

City of Burien, Washington

Shoreline Advisory Committee Meeting Agenda

Wednesday, July 9, 2008, 4:00 – 6:00 pm

Burien City Hall, 15811 Ambaum Blvd. SW, Suite C
(206) 241-4647

MEETING # 3

- (1) SIGN IN/ROLL CALL - (5 min.)
- (2) CONFIRM AGENDA - (5 min.)
- (3) REVIEW AND APPROVE MEETING #2 SUMMARY - (10 min.)
- (4) SHORELINE GOALS AND POLICIES, Continued DISCUSSION - (1 hr, 30 min.)
 1. Working Session
- (5) NEXT MEETING - (5 min.)

TENTATIVE DATE: Wednesday, September 10, 2008, 4:00 - 6:00 pm:
Shoreline Advisory Committee Meeting # 3
Burien City Hall
15811 Ambaum Blvd. SW, Suite C

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City of Burien, Washington

Shoreline Advisory Committee

Meeting #2 Summary

June 11, 2008

4:00pm

(1) ATTENDANCE

SAC Members present	Technical Staff Present	Interested Parties Present
Brian Bennett Bruce Berglund Jim Branson Cyrilla Cook Joe Fitzgobbon Bob Fritzen Victoria Hall David Johanson Rebecca McInteer Emelie McNett Lee Moyer Kim Otto Annie Phillips Scott Thomas Don Warren Joe Weiss George Yocum	Mark Daniel Liz Ockwell	

Brian Bennett opened the meeting at 4:05pm.

(2) CONFIRM AGENDA

The agenda was confirmed.

(3) REVIEW AND APPROVE MEETING #1 SUMMARY

The committee was asked if there were any changes to the meeting summary as presented. Emelie McNett noted that her name was missing from the member's present section. The meeting summary was accepted with that correction.

(4) OPEN HOUSE DEBRIEF

1. Each member was provided an opportunity to comment on the Open House meeting held on May 14th. The following comments were provided.

- It is hard to accurately summarize brief statements provided in discussion groups
- The Shoreline Advisory Committee will fill in the discussion gaps that were not covered at the open house
- Disappointed that the tone of the discussion groups was self-serving

- Need for more inland resident representation— meeting attendance was out of balance
- The committee should listen to all comments
- There is an appreciation of comments from those who live east of 1st Avenue
- Public trust doctrine and its implications on walking on private beach property, currently unresolved by Washington courts
- It is good that people are engaged and issues are being raised now

2. SAC Comments:

- A reminder that committee group discussions on shoreline topics should take place at our meetings, which are open to the public. Comments are encouraged and all e-mail comments should be submitted to David Johanson according to committee policy – he will then distribute them to the group.

(5) SHORELINE GOALS AND POLICIES, DISCUSSION

1. 2.13 Shoreline Element overview

- Introduction section to provide background information and technical terms used through out the element

2. 2.13.2 Shoreline Master Program Goals and Policies. Applicable to All Elements

- RE: PS 1.1, "Private property issues to be protected through this plan"
 - Discussion on the pros and cons to both include and exclude a statement regarding private vs. public use issues in the SMP
 - *Potential policy:* Private use and enjoyment of tidelands and adjacent lands should be balanced with the greater public benefit that shorelines provide
- RE: PS 3.1, "Concern that regulation will be applied "generally" not on a site specific basis"
 - Policy language should be included
 - Could be combined with P.S. 2.1, "We don't want DOE to regulate every aspect of our life"
 - *Potential policy:* When regulations are developed and applied they should consider site specific characteristics.
- RE: PS 3.3, "Proactive management of activities within the 200"
 - *Potential Policy:* The city should be proactive in managing activities within the shoreline jurisdiction
- *Consensus* that there should be a section that includes goals and policies that apply to all elements

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3. 2.13.3 Shoreline Master Program Coordination Element

- RE: (LB 1) What is the Shore club
 - Non-profit group on Lake Burien
 - Lake residents attempt to police themselves and monitor lake health
- Should have policy language recognizing existence of other plans and coordination opportunities where applicable
- *Consensus* that a separate coordination element may not be needed but include in section 2.13.2 (Goals and Policies that apply to all elements).

4. 2.13.4 Shoreline Master Program Economic Development Element

- Waterfront is an community amenity and asset that could attract businesses and residents to Burien
- Development near shoreline?
 - Small scale, water related commercial development may be allowed but should be harmonious with residential character
 - Carefully craft vision for future commercial development
 - *Consensus*: on Other Goal 1, "Insure healthy, orderly economic growth by allowing those economic activities which will be an asset to the local economy and which result in the least possible adverse effect on the quality of the shoreline and surrounding environment (and residential character)"
- Discussion on definition of redevelopment
 - How should nonconforming situations be addressed
 - *Consensus*: There should be incentives available to encourage removal and/or reductions of non-conformances
- *Consensus* supporting Other Policy 1, "New development or redevelopment should avoid or mitigate additional loss of shoreline ecological functions" and Other Policy 2, "Development on shorelines should result in no net loss of ecological function. Redevelopment should be encouraged to improve ecological functions and restore riparian buffers."
 - City should provide education and technical assistance on low-impact development techniques

5. 2.13.5 Shoreline Master Program Public Access Element

- *Consensus*: Enforcement related goals and policies should be moved to the section applying to all elements
- Street ends:
 - Should have parking available at street ends
 - There are impacts to beach and adjacent owners by disrespectful users, how do we enforce?

- Access points should be made ADA accessible
- Parking and street end development should be compatible with surrounding community
- Need for proper and maintained signage (parking, access identification)
- Other modes of transportation should be accommodated at street ends
- Street ends abut beach at:
 - a. 163rd -street sign is missing and hard to find
 - b. 170th - often used by windsurfers, kite-boarders
 - c. 172nd - often used by divers. No delineated parking area.
- Existing Burien policies 1, 2 and 3 cover many of the issues and opportunities raised regarding street ends
- RE: Other Polices 16, preference for this language "Promote a coordinated system of connected pathways, sidewalks, passageways between buildings, beach walks, and shoreline access points that increase the amount and diversity of opportunities for walking and chances for personal discoveries," Burien has a bike/pedestrian plan.

(6) NEXT MEETING

1. There was *consensus* that there should be another meeting to continue the discussion on the goals and policies. The end of July was preferred. David Johanson will look at the calendar to find a date and coordinate possible dates with the committee.

The meeting concluded at 6pm.

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**CITY OF BURIEN, WASHINGTON
MEMORANDUM**

DATE: July 1, 2008
TO: Burien Shoreline Advisory Committee
FROM: David Johanson, AICP, Senior Planner 
SUBJECT: Continued Burien Shoreline Master Program Policy Discussion

The purpose of this memo is to provide background information and general guidance to assist in the discussion of shoreline master program goals and policies. A majority of this memo's content was prepared from the original memo dated June 4, 2008.

BACKGROUND

The Shoreline Advisory Committee held a discussion on March 12, 2008, to explore and list issues and opportunities for Burien's shorelines. The meeting summary capturing the discussion can be found as Attachment 1. On May 14, 2008, the City hosted an open house at which all participants were asked to list their issues and opportunities. These conversations serve as the starting point and basis for beginning the policy discussion.

At your June 11, 2008 meeting the committee started discussing the issues and opportunity statements from both the Shoreline Advisory Committee discussion and community open house. These discussions are beginning to form policy recommendations from which staff and our consultants will formulate specific policy language.

PURPOSE

Continue the shoreline issues and opportunities discussion to form the basis for goals and policies. These goals and policies then will be used to help guide the City with other shoreline-related tasks, such as drafting new regulations, developing restoration plans, supporting capital improvement plans and generally providing guidance for shoreline related issues.

ACTION/DISCUSSION

We have prepared the beginnings of the shoreline master program that contain the goal and policy portions. This working document (see Attachment 1) was organized to replicate how it may be formatted in our shoreline master program and is intended to add structure to our discussion. The attached document is broken into required elements of a shoreline master program. Under each element you will find a number of subheadings and they are summarized below along with a brief description:

Issues and Opportunities - A list of the issues and opportunities as identified by either the Shoreline Advisory Committee or at the open house. Please note that some elements do not have identified issues or opportunities.

DOE Requirements – A list of known requirements that must be addressed in our shoreline master program. This list is being provided to inform the committee of our mandatory obligations to receive shoreline master program (SMP) approval from DOE.

Existing Burien Goals – A list of existing shoreline applicable goals in Burien planning documents. Please note that existing goals in Burien's Comprehensive Plan address many of the issues and opportunities identified to date.

Other Goals - A list of goals from other sources. This list is being provided to inform the committee of other goals that may be applicable to our update process or helpful in determining what goals are appropriate for Burien.

Existing Burien Policies - A list of existing shoreline applicable policies in Burien planning documents. Like the goals section above, it is worth noting that existing policies in the Burien Comprehensive Plan address many of the issues and opportunities identified to date.

Other Policies - A list of policies from other sources. This list is being provided to inform the committee of what other jurisdictions have adopted, and is intended to assist the committee in determining appropriate policies for Burien.

Key questions that we have for the committee are as follows:

- 1) **Do the existing goals and policies adequately address the shoreline vision and identified issues and/or opportunities?**
- 2) **Do any existing goals and policies need to be amended to accurately capture the shoreline vision, issues and/or opportunities?**
- 3) **Are additional goals and policies needed to address the identified issues and opportunities? If so what issues and opportunities need to be converted to goals and/or policy statements?**
- 4) **Do any of the "other" goal and policy statements capture your vision for Burien's shoreline or address the identified issues and opportunities?**
- 5) **There are three "optional" elements identified on page 2 of the working document, are these worth exploring or adding to the working document?**
[Staff and our consultants recommend including elements 2.13.2 (*SMP Goals and Policies Applicable to all Elements*) and 2.13.3 (*SMP Goals Coordination Element*)]

Our objective is to complete discussions based on each of the elements and capture consensus of the committee. Staff will then craft a preliminary set of goals and policies. If you have any comments please send an e-mail to me at DavidJ@burienwa.gov.

Attachments

1. Burien Shoreline Element, working policy document (document includes comments from both the SAC and the community open house)

2.13 SHORELINE ELEMENT

Terminology:

Goals:

Address longer-term, quality objectives for a particular issue or subject (i.e. Recreation facilities provided by the city are to serve the recreation needs of all citizens of the neighborhood.)

Policies:

Are shorter-term objectives that are measurable and have a schedule for accomplishment. (i.e. The amount of recreational space provided by the city for the neighborhood is to meet the national parks standards as measured in area per neighborhood citizens by the year 2006.)
[Salmon Creek Neighborhood Plan]

DOE Requirements:

SMP Content:

Any **goals** adopted as part of the SMP are consistent with the SMA. (Note: Goal statements are not required.)

Policies (A) are consistent with guidelines and policies of the SMA; (B) address elements of RCW 90.58.100; and (C) include policies for environment designations, accompanied by a map or physical description of designation boundaries in sufficient detail to compare with comprehensive plan land use designations. (D) are consistent with constitutional and other legal limitations on regulation of private property. WAC 173-26-191(2)(a)(i)

SMP implements **preferred use** policies of the SMA. WAC 173-26-201(2)(d)

Uncategorized Issues and Opportunities:

(PS 1.1) How was 200' jurisdiction determined?

2.13.1 - Other Shoreline Master Program Element(Optional)

"Any other element deemed appropriate or necessary to effectuate the policy of this chapter" [Ecology SMP Guidelines]

2.13.2 - Shoreline Master Program Goals and Policies Applicable to All Elements (Optional and Recommended)

Issues and Opportunities:

(PS 1.1) Private property issues to be protected through this plan

(PS 2.1) We don't want DOE to regulate every aspect of our life.

(PS 3.1) Concern that regulation will be applied "generally" not on a site specific basis

(PS 3.2) Taking of private property restricting potential development

(PS 3.3) Proactive management of activities within the 200'

EXISTING BURIEN GOALS: None

Other Goals: None

EXISTING BURIEN POLICIES: None

Other Policies: None

2.13.3 - Shoreline Master Program Coordination Element (Optional and Recommended)

Issues and Opportunities:

(LB 1) Shore club have self regulation within boundaries of law

(PS 1.1) Conflicting ecological agencies – Burien needs to advocate for Citizen between DFW and Corps

(PS 1.2) City negotiations with DOE need to convey/capture citizens concerns (stand up to DOE)

EXISTING BURIEN GOALS: None

Other Goals: None

1. Coordination of shoreline management with other relevant local, state, and federal programs. [Ecology SMP Guidelines]

EXISTING BURIEN POLICIES: None

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Other Policies:

1. Adjacent jurisdictions shall identify and protect habitat networks that are aligned at jurisdictional boundaries. Networks shall link large protected or significant blocks of habitat within and between jurisdictions to achieve a continuous Countywide network. These networks shall be mapped and displayed in comprehensive plans. *[Countywide Planning Policy CA-7]*
2. The Washington State Departments of Fisheries and Wildlife and the Indian Tribes both manage fish and wildlife resources. However, local governments have authority for land use regulation. Jurisdictions shall coordinate land use planning and management of fish and wildlife resources with affected state agencies and the federally recognized Tribes. *[Countywide Planning Policy CA-11]*
3. Promote informed, sustained commitment of key watershed interests. *[WRIA 9 Objective]*
4. Provide management actions that are doable, practical and effective. *[WRIA 9 Objective]*
5. Implement an adaptive management approach to respond to changes and to ensure continued effectiveness. *[WRIA 9 Objective]*
6. Coordinate with other WRIA 9 planning activities. *[WRIA 9 Objective]*

2.13.4 - Shoreline Master Program Economic Development Element

"An economic development element for the location and design of industries, industrial projects of statewide significance, transportation facilities, port facilities, tourist facilities, commerce, and other developments that are particularly dependent on their location on or use of shorelines of the state"
[Ecology SMP Guidelines]

Issues and Opportunities: None

DOE Requirements: None

EXISTING BURIEN GOALS:

1. Expand and improve services supporting quality business and residential environments. *[Based on Burien Comp Plan Goal ED.8]*
2. Develop a balanced regulatory environment promoting economic activity and a high quality of life. *[Burien Comp Plan Goal ED.9]*
3. Make every resident an ambassador for Burien. *[Burien Comp Plan Goal ED.10]*
4. Make Burien a safe and attractive place to work, live, shop and visit. *[Burien Comp Plan Goal ED.11]*

Other Goals:

1. Insure healthy, orderly economic growth by allowing those economic activities which will be an asset to the local economy and which result in the least possible adverse effect on the quality of the shoreline and surrounding environment. *[1994 SMP Handbook Goal 2 of 9]*
2. Insure that any economic activity taking place along the shoreline operates without harming the quality of the site's environment or adjacent shorelands. *[1994 SMP Handbook Goal 4 of 9]*
3. Proposed economic use of the shoreline should be consistent with local comprehensive plans. Conversely, upland uses on adjacent lands outside of immediate shoreline jurisdiction (in accordance with RCW 90.58.340) should be consistent with the purpose and intent of this master program as they affect the shoreline. *[1994 SMP Handbook Goal 8 of 9]*
4. To foster a balanced, diversified and sustainable local economy that contributes to Burien's high quality of life, through the protection and enhancement of the community's natural, historical, and cultural amenities, and the improvement of the financial well being of its residents. *[Based on Port Townsend SMP Economic Development Goal]*

EXISTING BURIEN POLICIES:

1. Continue to provide an active code compliance program that is equitable and responsive. *[Burien Comp Plan Pol. ED 8.4]*

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2. Protect the beauty and function of the natural environment to maintain a community where workers want to live and work. *[Burien Comp Plan Pol. ED 8.6]*
3. Balance zoning and land use regulations to stimulate economic growth and re-development while promoting a high quality of life. *[Burien Comp Plan Pol. ED 9.1]*
4. Regularly evaluate how regulations promote or constrain economic development. *[Burien Comp Plan Pol. ED 9.2]*
5. Provide high quality customer service and an equitable and efficient development review/land use permitting process. *[Burien Comp Plan Pol. ED 9.3]*
6. Promote actions ensuring a clean and attractive community. *[Burien Comp Plan Pol. ED 11.4]*

Other Policies:

1. New development or redevelopment should avoid or mitigate additional loss of shoreline ecological functions. *[City of Edmonds Draft SMP Policy 5]*
2. Development on shorelines should result in no net loss of ecological function. Redevelopment should be encouraged to improve ecological functions and restore riparian buffers. *[City of Bellingham Draft SMP Economic Development Policy 1]*

2.13.5 - Shoreline Master Program Public Access Element

"A public access element making provision for public access to publicly owned areas" [Ecology SMP Guidelines]

Issues and Opportunities:

- (SAC 1) Access to the beach – Physical and Visual
 - (a) Existing access is adequate through existing parks
 - (b) Gated communities prohibit access to some areas
 - (c) No public access to Lake Burien – why has it remained private?
 - (d) Public access along the Puget Sound leads people onto private property
 - (e) Available parking near access points
 - (f) Clearer signage identifying public access points needed
 - (g) Incentives to provide more access: use of conservation easements, tax breaks?

- (LB 1) Get Ruth Dykeman involved

- (LB 2) Do not want public access

- (PS 1.1) Public access – preserve – parks are wonderful

- (PS 1.2) See people harvesting (commercially?) during red tide bloom, ect (strangers, not residents)

- (PS 1.3) Liability of access – enforcement – police matter?

- (PS 1.4) Public education re: tidelands

- (PS 2.1) How will plan affect public access?

- (PS 2.2) Concern about maintaining existing public access on Indian Trail

- (PS 2.3) Concern about increasing public access at 3 Tree Point. Don't want liability, garbage, traffic, toilets. Preserve the neighborhood character.

- (PS 2.4) More explicit directions/rules for park/public access use

- (PS 2.5) Proper signage

- (PS 3.1) No horses on park (or private property) on beach

- (PS 3.2) No expansion/greater use of private beaches

- (PS 3.3) It's okay to walk on beach

- (PS 3.4) Concern that increased public access could degrade the beach

- (PS 3.5) Proper management of public access/impacts

DOE Requirements:

Public Access. WAC 173-26-221(4):

Policies and regulations protect and enhance both **physical and visual access**. WAC 173-26-221(4)(d)(i)

Public entities are required to incorporate public access measures as part of each development project, unless access is incompatible with safety, security, or environmental protection. WAC 173-26-221(4)(d)(ii)

Non-water-dependent uses (including water enjoyment, water related uses) and subdivisions of land into more than four parcels include standards for dedication and improvement of public access. WAC 173-26-221(4)(d)(iii)

Maximum height limits, setbacks, and view corridors **minimize impacts to existing views** from public property or substantial numbers of residences. WAC 173-26-221(4)(d)(iv); RCW 90.58.320

EXISTING BURIEN GOALS:

1. Increase and enhance public access to shoreline areas, consistent with the natural shoreline character, private rights, and public safety. *[Burien Comp Plan Goal SA.1]*

Other Goals:

2. Provide, protect and enhance a public access system that is both physical and visual, utilizing both private and public lands, which increases the amount and diversity of public access to the State's shorelines and adjacent areas, consistent with the natural shoreline character, private rights and public safety. *[1994 SMP Handbook Goal 1 of 1]*
3. Integrate public access to shorelines as part of the City's public trail system. *[1994 SMP Handbook Goal 2 of 2]*
4. Prepare and implement a comprehensive public access plan that incorporates public access into new shoreline development and unifies public access elements into an organized system. *[1994 SMP Handbook Goal 3 of 3]*

EXISTING BURIEN POLICIES:

1. Waterfront street ends should be recognized as:
 - a. An important community resource that provides visual and physical access to the Puget Sound;
 - b. Special use parks which serve the community, yet fit and support the character of the surrounding neighborhoods;
 - c. A destination resource, where limited facilities and enhancements are provided. *[Burien Comp Plan Pol. SA 1.1, Page 2 – 117]*
2. The City should manage and develop water front street ends by:
 - a. Supporting their use by residents city-wide, yet ensuring that the street ends and their supporting facilities are developed at a level or capacity which are appropriate to the neighborhood character, promotes safety, and is consistent with City risk management practices;
 - b. Ensuring that the waterfront street ends are preserved and maintained with limited enhancements, such as places to sit or rest which fit in with the natural character of the area;

- c. Installing signs that indicate the public's right of access and encourage appropriate use;
 - d. Installing limited trail improvements and enhancements to allow access to the water;
 - e. Minimizing the potential impacts associated with their use on adjacent private property; and
 - f. Developing a street ends plan that promotes waterfront access. *[Burien Comp Plan Pol. SA 1.2, Page 2 – 117]*
3. Waterfront street ends or other shoreline access should be planned in conjunction with the affected neighborhoods. However, the broader community should be notified during the public notification process. *[Burien Comp Plan Pol. SA 1.3, Page 2 – 117]*
 4. The City should seek opportunities to develop new waterfront access points or other shoreline access through:
 - a. tax-title properties;
 - b. donations of land and waterfront areas; and
 - c. acquisition using grants and bonds. *[Burien Comp Plan Pol. SA 1.4, Page 2 – 118]*
 5. 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. *[Burien Comp Plan Pol. SA 1.6, Page 2 – 118]*
 6. The public' visual access to the City's shorelines from streets, paths, trails and designated viewing areas should be conserved and enhanced. *[Burien Comp Plan Pol. SA 1.7, Page 2 – 118]*
 7. Public views from the shoreline upland areas should be enhanced and conserved, while recognizing that enhancement of views should not be necessarily construed to mean removal of vegetation. *[Burien Comp Plan Pol. SA 1.8, Page 2 – 118]*
 8. The vacation or sale of street-ends, other public right of ways and tax title properties that abut shoreline areas shall be prohibited. The City should protect these areas for public access and public viewpoints. *[Burien Comp Plan Pol. SA 1.10, Page 2 – 118]*

Other Policies:

1. Water bodies and rivers of the Puget Sound region form an important element of the open space system. Jurisdictions shall work to protect visual access to water bodies and rivers, and provide for physical access where appropriate. *[Countywide Planning Policy CC-8]*
2. Public access should be considered in the review of all private and public developments (including land division) with the exception of the following:
 - a. One- and two-family dwelling units; or
 - b. Where deemed inappropriate due to health, safety and environmental concerns. *[Based on 1994 SMP Handbook Policy 1 of 9]*
3. Developments, uses and activities on or near the shoreline should not impair or detract from the public's access to the water. *[1994 SMP Handbook Policy 2 of 9]*

4. Public access should be provided as close as possible to the water's edge without adversely affecting a sensitive environment and should be designed for handicapped and physically impaired persons. *[1994 SMP Handbook Policy 3 of 9]*
5. Public access afforded by shoreline street ends, public utilities and rights-of-way should be preserved, maintained and enhanced. *[1994 SMP Handbook Policy 5 of 9]*
6. The public access area should be a comfortable and safe place to visit. *[1994 SMP Handbook Policy 7 of 9]*
7. There should be a physical separation or other means of clearly delineating public and private space in order to avoid unnecessary user conflict. *[1994 SMP Handbook Policy 8 of 9]*
8. The city should use street ends and other publicly owned or controlled land within the shoreline area as a means of providing additional safe public access to shoreline areas. **When these types of areas are developed, the city should also provide for some associated limited off-street parking or public transportation connection in order to minimize impacts to surrounding properties. [Emphasis added]** *[City of Edmonds SMP Policy 1]*
9. The city, where practicable, should acquire key shoreline parcels that become available; such parcels are... *[Based on City of Edmonds SMP Policy 4]*
10. Visual access should be maintained, enhanced and preserved on shoreline street ends, public utilities and rights-of-way and within public "view corridors" as designated by the city. **[Emphasis added]** *[City of Edmonds SMP Policy 14]*
11. Publicly owned shorelines should be limited to water-dependent or public recreational uses, otherwise such shorelines should remain protected open space. *[1994 SMP Handbook Policy 4 of 9]*
12. The city should develop signage and informational programs which identify and explain unique scenic and cultural opportunities. Furthermore, the city should develop public information brochures and publications for distribution which identify all locations for public access to the shorelines, and underwater activities with information about each site location. *[City of Edmonds SMP Policy 2]*
13. The city should maintain public shorelines, waterways and tidelands in public ownership for continued public access and use. *[City of Edmonds SMP Policy 3]*
14. Art and cultural amenities should be provided along waterfront pedestrian corridors wherever practicable. *[City of Edmonds SMP Policy 5]*
15. Incorporate building and landscape design standards to protect and enhance public access. Design standards should include but are not limited to height, bulk, scale, setbacks, signage, lighting and preservation of view corridors through modulation of building heights and massing. Encourage the use of native vegetation where landscaping is required. *[Port Townsend SMP Policy 4.5.1]*
16. Promote a coordinated system of connected pathways, sidewalks, passageways between buildings, beach walks, and shoreline access points that increase the amount and diversity of opportunities for walking and chances for personal discoveries. *[Port Townsend SMP Policy 4.5.3]*

2.13.6 - Shoreline Master Program Recreational Element

"A recreational element for the preservation and enlargement of recreational opportunities, including, but not limited to parks, tidelands, beaches, and recreational areas" [Ecology SMP Guidelines]

Issues and Opportunities:

(PS 3.1) Boat launch should be at Seahurst Park

(PS 3.2) Existing private ramps should remain

DOE Requirements:

EXISTING BURIEN GOALS: None

Other Goals:

1. Insure optimal recreational opportunities now and in the future in shoreline areas that can reasonably tolerate during peak use periods active, passive, competitive or contemplative uses without destroying the integrity and character of the shoreline. [1994 SMP Handbook Goal 1 of 6]
2. Coordinate with the City Department of Parks and Recreation to optimize opportunities for water-oriented recreation. [1994 SMP Handbook Goal 2 of 6]
3. Integrate recreational elements into federal, state and local public access and conservation planning. [1994 SMP Handbook Goal 3 of 6]
4. Encourage federal, state and local government to acquire additional shoreline properties for public recreational uses. [1994 SMP Handbook Goal 4 of 6]
5. Insure existing and proposed recreational uses are of a safe and healthy nature. [1994 SMP Handbook Goal 5 of 6]
6. Consider both active and passive recreational needs in development of recreational areas. [1994 SMP Handbook Goal 6 of 6]
7. The amount of shorelines dedicated to public recreation should be increased and their potential optimized. [City of Bellingham Draft SMP Recreation Goal 1.a.]
8. Development of recreation uses should not result in a net loss of shoreline ecological function. [City of Bellingham Draft SMP Recreation Goal 1.b.]

