

**Attachment D:
Responsiveness Summary for Public Comments
City of Tukwila SMP Update
February 16, 2011**

The Department of Ecology (Ecology) held an open comment period on Tukwila's Shoreline Master Program (SMP) update from September 15, 2010 through October 15, 2010. Testimony was provided by two parties at the public hearing on September 29, 2010 and nine written comment letters submitted during the comment period. This includes one party that both testified at the public hearing and provided written comments.

In a letter dated November 2, 2010, Ecology summarized the key issues from all the public comments received. The City then responded to the summarized comments in a letter dated December 10, 2010. This document is a compilation of the Ecology comment summary, City Response, and Ecology Conclusion.

1. William B. Toon at the public hearing on September 29, 2010.

The complete comment states "I am 100 percent against 100 percent of the plan." No additional detail is provided.

City Response: Comment noted.

Ecology Conclusion: Ecology concurs with the City response.

2. Lara Fowler, law firm of Gordon Thomas Honeywell representing Baker Commodities at the public hearing on September 29, 2010 and in a written comment received during the comment period.

Baker Commodities owns a property that is surrounded by the Green River on three sides and railroad tracks on the fourth side. The Baker Commodities site contains 2,200 lineal feet of Green River shoreline. The property is used for an industrial use (rendering). Baker Commodities settled litigation with the City of Tukwila in the 1990's. Some elements of the settlement have been codified in the Tukwila Municipal Code. Baker Commodities expresses concern that the Shoreline Master Program has a significant impact on the Baker Commodities property, as follows:

a. The settlement agreement allows for the uses currently existing on the property to continue as an unclassified use. Structures associated with these uses can be maintained. According to Baker, the settlement agreement also mandated no requirement for public access, with no exceptions.

City Response: The ordinance implementing the SMP and the SMP itself acknowledges the settlement agreement between the City and Baker Commodities, by referencing TMC 18.66.120, the section of the Zoning Code that incorporates key provisions of the settlement agreement regarding nonconforming uses.

Section 11, Public Access, of the SMP provides for exemptions from the requirement to provide on-site public access. The potential application of these exemptions to any new development or redevelopment proposal will be evaluated at the time the proposal is received, based on the particular circumstances of the proposal, applicable law, and other legal requirements (such as the settlement agreement) in effect at the time of the proposal.

In addition, contrary to Baker Commodities' representation, the settlement agreement does not foreclose for all time the imposition of public access requirements on redevelopment of Baker's property. The agreement merely contains the City's acknowledgement that, at the time of execution of the settlement agreement in 1996, "there is no legal basis on which the City could impose a condition on any permit for expansion or redevelopment of the rendering plant that would require Baker to construct, dedicate or otherwise provide a public access trail or other form of public access across the property on which Baker operates its rendering facility." As the quoted language indicates, this settlement agreement provision applies to Baker's use of the property for operation or expansion of a rendering facility, and not to redevelopment proposals involving other uses. Further, the settlement agreement speaks to the law in effect at the time of the settlement agreement, and does not take into account changes in the law since that time, *e.g.*, *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn.App. 937 (Div. I 2010) (RCW 82.02.020 does not apply to adoption of shoreline master programs).

Ecology Conclusion: The Department of Ecology was not a party to the settlement. Ecology is bound by the requirements of the Shoreline Management Act. Ecology and the City must establish standards for public access in the SMP. The zoning classification of uses on the property remains unaffected by the adoption of the SMP. While the settlement language can be read to mostly preclude public access on the site, the settlement cannot impair the application of an ordinance adopted pursuant to the SMA. While public access must respect public safety, ecological function, and must be roughly proportional to the demand created, it cannot be prohibited by a prior legal agreement in a manner contrary to the SMA.

b. According to Baker, the SMP will increase shoreline buffers on the Baker Commodities site from 40 feet to 100 feet, and render at least three structures on the site nonconforming. The SMP will also change the line from which the buffer is measured from the mean high water line to the ordinary high water mark. Baker's comment letter also argues that these changes are a taking of private property or a

violation of substantive due process, and that the 100 foot buffer prevents any new development on more than 20 percent of the Baker Commodities property.

City Response: The SMA dictates using the Ordinary High Water Mark rather than the mean high water mark as the starting point for measuring shoreline jurisdiction. Section 14.6 of the SMP addresses nonconforming uses and structures and permits their continued use and provides guidance on repair, maintenance and upgrading of nonconforming structures. These would apply to Baker's property, assuming that the structures about which Baker writes were lawfully in place at the time the original SMP was approved in 1974. Regarding existing structures becoming nonconforming due to the new buffer width, City maps indicate two of Baker's structures within the existing shoreline designation (River Environment) are already within 40 feet of the OHWM, which makes these structures nonconforming under the City's current SMP. (The remaining structure lies outside the 100 foot buffer but within the 200 foot shoreline jurisdiction, which likely does not trigger nonconforming issues.) And, the River Environment is the current SMP's most restrictive designation in terms of permitted uses; it is similar to the restrictions that will apply in the shoreline buffer under the new SMP.

The SMP provides this explanation of how buffer widths were determined:

"The determination of the buffer distances for each shoreline environment was based on several factors including the analysis of buffer functions needed for protecting and restoring shoreline ecological function (as presented in the Shoreline Inventory and Characterization Report) and the need to allow space for bank stability and for protecting human life and structures from damage from high flows, erosion and bank failures. Safety of residents and people who work in buildings along the shoreline has become even more important in recent years due to the increase in stormwater entering the river from increasing impervious surfaces throughout the watershed and the recent problems with the Howard Hanson Dam, which preclude being able to store as much flood water behind the dam in the winter until the dam is repaired, and increasing the frequency and intensity of flows during high rain events. These higher and more frequent flows will put more stress on over-steepened banks all along the river, increasing the possibility of bank erosion, levee failures, and bank failures. Thus, ensuring that new structures are not built too close to the river's edge is crucial to avoid loss of human life.

