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PLANNING

September 21, 2011

City of Poulsbo  
Planning Department  
200 NE Moe Street  
Poulsbo, WA 98370

Subject: CITY OF POULSBO SMP COMMENTS

Attn: Keri Weaver, Associate Planner

Port of Poulsbo has conducted a technical review of the City of Poulsbo Draft Shoreline Management Plan (SMP) document dated July 2011 and associated supporting documents.

The following is a summary of our review comments:

**SMP General Comments**

- Ports and their associated water dependant facilities (such as Poulsbo Marina) are preferred users of the shorelines and should be treated as such in the proposed SMP update. In general, it appears from the SMP updates that the City does not perceive the Port's facility in this manner.
- The Port should be included as a participatory member on the SMP update process to provide critical input as one of the major users of the Poulsbo waterfront who under state authorized laws is tasked to construct, operate, and maintain harbor improvements as well as directly manage state aquatic lands under the Port's management agreement with State Department of Natural Resources.
- Local involvement provides opportunity to craft SMP code to local needs based on guidance of ecology and RCW. This process is not intended to be a grab for more regulatory power, but to set the goals and minimum requirements for future shoreline use with consideration for public access, environmental restoration, and water-dependant uses in mind.
- In general, the draft SMP is oriented to require the maximum level of review and approval by the City for the activities that are encouraged when compared to multiple other similar municipalities which have updated SMPs in the past four years. We are

concerned that the SMP as currently written could preclude future Port development within an existing use area, or at least create ambiguous regulatory code language leading to lengthy conditional use or variance approval processes that will result in substantial costs and schedule delays.

- A copy of the Port's Master Plan submitted to the city should be incorporated as a part of the SMP update.
- The Port would like to schedule a meeting with the City to review in detail how the proposed code will impact the major elements of the current Master Plan. This would include a detailed discussion of process, review, costs of permits, schedule for approval and type of approval (administrative or council level approval). Reviewing in this detail will aid in visualizing problematic code regulations which may result in significant cost, lost time and potentially loss of ability to implement a component of the Master Plan.
- The approach that was taken to develop this updated code (as it pertains to the elements which affect the Port's facility) seems to not be consistent with other SMP updates conducted by similar size communities having waterfront uses. Poulsbo sets very prescriptive requirements for the majority of near shore and overwater improvements, instead of outlining the overall guidelines/standards for an outcome to meet the goals of the SMP (recreation, public access and environmental protection). Additionally, the majority of these activities require a conditional use City approval. Most other SMPs set out requirements for permitted use, and if you do not meet the standard requirements, then a conditional use permit is required (improved definition of process and requirements). The following is an example of our point:
  - ♦ Boat Launches
    - Typical Code Language (outlining goals) = Parking stalls for boat launches shall be provided to accommodate the size and number of vessels (in accordance with industry standard guidelines) that will utilize the proposed facility.
    - Over Prescriptive Code (highly prescriptive current City Code approach) = Parking stalls for boat launches shall be a minimum of 10 ft x 40 ft.
  - ♦ Breakwaters, Jetties, and Groins
    - Typical Code Language (outlining goals) = Breakwaters shall be designed and constructed in a manner that minimizes significant adverse impacts on water circulation and aquatic life. The design shall also minimize impediments to navigation and to visual access to the shoreline.
    - Over Prescriptive Code (highly prescriptive current City Code approach) = Breakwaters may only use floating or open-pile designs.

### **SMP Comments**

#### 16.08.180 – Shoreline Use Table

- General
  - The table should summarize shoreline modifications in addition to shoreline uses. This would include activities such as Boat Launches, Breakwaters, Docks Piers &

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Floats, Dredging & Dredge Material Disposal, Fill, Mooring Buoys, Shoreline Stabilization, Shoreline Habitat Restoration and Jetties/Groins. This will make interpretation of Part V Shoreline Modifications much easier and clear to the reader.

