To: City of Mercer Island Planning Commission and Deputy Mayor Jahncke  
From: Travis Saunders, Planner  
Re: Shoreline Master Program (SMP) Update Work Plan  
Date: October 14, 2010

At the June 16, 2010 meeting, staff provided the Commission with a recap of the state mandated requirements for the Shoreline Master Program update, the extensive process the Commission has undertaken to comply with the mandated requirements, the key decisions made by the Commission, and the next steps necessary to complete the Commission’s work. Also provided at this meeting was a binder of Exhibits to be used for the continuation of the Commission’s work. It is recommended that you bring a copy of the binder to future meetings, as staff will be referencing the materials within. If you need an additional copy, please contact me.

Over the summer, staff analyzed the Draft SMP with regard to compliance with the guidelines under Chapter 173-26 WAC, as well as process and code structure related factors. The enclosed Discussion document (Exhibit A) outlines staff’s recommendations for finalizing work on the SMP. The Discussion document focuses on five key issues. An analysis of the issues and staff recommendation for addressing each is provided. At the October 20th meeting, staff will work through each in turn, seeking the Commission’s recommendation prior to proceeding with further code and policy drafting. A suggested meeting work agenda is provided below:

I. Staff presentation of Facts for Consideration
   • Discussion

II. Staff presentation of issues and recommendations
   1. Staff presentation of Issue #1 – Code Structure
      • Discussion of analysis and staff recommendation
• Motion to approve, approve with modifications, or deny staff recommendation to “move forward with the development of an entirely new section, but not new Title, of our Unified Development Code (19.07.100) which is specifically structured for compliance with all SMP requirements. Add Supplemental provisions to the other sections, as needed.”

2. Staff presentation of Issue #2 – Relation of Critical Areas Ordinance (CAO) to the SMP
• Discussion of analysis and staff recommendation
• Motion to approve, approve with modifications, or deny staff recommendation to “Reference a “specific, dated edition” of the CAO in the SMP, noting in detail either the CAO provisions that will not apply to the SMP, or the CAO provisions that will apply.”

3. Staff presentation of Issue #3 – Maximum Size of a dock
• Discussion of analysis and staff recommendation
• Motion to approve, approve with modifications, or deny staff recommendation to “remove the maximum size of docks from the Draft SMP, understanding that docks larger than 480 square feet would be required to obtain an Individual Permit from the Army Corps of Engineers.”

4. Staff presentation of Issue #4– Non-conforming structures
• Discussion of analysis and staff recommendation
• Motion to approve, approve with modifications, or deny staff recommendation to “Include in the Draft SMP regulations for the maintenance, repair, renovation and total replacement of legally existing non-conforming structures similar to those in the approved Whatcom County SMP. Require compliance with new SMP standards only for new, enlarged or expanded structures.”

5. Staff presentation of Issue #5 – Policies
• Discussion of analysis and staff recommendation
• Motion to approve, approve with modifications, or deny staff recommendation to “Adopt the required policy elements of the SMP by Resolution as an
element of the SMP and incorporate those elements into the Mercer Island Comprehensive Plan in the 2014 update.”

III. Next Steps

• Review of policies
• Review of reorganized regulations

Based on the Commission’s direction, staff will continue to develop the Draft SMP and return at a future meeting for further review.

QUESTIONS:
Staff welcomes any questions or concerns you may have. Feel free to contact me at (206) 275-7717 or travis.saunders@mercergov.org.
SHORELINE MASTER PROGRAM (SMP)

DISCUSSION

Mercer Island

October 20, 2010

FACTS for Consideration:

1. The Department of Ecology (DOE) must decide if any local SMP proposal is in compliance with the law, including the provision of “no net loss”. Once DOE approves a local proposal, any appeal is an appeal of the DOE decision (and not the City’s decision).

2. Cities in King County have a SMP completion target date of December 1, 2009. A Contract Letter of Amendment was issued by DOE to extend Mercer Island’s timetable through June 30, 2010. Recent correspondence from DOE indicates an additional formal extension is forthcoming. (Exhibit B)

3. The City of Kirkland’s SMP has been approved by the Department of Ecology (DOE). The period to appeal DOE’s decision has expired and no appeals were filed.