"Staff also reviewed the rationale for the buffer widths established for watercourses under TMC 18.45, the Sensitive Areas Ordinance, as well as buffer widths recommended by resource agencies, such as the State Department of Fish and Wildlife, Department of Natural Resources and the recent Biological Opinion issued by National Marine Fisheries Service in relation to FEMA's National Flood Insurance Program.

“The final buffer widths proposed by staff for each shoreline environment attempted to balance shoreline ecological function needs, human life and property protection needs (including future levee repair/reconstruction), existing land use patterns, and state and federal agency policies.”

The proposed SMP amendments do not constitute a taking of Baker Commodities property. Baker’s letter acknowledges that the new regulations do not prevent development on all of its property, only 20%. Therefore, the SMP amendments cannot be said to deprive Baker of all economically viable use of its property. And, while Baker claims that the proposed SMP amendments would be “detrimental to the economic use” of its property, it is well-established that a city may adopt new regulations that restrict use and thereby diminish the economic value of property, but such regulations are not a taking. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980). Finally, the SMP amendments do not violate Baker’s right to substantive due process; Baker has neither alleged nor demonstrated that the SMP amendments are not aimed at a legitimate public purpose, that they use unreasonable means, or that their effect would be unreasonably oppressive on Baker, as required by applicable Washington appellate precedent. *See, e.g., Guimont v. Clarke*, 121 Wn.2d 586, 609 (1993).

Ecology Conclusion: The Department of Ecology was not party to the settlement. Ecology is bound by the requirements of the Shoreline Management Act. Ecology and the City must establish standards for shoreline buffers in the SMP.

As noted by the City response, the ordinary high water mark is the required starting point for measuring the 200 foot shoreline jurisdiction.

While the buffers in the updated SMP may be larger than similar protections in the old Tukwila SMP, the updated SMP must propose buffers adequate to protect ecological functions as well as public safety, even though it may render some buildings nonconforming.

c. The vegetation and landscape requirements are problematic. Removal of invasive vegetation and planting of vegetation is required in Section 9.10 of the SMP. This will disproportionately affect the Baker Commodities site.

City Response: The vegetation and landscaping provisions of the SMP will be applied in proportion to the amount of work taking place in the shoreline jurisdiction for smaller projects; new development on a vacant parcel or full redevelopment of a site require landscaping on the entire site, as detailed in Section 9.10 C.1 a., which states:

- a. The landscaping requirements of this subsection apply for any new development or redevelopment in the Shoreline Jurisdiction, except: single family residential development of 4 or fewer lots. The extent of landscaping

required will depend on the size of the proposed project. New development or full redevelopment of a site will require landscaping of the entire site. For smaller projects, the Director will review the intent of this section and the scope of the project to determine a reasonable amount of landscaping to be carried out.

Ecology Conclusion: Ecology concurs with the City response.

3. Andy Padvorac, Puget Sound Energy, written comment received during the comment period.

A Puget Sound Energy (PSE) 230 KV overhead transmission line passes through the shoreline area just north of Interstate 405. Vegetation maintenance is a necessary part of the operation of electric transmission lines.

PSE recognizes the importance of maintaining vegetation within the shoreline environment. PSE has previously discussed with the City its intention to work cooperatively in this matter. PSE is preparing to submit permit applications to the City for a comprehensive vegetation maintenance plan along its 230 KV power lines. An important element of the proposed plan will be consistency and predictability. As PSE begins the process of developing this plan, it is hoped that the City can clarify the SMP regulations.

PSE identifies several areas of concern:

- a. Modify subsections 9.10.B. to clarify that vegetation being too close to overhead power lines is a hazard.

City Response: The Zoning Code defines a hazardous tree as:

“...a tree with a structural defect or disease, or which impedes safe vision or traffic flow, or otherwise currently poses a threat to life or property.”

We believe this definition provides sufficient guidance on what constitutes a hazardous tree. In addition, Section 9.10 D.1. allows trees and shrubs to be pruned “...for safety....to maintain clearance for utility lines...Topping of trees is prohibited except where absolutely necessary to avoid interference with utility lines.” The City believes this also provides the guidance necessary to permit removal of hazardous plant material without being overly broad.

Ecology Conclusion: Ecology concurs with the City response. In addition to Section 9.10.D.1 cited by the City, Section 9.10.B.1 allows for removal of trees that present an imminent hazard to existing structures or the public.

b. Add new subsection to encourage utilities and the City to work together to develop stable plant communities underneath overhead power lines, the plants being species that will mature at low enough heights so as to not create hazards.

City Response: We do not believe additional language is needed in the SMP to encourage discussions on identifying appropriate vegetation under utility lines – the City’s policy is to work with all applicants for permits to resolve issues on which the parties disagree. The City is currently working with PSE to resolve issues related to vegetation under power lines that fall within the shoreline jurisdiction on a mitigation site. The SMP also includes language that directs the use of native groundcover, grasses or other low-growing plants as the appropriate type of material to use under utility easements, to prevent future conflicts.

