CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

KELLY AND SALLY SAMSON and ROBERT AND JO ANNE HACKER Petitioners, and BAINBRIDGE CITIZENS UNITED Intervenor, v. CITY OF BAINBRIDGE ISLAND and STATE OF WASHINGTON DEPARTMENT OF ECOLOGY Respondents	)	**Case No. 04-3-0013** **FINAL DECISION AND ORDER** ***(Samson)***

SYNOPSIS

The City of Bainbridge Island amended its Shoreline Management Master program with respect to Blakely Harbor. The amendment limits dock and pier development in Blakely Harbor by prohibiting construction of new single-use private docks and allowing two joint-use docks for up to five vessels each and a community dock for public use. Use of mooring buoys by resident vessels is continued. The amendment was supported by a Harbor Management Plan that inventoried the natural resources and patterns of use of the city's four harbors, by the Blakely Harbor Cumulative Impacts Assessment which projected dock build-out and assessed impacts on navigation, scenic views, aquatic resources and recreational use, and by an extensive record.

The Washington State Department of Ecology approved the Amendment.

Petitioners are Blakely Harbor property owners who assert that the City and Ecology violated the Growth Management Act and the Shoreline Management Act by using a shoreline master plan amendment to deny the right to build new single-use private docks in Blakely Harbor rather than addressing impacts of proposed new private docks and piers on a case-by-case basis through the permitting process.

The Board found that the Petitioners failed to meet their burden of demonstrating that the City's action was clearly erroneous. The City's adopted Comprehensive Plan and Shoreline Master Plan goals and policies support the dock restrictions in light of the City's detailed record of the distinctive qualities and unique attributes of Blakely Harbor.

The Board found that Petitioners failed to present "clear and convincing evidence of error" in Ecology's approval of the Amendment. Ecology's approval is supportable when tested against either the goals, policies and provisions of chapter 90.58 RCW or the new guidelines cited by Petitioners and adopted by Ecology when its consideration of this Amendment was pending.

I. BACKGROUND[1]

On September 10, 2003, the Council of the City of Bainbridge Island (the **City**) adopted Ordinance No. 2003-30 (the **Amendment**) "…limiting dock and pier development within Blakely Harbor and amending the Shoreline Management Master Program…". On February 13, 2004, the Washington State Department of Ecology (**DOE** or **Ecology**) approved the amendment to the Bainbridge Island Shoreline Management Master Program (**Bainbridge SMP**). On April 23, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kelly and Sally Samson and Robert and Jo Anne Hacker (**Petitioners** or **Samson**). The matter was assigned Case No. 04-3-0013. Petitioners challenge the City's adoption of the Amendment to the Bainbridge SMP. Petitioners also challenge DOE's approval of the City's Amendment to the Bainbridge SMP. The bases for the challenges are noncompliance with the Growth Management Act (**GMA**) and the State Shoreline Management Act (**SMA**). The PFR set forth 19 Issues to be resolved.

During May and June, 2004, the Board issued a notice of hearing, conducted a prehearing conference and issued its Prehearing Order and Order on Intervention (**PHO**). The PHO set a schedule, established fifteen legal issues to be decided by the Board[2] and granted Bainbridge Citizens United (**Intervenor**) status to intervene on behalf of the Petitioners. The Board's Order on Motions of July 6, 2004, dismissed ten issues and restated three of the issues to be decided by the Board.[3] In October and November the Board received prehearing briefing and briefing on Petitioners' Motion to Correct and/or Supplement the Record. The prehearing briefing received by the Board is referenced in this Final Decision and Order (**FDO**) as: Petitioners' Prehearing Brief **(Samson PHB),** City of Bainbridge Island's Prehearing Brief **(City Response),** Department of Ecology Prehearing Brief **(DOE Response),** Petitioners' Reply Brief (**Samson Reply**). Intervenor Bainbridge Citizens United did not submit any briefing.

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[1] For more complete details, see Appendix – A, Chronological Procedural History, *infra*, at 25.

[2] Appendix – C, Legal Issues as Stated in the Prehearing Order, *infra*, at 30.

[3] Appendix – B, Legal Issues Restated and Retained for Prehearing Briefing, *infra*, at 28.

On November 22, 2004, the Board conducted a Hearing on the Merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Chuck Maduell represented the Petitioners. Rosemary Larson represented the City of Bainbridge Island. Present with Ms. Larson was Peter Namtvedt Best, Planner for the City. Thomas Young, Assistant Attorney General, represented the Department of Ecology. Gary Tripp attended as a member of Intervenor Bainbridge Citizens United. Also present was Julie Taylor, extern with the Board. The Court Reporter was Karmen Fox, Byers & Anderson, Inc. The hearing was opened at 10:00 a.m. and adjourned at 12:28 p.m.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

Due to the nature of the challenged action as both a local action under the GMA (*i.e.*, Bainbridge Island's adoption of its SMP Amendment) and a state action under the SMA (*i.e.*, Ecology's approval of the SMP Amendment), the Board must employ two different standards of review to reach a final decision.

A. GMA

The City of Bainbridge Island is subject to the goals and requirements of the GMA, therefore the Board's review of the City's action is governed by RCW 36.70A.320. Pursuant to that standard, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are presumed valid upon adoption. The burden is on the Petitioners to demonstrate that the City's action adopting the Amendment is not in compliance with the Growth Management Act.

The Board "shall find compliance with the [Growth Management] Act, unless it determines that the [City's] action[s are] clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the [GMA]." RCW 36.70A.320 (3). For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646, 658 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Bainbridge Island in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court recently stated:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . ."

Thurston County v. Western Washington Growth Management Hearings Board, 148 Wn.2d 1, 15, 57 P3d 1156 (2002).

B. SMA

Both Bainbridge Island's and Ecology's actions must be consistent with the goals and requirements of the Shoreline Management Act. However, because Ecology must approve a local government action in order for it to take effect, the Board here focuses on the applicable standard of review for Ecology's actions. The Board's review of Ecology's action here is governed by RCW 90.58.190(2) because the shorelines at issue here are "shorelines of state-wide significance."

RCW 90.58.190(2) provides in part:

> (c) If the appeal to the growth management hearings board concerns a shoreline of state-wide significance, the board shall uphold the decision by the department unless the board, by clear and convincing evidence, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.
>
> (d) The appellant has the burden of proof in all appeals to the growth management hearings board under this subsection.

The Board must test the Amendment against the policy of RCW 90.58.020 and the applicable SMA guidelines, upholding Ecology's decision to approve the Amendment unless the appellants present "clear and convincing evidence" of error. *Id.*

III. BOARD JURISDICTION, PRELIMINARY ITEMS, ABANDONED ISSUE

A. BOARD JURISDICTION

The Board finds that the Samson PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners participated in the City's public process and have participation standing to appear before the Board, pursuant to RCW 36.70A.280(2) and RCW 90.58.190; and pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the challenged action (Bainbridge Island Ordinance No. 2003-30) which amends the City's Shoreline Management Master Program and, *de jure*, Comprehensive Plan and development regulations. RCW 36.70A.480(1).

B. PRELIMINARY ITEMS

During the Hearing on the Merits, the Board made the following rulings:

1. On or before December 2, 2004, the City will file with the Board, and transmit to Petitioners, colored copies of the maps identified in the record as Exhibit C-2.2 "Blakely Harbor Existing Dock Development & Dock Buildability".

2. The following exhibits were admitted during the hearing:

a. **HOM Exhibit No. 1**. Three items identified in Exhibit C-196[4] as attachments to that document: the Judgment in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (4 pages); Memorandum on Decision on Motions for Summary Judgment in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (7 pages); and a transcript of the Deposition Upon Oral Examination of Stephanie Warren in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (25 pages).[5]

b. **HOM Exhibit No. 2**. Two Agreements between the South Bainbridge Community Association and two property owners and a Declaration of Covenants, Restrictions and Easements.[6]

c. **Core Document No. 1.** City of Bainbridge Island Comprehensive Plan, September 1, 1994.

d. **Core Document No. 2**. City of Bainbridge Island Shoreline Management Master Program, November 26, 1996, Corrected January 1998; including Ordinances 2003-025, 2003-30.

On December 2, 2004, the Board received colored copies of Exhibit C-2.2, which will be labeled **HOM Exhibit No. 3** and a colored copy of the map of shoreline environmental designations attached to the Shoreline Master Program, Core Document 2, which will be labeled **HOM Exhibit No. 4.**

C. ABANDONED ISSUE

The Board's Rules of Practice and Procedure provide:

> A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute*

[4] Listed in City's Index as C-196 and in DOE Index as 1297-1300.

[5] Attachment A to Petitioners' Motion to Correct and/or Supplement Record, received October 25, 2004.

