I. FINDINGS

1. The State of Washington has mandated that the City of Mercer Island update the Shoreline Master Program (SMP), which establishes policy, regulates structures and uses waterward and 200’ landward from the shore of Lake Washington and establishes plans for restoration of the shoreline.

2. Structures and uses in Lake Washington are regulated by a wide variety of Federal and State agencies, in addition to the regulations in the SMP, including the Federal Army Corps of Engineers (ACOE) and the Washington State Department of Fish and Wildlife (WSDFW).

3. Structures and uses 200’ landward from Lake Washington are regulated by a number of provisions of the Mercer Island Unified Development Code including height, bulk, impervious surfaces, tree protection ordinance and critical areas ordinance (CAO), including wetlands and geohazard areas, as well as storm water quality and quantity (NPDES) and building codes.

4. The state SMP mandate is extremely complex: with the State publishing 288 pages of SMP laws, rules and guidance.¹

5. The state SMP mandate is confusing: the ill defined relationship between the SMP (State Department of Ecology) and the Growth Management Act (State Department of Commerce) has resulted in litigation (see “Futurewise v. Anacortes. 164 Wn.2d 2008) and additional legislation (see Engrossed House Bill 1653, 2010). As one commenter noted: “The source of the confusion is regulatory overlap. Both the CAO and the SMP protect environmental resources within the Shoreline.”²

¹ The law (RCW 90.58) is 32 pages; the rules (WAC 173-26) are 78 pages and the guidance (The SMP Handbook) is currently 178 pages, with ongoing updates and changes.

6. The state SMP mandate is contentious sharply focusing the disagreement and dispute between environmental advocates and advocates for private property rights.

7. The state SMP mandate is also evolving as court rulings are issued, legislative actions adopted and as the Department of Ecology (DOE) establishes precedent as it approves local SMPs and modifies the SMP Handbook.

8. Staff conservatively estimates that the cost of Mercer Island’s SMP effort has been $523,168 to date. The state provided a grant to the City of Mercer Island in the amount of $150,000. Staff estimates that $385,840 in staff and other costs, plus $75,000 in consultant costs, has been used by the City in support of this effort. In addition, the value of volunteer time by the Planning Commissioners is estimated by staff to be $62,328. The value of community involvement and participation has not been estimated, but has been invaluable. The current net cost to the City of Mercer Island, after deducting the state grant, is estimated to be $373,168 to date.

9. The process of approval of Mercer Island’s SMP requires that the Planning Commission forward a recommendation to the City Council for action. Following Council action, the SMP is forwarded to DOE, who may conduct a new public hearing, for review. Typically, DOE will respond to a city’s submittal with required changes and suggested changes. The City then enters into negotiations with DOE. If negotiations are successful, the City will then adopt the final SMP, including regulations, and the new program and regulations will take effect. If the negotiations are not successful, DOE may impose SMP regulations upon the City. The City would then have the opportunity to appeal the DOE action.

10. One standard that DOE will use in reviewing the City’s SMP is to find that the program, in total, will result in no net loss of shoreline ecological functions necessary to sustain shoreline resources.

11. The Planning Commission has conducted 29 public meetings, including two public hearings, in developing this recommendation.

12. The Planning Commission heard hours of testimony and received thousands of pages of written documents including studies during its review process. Planning Commission agendas, staff reports and written documents are available to Council and will be posted on the City’s Website.

3 For example, state law had stated that the SMP shall provide a level of protection to critical areas located within shorelines of the state (Lake Washington) that “is at least equal to the level of protection provided to critical areas by the local government’s critical area ordinances”. With adoption of HB 1653 (2010), the level of protection was changed to “assures no net loss of shoreline ecological functions necessary to sustain shoreline resources as defined by department of ecology guidelines.”

4 The 2007 State Grant was divided: $75,000 for consultants; $75,000 for city staff costs and expenses.

5 Average of 4 staff at 5 hours per week for 3.5 years @ $106 per hour (City approved hourly billing rate) equals $385,840.

6 Average of 6 Commissioners per meeting (3.5hrs) for 29 meetings @ $106 per hour equals $64,554.

7 To approve a comprehensive SMP update, Ecology’s Director must formally conclude that the proposed SMP, when implemented over its planning horizon, typically 20 years, will result in “no net loss of ecological functions necessary to sustain shoreline natural resources” SMP Handbook, Chapter 4, page 5, 6/22/10.

