

**ATTACHMENT A: FINDINGS AND CONCLUSIONS –
LIMITED AMENDMENT TO THE CITY OF PORT ORCHARD’S SHORELINE MASTER PROGRAM**

SMP Submittal accepted December 12, 2016, Ordinances 031-16 and 032-16

As supplemented by Ordinance 011-17 submitted on March 28, 2017

Prepared by Misty Blair, on January 17, 2018

USE OF THIS DOCUMENT: Ecology’s *Findings and Conclusions* (Attachment A), including reference to *Attachment B* (Required Changes), provide the factual basis for Ecology’s decision on the City of Port Orchard’s (City) proposed amendment to their Shoreline Master Program (SMP).

BRIEF DESCRIPTION OF PROPOSED AMENDMENT:

The City of Port Orchard has submitted to Ecology for review an amendment to their Shoreline Master Program (SMP). The City Council adopted Ordinance 031-16 and 032-16 on October 11, 2016, with the expressed purpose of clarifying nonconforming uses and structure provisions, addressing redevelopment of shoreline properties and making certain clarifications and corrections related to SMP implementation. The City proposes to amend the following SMP sections:

Section 6.3 General Shoreline Master Program Policies and Regulations

Section 6.5 Public Access – Development Regulations

Section 6.6 Shoreline Vegetation Conservation – Management Policies

Section 7.2 Shoreline Development Standards Matrix

Section 7.5 Boating Facilities – Development Regulations

Section 7.10 Moorage: Docks, Piers and Mooring Buoys – Development Standards

Section 8.3 Shoreline Exemptions

Section 8.4 Administrative Shoreline Substantial Development Permits

Section 8.5 Shoreline Substantial Development Permits

Section 8.7.3 Variance Process

Section 8.9 Public Notice

Section 8.10 Public Hearing

Section 8.11 SEPA Review

Chapter 9 Existing Development – Introduction

Section 9.1 Existing Uses

Section 9.2 Existing Structures

Section 9.3 Existing Lots

Chapter 12 Definitions

***Addition of an Appendix E – Mitigation and Restoration for Redevelopment Activities**

Regional staff recommends approval of the proposed amendment subject to required changes (Attachment B).

FINDINGS OF FACT

Need for amendment. The original City SMP was approved by Ecology in 1973 with major amendments in 1992 and 1994. The City’s SMP comprehensive update process pursuant to RCW 90.58.080 and 100 was completed in March 2013. The City describes the purpose of these amendments as to *enhance the ability of downtown waterfront property owners to redevelop and improve their properties* and several “housekeeping” measures for consistency with the 2016 Comprehensive Plan, the City’s permit processing regulations, the Washington Administrative Code, and to incorporate recommendations from reviewing agencies.

SMP PROVISIONS TO BE CHANGED BY THE AMENDMENT AS PROPOSED:

Section 6.3 General Shoreline Master Program Policies and Regulations

The City proposes to remove the phrase *the majority of* to clarify that all the criteria within this section apply.

Section 6.5 Public Access – Development Regulations

The City proposes to delete development regulations G-DR-12 and G-DR-13, which provide public access requirements and standards for all public projects and development proposals within the High Intensity shoreline environment designation in accordance with the Mosquito Fleet Trail Plan.

Section 6.6 Shoreline Vegetation Conservation – Management Policies

The City proposes to modify this language to provide clarity for consistent implementation.

SMP-GP-32 The City shall ~~endeavor to provide~~ develop and apply standards and regulations that require shoreline development and uses to meet the provide-no net loss of standard for maintenance of shoreline ecological functions.

Section 7.2 Shoreline Development Standards Matrix

The City proposes to clarify that the development standards setbacks and height requirements are identified in feet. The City also proposes to add the following footnote which is applied to development scenarios throughout the matrix.

1. Lawfully constructed conforming structures within a shoreline buffer may be expanded or redeveloped in accordance with this Master Program. Refer to Appendix E for more information.

Section 7.5 Boating Facilities – Development Regulations

The City proposes to remove the outdated substantial development dollar threshold and replace it with a reference to WAC 173-27-040(2)(a) in order to clarify that this amount is adjusted and the City should be using the most current threshold amount.