[6] Attachment B to Petitioners' Motion to Correct and/or Supplement Record, received October 25, 2004.

> *abandonment of the unbriefed issue*. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's June 3, 2004, PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits**." PHO, at 7 (emphasis in original). *See, City of Bremerton, et al., v. Kitsap County (**Bremerton II**)*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5*; Tulalip Tribes of Washington v. Snohomish County* (**Tulalip**), CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3; *see also Bremerton II*, at 5.

In review of the Samson PHB, the Board found only a few conclusory restatements of Legal Issue No. 5[7] in the context of discussion of Legal Issues No. 1 and 2 but without any legal analysis or citation to authority.[8] It is not sufficient to brief an issue for the first time in a reply brief. *Tulalip*, at 7. Therefore the Board deems Legal Issue No. 5 **abandoned.**

VI. CHALLENGED ACTION AND POSITION OF THE PARTIES

The City's Action

This matter involves the City's enactment and Ecology's approval of Ordinance 2003-30 amending the City's Shoreline Master Program to include a provision limiting development of docks in Blakely Harbor. C-131.[9] The City adopted its first Shoreline

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[7] Legal Issue No. 5: *Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land-use decision-making process, including internal consistency among development regulations, by imposing different requirements for siting and constructing private residential docks on parcels with the same zoning and shoreline land use designations?*

[8] "[P]rivate docks and piers are allowed … in all other shoreline designations, including the Semi-rural designation along the Blakely Harbor shoreline. No SMP policies suggest or support adoption of a ban in other shoreline designations…." Samson PHB, at 35. "Banning docks and piers from all shoreline areas within Blakely Harbor, regardless of a property's shoreline designation … is inconsistent…." *Id*. "The Comprehensive Plan has designated Blakely Harbor shoreline area for residential uses. A ban on private docks is inconsistent with such land use policies." *Id*., at 37.

[9] In the remainder of this FDO, exhibits, whether submitted by Petitioners or Respondents, will be referenced by their numbers in the City's Index, i.e., "C-131".

Master Program in 1996. Subsequently, the City studied its four major harbors and adopted a Harbor Management Plan in January, 1999. C-222.

Blakely Harbor, one of the City's four harbor areas, is a coastal inlet on the southeast shore of Bainbridge Island. Because the land was primarily owned by a timber company for over a century, Blakely Harbor is less developed than most of the City's shorelands.[10] Blakely Harbor has only recently been made available for subdivision and residential development. C-222, Appendix C, Blakely Harbor Inventory and Report, 1997, at 3. With just 6 docks or piers, it is "the last harbor within Central Puget Sound that remains largely undeveloped … with docks or piers, and is a popular anchorage for vessels because of its undeveloped character, natural beauty, and scenic views." Amendment, C-131, at 1.

Blakeley Harbor's scenic beauty, unobstructed waters, birds and sealife, even the darkness of the nights with little artificial light, distinguish Blakely from the City's other harbor areas. C-222, Appendix C, at 2, 5. Blakely Harbor is uniquely attractive for transient moorage, for kayaks and other handcraft, for diving, swimming, fishing and passive public enjoyment. *Id.*, at 22-25. The community has supported several voluntary efforts to preserve the harbor's distinct character. The Bainbridge Island Land Trust secured donations to acquire nearly 40 acres of land for a park. C-27, at 2. Some Blakely Harbor residents and the South Bainbridge Community Association have entered into restrictive covenants to limit private dock construction on some parcels. *See e.g.*, HOM Ex. 2; C-27, at 1, 3.

The City prepared the Blakely Harbor Cumulative Impact Assessment (**Assessment**), dated February 22, 2002, to gauge the impact of the likely build-out of piers in the harbor under various scenarios. C-2.1. The Assessment concluded that predicted build-out of 45 docks would significantly impact navigability of the harbor, reduce scenic vistas, and create risk to natural resources. City Response, at 8-12.

At the same time, the City was developing a Nearshore Assessment for all of the City's marine shorelines in response to the listing of Puget Sound Chinook salmon under the Endangered Species Act. C-223. The City also convened a Shoreline Master Program Steering Committee to guide its review and update of its Shoreline Master Program.[11] Limitations on private docks in Blakely Harbor were discussed and recommended by the Steering Committee in 2001, then by the City's Planning Commission in 2002 and finally by the City Council in 2003. City Response, at 12-13. A variety of restrictions and allowances were considered, with public comment and debate at each level.

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[10] "Blakely Harbor is surrounded by 1,153 acres of undeveloped land owned by the Port Blakely Mill Company…. The land is now for sale in 20 acre parcels.… [T]he waterfront … can be developed into 80 foot lots." C-222, Appendix C, Blakely Harbor Inventory (1997), at 2.

[11] The City adopted a moratorium on overwater structures and bulkheads on all its shorelines while this review was pending. In December, 2004, the moratorium was struck down by the Court of Appeals on the grounds that development moratoria are only authorized under the GMA, not under the SMA. *Biggers et al. v. City of Bainbridge Island*, __ Wn.App. ___, __ P.3d ___ (No. 30752-9-II, December 21, 2004).

The Amendment as adopted prohibits new single-use docks or piers in Blakely Harbor, continues to allow use of mooring buoys and floating platforms, and allows development of two joint-use docks for up to five boats each and one community dock. The City based its action on two justifications: (1) "to preserve the unique character, navigable waters, natural resources, and scenic beauty of the harbor and promote compatible recreational use of the harbor for the residents of Bainbridge Island and the State;" and (2) because of the "significant cumulative loss of scenic view sheds, navigable waters, and adverse cumulative effects to water and environmental quality likely to be caused by the proliferation of private dock and pier development within Blakely Harbor." Amendment, C-131, at 2.

Ecology's Action

The City adopted the Amendment on September 10, 2003 and forwarded it to Ecology on September 25, 2003. Ecology's comment period closed on November 30, 2003, and Ecology issued its decision approving the Amendment on February 13, 2004. C-211.

By statute, Ecology's review must be based on the Shoreline Management Act and "applicable guidelines." Ecology's previous guidelines for master program approval were ruled invalid by the Shorelines Hearings Board in 2001. New guidelines were developed by Ecology and filed December 17, 2003, effective January 17, 2004. Thus, when the City submitted its Amendment to Ecology, the prior guidelines were invalid and not in effect, but the new guidelines were not yet effective. In the absence of applicable guidelines, Ecology reviewed the Amendment under the policy of RCW 90.58.020 and the requirements of RCW 90.58.100. DOE Response, at 3, 12; C-211, at 7-11.

Petitioners' Case

Petitioners contend that banning development of new private single-use recreational docks is contrary to the SMA and inconsistent with Bainbridge Island's Comprehensive Plan and Shoreline Master Program. Petitioners argue that the only lawful limitation under the circumstances is "allowance of a discrete number of new docks within Blakely Harbor on a case-by-case basis, as conditioned through compliance with the existing regulatory system." Samson PHB, at 35. "Absent evidence that existing procedural safeguards in the SMP policies and regulations are not adequate to mitigate and protect Blakely Harbor from adverse environmental impacts, and none exists in the record, the ban on docks and piers is inconsistent with SMA policies and applicable guidelines." *Id.*, at 34.

Petitioners argue that the Amendment is inconsistent with the goals and policies of SMA which identify residential docks and piers as a preferred use, requiring that their impacts be assessed and mitigated on a case-by-case basis through the permitting process, not through planned restrictions or use regulations. (Legal Issue 2) Further, Petitioners state, the Amendment is not consistent with the SMA because Ecology failed to test it against its new guidelines. In particular, Petitioners assert, the City's Blakely Harbor Cumulative

Impact Assessment does not meet the standards in the new guidelines at WAC 173-26-186(8)(d).

Petitioners assert that the City has failed to show the changed circumstances which Petitioners contend are required by Ecology's guidelines as a threshold matter in order to trigger the local SMP amendment process, *citing* WAC 173-26-090. (Legal Issue 9) Ecology should therefore have rejected the Amendment.

Petitioners contend that the Amendment is noncompliant with the GMA because it is inconsistent with the policies of the Bainbridge Island Comprehensive Plan, including the Bainbridge SMP policies. (Legal Issue 1) Petitioners point out that the 1996 Bainbridge SMP favors residential and recreational uses, allowing private docks and piers in all but two shoreline designations.

Petitioners raise other issues that were previously dismissed,[12] conditionally dismissed[13] or are deemed abandoned.[14] Petitioners' Legal Issue No. 15 asks for a determination of invalidity.

The Board analyzes the Petitioners' issues in the order above - Legal Issues 2, 9, 1 and 15. The Board finds and concludes that the City's Amendment to its SMP and Ecology's approval of the Amendment **comply** with the GMA and the SMA.

