded with the county auditor's office, and mitigation provided for buffer impacts [SMP 23.90.06.B.3])

Information sources

Sources of information for this section of the Shoreline Master Programs Handbook include the following:

RCW and WAC

Shoreline Management Act, RCW 90.58, particularly RCW 90.58.620 and RCW 90.58.270(5)(a).

Shoreline Master Program Guidelines, WAC 173-26 Part III, particularly WAC 173-26-191(2)(a)(iii)(A).

Shoreline Management Permit and Enforcement Procedures, WAC 173-27, particularly WAC 173-27-080.

Growth Management Act, particularly RCW 36.70A.480(3)(b).

Shoreline Master Programs

City of Arlington Shoreline Master Program, August 28, 2012.

City of Issaquah Shoreline Master Program, March 12, 2013.

City of Lacey Shoreline Master Program, October 13, 2011.

City of Marysville Shoreline Master Program, October 31, 2006.

City of Monroe Shoreline Master Program, August 22, 2008.

City of Port Townsend Shoreline Master Program, February 14, 2007.

City of Spokane Shoreline Master Program, July 26, 2010.

Douglas County Shoreline Master Program, August 27, 2009.

King County Shoreline Master Program, January 28, 2013.

Snohomish County Shoreline Master Program, July 27, 2012.

Spokane County Shoreline Master Program, January 22, 2013.

Whatcom County Shoreline Master Program, August 8, 2008.

Yakima County Regional Shoreline Master Program, February 25, 2010.

Court cases

Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1 (1988).

Meridian Minerals v. King County, 61 Wn. App. 195 (1991)

City of University Place v. Brian P McGuire, 144 Wn.2d 640 (2001)

Jefferson Cy. v. Seattle Yacht Club, 73 Wn. App. 576 (1994)

Shorelines Hearing Board cases

Jukanovich v. Ecology, SHB No. 06-013

Garlick et.al. v. Eiford et.al. SHB No. 95-6

Guy Fox v. Ecology, SHB NO. 00-025

Other

Bush and Callow Act Lands, Washington State Department of Natural Resources, no date.

"Distinguishing Between Detrimental and Benign Nonconformities," V. Gail Easley and David A. Theriaque, *Zoning Practice*, November 2009, Issue No. 11, American Planning Association.