Section 7.10 Moorage: Docks, Piers and Mooring Buoys – Development Standards

The City proposes to re-organize this provision and clarify that any proposed moorage should be the minimum size necessary for the intended use. Language was removed, added, and relocated within this section.

Development Standards for New Piers and Docks

Length – Docks, piers, and floats should be designed, located and operated to minimize interference with adjacent water uses and impacts to fish, shellfish and habitat. The maximum length, width and surface area of a pier or dock should be consistent with the requirements of WAC 220-660-380 or its successor, and should be the minimum necessary to accomplish moorage and shore access based on site-specific circumstances as determined by a marine engineer, as well as potential impacts and mitigation requirements. Ells are not permitted on single-family residential docks, piers or floats. Unless otherwise recommended by the Department of Ecology and/or Department of Fish and Wildlife based on site-specific review, all decking, and floats 6 feet or less in width shall include a minimum of thirty percent (30%) functional grating, floats greater than 6 feet in width shall have a minimum of fifty percent (50%) functional grating, and ramps shall be fully grated. Functional grating shall not be covered or used as a storage area, and must be maintained in a condition free of algae, mud or other debris that may impede light transmission.

Width

- ~~1. The maximum width of a single family residential pier or dock is six (6) feet.~~
- ~~2. The maximum width of a commercial or public pier will be the minimum necessary to accommodate the permitted use.~~
- ~~3. The maximum width of a ramp is four (4) feet.~~
- ~~4. The maximum width of ells and floats is six (6) feet for public or commercial uses. Any additional fingers must be no wider than two (2) feet.~~

~~5. Ells are not permitted on single family residential docks, piers, or floats.~~

~~Area. Surface area of docks, piers and ramps shall be determined on a site specific basis.~~

Decking

~~1. If pier is over four feet wide, decking is required to 30% functional grating on the pier.~~

~~2. Ramps are required to be fully grated.~~

~~a. Option 1: A float with a width of 6 feet or less must have functional grating installed on at least 30 percent of the surface area of the float.~~

~~b. Option 2: A float with a width greater than 6 feet (up to 8 feet) must have functional grating installed on at least 50 percent of the surface area of the float.~~

Piles

~~1. The Piling diameter of piling shall be the minimum required for the purpose based on site-specific circumstances as determined by a marine engineer cannot exceed 12 inches.~~

~~2. Piling materials. New or replaced piles or structural members of a pile in direct contact with the water shall be constructed of concrete or steel in accordance with current best management practices and shall not be treated or coated with herbicides, fungicides or pentachlorophenol. Existing piles may be maintained or reinforced with pile wrapping composed of marine grade materials. No creosote, pentachlorophenol, CCA or comparable toxic compounds not approved for marine use, shall be used for any portion of the overwater or in-water structure of a new or replacement pile, or a pile wrapping. For any ACZA treated wood may be used for overwater pile structures as long as it meets the most recent, the wood must be treated by the manufacturer per the Post Treatment Procedures establish as best management practices outlined in "BMP Amendment #1 Amendment to the Best Management Practices (BMPs) for the Use of Treated Wood in Aquatic Environments; USA Version Revised July 1996," by the American Wood Preservers' Association and Western Wood Preservers Institute, as amended April 17, 2002 or most current BMPs.~~

Sections 8.3 Shoreline Exemptions, 8.4 Administrative Shoreline Substantial Development Permits, and 8.5 Shoreline Substantial Development Permits

The City proposes to remove the outdated substantial development dollar threshold amounts from all three of these provisions and replace them with a reference to WAC 173-27-040(2)(a) in order to clarify that this amount is adjusted and the City should be using the most current threshold amount.

Sections 8.7.3 Variance Process, 8.9 Public Notice, 8.10 Public Hearing, and 8.11 SEPA Review

The City proposes to remove outdated Port Orchard Municipal Code references related to submittal requirements, public noticing, public hearings, and SEPA regulations.

