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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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CITIZENS FOR RATIONAL SHORELINE PLANNING, a Washington  
Nonprofit Corporation, and RONALD T. JEPSON, an individual,

Appellants,

v.

WHATCOM COUNTY, a municipal corporation of the State of  
Washington, the WHATCOM COUNTY COUNCIL, and the STATE OF  
WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

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**RESPONSE BRIEF OF RESPONDENT  
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY**

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## I. INTRODUCTION

The Shoreline Management Act (SMA or “the Act”), RCW 90.58, establishes a cooperative program of shoreline management between local governments and the state. Under the SMA, each local government must adopt a “shoreline master program” (master program), which the act defines as a comprehensive use plan to be developed “in accordance with the policies enunciated in RCW 90.58.020.” RCW 90.58.030(3)(b). The adoption and amendment of a local government’s proposed master program is subject to mandatory Department of Ecology (Ecology) review and approval. Once approved, the cumulative master programs become a part of the “state master program” and constitute the use regulations for the state’s various shorelines.

In this case, Whatcom County, in close coordination and with considerable guidance from Ecology, drafted a proposed amendment to its master program to conform with Ecology’s new master program guidelines (rules adopted by Ecology to govern and assist local governments in drafting proposed master programs). The County submitted its proposed master program revisions to Ecology for review and final approval. After requiring thirteen pages of modifications, Ecology ultimately approved the master program. Among its provisions, the master program requires a setback between structures and the shoreline

environment (shoreline setback). A provision added by Ecology during the review phase restricts the building area for lots under a certain size.

Appellants challenged Ecology's approval and the underlying master program amendment to the Western Washington Growth Management Hearings Board. Appellants simultaneously filed the present action in superior court asserting that, *inter alia*, the shoreline setbacks and building size restrictions constitute an indirect, in-kind tax or fee on development in violation of RCW 82.02.020. Upon motion by Respondents, the court dismissed Appellants' claims, holding that master programs are a unique form of land use regulation constituting state—not merely local—action and, therefore, are not subject to the limitations on local government action contained in RCW 82.02.020. The State respectfully requests that this Court affirm.

## II. ISSUE PRESENTED

Are Shoreline Master Programs subject to RCW 82.02.020, providing for state preemption of local government imposition of certain taxes, when master programs are the product of pervasive state oversight and control, require state action before taking effect, and expressly become part of the state's overall shoreline protections once approved by the state?

### III. STATEMENT OF THE CASE

#### A. Overview Of The SMA And The Shoreline Master Program Adoption/Amendment Process.

The SMA states that “the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.” RCW 90.58.020. The SMA also stresses “a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.” *Id.*

To effectuate this concerted effort, the SMA establishes a “cooperative program of shoreline management between local government and the state.” RCW 90.58.050; *see also* RCW 90.58.020. Under this framework, the state, through the Department of Ecology, works closely with local governments<sup>1</sup> to develop and implement master programs for governance of shoreline development consistent with the goals and policies of the SMA. *See generally* RCW 90.58.080–.090; *see also*

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<sup>1</sup> All local governments with “shorelines of the state” within their respective jurisdictions must develop and administer a master program. RCW 90.58.070-.080. Except for certain small streams and lakes, “shorelines of the state” include “all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them ....” RCW 90.58.030(2)(c)-(e). A full list of local governments having such shorelines, and thus falling under the SMA’s purview, can be found at WAC 173-26-080.

*Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). Local governments have primary responsibility for administering approved master programs with Ecology providing assistance and assuring compliance. RCW 90.58.050. Local governments and the state also have joint enforcement authority and share permitting responsibilities. *See* RCW 90.58.210(2)–(3) (civil penalties for violations of a master program may be brought by either the applicable local government or Ecology); RCW 90.58.140 (local governments approve “substantial development” permits with Ecology maintaining final authority over “conditional use” and “variance” permits).

The SMA requires Ecology to develop comprehensive guidelines for shoreline development and mandates that Ecology review and update these guidelines periodically. *See* RCW 90.58.060. Local governments must follow Ecology’s guidelines in developing or amending master programs and must periodically review their respective master programs for conformity with any changes in the guidelines. RCW 90.58.080(1), (4). If, upon review, an inconsistency results between an extant master program and any updated guidelines, the responsible local government must begin the process of revising its master program to bring it into

compliance.<sup>2</sup> RCW 90.58.080(4). The state also funds master program adoption and amendment through grants to local governments.<sup>3</sup> RCW 90.58.080(6).

Local governments lack authority to enact or amend a master program without Ecology's approval; a master program or amendment thereto is therefore ineffective until reviewed and approved by Ecology. RCW 90.58.080-.090; *see also Harvey v. Board of Cy. Comm'rs of San Juan Cy.*, 90 Wn.2d 473, 474-75, 584 P.2d 391 (1978).<sup>4</sup> As a result, local governments are encouraged to engage in "early and continuous" consultation with Ecology during the drafting of new or amended master programs and are required to solicit Ecology feedback prior to submitting a draft for Ecology review. *See* WAC 173-26-100. Upon receipt of a draft master program, Ecology must open the proposal to state-wide public comment and conduct a public hearing if necessary. RCW 90.58.090(2). After forwarding any public comments to the local government, Ecology

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<sup>2</sup> The SMA also establishes firm deadlines by which local governments must develop or amend their master programs to comply with new guidelines. *See* RCW 90.58.080(2), (7). Relevant to the instant appeal, the SMA required Whatcom County to submit an amendment to its master program, consistent with Ecology's 2003 guidelines, by December 1, 2005. *See* RCW 90.58.080(2)(a)(i).

<sup>3</sup> Since 2003, the Legislature has appropriated \$14,558,000 to fund master program updates in order to bring them into compliance with Ecology's master program guidelines. *See* Laws of 2003, ch. 25, § 302(4) (appropriating \$2,000,000); Laws of 2005, ch. 518, § 302(5) (appropriating \$4,500,000); Laws of 2007, ch. 522, § 1201(5) (appropriating \$4,500,000); Laws of 2009, ch. 564, § 302(7) (appropriating \$3,558,000).

<sup>4</sup> Appellants attack the continuing viability of relevant case law, including *Harvey*. The State's response to this argument is in section IV.B.2 below.

must then make written findings and conclusions regarding the master program. RCW 90.58.090(2)(d).

If, in Ecology's judgment, a draft master program is fully consistent with the SMA and Ecology's then-applicable guidelines, Ecology approves the master program. RCW 90.58.090(3). If Ecology determines that a proposal is inconsistent, Ecology may modify or veto the proposal. RCW 90.58.090(2)(d)-(e). If Ecology modifies the proposal, the local government must either accept Ecology's modifications or submit an alternative proposal that adequately addresses Ecology's concerns. *Id.*

A master program takes effect only when Ecology notifies the local government that it has reviewed and approved the master program proposal or, if Ecology requires that changes be made to the master program draft, after Ecology receives written notification that the local government submits to Ecology's changes. RCW 90.58.090(2)(e), (3). If a local government fails to comply with the master program process, Ecology may bypass the local government and adopt a master program on its own through formal rulemaking. RCW 90.58.070(2).

Once approved, master programs become a part of the “state master program”<sup>5</sup> and “constitute [the] use regulations for the various shorelines of the state.” *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002), *quoting* RCW 90.58.100(1) (alteration in original).

**B. Overview Of RCW 82.02.020.**

As originally enacted, RCW 82.02.020 provided for state preemption over local government taxation of the sale and use of tangible personal property, pari-mutuel wagering, conveyances, and cigarettes. *See* Laws of 1935, ch. 180, § 29; reenacted and recodified in Laws of 1961, ch. 15. In 1982, the Legislature amended RCW 82.02.020 in response to reports that some local governments had attempted to raise revenue for broad-based municipal services by placing per-parcel taxes on new development. Laws of 1982, 1st Ex. Sess., ch. 49, § 5; *see also* 1982 Final Legislative Report, 47th Leg., at 206 (Wash. 1982)<sup>6</sup> (noting that “[s]ome contend that the imposition of fees by several cities and a few counties in the state on housing developments and other construction projects” necessitated “[r]estrictions on the imposition of development fees”). In

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<sup>5</sup> The SMA defines the “state master program” as “the cumulative total of all master programs approved or adopted by the department of ecology”. RCW 90.58.030(3)(c).

<sup>6</sup> For the Court’s convenience, a copy of pages 206-08 of the 1982 Final Legislative Report is attached as Appendix A.

1990, the statute was amended to except local development impact fees adopted under RCW 82.02.050 through 82.02.090. Laws of 1990, 1st Ex. Sess., ch. 17, § 42.

Therefore, in addition to its original purpose, RCW 82.02.020 now limits local government imposition of certain development taxes:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, *no county, city, town, or other municipal corporation* shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.

RCW 82.02.020 (emphasis added).

**C. Factual Background.**

The SMA required Whatcom County to submit a proposed amendment to its master program, consistent with Ecology's 2003 guidelines, by December 1, 2005. *See* RCW 90.58.080(2)(a)(i). Whatcom County began the amendment process in 2004. Clerk's Papers (CP) 102. At the culmination of that process, and following the procedure prescribed in WAC 173-26-110, Whatcom County submitted its proposed master program revision to Ecology for review and approval. CP 3.

After review, Ecology provided the County with two pages of recommended and 13 pages of mandatory revisions to the draft master

program. *Id.* Ecology's mandatory revisions included a provision limiting the buildable area on non-conforming lots (lots less than a prescribed square footage) to 2,500 square feet. CP 78. On August 6, 2008, the Whatcom County Council provided Ecology with written notification that it had approved Ecology's revisions with minor exceptions. CP 4. Ecology notified the County of its final approval of the Master Program on August 8, 2008. *Id.* The master program went into effect at that time.<sup>7</sup> See RCW 90.58.090(2)(e).

**D. Proceedings At The Superior Court.**

On October 20, 2008, Appellants filed suit in Skagit County Superior Court alleging that the shoreline setback and building area restrictions contained in the master program violate RCW 82.02.020. CP 1-10. On April 7, 2009, Respondents moved for dismissal of Appellants' RCW 82.02.020 claims on the grounds that master programs are state—not just local—regulations and, as a result, are not subject to the limitations on local governments imposed by RCW 82.02.020. CP 113-22. Following oral argument on May 4, 2009, the superior court

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<sup>7</sup> Appellants assert that the County's master program took effect upon adoption of Whatcom County Ordinance No. 2009-013. Appellants' Brief at 5. This is incorrect. Per RCW 90.58.090, the Whatcom County master program took effect when Ecology received "written notification" that the County submitted to Ecology's revisions and Ecology sent its final approval letter on August 8, 2008. While the trial court agreed with Appellants that the County's approval should have been by ordinance rather than resolution, the court did not agree that this mistake rendered the master program invalid. CP 125.

granted Respondents' motion and dismissed Appellants' RCW 82.02.020 claims pursuant to CR 12(b)(6). CP 165-66.

Appellants moved for reconsideration on May 14, 2009, asserting that the court failed to adequately consider a 1995 amendment to the Growth Management Act. CP 167-71. The court denied Appellants' motion by letter dated June 26, 2009, noting that Appellants' arguments were "overshadowed by the pervasive level of state involvement in and control over the entire [master program] process." CP 184.

#### IV. ARGUMENT

##### A. **Shoreline Master Programs Constitute State, Not Merely Local, Shoreline Regulations, Which Are Not Subject To RCW 82.02.020.**

In an effort to squeeze master programs into RCW 82.02.020, Appellants marginalize the state's central role in master program adoption as well as the state's substantial responsibilities with regard to shoreline permitting and enforcement once an approved master program is in place. However, Appellants' casting of the state as a limited partner in the regulation of its shorelines is inconsistent with the plain language and overall structure of the SMA, which establishes that master programs amount to state, not merely local, regulation of the state's shorelines.

**1. The plain language and structure of the SMA establish that master programs are the product of state action or, at a minimum, a unique hybrid of state and local action.**

As noted above, the SMA expressly recognizes that shorelines are of state-wide import and, as such, require a concerted management effort between federal, state, and local governments. *See* RCW 90.58.020. It is to these state-wide ends that the SMA establishes its “cooperative program of shoreline management between local government and the state.” RCW 90.58.050. Appellants’ assertion that local governments operate with unfettered discretion in regulating shorelines is in direct contrast with this fundamental tenet and finds no support in the SMA’s provisions. Indeed, and intrinsic to the SMA’s state-wide efforts with regard to shoreline regulation, the state’s role is mandatory and pervasive throughout both the master program adoption process as well as the implementation and enforcement of master programs once approved.

**a. State involvement in master program adoption.**

In terms of adoption and amendment, the master program process begins and ends with state action.

As required in statute, Ecology sets the parameters for master program adoption and amendment by adopting the comprehensive guidelines to which all draft master programs must conform. *See* RCW 90.58.060, .090. Unlike guidelines developed by the Department of

Commerce<sup>8</sup> for planning under the Growth Management Act (GMA), local governments are required to follow Ecology guidelines in developing their master programs. *Compare* RCW 36.70A.170(2) (requiring only that local governments “consider” Department of Commerce guidelines in designating critical areas) *with* RCW 90.58.090(2)–(4) (stating that proposed master programs cannot be approved by the state unless fully compliant with Ecology guidelines). Because Ecology has ultimate approval authority, local governments deviate from the guidelines at their peril. *See* RCW 90.58.080.

Ecology is also deeply involved with local governments in the master program process throughout the planning and drafting phase. Again, because Ecology has ultimate authority over master program adoption, local governments are encouraged to engage with Ecology from the earliest stages of master program planning.<sup>9</sup> RCW 90.58.080(5); WAC 173-26-100. Local governments are also required to solicit comments from Ecology early in the process, before formally submitting a draft master program or master program amendment to Ecology for formal review. WAC 173-26-100(5).

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<sup>8</sup> Formerly the Department of Community, Trade and Economic Development.

<sup>9</sup> In this case, Ecology participated throughout the County’s planning process as a member of the master program Technical Advisory Committee. *See* CP 102.

Ecology does not simply serve as a rubber stamp for local proposals. *Harvey*, 90 Wn.2d at 475. Once Ecology receives a draft master program for formal review, Ecology must provide state-wide public notice, take comments, and, if necessary, conduct a public hearing.<sup>10</sup> RCW 90.58.090(2). Ecology must then make formal written findings and conclusions concerning the consistency of the master program with the Act and the guidelines. RCW 90.58.090(2).

While Appellants' correctly point out that Ecology must approve a draft master program that is consistent with the Act and the guidelines, Appellants omit the fact that the determination of whether such compliance exists is entirely within Ecology's discretion. RCW 90.58.090(2)-(6). If, as with Whatcom County's draft, Ecology determines that a local government proposal does not fully comply, Ecology may modify the proposal as necessary or veto it outright. RCW 90.58.090(2). In this case alone, Ecology provided Whatcom County with thirteen pages of mandatory changes to the County's draft master program. CP 3. Among these changes, Ecology modified the

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<sup>10</sup> On October 3, 2007, and pursuant to the SMA, Ecology conducted a public hearing on the County's master program draft. CP 104; *see also* RCW 90.58.090(2)(b). This hearing was in addition to the public hearings conducted by Whatcom County as mandated by Ecology regulations. *See* WAC 173-26-100.

building area restrictions Appellants now challenge as violative of RCW 82.02.020.<sup>11</sup> See CP 78.

