CITY OF BELLEVUE
BELLEVUE PLANNING COMMISSION
STUDY SESSION MINUTES

November 3, 2010 Bellevue City Hall
6:30 p.m. City Council Conference Room 1E-113

COMMISSIONERS PRESENT: Chair Ferris, Commissioners Hamlin, Himebaugh, Lai, Mathews, Sheffels, Turner

COMMISSIONERS ABSENT: None

STAFF PRESENT: Paul Inghram, Department of Planning and Community Development; Elizabeth Stead, Ken Thiem, Carol Helland, Michael Paine, Heidi Bedwell, Development Services Department

GUEST SPEAKERS: None

RECORDING SECRETARY: Gerry Lindsay

1. CALL TO ORDER

The meeting was called to order at 6:31 p.m. by Chair Ferris who presided.

2. ROLL CALL

Upon the call of the roll, all Commissioners were present.

3. PUBLIC COMMENT

Mr. John Haynes, CEO of the Tateuchi Center, shared with the Commission that over the past couple of days the design team has been looking for architectural and structural ways to add pedestrian cover along 106th Avenue NE for most of the length of the building. He said the $160 million project will be a tremendous amenity for the city and will increase the level of activity during the day and during the evening as a result of the concert hall, the cabaret, and by the ancillary uses. The Seattle Symphony will play part of its season in the facility, the Pacific Northwest Ballet will use the building, and about 100 nationally and internationally renowned artists will appear there annually. The design of the building does not fit neatly under the current code definitions, and that is why the proposed code amendment is needed.

4. APPROVAL OF AGENDA

The agenda as submitted was approved by consensus.

5. COMMUNICATIONS FROM CITY COUNCIL, COMMUNITY COUNCILS, BOARDS AND COMMISSIONS

Commissioner Hamlin said he had been selected to serve as co-chair of the Eastgate/I-90 CAC. He said the group will have its first meeting on November 18.

Comprehensive Planning Manager Paul Inghram said the City Council has appointed all of the

CAC members. The group will meet over the next year to talk about options for the Eastgate/I-90 area and how to maintain the area as a healthy economic center for the city.

## 6. STAFF REPORTS

Mr. Inghram informed the Commission that on November 9 there would be an open house for transportation projects.

Mr. Inghram said recently a concern was raised about the Commission meeting minutes. He stressed that they are not intended to be a verbatim transcript of the proceedings; they are intended to capture the nature of the conversations and actions taken for the use of the Commission. He allowed that anyone with a concern about the minutes should bring the issue to his attention or to the Commission. He added that the audio recording for each meeting is kept on file and is always available for anyone to listen to.

## 7. STUDY SESSION

### A. Performing Arts Code Amendment

Land Use Director Carol Helland noted that at the previous study session on the topic the Commission indicated a desire to see brought about the entertainment avenue vision contemplated in the Downtown Implementation Plan, and wanted a response to issues raised, including location and scope reductions, façade setback, the proposed public hearing draft language, building floor plate per floor language, floor area ratio language, building height, and the proposed design and use requirements.

Ms. Helland said staff clearly heard from the Commission concerns voiced about the scope and applicability being too broad. She noted that staff had since narrowed them. Staff also agreed that the dimensional flexibility needed to be tied to functional need and not be written so broadly as to be overly expansive. Staff further agreed with the importance of activating the street level.

Planning Manager Elizabeth Stead said the vision for the entertainment avenue concept in the Downtown Implementation Plan involved 106th Avenue NE between NE 2nd Street and NE 10th Street. The policy language calls for including a concentration of shops, cafés, restaurants and clubs, all of which should provide for an active pedestrian environment both during the day and after hours. There is already a strong pedestrian sense on 106th Avenue NE and adding the Tateuchi Center will enhance that. A midblock crossing is planned for the area near the Tateuchi Center to connect to Washington Square.

Ms. Stead said the revised language narrows the scope of the code amendment to properties abutting 106th Avenue NE between NE 2nd Street and NE 10th Street, and adds a definition of performing arts center reading "Any facility intended and designed for the presentation of live performances of dance, drama, and music."

With regard to dimensional flexibility, which is a key component of the proposed amendment, Ms. Stead presented revisions to the language that were more clearly defined. She noted that modification of the façade stepback requirement for floors above 40 feet in height were continued, but building would have to demonstrate that the proposed impacts to the abutting structures have been mitigated. The proposal included allowing unlimited floor area per floor up to a maximum permitted building height of 100 feet for performing arts uses only, provided buildings demonstrate conformance with the design guidelines for Type A streets to assure there is no compromise of the pedestrian environment.

The proposal is to increase the maximum FAR from 3.0 to 4.0 in the Downtown MU zone specifically for performing arts center uses. Projects would need to earn the additional FAR through participation in the FAR amenity bonus system.

The proposal is to control building height to accommodate performing arts uses to maintain a 100-foot threshold in every land use district where permitted, with the ability to increase the maximum height by an additional 15 feet or 15 percent, whichever is greater. A height increase beyond 100 feet would be granted only if the applicant demonstrates the additional height is needed to accommodate superlative design features, which is an option allowed under the current code.

Ms. Stead said the design requirements for performing arts center projects had been tightened up. The language calls for such facilities to meet the requirements for Type A frontage, which means the street-level edges of the entire project must incorporate retail activities. In the design guidelines, theater is considered to be a retail activity within the Building Sidewalk Design Guidelines. Characteristics to be incorporated into the design of the structures include windows providing visual access, street walls, multiple entrances, differentiating ground levels, canopies, awnings and arcades.