EXISTING BURIEN POLICIES: None

Other Policies:

1. The City shall plan to provide, in coordination with other agencies, a range of park facilities that serve a variety of recreational and open space purposes. Such planning should use the following designations and guidelines to provide such diversity:

1. Mini or Pocket Park

Use Description: Passive recreation or specialized facilities that *may* serve a concentrated or limited population such as children or senior citizens.

Service area: Approximately 1/3 of a mile radius.

Size: No Minimum to approximately one-acre

Desirable Characteristics: These parks should be in close proximity to dwellings and or other centers of activity. Mini parks should be designed for intensive use and should be accessible and visible from surrounding area.

Examples: In Burien these types of parks are primarily private parks consisting of play areas in large multiple family developments (such as Seahurst), beach access for adjacent subdivisions, view appreciation areas (bench or platform), picnic tables and trees in a small area, children's play area, game tables, or public gardens or planted areas.

Other Considerations: Since maintenance costs of these smaller parks are high relative to their service areas, few jurisdictions are able to meet the desired quantity. This type of park is most suitable to provide unique local needs, such as the Shore accesses, or as a consideration in the design of new development. The City should seek a variety of means for financing and maintaining mini-parks, including considering opportunities for community stewardship and grant or private funding. [Burien Comp Plan Pol. PRO 1.5, Page 2 – 106]

5. Special Use Park

Use Description: Specialized or single purpose recreational activities such as golf courses, walking and bicycle trails, skateboard parks, street ends, zoos, arenas or areas that preserve buildings, sites or features of historical significance.

Service area: Variable

Size: Depends on nature of facility.

Desirable Characteristics: Compatibility with adjacent facilities and uses.

Examples: Examples within the incorporated limits of Burien consist primarily of limited access high school athletic fields, designated view points and historical markers, and waterfront street ends (including those at SW 170th Pl., SW 163rd Pl., and at the intersection of Maplewild Ave. SW and SW 172nd St.). [Burien Comp Plan Pol. PRO 1.5, Page 2 – 108]

7. Conservancy Park

Use Description: Conservancy Parks are formally designated public resource areas. In such parks the primary management objectives are protection and management of historical, cultural and natural resources, including fish and wildlife habitat areas and may include appropriate passive recreational activities.

Service area: None

Size: As appropriate for the resource.

Desirable Characteristics: As appropriate for the resource.

Examples: Currently Salmon Creek Ravine is most appropriately classified in this category although its feasibility for including other types of park activities consistent with its character should be evaluated. This category would also apply to any significant formally designated land, protected wetlands or steep slope areas by private or public means. [Burien Comp Plan PRO 1.5, Page 2 – 109]

Figure 2-PRO1 (page 2-111) shows shoreline trails and beach access points

2. The coordination of local, state and federal recreation planning should be encouraged so as to mutually satisfy recreational needs. Shoreline recreational developments should be consistent with all adopted park, recreation and open space plans. [1994 SMP Handbook Policy 1 of 16]
3. The location and design of shoreline recreational developments should relate to local population characteristics, density and special activity demands. [1994 SMP Handbook Policy 2 of 16]
4. Recreational developments and plans should promote the primacy of preserving the natural character, resources and ecology of the shorelines of state-wide significance (see use preferences, Chapter 95.58.020 RCW). [1994 SMP Handbook Policy 3 of 16]
5. Recreational developments should be located, designed and operated to be compatible with, and minimize adverse impacts on, environmental quality and valuable natural features as well as on adjacent surrounding land and water uses. Favorable consideration should be given to proposals which complement their environment and surrounding land and water uses, and which leave natural areas undisturbed and protected. [1994 SMP Handbook Policy 4 of 16]
6. Shoreline areas with a potential for providing recreation or public access opportunities should be identified for this use and acquired by lease or purchase and incorporated into the public park and open space system. [1994 SMP Handbook Policy 5 of 16]
7. A variety of compatible recreational experiences should be encouraged to satisfy diverse recreational needs. [1994 SMP Handbook Policy 6 of 16]
8. The concentration of recreation use pressure at a few points along the shoreline should be avoided by encouraging development of smaller, dispersed recreation areas. [1994 SMP Handbook Policy 7 of 16]
9. The linkage of shoreline parks, recreation areas and public access points with linear systems, such as hiking paths, bicycle paths, easements and/or scenic drives, should be encouraged. [1994 SMP Handbook Policy 8 of 16]
10. Recreational developments should be located and designed to preserve, enhance or create scenic views and vistas. Such scenic views should be identified in the shoreline inventory. [1994 SMP Handbook Policy 9 of 16]
11. Where appropriate, nonintensive recreational uses may be permitted in floodplain areas. [1994 SMP Handbook Policy 10 of 16]
12. Artificial marine life habitats should be encouraged in order to provide increased aquatic life for recreation. Such habitats should be constructed in areas of low habitat diversity

- and in consultation with the Department of Fisheries. *[1994 SMP Handbook Policy 11 of 16]*
13. The use of shoreline street ends and publicly owned lands for public access and development of recreational opportunities should be encouraged. *[1994 SMP Handbook Policy 12 of 16]*
 14. All recreational developments should make adequate provisions for:
 - a. Vehicular and pedestrian access, both on-site and off-site;
 - b. Proper water supply and sewage waste disposal methods;
 - c. Security and fire protection;
 - d. The prevention of overflow and trespass onto adjacent properties, including but not limited to landscaping, fencing and posting of property; and
 - e. Buffering of such development from adjacent private property or natural area. *[1994 SMP Handbook Policy 15 of 16]*
 15. Trails and pathways on steep shoreline bluffs should be located, designed and maintained to protect bank stability. *[1994 SMP Handbook Policy 16 of 16]*
 16. Development of recreational facilities along City shorelines should implement Low Impact Development techniques whenever feasible. *[City of Bellingham Draft SMP Recreation Policy 2.b.]*
 17. Recreation facilities in the shoreline area should be restricted to those dependent upon a shoreline location, or those benefiting from a shoreline or in-water location that are in the public interest. *[City of Edmonds SMP Policy 5]*
 18. Prohibit recreational facilities and activities that adversely affect the integrity and character of the shoreline, or which threaten fragile shoreline ecosystems and ecological functions. *[Port Townsend SMP Policy 4.6.3]*
 19. Public information and education programs, and attendant enforcement procedures, should be developed and implemented to help ensure that the public is aware of park regulations and private property rights, and to prevent the abuse of the shoreline and its natural ecological system. *[City of Edmonds SMP Policy 7]*
 20. Existing and new upland activities should be developed and/or monitored to preserve water quality for continued water-enjoyment recreational uses (e.g. swimming, boating, fishing and bird-watching). *[City of Bellingham Draft SMP Recreation Policy 2.f.]*

2.13.7 - Shoreline Master Program Circulation Element

"A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element"
[Ecology SMP Guidelines]

Issues and Opportunities:

(SAC 1) Lake Burien

(a) Utility upgrades and their affect on the natural functions of the lake

DOE Requirements: None

EXISTING BURIEN GOALS: None

Other Goals:

1. Provide safe, reasonable and adequate circulation systems to shorelines where routes will have the least possible adverse effect on unique or fragile shoreline features and existing ecological systems, while contributing to the functional and visual enhancement of the shoreline. *[1994 SMP Handbook Goal 1 of 8]*
2. Locate land circulation systems which are not shoreline dependent as far from the land-water interface as feasible to reduce interference with either natural shoreline resources or other appropriate shoreline uses. Where possible avoid creating barriers between adjacent uplands and the shoreline. *[1994 SMP Handbook Goal 2 of 8]*
3. Route transportation corridors to harmonize with the topography and other natural characteristics of the shoreline. *[1994 SMP Handbook Goal 3 of 8]*
4. Provide for alternate modes of travel with some freedom of choice and encourage multiple-use corridors where compatible. *[1994 SMP Handbook Goal 4 of 8]*
5. Acquire and develop physical and visual public access where topography, view and natural features warrant as a result of new transportation development in shoreline areas (e.g. turnouts, rest areas). *[1994 SMP Handbook Goal 5 of 8]*
6. Discourage shoreline uses which curtail or reduce existing free movement of the public unless such restriction is in the interest of the environment, public health and safety, or is necessary to a proposed beneficial use. *[1994 SMP Handbook Goal 6 of 8]*
7. Where feasible relocate existing shoreline transportation facilities such as rail lines or freeways that are disruptive to public shoreline access or other shoreline uses or convert such rights-of-way to new public access routes. *[1994 SMP Handbook Goal 7 of 8]*
8. Protect, manage and enhance those characteristics or shoreline roadway corridors that are unique or have historic significance or aesthetic quality, for the benefit and enjoyment of the public. *[1994 SMP Handbook Goal 8 of 8]*
9. Develop balanced and efficient water and land transportation system that minimizes adverse environmental impacts on shorelines while contributing to the functional and visual enhancement of the system. Development of new circulation plans should

emphasize alternative modes of transportation (e.g. bicycles, pedestrians) within close proximity to shorelines as opposed to new systems for automobiles. *[Bellingham Draft SMP Circulation Goal a.]*

EXISTING BURIEN POLICIES: None

Other Policies:

1. Parking in shoreline areas should directly serve a permitted shoreline use. *[1994 SMP Handbook Parking Policy 1 of 3]*
2. Parking facilities should be located and designed to minimize adverse impacts including those related to stormwater runoff, water quality, visual qualities, public access and vegetation and habitat maintenance. *[1994 SMP Handbook Parking Policy 2 of 3]*
3. Parking should be planned to achieve optimum use. Where possible, parking should serve more than one use (e.g. serving recreational use on weekends, commercial uses on weekdays). *[1994 SMP Handbook Parking Policy 3 of 3]*
4. Utilities are necessary to serve shoreline uses and should be properly installed so as to protect the shoreline and water from contamination and degradation. *[1994 SMP Handbook Utilities Policy 1 of 3]*
5. Utility facilities and right-of-ways should be located outside of the shoreline area to the maximum extent possible. When utility lines require a shoreline location, they should be placed underground. *[1994 SMP Handbook Utilities Policy 2 of 3]*
6. Utility facilities should be designed and located in a manner which preserves the natural landscape and shoreline ecology and minimizes conflicts with present and planned land uses. *[1994 SMP Handbook Utilities Policy 3 of 3]*
7. Site non-water dependent transportation and parking facilities as far upland from the shoreline as feasible to reduce interference with both the shoreline ecology as well as other more appropriate shoreline uses. *[Port Townsend SMP Policy 4.4.1]*
8. Minimize impacts to the topography and other natural characteristics of the shoreline by appropriately locating transportation routes. *[Port Townsend SMP Policy 4.4.2]*
9. Where new roadways do occur in shoreline jurisdiction, the result should be no net loss of shoreline ecological function. *[Bellingham Draft SMP Circulation Objective 2b]*
10. New roadways for vehicle circulation should be located outside of or minimized within the shoreline jurisdiction. Where no feasible alternative exists for new roadways, mitigation should be provided and should be designed for a variety of transportation modes or multi-modal. *[Bellingham Draft SMP Circulation Objective 2a]*
11. Provide and/or enhance physical and visual public access along shoreline public roads (i.e., turnouts, viewpoints and rest areas) when appropriate given topography, views and natural features. *[Port Townsend SMP Policy 4.4.3]*
12. Encourage the use of bicycles, shuttles and other alternative modes of transportation for general access to and from the waterfront. *[Port Townsend SMP Policy 4.4.4]*

13. Wherever practicable, safe pedestrian and bicycle movement on and off roadways in the shoreline area should be encouraged as a means of personal transportation and recreation. *[City of Edmonds SMP Policy 2]*
14. Existing shoreline circulation should be redesigned to accommodate varied modes of transportation and, where feasible, be used as a means of increasing public enjoyment of the shorelines. *[Bellingham Draft SMP Circulation Objective 2e]*
15. Public transit systems should be linked to the urban waterfront. *[City of Edmonds SMP Policy 9]*

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2.13.8 - Shoreline Master Program Use Element

"A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land" [Ecology SMP Guidelines]

Issues and Opportunities:

- (SAC 1) Integrating the Growth Management Act (GMA) and the Shoreline Master Program (SMP)
 - (a) Pressure on ecology to reduce/eliminate development impacts on shorelines such as urban infill
- (SAC 2) Developer/Resident issues with regulation of shorelines with the Shoreline Master Program
 - (a) Piers, docks, McMansions
- (SAC 3) Septic Systems and their affect on the shoreline
- (SAC 4) The new SMP should protect the City of Burien from litigation
 - (a) Slides and liquefaction
 - (b) Impacts of development
- (LB 1) Density (allowable) on the Lake no commercial or multi-family
- (LB 2) Dock development
- (LB 3) Titles to some properties show ownership to center of Lake-opportunity
- (PS 1.1) Bulkheads and how they affect the land and the marine environment
- (PS 1.2) Would be no homes w/o bulkheads; the beaches would be public
- (PS 1.3) Can a bulkhead be designed that protects property yet benefits the beach/marine environment?
- (PS 1.4) Vessel wakes and affect on properties
- (PS 1.5) Don't impose stricter regs. than state requires
- (PS 1.6) Buoys-are there regs. Where do you find out about them if there are
- (PS 1.7) Protect ability to place buoys
- (PS 1.8) Concern about whether City will enforce regulations
- (PS 1.9) If you have a bulkhead and your neighbor doesn't, it doesn't do you any good-understand construction of effective bulkheads
- (PS 2.1) Will we be required to remove our mooring buoys?

- (PS 2.2) How will plane affect mooring buoys? (Existing and new)
- (PS 2.3) Human safety over ecology, bulkheads protect people and property from storms
- (PS 2.4) Waves from ships impact private property, bulkheads help protect property
- (PS 2.5) Bulkhead construction materials and design
- (PS 2.6) Concern about grandfathering limitations. You can't rebuild in every situation.
- (PS 3.1) Concern regarding septic systems draining to beach
- (PS 3.2) Mooring buoys are desirable
- (PS 3.3) Want to maintain ability to repair bulkheads
- (PS 3.4) Simple permit process to repair bulkheads

DOE Requirements:

Geologically Hazardous Areas. WAC 173-26-221(2)(c)(ii)

Prohibition on new development (or creation of new lots) that would:
cause foreseeable risk from geological conditions during the life of the
development prohibited. WAC 173-26-221(2)(c)(ii)(B)
require structural shoreline stabilization over the life of the development. (Exceptions allowed
where stabilization needed to protect allowed uses where no alternative locations are
available and no net loss of ecological functions will result.) WAC 173-26-221(2)(c)(ii)(C)

New stabilization structures for existing primary residential structures allowed only where no
alternatives (including relocation or reconstruction of existing structures), are feasible, and less
expensive than the proposed stabilization measure, and then only if no net loss of ecological
functions will result. WAC 173-26-221(2)(c)(ii)(D)

Critical Saltwater Habitats. WAC 173-26-221(2)(c)(iii):

Prohibition on new docks, bulkheads, bridges, fill, floats, jetties, utility crossings and other
human-made structures that intrude into or over critical saltwater habitats, except where:
- public need is clearly demonstrated;
- avoidance of impacts is not feasible or would result in unreasonable cost;
- the project include appropriate mitigation; and
- the project is consistent with resource protection and species recovery.

Private, non-commercial docks for individual residential or community use allowed if it is
infeasible to avoid impacts by alternative alignment or location and the project results in no net
loss of ecological functions. WAC 173-26-221(2)(c)(iii)(C)

Where inventory of critical saltwater habitat has not been done, all over water and near-shore
developments in marine and estuarine waters require habitat assessment of site and adjacent
beach sections. WAC 173-26-221(2)(c)(iii)(C)

Critical Freshwater Habitats. WAC 173-26-221(2)(c)(iv):

Requirements that ensure **new development** within stream channel, channel migration zone, wetlands, floodplain, hyporheic zone, does not cause a net loss of ecological functions. WAC 173-26-221(2)(c)(iv)(C)(I) and WAC 173-26-221(2)(c)(iv)(B)(II)

EXISTING BURIEN GOALS: None

Other Goals:

1. Establish an implement policies and regulations for shoreline use consistent with the Shoreline Management Act of 1971. These policies and regulations should insure that the overall land use patterns that result in shoreline areas are consistent with existing shoreline environment designations and will be sensitive to and not degrade habitat and ecological systems and other shoreline resources. *[1994 SMP Handbook Goal 1 of 10]*
2. Insure that activities and facilities are located on the shorelines in such a manner as to retain or improve the quality of the environment as it is designated for that area. *[1994 SMP Handbook Goal 3 of 10]*
3. Insure that proposed shoreline uses do not infringe upon the rights of others or upon the rights of private ownership. *[1994 SMP Handbook Goal 5 of 10]*
4. Encourage joint-use activities in proposed shoreline developments. *[1994 SMP Handbook Goal 7 of 10]*
5. Designated shorelines of state-wide significance are of value to the entire state and should be protected and managed. In order of preference, the priorities are to:
 - a. Recognize and protect the state-wide interest over local interest;
 - b. Preserve the natural character of the shoreline;
 - c. Result in long-term over short-term benefit;
 - d. Protect the resources and Ecology of shorelines; and
 - e. Increase public access to publicly owned areas of the shorelines. *[1994 SMP Handbook Goal 8 of 10]*
6. Encourage restoration of shoreline areas that have been degraded or diminished in ecological value and function as a result of past activities or catastrophic events. *[1994 SMP Handbook Goal 9 of 10]*
7. Ensure that planning, zoning and other regulatory and nonregulatory programs governing lands adjacent to shoreline jurisdiction are consistent with SMA policies and regulations and the provisions of this SMP. *[1994 SMP Handbook Goal 10 of 10]*
8. Ensure that residential development in the shoreline area is compatible with adjacent uses and minimizes impacts to shoreline ecological processes and functions. *[City of Edmonds Draft SMP Goal 12]*

EXISTING BURIEN POLICIES:

1. The City will ensure that infill development is compatible with the character, scale and design of surrounding development. The City will encourage infill projects when and where the conditions for development are met. *[Burien Comp Plan Pol. LU 1.6, Page 2 – 6]*

2. The city will strive to ensure that basic community values are reflected in the City's land use and decision making processes, while recognizing the rights of individuals to use and develop private property in a manner consistent with City regulations. [*Burien Comp Plan Pol. LU 1.7, Page 2 – 6*]
3. The planned densities for single family development should encourage a lower development potential in areas with development constraints. [*Burien Comp Plan Pol. RE 1.2, Page 2 – 6*]
4. Any existing single-family lot that was legally subdivided or legally created prior to enactment of subdivision statutes prior to incorporation or annexation shall be considered a legally conforming lot for building purposes, providing the size of the lot was not reduced by more than 50 percent through acquisition for public purposes, and on such lots new homes may be built and existing houses may be expanded and remodeled, provided that applicable setbacks, lot coverage, critical area restrictions, design review requirements (if any), height limits and other applicable regulations in the zoning code are met. [*Burien Comp Plan Pol. RE 1.3 Page 2 – 11*]
5. When determining buildable lot size for residential development, the area of a lot covered by water (including but not limited to lakes or the Puget Sound) shall not be included in the calculation. [*Burien Comp Plan Pol. RE 1.4, Page 2 – 11*]
6. The *Low Density Residential Neighborhood* designation will provide for low-density residential development. Development within this designation includes existing neighborhoods that are zoned for four units per acre or less. [*Burien Comp Plan Pol. RE 1.5, Page 2 – 11*]
7. *Allowed Uses and Description:* The *Low Density Residential Neighborhood* designation allows single family residential uses and their accessory uses at a density of 4 units per acre or less, due to the constraints posed by critical areas. This policy may be implemented by more than one zoning category, based on the ability of the land and public facilities to support development. Development standards, for such items as impervious surfaces, streetscapes, sidewalks and stormwater drainage, may vary within each zoning category based on the existing character of the area.
8. *Designation Criteria:* Properties designated *Low Density Residential Neighborhood* should reflect the following criteria:
 1. The area is already generally characterized by single family residential development at four units per acre or less; and
 2. Relative to other residential areas within the City, the area is characterized by lower intensity development as shown on Map LU-2.
 3. The land is designated as a potential landslide hazard area, steep slope area, or wetland on the City of Burien's Critical Areas Map,
 4. The existing and planned public facilities for the area cannot adequately support a higher density.
 5. The area is subject to existing impacts from high levels of airport-related noise.
9. Clustering of housing units may be allowed on lots designated for residential development that contains steep slopes and are located adjacent to an urban environment. [*Burien Comp Plan Pol. EV 1.6, Page 2 – 37*]
10. The City shall develop land use regulations to buffer critical areas from the impacts of adjacent land uses. [*Burien Comp Plan Pol. EV 1.7, Page 2 – 38*]