Ecology Conclusion: Ecology concurs with the City response. While the SMA does not require specific language encouraging the City and utilities to work together, Ecology believes that it will be beneficial to all parties to work towards agreed upon solutions.

c. Clarify dimensions in Table 4 in section 9.10.B.4.

City Response: Do not understand what is unclear in Table 4 dimensions.

Ecology Conclusion: PSE suggests minor changes to make Table 4 more readable. Ecology does not believe that the changes are necessary to bring the SMP into compliance with the SMA, however PSE has proposed what can be reasonable suggested changes to the SMP.

d. Measure tree diameter at 4.5 feet.

City Response: This is a typographical error that will be corrected.

Ecology Conclusion: PSE suggests a minor change to make Table 4 consistent with a standard practice. Ecology does not believe that the change is necessary to bring the SMP into compliance with the SMA, however PSE has proposed what can be reasonable suggested changes to the SMP.

e. PSE suggests that topping some trees at a reasonable height, like willows at 15 feet, is not as detrimental as removal and that therefore the replacement ratio for a topped tree should be less than stated in Table 4 in Section 9.10.B.4.

City Response: The City disagrees with this suggestion. Topping of some trees ultimately leads to their death and also removes a significant amount of canopy that cannot be recovered in a reasonable amount of time. As a result, it is appropriate to

require replacement of these trees at the replacement ratio set forth in Table 4, if not under the utility line, then at a more appropriate location where there will not be conflicts between the use and the plant material.

Ecology Conclusion: The change suggested by PSE is not necessary to bring the SMP into compliance with the SMA.

f. Modify section 9.10.C.1.o.2 to restrict the “mature height” of plantings under overhead power lines, whether landscaping or mitigation, to avoid future hazardous conditions.

City Response: The language in 9.10 C.1.o 2) already anticipates that new plantings under a utility easement will take into account the need for low growing plant material as that section talks about using groundcover, grasses or other low-growing plants. This will reduce future conflicts between trees and utility lines.

Ecology Conclusion: Ecology concurs with the City response.

g. Clarify that that "property owner" can include utility within an easement.

City Response: The City does not agree that this clarification is necessary. There is a legal distinction between a person or entity that owns a piece of property and a person or entity to which an easement has been granted on a piece of property they do not own. We do understand that a utility has an interest in development on properties on which it has an easement. Notice about development proposals are routinely sent to utilities and other interested parties. This notice provides these entities with the opportunity to provide input on issues of concern at the development stage. Utilities are also encouraged to comment on long range planning documents.

Ecology Conclusion: Ecology does not believe that the requested change is necessary for consistency with the SMA.

h. Add in section 9.10.C.1.g that overhead utility power lines should be taken into account during plant selection.

City Response: As noted above under the response to comment 3., Section 9.10 C.1.o. 2). speaks to this issue and provides guidance on the types of vegetation appropriate under utility lines.

Ecology Conclusion: Ecology concurs with the City response.

4. Charles E. Maduell, law firm of Davis Wright Tremaine, representing the Desimone Trusts, written comment received during the comment period.

The Desimone Trusts are concerned about use, development and financial impacts that some of the new provisions in the SMP will have.

Buffers

a. Desimone Trusts are concerned that the 100 foot buffer adjacent to the Green River would make many structures on their properties nonconforming. Maduell believes that the proposed buffer is not justified to achieve no net loss of ecological function or bank stabilization, but rather, this an attempt to set aside land for future flood control structures without having the City purchase privately owned land for this purpose.

City Response: The Desimone Trust parcels are in areas that do not contain levees. The buffer width is not an attempt to set aside land for future flood control structures, as none are planned in these areas. The buffer width of 100 feet is established to provide room for the bank to achieve a more natural slope, to prevent new structures from being located too close to the water as well as to ensure no net loss of ecological functions. The buffer width is also the same as the buffer required adjacent to Type 2 watercourses (watercourses similar to the Green River that have perennial flows and support salmonid fish use) regulated under the City's sensitive area regulations. The SMP provides the following summary of how the buffer widths were determined:

"The determination of buffer widths was based on two important criteria: the need to achieve bank stability and protect structures along the shoreline from damage due to erosion and bank failures and to protect and enhance shoreline ecological function.

"Applying the 200 to 250 foot buffer widths recommended by WDFW and WDNR would not be practical given the developed nature of the shoreline. It was also felt that a buffer less than that already established for Type 2 Watercourses under the City's SAO would not be sufficiently protective of shoreline functions, unless those functions were enhanced through various restoration options. Therefore, 100 feet was established as the starting point for considering buffer widths from the standpoint of shoreline ecological function in each of the Shoreline Environments. Between 100 and 125 feet was the starting point for buffer widths from the standpoint of bank stability and property protection.

"Thus buffers were established taking into account (as explained in the following sections) the characteristics of each Shoreline Environment, needs for protection/restoration of shoreline ecological functions, and needs for stable banks and human life and property protection."

Several of the Desimone Trust properties are small, irregularly shaped parcels developed with structures that are already nonconforming due to the City's current SMP buffer width of 50 feet, although the newly-adopted SMP buffers do increase the degree of nonconformity of some structures located on these parcels.

Ecology Conclusion: Ecology concurs with the City response. The buffer requirements in the SMP are part of a plan to retain the level of riparian vegetation along the Green River.

b. It is also stated that requiring a property owner to re-slope the bank to a slope profile for construction and repair of levees in order to obtain a buffer reduction is unreasonable and unwarranted, both because it is cost-prohibitive and also not reasonably necessary to mitigate the shoreline impacts of proposed development. The comment states that this would unfairly allocate the burden of providing flood control measures and improvements on private property owners.

