

## Debbie Beadle

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**From:** Reid Brockway <waterat@comcast.net>  
**Sent:** Friday, April 20, 2012 2:07 PM  
**To:** Kamuron Gurol; ECA  
**Subject:** Re: Your materials from last night  
**Attachments:** Testimony to 4-19-12 PC mtg - reb1.docx; Testimony to 4-19-12 PC mtg - reb2.pptx

Kamuron,

Attached are my two submittals to the 4/19 PC. Note that I sent these to Debbie yesterday, so they should be in the pipeline. At the suggestion of two of the commissioners during the public forum phase last night, I also sent them to Kathy as chair to forward to the other commissioners.

The “dramatization” was a verbal element of my testimony; I did not include text. And while fiction, I was careful to make it consistent with the current code. Below are the significant elements of that dialogue and citations to the code on which they are based, plus input from staff in a couple cases.

- Only allowed to plant native vegetation in a stream buffer – 21A.50.340 (3)

(Unless obtain “a state or federal permit or approval”)

- Type F stream has 150 foot buffer on each side – 21A.50.330 (1)

- Landscaping actions within a stream buffer beyond “routine maintenance” require a clearing and grading permit – Emily in Planning Dept., 1/30/12

- Replacing a tree in a stream buffer requires a “restoration or enhancement plan” – 21A.50.060 (1) (e) (ii), 21A.50.340 (1) (b)

- Advisable (actually required, it appears) to use a licensed professional to prepare a plan for altering a stream buffer – 21A.50.130 (1), 21A.50.340 (1) (b)

- Modifications to a stream buffer require a plan and a code compliance review – 21A.50.340 (1) (b), 21A.70.060, and Emily in Planning Dept., 1/30/12.

Reid

On 4/20/2012 10:44 AM, Kamuron Gurol wrote:

Hi Reid, can you please email your PPT, the fictional narrative of the applicant/staff conversation, and any other materials you want the PC to get? Thx, -KG

Please be aware that email communication with Council Members or City staff is a public record and is subject to disclosure upon request.

## Testimony to 4/19/2012 Planning Commission meeting

From: Reid Brockway

Subject: Significant issues with ECA code related to streams

### Abstract

The following is a compilation of significant issues that this reviewer believes exist in the current ECA code and related sections, and with its administration. The focus is on streams, but the majority of these issues pertain to other ECA's as well (e.g., wetlands). The issues are summarized as follows:

1. Stream buffers imposed as fixed width number by stream Type are inappropriate for many urban settings and should at least be supplemented by the option of buffer delineation.
2. Insufficient distinction is made between developed and undeveloped land as to the constraints on activities in the vicinity of a stream.
3. Flow rate is ignored as a criterion in defining "streams", contrary to WAC 173-22-030. Consequently our code places restrictions on small creeks and other drainages that are excessive for the environmental value they represent.
4. Grandfathering provisions in our code are inadequate, subjecting citizens to hassle, cost, and uncertainty when performing normal urban activities, like landscaping, in the vicinity of a stream, and encouraging these activities to be done covertly.
5. The code contains many "magic numbers" that appear arbitrary and should be replaced by meaningful criteria derived from explicit environmental objectives.
6. There is currently no recourse available to the resident or developer when an issue of code interpretation arises short of a lawsuit or a formal hearing. An ombudsman function is needed.

These are issues that should be corrected now, not in some future code update, so that they do not continue to create inequities for citizens and developers for years to come.

Stream buffer widths – Current stream buffer requirements, specified as width numbers by stream Type, are problematic in at least two respects:

1. They are based on forest practices and measures appropriate for rural environments that have questionable relevance to an established urban setting<sup>1</sup>.
2. They apply one-size-fits-all numbers for buffer widths irrespective of actual topography and features present.

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<sup>1</sup> As evidence of this, in Tab 1 on the city's ECA web page, reference Department of Commerce GMA Update, addressing Stream Typing, states:

The modeling system used to assess stream types was designed to address higher elevation forested areas, and not low lying and urbanizing area

While simple to specify and enforce, this crude approach can exaggerate the range of influence on a stream and consequently impose a burden on land use without significant environmental benefit.

