*City of Burien*

BURIEN PLANNING COMMISSION MEETING
March 9, 2010
7:00 p.m.
City Council Chambers
MINUTES

**Planning Commission Members Present:**
Joe Fitzgibbon, Janet Shull, Jim Clingan, Rebecca McInteer

**Absent:**
Rachel Pizarro

**Others Present:**
David Johanson, senior planner; Scott Greenberg, planning director; Bob Fritzen, Department of Ecology; Nicole Faghin, Reid Middleton

## Roll Call

Chair Fitzgibbon called the meeting to order at 7:02 p.m. Upon the call of the roll all commissioners were present with the exception of Commissioner Pizarro. Chair Fitzgibbon announced the resignation of Commissioner Grage from the commission.

## Agenda Confirmation

Motion to approve the agenda as printed was made by Commissioner McInteer. Second was by Commissioner Shull and the motion carried unanimously.

## Public Comment

Chair Fitzgibbon took a moment to thank the public for the comments made to date about the Shoreline Master Program. He noted that the commission would continue to receive written comments on the topic but not oral comments. He stressed that there will be additional opportunities for oral comments before the City Council and when the Department of Ecology reviews the final program.

**Mr. Tadas Kisielius**, an attorney with the firm GordonDerr, LLP, 2025 1st Avenue, Seattle, spoke representing the Burien Marine Homeowners Association, a group of marine shoreline property owners. He asked the commission to consider taking additional time to receive public comment on the substantive issues. The concern is that there has been a lack of adequate notice to some of the property owners who will be most affected by the proposed regulations. Many were given no direct notice of the hearings, and some who attended the open houses and specifically requested to be notified also received no notice and as such have not been permitted opportunity to provide substantive comment. The commission should take all the time it needs to make sure

everything is done right. The organization has prepared a petition and gathered more than 400 signatures of people who are supportive of giving more time to the process and allowing additional public comments to be made.

**Approval of Minutes**

A. February 23, 2010

Commissioner Shull called attention to the first full paragraph on page 8 and the last paragraph on page 9 and noted that both statements for which she was given credit in the minutes were in fact made by Commissioner Grage.

Motion to approve the minutes as amended was made by Commissioner McInteer. Second was by Commissioner Shull and the motion carried unanimously.

**Old Business**

A. Discussion and Possible Recommendation: Shoreline Master Program Update

1. Follow-up on Planning Commission Requests for Information

Senior planner David Johanson informed the commissioners that the table has been updated and clarified the changes. He noted first that a "modified" column had been added on the far left to indicate if changes had been to the row. He pointed out that item 15 on page 6 should have received a mark in the modified column. A column on the far right titled "PC Direction" also was added to capture the consensus of the commission for each item.

Mr. Johanson clarified that the letters "NR" included in the third and four rows were intended to indicate that no response was needed at the current time.

Mr. Johanson called attention to item 4 and said the issue related to matching the terms in the table to the terms used in the zoning code. He noted that he had added a definition of "retail" and "office." According to the direction of the commission, both uses would be prohibited in the shoreline jurisdiction. He said the outstanding issues in item 4 were the Environmental Learning Center, the Marine Tech Lab, and the Ruth Dykeman Center; he indicated that he had included the definition from the zoning code that would be used. The commission previously discussed whether the uses should be allowed to obtain a conditional use or shoreline substantial development permit. Uses not specifically called out in the table automatically will default to the conditional use process.

Commissioner Shull asked staff what their recommendation would be relative to the uses. Mr. Johanson said each of the uses already exists. A shoreline conditional use permit entails both a local process and Department of Ecology approval. The City has a greater level of control over uses located in city parks. He suggested that the more appropriate

3-42

permit for the Environmental Learning Center and the Marine Tech Lab uses would be shoreline substantial development. The Ruth Dykeman Center property is subject to its own very specific zoning and as such would be more appropriate for a conditional use permit, especially if the site is reused as a community residential facility.

Commissioner Shull said no one was arguing that the existing uses should not be there. The real issue is the potential for other uses that might follow in the future that might fit in the categories.