The design of the Tateuchi Center has a height of 114 feet, which meets the proposed requirements given that an extra fifteen feet would be earned. The project would have an FAR of 3.3, so the project would have to show how it intends to earn amenity points. The floor plate size of 400 feet would not be regulated. Under the proposal, no façade stepback would be required. The project meets the criteria for retail activity, and partly meets the requirement for windows providing visual access. The project complies with the street walls requirement. It does not have multiple entrances, but given the type of building with a single activity that requirement is less applicable. There is differentiation of ground level. The current design does not provide canopies, awnings or arcades, though work is under way to include those elements. Weather protection is provided at the main entrance, as is some outdoor seating.

Commissioner Sheffels suggested that performing arts centers should not be required to include extra retail activity, though it should be allowed. With regard to the proposed definition language, she noted that requirement for live performances would preclude the facility from being used for something like the Seattle Film Festival. Under certain circumstances, uses of that sort should be permitted. Ms. Helland said staff talked about that and concluded that through the subordinate use requirements and the requirements for flexibility that are already contained within the code would allow performing arts centers to include non-live performances. However, the predominant nature of the performance space being planned is to accommodate live performances. Commissioner Sheffels said she would like to see the definition language broadened.

Answering a question asked by Commissioner Mathews, Ms. Helland said performing arts center opportunities do not come along frequently. As such, the city is not expecting to see many applications for the downtown area. That said, the vision for the downtown is to help direct them into the entertainment street area. The other place they could be sited would be the convention center district. She added that staff has the objective of conducting a tune-up for the downtown Land Use Code, and as part of that the broad range of amenities could be reviewed and revised.

Chair Ferris said 106th Avenue NE offers good opportunities for becoming a pedestrian-oriented street. It is not dominated by cars like most of the other downtown streets are. The Tateuchi

Center will add to that image, but as drawn it does somewhat turn its side to where the pedestrian activity is desired; the building fronts NE 10th Street, not 106th Avenue NE. Ms. Helland clarified that in the current code 106th Avenue NE is classified as a Type D street, which has the lowest requirements for pedestrian orientation. That issue, however, is one of the reasons staff wants to see the downtown regulations tuned up; the regulations do not appear to be completely in sync with the adopted Downtown Implementation Plan policies. Chair Ferris pointed out that the Tateuchi Center will be only three blocks from the transit center; patrons could easily arrive in the downtown via transit and walk to the facility but they would want a pedestrian-friendly atmosphere, including continuous weather protection.

Commissioner Lai noted in the letter from Pfeiffer Partners, the architect for the center, that they are considering the inclusion of five large digital screens at eye height along 106th Avenue NE as a way to activate the pedestrian space. He allowed that while that might work very well, it could also backfire and give a Las Vegas impression instead. He asked if the city's sign ordinance would cover what could and could not be shown on the screens. Ms. Helland said it would be difficult to regulate content through the sign code. The code does, however, specifically prohibit moving objects. A sign code change would be required to permit the showing of images related to a performance or other advertising associated with the use.

Commissioner Himebaugh disagreed with the idea of reorienting entry points for the center on 106th Avenue NE. Those issues should be driven more by architectural design and feasibility. He agreed that retail uses should be allowed but not required.

There was consensus in favor of moving forward to public hearing with the language as proposed.

## 8. STUDY SESSION FOR SHORELINE MASTER PROGRAM

### A. Shoreline Master Program Update

Ms. Helland outlined the topics to be covered and briefly reviewed the project schedule. She reminded the Commissioners that the nonconforming concepts are common in the city's code, though they are described differently in different areas of the code. The general nonconforming requirements speak to what happens when code changes occur after a use is established and a repair, expansion or remodel is required. Some of the provisions are geographically specific. The provisions are tailored toward helping the city reach its long-term visions while allowing property owners to make use of the investments they have made over time.

Associate Planner Heidi Bedwell said there are more than a thousand primary residential structures within the within the collective jurisdictions of Phantom Lake, Lake Sammamish and Lake Washington, as well as some 295 residential accessory structures. Of the primary structures, 402 are located within 50 feet of the ordinary high water mark, 157 within 25 feet. Of the accessory structures, 126 are within 50 feet, and 79 are within 25 feet. Primary structures in residential areas are those that contain the residential dwelling unit; garages, sheds and stand-alone mechanical equipment buildings are not considered to be primary structures.

A nonconforming use or development is a use or development that was permitted by code at the time it was established but which does not conform to the current code owing to a change in the code subsequent to the establishment of the use or development. Such uses can continue to be maintained until there is voluntary action that triggers compliance with the current code provisions.

Ms. Bedwell said the current code contains a provision known as the footprint exception. The exception was crafted to help keep primary structures from being deemed nonconforming. The provision allows for modifying a buffer to exclude the footprint of the primary structure. Accessory structures are not afforded the same exclusion. Staff has discussed with and recommended to the Commission incorporating the footprint exception into the updated Shoreline Master Program, though staff does not recommend allowing the exception to occur within the vegetation conservation setback; structures within the vegetation conservation area would be considered nonconforming, in part because the original 1974 Shoreline Master Program contained a 25-foot setback, which means any structure developed since then would have had to comply.

Legal nonconforming status can be lost through abandonment or discontinuance of a use. Generally, failure to maintain a use for 12 continuous months is the standard that is applied. Loss due to storm or disaster, however, is not necessarily abandonment provided there is an action initiated to reconstruct.

Commissioner Sheffels asked what the ruling would be on a structure being held for sale but not inhabited for a year or more. Ms. Helland said that would not be considered abandonment because the structure would still be adequate for its intended use.

