SUMMARY STATEMENT OF OCTOBER 7, 2010 TO WA DEPT. OF ECOLOGY

The Washington State Department of Ecology has stated that it will determine whether vegetation management provisions of the Sammamish Shoreline Master Program are adequate to achieve no net loss of ecological function. A significant number of Sammamish residents who live on Pine Lake would submit that the SMP approved by our City Council represents a balance of opinions submitted by all those concerned so as to achieve no net loss to our lake. Some of the evidence to support this position is:

➢ Scientific evidence on the subject of lakeshore vegetation and its role in protecting lake ecology fails to scientifically demonstrate the ecological benefits of a Vegetation Enhancement Area (VEA) on Pine Lake. See the Memorandum dated June 16, 2009, addressed to the City of Sammamish from Margaret Clancy and Laura Brock, ESA Adolfson on this subject. See page 2 for more details.
➢ This same Memorandum states “Vegetated lakeshore zones may also contribute more nutrients than they remove.” See page 2 for more details.
➢ In a study in the J. Environ. Qual. Volume 32, March to April 2003 entitled Phosphorous Removal in Vegetated Filter Strips, Table 2, demonstrates that the difference in the phosphorous trapping efficiency between a grass strip and a native vegetation strip is negligible, and fails to prove that a native vegetation area is significantly superior to grass. See page 3 for more details.
➢ According to the “Management of Pine Lake Water Quality” report of March 5, 2009 “There are little direct data from the Pine Lake watershed that would definitively quantify how much native vegetative buffer is needed to protect the lake’s water quality...” See page 3 for more details.
➢ According to this same report “the quality of Pine Lake has improved greatly...” and “Lake quality during the summer has always been relatively good, but has even improved in the past 15 years...” See page 3 for more details.
➢ The requirement of a VEA affects the owners of property disproportionally depending on the size of their property, causing a greater hardship on almost one-third of the homeowners. See page 6 for details.
➢ The Washington Supreme Court has affirmed that “The Shoreline Management Act intended to strike a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. The right to make reasonable use of one’s private property is a constitutionally protected right. Government activities that invade or interfere with the right to use and enjoy property is a taking.” See page 4 for details.

The SMP submitted by Sammamish does represent a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. It should by approved by the Department of Ecology as submitted.

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WHITE PAPER ON THE ISSUE OF A VEGETATION ENHANCEMENT AREA REQUIREMENT FOR SHORELINE PROPERTIES LOCATED ON PINE LAKE

October 7, 2010

Prepared by C.J. and Mary Jo Kahler, 21911 SE 20th Street, Sammamish, WA 98075

The Washington State Department of Ecology has stated that it will determine whether vegetation management provisions of the Sammamish Shoreline Master Program are adequate to achieve no net loss of ecological function. A significant number of Sammamish residents who live on Pine Lake would submit that the SMP approved by our City Council represents a balance of opinions submitted by all those concerned so as to achieve no net loss to our lake. Some of the detailed evidence to support this position is:

After doing significant research we believe there are four issues concerning a Vegetation Enhancement Area for Pine Lake that must be considered: These issues are:

I. The Program must comply with WAC 173-26-201 in basing all master program provisions on the application of all available scientific and technical information;

II. The Program must recognize and follow the “Management of Pine Lake Water Quality” report with respect to its findings and recommendations as regards provisions specific to Pine Lake;

III. The Program must take into consideration significant constitutional and statutory data regarding private property and its use;

IV. The Program must recognize that the requirement of a Vegetation Enhancement Area disproportionately affects the owners of property, causing a greater hardship on almost one-third of the homeowners.

I. Must comply with WAC 173-26-201 in basing all master program provisions on the application of relevant available scientific and technical information.

A. The following Washington code, as quoted below, prescribe the processes to be followed by Sammamish in the updating of the city’s SMP:

“WAC 173-26-201 Comprehensive process to prepare or amend shoreline master programs. . . .
(2) Basic concepts.
(a) Use of scientific and technical information. To satisfy the requirements for the use of scientific and technical information in RCW 90.58.100(1), local governments shall incorporate the following two steps into their master program development and amendment process.

First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance
materials, manuals and services from reliable sources of science. Local governments should also contact relevant state agencies, universities, affected Indian tribes, port districts and private parties for available information. While adequate scientific information and methodology necessary for development of a master program should be available, if any person, including local government, chooses to initiate scientific research with the expectation that it will be used as a basis for master program provisions, that research shall use accepted scientific methods, research procedures and review protocols. Local governments are encouraged to work interactively with neighboring jurisdictions, state resource agencies, affected Indian tribes, and other local government entities such as port districts to address technical issues beyond the scope of existing information resources or locally initiated research.