Commissioner McInteer indicated her support for the conditional use permit approach for the Ruth Dykeman property. She also agreed with staff that shoreline substantial development is the appropriate process for the Environmental Learning Center and Marine Tech Lab uses.

Chair Fitzgibbon and Commissioner Clingan concurred.

With regard to issue 7 in the table, Mr. Johanson said staff was recommending replacing the term "cell towers" with "personal wireless service facilities," which is the term used in the zoning code. He said additional information had been added to the table with regard to what would be allowed in the SPA-2 and RS zones relative to personal wireless service facilities.

Mr. Johanson noted that item 11 had to do with impact mitigation and reminded the commissioners that during their previous discussion it was observed that the suggested language could be either policy or regulation. He said the recommendation of staff was to recognize them as both and add the policy language and insert it into the regulations. As drafted, the language focuses first on degraded areas and then on areas of restoration in a mitigation plan.

There was consensus in favor of the proposal.

Mr. Johanson clarified that all of the text amendments would be folded into a Planning Commission draft for final discussion and approval.

Planning director Scott Greenberg called attention next to item 15 and the use of the term "critical fresh water habitat." He explained that the term is not specifically defined in either the Shoreline Management Act or the guidelines. However, there is a checklist that the Department of Ecology uses in reviewing amendments to critical area portions of already adopted Shoreline Master Programs. The checklist characterizes critical fresh water habitat as applying to streams, wetlands, lakes, channel migration zones, and floodplains designated as critical areas by the local government. The WAC simply uses the term "designated as such" and does not provide the additional guidelines. Following the checklist, Lake Burien and its wetlands would be considered critical fresh water habitat because both are designated as wetlands under the city's critical areas ordinance and the Shoreline Master Program. The wetlands regulations being proposed as a part of the Shoreline Master Program actually provide the protections the Department of

Ecology would be looking for by using the checklist. Accordingly, staff was not recommending any further action.

Commissioner Shull said it was her understanding that the Shoreline Master Program ultimately approved by the City Council will be reviewed by the Department of Ecology against the checklist. Bob Fritzen, shoreline planner with the Department of Ecology, explained that under the Growth Management Act critical areas are pretty specifically defined. In drafting the guidelines, consideration was given to areas in need of protection that do not technically fall under the critical area definition as defined by the Growth Management Act. One example would be the near shore area up to the 20-meter contour line of all shorelines of Puget Sound that NOAA Fisheries has designated as critical habitat for salmonids. The guidelines give local governments the authority to include such areas.

Commissioner Shull said the recommendation of staff for no additional change was reasonable. Chair Fitzgibbon and the other commissioners concurred.

Mr. Johanson said the revision to item 45 is intended to clarify where non water-dependent accessory structures can be located. He explained that the language makes it clear that accessory structures should not be located in the required shoreline setbacks where feasible. The language would not affect existing structures.

Commissioner Shull zeroed in on the phrase "where feasible" and asked if someone could propose a new construction accessory structure within a buffer area based on a determination of feasibility. Mr. Johanson said the phrase is intended to allow for some flexibility. The primary objective is to ensure that the buffer areas are maintained, but there could be a scenario in which an accessory structure could be appropriate in a buffer area. In all cases, however, the standard of no net loss will apply.

Chair Fitzgibbon asked if a property owner would need to seek a variance or go through some specific process in order to be allowed to construct an accessory structure in a buffer area. Mr. Johanson said the task of staff will be to review all such applications with an eye on keeping the buffers sacrosanct. If no feasible alternative can be demonstrated, staff could approve the request. No special process would be required.

Commissioner McInteer voiced concern over including the "where feasible" phrase. She said it could become a loophole through which a buffer area could be impacted by new construction. She proposed removing "where feasible" from the proposed language. Mr. Johanson pointed out that if "where feasible" is not included, any proposal to construct an accessory structure in a setback would require a variance.

