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Bellevue, WA 98005

May 20, 2011

CITY OF BURIEN

Mayor McGilton and  
Burien City Council  
C/o Mike Martin, City Manager &  
Monica Lusk, City Clerk  
400 SW 152nd Street, Suite 300  
Burien, WA 98166

**RE: Burien Shoreline Master Program**

Dear Mayor McGilton and Members of the City Council,

I'm writing to you on behalf of the SEATTLE *KingCounty* REALTORS® to encourage the City Council to stand firm, and to reject the errant request from the Department of Ecology (DOE) that the City of Burien modify its Shoreline Master Program to conform to the recommendations that were submitted to the City Council by the Burien Planning Commission.

Our request that you reject the Department of Ecology's position is based on the following three factors:

**1. The record upon which the Planning Commission based its recommendation did not include the wealth of additional information, additional testimony, additional data and additional analysis that was submitted to, carefully considered by, and persuasive for, the Burien City Council. As a result, the recommendation approved by the Planning Commission and preferred by DOE is substantively - and fatally - flawed.**

A partial list of the kinds of information, testimony, data and analysis not considered by the Planning Commission, but which were submitted to, and carefully considered by, the Burien City Council include (but are not limited to) the following: <sup>1</sup>

- The testimony of experienced scuba divers with personal, detailed, first-hand knowledge of the underwater condition of Burien's marine shoreline, how that condition has continued to improve over time, and favorably comparing and contrasting Burien's underwater marine shoreline to other Puget Sound marine shorelines known to the diver.
- Testimony regarding other first-hand observations concerning the continual

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<sup>1</sup> WAC 173-26-201 (3)(b) expressly authorized the City to solicit, incorporate and use such information (including information, experience and anecdotal evidence provided by interested parties) as part of the master program amendment process. The WAC indicates such information should be solicited through the public participation process, which is what the Burien City Council did.

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improvement in Burien's marine shorelines, together with testimony from a variety of witnesses regarding the improving habitat conditions, and the increasing populations of wildlife, in the near-shore areas.

- The results of a physical survey of existing marine shoreline setbacks. This analysis was submitted to the City Council on or about May 3<sup>rd</sup>, 2010, well after the Planning Commission had finalized and approved its recommendation on March 30<sup>th</sup>.

This analysis (which was generated in large part to respond to the deficiencies in the work underlying the draft approved by the Planning Commission) was submitted to the City Council on behalf of the *Burien Marine Homeowners' Association* (BMHA).

It was - and remains - critically important for at least three reasons:

1. The analysis demonstrated the Planning Commission's recommendation to impose new 65-foot restrictions (50' + 15') would have transformed approximately 75% of the *existing* single family homes into non-conforming uses;

2. Those single family homes are *expressly* designated as a *preferred shoreline use* under Washington's Shoreline Management Act. Stated another way: As applied, the recommendation approved by the Planning Commission and preferred by the Department of Ecology would have produced a result clearly inconsistent with state law; and

3. The basis for suggesting new 65-foot buffer/set-back regulations in the draft approved by the Planning Commission was not well supported. Additionally, efforts during the Planning Commission's process to rationalize new 65-foot regulations by way of passing references to generalized literature supportive of 100' - 300' buffers in undisturbed environments near freshwater rivers are:

- (a) Not relevant to the kind of city-specific analysis of Burien's marine shorelines and shorelands that are mandated by state statute, and

- (b) Not relevant to the rather unique marine shoreline conditions in Burien where the primary marine shoreline uses are single family homes and city park lands. Unlike many other marine areas in Puget Sound, Burien's marine shoreline uses do not include shipping or industrial uses that may carry larger risks of future degradation.

- On or about June 7<sup>th</sup> Carl Hadley of Cedarock Consultants, Inc. provided the City Council with a scientific environmental analysis and report he had prepared entitled, "*The Use of Science to Develop Marine Buffer Recommendations in Burien.*"
- On or about July 19<sup>th</sup> the BMHA provided the City Council with a 14-page document outlining new significant and broad data regarding development conditions in Burien's

marine areas. The memo itself was constrained to just 14 pages out of respect for the enormous challenge the City Council appeared to be confronting as a result of the volume of new information and data the Council was receiving in response to the fatally-flawed draft that was delivered to the City Council by the Planning Commission.<sup>2</sup>

- A *White Paper* on the State's Shoreline Management Act and how municipalities should - and should not - act to ensure their Shoreline Master Program is consistent with state law. I submitted the White Paper on behalf of the SEATTLE *KingCounty* REALTORS®, with assistance from the Washington REALTORS®. (All our local SKCR REALTOR® members are also members of our state association, the Washington REALTORS®)
- Detailed written comments I submitted to the City Council from the REALTORS® in the form of a 12-page letter dated July 23, 2010, which addressed:
  - The inadequacy of the inventory data on which the draft approved by the Planning Commission was based
  - The lack of data indicating or demonstrating a continuing degradation to shoreline functions below current conditions in Burien
  - The fact that unsupported proposals for new prophylactic regulations on Burien's existing *statutorily preferred shoreline uses* (such as existing single family homes) would likely violate state law
  - The fact that the recommendation the City Council received from the Planning Commission proposed statutorily impermissible treatment of bulkheads and other appurtenances that are serving existing single family homes
  - The untenable proposal in the draft for new *buffers* and *vegetative buffers* that were not justified in the absence of some showing of continuing degradation of shoreline functions below current levels
  - The problematic proposal in the draft to unilaterally convert existing transportation easements to other purposes for public access to shorelines, and
  - The importance under state law of non-regulatory approaches to enhancing shoreline ecological functions.

