

Lisa Clausen

From: Public Council Inbox
Sent: Friday, June 11, 2010 11:49 AM
To: 'Linda Hall'
Subject: RE: Shoreline Master Program Update

Thank you for your correspondence to the Burien City Council. It will be included in the Correspondence for the Record for an upcoming Council meeting.

L. Clausen
City Manager's Office

-----Original Message-----

From: Linda Hall [mailto:lhall@gsklegal.pro]
Sent: Friday, June 11, 2010 10:41 AM
To: Public Council Inbox
Cc: groen@GSKlegal.pro
Subject: Shoreline Master Program Update

Members of the Burien City Council:

Please see attached letter from John Groen for property owners in the Three Tree Point area.

Linda Hall, Legal Secretary to
John M. Groen
Groen Stephens & Klinge LLP
11100 NE 8th Street, Suite 750
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(425) 453-6206

CFTR: 06/21/10



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June 11, 2010

Burien City Council
400 SW 152nd St, Suite 300
Burien, WA 98166

Re: Shoreline Master Program Update

Dear Council Members:

This letter is sent on behalf of property owners in the Three Tree Point area along SW 172nd Street. Those property owners have a number of concerns regarding the draft Shoreline Master Program, particularly with respect to public access and impact on private property rights.

This letter will first set forth the factual background and key principles of law that should provide sufficient context for the specific line by line suggested edits that will follow.

Factual and Legal Background

First, Burien should understand that the shorefront property owners along SW 172nd are the fee owners of the tidelands. While the State in many areas of Puget Sound decided to retain the ownership of the tidelands for the public, the State in this particular vicinity sold the tidelands to the waterfront owners. There is no dispute that the tidelands were sold by the State beginning in about 1902 and are now included within the legal title held by the adjacent waterfront owners. The deeds typically are stated with language such as "Together with all tidelands of second class to extreme low tide fronting said lot" If necessary, Burien can confirm this through a title company.

For purposes here, it is important for Burien to understand that the shoreline is not public property, it is private property. Accordingly, there is no public shoreline to which Burien can legally provide public access.

Second, Burien should understand the legal status of the unused portion of the right of way that is SW 172nd Street. The right of way was dedicated in the Sunkist Plat and was for an 80 foot wide right of way called Seacoma Boulevard (now SW 172nd Street). Of course, the "as built" road is far less than 80 feet wide. Some City staff or council members may believe that that the unused portion of the right of way can now be used for whatever purposes the City desires, including as a public park. That notion is not correct.

Washington has long recognized that a public road dedicated in a plat is merely an easement and the fee title to the land remains in the adjoining landowner.

When an easement is taken as a public highway, the soil and freehold remain in the owner of the land encumbered only with the right of passage in the public; ... in the case of streets and alleys, the proprietors of adjacent lots own the soil to the middle of the street, subject only to this right of passage in the public; and upon discontinuance of such street or alley, the adjacent owners of lots on each side take the soil to the middle of the street.

Burmeister v. Howard, 1 Wash. T. 207, 2111 (1867). *Accord Rainier Avenue Corporation v. City of Seattle*, 80 Wash.2d 362 (1972); *Finch v. Mathews*, 75 Wash.2d 161 (1968); *City of Seattle v. P.B. Investment*, 11 Wash. App. 653, 657 (1974). Thus, where there is a dedicated public right of way, the fee title remains with the adjacent owner. The fee title is merely subject to the purposes for which the right of way was established.

From this well established doctrine, Washington law recognizes two corollary principles of property law. First, the owner of the adjoining parcel may utilize the unused easement area in any manner that does not materially interfere with the easement purposes. Second, any attempt by the City to use the right of way for purposes other than as originally intended, *i.e.* as a road, will be a use beyond the scope of the intended easement and therefore constitute a taking for which compensation must be paid. The law in back of each of these principles is set forth below.

First, in *Nystrand v. O'Malley*, 60 Wash.2d 792 (1962), the Washington Supreme Court held as follows:

The law in this state is well settled that the fee to the street rests in the owner of the abutting property. *Northwest Supermarkets, Inc. v. Crabtree*, 54 Wash. 2d 181, 338 P.2d 733 (1959); *Simons v. Wilson*, 61 Wash. 574, 112 P. 653 (1911); *Gifford v. Horton*, 54 Wash. 595, 102 P. 988 (1909). **The owner of the abutting property may use the street area, to which he holds the fee, in any manner not inconsistent with the easement in the public for street purposes.** *James v. Burchett*, 15 Wash.2d 119, 120 P. 790 (1942). In the instant case, the road was unopened and unusable as a street for travel. The use by plaintiffs, in extending their garage onto the area, planting the trees and hedge and constructing the bulkhead, was not inconsistent with the public's easement since the right to open the street for the public's use had not been asserted by the city.