Buffer size should instead be based on actual width of the viable habitat that adjoins a watercourse, existing topography as it relates to drainage into the watercourse, and slope stability if applicable. “Prescribed buffers” should be delineated based on actual conditions present. Man-made structures such as houses, walls, roads and driveways that constitute de-facto barriers to influence should define the boundary of a buffer where present. Other jurisdictions (e.g., Aberdeen) have taken this approach to buffer delineation. If Sammamish cannot afford to do the delineation, the property owner or developer should have the right to have it performed by qualified professionals as an alternative to arbitrary buffer widths.

Undeveloped versus developed land – For streams (and for ECAs in general) the current code largely fails to distinguish between actions on raw land and those in established urban neighborhoods. Most code elements refer to “development” and are of the nature that would pertain to land being newly developed<sup>2</sup>. Maintenance and minor improvements to yards, residences, and outbuildings is substantially different from clearing and grading and installation of infrastructure as takes place for new development. The constraints on activities within established urban settings should be appropriate for the conditions and features now present, not those that would apply to a proposed new development on raw land. Further, constraints on activities in developed neighborhoods should be applied only to the extent dictated by solid science *addressing ECA’s in urban settings*, or in the absence of such science, by common sense. It makes no sense to restrict activity that has no effect whatsoever on a watercourse merely because it is within a stipulated distance from that watercourse.

Note that at one point it may have been the intent to make this distinction, as there is a paragraph 21A.50.080, “Modification or waiver of sensitive area requirements – Urban lots”, but its contents were deleted.

Definition of “Streams” – “Streams” are defined in 21A.15.1240, but that definition is inconsistent with WAC 173-22-030 which defines streams as having mean annual flow in excess of 20 cfs. Then buffers are mandated (in 21A.50.330) based on Water Types from WAC 222-16, which applies to “streams, lakes and ponds”. As a consequence, exaggerated restrictions are placed on small creeks and other drainages that are inappropriate for the environmental value they represent. Flow rate should be a factor in the regulation of these features.

Grandfathering provisions for landscaping – It has been asserted by Staff that the current ECA code does not represent a burden on existing residents and developments because of

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<sup>2</sup> “Development” is not defined, but “Development Activity” is, as follows:

“Development activity” means any residential construction or expansion of a building, structure or use, any change in use of a building or structure, or any change in the use of land that creates additional demand for school facilities. (21A.15.300)

grandfathering provisions in the code. This assertion does not appear to be supported by the code itself, at least as regards landscaping and certain other improvements commonly allowed on private property. An accompanying assessment (see Appendix below) looks for the basis of this grandfathering in the code in the context of landscaping within a stream buffer.

The conclusion of this assessment is that any change to landscaping within a stream buffer (which can be up to 300 feet in width and span several residential lots) requires a permit from the city, and in the case of introducing non-native species, requires “a state or federal permit or approval”. This is the case regardless of legally established features within the prescribed width of the buffer.

It is not true grandfathering if a use that normally would not require approval by a jurisdiction, in absence of an ECA, subjects the citizen to the hassle, cost, and uncertainty of obtaining a permit, and supplying supporting studies, when it involves a buffer. And any meaningful code should be enforced. If the answer is that the resident is expected to do this kind of thing “under the radar”, that is bad code and bad policy. Nor should staff be relied upon to counter what a literal interpretation of the code would dictate. Grandfathering provisions should be reasonable, consistent, and unambiguous. As the example assessment shows, currently they are not.

Quantitative requirements – The ECA code contains approximately thirty quantitative requirements pertaining to stream buffers. Many of these constraints appear to be arbitrary “magic numbers”. One example is the 50 percent minimum width allowed for buffer averaging. Unless it can be shown that these numbers are based on solid science or required by state statute, they are arbitrary and should be replaced by meaningful criteria that derive from explicit environmental objectives. It should be required that the city’s ECA consultant identify the science and/or law behind these numbers.