If Ecology does make revisions, the local government must accept Ecology's changes or submit an alternative proposal that adequately addresses Ecology's concerns. RCW 90.58.090(2)(e). If a local government ultimately fails to comply, Ecology may bypass the local government completely and unilaterally adopt a master program for the local government via formal rulemaking.<sup>12</sup> RCW 90.58.070; see also RCW 90.58.090(6).

A master program, or amendment thereto, takes effect only "when and in such form as approved or adopted by [Ecology]." RCW 90.58.090(7). The collective master programs become part of the "state master program" and "constitute [the] use regulations for the various shorelines of the state." RCW 90.58.030(3)(c); *Samuel's Furniture*, 147 Wn.2d at 448, quoting RCW 90.58.100(1) (alteration in original). Thus, once approved, master programs "[become] state

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<sup>11</sup> Before the trial court, Appellants argued that Ecology's changes in this regard were insignificant because Ecology was revising a draft in inserting the building area restriction. CP 132 n.6. Regardless of the procedural point at which the provision was drafted, it is beyond dispute that the building area restrictions now contained in Whatcom County's master program resulted from Ecology's authority to review and modify draft master programs.

<sup>12</sup> Appellants attempt to diminish Ecology's ability in this regard by stating that such authority is limited to "shorelines of the state." Appellants' Brief at 7 n.3. However, Appellants' distinction is meaningless; *all* regulatory authority under the SMA, including that of local government, is limited to "shorelines of the state." See RCW 90.58.040.

regulation.” *Orion Corp. v. State*, 109 Wn.2d 621, 643, 747 P.2d 1062 (1987).

**b. State involvement in master program implementation and enforcement.**

Appellants also substantially diminish the state’s role with regard to implementation and enforcement of approved master programs. Ecology has direct review and final approval authority over two of the three types of permits available for shoreline development. *See* RCW 90.58.140(10) (“Any permit for a variance or a conditional use by local government under approved master programs must be submitted to [Ecology] for its approval or disapproval.”). While Ecology does not have final decision-making authority over the third type (substantial development permit), the SMA requires that all local government substantial development permit decisions be immediately forwarded to both Ecology and the Attorney General’s Office, who then have independent authority to appeal the decision.<sup>13</sup> RCW 90.58.140(6); RCW 90.58.180(2). Thus, *all* shoreline permitting decisions by local governments receive some degree of vetting by state hands, with a significant percentage issuing only after express state approval.

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<sup>13</sup> The fact that the SMA ensures that *two* state agencies receive a copy of every shoreline permit issued in the state provides clear evidence of the unique nature of master programs (as well as shoreline regulation in general) and severely undercuts Appellants’ assertion that the state’s role in the enforcement of master programs is “limited.”

Next, in tandem with local governments, the state also has explicit authority to enforce the state's master programs. The SMA authorizes the state to bring "such injunctive, declaratory, or other actions" necessary to insure compliance with the SMA and the master programs and to enforce their provisions. RCW 90.58.210(1). The state may issue civil penalties (up to \$1,000 per violation) for permit violations under any master program. RCW 90.58.210(2). The state is also exclusively tasked with representing the state's interest with regard to the SMA (including master program provisions) against the federal government.<sup>14</sup> RCW 90.58.260.

Appellants erroneously conflate local governments' *administration* of master programs with development, adoption, implementation, and enforcement of master programs. It is true that the SMA tasks local governments with establishing a system for receipt and processing of shoreline permits and places operation of this administrative system strictly within local government purview.<sup>15</sup> RCW 90.58.140(3). As demonstrated above, however, the fact that local governments are delegated such administrative responsibility does nothing to erase the state's substantial role in master program development, implementation, and enforcement.

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<sup>14</sup> As discussed below, this is possible, in part, precisely because local master programs also constitute state shoreline regulations.

<sup>15</sup> Even then, the SMA requires that all such programs must be consistent with Ecology regulations. RCW 90.58.140(3).

In sum, Appellants' assertion that master programs are strictly creations and creatures of local regulation is rebutted by the state's extensive role with regard to development and implementation of master programs under the SMA. Master programs are the product of a coordinated, state-wide program of shoreline management between the state and local governments. Pursuant to this program, the state: (1) sets the parameters and deadlines for master program adoption and amendment, (2) is substantially and directly involved with the local government during the planning and drafting phase, (3) is given sole discretion and final authority regarding whether to approve, modify, or reject a local government proposal, (4) may bypass local governments if necessary, (5) adopts approved master programs as state regulations, and (6) plays a significant role in implementation of the state's collective master programs once approved. As such, master programs are the product of state action and constitute state, not merely local, regulations.

**2. RCW 82.02.020 applies only to actions by local governments.**

RCW 82.02.020 generally provides that the state preempts local governments' ability to impose certain taxes. In pertinent part, RCW 82.02.020 provides:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, *no county, city, town, or other*

*municipal corporation* shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land.

(Emphasis added.) Thus, by its unambiguous scope, RCW 82.02.020 applies only to actions taken by local governments and does not apply to actions taken by the state. *Id.*; see also *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 407 n.2, 780 P.2d 838 (1989) (noting that RCW 82.02.020 does not prohibit the state from imposing exactions that the statute would otherwise prohibit).

As noted above, the adoption or amendment of a master program constitutes state action. A local government's development of a master program is a mere proposal for shoreline regulation that is ineffective until approved by Ecology, subject to revision by Ecology, and becomes a part of the state's shoreline regulations (and thus, a state as well as local regulation) upon Ecology's final approval. When it comes to appealing a master program, the SMA expressly states that it is "[Ecology's] decision" to approve, reject, or modify a master program or amendment that is subject to review, not any decision by the local government. RCW 90.58.190(1), (2)(a), (3)(a).

Indeed, and as discussed *infra*, the Washington Supreme Court has gone so far as to assign to the state the sole responsibility for takings claims based on provisions in state-approved master programs and to absolve local government of responsibility for these claims. *See Orion*, 109 Wn.2d at 644.<sup>16</sup> Given that the state stands alone—without the local government—in facing takings claims arising out of state-approved master programs, the state must also stand alone in facing claims that state-approved master programs violate RCW 82.02.020.

**3. 1995 amendments to the GMA do not establish RCW 82.02.020's applicability to master programs.**

Appellants assert that a 1995 amendment to the GMA (requiring master programs to be considered part of a local government's comprehensive plan and development regulations) negates the state's role in master program adoption and provides clear evidence that master programs are subject to RCW 82.02.020.<sup>17</sup> Appellants' arguments are incorrect.

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<sup>16</sup> For a response to Appellants' attack on *Orion*'s ongoing validity, please see section IV.B.2.

<sup>17</sup> Appellants' logic in this regard is flawed from the gate. Appellants assert that RCW 36.70A.480(1) establishes a legislative intent that master programs be considered purely local regulations. Appellants' Brief at 9-10. However, by its plain terms, RCW 36.70A.480 applies only to local governments planning pursuant to the GMA. *See* RCW 36.70A.480; RCW 36.70A.020. Thus, under Appellants' logic, master programs in jurisdictions within the GMA's reach would be subject to RCW 82.02.020 while other jurisdictions' master programs would not. Such a conclusion represents a strained result that this Court should avoid. *See Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

To begin with, Appellants' assertions in this regard do nothing to diminish the State's position. The State's argument, both now and at the superior court, has always included recognition of the unique nature of master programs as dual state and local regulations. *See* CP 116-17, 156, 163, 178. Indeed, the State's arguments are premised upon an analysis that takes the entirety of the statutory scheme into account, including a focus on the pervasive level of state control over both the master program development process and shoreline regulation in general. While RCW 36.70A.480(1) does state that master programs should be considered a part of the local government's development regulations, it is evident that neither this provision, nor any part of the 1995 legislation, modified the state's role in guiding, crafting, enacting, and ultimately implementing master programs, upon which the State's arguments hinge.

Next, it is also plain that the 1995 amendments do not place master programs within the purview of RCW 82.02.020. The amendment in question was part of a larger legislative effort designed to implement certain recommendations of then-Governor Lowry's Task Force on Regulatory Reform. *See* S.B. Rep. on Engrossed Substitute H.B. 1724, at 1, 54th Leg., Reg. Sess. (Wash 1995). To ensure consistency between planning under the GMA and the SMA, and to reinforce that the SMA governs land use within the shoreline jurisdiction, the amendments made

the goals and policies of the SMA the fourteenth planning goal under the GMA. *See* Laws of 1995, ch. 347, § 104(1) (codified at RCW 36.70A.480(1)). The language cited by Appellants simply reflects this change: master programs were required to become part of local governments' comprehensive plans and development regulations because the legislation imposed the SMA upon the GMA planning process to ensure consistency between policies and regulations adopted under the GMA and the SMA. *See id.*

The 1995 amendment made this imposition clear in the subsection immediately following language cited by Appellants by firmly establishing that the SMA—not the GMA—is still to govern master program development and adoption:

(2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies, and procedures set forth in [the GMA] for the adoption of a comprehensive plan or development regulations.

Laws of 1995, ch. 347, § 104(2) (codified at RCW 36.70A.480(2)). The amendments cited by Appellant do nothing to alter the state's role in master program adoption and enforcement and do not significantly modify the SMA in any respect.<sup>18</sup> *See* Laws of 1995, ch. 347.

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<sup>18</sup> The Senate Bill Report on ESHB 1724 provides highlights of the bill's changes to the SMA: "Shoreline master programs are to be included as an element of GMA comprehensive plans. The wetlands definition under the SMA is amended to

Moreover, RCW 36.70A.480 was amended in 2003, along with sections of the SMA, to clarify the relationship between the GMA and the SMA as they relate to shorelines. Sections 2, 3, and 4 of the 2003 legislation (Laws of 2003, ch. 321) specifically amended the SMA, but, as with the 1995 amendments, none of these sections changed Ecology's role or lessened the duties and responsibilities placed on Ecology to take formal action to review and approve each local master program to ensure it complies with the SMA. *See* Laws of 2003, ch. 321, §§ 2-4. In fact, the 2003 amendments further cemented the SMA's imposition upon the GMA by adding a new subsection to RCW 36.70A.480 providing that: "[t]he policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with [the GMA] ...." Laws of 2003, ch. 321, § 5(3) (codified at RCW 36.70A.480(3)).

Appellants' broad reading of the 1995 amendments finds no support in either the plain language of RCW 36.70A.480, the remainder of

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conform with the wetlands definition under GMA. The Department of Ecology is to administratively approve local shoreline master programs, but is no longer required to adopt these programs by rule." S.B. Rep. on Engrossed Substitute H.B. 1724, at 2, 54th Leg., Reg. Sess. (Wash. 1995). In addition to these changes, the legislation also established a 21-day deadline for SMA permit appeals and directed master program challenges to the Growth Management Hearings Boards rather than the Shorelines Hearings Board. *See, generally*, Laws of 1995, ch. 347.

the 1995 legislation, or the legislative history surrounding its enactment (or subsequent amendment) and are, therefore, unpersuasive.

**4. Ecology regulations do not, and indeed *cannot*, subject master programs to RCW 82.02.020.**

Appellants cite WAC 173-26-186(5) as establishing that master programs fall under RCW 82.02.020. Appellants' Brief at 13. However, Appellants' argument in this regard is premised on an incorrect and overly broad reading of the regulation's purpose and, furthermore, presumes powers that Ecology simply does not possess.

First, WAC 173-26-186<sup>19</sup> does not "expressly incorporate" RCW 82.02.020. The specific subsection cited by Appellants states that master program planning policies should be consistent with relevant constitutional and statutory property protections. WAC 173-26-186(5). In other words, the WAC merely states that master program planning is subject to relevant legal limitations; it does not operate as a definitive statement that specific laws apply. *See id.* As a result, the mention of Chapter 82.02 RCW is not an incorporation of the statute or dispositive of Appellants' claim that RCW 82.02.020, specifically, applies to master programs.

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<sup>19</sup> The WAC in question is part of the "governing principles" of the master program guidelines and is intended to "articulate a set of foundational concepts that underpin the guidelines, guide the development of the planning policies and regulatory provisions of master programs, and provide direction to [Ecology] in reviewing and approving master programs." WAC 173-26-186.

More fundamentally, however, Ecology cannot substantively modify or otherwise override the plain wording of either the SMA or RCW 82.02.020 in an administrative rule. “Administrative rules may not amend or change enactments of the legislature.” *Fahn v. Cowlitz Cy.*, 93 Wn.2d 368, 383, 610 P.2d 857 (1980) (citation omitted). In fact, the regulation itself begins with the statement that the guidelines are “subordinate to the [SMA]” and require any inconsistencies in the guidelines to yield to the Act. WAC 173-26-186(1). Thus, even if Appellants could somehow establish that Ecology affirmatively intended the reference to Chapter 82.02 as an explicit statement that RCW 82.02.020 applies to master programs, it is plain that Ecology does not have the power to do so. Whether RCW 82.02.020 applies to state-approved master programs is determined by the statute itself, as interpreted by the courts, not by an administrative rule adopted by a state agency.

Finally, *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) (cited by Appellants for the proposition that agency interpretations inconsistent to prior agency policy are not entitled to deference) is inapposite to the present case because there is no preexisting agency policy involved in this matter. As noted above, WAC 173-26-186(5) does not address the question of whether master programs are local law subject

to RCW 82.02.020. Furthermore, even if there were a preexisting policy, Ecology's interpretation of a purely legal question (i.e., whether master programs are subject to RCW 82.02.020) would be reviewed *de novo* in any event. See *Hunter v. University of Washington*, 101 Wn. App. 283, 291-92 n.3, 2 P.3d 1022 (2000).

**5. Appellants' arguments regarding the "state master program" run counter to the Shoreline Management Act.**

Appellants assert that a master program is not transformed into state law because it is included as part of the "state master program" upon approval by Ecology. Appellants' Brief at 17. In support, Appellants point to Ecology regulations outlining that Ecology maintains the official record of all approved master programs as providing evidence that the state master program is simply a list of approved programs. *Id.* at 17-18.

At the outset, this argument misconstrues the state's position: it is the *entirety* of the structure created by the SMA that establishes master programs as the product of state action, not just any one component of the larger whole. Even aside from this point, however, Appellants' argument is incorrect.

First, the regulations cited by Appellants do not establish that the state master program is simply a catalogue of master programs. The first regulation, WAC 173-26-050, refers to the "state master program

register,” not the “state master program” itself.<sup>20</sup> See WAC 173-26-050. The next section, also relied upon by Appellants, simply establishes that it is Ecology’s (not the local government’s) record of a master program, contained in the state master program register, that is to comprise the master program for purpose of its incorporation into the state master program. See WAC 173-26-060. These regulations make sense given the framework established by the SMA. As noted, local governments do not have the power to regulate shorelines; thus, the fact that Ecology’s record of an approved master program constitutes the only official copy serves to prevent local governments from circumventing the SMA process by attempting unilateral master program amendments.