- The City has outlined the majority of shoreline activities and uses as Conditional Uses with very few Permitted uses. Based on a review of similar municipalities' recent SMP updates, this is not consistent and it does not represent the overall intent and goals for the SMP update. Shoreline uses that are consistent with the overarching goals of the shoreline management should be allowed as permitted uses to encourage development of those uses. It should be noted that the goal is not to tightly regulate and restrict shoreline use, but rather, to provide incentives and boundaries which maximize public use and minimize impacts to environment through the use of existing use areas. This is not apparent under the current SMP draft.
- Permitted uses when meeting requirements for that use and area may be subject to shoreline substantial development of shoreline exemption requirements. It is not clear that there are very many permitted uses that will qualify for a shoreline exemption other than simple repair and maintenance. There needs to be additional flexibility in this SMP for typical uses that are preferred and encouraged shoreline uses.
- There is no mention or delineation (in the SMP document or in the supporting exhibits) of existing covered moorage within the Marina, yet the new SMP has code language specifically limiting the construction and reconstruction of these facilities.
- High Intensity
  - Commercial Land Use. The Port has an existing restroom building which may include modifications as part of their master plan (see comments in Environmental Designations section).
- Aquatic
  - Why is a public recreational facility (docks and boat launches) a conditional use and not a permitted use? We have reviewed City of Anacortes, City of Everett and Jefferson County, and all three are permitted uses in those jurisdictions. This pertains to the marina, boat ramp, docks, buoys, etc.
  - Overwater structures are defined as not allowed uses. The Port presently has an overwater structure near the existing restroom building which will likely require modification as part of their master plan. We recommend that this structure be exempted from the proposed new requirements.
  - Boat launches for public facilities are typically permitted uses (except in Natural Environment) whereas private boat launches are typically classified as conditional uses. This should be changed for public boat launches to permitted use.
  - The City should consider allowing two different levels of development in the aquatic environment. A first category of "Urban Aquatic" would apply to those

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areas already developed as marinas and are located adjacent to the upland Hi Intensity downtown core district. A second category of "Aquatic" would apply to other locations with Shoreline Residential uplands and locations without existing marina developments. The Urban Aquatic could allow for more intense use and ease of permitting.

- Boat repair and service is not an allowed use. How will this effect any boat repair work that may be required on vessels moored at the marina.
- Yacht club, marina or boating club support facilities is not an allowed use in the aquatic area. The Port currently has a floating conference building and office building within this area. How will these regulations effect the use and modification of these facilities.

#### 16.08.210 – Lot Coverage by Buildings & Structure

- Item C, D. The Port has an existing restroom building which is within 125 feet. The Port has in its Capital Improvement Plan to make improvements to this facility, which could result in adjustments to the footprint and height of the structure. These potential improvements should not be precluded as a part of this SMP, nor should it require a variance or special permit approval. This is the only piece of upland space available to the Port to support their water dependant operations.

#### 16.08.220 – Height Regulations

- Item A and D. Near Shore Structures (Downtown Core District near shore building and overwater structures).
  - This includes improvements to the restroom building. Due to a lack of available upland space for the size of marina the Port operates, these improvements could include a complete reconstruction of the restroom facility to also include office space for the Port's administration as well as a meeting room for large gatherings.
  - It is critical that the updated SMP not preclude the Port's ability to maintain and upgrade this existing use (restroom). The existing restroom building should be provided some level of mitigated exemption from these requirements.

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

- Section A.3. Adequate parking is very ambiguous and could have a big effect on future improvements to the Port.
- Section C – Number of Slips
  - Section C.1. Why is this so restrictive? Shouldn't it state that proposed development should meet state and federal requirements for in-water work?
  - Section C.3. Requirement that adjacent uplands provide support (parking facilities, etc...) of any new slips. The parking and support facilities should not have to be on adjacent uplands. The Port does not own the adjacent uplands at the marina. This code requirement should be deleted. If a proposal can be supported with adequate parking within a reasonable distance, then why does it also have to own the uplands? Additionally, through DNR

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tideland lease requirements it is difficult to secure a lease of the tidelands (which is required for the marina construction) without owning the adjacent uplands. Therefore, this provision is adding regulations that pertain to another state agency process. This is over-prescriptive and should be removed.

