EXHIBIT LIST

Exhibit 1 – WAC 173-26 Shoreline Master Program Guidelines
Exhibit 2 – Department of Ecology Shoreline Master Program Frequently Asked Questions
Exhibit 3 – Department of Ecology Handbook Chapter 4 – No Net Loss of Shoreline Ecological Functions
Exhibit 4 – Shoreline Analysis Report prepared by the Watershed Company and the City of Mercer Island
Exhibit 5 - Department of Ecology Handbook – Nonconforming Uses and Development Guidance
Exhibit 6 – WAC 173-27-080 – Nonconforming Use and Development Standards
Exhibit 7 – 19.01.050 MICC 19.01.050 – Nonconforming Structures, Sites, Lots, and Uses
Exhibit 8 – City of Kirkland’s Chapter 83 – Shoreline Management
Exhibit 9 – Comparison of Mercer Island’s Draft SMP with Key Pier and Vegetation Standards in Kirkland’s Draft SMP
Exhibit 10 – Department of Ecology March 30, 2010 Letter
Exhibit 11 – Management Recommendations for Washington’s Priority Habitats Prepared for Washington Department of Fish and Wildlife
Exhibit 12 – Protection of Marine Riparian Functions in Puget Sound Washington Prepared for Washington Department of Fish and Wildlife
Exhibit 13 – Protecting Nearshore Habitat and Functions in Puget Sound an Interim Guide Prepared for Washington Department of Fish and Wildlife
Exhibit 14 – Marine Riparian Vegetation Communities of Puget Sound Prepared in Support of the Puget Sound Nearshore Partnership
Exhibit 15 – Army Corps of Engineers – RGP1
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Exhibit 17 – Overwater Structures: Fresh Water Issues Prepared for Washington Department of Fish and Wildlife
Exhibit 18 – RCW 36.70A.172 – Critical Areas and Protection
Exhibit 19 – RCW 36.70A.480 – Shorelines of the State
Exhibit 20 – Shoreline Master Program Submittal Checklist
May 24, 2010

Mercer Island Planning Commission  
City of Mercer Island  
9611 SE 36th Street,  
Mercer Island WA 98040

Reference: Shorelines Management Act, Shorelines Master Program Update

Honorable Planning Commissioners:

This is to put in writing the comments I have provided at the last 2 Planning Commission meetings, the open meeting and your Hearing of Record on May 5th 2010. I appreciate the opportunity to speak, and particularly the response received from several of the Commission members. I would encourage you to continue to reach out and provide as many opportunities as possible for public oral and written comment. This is an important issue for Mercer Island, not only for private property owners but City parks, regional utilities, WS DOT, and other agencies. The extra time in crafting a well-written document, rather than rushing to a “deadline”, will serve the Island and its residents well.

A. Background

As you are aware from my presentation, I served on the Planning Staff from 1971 to 1976, including Staff to the Planning Commission. At that time Mercer Island and Kirkland were assigned the task to provide the staffing for Washington State DOE on the Model Shorelines Program, one that all other cities and counties in the state used as a model. I was fortunate to be one of the 4 key staff that served on that year-long process, managing the citizen input portions as well as drafting the Plan. Following that I helped craft, and did major portions of the writing of Mercer Island’s Shorelines Program, and have followed updates and testified in the past. In addition, our firm has developed SMP’s and CAO programs for a number of cities and counties in Washington State. We also have extensive permitting backgrounds in marinas, docks, upland parks, trails, residential developments etc. throughout the State of Washington.

Recently, in the last 4 years, we have been asked to serve on task force and technical committees providing research and updates of Critical Areas and Shorelines, including Thurston County, Okanogan County, Tukwila, Issaquah, Bellevue, etc. Our approach has been to develop case studies to determine how these regulations affect properties, including vegetation, docks, cabanas, primary residences, multi-family, commercial/ industrial property, semi-private recreational areas, parks, including State and National Parks, trails, and other facilities. More information about these studies can be found at www.rwta.com. Therefore, I trust that we have some standing as knowledgeable professionals/experts to provide input to this process.
B. Overview – Observations

At the Hearing, I indicated we believe there are some broadly circulated misconceptions about the update to the Shorelines Program, as follows:

1. **DOE Review.** The idea that if a city does not adopt a SMP in a certain way, then the DOE take it over, or force the city to adopt a standardized “one size fits all” program. Our experience, and the answers form the DOE representative at numerous public hearing processes, is that DOE wants local jurisdictions to develop their regulations aligned with their land use and environmental characteristics. In addition, **DOE deadlines are oftentimes flexible if a jurisdiction is making “substantial progress” to that end.** Our experience in Brier, Algona, and other communities writing these regulations is that there is some flexibility in the DOE’s approval process and timing.