Chapter 9 Existing Development – Introduction

The City proposes to modify this section to classify all existing primary uses and structures as legal conforming, except appurtenant and over-water structures which would be considered legal nonconforming.

~~Nonconforming development includes Primary shoreline uses and structures which were lawfully constructed, established, or created prior to the effective date of the Master Program, or amendment thereto, including those approved through a variance or conditional use permit, shall be considered legal conforming. Lawfully constructed appurtenant structures that do not conform to present regulations or standards of this Master Program or the Act, and lawfully constructed existing over-water residences and other non-water dependent over-water or in-water structures, shall be considered legal nonconforming. Any structure or use that was not lawfully constructed or established shall be considered illegal nonconforming and may be subject to enforcement or abatement action pursuant to the Port Orchard Municipal Code. But which do not conform to present regulations or standards of the Master Program or policies of the Act. In such cases, the standards of this Chapter shall apply.~~

Section 9.1 Existing Uses

The City proposes to provide that conforming uses may be expanded or intensified, while nonconforming uses may only be continued. The City also proposes to remove the provision that states a use which is listed as a conditional use but which existed prior to adoption of the Master Program for which a Conditional Use Permit has not been obtained shall be considered a non-conforming use.

Section 9.2 Existing Structures

The City proposes to provide different standards for legal conforming and nonconforming structures. The proposed Appendix E is also referenced in these provisions as it relates to the expansion and redevelopment of conforming structures.

9.2 Existing Legal Conforming and Nonconforming Structures

1) Conforming Structures.

a. Conforming primary structures may be repaired, maintained, expanded or redeveloped in accordance with the Act, this Master Program, and the standards of Appendix E.

b. Conforming appurtenant structures may be repaired, maintained, expanded or redeveloped in accordance with the city's land use code and other applicable city policies and regulations, except that they may not be expanded or redeveloped within the shoreline buffer unless a shoreline variance is obtained.

2) Nonconforming Structures. ~~Nonconforming structures include shoreline structures which were lawfully constructed or placed prior to the effective date of the Act or the Master Program, or amendment thereto, but which do not conform to present bulk, height, dimensional, setback, or density requirements. Nonconforming structures may continue even though the structures fail to conform to the present requirements of the environmental district which they are located. A nonconforming structure may be maintained as follows:~~

~~a. Necessary repairs and alterations that do not increase the degree of nonconformity may be made to nonconforming structures.~~

~~b. A primary or appurtenant nonconforming building or structure may be repaired and maintained and replaced as provided in and as limited by this section and by Appendix E. The Any maintenance or repair or replacement shall be within the existing building or structure footprint and shall should not increase the degree of nonconformity.~~

~~c. Changes to interior walls or non-structural improvements may be made to nonconforming buildings or structures.~~

~~d. A building or structure, nonconforming as to the bulk, dimensional and density requirements of this Master Program, may be added to or enlarged if such addition or enlargement conforms to the regulations of the zoning district in which it is located.~~

~~e. A structure for which a variance has been issued shall be considered a legal nonconforming structure and the requirements of this section shall apply as they apply to preexisting nonconformities.~~

~~2) Residential structures shall be deemed "conforming" and not subject to the provisions of this Section 9.2 under the following conditions:~~

~~a. the residential structure or appurtenant structure was legally established and used for a conforming use when established;~~

~~b. the residential structure or appurtenant structure is not an over-water structure;~~

~~c. the residential structure or appurtenant structure is non-conforming solely because it no longer meets the current standards for setbacks, buffers, or yards; area; bulk; height; or density; and~~

~~d. redevelopment, expansion, change of occupancy class, or replacement of the residential structure is consistent with the master program, including requirements for no net loss of shoreline ecological functions.~~

For purposes of this provision, "appurtenant structures" means garages, sheds, and other legally established structures.

"Appurtenant structures" does not include bulkheads and other shoreline modifications or over-water structures. Nothing in this section affects the application of other federal, state, or local government requirements to residential structures.

Section 9.3 Existing Lots

The City proposes to clarify that for existing nonconforming lots of record to be buildable they need to meet both the SMP and zoning code regulations.