- Section C1.4. Why is a demand analysis required? The need for additional moorage is determined by the Port and not the City. The City is responsible to ensure it complies with SMP and Ecology goals and not to decide if there is sufficient demand. The City is not charged with deciding whether it is justified, that is the responsibility of the applicant. This paragraph should be deleted since it is not in the scope of the SMP and is overly prescriptive.
- Section D. Public Access Requirements. Public access is required as part of any development by a Port District. It may not be physically feasible to include public access elements as a part of replacement of some Port facilities such as a detached (non shore attached) breakwater. This would not fall under the specified exemptions of safety, security or shoreline environment. Other Port facilities could also fall into this special category. It should be revised to state that public access is to be provided where determined to be feasible.
- Section E. Liveaboards. This section should state that liveaboards are restricted to permitted marinas and not allowable outside of those marinas. There should be no limit on the marina other than if they have the infrastructure to support them. If the demand for this water dependant use is present and the marina has the proper infrastructure to support this demand, why would the City be so over-prescriptive on the operations of the marina? This decision be left up to the elected officials (Port Commissioners) charged with overseeing the marina facility rather than the City. It appears the City is assuming control of the Ports area of authority.
  - Section E.3. This is not a requirement or goal of Ecology and should be deleted.
  - Section E.4. Why are there special restrictions on liveaboards on state leased lands within marinas? It is not a requirement or goal of Ecology and not typical of other SMPs; therefore it should be deleted. The location of liveaboard is not a fixed position in the marina and will change based on demand at the time a slip becomes available. Furthermore, aren't the use of leased lands governed by WA DNR rather than the City?
- Section F. Why are covered slips not allowed? More importantly, there is concern regarding the language of this section combined with the regulations of Section 16.08.460 "Non Conforming Use." The existing covered slips should be allowed in perpetuity and allowed to be reconstructed. Provisions should be made to prevent requirements for complete removal in the event of a major rehabilitation of one of these structures. Many municipal jurisdictions have covered moorage as a conditional use.
  - New covered slips are prohibited future use. How does this relate to repair or replacement of existing facilities? Section 16.08.450 states for non-conforming uses and structures removal is required if damage or repair exceeds 50 percent of

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replacement cost. Therefore, can this be interpreted to mean that proposed repairs in excess of 50 percent of replacement cost will require permanent removal of these non-conforming facilities?

- Section G.3 – Float Planes. Liberty Bay is a federally recognized float plane airport and the Port of Poulsbo is the primary water to shore infrastructure for that facility. Therefore use of Liberty Bay for float plane landing is an allowed use since it is mapped (by FAA and WSDOT) as a float plane runway. As an existing use, these requirements are over-prescriptive and should be removed. This should be evaluated as a part of SEPA and not the SMP code. As part of their master plan, the Port intends to provide improved infrastructure for this type of use.
- Section H.2 – Boat Service & Repair. How will the “no boat service or repair” code requirements affect the use of the existing boat grid.
- Section H.3 – Repair and service to be conducted within upland areas will have an effect on current boat repair work that is done in the marina. It appears the code intends to limit this type of activity but does so in a very broad, non specific manner which could have big implications on the marina operations. This would preclude any maintenance and repair work that could occur on the vessel that at other marinas would not require the vessel to be hauled out.
- Section I – Boat Launches.
  - Section I.3. This provision requires a demand analysis and should be deleted. Why does the City need to have justification for a proposed boating facility by another state or local government agency? Additionally, the demand analysis should be left up to the project proponent and questions regarding this topic should be part of the SEPA process and not a requirement of the shoreline permit.
  - Section I.4. Parking space size requirements are listed. These requirements (10 ft x 40 ft) are too prescriptive and should be deleted. What if the boat launch was for very small boats or a hand boat launch; this provision would not make any sense. Another example of too much detail in the code. Suggestion is to state “parking stalls should be provided to meet industry standard guidelines for the range of vessels that will utilize the facility”.
- Section J. Accessory Commercial Uses.
  - Section J.3. No commercial activities on any vessel or overwater structure are allowed unless a special approval is made by the City. This will have an effect on the kayak rental business, boat rental, or commercial fisherman selling seafood from their vessels. Why is a conditional use for this type of business required if the proposed business is water dependant and meets the requirements of the SMP? Why would there need to be yet another approval? This greatly restricts the ability of the Port to conduct business in their Marina. This provision should be re-written or completely removed.

16.08.270 – Buoys

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- Section B.1. Why will these require a conditional use permit for a buoy? This is typically a permitted use. It is equivalent to soft shore stabilization vs. hard shore stabilization. Ecology is attempting to encourage buoys in lieu of floats. A conditional use permit will increase cost and difficulties in obtaining a permit which is the opposite of the goal of the SMP. Typically for public facilities these are a permitted use and if the proposed development meets the minimum code requirements would be exempt from a shoreline substantial development permit. This is especially true of the area within the high density use areas near the downtown areas.