Commissioner Shull said she could envision a situation in which it would be a compelling reason to allow an accessory structure in a buffer. She added that the variance process could be very onerous, particularly for a single-family homeowner. She asked if some other process could be implemented. Mr. Fritzen said Whatcom County

3-44

created what they termed an administrative variance process that is less costly and entails far less process but which still requires the criteria and the need must be met.

Mr. Johanson said staff would do a little more research and provide additional options at the next commission meeting.

Commissioner Clingan allowed that because the section applies only to new construction, a little flexibility might be appropriate. He said he would welcome additional information from staff at the next meeting.

With regard to item 47, Mr. Johanson said the suggested revision is intended to provide clarification as to where the common-line riparian buffer and building setback standards apply and what they apply to, which are single-family primary residential structures. The commissioners agreed with the proposed revision.

Mr. Johanson said item 49 related to residential development would be dealt with later under a separate discussion topic.

Calling attention to item 52 and the issue of nonconforming structures, Mr. Johanson noted that the commissioners had asked for additional information regarding the percentage threshold. He said staff reviewed all of the Shoreline Master Programs shown on the Department of Ecology website as having been adopted and included in the packet materials a table showing how other jurisdictions have used a percentage threshold. The draft used the 50 percent threshold, which is in line with the existing nonconforming section of the zoning code. The prevailing percentage threshold in the adopted plans from other jurisdictions is closer to 75 percent. Additionally, one jurisdiction bases the percentage on assessed value while all of the others use replacement cost.

Commissioner Shull asked if staff had found anything in doing the research that would warrant using a threshold other than 50 percent. Mr. Johanson said the rationale for using that threshold from the start has been to assure consistency with other city codes, and that argument is not swayed by the thresholds used by other jurisdictions.

Commissioner Clingan recognized the need to be consistent but suggested that the more appropriate action might be to change the other city codes to reflect the 75 percent threshold. He voiced support for using the 75 percent threshold in the Shoreline Master Program and have it be based on replacement cost rather than assessed valuation.

Chair Fitzgibbon suggested that if the threshold were predicated on replacement cost, the restrictions (a), (b), (c), (d) and (e) would likely not apply to as many structures. Mr. Johanson said that is possible. Key to the section is the fact that the language allows structures damaged or destroyed to be rebuilt. The provisions of (a), (b), (c), (d) and (e) only kick in when the threshold is crossed, and all of them are focused on meeting the vegetation conservation standards for the area between the structure and the shoreline. If the threshold were increased, there is less likelihood that the additional vegetation provisions would be applied.

Chair Fitzgibbon said none of the provisions (a), (b), (c), (d) and (e) are all that onerous. He said it would be difficult to envision a situation in which (a), (c) or (d) would disadvantageously impact the ability of the property owner to reconstruct a damaged structure. Paragraph (e) could be onerous, but 18 months is a reasonable amount of time for a reconstruction project to be under way. It is reasonable for the City to ask property owners to comply with the vegetation conservation standards. He said his inclination was the keep the threshold at 50 percent, adding that he could be persuaded to change from assessed valuation to replacement cost.

Commissioner McInteer pointed out that assessed value is a fixed mark that gives certainty to the homeowner. The replacement cost figure could be the foundation for what amounts to a guessing game. Shoreline property owners have testified before the commission about their interests in serving as stewards of the shoreline, and the vegetation conservation standards offer ecological function and value. Increasing the threshold will reduce compliance with those standards. With regard to paragraph (e), Commissioner McInteer said she was somewhat bothered by the notion of having to have an application filed within 18 months; it may be very difficult for a property owner to get all of their ducks in a row in that short amount of time. They should be given enough time to act.

Commissioner Shull said she would agree if paragraph (e) read that the reconstruction project had to be completed within 18 months. However, the requirement is that an application must be submitted within 18 months, which seems very reasonable. She voiced her support for the proposed revision to issue 52 in its entirety as it appeared on page 25 of the packet, including the reference to assessed value.

Commissioner Clingan said he would support having staff go back and review the Shoreline Master Programs of the six or so cities that have chosen to go with a 75 percent threshold to see if there is a variation between their regular zoning code and their Shoreline Master Program. Chair Fitzgibbon said he would support having staff gather that information. Commissioner Shull said she also was amenable to taking that approach.