4. The City of Sammamish has approved and transmitted their SMP to DOE for review and approval. DOE held its Public Hearing of Sammamish’s SMP on October 7, 2010, with public comment closing at 5PM on October 29, 2010. DOE’s response is pending.

5. Kirkland’s SMP is a new Title in the Kirkland Municipal Code (as are most of the other SMPs which have been approved by DOE).

6. Kirkland’s SMP does not include any “maximum” dock size, but generally defers the limits of the size for new or expanded docks to the Army Corps of Engineers (ACE).

7. The ACE Regional General Permit RGP-3 (or successor permit) authorizes work within a set of specific parameters (e.g. the size of new docks for a single property owner is limited to 480 square feet). The ACE does not prohibit larger docks, but does require that any proposed modification beyond the limits “must be approved by a Department of the Army Individual Permit”.

8. Mercer Island’s Draft SMP has been developed with the intent of integration into Mercer Island’s Unified Development Code (Title 19) and not as a separate Title.

9. Cities have three options to integrate Critical Areas Ordinances (CAO) into the SMP:
   a. Copy specific sections from the CAO and embed them into the body of the SMP.
   b. Reference a “specific, dated edition” of the CAO in the SMP, noting in detail either the CAO provisions that will not apply to the SMP, or the CAO provisions that will apply.
   c. Include the relevant portions of the CAO as an appendix and explain in the SMP that the appendix is specifically approved as a part of the SMP.

10. DOE has provided new (April 29, 2010) guidance regarding legally existing structures (including docks and other over-water structures), noting that the following language in the Whatcom County SMP is acceptable to DOE: “Non-conforming structures may be maintained, repaired, etc.”
renovated, or remodeled to the extent that non-conformance with the standards and regulations of this program are not increased…”. And that: “Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act…” (DOE SMP Handbook, Non-conforming uses and development guidance, p 12).

11. DOE has stated that the “no net loss” policy objective “should guide review of proposed expansions or other changes to grandfathered uses…” (Ibid, p 6).

12. DOE has stated that “Grandfathered (nonconforming) existing legal uses and structures may continue” (Ibid, p 5).

13. Mercer Island’s Development Code currently allows for “ordinary repairs and maintenance of a non-conforming structure” but also states that “this is not intended to allow total replacement” (MIC 19.01.050 B (1) and 19.16.010). The DOE guidance on non-conforming structures is much broader than the current city rule regarding non-conforming structures.

14. The state mandated update of the Mercer Island Comprehensive Plan, originally scheduled for 2012 has been extended until 2014.

15. Due to budget constraints, and a change in State Law, the City of Mercer Island will not begin its Comprehensive Plan Update until after the 2011-2012 Biennial Budget. Work on the Comprehensive Plan update is expected to begin in 2013 and be completed in 2014.

16. DOE requires adoption of a number of policies including policies related to environmental designations (including the CAO), constitutional and other legal limitations on the regulation of private property and public access.

17. The currently adopted Mercer Island Comprehensive Plan has established Shoreline Goals and Policies which are generally consistent with the DOE requirements, but which do not include all of the specific policies required by DOE.

18. Pursuant to RCW 36.70A.480, the goals and policies of a shoreline master program shall be considered an element of the Comprehensive Plan.

19. Any appeal of an amendment of the City’s Comprehensive Plan is an appeal of the City’s decision and must be defended by the City in front of the Growth Management Hearings Board.

20. Any appeal of SMP supplemental policies and regulations approved by DOE, as a part of the SMP, is an appeal of DOE’s decision in Court and will be defended by DOE.

ISSUES, ANALYSIS AND RECOMMENDATIONS

Issue #1 Code Structure. Shall the Mercer Island SMP be adopted as a new Title within the Mercer Island Code or shall it be integrated into our Unified Development Code?

ANALYSIS: While most cities adopt the SMP as a new Title in their Municipal Code, Mercer Island is seeking to integrate the SMP into the City’s Unified Development Code (Title 19). A Unified Development Code is generally advantageous for city staff members, customers and the general community because it provides a single source for all development requirements and thereby reduces the potential for inconsistencies and conflicting provisions between Titles. This unified development code approach is challenging for the adoption of the SMP because most development activities outside
of the shoreline jurisdiction are regulated by the Growth Management Act (GMA; Notice to the State Department of Commerce) while shoreline provisions are regulated by the SMP (Notice to and approval by DOE). The overarching question: if the SMP is adopted into our Unified Development Code will any future amendment of our entire Code be subject to both DOE review and approval AND appeal to the Growth Management Hearings Board under GMA?