11. The City shall ensure that uses and development in shoreline areas is compatible with the shoreline environments designated in the City's Shoreline Master Program. Adherence to these designations will ensure that sensitive habitat, ecological systems, and other shoreline resources are protected. *[Burien Comp Plan Pol. EV 2.1, Page 2 – 38]*
12. The City Shoreline Master Program, hereby adopted as an element of this Plan, shall govern the development of all designated Shorelines of the City. Lands adjacent to these areas shall be managed in a manner consistent with this Program. *[Burien Comp Plan Pol. EV 2.5, Page, 2 – 38]*
13. As slope increases, development intensity, site coverage, and vegetation removal should decrease and thereby minimize the potential for drainage problems, soil erosion, siltation and landslides. Slopes of 40 percent or greater should be retained in a natural state, free of structures and other land surface modifications.
 1. Single family homes and detached single-family garages on existing legally established lots are exempted from this restriction, provided that:
 - a. The application of this restriction would deny any appropriate use of this property;
 - b. There is no other appropriate economic use with less impact;
 - c. The proposed development does not pose a threat to public health, safety or welfare on or off the development site;
 - d. Any alterations permitted to the critical area shall be the minimum necessary to allow for economic use of the property;
 - e. An analysis of soils, footings and foundations, and drainage be prepared by qualified professionals, certifying that the proposed activity is safe and will not adversely affect the steep slope hazard area or buffer; and
 - f. There are adequate plans, as determined by the City, for stormwater and vegetation management.
 2. Short plats or other divisions of an existing legal lot shall only be approved if all resulting lots are buildable under this restriction.
 3. It is the applicant's responsibility to show that these provisions are met through an appropriate mechanism such as, or similar to, the SEPA process. *[Burien Comp Plan Pol. EV 3.1, Page 2 – 40]*
14. The City should prohibit development on areas prone to erosion and landslide hazards. Further, the City should restrict development on potentially unstable land to ensure public safety and conformity with existing natural constraints, unless the risks and adverse impacts associated with such development can be appropriately mitigated. *[Burien Comp Plan Pol. EV 3.2, Page 2 – 40]*
15. Land uses on steep slopes should be designed to prevent property damage and environmental degradation, and to enhance open space and wildlife habitat. *[Burien Comp Plan Pol. EV 3.5, Page 2 – 41]*
16. Where there is a high probability of erosion, grading should be kept to a minimum and disturbed vegetation should be restored as soon as feasible. In all cases, the City shall require appropriate site design and construction measures to control erosion and sedimentation. *[Burien Comp Plan Pol. EV 3.6, Page 2 – 41]*
17. Native plant communities and wildlife habitats shall be integrated with other land uses where possible. Development shall protect wildlife habitat through site design and landscaping. Landscaping, screening, or vegetated buffers required during development

review shall retain, salvage and/or reestablish native vegetation whenever feasible. Development within or adjacent to wildlife habitat networks shall incorporate design techniques that protect and enhance wildlife habitat values. *[Burien Comp Plan Pol. EV 4.8, page 2 - 42]*

Other Policies:

1. All jurisdictions shall protect and enhance the natural ecosystems through comprehensive plans and policies, and develop regulations that reflect natural constraints and protect sensitive features. Land use and development shall be regulated in a manner which respects fish and wildlife habitat in conjunction with natural features and functions, including air and water quality. Natural resources and the built environment shall be managed to protect, improve and sustain environmental quality while minimizing public and private costs. *[Countywide Planning Policy FW-4]*
2. Encourage management of land use changes and development standards to minimize impacts. *[WRIA 9 Objective]*
3. New uses and developments in shoreline areas that have established desirable development patterns should be designed to be compatible with those areas; provided the existing uses are consistent with the Shoreline Management Act and the City's comprehensive plan and shoreline master program. *[City of Edmonds Draft SMP Policy 1]*
4. Protect existing shoreline and water views, promote public safety, and avoid adverse impacts to marine bluffs and nearshore habitat in designing new residential development. *[Port Townsend SMP Policy 4.2.3]*
5. Ensure public safety, enhance public access, and achieve no net loss of shoreline ecological functions by appropriately locating, designing, and operating all activities, development and redevelopment. *[Port Townsend SMP Policy 4.2.4]*
6. Over-water structures other than docks, piers, walkways, breakwaters and other similar structures should be prohibited with the exception of minor appurtenant buildings, buoys, divers resting floats, and art sculpture. *[Based on City of Edmonds Draft SMP Policy 3]*
7. Uses in shoreline areas should not degrade water quality nor disrupt any more than is essential the land covered by water and the land area adjacent to the ordinary high water mark. *[City of Edmonds Draft SMP Policy 5]*
8. Shoreline stabilization and protective measures should be limited in number and extent. The use of "soft" stabilization and protective measures, such as vegetation, is preferred over the use of "hard" measures, such as concrete bulkheads. *[City of Edmonds Draft SMP Policy 12]*
9. Uses which adversely alter or degrade the defined shoreline "natural systems" should be prohibited. *[City of Edmonds Draft SMP Policy 9]*
10. Shoreline use and development should be provided for through a process of review and analysis that gives priority to:
 - i. The protection and enhancement of the shoreline natural system;
 - ii. The provision for shoreline-dependent uses;
 - iii. The provision for shoreline-oriented uses; and

iv. The accommodation of necessary uses that are neither shoreline dependent nor shoreline-oriented.

11. The priority system will recognize, but not be limited to, the following criteria:

i. Protect and enhance natural systems:

(A) Biological:

- (1) Critical areas for fish spawning, rearing, feeding, and migration, including beaches, marshland, aquatic vegetation and nearshore/subtidal areas;
- (2) Waterfowl and water associated bird nesting, resting, feeding and nursery areas;
- (3) Shellfish life – supporting areas;
- (4) Upland mammal breeding, rearing and feeding areas;
- (5) Upland plant growth areas (greenbelts, etc.);
- (6) Aquatic (non-fish and non-shellfish) marine organisms life supporting areas; and
- (7) Other.

(B) Geological:

- (1) Bluff and landslide areas;
- (2) Beaches and tidelands – shoals and coves;
- (3) Marshland and slough areas;
- (4) Streams and ravines;
- (5) Below low water submerged lands – canyons, cliffs, rock reefs, sand or mud flats, etc.; and
- (6) Other.

ii. Provide for shoreline-dependent uses, such as:

- (A) Ferry and passenger terminals;
- (B) Terminal and transfer facilities for marine commerce and industry;
- (C) Marine and fresh water construction, dismantling and repair;
- (D) Marinas – boats;
- (E) Intakes and outfalls;
- (F) Boat launch facilities;
- (G) Shoreline recreation – including parks, bike and walking trails, beaches, etc.
- (H) Water-related recreation – including scuba diving, waterway trail system, fishing, and small craft boating;
- (I) Marine and limnological research, interpretation and education;
- (J) Piers and related facilities for the loading and unloading of petroleum products; and
- (K) Other uses of like intensity and dependency. *[Based on City of Edmonds Draft SMP Policy 11]*

2.13.9 - Shoreline Master Program Conservation Element

"A conservation element for the preservation of natural resources, including, but not limited to, scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection" [Ecology SMP Guidelines]

Issues and Opportunities:

- (SAC 1) Impacts of climate change
 - (a) Rise of sea level and how it affects our shorelines and adjacent development.
 - (b) Can Shoreline Master Program assist residents with the affects of climate change or provide incentives (i.e. shoreline armoring)

- (SAC 2) Stewardship and Public Education
 - (a) Educate the community and their impact on the shoreline: armoring, hydrological connections, public access, community responsibilities.
 - (b) Shoreline Advisory Committee should educate them selves and use resources available to gain information on what is in Burien on the shoreline
 - (c) Input from the community – community pride
 - (d) Look ahead into the future

- (LB 1) Official regulations regarding no motorized motorcrafts/boats on the lake

- (LB 2) Keeping storm sewers open and clean (city should take care of this)

- (LB 3) Keep oil out of the lake

- (LB 4) Fertilizer

- (PS 1.1) Global warming's affect on rising waters and properties

- (PS 1.2) Question about Coast and Harbor's study indicating southerly drift on north side of 3 Tree Point

- (PS 1.3) Environment already too altered to regulate native plants – it's too late to make a difference. Recommendation ok.

- (PS 2.1) Clams declined 30 years ago when sewer line and pump station went in. Finally coming back. Will plan counteract this?

- (PS 3.1) Education on yard maintenance

- (PS 3.2) Concern regarding oil from City storm drains

- (PS 3.3) Educate beyond the beach (uplands)

DOE Requirements:

Critical areas. WAC 173-26-221(2)

Policies and regulations for critical areas (designated under GMA) located within shorelines of the state: (i) are consistent with SMP guidelines, and (ii) provide a level of protection to critical areas within the shoreline area that is at least equal to that provided by the local government's

existing critical area regulations adopted pursuant to the GMA for comparable areas other than shorelines. WAC 173-26-221(2)(a) and (c)

Planning objectives are for protection and restoration of degraded ecological functions and ecosystem-wide processes. **Regulatory provisions** protect existing ecological functions and ecosystem-wide processes. WAC 173-26-221(2)(b)(iv)

Critical area provisions **promote human uses and values**, such as public access and aesthetic values, provided they do not significantly adversely impact ecological functions. WAC 173-26-221(2)(b)(v)

Wetlands. WAC 173-26-221(2)(c)(i):

Wetlands **definition** are consistent with WAC 173-22.

Provisions requiring wetlands delineation method are consistent with WAC 173-22-035.

Regulations address all **uses and activities** listed in WAC 173-26-221(2)(c)(i)(A) to achieve no net loss of wetland area and functions including lost time when the wetland does not perform the function. [WAC 173-26-221(2)(c)(i)(A) + (C)]

Wetlands **rating** or categorization system is based on rarity, irreplaceability, or sensitivity to disturbance of a wetland and the functions the wetland provides. Use Ecology Rating system or regionally specific, scientifically based method. WAC 173-26-221(2)(c)(i)(B)]

Buffer requirements are adequate to ensure wetland functions are protected and maintained in the long-term, taking into account ecological functions of the wetland, characteristics of the buffer, and potential impacts associated with adjacent land uses. WAC 173-26-221(2)(c)(i)(B)

Wetland **mitigation** requirements are consistent with WAC 173-26-201(2)(e) and which are based on the wetland rating. WAC 173-26-221(2)(c)(i)(E) and (F)

Compensatory mitigation allowed only after mitigation sequencing is applied and higher priority means of mitigation are determined to be infeasible.

Compensatory mitigation requirements include (I) replacement ratios; (II) Performance standards for evaluating success; (III) long-term monitoring and reporting procedures; and (IV) long-term protection and management of compensatory mitigation sites. WAC 173-26-221(2)(c)(i)(F)

Compensatory mitigation requirements are consistent with preference for "in-kind and nearby" replacement, and include requirement for watershed plan if off-site mitigation is proposed. WAC 173-26-201(2)(e)(B)

Critical Freshwater Habitats. WAC 173-26-221(2)(c)(iv)

Regulations **protect hydrologic connections** between water bodies, water courses, and associated wetlands. WAC 173-26-221(2)(c)(iv)(C)(IV)

Vegetation Conservation (Clearing and Grading). WAC 173-26-221(5):

Vegetation **standards** implement the principles in WAC 173-26-221(5)(b). Methods to do this may include setback or buffer requirements, clearing and grading standards, regulatory incentives, environment designation standards, or other master program provisions. WAC 173-26-221(5)(c)

Selective **pruning** of trees for safety and view protection is allowed and removal of noxious weeds is authorized. WAC 173-26-221(5)(c)

Water Quality. WAC 173-26-221(6)

Provisions protect against adverse impacts to water quality and storm water quantity and ensure mutual consistency between SMP and other regulations addressing water quality. WAC 173-26-221(6)

EXISTING BURIEN GOALS:

1. Preserve and enhance critical areas in order to protect public health, safety, and welfare, and to maintain the integrity of the natural environment. *[Burien Comp Plan Goal EV.1]*
2. Maintain and promote a safe and healthy environment and preserve the quality of life in Burien. *[Burien Comp Plan Goal EV.2]*
3. Promote soil stability and to ensure against the loss of both public and private property in areas with steep slopes. *[Burien Comp Plan Goal EV.3]*
4. Conserve fish and wildlife resources and maintain bio-diversity. *[Burien Comp Plan Goal EV.4]*
5. Protect and enhance the functions and values of the City's wetlands. *[Burien Comp Plan Goal EV.6]*
6. Recognize the significant role that the natural environment plays in creating a healthy and attractive community. *[Burien Comp Plan Goal EQ.1]*

Other Goals:

1. Protect and restore physical, chemical and biological processes and the freshwater, marine and estuarine habitats on which salmonids depend. *[WRIA 9 Goal]*
2. Protect and restore habitat connectivity where feasible. *[WRIA 9 Goal]*
3. Protect and improve water quality and quantity conditions to support healthy salmonid populations. *[WRIA 9 Goal]*
4. Prevent toxic contamination. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 2]*
5. Prevent harm from stormwater runoff. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 3]*
6. Prevent nutrient and pathogen pollution. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 4]*
7. Protect functioning marine and freshwater habitats. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 5]*
8. Protect species diversity. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 7]*

9. Develop and implement management practices that will insure a sustained yield of renewable resources of the shorelines while preserving, protecting, enhancing and restoring unique and nonrenewable shoreline resources or features, including forested areas, wetlands and wildlife habitat. *[1994 SMP Handbook Goal 1 of 4]*
10. Insure that utilization of a resource takes place with the minimum adverse impact to natural systems and quality of the shoreline environment. *[1994 SMP Handbook Goal 2 of 4]*
11. To preserve shoreline natural resources including scenic vistas, aesthetics, estuaries, beaches, shorelines, fragile ecological areas, fish and wildlife habitats, native vegetation and landforms, water and air. *[Port Townsend SMP Goal]*

EXISTING BURIEN POLICIES:

1. The City of Burien's Critical Areas Map shall be used as a reference for identifying the City's critical areas. Other unmapped critical areas do exist throughout the city. Any site containing critical areas are subject to the special development regulations and conditions found in the City's Critical Areas Ordinance. *[Burien Comp Plan Pol. EV 1.1, Page 2 - 36]*
2. Development should be directed toward areas where their adverse impacts on critical areas can be minimized. *[Burien Comp Plan Pol. EV 1.2, Page 2 - 37]*
3. The City shall maintain a system of development regulations and a permitting system to prevent the destruction of critical areas. Development regulations should at a minimum address wetland protection, aquifer recharge areas important for potable water, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. *[Burien Comp Plan Pol. EV 1.3, Page 2 - 37]*
4. The City shall require permit review approval before any activity or construction is allowed to occur in, adjacent to, or impact a critical area. *[Burien Comp Plan Pol. EV 1.4, Page 2 - 37]*
5. If no feasible alternative exists, a limited amount of development may occur on wetlands and floodplains. In these instances, a broad range of site planning techniques should be explored to minimize impacts on these critical areas. *[Burien Comp Plan Pol. EV 1.5, Page 2 - 37]*
6. Clustering of housing units may be allowed on lots designated for residential development that contains steep slopes and are located adjacent to an urban environment. *[Burien Comp Plan Pol. EV 1.6, Page 2 - 37]*
7. The City shall develop land use regulations to buffer critical areas from the impacts of adjacent land uses. *[Burien Comp Plan Pol. EV 1.7, Page 2 - 38]*
8. The City requires the use of Best Available Science for protecting critical areas within the community pursuant to the Growth Management Act [RCW 36.70A.172(1)]. *[Burien Comp Plan Pol. EV 1.8, Page 2 - 38]*
9. Encourage minimizing the amount of impervious surfaces in new development through the use of appropriate low-impact development techniques and removing paved areas or

using retrofit options in existing developments, where applicable, to minimize runoff. [Burien Comp Plan Pol. EV 1.9, Page 2 - 38]

10. The City shall consider the impacts of new development on water quality as part of its environmental review process and require where appropriate any mitigation measures. [Burien Comp Plan Pol. EV 2.4, Page 2 - 38]
11. The City shall consider the impacts of new development on the quality of land, wildlife and vegetative resources as a part of its environmental review process and require any appropriate mitigating measures. Such mitigation may involve the retention of significant habitats. [Burien Comp Plan Pol. EV 2.9, Page 2 - 39]
12. The City shall encourage an increase in tree canopies through the addition and the preservation of existing vegetation and use of landscaping as an integral part of development plans. [Burien Comp Plan Pol. EV 2.10, Page 2 - 39]
13. Educate the public on water quality issues and impacts of stormwater flow. [Burien Comp Plan Pol. EV 2.15, Page 2 - 39]
14. Educate individuals and households about different ways to reduce pollution. [Burien Comp Plan Pol. EV 2.16, Page 2 - 40]
15. The City should require development proposals to include measures to stabilize soils, hillsides, bluffs and ravine sidewalls and to promote wildlife habitat by retaining or restoring native vegetation. [Burien Comp Plan Pol. EV 3.3, Page 2 - 41]
16. The City should consider developing policies that balance the removal of vegetation to preserve and enhance views with the need to retain vegetation to promote slope stability and open space. [Burien Comp Plan Pol. EV 3.4, Page 2 - 41]
17. The City should maintain and enhance existing species and habitat diversity including fish and wildlife habitat that supports the greatest diversity of native species. [Burien Comp Plan Pol. EV 4.1, Page 2 - 41]
18. All development activities shall be located, designed, constructed and managed to avoid disturbance of adverse impacts to fish and wildlife resources, including spawning, nesting, rearing and habitat areas and migratory routes. [Burien Comp Plan Pol. EV 4.2, Page 2 - 41]
19. Fish and wildlife habitat should be protected, conserved and enhanced, including:
 - a. Habitats for species which have been identified as endangered, threatened, or sensitive by the state or federal government;
 - b. Priority species and habitats listed in the Adopted King County Comprehensive Plan, November 1994;
 - c. Commercial and recreational shellfish areas;
 - d. Kelp and eel-grass beds;
 - e. Herring and smelt spawning areas; and
 - f. Wildlife habitat networks designated by the City. [Burien Comp Plan Pol. EV 4.3, Page 2 - 41]
20. Fish and wildlife should be maintained through conservation and enhancement of terrestrial, air and aquatic habitats. [Burien Comp Plan Pol. EV 4.4, Page 2 - 42]

21. The City shall work with adjacent jurisdictions and state, federal and tribal governments during land use plan development review to identify and protect habitat networks that follow or are adjacent to jurisdictional boundaries. *[Burien Comp Plan Pol. EV 4.6, Page 2 - 42]*
22. The City should ensure that habitat networks throughout the City are designated and mapped. The network should be of sufficient width to protect habitat and dispersal zones for small mammals, amphibians, reptiles, and birds. These networks should be protected through incentives, regulation and other appropriate mechanisms. Site planning should be coordinated during development review to ensure that connections are made or maintained amongst segments of the network. *[Burien Comp Plan Pol. EV 4.7, Page 2 - 42]*
23. The City should protect salmonid habitats by ensuring that land use and facility plans (transportation, water, sewer, power, gas) include riparian habitat conservation measures developed by the City, affected tribes, and/or state and federal agencies. Development within basins that contain fish enhancement facilities must consider impacts to those facilities. *[Burien Comp Plan Pol. EV 4.9, Page 2 - 42]*
24. In order to minimize adverse impacts related to noise, unless prohibited by federal or state law, fish and wildlife habitat conservation areas within the City should be protected from exterior noise levels which exceed 55 dBA Ldn. *[Burien Comp Plan Pol. EV 4.10, Page 2 - 42]*
25. The City shall promote voluntary wildlife enhancement projects which buffer and expand existing wildlife habitat, through educational and incentive programs for individuals and businesses. *[Burien Comp Plan Pol. EV 4.11, Page 2 - 42]*
26. The City shall protect its wetlands with an objective of no overall net-loss of functions and values. *[Burien Comp Plan Pol. EV 6.1, Page 2 - 43]*
27. All wetland functions should be considered in evaluating wetland mitigation proposals, including fish and wildlife habitat, flood storage, water quality, recreation, educational opportunities, and aesthetics. *[Burien Comp Plan Pol. EV 6.2, Page 2 - 44]*
28. The City will protect wetlands by maximizing infiltration opportunities and promoting the conservation of forest cover and native vegetation. *[Burien Comp Plan Pol. EV 6.3, Page 2 - 44]*
29. Mitigation for any adverse impacts on wetlands shall be provided in the same basin within which the impacts occur. *[Burien Comp Plan Pol. EV 6.4, Page 2 - 44]*
30. The City shall seek to retain as open space, those areas that provide essential habitat for any rare, threatened or endangered plant or wildlife species. *[Burien Comp Plan Pol. OS 1.2, Page 2 - 121]*
31. The City should maintain, protect and enhance greenbelts riparian corridors and wildlife habit corridors so that the extent and intensity of the built environment is balanced by these natural features. *[Burien Comp Plan Pol. EQ 1.2, Page 2 - 52]*
32. The City shall work with property owners to encourage non-purchase options such as conservation easements, current use easements, and development covenants to preserve open space and greenbelts within the city's neighborhoods. The City should also accept

donations of properties where public access is anticipated or planned. *[Burien Comp Plan Pol. EQ 1.3, Page 2 – 52]*

Other Policies:

1. All jurisdictions shall identify critical fish and wildlife habitats and species and develop regulations that:
 - a. Promote their protection and proper management; and
 - b. Integrate native plant communities and wildlife with other land uses where possible. *[Countywide Planning Policy CA-7]*
2. Enhance riparian vegetation to improve water quality conditions where possible. *[WRIA 9 Objective]*
3. Protect and restore natural ecosystem processes; where restoration is not possible, consider sustainable engineered solutions. *[WRIA 9 Objective]*
4. Protect currently functioning habitat. *[WRIA 9 Objective]*
5. Protect and restore headwater areas, streams and wetlands where feasible. *[WRIA 9 Objective]*
6. Encourage management of flows to support habitat-forming processes. *[WRIA 9 Objective]*
7. Encourage maintenance and protection of corridors that link habitats and (re) connect freshwater, estuarine and saltwater habitats and their associated zones, as required by salmonids during all life stages. *[WRIA 9 Objective]*
8. Reduce processes and inputs that degrade water quality where possible. *[WRIA 9 Objective]*
9. Encourage management of water withdrawals and groundwater recharge to maintain cool water inputs in key areas. *[WRIA 9 Objective]*
10. Provide public outreach and education, and engage the public in stewardship, restoration and enhancement activities. *[WRIA 9 Objective]*
11. Eliminate the harm from toxic pollutants entering Puget Sound. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 2 Long-term goal]*
12. Stormwater runoff and combined sewer overflows do not impair water quality in any waters of the basin *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 3 Long-term goal]*
13. Nutrient and pathogen pollution meets water quality standards and protects public health in all Puget Sound waters *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 4 Long-term goal]*
14. Preserve marine and freshwater habitats and the ecological processes that create and maintain them. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 5 Long-term goal]*

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15. Manage Puget Sound to protect the full range of its biological diversity. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 7 Long-term goal]*
16. Protect critical areas and shoreline ecological processes and functions through regulatory and non-regulatory means that may include acquisition of key properties, regulation of development, and incentives to encourage ecologically sound design. *[Port Townsend SMP Policy 4.7.1]*
17. Development should take the appropriate steps to avoid shoreline modification and stabilization, utilize a range of Low Impact Development techniques, minimize site disturbance, and avoid or minimize impacts to critical areas within shorelines. *[City of Bellingham History, Restoration and Conservation Policy 2c]*

2.13.10 - Shoreline Master Program Historic, Cultural, Scientific, and Educational Element

"An historic, cultural, and scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values" [Ecology SMP Guidelines]

Issues and Opportunities: None

DOE Requirements:

Archaeological and Historical Resources. WAC 173-26-221(1):

Developers and property owners required to **stop work** and notify the local government, state office of archaeology and historic preservation and affected Indian tribes if archaeological resources are uncovered during excavation. WAC 173-26-221(1)(c)(i)

Permits issued in areas documented to contain archaeological resources require **site inspection** or evaluation by a professional archaeologist in coordination with affected Indian tribes WAC 173-26-221(1)(c)(ii)

EXISTING BURIEN GOALS:

1. Ensure that historic properties and sites are identified, protected from undue adverse impacts associated with incompatible land uses or transportation facilities, and protected from detrimental exterior noise levels. [Burien Comp Plan Goal HT.1]

Other Goals:

1. Identify, protect, preserve and restore important archaeological, historical and cultural sites located in shorelands of the State for educational, scientific and enjoyment of the general public. [1994 SMP Handbook Goal 1 of 3]
2. Acquire historical/cultural sites through purchase or gift, so as to insure their protection and preservation. [1994 SMP Handbook Goal 2 of 3]
3. Encourage educational projects and programs that foster a greater appreciation of shoreline management, maritime activities, environmental conservation and maritime history. [1994 SMP Handbook Goal 3 of 3]
4. Protect the public's interest in the conservation, preservation, and protection of the state's archeological resources, and the knowledge to be derived and gained from the scientific study of these resources. [City of Bellingham History, Cultural and Education Goal 1a]

EXISTING BURIEN POLICIES:

1. The City should protect local historic, archeological and cultural sites and structures through designation and incentives for the preservation of such properties. [Burien Comp Plan Goal HT 1.1, Page 2 - 45]
2. The City should consider developing and implementing a measure which would preserve trees of historical significance. [Burien Comp Plan Goal EV 2.11, Page 2 - 39]

Other Policies:

1. Due to the limited and irreplaceable nature of the resource, public or private uses and activities should be prevented from destroying or damaging any site having historic, cultural, scientific or educational value as identified by the appropriate authorities. *[1994 SMP Handbook Policy 1 of 1]*
2. Protect the public's interest in the conservation, preservation, and protection of the state's archeological resources, and the knowledge to be derived and gained from the scientific study of these resources. *[City of Bellingham History, Cultural and Education Goal 1a]*
3. Shoreline areas having historical and/or cultural significance...should be identified, preserved, protected, and restored. *[Based on City of Bellingham History, Cultural and Education Policy 2a]*
4. Funds for the acquisition and/or restoration of sites having historic/cultural significance should be sought. *[City of Bellingham History, Cultural and Education Policy 2d]*
5. Efforts to protect and promote the historical, cultural, scientific and educational resources within the City of Burien should be prioritized. These include but are not limited to:... *[Based on City of Bellingham History, Cultural and Education Policy 2e]*
6. Cooperation among public and private groups in the research and study of historical or cultural sites within the City should be encouraged. *[City of Bellingham History, Cultural and Education Policy 2b]*
7. Historical or cultural sites should be considered in park and open space and public access planning... *[Based on City of Bellingham History, Cultural and Education Policy 2c]*
8. Educational projects and programs including signage should be encouraged that foster a greater appreciation of the importance of shoreline management, maritime activities, environmental conservation, cultural and maritime history. *[City of Edmonds Draft SMP Policy 3]*
9. Ensure that new development is compatible with existing historic structures and cultural areas, and that it promotes the creation of our own legacy for the future *[Port Townsend SMP Policy 4.6.3]*

2.13.11 - Shoreline Master Program Flood-Prevention and Minimization Element

"An element that gives consideration to the statewide interest in the prevention and minimization of flood damages" [Ecology SMP Guidelines]

Issues and Opportunities: None

DOE Requirements:

Flood Hazard Reduction. WAC 173-26-221(3):

New structural flood hazard reduction measures allowed only:

where demonstrated to be necessary, and when non-structural methods are infeasible and mitigation is accomplished.

landward of associated wetlands and buffer areas except where no alternative exists as documented in a geotechnical analysis. WAC 173-26-221(3)(c)(ii) & (iii)

EXISTING BURIEN GOALS: None

Other Goals:

1. Prepare for and adapt Puget Sound efforts to a changing climate. [Priority 8 2007-2009 Puget Sound Conservation and Recovery Plan]
2. It is a goal of the city to reduce the likelihood of flood damage by locating development away from flood-prone areas and by protecting and restoring shoreline ecological functions and ecosystem-wide processes. [City of Edmonds Draft SMP Goal]
3. Establish and implement appropriate floodplain management strategies to minimize private and public property damage, and to improve the ecological functions and prevent habitat loss in wetlands, streams, estuaries and the marine nearshore. [City of Bellingham Flood Minimization Goal 1a]

EXISTING BURIEN POLICIES:

1. The capacity of natural drainage courses shall not be diminished by development or other activities. [Burien Comp Plan Pol. EV 2.3, Page 2 – 38]

Other Policies:

1. Environmental policy and management in Puget Sound is informed by ongoing and comprehensive science. [2007-2009 Puget Sound Conservation and Recovery Plan Priority 8 Long-term goal]
2. New scientific studies/information on tsunamis and sea level rise should be used to guide shoreline development as it becomes available and accepted as scientifically valid. [City of Bellingham Flood Minimization Policy 2a]
3. Structural flood control devices should be allowed only after it is demonstrated that nonstructural solutions are not feasible to reduce the hazard. [City of Edmonds Draft SMP Policy 1]

4. Participate in watershed-wide programs to reduce flood hazards and improve the shoreline ecology. *[City of Edmonds Draft SMP Policy 2]*
5. Discourage new development in shoreline areas that would be harmed by flood conditions, or which would create or intensify flood hazard impacts on other properties. *[City of Edmonds Draft SMP Policy 3]*
6. Ensure that flood hazard reduction measures do not result in a net loss of ecological functions in shoreline areas. *[City of Edmonds Draft SMP Policy 4]*

2.13.12 - Shoreline Master Program Restoration Element

"Master programs shall include goals, policies and actions for restoration of impaired shoreline ecological functions. These master program provisions should be designed to achieve overall improvements in shoreline ecological functions over time, when compared to the status upon adoption of the master program."
[WAC 173-26-201 (2)(f)]

Issues and Opportunities:

- (SAC 1) How will the City repair/restore the shoreline
 - (a) Will the City do a good, quality job that will last?
 - (b) Opportunities at street ends?

- (SAC 2) Salmon Creek Ravine open space
 - (a) Will Salmon Creek open space connect to the Puget Sound? What is the receptiveness to connect the open space to the Sound?

- (PS 2.1) What restoration opportunities are we considering?

- (PS 2.2) What point in time are we restoring to?

- (PS 2.3) Who pays for restoration?

- (PS 2.4) Whose properties are we restoring?

- (PS 3.1) Concern that after storm events restoration will be required

DOE Requirements:

Critical areas. WAC 173-26-221(2)

Planning objectives are for protection and restoration of degraded ecological functions and ecosystem-wide processes. **Regulatory provisions** protect existing ecological functions and ecosystem-wide processes. WAC 173-26-221(2)(b)(iv)

Critical Freshwater Habitats. WAC 173-26-221(2)(c)(iv)

Authorization of appropriate **restoration projects** is facilitated. WAC 173-26-221(2)(c)(iv)(C)(III)

EXISTING BURIEN PLAN and NEIGHBORHOOD PLAN GOALS:

1. Eliminate fish blockages and return fish. *[Based on Salmon Creek Neighborhood Plan Goal NE 8.1]*

2. Organize, educate, and conduct water quality volunteer programs that are pertinent to restoration. The program should be structured using scientifically recognized methods to ensure validity and usefulness of information and knowledge obtained through the program. *[Based on Salmon Creek Neighborhood Plan Goal NE 8.2]*

3. Improve natural conditions to an environmental quality level that supports the return and continuation of salmon runs. *[Based on Salmon Creek Neighborhood Plan Goal NE 8.3]*

4. Restore degraded critical areas with native species. [*Salmon Creek Neighborhood Plan Goal NE 8.5*]

Other Goals:

1. Provide an implementable plan that supports salmon recovery. [*WRIA 9 Goal*]
2. Clean up contaminated sites and sediments. [*2007-2009 Puget Sound Conservation and Recovery Plan Priority 1*]
3. Restore degraded marine and freshwater habitats. [*2007-2009 Puget Sound Conservation and Recovery Plan Priority 6*]
4. Reclaim and restore areas which are biologically and aesthetically degraded to the greatest extent feasible while maintaining appropriate use of the shoreline. [*1994 SMP Handbook Conservation Element Goal 3 of 4*]
5. To achieve No Net Loss and strive to improve impaired shoreline ecological functions with the goal of achieving improvement over time, when compared to the status at the time of adoption of the master program [*Port Townsend SMP Restoration and Adaptive Management Element Goal*]

EXISTING BURIEN PLAN and NEIGHBORHOOD PLAN POLICIES:

1. Stream banks and stream channels should be maintained or restored to their natural condition wherever such conditions or opportunities exist. [*Burien Comp Plan Pol. EV 2.2, Page, 2 - 38*]
2. The City shall be a good steward of public lands and should integrate fish and wildlife habitats into capital improvement projects whenever feasible. [*Burien Comp Plan Pol. EV 4.5, Page 2 - 42*]
3. The City shall promote voluntary wildlife enhancement projects which buffer and expand existing wildlife habitat, through educational and incentive programs for individuals and businesses. [*Burien Comp Plan Pol. EV 4.11, Page 2 - 42*]
4. The City should work with and utilize expertise of other agencies such as the Department of Ecology and King County to assist in restoration efforts. [*Based on Salmon Creek Neighborhood Plan Policy NE 8.2.1*]
5. Restoration efforts should include an educational component to benefit younger generations. [*Based on Salmon Creek Neighborhood Plan Policy NE 8.2.2*]
6. The City should provide opportunities for education regarding techniques and methods to reduce the impacts of stormwater runoff and water quality. [*Salmon Creek Neighborhood Plan Policy NE 8.2.3*]
7. The City should incorporate low impact development practices to reduce the amount of stormwater runoff. [*Salmon Creek Neighborhood Plan Policy NE 8.3.1*]
8. The City should improve water quality with the use of catch basin inserts. This method should generally be used in basins that are most susceptible to debris and contaminants. [*Salmon Creek Neighborhood Plan Policy NE 8.3.2*]

Other Policies:

1. Where feasible, restore fish access where limited by dams, culverts, revetments and other barriers. *[WRIA 9 Objective]*
2. Connect side channels and floodplain areas to the mainstream where feasible. *[WRIA 9 Objective]*
3. Obtain support of ILA jurisdictions, federal and state agencies and Tribes in their recovery efforts, and the support of the business community. *[WRIA 9 Objective]*
4. Develop a strategy to secure adequate funding for implementation. *[WRIA 9 Objective]*
5. Clean up all sites and sediments exceeding state standards for contamination. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 1 Long-term goal]*
6. Restore streams, nearshore, and estuarine habitats within Puget Sound to achieve a net gain in ecological function and area. *[2007-2009 Puget Sound Conservation and Recovery Plan Priority 6 Long-term goal]*
7. Remove or improve fish- and wildlife-passage barriers. *[City of Edmonds Draft SMP Policy 7]*
8. Establish incentives that could provide opportunities for new development to restore impaired shoreline ecological functions. *[City of Edmonds Draft SMP Policy 12]*
9. Implement the Restoration Plan as described in Chapter X of this master program. *[Based on Port Townsend SMP Policy 4.8.1]*
10. Encourage projects that restore/rehabilitate/enhance shoreline resources. Strategies may include but are not limited to a simplified permit process, reduced or waiver of permits fees, public outreach encouraging landowners to replant with native vegetation, tax relief, and city participation in a pilot project. *[Based on Port Townsend SMP Policy 4.8.2]*
11. Provide incentives to restoration by implementing tools which may include, but are not limited to: modifying the buffers that would apply to the restored areas or allowing a greater range of uses or flexible development standards (e.g. setbacks, height limits, lot coverage) on properties providing restoration and/or affected by restoration buffers. *[Based on Port Townsend SMP Policy 4.8.3]*
12. Craft a preferential tax incentive in coordination with the County through the Public Benefit Rating System administered by the County under the Open Space Taxation Act (RCW 84.34) to encourage private landowners to preserve natural shoreline features for "open space" tax relief. *[Based on Port Townsend SMP Policy 4.8.4]*
13. Employ Adaptive Management: Monitor and analyze the cumulative impacts of development permitted in shoreline areas, including development exempt from a shoreline Substantial Development Permit. Where impacts are occurring beyond that anticipated, the City should revise the Master Program to address the cumulative impacts, and/or revise the conditions of approval of development to address the new information. *[Based on Port Townsend SMP Policy 4.8.5]*

14. The City shall develop a "scorecard" as a tool to evaluate potential restoration projects consistent with the criteria listed in Chapter X. *[Based on Port Townsend SMP Policy 4.8.6]*
15. Restoration should improve the ecological functions of aquatic and upland areas within shorelines. *[City of Bellingham Restoration and Conservation Policy 2a]*
16. Protect and/or restore freshwater, nearshore, and estuarine habitat and habitat-forming processes. *[City of Edmonds Draft SMP Policy 1]*
17. Protect and restore wetland and restore salt marsh habitat to improve shoreline ecological functions. *[City of Edmonds Draft SMP Policy 2]*
18. Remove intertidal fill; restore beach deposits and processes and ecological functions. *[City of Edmonds Draft SMP Policy 3]*
19. Remove/replace creosote-treated logs, pilings, and debris. *[City of Edmonds Draft SMP Policy 4]*
20. Increase availability of large woody debris and opportunities for recruitment in the nearshore zone. *[City of Edmonds Draft SMP Policy 5]*
21. Protect and restore native species of vegetation, fish, and wildlife. *[City of Edmonds Draft SMP Policy 6]*
22. Manage and treat stormwater to improve water quality, decrease peak flow events, and increase implementation of low impact development (LID) practices. *[City of Edmonds Draft SMP Policy 8]*
23. Protect naturally eroding bluffs and associated ecological functions. *[City of Edmonds Draft SMP Policy 9]*
24. Protect and restore wildlife corridors. *[City of Edmonds Draft SMP Policy 10]*
25. Ensure that shoreline restoration projects do not degrade critical areas and water quality. *[City of Edmonds Draft SMP Policy 11]*

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**CITY OF BURIEN, WASHINGTON
MEMORANDUM**

DATE: July 1, 2008
TO: Burien Shoreline Advisory Committee
FROM: David Johanson, AICP, Senior Planner *DJ*
SUBJECT: Transmittal of Jim Branson comment document

The purpose of this memo is to transmit a copy of a comment document provided from Jim Branson.

I forwarded this document to our Parks Director, Michael Lafreniere for a response. His response is attached.

2010-2011



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CITY OF BURIEN, WASHINGTON

MEMORANDUM

TO: David Johanson, Senior Planner
FROM: Michael Lafreniere, Director, Parks, Recreation, & Cultural Services 
DATE: June 23, 2008
SUBJECT: Park Ranger Proposal / Shoreline Master Program Updated

Thank you for the opportunity to review and comment on the proposal submitted by Mr. Branson for consideration by the Shoreline Master Program Advisory Committee. Mr. Branson raises a range of substantive issues that should be of concern. As an active parks volunteer and naturalist, his knowledge of the city's parks system is extensive.

My understanding of the goals of the Shoreline Master Program update process is that it should examine what may be needed:

- To preserve water dependent uses that cannot exist in any other location;
- To protect water quality and the natural environment;
- To preserve and enhance public access and recreational opportunities along the shorelines.

I think that many of the issues raised by Mr. Branson pertain to the levels of service that the City is able to support with limited resources. As the focus of the Shoreline Master Program is as outlined above, only two of the city's parks have shorelines.

To a certain extent, Mr. Branson is correct; budgets do translate into levels of service, particularly maintenance and personnel levels. With respect to the behavior of the public in city parks, as parks and their facilities are open to the public, it means all members of the community are entitled to enter and use the parks, including people who will abuse the environment and demonstrate their indifference to it. Unfortunately even doubling the resources available will not stop the kind of activity outlined in the report. Though I am not opposed to the idea, I am not aware of any evidence that the addition of a park ranger as proposed to monitor @350 acres of parks and open space, as well as miles of trails and beaches will make a significant difference.

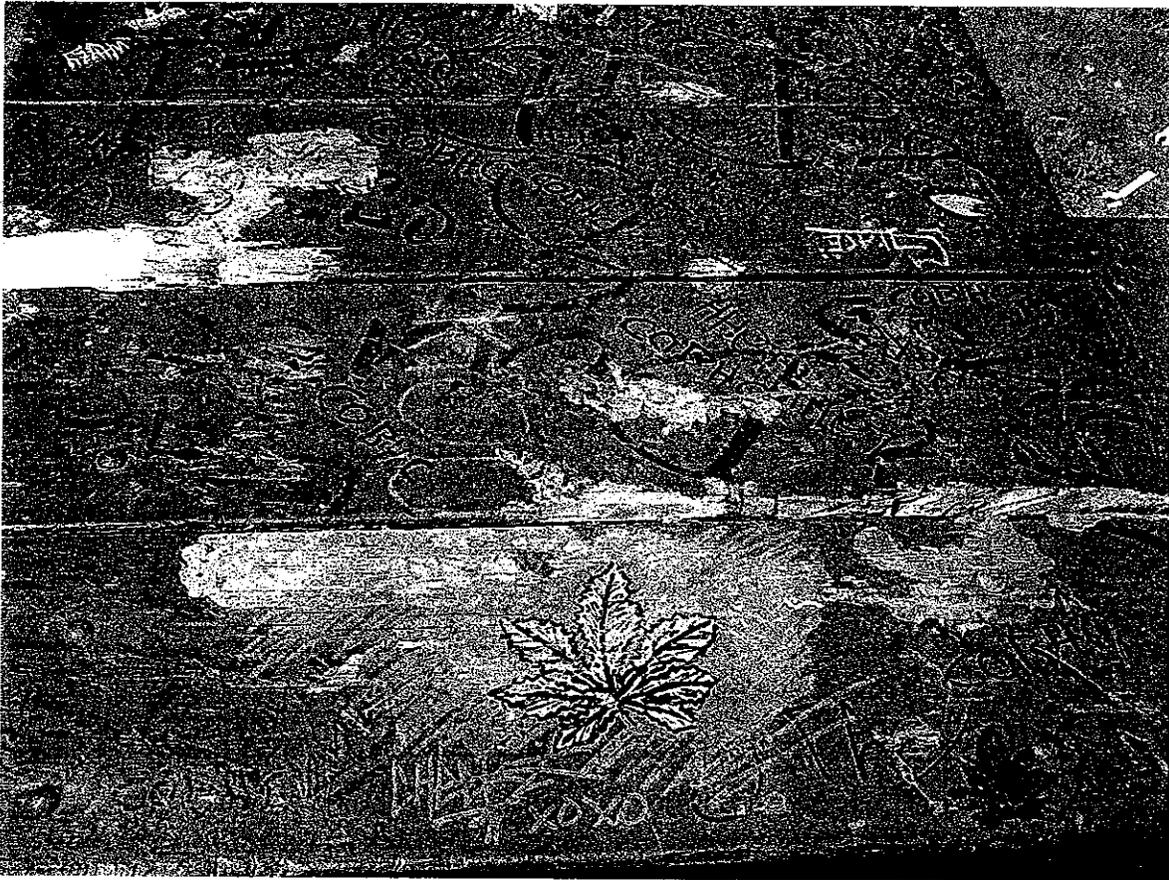
Some members of the Advisory Committee may not be aware that, as a contract city, Burien does not have parks maintenance crews. This work is performed by a contractor; this contract for FY2008 is \$343,712. The proposed park ranger would cost an additional \$100,000 in salary and benefit costs, not including the need for a vehicle and its associated costs.

A number of the examples that Mr. Branson points to are damages and vandalism that occur from time to time, and these are addressed as best we can as they are brought to the attention of parks staff. The Department has one employee who is responsible for managing the maintenance contract, as well as maintenance of the Department's other aging facilities. As this individual cannot be everywhere at all times, we also rely upon the public to bring to our attention when something needs to be repaired. The tables depicted in the report, for example, have been repainted and replaced several times in the past two years. After receiving notice through this proposal, we are taking steps to repaint them again. The Department has also taken steps to replace certain pieces of equipment with graffiti-resistant equipment as occasions arise and resources permit (for example, when certain old wood table and benches in Dottie Harper Park were destroyed in a storm). In addition to the base level of contracted park maintenance, the City has enhanced its level of service significantly in recent years to address graffiti issues at playgrounds and its skatepark.

As it has in the past, Department staff will address the specific issues that are brought to its attention. While we also agree that more resources would help, some of these areas and concerns are likely outside of the scope of your process.

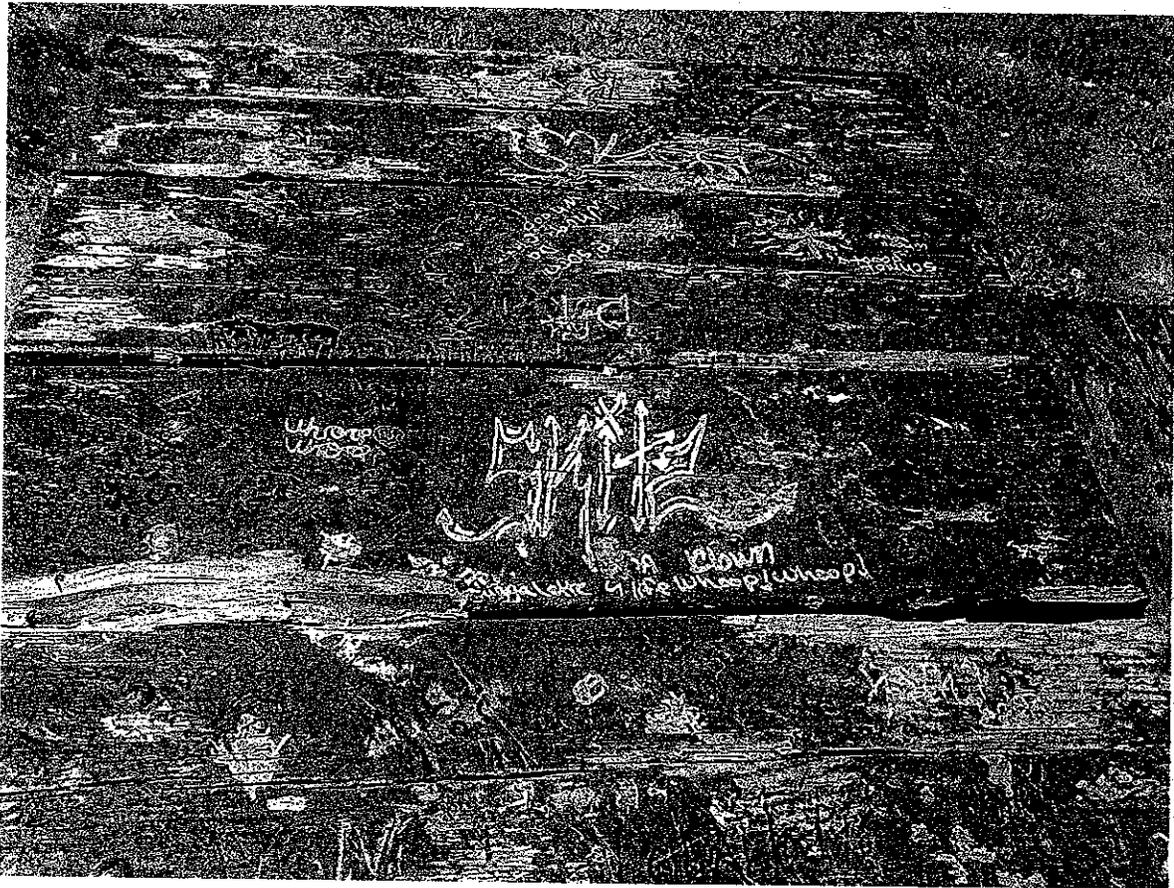
A Park Ranger System Is a Key Element of a Shoreline Master Program

On a Thursday afternoon, while waiting for Burien Toyota to complete an oil change, I walked to Dottie Harper Park to make note of the species of native plants. I counted at least 23 species of natives struggling to survive among no less than 18 aggressive invasive species not adequately contained. If these invasive species are not removed, it will not be any easier to remove them later. It will just become someone else's problem. I had previously participated in "Ivy Out" events at Dottie Harper, where volunteers made good progress at removing a patch of ivy. Those volunteers stopped coming to Dottie Harper to work because they grew tired of seeing their work being ruined. On that Thursday afternoon, I had a full demonstration of the ways that the work of volunteers was allowed to be ruined.



A couple dozen teens were having a rock fight in the center of the park. They did not seem to be hurting each other too badly, but they made it impossible for anyone else to enjoy the park, and they also trampled the plants indiscriminately, ruining the restoration work. The picnic tables were completely covered in graffiti, even though it is against City law to allow graffiti to remain for more than ten days. The Parks Department has agreed that it is their responsibility to remove graffiti; they have agreed that it is in everyone's best interest to remove graffiti quickly because it tends to spread like a disease. They have agreed that it is less expensive to remove a little graffiti quickly than to remove an entire outbreak of graffiti later. Still, the tables were so densely covered with graffiti that no self-

respecting citizen would bring a family member there for a picnic. The graffiti made it clear that this park had been given to miscreants and criminals. Further evidence that the park had been abandoned included large cans of cheap beer left in the bushes, plastic wrappers from cheap cigars that are used for smoking various drugs, and small ziplock bags used for methamphetamine. I believe I witnessed a drug deal, but I am not knowledgeable enough about these things to be sure. Also, broken glass on the paths made it unsafe for anyone to walk their dogs. On that Thursday, I also walked through Lake Burien School Park, which had long-standing graffiti—where I saw two men sitting in a car in full view of the rest of the park users, filling their car with smoke that, when it seeped out, smelled of marijuana—and I walked through Seahurst Park, where the central educational signs were made nearly unreadable by etched graffiti that had been there for at least three years that I am aware of.



