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SUBJECT: Whatcom County Shoreline Master Program Amendments to address nonconformities

Dear Whatcom County Shoreline Advisory Committee,

Thank you for the opportunity to comment on the proposed amendments to the Whatcom County Shoreline Master Program. Our mission at Futurewise is to promote healthy communities and cities while protecting working farms and forests and shorelines for this and future generations. Futurewise has members across Washington State, including many in Whatcom County.

Futurewise strongly supported, and continues to support, the Whatcom County Shoreline Master Program. Overall we believe the support the updated Regional Shoreline Master Program (SMP). We believe that the updated SMP will help in the recovery of Puget Sound while providing appropriate opportunities for development. Whatcom County has good reason to be proud of its updated SMP.

Whatcom County is considering changes to its recently adopted SMP. These changes are largely intended to deal with nonconformities, and are focused on WCC Title 23 Chapter 5 - Applicability and Nonconforming Uses. Futurewise has several comments and recommendations for changes to Chapter 5 and related code sections. Some comments or recommendations relate directly to the proposed changes. However, in our detailed review of the provisions related to nonconformities we have also found structural problems that we did not notice before that need to be addressed at this time. Comments and recommendations are provided to deal with these as well.

The structural problems are a result of the source of the nonconforming regulations that Whatcom County used in developing the SMP. They seem to resemble the Ecology regulatory language in the state WACs which is old and poorly worded to suit today's ordinance language. The Ecology language is intended to be default regulations in case the local jurisdiction does not include them in its SMP. Jurisdictions don't have to use them, a county can craft regulations for nonconformities that work better for their areas. The structural problems are focused around two issues – definitions of nonconformity, and the lack of a systematic strategy for reviewing nonconformities. Below is a discussion of the problems and our recommendations for addressing them.

Steering Committee: Allison Aurand, Todd Donovan, Rick Dubrow, Lynnea Flarry,
Eric Hirst, Michael Lilliquist, Charlie Maliszewski, Tris Shirley, Dan Warner
Chapter Director: Cathy Lehman

Definitions of Nonconformity

Much of the structural problem stems from the definition related to nonconformities. It is one definition for three very different types of nonconformity, and is provided below.

“Non-conforming Use”, “Non-conforming Development” or “Non-conforming Structure” means a shoreline use, development or structure that was lawfully constructed or established prior to the effective date of this Program (August 27, 1976) or amendments hereto, but which does not conform to present regulations or standards of the Program.

As written, a Non-Conforming Use is one “which does not conform to present regulations or standards of the Program ...”. A Non-Conforming Development is one “which does not conform to present regulations or standards of the Program ...”. And a Non-Conforming Structure is one “which does not conform to present regulations or standards of the Program ...”. Note that all three definitions end up the same and any nonconforming development will usually meet all three definitions. Thus, given the new science-based buffers, any use or development that was built inside the new buffers would be a “Non-Conforming Use”, a “Non-Conforming Structure”, and a “Non-Conforming Development” – including homes. Nonconforming Use status has important implications, as noted below.

After talking with staff about this, we understand that this is not how Nonconforming Uses are intended to be administered. To make the ordinance match the intent, we recommend that new definitions be established for the different types of nonconformity to be more specific about what is considered to be nonconforming, similar to those provided below.

Nonconforming Uses. Uses of a structure or land that were lawfully established at the time of their initiation but are *currently prohibited* by this title are Nonconforming Uses, and may utilize structures or land areas that are also Nonconforming. A Nonconforming Use that is discontinued for any reason for more than one year shall have a presumption of intent to abandon, shall not be re-established, and shall lose its nonconforming status. In the case of destruction or damage where reconstruction costs exceed 50% of the assessed value, the use shall lose its nonconforming status.

Nonconforming Structures or Areas are structures or areas for conforming or Nonconforming Uses that were lawfully established at the time of their initiation, but currently do not conform to the bulk, dimensional or other development standards of this title. Nonconforming outdoor areas lying within buffers that have not been used or maintained for 5 consecutive years shall lose their nonconforming status and may not be reestablished.

There are two important aspects of note in the above definitions that are emphasized with italic underlining.

(1) Distinguish between Nonconforming Uses, and Nonconforming Structures: They should both be carefully defined, especially Nonconforming Uses. Nonconforming Uses are generally not appropriate for the shoreline environment, and are prohibited. They have a different level of acceptability and need careful review. ***If its not prohibited, its not a Nonconforming Use***, and should be reviewed under the normal review process for that use. Nonconforming Uses are intended to eventually go away over time through obsolescence, neglect, or destruction. Also note that Whatcom County Code (WCC) 23.50.07(A) seems to be an alternate definition that generally means the same thing, but uses different language. Important parts should be incorporated into the actual definition and the rest eliminated. Also note that WCC 23.50.07(B) changes the definition again to include pre-existing Conditional Uses that have not received a permit before. The idea of a

Nonconforming Use should be reserved for prohibited uses, so this section should be deleted.