Chair Fitzgibbon observed that the Whatcom County Shoreline Master Program states that reconstruction must begin within 18 months, which is somewhat different from the proposed language for Burien that only calls for an application for reconstruction to be filed within 18 months. He suggested the Burien language is more lenient and flexible.

Mr. Johanson called attention to item 52B and said the proposed revision is intended to clarify that the context of the section is alteration or reconstruction of nonconforming structures. The section allows for expansions up to certain thresholds within the buffer or setback.

The commissioners were in agreement with the proposed change.

3-46

2. Public Access

Mr. Fritzen explained that the Shoreline Management Act dictates all master programs must include a public access element making provision for public access to publicly owned areas, both physical and visual, within the qualifiers of health, safety and protecting the environment. Every shoreline development project done by a public entity must include public access measures, unless it would be unreasonable to do so for reasons of safety, security or impact to the shoreline environment. Development on privately owned lands must provide public access where appropriate within the limitations set out by the guidelines.

Mr. Johanson referred to item 20 and the language from the guidelines regarding the issue of providing public access while still achieving no net loss. He noted that the guidelines recognize that the policy goals of the Shoreline Management Act harbor the potential for conflict. The guidelines also state that the act's policy of achieving both shoreline utilization and protection is reflected in the provision that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical..." The Burien document includes several specific policies that talk about how to achieve the desired outcomes.

Mr. Johanson reminded the commissioners how the proposed policy language was developed. He said an open house was conducted in May 2008 in which the public was encouraged to highlight the issues. Those comments were taken before the Shoreline Advisory Committee; the committee reviewed each issue and determined what the appropriate policy should be. The group used policy language from other jurisdictions, policy language from the City's adopted Comprehensive Plan, and created some of its own policy language. In the majority of cases, the committee concluded that the City's existing access-related policies should be included; in only one instance did the committee determine the existing policy language should be modified.

Mr. Greenberg called attention to items 21A through 21L and noted that many of the comments propose a very simple change to the language of the advisory committee to add the notion that all of the public access policies should apply only to public lands, not private lands. He suggested the commission should come to agreement on that issue first.

Commissioner Clingan asked if the City has the authority to require public access on private land. Mr. Greenberg allowed that it does under some of the criteria in the master program, the Shoreline Management Act, and the guidelines. He informed the commission that for 30 years or so the City of Kirkland has had policy and regulation that requires a public access trail from Lake Washington Boulevard through private properties to Lake Washington, which requires a trail easement along Lake Washington with access to the general public as part of any multifamily development. Kirkland's policies and regulations require the same public access but only under certain circumstances. The proposed policy language for Burien would require private subdivisions of five lots or

more to provide public access to the shoreline under the same authority the City uses to require sidewalks, sewer lines and water lines.

Chair Fitzgibbon said the only instance in which the City should want to require public access on private property would be a new subdivision on the waterfront of five or more homes.

Mr. Fritzen said if city code were to allow the development of a restaurant on the shoreline, the non-water-dependent use would need to provide public access. If there is no opportunity for commercial or industrial development along the marine shoreline, there may not be any opportunity to require public access on private lands. The guidelines do call for local jurisdictions to provide standards for the dedication and improvement of public access, and that may apply to subdivisions.

Commissioner Shull allowed that there is no commercial or industrial zoning along any of Burien's shorelines, and suggested it would be highly unusual for anyone to come forward with a rezone request. She said the only instance in which she could potentially envision requiring public access on private property would be a subdivision of five or more lots.

Mr. Greenberg said the Ruth Dykeman site could potentially be redeveloped for a non-single-family use, though currently there would be a zoning issue involved in trying to accomplish that. Assuming the current use was to cease and the new property owner stepped forward with a proposed rezone, there is the potential that the City might want to require public access. Absent having a provision in the master program, it would be difficult if not impossible for the City to require public access.