V. LEGAL ISSUES AND DISCUSSION[15]

A. Legal Issue 2 – Consistency with SMA and Applicable Regulations

The Board's Prehearing Order states Legal Issue No. 2 as follows:

> Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3), because it is inconsistent with and fails to implement the goals and policies of the Shoreline Management Act (the SMA) and the Bainbridge Island Shoreline Master Program?

Applicable Law

RCW 36.70A.480(2) and (3) state, in pertinent part:

> (2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies and

[12] *See infra*, fn. 35.

[13] *See infra*, fn. 19, 20, 34.

[14] *Supra*, at 5-6.

[15] See Appendix – B, Legal Issues Restated and Retained for Prehearing Briefing, *infra*, at 28.

> procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.
>
> (3) The *policies, goals and provisions of chapter 90.58 RCW* and *applicable guidelines* shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.

(Emphasis supplied.)

Relevant portions of the Shoreline Management Act, chapter 90.58 RCW, are set out in Appendix – D, *infra*, at 33-35.

Discussion – Goals and Policies of the Shoreline Management Act

Petitioners assert that the Amendment is inconsistent with the goals and policies of the Shoreline Management Act because the SMA requires Ecology and local jurisdictions to balance shoreline development and shoreline preservation. That balance must be achieved, according to Petitioners, by allowing preferred water-dependent uses such as private residential docks in the shoreline plan and then denying them or conditioning them on a case-by-case basis through the permit process to address specific impacts. Petitioners allege that the City's ban on private docks in Blakely Harbor violates the statutory priority for residential docks and piers. The City may deny a permit for a particular dock, they argue, but may not do so in its master program. "Absent evidence that existing procedural safeguards in the SMP policies and regulations are not adequate to mitigate and protect Blakely Harbor from adverse environmental impacts, and none exists in the record, the ban on docks and piers is inconsistent with SMA policies and applicable guidelines." Sampson PHB, at 34.

It is well-settled that a jurisdiction may limit or even prohibit construction of a single-use private recreational dock in a permit proceeding. Petitioners agree. But Petitioners argue that a jurisdiction may not take the same action prospectively as it fine-tunes its SMP for a particular area of shoreline within the purview of its plan; rather, each permit application must be decided on its own discrete facts.

Ecology responds that the SMA recognizes "the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. "If a local government can conclude at a particular site that a dock may not be allowed because it will interfere with navigation, or aesthetics, or other shoreline uses or functions, the local government can, on proper evidence, reach the same conclusion with regard to a class of sites or section of shoreline." DOE Response, at 7. There is no requirement in the SMA that local governments proceed on a permit-by-permit basis; to the contrary, the SMA

requires master programs in order to "prevent the inherent harm in uncoordinated and piecemeal development." *Id*., at 11.

Ecology argues that the limitation on private docks and piers in Blakely Harbor is not inconsistent with SMA preference for public access or water dependent use. Indeed private piers are not a preferred use under SMA. DOE Response, at 8, 9, *citing Spencer v. Bainbridge Island* **(*Spencer*)**, SHB 97-43, Final Order (1998).[16] The Amendment balances the SMA values of navigation, public access, need for recreational (joint use) piers, and protection of the unique harbor for public enjoyment. DOE Response, at 10.

The City focuses on the emphasis on public rather than private values in the goals of SMA, particularly in shorelines of statewide significance. *Citing* RCW 90.58.020. The Blakely Harbor amendment promotes "the public's opportunity to enjoy the physical and aesthetic qualities of the natural shorelines of the state." *Id*.; City Response, at 16. The Amendment protects the shores of Blakely Harbor for use by the public and protects the public's interest in navigation. *Id*., at 19. Indeed, the City argues, private docks are not a preferred use; public recreational piers are preferred. *Id*., at 24. No case cited by Petitioners requires the City to allow single-use private docks on *all* shorelines of the City or even to allow them subject to a case-by-case permit review. *Id*., at 19.

The Board looks to the SMA preference policy articulated in RCW 90.58.020:

> Alterations of the natural conditions of the shorelines of the state, *in those limited instances when authorized*, shall be given priority for [1] single family residences and their appurtenant structures, [2] ports, [3] shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to the shorelines of the state, [4] industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and [5] other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

(Numeration and emphasis added.)

The Board notes that in this set of priorities, "piers" (i.e., docks) are listed in the context of [3] "shoreline recreational uses … facilitating public access to shorelines of the state," not in the context of [1] single-family residences. In *Spencer*, *supra*, at 11, the Shorelines Hearings Board stated:

> The reference in RCW 90.58.020, to single-family residential uses and their appurtenant structures, does not specifically list docks or piers. Piers are listed, however, as a preferred use, under improvements which

[16] In EHSB 1933, the Legislature directed that the SMA "be read, interpreted, applied and implemented as a whole consistent with decisions of the Shoreline Hearings Board and Washington courts."

> facilitate public access to the state's shorelines. We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the water of the state.

Petitioners are incorrect in contending that private docks, because of a statutory preference for single family residences and water-dependent uses, must be allowed on every shoreline, or even on every shoreline otherwise designated for residential use. In *Beuchel v. Department of Ecology*, 125 Wn.2d 196, 209, 884 P.2d 910 (1994), the Court underscored the key phrase in the statutory preference language:

> The landowner argues that…residential use must be given priority under the SMA. This is inaccurate. The landowner relies on the SMA which states that "alterations of the natural condition of the shorelines of the state, *in those limited instances when authorized*, shall be given priority for single family residences and … shoreline recreational uses." RCW 90.58.020(7). However, in this case the residential use was not "authorized"; in fact, it was prohibited by the regulations….

(Emphasis added); *see also Lund v. Department of Ecology*, 93 Wn.App. 329, 337, 969 P.2d 1072 (1998) (denying residential construction in a shoreline residential zone).

It is within the authority of the local government, in developing and amending its master program, to determine *where* various priority uses may be located. *See e.g.*, WAC 173-26-231(3)(b) ("*where* new piers or docks are allowed…"); RCW 79.90.105 (construction of dock on state tidelands "is subject to applicable local, state, and federal rules and regulations governing *location* …").[17] The City of Bainbridge Island does not allow docks within the natural and aquatic conservancy environments, allows them only as conditional uses in the conservancy environment, and now has amended its SMP to prohibit new single-use private docks in Blakely Harbor. This is well within the City's authority given the record and consistent with the goals and policies of the SMA – RCW 90.58.020.

The Board finds that the City's adoption of the Amendment and Ecology's approval **is consistent with the goals and policies of the SMA** as set forth in RCW 90.58.020.

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[17] Construction of a dock on saltwater is exempt from obtaining a shoreline substantial development permit if it has a fair market value of less than $2500. RCW 90.58.030(3)(e)(vii)(A); WAC 173-27-040(2)(h)(i). The development must still comply with master program locational regulations. WAC 173-27-040(1)(b). The parties acknowledge that due to Blakely Harbor's geography, docks of 300-400 feet are generally required. Samson PHB, at 25; City Response, at 25 fn. 6, 35 fn. 8. However, the dock constructed in 2002 has a length of just 98 feet. Samson Reply, at 7.

Discussion – "Applicable Guidelines"

Petitioners also contend that Ecology failed to consider applicable guidelines and that, if the guidelines at WAC 173-26-186(8)(d) and WAC 173-26-231(3)(b) were applied, the Amendment could not be approved.

The parties dispute whether there are "applicable guidelines." Petitioners contend that Ecology was required to apply its new guidelines and that doing so would have required invalidation of the Amendment. Sampson PHB, at 15-16. The City submitted its Amendment to Ecology on September 25, 2003. At that time, a draft of proposed new DOE guidelines had been published for public review. Ecology adopted its new guidelines December 17, 2003, and they became effective January 17, 2004. Ecology completed its review and issued its approval of the City's Amendment on February 13, 2004.

Ecology states: "It would have been unfair for Ecology to apply the new guidelines to the City's amendment because the City had in good faith adopted the amendment and submitted it during the time period when there were no guidelines in effect." DOE Response, at 3. Ecology chose to apply the "law which was in effect at the time of the submittal," *i.e.*, the SMA. *Id.*

None of the parties cites any authority for or against Ecology's position here. Nothing in the guidelines themselves expressly decides this question. Without more, the Board will defer to Ecology's interpretation of its own regulations and governing statute.[18] The Board concludes that Ecology's review of the Amendment in the context of the policies of the SMA (RCW 90.58.020) was the correct and appropriate basis for review.

Even if the new guidelines relied upon by Petitioners are applied, *arguendo*, the Board must conclude that the cited provisions support the Blakely Harbor Cumulative Impact Assessment relied on by the City and Ecology.