One might think it is the responsibility of the Parks Department to maintain these public facilities to a higher standard, but they are only following the lead of the general public. We, the taxpayers of Burien, have said (through our indifference) that this is acceptable to us. We have set a standard for our public parks where it is okay for them to be degraded and abused. The public—the City—is the largest land owner in Burien, with over 300 acres of prime real estate worth a minimum of \$150 million. If you count the ecological functions of those public lands, including storm water retention and filtration, and air cleansing and oxygen production, the value of public lands would be worth at least

a billion dollars. If we had to buy 300 acres today, we could not obtain that amount and quality of land at any price. If a private corporation owned 300 acres worth millions of dollars within the City of Burien, they would not be allowed to maintain that property at such a low standard. They would not be allowed to harbor petty criminals who then prey on the rest of the community. They would not be allowed to invite the general public into a facility that had been rendered unsafe by unrestrained thugs and petty criminals. We, the taxpayers, the voters, the volunteers on ad hoc committees, have chosen this standard for our public lands. We have maintained this low standard since long before Burien became a city, but one of the reasons we incorporated was to raise our standard of living and stop Burien from being a dumping ground for the rest of King County. It is only prudent, fair, and sensible that we should begin to maintain our public lands at least to the minimum standards we require of private lands. If our goal in the Shoreline Master Program is to ensure "No net loss" of shoreline quality, function, and access, we can only achieve this through equitable enforcement of basic standards of behavior on beaches and in parks that belong to all of us, and we can only achieve practical, effective enforcement with a Park Ranger system of trained professionals with specific knowledge of our parks.

Our current policy is Zero Enforcement. Some public servants will argue that this is not true, but it is easy enough to verify for yourself. Go to our parks and watch. In every park (except one) you will find a corner of the park or the entire park has been designated for criminal use. In Dottie Harper Park, the entire park has been given over. In Seahurst Park, it is the upper parking lot and several corners of the woods. Go to these places and you will see: graffiti that has been there for long over ten days, sometimes for years; evidence of alcohol and drug use, if not actual alcohol and drug consumption; vandalism of infrastructure and vegetation; illicit sexual activity in the bushes, or evidence thereof; off-leash dogs and dog waste; illegal fires or evidence thereof. What you won't see is enforcement. You will not see a police officer outside of a vehicle in any of our parks, and you will rarely see an officer even in a vehicle. At Dottie Harper, the cops park in the church parking lot across the street to do their paperwork and get ready for their shifts. They park where they can see the men drinking 40-ounce beers on the little hill above the library, but they don't look. You often see two police cars parked in this church parking lot between Dottie Harper and the skate park, the two locations with the highest concentration of petty crimes in this City. Police Officers will not enforce park policies on park property a block away from them for three reasons. First, it is park property, and they seem to believe it is the responsibility of the Parks Department to take care of it. Second, most of the illegal behavior is below their threshold of awareness. They are constantly called to more serious or urgent crime, and they don't have the time or resources to proactively patrol our parks. Third, no one (or not enough people) will call the police when they see this illegal activity occurring every day. We have accepted this standard in our public areas. Also, regarding dogs off-leash and dog waste, (probably our biggest problem on public lands), the police will tell you it is the responsibility of Animal Control, which is an agency with even fewer resources and no proactive patrols. There is a fourth reason why our uniformed police officers *should not* respond to illegal activities in parks: they are not trained. A Park Ranger should know the geology and geography of the parks, he should know the value and function of our plants and animals, and he should be able to provide education about being good stewards of our public lands when education is all that is needed. Crime and vandalism happen in the same locations and at

the same times, like clockwork, and a dedicated Park Ranger would know where to look for trouble and how to prevent it before it required more expensive remedies.

Our current policy of Zero Enforcement is damaging, unfair, and unreasonable. It means that the public does not have equal access to our parks and our shorelines. People are clamoring for access to relatively clean and safe private beaches because large portions of our public parks have been dedicated to illegal uses. Because dogs are allowed off-leash, people who would keep their dogs on a leash are at a disadvantage. My dogs, on leashes, have been attacked by off-leash dogs on at least six occasions that I can think of off the top of my head. I have learned not to rely on police or animal control for protection. I now get between my dogs and any other dog approaching, making sure that dog can't get to my dogs. Not all dog owners are physically capable of protecting their dogs from attack by off-leash dogs, and they should not have to. Mixing off-leash dogs and on-leash dogs very often results in a volatile situation, due to dog psychology and inherent inequality. Also, law-biding dog walkers cannot use places like Dottie Harper because of the large amounts of broken glass. People with small children are, or should be, equally hesitant to take their kids to places with off-leash dogs, dog waste, discarded drug paraphernalia, and broken glass. It is inherently unfair to give a few troublemakers complete ownership of parks or park portions while those who follow the rules and pay taxes and vote are excluded. People who are older or less mobile often don't feel safe on some of our park trails. In what I consider to be our safest park, I have met many people, often women or elderly, who would not walk down to the beach because they didn't feel safe in a Burien Public Park. The park user we should be encouraging, the quiet and gentle birdwatcher, does not feel safe because we have made our parks a haven for miscreants and criminals. They know that the very last place you will ever see law enforcement is in a Burien Park. Everyone knows this. This places an unfair and unreasonable burden on our less-daring citizens when they can't enjoy large portions of our parks and shorelines due to our policy of Zero Enforcement.

Not only is it unfair and unreasonable, but Zero Enforcement makes no economic sense. The people who are ruining our public lands and disturbing our peace are often transient in some sense of the word. They often aren't invested in our community. (I know of many Seattle residents that regularly bring their dogs to Burien parks because they know the laws are not enforced here.) Some of them don't pay taxes, other than the tax on gas and beer and cigarettes. They don't vote. Yet they get freedom from any enforcement while the law-biding, tax-paying, civic-minded shoreline property owner is subject to full enforcement of the building code and Shoreline Management Act should he try to build any structure within 200 feet of the shoreline. And while these people who are a drain on our society continue to degrade our public spaces without restraint, they bring down the property values and the tax base of the majority of the other citizens. A pilot program of two Park Rangers might cost around \$300,000 per year for salaries, vehicles, support, training, and communications. The loss of property value on our private and public properties due to crime, graffiti, and vandalism far exceeds that small expense for enforcement. Burien's public and private property is worth at least two billion dollars. A loss of just one percent of that property value would be \$20,000,000 but studies show that property values often decline as much as fifteen percent near areas of crime, vandalism, and graffiti. Ridding our parks of this handful of troublemakers should boost property values enough that the increased property

tax revenue would just about cover the annual cost of \$300,000. Also, the people who make enforcement necessary should be the ones to pay for enforcement, just as it is with building codes and building permits. People with off-leash dogs should have to pay the \$250 fine. I would wager that that fine has never been collected at any time in Burien's history. Two off-leash dogs per day would pay for most of the Park Ranger program.

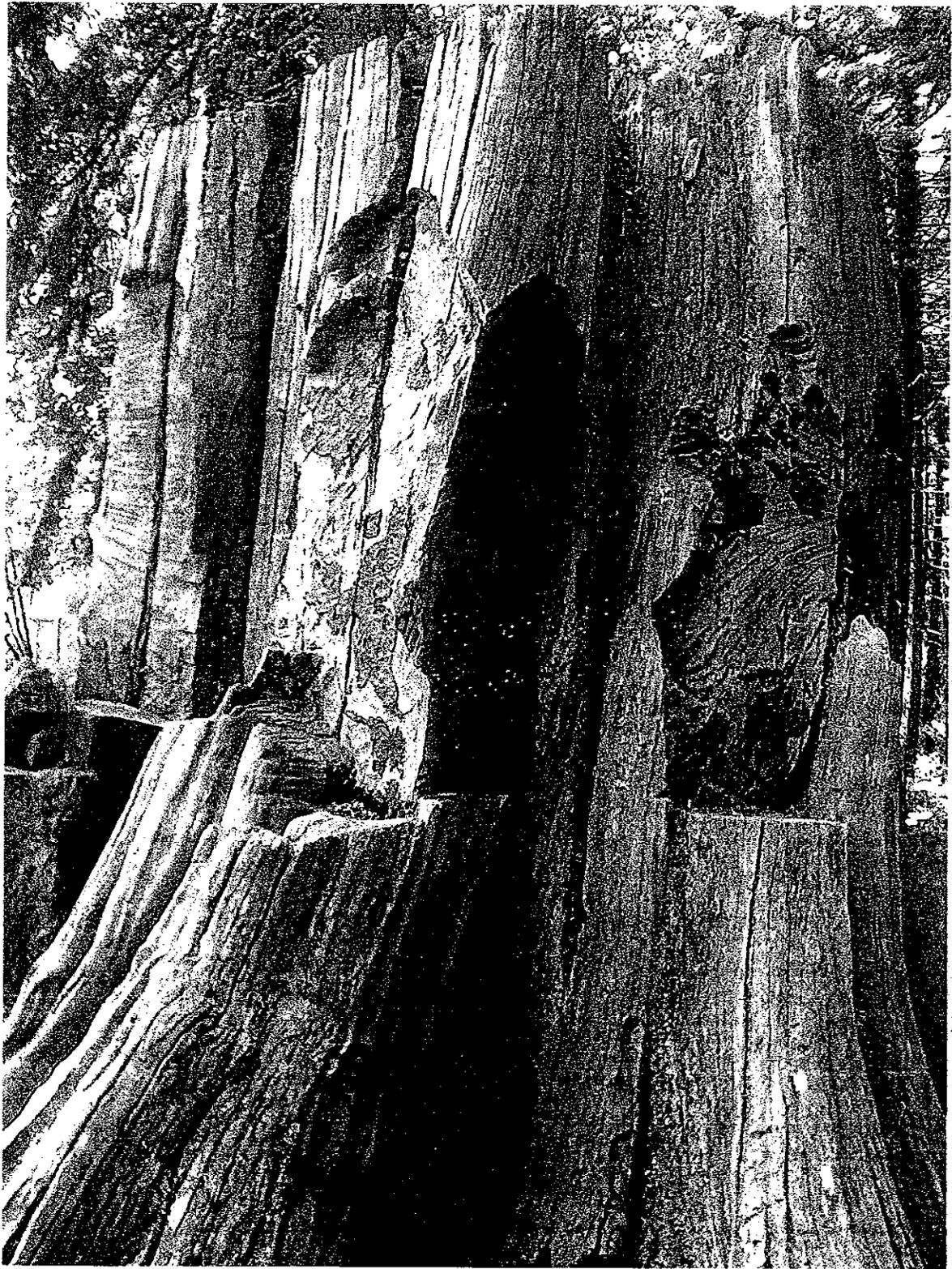
It is not just the law-biding citizen that would benefit from enforcement, but also the law-breaker. It is not in anyone's best interest to have dogs off-leash, just to start with the most minor of infractions. Dogs off-leash are subjected to too many risks. They can get into fights, get hit by cars, step on broken glass, and eat poisonous substances that were left behind either on accident or on purpose (as happened recently at nearby Westcrest Park). Any dog should be calm and manageable on a leash, and if your dog is too much trouble to keep on a leash then it is not safe for him to be off-leash. For people who do drugs and drink beer in our public parks, it is not doing them any favor to leave them free from enforcement. If someone has no job and has nothing but time on his hands for sitting in a park drinking beer, the very last thing he should be spending his meager resources on is something that will only make his situation worse. For those who drink beer in our parks and have plenty of resources, the danger for them is that they often drink and drive. In most cases, the few who disrupt and degrade our parks and shorelines are not content with getting high or having their own private fun; it is often a critical component of their fun that they cause some damage and leave behind some sign that they got away with breaking the law. It is not healthy for these people to live their lives getting joy from causing harm to others. We do them no favors by permitting this behavior.

A Park Ranger system would generate other benefits for the shoreline and the entire city. Our parks and shorelines need restoration for healthy ecological function. It is not reasonable to expect volunteers working on restoration to have to work in an environment of dog waste and dangerous debris. They will not come back if they see that their hard work has been destroyed by a handful of miscreants. A Park Ranger system could enhance, promote, and protect the restoration of our shorelines and uplands. Given that we have already spent millions on restoration, it only makes sense to protect that investment. In addition, stopping illegal activity in our parks would inhibit crime in the rest of the city. People who use our parks as a "safe zone" to buy and sell drugs likely have to get their money by stealing from our community. Reducing crime in one area can reduce crime in surrounding areas. Rangers would not have to become storm-troopers making mass arrests and clubbing people into submission. They could do most of their work by education. If they made people aware of the ecological and economic value of our parks and shorelines, they could encourage proper stewardship of our collective resources. Average, good citizens would be more likely to speak up against abuse and misbehavior if they knew it was even a possibility they would be backed up by someone in authority. Attracting more beneficial and benign visitors to our parks would also make them less enticing to criminals. Environmental damage is usually not given a dollar value because there is no easy formula for calculating the loss of a tree or a bird or a flower, but Park Rangers would almost certainly prevent damage far in excess of their annual salaries.

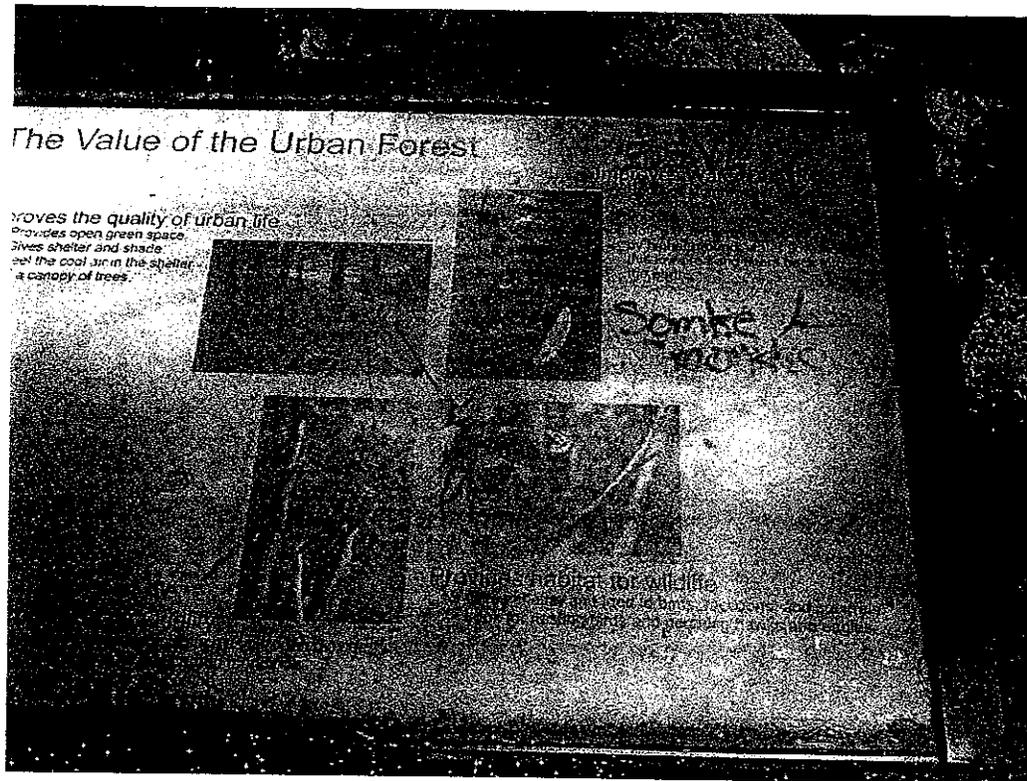
In speaking with several members of management in our Parks Department, I have found them all to be in favor of having Park Rangers if only the public was willing to pay for it. We cannot afford *not*

to pay for adequate enforcement in our parks. We know from experience that ignoring these problems does not make them go away. By failing to manage our parks properly, we have only increased the magnitude of the problem we now have to address. We cannot leave this problem for future generations. Our mandate of "No net loss" requires us to provide equal protection to park users. Paying for Park Rangers is a win-win-win situation for everyone. They will protect and enhance the value of our parks and our private property. Having Rangers will promote equal treatment for private property owners and public property users, rectifying our current imbalance where shoreline owners must pay for their own enforcement while shoreline abusers are given carte blanche. Park Rangers that enforce reasonable park rules will even benefit those few who are currently breaking the rules—it will shield them from their own unwise choices. Regarding building codes, we would never think of saying to developers and homeowners, "These are the rules, but we can't afford building inspectors so you are free to follow or ignore the laws at your discretion." Regarding our roads and places of business, it would be silly to say, "Hiring police is too expensive, so just behave yourselves." Likewise, regarding our largest and most significant class of property and shoreline, our public parks, it would be foolish, unfair, and imprudent to continue our policy of zero enforcement. The Shoreline Master Program has the authority and the duty to require the City's largest landowner—the City—to ensure enforcement of commonsense rules that protect our property and our quality of life. We must mandate that our Parks Department begin an effective Park Ranger System, and we must insist that our citizens pay for this small cost that will deliver such substantial and wide-ranging benefits.

Below is a picture of the stump at Dottie Harper Park that used to be covered with artistic sculptures. With the sculptures missing, it's just an ugly stump, adding to the depressed and depressing atmosphere of the park.



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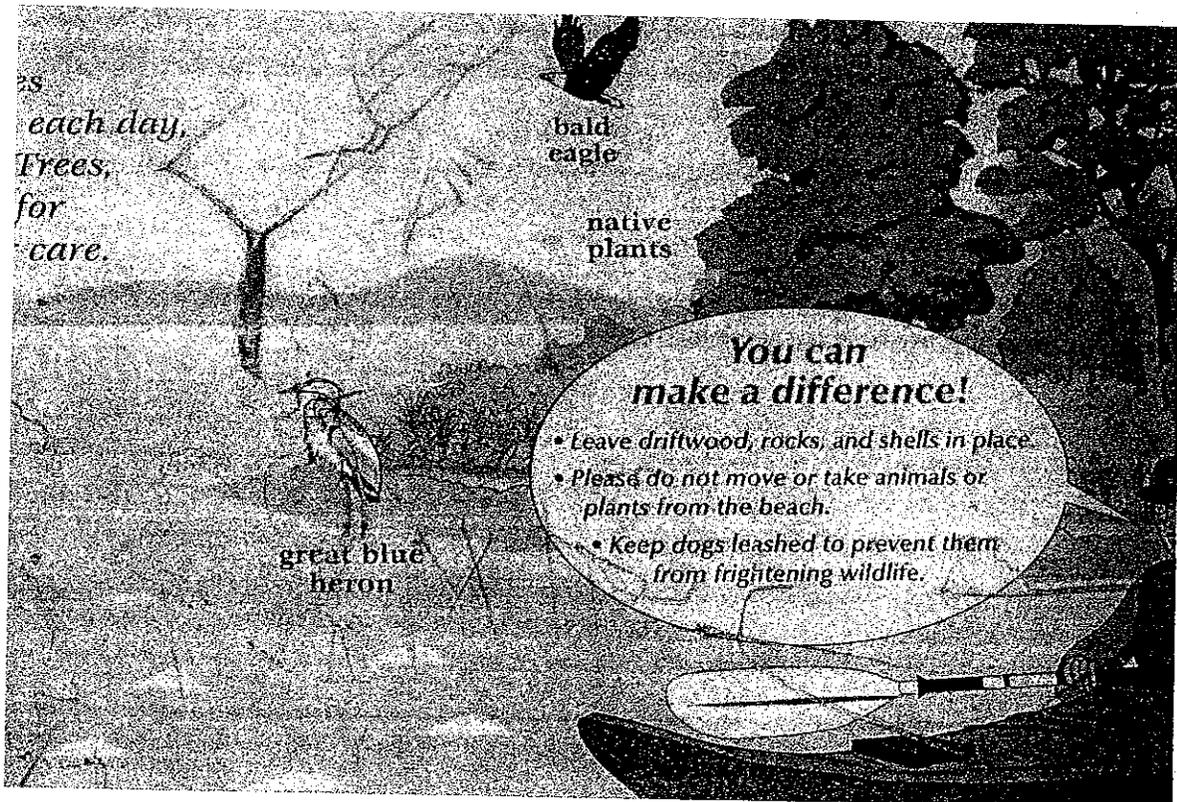
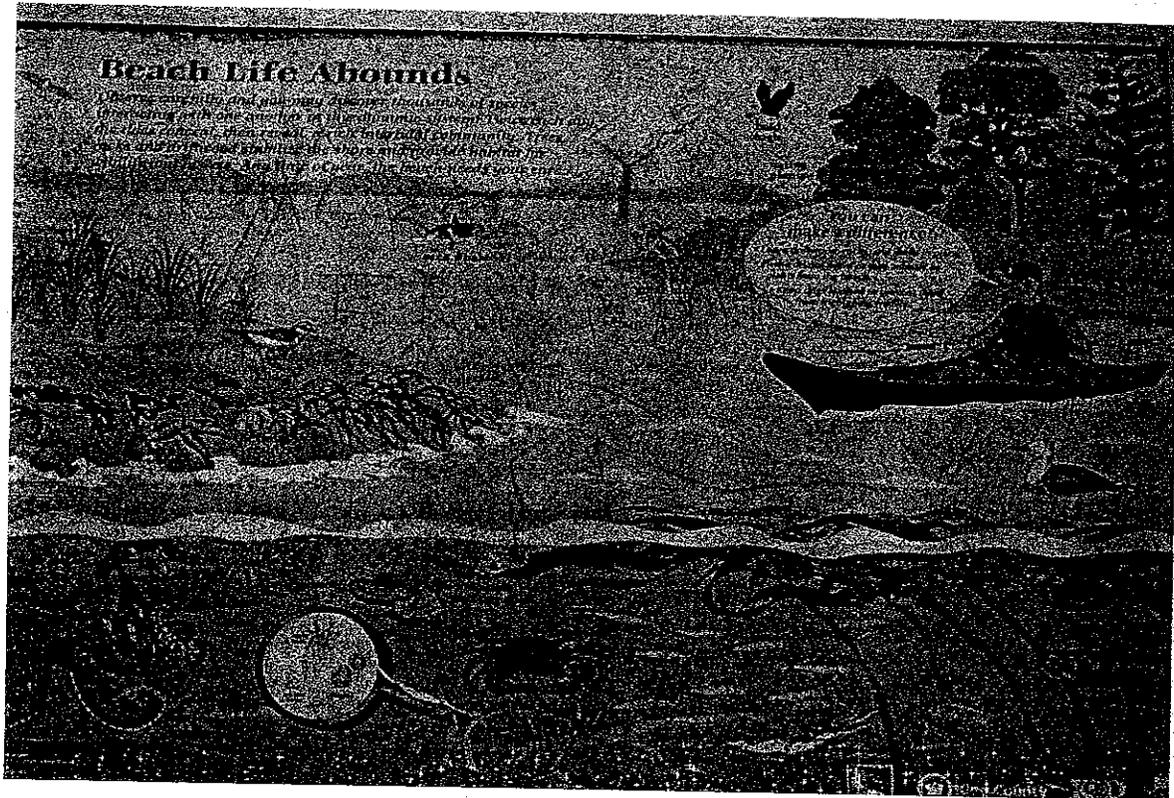


A sign that should be educational instead tells people that this park has been abandoned.



The graffiti above, on a private beach near Seahurst Park, advertises the location as a hangout for pot smokers. The graffiti on the sign below is likely to stay there for years. The graffiti tells people that we have a policy of zero enforcement, and they can ignore the sign.







The 3 pictures above are of the educational interpretive panels at Seahurst Park. The graffiti has been there for years. The message to the visitor is that we only pay lip service to stewardship, and this park is really the Wild West where anything goes.

This essay, by James Branson, is intended to be included in the Shoreline Master Program process of Burien, Washington, as part of the public input, submitted on June 18, 2008.

from Bruce Berglund
provided to SAC at meeting

ENJOYS LONG WALKS ON THE BEACH: WASHINGTON'S PUBLIC TRUST DOCTRINE AND THE RIGHT OF PEDESTRIAN PASSAGE OVER PRIVATE TIDELANDS

Ewa M. Davison, Ph.D.