2. **The concept of Best Available Science.** Although we are not wetlands biologists or fisheries biologists, virtually every project we work on has experts in this field, and we as Landscape Architects are often involved in mitigation plans for wetlands, shorelines restoration, landscape plans within shorelines areas, and landscape mitigation plans. We currently have a number of projects of this nature, where we are leading the permitting team in these issues.

   Our observations on the “Best Available Science” as presented by the City’s Consultant is far from “perfect science”. “Best Available Science” as the testimony by the Fishers expert at your Hearing, and several experts at Tukwila, Thurston County, and recently at Bellevue (WSSA presentation), much of the information coming forth is rolled forward in an anecdotal manner, **not based upon scientific studies that involve peer review.** “Peer review” is the review of papers and analysis by other experts, scholars, and scientists that give the theories standing. Without that peer review, it is the opinion of the writer and other experts that **anecdotal information should not be given significant weight in providing best available science baseline information.**

3. **“All shorelines are critical areas”.** Redmond rejected this approach, Thurston County rejected this approach, as did Mount Vernon and other communities.

   Along Lake Washington, much of the shoreline has been developed (i.e. Mercer Island, 90 to 95%). The Mercer Island shoreline, due to the nature of its use, unless it has steep slopes or wetlands, is **not therefore a critical area.** Once the SMP is adopted, the regulations call for the SMP to have precedence over the Critical Areas regulations. **Recommendation: Please do not apply a CAO overlay on the Shorelines areas on Mercer Island.**
4. **Restoration.** The State law, when the Model Program was adopted, provided for the ability of the property owner to restore that lost by a storm within two years. **Mercer Island draft regulations call for one year.** I would ask that the Staff research this issue and make changes to be consistent with state law. Due to the challenges of a long permitting process, seasonal restrictions on construction due to fish migration and spawning periods, **a two year period would seem to be more reasonable and consistent with state law and other neighboring jurisdictions’ regulations.**

5. **Replacement Of Native Vegetation.** The case study I cited in Bellevue, just north of the East Channel Bridge, is an incidence where a property owner cut down three separate trunks of a dead birch tree and the staff wanted them to replace the entire shoreline vegetation for 25 feet, equaling the estimated 60 s.f. canopy of the tree when it was alive. The home and shoreline/dock in question was developed with soft bank gravel and wetland facultative material along the edge, what we, as permitting experts, viewed as a very sensitive treatment of the shoreline, similar to Seattle’s Model Program Implementation Brochure. One of Bellevue Planning Staff’s interpretation caused this process to go on for a year and a half, involved attorneys and expensive consultants, and to literally replant the front yard cost the property owner over $50,000 in extra professional services as part of a two-lot short plat (i.e. no new docks, walkways, etc.) and a total cost of over $100,000 for the short plat.

6. **Native vegetation replacement/planting plans should be able to be stamped and approved by a Registered Landscape Architect consistent with the plant materials recommended by the City.** One of our professional staff’s major concerns in the past is that in the City of Mercer Island the arborist’s opinion can trump that of a Registered Landscape Architect. I believe there needs to be in the implementation of this program a balancing between the professional viewpoints of highly qualified Registered Landscape Architects/Biologists/Engineers and qualified Arborists. An Architect, AIA, or Civil Engineer’s PE stamp should be given respect based upon their qualifications, errors and omissions insurance—here **professionals’ opinions and reports should be given substantial weight in redevelopment projects—i.e., the “Reasonably Probable” Standard.**

C. **Definitions.** In several areas, definitions which I will spell out later need to be clarified and made consistent with the law and the Model Program.