#### 16.08.400 Shoreline Stabilization Measures

- Paragraph A, Requirements column, 2nd row in table, 1st paragraph. Evaluation of shoreline processes are not conducted by Geotechnical Engineers nor properly addressed as a part of a Geotechnical Report. If the City proposes to include such prescriptive language with regards to approval of shoreline stabilization measures, then it needs to correctly define the types of analysis and professionals to conduct the work. Most jurisdictions state that the evaluation of the hard/soft stabilization methods should be determined by a WA State licensed civil engineer with a specialty in coastal engineering or a qualified WA State licensed geologist with a specialty in coastal geology. The use of Geotechnical Engineer should be changed to Civil Engineer or licensed geologist with a definition that it is a licensed professional trained and experienced in wave, tides, and current interaction with shorelines and shore structures. Failure to make this change will result in hiring of improper professionals to evaluate highly prescriptive requirements that will result in lost time and money for both the applicant and the City.
- Paragraph C, 2.a., 2nd sentence: What is critical about the time frame associated with proving that damage could occur within 3 years? How is “conclusive evidence” defined for purposes of determining need for shore protection? In the event the City believes there is not conclusive evidence of the risk of damage within a 3 year period for a proposed development, denies a permit and then an extreme storm event occurs resulting in damage, will the City be responsible for compensation for losses due to the property owners inability to permit stabilization measures to protect their infrastructure? This again seems to be very prescriptive requirements.
- Paragraph C, 2a. The riprap structural stabilization along the Park (adjacent to the Port) is in need of repair and will need work in the near future to protect both the marina and the city bulkhead. This has already been evaluated in the past by both the City and Port for shore stabilization systems and the conclusion was a soft shore system is not feasible in the reach between the Sons of Norway and the overwater structure at Sheila’s Café. We recommend that this reach of shoreline be exempted from this provision based on current and historical information in order to not require additional expense by the Port and City to justify a need that has already been established.
- General. The code is very prescriptive on the requirements. This proposed code is written to *require* soft shore stabilization unless it can be proven with no reasonable doubt that structural stabilization is required. This contrasts with the approach to

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*encourage* the use of soft shore stabilization systems. We believe there needs to be substantial modification to this code language for it to be easily applied and to meet the overall goal of having more soft shore stabilization systems installed.

#### 16.08.410 – Breakwaters, Jetties, and Groins

- General. Why is this so restrictive for these types of structures? What if one of these structures was the best solution to conduct extensive shoreline restoration work. This SMP would eliminate the option for restoration.
- General. As part of the Port's Master Plan, future improvements to the breakwater structure are planned. The type of breakwater will be selected based on a combination of factors including environmental enhancement, wave protection performance, construction costs, maintenance, public access, and potential for revenue generation. This may consist of either a fixed pile barrier and floating breakwater, or a combination of the two. The current SMP code is very prescriptive to the type of breakwater construction that will be allowed. The code should be revised to be less prescriptive on construction methods and materials and more detailed relative to the intended goals.
- Section D – Type of Breakwater Structure. This is too prescriptive and should be removed. It should be stated that floating breakwaters are encouraged and preferred but not restricted to only floating structures.
- First Paragraph, 1st sentence: The sentence needs to be modified as follows....."In a marina or port facility, public access, navigation, habitat restoration, boat ramp or public recreation facility."
- Paragraph A. Need to add also for nearshore restoration.
- Paragraph D. What if these types are not feasible? Why is it restrictive to the type of breakwater?
- Paragraph E. This should be limited to new structures and not to repair or replacement of existing structures.

#### 16.08.420 Dredging and Dredge Material Disposal

- Paragraph B, 2: *Boat Ramps* need to be added to the list.
- Paragraph B, 3, "previously dredged": How is this determined if records are not available?
- Paragraph B, 3: Add "unless necessary to improve navigation"
- Paragraph D, "state pollutant standards": Should reference U.S. Army Corps DMMP. State pollutant could be MTCA which may not apply. Should state "as approved by State agencies at..."
- Paragraph D, last sentence, "deposited": Where is consideration for open water disposal outside of Liberty Bay?
- Paragraph G: Why is a conditional use permit required for maintenance dredging?