Abstract: Under Washington's public trust doctrine, the state retains a *jus publicum* interest in tidelands, regardless of ownership. This interest obligates the state to protect the public rights encompassed within the *jus publicum*: navigation, fishing, boating, swimming, water skiing, and corollary recreational activities. The state satisfies this duty so long as its actions do not circumscribe public access to those resources, including tidelands, traditionally protected by the public trust doctrine. The title to any tidelands property sold into private ownership is similarly burdened; a private tidelands owner may not utilize property in a way that would compromise the state's *jus publicum* interest and public rights protected thereby. This Comment argues that Washington's public trust doctrine encompasses a public right of pedestrian passage over unsubmerged private tidelands, at least where necessary to realize those *jus publicum* rights previously recognized by the judiciary. Judicial acknowledgment of such a right is a logical extension of the Washington State Supreme Court's holding in *Caminiti v. Boyle* that private construction on state tidelands does not impair the *jus publicum* where the private property owner permits public pedestrian passage as necessary to effectuate public trust rights. Furthermore, recognition of a right of public access to private tidelands harmonizes Washington's public trust doctrine with that of other states that also recognize the Institutes of Justinian as an ancient source of public trust principles. Finally, the state legislature's repeated identification of a dearth of public recreational access to tidelands also supports this premise, as the scope of Washington's public trust doctrine is shaped by the needs of the state's citizens.

Two Washington residents decide to go fishing, one on foot and the other by boat.¹ The first individual accesses state-owned tidelands within a state park, but then continues walking beyond the state park boundary until he reaches a promising location on unsubmerged, privately-owned tidelands from which to cast his line. The second individual launches his boat from the state park and then tries his luck while floating over the same private tidelands on which the first fisherman stands just a few feet away. The owner of the tidelands, incensed by the presence of these strangers on his property, calls the police. Both individuals inform the arriving officer that the public trust doctrine protects the public right of fishing from both tidelands and tidewaters, regardless of the tidelands' private ownership. Yet, under the holding of a recent unpublished

1. Hypothetical created by the author.

decision from the Washington State Court of Appeals,² the officer would allow the second individual to continue fishing from his boat but arrest the first individual traveling on foot for trespass.

The majority of tidelands within Washington State are privately owned. Washington entered the Union with ownership of all tidelands within its borders up to and including the line of ordinary high tide, with the exception of those areas previously reserved by the federal government.³ The Washington Constitution, while establishing state ownership of the state's 2337 miles of tidelands,⁴ provides no guidance as to their management. Intent on encouraging development, the state transferred sixty-one percent of its tidelands into private ownership between 1890 and 1979.⁵ A recent study estimates that approximately seventy-three percent of the Puget Sound coastline is currently in private ownership.⁶ Yet approximately two-thirds of Washington's population lives in the counties bordering Puget Sound, with some eighty-five percent of this subpopulation residing within ten miles of the Puget Sound shoreline.⁷

In 1987, the Supreme Court of Washington—perhaps responding to the extensive transfer of tidelands into private ownership during the previous century—declared in *Caminiti v. Boyle*⁸ “that the [public trust] doctrine has always existed in the State of Washington.”⁹ Regardless of actual ownership, Washington retains sovereignty and dominion over all

2. *City of Bainbridge Island v. Brennan*, No. 31816-4-II, 2005 Wash. App. LEXIS 1744, at *63 (Wash. Ct. App. July 20, 2005), review denied, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006). See *infra* notes 115–121 and accompanying text for an explanation of the error underlying this holding.

3. WASH. CONST. art. XVII, §§ 1–2; see also *infra* notes 53–60 and accompanying text.

4. WASH. CONST. art. XVII, § 1; see WASH. STATE DEP'T OF ECOLOGY, PUBL'N NO. 00-06-029, MANAGING WASHINGTON'S COAST: WASHINGTON STATE'S COASTAL ZONE MANAGEMENT PROGRAM 21 (2001), available at <http://www.ecy.wa.gov/pubs/0006029.pdf>.

5. Kennan R. Conne, *The Disposition of Tidelands and Shorelands*, Washington State Policy 1889–1982, at 55–56 (Dec. 7, 1982) (unpublished M.P.A. thesis, The Evergreen State College) (on file with The Evergreen State College); see also JAMES W. SCOTT, WASH. STATE DEP'T OF ECOLOGY, AN EVALUATION OF PUBLIC ACCESS TO WASHINGTON'S SHORELINES SINCE PASSAGE OF THE SHORELINE MANAGEMENT ACT OF 1971, at 10 (1983) (estimating that forty-five percent of the

tidelands within its borders.¹⁰ This public property interest, known as the *ius publicum*, requires the state to protect public access to resources and activities encompassed by the public trust doctrine.¹¹ Specifically, the state must protect “the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.”¹² The state's *ius publicum* interest in effect limits the property rights conveyed with the title to any Washington tidelands, preventing private owners from substantially impairing protected public rights in any way.¹³

This Comment argues that the public trust doctrine in Washington encompasses public access to private tidelands, at least where pedestrian passage is necessary to effectuate currently protected *ius publicum* rights. The Supreme Court of Washington's opinion in *Caminiti* strongly suggests that where private ownership obstructs public access to resources protected by the public trust doctrine, the *ius publicum* is impermissibly impaired if the owner does not in some way allow pedestrian passage across the impeding property.¹⁴ Judicial protection of public access to private tidelands is also consistent with the scope of the doctrine in states that, like Washington, recognize the Institutes of Justinian as a source of public trust principles.¹⁵ Furthermore, the courts have recognized that application of the Washington public trust doctrine must be responsive to the needs of its citizens.¹⁶ The Washington Legislature, the arbiter of public need, has enacted legislation to correct a perceived deficiency in recreational access to tidelands.¹⁷

Part I of this Comment establishes that the public trust doctrine protects all tidelands within Washington State and examines the responsibilities this doctrine imposes upon both the state and private

10. *Id.* at 669, 732 P.2d at 994.

11. *Id.* at 668–70, 732 P.2d at 994.

12. *Id.* at 669, 732 P.2d at 994 (quoting *Wilbour v. Gallagher*, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)).

13. *Orion Corp. v. State*, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072–73 (1987) (observing that “[t]he public trust doctrine resembles ‘a covenant running with the land . . . for the benefit of the

tidelands owners. Part II discusses the relationship between judicial recognition of public access to private tidelands and judicial recognition of the Institutes of Justinian as an ancient codification of public trust principles. Part III examines the role of the Washington Legislature in determining the scope of the public trust doctrine. Finally, Part IV argues that the public trust doctrine in Washington encompasses a public right to pedestrian passage over private tidelands, at least where such access is required to effectuate uses already judicially recognized as protected by the public trust.

I. THE PUBLIC TRUST DOCTRINE PROTECTS WASHINGTON'S TIDELANDS

Although vested with ownership of most tidelands within its borders upon entry into the Union, Washington has since sold the majority of this valuable property into private ownership.¹⁸ Under the public trust doctrine, the title to any tidelands consists of two separable interests—the *jus privatum* and the *jus publicum*. Although Washington may sell the *jus privatum* interest in the title into private ownership, the state retains a *jus publicum* interest in any such property, regardless of the identity of the titleholder.¹⁹ Federal case law—later adopted explicitly by the Washington State Supreme Court,²⁰—suggests that a state may not cede all control of the *jus publicum*.²¹ Furthermore, under its own case law, the *jus publicum* interest obligates Washington State to protect the public rights encompassed within the public trust doctrine: “the right of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.”²² The state satisfies this duty so long as it either: (1) promotes the overall public interest in the *jus publicum*; or (2) does not substantially circumscribe public access to resources, including

18. See Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521-552-53 (1992) (citing *Commonwealth v. ...*, 5 W. 2d 44).

Pedestrian Passage over Private Tidelands

tidelands, protected under the *jus publicum*.²³ Similarly, the public trust doctrine also burdens the title to tidelands transferred into private ownership.²⁴ A private tidelands owner thus may not undertake any property usage that would substantially compromise the state's *jus publicum* interest and public rights protected thereby.²⁵

A. Judicial Interpretation of the Public Trust Doctrine Prohibits the State of Washington from Ceding Control of Its Jus Publicum Interest in Tidelands

Each state holds in trust for the benefit of its people an interest in any property protected by the public trust doctrine.²⁶ Although federal case law may prohibit a state from entirely ceding control of this trust,²⁷ each state determines the scope of public rights protected thereby.²⁸ Under Washington's public trust doctrine, the state may not cede its *jus publicum* interest in any individual parcel unless doing so either promotes or does not substantially impair the public rights protected thereby.²⁹ navigation, fishing, boating, swimming, water skiing, “and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.”³⁰ Washington case law

23. See *Weden v. San Juan County*, 135 Wash. 2d 678, 698-99, 958 P.2d 273, 283 (1998); *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994-95; *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res.*, 124 Wash. App. 441, 451-52, 101 P.3d 891, 896-97 (2004).

24. See *Orion Corp. v. State*, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072-73 (1987) (quoting *Reed*, *supra* note 13, at 118).

25. See *Orion*, 109 Wash. 2d at 640, 747 P.2d at 1073 (holding under the public trust doctrine that a developer never possessed the right to fill and dredge navigable tidelands); see also *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 986-87 (9th Cir. 2002) (holding under Washington law that denial of a developer's application to construct homes over Puget Sound tidelands did not constitute a regulatory taking because such construction was inconsistent with public trust principles); *Whitbour*, 77 Wash. 2d at 316, 462 P.2d at 239 (Ordering the owners of littoral property to remove fills that prevented annual submergence of their shoreline and thus impeded their neighbors' access to the adjoining lake).

26. *Ill. Cent.*, 146 U.S. at 435.

27. *Id.* at 452-53.

further establishes that so long as state regulation either promotes or does not circumscribe public access to protected resources, the state has not ceded control over the *jus publicum*.³¹

1. *Federal Case Law Suggests that No State May Cede All Control over its Tidelands, but that Individual Parcels May Sometimes Be Transferred into Private Ownership*

The United States inherited the public trust doctrine from English common law,³² whereby the Crown retained an interest in the nation's ports, seas, and navigable rivers for the benefit of the people.³³ Early U.S. Supreme Court decisions developing American public trust doctrine explicitly referred to Lord Hale's treatises on the foreshore and adopted his concepts of the *jus privatum* and *jus publicum*.³⁴ Discussing the Crown's "right of propriety or ownership in the sea and soil thereof," Lord Hale explained:

But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof³⁵

Although tidelands belonged *prima facie* to the Crown, they could also belong to a subject, as where transferred by the king through charter or grant.³⁷ But even upon such transfer of title,

31. See *Weeden v. San Juan County*, 135 Wash. 2d 678, 699, 958 P.2d 273, 283-84 (1998) (holding that San Juan County did not cede control of the public trust by banning use of motorized personal watercraft because the regulated waters remained accessible to all individuals); *Cominiti*, 107 Wash. 2d at 674, 732 P.2d at 996 (holding that a statutory provision eliminating fees for construction and maintenance of private docks on state tidelands did not interfere with public access to affected tidelands because a regulation required that the public "be able to get around, under or over" the docks); *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res.*, 124 Wash. App. 441, 452, 101 P.3d 891, 897 (2004) (holding that the state did not cede control of the public trust by regulating commercial geoduck harvesting because such regulation promoted regeneration of this resource).

32. See *Shively*, 152 U.S. at 14.

33. See *id.* at 11-13.

34. See, e.g., *id.* at 11, 12; *Martin v. Waddell*, 41 U.S. 367, 412, 16 Pet. 234, 264 (1842).

the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or dammified.³⁸

The U.S. Supreme Court summarized the public trust doctrine under English common law in *Shively v. Bowlby*:³⁹ (1) "the title, *jus privatum*, in [tidelands] . . . belongs to the King as the sovereign"; and (2) "the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit."⁴⁰

American public trust doctrine at its most basic level constitutes "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."⁴¹ Yet each state is otherwise free to individually determine the lands and rights protected under the *jus publicum*.⁴² Although the reach of the public trust doctrine must therefore be determined independently for each state, early federal case law reveals several overarching principles.⁴³

38. *Id.* at 404-05.

39. 152 U.S. 1 (1894).

40. *Id.* at 11.

41. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

42. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (noting that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit"); *Shively*, 152 U.S. at 26 ("[E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.");

43. Commentators disagree as to whether *Illinois Central*, 146 U.S. 387, establishes a federal basis for the public trust doctrine. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 803 (2004) (questioning whether the holding of *Illinois Central* rests on federal or state law); William D. Aranza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 U.C.L.A. L. Rev. 385, 396 n.39 (1997) (discussing the uncertainty). In fact, the U.S. Supreme Court itself later noted with respect to its decision in *Illinois Central* that "the conclusion reached was necessarily a statement of Illinois law." *Appelby v. City of New York*, 271 U.S. 364, 395 (1926). Although this is true in that each state independently determines the scope of the public trust

Most significantly, *Illinois Central Railroad Co. v. Illinois*⁴⁴ suggests that no state may entirely cede control of the *jus publicum*. In this seminal public trust decision, the U.S. Supreme Court held that the Illinois Legislature lacked authority to grant to the railroad both "ownership and control" of the submerged lands underlying most of the Chicago waterfront on Lake Michigan.⁴⁵ Although the terms of the sale prohibited the railroad from impairing the public right of navigation, the transfer nonetheless deprived the state of any meaningful control over development of this important harbor.⁴⁶ The Court declared that

[t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.⁴⁷

In so holding, the Court enunciated the general rule that with respect to the lands beneath navigable waters, "control of the State for the purposes of the [public] trust can never be lost."⁴⁸ It further found exceptions to this general rule for only two property categories: (1) "such parcels as are used in promoting the interests of the public therein," and (2) "such parcels as . . . can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."⁴⁹ Thus, the *Illinois Central* opinion suggests that no state may transfer into private ownership individual tidelands parcels unless

States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . .

146 U.S. at 435 (emphasis added). See also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970) ("The Court's special regulatory obligations over shorelands . . ." (emphasis added)). Ultimately, however, whether *Illinois Central* establishes federal underpinnings for the public trust doctrine is here moot because the Washington State Supreme Court has explicitly adopted the *Illinois Central* standard. *Carminiti v. Boyle*, 107 Wash. 2d 662, 670, 732 P.2d 989, 994-95 (1987); see also *infra* notes 62-66 and accompanying text.

44. 146 U.S. 387 (1892).

45. See *id.* at 460.

46. *Id.* at 450-51.

47. *Id.* at 453.

48. *Id.* In discussing the public trust obligations of the states, the Court referred specifically to "lands under the navigable waters of an entire harbor or bay, or of a sea or lake." *Id.* at 452-53.

49. *Id.* at 453.

such transfer either promotes the public interest in that same property or does not substantially impair public interest in remaining public trust lands.⁵⁰ Subsequent to its decision in *Illinois Central*, the Court held that New York lost its authority to regulate navigation over two Hudson River lots sold under condition that the private owner construct bulkheads, wharves, and streets upon request.⁵¹ Similarly, the Court affirmed Oregon's ability to sell tidelands into private ownership under conditions that encouraged expensive improvements necessary to prevent ongoing shore erosion and harbor shoaling.⁵²

2. *Washington State Retains the Jus Publicum Interest in All Tidelands Property Transferred into Private Ownership*

Upon its admission into statehood in 1889, the equal footing doctrine vested Washington with title to its tidelands.⁵³ Each state receives title to the tidelands within its borders upon entry into the Union.⁵⁴ For states formed from the original thirteen colonies, such title can be traced to royal charters;⁵⁵ the equal footing doctrine ensures that states subsequently admitted into the Union similarly receive title to the tidelands within their borders.⁵⁶ The U.S. Supreme Court reaffirmed its most recent public trust case that "all lands under waters subject to the ebb and flow of the tide"—regardless of actual navigability—became property of each respective State upon its entry into the Union.⁵⁷

50. *Id.*

51. *Appleby v. City of New York*, 271 U.S. 364, 368, 396-99 (1926).

52. *Shively v. Bowlby*, 152 U.S. 1, 52-57 (1894). Oregon today recognizes, on the basis of both custom and usage, a public right to use not only tidelands, much of which are owned by the State of Oregon, but also any dry sand area—that portion of the beach between the tidelands and the visible line of vegetation. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 672-73, 675-77 (Or. 1969).

53. Act of Feb. 22, 1889, ch. 180, § 8, 25 Stat. 676, 678-79 (providing that upon compliance with all requirements therein, Washington "shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States"); see also *Pollard's Lessee v. Hegan*, 44 U.S. 212, 230, 3 How. 238, 239 (1845).

54. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); see also *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 332, 95 P. 278, 281 (1908) ("This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state on which they are situate . . .").

55. *Shively*, 152 U.S. at 48-49 (quoting *Martin v. Waddell*, 41 U.S. 367, 409-11, 16 Pet. 234, 262-64 (1842)).

56. See *Pollard's Lessee*, 44 U.S. at 230, 3 How. at 259.

57. *Phillips*, 484 U.S. at 476.

In addition, the Washington Constitution independently provides the state with title to tidelands as well as to the land beneath all navigable waters:

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes⁵⁸

Thus, with the exception of such lands previously reserved by the federal government,⁵⁹ Washington entered the Union with ownership of all tidelands up to the line of ordinary high tide.⁶⁰

The Supreme Court of Washington, following extensive review of the state's case law, declared in 1987 in *Caminiti* that "the [public trust] doctrine has always existed in the State of Washington"⁶¹ and explicitly adopted the test enunciated by the U.S. Supreme Court in *Illinois Central*.⁶² Washington's title to tidelands and shorelands consists of both *jus privatum* and *jus publicum* interests; the public trust doctrine dictates that the state may transfer into private ownership only its interest in the *jus privatum*.⁶³ Thus, "sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains [sic] in the State, and the State holds such dominion in trust for the public."⁶⁴ Following *Illinois Central*,⁶⁵ Washington courts look to the

58. WASH. CONST. art. XVII, § 1.

59. *Id.* § 2.

60. See *Harkins v. Del Pozzi*, 50 Wash. 2d 237, 240, 310 P.2d 532, 535 (1957); *Braze & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 93 P. 278, 280 (1908) (collecting cases). The Supreme Court of Washington has since defined the line of ordinary high tide as "the average of all high tides during the tidal cycle." *Hughes v. State*, 67 Wash. 2d 799, 810, 410 P.2d 20, 26 (1966), *rev'd on other grounds*, 389 U.S. 290 (1967).

61. *Caminiti v. Boyle*, 107 Wash. 2d 663, 670, 732 P.2d 989, 994 (1987). In accordance with federal case law, the court has also explicitly stated that "[i]t look[s] solely to Washington law to determine whether the public trust doctrine provides the general public with [a] right," thus insulating its public trust decisions from those of sister courts in other states. *State v. Longshore*, 141 Wash. 2d 414, 428, 5 P.3d 1256, 1263 (2000) (emphasis in original); see also *supra* note 42 and accompanying text (describing federal case law). Yet this pronouncement has not prevented the court, when deciding the scope of the public trust doctrine in Washington, from considering the scope of this doctrine in other states. See *Orion Corp. v. State*, 109 Wash. 2d 621, 641 n.10, 747 P.2d 1062, 1073 n.10 (1987); *Whitbour v. Gallagher*, 77 Wash. 2d 306, 316 n.12, 462 P.2d 232, 239 n.12 (1969).

62. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994-95; see *supra* text accompanying notes 48-50.

63. *Id.* at 668-69, 732 P.2d at 993-94.

64. *Id.* at 669, 732 P.2d at 994 (emphasis in original).

following two factors in determining whether a legislative act violates the public trust doctrine: "(1) whether the State, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it."⁶⁶

Beyond the minimum established in *Illinois Central*, states may further define the characteristics of their own public trust doctrine,⁶⁷ Washington explicitly protects not only the public's interest in waters subject to tidal influence, but also to the lands beneath such waters. In *Caminiti*, the Supreme Court of Washington analyzed the public's "overriding interest in navigable waterways and lands *under them*."⁶⁸ It has since referred to "public ownership interests in certain uses of navigable waters and *underlying lands*,"⁶⁹ and to "a public property interest, the *jus publicum*, in *tidelands* and the waters flowing over them, despite the sale of these lands into private ownership."⁷⁰

3. Regulation of Public Trust Resources Does Not Cede the State's Control Over the *Jus Publicum* if It Either Promotes or Does Not Circumscribe Public Access to the Regulated Resources

The State of Washington does not cede control over the *jus publicum* when it promotes public access to tidelands. The Washington State Supreme Court held in *Caminiti* that a provision of the Aquatic Lands Act⁷¹ eliminating fees for the installation and maintenance of private recreational docks on state tidelands did not violate the public trust doctrine.⁷² Enactment of this provision⁷³ changed state practice by allowing owners of private residential property abutting state-owned

65. See *supra* text accompanying notes 48-49.

66. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994-95.

67. See *supra* notes 41-43 and accompanying text.

68. *Caminiti*, 107 Wash. 2d at 668, 732 P.2d at 994 (emphasis added).

69. *Weden v. San Juan County*, 135 Wash. 2d 678, 698, 958 P.2d 273, 283 (1998) (emphasis added) (quoting *Johnson, supra* note 18, at 524).

70. *Id.* (emphasis added).

71. The provision challenged in *Caminiti* was codified at the time of suit at WASH. REV. CODE § 79.90.105 (1983). The current version of this provision—amended to specify the abutting property owner's rights in the event that the state desires to lease or sell the adjoining tidelands—was recodified at WASH. REV. CODE § 79.105.430(1) (2006). The Aquatic Lands Act (ALA) is now found at WASH. REV. CODE chs. 79.105-140 (2006).

72. *Caminiti*, 107 Wash. 2d at 675, 732 P.2d at 997.

73. 1983 Wash. 2d Ex. Sess. Laws 2159-60 (codified at WASH. REV. CODE § 79.105.430).

tidelands to build private recreational docks on the adjacent state tidelands without paying compensation to the state.⁷⁴ The provision does not convey title to any of the state-owned tidelands into private ownership, but merely confers a revocable license to construct and maintain a private dock.⁷⁵ Use of any private docks so constructed is limited to recreational purposes, and is further subject to both state and local regulation.⁷⁶ In holding that this statute does not violate but rather advances some of the interests of the public trust doctrine—"albeit to a limited degree"—the court observed that the docks would improve recreational access to tidal waters by these property owners and their guests.⁷⁷ Private investment in such docks would thus contribute, at least to some extent, to increasing usage of tidal waters.⁷⁸

The state also does not cede control over the *jus publicum* where it acts to protect tidelands through restriction of particular uses, at least so long as public access to tidelands is not impaired. To the contrary, Washington courts generally find that such regulations increase, rather than decrease, state control of the *jus publicum*. Thus, San Juan County did not cede control of public trust waters by enacting an ordinance banning use of motorized personal watercraft.⁷⁹ There, the court stressed that the regulated waters remained accessible to all individuals.⁸⁰ Similarly, state regulation of commercial geoduck harvesting protects the public interest by ensuring continuation of geoduck resources.⁸¹ And while no judicial determination has yet squarely addressed whether the Washington public trust doctrine encompasses wildlife, state regulation of hunting and trapping practices increases state control over this potential public trust resource.⁸²

74. *Caminiti*, 107 Wash.2d at 664-65, 732 P.2d at 991-92.

75. *Id.* at 672-73, 732 P.2d at 995-96.

76. *Id.*

77. *See id.* at 673-74, 732 P.2d at 996.

78. *See id.*

79. *Weden v. San Juan County*, 135 Wash.2d 678, 699, 958 P.2d 273, 283 (1998).

80. *Id.* at 699, 958 P.2d at 283-84 ("Although the Ordinance prohibits a particular form of recreation, the waters are open to access by the *entire* public, including owners of [personal watercraft] who utilize some other method of recreation.")

81. *Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res.*, 124 Wash. App. 441, 452, 101 P.3d 891, 897 (2004) ("The public trust doctrine . . . protects the public right to recreation, commerce, and commercial fishing, all of which are bolstered by the state's system of facilitating sustainable geoduck harvesting and natural regeneration of the resource.")

82. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash. App. 566, 575, 103 P.3d 203, 207-08 (2004).