Chair Fitzgibbon asked if there are currently lots on Lake Burien that are large enough to allow for a subdivision into five or more lots. Mr. Johanson said the anecdotal evidence is that there are some lots on the lake that are large enough based solely on their total area. The minimum lot size under the zoning in place around the lake is 7,200 square feet, so a property would have to have a minimum of 36,000 square feet. Access easements are excluded from the total, so generally it would take even more land. However, because Lake Burien is considered a critical area, clustering is allowed, and that could reduce the amount of access needed.

Mr. Greenberg clarified that staff was recommending changing the draft language of item 31A to refer to subdivisions of more than four parcels.

There was consensus in favor of making the change as recommended by staff.

Commissioner Shull expressed concern over limiting the ability of the City to require public access only on public lands. She allowed that while the opportunities to require public access on private lands are very limited, the fact is that the Shoreline Master Program, once approved, will live for a very long time. There could conceivably be a circumstance in the future in which the City may want to require public access in

3-48

association with a privately proposed project. She said she was clear on the fact that nothing in the proposed language would allow the City to require public access on any existing developed privately owned property.

Commissioner Clingan argued that there would be no harm in including the phrase "on public lands" in the various policies referenced by item 21 given the limiting factor of subdivisions having more than four parcels.

Commissioner Shull called attention to 21C and the proposed language "Public access to shoreline areas on public lands within the City must protect private property rights, public safety, and individual privacy." She suggested the addition of "on public lands" could be interpreted as meaning the City will not seek to protect shoreline access on private lands. Mr. Greenberg said if the decision of the commission is not to require public access on private lands, the proposed language would not matter.

Chair Fitzgibbon voiced concern over use of the word "shall" in item 31A. He suggested that if the language were to be adopted, the City Council would need to take the additional step of clarifying which shorelines should be in play. All new developments that meet the criteria would be required to provide public access; the City would not have the leeway of being able to determine that public access may not in fact be appropriate in any specific instance, such as where a subdivision of more than four lots has only one lot on the water and the rest located in the upland area away from the water. Mr. Greenberg said regulation language is always more directive. Policy language more often uses words such as "should" or "may." He allowed that as written the City would require public access in all instances where the criteria were met, but he stressed that public access can be either physical or visual, and that where it is physical certain design standards apply.

Commissioner McInteer commented that Burien is not a city that excludes people; it is a city that welcomes people and wants people to be able to enjoy the outdoors. There are limitations that may come by way of public safety or private property rights as well as environmental standards. She said she would not support focusing the City's right to require public access only on public lands; that would be too limiting.

Chair Fitzgibbon concurred. He said there are provisions in the document that ensure the protection of private property rights and ecological functions. He noted, however, that including the phrase "on public lands" could be appropriately included in some of the policies, especially in PA 4. Adding the phrase liberally would limit the ability of the City to be flexible.

Commissioner Shull said she would resist making changes to any language taken from the existing Comprehensive Plan, absent a compelling reason to do so.

Mr. Greenberg reviewed the proposed changes to item 21A. He said the notion of using the word "promote" in place of "increase" would make the language inconsistent with the

Shoreline Management Act. There was consensus to leave the language of 21A as proposed by the advisory committee.

Mr. Greenberg said the recommendation of staff for 21B was to keep the original language and not make any changes. The proposed change would change the language from applying to existing developments to applying to new developments, and would apply only to existing public access and not potential future public access.

Chair Fitzgibbon asked how the proposed language would impact property owners on Lake Burien where there is currently no public access. Mr. Greenberg said the language applies to access to the water, and where there is no existing public access, there is nothing to impair or detract from. By using the term existing public access, one could argue that the starting point would be the date of adoption of the master program. If there is an approved legal public access in the future, no one should be allowed to impair or detract from access to the water, either physical or visual. Chair Fitzgibbon said he could see the intent but suggested there might be another way to word it to make it easier to interpret.

Commissioner Shull proposed replacing "...not impair or detract from the public's existing public access to the water" with "...not impair or detract from public access to the water." Chair Fitzgibbon said he could support that. Commissioner McInteer concurred.