Commissioner Lai asked what action must be taken following a storm or other natural disaster to prevent a structure from being deemed abandoned. Ms. Helland said following a disaster time is often needed in which to negotiate with insurance companies and take other steps before getting to the place where they can file for a building permit. So long as the city understands steps are being taken to reestablish the use for its intended purpose, the abandonment clock is not started.

Ms. Bedwell said allowable activities must be defined before determining what activities are nonconforming. Accordingly, the definitions apply to primary structures within the vegetation conservation setback, accessory structures within either the vegetation conservation setback or the primary structure setback, overwater structures, and piers, docks, and shoreline stabilization. It is also important to have a common understanding of the activities which the city considers routine maintenance not subject to the nonconforming rules. Such activities include the ordinary and routine actions undertaken to prevent deterioration. For the purposes of the nonconforming standards, the term "repair" refers to the returning of a structure to good condition after decay or damage not involving any change to the structure's dimensions or functions. The suggestion of staff is that such repairs should be no greater than 50 percent of the replacement value of the structure. Repair activities exceeding the 50 percent threshold would be deemed reconstruction, which would trigger compliance with the standards. Compliance with the standards would be triggered when repairing damage from a fire or natural disaster will be more than 75 percent of the replacement value.

If the 50 percent threshold is exceeded by a repair, the portion of a primary structure that lies within the vegetation conservation setback would need to be removed. The property owner could under the footprint exception rebuild the remaining portion of the structure without having to meet any other compliance standards. The property owner could also take advantage of the lateral expansion provision by adding up to 500 square feet; to add more than 500 square feet in a lateral expansion would trigger the landscaping standard and would require selecting something from the option menu. In any event, the option for a variance will be available.

Ms. Helland said the 50 percent threshold for maintenance and repair, and the 75 percent threshold for structures that have experienced destruction by storm or other natural event, are both taken directly from the WAC with respect to nonconforming structures. The variance

process serves as the safety valve for when there are issues involved in meeting the requirements imposed.

Ms. Bedwell said one approach that could be taken with regard to the 75 percent threshold would be to allow the structure to be rebuilt within the vegetation conservation area, but with some sort of compensatory mitigation.

With regard to accessory structures, Ms. Bedwell noted that they are allowed without mitigation within the primary structure setback when limited to 200 square feet. The provisions would not, however, allow any new accessory structures within the vegetation conservation setback. An existing 200-square-foot accessory structure could under the proposal be reconstructed, provided it is still no more than 200 square feet. The concepts of repair and reconstruction do not apply to accessory structures that are 200 square feet or less.

Accessory structures in the primary structure setback that are greater than 200 square feet can be maintained and repaired up to the 50 percent threshold, and can be rebuilt if damaged or destroyed up to the 75 percent threshold without triggering the compliance standards. Reconstruction that involves reducing the size of the structure to 200 square feet or less would not trigger the other development standards. If rebuilt to its original size, however, some mitigation would be required, such as landscaping. The variance option would kick in absent feasible alternatives.

Accessory structures of 200 square feet or less that are located within the vegetation conservation setback can also be maintained and repaired up to the 50 percent replacement value threshold. When that threshold is exceeded, the option would be to move the structure out of the setback. If the intent is to have a structure greater than 200 square feet, it would be allowed in the primary structure setback, but the standards that would apply would be those applicable to entirely new structures.

Ms. Helland called attention to the language on page 15 of the packet and noted that the recommendation of staff was to allow through the variance process reconstruction of an accessory structure that is damaged by storm or natural disaster beyond the 50 percent threshold.

Ms. Bedwell said new accessory structures will not be permitted in the vegetation conservation setback. Structures of greater than 200 square feet within the vegetation conservation setback that are damaged or destroyed beyond the 75 percent threshold would not be allowed to be reconstructed within the setback.

Commissioner Sheffels asked what the process is for a variance. Ms. Helland said a shoreline variance involves a process that is stipulated by and involves affirmative action by the Department of Ecology. It includes an opportunity to appeal to the Shoreline Hearings Board.

Answering a question asked by Commissioner Lai, Environmental Planning Manager Michael Paine explained that accessory structures are not allowed in the vegetation conservation area. The threshold has been set lower because it is easy to rebuild existing accessory structures than it is to rebuild an existing primary structure. The lower threshold should also encourage property owners to remove damaged or destroyed accessory structures out of the vegetation conservation setback entirely.

Commissioner Lai said it would make more sense to allow property owners to replace structures damaged or destroyed by means beyond their control. Ms. Helland said that has always been a concern and one that staff has tried to accommodate. As drafted, the primary structure houses the principal use on the site and should be allowed to be reconstructed in all cases. Accessory structures are not permitted in the setback and have not been permitted since 1974. The act of setting a new vision for the shoreline includes incentives to have accessory structures within the vegetation conservation setback disappear.

Ms. Bedwell said the proposal allows for maintenance and repair of legally established overwater structures up to the 50 percent threshold. Action that exceeds the threshold, however, would need to be done in full compliance with the code. The structures can be maintained and repaired to the point of needing significant work.

Ms. Bedwell said the approach with regard to docks, piers and shoreline stabilization is slightly different, though the concept of allowing existing legally established structures to remain and to be maintained and repaired holds. However, modification will trigger compliance with certain performance standards. The replacement value thresholds do not apply to those structures.