More importantly, however, the fact that local master programs are also a part of the state master program and constitute the state’s substantive shoreline regulations serves critical functions. As noted above, Ecology and the Attorney General’s Office are charged with representing and enforcing the state’s interest in protecting its shorelines against federal government action. RCW 90.58.260. The state uses the state master program to regulate federal activities in state waters and on state shorelines.

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<sup>20</sup> In pertinent part, WAC 173-26-050 provides: “The department shall prepare and maintain an official *state master program register* identifying original department adoption dates and the effective dates of subsequent amendments approved or adopted by the department for each local government shoreline master program.” (Emphasis added.)

For example, the Coastal Zone Management Act of 1972, codified at 16 U.S.C. §§ 1451-1466, was enacted to encourage the appropriate development and protection of the nation's coastal and shoreline resources. 16 U.S.C. § 1452. As part of these protections, the Coastal Zone Management Act allows states to develop a Coastal Zone Management Program and requires that federal agency activity in coastal waters conform to approved state management programs. 16 U.S.C. §§ 1454, 1456(c)(1)(A). Washington has incorporated the SMA and all regulations adopted under its authority (including master programs) into its Coastal Zone Management Program, *see* WAC 173-27-060, thus enabling the state to enforce such provisions against federal activities in state waters.

The fact that master programs are state regulations also comes into play with regard to remedial actions pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. While CERCLA exempts federal remedial actions from all state and local land use and zoning permit procedures, 42 U.S.C. § 9621(e)(1), CERCLA does permit a state to file suit against the Environmental Protection Agency seeking to enforce state substantive environmental laws. 42 U.S.C. § 9621(e)(2) (states may enforce any "State standard, requirement, criteria, or limitation to which the remedial

action is required to conform ... in the United States district court for the district in which the facility is located.”). Because local master programs are a part of the state master program, and comprise the state’s shoreline regulations, the state may seek to enforce the provisions of applicable master programs on federal remedial actions. *Id.* Were they solely local regulations, master program provisions would not be enforceable under CERCLA.<sup>21</sup>

**B. The Washington Courts Have Repeatedly Recognized That Shoreline Master Programs Are The Product Of State Action.**

**1. Relevant case law highlights the nature of master programs as state regulations.**

To the best of the state’s knowledge, the issue of whether RCW 82.02.020 applies to master programs is one of first impression.<sup>22</sup> However, given the pervasive level of state oversight and control over the master program development process, it is no surprise that the Washington Supreme Court has repeatedly recognized that local governments act at the behest of the state when developing their shoreline master programs and that the resulting master programs are state regulations.<sup>23</sup> *See, e.g.,*

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<sup>21</sup> This is of crucial import because the SMA is a *general* statute. It is the master programs that give flesh to the SMA’s framework protections. Thus, without the state master program, there would be little to enforce against the federal government.

<sup>22</sup> Ecology has been involved in frequent litigation challenging its adoption of master programs in the 27 years since the 1982 amendment to RCW 82.02.020, but this is the first such challenge invoking RCW 82.02.020.

<sup>23</sup> As discussed in section B.2., Appellants attempt to distinguish these cases is unconvincing.

*Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203-04, 884 P.2d 910 (1994) (“The total of all approved shoreline management master programs constitute Washington State's Shoreline Management Master Program.” Once Ecology approves a master program, it is adopted “as a state regulation.”); *Orion*, 109 Wn.2d at 643-44 (“the [Skagit County master program] became effective only when adopted or approved by the State Department of Ecology ... [u]pon adoption, the [master program] became state regulation.”); *Harvey*, 90 Wn.2d at 474-75 (“Action by [Ecology] is an integral and mandatory part of the development and ultimate adoption of a shorelines master program. Approval or adoption of that program by [Ecology] is a condition precedent to the program becoming effective.”).

*Orion Corp. v. State* contains the clearest pronouncement in this regard. There, the Court found that Skagit County could not be held liable for a regulatory taking arising from its master program because, in developing a master program, local governments act “under the direction and control of the state.” *Orion*, 109 Wn.2d at 643. The Court likened the state/local dichotomy created by the SMA to that of a principal and agent. *Id.* at 644. The Court also emphasized that master programs are ineffective until adopted or approved by Ecology and that, once approved, Skagit County’s master program “became state regulation.” *Id.* at 643. The Court then held that “[b]ecause the County acted at the instance of

and, in some material degree, under the direction and control of the State ... the State must take full responsibility if a taking occurred.” *Id.* at 644 (citation omitted). As noted above, if the state must stand alone in facing takings claims arising from its approval of master programs, surely the state must also be solely responsible in answering a charge that an approved master program violates RCW 82.02.020.

While certainly not binding on this Court, decisions by the Shorelines Hearings Board also shed light on the status of master programs within the greater realm of land use regulation. For instance, in *Bidwell v. City of Bellevue*, SHB No. 93-078 (Jan. 23, 1995)<sup>24</sup>, the board was confronted with a conflict between a purely local ordinance (a City of Bellevue ordinance governing street setbacks) and what the board termed “State law” (i.e., Bellevue’s master program). *Id.* at Conclusion of Law (COL) XI. The board found that “[b]ecause a local government is a creature of the State, no local ordinance may override State law.” *Id.* As a result, the board held that the street setbacks, as a local ordinance, must yield to the master program provision. *Id.* at COL XII. *Bidwell* not only shows master programs’ unique status as state *and* local law, but also highlights that master programs receive an imprimatur of the state not afforded to other “local” regulations.

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<sup>24</sup> For the Court’s convenience, a copy of *Bidwell* is attached as Appendix B.

**2. Appellants' distinction of the case law is unconvincing.**

Appellants attempt to distinguish *Orion* on multiple grounds.<sup>25</sup> First, Appellants assert that *Orion*'s holding should be limited to the facts of that case because the guidelines in place at the time "expressly prescribed" the limitations contained in the Skagit County master program. Appellants' Brief at 19. This is incorrect.

The regulations at issue in *Orion* were not mandated by the guidelines; rather, the guidelines merely required the County to give "preferences" to uses favoring public and long-range goals and "suggested" that estuaries be left in their natural state. *Orion*, 109 Wn.2d at 643, *citing* former WAC 173-16-040(5) and former WAC 173-16-050(5)<sup>26</sup>. The current master program guidelines, applicable to the buffers, setbacks, and building size limitations at issue in this case, are at least as prescriptive as the guidelines in effect when *Orion* was decided. As Appellants point out, Whatcom County designated all of its shorelines as critical areas in the County's Critical Areas Ordinance, and the master program setback widths mirror the buffer widths in the Critical Areas

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<sup>25</sup> Aside from trying to distinguish *Orion*, Appellants also question the ongoing validity of the *Orion* court's holding in light of a 1995 amendment to the GMA (discussed *supra* at 19). As noted above, the 1995 SMA amendments, including RCW 36.70A.480(1), did not substantively modify the SMA in any respect relevant to the holding in *Orion*. As such, there is no basis for disregarding the *Orion* court's pronouncements.

<sup>26</sup> For the Court's convenience, a copy of former WAC 173-16-040(5) and former WAC 173-16-050(5) are attached as Appendix C.

Ordinance. However, this is so because the SMA is very specific with regard to the protection of critical areas in shoreline jurisdiction: master program provisions must provide a level of protection of critical areas “*at least equal to that provided by the local government’s critical areas ordinances....*” RCW 90.58.090(4) (emphasis added).

Furthermore, current state regulations require that master programs: (1) assure, at a minimum “no net loss of ecological functions necessary to sustain shoreline natural resources” (WAC 173-26-201(2)(c)); (2) establish “adequate buffer zones around [critical saltwater habitats] to separate incompatible uses from the habitat areas” (WAC 173-26-221(2)(c)(iii)(B); and (3) include regulatory provisions that “address conservation of vegetation; as necessary to assure no net loss of shoreline ecological functions and ecosystem-wide processes” (WAC 173-26-221(5)(b)). Given this level of mandated protection and the guideline’s “no net loss” requirement, it is apparent that Ecology would be unlikely to approve a master program proposal that did not include protections such as setbacks and building area limitations because, without such limitations, it would be difficult to demonstrate no net loss. In fact, the building area limitations currently challenged by Appellants were inserted by the state: Ecology modified this provision with mandatory changes clarifying the limits of the proposal (i.e., limiting the buildable area on

non-conforming lots to 2,500 square feet) and approved it only after ensuring that it met the guidelines' "no net loss" standard.<sup>27</sup> CP 78.

Finally, Appellants also attempt to nullify cases such as *Orion*, *Buechel*, and *Harvey* by asserting that they were decided at a time when the SMA required Ecology to adopt master programs through formal rulemaking. It is true that, in 1995, the Legislature removed the requirement that Ecology approve master programs by rule in favor of granting Ecology the authority for administrative approval. However, Appellants present no authority to suggest that, in granting such authority, the Legislature intended to modify in any substantive way the status of a master program administratively approved by Ecology. As mentioned above, except for the convenience that Ecology "is no longer required to adopt these programs by rule", it is evident that the 1995 amendments made no substantive changes to the master program adoption process. *See* S.B. Rep. on Engrossed Substitute H.B. 1724, at 2, 54th Leg., Reg. Sess. (Wash. 1995); *see also* Laws of 1995, ch. 347, § 308.

In sum, as when these cases were decided, state action is still an integral and mandatory part of master program adoption, and state approval of a master program is still a condition precedent to their

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<sup>27</sup> Again, the fact that Ecology was revising a draft prepared by the County when setting the limitation does not eliminate Ecology's role in requiring the limitation.

effectiveness. As a result, the cases cited above apply with equal force to the instant appeal.

**C. This Court Should Decline Appellants' Invitation To Extend *Isla Verde v. City of Camas* and *Citizens' Alliance For Property Rights v. Sims* To The State's Adoption Of Master Programs.**

Appellants' invoke *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) and *Citizens' Alliance for Property Rights (CAPR) v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008) to support their claim that master programs are subject to RCW 82.02.020. Neither decision is applicable in the present context.

First, both *Isla Verde* and *CAPR* involved challenges to purely local regulations. The ordinance at issue in *Isla Verde* involved a City of Camas open space requirement for new development; the open space requirement was not mandated by state law. *Isla Verde*, 146 Wn.2d at 746-47. No state approval was required for the City's open space ordinance to take effect, nor was the City's ordinance incorporated into any state "open space plan" that would be analogous to the state master program adopted under the SMA. The purely local character of the challenged ordinance stands in sharp contrast to shoreline master programs that must be adopted to comply with specific requirements in the SMA and shoreline guidelines, that must be approved by Ecology before

they can take effect, that may be rewritten or supplanted by Ecology, and that are explicitly incorporated into a state shoreline master program.

This Court's decision in *CAPR* similarly involved a King County ordinance restricting clearing in rural areas to protect environmentally sensitive areas. *CAPR*, 145 Wn. App. at 653. As in *Isla Verde*, the *CAPR* case did not involve regulations subject to mandatory state review and revision and expressly requiring state approval before taking effect, nor did it involve regulations that, by law, become a part of the state's regulatory scheme upon adoption. *See CAPR*, 145 Wn. App. at 653. Consequently, neither *Isla Verde* nor *CAPR* speak to the question at hand.

Additionally, while this Court's decision in *CAPR* did find that ordinances adopted under the GMA's planning requirements were subject to RCW 82.02.020, there can be no serious comparison—from the perspective of overall structure and state involvement—between local governments adopting regulations under the GMA and local governments *proposing* master programs for Ecology approval under the SMA. While the state, through the Department of Commerce, provides guidelines and procedural criteria for GMA planning, local governments are under no obligation to follow the guidelines or criteria. *See generally*

RCW 36.70A.050, .170(2), .190(4)(b).<sup>28</sup> In fact, apart from a limited opportunity to appeal local enactments, the GMA does not provide for *any* state oversight of local development regulations, much less final review, modification, and approval, as is the case with master programs adopted under the SMA.

Finally, Appellants also rely on *CAPR* for the proposition that regulations promulgated in response to state requirements are not exempt from RCW 82.02.020. Appellants' Brief at 16. This reliance is also misplaced because, as explained above, master programs do not involve regulations adopted simply *in response* to state requirements. Unlike the GMA ordinance in *CAPR*, the master program approval process at issue in this case involves the state *affirmatively taking action*. Under the SMA, the state sets the parameters which local governments must conform to in developing proposals, works closely with local governments during the development of proposals, can force a local government to change its proposal (or even adopt a master program unilaterally, if necessary), has discretion in approving (or rejecting) proposed master programs, and, finally, adopts master programs as state regulations once approved. Because this process stands in stark contrast to that found under the GMA,

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<sup>28</sup> Even the Growth Management Hearings Boards are required only to *consider* the procedural criteria when assessing the compliance with the GMA. *See* RCW 36.70A.320(3).

a finding that master programs are subject to RCW 82.02.020 would operate as a significant expansion of this Court's decision in *CAPR*; the State respectfully requests that this Court decline to do so.

**D. Appellants' Alternative Position Is Based Upon A Flawed Premise And Would Create An Unworkable Patchwork Of RCW 82.02.020 Challenges.**

Appellants fall back on the position that, even if this Court determines that master programs are not subject to RCW 82.02.020, those portions of the County's master program that Appellants feel are the product of "unfettered County discretion" (i.e., the shoreline setbacks) should still be found subject to the statute. Appellants' Brief at 22-23. This position fails in at least two regards.

First, the shoreline setbacks at issue in this case are not the product of unfettered County discretion.<sup>29</sup> It is true that the master program setbacks mirror those from the County's Critical Areas Ordinance. However, as noted above, this is so because the SMA expressly mandates that protections of critical areas within shoreline jurisdiction to be "*at least equal to that provided by the local government's critical areas ordinances ...*", RCW 90.58.090(4) (emphasis added), and because both the SMA and GMA require the use of valid science to determine the

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<sup>29</sup> Indeed, given the pervasive level of state oversight and control, this Court would likely be hard-pressed to find a local government that has been through the master program amendment process and would describe the experience as an exercise of "unfettered" local power.

appropriate protection for environmentally sensitive areas, *see* RCW 36.70A.172(1); RCW 90.58.100(1); WAC 173-26-201(2)(a). As a result, had the county left setbacks out of its master program proposal or reduced the buffer size from that in the Critical Areas Ordinance, Ecology would have been required during the revision process to either mandate protections equal to those in the Critical Areas Ordinance or reject the master program outright. RCW 90.58.090(4); RCW 90.58.090(2). In addition, the shoreline setback provisions still had to go through the entire review and adoption procedure, outlined above, whereby the state affirmatively adopted such provisions as its own.