WAC 173-26-186(8)(d) states:

> Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and [1] *other shoreline functions* fostered by the policy goals of the act. To ensure no net loss of ecological functions and protection of *other shoreline functions* and/or uses, master programs shall contain policies, programs, and regulations that address adverse cumulative impacts and [2] *fairly allocate the burden* of addressing cumulative

[18] *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn.2d 441, 449, 536 P. 2d 157 (1975); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) ("deference to an agency's interpretation of its own regulations is also appropriate").

> impacts among development opportunities. Evaluation of such cumulative impacts should consider:
>
> (i) Current circumstances affecting the shorelines and relevant natural processes:
>
> (ii) [3] *Reasonably foreseeable future development* and use of the shoreline; and
>
> (iii)[4] *Beneficial effects of any established regulatory programs* under other local, state, and federal laws.
>
> It is recognized that methods of determining reasonably foreseeable future development may vary according to local circumstances, including demographic and economic characteristics and the nature and extent of local shorelines.

WAC 173-26-231(3)(b) states:

> New piers and docks shall be allowed only for water-dependent uses or public access. As used here, a dock associated with a single-family residence is a water-dependent use provided that it is designed and intended as a facility for access to watercraft and otherwise complies with the provisions of this section. …
>
> [5] *Where new piers or docks are allowed*, master programs should contain provisions to require new residential development of two or more dwellings to provide for joint use or community dock facilities, where feasible, rather than allow individual docks for each residence.

(Emphasis and numeration supplied.)

1.Other Shoreline Functions.[19] Petitioners argue that the cumulative impacts analysis required by the guidelines is limited to "shoreline ecological functions" and that impacts on aesthetics and navigation "cannot be taken into account or used to justify a use regulation." Samson PHB, at 21. Ecology counters that the guidelines themselves require local governments to conduct cumulative impacts analysis on other shoreline functions and uses: "For example, a cumulative impact of allowing development of docks or piers could be interference with navigation on a water body." WAC 173-26-210(3)(d)(iii). DOE Response, at 4.

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[19] Legal Issue No. 8 stated: "*Are perceived navigational and visual impacts valid elements to take into consideration in a cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?*" This issue was dismissed on motions, subject to permission to argue the matter "if Petitioner can demonstrate… a statutory duty …related to the assertions." See Appendix - B, *infra*, at 29.

The Board notes that the plain language of the guideline includes "other shoreline functions fostered by the policy goals of the act" and "protection of other shoreline functions and/or uses." Without question, the SMA fosters such shoreline functions as navigation, public recreation and scenic views. RCW 90.58.020; *see, e.g., Bellevue Farm Owners Ass'n v. Shorelines Hearings Board*, 100 Wn.App. 341, 356, 997 P.2d 380 (2000) (upholding denial of dock permit in Westcott Bay because of impact on scenic views). Petitioners' objection to consideration of view impacts and navigational obstruction in the Blakely Harbor Cumulative Impact Assessment is without merit.

2. Fair Allocation of Burden. Petitioners argue that by not allowing single-use private docks in Blakely Harbor, the City unfairly burdens residential property owners with protection of the harbor. Samson PHB, at 21. Ecology explains that the regulation requires "that no one type of use, area or property owner bear a disproportionate share of the requirement to protect the shoreline environment…. In this case, myriad uses and development opportunities remain under the amended master program." DOE Response, at 4-5.

The Board notes that Blakely Harbor boat owners may use mooring buoys, develop a joint use dock on each shore or work toward the development of a community dock. Given the special character of Blakely Harbor as demonstrated in the record, the restrictions on single-use private dock construction are not an unfair burden to shoreline property owners who will continue to enjoy the harbor's "unique recreational, aesthetic, and natural resource values." *Id.*

3. Reasonably Foreseeable Development.[20] Petitioners argue that the predicted build-out scenario in the Assessment is unrealistic. They allege that the City failed to take into consideration the acquisition of property for a park, the restrictive covenants on some Blakely Harbor waterfront lots, and the practical difficulties and costs of building docks because of the topography of the harbor. Sampson PHB, at 17.

The City responds that its predicted build-out scenario was based on "known parcel restrictions that affect development, such as zoning density, critical areas, restrictive covenants, and other existing regulations." City Response, at 28; C-2.1, at 7-8. The City also accounted for park and country club property, adjacent lots in single ownership, subdivisions required to provide joint-use dock facilities, and the average density of dock development in other Bainbridge Island residential harbors. *Id.*

The Board notes that a maximum waterfront lot build-out for Blakely Harbor could theoretically produce 307 homes. C-2.1, at 9. The City's Assessment did not assume maximum build-out; applying the discount factors listed above, likely build-out was

[20] Legal Issue No. 7 stated: "*May a local jurisdiction and/or the Department of Ecology presume maximum build-out of all waterfront properties unrelated to actual experience or reasonable probabilities as to project development, when enacting use regulations intended to preserve and protect the shorelines?*" This issue was dismissed on motions subject to permission to argue the matter "if Petitioner can demonstrate … a statutory duty … related to the assertions." See Appendix - B, *infra*, at 29.

calculated at 94 homes of which, again discounting as indicated, only 50% would build docks. Consistent with WAC 173-26-186(8)(d),[21] the City also applied its local experience of its own residents' expectations and economic capability, based in part on the pier and dock build-out on other Bainbridge residential shorelines. Petitioners' objections on this point are unfounded.

4. Beneficial Effects of Regulatory Programs. Petitioners contend that the shorelines permitting process will reduce the number of docks that can be developed so that adverse impacts will be minimized. Sampson PHB, at 21. The City responds that environmental regulations were considered in its cumulative analysis, but "navigational and visual or aesthetic impacts would not be adequately addressed by these [regulatory] programs." City Response, at 29.

In fact, the Board notes that the Assessment modeled all docks on a "standard design that reflects … typical mitigation measures and regulatory requirements." C-2.1, at 7. The beneficial effects of regulatory programs were clearly incorporated in the Assessment.

5. Where New Piers and Docks are Allowed. Petitioners read the new guideline concerning piers and docks - WAC 173-26-231(3)(b) - as *requiring* local governments to allow waterfront homeowners to build docks. Sampson PHB, at 25.

Ecology points out that the regulation recognizes residential docks and piers as water-dependent uses and provides standards for their development "where they are allowed." DOE Response, at 8. The City reads the whole rule and notes that "where new piers are allowed," master programs should "require … joint use or community dock facilities" rather than allow single-use docks. City Response, at 31. The Board concurs – the guideline by its terms appears to recognize that there will be areas where private docks are not allowed.

In sum, the Board finds no merit in Petitioners' challenge pertaining to compliance with the new Ecology guidelines, even if they were "applicable."

Conclusion

The Board finds and concludes that the City's adoption of the Amendment **was consistent** with the goals and policies of the SMA. The Board finds and concludes that Ecology's approval of the Amendment **complied** with the SMA goals and policies and the applicable guidelines, if any.

[21] "It is recognized that methods of determining reasonably foreseeable future development may vary according to local circumstances, including demographic and economic characteristics…" *Id.*

B. Legal Issue 9 – WAC 173-26-090

The Board's Prehearing Order states Legal Issue No. 9 as follows:

> Does the Administrative record demonstrate sufficient "changing local circumstances, new information or improved data" pursuant to WAC 173-26-090 to justify an amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?

Applicable Law

RCW 90.58.100 provides, in pertinent part:

> 1) . . . In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:
>
> (a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts; (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact; (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state; (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary; (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data; (f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

Discussion

The Board notes that WAC 173-26-090[22] (i.e., the *new* shoreline guideline) was not in effect when the City adopted the Amendment and submitted it to Ecology for approval. Nonetheless, the Board will discuss compliance in the context of RCW 90.58.100 which sets a clear standard for local governments in preparing master program amendments.

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[22] WAC 173-26-090 states as follows: "Each local government *should* periodically review a shoreline master program under its jurisdiction and make amendments to the master program deemed necessary to reflect changing local circumstances, new information or improved data. Each local government *shall* also review any master program under its jurisdiction and make amendments to the master program necessary to comply with the requirements of RCW 90.58.080 and any applicable guidelines issued by the department." (Emphasis supplied.)

Petitioners assert the Amendment should not have been approved by Ecology because the Blakely Harbor Cumulative Impact Assessment is flawed; therefore the City cannot justify that the Amendment was "necessary to reflect changing local circumstances, new information or improved data," as Petitioners contend is required by WAC 173-26-090. Sampson PHB, at 16-19; Samson Reply, at 20. In particular, Petitioners assert that there is no proliferation of new dock development in Blakely Harbor and no new scientific information to support a master program amendment.