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#### 16.08.460 – Nonconforming Uses and Structures

- We have significant concerns regarding the implications of the non-conforming regulations of this section combined with how the Shoreline Use Table of Section 16.08.180 pertains to the Port's facilities. The entire Port of Poulsbo is interpreted as a non-conforming use since the majority of the marina facility is a conditional use (rather than a permitted use) within the aquatic and hi-intensity shoreline. Since it is not a permitted use (which it is under the majority of other similar communities), it gives the appearance the City does not perceive the Port facility to be an important use of the downtown shoreline area. Again, we reiterate that the Shoreline Use Table requires significant revisions for proper compliance with the intent of the SMP update and goals of Ecology.
- It is suggested that critical existing infrastructure such as the Port of Poulsbo be provided additional exceptions with language and detailed explanation such as . . . . "A regulated activity that was lawful before the passage of these regulations, but which is not in conformity with the provisions of these regulations, may be continued subject to the following:"
- Other language that should be included for flexibility includes the following: "In the event that a structure defined as non-conforming relative to provisions of these regulations is destroyed by fire or remodeled, it may be rebuilt in such a way that does not increase the non-conformity, but 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."

#### 16.09.090 - Shoreline substantial development permits.

- Reference to PMC Title 19 for procedures on processing and issuing shoreline substantial development permits. Based on the Shoreline Use Table of section 16.08.180, the majority of the Ports facility will fall under Conditional Uses; very few elements of the marina are Permitted uses. This will require a Type III permit process and evaluation for any Port proposed use, development or activity (as defined in 16.09.100). It is not clear how these new code regulations of section 16.08 and 16.09 will relate to a condition use permit approval that will require a hearings examiner or administrative approval. It appears a Type III requires a hearings examiner and a Type II requires planning director (administrative). Additionally, all condition use permits will require approval by Ecology. This will affect any proposed use, development or activity that the Port would propose within their marina. Overall, this seems to point towards a lot of approvals and process for almost any new proposed work in the Marina. We believe there needs to be substantial changes in all of the above referenced code language to reduce the amount of special regulatory approvals and length process for what would normally be a simple process of permitted uses and administrative approvals at other similar facilities within similar City/County jurisdictions that have current updated SMP's.
- If the Port has an existing use, but it is not documented by the City, and proposes to make upgrades or expansion of that use what would be the process for approval. Would it be treated as an existing use and therefore a condition use permit would not be required for

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the proposed use but would require a conditional use permit for the development? If so, how does the City know that it is an existing use if it were not documented as such during the SMP process? Would it then be classified as a non-conforming use? This type of uncertainty should lead the City toward making sure that the existing uses (and future planned developments) are referenced and some allowance for exceptions to the SMP for those future master planned modifications.

#### 16.09.100 – Shoreline Conditional use permits.

- Section C. This section states that a conditional use permit can be issued if the proposed use is listed as allowable in PMC 16.08. The term “allowable” is not defined anywhere in 16.08. Does this mean both permitted and conditional uses or only permitted uses? This should be better defined and proper terms cross referenced to ensure there is no question about what constitutes an allowable use.
- General. What the costs and fee schedule associated with a Type III permit process?

### **Cumulative Impacts Analysis & No Net Loss Summary**

11.5 SUPPORTING DOCUMENTS AND SMP UPDATE, 11.5.1 Environmental Designations: Section 11.5.1 Environmental Designations for “Aquatic” (page 45 of Cumulative Impact Analysis & No Net Loss Summary Report. All other designations provide a description of the goals for that specific designation except for the Aquatic. For example, each of the other designations has one of the following statements: “The goal of these areas.....” or “The purpose of the Urban .....”. There is not statement under Aquatic. This needs to be clearly defined.

### **Comments on City Draft Restoration Plan**

Policy NE-7.7: Provisions to promote the use of community docks, shared over-water structures, and the use of grating or other materials on docks and marine structures to allow light passage, will be added to the City’s Shoreline Master Program update.

This is not represented in the current SMP draft, and in fact, discourages and prohibits these activities.

