



Planning Commission

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Date: February 6, 2013
To: City Council
From: Planning Commissioner Mahbubul Islam
RE: Minority Report #4

Isolated Wetlands, Development in the No Disturbance Area, Wildlife Protection, Steep Slope Exemptions, etc.

I dissent from the Planning Commission's recommendation for approval of the ECA update and file this minority report explaining the reasons for my dissenting views. As a member of the Commission, I have actively participated in all planning commission meetings, carefully considered all public testimonies, independently researched and reviewed all pertinent issues, and evaluated both staff input and the consultant's Best Available Science (BAS) reports. I have produced this minority report based on my collective assessment of all these sources of information.

Overall, the Commission's recommendations failed to include many BAS conclusions and substantially reduced protections of ECA values and functions by expanding exemptions and adding allowable activities within buffers. Many of the Commission's proposed code amendments, except minor issues and clarifications, simply serve the economic interests of a handful of property owners and thereby, causes lasting damage to already degraded critical areas and water quality. I urge the Council to put collective public interests above individual property interests, and restore the integrity and objectivity of the public process by rejecting those recommendations not supported by the BAS.

Context and Background

Protecting the values and functions of ECAs is our first and foremost responsibility under the current review effort. The State Growth Management Act (GMA) mandates it, and the established city goals affirm and strongly support it. Our ECA review effort should have begun with a thorough evaluation of the current conditions of the existing ECA functions and values. After that, we needed to determine whether the existing ECA regulations should be revised to provide necessary environmental protection. Despite existence of water quality data from some lakes and streams, and study reports from sub-basin planning, no assessment of the current baseline conditions of the city's existing ECAs was presented or shared with the Commission. The Commission, thus, lacked a comprehensive understanding of the importance of the protection of ECAs with any Sammamish specific data and facts.

The policies at issue here deal with environmentally critical areas, which are deemed "critical" because of their extraordinary values. We already know that many of our wetlands, streams, and lakes including Lake Sammamish, Pine Lake, Pine Lake Creek, Ebright Creek, and Laughing Jacobs Creek are listed by Washington Department of Ecology as the most impaired 303 (d) category five water bodies which

require management plans for improvement. Therefore, we must develop regulations to maximize their protection.

Basis of my objections

The Commission received a significant number of public comments asserting that current ECA codes restrict private property rights and requesting that we consider a “balance” between the environmental protection and property rights. As a result, the Commission established an evaluation approach which considers effects on environment, implementation, and property in an equal manner. This emphasis on “equality and balance” coupled with a lack of understanding of the current conditions of the city’s ECAs, deterred the Commission from seeking a better level of protection for the ECA values and functions.

Let us briefly examine statutory directions for property rights in the GMA and Revised Code of Washington (RCW). In describing GMA Planning goals, RCW 36.70A.020 states that, “*The property rights of landowners shall be protected from arbitrary and discriminatory actions.*” Then, in RCW 36.70A.370, the legislature provided a meaning for what constitutes “arbitrary and discriminatory actions” by directing the local governments to “*evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property.*” Based on these legislative contexts, we can conclude that it is not the “equal balance” between the environment and property rights that our legislature mandated, rather the “unconstitutional taking of private property” that they prohibited. The state and local governments demonstrate compliance with the prohibition of unconstitutional taking of private property by adopting codes to retain a property owner’s right to “reasonable” use of his/her property. Sammamish’s current ECA code, like many other jurisdictions’, contains a “reasonable use exception” clause, which many property owners have successfully used. No additional equal balance test is therefore necessary, or called for.

The Commission employed an evaluation form to rate impacts of any proposed code amendment on three different paradigms: environment, implementation, and property. For a code amendment to move forward, it must be rated overall “positive” based on the composite results of three individual ratings. In this scheme, the protection of ECA’s environmental values and functions is simply reduced to a third of the overall goal and a code amendment would not be rated overall “positive” solely based on its extraordinary environmental benefits. If it reduces economic interests of property owners or causes any difficulty with implementation, the evaluation form, by its underlying design, would rate the code amendment overall “negative.” There is no such statutory basis in the state GMA or any other relevant federal, state, or local laws to support this rating mechanism, which would consider code amendments to protect ECA values and functions only if they are deemed economically feasible and easily implementable.

