June 17, 2011

Via E-Mail and U.S. Mail

City of Sammamish
801 228th Ave SE
Sammamish, WA 98075

Attn: City Council Members
Ben Yazici, City Manager
Kamuron Gurol, Director of Community Development
Susan Cezar, Deputy Director of Community Development

Re: Response to City Staff Alternatives for Shoreline Master Program

To all whom it may concern:

This firm represents Sammamish Homeowners (SHO), a non-profit corporation comprised of owners of residential shoreline property throughout the City of Sammamish. SHO is interested in the promotion and adoption of an SMP that protects the existing ecological functions and values of our City’s shorelines while simultaneously addressing the reality that the City’s shorelines are already largely comprised of residential development at urban densities.

The City Council will be considering City Staff’s recommended alternatives to Ecology’s “required” changes to the SMP at its meeting on June 20, 2011. As explained in SHO’s letter dated June 9, 2011, although SHO finds many of Ecology’s “required” changes to be acceptable, Ecology’s overall approach with respect to setbacks, docks, vegetation enhancement areas (VEAs), exemptions/non-conforming uses, and mitigation sequencing was simply unacceptable. As such, SHO is appreciative of City Staff’s efforts to develop alternatives to Ecology’s required changes, as authorized by RCW 90.58.090(1)(ii).

SHO has now had an opportunity to review City Staff’s recommended alternatives, and is pleased to support many of them, including language relating to non-conforming uses and mitigation sequencing. In addition, SHO believes that some of City Staff’s alternatives can be improved upon with slight modification, including language relating to shoreline setbacks. However, SHO remains deeply concerned with City Staff’s approach with respect to docks and vegetation enhancement areas (VEAs). For this reason, SHO has prepared their own alternatives to City Staff’s approach on these issues, which are addressed herein. The specific ordinance language that constitutes SHO’s proposed alternatives is set forth in a table attached hereto. For
ease of reference, the table follows the same format as Attachment A to Exhibit 2 in the council packet.

DISCUSSION

I. DOCKS

<table>
<thead>
<tr>
<th>Staff’s recommended alternative, includes the following:</th>
<th>SHO’s response to Staff’s recommended alternative:</th>
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<tbody>
<tr>
<td><strong>New docks:</strong></td>
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<tr>
<td>• Relent to Ecology’s demand to impose U.S. Army Corps of Engineers standards on all lakes, including the following specifications</td>
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<tr>
<td>- Maximum overwater coverage to 480 ft² for single-family residences and 700 ft² for new shared docks</td>
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<td>- 4 ft. dock width within 30 ft. from OHWM, and up to 6 ft. more than 30 ft. from OHWM (with slight variation for Pine/Beaver Lakes);</td>
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<tr>
<td>• Create administrative process to allow dock width up to 6 feet, if permits are approved by USACOE and WDFW</td>
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<tr>
<td><strong>Repair/Replacement of docks</strong></td>
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<tr>
<td>• Relent to Ecology’s demand to make repair/replacement docks subject to new dock standards</td>
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<tr>
<td>• Maintain dock widths at 6 feet regardless of location waterward of OHWM to ensure safety of all members of the public</td>
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<tr>
<td>• Retain maximum overwater coverage at 600 ft² for new docks for single-family residences and 800 ft² for new shared docks (i.e., essentially a byproduct of retaining 6-foot dock widths)</td>
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</table>

SHO already provided an extensive factual and legal analysis supporting its position with respect to new and repair/replacement docks in its letter dated June 9, 2011. For the sake of brevity, the majority of that analysis will not be repeated here.