9.3 Existing Lots

Undeveloped lots, tracts, parcels or sites located landward of the ordinary high water mark that were established prior to the effective date of the Act and this Master Program, but that do not conform to the present lot size or density standards are considered nonconforming lots of record and are legally buildable subject to the following conditions:

a. All new structures or additions to structures on any nonconforming lot must meet all setback, height, and other construction requirements of the Master Program, the Act, and the underlying zoning requirements and must also comply with applicable design, building, and engineering standards.

Chapter 12 Definitions

The City proposes to remove, modify, or add the following definitions:

~~**Accessory Building** — A separate building attached to or detached from the principal building and used for purposes customarily incidental to the use of the principal building. Accessory buildings can include, but are not limited to: garage, shed, playhouse, cabana, hobby room, etc.~~

~~**Appurtenant Structure or Building** – A structure or building that is secondary to or which supports the use of the primary structure or building on the site, serving a purpose customarily associated with and incidental to the primary structure. Examples: decks, garages, parking lots and patios may be considered appurtenant structures to a single family residence.~~

~~**Building** - Any structure having a roof and walls, used or built for the housing, shelter or enclosure of persons, animals or property of any kind.~~

~~**Commercial** – Commercial developments are those uses that include wholesale, retail, service, office or business trade activities. A mixed-use development that contains commercial uses and residential uses within the same building or buildings shall be regulated as a commercial use according to the requirements of this Master Plan, including but not limited to setbacks, height and public access.~~

~~**Development** – A use consisting of the exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel, or minerals, bulkheading, pile driving, placement of any obstruction, or any project of a permanent or temporary nature which interferes with the normal public use of the waters overlying lands subject to this Master Program at any state of water level. For the purposes of this Master Program, development means (1) any construction or expansion of a building, structure, or use; or change in the use of a building or structure; or (2) paving, landscaping, tree or vegetation removal, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, or pile driving; or (3) placement of any obstruction, or any project of a permanent or temporary nature, which interferes with the normal public use of the waters overlying lands subject to this Master Program at any state of water level.~~

~~**Footprint, Building** - The area covered by a building on the ground. For the purposes of this Master Program, this definition does not include cantilevered portions of a building, or those portions of a site that have only surface development without walls and a roof (such as a deck or patio) or development located solely underground (such as a below-ground basement).~~

~~**Mixed-Use** – A mixed-use development contains residential and commercial uses within the same building.~~

~~**Non-conforming Use or Development, Legal** – Any appurtenant building or other structure, an over-water residence, or other non-water dependent over-water or in-water building or structures, shoreline use or structure or portion thereof which was lawfully constructed or established prior to the effective date of the Act SMA or local Shoreline this Master Program or amendments, but which no longer conforms to the policies and regulations of the Master Program.~~

~~**Primary Structure or Building** – The structure or building associated with the principal use of the property. In some circumstances, such as multibuilding commercial or multifamily residential development, there may be more than one primary structure on a property. This definition shall not include nonhabitable, appurtenant structures and buildings such as storage sheds, decks, patios, greenhouses, swimming pools, and parking lots.~~

~~**Redevelop, Redevelopment** – “Redevelop” or “redevelopment” means the replacement of an existing structure or part of an existing structure, or demolition of the structure, with development of a new and/or remodeled structure or structures in its place.~~

~~**Structure** – A permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, except for vessels. “Structure” means a combination of materials constructed and erected permanently on or under the ground, or attached to something having a permanent location on or under the ground.~~

Substantial Development – Any developments of which the total cost or fair market value exceeds the amount currently established and in effect per WAC 173-27-040(2)(a) \$5000, or any development which materially interferes with the normal public use of the water or shorelines of the state; EXCEPT as specifically exempted pursuant to RCW 90.58.030(3e).