(2) Address Nonconforming Areas similar to Nonconforming Structures:

Nonconforming structures were lawfully established (including through a permit) before a buffer requirement, height limit or other standard made them nonconforming. The same can be said for Nonconforming Areas such as lawns, gardens, stormwater facilities, parking areas, and similar use areas. Note in the recommended definition, there is a provision that buffer areas that are not maintained for the purpose they were established lose their nonconforming status. This is to prevent claims that at some point in the distant past, the buffer vegetation had been eliminated and now the existing vegetation can be eliminated under a nonconforming/grandfathered status.

Related to the definitions discussion is the issue of Nonconforming Lots. The definition and use of Nonconforming lots seems to be in flux in an attempt to allow residential development on small lots near the water without permit review. The idea of Nonconforming Lots, as it exists in the SMP and as proposed, seems to stretch the idea of nonconformity too far. Buffers and setbacks are applied to structures and uses, not to lot lines. There are plenty of uses that can take place on such lots, especially water dependent and water related uses, without the lot being considered nonconforming. It is only certain uses that must meet the buffer, not a lot. An alternative to the idea of Nonconforming Lots is provided below.

The principal benefit of distinguishing between non-conforming uses, non-conforming areas and structures, and nonconforming lots is that they can then be treated in ways that are appropriate to their potential adverse impact on shorelines resources and nearby uses. Those developments that often have minor impacts, such as non-conforming structures, can receive less scrutiny and non-conforming uses greater scrutiny.

Organization and Review Processes

Section 23.50.07 – Non-Conforming Development – focuses mostly on Nonconforming Structures, but also mixes in rules for nonconforming uses and nonconforming lots without any organization to the section, which makes it confusing to determine what kind of review to apply to a given situation. The many sub-paragraphs tend to address specific situations, but none really address the general situation of reviewing nonconformities or provide a default statement of how nonconformities are reviewed in general.

We recommend that regulations on each type of nonconformity be grouped together under subheadings so the public, applicants, and staff can clearly understand what applies to specific situations, thereby avoiding costly miscommunications and misunderstandings on both sides. Doing so also allows for the establishment of specific review processes and approval criteria for the different types of nonconformity so that they can be treated in a manner befitting their importance. This will also allow one to see where there are gaps in coverage of different situations. As the nonconforming section is now, it is difficult to determine the review process for all types of nonconformities. There are many nuances in the existing SMP and the proposed changes. Adding nuances to an already unclear situation makes gaps in coverage worse, so they should be avoided whenever possible.

An outline of the organization and process would be similar to the following:

Nonconforming Uses

Alterations and expansions of Nonconforming Uses need to be reviewed as a Conditional Use Permit. Residences are usually not nonconforming uses, but when they are they should be reviewed as other nonconforming uses. Criteria for reviewing a

Nonconforming Use (in addition to the Conditional Use Permit criteria) should be provided here. Criteria to qualify or disqualify for nonconforming status should usually be in the definition.

Nonconforming Structures and Areas

Expansion of Nonconforming Structures and Areas that increase the non-conformity (including increased use area within a buffer) should be reviewed as a Variance or Conditional Use Permit. Expansions that do not increase the nonconformity should not require special review, but rather the normal review process for the use. The proposed changes to the SMP would waive Variance and Conditional Use permit review for residences; and since they are exempt from a Standard Development Permit, they would get only rudimentary review. Residences built close to the water or otherwise not meeting the standards of the SMP should never be exempted from all permit review. This is completely contrary to the Shoreline Management Act, and results in an unmitigated and planned for loss of ecological function. Such development must receive an official permit review to provide surety that the policies and standards of the SMP are being met, including minimization and mitigation. Criteria for reviewing a Nonconforming Structure should be provided here, such as standards for rebuilding a destroyed nonconforming structure. For example, the standards about rebuilding a nonconforming structure in a hazardous location would be placed here. If the old location couldn't be used, re-establishment in a different location/configuration would otherwise be subject to normal permits.

Nonconforming Lots

Even more concerning is that proposed changes to the SMP are also attempting to waive any permit review for entirely new residential development on small lots within the buffer. This seems to be a misguided attempt to ease the hearing review process currently required for Conditional Use Permits and Variances. As above, residences built close to the water or otherwise not meeting the standards of the SMP should never be exempted from all permit review. This is completely contrary to the Shoreline Management Act, and results in an unmitigated and planned for loss of ecological function – even more so than the provisions for Nonconforming Structures. Such development must receive an official permit review to provide surety that the policies and standards of the SMP are being met, including minimization and mitigation. The better solution is not to eliminate permit review, but the change permit review process to meet the situation, as noted below.

Hearing vs. Administrative Processes

As indicated above, the review process should be appropriate for the type of nonconformity. The review of a Nonconforming Use really does need a Conditional Use Permit reviewed in a hearing. Expansions of nonconforming structures and new development on existing small lots that takes place within buffers probably do not need the expense of a hearing borne by both the proponent and local government, and could be changed to an administrative review. However, they do need a Variance or Conditional Use Permit. The SMA is structured to provide co-review by both the local jurisdiction and Ecology. Exempting such development from the Variance and Conditional Use Permit, circumvents the intent of the SMA. To provide relief from the hearing requirement while meeting the intent of the SMA, either an administrative Conditional Use Permit could be established, or the Variance process could be made to be administrative for these types of uses.