Ombudsman – There is great need for an ombudsman to whom the resident or developer can turn when an issue of code interpretation arises. The ECA code contains significant ambiguity and opportunity for the city to impose regulatory bias. It also contains restrictions that are overly broad or extreme for a developed urban setting, where literal interpretation and enforcement places an unreasonable burden on the applicant. (Examples of both can be provided.) Presently when such difficulties arise the only recourse is for the applicant to sue or request a formal hearing, both entailing considerable expense and with uncertain results. There needs to be a less extreme alternative wherein a neutral arbitrator is brought in to help resolve an issue. This needs to be a person or group (board) who understands the ECA code, its context, and its intent, is flexible in its interpretation, and uses common sense to achieve a balance between environmental and human concerns.

## Appendix: Assessment of grandfathering provisions of ECA and related code as it pertains to landscaping within a stream buffer

### 21A.50.340 Streams – Permitted alterations

States “Alterations to streams and stream buffers are not allowed except as provided for by complete exemptions, partial exemptions and exceptions in this chapter or as allowed for by this section.” See below for what 21A.50.050, 060 & 070 allow.

Contains the following:

- (3) There shall be no introduction of any plant or wildlife which is not indigenous to the coastal region of the Pacific Northwest into any stream or buffer ***unless authorized by a state or federal permit or approval.*** (emphasis added)

### 21A.50.050, Complete exemptions

Only allows relief for emergencies, public projects, and clearing and grading activities that are exempt from the requirement for a clearing and grading permit. Regarding the latter, the specific text is:

- (5) All clearing and grading activities that are exempt from the requirement for a clearing and grading permit as specified in SMC 16.15.050, unless these activities require other permits or authorizations as specified in SMC 21A.50.020.

And under 16.15.050 the relevant material is:

- (8) The following activities are exempt from the clearing requirements of this chapter and no permit shall be required:
  - (a) Normal and routine maintenance of existing lawns and landscaping, including up to 50 cubic yards of top soil, mulch, or bark materials added to existing landscaped areas subject to the limitations in critical areas and their buffers as set out in Chapter 21A.50 SMC.The question this raises is what constitutes “normal and routine maintenance... of landscaping”.

In a phone call to the city on 1/30/12, Emily, the planner on duty, was asked what kinds of landscaping activities require a clearing and grading permit, vis a vi “normal and routine maintenance”. She stated:

- “normal and routine maintenance” is not defined anywhere in the code (confirmed). What it consists of is a judgment call on the part of staff.
- A clearing and grading permit would ***not normally*** be required for things like replacing a small tree, adding some placed rocks, moving a low garden wall, or adding a drip irrigation system, as long as they do not involve moving more than 50 cubic yards of material. (Note that Emily is using a broader definition of “material” than in (a) above.)

But...

- Work of this nature within a stream buffer **does** require a permit, and a clearing and grading permit is what the city uses for this.

Conclusion regarding 21A.50.050: small-scale landscaping activities within a stream buffer are subject to staff's interpretation of what constitutes "normal and routine maintenance", which is not defined. By policy, apparently, anything beyond mowing, pruning, and applying ground cover require a clearing and grading permit and do not qualify as "complete exemptions".

#### **21A.50.060, Partial exemptions**

- Contains the provisions for expanding footprint, and for the maintenance and repair of **structures**.
- Allows removal of specifically enumerated species of invasive vegetation, provided that "the area is replanted with native vegetation according to **a restoration or enhancement plan that has been approved by the City of Sammamish**" (emphasis added)
- Specifically prohibits removal of any native vegetation or woody debris "unless the action is part of an approved alteration"

#### **21A.50.070, Exceptions**

Allows for only two kinds of exceptions:

- Public Agency and Utility Exception – N/A for private parties
- Reasonable Use Exception – N/A unless code "would deny all reasonable use of the property"

Conclusion regarding 21A.50.340: Neither the Complete Exemptions, the Partial exemptions, nor the Exceptions clause relieves the property owner from having to submit a plan and get a permit to do minor landscaping improvements within a stream buffer. What kinds of landscaping actions would and would not be allowed under such permit is not defined, but the basis exists for an extreme interpretation wherein only conversion to native vegetation is allowed (ref. 21A.50.060). Further, "a state or federal permit or approval" is required for introducing any plant or wildlife (pet dog?) which is not indigenous to the coastal region of the Pacific Northwest into any stream or buffer.