B. Shoreline Master Program Update – Public Comments

Mr. Marty Nizlek, 312 West Lake Sammamish Parkway, said regulations carry with them a cost. The cost of owning a home is dramatically affected by land use regulations; such regulations can also have the effect of reducing the value of homes by making them less attractive to prospective buyers. The issue is particularly evident where there are layers upon layers of regulations, where permits take a long time to obtain and are costly, where expensive reports are required, and where legal actions may ensue. The Wharton School of Business residential land use regulatory index includes that information. Locally, an economics study done by the University of Washington looked at over 250 cities over a period of more than 15 years and employed the Wharton index. The study isolated out the supply and demand effects versus regulatory effects. Seattle topped the negative index list, and the state regulations were listed as the most onerous relative to driving the price of homes. Incentives have a far greater potential for effecting change than do costly regulations, though to date there has been very little discussion regarding incentives. A list of possible incentives was shared with the Commission.

Mr. Mike Lunenschloss, 2242 West Lake Sammamish Parkway SE, asked the Commissioners to imagine standing on the curb in front of their homes, and to consider the curb to be the ordinary high water mark. He asked them to consider taking another six to eight steps and consider that spot to be the new ordinary high water mark under the Bellevue regulations. He noted that in Bellevue the mark is different for every property and no one has any recourse. If a permit is required to do something, everything from another five steps forward must be removed, including landscaping and retaining walls. The property would no longer look the same, but the city will allow the property owner to use 40 percent of the property. Of course, the property owner will have to shoulder 100 percent of the costs. The very same month one of the city's environmental experts testified in favor of throwing Christmas trees and logs into the water, the City Council approved an ordinance that makes that very action illegal. Currently, the going rate

for a property owner to fix a dock is $40,000; it is $50,000 for a new dock, and all the planning work and other requirements will add about $40,000 more. Planting predators in the lake and following that up by building predator habitat will result in a lake full of predators. The coho and the chinook are currently running, and the hatchery has collected its target number of eggs. The two species that are doing well are in the hatchery and are protected from predators while they are small; the species that is not protected is not doing well.

Mr. Ralph Guditz, 3929 179th Lane SE, said he spent all of 2003, all of 2004 and half of 2005 engaged with the Shoreline Hearings Board based on a frivolous appeal by a neighbor to an application to replace a one-room house. In all, ten years was required for all the litigation and permitting, and the cost came close to a quarter million dollars, even without a variance or conditional use permit. No one would reasonably undertake the Shoreline Hearings Board process just to press an issue on a dock or accessory structure.

Mr. Brian Parks, 16011 SE 16th Street, said he is a resident on the shoreline of Phantom Lake where there are many older homes and large mature trees which are falling due to utilities raising the lake level. With regard to nonconforming uses, he said it was important to reiterate that due to an increased average lake level and ordinary high water mark, structures that were not previously nonconforming have been made so by the city's use of Phantom Lake for stormwater detention purposes. He said he was continuing to acquire evidence and testimony regarding increased lake levels despite the city's inability to bring forth any pre-1990 lake level data showing otherwise. The lake level increases were implemented in 1990 as part of a restoration efforts. There were two subsequent lawsuits, one on Phantom Lake and another regarding property at the base of Phantom Creek on Lake Sammamish; both property owners were gentlemen approaching the age of 90, and both lawsuits ended without a decision absent historic lake level information from the city. That data has since been collected from other sources. Comparisons of photos taken around 1990 and recently show vegetation changes that are the result of lake increases. The evidence suggests an increase of at least nine inches since the late 1980s and more in peak conditions. The staff's ordinary high water mark approximation of 262 NAVD is a foot over the original northwest outlet's valley high point of 261 NAVD before the berm was built. He said the lake level increase has shifted the ordinary high water mark on his property about 85 feet landward. The lake level should be lowered by 0.8 feet and see if the phosphorous levels remain unchanged significantly. There should be an exclusion from the new regulations for any loss of property caused by government action or inaction, such as mismanagement of a kettle lake without a natural inlet or outlet for stormwater detention purposes, and the regulation of water levels with a weir that was put in for other purposes. The landowners have not caused the problems and should not suffer as a result. Homes, sheds, patios and vegetable gardens should not be labeled as nonconforming when the waterline has been brought landward as much as seven horizontal feet for every inch of lake elevation increase.

Mr. Charley Klinge, 11100 NE 8th Street, spoke representing the Washington Sensible Shorelines Association. He pointed out that when it comes to nonconformance, uses and structures are not the same thing. Nothing in the proposal seeks to change the allowed uses along the shorelines, which are primarily residential areas. The footprint approach is good, though a simpler approach would be to freely allow expansion along the existing building setback unless in a critical area or

a critical area buffer, which is what the code allows in the rest of the city. The Shoreline Hearings Board in the Fox case allowed an overwater deck to be enclosed and turned into a room; they found that the action would not increase the nonconformity given that the deck was already over water. The 12-month discontinuance provision applies only to uses, not structures; if a person were to die and it took the family two years to sell the property, an accessory structure could be deemed to have not been used. That language should be cleaned up. There should also be some clarification as to what structures can be maintained and repaired; while the intent is probably buildings, the word is broad enough to include stairs, patios, and barbeque facilities if they are over three feet high. The replacement value thresholds are just too complicated to apply to a barbeque pit. The WAC guidelines do have the 75 percent threshold, but does not appear to include the 50 percent threshold. Regardless, the language needs to be clarified to include damage resulting from fire and accidents in addition to storm or other natural disasters. The provisions that apply throughout the city should apply along the shorelines given that they are not critical areas.

Mr. Terry Dodd, 3404 West Lake Sammamish Parkway SE, said he recently completed a build on his property. He said things like patios and decks are not addressed very well. He said he found out during his recent build that the footprint rule did not apply to the concrete deck that was adjacent to the exit from his house on the water side. A deck should be considered part of the overall footprint. Many houses have patios that are not directly connected to the main structure, and those should not be thrown by the wayside if a small change is needed because of normal wear and tear or deterioration. Variances are not easily obtained, and most homeowners are not able to get them without costly professional help. The cost of the professionals as well as the staff time is all paid for by the homeowner seeking a variance.