13. Many of the comments received during the Planning Commission process were conflicting, frequently exhibiting the opposing values between environmental and property rights advocates.9

14. In reaching its final recommendation, and after careful and diligent review of all relevant information, the Planning Commission believes the proposed SMP has achieved a balance between the public interest and private property rights, satisfying the state SMP mandate of no net loss.

15. The Planning Commission received, reviewed, evaluated and formed a consensus recommendation on all of the many issues presented during review. The following questions will likely emerge during the discussion and debate at the City Council:

   a. **Replacement of legally existing structures.** Should legally existing overwater structures and structures 25’ landward of the shoreline be allowed to be maintained, repaired and completely replaced?

   b. **Optional Standards.** Should the City SMP allow for alternative development standards? When optional standards are applied waterward: 1) the applicant demonstrates no net loss and (2) the alternative is approved by both the US Army Corps of Engineers and the Washington Department of Fish and Wildlife. When optional standards are applied landward, for a Shoreline Variance or Shoreline Conditional Use Permit, no net loss must be demonstrated and may be consolidated using the substantive authority of the State Environmental Policy Act (SEPA).

   c. **Structures Waterward of the Ordinary High Water Mark (OHWM) especially in the First 30’.** Within the first 30’ waterward from OHWM, would a dock width of 8’ or the installation of a boat lift create an unmitigated “net loss” of shoreline ecological function?

   d. **Setback and Vegetation Standards Landward from the OHWM.** Should the setback and vegetation standards be increased or decreased?

   e. **Covered Moorages.** Should covered moorages be permitted?

16. **Replacement of legally existing structures.** The Planning Commission recommends that all legally existing overwater structures and landward structures within 25’ of the OHWM be allowed to be maintained and repaired, and to be completely replaced to the extent that non-conformance with the standards and regulations is not increased.10 The rationale for this recommendation is that all legally existing structures form the “baseline” from which “no net loss” is measured. The complete replacement of a structure, in kind, would therefore not result in any loss of shoreline ecological function. The City has the option to require that repaired or replaced structures meet the same development standards as new construction. This is not the Planning Commission’s recommendation. The Planning Commission recommends that the City achieve no net loss over time by regulating the impacts of new and expanded structures while

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9 This conflict has been recognized within the State Policy Enunciated in the Legislative Findings of the SMP “...to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest” RCW 90.58.020. “The policy goals for the management of the shorelines harbor potential for conflict” WAC 173-26-176(2).

10 Draft MICC 19.07.110(B)(1).
allowing existing docks to be repaired and replaced in kind, indefinitely.\textsuperscript{11} This SMP rule would only apply narrowly in the shoreline jurisdiction and would not change the City’s non-conformity rule regarding the reconstruction of non-conforming structures for the rest of the Island, outside of the area within 25’ of the OHWM.

17. **Optional Standards.** The proposed SMP regulations\textsuperscript{12} authorize optional flexible standards. Many of the standards included in the Draft SMP regulations follow standards established by the Army Corps of Engineers (ACOE)\textsuperscript{13} and used by the City of Kirkland’s SMP which has been approved by DOE. The Planning Commission recommends that optional standards be included as a fundamental element of the Mercer Island SMP regulations. The rationale for including this provision is that the ACOE frequently approves individual permits which do not strictly comply with its published standards. The Planning Commission believes that the City’s SMP regulations should not be more restrictive than the requirements of the Federal Government and should provide flexibility when a development proposal is approved by the Federal Government and appropriate State Agencies such as the Washington Department of Fish and Wildlife (WDFW) and demonstrates no net loss to the city. One primary source of confusion in shoreline regulations is the bewildering array of federal, state and local regulations and permits. By including an optional flexible standard in the City’s SMP regulations this regulatory burden is significantly eased. As the draft SMP states, the provisions of Mercer Island’s SMP regulations “shall not relieve any responsibility to comply with other Federal and State laws or permits”\textsuperscript{14}.