From a policy perspective, Appellants' fall-back position would also prove inconsistent and unworkable. In this case alone, Ecology made thirteen pages of revisions to the County's proposal. CP 3. Ecology also provides extensive feedback and guidance to local governments throughout the master program process and, in this instance, attended countless planning sessions as a member of the Technical Advisory Committee. CP 102. Aside from necessitating the factual untangling of years of planning efforts (in order to determine precisely who suggested what provision), Appellants' logic would result in patchwork portions of master programs exempt from RCW 82.02.020 while the remainder would be open to challenge under the statute. Or, where Ecology adopts a

shoreline master program on behalf of a local government that is unwilling to do so, the recalcitrant jurisdiction's master program would be wholly exempt from RCW 82.02.020 while a neighboring jurisdiction that acted in good faith to comply with the SMA would not.

This cannot be the result the framers of the SMA intended when enacting a "cooperative program of shoreline management between local government and the state" to reduce "uncoordinated and piecemeal" development of Washington's shorelines. See RCW 90.58.050; RCW 90.58.020. As a result, Appellants' alternative position should also be rejected.

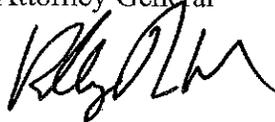
## V. CONCLUSION

The development and enforcement of master programs is not an act of unfettered local action. To the contrary, the master program process begins and ends with state action, whereby the state: sets the parameters by which master programs must conform, is heavily involved with local governments during the planning and drafting phase, has sole discretion and final authority regarding whether to approve, modify, or reject proposed master programs, may bypass local governments if necessary, adopts approved master programs as state regulations, and plays a significant role in actually implementing and enforcing master programs once approved.

Given this level of control, Washington Courts have repeatedly recognized the unique nature of master programs and their status as state regulations, with the State Supreme Court going so far as to assign the state sole responsibility for alleged takings arising from master program provisions. Additionally, subsequent amendments have not diminished the state's role with regard to master program development and implementation. As a result, the State respectfully requests this Court to uphold the trial court's determination that master programs are not subject to RCW 82.02.020.

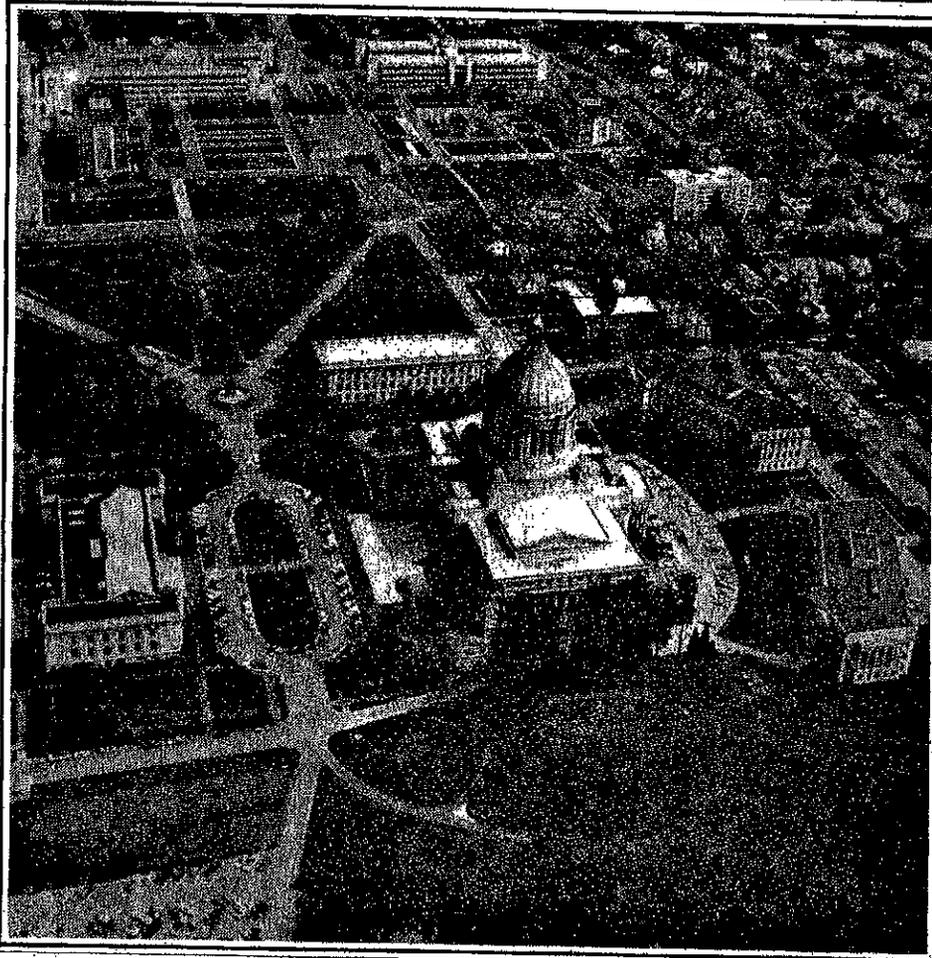
RESPECTFULLY SUBMITTED this 9th day of November, 2009.

ROBERT M. MCKENNA  
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# 1982 FINAL LEGISLATIVE REPORT



Forty-Seventh Legislature of Washington State  
Regular and First Special Sessions

**SSB 4963**

C 3 L 82 E1

**BRIEF TITLE:** Authorizing an extended industrial development levy by port districts.

**SPONSORS:** Senate Committee on Transportation  
(Originally Sponsored by Senators von Reichbauer and Talley)

**SENATE COMMITTEE:** Transportation

**HOUSE COMMITTEE:** Labor and Economic Development

**BACKGROUND:**

In 1955, the Legislature provided authority for public port districts to create an industrial development district and to develop land within their boundaries to attract industry. To accomplish this, in 1957 ports were given the authority to levy a tax of up to 45 cents per thousand dollars of assessed valuation, for any six consecutive years, later amended to any six years.

Since 1955, more than 15 port districts have established industrial development districts and a number have collected the tax. Because these levies were for six years, they have since expired and are no longer available for use by many port districts.

**SUMMARY:**

The number of years a port district may impose an industrial development levy, not exceeding 45 cents per thousand dollars of assessed valuation, is extended from six to 12 years. A provision is made for a referendum on the seventh through twelfth years of the levy if, within 90 days of the port providing notice of the levy, 8 percent of the voters voting in the last election for Governor sign a petition to put the levy on the ballot.

The industrial development levy is separated from other regular property taxes imposed by port districts for the purpose of calculating the 106 percent levy limitation. The first industrial development levy imposed by a port district after the effective date of the act is exempted from the 106 percent levy limitation.

**VOTES ON FINAL PASSAGE:**Regular Session

Senate	33	13	
House	84	12	(House amended)
Senate			(Senate refused to concur)

First Special Session

Senate	31	13	
House	78	13	(House amended)
Senate			(Senate refused to concur)
House	77	19	(House receded)

**EFFECTIVE:** April 1, 1982

**SB 4972**

C 49 L 82 E1

**BRIEF TITLE:** Relating to local government finance.

**SPONSOR:** Senator Zimmerman

**SENATE COMMITTEE:** Local Government

**HOUSE COMMITTEE:** Rules

**BACKGROUND:**

The current reductions in federal and state aid to local governments have sharply curtailed the ability of these entities to provide basic services to their residents. New sources of revenue need to be provided so that the public health, welfare and safety are adequately protected.

The building and construction industry has also been hard hit by current economic conditions. Some contend that the imposition of fees by several cities and a few counties in the state on housing developments and other construction projects beleaguer an already troubled industry. Restrictions on the imposition of development fees would provide much needed assistance for the industry.

**SUMMARY:**

The Legislature recognizes the concern local governments have regarding the financing of vital services to the public, and intends that these services be seen as top priorities by the local governmental entities.

No city or town may impose a franchise fee or any type of fee upon the light and power, telephone, or gas distribution businesses except for regular business and occupation taxes and administrative expenses incurred because of these businesses. Franchise fees

imposed by contract prior to the effective date of this act are not prohibited.

The rate of tax imposed on the privilege of conducting an electrical energy, natural gas, or telephone business may not be increased on those business activities occurring before the effective date of the increase. A proposed rate change may take effect sixty days after enactment of the ordinance establishing the change.

Because the development fees provision is enacted into law, municipal utility tax rates are limited to 6 percent unless an increase is approved by a majority of the voters. Procedures are outlined for phasing down current municipal utility tax rates in excess of 6 percent by requiring cities or towns to reduce the rate each year according to prescribed formulas.

Development fees are substantially restricted so that no county, city, town or municipal corporation may impose a tax or fee on any construction project. However, dedications of land and easements shown to be reasonably necessary as a direct result of the development are permitted. Voluntary agreements authorizing a payment in lieu of a dedication of land are permitted, provided that the payment is held in a reserve account, only expended for capital improvements, and is expended within five years. A payment not expended within five years will be refunded with interest. However, if the developer is responsible for a delay beyond five years, the refund will be without interest.

All payments must be reasonably necessary as a direct result of the proposed development.

Reasonable fees to cover governmental expenses in processing development applications, reviewing plans or preparing environmental impact statements are still permitted. Special assessments on property specifically benefited thereby are permitted.

General purpose local governments may continue to impose utility system development charges without expansion or contraction of their existing authority.

Special purpose districts, pursuant to RCW Chapters 54, 56, 57 and 87 (PUDs, water, sewer, irrigation), are specifically excluded from the restrictions placed on development fees.

The imposition of business and occupation taxes and sales and use taxes by cities and towns are not precluded, but counties are not authorized to impose business and occupation taxes.

The city business and occupation sales tax authority is limited to .2 percent of gross receipts or income. Any city whose business and occupation tax rate on sales on January 1, 1982 was higher than .2 percent and any

city which has separate classifications for various businesses or services will be limited to a maximum increase in the January rate of 10 percent, not to exceed an annual incremental increase of 2 percent of the current rate. Business and occupation surtaxes in effect on January 1, 1982 will expire either on December 31, 1982 or by the local ordinance expiration date. Cities imposing a license fee or business and occupation tax on retail sales must report the rate and revenues received annually to the Department of Revenue. Business and occupation tax rates in excess of these provisions may be approved by a majority vote of the qualified voters of any city or town.

The Municipal Research Council is required to conduct a survey of all business and occupation tax rates in the state. The survey results will be reported to the Legislature by July 1, 1982.

Because the development fees provision is enacted into law, cities and counties are authorized to levy a real estate excise tax not exceeding one-quarter of 1 percent. This authorization is intended to replace the loss of revenue from the restriction on system development charges. Those entities which do not levy the additional one-half of 1 percent sales tax are authorized to levy a second real estate excise tax not exceeding one-half of 1 percent.

One percent of the proceeds from the real estate excise tax shall be allocated to the county for its costs incurred in collecting the tax. The proceeds from the first one-quarter real estate excise tax levied in lieu of development fees will be used for capital purposes, while any additional real estate excise tax levied in lieu of the additional half-cent sales tax will be used for general government purposes.

The real estate excise tax will be a lien upon real property.

The taxes levied under this act are the obligation of the seller and may be enforced through an action of debt against the seller or in the manner of a foreclosure of a mortgage.

The treasurer of the county within which the real property is located (which was sold to satisfy the real estate excise tax) will act as an agent for the city imposing the tax. A process for the collection of real estate excise taxes is established.

The taxes authorized in this section must comply with the body of law concerning imposition of real estate excise taxes by the state.

Because the development fees provision is enacted into law, a county or city may levy up to an additional one-half of 1 percent sales tax. In the event a sales

and use tax is imposed by both a county and a city within the county, the county will receive 15 percent of the city tax revenue.

A credit against the county tax for the full amount of any city sales or use tax upon the same taxable event is required in any county ordinance imposing sales and use taxes.

An initiative process is authorized for: the first time imposition of any business and occupation tax, as well as any increase in the tax after the effective date of this act; imposition of an additional sales tax; imposition of any real estate excise tax in excess of one-quarter of 1 percent. If the voters already possess the general power of initiative, the initiative procedure will conform to that standard. If the voters do not possess the power of initiative, the procedure shall be in compliance with the initiative petitions provided for code cities.

A procedure for allocating the motor vehicle excise tax to cities and counties is established. Of the seventeen percent of all MVET receipts already allocated to cities, 65 percent will be apportioned on the basis of population and 35 percent will be apportioned to the municipal sales and use tax equalization account. An additional two percent of the MVET receipts will be allocated to the county sales and use tax equalization account.

The State Treasurer will apportion to each county imposing the existing sales and use tax at the maximum rate and receiving less than \$150,000 from the tax in the previous year, an amount from the county equalization account sufficient to equal \$150,000 when added to the revenues received the previous year. These same counties will be entitled to receive an additional amount from the equalization fund so that their total sales tax revenues will equal 70 percent of the statewide weighted average per capita level of revenues for unincorporated areas. Counties which receive this distribution, and which also impose the additional sales and use tax for an entire calendar year, may be entitled to another equivalent distribution. All of the distributions from the equalization account are subject to the following limitations:

- (1) revenues distributed may not exceed an amount equal to 70 percent of the statewide weighted average per county level of revenues for the unincorporated areas of all counties;
- (2) if inadequate revenues exist in the equalization account, then the distributions will be reduced ratably among the counties; and

- (3) if revenues in the account exceed the amount required for equalization, then the additional revenues will be credited and transferred to the state general fund.

A "municipal sales and use tax equalization account" is created into which the revenues from the apportionment of the motor vehicle excise taxes are placed.

The State Treasurer will apportion to each city not imposing the additional sales and use tax an amount equal to 65 percent of the MVET allocation to cities multiplied by 35/65. Each city which does impose the existing sales and use tax at the maximum rate, but receives less than 70 percent of the statewide weighted average per capita level of revenues for all cities, will receive an amount from the municipal equalization account sufficient to bring it up to the 70 percent figure. Cities which receive this second distribution may be entitled to a third distribution. To qualify for this third distribution, the additional sales tax must be imposed at the maximum rate for the entire calendar year. If the tax is not imposed for the full year, the cities will receive prorated allocations proportionate to the number of months the tax was imposed.

The distributions from the equalization account are subject to the following limitations:

- (1) if inadequate revenues exist in the equalization account, then the distributions will be reduced ratably among the cities; and
- (2) if the equalization account exceeds its necessary revenues, then the additional revenues will be apportioned among the cities which impose a sales and use tax.

Funding for fire district services will be considered by county legislative authorities when levying the optional taxes authorized in this act.

**Future Obligation:** The Municipal Research Council will conduct a survey of the business and occupation tax rates throughout the state and report on the results to the Legislature by July 1, 1982. The Local Government Committees of both houses of the Legislature will study fire district services and funding thereof and report on the results to the Legislature by December 31, 1982.