Commissioner Clingan asked if an issue would be created should a property owner plant a tree that blocks the view of the water from the roadway under the language as proposed by Commissioner Shull. Mr. Greenberg polices PA 11 and PA 12 are applicable to that situation. Depending on the situation, the planting of a tree that blocks a view corridor could in fact result in an issue.

Nicole Faghin with Reid Middleton suggested that the issue would be whether or not the tree was planted on private property or in a designated public access or view corridor.

Staff agreed to give the issue additional consideration and come back with a recommendation.

Mr. Greenberg said the intent of item 21C is to address the balancing act the Shoreline Management Act talks about. He said the proposed change was to revise the language from "Public access to the city's shorelines should be designed to provide for public safety and to minimize potential impacts to private property and individual privacy" to "Public access to shoreline areas on public lands within the city's shorelines should be designed to provide for public safety and to minimize potential impacts to private property and individual privacy."

Chair Fitzgibbon suggested the proposed language change would actually weaken the protections of private property rights, public safety and individual privacy. He said he

3-50

would not support the language change, but would support using the word "should" rather than "shall."

The consensus opinion was in favor of leaving 21C unchanged.

With regard to item 21D, there was consensus to not include "on public lands" and to include "with no net loss of shoreline ecological function."

Mr. Johanson said item 21E was heavily discussed by the advisory committee. He said the idea is that public access should be spread out to make it available to all neighborhoods. If the City should decide to pursue new public access, it should look first at reaches that do not have existing access. He pointed out that the proposed policy language was originally taken from the Comprehensive Plan but was modified by the advisory committee.

Chair Fitzgibbon said the policy is not one that needs to stay the way it is. He said there has been a lot of concern voiced that has been reasonable. Responding to the concerns will not lessen the overall thrust of the plan toward improving the public's access to the water. By including the phrase "...highest priority..." may create an impression that is not accurate relative to the intent of the plan.

Commissioner Shull concurred. She stressed that the potential for any new public access is highly limited given that the shoreline is mostly built out. Ideally, every stretch should have some sort of public access. Future possibilities for public access will be rare and they could be adjacent to existing public access points. She said she would be open to eliminating or modifying the "highest priority" language.

Commissioner Clingan suggested that access should not be valued more than the quality of the lake. He said the "highest priority" language is not particularly useful, nor the following sentence with the three sub-items.

Commissioner McInteer said she was okay with the first sentence of 21E, including the notion of dispersing public access throughout the shoreline areas. The "highest priority" language could end up working against the notion of adding new public access points. She said she was in favor of the mechanisms to obtain public access.

Commissioner Shull agreed that the mechanisms to obtain access should be retained in the policy. She noted that there have been concerns raised by the public about the City's use of eminent domain to bring about new public access, and stressed that that approach is not one of the mechanisms listed in the proposed policy language.

Mr. Greenberg said the existing Comprehensive Plan policy reads "The City should seek opportunities to develop new waterfront access points or other shoreline access through tax-title properties, donations of land and waterfront areas, and acquisition using grants and bonds." He suggested that including the mechanisms to obtain would not be absolutely necessary.

Commissioner Shull noted her support for retaining the first sentence, including the notion of dispersing public access throughout the shoreline, and said she could support eliminating the mechanisms to obtain.

Commissioner Clingan said he could support eliminating the entire first sentence. Commissioner McInteer said that would be her recommendation as well.

Chair Fitzgibbon observed that the commission would not be able to complete its discussion of the proposed policy language without calling an additional work session ahead of the next regularly scheduled meeting.

It was agreed to schedule a special commission meeting for March 16. The commission also discussed scheduling a review of the final draft before it is forwarded to the City Council.

**New Business** -- None

**Director's Report**

Chair Fitzgibbon took a moment to express the gratitude of the commission for the service of Commissioner Grage. He said she will be missed.

**Adjournment**

Motion to adjourn was made by Commissioner Shull.

Chair Fitzgibbon adjourned the meeting at 9:24 p.m.

Approved: March 23, 2010

Joe Fitzgibbon, Chair
Planning Commission

3-52