Construction of a new dock on Lake Sammamish generally requires three permits: a shoreline permit from the City of Sammamish (typically a shoreline substantial development permit); a Section 404 Clean Water Act/Section 10 Rivers and Harbors Act permit from the U.S. Army Corps of Engineers (typically issued under Regional General Permit 3 (RGP-3)); and a hydraulic
project approval (HPA) from the Washington Department of Fish and Wildlife (WDFW). In contrast, the construction of a new dock on Pine and Beaver Lakes would typically require only two permits, namely a shoreline permit from the City of Sammamish and an HPA from WDFW. Critically, such docks would not require a permit from the USACOE because the USACOE has no jurisdiction over Pine and Beaver Lakes.

As indicated in more detail below, Ecology’s required changes to the SMP would essentially impose *optional* USACOE standards for new docks on all lakes within Sammamish, and make them *mandatory*: *See Table supra* (listing USACOE optional standards). City Staff’s recommended alternative would essentially do the same, but would allow limited modification to those standards, including wider docks, if approved by USACOE and/or WDFW.

Prior to determining what optional standards would be imposed for new docks on Lake Sammamish under RGP-3, the USACOE completed a biological evaluation in consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries. This biological evaluation was necessary to comply with the Endangered Species Act (ESA), inasmuch as Lake Sammamish contains several species of salmonids listed as endangered or threatened under the ESA, including chinook salmon and bull trout.

The optional dock design standards in RGP-3 were allegedly designed to minimize harm to salmonids in Lake Sammamish. These design standards included maximum overwater coverage of 480 feet for single-family dwellings, maximum dock width of 4 feet with 30 feet from OHWM, 18-foot spaced pilings, among others. **Critically, however, compliance with RGP-3 docks standards is essentially a “safe harbor” to ensure the requisite protection for salmonids.** Where a project applicant proposes a dock with greater dimensions than those in RGP-3, the applicant simply applies to the USACOE for a slightly different permit, namely a “general permit” or a “letter of permission.” *See generally 33 C.F.R. § 325.5. Under these other permitting processes, the USACOE routinely approves docks in greater dimension than RGP-3 on Lake Sammamish.*

For whatever reason, City Staff appears to have relented on Ecology’s demand to impose RGP-3 standards not only on Lake Sammamish, but also on Pine and Beaver Lakes, with an allowed administrative process to achieve greater dock width.

City Staff’s concession to use RGP-3 standards as a default is unfortunate. First, narrow docks, such as the 4-foot docks generally imposed by RGP-3, are dangerous for *anyone* unsteady on their feet, including the disabled, children, elderly, or otherwise able-bodied adults carrying equipment or supplies. Second, Ecology has already approved 6-foot wide docks for Lake Sammamish in the Redmond SMP, and provides no explanation why a similar approval is inappropriate in Sammamish. Third, through the permitting process, RGP-3 standards are regularly exceeded by the USACOE. In other words, although the USACOE does not use RGP-3 as a ceiling for dock dimensions, the City appears willing to impose those standards as their own ceiling. Worse yet, the design standards under RGP-3 are directed toward minimizing harm to salmonids, which simply do not exist in Pine and Beaver Lakes. Neither Ecology nor the City
Staff has provided any justification for why the onerous RGP-3 standards are appropriate on Pine and Beaver Lakes.

SHO continues to object to the imposition of RGP-3 standards on new docks on Lake Sammamish and Pine and Beaver Lakes. The City should adopt those dock standards that were in the original SMP that was submitted to Ecology, which more closely approximate what the USACOE routinely approves for docks on Lake Sammamish. Additionally, RGP-3 has no applicability whatsoever to Pine and Beaver Lakes because the USACOE has no jurisdiction over those lakes and they contain no salmonids.