The Commission had an objective basis (i.e. BAS) to evaluate merits of environmental protection of ECA values and functions. However, for property and implementation elements, the Commission had no such objective analysis or information (i.e., cost-benefit analysis) available; therefore, to rate these elements, the Commission had to rely on subjective anecdotal information, public testimony, and personal judgment calls. In this underlying context, Commission’s recommendations suffered from a significant bias, favoring the interests and economic benefits of property owners. This bias was evident when the Commission changed original staff ratings in some evaluation forms by moving the rating for environment from a “large P” to a “small p” and property rating from a “small p” to a “large P.”

Staff and Commission also allowed property owners to “influence” the outcome in an unusual manner. In some situations (i.e., development in the no disturbance area), the property owners, their consultants and attorneys simply wrote the “draft code.” As the Architects of the code, these property owners designed the code the way they saw meeting their needs. The staff and commission then took a secondary role, which is, to react to the draft code. In other cases (i.e., isolated wetland exemption), the staff arranged for property owners and their attorneys a meeting with the Department of Ecology where they had an unusual opportunity to negotiate the substance of the code. The lack of representation of the broader public interests in such critical junctures of code development ultimately weakened these codes.

The protection of ECA values and functions, which is vital to both citizens and ecosystems of Sammamish, should be considered a primary objective of our city government. The natural beauty of the city attracted all of us to call it our “home”, therefore saving its “precious and pristine emerald jewels” is a call of duty that should not be relegated to a back seat. Sammamish is the first Eastside city to complete an ECA review effort since 2010; we should lead the way and our ECA codes should serve as a model for other cities with which we share the management responsibility of the Lake Sammamish watershed.

Departure from BAS

After evaluating all the information included in the record to-date, I could not ascertain any overwhelming rationale to deviate from any BAS recommendations; GMA requires that ECA updates not only consider BAS, but also demonstrate that it included BAS. If the Council wishes to depart from a BAS recommendation, I request that requirements cited below (per RCW 365-195-915) are followed:

- (i) Identify the information in the record that supports its decision to depart from science-based recommendations;
- (ii) Explain its rationale for departing from science-based recommendations; and
- (iii) Identify potential risks to the functions and values of the critical areas at issue and any additional measures chosen to limit such risks.

As of the date of this memo, the Commission’s public record lacks full compliance of these statutory requirements.

Detailed Objections

For brevity and effectiveness, I have prioritized my objections and only listed the ones of significant concerns to me:

1. Increase of Isolated Wetland Exemption and Wetland Buffer Reduction (Item 3-19)

Our current ECA code already provides some flexibility for the property owners by exempting up to 1,000 square feet wetlands. I recommend to the Council to not expand any further expansion of the current size based exemption for the following reasons:

- Best Available Science does not support any wetland exemption based on its size or lack of hydrological connection with other water bodies. AMEC’s BAS report on Wetlands (pg. 20) states that: “Due to the potential ecological functions of small isolated wetlands, best available science indicates that no wetland should be completely exempt from review or regulation. As described previously, there is scientific evidence to suggest that small, isolated wetlands may potentially provide functions equivalent to larger, non-isolated wetlands.”