One solution might be to adopt the SMP as a part of our Unified Development Code, specifically isolated in 19.07.100, but structured in that section to include all elements required by DOE. This may require some minor amendments to other sections of the Code, especially definitions and administration, which could be tailored specifically for the SMP. For example, a new definition for “Shoreline Non-Conforming Structures” might be added to our definitions but would only apply in areas of the Shoreline jurisdiction. This could provide for a clear demarcation of what parts of our Unified Development Code are for GMA and must comply with GMA standards and procedures and what parts (19.07.100 plus specific definitions and procedures) are required for the SMP with DOE jurisdiction.

RECOMMENDATION: Move forward with the development of an entirely new section, but not new Title, of our Unified Development Code (19.07.100) which is specifically structured for compliance with all SMP requirements. Add supplemental provisions to the other sections, as needed.

Issue #2 Relationship of the CAO to the SMP. How shall Mercer Island integrate the CAO with the SMP?

ANALYSIS: The integration of the CAO (required by GMA) with the SMP (required by a different state law) has proven to be a significant challenge for many local governments. The issue is complex and rooted in the subtle differences between these two state laws. DOE has provided us with three alternatives (see Fact #8) to integrate the CAO with the SMP. Under the first option, “a”, the city would repeat applicable sections of the CAO within the SMP. This option is most appropriate when the SMP is a “stand alone” new Title in a Municipal Code. If the City chooses to adopt the SMP within Title 19, as recommended in #1, this option would require duplication of significant parts of regulations in the same Title. The result would be an Ordinance which would be awkward, redundant and confusing. Either option “b” or “c” would be more appropriate if the SMP is included in our Unified Development Code. Option “b” would likely involve a simple paragraph within the SMP. Option “c” would require an attachment of many elements of Title 19.

RECOMMENDATION: The simplest solution to the challenge of integrating the CAO with the SMP would be option “b” and that option is recommended.

Issue #3 Maximum Size of a Dock. Should the City of Mercer Island SMP limit the maximum size of a dock?

ANALYSIS: The ACE does not limit the size of docks, but provides two types of permits for regulation. Docks on Lake Washington are permitted under a Regional General Permit (RGP-3) if the application

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meets specific standards, including a size limitation of 480 SF for a single property owner. A dock larger than 480 SF may be permitted, but under the separate and more lengthy process for an Individual Permit. The City of Kirkland recognizes that docks of more than 480 SF may be allowed when approved by the ACE through an Individual permit. The current Mercer Island Draft SMP limits dock size to no more than 1,000 SF. The effect of this limitation would be that individuals would be required to obtain an Individual ACE permit for docks greater than 480 SF but would be prohibited by our local SMP from being larger than 1,000 SF. The limitation on the size of docks in the SMP to no more than 1,000 SF would be more restrictive than allowed by either the ACE or the City of Kirkland.

RECOMMENDATION: Remove the maximum size of docks from the DRAFT SMP, understanding that docks larger than 480 SF would be required to obtain an Individual Permit from the ACE.

**Issue #4 Non-conforming structures.** Should the Mercer Island SMP allow legally existing non-conforming structures, such as docks, boathouses, decks and principal structures, to be maintained, repaired and entirely replaced?

ANALYSIS: The DOE allows legally existing non-conforming structures to be maintained, repaired and replaced if they do not expand or increase the non-conformity. This position is illustrated in the Whatcom County SMP which has been approved by DOE: “Non-conforming structures may be maintained, repaired, renovated, or remodeled to the extent that the non-conformance with the standards and regulations of this program are not increased...Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act.” Mercer Island’s current non-conformity rule is much more restrictive, stating that the ordinary maintenance and repair of non-conforming structures is allowed but that repair and maintenance “is not intended to allow total replacement”.

DOE has also indicated that the “no net loss” policy objective “should guide review of proposed expansions or other changes”. The complete replacement of a legally existing non-conforming structure is not an expansion or a change and a complete replacement would therefore not constitute a “net loss”.

