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October 25, 2011

City of Poulsbo  
Keri Weaver, Associate Planner  
Planning & Building Department  
200 NE Moe Street  
Poulsbo, WA 98370

RE: ***CITY OF POULSBO SHORELINE MASTER PROGRAM UPDATE AND  
STATE ENVIRONMENTAL POLICY ACT COMMENTS BY LIBERTY BAY  
MARINA***

Dear Ms. Weaver:

This firm represents Liberty Bay Marina, a family-owned and operated business located at 17791 Fjord Dr NE in the City of Poulsbo. We sincerely appreciate your assistance to our client in helping identify and understand the proposed shoreline master program ("SMP") update and offering an opportunity to provide comments on the proposal. After reviewing the proposed regulations and consulting with our client, we respectfully submit our comments for the City of Poulsbo's consideration.

1. **Shoreline Management Act - Background**

During the City's SMP update, it is important to remember that the Shoreline Management Act ("SMA") was enacted by voter initiative in 1971. The voters were faced with two competing shoreline initiatives - one sponsored by the environmental community and another sponsored by the business community. The voters rejected the environmental-sponsored initiative and approved the business-sponsored initiative.<sup>1</sup> As a result, the SMA generally establishes three broad state policies: (i) encouragement of water-dependent uses; (ii) protection of shoreline resources; and (iii) promotion of public access.<sup>2</sup> Unfortunately, the proposed SMP update reflects the Department of Ecology's preference for increased protection of shoreline resources over other preferred shoreline uses. We are concerned that the proposed SMP update will *discourage* water-dependent uses, and, as a result, be inconsistent with and contrary to the

<sup>1</sup> R. Settle, *Washington Land Use and Environmental Law and Practice*, §4.2 (1983); G. Crooks, *The Washington State Shoreline Management Act of 1971*, 49 Wash. L Rev. 423 (1971).

<sup>2</sup> The Shoreline Management Act regulations demonstrate that the policy goals include: "(a) The utilization of shorelines for economically productive uses that are particularly depending on shoreline location or use; ... (b) The utilization of shoreline and the water they encompass for public access and recreation; ... (h) Recognizing and protecting private property rights." WAC 173-26-176(3).

SMA's policies. The proposed SMP update will also work at cross-purposes with the City of Poulsbo's economic development policies.

Fortunately, the City of Poulsbo has broad discretion to enact a SMP update that balances the SMA's broad policies, as is the intent of the SMA. WAC 173-26-186(9) explicitly recognizes that "local governments have reasonable discretion to balance the various policy goals [of the shoreline guidelines]...." The City of Poulsbo's front door is the sea, and for years Liberty Bay Marina has provided a point of landing for Poulsbo residents and visitors. We encourage the City of Poulsbo to identify and remember the City's unique shoreline characteristics and to enact SMP regulations that properly weigh and balance the Shoreline Management Act's policies, *including* the policy that encourages water-dependant uses.

Our specific SMP and SEPA comments follow below. We sincerely thank you for your consideration.

## **2. SMP Comments**

Among our numerous concerns, proposed 16.08.260 and proposed 16.08.460 provide the greatest threat to continued water-dependent uses in the City of Poulsbo.

### **16.08.260 – Marinas, Ports, Other Boating Facilities, and Boat Maintenance and Service Uses**

- A. The provision applies to "new, altered, or expanded marinas ...." The term "altered" is not defined, and it is unclear what triggers this section's regulations. We recommend striking the term "altered" from subsection A to improve the section's clarity, and avoid triggering an unintended application of these regulations upon minor modifications or repairs to the marina.
- Section A.3. The adequate parking requirement is ambiguous. The provision may also be unachievable given certain waterfront parcel configurations and the proposed parking prohibitions in 16.08.290 (parking lots and parking structures). To encourage water-dependent uses, we recommend striking this provision altogether, especially if the City opts to enact 16.08.290.
- Section B. The 30 foot setback between SR-1 and N designated properties may interfere with a marina expansion, working at cross-purposes with the SMA's policy to encourage water-dependent uses. We recommend modifying all SR-1 setbacks to 10 feet.
- Section C.1. This provision is too restrictive, and it works at cross-purposes with the SMA's policy to encourage water-dependent uses. In addition the provision gives unfettered discretion to City officials to approve or deny slips and moorages based on vague and uncertain factors. As currently drafted, this provision may be unconstitutionally vague. *See, e.g. Anderson v. City of Issaquah, 70 Wn. App. 65, 851 P.2d 744 (1993)* (holding that a City's vague code was unconstitutional on its face and as applied). We recommend striking this provision altogether.