Policy NE-7.8: Provisions to discourage “hard armoring” of the Liberty Bay shoreline will be added to the City’s Shoreline Master Program update, and natural vegetation protection and soft bulkheads techniques will be encouraged. It should be recognized, however, that historic and existing bulkheads in the City may need to be maintained, especially those necessary for roadways near the shoreline.

Reference to the Port of Poulsbo and Waterfront Park shoreline bulkhead should be included.

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The following modification should be made to accommodate existing structural shoreline stabilization that exists within the marina and which may be required in the future to prevent additional dredging work.....

Structural shoreline stabilization measures may be allowed to protect existing primary residential structures, and public facilities such as roads, *parks, marinas*, public parking and water and sewer utilities, in strict conformance with the requirements of WAC 173-26-231, if no other feasible alternatives are identified, but only if no net loss of ecological functions will occur.

What is the justification for requiring a Conditional Use Permit for expansion of an open water harbor area which is part of a Port Management Agreement? The reasons listed are already a consideration in the WADNR process for approval of harbor area modifications. The Port feels that this requirement for a conditional use permit should be removed.

Proposed new, expanded or altered state-designated harbor lines or harbor areas shall require a ~~Shoreline Conditional Use Permit~~. A harbor area expansion shall not adversely impact the public right of navigation, and permanent provision for public temporary moorage within the new or expanded harbor area shall be a condition of approval.

### **Shoreline Master Program Exhibits**

Shoreline Master Program Downtown Core Segment Map; Ex. N-3: Shoreline Topography.

- States the shoreline bank type as being “High Bank” at the location of the marina and waterfront park. High bank is typically defined as greater than 20 ft in height.

Shoreline Master Program Ex. Q-1 and Q-3: Existing Public Access.

- There is no mention of public access at the marina facility to piers E & F from gangway.
- There is no mention of public access at the marina facility to pier C kayak rental float.

Shoreline Master Program Ex. V: Bulkheads and Other Armoring Map.

- The shoreline between the boat ramp and west to the overwater structure should be designated as a bulkhead rather than shoreline. A concrete bulkhead exists under the overwater sidewalk in this area.

Shoreline Master Program Ex. U: Overhanging Structures by Type Map.

- There are no overhanging structures shown within the Port boundaries. There is one near the existing restroom facility, and another over near the boat ramp.

Shoreline Master Program Ex. D-1: Existing Land Use Map.

- The shoreline use designations within the Port boundary appear to not be correct. Very little of the shoreline area is designated as Public Marina.

Shoreline Master Program Ex. D-3: Existing Land Use Map.

- Area shown at the Ports restroom building is defined as Park. It should be classified as either Marina or parking and not a park.

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Shoreline Master Program Ex. Z: Environmental Designations.

- Aquatic environmental designation is shown out to the middle of Liberty Bay. It is not clear whether the City has these overwater jurisdictional limits.

Let us know if you have any questions.

Sincerely,

Port of Poulsbo

**TO: PORT OF POULSBO**  
**FROM: Gregory P. Norbut**  
**DATE: September 14, 2011**  
**RE: Memorandum regarding Jurisdiction**

Jurisdiction is the authority, capacity, power or right to act. Generally, jurisdiction is not exclusive and separate public entities can maintain jurisdiction concurrently.

The authority to regulate "Harbor areas" and waterways is shared between the State of Washington and the Federal Government. The State has only limited authority, however, to allow private rights inside the outer harbor line.

Cities and the Department of Natural Resources have been delegated authority to regulate Harbor areas inside of the outer harbor line (or pier head line). Cities have jurisdiction over navigable waters within their corporate limits and exercise their police power to regulate public and private use of those waters. Wash. Const. Art. XI §11; RCW 35.21.160, 79.93.010.

Correspondingly, Cities have the authority to regulate land use pursuant to the Growth Management Act. Des Moines v. Puget Sound Reg'd Counsel, 108 WnApp 836, 843 (1999). Port Districts must, therefore, comply with local comprehensive plans.

The State legislature has not provided Port Districts with jurisdiction or standards to regulate siting of or the location of its facilities. Furthermore, neither Title 53, RCW nor Title 35 preempt the zoning authority of cities in favor of Port Districts.

Therefore, although Port Districts certainly engage in planning with respect to its facilities and properties (see e.g. RCW 53.25.090), its development activities pursuant to any such plan must generally be consistent with the City's zoning and comprehensive plan.