#### **Chapter 21A.70, Nonconformance, Temporary Uses, and Re-use of Facilities<sup>3</sup>**

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<sup>3</sup> Note that Eric LaFrance told the author (2/2/2007) that this section is where the grandfathering provisions are found that pertain to critical areas like stream buffers. However Rob Garwood told the author (1/31/2012) that this section does not apply to ECA's, including stream buffers. Neither 21A.50 nor 21A.70 speak to this question. This is a good example of the problem with code that is ambiguous, as it is subject to inconsistent interpretation by staff; it puts city planners in the position of defining the rules and leaves the applicants guessing. This assessment looks at this section assuming Eric LaFrance's answer was the correct one.

Presumably by the terms of this chapter, landscaping within a stream buffer is a nonconforming use, or perhaps nonconforming site improvement. However the code does not speak to landscaping specifically.

21A.70.030 states that a use or site improvement can be continued if it was legal at the time it was established.

21A.70.060 states that modifications to a nonconforming use, structure, or site improvement may be allowed if they are “reviewed and approved by the department” as long as they do not expand any existing nonconformance.

21A.70.070 allows for expansion of nonconforming uses, structures, or site improvements, subject to department review and approval, but this section only speaks to buildings, impervious surfaces, and parking; it is silent on landscaping.

21A.70.090 is entitled, Nonconformance – Residences. It merely says that a residence may be expanded, after review and approval, subject to other applicable codes.

Conclusion regarding 21A.70: This chapter does not address landscaping per se, but it appears to allow landscaping within a stream buffer to be maintained as a nonconforming use or nonconforming site improvement. However there is no basis in this section of code for such landscaping to be changed. A citizen wanting to plant a tree, add some placed rocks, move a low wall, or do other kinds of minor landscaping improvements that would normally be allowed in absence of a nearby stream cannot find in this section the legal basis for doing such minor improvements.

## Observations on Code Associated with Streams

Testimony to 4/19/2012  
 Planning Commission  
 by Reid Brockway

## Stream Regulations

Two main problems:

1. Current code inappropriately applies forest practices to urban settings
2. Current code does not adequately distinguish between new development and established neighborhoods

(There *are* reasonable solutions)

REB

2

## Stream Buffers

21A.50.330 (1) The following standard buffers shall be established from the ordinary high water mark or from the top of the bank if the ordinary high water mark cannot be identified:

Stream Type	Standard Buffer Width (ft)
Type S:	150
Type F:	150
Type Np:	75
Type Ns:	50

- Sammamish has no Type S streams (as of 2005)
- Type F streams are those that either are, or could be, used by salmonids
- Type Np streams typically flow year-round but do not have potential use by salmonids
- Type Ns streams typically do not flow year round and do not have potential use by salmonids
- There are no flow rate qualifications on any of these stream types. (It doesn't take much to be a Type F stream.)
- Note that these definitions come from WAC 222, Forest Practices Board.