Specific Recommendations on the Nonconforming Section

The first half of paragraph D (maintenance, repair, renovation) is a statement that applies to all development, not just nonconformities, so long as changes to the building envelope or outdoor use areas are not being made. There should be such a general statement in the beginning of the ordinance that applies to all existing development, thus it is not needed here. The second half consists of two statements regarding moving/altering structures that should in no way be associated with repair and maintenance. They are new development and the statements should be stand alone standards for all nonconforming structures.

Paragraph F relates to reconstructing a destroyed Nonconforming Structure. However, there are no criteria for when a structure is destroyed, as opposed to just damaged and repairable. We recommend that structures damaged more than 75 percent of the assessed value be declared destroyed, and subject to nonconforming structure standards, while damage of 75 percent or less is allowed to be repaired. Also note that our recommended definition for Nonconforming Use also includes a destruction limit.

Paragraph G is one of the few standards dealing with Nonconforming Uses. Given the definition problems noted above, houses and businesses would become Nonconforming Uses and subject to this abandonment criteria. Then they would have to meet all provisions of the SMP. This is a major reason to fix the definition of Nonconforming Use. The concept of this standard is incorporated in our recommended definition.

Paragraph H seems to be a standard that should apply whether the in-water structure is nonconforming or not. It should be moved to the general standards or other relevant section.

The proposed paragraph I attempts to limit when a Variance is needed for residences. Expansions not meeting the triggers would receive an exemption. All expansions in or into the buffer should be reviewed to ensure that impacts are minimized and mitigated, but probably do not need a public hearing.

Paragraph J establishes criteria for changing one Nonconforming Use into another Nonconforming Use. Since Nonconforming Uses should be re-existing prohibited uses that will eventually go away, we are opposed to establishing new Nonconforming Uses, and this provision should be eliminated. Note that there are no criteria for expanding or otherwise altering a Nonconforming Use. This is much more likely than changing to another Nonconforming Use. Also note that if Nonconforming Uses are normally prohibited uses, then (7) means you actually can NOT change to another prohibited use, which supports out opposition to establishing new Nonconforming Uses.

The proposed new paragraph K proposes to allow new development under the nonconforming provisions. See comments above on this subject regarding nonconforming lots. Items (1) and (2) seem to contradict each other (depth of lot all inside buffer v. having building area outside buffer). Item (9) allows any "facility" to be built outside the building area and inside a buffer. It gives the example of a septic system, but does not limit what other "facilities" can be located in the buffer. Septic systems and almost all other facilities (stormwater, garden, gazebo, tennis court, etc.) will eliminate the buffer vegetation and will have to be paved, mowed, or cleared into the foreseeable future – effectively eliminating or degrading that area of vegetation. Facilities should be defined to only include those systems necessary to support a residence, such as wells, septic systems, and any needed storm water facilities. Adverse impacts should also be mitigated. This whole provision sets up a situation where new residences and other development on bigger lots (able to meet the buffer) must go through the formal permit process with careful review

of impacts and mitigation to adjust SMP standards; while development on small lots close to the shoreline that will have the most impact will be completely exempt from permits. They will escape the surety of compliance that a formal review provides. In addition the common-line rule will almost automatically default these developments to the 50' setback/buffer, since it will probably be the most common development situation, even though there may be the ability to provide a larger buffer. We recommend that buffer reductions be the minimum necessary to allow for reasonable development. Notice should also be provided to nearby property owners so they can comment on any potential adverse impacts.

Old paragraph L/new paragraph M addresses transportation facilities should be subject to the same reviews as other development. As with other development, it is unclear how they are to be classified and reviewed. If its prohibited, then it's a NC Use, and should be reviewed as such. If it's a NC structure/facility/area, it should be reviewed as such (expansions need Variance or Conditional Use Permit). Repair and maintenance could receive an exemption.

New paragraph N allows 10% and 25% expansions without permit review. These apparently can be done as often as desired to get drastic enlargements, as there is no limit established. It can also be done for residences that are normally prohibited in the environment. Such expansions can all take place within the buffer since there is no standard about location. This section should be deleted, and such instances be handled as other Nonconforming Structures. See comments above regarding review process, and residential development. If the provisions are not deleted, they should only be allowed once and any adverse impacts mitigated.

New Paragraph O is the closest thing addressing how to do a review for a nonconformity, but it is limited in scope. Most of section on nonconformities is about how specific situations will avoid review. This paragraph makes the statement that a conditional use permit review is needed for nonconformities, but it limits itself to residences in the sub-paragraphs. What about nonconformities for industrial, recreation, mining, and other development? Generally, the variance process should be used for nonconforming uses and significant expansions of non-conforming non-residential building and areas within buffers or critical areas.

Thank you for considering our comments. If you require additional information please contact me at dean@futurewise.org or 509-823-5481.

Sincerely,



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