City Response: As noted above, the buffer width for properties that are not behind King County or Army Corps of Engineers certified levees is meant to provide room for the over-steepened banks to achieve a more natural slope, and thereby provide protection of property and structures adjacent to the river. The SMP's nonconforming use provisions allow continuation of existing, nonconforming uses, and only new development or redevelopment is required to come into compliance with the 100-foot buffer requirements. And, the SMP follows the same approach as the City's sensitive area regulations, with buffer reductions permissible if mitigation is provided. This is a fair and appropriate method of requiring private property owners to develop in a way that protects their properties/structures from river bank failures while also ensuring no net loss of ecological functions.

Ecology Conclusion: The SMP has standard buffer provisions that can be reduced when reducing the levee profile consistent with the SMP. It also should be noted that the SMP has standard buffers for development that would prefer to engage in a more prescriptive design.

c. Maduell states that a 100 foot buffer is not needed to protect shoreline ecological functions or to achieve no net loss of such functions. Maduell believes that imposition of a 100-foot buffer for flood control is inconsistent with the SMA and an unconstitutional taking.

d. The comment letter states that a 50 foot buffer for non-leveed and industrial properties is more than sufficient to protect shoreline ecological functions and ensure no net loss of function.

City Response: Section 7 of the SMP explains the rationale for the adopted buffer widths - the SMP attempts to balance private property rights and the requirements of

the SMA, and is not a taking for reasons explained in the response to Comment 2.b. above.

Ecology Conclusion: Ecology concurs with the City response. Ecology believes that it is the City's intent for the response immediately above to apply to both comments 4c and 4d.

Nonconforming Use and Structure Limitations

e. Concern is expressed that a developed commercial or industrial property will lose its legal, nonconforming status where the pre-existing use of all or a portion of the structure is changed to another use. This is a particular concern when the new buffer standards will make a structure nonconforming. The concern is expressed that this will make it difficult to replace commercial tenants when vacancies occur.

City Response: Swapping out one nonconforming use for another nonconforming is permitted under the provisions of the SMP and implementing regulations, and would therefore not eliminate the nonconforming status

Ecology Conclusion: Ecology concurs with the response. One of the required changes to the SMP will be to require a use matrix. This will minimize the number of distinct use classifications in shoreline jurisdiction, thus reducing the number of uses that "change" for purposes of SMP administration.

f. The letter expresses concern that the only way for a property owner to obtain approval for a change of one nonconforming use to another, involving no exterior alterations to the existing building or impact to shoreline functions and values, is to obtain a permit that would require the property owner to restore and/or enhance the entire shoreline buffer.

City Response: A great deal of discussion occurred during the Planning Commission and Council review of the nonconforming uses and structures section of the SMP. Many revisions were made to this section of the SMP and the final language tries to balance the continuation or trading out of nonconforming uses with the desire to eventually amortize these uses.

Ecology Conclusion: One of the required changes to the SMP will be to require a use matrix. This will minimize the number of distinct use classifications in shoreline jurisdiction, thus reducing the number of uses that "change" for purposes of SMP administration.

g. If a nonconforming use ceases, the right to that nonconforming use will expire after 24 months. Concern is expressed that it can take a commercial landlord more than 24 months to locate a new tenant. While the SMP allows for approval of an extension of time beyond the 24 months, Maduell is concerned that the extension would require the property owner to restore and/or enhance the shoreline buffer. The comment states that this would be cost-prohibitive and a taking. The letter writer encourages Ecology to modify the nonconforming use standards to allow more time to find a commercial tenant and make it easier to locate a new nonconforming use in an existing commercial building.

City Response: The amount of shoreline to be restored in return for extending the time to find a replacement tenant for a nonconforming use will be based on the percentage of the existing building used by the nonconforming use (Section 14.5 C. 3). The 24 month period allowed of right, even without an extension, is substantially more time than allowed for nonconforming uses outside the shoreline, which the Zoning Code limits to six months. And, provisions that require conformance within a specified period of time or, in the alternative, the loss of nonconforming status and consequent phasing out of those uses, are not a taking. See, e.g., *Rhod-A-Zalea and 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 10-11 (1998) (if ordinance regulating nonconforming use "is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."). Ecology should decline the letter writer's request to modify the SMP to provide more time for location of a replacement commercial tenant. Such a modification would be within the City's discretion, but is unnecessary to address any substantive Shoreline Management Act or other legal requirement.

Ecology Conclusion: The 24 month time period (with potential of an additional 24 month extension) in the Tukwila SMP is a more liberal standard than found in the Ecology nonconforming standards at WAC 173-27-080. One of the required changes to the SMP will be to require a use matrix. This will minimize the number of distinct use classifications in shoreline jurisdiction, thus reducing the number of uses that "change" for purposes of SMP administration.

Vegetation and Landscaping

h. The letter expresses concern that imposing a requirement for installation and maintenance of vegetation and landscaping without consideration of the need for such requirements based on the impacts of development would be inconsistent with the SMA and the Shoreline Guidelines, as well as be a taking.

Maduell asks Ecology to modify the SMP to revise the SMP to require vegetation protection and landscaping to the extent that they are roughly proportional to or

reasonably necessary as a direct result of impacts to shoreline functions and values from the proposed development.