B. The Public Trust Doctrine Burdens the Title to Tidelands Transferred into Private Ownership

The Supreme Court of Washington has compared the *jus publicum* to "a covenant running with the land . . . for the benefit of the public."⁸³ This limitation on the rights conveyed with titles of Washington tidelands bars their private owners from undertaking activities that compromise the *jus publicum*. In fact, even prior to officially recognizing the public trust doctrine, the court had indicated that the property rights accompanying land covered by navigable water were circumscribed.⁸⁴ In *Wilbour v. Gallagher*,⁸⁵ the court required littoral property owners to remove fills that prevented submergence of their shoreline and thus impeded their neighbors' access to the adjoining lake.⁸⁶ The property at issue bordered Lake Chelan, whose level is raised and lowered annually to allow generation of hydroelectric power.⁸⁷ Neighbors had long used the waters that, at peak levels, covered the defendants' property for such recreational activities as fishing, boating, and swimming.⁸⁸ Attempting to prevent the annual submergence of their property that allowed such use, the defendants erected fills to a height five feet above the maximum lake level.⁸⁹ Comparing the situation to that of a naturally fluctuating lake, the court held that "the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands."⁹⁰ The court thus ordered the fills removed because they obstructed public navigation.⁹¹

83. *Orion Corp. v. State*, 109 Wash.2d 621, 640, 747 P.2d 1062, 1072-73 (1987) (quoting *Reed*, *supra* note 13, at 1118).

84. *Wilbour v. Gallagher*, 77 Wash.2d 306, 315, 462 P.2d 232, 238 (1969) ("As the level [of the water] rises, . . . the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights.") Although *Wilbour* predates judicial recognition of the public trust doctrine in Washington, the scope of activities declared protected by the *jus publicum* in *Caminiti* is in fact taken from *Wilbour*. *See Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989, 994 (1987).

85. 77 Wash.2d 306, 462 P.2d 232 (1969).

86. *Id.* at 316, 462 P.2d at 239.

87. For information about the Lake Chelan hydroelectric project, see <http://www.chelanpub.org/lake-chelan-hydro-project.html> (last visited Oct. 10, 2006). For information about Lake Chelan levels, see <http://www.chelanpub.org/lake-chelan-lake-levels.html> (last visited Oct. 10, 2006).

88. *Wilbour*, 77 Wash.2d at 312, 462 P.2d at 236.

89. *Id.* at 309, 462 P.2d at 234-35.

90. *Id.* at 315-16, 462 P.2d at 238. The court went on to state that the property owners were nonetheless "entitled to keep trespassers off their land" during the months the lake was lowered. *Id.*

The Washington State Supreme Court has since explicitly affirmed that the property rights of private tidelands owners are limited by the public trust doctrine. In *Orion Corp. v. State*,⁹² the court held that a developer never possessed the right to dredge and fill navigable tidelands in Padilla Bay.⁹³ Orion Corporation, the purchaser of 5600 acres of tidelands in this Puget Sound estuary, sued the state for inverse condemnation after regulations enacted pursuant to the Shoreline Management Act⁹⁴ allegedly prevented both its planned construction of a Venetian-style development and reclamation of the land for farming.⁹⁵ The court held that Orion's purchase of the Padilla Bay tidelands was subject to the public trust.⁹⁶ As a consequence, Orion could not use its property in any way that would "substantially impair" public trust rights.⁹⁷ The regulations thus did not effect a taking so long as they only denied uses barred by the public trust doctrine.⁹⁸ In particular, the court held that dredging and filling of privately owned tidelands was inconsistent with public trust principles because navigation, fishing, and associated public trust rights would be substantially impaired.⁹⁹

Conversely, private construction on state tidelands does not impair the *jus publicum* where the private property owner permits public pedestrian

Note that if the public trust doctrine in fact encompasses a public right to walk across unsubmerged private tidelands and shorelands, then an individual indulging in such activity would not in fact be trespassing. Furthermore, the Supreme Court of Washington recently reserved as open the question of "whether and under what circumstances the public has a right to enter upon or cross over private tidelands on foot," indicating that its decision in *Wilbour* does not provide an answer to this question. *State v. Longshore*, 141 Wash. 2d 414, 429 n.9, 5 P.3d 1256, 1263 n.9 (2000).

91. *Wilbour*, 77 Wash. 2d at 318, 462 P.2d at 237.

92. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

93. *Id.* at 641, 747 P.2d at 1073.

94. WASH. REV. CODE ch. 90.58 (2006).

95. *Orion*, 109 Wash. 2d at 626-30, 747 P.2d at 1065-67.

96. *Id.* at 659, 747 P.2d at 1082-83.

97. *Id.* at 641, 747 P.2d at 1073.

98. *See id.* at 660, 747 P.2d at 1083.

99. *Id.* at 641, 747 P.2d at 1073; accord *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 986-87 (9th Cir. 2002) (holding under Washington law that denial of a developer's application to construct homes over Puget Sound tidelands below Magnolia bluff did not constitute a regulatory taking because such construction was inconsistent with public trust principles).

Note that Seattle reclaimed the extensive tidelands of Elliott Bay through such filling during the late nineteenth and early twentieth centuries. *See generally* Seattle Central Waterfront Tour, Part 1: Overview, http://www.historylink.org/essays/outpu.cfm?file_id=7072 (last visited Sept. 19, 2006). Art. XV, sec. 3 of the Washington Constitution specifically reserves to municipal corporations the right to extend streets over the tidelands in navigable city harbors and bays.

passage necessary for the purpose of effectuating public trust rights.¹⁰⁰ Specifically, the Supreme Court of Washington held in *Caminiti* that a provision of the Aquatic Lands Act eliminating fees for construction and maintenance of private docks on state tidelands did not violate the public trust doctrine.¹⁰¹ In finding that the *jus publicum* was not substantially impaired, the court specifically cited to a state administrative regulation¹⁰² requiring that the owners of such docks provide public pedestrian access over, under, or around these structures.¹⁰³ The court's opinion thus suggests that private docks on state tidelands do not run afoul of the public trust doctrine where they do not impair public access to state tidelands.¹⁰⁴

The scope of permissible public activity on private tidelands is not, however, limitless. Specifically, the Washington State Supreme Court has held one activity—the taking of shellfish from private tidelands—to be outside the scope of the *jus publicum*.¹⁰⁵ In *State v. Longshore*,¹⁰⁶ the defendant removed naturally occurring clams from privately owned tidelands.¹⁰⁷ On appeal from a conviction for second-degree theft, the defendant asserted that such clams constitute a public trust resource and thus could not be privately owned.¹⁰⁸ The court rejected this argument, holding that the unauthorized taking of naturally occurring clams from private tideland property constitutes theft.¹⁰⁹

The Supreme Court of Washington has yet to squarely address the existence of a public right of passage over unsubmerged private tidelands.¹¹⁰ That the *jus publicum* in Washington does not encompass

100. *See Caminiti v. Boyle*, 107 Wash. 2d 662, 667, 732 P.2d 989, 996 (1987).

101. *Id.* at 675, 732 P.2d at 997; *see supra* text accompanying notes 72-78.

102. WASH. ADMIN. CODE 332-30-144(9)(c) (2005) provides: "Owners of docks located on state-owned tidelands or shorelands must provide a safe, convenient, and clearly available means of pedestrian access over, around, or under the dock at all tide levels."

103. *Caminiti*, 107 Wash. 2d at 674, 732 P.2d at 996 ("[T]he public must be able to get around, under or over [the private docks].") (emphasis added).

104. *See id.*

105. *State v. Longshore*, 141 Wash. 2d 414, 429, 5 P.3d 1256, 1263 (2000).

106. 141 Wash. 2d 414, 5 P.3d 1256 (2000).

107. *Id.* at 417-18, 5 P.3d at 1258.

108. *Id.* at 419-20, 427, 5 P.3d at 1259, 1262.

109. *Id.* at 429, 5 P.3d at 1263.

110. Note that recognition and enforcement under the public trust doctrine of a public right of access to private tidelands would not constitute a taking under either state or federal law. The right to exclude others is admittedly a "fundamental attribute of property ownership." *Guinont v. Clarke*, 121 Wash. 2d 586, 602, 854 P.2d 1, 10 (1993). But where a property right is denied, the state can

the right to take shellfish from private tidelands, however, has no bearing on this issue. Although the court held in *Longshore* that an unauthorized taking of naturally occurring clams from private property constitutes theft,¹¹¹ it explicitly noted that its decision did not reach the question of public access to private tidelands.¹¹² Furthermore, the court's decision rested in large part on the state legislature's specific exemption of shellfish from the definition of wildlife in RCW 77.08.01(16).¹¹³ Washington case law in fact strongly suggests that both wild and seeded shellfish, at least if slow-moving, constitute either real or personal property.¹¹⁴ The Washington public trust doctrine, while burdening tidelands with the right of public access for fishing, navigation, and recreational activities, has never sanctioned a taking of tangible private property.

Although the Supreme Court of Washington has yet to squarely address the issue, Division II of the Washington State Court of Appeals

nonetheless rebut the presumption of a taking under the Washington Constitution by demonstrating that the property owner never possessed the right under state law to engage in the desired activity. *Id.* Succinctly stated, "a property right must exist before it can be taken." *Orion Corp. v. State*, 109 Wash. 2d 621, 641-42, 747 P.2d 1062, 1073 (1987) (quoting Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 456 (1974)); see also Granite Beach Holdings, L.L.C. v. State ex rel. Dep't of Natural Res., 103 Wash. App. 186, 205, 11 P.3d 847, 858 (2000) ("There can be no inverse condemnation if no property right exists."). Similarly, the U.S. Supreme Court held that confiscatory regulations do not constitute a taking under the U.S. Constitution where the limitation effected already "inhered(s) in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); see also *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at *6-7 (R.I. Super. Ct. July 5, 2005) (holding under *Lucas* that the public trust doctrine constitutes a background principle of state law limiting plaintiff's takings claim).

The public trust doctrine burdens the title to any privately owned tidelands in Washington, and thus bars such a property owner from engaging in any property use that substantially impairs public rights within the scope of the *ius publicum*. See *supra* text accompanying notes 84-99. Accordingly, courts have twice held under Washington law that the title possessed by a private tidelands owner simply does not encompass the right to dredge and fill the property, and that regulations prohibiting such a right thus do not effect a taking. See *supra* note 99 and accompanying text. Similarly, if the public trust doctrine encompasses a public right of access to private tidelands, then the title possessed by a private tidelands owner never included the right to exclude individuals from such property; a right of exclusion would substantially impair the *ius publicum*.

111. *Longshore*, 141 Wash. 2d at 429, 3 P.3d at 1263.

112. *Id.* at 429 n.9, 3 P.3d at 1263 n.9 ("[W]e need not determine whether and under what circumstances the public has a right to enter upon or cross over private tidelands on foot.")

113. See *id.* at 425-26, 3 P.3d at 1261-62.

114. See *id.* at 426, 3 P.3d at 1262; see also *Sequim Bay Canning Co. v. Bugges*, 49 Wash. 131, 94 P. 922, 923 (1908) ("[Clams] therefore, in a very material sense, belong with the land. When taken they must be wrenched from their beds, made well down in the soil itself.")

explicitly refused to recognize a public right of passage over unsubmerged private tidelands in a 2005 unpublished opinion.¹¹⁵ The court based its decision on the Supreme Court of Washington's takings analysis in *Orion*.¹¹⁶ Specifically, the Washington State Supreme Court held in *Orion* that a state regulatory scheme that prohibited a developer's plan to dredge and fill Padilla Bay tidelands did not effect an inverse condemnation.¹¹⁷ In so holding, the court observed that "[t]he developer's] right to dispose of its property and to exclude others . . . remain[ed] unaffected" under the offending regulations.¹¹⁸ Division II interpreted this reference to an unaffected right of exclusion as "suggest[ing] that [the Washington State] Supreme Court did not contemplate pedestrian passage over tidelands."¹¹⁹ But in so reasoning, the appellate court mistakenly construed the *Orion* court's statement regarding the developer's right to exclude others. Specifically, the appellate court interpreted that statement by comparing the developer's property to property not burdened by the public trust, on which the right to exclude would admittedly be near absolute.¹²⁰ This interpretation,

115. *City of Bainbridge Island v. Brennan*, No. 31816-4-II, 2005 Wash. App. LEXIS 1744 (Wash. Ct. App. July 20, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006). The City of Bainbridge Island filed suit in 1999 against several waterfront property owners, in part to quiet title to the Puget Sound tidelands fronting the western end of N.E. Fletcher Landing Road. *Id.* at *9-10; Petition for Review of Cross-Appellants Larson at 3, City of Bainbridge Island v. Brennan, No. 31816-4-II, (Wash. Ct. App. Sept. 26, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006) [hereinafter *Petition*] (on file with author). The city sought removal of a fence and locked gate erected across the road by abutting private tideland owners. See *Brennan*, 2005 Wash. App. LEXIS 1744, at *9; Petition at 3. The waterfront property owned by the Larsons, among those named as defendants, included tidelands accessible only via a steep trail. See *Brennan*, 2005 Wash. App. LEXIS 1744, at *10; Petition at 3-4. Despite the Larsons' ownership interest both in the tidelands abutting their property and in the road end locked gate. See *Brennan*, 2005 Wash. App. LEXIS 1744, at *10; Petition at 4. The Larsons chose to side with the city and filed a cross-claim asserting under the public trust doctrine a public right of passage not only over the road end but also adjacent tidelands. *Brennan*, 2005 Wash. App. LEXIS 1744, at *11, *56-57. The trial court dismissed without comment the Larsons' public trust claim on a summary judgment motion made by the remaining defendants. *Id.* at *11.

116. *Brennan*, 2005 Wash. App. LEXIS 1744, at *61-63; see *supra* notes 92-99 and accompanying text.

117. *Orion Corp. v. State*, 109 Wash. 2d 621, 641-42, 747 P.2d 1062, 1073 (1987). The court nonetheless remanded the case to the trial court to determine if Orion could have made a "reasonably profitable use of its land consistent with the public trust." *Id.* at 660, 747 P.2d at 1083.

118. *Id.* at 665, 747 P.2d at 1085 (emphasis added).

119. *Brennan*, 2005 Wash. App. LEXIS 1744, at *63.

120. For a general discussion of the right to exclude others from private property, see JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 2.2.1 (2d ed. 2005).

however, ignores the *Orion* court's earlier holding that the developer purchased its estuarine property subject to the public trust.¹²¹

In sum, Washington's public trust doctrine bars both the state and private tidelands owners from substantially circumscribing public rights protected by the state's *jus publicum* interest. Federal law may prevent any state from ceding all of its *jus publicum* interest. Washington's public trust doctrine further prevents this state from ceding its *jus publicum* interest in any individual parcel unless such action either promotes or does not substantially impair public rights protected therein.

II. STATES RECOGNIZING JUSTINIAN *JUS PUBLICUM* PRINCIPLES ALLOW AT LEAST LIMITED PUBLIC ACCESS TO PRIVATELY OWNED TIDELANDS

The Institutes of Justinian, an ancient Roman text, ensured public access to all tidelands by declaring that tidelands simply could not be subject to ownership.¹²² The judiciaries of ten states,¹²³ including Washington, recognize the Institutes as an ancient codification of the public trust doctrine. Of the three judiciaries in these ten states that have addressed the issue of public passage over privately owned tidelands, all have affirmed the existence of such a right, at least where necessary to effectuate more widely recognized public trust activities.¹²⁴

A. *The Institutes of Justinian Assert Common Ownership of Tidelands*

Numerous scholars trace the roots of the public trust doctrine to ancient Roman legal principles.¹²⁵ The Institutes of Justinian, a textbook

121. *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073; see *supra* Part I.C.

122. J. INST. 2.1.1 in THOMAS COOPER, *THE INSTITUTES OF JUSTINIAN* 67 (3d ed. J.S. Voorhies 1952).

123. California, Hawaii, Iowa, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Vermont, and Washington. See Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718 (Cal. 1983); *In re Water Use Permit Applications*, 9 P.3d 409, 445 (Haw. 2000); State v. Sorensen, 436 N.W.2d 358, 361 (Iowa 1989); Dep't of Natural Res. v. Mayor & Council of Ocean City, 332 A.2d 630, 637 & n.8 (Md. Ct. App. 1975); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979); Glass v. Goeckel, 703 N.W.2d 58, 63-64 (Mich. 2005); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360 (N.J. 1984); Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003); State v. Cent. Vt. Ry. Inc., 571 A.2d 1128, 1130 (Vt. 1989); *Caminiti v. Boyle*, 107 Wash. 2d 662, 668-69 & n.12, 732 P.2d 989, 994 & n.12 (1987).

124. See Barry v. Grela, 361 N.E.2d 1251, 1252 (Mass. 1977); *Glass*, 703 N.W.2d at 74; Raleigh Ave. Beach Ass'n v. Atlantic Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005).

125. See, e.g., *THE INSTITUTES OF JUSTINIAN*, supra note 122, at 67.

of Roman law written some 1500 years ago, asserts that certain natural resources cannot pass into private ownership:

Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is.¹²⁶

By declaring that no individual could hold title to the seashore, Roman law thus explicitly assured public access not only to the sea but also to the underlying tidelands:

The use of the sea-shore, as well as of the sea, is also public by the law of nations; and therefore any person may erect a cottage upon it, to which he may resort to dry his nets, and haul them from the water; for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.¹²⁷

This expansive understanding of the public's right to use the seashore stands in marked contrast to the scope of the *jus publicum* in any state today. Yet judicial recognition of the Institutes of Justinian as an ancient codification of the public trust doctrine correlates with an understanding of the *jus publicum* that encompasses a right of public access to private tidelands.

B. *States That Recognize the Institutes of Justinian at a Minimum Allow Public Access to Private Tidelands for Effectuation of Public Trust Rights*

In *Caminiti*, the Supreme Court of Washington explicitly recognized not only the existence of the public trust doctrine but also the ancient codification of this legal principle in the Institutes of Justinian.¹²⁸ Several states in addition to Washington recognize the origins of the public trust doctrine in the Institutes of Justinian.¹²⁹ Three of these

YALE L.J. 762, 763-64 (1970); Sax, *supra* note 43, at 475 & n.15 (collecting sources).

126. J. INST. 2.1.1 in COOPER, *supra* note 122, at 67.

127. J. INST. 2.1.5 in COOPER, *supra* note 122, at 68.

128. *Caminiti*, 107 Wash. 2d at 668-69 & n.12, 732 P.2d at 994 & n.12 ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian...." (citing to J. INST.)); see also *Retkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (1993) (Guy J., dissenting).

129. The case law of three additional states—Montana, New Hampshire, and New York—refers

states—Massachusetts,¹³⁰ Michigan,¹³¹ and New Jersey¹³²—have directly addressed the issue of public access to private tidelands and at a minimum affirm such access for the purpose of effectuating traditional public trust rights.¹³³

Although otherwise narrow in its scope, the *jus publicum* in Massachusetts encompasses a public right to walk across private tidelands in order to effectuate traditional public trust rights. The Massachusetts judiciary has generally interpreted the public trust doctrine strictly in response to colonial legislation.¹³⁴ Specifically, the Colonial Ordinance of 1641–1647¹³⁵ granted title of tidelands to all

generally to Roman law, but fails to cite specifically to the work of Emperor Justinian. See Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 167 (Mont. 1984); Opinion of the Justices, 649 A.2d 604, 607 (N.H. 1994); Landmark West v. City of New York, 802 N.Y.S.2d 340, 349 (2005).

130. See Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979) (“At Roman law, all citizens held and had access to the seashore as a resource in common; in the words of Justinian . . .” (quoting J. INST. 2.1.1–2.1.6)).

131. See Glass v. Goeckel, 703 N.W.2d 58, 63–64 (Mich. 2005) (“This obligation traces back to the Roman Emperor Justinian, whose *institutes* provided . . .” (quoting J. INST. 2.1.1)).

132. See Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355, 360 (N.J. 1984) (“The genesis of this principle is found in Roman jurisprudence, which held . . .” (quoting J. INST. 2.1.1)).

133. One state—California—has also created through constitutional amendment a right of public access to private tidelands “whenever it is required for any public purpose.” CAL. CONST. art. X, § 4; see also Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 847–48 (1987) (observing with respect to article X, section 4 of the California Constitution that “the State [of California] has sought to protect public expectations of access from disruption by private land use”); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 522–23 (1980) (recounting the history leading to adoption of article X, section 4 of the California Constitution). Because this protection is not judicially created, it will not be addressed here further. The remaining states—Hawaii, Iowa, Maryland, Rhode Island, and Vermont—have not directly addressed the question of public access to private tidelands under the public trust doctrine, and thus will also not be addressed further.

The opinion of the Court of Appeals of Maryland in *Department of Natural Resources v. Mayor & Council of Ocean City* arguably suggests, contrary to the thesis proposed here, that private property rights are not circumscribed by the public trust doctrine. See 332 A.2d 630, 634 (Md. Ct. App. 1975). While recognizing the traditional public trust rights of navigation and fishing, the court observed that “[t]he notion that the rights of the owner of the littoral must be exercised in subordination to the paramount rights of the public is no longer applicable, since rights of fishing, boating, hunting, bathing, taking shellfish and seaweed and of passing and repassing have been *pro tanto* extinguished by the prior grant.” *Id.* (citing *Town of Orange v. Resnick*, 109 A. 864 (Conn. 1920)). This statement is *mere dicta*, however, because the issue actually considered by the court concerned the right of a property owner to build *landward* of the high water mark. See *id.* at 632.

134. See Opinion of the Justices, 313 N.E.2d 561, 565–66 (Mass. 1974).

135. Colonial Ordinance of 1641–1647; in THE BOOK OF THE GENERAL LAWS AND LIBERTIES CONCERNING THE INHABITANTS OF THE MASSACHUSETTS 35 (Thomas G. Barnes ed. 1975)

private coastal owners,¹³⁶ subject only to the enumerated public rights of fishing, fowling, and navigation.¹³⁷ Although the Supreme Judicial Court of Massachusetts decided that “the right of passage over dry land at periods of low tide cannot be reasonably included as one of the traditional rights of navigation,”¹³⁸ it has nevertheless recognized a right to walk across otherwise private tidelands in order to fish from a public jetty.¹³⁹ The public trust doctrine in Massachusetts thus appears to encompass public access to private tidelands where necessary to effect enumerated public trust rights, but not for the purpose of allowing general recreation.

Similarly, the Supreme Court of Michigan recently held that the public possesses a right of pedestrian passage over all shorelands of the Great Lakes, regardless of ownership.¹⁴⁰ While the boundary of a private landowner’s fee title extends to the low water mark of the Great Lakes, the *jus publicum* extends to the high water mark and thus overlaps with the *jus privatium* between these two boundaries.¹⁴¹ Michigan had previously recognized protection under the public trust doctrine for the traditional rights of “fishing, hunting, and navigation for commerce or pleasure.”¹⁴² But the court acknowledged that it could only protect these traditional rights if it also protected the activities inherent to their exercise.¹⁴³ Pedestrian passage constitutes such an activity because the waters of the Great Lakes cannot otherwise be accessed for fishing,

136. See Colonial Ordinance, *supra* note 135, at 35 (“[I]t is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoining shall have propertie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebs farther.”); see also Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 359–60 (Mass. 1979); Opinion, 313 N.E.2d at 565–66.

137. See Colonial Ordinance, *supra* note 135, at 35 (“Everie Inhabitant who is an house-holder shall have free fishing and fowling, in any great Ponds, Bayses, Coves and Rivers so far as the Sea ebs and flows, within the precincts of the town where they dwell, unles the Free-men of the same town or the General Court have otherwise appropriated them.”); see also Boston Waterfront, 393 N.E.2d at 359–60; Opinion, 313 N.E.2d at 565–66.

138. Opinion, 313 N.E.2d at 566.

139. Barry v. Grela, 361 N.E.2d 1251, 1251–52 (Mass. 1977).

140. Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005) (“[T]he public must have a right of passage over land below the ordinary high water mark.”). The U.S. Supreme Court held long ago that the lands beneath the navigable waters of the Great Lakes, although not overtly subject to tidal influence, are encompassed within the public trust doctrine. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436–37 (1892).