There are exceptions to the general rule that Port Districts must comply with City land use regulations. For example, the Port can perform their own State Environmental Protection Act review for its projects. See, Des Moines v. City of Burien, et al., 98 WnApp 23. Additionally, it should be noted that the City through its comprehensive plan cannot develop regulations which preclude the siting (location) of essential public facilities. RCW 36.70A.200. In other words the City cannot stop the Port from building essential public facilities which would arguably include most of the Ports projects. (See attached addendum regarding essential public facilities).

In conclusion, jurisdiction in Harbor areas is shared. The Port can do its own SEPA review and retains control over the siting of essential public facilities but, otherwise must comply with zoning regulations of the City of Poulsbo.

# Essential Public Facility Siting

## Issue Statement

Essential public facility siting in Washington involves a complex array of interests and social policy. The GMA, which directs cities and counties to establish a process for siting essential public facilities, also prohibits them from precluding the siting of those facilities. The GMA definition of essential public facilities is broad and ambiguous. It includes facilities owned and operated by governmental agencies as well as facilities owned and operated by private entities. The current procedures do not provide guidance for addressing the impacts of essential public facilities on the host communities.

## Background

### Pre-GMA

The traditional power of local government to control land uses within their jurisdiction is in the Washington Constitution, Article XI, Section 11. A county, city, town, or township may "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Under pre-GMA zoning laws, there was little specific legislative guidance regarding the siting of most essential public facilities. Disputes over siting were decided on a case by case basis.

### State Siting Processes

State law does provide for the siting of certain types of large facilities. The Energy Facilities Siting Evaluation Council (EFSEC), originally established in 1970, has authority to site large energy facilities, such as nuclear power plants, oil pipelines, and some electrical transmission facilities.<sup>10</sup> EFSEC preempts all state and local permit processes for those facilities over which it has authority. The siting of hazardous waste management facilities is also regulated by state law.<sup>11</sup> The state has preempted the field for siting some types of hazardous waste management facilities, but does provide a mechanism for a community and a facility proponent to reach an agreement that becomes a part of the state's regulations.

### GMA

The GMA attempted to address essential public facilities siting issues. It defines essential public facilities to include

those facilities that are typically difficult to site, such as airports, state education facilities, and state or regional transportation facilities, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, and group homes.

RCW 36.70A.020.

These facilities, while needed by society, often have real or perceived negative impacts on

surrounding communities that may make them undesirable neighbors, and increase the complexity and difficulty of siting new facilities or expanding existing facilities. The GMA requires all local comprehensive plans to include a process for identifying and siting essential public facilities, and prohibits local comprehensive plans or development regulations from precluding the siting of essential public facilities. It requires the state Office of Financial Management to maintain a list of essential state public facilities. State agencies must comply with local comprehensive plans and development regulations.<sup>12</sup>

In addition to these siting provisions, the GMA requires county-wide planning policies to include policies for siting public capital facilities of a county-wide or state-wide nature.<sup>13</sup>

The Department of Community, Trade and Economic Development (DCTED) adopted procedural criteria to guide local governments in the implementation of GMA, including the siting of essential public facilities, but these procedural criteria are not mandatory nor do they address all of the issues that have arisen over the siting of essential public facilities.

## **Discussion**

While the Growth Management Act established a process for the siting of essential public facilities under the local comprehensive planning process, this bottom-up process does not always work for statewide or regional facilities, especially those sited by state agencies. Specific issues include:

- The process of identifying and siting these facilities is defined as a local responsibility under the Growth Management Act, while these facilities are often owned and provided by state or regional agencies or private companies. The role of these facility owners in identifying needs and in siting is unclear.
- The definition of an essential public facility in the legislation is vague. For example, "state and regional transportation facilities" are listed. Does this include all state-owned transportation facilities? What is a regional transportation facility? Does this include facilities not owned by the state, but which are of state-wide significance?
- The status of the OFM list of essential state public facilities is not clear. The legislation indicates that this is a short-term list. In practice, OFM has used the 10 year capital budget as the list. A longer term list seems to be needed to better integrate into local land use plans, but state agencies vary in their authority to develop long term plans. Is the list meant to be of generic types of facilities - i.e. interstate highways, branch campuses, etc. - or only specific improvement needs - i.e. widening I-405 from point a to point b, a UW building expansion, etc? What process should be used to determine the need for a facility on the list? Should all state capital projects be classified as essential?
- The legislation is silent on any details of the siting process. Should mitigation be part of the siting process for essential public facilities? Should mitigation be a totally local decision?
- At what point do local government siting requirements effectively preclude development or expansion of an essential public facility? Does "siting" include just new facilities, or does it include expansion of existing facilities as well?