City Response: The vegetation and landscaping requirements are similar to requirements already in place both in the existing SMP as well as Zoning Code requirements for landscaping when property is developed. There is language in Section 9.10 C.1 a. that allows proportional application of the landscaping requirements for projects that are not new development or full redevelopment on a site. Further, the legal tests of “rough proportionality” and “reasonably necessary as a direct result of” proposed development do not apply to the landscaping requirements, because they do not require dedication of real property, and because RCW 82.02.020 is inapplicable to Shoreline Master Programs. See, e.g., *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn.App. 937 (Div. I 2010).

Ecology Conclusion: Ecology concurs with the City's response. Provisions for vegetation conservation are a necessary component of an SMP. Tukwila has devised a locally acceptable method for achieving vegetation conservation. The Tukwila SMP does contain language in Section 9.10.C.1.a that states "for smaller projects, the Director will review the intent of this section and the scope of the project to determine a reasonable amount of landscaping to be carried out." The City has developed a local framework for reestablishing vegetation to address shoreline impairments. The City is correct in noting that RCW 82.02.020 is not applicable to SMPs.

Public Access

i. The letter expresses concern regarding the public access requirements for new or expanded developments over 3,000 square feet. While the letter acknowledges that the SMP contains a provision that allows some relief from some of the public access requirement, concern is expressed that such relief does not appear to extend to the requirement that a property owner upgrade an existing trail along the shoreline regardless of the impacts to public access that a development may have. Maduell states that this is inconsistent with certain provisions of the SMA and the Shoreline Guidelines, and may be a taking. To address the concern, Maduell asks Ecology to modify the SMP to only require public access when the requirements are roughly proportional to or reasonably necessary as a direct result of the impacts from the proposed shoreline development.

City Response: Section 11.1 states the Director will review the scope of a project to determine a reasonable amount of public access to be carried out and that depending on the amount of increase in demand for public access, the alternative provisions in Section 11.6 C. may be utilized. These provisions would apply to a project on a site that abuts the trail or is located in an area where no trail is located or anticipated. For additional response, see responses to Comments 2.b and 4.h above.

Ecology Conclusion: Section 11.6.A.3 of the SMP allows that "requirements for providing on-site general public access, as distinguished from employee access, will not apply if the applicant can demonstrate one or more of the following: the cost of providing the access, easement or other public amenity on or off the development site is unreasonably disproportionate to the total long-term cost of the proposed development." The SMP includes a provision requiring proportionality in public access requirements. Included with the required changes is a change to Section 11.6.A making it clear that Section 11.6.A.3 applies to both onsite and offsite activities.

5. Jacek Pawlicki, Segale Properties LLC, written comment received during the comment period.

a. Buffer

The letter expresses concern that the buffer standards are designed to keep the area near the Green River clear for future improvement to the public infrastructure along the river. The letter expresses concern that rather than utilizing eminent domain, the City has elected to impose regulations. The letter states that the SMA does not grant the City authority to accomplish all of its goals and policies solely through regulation.

The letter states the view that the "no-build" buffers are intended to accomplish a "public benefit." It states that the "Attorney General has cautioned that"(i)f regulation or regulatory actions act more to provide a public benefit than to prevent a public harm, it should be evaluated using the takings analysis. . . ."

The letter argues that Ecology must modify the no-build buffer provision to be consistent with federal and state constitutional provisions.

City Response: The buffers were established based on a variety of factors as discussed in Section 7 of the SMP. Further, the buffer requirements have been evaluated as called for by the Attorney General, and are not a taking for the reasons explained above. See also responses to questions 2.b.

Ecology Conclusion: Ecology concurs with the City response.

b. Height Limits

Pawlicki argues that the SMP cannot impose height limits unless it makes a specific finding that the height of a building will block a substantial number of views. The letter goes on to state that since the City has not documented that buildings in shoreline jurisdiction will block views, Ecology should direct the city to justify the height limitation.

City Response: While the SMA affirmatively restricts building heights if views of a substantial number of single family homes will be blocked, this provision does not limit the City's ability to regulate the height of structures generally, as set forth in applicable height standards for different Zoning Code districts. These standards establish a variety of heights based on the intensity of the zoning district. Tukwila's SMP simply provides incentives to obtain increases in the height of buildings located within the shoreline jurisdiction.

Ecology Conclusion: Ecology concurs with the City response. RCW 90.50.320 requires that:

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

A building in shoreline jurisdiction that blocks a substantial number of residences cannot be greater than 35 feet in height. This does not limit the ability of a local government to regulate building height. RCW 90.58.320 provides a minimum standard that must be met.

6. Dean Patterson, Futurewise, written comment received during the comment period

a. Buffers and landscaping

The email generally supports the buffer strategy and landscaping standards. However, concern is expressed that broad exceptions to the general requirements may make the section largely pointless.

City Response: The City disagrees that broad exceptions make the buffers largely pointless – the mechanism by which a property owner may obtain approval for a reduced buffer is to re-slope the bank and plant with native plants. This will provide significant improvement in shoreline ecological functions, in exchange for buffer width reduction.

Ecology Conclusion: The Shoreline residential environment requires a 50 foot buffer. Many of the exceptions are currently part of the existing development pattern. Ecology does have concern regarding some of the potential encroachments allowed in the

shoreline buffer. Required changes to the SMP will somewhat minimize the extent of allowed encroachments.

Development on fill immediately behind a levee, requires a setback levee discussed in the SMP.

b. Ecological Functions

The text of the SMP does not acknowledge that buffers provide upland habitat for animals that depend on riparian areas. The email expresses concern that habitat functions of buffers for other species besides salmon were not discussed.

City Response: Comment noted. The net effect of the policies and regulations adopted to implement the SMP will be improved habitat, both riparian and upland.