VOTES ON FINAL PASSAGE:

First Special Session		
Senate	29	17
House	75	23

EFFECTIVE: July 1, 1982 (Section 5)  
April 20, 1982 (all other sections)

**BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON**

<b>GEOFFREY J. BIDWELL,</b>	)	<b>SHB No. 93-78</b>
<b>Appellant,</b>	)	
<b>v.</b>	)	
<b>CITY OF BELLEVUE, THE</b>	)	
<b>OVERLAKE FUND,</b>	)	<b>FINAL FINDINGS OF FACT,</b>
<b>AND DEPARTMENT OF ECOLOGY,</b>	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
<b>Respondents.</b>	)	
	)	

On October 21, 1993, the City of Bellevue issued a shoreline substantial development permit and shoreline variance permit to Overlake Fund ("Overlake") to construct a 270 room, 183,295 square foot hotel with an associated 143,881 square foot parking structure on the shoreline of Lake Washington. On November 29, 1993, the Department of Ecology ("Ecology") approved the variance permit with conditions. On November 22, 1993, Geoffrey Bidwell ("Bidwell") filed a request for review with the Shorelines Hearings Board ("Board").

A hearing was held on October 3, 1994, in Bellevue, at which time the Board visited the site, and October 5 and 6 in Lacey. Witnesses were sworn and testified, exhibits were introduced and examined, and the arguments of the parties were heard. Based on the above, the Board makes the following

**FINDINGS OF FACT**

**I.**

The shoreline substantial development permit ("SDP") approved by Bellevue would authorize Overlake to construct a hotel on a parcel of land, approximately 90% wetlands, at the northeast corner of a 6.9 acre parcel bounded on the north by S.E. 6th Street and on the east by 114th Avenue S.E. The variance approved by Bellevue would authorize Overlake to exceed the general height limit of 35 feet on shorelines of the state, and build to a total height of 92.27 feet.

**II.**

Overlake purchased the property in 1980, as part of their acquisition of a larger, 14 acre site adjacent to and including the wetlands. They received a permit in 1985 for, and did construct, an office complex on the western half of the property. In conjunction with the permit for the office complex, Overlake recorded covenants to permanently preserve over half the site as wetlands and open space. Later, Overlake sold the western, office property, and changed the lot lines (Boundary Line Adjustment BLA-85-28) so as to add a

**Appendix B**

major portion of the preserved wetlands to the easterly parcel on which the current proposal is sited.

### III.

The general area to the north and west of the site is being rapidly and intensively developed by Bellevue as an extension of its downtown office and commercial core. The City's planning for development in the adjacent area is heavily influenced by the creation of the Bellevue Convention Center and the desire for hotel and other development which would support and be supported by the Convention Center.

### IV.

The wetland on which the project sits is a roughly rectangular piece bounded by S.E. 6th, S.E. 8th, 112th S.E., and 114th S.E. It is bisected by Sturtevant Creek, which flows from the north, through the wetland, and connects to Mercer Slough and Lake Washington proper. The wetland is an upstream part of the Mercer Slough system, and partakes of many of the wetland values and functions performed by Mercer Slough as a whole. While road and building development has incrementally acted to isolate the project area wetland from the larger Mercer Slough wetland, it originally was and is now a part of that larger wetland, and it is not an isolated wetland.

A wetland delineation was conducted in October, 1990, by Shapiro and Associates, environmental consultants in Seattle, which determined the site to include approximately 0.8 acre of dry land, the balance being wetland.

Wetland functions performed by this smaller portion of the Mercer Slough wetland include flood storage, storm water filtration, and animal habitat, encompassing mammals, birds, reptiles and amphibians. By the evidence of dead animals found on adjacent streets, both beaver and muskrat are present, and blue herons nest in the portion of the Mercer Slough system immediately south of this wetland rectangle. Evidence of fish life in Sturdevant Creek exists, although its importance in that regard is not clear.

The Mercer Slough wetland system is a natural feature of the first importance. It has been the focus of a great deal of citizen activity and concern. As a result of citizen interest, the City of Bellevue designated a 320 acre area downstream from this project a nature park, with funding coming from state and local government sources as well as directly from Bellevue citizens voting to tax themselves for property acquisition. The importance of Mercer Slough is increased by the destruction of the great majority of the wetlands bordering Lake Washington, both in Bellevue and on other shorelines of the Lake.

### V.

In 1987, Overlake, to vest a building permit before the effective date of the City's Natural Determinants

Ordinance, submitted a building permit application for a seven story, 238 room hotel with a height of 97 feet, and parking for 346 vehicles. A Draft Environmental Impact Statement was prepared and issued on June 23, 1989. The Final EIS was issued October 4, 1989. After more City process regarding zoning and land use issues, public hearings were held on September 5, October 24, December 10 and December 12, 1991. The City Hearings Examiner recommended denial of the application, mostly due to impacts on the wetlands. On appeal, the City Council, on June 22, 1992, rejected the Hearing Examiner's recommendation. On July 13, 1992, the City Council approved a (land use) conditional use permit. On June 7, 1993 the Director of Design and Development (predecessor to the present Community Development) approved land use variances from the 50 foot zoning code setback requirement. On June 17, 1993, he approved a shoreline variance from the 35 foot height limit, and on October 21, 1993, the shoreline substantial development permit was approved.

The proposal as approved by the City in the shoreline substantial development permit would allow the hotel to cover 52,274 sq. ft. of the site, including 35,624 sq. ft. of wetland.

#### VI.

The original permit application, for the so-called "vested" alternative, has been supplanted by a succession of different proposals, to meet both the City's desires and those of Overlake, before the present proposal ("Alternative G") was deemed acceptable to both the developer and the City.

#### VII.

Bellevue's land use code incorporates a wide range of values, from environmental protection to protection from adverse effects of density, noise, and parking. One of the values it seeks to further is the aesthetic one of how a development looks and feels from the street. To this end the City requires setbacks from the street for new construction. The required setback for the Overlake project would by code have been 50 feet, unless a smaller setback were approved. The City did grant smaller setbacks. In order to reduce the intrusion of the hotel into the wetlands, City staff had recommended little or no setback from the street line on the S.E. 6th side. The City Council, apparently weighing street esthetics more heavily, required a 20 foot setback from the street, at the cost of greater intrusion into the wetland.

#### VIII.

Another tradeoff the City employed, in differing combinations over its consideration of the various Overlake proposals, was the tradeoff between building footprint and building height. The total space in a building is the product of the height multiplied by the footprint. Thus if the footprint is deemed too large, for example, it can be reduced by increasing the building height, without any change in the total size of the

building.

#### IX.

The project as approved by the City will cover most of the dry land portion of the site, except for the street setbacks required by the City, and .82 acre of the wetland. At 92 feet in height, it is much taller than the other buildings on the wetland, on the west side. The portion extending into the wetland would be built over pilings, to preserve at least the flood storage function of the wetland; the displacement of the pilings themselves requires excavation of approximately 60 cubic yards of land under the hotel in order to avoid reducing flood storage. Both the hotel and the parking garage would be built in part over the wetland.

As a result of the City's and Ecology's required mitigation of wetland impacts, some trees would be planted near the hotel, and other enhancements, mostly in the form of vegetation, would be made, not to the wetland adjacent to the hotel, but to the main portion of the Mercer Slough wetland many blocks to the south.

#### X.

Overlake and its agents testified that a hotel is the only economically feasible use of the site, but no comparison with other possible uses is in evidence, and the uses of comparable sites on the wetland's west side do not include hotels. Similarly, Overlake argued that the variance represented the minimum necessary to afford relief from their hardship, but presented no calculation of that minimum, nor of the presumed hardship itself. Appellant, however, also presented no analysis of the extent of "hardship" for Overlake or of the minimum variance necessary to afford relief.

#### XI.

Despite the huge size of the proposed building in relation to the small amount of dry land available on the site, neither Overlake nor the City designed the project to minimize the intrusion into the wetland. Overlake's design has the hotel built around a central courtyard, thus using up precious dry land. Bellevue required setbacks from the street on two sides for aesthetic reasons, thus forcing the entire structure farther into the wetland.

#### XII.

Despite the over 92 feet height of the proposed hotel, the position of the site in relation to adjacent land uses is such that it does not block the view of the wetland from any residences. The principal view blockage would be from the I-405 freeway to the east of the site.

#### XIII.

Despite some history of agricultural activities in portions of the wetland system, the portion of the

wetland on which the proposed hotel would sit is in an essentially natural state, and is a natural shoreline.

#### XIV.

Any conclusion of law deemed to be a finding of fact is adopted as such.

Based on the above findings of fact, the Board makes these

#### CONCLUSIONS OF LAW

##### I.

The Board has jurisdiction over the parties and the subject matter of this case under RCW 90.58.

##### II.

In reviewing a local government's decision to grant, deny, or rescind a shoreline permit, the Board reviews the permit *de novo*. Buechel v. Department of Ecology, 125 Wn. 2d 196, 202-203; Department of Ecology and Attorney General v. Mason County and Hama Hama Company, SHB No. 115 (1976), Order on Motion. The various complaints raised by Appellants regarding the City of Bellevue's decision making process, availability of documents, etc., are rendered immaterial and harmless by the Board's *de novo* review. Attorney General v. Grays Harbor County, Slenes and Department of Ecology, SHB No. 231 (1977). Earlier land use actions taken by the City, which were never appealed to the Board, have no effect on the Board's application of existing law to this property. Buechel, at 211.

##### III.

As an associated wetland of Lake Washington, the wetland on which this proposed hotel would sit is a shoreline of statewide significance under RCW 90.58.030(2)(e). The wetland on the site is defined as within the Bellevue Shoreline Management Areas by the Bellevue Shoreline Master Program (BSMP). BSMP p. 15 and 20.25E.010.

##### IV.

A hotel and parking structure is not a water-dependent use given priority for shoreline development under RCW 90.58.020 Gislason v. Town of Friday Harbor, SHB No. 81-22 (1981); Clifford, et al., v. City of Renton and Boeing, SHB No. 92-52 (1993).

##### V.

The question of whether the proposed project constitutes a reasonable use was not brought before the Board by either party directly. However, a proposal which would put such a massive structure on, and overlapping beyond, such a tiny sliver of dry land, inclines the Board, *sua sponte*, to wonder whether such a use

is reasonable for this site. (The Board may consider a proposed building in relation to the size, location and physical attributes of the parcel of land in assessing whether a use is reasonable. Buechel, at 209.)

## VI.

RCW 90.58.020 , the Shorelines Management Act, states as a purpose

*..protecting against adverse effects to the public health, the land and its vegetation and wildlife...*

RCW 90.58.020 also requires that local governments, in their Master Programs, give preference on shorelines of statewide significance to uses which

*(2) Preserve the natural character of the shoreline; and*

*(4) Protect the resources and ecology of the shoreline;...*

RCW 90.58.020 also requires

*In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally.*

and

*Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area...*

## VII.

The City of Bellevue Shoreline Master Program states

*Existing natural resources should be conserved. BSMP Policy 21.U.102.*

and

*Wildlife habitats should be protected, improved and, if feasible, increased BSMP Policy 21.U.102b.*

and

*Existing and future activities on the City's shorelines and wetlands should be designed to minimize adverse effects of the natural environment. BSMP Policy 21.U.104.*

and

*Provision should be made for public access to and along the water's edge in new substantial shoreline developments. BSMP Policy 21.U.156.*

and

*Parking facilities for motor vehicles or boat trailers should be minimized in the shoreline area. BSMP*

Policy 21.U.652a.

### VIII.

We find that the proposed development, by intruding into and damaging the wetland, fails to protect against adverse effects to the land, its vegetation and wildlife; it reduces the public's ability to enjoy the natural shoreline; and it fails to minimize damage to the ecology and environment of the shoreline area; and therefore, it is contrary to the policy of RCW 90.58.020.

### IX.

We find that the proposed development, by intruding into and damaging the wetland, fails to conserve existing natural resources; fails to protect, improve and increase wildlife habitat; fails to minimize adverse effects on the natural environment; fails to provide for, and actually reduces, public access to the shoreline; and fails to minimize the placement of parking facilities in the shoreline; and therefore, it violates the provisions cited above of the Bellevue Shoreline Master Program.

### X.

We find that the wetland mitigation plan proposed fails to fully mitigate the impacts on the wetland of the development, and most particularly fails to mitigate impacts on the Sturdevant Creek portion of the wetland system.

### XI.

A local shoreline master program, once approved and filed by Ecology, is state law as well as local law. Because a local government is a creature of the State, no local ordinance may override State law. The BSMP may be amended only by the City Council adopting a proposed amendment and submitting it to Ecology for approval.

### XII.

The BSMP states

*When conflict arises between regulations of the Shoreline Overlay District and underlying land use districts, regulations of the Shoreline Overlay District shall prevail.* BSMP 20.25E.030.

Increasing the project's intrusion into and damage to the wetland in order to reduce the variance the project required from the street setback provisions of other Bellevue land use ordinances was contrary to this provision of the City's SMP. If it intends that street aesthetics ordinances and policies should have priority over existing provisions of its Shoreline Master Program, the City must initiate an amendment to the BSMP.

## XIII.

We do not find that no development of a non-water dependent use may ever occur in a wetland shoreline of statewide significance. We do conclude, however, that this development violates the Shorelines Management Act and the Bellevue Shoreline Master Program in its extensive and unwarranted coverage of this wetland, and that the wetland mitigation proposed fails to compensate for the adverse effects of the project.

## XIV.

Regarding the height variance approved by the City, a different analysis is necessary. For a variance to be approved from the requirements of the SMA and the local SMP, the requirements of WAC 173-14-150(2) must be met: (a) that strict application of the master program would preclude or significantly interfere with a reasonable use of the property not otherwise prohibited; (b) that the hardship is specifically related to the property and is the result of unique conditions; (c) that it is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment; (d) that it does not constitute a grant of special privilege and is the minimum necessary to afford relief; and (e) that the public interest will suffer no substantial detrimental effect.

## XV.

In addition, RCW 90.58.320 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.*

We find that the hotel project with the approved height variance to 92.27 feet will not obstruct the view of a substantial number of residences.

## XVI.

In any appeal of a permit or variance approved, denied or rescinded by a local government, the burden of proving that the permit or variance is inconsistent with the Shoreline Management Act and the local shoreline master program is on the appellant. Wallingford Community Council, Inc., et al., v. City of Seattle, et al., SHB No. 203 (1976); Buechel, at 205.

## XVII.

We find that while the height variance for the project could sensibly be questioned on a number of the criteria of WAC 173-14-150(2), including the reasonableness of the proposed use, appellant has failed to carry

his burden of proof that any of the criteria have not been met. Absent such proof by appellant, the Board cannot overturn the height variance.

### XVIII.

Any finding of fact deemed to be a conclusion of law is adopted as such.