- The Washington Department of Ecology’s guidance document suggested a size based threshold only for small cities which lack wetland staff expertise, yet required to comply with GMA’s mandate for critical areas ordinance development. Sammamish is not certainly one of these small cities; in fact, we have a staff wetland biologist (Kathy Curry) with appropriate expertise.
- The Ecology’s small cities guidance document describes an exemption (pages A-3 and A-4) limited to 1000 square feet class III and IV category isolated wetlands which meet certain parameters. Our current ECA regulations already allow for isolated wetlands less than 1000 square feet to be exempted from wetland development standards and may be altered by filling or dredging. Therefore, we have already included this flexibility in our current code, which need not be increased any further.
- Our neighboring jurisdictions, such as, Redmond, Bellevue, and Issaquah have size based wetlands exemption ranging from sizes 250 square feet to 2,500 square feet. Sammamish’s current 1,000 square feet is within these ranges. Any further expansion of the exemption will seriously undermine many years of collective efforts to the adherence of the “no net loss of wetlands” policy.
- The negative environmental consequences resulting from increasing the size threshold from 1,000 to 4,000 square feet (or 2500 square feet) must be considered as a “large negative” in the Commissions’ evaluation form of this item.
- Department of Ecology cautioned the City through a comment letter (October 3, 2012, letter from Patrick McGraner) that water quality in any wetlands must meet the anti-degradation requirement of the State Water Quality standards (Chapter 173-201A WAC). The Ecology letter asserts that, “...applying the water quality standards to wetlands means that all existing beneficial uses (or functions and values) of wetlands cannot be disturbed or must be adequately replaced or compensated if wetlands impacts are unavoidable.” To comply with this legal obligation, our ECA code will need a provision for a case-by-case evaluation of all wetlands to determine when impacts are “unavoidable.” Approving a size based exemption in the code completely negates the statutory responsibility, and increases the city’s exposure to potential litigations and sanctions from the state.
- The Commission received testimony from only one property owner who requested the exemption to be increased to 4,000 square feet. I understand that this property owner is entitled to submit an application for “reasonable use exception” under the current code. Because the property owner is not denied his/her rights to the reasonable use of the property, there is no need to increase the exemption and cause irreversible damage to our precious wetlands and associated ecosystems.

2. Pilot Programs allowing development in the no-disturbance area (Item 4-15)

I recommend no new developments in the no disturbance area for following reasons:

- Developments on steep slopes along the western perimeter of the city (no-disturbance area) where the highlands descend to Lake Sammamish pose extreme risks from erosion, landslide, and accumulation of pollutants due to the area’s geologic, topographic, and hydrologic conditions. This area is already developed in an urban capacity with predominantly single family houses. In addition, the existing code also allows some limited development in no disturbance area for single family homes on pre-existing lots, utility improvements in public right of way, street construction to access existing property, etc. The risks associated with further developments in this area are too high.
- Some property owners and developers voiced their concerns at the Commission Meetings that prohibition of new subdivision and short plats development in the no-disturbance area severely restricts their economic interests. I suggest that the City Council consider employing transfer of development rights (TDR), development density changes, and other innovative land use tools to limit new growth in the no disturbance area, enabling property owners to reap some economic benefits through selling their development rights.
- The city does not require single family homes in the no disturbance area to comply with latest King County Surface Water Manual to implement best management practices for storm water protections (because of a size based exemption in the current city code). Also, no community level storm water conveyance (i.e., tight lines) is available in area to drain storm water directly to the lake. The developments in the no disturbance are should not be lifted until these existing risks are mitigated.
- AMEC’s BAS report on erosion hazard areas (page 9) states that, “Generally, best available science for protecting sensitive resources requires buffers and offsets, and does not support increasing risk associated activities proximate to the resources. For these reasons we do not recommend changing the restrictions of SMC 21 A.50.225 (3) (b).” Since there is an unequivocal recommendation, the pilot program serves no valuable purpose in this case. A pilot program is used when there is lack of adequate data to make decisions or a high degree of uncertainty exists about a policy outcome.

If the council moves forward with the pilot program, I would provide following suggestions for improvement:

- The proposed code for the pilot program states its purpose is, “...to evaluate the ability to allow increased development within the no-disturbance area **without adversely affecting the water quality of Lake Sammamish.**” However, no metrics are adapted to measure what constitutes “adversely affecting the water quality of Lake Sammamish. “ I highly recommend that a volume standard that limits the storm water discharge volumes to match pre-developed forested site conditions is included in any pilot program. Likewise, discharge water from the pilot program projects must meet water quality standards for different parameters (Phosphorus, pH, temperature, turbidity, etc.) based on the current water quality goals of Lake Sammamish.