Ecology Conclusion: The Inventory and Characterization Report does discuss riparian habitat. The Cumulative Impacts Analysis does anticipate some improvement in riparian habitat as the new buffers are implemented.

c. Protecting Remaining Intact Areas

The email states that the area between the Green River and Tukwila Park should not be designated Residential. This area has intact vegetation. The comment compares this to the stormwater pond at the end of Minkler Road. Futurewise recommends additional protection for both of these areas.

City Response: Comment noted; however, this area is in private ownership and must have both a zoning and comprehensive plan designation, which is why the area is designated Residential. The City does not have funds to purchase the site. Single family residential is less intensive than commercial, industrial or multi-family use and zoning designations. The area is steeply sloped and separated from the river by the Green River Trail. The vegetation is a mix of native and non-native plants and includes invasive species. Minkler Pond, a storm water pond, is located behind a COE certified levee – there is not much that can be done to expand the shoreline protection in this location due to the levee.

Ecology Conclusion: This site contains a substantial amount of riparian vegetation. For Tukwila, the riparian vegetation helps to retain important ecological functions even though the area is developed with highways and levees. Approximately 100 feet of this area landward of the Ordinary High Water Mark (OHWM) is in public ownership. This, while an Urban Conservancy designation would provide this area with a larger buffer than the Shoreline Residential designation, the buffer area is in public ownership. The shoreline Residential designation actually allows fewer uses and less intensive uses than the Urban Conservancy Environment. While an Urban Conservancy environment

designation is supportable for the site adjacent to Tukwila Park extending along the left bank of the Green River from Interurban Avenue to Southcenter Boulevard, it would not result in greater protection of the site.

d. Use and Modification Limits and Lack of Development Regulations

Futurewise is concerned that the use limits in the SMP are almost nonexistent. There are no prohibited uses and very few prohibited activities. Uses that are not prohibited could be allowed with a CUP.

Futurewise recommends that all use-types be described and clearly state whether they are allowed or prohibited.

Futurewise believes that since all of the different uses could be allowed, the SMP needs to have a complete set of regulations including those for mining, forestry, agriculture, aquaculture, in-stream uses, and so on. Futurewise is concerned that as drafted, boating facilities could be allowed in any environment.

City Response: The City disagrees with the characterization that the use limits in the SMP are almost nonexistent. A Use Table will be included in the SMP, and the buffer areas of each environment also limit the uses permitted. If a use is not listed as permitted either outright or as a conditional use, then it is not permitted in that shoreline environment, period. Mining, forestry, agriculture and aquaculture are not permitted in any shoreline environment by virtue of the fact that the uses are not listed as among those permitted, nor is it practical to expect that these uses would be proposed any time in the future. Boating facilities are a water dependent use and therefore a preferred use in the shoreline according to the SMA, as a result the City would want to encourage this type of use. Practically speaking, the condition of the river bank (over-steepened or leveed) discourages the location of boating facilities upstream of the turning basin.

Ecology Conclusion: Ecology will be proposing a required change to include a use matrix that addresses agriculture, mining, forestry, and aquaculture. The use matrix will affirmatively address whether the use is permitted conditionally permitted, or prohibited.

e. Urban Conservancy

Futurewise is concerned that all uses are allowed in the Urban Conservancy environment, which is not consistent with the purpose of the Shoreline Management Act's requirement "to protect and restore ecological functions."

City Response: The City acknowledges that the shoreline environments developed by Ecology do not fit most urban developed shorelines. The City's initial draft SMP applied the High Intensity Environment designation to most of the shoreline, but the Department of Ecology indicated that this environment designation is meant for areas that can reasonably expect water dependent uses. Ecology strongly encouraged the City to change the environment designation to Urban Conservancy, despite the fact that the Tukwila shoreline is highly urbanized and does not reflect the definition of the Urban Conservancy environment. The City complied with Ecology's request, and does not plan to change the shoreline environment designation at this point. There are a number of provisions in the City's SMP that encourage the restoration of ecological functions, with attention focused on publically-owned sites that have been designated for restoration.

Ecology Conclusion: Ecology concurs with the City response.

f. Water Dependent Uses

Futurewise could not find, in the SMP, how commercial and industrial uses meet the SMP Guideline requirements for water-dependent uses. Futurewise could find nothing in the regulations to implement the SMA preference for water-dependent uses.

City Response: The Urban Conservancy and High Intensity shoreline environments, in the buffer portion, permit "water dependent uses and their structures, if permitted in the underlying zoning district." In the Shoreline Residential environment, water dependent uses are permitted as long as there is no net loss to ecological functions. Practically speaking, the only portion of the river where water dependent uses can be expected to locate is the area downstream of the Turning Basin, given the shallow nature of the river upstream of this point and the over-steepened banks or existing levee system, both of which discourage direct access to the water.

Ecology Conclusion: In addition to the City discussion above, Ecology will propose a use matrix that will create categories for water-dependent uses.

g. Exemptions

Futurewise is concerned that the SMP does not contain procedures and criteria for reviewing shoreline exemptions. Concern is expressed that the SMP will not document exemptions or ensure that exemptions are properly implemented.

City Response: We are not aware of a requirement in the SMA regulations to include a process for reviewing shoreline exemptions. The City currently follows the process outlined in the WAC for exemptions and will continue to do so under the new SMP.

Ecology Conclusion: The City response is correct. Ecology will suggest, but not require, changes requiring documentation of review of shoreline exemptions.