Based on these findings of fact and conclusions of law, the Board enters the following

#### ORDER

1. The height variance to a total height of 92.27 feet, as approved by the City of Bellevue, is affirmed.
  2. The substantial development permit is approved with the following conditions:
    - a) No portion of the hotel, parking structure, or any other building on the site may extend into the wetland, as delineated by Shapiro and Associates in October, 1990. Because the dry land on the site is less than the footprint of the proposed structures, the footprint of the structures shall be reduced, in a configuration which avoids intrusion into the wetland; and
    - b) The developer may create a balcony, promenade, deck or similar appurtenance to the hotel extending out over the wetland by up to a total of 5,000 square feet, provided: that any such structure is readily available to the public at all reasonable daylight hours and during all times when it is available to paying guests of the hotel, restaurant or any other business, and that there shall be signage easily visible from the street inviting the public to use such structure to view the wetlands without charge, and that the public's access to the structure shall not be through the hotel lobby or in any other way appear to be at the discretion of the hotel; and
    - c) Neither the hotel, the parking structure, any other structure, nor the viewing structure described above may be supported by any pier, piling, or other foundation element in the wetland, and the edge of the wetland may not be excavated or otherwise altered; and
    - d) All exterior lighting on the wetland sides of the structures shall be aimed toward the structures or otherwise away from the wetland, so as to minimize the effects of artificial lights on wildlife in the wetland; and
    - e) Because these conditions will reduce the impacts of the project on the wetland, the wetland mitigation plan elements involving any work more than two hundred yards from the structures are eliminated. Those elements of the mitigation within two hundred yards remain as approved by the City.
- DONE this 23rd day of January, 1995, in Lacey, Washington.

SHORELINES HEARINGS BOARD

RICHARD C. KELLEY, Presiding

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Chapter 173-16 WAC

SHORELINE MANAGEMENT ACT GUIDELINES  
FOR DEVELOPMENT OF MASTER PROGRAMS

Last Update: 4/24/91

WAC

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**WAC 173-16-010 Purpose.** This regulation is adopted pursuant to chapter 90.58 RCW, in order to: (1) Serve as standards for implementation of the policy of chapter 90.58 RCW for regulations of uses of the shorelines; and

(2) Provide criteria to local governments and the department of ecology in developing master programs.

[Order DE 72-12, § 173-16-010, filed 6/20/72 and 7/20/72.]

**WAC 173-16-020 Applicability.** The provisions of this chapter shall apply state-wide to all shorelines and shorelines of state-wide significance as defined in chapter 90.58 RCW and WAC 173-16-030.

[Order DE 72-12, § 173-16-020, filed 6/20/72 and 7/20/72.]

**WAC 173-16-030 Definitions.** As used herein, the following words and phrases shall have the following meanings:

(1) "Act" means Shoreline Management Act of 1971, chapter 90.58 RCW.

(2) "Department" means state of Washington, department of ecology.

(3) "Development" means a use, consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the act at any state of water level.

(4) "Director" means the director of the department of ecology.

(5) "Extreme low tide" means the lowest line on the land reached by a receding tide.

(6) "Guidelines" means those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs.

(7) "Hearings board" means the shorelines hearings board

established by the act.

(8) "Local government" means any county, incorporated city, or town which contains within its boundaries any lands or waters subject to the Shoreline Act of 1971.

(9) "Master program" means the comprehensive use plan for a described area, and the use regulations, together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in section 2 of the act.

(10) "Ordinary high-water mark" means the mark on all lakes, streams, and tidal waters, which will be found by examining the beds and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation, as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: *Provided*, That in any area where the ordinary high-water mark cannot be found, the ordinary high-water mark adjoining saltwater shall be the line of mean higher high tide and the ordinary high-water mark adjoining freshwater shall be the line of mean high water.

(11) "Permit" means that required by the act for substantial development on shorelines, to be issued by the local government entity having administrative jurisdiction and subject to review by the department of ecology and the attorney general.

(12) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them, except:

(a) Shorelines of state-wide significance;

(b) Shorelines on segments of streams upstream of a point where the mean annual flow is 20 cubic feet per second or less, and the wetlands associated with such upstream segments; and

(c) Shorelines on lakes less than 20 acres in size and wetlands associated with such small lakes.

(13) "Shorelines of state-wide significance" means the following shorelines of the state:

(a) The area between the ordinary high-water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(b) Those areas of Puget Sound and adjacent saltwaters and the Strait of Juan de Fuca between the ordinary high-water mark and the line of extreme low tide as follows:

(i) Nisqually Delta - from DeWolf Bight to Tatsolo Point;

(ii) Birch Bay - from Point Whitehorn to Birch Point;

(iii) Hood Canal - from Tala Point to Foulweather Bluff;

(iv) Skagit Bay and adjacent area - from Brown Point to Yokeko Point; and

(v) Padilla Bay - from March Point to William Point.

(c) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent saltwaters north to the Canadian line and lying seaward from the line of extreme low tide;

(d) Those lakes, whether natural, artificial or a combination thereof, with a surface acreage of 1,000 acres, or more, measured at the ordinary high-water mark;

(e) Those natural rivers or segments thereof, as follows:

(i) Any west of the crest of the Cascade Range downstream of

a point where the mean annual flow is measured at 1,000 cubic feet per second, or more;

(ii) Any east of the crest of the Cascade Range downstream of a point where the annual flow is measured at 200 cubic feet per second, or more, or those portions of rivers east of the crest of the Cascade Range downstream from the first 300 square miles of drainage area, whichever is longer;

(f) Those wetlands associated with (a), (b), (d), and (e) of this subsection.

(14) "Shorelines of the state" means the total of all "shorelines" and "shorelines of state-wide significance" within the state.

(15) "State master program" means the cumulative total of all master programs approved or adopted by the department of ecology.

(16) "Substantial development" means any development of which the total cost, or fair market value, exceeds \$1,000, or any development which materially interferes with normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments:

(a) Normal maintenance or repair of existing structures or developments, including damage by fire, accident, or elements;

(b) Construction of the normal protective bulkhead, common to single-family residences;

(c) Emergency construction necessary to protect property from damage by the elements;

(d) Construction of a barn or similar agricultural structure on wetlands;

(e) Construction or modification of navigational aids, such as channel markers and anchor buoys;

(f) Construction on wetlands by an owner, lessee, or contract purchaser, of a single-family residence, for his own use or for the use of his family, which residence does not exceed a height of 35 feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof.

(17) "Wetlands" or "wetland areas" means those lands extending landward for 200 feet in all directions, as measured on a horizontal plane from the ordinary high-water mark and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of the act.

[Statutory Authority: RCW 90.58.030, 90.58.120 and 90.58.200. 85-09-043 (Order DE 85-05), § 173-16-030, filed 4/15/85; Order DE 72-12, § 173-16-030, filed 6/20/72 and 7/20/72.]

**WAC 173-16-040 The master program.** The master program is to be developed by local government to provide an objective guide for regulating the use of shorelines. The master program should clearly state local policies for the development of shorelands and indicate how these policies relate to the goals of the local citizens and to specific regulations of uses affecting the physical development of land and water resources throughout the local governments' jurisdiction.

The master program developed by each local government will reflect the unique shoreline conditions and the development requirements which exist and are projected in that area. As part of the process of master program development, local governments can

identify problems and seek solutions which best satisfy their needs.

A master program, by its definition, is general, comprehensive and long-range in order to be applicable to the whole area for a reasonable length of time under changing conditions.

"General" means that the policies, proposals and guidelines are not directed towards any specific sites.

"Comprehensive" means that the program is directed towards all land and water uses, their impact on the environment and logical estimates of future growth. It also means that the program shall recognize plans and programs of the other government units, adjacent jurisdictions and private developers.

"Long-range" means that the program is to be directed at least 20-to-30 years into the future, look beyond immediate issues, and follow creative objectives rather than a simple projection of current trends and conditions.

Finally, chapter 90.58 RCW requires that the master program shall constitute use regulations for the various shorelines of the state. Specific guidelines are outlined in RCW 90.58.100(1) for preparing the master programs to accomplish this purpose. It is the intention of these guidelines, especially those related to citizen involvement, and the inventory to aid in carrying out this section of the act.

To facilitate an effective implementation of chapter 90.58 RCW throughout the state, the procedures on the following pages shall be observed while developing master programs for the shorelines. Exceptions to some of the specific provisions of these guidelines may occur where unique circumstances justify such departure. Any departure from these guidelines must, however, be compatible with the intent of the Shoreline Management Act as enunciated in RCW 90.58.020. Further, in all cases, local governments must meet the master program requirements specified in the Shoreline Management Act of 1971.

The following provisions set forth guidelines as to citizen involvement. (1) Citizen involvement. While public involvement and notification is required of the master program at the time of adoption by the act, the general public must be involved in the initial planning stage during formulation of the master plan.

The act requires that prior to approval or adoption of a master program, or a portion thereof, by the department, at least one public hearing shall be held in each county affected by the program for the purpose of obtaining the views and comments of the public.

The act charges the state and local government with not only the responsibility of making reasonable efforts to inform the people of the state about the shoreline management program, but also actively encourages participation by all persons, private groups, and entities, which have an interest in shoreline management.

To meet these responsibilities, the local government agencies responsible for the development of the master program should establish a method for obtaining and utilizing citizen involvement. The extent of citizen involvement in the formulation of the master program will be considered by the department in the review of the program. A failure by the local government to encourage and utilize citizen involvement, or to justify not having done so, may be noted as a failure to comply with the act.

Though the department recognizes various forms of citizen

involvement as viable approaches for involving the public in the master program, the local government will be encouraged to utilize the method as suggested in these guidelines. If a local government does not followed these guidelines, it should provide an explanation of the method used. The department will be available to explain and help organize the suggested approach to citizen involvement upon request.

The suggested approach to citizen involvement to be utilized by the local government agency responsible for the development of the master program includes the following:

(a) Appoint a citizen advisory committee whose function will be to guide the formulation of the master program through a series of public evening meetings and at least one public hearing. The committee members should represent both commercial interests as well as environmentalists. However, the advisory committee itself is not to be a substitute for general citizen involvement and input. The aim of the committee will be to utilize citizen input in:

- (i) Studying existing public policies related to shorelines.
- (ii) Defining the needs to satisfy local demands for shorelines.
- (iii) Studying the type and condition of local shorelines relative to needs.
- (iv) Developing goals and policies for the master program with the local government fulfilling the specifications of the master program, including designation of the environments.
- (v) Identifying use conflicts.
- (vi) Proposing alternatives for the use of shorelines.
- (vii) Examining the effects of the master program on the environment.

(b) The citizen advisory committee should hold at least three public meetings during development of the master program and designation of the environments according to the following guidelines:

- (i) Public notice (as stated in subsection 1 below) must be provided seven days prior to the evening meeting.
- (ii) All meetings must be open to the public for free discussion.
- (iii) Meetings should be held in the evening at a location accessible to the general public.
- (iv) Record of all meetings should be filed with the local government and made available to the public.
- (v) Local government should provide resource persons to assist in the preparation, organization and diffusion of information.
- (vi) The final evening meeting should be held at least seven days prior to the public hearing.

(c) A newsletter should be published by the advisory committee in cooperation with the local government.

- (i) The information sheet should be available to the public at posted locations.
- (ii) It should be available after the first evening public meeting and prior to the second.
- (iii) The date, time, and location of future meetings and hearings should be stated.
- (iv) A phone number should be provided to obtain further information.
- (v) Public notice should be made of the availability of the newsletter as stated in subsection (d) below.

(d) Publicity of the master program should utilize:  
(i) Public notice postings as per subsection (i) below.  
(ii) Newsletter.  
(iii) Radio, T.V. and local news media.  
(iv) A local paper of general circulation.  
(v) Announcements to community groups.  
(e) At least one public hearing should be held by the local government after the three public meetings have been held to discuss the proposed master plan.

(i) Public notice (as stated in subsection (i) below) must be made a minimum of once in each of three weeks immediately preceding the hearing in one or more newspapers of general circulation in the area in which the hearing is to be held.

(ii) The master program should be available for public inspection at the local government office and available upon request at least seven days prior to the public hearing.

(f) Prior to adoption of the master program, all reasonable attempts should have been made to obtain a general concurrence of the public and the advisory committee. The method of obtaining or measuring concurrence must be established by the local government and must provide a clear indication of how citizen input is utilized.

(g) If the level of concurrence on the master program is not considered adequate by the advisory committee at the conclusion of the public hearing, the local government should hold subsequent public meetings and public hearings until such time as adequate concurrence as per subsection (f) above is reached.

(h) Attached to the master program upon its submission to the department of ecology shall be a record of public meetings and citizen involvement. A discussion of the use of citizen involvement and measurement on concurrence should be included.

(i) Public notice shall include:

(i) Reference to the authority under which the rule is proposed.

(ii) A statement of either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(iii) The time, place and manner in which interested persons may present their views thereon (as stated in RCW 30.04.025 [34.04.025]).

(2) Policy statements. Each local government shall submit policy statements, developed through the citizen involvement process, regarding shoreline development as part of its master program. Because goal statements are often too general to be useful to very specific decision problems, the policy statements are to provide a bridge for formulating and relating use regulations to the goals also developed through the citizen involvement process. In summary, the policy statements must reflect the intent of the act, the goals of the local citizens, and specifically relate the shoreline management goals to the master program use regulations.

Clearly stated policies are essential to the viability of the master programs. The policy statements will not only support the environmental designations explained below, but, also being more specific than goal statements, will provide an indication of needed environmental designations and use regulations.

The following methodology for developing policy statements is recommended:

(a) Obtain a broad citizen input in developing policy by

involving interested citizens and all private and public entities having interest or responsibilities relating to shorelines. Form a citizen advisory committee and conduct public meetings as outlined in WAC 173-16-040(1) to encourage citizens to become involved in developing a master program.

(b) Analyze existing policies to identify those policies that may be incorporated into the master program and those which conflict with the intent of the act. Further, identify constraints to local planning and policy implementation which are a result of previous government actions, existing land-use patterns, actions of adjacent jurisdictions or other factors not subject to local control or influence.

(c) Formulate goals for the use of shoreline areas and develop policies to guide shoreland activities to achieve these goals.

The policies should be consistent with RCW 90.58.020 and provide guidance and support to local government actions regarding shoreline management. Additionally, the policies should express the desires of local citizens and be based on principles of resource management which reflect the state-wide public interest in all shorelines of state-wide significance.

(3) Master program elements. Consistent with the general nature of master programs, the following land and water use elements are to be dealt with, when appropriate, in the local master programs. By dealing with shoreline uses, systematically as belonging to these generic classes of activities, the policies and goals in the master programs can be clearly applied to different shoreline uses. In the absence of this kind of specificity in the master programs, the application of policy and use regulations could be inconsistent and arbitrary.

The plan elements are:

(a) Economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commercial and other developments that are particularly dependent on shoreland locations.

(b) Public access element for assessing the need for providing public access to shoreline areas.

(c) Circulation element for assessing the location and extent of existing and proposed major thoroughfares, transportation routes, terminals and other public facilities and correlating those facilities with the shoreline use elements.

(d) Recreational element for the preservation and expansion of recreational opportunities through programs of acquisition, development and various means of less-than-fee acquisition.