- The pilot program should be limited to fewer than nine subdivision type projects to avoid any significant level of harm on the water quality of Lake Sammamish. Three to six projects should be adequate to collect sufficient information.
- Pilot program was designed and crafted by individual property owners and their developers to serve their economic interests. The Osgood proposal opposed accepting any water volume standards to protect their maximum economic interests. We must not include projects in the pilot program which cannot agree to install conveyances to limit discharge to match pre-developed conditions.

3. Wildlife Protection (item 2-1 and 2-2, and 2-13c)

Our current ECA code provides for protection of only endangered, threatened, and sensitive species regulated by federal and state laws. BAS report stresses that many other diverse wildlife species consider Sammamish as their habitat or usually accustomed corridor. Citizens of Sammamish highly value the importance of diverse wildlife existence within the city limits and city's comprehensive plan and council adopted city goals support their increased protection. Our BAS consultant, upon synthesis of the current science and regulatory trends in other state and local jurisdictions, recommended that Sammamish consider two possible amendments to its wildlife corridor regulations: identify species of greatest interest and concern to the Sammamish citizens and afford them protection by increasing wildlife corridor widths in those areas not constrained by existing development. The city staff presented evaluation forms (item 2-1 and 2-2) to accomplish this purpose and rated both evaluation forms as having "positive" impact on environment and implementation and as "negative" impact on property. The commission chose to ignore positive ratings for environment and implementation, and recommended not to advance these items. I seriously disagreed with the Commission's decision, because the deviation from BAS recommendation was unjustified, negative impacts on the property was overly inflated, and a "bias" tilted toward protect property rights was exhibited. I urge the Council to reverse the Commission's recommendation and support the overall public interests to retain our unique wildlife habitats and corridors.

The Commission approved an alternative item (2-13c) which would allow the City as part of a development proposal to evaluate habitat protections in high value wetlands and streams with high habitat scores. This alternative wildlife protection approach will ignore protection of many desired species, and limit assessment of habitat protection to only high value wetlands/streams. I could not support the alternative because it was not derived from BAS recommendations and it lacks protection for many wildlife species.

4. Steep Slope Exemption (Item 4-8)

The current regulations allow the city to waive landslide hazard area buffer requirements for slopes greater than 10 feet but less than 20 feet. The BAS report cited a study done by the City of Seattle in 2005 showing that "about 15% of reported landslides had slope height of 20 feet or less." Based on this new and emerging data about landslide risks, the BAS consultant recommended that we eliminate the waiver in our current code for developments in slopes greater than 10 feet. This policy item (4-8 c) rated positive, but majority of the Commission chose to ignore the rating and safety concerns associated with increased landslides, and decided to reject the factual BAS based recommendation. To me, the

Commission's action in this instance demonstrates a disregard to an overwhelming public benefit borne out by scientific data, and shows a strong "bias" to support the economic interests of a few property owners and developers. The Commission also departed from its own decision to not support an item which cannot be rated positive. I simply advise the Council to consider the facts and risks associated with developments in slopes between 10 and 20 feet, and direct the staff to eliminate this exemption.

5. Balance of ECA protection and property use (Item 2-14)

Some property owners requested that the ECA code be revised to not extend the buffer width beyond any structure or building. The BAS does not recommend terminating a required buffer width solely because a structure or building lies on it. The city's current ECA code strikes a balance between ECA protection and property use by limiting modification of a single detached residence to no more than 1,000 square feet over the existing footprint. The Commission has now expanded this flexibility to **any existing building**. I believe this additional flexibility, over the time, will result in significant loss of buffer widths in already constrained situations. The current flexibility is tied to a single detached residence; any additional flexibility beyond residential uses should not be encouraged.

Thank you for your consideration of our recommendations.