Addition of an Appendix E – Mitigation and Restoration for Redevelopment Activities

The City proposes to add Appendix E - Mitigation and Restoration for Redevelopment Activities to their Shoreline Master Program. Appendix E is intended to encourage the revitalization and improvement of the City's waterfront while preserving existing shoreline functions. This four (4) page appendix outlines the how waterfront redevelopment can occur with appropriate avoidance, minimization, and mitigation. The appendix includes sections on applicability, mitigation sequencing, mitigation standards, restoration standards, redevelopment within a shoreline buffer, and monitoring and maintenance of mitigation and restoration activities.

AMENDMENT HISTORY AND REVIEW PROCESS:

LOCAL SMP AMENDMENT PROCESS

The city indicates the proposed SMP amendments originated from a local planning process following the City's 2016 Comprehensive Plan update. The City circulated the draft SMP amendment to interested parties and agencies on August 2, 2016 for comments. The City received and responded to comments from the Washington State Department of Fish and Wildlife and the Suquamish Tribe. The City made modifications to sections 7.10 and 6.3 in an attempt to address comments received. The formal adoption process began with Planning Commission on September 14, 2016. Affidavits of publication provided by the City indicate notice of the hearing was published in the Port Orchard Independent, a weekly newspaper, on August 26, 2016. The record shows that a public hearing regarding the SMP Amendment before the Planning Commission was held on September 14, 2016. The City received no formal oral or written comments during the hearing.

The Planning Commission unanimously recommended adoption of the proposed limited amendments to the Shoreline Master Program. City Council considered the proposed SMP limited amendment on October 11, 2016. With passage of Ordinance Nos. 031-16 and 032-16, on October 11, 2016, the City authorized staff to forward the proposed amendments to Ecology for approval.

DEPARTMENT OF ECOLOGY REVIEW PROCESS

The proposed SMP amendments were received by Ecology for state review on October 31, 2016 and verified as complete on December 12, 2016. Notice of the state comment period was distributed to state task force members and interested parties identified by the City on January 3, 2017, in compliance with the requirements of WAC 173-26-120, and as follows: The state comment period began on January 3, 2017 and continued through February 2, 2017. No public hearing was held during the state comment period. One (1) comment letter was received during the comment period. Ecology received a comment from the Washington State Department of Natural Resources requesting the addition of the following language to SMP Section 7.10: If docks, piers and/or floats are located on aquatic lands, consultation with the Department of Natural Resources will be required to assess applicability of conservation measures. Ecology prepared and sent a summary of this comment to the City on February 14, 2017. The City responded by adopting Ordinance 011-17 on March 28, 2017 adding the above language to the SMP.

Summary of Issues Identified by Ecology as Relevant to its Decision: On April 19, 2017 Ecology provided City staff with a list of issues identified by Ecology as relevant to its decision.

Based on review of the proposed SMP amendments for consistency with applicable SMP-Guideline requirements, consideration of supporting materials included in the City's submittal, and comments received, the following issues remain relevant to Ecology's final decision on the City of Port Orchard's SMP amendment:

Nonconforming Standard and Redevelopment: Considering the fact that the City's shoreline areas are mostly built out, the proposed SMP provides a number of accommodations supporting redevelopment or even expansion of existing legally established uses and structures that are nonconforming to current (or proposed) standards. As proposed, it was not clear that these allowances were intended apply only in the High Intensity SED which is located along the downtown waterfront. Changes are included in Attachment B to provide this clarity and ensure consistency with SMP guidelines. Additionally, the original amendment proposal included changes to the definition of non-conforming that could have led to cumulative impacts and piecemeal development. Therefore, changes are included in Attachment B to address this issue. In most cases, SMP provisions provide reasonable accommodations with clearly defined sideboards to ensure appropriate management of these existing uses and structures. However, as listed in Attachment B, Ecology has identified a number of instances where modification are necessary for internal consistency and to ensure compliance with SMP-Guideline requirements.