- Section C.3. This provision is similarly vague. For example, how does the City determine when an applicant has satisfied vehicle and boat trailer parking? Furthermore, is adequate land available for property owners to achieve this vague requirement, especially if the City enacts 16.08.290? We recommend striking this provision altogether.
- Section E. We generally concur with the Port of Poulsbo's comment. This section should state that liveaboards are restricted to marinas and not allowable outside of marinas. There should be no limit on the marina other than if they have the infrastructure to support the liveaboards. If the demand for this water dependent use is present and a marina has the proper infrastructure to support the demand, why would the City limit the marina's operations? Furthermore, under the Growth Management Act, the City of Poulsbo has the responsibility to accommodate growth. As such, this section may be in violation of the state's Growth Management Act.
  - Section E.2. This provision is vague. What sort of connections are required?
  - Section E.3. This provision should be deleted. It is not required by the Shoreline Management Act or the Department of Ecology, and it is contrary to the intent of the Growth Management Act.
  - Section E.4. For the purposes stated in Section E.3 (above), this provision should be deleted. If the City enacts this provision, it should be modified to reflect the reality that liveaboard vessels or ships change seasonally based upon demand.
- Section H.2. This provision is overly broad. Boat cleaning, maintenance, and service should be authorized in-water, provided that certain ecological standards are met. Requiring out-of-water cleaning, maintenance, and service will increase the cost of water-dependent uses, increase air pollution and carbon emissions (by requiring machinery to remove boats from the water for maintenance), and work at cross-purposes of the Shoreline Management Act's policy to encourage water-dependant uses.
- J.2. It is unclear what constitutes a drive-up or drive through use. We recommend adding a definition to clarify this provision, or removing this provision altogether.

#### 16.08.460 – Nonconforming Uses and Structures

- The 50% threshold established in 16.08.460(D)(4) and (E)(6) threaten the livelihood of our business and the public's use of the waterfront.
- D.4. We suggest that the City modify 16.08.460(D)(4) to include the following: "If the damage exceeds 50% of the replacement cost, the structure may be restored but the nonconforming use may not be resumed, *unless the nonconforming use is a priority use as defined by PMC 16.08.040(43) or the use was in existence pursuant to a contract or lease that requires rebuilding of the damaged structure. These preferred and contractually-obligated uses may be resumed. The continued preferred use shall not trigger a requirement*

*for restoration of wetlands, streams, or buffers that were altered in a way that was legal at the time of their alteration.”*

- E.6. We suggest that the City modify 16.08.460(E)(6) to include the following final sentence. *Nonconforming structures that is a priority use as defined by PMC 16.08.040(43) may be rebuilt in such a way that does not increase the non-conformity. Such rebuilding or remodeling shall not trigger a requirement for restoration of wetlands, streams, or buffers that were altered in a way that was legal at the time of their alteration.”*<sup>3</sup>

#### 16.08.180 – Shoreline Use Table

- We generally concur with the Port of Poulsbo’s comments on 16.08.180. Simply put, the use table is too restrictive, and the proposed regulations will work at cross-purposes with the SMA’s goal of encouraging water-dependent uses. As currently drafted, the SMP update will *discourage* improvements along the water-front. More permitted uses are needed.
- We recommend City Staff meet with Liberty Bay Marina to discuss incorporating several permitted uses to encourage water-dependent uses. For example, it is unclear why all of the uses associated with public and private marinas are conditional, rather than permitted uses.

#### 16.08.290 – Parking Lots and Parking Garages

- The proposed parking limitations restrict water-dependant uses. To encourage water-dependent uses, we suggest the following amendment: “Shoreline access points, day use docks, *marinas*, and other short-term public uses, either stand-alone or as part of an overall recreation development, up to a maximum of *twenty new* parking spaces. ... C. *Any existing parking spaces situated in the shoreline area are not regulated by this chapter, and they may be used to satisfy the requirements in the Poulsbo City Code.*
  - Incorporating the proposed amendment would also require amending the use table in 16.08.180 – Table, Row I.