141. Glass, 703 N.W.2d at 69–70.

142. *Id.* at 74.

hunting, and boating; effectuation of these traditional public trust rights thus requires a right of public pedestrian passage over the lakeshore.¹⁴⁴

The Supreme Court of New Jersey also recently affirmed the importance of public access to private tidelands.¹⁴⁵ The court had already suggested more than thirty years earlier that the title to tidelands conveyed by the state into private ownership might be burdened with a public right of access to ocean waters.¹⁴⁶ In holding that a private club could not restrict public use of the dry sand area¹⁴⁷ within its oceanfront lots, the court in *Raleigh Avenue Beach Ass'n v. Atlantia Beach Club*¹⁴⁸ returned in part to this question.¹⁴⁹ The court held that "the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary."¹⁵⁰ This limitation on private property rights was required to afford the public not only "a suitable area for recreation on the dry sand" but also "reasonable access to the foreshore."¹⁵¹ Under the court's ruling, therefore, public access to private tidelands tracks public access to private dry sand areas.¹⁵²

As in Massachusetts and Michigan, the Supreme Court of New Jersey's holding in *Raleigh* appears to be motivated by desire to protect *jus publicum* rights. The Supreme Court of New Jersey has repeatedly stressed the flexibility of the public trust doctrine in responding to public

144. *Id.*

145. See *Raleigh Ave. Beach Ass'n v. Atlantia Beach Club*, 879 A.2d 112, 121 (N.J. 2005).

146. See *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972).

147. The dry sand area is that part of the beach between the high water mark and either the vegetation line or a man-made boundary such as a seawall or boardwalk, and thus lies adjacent to but landward of the tidelands. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358 n.1 (N.J. 1984).

148. 879 A.2d 112 (N.J. 2005).

149. See *id.* at 120-21.

150. *Id.* at 121. Necessity is determined on the basis of four specific criteria: (1) location of the dry sand area with respect to the tidelands, (2) availability and size of publicly-owned dry sand areas, (3) nature and scope of public demand for beach access, and (4) the private owner's usage of the dry sand area. *Id.* at 121-22 (citing *Matthews*, 471 A.2d at 365).

151. *Id.* at 121; see also *Matthews*, 471 A.2d at 366. Note that New Jersey refers to its tidelands as the foreshore. See *Spiegel v. Borough of Beach Haven*, 218 A.2d 129, 133 (N.J. 1966) ("Foreshore: The part of the shore, lying between the crest of the seaward berm and the ordinary low water mark, that is ordinarily traversed by the uprush and backrush of the waves.").

152. The existence of a right of reasonable public access to tidelands appears to have been conceded during oral argument, perhaps explaining why this issue was not directly addressed by the court. *Raleigh*, 879 A.2d at 127 (Wallace, Jr., J., dissenting) (noting that the "defendant concedes . . . that the public has the right to use its property 'at and below the mean high water line'").

need.¹⁵³ Even prior to *Raleigh*, it thus had "no difficulty" finding that the activities encompassed by the *jus publicum* "are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities."¹⁵⁴ In defining the public trust doctrine so expansively, of particular concern to the court was that activities such as bathing and swimming could not be enjoyed without periods of rest on the shore.¹⁵⁵

In sum, the Washington judiciary recognizes the Institutes of Justinian as an ancient codification of public trust principles. A survey of state case law reveals that such affirmative judicial appreciation of the public trust doctrine's historical roots correlates with judicial recognition of a public right of pedestrian passage over privately owned tidelands. This public right of access may, however, apply only where necessary to effectuate activities protected by the *jus publicum*.

III. THE WASHINGTON LEGISLATURE RECOGNIZES A PUBLIC NEED FOR RECREATIONAL TIDELANDS ACCESS

The scope of Washington's public trust doctrine is shaped by the needs of its citizens.¹⁵⁶ The police power of the state vests the Washington Legislature with authority to identify and enact legislation to protect public welfare and safety interests.¹⁵⁷ Because recreational opportunities constitute a concern of the public welfare,¹⁵⁸ the public trust doctrine should respond to the legislature's identification of a need for public recreational access to tidelands.¹⁵⁹

153. See *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine . . . should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."); *Raleigh*, 879 A.2d at 121 ("recognizing . . . the dynamic nature of the public trust doctrine" (quoting *Matthews*, 471 A.2d at 365)).

154. *Neptune City*, 294 A.2d at 54 (emphasis added).

155. *Matthews*, 471 A.2d at 365 ("The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean."); see also *Raleigh*, 879 A.2d at 120. Note that the *Raleigh* court even made the specific analogy between such recreational use and the reference in the Institutes of Justinian to fisherman drying their nets on the seashore. *Id.*

156. *Orion Corp. v. State*, 109 Wash. 2d 621, 640-41, 747 P.2d 1062, 1073 (1987).

157. *City of Seattle v. Ford*, 144 Wash. 107, 110-11, 257 P. 243, 244 (1927) (quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1894)).

158. *Martham Adver. Co. v. State*, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968).

159. See generally *WASH. REV. CODE* ch. 90.38 (2006), *id.* §§ 79A.05.600-695; *id.* chs. 79.105-140.

A. The Scope of the Washington Public Trust Doctrine Is Elastic and Defined by Public Need

The scope of the public trust doctrine in Washington is elastic and ultimately determined by the needs of the people.¹⁶⁰ In *Orion*, the Supreme Court of Washington declared that "[t]he trust's relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay."¹⁶¹ Even upon first announcing the existence of the public trust doctrine in Washington, the court explicitly refused to limit protected public rights to the narrow confines of navigation and fishing.¹⁶² To the contrary, the court stated that the *jus publicum* interest encompasses "the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."¹⁶³

The Supreme Court of Washington has in recent years repeatedly affirmed the wide swath of public rights protected by the public trust doctrine, attesting to the latter's continued breadth.¹⁶⁴ To this day, the court has held only one activity—the taking of shellfish from private tidelands—to be outside the scope of the *jus publicum*,¹⁶⁵ and has hinted that the public trust doctrine may even extend to environmental protection.¹⁶⁶ But the court has otherwise failed to explicitly elaborate on what activities might constitute "other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."¹⁶⁷ And in particular, it has yet to delineate protected land-based activities.

160. *Orion*, 109 Wash. 2d at 640-41, 747 P.2d at 1073.
161. *Id.*; see also *Rettkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 242, 858 P.2d 232, 244 (1993) (Guy, J. dissenting) (observing that "at its most basic level, the scope of the public trust doctrine is defined by the public's needs in those natural resources necessary for social stability").
162. *Caminetti v. Boyle*, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987).
163. *Id.* (quoting *Wijlbou v. Gallagher*, 77 Wash. 2d 305, 316, 462 P.2d 232, 239 (1969)).
164. See *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073; *Weden v. San Juan County*, 135 Wash. 2d 678, 699, 958 P.2d 273, 283 (1998); *State v. Longshore*, 141 Wash. 2d 414, 427, 5 P.3d 1256, 1262 (2000).
165. *Longshore*, 141 Wash. 2d at 429, 5 P.3d at 1263.
166. See *Weden*, 135 Wash. 2d at 698, 958 P.2d at 283 ("The doctrine protects 'public ownership interests in certain uses of navigable waters and underlying lands, including ... environmental quality.'" (quoting *Johnson*, *supra* note 18, at 524)).
167. *Caminetti*, 107 Wash. 2d at 669, 732 P.2d at 994 (citing *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239). A corollary is defined as "[a] proposition that follows from a proven proposition with little or no additional proof" or "something that naturally follows." BLACK'S LAW DICTIONARY 363

B. The Police Power of the State Vests the Washington Legislature with Discretion to Determine Public Need

In discussing the constitutional reach of the state's police power, the Supreme Court of Washington has repeatedly affirmed the role of the legislature in determining public needs. Police power is the unwritten authority possessed by a state's legislature to enact statutes promoting public welfare and security.¹⁶⁸ "[h]owever difficult it may be to give a precise or satisfactory definition of 'police power,' there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people."¹⁶⁹ Included amongst the concerns encompassed by the police power is recreation and resource protection.¹⁷⁰ The Washington Legislature is vested with extensive discretion to determine current requirements of the public interest.¹⁷¹ In the context of the public trust doctrine, the Washington State Supreme Court has specifically opined that "the use of police power by government allows the Legislature to enact laws in the interest of the people."¹⁷²

(8th ed. 2004).
168. *City of Seattle v. Ford*, 144 Wash. 107, 110-12, 257 P. 243, 244 (1927) (quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1894)); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 421-22, 439 P.2d 248, 258 (1968).
169. *Markham*, 73 Wash. 2d at 421-22, 439 P.2d at 258 (quoting *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936)); see also *McDermott v. State*, 197 Wash. 79, 84, 84 P.2d 372, 374 (1938) (noting that the police power authorizes the legislature to enact "regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety" (quoting *State v. Pimney*, 79 Wash. 608, 611, 140 P. 918, 919 (1914) (emphasis added))).
170. *Markham*, 73 Wash. 2d at 424, 439 P.2d at 260 ("The public welfare embraces healthful recreation and the protection of our national resources").
171. *Ford*, 144 Wash. 2d at 112, 257 P. 243 at 244 ("[A] large discretion is necessarily vested in the legislature to determine ... what the interests of the public require." (quoting *Lawton*, 152 U.S. at 136)); see also *Weden*, 135 Wash. 2d at 691, 958 P.2d at 280 (quoting same passage); *McDermott*, 197 Wash. 2d at 83, 84 P.2d at 374 ("In the exercise of police power, the legislature is vested with a wide discretion ... to determine what the public interest requires ..."); *Markham*, 73 Wash. 2d at 422, 439 P.2d at 259 ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954))).
172. *Weden*, 135 Wash. 2d at 691, 958 P.2d at 279. Note that a takings challenge would almost certainly be mounted were the Washington Legislature to enact a law restricting the right of private individuals to exclude the public from privately owned tidelands, thus necessitating that the courts examine whether a right of public access to private tidelands is encompassed by the public trust

C. *The Washington Legislature Recognizes Recreational Access to Tidelands as a Public Need*

The Washington Legislature's understanding of public need with respect to tidelands may be inferred from three statutes: the Shoreline Management Act (SMA),¹⁷³ the Seashore Conservation Act (SCA),¹⁷⁴ and the Aquatic Lands Act (ALA).¹⁷⁵ The SCA's Declaration of Principles eloquently summarizes the importance of tidelands access to the public, particularly with respect to recreational opportunities:

The beaches bounding the Pacific Ocean from the Straits of Juan de Fuca to Cape Disappointment at the mouth of the Columbia River constitute some of the last unspoiled seashore remaining in the United States. They provide the public with almost unlimited opportunities for recreational activities, like swimming, surfing and hiking; for outdoor sports, like hunting, fishing, clamming, and boating; for the observation of nature as it existed for hundreds of years before the arrival of white men; and for relaxation away from the pressures and tensions of modern life. In past years, these recreational activities have been enjoyed by countless Washington citizens, as well as by tourists from other states and countries. The number of people wishing to participate in such recreational activities grows annually.¹⁷⁶

doctrine.

173. WASH. REV. CODE ch. 90.58 (2006). The Supreme Court of Washington has itself recognized that "[public] trust principles are reflected in the SMA's underlying policy." *Orion Corp. v. State*, 109 Wash. 2d 621, 641 n.11, 747 P.2d 1062, 1073 n.11 (1987). See also A. Reid Allison III, *The Public Trust Doctrine in Washington*, 10 U. PUGET SOUND L. REV. 633, 661 (1987) (observing that "the SMA explicitly recognizes the interest of the public in its enjoyment of the physical and aesthetic qualities of the natural shorelines of the state").

174. WASH. REV. CODE §§ 79A.05.600-95.

175. *Id.* chs. 79.105-45. More generally, Prof. Ralph Johnson, in his seminal article regarding the public trust doctrine in Washington, analyzed several statutes and in summarizing observed: "Congruence between public trust values and several statutes governing use of the state's natural resources is common. These statutes have become increasingly important resource management tools, and the extent to which they embody or reflect public trust values has increased over time." Johnson, *supra* note 18, at 542-48.

176. WASH. REV. CODE § 79A.05.600 (emphasis added). Furthermore, the Legislature explicitly provides in a later provision that the SCA is to be administered "in harmony with the broad principles set forth in RCW 79A.05.600." *Id.* § 79A.05.615. This approach is consistent with the role given to declarations of policy and statements of purpose by the courts. Specifically, the Washington State Supreme Court has noted that "[d]eclarations of policy in an act, although without operative force in and of themselves, serve as an important guide in determining the intended effect

In addition to noting in the SCA the increasing number of people seeking recreational access to tidelands, the legislature in the SMA expressed concern that a large portion of the state's tidelands and shorelands had been transferred into private ownership.¹⁷⁷ Seeking to preserve public recreational access to tidelands and shorelands, the legislature ordered the state Department of Ecology to give preference to several uses for "shorelines of statewide significance,"¹⁷⁸ including, regardless of ownership, the tidelands of the Pacific coastline and of much of Puget Sound and the Strait of Juan de Fuca.¹⁷⁹ Among these preferred uses the legislature included "[i]ncreasing[ing] recreational opportunities for the public in the shoreline."¹⁸⁰ The legislature also emphasized the importance of increasing public access to state-owned tidelands in the ALA,¹⁸¹ and established the Washington State Seashore Conservation Area under the SCA to provide public recreational access to state-owned tidelands.¹⁸² The Department of Ecology includes opportunity to reach the water's edge—tidelands—in the definition of "public access."¹⁸³

In sum, the public trust doctrine responds to public need. Public need, in turn, is determined by the Washington Legislature. The legislature's identification of a need for increased public recreational access to

of the operative sections." *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978). See also *Wash. State Hous. Fin. Comm'n v. O'Brien*, 100 Wash. 2d 491, 495-96, 671 P.2d 247, 250 (1983) ("In determining legislative motive, we give great weight to the statutory declaration of purpose."); *Moore v. Moore*, 20 Wash. App. 909, 913, 583 P.2d 1249, 1252 (1978) ("The statement of purpose in an act is the 'primary insight into the intent of the legislature . . .'" (quoting *Anderson v. O'Brien*, 84 Wash. 2d 64, 67, 524 P.2d 390, 393 (1974))).

177. See WASH. REV. CODE § 90.58.020 ("The legislature further funds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest . . .").

178. *Id.*

179. *Id.* § 90.58.030(2)(e).

180. *Id.* § 90.58.020.

181. *Id.* § 79.105.030 (2006) (providing that "[t]he manager of state-owned aquatic lands shall strive to provide a balance of public benefits," which include "[e]ncouraging direct public use and access").

182. *Id.* § 79A.05.605.

183. WASH. ADMIN. CODE 173-26-221(4)(a) (2005), promulgated by the Department of Ecology under the SMA, defines "public access" as follows: "Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations."

tidelands may be inferred from its repeated statutory attempts to address this issue.

IV. WASHINGTON'S PUBLIC TRUST DOCTRINE INCLUDES PEDESTRIAN PASSAGE OVER PRIVATE TIDELANDS

Although the Supreme Court of Washington recently denied the petition for review of the public trust claim rejected by the Washington State Court of Appeals, Division II, in its unpublished decision in *City of Bainbridge Island v. Brennan*,¹⁸⁴ both legal and historical analyses indicate that the public trust doctrine in Washington encompasses public pedestrian passage over private tidelands, at least where necessary to effectuate currently protected *jus publicum* rights. This outcome is a logical extension of the court's narrow interpretation in *Caminiti* of private property rights burdened by the *jus publicum*.¹⁸⁵ Furthermore, judicial espousal of at least limited public access to private tidelands both harmonizes the public trust doctrine of this state with others that recognize the Institutes of Justinian as a source of public trust rights,¹⁸⁶ and responds to the Washington Legislature's identification of a need for increased public recreational access to tidelands generally.¹⁸⁷

A. *Establishing a Public Right of Pedestrian Passage over Private Tidelands Allows both Private Tidelands Owners and the State to Fulfill Their Public Trust Doctrine Obligations*

Where private property ownership obstructs public access to resources protected by the public trust doctrine, *Caminiti* strongly suggests that the *jus publicum* is impermissibly impaired if the private owner does not in some way allow public pedestrian passage across the impeding property.¹⁸⁸ There, the court found that private docks on state tidelands did not circumscribe the *jus publicum* because state administrative regulations required that dock owners allow the public to walk over, under, or around such structures.¹⁸⁹ The court's explicit

condonation of activity that would normally constitute a private property was not motivated by concern for public access to state property per se. Rather, this judicial sanctioning of public passage over private docks situated on state tidelands constitutes a primary basis for the court's conclusion that the statutory provision at issue does not substantially impair the *jus publicum*.¹⁹⁰ The *jus publicum*, in turn, is comprised not of the actual land protected under the public trust doctrine, but of the interest always retained by the state in land protected by the public trust doctrine.¹⁹¹ This interest—the public trust doctrine rights to which the public is entitled and which the state must always protect—is identical regardless of whether the protected tidelands are in state or in private ownership.¹⁹² Because the *Caminiti* court made its conclusion with respect to the *jus publicum*, rather than mere public access to state tidelands, its holding applies with equal force to all tidelands, regardless of state or private ownership.

The public trust doctrine effectively limits the title to private tidelands insofar as the owner of such property cannot undertake any property usage that substantially impairs the *jus publicum*.¹⁹³ A property owner substantially impairs the *jus publicum* whenever public access to private tidelands is barred, whether the private owner dredges and fills the tidelands¹⁹⁴ or, more simply, excludes all entry by members of the public. At least where no other tidelands access is reasonably available and the private tidelands owner excludes the public, conveyance of tidelands property into private ownership also violates the state's obligation not to substantially impair the *jus publicum*.¹⁹⁵ No such impairment occurs, however, so long as the private tidelands owner allows public pedestrian passage where necessary to effectuate public trust rights such as navigation, fishing, and swimming.¹⁹⁶ Thus, neither the state nor private property owners can satisfy their public trust obligations unless the *jus publicum* encompasses a right of pedestrian passage across private tidelands for members of the public attempting to engage in protected activities.

190. *Id.* ("In any event, nothing in the statute substantially impairs the *jus publicum*.")
191. *See id.* at 668-69, 732 P.2d at 994; *supra* Part I.A.1.

192. *See Caminiti*, 107 Wash.2d at 669-70, 732 P.2d at 994; *supra* Part I.A.1.

193. *See supra* Part I.B.

194. *See supra* Part I.B.

195. *See supra* Part I.B.2-3.

196. *See Caminiti*, 107 Wash.2d at 674, 732 P.2d at 996.

184. No. 31816-II, 2005 Wash. App. LEXIS 1744 (Wash. Ct. App. July 20, 2005), review denied, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006).

185. *See supra* text accompanying notes 100-104.

186. *See supra* Part II.

187. *See supra* Part III.

188. *See, e.g., Caminiti v. Boyle*, 107 Wash.2d 662, 674, 732 P.2d 989, 996 (1987).

189. *Id.*

B. *Broad Construction of Washington's Public Trust Doctrine Is Consistent with Judicial Recognition of the Institutes of Justinian as a Codification of Public Trust Rights*

The Institutes of Justinian declare that tidelands could be owned by no one, consequently establishing a universal right of tidelands access.¹⁹⁷ Many scholars thus identify this ancient Roman text as one of the earliest codifications of public trust principles.¹⁹⁸ The public trust doctrine as we know it today, however, has evolved tremendously from its communal beginnings. Because of this country's inheritance of property law by way of England,¹⁹⁹ title to all tidelands in the United States resides in the possession of either a state, the federal government, an Indian nation, or a private party. Furthermore, federal jurisprudence declares that, beyond certain minimum requirements, each state is free to individually determine the public rights protected under its *jus publicum* interest in all tidelands within its borders.²⁰⁰ Ten state judiciaries nonetheless specifically recognize Emperor Justinian's codification of public trust principles and thus choose to continue in his tradition, albeit within the confines imposed by tidelands ownership.²⁰¹

Of the three such judiciaries that have addressed the issue of public passage over privately owned tidelands, all have affirmed the existence of such a right, at least where necessary to effectuate more widely recognized public trust activities.²⁰² Massachusetts does not protect pedestrian passage over tidelands for its own sake,²⁰³ but protects this activity when in aid of the enumerated public trust right of fishing.²⁰⁴ Similarly, the public trust doctrine in Michigan encompasses walking along private property on the shoreline of the Great Lakes, as members of the public would not otherwise be able to effectuate their traditionally protected activities of fishing, hunting, and navigation.²⁰⁵ The New Jersey public trust doctrine guarantees "reasonable access" to coastal

197. See *supra* Part II.A.

198. See *supra* Part II.A.

199. See *supra* Part I.A.1.

200. See *Shively v. Bowlby*, 132 U.S. 1, 26 (1894).

201. See *supra* Part II.B.

202. See *supra* Part II.B.

203. *Opinion of the Justices*, 313 N.E.2d 561, 567 (Mass. 1974).

204. *Barry v. Grella*, 361 N.E.2d 1251, 1251-52 (Mass. 1977).

205. *Glass v. Goetzke*, 703 N.W.2d 58, 74 (Mich. 2005).

beaches for recreational use by allowing pedestrian passage even over private dry sand areas.²⁰⁶

The Supreme Court of Washington also looks to the Institutes of Justinian as an ancient codification of public trust principles.²⁰⁷ Judicial protection of public pedestrian passage over private tidelands would therefore harmonize Washington's public trust doctrine with that of states that adopt a similarly broad view. Such harmonization may only require public recreational access to private tidelands where necessary to effect activities protected by the *jus publicum*.

C. *The Washington Legislature's Identification of a Public Need for Increased Recreational Access to Tidelands Further Validates this Construction of the Public Trust Doctrine*

The Washington State Supreme Court explicitly declared soon after confirming the existence of the public trust doctrine that the doctrine's scope derives not from navigable waters *per se* but rather from public need.²⁰⁸ This underpinning in public need in turn caused the court to recognize that the *jus publicum* interest encompasses not only the traditional rights of navigation and fishing, but also recreational activities such as boating, swimming, and water skiing.²⁰⁹ In fact, the court has thus far found only one activity—the taking of shellfish from private tidelands—to fall outside the scope of the public trust doctrine.²¹⁰

By focusing on public need, the judiciary created an indirect role for the Washington Legislature in defining the scope of the public trust doctrine.²¹¹ The legislature determines public need with respect to welfare and security under its inherent police powers;²¹² public welfare includes recreational opportunities.²¹³ The legislature has expressed concern for public recreational access to tidelands²¹⁴ in response to its

206. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 121 (N.J. 2005).

207. See *Caminiti v. Boyle*, 107 Wash. 2d 662, 668-69, 732 P.2d 989, 994 (1987); see also *Retkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (Oy J., dissenting).

208. *Orion Corp. v. State*, 109 Wash. 2d 621, 640-41, 747 P.2d 1062, 1073 (1987).

209. *Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (citing *Wilbour v. Gallagher*, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)).

210. *State v. Longshore*, 141 Wash. 2d 414, 429, 5 P.3d 1256, 1263 (2000).

211. See *supra* Part III.A-B.

212. See *supra* Part III.B.

213. *Markham Adver. Co., Inc. v. State*, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968).

214. See *supra* Part III.C.

prior conveyance of more than sixty percent of Washington tidelands into private ownership.²¹⁵ Furthermore, the legislature has specifically established as a goal "[i]ncreas[ing] recreational opportunities for the public in the shoreline,"²¹⁶ including in the latter term both state-owned and privately owned tidelands.²¹⁷ The courts should now respond to the legislature's repeated calls and recognize as protected by the *jus publicum* a public right of pedestrian passage across private tidelands, at least where necessary to effectuate recreational activities also protected thereby.

V. CONCLUSION

Although the Supreme Court of Washington has yet to squarely address a right of public pedestrian passage over private tidelands, the Washington public trust doctrine logically encompasses such a right, at least where necessary to effectuate those water-based activities already judicially recognized as protected by the *jus publicum*. Neither the state nor private property owners can otherwise satisfy their obligations under the public trust doctrine. Recognition of a right of public access to private tidelands would also harmonize *jus publicum* rights among those states that recognize the Institutes of Justinian as a source of public trust principles. Furthermore, the public trust doctrine responds to public need, which the Shoreline Management Act, the Seashore Conservation Act, and the Aquatic Lands Act all strongly suggest includes increased public recreational access to tidelands.

215. Conte, *supra* note 5, at 55-56; see also SCOTT, *supra* note 5, at 10.



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