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October 15, 2010

David Radabaugh, Shoreline Planner
WA Dept. of Ecology
3190 160th Ave. SE
Bellevue, WA 98008

RE: Proposed Updates for City of Tukwila Shoreline Master Program

Dear Mr. Radabaugh:

We represent Baker Commodities, Inc., a rendering plant located north of I-405 in the light industrial zone at 5795 S. 130th Place. See *Map, Attachment A*. This property includes approximately 2,200 feet of shoreline along three sides of the property. Because of this configuration and the expansion of shoreline jurisdiction from the mean high water line to the ordinary high water mark and all floodways, the draft Shoreline Master Program has a significant impact on the Baker Commodities Property. Accordingly, Baker Commodities has provided comments, both written and at hearings, throughout the City's update process. Although some concerns have been addressed, we would like to highlight three sets of issues.

First, Baker Commodities filed, and eventually settled, a lawsuit against the City of Tukwila over its 1995 Comprehensive Development Plan; many of the issues addressed by that settlement are affected by the proposed updates to the City's Shoreline Master Program, including the public access provisions. Second, the proposed Shoreline Master Plan expands the "no build" buffer width by sixty feet, significantly limiting future use and development on the Baker Commodities property and leading to concerns over takings. Third, given the amount of shoreline, the vegetation requirements are of concern. Each of these issues is addressed below.

I. Concerns Related to Issues Already Litigated Against the City of Tukwila

The draft SMP purports to adopt standards that are adverse to the Settlement Agreement that Baker already reached with the City of Tukwila a number of years ago.

In early 1996, Baker challenged certain aspects of the City of Tukwila's newly adopted Comprehensive Plan and Development Regulations. This challenge specifically addressed several key issues raised by the draft SMP, including the use, development, and

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redevelopment of the property listed above. The City of Tukwila and Baker reached a Settlement Agreement to address these issues. See *Attachment B*, Settlement Agreement between City of Tukwila & Baker Commodities, CPSGMHB File No. 96-4-0008 (May 7, 1996). This agreement was then approved by the Central Puget Sound Growth Management Hearings Board. See *Attachment C*, Order Granting Stipulated Dismissal, Baker Commodities Inc. v. City of Tukwila, CPSGMHB File No. 96-5-0008 (May 13, 1996).

The Settlement Agreement specifically provides several key statements that would be affected by the draft SMP. For example, Paragraphs 1 through 3 require the City of Tukwila to adopt a code interpretation governing the use, development and re-development of rendering facilities, followed by the requirement to pursue an amendment to codify the same. The Code Interpretation, dated May 3, 1996 and included as part of the Settlement Agreement (*Attachment B*), provides that “[n]ormal upkeep, repairs, maintenance, strengthening, or restoration to a safe condition of any building or structure being used as part of an unclassified use shall not require a new or unclassified use permit. The replacement of existing structures with either new structures of equivalent size and/or capacity, or new structures which do not change the use and do not constitute an expansion or enlargement... shall not require a new or revised unclassified use permit.” *Code Interpretation at 1, Attachment B*. The interpretation further provides that “[a] legal use does not become nonconforming because the zone in which it is located is changed to a zone which requires an Unclassified Use Permit for the use, or because the use is changed from an allowed use to an unclassified use within the same zone...” provided the use is not expanded or buildings enlarged under specified criteria. *Id.* at 2-3.

The City of Tukwila’s Community Development Department’s Director noted that code interpretation “furthers the City’s goals of encouraging owners of such facilities to update, modernize and improve its facilities to minimize existing impacts upon the surrounding vicinity...” He further notes that for “normal upkeep and repairs”, the provisions both recognize the historic practice of DCD and “court decisions that have upheld the rights of property owners to maintain legally established improvements and investments.” *Id.* at 5-6.

In addition to the agreements on use, upkeep and repair, the Settlement Agreement provides that “there is no legal basis on which the City could impose a condition on any permit for redevelopment or expansion of the rendering plant that would require that Baker 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.” *Settlement Agreement*, ¶ 4. Such public access rights would also run counter to an agreement between Baker Commodities and the Burlington Northern Santa Fe Railroad, which has granted a limited access easement for Baker to reach its property. Not only would public access violate both the Settlement Agreement and the easement agreement, it would create a public safety hazard by providing access to an industrial area.