In approving the Amendment, Ecology cited WAC 173-26-090, finding "increasing interest in developing new docks and piers" in Blakely Harbor and "continuing scientific research indicating that cumulative impacts of shoreline development reduce aquatic ecosystem functions." C-211, at 2. WAC 173-26-090, however, is not by its terms a limitation on the authority of local governments to amend their master programs. DOE Response, at 13; City Response, at 32-33. The Board concurs.

The relevant standard, however, is not the new shoreline guideline[23] but is the requirement of RCW 90.58.100(1). Ecology makes this clear:

> Under RCW 90.58.100, local governments in developing master programs must utilize "all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data," to "employ, when feasible, all appropriate, modern scientific data processing and computer techniques" and "to conduct or support such further research, studies, surveys and interviews that are deemed necessary." The Blakely Harbor Cumulative Impact Assessment meets this standard because it uses "all available information" and "modern computer techniques" to assess the cumulative impacts of dock construction in the harbor.

DOE Response, at 12. As detailed below, the Board finds that the record before the City and Ecology meets the statutory standard.

Changing Local Circumstances. Petitioners assert that the City's Cumulative Impact Assessment is pure speculation because, with only six functional docks in Blakely Harbor and one recently built, there is "no reason to believe that this 'relatively low level of dock development' will not continue into the foreseeable future." Samson PHB, at 17.

The Board finds that the fact that the land surrounding Blakely Harbor has only recently become available for development is sufficient "changed circumstance" to merit the City's action. Letters and testimony in the record indicate the interest of Blakely Harbor property owners in constructing private docks.[24] Under current zoning, the City projects 94 residences on Blakely Harbor waterfront at likely build-out. C-2.1, at 9. From the 34

[23] *See* discussion *supra*, at 13.

[24] *See*, e.g., C-62, C-74, C-78 at 5, C-164, C-167, C-183, C-196 "on behalf of a number of property owners", C-198, C-202.

homes around the Harbor at the time of the 1997 inventory, there were 20 resident boats, most moored at mooring buoys or anchored in the Harbor. C-222, at 23; C-2.1, at 8. The City's experience on its other shorelines is that 60% of waterfront residential properties build docks or piers. *Id.* The City contends that it "does not have to wait until after a flood of applications has occurred to amend its SMP to protect the Harbor." City Response, at 35. The Board agrees.

New Information. Petitioners contend that the Blakely Harbor Cumulative Impact Assessment and other materials relied on are not "new information" but are mere "literature surveys," containing virtually no substance specific to Blakely Harbor. Samson PHB, at 18. In response, the City asserts that since adopting its 1996 Shoreline Master Program, and particularly since Puget Sound Chinook were listed under the Endangered Species Act in 1999, new understandings have emerged in the scientific literature concerning the value of nearshore marine environments and the ecological impacts of overwater structures. City Response, at 33-34.

The City notes that most of the studies and reports on which the Assessment was based were prepared after 1996. *Id.*[25] While some of these studies are not specific to Blakely Harbor, the City applied the relevant scientific principles in its assessment of the cumulative impact of potential dock and pier development on the aquatic resources of Blakely Harbor.[26] *Id*., at 35. The City also commissioned inventories of birds, wildlife and other natural resources in Blakely Harbor and was developing a Nearshore Assessment specific to City shorelines, drafts of which were available and considered in the Blakely Harbor Amendment process. C-223.

The Petitioners argue that newly-understood ecological impacts of dock and pier development should be addressed through the permit process on a case-by-case basis, but they present no science to dispute the research on which the City and Ecology relied.[27] The Board finds that since the 1999 listing of Puget Sound Chinook, there has been ample new information reported in the scientific literature pertaining to the impacts of

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[25] For example, Bainbridge Island Watershed Nonpoint Source Pollution Water Quality Assessment Project, 1997 (C-225); Salmonid Habitat Limiting Factors: Water Resource Inventory Area 15, 2000 (C-226); Overwater Structures: Marine Issues, 2001 (C-228); Cumulative Impact Consideration in Environmental Resource Permitting, 2001 (C-2.1, at 26; City's Index, at 229); Treated Wood Issues Associated with Overwater Structures in Marine and Freshwater Environments, 2001 (C-231); Washington State ShoreZone Inventory, 2001 (City's Index, at 235); Marine and Estuarine Shoreline Modification Issues, 2001 (C-236); Reconnaissance Assessment of the State of the Nearshore Ecosystem; Eastern Shore of Central Puget Sound, 2001 (C-2.1 at 27); Bainbridge Island Nearshore Assessment, 2003 (available in draft form, *see* C-2.1, at 26; C-2.2; C-2.5; C-223); A Review of Natural Resource Values and Restoration Opportunities at Blakely Harbor Park, 2001 [where 12 of 19 studies relied on are subsequent to Bainbridge Island SMP adoption, at 10-11] (C-221).

[26] The City notes that local governments are not expected to conduct site-specific research in order to comply with GMA or SMA requirements. *Id.* Ecology agrees: "[T]he Assessment documents the resources found in Blakely Harbor and reasonably infers that the impacts known to occur from docks elsewhere in Puget Sound will likely occur in Blakely Harbor also." DOE Response, at 12.

[27] Petitioners rely on the deposition of a former city planning director. Samson PHB at 32-33; HOM Ex. 1.

overwater structures on the shoreline ecosystem to merit the City's Amendment applicable to all of Blakely Harbor, rather than reliance on case-by-case analysis and mitigations.

Improved Data. Since 1996, the City has inventoried its four harbors and developed a Harbor Management Plan focusing on shoreline development patterns, water-dependent uses, navigation, and natural resources. C-222. The City applied this "improved data" concerning harbor use to its Cumulative Impact Assessment of new docks and piers in Blakely Harbor. A computer model of three development scenarios was used to project impacts on navigation and vistas. HOM Ex. 3. The City concluded that continuing to allow development of single-use private docks and piers in Blakely Harbor would interfere with navigational access and recreational anchorage for the scores of boats that now enjoy the scenic harbor.[28] City Response, at 10-11. Scenic view corridors and "ambient views" would be significantly reduced.[29] *Id*., at 9-10.

Ecology found this modeling to be consistent with the SMA requirement that local jurisdictions use "modern computer techniques" in developing master program amendments. DOE Response, at 12.

Petitioners contend that the City's inventories and modeling are not "improved" data because the predicted build-out is unrealistic. The Board disagrees with Petitioners and finds that the City's recent inventories and modeling provide improved data that is responsive to the requirements of RCW 90.58.100.

Conclusion

The Board finds and concludes that the City's action, and Ecology's approval, are consistent and **comply** with the standards of RCW 90.58.100 (and, by implication, of WAC 173-26-090) for development of master program amendments.

C. Legal Issue 1 – Consistency with Bainbridge Island Comprehensive Plan and Shoreline Master Program

The Board's Prehearing Order states Legal Issue No. 1 as follows:

> Does the Ordinance violate the Growth Management Act (the "GMA"), specifically RCW 36.70A.040 and RCW 36.70C.070 because it is not consistent with and fails to implement the City's Land Use

[28] The Assessment finds that the predicted build-out scenario will eliminate nearly 90 acres of navigable water, prevent almost all unencumbered nearshore navigation, and adversely impact boater safety for both vessels and handcraft. C-2.1, at 10-13; HOM Ex. 3.

[29] The Assessment concludes that the predicted build-out scenario narrows scenic vistas in a range of 27% to 58% reduction. C-2.1, at 13-14; HOM Ex. 3.

> Comprehensive Plan goals and policies, including its Shoreline Master Program policies which are a part of the Plan per RCW 36.70A.480(1)?

Applicable Law

RCW 36.70A.480(1) integrates shoreline management programs into comprehensive plans as follows:

> For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

Discussion[30]

Petitioners state: "Banning docks and piers from all shoreline areas within Blakely Harbor…is inconsistent with the intent, goals and policies of the SMP that strongly support allowance of a discrete number of new docks within Blakely Harbor on a case-by-case basis, as conditioned through compliance with the existing regulatory system." Samson PHB, at 35. Petitioners argue that the Amendment is inconsistent with the City's SMP and Comprehensive Plan policies which allow private docks and piers in all shoreline designations except the most protective – Aquatic and Natural Conservancy designations.

Petitioners cite provisions of the Bainbridge SMP that support residential use and recreational enjoyment (SMP, at 11), give preference to water dependent uses (*Id.*) and support residential recreational use of the shoreline. SMP, at 13. They assert that the policies regarding Piers, Docks, Recreational Floats, and Mooring Buoys (SMP, at 13) "establish performance standards for construction and use of over-water structures, not a prohibition." Samson PHB, at 37. The policy to "ensure that proposed shoreline uses give consideration to the rights of private property ownership" (SMP, at 11) is violated by imposing a ban on dock development in Blakely Harbor, Petitioners allege.[31]

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[30] Appendix – E, Bainbridge Island Shoreline Master Program and Comprehensive Plan Goals and Policies, *infra*, at 36-39, provides the text of the SMP and Comprehensive Plan provisions cited by the parties, with some of the City's explanatory comments.