Mr. Fred Weiss, 3410 97th Avenue SE, Mercer Island, said his interest in the subject stemmed from the fact that whatever happens in Bellevue will likely happen in Mercer Island. He called attention to the fact that every year property owners have a little more of their property rights taken away. He said he was not sure what is driving the changes but was concerned about the cavalier attitude toward increasing regulation and meddling by all forms of government, both local and national. It appears that the taking clause is being violated all the time. He said he loves his country but is afraid of his government. The ones who are being overregulated are the very ones who are paying the taxes that pay the salaries of government officials.

Mr. Jerry Baruffi, 9236 SE Shoreland Drive, said he was curious to know who would decide what a nonconforming use is. It should be up to the people of Bellevue, or the people who live along the lake, not some bureaucrat that comes up with an opinion. He urged the Commission to seek proofs whenever people start talking about trees and where they ought to be. He said recently he stood on his dock and watched salmon coming in to spawn pass underneath his dock; they did not seem to be having any trouble going around the pilings. Some have suggested that the shade cast by docks causes problems for the salmon while the shade from trees does not, but no one has offered any proof. He said his waterfront property has a dock in the middle, a sandy beach on one side, and a rockery on the other. Behind the rockery is a garden with both flowers and vegetables. Under the proposal, the rockery and the garden are nonconforming uses.

Meydenbauer Bay is being threatened by silt and milfoil, and those problems have nothing to do with setbacks and vegetation. No one is addressing the problem.

Mr. Scott Sheffield, 2220 West Lake Sammamish Parkway SE, said there is a real need to establish baselines and to monitor conditions over time. The state will require it, and property owners along the lakes will be impacted. If there is no testing to determine current ecological functions, an opportunity will be missed. Staff has said there is no budget for doing that work. A wish list should be put together, one that does not worry about a budget. At the Planning Commission retreat, Mayor Davidson directed the Commission not to worry about budgetary concerns but rather to plan big and to leave the budget concerns to the Council. The Commission should include a requirement for determining the baselines and monitoring in the Shoreline Master Program. Without that data, it will simply not be known if the setbacks and the vegetation conservation requirements are actually accomplishing anything.

Ms. Anita Skoog-Neil, 9302 SE Shoreland Drive, said from the beginning she suggested to the Washington Sensible Shorelines Association that the issue is about land use rather than science. A lot of time has been spent on science, in part because the WAC requires it, but also to underpin the perception that there is a reason for the proposed regulations. One Commissioner recently was brave enough to state that he had come to accept the fact that the science is indefinable. At its last meeting, the Commission was directed to make policy decisions based on a subjective sociopolitical orientation, not on rational thinking or cause and effect, but on the principle of caution. The precautionary principle espouses the belief that under conditions of substantial scientific uncertainty, environmental regulation should err on the side of caution in order to prevent harm. That moves the burden of decision making from scientists to policy makers and advises them to take action even in the absence of evidence of harm and notwithstanding the costs. All life involves risk, so the approach leaves only a standardless strategy. Staff continues to claim that the WAC requires caution, but the fact is all law is subject to interpretation. If science is not going to provide the base, a rational person might assume decisions will be made based on reason. That, however, would mean the government would have to show a cause-and-effect relationship between the proposed solution to the identified problem that is roughly proportional to the part of the problem that is created or exacerbated by the landowner's development. The Washington State Court of Appeals has said a condition on development must mitigate a direct impact that has been identified as a consequence of proposed development. Under RCW 82.02.020, the burden rests on the government to prove the essential nexus or rough proportionality has been satisfied to prevent the development condition from constituting an illegal tax, fee or charge. The creation of regulatory nonconformity is the focal point of the whole Shoreline Master Program. It is significant that it is a non-legislative anomaly; that means jurisdictions and agencies have used the courts to influence nonconforming land use codes without due legislative process. The Shoreline Management Act does not specifically address nonconformance, so the Department of Ecology adopted default rules that apply only if a jurisdiction does not address nonconforming uses. It is also noteworthy that the Commission has not actually accepted the proposed 50-foot setback because changing the setback is the key to creating a regulatory framework for the proposed nonconformity. The options matrix is only a smokescreen to make it appear the residents will not be damaged too badly because they have choices and options. Just what it would take to get down to a 25-foot setback, but most rational

property owners would certainly not elect to remove 75 percent of a bulkhead to get there. The option matrix is not designed to allow for flexibility but to disincentivize a property owner from deviating from the new 50-foot setback. The staff report says that the continuation of nonconforming uses can interfere with the ability to achieve new policy, and that property improvement must be allowed in the early years of policy implementation, and that the purpose of the shoreline setback is to phase out residential uses in the setback area. It is not about science or the environment, it is about a sociopolitical policy shift. Rational regulations are possible. If it does not make logical sense, it should not be done.

C. Shoreline Master Program Update – Commission Discussion

With regard to the footprint exception, Commissioner Himebaugh said he felt the Commission had been clear about wanting to incorporate it. He suggested a discussion about extending it might be in order, but the footprint exception for the primary residence within the primary structure setback should serve as the baseline. The other Commissioners agreed.

Staff asked the Commission to develop a position with regard to continuing to label as nonconforming structures located within the vegetation conservation setback as they have been since 1974.