7. Karen Walter, Muckleshoot Indian Tribe, written comment received during the comment period.

a. The Muckleshoot Indian Tribe (MIT) would like the SMP to be revised to acknowledge the importance of the Green-Duwamish River and associated shoreline tributaries for the Tribe's ceremonial, commercial and subsistence fisheries. MIT appreciates the specificity in the SMP regarding plans to improve the existing degraded river conditions.

City Response: Section 7.2, second bullet acknowledges the critical importance of the river as a resource for Muckleshoot Indian Tribe fishing.

Ecology Conclusion: Ecology concurs with the City response.

b. MIT expresses concern that many activities allowed within the OHWM and regulated shoreline have the potential to create structures or conditions that limit Tribal members' ability to access their treaty protected fisheries resources. MIT has suggested that the SMP provide direction for early coordination with the Tribe during project reviews. The SMP does not have policies in this regard.

City Response: : The SMP does not interfere with the Tribe's treaty fishing rights. To the contrary, by requiring a wider shoreline buffer, and public access, the SMP facilitates the Tribe's exercise of its treaty fishing rights. And, the SMP's requirements for shoreline buffers that allow for over-steepened banks to return to a more stable slope, and for landscaping and other riparian vegetation in certain circumstances, will help protect fish and fish habitat, and in turn also facilitate protection of tribal fisheries resources. The SMP also tries to balance the rights of all users of the shoreline. The City provides notice to the Tribe on applications that require public notice, through the Notice of Application phase of permit review. The City historically has not provided public notice on requests for shoreline exemptions as these are not a specified permit under the City's Zoning Ordinance. The SMP has specific direction to coordinate with the Tribe on archaeological resources (see Section 9.7). Finally, to the extent that the Tribe believes that a particular development proposal contravenes its treaty fishing rights, the Tribe can seek judicial enforcement of its treaty rights, as it has on other occasions. See, e.g., *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504 (W.D. Wa. 1988).

Ecology Conclusion: Ecology believes that this aspect of the SMP is consistent with the SMA.

c. The MIT letter states that the current riparian conditions in the Green-Duwamish within Tukwila are generally poor. The letter notes high water temperatures. MIT expresses a concern that if implemented, the setback levee with a 15 foot wide vegetated bench will be too narrow to support the necessary trees needed to provide shade to lower existing high water temperatures. MIT also notes that the U.S. Army Corps of Engineers levee maintenance standards preclude trees in many areas. MIT notes that Ecology has used a 100 meter riparian vegetation width to model maximum potential shade scenarios for water temperatures. MIT would like the SMP modified so that opportunities for significant levee setbacks may be pursued and the riparian areas restored to the fullest extent possible within the 200 foot regulated shoreline area.

City Response: The adopted SMP establishes a reconfigured levee profile that adds an area of vegetation to slow down flood water, provide access for levee maintenance and improve ecological functions. The fifteen foot wide vegetated bench is an accepted width by both the Corps of Engineers (Seattle District) and King County Levee District. The City shares the Tribe's concerns about current and possible changes to the COE vegetation standards and has communicated these concerns to the COE.

Ecology Conclusion: For most of its shoreline jurisdiction, the City has proposed standard buffers of 100 feet or more. The exception is a 50 foot standard buffer in the Shoreline Residential environment. The larger issue is what actually happens in those buffers. The City correctly explains the difficulty in creating fully vegetated buffers. None the less, the buffer and vegetation requirements in the SMP can be expected to achieve no net loss of ecological function.

d. MIT also expresses concern that the trails immediately adjacent to the river will encourage access for illegal fishing and reduce shade along the river. MIT recommends that trails be set back from the river.

City Response: Trail locations are established on a site-by-site basis taking into account particular site conditions, such as topography, sensitive areas and other characteristics. Any new trails would not be located at the top of the bank, but set back an appropriate distance to permit at least visual access to the river (and in some instances physical access), depending on whether the trail is located adjacent to a City park.

Ecology Conclusion: Ecology concurs with the City response.

8. Dennis Clark, Green/Duwamish and Central Puget Sound Watershed Salmon Habitat Recovery (WRIA 9), written comment received during the comment period.

WRIA 9 endorses the Shoreline Restoration Plan and generally supports the use regulations, flood hazard reduction standards, shoreline stabilization standards and

vegetation protection landscaping standards. WRIA 9 recommends two minor changes to reflect project updates and an organization name change.

City Response: The City appreciates the comments from the Green/Duwamish and Central Puget Sound Watershed Salmon Habitat Recovery team.

Ecology Conclusion: Ecology concurs with the City response.

9. Brooke Alford, Green-Duwamish Watershed Alliance, written comment received during the comment period.

The Green-Duwamish Watershed Alliance supports the Tukwila proposed SMP. The letter notes the importance of buffers and the importance of reducing shoreline armoring.

City Response: The City appreciates the comments from the Green-Duwamish Watershed Alliance.

Ecology Conclusion: Ecology concurs with the City response.

10. Charles E. Maduell, law firm of Davis Wright Tremaine, representing the Innkeepers USA, written comment received during the comment period.

The Innkeepers USA are concerned about use, development and financial impacts that some of the new provisions in the SMP will have.

a. Buffers

Innkeepers USA is concerned that the 100 foot buffer adjacent to the Green River would make many structures on their properties nonconforming. Maduell believes that the proposed buffer is not justified to achieve no net loss of ecological function or bank stabilization, but rather, this an attempt to set aside land for future flood control structures without having the City purchase privately owned land for this purpose.