[31] Petitioners' briefs incorporate arguments concerning private property rights and the public trust doctrine. These issues (Legal Issues No. 4, 6, and 10) were dismissed on motion as beyond the jurisdiction of this Board and will not be discussed here. *See* Appendix – B, at 29, and Appendix C, at 30-31. *See also* fn. 35, *infra*, at 26, acknowledging that constitutional claims in the PFR are outside the Board's jurisdiction.

Petitioners cite the "Overriding Principles" and Goal 5 of the Comprehensive Plan Land Use Element (*infra*, at 38-39) and contend that the Blakely Harbor restrictions fail to allow recreational use of waters consistent with the "special character of the Island," fail to consider the "costs and benefits to property owners," and fail to "recognize the rights of individuals to use and develop private property in a manner that is consistent with City regulations." Samson PHB, at 38.

The City points to the same policies identified by Petitioners and finds support for limiting new single-use private docks in Blakely Harbor. The City's comments on the cited Bainbridge SMP and Comprehensive Plan policies are quoted in Appendix E. For example, the SMP Recreational Element Goals call for "optimizing" opportunities for passive and active water-oriented recreation, including "those that can reasonably tolerate peak use." SMP, at 13. Given the inventoried peak use of Blakely Harbor by 7,643 vessels during the 1997 yachting season (112 vessels on the busiest night), limiting new single-use docks is appropriate. C2.1, at 13. Similarly, the Bainbridge SMP policies for piers and docks express a preference for mooring buoys and for multiple-use docks, consistent with the Amendment. SMP, at 13.

The Board finds that the Amendment is consistent with and supported by the goals and policies cited by the parties and set out in Appendix E. The Board notes, for example, policies favoring marine views (SMP, at 12; Comp Plan, at 47), marine safety (SMP, at 11, 14), joint-use docks (SMP, at 11, 13) and a focus on "unique attributes" and "distinctive qualities of harbors" (SMP, at 11; Comp Plan Vision Statement). Part of the distinctive quality and unique attribute of Blakely Harbor is its relative lack of docks.

Petitioners cite no authority, nor has the Board found any, for their contention that the Comprehensive Plan and Bainbridge SMP policies prohibit the City from adopting particularized regulations for residential shoreline areas with distinctive features. Comprehensive plans have long used overlay zones, subarea plans, and similar mechanisms to tailor regulations to particular situations, even where the underlying zoning or classification may remain the same. *See* R. Settle, *Washington Land Use and Environmental Law and Practice*, Section 2.12(F), "Overlay," at 71 (1983).

Carlson v. San Juan County, WWGMHB Case No. 00-2-0016 (Final Decision and Order, September 15, 2000) is instructive. San Juan County adopted a subarea plan for Waldron Island that prohibited new private docks. Several Waldron owners appealed, contending that the dock prohibition, which was unique to Waldron Island, was inconsistent with the county's comprehensive plan. The County's findings included:

- "Unlike most other areas in the County, for many years Waldron Island has had only one County dock and one private dock. There is no existing pattern of moorage development on the Island.
- The Island's shoreline is highly exposed to wind and wave action, and there are few, if any, locations where docks of small or moderate scale could withstand these conditions on a year-round basis.

- Use of the County dock by Island residents in lieu of having private docks is common and accepted practice of long standing. Mooring buoys may also be, and have been permitted in some locations.
- Generally, once a dock is approved in a given area, it is difficult to avoid further dock approvals and proliferation of the facilities in the same area over time.
- The marine and intertidal conditions on the shore of the island are almost completely unaffected by the physical and biological impacts of moorage development. Eelgrass is abundant along much of the island's shorelines, and marine habitat quality is high."

Because the County's record revealed extensive support for these findings, the Western Board found the unique dock prohibition for Waldron Island consistent with the Comprehensive Plan. *See also* San Juan County Uniform Development Code 18.50.190(K)(9) (prohibiting boating facilities in East Sound on Orcas Island, in conservancy, protected and residential designations).

The record before the Board in the present case supports analogous findings. Blakely Harbor has a low level of dock development, so that marine habitat quality is high. There are eelgrass beds along the southern shore.[32] Use of mooring buoys in lieu of private docks is a long-standing practice. Approval of one new private dock is likely to be followed by many others.[33] On this record, the Board finds that different and more restrictive dock regulations for Blakely Harbor are consistent with the Comprehensive Plan and Bainbridge SMP policies[34] and compliant with the consistency requirements of RCW 36.70A.070 and .040.

Conclusion

The Board finds and concludes that the City's Amendment **complies** with the consistency requirement of RCW 36.70A.070 and .040.

D. Legal Issue No. 15 – Invalidity

The Board's Prehearing Order states Legal Issue No. 15 as follows:

> If the Board finds that the City has not complied with the goals or requirements of the GMA when addressing issues 1, 2, 5, or 9, does such

[32] C-222, Appendix C, Blakely Harbor Inventory, at 23-24; C-2.1; C-2.2; Samson PHB, at 18.

[33] *See* fn. 24, *supra*, at 18.

[34] Petitioners also argue that the City erred in relying on policies outside of its adopted Comprehensive Plan and SMP. Sampson PHB, at 38. The documents referred to are the Bainbridge Island Parks and Recreation Plan, Appendix C, and the 1999 Harbor Management Plan. Petitioners' argument addresses Legal Issue No. 11: "Did the City impermissibly rely upon policies not part of its Comprehensive Plan and Shoreline Master Program when enacting the Ordinance?" This issue was **dismissed** on motions, subject to permission to argue the matter "if Petitioners can demonstrate … a statutory duty … related to the assertions." See Appendix - B, *infra*, at 29. Petitioners have not identified any statutory duty supporting their argument, and the issue must be disregarded.

noncompliance substantially interfere with the fulfillment of the goals of the Act, such as to merit a determination of invalidity?

Conclusion

The Board has not found noncompliance with the goals or requirements of the GMA; therefore the Board need not and will not address the request for invalidity.

VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

> The City of Bainbridge Island's adoption of Ordinance No. 2003-30, amending its shoreline master program, and the Department of Ecology's approval of the City's action, **comply** with the goals, policies and provisions of the SMA (RCW 90.58.020 and .100) and **comply** with the relevant requirements of the GMA (RCW 36.70A.040, .070 and .480).

So ORDERED this 19th day of January, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Bruce C. Laing, FAICP
Board Member

_____
Edward G. McGuire, AICP
Board Member

_____
Margaret A. Pageler
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX - A

Chronological Procedural History of CPSGMHB Case No. 04-3-0013

On April 23, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kelly and Sally Samson and Robert and Jo Anne Hacker (**Petitioners** or **Samson**). The matter was assigned Case No. 04-3-0013. Petitioners challenge the City of Bainbridge Island's (the **City**) adoption of Ordinance No. 2003-30 (the **Ordinance**), amending the City's Shoreline Master Program. Petitioners also challenge the Department of Ecology's (the **DOE** or **Ecology**) approval of the City's amendments to the Shoreline Master Program. The bases for the challenges are noncompliance with the Growth Management Act (**GMA**) and the State Shoreline Management Act (**SMA**). Petitioners request the Board find the Ordinance noncompliant under the GMA and SMA. Petitioners also request that the Board enter a determination of invalidity. The PFR set forth 19 Issues to be resolved.

On May 3, 2004 the Board received a Notice of Appearance from legal counsel for the City and a Notice of Appearance from legal counsel for Ecology.

On May 4, 2004 the Board issued a "Notice of Hearing" in the above-captioned case. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On May 7, 2004 the Board issued a "Corrected Notice of Hearing".

On May 24, 2004 the Board received "City's Motion to Extend Time for Filing Index".

On May 25, 2004 the board received "Department of Ecology's Joinder in City's Motion to Extend Time for Filing Index".

On May 27, 2004, the Board conducted the prehearing conference in this matter in Suite 2430, Union Bank of California Building, 900 4th Avenue, Seattle. Present for the Board were Edward G. McGuire and Bruce C. Laing, presiding officer. Dennis D. Reynolds represented the Petitioners. Present with Mr. Reynolds was Petitioner Kelly Samson. Rosemary A. Larson represented the City. Present with Ms. Larson was Peter Namtvedt Best, Planner for the City. Thomas J. Young, Assistant Attorney General, represented the Department. Also present at the prehearing conference was Gary W. Tripp who presented to the Board and participants "Bainbridge Citizen United's Motion to Intervene".