(d) Shoreline use element for considering:

(i) The pattern of distribution and location requirements of land uses on shorelines and adjacent areas, including, but not limited to, housing, commerce, industry, transportation, public buildings and utilities, agriculture, education and natural resources.

(ii) The pattern of distribution and location requirements of water uses including, but not limited to, aquaculture, recreation and transportation.

(f) Conservation element for the preservation of the natural shoreline resources, considering such characteristics as scenic vistas, parkways, estuarine areas for fish and wildlife protection, beaches and other valuable natural or aesthetic features.

(g) Historical/cultural element for protection and restoration of buildings, sites and areas having historic cultural, educational

or scientific values.

(h) In addition to the above-described elements, local governments are encouraged to include in their master programs, an element concerned with the restoration of areas to a natural useful condition which are blighted by abandoned and dilapidated structures. Local governments are also encouraged to include in their master programs any other elements, which, because of present uses or future needs, are deemed appropriate and necessary to effectuate the Shoreline Management Act.

(4) Environments. In order to plan and effectively manage shoreline resources, a system of categorizing shoreline areas is required for use by local governments in the preparation of master programs. The system is designed to provide a uniform basis for applying policies and use regulations within distinctively different shoreline areas. To accomplish this, the environmental designation to be given any specific area is to be based on the existing development pattern, the biophysical capabilities and limitations of the shoreline being considered for development and the goals and aspirations of local citizenry.

The recommended system classifies shorelines into four distinct environments (natural, conservancy, rural and urban) which provide the framework for implementing shoreline policies and regulatory measures.

This system is designed to encourage uses in each environment which enhance the character of that environment. At the same time, local government may place reasonable standards and restrictions on development so that such development does not disrupt or destroy the character of the environment.

The basic intent of this system is to utilize performance standards which regulate use activities in accordance with goals and objectives defined locally rather than to exclude any use from any one environment. Thus, the particular uses or type of developments placed in each environment must be designed and located so that there are no effects detrimental to achieving the objectives of the environment designations and local development criteria.

This approach provides an "umbrella" environment class over local planning and zoning on the shorelines. Since every area is endowed with different resources, has different intensity of development and attaches different social values to these physical and economic characteristics, the environment designations should not be regarded as a substitute for local planning and land-use regulations.

(a) The basic concept for using the system is for local governments to designate their shorelines into environment categories that reflect the natural character of the shoreline areas and the goals for use of characteristically different shorelines. The determination as to which designation should be given any specific area should be made in the following manner:

(i) The resources of the shoreline areas should be analyzed for their opportunities and limitations for different uses. Completion of the comprehensive inventory of resources is a requisite to identifying resource attributes which determine these opportunities and limitations.

(ii) Each of the plan elements should be analyzed for their effect on the various resources throughout shoreline areas. Since shorelines are only a part of the system of resources within local jurisdiction, it is particularly important that planning for

shorelines be considered an integral part of area-wide planning. Further, plans, policies and regulations for lands adjacent to the shorelines of the state should be reviewed in accordance with RCW 90.58.340.

(iii) Public desires should be considered through the citizen involvement process to determine which environment designations reflect local values and aspirations for the development of different shoreline areas.

(b) The management objectives and features which characterize each of the environments are given below to provide a basis for environment designation within local jurisdictions.

(i) Natural environment. The natural environment is intended to preserve and restore those natural resource systems existing relatively free of human influence. Local policies to achieve this objective should aim to regulate all potential developments degrading or changing the natural characteristics which make these areas unique and valuable.

The main emphasis of regulation in these areas should be on natural systems and resources which require severe restrictions of intensities and types of uses to maintain them in a natural state. Therefore, activities which may degrade the actual or potential value of this environment should be strictly regulated. Any activity which would bring about a change in the existing situation would be desirable only if such a change would contribute to the preservation of the existing character.

The primary determinant for designating an area as a natural environment is the actual presence of some unique natural or cultural features considered valuable in their natural or original condition which are relatively intolerant of intensive human use. Such features should be defined, identified and quantified in the shoreline inventory. The relative value of the resources is to be based on local citizen opinion and the needs and desires of other people in the rest of the state.

(ii) Conservancy environment. The objective in designating a conservancy environment is to protect, conserve and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization.

The conservancy environment is for those areas which are intended to maintain their existing character. The preferred uses are those which are nonconsumptive of the physical and biological resources of the area. Nonconsumptive uses are those uses which can utilize resources on a sustained yield basis while minimally reducing opportunities for other future uses of the resources in the area. Activities and uses of a nonpermanent nature which do not substantially degrade the existing character of an area are appropriate uses for a conservancy environment. Examples of uses that might be predominant in a conservancy environment include diffuse outdoor recreation activities, timber harvesting on a sustained yield basis, passive agricultural uses such as pasture and range lands, and other related uses and activities.

The designation of conservancy environments should seek to satisfy the needs of the community as to the present and future location of recreational areas proximate to concentrations of population, either existing or projected. For example, a conservancy environment designation can be used to complement city, county or state plans to legally acquire public access to the water.

The conservancy environment would also be the most suitable designation for those areas which present too severe biophysical limitations to be designated as rural or urban environments. Such limitations would include areas of steep slopes presenting erosion and slide hazards, areas prone to flooding, and areas which cannot provide adequate water supply or sewage disposal.

(iii) Rural environment. The rural environment is intended to protect agricultural land from urban expansion, restrict intensive development along undeveloped shorelines, function as a buffer between urban areas, and maintain open spaces and opportunities for recreational uses compatible with agricultural activities.

The rural environment is intended for those areas characterized by intensive agricultural and recreational uses and those areas having a high capability to support active agricultural practices and intensive recreational development. Hence, those areas that are already used for agricultural purposes, or which have agricultural potential should be maintained for present and future agricultural needs. Designation of rural environments should also seek to alleviate pressures of urban expansion on prime farming areas.

New developments in a rural environment are to reflect the character of the surrounding area by limiting residential density, providing permanent open space and by maintaining adequate building setbacks from water to prevent shoreline resources from being destroyed for other rural types of uses.

Public recreation facilities for public use which can be located and designed to minimize conflicts with agricultural activities are recommended for the rural environment. Linear water access which will prevent overcrowding in any one area, trail systems for safe nonmotorized traffic along scenic corridors and provisions for recreational viewing of water areas illustrate some of the ways to ensure maximum enjoyment of recreational opportunities along shorelines without conflicting with agricultural uses. In a similar fashion, agricultural activities should be conducted in a manner which will enhance the opportunities for shoreline recreation. Farm management practices which prevent erosion and subsequent siltation of water bodies and minimize the flow of waste material into water courses are to be encouraged by the master program for rural environments.

(iv) Urban environment. The objective of the urban environment is to ensure optimum utilization of shorelines within urbanized areas by providing for intensive public use and by managing development so that it enhances and maintains shorelines for a multiplicity of urban uses.

The urban environment is an area of high-intensity land-use including residential, commercial, and industrial development. The environment does not necessarily include all shorelines within an incorporated city, but is particularly suitable to those areas presently subjected to extremely intensive use pressure, as well as areas planned to accommodate urban expansion. Shorelines planned for future urban expansion should present few biophysical limitations for urban activities and not have a high priority for designation as an alternative environment.

Because shorelines suitable for urban uses are a limited resource, emphasis should be given to development within already developed areas and particularly to water-dependent industrial and commercial uses requiring frontage on navigable waters.

In the master program, priority is also to be given to

planning for public visual and physical access to water in the urban environment. Identifying needs and planning for the acquisition of urban land for permanent public access to the water in the urban environment should be accomplished in the master program. To enhance waterfront and ensure maximum public use, industrial and commercial facilities should be designed to permit pedestrian waterfront activities. Where practicable, various access points ought to be linked to nonmotorized transportation routes, such as bicycle and hiking paths.

(5) Shorelines of state-wide significance. The act designated certain shorelines as shorelines of state-wide significance. Shorelines thus designated are important to the entire state. Because these shorelines are major resources from which all people in the state derive benefit, the guidelines and master programs must give preference to uses which favor public and long-range goals.

Accordingly, the act established that local master programs shall give preference to uses which meet the principles outlined below in order of preference. Guidelines for ensuring that these principles are incorporated into the master programs and adhered to in implementing the act follow each principle.

(a) Recognize and protect the state-wide interest over local interest. Development guidelines:

(i) Solicit comments and opinions from groups and individuals representing state-wide interests by circulating proposed master programs for review and comment by state agencies, adjacent jurisdictions' citizen advisory committees, and state-wide interest groups. (See Appendix, Reference No. 32.)

(ii) Recognize and take into account state agencies' policies, programs and recommendations in developing use regulations. Reference to many of these agencies' policies are provided in the appendix. This information can also be obtained by contacting agencies listed in the *Shoreline Inventory Supplement Number One*.

(iii) Solicit comments, opinions and advice from individuals with expertise in ecology, oceanography, geology, limnology, aquaculture and other scientific fields pertinent to shoreline management. Names of organizations and individuals which can provide expert advice can be obtained from the department's resource specialist listing.

(b) Preserve the natural character of the shoreline. Development guidelines:

(i) Designate environments and use regulations to minimize man-made intrusions on shorelines.

(ii) Where intensive development already occurs, upgrade and redevelop those areas to reduce their adverse impact on the environment and to accommodate future growth rather than allowing high intensity uses to extend into low intensity use or underdeveloped areas.

(iii) Ensure that where commercial timber-cutting is allowed as provided in RCW 90.58.150, reforestation will be possible and accomplished as soon as practicable.

(c) Result in long-term over short-term benefit. Development guidelines:

(i) Prepare master programs on the basis of preserving the shorelines for future generations. For example, actions that would convert resources into irreversible uses or detrimentally alter natural conditions characteristic of shorelines of state-wide significance, should be severely limited.

(ii) Evaluate the short-term-economic gain or convenience of developments in relationship to long-term and potentially costly impairments to the natural environment.

(iii) Actively promote aesthetic considerations when contemplating new development, redevelopment of existing facilities or for the general enhancement of shoreline areas.

(d) Protect the resources and ecology of shorelines.  
Development guidelines:

(i) Leave undeveloped those areas which contain a unique or fragile natural resource.

(ii) Prevent erosion and sedimentation that would alter the natural function of the water system. In areas where erosion and sediment control practices will not be effective, excavations or other activities which increase erosion are to be severely limited.

(iii) Restrict or prohibit public access onto areas which cannot be maintained in a natural condition under human uses.

(e) Increase public access to publicly owned areas of the shorelines. Development guidelines:

(i) In master programs, give priority to developing paths and trails to shoreline areas, linear access along the shorelines, and to developing upland parking.

(ii) Locate development inland from the ordinary high-water mark so that access is enhanced.

(f) Increase recreational opportunities for the public on the shorelines. Development guidelines:

(i) Plan for and encourage development of facilities for recreational use of the shorelines.

(ii) Reserve areas for lodging and related facilities on uplands well away from the shorelines with provisions for nonmotorized access to the shorelines.

[Order DE 72-12, § 173-16-040, filed 6/20/72 and 7/20/72.]

**WAC 173-16-050 Natural systems.** This section contains brief and general descriptions of the natural geographic systems around which the shoreline management program is designed. The intent of this section is to define those natural systems to which the Shoreline Management Act applies, to highlight some of the features of those systems which are susceptible to damage from human activity, and to provide a basis for the guidelines pertaining to human-use activities contained in WAC 173-16-060.

It is intended that this section will provide criteria to local governments in the development of their master programs, as required in RCW 90.58.030(a).

(1) Marine beaches. Beaches are relatively level land areas which are contiguous with the sea and are directly affected by the sea even to the point of origination. The most common types of beaches in Washington marine waters are:

(a) Sandy beaches. Waves, wind, tide and geological material are the principal factors involved in the formation of beaches. The beach material can usually be traced to one of four possible sources: The cliffs behind the beach; from the land via rivers; offshore wind; and finally from longshore drifting of material. Longshore-drifting material must have been derived initially from the first three sources. Most beach material in Puget Sound is eroded from the adjacent bluffs composed of glacial till.

The effect of wave action on the movement and deposition of

beach material varies depending upon the size of the material. Hence, in most cases, beaches composed of different sized material are usually characterized by different slopes and profiles. The entire process of beach formation is a dynamic process resulting from the effect of wave action on material transport and deposition. Initially, wave action will establish currents which transport and deposit material in various patterns. However, once a particular beach form and profile is established it begins to modify the effects of waves thus altering the initial patterns of material transport and deposition. Hence, in building beach structures such as groins, bulkheads or jetties, it is particularly important to recognize that subsequent changes in wave and current patterns will result in a series of changes in beach formation over time. (See WAC 173-16-060 (6), (11), (12) and (13).)

In the process of beach formation, sand particles are transported up the beach by breaking waves that wash onto the beach in a diagonal direction and retreat in a vertical direction. At the same time, longshore currents are created in the submerged intertidal area by the force of diagonally approaching waves. Beach material suspended by the force of the breaking waves is transported in one direction or another by the longshore current. Longshore drifting of material often results in the net transportation of beach material in one direction causing the loss of material in some areas and gains in others.

The profile of a beach at any time will be determined by the wave conditions during the preceding period. Severe storms will erode or scour much material away from the beaches due to the force of retreating waves. During calm weather, however, the waves will constructively move material back onto the beach. This destructive and constructive action, called cut and fill, is evidenced by the presence of beach ridges or berms. New ridges are built up in front of those that survive storm conditions as sand is supplied to the beach in succeeding phases of calmer weather. In time, the more stable landward ridges are colonized by successional stages of vegetation. The vegetation stabilizes the ridges, protects them from erosion and promotes the development of soil.

(b) Rocky beaches. Rocky beaches, composed of cobbles, boulders and/or exposed bedrock are usually steeper and more stable than sandy shores. Coarse material is very permeable which allows attacking waves to sink into the beach causing the backwash to be reduced correspondingly. On sandy shores a strong backwash distributes sand more evenly, thus creating a flatter slope.

On rocky shores a zonal pattern in the distribution of plants and animals is more evident than on muddy or sandy shores. The upper beach zone is frequently very dry, limiting inhabitants to species which can tolerate a dry environment. The intertidal zone is a narrow area between mean low tide and mean high tide that experiences uninterrupted covering and uncovering by tidal action. One of the major characteristics of this zone is the occurrence of tidal pools which harbor separate communities which can be considered subzones within the intertidal zone. The subtidal zone is characterized by less stressful tidal influences but is subject to the forces of waves and currents which affect the distribution and kinds of organisms in this zone.

(c) Muddy shores. Muddy shores occur where the energy of coastal currents and wave action is minimal, allowing fine particles of silt to settle to the bottom. The result is an accumulation of mud on the shores of protected bays and mouths of

coastal streams and rivers. Most muddy beaches occur in estuarine areas. However, some muddy shore areas may be found in coastal inlets and embayments where salinity is about the same as the adjacent sea.