It is also stated that requiring a property owner to reslope the bank to a slope profile for construction and repair of levees in order to obtain a buffer reduction is unreasonable and unwarranted, both because it is cost-prohibitive and also not reasonably necessary to mitigate the shoreline impacts of proposed development. The comment states that this would unfairly allocate the burden of providing flood control measures and improvements on private property owners.

Maduell states that a 100 foot buffer is not needed to protect shoreline ecological functions or to achieve no net loss of such functions. Maduell believes that imposition

of a 100-foot buffer for flood control is inconsistent with the SMA and an unconstitutional taking.

The comment letter states that a 50 foot buffer for non-leveed and industrial properties is more than sufficient to protect shoreline ecological functions and ensure no net loss of function.

City Response: Section 7 of the SMP explains the rationale for the adopted buffer widths - the SMP attempts to balance private property rights and the requirements of the SMA. See also the response to comment 2.b.and 4.a.

The proposed buffer is not an attempt to set aside land for a future flood control structure, as no additional structures are planned for the river. The buffer widths are to protect new structures from being located too close to the water. Mr. Maduel is correct that existing buildings that are located within the buffer will become nonconforming and will be subject to the provisions of Section 14.5. The SMP does not require a property owner to re-slope the bank – that is an option available if a property owner wishes to reduce the buffer width on a particular parcel of property as part of redevelopment. .

Ecology Conclusion: Ecology concurs with the City response.

b. Nonconforming use and Structure Limitations

Concern is expressed that the property will lose its legal, nonconforming status where the pre-existing use of all or a portion of the structure is changed to another use. This is a particular concern when the new buffer standards will make a structure nonconforming. The concern is expressed that this will make it difficult to redevelop the property.

The letter expresses concern that the only way for a property owner to obtain approval for a change of one nonconforming use to another, involving no exterior alterations to the existing building or impact shoreline functions and values, is to obtain a permit that would require the property owner to restore and/or enhance the entire shoreline buffer.

The letter states that the nonconforming use provisions are inconsistent with RCW 90.58.020 and various sections of the Shoreline Guidelines, as well as possibly be a taking. The letter writer encourages Ecology to modify the SMP to make it easier to locate a new nonconforming use in an existing commercial building.

City Response: There was lengthy discussion about these issues both at the Planning Commission and City Council. Section 14.5 tries to balance allowing existing uses that fall within the new buffer to continue or be replaced with a new use with the desire to amortize these uses over time. See also the response to comments 4.e – 4.h above.

Ecology Conclusion: The SMP has standard buffer provisions that can be reduced when reducing the levee profile consistent with the SMP. It also should be noted that the SMP has standard buffers for development that would prefer to engage in a more prescriptive design.

c. Vegetation and Landscaping

The letter expresses concern that imposing a requirement for installation and maintenance of vegetation and landscaping without consideration of the need for such requirements based on the impacts of development would be inconsistent with the SMA and the Shoreline Guidelines, as well as be a taking.

Maduell asks Ecology to modify the SMP to revise the SMP to require vegetation protection and landscaping to the extent that they are roughly proportional to or reasonably necessary as a direct result of impacts to shoreline functions and values from the proposed development.

City Response: The vegetation and landscaping requirements are similar to requirements already in place both in the existing SMP as well as Zoning Code requirements for landscaping when property is developed. There is language in Section 9.10 C.1 a. that allows proportional application of the landscaping requirements for projects that are not new development or full redevelopment on a site. Further, as discussed in response to comment 4.h above, the legal standards of “rough proportionality” and “reasonably necessary as a direct result of the impacts from development” do not apply to Tukwila’s adoption of the new Shoreline Master Program, because the SMP does not require dedication of real property, and because RCW 82.02.020 is inapplicable to Shoreline Master Programs. See, e.g., *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn.App. 937 (Div. I 2010).

Ecology Conclusion: Ecology concurs with the city response.

d. Public Access

The letter expresses concern regarding the public access requirements for new or expanded developments over 3,000 square feet. While the letter acknowledges that the SMP contains a provision that allows some relief from some of the public access requirement, concern is expressed that such relief does not appear to extend to the requirement that a property owner upgrade an existing trail along the shoreline regardless of the impacts to public access that a development may have. Maduell states that this is inconsistent with certain provisions of the SMA and the Shoreline Guidelines, and may be a taking. To address the concern, Maduell asks Ecology to modify the SMP to only require public access when the requirements are roughly

proportional to or reasonably necessary as a direct result of the impacts from the proposed shoreline development.

City Response: Section 11.1 states the Director will review the scope of a project to determine a reasonable amount of public access to be carried out and that depending on the amount of increase in demand for public access, the alternative provisions in Section 11.6 C. may be utilized. These provisions would apply to a project on a site that abuts the trail or is located in an area where no trail is located or anticipated. Further, as discussed in response to comment 4.h above, the legal standards of “rough proportionality” and “reasonably necessary as a direct result of the impacts from development” do not apply to Tukwila’s adoption of the new Shoreline Master Program, because the SMP does not require dedication of real property, and because RCW 82.02.020 is inapplicable to Shoreline Master Programs. See, e.g., *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn.App. 937 (Div. I 2010).

Ecology Conclusion: Section 11.6.A.3 of the SMP allows that "requirements for providing on-site general public access, as distinguished from employee access, will not apply if the applicant can demonstrate one or more of the following: the cost of providing the access, easement or other public amenity on or off the development site is unreasonably disproportionate to the total long-term cost of the proposed development." The SMP effectively includes a provision allowing for proportionality in public access requirements. Included with the required changes is a change to Section 11.6.A making it clear that Section 11.6.A.3 applies to both onsite and offsite activities.