Although some of the concerns raised by the Settlement Agreement have been addressed in the draft SMP, there are still problems as the draft SMP is written. For example, Section

14.5.B.1 recognizes that a non-conforming structure may not be enlarged or altered except as authorized by the Tukwila Municipal Code (TMC) 18.66.120, the code provision dealing with unclassified use permits and animal rendering facilities; this reference is helpful in recognizing the Settlement provisions, but concerns remain about how the draft Shoreline Master Program might affect redevelopment of this site in the future.

In addition, the Settlement also mandated no requirement for public access, with no exceptions. While Section 11 of the draft SMP exempts public access if “such access would cause unavoidable health or safety issues” (draft SMP 11.1.B.2, pg. 120), it requires that Section 11.6 procedures be met. Section 11.6 shifts the burden to the applicant to provide unavoidable health or safety hazards to the public; if these can be proved, the City would still require an “alternative provision for meeting public access”, including development of public access at an adjacent street end, protection of easements or setbacks, contributions of materials and/or labor towards shoreline projects, or restoration/enhancement of the shoreline jurisdiction at the Director’s discretion.” SMP 11.6.C, pg. 124-25. Under these rules, Baker Commodities would first need to prove that no access should be required, then undertake some other action or funding to offset not providing access. This counters the Settlement Agreement that recognizes, without condition, that no public access is required.

Based upon the 1996 Settlement Agreement, Baker Commodities would like to maintain its right to use its legally established improvements and investments in its property, and opposes any requirement for public access to its property.

II. The Proposed Expansion of Buffers from 40’ to 100’ is a Taking of Private Property

As noted in numerous comments to the City of Tukwila, the proposed expansion of the shoreline buffer from 40’ to 100’ is a taking of private property for public purpose. This expansion of the “no build” buffer particularly affects the Baker Commodities property given the shape of the property; see the attached map (*Attachment A*).

As the draft Shoreline Master Plan itself acknowledges, the City of Tukwila’s existing SMP, “in place since 1974, establishes a 40-foot setback from the mean high water line. In many places, there is little more than this 40-foot zone that is not intensely developed.” Draft SMP, page 24 (Dec. 14, 2009 Draft). In non-levée areas, the draft SMP proposes a 100’ buffer area from the Ordinary High Water Mark, floodways, and all associated wetlands. See Table 3, Draft SMP, pgs. 48-50 (Dec. 14, 2009 Draft). Although a reduction in buffer width to no less than 50’ is possible if the bank is re-sloped, the basic assumption is that any building within that 100’ buffer area will be rendered non-conforming, and that new construction cannot occur within that area. This renders at least three structures non-conforming, and prevents any new development on more than 20% of the Baker Commodities property.

This is exacerbated by changing the jurisdictional definition from the mean high water line to include the OHWM, floodways and all associate wetlands. Draft FEMA maps show floodways reaching further into the Baker Commodities property, thus impacting additional land as part

of the “no build” buffer. See *Attachment D* (excerpting the proposed FEMA map to highlight the Baker Commodities property and showing blue for the floodways; the entire map is available online at <http://your.kingcounty.gov/dnrp/library/archive-documents/wlr/flood/pdf/LG-2.pdf>).

Although the Shoreline Management Act recognizes that economic development is one of eight elements under RCW 90.58.100 the City must consider, this kind of impact is detrimental to the economic use of this property, and any future changes to the use or structures on it. This kind of regulatory limitation amounts to a taking of private property for a public good or a violation of substantive due process, and is something the State should consider carefully.

III. The Vegetation Protection and Landscaping Requirements are Problematic

Section 9.10 of the Draft SMP addresses the vegetation protection and landscaping requirements. Under Section 9.10.C.1, any development or redevelopment would require landscaping of the entire site, and removal of invasive vegetation at the site and along the entire river bank. Although the director may determine a reasonable amount of landscaping to be carried out for “smaller projects” under Section 9.10.C.1.a, this is not defined. If any activity triggers the vegetation requirements as written, there would be a potentially disproportionate impact given the approximately 2,200’ of shoreline owned by Baker Commodities.

Baker Commodities requests that the Department of Ecology consider these issues in reviewing the City of Tukwila’s draft Shoreline Master Program, especially given the future impact on property owners like Baker Commodities.

Thank you for the opportunity to provide comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Lara B. Fowler". The signature is fluid and cursive, with a large initial "L" and "F".

Lara B. Fowler

Attachments

cc: Carol Lumb, City of Tukwila
Bob Sterbank, Keynon Disend
Mitch Ebright, Dennis Luckey, Dick Hinthorne, Baker Commodities