- What does the legislation imply for the use of state property? Can local governments make the decision to change the use of state lands?

## Options

A specialized process for siting essential public facilities should be considered. There are a variety of approaches possible. The one given the most attention by the Commission's advisory committee is described below.

The process would provide for different processes depending on whether the facility is a state-wide essential public facility or a local or regional essential public facility. A state-wide facility might include a state owned and operated prison or detention facility, a new college or university, or a hospital. Other unique types of facilities, such as energy facilities currently sited through EFSEC and hazardous waste disposal facilities, might also be considered state-wide facilities. All other essential public facilities would be considered as local or regional facilities. The state-wide process would be managed by a board or council comprised of representatives from state agencies and local governments. The board could be specifically established to address essential public facilities or it could be part of another body.

Local or regional facilities would be sited by local governments using the existing GMA process. DCTED would be given authority to adopt minimum standards for the process, including timeframes for making a decision and procedures to coordinate with adjoining local governments and state agencies. If the local government process does not reach a decision within the timeframes established or if the applicant or other participants in the process believe that conditions imposed on the proposal are intended to preclude siting rather than address legitimate project impacts, a negotiated siting process may be requested.

The negotiation process would include representatives from each local government in which the facility is located or which would be directly impacted by operation of the facility, the applicant, and other parties whose participation is necessary to resolve the issues involved with the proposal. Who these parties should be and how the public would participate in the process are issues that will need to be resolved.

The facility siting committee would seek to negotiate a resolution of the siting issues with assistance from the office of dispute resolution, if available. If an agreement is reached, each local legislative body represented on the committee would have to ratify the agreement for it to take effect. The local legislative body could only accept or reject the agreement. It could not modify the agreement. If approved, the agreement is binding on all parties.

If an agreement cannot be reached, the state oversight body would be presented with the proposals from each party. The oversight body would select the proposal it determines is most consistent with state policy.

An essential component of a new process should be timelines for the local siting review process and for the negotiation, in order to limit permit delays.

As a part of the essential public facility siting process, issues of impact compensation could be included in the negotiation process for local or regional facilities or as part of the siting process for state-wide facilities. Impact compensation could include:

- For state facilities, the allocation of discretionary federal funds to the impacted



community or of an existing revenue source to the impacted community for a specified period of time, e.g. state share of sales tax on construction on the project to the impacted community

- A compensation budget included as part of the project to cover impacts in addition to direct impacts covered by SEPA mitigation and impact fees. This could be modeled on programs such as "one percent for the arts."

*Pros:*

- Proponents point out that the proposal establishes timelines for siting essential public facilities that should result in expedited decisions. They suggest that funds saved by reducing permit delays could be used to benefit communities through impact compensation and mitigation.
- Proponents suggest that thorny issues of siting essential public facilities may be reduced in Washington.
- Proponents suggest that the process could provide a mechanism for determining the need for a proposed essential public facility. They point out that the lack of a need determination is a criticism sometimes made about the process for siting energy facilities under the EFSEC process.

*Cons:*

- Those opposed to this option believe that even though there may have been problems siting some essential public facilities, many jurisdictions have successfully sited facilities. Local control advocates do not believe there is a problem that needs this type of state-wide solution.
- Some local governments believe that the proposed process will force most siting decisions into negotiation and litigation because opponents of projects will take advantage of every opportunity for delay.
- Some argue that the proposal does not address the fact that GMA has an over-broad definition of essential public facilities.

## **Recommendations**

Improved procedures for siting essential public facilities should be established. In particular, the new procedures should address the definition of essential public facilities and methods to provide impact compensation and mitigation to communities impacted by the facilities.

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<sup>10</sup> Chapter 80.50 RCW.

<sup>11</sup> See RCW 70.105.200 through 70.105.260.

<sup>12</sup> RCW 36.70A.103.

<sup>13</sup> RCW 36.70A.210.