18. **Structures Waterward of the Ordinary High Water Mark, especially in the first 30’.** The State DOE has stated that “Ecology will require maximum moorage width to be 4 feet within the first 30 waterward of the OHWM with a 6’ width beyond that point”.\textsuperscript{15} The existing SMP allows docks up to 8’ wide with no distinction for the first 30’. The Planning Commission recommends a maximum width of 8’\textsuperscript{16} which “must be fully grated with materials that allow a minimum of 40% light transmittance”.\textsuperscript{17} The Planning Commission received and evaluated a huge amount of information related to the impact of light and shade on salmon and bass populations. After careful consideration of all the facts, the Planning Commission is unconvinced there would be a net loss of shoreline ecological function in comparing an 8’ grated dock with a 4’ or 6’ grated dock and has concluded that no scientific or quantitative relationship between residential dock coverage and significant smolt survival has been conclusively demonstrated. For example, juvenile salmonids are most abundant at stream mouths which are not generally present on Mercer Island. In addition, the studies most specific to South Lake Washington and bass predation concluded that residential dock shading was not a significant factor. The Commission received and evaluated a number of comments from waterfront property owners supporting an 8’ maximum width.

19. **Setbacks and Vegetation Standards Landward from the OHWM.** The Planning Commission recommends that the existing 25’ setback be retained landward from the OHWM with an added

\textsuperscript{11} The ACOE and WSDFW already impose project specific restrictions and mitigation sequencing on overwater repairs and replacements. The Planning Commission recognizes that existing state and federal regulations will create net ecological gains when existing structures are repaired and replaced. Duplication by the City of the state and federal regulators highly complex and property specific controls is unnecessary to meet no net loss and would be impractical for the City’s staff to administer.

\textsuperscript{12} Draft MICC 19.07.110(B)(2)(b) and 19.07.110(E)(6).

\textsuperscript{13} Regional General Permit (RPG-3), successor permit or standard practices.

\textsuperscript{14} Draft MICC 19.07.110(A)(5)

\textsuperscript{15} Letter from Barbara Nightingale, Regional Shoreline Planner, DOE, March 10, 2011.

\textsuperscript{16} Draft MICC 19.07.110(E) Table D.

\textsuperscript{17} Draft MICC 19.07.110(E)(6)(a)(ii).
20' vegetative area in which the first 5' shall contain at least 25% native vegetation and at least 25% of the 20' be covered by vegetation. This vegetated area would be in addition to the existing limitation allowing for no more than 10% impervious surface with the 25' setback. The Planning Commission received comments stating that these standards were too low. The Commission believes that the proposed setbacks and vegetation requirements appropriately balance competing environmental and property right values.

20. Covered Moorages. The Planning Commission recommends that covered moorages be permitted, subject to specific standards. DOE has informed us that most jurisdictions currently updating their SMPs prohibit covered moorages and that covered moorages are discouraged by DOE, WDFW and ACOE and if allowed should be constructed in a north-south; rather than an east-west orientation. Covered moorages have a long and well established tradition on Mercer Island and the Planning Commission recommends that covered moorages should continue to be permitted.

II. CONCLUSIONS
The Planning Commission’s work in the development of this proposed SMP for the City of Mercer Island has been complex and contentious. The State of Washington’s Guidelines for the SMP “allow local governments substantial discretion to adopt master program reflecting local circumstances and other local regulatory and non-regulatory program related to the policy goals of Shoreline Management...” The Commission believes that this proposal meets the needs of our community and the mandate of the State of Washington including the standard for no net loss, by balancing the protection of the environment with the protection of private property rights.

III. RECOMMENDATION
THE PLANNING COMMISSION OF THE CITY OF MERCER ISLAND HEREBY RECOMMENDS THAT THE CITY COUNCIL ADOPT THE 2011 SHORELINE MASTER PROGRAM FOR THE CITY OF MERCER ISLAND:

Exhibit 1: Draft SMP Development Regulations
Exhibit 2: Appendix F - Shoreline Environmental Designation Map
Exhibit 3: Shoreline Procedures
Exhibit 4: Shoreline Master Program Policies
Exhibit 5: Shoreline Restoration Plan

[Signature]
Adam Cooper, Chair
Mercer Island Planning Commission

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18 Draft MICC 19.07.110(E)(9)(d) and Figure C.
19 Letter from Futurewise and People for Puget Sound, March 16, 2011; comments from Rita Moore, March 16, 2011.
20 Draft MICC 19.04.110(E)(5)(a) and Table D.
21 Letter from Nightingale, March 10, 2011.
22 WAC 173-26-171(3).