Local governments should consult the technical assistance materials produced by the department. When relevant information is available and unless there is more current or specific information available, those technical assistance materials (e.g. Pine Lake Water Quality Report) shall constitute an element of scientific and technical information as defined in these guidelines and the use of which is required by the Act."

B. The scientific and technical information supplied to the Sammamish City Council is in the form of a Memorandum dated June 16, 2009, addressed to the City of Sammamish from Margaret Clancy and Laura Brock, ESA Adolfson on the subject of Lakeshore vegetation and its role in protecting lake ecology. This memorandum fails to provide sufficient information to scientifically demonstrate the ecological benefits of a VEA on Pine Lake for the following reasons:

1. From a scientific basis, data and studies that are presented to demonstrate a position should be based on identical conditions that apply to the issue being studied. Scientists always compare apples to apples, and not apples to oranges. Pine Lake is a small 88 acre lake. Thus, the data and studies supplied should involve data that applies to a similar lake. Twelve of the 22 references listed do not even address conditions or studies on a lake and should be discarded as irrelevant.

2. The memorandum states “The trophic condition of a lake can range from least productive (called oligotrophic) to moderately productive (mesotrophic) to highly productive (eutrophic).” Pine Lake has been rated oligotrophic (least productive). It now has almost fully developed shorelines which make it minimally vulnerable to the pressures of any future development. As a point of reference, the Redmond adopted (and DOE accepted) SMP adopts this same position with respect to buffers on Lake Sammamish, a Lake more fragile than Pine Lake. Since Pine Lake is at an optimal point with respect to its trophic condition, no shoreline modifications should be required.

3. The memorandum states “Vegetated lakeshore zones can be a source of nutrients as well as a nutrient sink. Lakeshore plants cycle nutrients and some (such as red alder) fix nitrogen in soil. Nutrients can be released through surface or
groundwater when plants die or when nitrogen is released from soils. This may mean that even though vegetated areas may retain nutrients and infiltrate well, they may also contribute more nutrients than they remove.” This statement shows that VEA’s on Pine Lake could even be detrimental to its water quality.

4. In a study in the J. Environ. Qual. Volume 32, March to April 2003 entitled Phosphorous Removal in Vegetated Filter Strips, Table 2, entitled Water retention and phosphorous trapping efficiency of various filters, demonstrates that the phosphorous trapping efficiency of a 5 meter wide strip of perennial rye grass was 65% as compared to a 5 meter wide strip of native vegetation at an average of 68%. The difference in the phosphorous trapping efficiency is negligible and fails to prove that a native vegetation area is significantly superior to grass.

II. Must recognize and follow the “Management of Pine Lake Water Quality” report with respect to its specific findings and recommendations for Pine Lake.

A. The “Management of Pine Lake Water Quality” report of March 5, 2009, states:

1. Section 6.4.1 Buffer Requirements:
   “There are little direct data from the Pine Lake watershed that would definitively quantify how much native vegetative buffer is needed to protect the lake’s water quality, or specifically control P loading to the lake. It is clear that the more buffer that can be maintained the less risk there will be for water quality degradation. Until there are data to support specific buffer widths and coverage it is recommended that native vegetative buffers be encouraged to the greatest extent allowable under current land use codes.”

   The above recommendation of this report again confirms the lack of scientific evidence for buffers (which the SMP calls VEAs) of any certain width on Pine Lake.

2. Section 5.1 Lake Condition:
   “The quality of Pine Lake has improved greatly since diversion of the wetland inflow in 1988. Large spring cyanobacteria (blue-green algae) blooms have largely disappeared, however post destratification fall and winter blooms still occur, as was the case in 2005. While diversion of P input from the wetland was the cause for the spring bloom elimination, fall-winter blooms result largely from high P content in the anoxic hypolimnion that becomes distributed throughout the lake following fall mixing. High cyanobacterial biomass can also accumulate at mid depth during the stratified period and contribute to fall-winter surface blooms (Anderson and Welch, 1991; Jacoby et al., 1997).

   While these fall-winter blooms can be aesthetically offensive, they do not affect recreation during summer. Lake quality during the summer has always been relatively good, but has even improved in the past 15 years such that mean summer surface chl a and TP are now about 3 μg/L and 10 μg/L, respectively. deepen the mixed layer (epilimnion). “

   According to this report,” the quality of Pine Lake has improved greatly...” and “Lake quality during the summer has always been relatively good, but has even improved in the past 15 years...” Again, there is a lack of any positive scientific evidence that would
dictate a need for more restrictive regulations. In fact the report tells us that Pine Lake has improved. Pine Lake is not broken. There does not need to be an extra burden on property owners to install VEA’s.