D. **PAGE BY PAGE ANALYSIS:**
The following critique incorporates our case studies in other jurisdictions including several on Lake Washington for single family, park, semi-private recreational tracts.

- Page 6, sub-point 7C, Critical Areas Ordinance:
  I would repeat that **shorelines by definition are not critical areas.**

- Page 7, definition “Feasible” sub (b):
  “The action provides a reasonable likelihood of achieving intended purpose.”

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Burden is on the applicant to provide a showing by qualified experts. (See previous Bellevue and Tukwila examples.) Then it is up to the code official to interpret the meaning of “No Net Loss”. Our experience in Bellevue that a delegated staff member went well beyond the standard of “No Net Loss” showing rather than a “reasonably probable” standard. This language of “reasonably probable” occurs in condemnation law, as to the reasonable probability of future use of a property given some “taking”. I realize we are not describing a fee taking, but a “partial regulatory taking” with significant impact on the use and reasonable maintenance of already improved properties on 90-95% of the shoreline.

Note: This is one area of our firm’s extensive Expert Witness/Litigation expertise, and I would strongly encourage that the language be changed to a “reasonable and probable likelihood” of achieving that purpose.

- Page 8 - Normal Maintenance or Repair
  Including 40% of pilings in a one time clearly is an overly restrictive requirement. This means that on three different occasions, in order to replace 100% of a pier that may no longer be “environmentally friendly”, i.e., creosote, would restrict this being done at one time. Would recommend this be revisited, to see if there is some deviation process that would yield a net environmental benefit which would warrant replacing all or a majority of the pilings at one time.

- Page 10, Use Table bottom of the page, Single Family Residential:
  We have in the past assisted property owners in determining highest and best use to be converted to conservation trusts (i.e. the Davidson property on Forest Avenue) to insure that having a single family property includes the opportunity to place something in a conservation trust. It would appear that this is not necessary for it to be in a conservation environment, and this wording is correct. In addition, it is important to protect the custom home exemption for residential homes, out buildings, recreational facilities.

- Page 11, top - Public And Private Recreational Facilities And Parks.
  An individual tennis court, swimming pool or other use incidental to the primary use of a single family home, including cabanas, pool houses, etc., should be exempt, and not require a substantial development permit, nor SEPA. I strongly recommend that this be amended.

- Page 17 - Setbacks and Moorage Facilities
  See comments from other building experts and waterfront owners.

- Setbacks from Boat Launching Facilities
  One of my questions is, are there any street ends where this 25-foot setback would preclude the City from allowing car top and kayak boat launching? (i.e., a 50-ft. Right of Way.)

- Size of Piers and Docks
Based upon the testimony at several hearings the maximum square footage if piers are longer needs to be addressed, and consistent with the allowance of longer docks to reach minimum depth for boats with large keels.

- Transparency of Decking Requirements
  See comments of several others as to the material that can be used, i.e. materials that have transparency, versus just open decking materials.

- Public access may also include “visual access” — we recommend it be a part of the staff review of permitting processes.

- Semi-Private Recreational Tract: We would note that semi-private recreational tract was developed by Mercer Island and Kirkland to give upland property owners visual and physical access to the waterfront. Other communities around Lake Washington have adopted Mercer Island’s model as a way to meet the intent of the Shorelines Master Program and the RCW’s.

- Page 19 – Requirement for Covered Moorage Facilities (c).
  Has Staff conducted an analysis of how many nonconforming uses this may affect? Conditional Use Permits should be done at Staff level, not requiring a Planning Commissioner or Examiner Hearing. **However, the regulations should provide the option that if the Applicant disagrees with the Staff’s preliminary findings that going before the Hearing Examiner may be an option that may be exercised by the property owner.** (Example: Dwight/Chris Schaeffer Shorelines/Impervious Surface Variance Approval by Hearing Examiner.)