Finally, SHO objects to the imposition of RGP-3 standards for the repair/replacement of existing docks. As already explained in detail in the SHO letter dated June 9, 2011, the SMA merely requires that new development result in “no net loss” of existing shoreline ecological functions. WAC 173-26-201(2)(c) (requiring protection of “shoreline resources and values as they currently exist.”) (italics added). Although restoration is an important goal of the SMA, achieving restoration of impaired ecological functions may only be accomplished through “nonregulatory policies and programs”). Id. Imposing new docks standards for the repair/replacement of an existing dock is clearly an unlawful attempt to impose restoration via a regulatory program. SHO believes that in-kind repair/replacement of docks is appropriate, as long as new docks are not constructed with harmful materials, such as creosote and penta piles. SHO is even willing to accept the removal of all dock skirting for repair/replacement docks. However, requiring changes in dimensional standards for mere repair/replacement of docks would clearly contravene the “no net loss” standard, and would instead constitute restoration.

II. VEGETATION ENHANCEMENT AREAS

<table>
<thead>
<tr>
<th><strong>Staff’s recommended alternative, include the following:</strong></th>
<th><strong>SHO’s response to Staff’s recommended alternative:</strong></th>
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<tbody>
<tr>
<td>• Relent to Ecology’s demand to impose VEA’s on all development affecting shoreline setbacks or buffer areas.</td>
<td>• On Pine and Beaver Lakes, allow a flexible menu of mitigation options, in lieu of imposing a one-size-fits-all VEA</td>
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</tbody>
</table>

SHO already provided an extensive factual and legal analysis supporting its position with respect to VEAs in its letter dated June 9, 2011. Again, for the sake of brevity, the majority of that analysis will not be repeated here.

As previously indicated, in legislative process leading to the adoption of the original SMP that was submitted to Ecology, property owners in Pine and Beaver Lakes voluntarily assumed an unprecedented burden in the form of an 80% tree retention requirement. In exchange for taking on this burden, property owners on Pine and Beaver Lakes were not required to maintain a VEA.
Despite this concession, Ecology wanted the best of both worlds—an 80% tree retention requirement on Pine and Beaver Lakes and a fully vegetated VEA. Unfortunately, it appears that City Staff now agrees with Ecology in this respect.

Members of SHO that are residents on Pine and Beaver Lakes retain their opposition to a one-size-fits-all VEA. As previously indicated, for development that would affect shoreline setbacks or buffer areas, these residents are still in favor of a flexible menu of mitigation options, in lieu of a VEA. Although development of this menu of options is still in its preliminary stages, such a menu could contain many of the following options:

- Prohibition of all phosphorus containing fertilizers within shoreline jurisdiction;
- Removal of existing bulkhead located at, below, or within five feet landward of OHWM and subsequent restoration of the shoreline to a natural or semi-natural state, including the restoration of topography, soil composition, and vegetation;
- Restoration of the shoreline to a natural or semi-natural state if no bulkhead is present, but other existing unnatural shoreline contours are present;
- Preservation of the existing natural shoreline conditions if no bulkhead or other unnatural shoreline features are present;
- Decrease impervious surface coverage to 10 percent less than the city standard;
- Preservation or restoration of a 200-foot area landward of the shoreline jurisdiction area with natural vegetation;
- Creation of a proportional VEA with flexibility regarding its location, rather than immediately landward of OHWM;
- Avoidance of excessive irrigation to reduce water runoff into lake by installing an outdoor water conservation program;
- Provide an environmental biologist’s statement that any new or expanded development within the applicable shoreline setback will cause no net loss of shoreline ecological function; or,
- Use of mitigation banking.

If, as a policy matter, the City Council is supportive of a flexible menu of options for Pine and Beaver Lakes, for mitigation of development that will impact a shoreline setback or buffer, SHO will expeditiously work with City Staff to draft proposed ordinance language that would implement such an approach.