Few plants have adapted to living on muddy shores. Their growth is restricted by turbidity which reduces light penetration into the water and thereby inhibits photosynthesis. In addition, the lack of solid structures to which algae may attach itself and siltation which smothers plants effectively prevents much plant colonization of muddy shores. While the lack of oxygen in mud makes life for fauna in muddy shores difficult, the abundance of food as organic detritus provides nutrition for a large number of detritus feeders.

(2) Spits and bars. Spits and bars are natural formations composed of sand and gravel and shaped by wind and water currents and littoral drifting. Generally a spit is formed from a headland beach (tall cliff with a curved beach at the foot) and extends out into the water (hooks are simply hookshaped spits). While spits usually have one end free in open water, bars generally are attached to land at both ends. These natural forms enclose an area which is protected from wave action, allowing life forms such as shellfish, to reproduce and live protected from the violence of the open coast. (See WAC 173-16-060(16).)

(3) Dunes. Dunes are mounds or hills of sand which have been heaped up by wind action. Typically, dunes exhibit four distinct features:

(a) Primary dunes. The first system of dunes shoreward of the water, having little or no vegetation, which are intolerant of unnatural disturbances.

(b) Secondary dunes. The second system of dunes shoreward from the water, with some vegetative cover.

(c) Back dunes. The system of dunes behind the secondary dunes, generally having vegetation and some top soil, and being more tolerant of development than the primary and secondary systems.

(d) Troughs. The valleys between the dune systems.

Dunes are a natural levee and a final protection line against the sea. The destructive leveling of, or interference with the primary dune system (such as cutting through the dunes for access) can endanger upland areas by subjecting them to flooding from heavy wave action during severe storms and destroy a distinct and disappearing natural feature. Removal of sand from the beach and shore in dune areas starves dunes of their natural supply of sand and may cause their destruction from lack of sand. (See WAC 173-16-060(16).) Appropriate vegetation can and should be encouraged throughout the entire system for stabilization. (See WAC 173-16-060(21).)

(4) Islands. An island, broadly defined, is a land mass surrounded by water. Islands are particularly important to the state of Washington since two entire counties are made up of islands and parts of several other counties are islands. A fairly small island, such as those in our Puget Sound and north coast area, is an intriguing ecosystem, in that no problem or area of study can be isolated. Every living and nonliving thing is an integral part of the functioning system. Each island, along with the mystique afforded it by man, is a world of its own, with a biological chain, fragile and delicately balanced. Obviously it does not take as much to upset this balance as it would the

mainland system. Because of this, projects should be planned with a more critical eye toward preserving the very qualities which make island environments viable systems as well as aesthetically captivating to humans.

(5) Estuaries. An estuary is that portion of a coastal stream influenced by the tide of the marine waters into which it flows and within which the sea water is measurably diluted with freshwater derived from land drainage.

Estuaries are zones of ecological transition between fresh and saltwater. The coastal brackish water areas are rich in aquatic life, some species of which are important food organisms for anadromous fish species which use these areas for feeding, rearing and migration. An estuarine area left untouched by man is rare since historically they have been the sites for major cities and port developments. Because of their importance in the food production chain and their natural beauty, the limited estuarial areas require careful attention in the planning function. Close scrutiny should be given to all plans for development in estuaries which reduce the area of the estuary and interfere with water flow.

(See WAC 173-16-060(14).) Special attention should be given to plans for upstream projects which could deplete the freshwater supply of the estuary.

(6) Marshes, bogs, swamps. Marshes, bogs and swamps are areas which have a water table very close to the surface of the ground. They are areas which were formerly shallow water areas that gradually filled through nature's processes of sedimentation (often accelerated by man's activities) and the decay of shallow water vegetation.

Although considered abysmal wastelands by many, these wet areas are extremely important to the food chain. Many species of both animal and plant life depend on this wet environment for existence. Birds and waterfowl choose these locations for nesting places. Wet areas are important as ground water recharge areas and have tremendous flood control value.

The high-water table and poor foundation support provided by the organic soils in these areas usually prevent development on them. The extraction of peat from bogs is possible when it is accomplished in such a manner that the surrounding vegetation and wildlife is left undisturbed and the access roads and shorelines are returned to a natural state upon completion of the operation.

The potential of marshes, bogs and swamps to provide permanent open space in urbanizing regions is high because of the costs involved in making these areas suitable for use. Unlimited public access into them, however, may cause damage to the fragile plant and animal life residing there.

(7) Lakes. A lake can be defined broadly as a body of standing water located inland. Lakes originate in several ways. Many lakes are created each year by man, either by digging a lake basin or by damming a natural valley. Natural lakes can be formed in several ways: By glaciers gouging basins and melting and depositing materials in such a way as to form natural dams; by landslides which close off open ends of valleys; extinct craters which fill with water; changes in the earth's crust, as can happen during earthquakes, forming basins which fill with water; or by changes in a river or stream course which isolate parts of the old course forming lakes, called oxbow lakes.

A lake, like its inhabitants, has a life span. This lifetime may be thousands of years for a large lake or just a few years for

a pond. This process of a lake aging is known generally as eutrophication. It is a natural process which is usually accelerated by man's activities. Human sewage, industrial waste, and the drainage from agricultural lands increases the nutrients in a lake which in turn increases the growth of algae and other plants. As plants die, the chemical process of decomposition depletes the water's supply of oxygen necessary for fish and other animal life. These life forms then disappear from the lake, and the lake becomes a marsh or swamp.

Shallow lakes are extremely susceptible to increases in the rate of eutrophication resulting from discharges of waste and nutrient-laden runoff waters. Temperature stratification does not normally occur in shallow lakes. Efficient bottom-to-surface circulation of water in these shallow lakes moves nutrients to the surface photosynthetic zone encouraging increased biotic productivity. Large quantities of organic matter are produced under these conditions. Upon decomposition, heavy demands are made on the dissolved oxygen content of shallow lakes. Eventually, the oxygen level drops and some fish and other life forms die.

The entire ecosystem of a lake can be altered by man. By removing the surrounding forest for lumber or to provide a building site or farm land, erosion into the lake is accelerated. Fertilizers, whether agricultural or those used by homeowners, can enter the lake either from runoff or leaching along with other chemicals that interfere with the intricate balance of living organisms. The construction of bulkheads to control erosion and filling behind them to enlarge individual properties can rob small fish and amphibians of their habitats. The indiscriminate construction of piers, docks and boathouses, can deprive all of the waterfront owners and the general public of a serene natural view and reduce the lake's surface. (See WAC 173-16-060 (5), (8), (11), (12), (13).)

(8) Rivers, streams and creeks. Generally, rivers, streams and creeks can be defined as surface-water runoff flowing in a natural or modified channel. Runoff results either from excessive precipitation which cannot infiltrate the soil, or from ground water where the water table intersects the surface of the ground. Drawn by gravity to progressively lower levels and eventually to the sea, the surface runoff organizes into a system of channels which drain a particular geographic area.

The drainage system serves as a transportation network for nature's leveling process, selectively eroding materials from the higher altitudes and transporting the materials to lower elevations where they are deposited. A portion of these materials eventually reaches the sea where they may form beaches, dunes or spits.

Typically, a river exhibits several distinct stages as it flows from the headwaters to the mouth. In the upper reaches where the gradient is steepest, the hydraulic action of the flowing water results in a net erosion of the stream bed and a V-shaped cross section, with the stream occupying all or most of the valley floor.

Proceeding downstream, the gradient decreases and the valley walls become gentler in slope. A point is eventually reached where erosion and deposition equalize and the action of the stream changes from vertical cutting to lateral meandering. As the lateral movement continues, a flood plain is formed, over which the river meanders and upon which materials are deposited during floods. Finally, when the river enters a body of standing water, the remaining sediment load is deposited.

Extensive human use is made of rivers, including transportation, recreation, waste and sewage dumping and for drinking water. Rivers are dammed for the production of electric power, diked for flood control and withdrawn for the irrigation of crops. Many of these activities directly affect the natural hydraulic functioning of the streams and rivers as well as the biology of the water courses. (See WAC 173-16-060(17).)

(9) Flood plains. A flood plain is a shoreland area which has been or is subject to flooding. It is a natural corridor for water which has accumulated from snow melt or from heavy rainfall in a short period. Flood plains are usually flat areas with rich soil because they have been formed by deposits from flood waters. As such they are attractive places for man to build and farm until the next flood passes across the plain. In certain areas, these plains can be "flood proofed" by diking or building levees along the adjacent river or stream, but always with provisions for tremendous amounts of water that will sooner or later be generated by weather conditions. Streamway modifications can be placed in such a way to cause channelization. Channelization tends to destroy the vital and fragile flood-plain-shoreline habitats and increase the velocity of waters in times of extreme flow. (See WAC 173-16-060(17).)

This may cause considerable damage downstream even in areas already given some flood protection. In unprotected flood plains, land-use regulations must be applied to provide an adequate open corridor within which the effects of bank erosion, channel shifts and increased runoff may be contained. Obviously, structures which must be built on a flood plain should be of a design to allow the passage of water and, wherever possible, permanent vegetation should be preserved to prevent erosion, retard runoff, and contribute to the natural beauty of the flood plain.

(10) Puget Sound. Puget Sound is a complex of interconnected inlets, bays and channels with tidal sea water entering from the west and freshwater streams entering at many points throughout the system. Most of what is known as Puget Sound was formed by glacial action that terminated near Tenino in Thurston County. The entire system, of which Puget Sound is actually a small portion, also includes the Strait of Georgia and the Strait of Juan de Fuca. The large complex may be divided into nine oceanographic areas which are interrelated: Strait of Juan de Fuca, Admiralty Inlet, Puget Sound Basin, Southern Puget Sound, Hood Canal, Possession Sound, Bellingham Bay, San Juan Archipelago, and Georgia Strait (from *Puget Sound and Adjacent Waters, Appendix XV, Plan Formulation.*)

The economic development of the central Puget Sound Basin has been stimulated by the fact that the sound is one of the few areas in the world which provides several deepwater inland harbors. The use of Puget Sound waters by deep-draft vessels is on the increase due to its proximity to the developing Asian countries. This increased trade will attract more industry and more people which will put more use pressure on the Sound in the forms of recreation (sport fishing, boating and other water-related sports) and the requirements for increased food supply.

Puget Sound waters are rich in nutrients and support a wide variety of marine fish and shellfish species. An estimated 2,820 miles of stream are utilized by anadromous fish for spawning and rearing throughout the area. Some of these fish are chinook, coho, sockeye, pink and chum salmon, steelhead, searun cutthroat and Dolly Vardon trout. All these fish spend a portion of their lives

in the saltwaters of Puget Sound and the Pacific Ocean before returning to streams of origin to spawn. The juveniles of these fish spend varying amounts of time in the shore waters of the area before moving to sea to grow to maturity. Aquaculture or sea farming is now in the process of becoming reality in the Puget Sound complex. The mass production of seaweed, clams, geoducks, scallops, shrimp, oysters, small salmon, lobsters and other possibilities looms as an important new industry. Shoreline management is particularly crucial to the success of sea farming. Aquaculture on any scale can be compatible and coexist with maritime shipping and shoreland industrial activities only be careful planning and regulation.

The shoreline resources of Puget Sound include few beach areas which are not covered at high tide. Bluffs ranging from 10 to 500 feet in height rim nearly the entire extent of the Sound making access to beach and intertidal areas difficult. Because of the glacial-till composition of these bluffs, they are susceptible to fluvial and marine erosion and present constant slide hazards. Although Puget Sound is protected from the direct influence of Pacific Ocean weather, storm conditions can create very turbulent and sometimes destructive wave action. Without recognizing the tremendous energy contained in storm waves, development of shoreline resources can be hazardous and deleterious to the resource characteristics which make Puget Sound beaches attractive.

(WAC 173-16-060 (11), (12), (13).)

(11) Pacific Ocean. From Cape Flattery on the north to Cape Disappointment on the south, there are approximately 160 miles of beaches, rocky headlands, inlets and estuaries on Washington's Pacific Coast. The shoreline south of Cape Flattery to the Quinault River is generally characterized as being rugged and rocky, with high bluffs. The remaining shoreline south of the Quinault River is predominantly flat sandy beaches with low banks and dunes.

During the winter, Pacific currents set toward the north, while during summer months they set to the south. Associated with the summer currents is a general offshore movement of surface water, resulting in upwelling of water from lower depths. This upwelled water is cold, high in salinity, low in oxygen content and rich in nutrients. It is this latter characteristic which causes upwelled water to be extremely significant in biological terms, since it often triggers "blooms" of marine plant life.

Directions of wave action and littoral drift of sediments shift seasonally with Pacific Ocean storms. Although very little data are available on the net direction of littoral transport, the University of Washington has offshore data which indicate a northerly offshore flow. RCW 43.51.650 declares:

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

in such recreational activities grows annually. This increasing public pressure makes it necessary that the state dedicate the use of the ocean beaches to public recreation and to provide certain recreational and sanitary facilities. Nonrecreational use of the beach must be strictly limited. Even recreational uses must be regulated in order that Washington's unrivaled seashore may be saved for our children in much the same form as we know it today." (See Appendix Reference Nos. 30 and 31.)

[Order DE 72-12, § 173-16-050, filed 6/20/72 and 7/20/72.]

**WAC 173-16-060 The use activities.** This section contains guidelines for the local regulation of use activities proposed for shorelines. Each topic, representing a specific use or group of uses, is broadly defined and followed by several guidelines. These guidelines represent the criteria upon which judgments for proposed shoreline developments will be based until master programs are completed. In addition, these guidelines are intended to provide the basis for the development of that portion of the master program concerned with the regulation of such uses.

In addition to application of the guidelines in this section, the local government should identify the type or types of natural systems (as described in WAC 173-16-050) within which a use is proposed and should impose regulations on those developments and uses which would tend to affect adversely the natural characteristics needed to preserve the integrity of the system. Examples would include but would not be limited to proposed uses that would threaten the character of fragile dune areas, reduce water tables in marshes, impede water flow in estuaries, or threaten the stability of spits and bars.

These guidelines have been prepared in recognition of the flexibility needed to carry out effective local planning of shorelines. Therefore, the interpretation and application of the guidelines may vary relative to different local conditions. Exceptions to specific provisions of these guidelines may occur where local circumstances justify such departure. Any departure from these guidelines must, however, be compatible with the intent of the act as enunciated in RCW 90.58.020.

It should be noted that there are several guidelines for certain activities which are not explicitly defined in the shoreline act as developments for which substantial development permits are not required (for example, the suggestion that a buffer of permanent vegetation be maintained along water bodies in agriculture areas.) While such activities generally cannot be regulated through the permit system, it is intended that they be dealt with in the comprehensive master program in a manner consistent with policy and intent of the Shoreline Act. To effectively provide for the management of the shorelines of the state, master programs should plan for and foster all reasonable and appropriate uses as provided in RCW 90.58.020.

Finally, most of the guidelines are intentionally written in general terms to allow some latitude for local government to expand and elaborate on them as local conditions warrant. The guidelines are adopted state regulations, however, and must be complied with both in permit application review and in master program development.

(1) Agricultural practices. Agricultural practices are those