Commissioner Himebaugh said he could support rejecting the idea that structures within the first 25 feet from the ordinary high water mark, which is the vegetation conservation setback, should be nonconforming. Mr. Paine said when the shoreline was treated as a critical area, the Planning Commission, after a lot of debate, realized that the additional buffers that were being created by the critical areas code warranted a different treatment. That was because people were being captured by a setback or a buffer who had previously never been regulated. The footprint exception was developed in part to address that issue. The buffer, however, was a no touch zone, so the property owner got the footprint but that is all. The current approach does not involve a no touch buffer. The Commission also excluded accessory structures completely from the footprint protection and ruled them nonconforming in the buffer zone.

Commissioner Himebaugh said what concerns him is the fact that 12 percent of the primary structures and 26 percent of the accessory structures along the combined shorelines are within the vegetation conservation setback. He suggested those numbers are significant. Mr. Paine said one option the Commission could take would be to recognize the nonconforming status but provide remedies with an impact similar to that of the footprint exception process. It is not known how many of the nonconforming structures within the vegetation conservation setback along the shorelines were created legally; those that were not would not qualify for legally nonconforming status under any scenario.

Commissioner Himebaugh said he did not have a specific proposal but suggested the Commission should at least discuss the issue.

Commissioner Turner added his support and said he was curious about where the information for the existing conditions chart in the staff report came from. Mr. Paine said the data came from the GIS analysis.

Commissioner Mathews suggested the Commission should not look at the footprint exception without also looking at the reconstruction abilities that are allowed. Mr. Paine clarified that the reconstruction threshold of 75 percent has been in place since 1974. The proposal does not reflect a change.

Commissioner Lai said it was his understanding that the 75 percent threshold as it applies to accessory structures did represent a change. Ms. Helland said before the critical areas update there was no distinguishing between primary and accessory structures.

Chair Ferris commented that in the event a nonconforming structure were to be destroyed, the homeowner would receive from their insurance provider the full value of the structure, but under the proposal they would only be able to replace 75 percent of the structure. In the past, the Commission has heard testimony from commercial property owners who indicated they were not able to obtain insurance coverage for nonconforming structures. Ms. Helland said staff fully understands that point and noted that the Commission is free to look at a different threshold. She pointed out that as drafted, the regulations would allow a structure destroyed up to 75 percent of the replacement value, to be reconstructed on its original footprint. The Commission could, however, select any percentage threshold.

Chair Ferris said the 50 percent threshold is a common number that is used all the time. Reconstruction or remodeling work that exceeds that threshold generally triggers compliance with the existing code. Someone could have a fire destroy a structure and then find that their existing foundation does not meet the current code, and in that instance they would be required to rip out the foundation and put in a new one, which essentially would cause the project to exceed the 75 percent threshold. He suggested that the threshold for legally nonconforming structures should be increased to 100 percent.

Commissioner Hamlin noted his preference for continuing the nonconforming status within the first 25 feet from the ordinary high water mark. Commissioner Sheffels concurred.

Commissioner Turner asked how the city goes about establishing that a structure was legally established. Ms. Helland said that issue arose during the Bel-Red study and as a result staff put together a list of items that can be used to demonstrate that a structure was established legally. One of the easiest methods is the use of aerial photographs, most of which are very accurate. She suggested the Shoreline Master Program update should include the list of documentation that can be used.

With the exception of Commissioners Commissioner Himebaugh and Turner, there was agreement that structures within the first 25 feet should continue to be recognized as nonconforming.

With regard to how legally nonconforming status could be lost, the proposal of the staff was that failure to maintain a use for 12 continuous months is the standard indication that abandonment has occurred. Ms. Helland said staff was willing to clarify the language concerning use versus structure and the type of event that caused the loss.

Commissioner Himebaugh suggested an argument could be made for increasing the number of months beyond 12 to either 24 or 36. He said he could see a situation, especially during difficult economic times, in which a person may want to comply within 12 months but is simply not able to do so for financial reasons.

Commissioner Turner asked if the clock could be stopped by merely allowing the property owner to state his or her intentions within the 12-month period. Ms. Helland said notice by a property owner that they are pursuing an insurance claim can be deemed to be continuous progress. Simply allowing a property owner to announce that they will not have the money to rebuild for several years would create duration problems; it would be easier to just allow up to 24 months.

Commissioner Lai said he did not see a strong argument in favor of moving beyond the 12-month period. He said he would like to see detailed out the actions a homeowner could initiate to extend the time period. Ms. Helland commented that there are geographic differences in the city's nonconforming regulations; the 12-month period is the only one that is consistent citywide.

With regard to maintenance, repair and reconstruction, Commissioner Sheffels suggested that the line between maintenance and repair is somewhat fuzzy. She also noted that the words "development" and "structure" are used somewhat interchangeably in the text, which is confusing; she suggested the latter should be used. Mr. Paine said the word "development" was used because it is commonly used in the WAC. He agreed, however, that more precision might help to provide clarity.

Commissioner Lai said he could see no plausible reason to distinguish between maintenance and repair. Mr. Paine said he generally agreed but pointed out that it is the value of the work that triggers one definition or the other. Commissioner Lai suggested the scenarios would work exactly as intended if the category were called maintenance and/or repair; no general maintenance work would cost 50 percent of the value of a structure.

Chair Ferris pointed out that with the two separated, the costs of maintenance do not count toward meeting the 50 percent of value threshold. So a property owner could replace the siding on one wall, caulk all the windows and paint everything, but count only the cost of replacing the siding. Ms. Helland said that was the intent behind distinguishing between the two. She added that there is some confusion with regard to what actions require a permit and what actions do not. Staff wants to force as many things as possible into the non-permit category and to make them easily understood. There are some repairs that would not trigger the 50 percent threshold that would still need an exemption letter under the WAC rules.

The Commissioners were in agreement regarding the definition of maintenance.