#### 16.08.360 Public Viewshed and Public View Corridors

- The Liberty Bay Marina is included in the Viewshed and Public View Corridor (16.08.360(A)(2))
- As drafted, this provision is vague. It is unclear what exactions the City will require from project applicants. Such a provision may be prohibited by law. *See, e.g. Anderson v. City of Issaquah*, 70 Wn. App. 65, 851 P.2d 744 (1993) (holding that a City’s vague code was unconstitutional on its face and as applied).

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<sup>3</sup> We question the City’s authority to require restoration after the Supreme Court’s decision in *Swinomish v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 166 P.3d 1198 (2007).

- We recommend that the City remove 16.08.360 from the SMP update. The exaction places increased regulations on waterfront owners, adversely impacting the City's economic development opportunities.

**3. SEPA Comments**

The proposed regulations identified above will create adverse impacts including but limited to water-dependent recreation and the built environment, including the Liberty Bay Marina. As such, the City's Determination of Non-Significance ("DNS") threshold decision appears to be improper, and it warrants further analysis in an EIS. Specifically, it appears to us that the City's DNS threshold determination fails to adequately consider the following items, among others, in the SEPA checklist:

1a. Air

- What types of emissions to the air would result from the proposal?
- Are there any off-site sources of emissions that may affect your proposal?

8. Land and shoreline use

- Describe any structures on the site.
- Approximately how many people would reside or work in the completed project?
- Approximately how many people would the project displace?
- Proposed measures to ensure the proposal is compatible with existing and project land uses and plans.

9. Housing

- Describe how many units of housing would be eliminated?
- Proposed measures to reduce or control housing impacts?

12. Recreation

- Would the proposed project displace any existing recreation uses? If so, describe?
- Proposed measures to reduce or control impacts on recreation ...

Supplemental nonproject action question 5

- How would the proposal be likely to affect land and shoreline use, including whether it would allow or encourage land or shoreline uses incompatible with existing plans?

Supplemental nonproject action question 7

- Identify, if possible, whether the proposal may conflict with local, state or federal laws or requirements for the protection of the environment?

In addition, the City's SEPA threshold determination fails to adequately analyze the off-site impacts of the proposed regulations. This constitutes a SEPA procedural violation as

October 25, 2011

Page 6

demonstrated in *SAVE v. City of Bothell*, 89 Wn.2d 862, 870, 576 P.2d 401 (1978) (identifying the need for a threshold determination to consider off-site impacts). Here, the City's threshold determination reviewed the regulated environment (e.g. the shoreline), but it failed to review the impacts of the proposed regulations on property and businesses located outside of the regulated environment.

Finally, shoreline and aquatic restoration is a laudable goal, provided that it does not work at cross-purposes with the SMA's broad policies. However, when making a SEPA threshold determination, the lead agency may not balance beneficial aspects of the proposal (e.g. restoration) with the adverse impacts of the proposal (e.g. discouraging water-dependent uses), as identified in our comments above. WAC 197-11-330(5).

#### 4. Summary

Certain provisions in the proposed SMP update will discourage water-dependent uses in contravention of the SMP's purposes and objectives, and will hinder economic growth in the City of Poulsbo and improperly restrict water-dependent uses, including marina use. From a practical standpoint, the proposed regulations, if enacted, would make it very difficult to continue our client's marina operations. Unfortunately, the City has failed to properly review and analyze the adverse impacts of the proposed SMP update. We fear that the City is rushing to enact an update that fails to take into account the City's unique and historical use of its shoreline. We urge the City to implement our recommendations above to enact an update that continues to encourage water-dependent uses, does not unreasonably interfere with or restrict marina operations, and as such, would be consistent with the SMA. As we stated at the beginning of this letter, WAC 173-26-186(9) provides the City with the authority to balance the Shoreline Management Act's various policy goals and we respectfully request that the City do so.

Sincerely,

Foster Pepper PLLC

Rodrick J. Dembowski  
Jeremy Eckert

Ralph Swanson, Lighthouse Properties