As we followed - and participated in - the City Council's extensive public process, it appeared to us that much of the additional information, testimony, data and analysis were submitted to the

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<sup>2</sup> On or about December 8, 2010, at DOE's Hearing on Burien's SMP Update, the Burien Marine Home Homeowners Association (BMHA) provided the Department of Ecology with a more in-depth report on the data (about 35 pages) to address any potential DOE concerns about the abbreviated summary of data that had been provided to the City Council on July 19<sup>th</sup>.

City Council as a result of three factors:

1. Residents of the greater Burien community (who know their City *extremely well*) appeared to recognize very quickly that the draft that was approved by the Planning Commission was clearly inconsistent with their own personal observations (made over many, many, years) of the condition of Burien's shorelines and near-shore areas.

As their knowledge of the details of the draft approved by the Planning Commission became more widely understood, the inadequacy of the Planning Commission's well-intended but fatally-flawed effort became all the more glaring.

In contrast to the detailed analysis of the Burien marine shoreline developed by the BMHA, which included an at-site review of every marine lot/parcel in the City, it appeared that no member of the City's *Shoreline Advisory Committee* (SAC), no member of the City's *Planning Commission* (PC), and no one from the *Department of Ecology* (DOE) had traveled the length of Burien's marine shorelines.

2. Residents became concerned with the speed at which the Planning Commission moved forward without really engaging on the concerns a ground swell of residents were expressing about the quality and incompleteness of the work that had been done on the update of Burien's SMP. In particular, there was concern that both the Shoreline Advisory Committee and the Planning Commission failed to really engage on the issues central to the concepts of "Ecological Function" and "No Net Loss."<sup>3</sup>

As a result, significant deficiencies remained in the draft proposal the City Council received following the Planning Commission's approval of the draft in late March.

3. To their very considerable credit, the Mayor (Hon. Joan McGilton) and the other members of the Burien City Council empowered the residents of Burien to inform and enlighten the Council by providing the very best Public Process for update of a City's Shoreline Master Program that we have seen to-date in any of King County's 39 cities.

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<sup>3</sup> In contrast, the Burien City Council attempted to discuss these matters multiple times, and inquired about these topics at the Council's SMP "Science Forum" on June 7<sup>th</sup> and the Council's SMP "Policy Forum" on June 14<sup>th</sup>. The issues were of particular concern to our REALTOR® Association - and we raised our concerns publicly and on the record with the City Council - because:

- The Legislature had changed the legal standard for SMP updates from "Best Available Science" (a concept central to much of GMA) to "No Net Loss" (which is a new *No Additional Harm* Shorelines standard adopted by the Legislature). This legislative change to the law occurred while Burien's SMP was being updated;
- The Shoreline Advisory Committee and the Planning Commission had not adequately engaged on these critically important environmental and statutory concepts; and
- The consulting firm that assisted the City in its update of Burien's SMP had not updated its work in a way that appeared to adequately address the Legislature's change in the law regarding "No-Net-Loss" as the applicable standard for updates of Shoreline Master Programs.

**2. During the City Council's very extensive Public Process, representatives from the Department of Ecology were consistently and repeatedly unable to satisfactorily address well-informed and very pointed questions about the Department's views and assertions regarding Burien's Shoreline Master Program (SMP) update when members of the City Council and the public "drilled-down" to get answers.**

On June 7, 2010, the City Council held a forum on shoreline "Science." A second City Council forum on shoreline "Policy" was held on June 14<sup>th</sup>.

Because of the important role the Department of Ecology plays in the SMP update process, representatives from the Department of Ecology were invited to be present, and participated at both forums:

- Dr. Taylor represented DOE at the June 7<sup>th</sup> Science Forum, and
- Bob Fritzen represented DOE at the Policy Forum on June 14<sup>th</sup>.

City Council members and residents not only heard what DOE's representatives had to say, they also had the opportunity to pose questions to DOE's representatives. At the June 7<sup>th</sup> forum Dr. Taylor essentially indicated she didn't know enough about Burien to be able to comment in a meaningful way regarding potential shoreline buffers in Burien.

The substantive vacuum - or void - in Ecology's responses to pointed questions was roundly characterized as "disappointing." Examples of the general nature of inquiries the Department of Ecology representatives were unable to satisfactorily address included, but were not limited to:

- What quantitative difference in *ecological function* would DOE's preferred alternative (on marine shoreline buffers) make - at the margin - in Burien compared to the City's current marine shoreline buffers, and what is the evidence to support DOE's position in this regard?
- What specific Burien data, if any, does the Department of Ecology have to support its preferred alternative for increasing the size of marine shoreline buffers? (The Department of Ecology appeared to have no accurate local data in this regard and, unlike the residents who provided new data to the City Council, no representatives of Ecology had traveled the length of Burien's marine shorelines.)
- What is the difference between the size of the buffer needed to satisfy the "balancing" approach embodied in the Legislatures' newly adopted Shoreline standard of *No-Net-Loss (No Additional Harm)*, compared to the size of buffer required under the prior Growth Management Act (GMA) standard of *Best Available Science*?