Referring to the definition of repair, Commissioner Mathews suggested that the phrase "actions taken within a reasonable time period" could be open to interpretation. Mr. Paine said necessary repairs need to be made within a reasonable timeframe to avoid deterioration of a structure; if neglected for too long, a homeowner may find their structure facing serious permitting problems. Ms. Helland agreed to take a closer look at the language in order to clarify it.

There was agreement with regard to the definition of repair and the notion of a functional definition of repair broad enough to allow for minor substitutions of material, such as steel piles for wooden ones, even when those changes may result in a modest change in the dimension or appearance of the structure. It was noted that substituting materials may bring a project closer to or over the 50 percent threshold.

With regard to the definition of reconstructing and remodeling, Ms. Helland noted that the 50 percent threshold is the inverse of the repair definition. She said the language tied to the 75 percent threshold related to damage from storm or natural disaster was intended to encompass anything not planned by the property owner. She asked the Commissioners to indicate whether there should be a different standard for houses that are destroyed, and if the threshold should be 75 percent of replacement value or some other number. The 75 percent threshold is used citywide.

Commissioner Himebaugh suggested the list of things homeowners are not responsible for should include damage caused by mismanagement of a public utility and accidental flooding. Ms. Helland said the same approach was taken in Bel-Red and the focus was entirely on damage not caused by the owner.

There was general agreement to increase the threshold to 100 percent for instances involving damage or destruction outside of the homeowner's control. The Commissioners clarified that they wanted to see such structures allowed to be rebuilt regardless of percentage of replacement cost, and to allow for the substitution of materials.

Ms. Helland clarified that accessory structures up to and including 200 square feet located in the primary structure setback are legal conforming structures. She added that the 200 square feet is a cumulative total, so one could not have several accessory structures of less than 200 square feet each.

Commissioner Sheffels suggested that legally established accessory structures should be allowed to be replaced without regard to percentage of replacement value where the structure was destroyed through no fault of the homeowner. The Commissioners concurred, but agreed that any brand new structure constructed in the primary structure setback would have to comply with all applicable code requirements.

Commissioner Himebaugh asked what the thinking was behind including the options menu or special shoreline area report approach for reconstruction or expansion above the 75 percent threshold. Mr. Paine said the thinking was that rather than to go to the hundred percent mark, the Commission could choose the options menu approach whenever the 75 percent threshold is

exceeded, for anything above 200 square feet. Ms. Helland added that the proposal fundamentally creates a different hierarchy for accessory structures and seeks to either keep them at 200 square feet or less or allow them to increase through mitigation. She allowed that the approach would not apply with the threshold set at 100 percent, except that it would apply to structures not damaged by means outside the control of the homeowner. Ms. Bedwell clarified that the options menu would kick in only for non-damage projects exceeding the 50 percent threshold and gives some flexibility to expand the nonconforming use.

Commissioner Himebaugh said he would be in favor of expanding the footprint exception to cover uses such as decks and patios. At the very least, what is included and what is not included in the exception should be made very clear to the public. Mr. Paine said at the time the footprint exception was created, the Commission determined that it should apply only to primary structures, not accessory structures, patios or decks. In practice, however, those with decks attached to their primary structure found it ludicrous that the deck was not included, especially where the focus was on simply repairing or rebuilding the existing deck. Essentially the city winked and approved the projects provided that they did not seek to expand the original deck. Taking that approach in the Shoreline Master Program would not meet with an objection from staff. Decks that are not attached to the primary structure, however, should not be afforded the same latitude.

Commissioner Lai raised the notion of a deck cascading from the primary structure down a hill to the waterfront and asked if the fact that the top part of the deck is attached to the primary structure would by extension make the entire deck a part of the footprint. Mr. Paine suggested that there would need to be some reasonable way to make the distinction. He said staff would give it consideration and bring some language back to the Commission at a later date.

Mr. Paine added that a patio is not a structure by definition and as such would not be part of the footprint. Ms. Bedwell said patios are impervious surfaces under the code and can be taken up and replaced. The proposal also makes some allowance for adding impervious surface area within the first 25 feet and in the primary structure setback area to the limits of the amount of impervious surface allowed on the total site.

Commissioner Himebaugh suggested it might be a good idea to extend the footprint exception to include patios as well as decks. Chair Ferris said his concern with taking that approach would be intensification of use. Someone could have a patio, then build a gazebo over it, then the walls get enclosed and what was a patio becomes a place to put a day bed in the summer months. The same would be true for accessory structures, and what was a lawnmower shed could become a guest room. Commissioner Himebaugh said he did not see a huge problem with that.

With regard to legally established accessory structures in the vegetation conservation setback, Ms. Helland noted that the proposal included the 50 percent threshold for maintenance and repair, would require the structure to be moved out of the setback if the threshold were exceeded, and would require a variance in the event relocation outside the setback were not allowed. In no case would reconstruction be allowed.

Commissioner Lai suggested that in order to be consistent, homeowners should be able to replace accessory structures lost to circumstances beyond their control, even if the structure is within the first 25 feet. He noted that the structure in question could be a boathouse which could not be moved outside of the vegetation conservation setback. Ms. Helland said the long-term vision is to protect the setback area. The preexisting 25-foot setback requires nonconforming status for structures in the first 25 feet in any case. The proposal allows for some more flexibility in the next band, and more absolute protections for primary structures. Commissioner Lai said he would agree that in cases of neglect or deterioration structures should be removed, but a distinction should be made in cases of natural disasters.

Commissioner Hamlin concurred. He said it is not the homeowner's fault when a legally established accessory structure is located in an area that subsequently became a setback zone. In the event of the structure being destroyed through no fault of their own, it would be an undue burden to require removal of the structure from the setback. They should be able to replace such structures without mitigation. The other Commissioners agreed as well.