III. Must take into consideration significant constitutional and statutory data regarding private property and its use.

The proposed update of the SMP, as applied to particular property owners, must take into consideration significant constitutional and statutory regarding private property and its use for the following reasons:

1. Our Supreme Court has repeatedly concluded that the SMA intended to strike a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. *See Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 687 (2007) (the SMA seeks to balance protecting shorelines with the rights of private property owners); *accord, Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 203 (1994); *Nisqually Delta Ass’n v. City of Dupont*, 103 Wn.2d 720, 726 (1985).

2. Washington’s landowners have the fundamental right "to acquire and hold property, and to protect and defend the same." *American Legion Post No. 149 v. Washington State Dept. Of Health*, 164 Wn.2d 570, 607 (2008) (emphasis added); *State v. Vander Houwen*, 163 Wn.2d 25, 36 (2008); *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812-13 (2004). Property is defined by state law, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and Washington has defined property in the broadest of terms:
   i. *Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal.* Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of property is annihilated and ownership is rendered a barren right.

3. *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409 (1960) (emphasis added). The right to make reasonable use of one’s private property is a constitutionally protected right. Government activities that invade or interfere with the right to use and enjoy property is a taking. *Pruitt v. Douglas County*, 116 Wn.App. 547, 559 (2003). Thus, even if title and possession of property remain undisturbed, a taking still may have occurred in the constitutional sense. *See State ex. rel. Smith v. Superior Court*, 26 Wash. 278, 287 (1901).
   i. While government can adopt reasonable regulations to protect the public interest, it cannot "abrogate a property owner’s constitutional right to protect his property." *Vander Houwen*, 163
Wn.2d at 36; *Biggers*, 162 Wn.2d at 697 (A complete prohibition on protective bulkheads would "conflict[] with [the] regulatory system established by the SMA.").

ii. Washington’s constitution prohibits government from enacting laws that take or damage private property without first paying just compensation. *See* Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ."); *Dickgieser v. State*, 153 Wn.2d 530, 534-35 (2005). It has long been established that government regulation that goes too far in interfering with the rights of landowners may result in a taking. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In other words, an ordinance is not insulated from a takings challenge merely because a sweeping legislative generalization has been made that the ordinance protects society from a conceived harm, whether it be public safety, environmental degradation, etc. Rather, the more pertinent question is where a permissible "regulation" ends and an unconstitutional "taking" begins. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

iii. The Takings Clause operates to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 964 (1988). In other words, it assures fundamental fairness in the way that government treats its citizens and distributes the burdens of community life.

The above citations from case law emphasize that:

1. The SMA intended to strike a balance between the public interest in protecting shorelines and the property rights of shoreline landowners.

2. Washington’s landowners have the fundamental right to acquire and hold property, and to protect and defend the same.

3. The right to make reasonable use of one’s private property is a constitutionally protected right. Government activities that invade or interfere with the right to use and enjoy property is a taking.

4. While government can adopt reasonable regulations to protect the public interest, it cannot abrogate a property owner’s constitutional right to protect his property.

5. Washington’s constitution prohibits government from enacting laws that take or damage private property without first paying just compensation.

6. The Takings Clause operates to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

In both the United States Bill of Rights and even more specifically in the Washington State Constitution, the individual’s right to own and use their property is clearly
articulated and substantiated by numerous citations in case law. A minimalist approach to property regulation under the SMA/SMP is consistent with that legal tradition.

**IV. Must recognize that the requirement of a VEA affects the owners of property disproportionately, causing a greater hardship on almost one-third of the homeowners.**

Using online information from the King County Assessor’s office about 99 properties on Pine Lake with an area of 26,000 sq. ft. or less, and using varying actual shoreline widths, and assuming that each property would have an average area of 5,000 sq. ft occupied by a residence, a driveway, and sidewalks, and assuming a 15 foot VEA was mandatory, a determination was made as to the percent of remaining property that the VEA would occupy. This calculation revealed that:

- for 33 of the 99 properties, the VEA would occupy 10% or more of the properties’ remaining area.

- for 56 of the 99 properties, the VEA would occupy between 5 and 9% of the properties’ remaining area.

- for 10 of the 99 properties, the VEA would occupy between 1 and 4% of the properties’ remaining area.

Conclusion:

We, along with many, many of our fellow citizens, have spent hundreds of volunteer hours defining our vision of a balanced SMP for Sammamish that respects the rights and needs of the varied parties affected by this policy. In doing so we are fulfilling our role in the process set forth in the August, 2009 City Newsletter, “City leaders have set course” which says, “...the elected representatives of the people are responsible for understanding the community’s “vision,” and then creating the broad policy strokes that allow the community to attain that vision.” To be credible participants in the SMP process we have derived our conclusions from scientific research (some of which has been commissioned by the City itself), from federal and state laws and the legal challenges/decisions that have resulted therefrom, and from physically observing the application of the proposed policy regulations using both water and shoreline perspectives.

The SMP submitted by Sammamish does represent a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. It should by approved by the Department of Ecology as submitted.