On May 27, 2004 the Board received "City's Index" (**City's Index**).

On May 27, 2004 the Board received "Respondent Department of Ecology's Submittal of Index of Record" (**Ecology's Index**).

On June 2, 2004 the Board received a letter from counsel for the City advising that the City will not file a response to Bainbridge Citizen United's Motion to Intervene.

On June 3, 2004 the Board issued its "Prehearing Order and Order on Intervention" (**PHO**) in this matter. The PHO set forth the schedule and listed 15[35] Legal Issues to be resolved by the Board. The Board granted intervention to Bainbridge Citizens United. The Board received several timely motions from the parties: 1) Petitioners' Motion to Clarify; and 2) Motions to Dismiss certain issues filed by the City and Ecology.

On June 10, 2004 the Board received: 1) Petitioners' "Motion for Order Clarifying Issues on Appeal"; 2) "Dep't of Ecology's Motion to Dismiss" with an attached "Declaration of Thomas J. Young in Support of Ecology's Motion to Dismiss;" 3) "City's Motion to Dismiss Issues" with an attached "Declaration of Rosemary Larson in Support of City's Motion to Dismiss Issues."

On June 24, 2004 the Board received: 1) "City's Response to Petitioners' Motion for Order Clarifying Issues on Appeal"; 2) "Ecology's Objection to Petitioners' Motion for Order Clarifying Issues on Appeal"; and 3) Petitioners' Response to Respondent's Motions to Dismiss".

On July 1, 2004 the Board received: 1) "Petitioners' Reply to Respondents' Response to Petitioners' Motion for Order Clarifying Issues on Appeal"; 2) "Dep't of Ecology's Reply to Petitioners' Response to Ecology's Motion to Dismiss"; and 3) "City's Reply to Petitioners' Response to Respondents' Motions to Dismiss."

On July 6, 2004 the Board issued its "Order on Motions" in this matter. The Order dismissed several issues and restated three of the issues to be decided by the Board. Order on Motions at 5-6.

On July 16, 2004 the Board received a "Motion to Correct and/or Reconsider Order on Motions" from Petitioners.

On July 19, 2004 the Board issued its "Order Correcting Legal Issue No. 2" as stated in the July 6, 2004 Order on Motions.

On July 21, 2004 the Board received "Stipulation and Joint Request to Extend Time".

On July 22, 2004 the Board issued its "Order Granting Settlement Extension and Amending Case Schedule."

On October 11, 2004 the Board received "Stipulation to Amend Index" (**City's Amended Index**).

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[35] The PFR acknowledged that Issues 16 through 19 therein "are constitutional issues beyond Board purview but stated herein to preserve them for appeal." PFR, at 5. At the prehearing conference, the parties and the Board agreed that they would not be included in the PHO, since they were issues outside the Board's subject matter jurisdiction. For all intents and purposes they were **dismissed** for lack of jurisdiction.

On October 20, 2004 the Board received a "Stipulated Motion to Amend Briefing Schedule" signed by all parties to this case.

On October 22, 2004 the Board issued its "Order Amending Briefing Schedule."

On October 25, 2004 the Board received "Petitioner's Opening Brief" (**Samson PHB**).

On October 25, 2004 the Board received Petitioner's "Motion to Correct and /or Supplement the Record."

On November 9, 2004 the Board received "Ecology's Response Brief" (**DOE Response**).

On November 9, 2004 the Board received "City's Response Brief" (**City's Response**).

On November 9, 2004 the Board received "City's Response to Motion to Supplement Record".

On November 16, 2004 the Board received "Petitioners' Reply Brief" (**Samson Reply**).

On November 16, 2004 the Board received Petitioners' "Reply Regarding Motion to Correct and/or Supplement Record."

No briefing was received from Intervenor Bainbridge Citizens United on motions or on the merits.

On November 22, 2004 the Board conducted a Hearing on the Merits (**HOM**) in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. Board members present were Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer. Chuck Maduell represented the Petitioners. Rosemary Larson represented the City of Bainbridge Island. Present with Ms. Larson was Peter Namtvedt Best, Planner for the City. Thomas Young, Assistant Attorney General, represented the Department of Ecology. Gary Tripp attended as a member of Intervenor Bainbridge Citizens United. Also present was Julie Taylor, extern with the Board. The Court Reporter was Karmen Fox, Byers & Anderson, Inc. The hearing was opened at 10:00 a.m. and adjourned at 12:28 p.m.

On December 2, 2004 the Board received a letter from Rosemary Larson attaching color versions of certain exhibits as requested by the Board at the HOM.

On December 23, 2004 the Board received Petitioners' "Citation of Additional Authority" with attached opinion from Division II Court of Appeals in *Biggers et. al. v. City of Bainbridge Island* (December 21, 2004.)

APPENDIX – B

Legal Issues Restated and Retained for Prehearing Briefing in CPSGMHB Case No. 04-3-0013[36]

Legal Issue No. 1

Does Ordinance No 2003-02 (the **Ordinance**) violate the Growth Management Act (**GMA**), specifically, RCW 36.70A.040 and RCW 36.70A.070, because it is not consistent with and fails to implement the City's Comprehensive Land Use Plan (**Plan**) goals and policies, including its shoreline Master Program polices which are part of the Plan per RCW 36.70A.480(1)? [*Restated per Petitioner*].

Legal Issue No. 2

Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3), because it is inconsistent with and fails to implement the goals and policies of the Shoreline Management Act (SMA) and Bainbridge Island Shoreline Master Program?[37]

Legal Issue No. 5

Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land use decision-making process, including internal consistency among development regulations, by imposing different requirements for siting and construction of private residential docks on parcels with the same zoning and shoreline land use designations? [*Restated per Petitioner*].

Legal Issue No. 9

Does the administrative record demonstrate sufficient "changing local circumstances, new information or improved data" pursuant to WAC 173-26-090 to justify an amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?

Legal Issue No. 15

If the Board finds the City has not complied with the goals or requirements of the GMA when addressing issues [remaining Legal Issues 1, 2, 5 or 9] does such noncompliance substantially interfere with the fulfillment of the goals of the Act, such as to merit a determination of invalidity?

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[36] Order on Motions. 7/16/04 Order, at 5-6.

[37] Order Correcting Issue No. 2, at 1-2.

Legal Issues No. 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14 were dismissed by the Board's Order on Motions. The Order on Motions includes the following proviso regarding the dismissal of Issues No. 7, 8 and 11: "However, as the City suggests, these issues may be duplicative of *arguments* that fall within the parameters of Legal Issues 1, 2 or 5. Consequently, if Petitioner can demonstrate that either the City or DOE had a statutory duty [as framed in Legal Issues 1, 2 or 5] to do something related to the assertions in Legal Issue 7, 8 or 11, that the City or DOE failed to comply with, they may be argued in the context of those Legal Issues (*i.e.*, Legal Issues 1, 2 or 5)."

APPENDIX – C

Legal Issues as Stated in the Prehearing Order in CPSGMHB Case No. 04-3-0013

Legal Issue No. 1

Does the Ordinance violate the Growth Management Act (the "GMA"), specifically RCW 36.70A.040, RCW 36.70A.070, RCW 36.70A.120, and RCW 36.70A.130, because it is not consistent with and fails to implement the City's Comprehensive Land Use Plan goals and policies? (Comprehensive Plan, Land Use Elements.)

Legal Issue No. 2

Does the Ordinance violate the GMA because it is inconsistent with and fails to implement the goals and policies of the Shoreline Management Act (the "SMA") and the Bainbridge Island Shoreline Master Program? (Master Program Goals.)

Legal Issue No. 3

Does the Ordinance violate GMA Goal 9 (Enhancement of Recreational Opportunities), RCW 36.70A.020(9)?

Legal Issue No. 4

Has the City of Bainbridge Island, in adopting the Ordinance, and the Department, in approving the Blakely Harbor Shoreline Amendments, acted in an arbitrary, capricious and discriminating manner in violation of GMA Goal 6 (Property Rights), RCW 36.70.A.020(6)?

Legal Issue No. 5

Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land use decision-making process, including internal consistency among development regulations, by imposing different requirements for siting and constructing private residential docks on parcels with the same Zoning and Shoreline and Land Use designations?

Legal Issue No. 6

Did the City and the Department adequately comply with the requirements of RCW 36.70A.370 to utilize the process established by the Office of the Washington State Attorney General[38] to ensure the Ordinance does not result in an unconstitutional taking of private property?

[38] The guidelines are entitled "State of Washington, Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Taking of Private Property," first published in February, 1992.

