



DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

MEMORANDUM

Date: October 8, 2018
To: City Council
From: Christy Carr, AICP
Senior Planner
Subject: Shoreline Master Program Amendment
Additional Information: Nonconforming Structures and Aquifer Recharge Protection Area

INTRODUCTION

This memo provides additional background information related to nonconforming structures and inclusion of the aquifer recharge protection area (ARPA) requirement in the shoreline jurisdiction.

NONCONFORMING STRUCTURES

First, a point of clarification from the October 2, 2018 Study Session:

The Washington Department of Ecology, through implementation of the Shoreline Management Act (SMA) does not expect, nor is it asking, local governments to eliminate legal, existing nonconforming structures and uses from shorelines. **Legal, existing nonconforming development may continue, and nonconforming structures may be repaired, maintained, and remodeled. This is clear in both the SMA and the City’s existing SMP.**

While the state provides nonconforming standards (WAC 173-27-080), local governments typically develop their own approaches to addressing nonconforming structures, uses, and lots. The City’s existing SMP includes goal and policy language related to eliminating or decreasing nonconformity over time:

- SMP 4.2.1.2: Residential structures that do not conform to this program should, over time, as the owner proposes changes to the structure, conform as completely as possible to this program, with due regard to unique site conditions and property rights.
- SMP 4.2.1.2: It is further the purpose of this program to ultimately, over time, have uses and commercial structures conform to the provisions of this program. Over time, uses and commercial structures that do not conform to the standards of this program should be phased out as uses cease or redevelopment of structures occurs.

- SMP 4.2.1.3.6: Lawfully constructed commercial structures that are located in the shoreline jurisdiction are to be phased out over time. Depending on the extent and intensity of the nonconformity, a primary residential structure and primary appurtenance, may be allowed certain alteration or expansion, provided that adverse impacts to shoreline ecological functions and shoreline processes are mitigated or restored.
- SMP 4.2.1.3.7: Lawfully constructed structures that are destroyed by fire, explosion, flood, or other casualty may be restored or replaced without increasing or expanding the nonconformity, and are encouraged to decrease nonconformity.

The major policy questions for the City Council to consider related to nonconforming structures include:

- Can intentionally demolished nonconforming structures be rebuilt? If so, which ones?
- Can nonconforming structures be expanded? If so, are there limits to expansion?

As discussed previously, the City’s SMP includes standards for different **types of structures** and different **types of demolition**. This level of differentiation and detail is unique to the City’s SMP. A major focus of the amendment is to clarify allowances for replacement and expansion in the case of intentional demolition.

The attached table provides a summary of allowed actions for nonconforming structures, in accordance with the existing SMP and the Planning Commission’s recommendation. Staff comments are provided.

State nonconforming standards are included at the end of this memorandum. [State standards are used only when a local jurisdiction does not develop their own.]

The City’s nonconforming standards in its zoning code are also included at the end of this moratorium.

Note that both the existing SMP and the Planning Commission’s recommendation include the requirement for any proposal to demonstrate the no net loss of shoreline ecological functions standard articulated in SMP 4.1.2. The list of shoreline ecological functions included in the SMA is provided at the end of this memorandum (or see WAC 173-26-201).

AQUIFER RECHARGE PROTECTION AREA

The City’s 2018 Critical Areas Ordinance (CAO) update included a new provision, the aquifer recharge protection area (ARPA). The purpose of the ARPA is to maintain and protect aquifer recharge. The ARPA is a designation and retention of up to 65 percent of a site’s native vegetation when certain development thresholds are met (including subdivision of land, 800 square feet of new hard surfaces, 7,000 square feet of land disturbing activities). The ARPA is not a “no-touch” zone, although significant development is prohibited within the ARPA unless it is demonstrated that it will not result in less than 100 percent pre-development groundwater recharge.

The ARPA requires designation and retention of a site’s native vegetation because the state’s stormwater manual, low impact development (LID) technical manual, and supporting studies provide

that maintaining 65 percent mature forest cover is optimal to mimic pre-development hydrologic conditions.

The ARPA is designed to maintain and protect aquifer recharge by retaining native soil layers and vegetation. The SMP includes a number of provisions designed to retain native vegetation and mitigate for changes to the pre-development hydrologic conditions, including:

- Shoreline buffers: All properties have a shoreline buffer ranging from 50 to 200 feet. All native vegetation within the shoreline buffer is supposed to be retained unless specifically allowed to be removed. Most properties have either a 50- or 75-foot buffer. Undeveloped properties have larger buffers and properties with native vegetation contiguous with the shoreline (water) have larger buffers. New development is limited within shoreline buffers and any vegetation removal due to construction requires replanting (see below).
- Limit on non-habitable structures in shoreline buffer: Non-habitable structures (e.g., boathouse, gazebo, patio, deck) are generally limited to 400 square feet of the total buffer area. Stairs are limited to 300 square feet and only one path to the shoreline is permitted. Any vegetation removal requires replanting.
- Limits on vegetation removal and pruning: Vegetation removal and pruning is limited within the shoreline buffer. Vegetation removal and pruning is allowed for construction, view maintenance, and hazard tree removal. Any vegetation removal, and some pruning, requires replanting. Vegetation removal outside the shoreline buffer not related to construction is limited to an area no greater than 200 square feet in area and/or no more than 3 non-significant trees per 20,000 square feet up to a maximum of six (6) trees within a three (3) year period.
- Significant tree retention: As stated above, all native vegetation within the shoreline buffer is supposed to be retained unless specifically allowed to be removed. There are no allowances for significant tree removal within or outside the shoreline buffer. This is very challenging to apply, particularly for new development. If strictly applied, removal of one significant tree would require a shoreline variance. Significant trees are allowed to be removed for construction if there is a demonstration of need, no reasonable alternatives, and mitigation is provided.
- Encumbered lot provisions: A parcel that is encumbered by its shoreline buffer or a critical area buffer is one that has less than 2,500 square feet available for a development area. In that case, a shoreline variance is required. If a parcel has 2,500 square feet available, then development must occur in that space and is limited to 1,200 square feet of lot coverage. For example, if a parcel's shoreline buffer is completely wooded, it would be encumbered by the shoreline buffer and require a shoreline variance.
- Replanting requirements (mitigation): Removal of any vegetation within the shoreline buffer requires replanting of vegetation depending on the type of vegetation removed (native, non-native, or lawn) and location. The amount of replanting required is highest for native vegetation removal closest to the shoreline (water). Removal of native vegetation outside the shoreline buffer also requires replanting. When new single family primary structures are located within Zone 2 of the shoreline buffer, all of Zone 1 and a portion of Zone 2 of the shoreline buffer must be replanted with native plants. If a site cannot accommodate the required replanting, an off-site location must be found. All replanting must be monitored for success (survival) for five years.
- Rain garden requirement (mitigation): Use of the Single Family Residence Shoreline Mitigation Manual requires installation of a rain garden to mitigate for new impervious surfaces, noting how "rain gardens mimic a native forest by collecting, absorbing, and filtering stormwater runoff

from rooftops, driveways, patios, and other areas that don't allow water to soak in." Installation/construction of new impervious surfaces (e.g., house, patio) requires installation of a rain garden (planted with native plants) equaling 20 percent of the size of new impervious surfaces.

In general, the SMP vegetation management requirements result in more vegetation retention than the ARPA. For example, the SMP vegetation management requirements would not allow for a 12,500 square foot development area on a fully wooded lot – it would be limited to 2,500 square feet or require a shoreline variance (which would require demonstration of the “minimum necessary” to achieve reasonable use and cannot cause adverse impacts to the shoreline environment). In addition, pruning is generally allowed without restrictions in the ARPA, whereas it is significantly limited in the SMP. Finally, most vegetation removal in the shoreline jurisdiction requires replanting, generally at more than a 1:1 ratio, and can require replanting up to three times the amount of vegetation removed. No replanting is required when an ARPA is designated.

It is also worth noting that the SMA (see WAC 173-26-201(3)(d)(i)(C)) articulates the shoreline ecological functions in marine waters:

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

When amending their SMP, WAC 173026-201(3)(d)(i)(A) directs local jurisdictions to:

- (I) Identify the ecosystem-wide processes and ecological functions based on the list [above] that apply to the shoreline(s) of the jurisdiction.
- (II) Assess the ecosystem-wide processes to determine their relationship to ecological functions present within the jurisdiction and identify which ecological functions are healthy, which have been significantly altered and/or adversely impacted and which functions may have previously existed and are missing ...; and
- (III) Identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes.

Staff will closely revisit the foundational documents prepared for the SMP comprehensive update, including *Bainbridge Island Nearshore Habitat Characterization and Assessment, Management Strategy Prioritization, and Monitoring Recommendations* and *Bainbridge Island Nearshore Assessment Summary of Best Available Science* and then provide additional analysis consistent with the steps outlined in WAC 173026-201(3)(d)(i)(A) related to inclusion of the ARPA in the SMP as a measure necessary to protect and/or restore the ecological functions and ecosystem-wide processes of the island's shoreline.

State Nonconforming Standards

WAC 173-27-080

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.

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.

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.

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.

City's existing zoning nonconforming structure language

18.30.030 Nonconforming structures and buildings.

A nonconforming structure may remain and be used; provided, that:

- A. Changes to the structure that would alter or increase the nonconformity are not permitted.
 - 1. Any vertical or horizontal extension of a nonconforming wall must meet the applicable standards.
 - 2. Adding to the footprint of a nonconforming structure is permitted as long as the addition meets the requirements of BIMC Title 18;
- B. If moved, the structure shall be made to conform to regulations of this code;
- C. If a building is **harmed or destroyed by more than 50 percent of its square footage**, the building must be reconstructed in compliance with the requirements for the zone in which it is located (this provision shall not apply to any dwelling unit constructed as an affordable housing unit under Chapter 18.21 BIMC); and
- D. Any structure other than a building that is damaged or removed to an extent that exceeds 50 percent of its square footage may be replaced or reconstructed in substantially the same location and of substantially the same design as the pre-damaged or pre-removed structure, if a complete application is submitted for any and all required construction permits within 180 days of the damage or removal. (Ord. 2011-02 § 2 (Exh. A), 2011)