The City has the authority to write new non-conforming provisions in the SMP and need not use the same provisions within our current development code.

RECOMMENDATION: Include in the DRAFT SMP regulations for the maintenance, repair, renovation and total replacement of legally existing non-conforming structures similar to those in the approved Whatcom County SMP. Require compliance with new SMP standards only for new, enlarged or expanded structures.
**Issue #5 SMP Policies.** Should the policy statements required by the SMP be adopted into the Mercer Island Comprehensive Plan or should they be adopted as a separate City Resolution as an element of the SMP now and then incorporated into the Comprehensive Plan when it is updated in 2014?

ANALYSIS: DOE requires that local governments include a number of policies within the SMP. None of those required policies is inconsistent with the currently adopted Mercer Island Comprehensive Plan. The current Comprehensive Plan provides goals and policies which support the SMP. While the Comprehensive Plan may be amended to include the policies of the new SMP we may also adopt those policies as a policy element of the SMP. If the City amends its Comprehensive Plan as a part of the SMP update, this amendment would be subject to appeal to the Growth Management Hearings Board *in addition to the approval by DOE*. The State mandated update of our Comprehensive Plan (originally scheduled for 2012) has been pushed back by an act of the Legislature until 2014. State funding to assist local governments with this update has been deleted from the State budget.

RECOMMENDATION: Adopt the required policy elements of the SMP by Resolution as an element of the SMP and incorporate those elements into the Mercer Island Comprehensive Plan in the 2014 update.
September 29, 2010

Department of Ecology
Northwest Regional Office
Attn: Barbara Nightingale
3190 160th Avenue SE
Bellevue, WA 98008-5452

RE: Status Update for Mercer Island SMP – Grant No. G0800023

Dear Barbara,

Over the course of the past three years, the City of Mercer Island has been diligently working to produce SMP deliverables, as required under WAC 173-26. Due to the lengthy and contentious nature of this process, limited fiscal resources, and in order to better inform the public and the City’s appointed and elected officials about issues and alternatives, the timeline for completion has been delayed, despite our reasonable, best efforts.

As a partner in this process, the purpose of this letter is to keep you abreast of the City’s progress and revised timeline. As you know, City staff has been working through the summer months to address a number of important outstanding issues. We will bring these issues to the Planning Commission in October and expect that they will complete their recommendation to the City Council by the end of this year. We hope that the Council will take final action on the SMP in the first or no later than the second quarter of 2011.

If you have any questions or concerns, please do not hesitate to contact me at 206-275-7706 or via e-mail at tim.stewart@mercery.org.

Sincerely,

Tim Stewart, AICP
Director, Development Services Group

Cc: Rich Conrad, City Manager
Geoff Tallent, Ecology Section Manager
Shane Maloney, Assistant City Attorney
Travis Saunders, Planner
From: Nightingale, Barbara (ECY) [mailto:bnig461@ECY.WA.GOV]
Sent: Wednesday, September 29, 2010 3:44 PM
To: Tim Stewart
Subject: RE: Mercer Island Status Update

Tim,

Thank you very much. This is very helpful. We will draft an amendment reflective of this letter and provide you with the documentation you can provide to your planning staff and committees to formally acknowledge this anticipated timeline.

If you have any questions or concerns, please feel free to email or call me at 425-649-4309.

Thanks again,
Barbara Nightingale
Regional Shoreline Planner
425-649-4309
Shorelands and Environmental Assistance
Department of Ecology

From: Tim Stewart [mailto:Tim.Stewart@mercergov.org]
Sent: Wednesday, September 29, 2010 2:46 PM
To: Nightingale, Barbara (ECY)
Cc: Rich Conrad; Tallent, Geoff (ECY); Shane Moloney; Travis Saunders; Kirsten Taylor; George Steirer
Subject: Mercer Island Status Update

Hi Barbara,

Attached is a letter updating the status of the Mercer Island SMP, hard copy to follow in the mail.

Please let me know if you have any questions.

Tim

Tim Stewart, AICP
Director, Development Services Group
City of Mercer Island
9611 SE 36th Street
Mercer Island, WA 98040
206.275.7706 phone
206.275.7726 fax
tim.stewart@mercergov.org

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