Legal Issue No. 7

May a local jurisdiction and/or the Department of Ecology, presume maximum build out of all waterfront properties unrelated to actual experience or reasonable probabilities as to project development, when enacting use regulations intended to preserve and protect the shorelines?

Legal Issue No. 8

Are perceived navigation and visual impacts valid elements to take into consideration in a cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?

Legal Issue No. 9

Does the administrative record demonstrate sufficient "changing local circumstances, new information or improved data" pursuant to WAC 173-26-090 to justify an amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?

Legal Issue No. 10

Does the Ordinance violate the public trust doctrine?

Legal Issue No. 11

Did the City impermissibly rely upon policies not part of its Comprehensive Plan and Shoreline Master Program when enacting the Ordinance?

Legal Issue No. 12

Do the notices issued by the City regarding possible adoption of the Ordinance comply with GMA, Comprehensive Plan, and procedural due process requirements for adequate notice to the public of proposed City Council actions?

Legal Issue No. 13

Has the City of Bainbridge Island complied with the public participation requirements of the GMA (RCW 36.70A.140; .035) in adopting the Ordinance?

Legal Issue No. 14

Has the City of Bainbridge Island in adopting the Ordinance complied with its procedures for amendment of its Comprehensive Land Use Plan and development regulations specified in its Plan and public participation program, as required by RCW 36.70A.130(1)(2)(b)?

Legal Issue No. 15

If the Board finds the City has not complied with the goals or requirements of the GMA when addressing Issues 1-14, supra, does such noncompliance substantially interfere with the fulfillment of the goals of the Act, such as to merit a determination of invalidity?

APPENDIX - D

Shoreline Management Act Provisions

RCW 90.58.020 provides:

[FINDINGS PORTION]

> The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever-increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order 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. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

[POLICY PORTION]

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner, which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
>
> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the state-wide interest over local interest; (2) Preserve the natural character of the shoreline; (3) Result in long term over short term

benefit; (4) Protect the resources and ecology of the shoreline; (5) Increase public access to publicly owned areas of the shorelines; (6) Increase recreational opportunities for the public in the shoreline; (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

[IMPLEMENTATION PORTION]

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

RCW 90.58.030 provides in pertinent part:

(e) "Shorelines of state-wide significance" means the following shorelines of the state:

….

(iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;

RCW 90.58.090(4) provides:

> The department shall approve those segments of the master program relating to shorelines of state-wide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the state-wide interest. If the department does not approve a segment of a local government master program relating to a shoreline of state-wide significance, the department may develop and by rule adopt an alternative to the local government's proposal.

RCW 90.58.100 provides:

> 1) The master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:
> (a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts; (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact; (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state; (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary; (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data; (f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

APPENDIX - E

Bainbridge Island Shoreline Master Program and Comprehensive Plan

Goals and Policies

Shoreline Master Plan Master Goal, SMP, Sec. I.A, p. 11.

> The City's shorelines are among the most valuable, scarce, and fragile of our natural resources that provide a significant part of our way of life as a place of residence, recreational enjoyment, and occupation. It is the intent of this program to manage the shorelines of Bainbridge Island, giving preference to water-dependent and water-related uses, and to encourage development and other activities to co-exist in harmony with the natural conditions. Uses that result in long-term over short-term benefits are preferred, as are uses which promote sustainable development.

Shoreline Use Element Goal, SMP, Sec. I.B, p. 11.

> Identify and preserve shoreline and water areas with unique attributes for specific long term uses, including commercial, industrial, residential, recreational, and open space uses.

"The Ordinance assists in preserving Blakely Harbor as a scarce natural resource, with unique attributes. The Ordinance promotes recreational enjoyment of the harbor by watercraft, by protecting against adverse impacts to navigation." City Response at 43-44.

Recreation Element Goals, SMP, Sec. I.H, p. 13.

> 1. Ensure optimal recreational opportunities that can reasonably tolerate peak use periods as well as active, passive, competitive, or contemplative recreational uses without destroying integrity and character of the shoreline.
>
> 2. Optimize opportunities for both passive and active water-oriented recreation.
>
> 3. Integrate shoreline recreational elements into public access and conservation planning.
>
> 4. Encourage State and local government to acquire additional shoreline properties for public recreational uses.

The City states that the Ordinance supports the first two goals and does not conflict with Goals 3 and 4. City Response at 44.

Piers, Docks, Recreational Floats and Mooring Buoys, SMP Sec. I.H, p. 13.

> 1. Multiple use and expansion of existing conforming piers, docks and floats should be encouraged over the addition and/or proliferation of new facilities. Joint use facilities are preferred over new, single-use piers, docks and floats.
>
> 2. The use of mooring buoys should be encouraged in preference to either piers or docks.
>
> 3. Piers, docks, and floats should be designed to cause minimum possible adverse environmental impacts, including potential impacts on littoral drift, sand movement, water circulation and quality, and fish and wildlife habitat. . . .
>
> 8. The proposed size of the structure and intensity of use or uses of any dock, pier, and/or float should be compatible with the surrounding environment and land and water uses.

"The fact that some policies encourage or require mitigation of adverse impacts of docks does not preclude the City from restricting dock development in Blakely Harbor, based on the unique circumstances applicable to that Harbor. . . . Ordinance No. 2003-30 requires joint use dock facilities in Blakely Harbor. The Ordinance encourages use of mooring buoys, rather than docks. It protects against interference with navigable waters, the public's use of the shoreline, and views from adjoining property." City Response at 45.

Shoreline Use Element Goals, SMP, Sec. I.B, p. 11.

> 3. Designated shorelines of statewide significance are of value to the entire state and should be protected and managed. In order of preference, the priorities are to:
>
> a. Recognize and protect the state-wide interest over local area and individual interest.
>
> b. Preserve the natural character of the shoreline.
>
> c. Produce long-term benefits over short-term benefits.
>
> d. Protect the resources and ecology of the shorelines.
>
> e. Increase public access to publicly-owned areas of the shorelines.
>
> f. Increase public recreational opportunities on the shoreline.

> 4. Ensure that proposed shoreline uses are distributed, located, and developed in a manner that will maintain or improve the health, safety, and welfare of the public. . . .
>
> 8. Encourage joint-use activities in proposed shoreline developments.

Conservation Element Goals, SMP Sec. I.E, p. 12.

> 1. Acknowledge natural shoreline processes and seek alternatives to structures that adversely affect the shoreline.

Public Access Element Goals, SMP Sec. I.F, p. 12.

> 1. Provide, protect and enhance a public access system that is both physical and visual and which utilizes public and appropriate private lands and increases the amount and diversity of public access to the State's shorelines.

The City emphasizes the commitment to protect the public's *visual* access to shorelines. City Response at 46.

Harbor Use and Safety Element, SMP Sec. I.I, p. 14.

> 1. Ensure the safe and environmentally sound use of Island harbors and bays in a manner that protects and enhances harbor and shoreline use consistent with the goals of the other elements.
>
> 2. Provide, protect, and control public use of harbor and bay waters in a manner that is in the best interest of the public.

Comprehensive Plan Land Use Element – "Overriding Principles." Comp Plan, p. 47.

> 1. Preserve the special character of the Island which includes forested areas, meadows, marine views, and winding roads bordered by dense vegetation.
>
> 2. Protect the water resources of the Island.
>
> 3. Foster diversity of the residents of the Island, its most precious resource.
>
> 4. The costs and benefits to property owners should be considered in making land use decisions.
>
> 5. Development should be based on the principle that the Island environmental resources are finite and must be maintained at a sustainable level.

The Ordinance "furthers these principles . . . with the exception of Principle 3, which does not apply. . . . Even with respect to Principle 4, … the City balanced the relatively small cost to property owners resulting from dock restrictions against the benefit to owners (protected views of the pristine Harbor), and more importantly, the benefit to the public from the protection of Blakely Harbor." City Response at 47.

Land Use Element Goal 5, Comp. Plan, p. 51.

> Strive to ensure that basic community values and aspirations are reflected in the City's planning program while recognizing the rights of individuals to use and develop private property in a manner that is consistent with City regulations. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Comprehensive Plan Vision Statement.

The City should "preserve its pastoral heritage" and should "preserve the distinctive qualities of its harbors and small communities. New development should be compatible with the natural landscape." City Response at 49.

Comprehensive Plan Land Use Element, Environment, Comp. Plan, p. 84-86.

> Goal 1. Preserve and enhance Bainbridge Island's natural systems, natural beauty, and environmental quality.
>
> Goal 3. Protect and enhance wildlife and natural ecosystems on Bainbridge Island.

Comprehensive Plan Land Use Element, Aquatic Resources, Comp. Plan, p. 87.

> Goal 1. Preserve and protect the Island's remaining aquatic resources' functions and values.