REB

3

## Forest Practices Issue

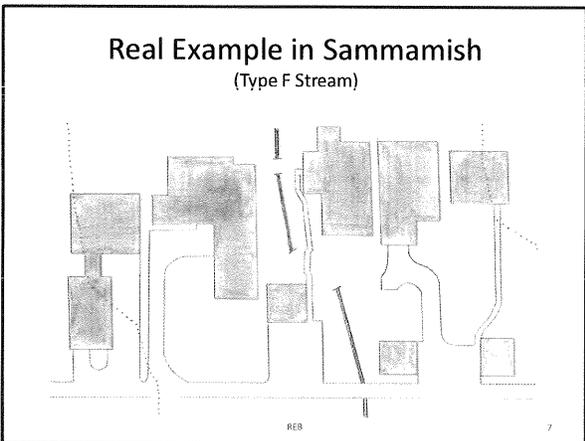
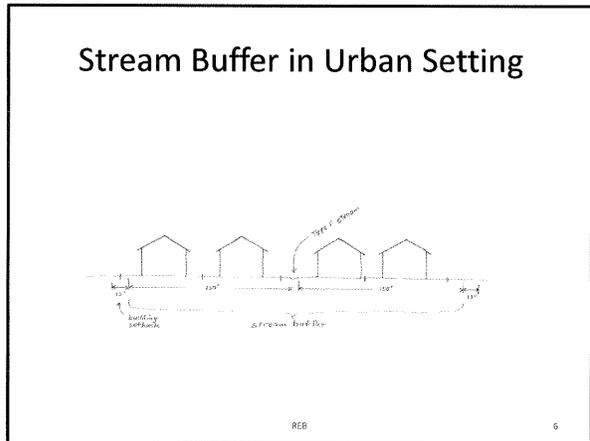
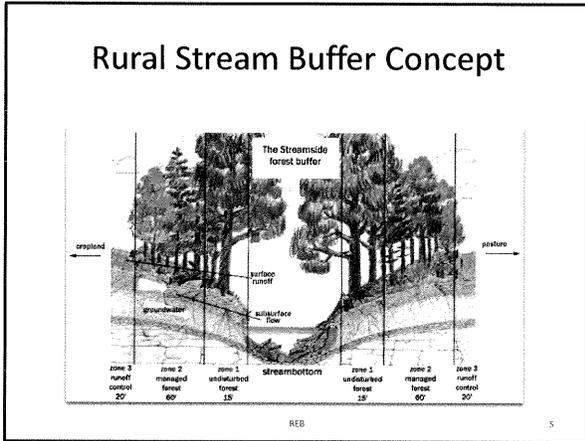
Document Department of Commerce GMA Update found in Resource Guide under Tab 1 on the city's ECA web page

Addressing "Stream Typing", document states:

"The modeling system used to assess stream types was designed to address higher elevation forested areas, and not low lying and urbanizing areas"

REB

4



### Real Example in Sammamish

So why is this a problem?

As the code now stands:

- These property owners required to obtain a permit to do any landscaping beyond simple "maintenance"
- The footprints of these structures cannot be expanded, reducing property values
- No new structures (e.g., garden shed) permitted within 165 ft of creek

REB 8

One-size-fits-all buffers by stream Type...

- Simple to codify and administer, but
- Bear no particular relation to actual width of habitat or range of influence on it
- Arbitrarily burden developed properties

REG

9

## Dramatization

Fictional dialogue between resident and staff

REG

10

## Property Rights Issue

RCW Chapter 36.70A, "Growth management – Planning by selected counties and cities", found in the city's Resource Guide

36.70A.020 (6), Property Rights, states:

"The property rights of landowners shall be protected from arbitrary and discriminatory actions."

REG

11

## Property Rights Issue, Continued

Verbal dramatization is an example of both

- Arbitrary because it is imposing a buffer where there may be no environmental benefit
- Discriminatory because it prevents or inhibits a subset of residents from doing something most residents have a clear, unrestricted right to do

REG

12

## Solutions

- Ideally, all the “magic numbers” in the code should be assessed (BAS and law) and replaced where appropriate by problem/solution-driven requirements

Or a simpler, compromise solution:

- Add the option of buffer delineation

REB

13

## Buffer Delineation

- Also referred to as “prescriptive buffers”
- Determine actual range of influence around an urban stream or other watercourse, taking into account topography and the band of viable habitat that actually exists
- Recognizes that features like roads, buildings, and walls can constitute de facto boundaries to buffers
- Solves the inequities of one-size-fits-all buffers
- Applies to other ECAs as well, e.g., wetlands
- Supported by an abundance of BAS
- Other jurisdictions do this

REB

14

## Buffer Delineation, Continued

- Sammamish should perform buffer delineation, either upon specific request or for the entire city as part of the overlay scheme

But if resources do not allow this, then...

- Citizens and developers should at least be given the option to have this done at their expense, by qualified professionals
- This reviewer can supply draft text for such a clause

REB

15

## Followup

- Additional testimony submitted
  - Collection of significant code issues related to streams
- Specific recommended code changes can be provided
  - But absence of science and law references for specific code requirements from consultant makes this task significantly more difficult
- This reviewer would welcome additional discussion with the Planning Commission

REB

16