Based on discussions with City staff, Ecology believes the required changes contained within Attachment B will bring the proposed SMP into compliance with the SMA and applicable SMP-Guidelines while meeting the City's objective of providing clarity to nonconformities and encouraging waterfront redevelopment in the High Intensity SED. *Therefore, Ecology finds that the proposed SMP amendments as approved by the City under Ordinances 031-16, 032-16, and 011-17 is not consistent with the applicable SMP-Guideline requirements as specifically identified within Attachment B (Required Changes). However, Ecology also finds that the SMP amendments can be modified to be compliant with the SMP-Guidelines through the City's acceptance of "Required Changes."*

Consistency with Chapter 90.58 RCW: The proposed amendment has been reviewed for consistency with the policy of RCW 90.58.020 and the approval criteria of RCW 90.58.090(3), (4) and (5). The City has also provided evidence of its compliance with SMA procedural requirements for amending their SMP contained in RCW 90.58.090(1) and (2).

Consistency with "applicable guidelines" (Chapter 173-26 WAC, Part III): The proposed amendment has been reviewed for compliance with the requirements of the applicable Shoreline Master Program Guidelines (WAC 173-26-171 through 251 and 173-26-020 definitions).

Consistency with Limited Amendment Criteria: The proposed amendment has also been reviewed for compliance with WAC 173-26-201(1)(c) of the SMP Guidelines.

Consistency with SEPA Requirements: The City submitted evidence of SEPA compliance in the form a Determination of Non-Significance (DNS) for the amendments to the City of Port Orchard 2013 Shoreline Master Program, a non-project action, issued on August 26, 2016. Ecology did not comment.

Other Studies or Analyses supporting the SMP update: Ecology also reviewed the following documents prepared by the City in support of the SMP amendment:

- Revised 2016 Amendments Strikethrough-Underline, revised by City Staff 11/2017, following coordination with Ecology.
- An illustration of existing buildings and setbacks within the downtown Port Orchard High Intensity shoreline environment, provided by City Staff 10/11/2017.

CONCLUSIONS OF LAW

After review by Ecology of the complete record submitted and all comments received, Ecology concludes that the City's proposed limited SMP amendment, subject to and including Ecology's required changes (itemized in Attachment B), is consistent with the policy and standards of RCW 90.58.020 and RCW 90.58.090 and the applicable SMP guidelines (WAC 173-26-171 through 251 and .020 definitions). This includes a conclusion that the proposed SMP amendment, subject to required changes, retains sufficient policies and regulations to assure that no net loss of shoreline ecological functions will result from implementation of the amended master program (WAC 173-26-201(2)(c)(5) and WAC 173-26-186(8)).

Ecology concludes that the City has complied with the requirements of RCW 90.58.100 regarding the SMP amendment process and contents.

Ecology concludes that the City has complied with the requirements of RCW 90.58.130 and WAC 173-26-090 regarding public and agency involvement in the SMP amendment process.

Ecology concludes that the City has complied with the purpose and intent of the local amendment process requirements contained in WAC 173-26-100, including conducting public hearings, notice, consultation with parties of interest and solicitation of comments from tribes and government agencies.

Ecology concludes that the City has complied with requirements of Chapter 43.21C RCW, the State Environmental Policy Act.

Ecology concludes that the City's SMP amendment submittal to Ecology was complete pursuant to the requirements of WAC 173-26-110 and WAC 173-26-201(3)(a).

Ecology concludes that the proposed amendments satisfy the criteria for approval of limited amendments found in WAC 173-26-201(1)(c).

Ecology concludes that it has complied with the procedural requirements for state review and approval of shoreline master program amendments as set forth in RCW 90.58.090 and WAC 173-26-120.

DECISION AND EFFECTIVE DATE

Based on the preceding, Ecology has determined the proposed amendments to this SMP are consistent with the policy of the Shoreline Management Act, the applicable guidelines and implementing rules, once required changes set forth in Attachment B are accepted by the City. Ecology approval of the proposed amendments, with required changes, is effective 14 days from Ecology's final action approving the amendment. Ecology's final action will be a letter verifying of receipt of written notice that the City has agreed to the required changes or approval of proposed alternative language.

As provided in RCW 90.58.090(2)(e)(ii) the City may choose to submit an alternative to all or part of the changes required by Ecology. If Ecology determines that the alternative proposal is consistent with the purpose and intent of Ecology's original changes and with RCW 90.58, then the department shall approve the alternative proposal and that action shall be the final action on the amendment.