- Page 22 Bulkheads and Shoreline Stabilization 4(i) “**Constructed to assure no net loss of ecological function**”.
  Our opinion is this is clearly in the “eye of the beholder” and gives a great deal of latitude and flexibility by Staff. In our experience this is where great latitude in interpretation occurs within and among jurisdictions and members of the Board and how they interpret this. Oftentimes the applicant is advised by 3 or 4 “SMP” consultants/experts who draft most of plans for most cities, and there may be a vested interest in having a process that requires a property owner to hire a biologist and permitting group that drafted them. (See Anita Skoog’s testimony at the Public Hearing.)

  Our strong recommendation: change to include “**reasonably probable – no net loss of ecological function**”.

- Page 22, iv. “unless a report is required by the code official to insure compliance.” Again, in submitting reports to the code official or his/her designee – the “**reasonably probable**” standard should also apply here.

- Page 23 b: Normal sloughing/erosion of steep banks...normal or storm related erosion should not result a showing of no net loss of the shorelines.
Here again, there are areas, particularly on the southwest part of the Island, where the prevailing wind continues to erode the shoreline. Steep banks have exposed glacial till and a history of subsidence. Efforts to tie the toe of shorelines and stabilize the banks should be allowed, with appropriate technical experts’ reports and designs.

Our recommendation: Delete this section or change to Staff Review Process should be “reasonable and probable” and significant weight given to the opinion of geotechnical and engineering experts to correct this problem.

- Page 23 – Planting Plans Note: should be done by Registered Landscape Architects from a city approved list of plant materials.

- Page 24 i. (g) – One year replacement – Change to 2 years.

- Page 25 – Transportation – Subpoint C. – “Should not prevent short plats from being developed in shoreline areas.” Should not pre-empt single family exemptions for custom or owner-occupied homes.

(b) Public Access. Public access to provide for semi-private recreational tracts for short plats and plats to meet public access goals of master program.

This is a summary of my comments to date. Upon re-reading, should I find any additional items, I will forward them to Staff. I have briefly reviewed Integrity Shoreline Permitting’s letter of May 19, 2010, and believe there are a number of suggested SMP text changes that are consistent with or expand on our recommendations. We trust this type of technical/expert input will result in a better Program – one that is “user friendly” and more cost effective. On behalf of myself as a property owner since 1972 on Mercer Island, and as a long-time consultant to a number of property owners including private individuals, semi-private recreational clubs, etc., we all appreciate your consideration of these comments and their incorporation in a Revised SMP.

Respectfully submitted,

Robert W. Thorpe, AICP
5800 West Mercer Way

CC: Property Owners/ Clients
Travis,

Please enter my comments below into the official record for public comments this Wednesday's meeting. I have another commitment and cannot attend.

1. **Trees** - There is no tree protection at all for trees in the shoreline management area unless they fall under the critical areas ordinances of wetlands, watercourses, slopes, or erosion zones. We need to protect existing trees. All trees should require a permit before they can be removed within the SMP zone. Property owners should be strongly encouraged from removing trees and should be prohibited from removing trees over 8”DBH unless they are a hazard as defined by the association of foresters (ask Kathy Parker or Paul West for the proper association name) or there is no reasonable way to site a house without removing some trees. Topping of trees should be prohibited.

2. **Vegetation** - There should be a requirement of 50%-75% of native vegetation along the whole shoreline of the property and 75% of the area for a 10’ wide strip along the shoreline should be vegetated. The remaining setback area should require a minimum of 40% native vegetation and 60% vegetation coverage. Vegetation consists of a ground cover layer, a shrub layer and a canopy layer. The percent canopy and shrub layer should be specified. All grass, even if all native grass, should not be allowed. The intent of vegetation is to create functioning natural habitat for our wildlife, including but not limited to salmon and other fish, birds, bats, amphibians and butterflies.

3. **Pesticides, Herbicides and Inorganic Fertilizer** - All use of inorganic fertilizers and herbicides and pesticides should be prohibited from the 10’ closest to the shoreline. Inorganic fertilizers, pesticides and herbicides should only be use following BMP's for their use anywhere within the 200' shoreline management zone. It is preferred that they not be used at all.

4. **Emergent vegetation** - People should be encouraged to plant native emergent plants in the water and at the waterline.

5. **Float Planes** - There are no regulations for float airplanes at all. They should at least fall under the same restrictions as boats for their lifts.

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