Nystrand, 60 Wash.2d at 795 (emphasis added). The Court likewise ruled in *Thompson v. Smith*, 59 Wash.2d 397 (1962) as follows:

As to the portion of the [concrete] slab lying within the ten feet 'reserved for road purposes,' our view is that Smith is entitled to make use of the property **until** it is used for the purpose reserved.

... [T]he owner of the property has the right to use his land for purposes not inconsistent with its ultimate use for the reserved purpose during the period of nonuse. The **rule** is that where a right of way is established by reservation, the land remains the property of the owner of the servient estate and he is **entitled to use it for any purpose that does not interfere with the proper enjoyment of the easement.**

59 Wash.2d at 407-08 (emphasis added). The Court continued:

There is no evidence that the south ten feet of Smith's property has ever been used for a road, and no evidence that it will be used as such in the immediate future. It would not be proper at this time to prevent Smith's use of a concrete slab for parking an automobile or other appropriate use, until such time as the ten-foot strip may be required for road purposes.

Id. at 409.

This law is directly applicable to the unopened portion of the right of way for SW 172nd Street. Specifically, there is no indication that Burien has any intention to use the unopened portion of the right of way for road purposes. Accordingly, the use by the abutting owners is lawful and may continue.

Regarding any attempt by Burien to convert the use of the right of way from road purposes to public park purposes, the Washington Supreme Court has established that compensation to the abutting landowners will be required. In platting this property in 1919, the owners dedicated Seacoma Boulevard (now SW 172nd Street) to the public "for public highway purposes." Plat of Sunkist Beach, Plats Vol. 23, page 12, May 19, 1919. For your convenience, a copy of the plat with the dedication language is attached. This limitation "for public highway purposes" is consistent with Washington law. *State ex rel. York v. Board of Commissioners of Walla Walla County*, 28 Wash.2d 891 (1947). In these situations, secondary uses of the right of way for such uses as water mains, gas pipes, and telephone lines are permissible "only when not inconsistent with the primary object of the highway." *Id.* at 898. In a right of way for a public highway, Washington will allow incidental uses "suitable to public thoroughfares" that include the transmission and conveyance of people, commodities and intelligence. *Id.* at 903. Of course, electric power lines, telephone lines, sewer and water pipes and similar uses are incidental secondary uses that do not interfere with the primary purpose as a highway. In contrast, use as a public park would not be a secondary or incidental use, but would be a new primary use of the land. As such, it is beyond the scope of the existing easement and would be a new burden on the abutting fee title owners and thus be a taking requiring payment of just compensation. *Id.* at 904.

The fact that a public park might be a desirable or convenient thing does not insulate Burien from having to pay compensation.

Numerous instances of conveniences immediately occur to any one considering the matter which the public might enjoy using upon the public streets, but the fact that they are convenient and might generally be used by the public gives no right to impress that use upon the fee owned by the abutting owner without compensation to him.

Motoramp Garage v. City of Tacoma, 136 Wash. 589, 593 (1925).

In *Lawson v. State*, 107 Wash.2d 444 (1986), the Court again recognized that where a public easement for a right of way is used differently than the original purpose of the easement, the new or changed use is actually an imposition of a new easement for which compensation must be paid. *Id.* at 450. In *Lawson*, an easement for a railroad right of way was converted for use as a public recreation trail. The Court found that this change in use was not encompassed within the original grant of the right of way easement for a railroad and compensation was therefore required. *Id.* at 451.

A third salient fact that must be understood with respect to SW 172nd Street is that even if the unopened portion of the street could be converted to a park (with payment of just compensation) such park still cannot provide legal public access to the shoreline. Although surveys have not been done, it is believed that in various locations there is a strip of upland located between Seacoma Blvd. and the ordinary high water mark. The result is that there can be no public access to Puget Sound. Accordingly, that strip of land would have to be purchased as well as the tidelands themselves. Of course, in a condemnation action to acquire these lands, Burien would also have to pay severance damages for the lost value to the remaining private property that was not taken.

Finally, Burien should ensure that its policies and regulations comply with constitutional limitations on attempts to exact public access from private property owners. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the United States Supreme Court ruled that the coastal commission could not demand dedication of public access along the private beach where there was no showing that the landowners' project detracted or adversely impacted existing public access rights. *Id.* at 837-39. Lacking such a showing, the Court ruled the exaction was not mitigating an impact of the project, but was an "out and out plan of extortion." *Id.* at 837. Washington cases follow this precedent and also apply similar principles under RCW 82.02.020. *Sparks v. Douglas County*, 127 Wash.2d 901 (1995); *Isla Verde v. City of Camas*, 146 Wash.2d 740 (2002). Moreover, the law places the burden of proof on the government entity to show that the exaction mitigates a specific harm that would be caused by the proposed project. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Suggested Line by Line Edits to Draft SMP

In light of the above legal principles, and with a perspective that Burien seeks to avoid future litigation, the following suggested edits are provided as a way to meet the state guidelines for updating the SMP while also avoiding conflict with individual rights in real property.

Using the DRAFT SMP dated March 30, 2010, suggested edits are as follows:

1. Page II-2.

In section 20.20.015, edit the Goal PA by inserting the term “publicly owned” before the word “shoreline” so that the sentence reads: “Increase and enhance public access to publicly owned shoreline areas, consistent with ...”

In section 20.20.015, Pol PA 1, insert the term “existing” so that the sentence reads: “Developments, uses, and activities on or near the shoreline should not impair or detract from existing public access to water.”

In section 20.20.015, Pol. PA 3, edit the term “City’s” to remove the possessive, and insert the term “owned” so that the sentence reads as follows: “Public access to the City owned shorelines should be designed to ...”

2. Page II-3.

In section 20.20.015, Pol. PA 6, insert the phrase “except as provided for in RCW 35.79.035” so that the sentence reads: “The vacation or sale of street ends, other public right of ways and tax title properties that abut shoreline areas shall be prohibited except as provided for in RCW 35.79.035.”

In section 20.20.015, Pol. PA 7 and PA 8 should both be **deleted in their entirety**. The reason for deletion is because the City should not restrict its future decisions by adopting a broad policy to pursue waterfront street ends as public parks. The City should retain flexibility to pursue such objectives on a case-by-case basis, recognizing that policy considerations may vary between particular parcels and neighborhoods. One of those considerations will be whether a particular proposed conversion of right of way to park use would violate the constitutional protection against takings without just compensation. The next policy, PA 9, is sufficient to meet whatever future direction the City might want to take with respect to any particular waterfront street end, and to do so in conjunction with the affected neighborhood.

In section 20.20.015, Pol. PA 10, the word “the” should be deleted and the term “publicly owned” should be inserted before the term “shoreline” so that the sentence reads: “The City should disseminate information that identifies all locations for public access to publicly owned shorelines.”

3. Page II-4.

In section 20.20.015, Pol. PA 11 should be edited by inserting the phrase “on public property” at the end of the sentence, so that it reads: “The public’s visual access to the City’s shorelines from streets, paths, trails and designated viewing areas should be conserved and enhanced on public property.”

In section 20.20.015, Pol. PA 12 should be deleted in its entirety as it is repetitive of Pol. PA 11.

In section 20.20.015, Pol. PA 13 should be edited by inserting at the beginning of the sentence the phrase "Using publicly owned property," and by inserting the term "public," and by adding a new sentence so that the policy reads as follows: "Using publicly owned property, promote a coordinated system of connected pathways, sidewalks, passageways between buildings, beach walks, and public shoreline access points that increase the amount and diversity of opportunities for walking and chances for personal discovery. This policy recognizes that private property owners are not responsible for meeting this public objective."

4. Page II-6.

In section 20.20.020, Recreation Element, Pol. REC 4, the text provides "*Examples*" that include specifically identifying SW 172nd Street as a potential Special Use Park. The *Examples* should be **deleted entirely** because there has not been a public process where a specific proposal is made and then followed by due consideration of whether a special use park should be established at that specific location, particularly in light of neighborhood impacts, budget costs, and constitutionally required compensation where private property rights are impaired. By including "*Examples*" the implication is that Burien has already determined that the identified examples are in the public interest to pursue.

5. Page IV-8

In Chapter 4, section 20.30.035, subsection 2 c should be deleted in its entirety. This requirement that unused right of way shall be dedicated as open space/public access is illegal under Washington law and its implementation would constitute a taking without just compensation in violation of constitutional protections. The easement for a right of way is for highway purposes, not as open space and public parks.

Section 20.30.035, subsection 2 d should be edited by inserting the phrase "Subject to constitutional limitations" at the beginning of the sentence so that it reads: "Subject to constitutional limitations, public access shall be required for ..."

Section 20.30.035, subsection 2 e should be edited so that it reads: "Public access to shoreline areas shall only be required where it is demonstrated to be compatible with uses, safety, security and constitutional and other legal limitations that may be applicable." This edit is to reflect that the burden of proof to justify the imposition of a mitigating condition is upon the regulating agency, not the property owner.

There may be other specific suggested edits that will become apparent as the public process of review and deliberation continues. The property owners in the Three Tree Point area along SW 172nd Street appreciate your careful consideration of these comments and suggestions.

Sincerely,

GROEN STEPHENS & KLINGE LLP

John M. Groen
by CAK

John M. Groen
groen@GSKlegal.pro

JMG:lch
Attachment

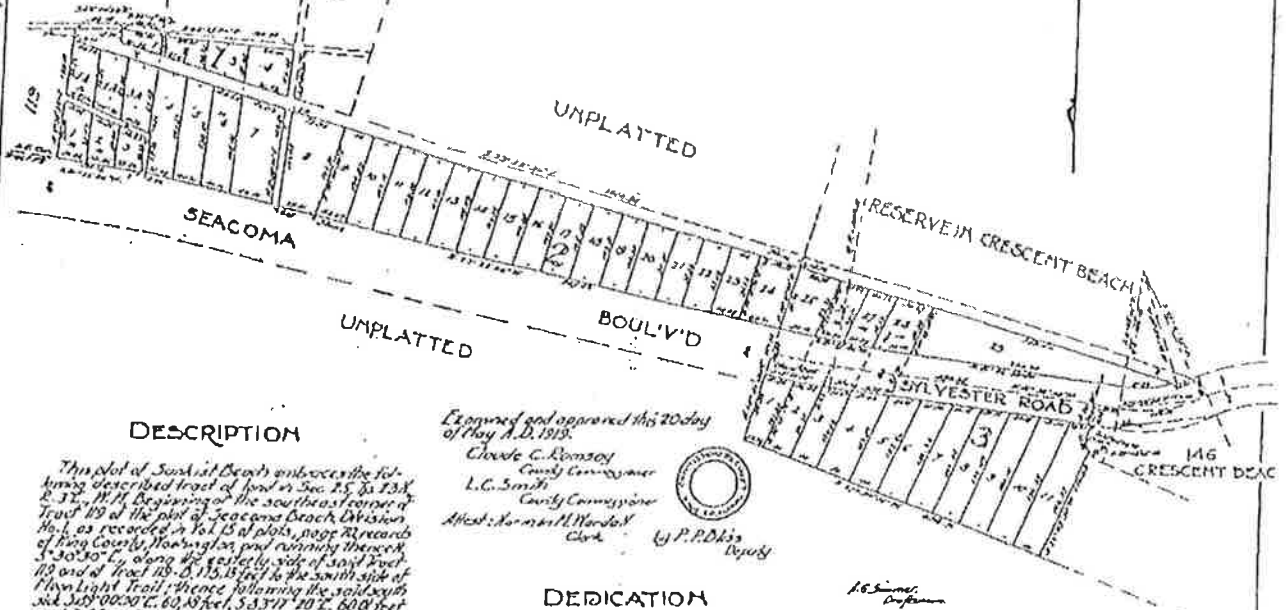
SUNKIST BEACH

Scale: 1"=100'

Gardner, Gardner & Fischer, Inc.
Engrs. - Seattle,

April 1919.

SEACOMA BEACH DIV. No. 1. SEACOMA BEACH DIV. No. 2.



DESCRIPTION

This plot of Sunkist Beach embraces the following described tract of land in Sec. 25, T. 23N., R. 3E., 11th Beginning of the southeast corner of Tract No. 1 of the plot of Seacoma Beach Division No. 1, as recorded in Vol. 13 of plats, page 72 records of King County, Washington, and running thence S. 30° 30' E., along the easterly side of said Tract No. 1 and of Tract No. 2, 115.15 feet to the south side of Flanlight Trail; thence following the southeasterly side S. 87° 00' 00" E., 60.49 feet, S. 33° 11' 20" E., 60.0 feet and S. 88° 25' 50" E., 100.03 feet to the northeast corner of Tract No. 1 in the receded portion of the plot of Seacoma Beach, Division No. 1, as recorded in Vol. 13 of plats, page 31, records of King County, Washington; thence S. 5° 20' 30" E., 44.53 feet along the easterly line of said Tract No. 1, thence S. 23° 25' 30" E., 15.16 feet to the northwesterly corner of Sylvester Road; thence S. 19° 16' 25" E., 20.00 feet to the center line of the said road; thence along a curve to the right having a radius of 100.00 feet, whose center of this point bears N. 19° 16' 25" W., a distance of 116.10 feet; thence N. 61° 40' 10" E., 25.33 feet thence S. 12° 03' 30" E., 44.04 feet to a point which bears N. 41° 58' 40" E., 29.40 feet from the center of the curve of radius 100.00 feet, as shown in Tract No. 1 of the plot of Crescent Beach, as recorded in Vol. 10 of plats, page 44, records of King County, Washington; thence along said curve to the left, a distance of 17.89 feet; thence S. 12° 03' 30" E., 44.04 feet; thence N. 61° 40' 10" E., 25.33 feet to a point on the southerly line of the westerly line of the reserved portion of said plot of Crescent Beach; thence along the said westerly line N. 11° 00' 15" E., 14 feet to the north easterly corner of Seacoma Boulevard; thence along the said northwesterly margin N. 77° 11' 40" W., 905.81 feet and N. 22° 20' W., 110.13 feet to the place of beginning, excepting therefrom portions acquired by King County for Road purposes, being a portion of the receded portions of the scripslots of Seacoma Beach, Division No. 1 and Division No. 2 and of the Reserve and of the receded portions of Seacoma Boulevard, in the said plot of Crescent Beach.

All distances are as shown on this plat in feet.

Examined and approved this 19th day of May A.D. 1919.
By C.P. Murray Deputy
By Samuel J. Thomas County Engineer

Examined and approved this 20th day of May A.D. 1919.

Cloude C. Ramsey
County Commissioner
L.C. Smith
County Commissioner
Attest: Norman H. Wardell
Clerk
By P.P. Davis Deputy



DEDICATION

Know all men by these presents that the Seacoma Beach Improvement Company, a corporation organized under the laws of the State of Washington, owns in fee simple and C.L. Taylor, its duly appointed agent, do hereby dedicate this plot and appurtenances to the use of the public for ever, as shown by necessary boundaries and alleys, or whatever public property there is shown on this plat and the use thereof for city and all public purposes not inconsistent with the use thereof for public highway purposes, also the right to make of necessary changes for cuts or fills upon the lots blocks and tracts shown on the plat in the reasonable original grading of all the streets and avenues shown thereon.

In witness whereof C.L. Taylor has hereunto set his hand and seal and the said corporation has caused its corporate name to be hereunto subscribed by its President and Secretary and its corporate seal to be hereunto affixed this 20th day of May A. D. 1919.

Seacoma Beach Improvement Company
by A.H. Brooks
Its President
by L.I. Gregory
Its Secretary
C.J. Taylor



CERTIFICATE

We hereby certify that the plot of Sunkist Beach is based upon an actual surveyed subdivision of Sec. 25, T. 23N., R. 3E., 11th, that the distances and courses as shown thereon are correct, that monuments have been set and the lots and blocks have been staked on the ground.

Gardner, Gardner & Fischer, Inc.
by A.H. Fischer

16 Samuel J. Thomas

ACKNOWLEDGMENT

State of Washington) s.s. This is to certify that on County of King) this 10th day of May A.D. 1919 before me the undersigned Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared C.L. Taylor, and A.H. Brooks, President and L.I. Gregory, Secretary of the Seacoma Beach Improvement Company, persons known to be the individuals who executed the foregoing instrument and acknowledged to me that they signed and sealed the same of their free and voluntary act and deed, C.L. Taylor for himself, and A.H. Brooks and L.I. Gregory for the said corporation, for the uses and purposes herein mentioned, A.H. Brooks and L.I. Gregory on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of the said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year above written.



W.O. Macomber
Notary Public in and for the State of Washington, residing at Seattle.
1309045

Filed for record of the request of Gardner, Gardner & Fischer, Inc. May 20 A.D. 1919 of 48m, post 35 Pl. and recorded in Vol. 23 of plats, page 12, records of King County, Washington.
Norman H. Wardell
County Clerk
By P.P. Davis Deputy