Commissioner Lai said he would support taking the same approach for legally established overwater structures. Ms. Helland pointed out that the city has not allowed overwater boathouses to be constructed legally since 1974.

Photos of a boathouse structure were shared with the Commission and Mr. Paine said though the issue has been disputed, such structures have more of an impact on the aquatic area. He suggested that the ideal time to consider another approach would be following the destruction of the structure.

Commissioner Turner commented that the process began with the acknowledgement that Bellevue is an urban area and that attempts to turn back the clock would not work well. The notion of requiring destroyed nonconforming structures to be removed violates that principle. Mr. Paine reiterated that overwater boathouses have not been allowed since 1974. Ms. Helland added that there are view blockage issues associated with overwater boathouses. Overwater covered moorage is allowed and would be permitted under the proposed regulations.

Commissioner Lai asked how many legal overwater structures there are on the shorelines. Mr. Paine said he did not have an exact number. He said there is a fair number of overwater party platforms and structures for boat covers, and the city does receive complaints about them because of the view issue. Even if the city were to allow such structures to be rebuilt, the homeowner would have to obtain permits from the Army Corps of Engineers and from Fish and Wildlife.

Commissioner Hamlin said his opinion was that homeowners should have the right to replace any legally established structure that is destroyed through no fault of their own. The other Commissioners concurred. Commissioner Turner suggested the situation would be the perfect opportunity for the city to offer incentives for the homeowner to move toward compliance.

Ms. Helland clarified that all overwater structures on the shorelines of Bellevue are currently nonconforming and as such they are disfavored. She said they all serve as barriers to what the city is ultimately trying to accomplish. Allowing the structures to be rebuilt if destroyed would be far more lenient in an environment that is more susceptible to environmental impacts than any other nonconforming provision in the city.

Commissioner Himebaugh referred to the memorandum on the legal opinion and noted that it included a listing of the provisions that will be reviewed after there is a proposed Shoreline Master Program. One item missing from the list was RCW 82.02.020, the impact fee ordinance. Ms. Helland said she anticipated the city would be reviewing that issue as well but said she would clarify that with the legal department.

There was agreement to revise the agenda to allow public comment next.

11. PUBLIC COMMENT

Ms. Anita Skoog-Neil, 9302 SE Shoreland Drive, said her cabana is just under the 200-foot mark, however it has a deck that protrudes into the 50-foot setback. She said she was not clear whether or not the size of accessory structures outside of the setback matters, and whether or not she would be allowed to rebuild it if it were to burn down.

Ms. Helland said under the recommended approach the structure could be rebuilt.

Mr. Marty Nizlek, 312 West Lake Sammamish Parkway, referred to the photo of the overwater structure that was presented by the staff and said he would not want to have it blocking his view. He allowed, however, that putting decks over the docks in lieu of boat canopies is popular. Whether they are legally established or not, they serve as popular places for kids and group gatherings. He said he agreed homeowners should be allowed to replace legally established overwater structures. He said the list of approaches for establishing whether or not a structure was legally established will be very helpful.

Mr. Mike Lunenschloss, 2242 West Lake Sammamish Parkway SE, said he has heard it stated over and over that what is needed is to return the shorelines to what they looked like when Adam and Eve were living. The minute predator fish were put into the lake, all the rules changed. He said he found it interesting that it takes about 18 months to get a permit to fix a dock, yet a structure can be deemed abandoned after only 12 months.

Mr. Terry Dodd, 3404 West Lake Sammamish Parkway SE, suggested that as long as the issue of what can be done in the shoreline areas is on the table, it would make sense to address the rules regarding patios as well.

Mr. Dave Radibaugh with the Department of Ecology, 3190 160th Avenue SE, said other jurisdictions have looked at the issue of replacing structures following natural disasters. By and large the issue has not been a major concern because it does not happen that often. He expressed concern, however, with allowing overwater structures to be reconstructed. Such structures do

experience damage more often as a result of windstorms and wave action. He said the structures do have ecological impacts on the nearshore area. The Commission was asked to reconsider that point.

Mr. Jerry Baruffi, 9236 SE Shoreland Drive, suggested Mr. Radibaugh should indicate whether he knows whether or not a fish can tell the difference between the shade of a tree and the shade of a dock.

Mr. Scott Sheffield, 2220 West Lake Sammamish Parkway SE, said he is a dock owner. He said putting in steel pilings instead of wood pilings would be far more expensive, but they would last many years longer and in that way benefit the environment. Additionally, if flow-through decking is such a benefit, it should not count toward the 50 percent threshold; those would be good incentives.

9. OTHER BUSINESS

Mr. Inghram said the electric vehicle code amendment recommended by the Commission was carried forward to the Council earlier in the year. Since then there has been additional discussion and some guidance from the Puget Sound Regional Council, and staff is proposing a modification for how the code is structured; the change will be to use a footnote in the use table rather than a line item. With the change, the item will need to be the subject of another public hearing.

10. APPROVAL OF MINUTES

A. October 13, 2010

Motion to approve the minutes as submitted was made by Commissioner Lai. Second was by Commissioner Sheffels and the motion carried without dissent; Chair Ferris and Commissioner Hamlin abstained from voting.

12. NEXT COMMISSION MEETING

A. November 17, 2010

13. ADJOURNMENT

Chair Ferris adjourned the meeting at 10:00 p.m.

Paul Inghram
Staff to the Planning Commission

1/26/2011
Date

Hal Ferris
Chair of the Planning Commission

1/26/11
Date