- What is the impact on *ecological function* of city park and single family residential build-out of shorelines (which typify Burien's shorelines), compared to the impact on *ecological function* of build-out to accommodate commercial, industrial and shipping shoreline uses (which typify shoreline development in some other areas of Puget Sound).

**3. The Department of Ecology has an important role in the SMP process because an update adopted by a city typically does not become effective until approved by DOE. Even so, the Department of Ecology is unlikely to have the last word on Burien's SMP Update. As a result, the City Council's efforts to remain true to its decision - a decision that is well reasoned and amply justified - is worthy of support at every level of forthcoming review.**

The Department of Ecology has a reputation for being involved in the Shoreline Master Program (SMP) updates at various stages of the process, including:

- Consulting behind the scenes with municipal staffs about SMP regulations for the jurisdiction that might (or might not) be well-received by the Department. (aka: DOE's "1<sup>st</sup> Bite" at the apple).
- Consulting with private-sector environmental consultants that are assisting municipal jurisdictions with SMP updates. Arguably, consultants may be better-positioned to get additional consulting work from jurisdictions if they have a track record of suggesting approaches likely to be accepted by DOE - a result not inconsistent with recommending a jurisdiction simply give DOE what it wants (aka: DOE's "2<sup>nd</sup> Bite" at the apple).
- Participating in the Planning Commission and/or City Council public process regarding SMP Updates (aka: DOE's "3<sup>rd</sup> Bite" at the apple).
- Then, once the City Council approves a SMP Update, it goes to the Department of Ecology for the Department's formal approval - as provided for in state statute. (aka: DOE's "4<sup>th</sup> Bite" at the apple).

The requirement for cities to update their Shoreline Master Programs is imposed on jurisdictions by state statute. The shoreline regulations are viewed as regulations of the state of Washington. Absent of a successful challenge to higher authority (such as the Hearings Board or the State Supreme Court), they must be approved by DOE before taking effect.

As a result, the dynamics of the process typically encourage, or at least facilitate, somewhat of a "greased skid" for approval of SMP updates once a jurisdiction's consultant helps develop a formal recommendation that is approved by the Planning Commission and submitted to the City Council for its consideration.

The prospect of an extended and avoidable commitment of time, staff resources and financial resources if the City's locally-informed proposal is at variance with the preferences of DOE staff members provides an additional incentive for jurisdictions to largely just "go along."

The city of Des Moines' experience with its SMP update provides cities throughout the region with a vivid reminder (and example) of the costs associated with incurring DOE's disfavor.

Moreover, DOE's influence very early in the update process helps to illuminate for jurisdictions an anticipated path of least resistance through DOE.

Against this backdrop and context, the actions by the Burien City Council to endeavor to...

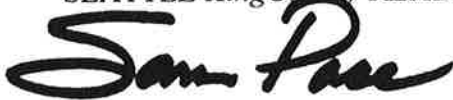
- Be true to the Legislature's newly adopted SMP standard of *No-Net-Loss*
- Fully engage on the issue of shoreline *Ecological Functions*
- Review the local science, local data, local analysis and local marine conditions to ensure Burien's approach to the City's update of the SMP is environmentally sound, reasoned and well-justified by the local evidence
- Give life - not just lip service - to the statutorily preferred shoreline uses identified in state law, including single family homes, protective bulkheads and property rights, among others
- Be fair to the residents and property owners in the city
- Invite DOE's representatives to address the Council on multiple occasions, and to take questions from the Council and the Public; and
- Consistent with WAC 173-26-201(3)(b), to truly engaged the community - even at the risk of incurring the disfavor of DOE officials who fell far short in responding to pointed inquiries from the City Council and the public at the Burien SMP "Science" and "Policy" forums on June 7<sup>th</sup> and 14<sup>th</sup>, 2010...

...is nothing short of a responsible, reasoned, remarkable and courageous course of conduct that should be affirmed.

The City Council should stand firm, and if necessary be upheld by the Hearings Board and/or the Washington State Supreme Court in the event the Department of Ecology persists with its errant request that the City of Burien modify its Shoreline Master Program to conform to the fatally-flawed recommendations that were delivered to the City Council by the Burien Planning Commission.

Hopefully it will not come to that. But in this particular situation, it appears the City Council and the residents of Burien have the fortitude (and the community has an abundance of resources and the resolve) to ensure that if necessary the State Supreme Court - and not the Department of Ecology - will have the last word on Burien's exemplary effort to protect its shorelines for future generations in a manner that is consistent with state law.

Sincerely,  
SEATTLE *KingCounty* REALTORS®

A handwritten signature in black ink that reads "Sam Pace". The signature is written in a cursive, flowing style.

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