This issue is of critical importance to the residents of Pine and Beaver Lakes. As currently drafted, these select residents are enduring the brunt of the regulatory burden imposed by the SMP, including 80% tree retention within shoreline jurisdiction (not just within the shoreline setback) and USACOE standards for docks, which are wholly inapplicable to Pine and Beaver Lakes, among other regulatory burdens. The City Council would be well justified to inquire of Ecology and City Staff why these disparate burdens are being placed on these select residents.
### III. SETBACKS/FENCES

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<th>Staff’s recommended alternative, include the following:</th>
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<tr>
<td><strong>Setbacks</strong></td>
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<tr>
<td>• Reprioritize establishment of VEA as top priority of setback reduction table and allow 10-foot reduction for establishment of 15-foot VEA</td>
<td>• Improve upon Staff’s recommendation by allowing 15-foot shoreline setback reduction for establishment of 15-foot VEA</td>
</tr>
<tr>
<td>• Allow bulkhead removal as sole option for reducing setback, for those property owners with existing bulkheads</td>
<td>• Allow all property owners the opportunity to take advantage of setback reductions</td>
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<tr>
<td><strong>Fences within Setback</strong></td>
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</tr>
<tr>
<td>• Allow fences within shoreline setback, subject to discretion of City Staff</td>
<td>• As a matter of property rights and personal protection/safety, allow fences in all circumstances</td>
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</table>

### SETBACKS

SHO is generally supportive of City’s Staff’s efforts to revise the setback reduction table, but believe that it could use some additional improvements.

Specifically, SHO is pleased that City Staff supported retaining a reduction in the applicable shoreline setback for the establishment of a 15-foot VEA. However, SHO believes that the applicable reduction should be 15 feet, rather than the 10 feet proposed by City Staff. The setback reduction should be 15 feet for consistency with the Redmond SMP, which allows a 35-foot setback with 50% vegetation in the first 20 feet. The total Sammamish setback is 50 feet, with a mandatory VEA vegetated with 75% vegetation (i.e., the VEA minus a 25% active use area). A 15-foot reduction aligns with the Redmond 35-feet with 56.25% vegetation in the first 20 feet. If Ecology and City Staff are desirous to impose VEAs, they should give property owners sufficient incentives to do so. A 15-foot reduction for a VEA would provide the requisite incentive.

Additionally, SHO disagrees with the prioritization of the menu of options for obtaining a setback reduction. As currently written, for any shoreline property owner with an existing bulkhead that wants a reduced setback, City Staff’s alternative appears to require removal of the bulkhead as the only option. If removal is not selected, then none of the other options from the menu are available to obtain a setback reduction.

Many shoreline properties will legitimately require shoreline armoring to protect legally established structures on their property. Accordingly, bulkhead removal is not an option. City
Staff’s alternative does not provide an option to property to “soften” the existing bulkhead, by performing restoration waterward of the bulkhead. If Ecology and the City are serious about using non-regulatory measures (i.e., incentives) to encourage restoration and enhancement of the shoreline, allowing a reduction for softening a bulkhead is eminently reasonable.

FENCES

Although subject to interpretation, Ecology’s required changes would appear to prohibit most fences within shoreline setbacks, subject to limited discretion from the City. City Staff apparently supports this approach. The rational appears to be to minimize disruption to wildlife migration.

At no time has Ecology stated exactly what species require a migration corridor, or even whether such species are the type generally protected by applicable law. Moreover, the Washington State Supreme Court has determined that there are certain “fundamental attributes” of property ownership that government cannot infringe upon. Specifically, the “fundamental attributes of property ownership [include] the right to possess, to exclude others, or to dispose of property.” See Presbytery of Seattle v. King County, 114 Wn.2d 320, 329-30 (1990)(emphasis added). Property owners are entitled to take steps necessary to exclude others from their property. Fences are necessary in this day and age to ensure this fundamental attribute of ownership. Fences are necessary to ensure the safety of property owners from negative third-party influences, including criminals and even wildlife, including bears and coyotes, which are commonplace in Sammamish. They are also entitled to protect their children and pets from undue harm, and fences are necessary for that purpose.

Sincerely,

GROEN STEPHENS & KLINGE LLP

[Signature]

Samuel A. Rodabough
sam@GSKlegal.pro

Attachments: