

CITY OF BELLEVUE  
BELLEVUE PLANNING COMMISSION  
STUDY SESSION MINUTES

April 11, 2012  
6:30 p.m.

Bellevue City Hall  
City Council Conference Room 1E-113

COMMISSIONERS PRESENT: Chair Turner, Commissioners Ferris, Hamlin, Laing, Sheffels, Tebelius

COMMISSIONERS ABSENT: Commissioner Carlson

STAFF PRESENT: Paul Inghram, Carol Helland, Catherine Drews, Department of Planning and Community Development

GUEST SPEAKERS: None

COUNCIL LIAISON: Deputy Mayor Jennifer Robertson

RECORDING SECRETARY: Gerry Lindsay

1. CALL TO ORDER

The meeting was called to order at 6:41 p.m. by Chair Turner who presided.

2. ROLL CALL

Upon the call of the roll, all Commissioners were present with the exception of Commissioner Carlson who was excused.

3. PUBLIC COMMENT

Mr. Brian Parks, 16011 SE 16<sup>th</sup> Street, spoke on behalf of the Phantom Lake Homeowners Association. He reminded the Commissioners that it was previously shown that no inlet to Phantom Lake existed on the old maps. The air field created a seasonal flow in a swale and because it was overwhelmed the city created a new inlet channel. The city then enlarged the inlet, which was designed to 42 cubic feet per second. The outlet channel was created by a local farmer and it is overwhelmed with stormwater. He shared several photos with the Commission. He said the lake originally had a limited capacity given that it had no inlets and no outlets. The 1976 drainage master plan chose lakes over running parallel pipes. A control structure at the outlet of Phantom Lake was recommended in the plan. Because of the lack of drainage problems, the conclusion reached was that a limited number of drainage system improvements would be required for each of the alternatives. Utilities says they cannot maintain private flow, which the Phantom Lake outlet is because it runs through private property. However, point source stormwater once it is captured and contained is a public responsibility. One plan that shows the drainage master plan projects includes the Phantom Lake SE 17<sup>th</sup> Place culvert. It is not reasonable for the city to conclude that no maintenance would be necessary. RCW 90.03.030 says the ordinary high water mark cannot be raised by using the conveyance system without compensation, but in fact the Phantom Lake water level has increased by nearly a foot. The 1980 concomitant agreement gave protections to Phantom Lake when the air field was rezoned to business park use, and the city was required to mitigate any adverse impacts that might result.

Recent tests on Phantom Lake sediments at the inlet, and tests on water from Pond A, show that metal deposits are very high. The tests previously done that showed the water coming out of Pond A was higher in metals than the water going into Pond A was given to Environmental Services Commission chair Brad Helland, but he never offered any response. The Council should clarify Resolution 5968 to indicate whether or not they intended to preclude looking at Phantom Lake when saying that future city funding of the committee and additional Phantom Lake watershed studies and projects would be contingent on the implementation of a lake management district. Policy is needed for downstream limitations. Monitoring of the inflow into Phantom Lake is needed. The Shoreline Master Program policy is needed to restore the traditional ordinary high water mark. Policy is needed to reduce the artificial wetlands that have been created by the increase in the lake level. The municipal use of Phantom Lake for the collection, conveyance and discharge of point source waters, for which the city is responsible, justifies city expenditures.

Commissioner Tebelius asked Mr. Parks if he had reviewed the comments made by the Environmental Services Commission chair made at the March 28 Commission meeting. Mr. Parks said he has requested the audio recording but had not yet received it. He said from what he has heard from others some half-truths are still being propagated. He said there should be a general roundtable discussion scheduled to hear details from all parties involved. Monitoring of inflow is needed; it was done in the past and new data is needed to establish a baseline. Protecting inflow water quality should be a priority; the Eastgate ponds are known to be undersized. The traditional ordinary high water mark for Phantom Lake should be restored. He offered to compile the pertinent issues into a single document for the Commission to review.

Commissioner Laing noted that the Commission often hears references made to studies or documents, but they are not always made available to the Commission. He said the Commission has, for instance, heard about an easement over the private property that would allow the city to maintain the weir, but there seems to be some dispute about the existence of the easement. It seems like it should be a simple thing to bring the document before the Commission if it actually exists.

Commissioner Sheffels commented that in addition to the Commission's transmittal memo regarding the Shoreline Master Program, all of the information should be made available to the Environmental Services Commission and the utilities department.

Mr. Parks said he has addressed the Environmental Services Commission on a number of occasions and has found that they seem to just go along with whatever the utilities staff tell them about Phantom Lake.

Mr. Charlie Klinge, 11100 NE 8<sup>th</sup> Street, spoke on behalf of the Meydenbauer Bay Neighbors Association. He thanked the Commissioners for making the suggestion that the footnote should be added to each of the use charts just to be clear. The same approach should be applied to the request to include a reference to the implementation principles. The principles are in the park master plan, but it would not hurt anything to include an additional reference to them. With regard to which process to follow, he said in talks with staff he found there may be ways to adjust the conditional use process in a way the citizens might be able to live with and which might alleviate some concerns the parks department has. What is needed is maximum public input, and the conditional use permit process seems to fit the best.

#### 4. APPROVAL OF AGENDA

Motion to approve the agenda was made by Commissioner Tebelius. Second was by Commissioner Hamlin and the motion carried unanimously.

5. COMMUNICATIONS FROM CITY COUNCIL, COMMUNITY COUNCILS, BOARDS AND COMMISSIONS – None
6. STAFF REPORTS – None
7. STUDY SESSION
  - A. Shoreline Master Program Update

Comprehensive Planning Manager Paul Inghram provided the Commission with copies of staff-prepared outline of the issues and noted that at the March 28 meeting the discussion left off on the conditional use permit process for Meydenbauer Bay.

Commissioner Tebelius said what she heard from Mr. Klinge is that the community is amenable to referring the process question to the staff to come up with an alternative process. Under that approach, the Commission would not decide the issue until it was before the Commission again in redraft form. Mr. Inghram said he talked with Mr. Klinge about alternative process routes that would not have some of the quasi judicial restrictions. There may be options, but until they are crafted and a determination is made how it might fit into the code, it cannot be said for certain.

Commissioner Sheffels commented that the conditional use permit process as requested would apply to the park, the area of which extends beyond the area under the jurisdiction of the Shoreline Master Program. Additionally, there are areas directly affected by the park that would be outside both the park and Shoreline Master Program jurisdictions. She said she would be interested in looking for a process that is fair and includes the public from the entire area.

Commissioner Ferris said there are areas in the city that have specific land uses that are effective only in that area; Factoria is a case in point. The Meydenbauer Bay park plan includes far more than just the park itself; it includes the density of the land in the upland areas. The master plan area includes both public and private lands, and taken together could become its own land use area. The changes in land use necessary to support the vision were to have come before the Commission; that has not happened yet. The steering committee recognized that the city zoning in place allows less development density than what exists currently, so anyone choosing to tear down an existing building could not rebuild to the same density. What the steering committee attempted to do was to give the upland property owners an incentive to make improvements to their properties and to include street amenities such as benches and public art. None of that is captured in any way except in words in the park plan.

Mr. Inghram said some of those issues will come before the Commission through changes to the land use designations in the Comprehensive Plan and the zoning that affect the private development areas. The focus will be on consistency between the Comprehensive Plan and the Meydenbauer Bay park and land use plan. The desire is to avoid having a disconnect between the Shoreline Master Program jurisdiction and the upland area. Upland actions will not necessarily trigger a Shoreline Master Program review, but there needs to be some consistency.

Commissioner Laing observed that there are four types of property within the park master plan, namely publicly owned properties inside and outside of the shoreline jurisdiction, and privately owned properties inside and outside the shoreline jurisdiction. He said the master plan

essentially is an overlay, both within the shoreline environment and over the city's general Comprehensive Plan relative to the upland areas. He said he was not concerned about non-shoreline areas being subject to the shoreline rules simply by referencing the master plan in the Shoreline Master Program. The concern of the public appears to be seeing the publicly owned shoreline property developed consistent with the Council-adopted master plan, including the implementation principles, and it appears the public is concerned about the process by which the permits would be handled, given that the city does not have the funding to go forward with implementing the park plan anytime soon. If the process is not set up to allow for more public notice and input, some of what was achieved through the public planning process for the park itself could be lost, which would put the public in the position of having to catch when the issuance of a permit that is contrary to the implementation principles. Under the shoreline substantial development permit approach, their only option would be to seek redress before the Shoreline Hearings Board.

Mr. Inghram clarified that private property is in a separate shoreline environment designation.

Chair Turner said one of the fundamental issues appears to be a difference of understanding between what is in the park master plan and what the people living around the park hold as a vision. That may be driving some of the public comments about how the property will get developed.

Commissioner Tebelius said the concerns voiced by the public are not invalid. What is needed is a solution that will be acceptable to the public and the city.

Commissioner Ferris said the park master plan is really only a concept plan. It is not possible to build from a concept plan. For instance, there is a large sewer line running just under the water at the edge of the shoreline, and no one really delved into the notion of whether or not a beach could be put there without relocating the sewer line. The next step will be to develop a schematic design. The park could be developed in phases over time, so it is not outside the bounds of reason that the schematics and the greater level of design may address only one area at a time. The Commission could ask the staff to include in the Shoreline Master Program a requirement for a presentation and public hearing for each schematic design. That would keep the review work at the city level, and approval would have to come from the Council.

Mr. Inghram said the Council's intent clearly was to have the public involvement occur with each of the phases of development. One concern with the conditional use process is that in theory one could get the conditional use permit could be obtained up front with a single public hearing, thus satisfying the public hearing requirement indefinitely for the park development. That approach would not meet the intent of the public to have involvement in every phase of the park development. The parks department has a concern with having in place a formal and laborious process to follow. The implementation principles appear to describe a public process that is a bit different from the traditional conditional use permit process. It is possible something could be drafted to better capture the intent of the implementation principles.

Commissioner Hamlin said the whole point of having a master plan in hand is to avoid having to go through the conditional use permit process. He said he understands the concerns voiced by the property owners, but wants to avoid overburdening the process. It is possible that once the details emerge in the schematic plans the public will be satisfied.

Land Use Director Carol Helland suggested that the draft could be revised to avoid the use of a conditional use permit process. The framework already exists in the Shoreline Master Program

draft. Conditional use is a Process I approach that stipulates a lot of different steps. In the shoreline substantial development permit approach it is a Process II review, and the draft describes the process, including the notices required and describes that public meetings may be held. A footnote could be added relative to Meydenbauer Bay park requiring a public meeting. The notice requirements could also be expanded.

Commissioner Tebelius suggested that there are valid concerns in the community about what is going to happen with the park. Everything should be done in the context of the Shoreline Master Program to assure the community that it will be given every opportunity to complain or object, or to say that something different is wanted. She asked the staff to come back with a recommendation on process that will serve as a compromise with what the public wants.

Commissioner Sheffels said she is not in favor of using the conditional use process. She stated that the Shoreline Master Program includes the park area that lies within the shoreline jurisdiction, and asked if a public process could be included for the public and private properties that are upland from the park or if it should simply be highlighted in the Commission's transmittal to the Council. Ms. Helland reminded the Commission that when the draft was submitted to the Commission for consideration, it was stated that at the end of the process a reconciliation amendment would be necessary for the non-shoreline sections of the code in order to assure consistency. She agreed to docket the issue to be taken up as part of the reconciliation amendment process. The general use charts in the Land Use Code speak to how park properties on shorelines are developed, in addition to speaking to park properties in general and whether they require conditional use or a permitted use; that can be fixed at the same time as part of the reconciliation amendment. The broader amendments related to the private properties covered by the terms of the master plan will be the subject of another process at a future date and will certainly involve the Commission.

Commissioner Laing said the concern he heard voiced by the parks department and the Parks and Community Services Board about the conditional use permit process was that it might effectively keep the City Council from being able to be involved in that it could find itself sitting on an appeal in a quasi judicial capacity. He said that was the only reason articulated against use of the conditional use permit process. He suggested that whoever is involved in advising the city with regard to risk management should look at doing what most jurisdictions have done, which is to take their city councils out of the land use process altogether. He said he has been through both the conditional use permit process and the shoreline substantial development permit process and suggested no one should be afraid of the former; the process is not that big a deal. One basic difference between the two processes is who makes the decision. Under the city's code, a shoreline substantial development permit is issued by the director, whereas a conditional use permit is typically issued either by a hearing examiner or the City Council. Another difference is whether or not there is an open record public hearing. In the shoreline substantial development permit process the public is able to submit written comments; in the conditional use permit process the public has the opportunity to have verbal input. Regardless of which process is ultimately implemented, be it a modified conditional use permit process or a hybrid between the two permit processes, the decisions should be made either by the Council or the hearing examiner, and there should be at least one open record hearing. The latter is important because it allows for the creation of a public record that can be called into play should the permit end up before the Shoreline Hearings Board on appeal.

Commissioner Tebelius said tailoring a process that has the hearing examiner making the decision rather than the Council would remove the Council from having to act in a quasi judicial setting and would resolve that issue. Mr. Inghram allowed that there have been discussions

about whether or not the Council should continue to be the decision maker for conditional use permits. That decision, however, will have to be made by the Council.

Deputy Mayor Robertson said she helped write the implementation principles that were adopted by the Council as part of the park master plan. She said in her opinion the Council will be out of the business of acting in a quasi judicial role, to the extent it is allowed to be out of that role, within the next 12 to 24 months. Where the Council acts in a quasi judicial role it cannot take ex parte contacts from members of the public; it must base its decisions on the code. To a certain extent, the Council is bound by the hearing examiner's recommendation. That likely is not what the public wants. The implementation principles call for a very robust public engagement process. The park will be very expensive to construct; it is not currently in the seven-year capital budget, and the next CIP may have no more than a small phase of the park development. The public needs to be involved at every stage as the master plan is implemented.

Mr. Inghram said staff would work on drafting a solution in line with the stated objectives.

With regard to the notice issue, Commissioner Ferris commented that the steering committee struggled with how to get the word out. The park is not about just those who live within a certain radius of it; the park is a big part of the city's overall park plan and all citizens of the city are free to offer their input.

Commissioner Tebelius asked if any harm could come from including a reference to the implementation principles along with the park master plan.

Commissioner Ferris said by merely referencing the park master plan it would not be necessary to change the Shoreline Master Program should a change be made to the master plan. However, if the implementation principles are included it may be necessary to change the Shoreline Master Program if a change is made to the principles. The public is interested in clarity but is more concerned about creating a greater requirement for the city to follow should there be a move to change the implementation principles. Mr. Inghram said the simplest approach would be to simply refer to the implementation principles in the footnote. He agreed that if the principles were to be included in the Shoreline Master Program itself, to make any change in them would require changing the Shoreline Master Program and going back to the Department of Ecology for approval. Ms. Helland added that the Department of Ecology could elect to fix all information referenced in the plan, and that could result in the implementation principles being spelled out in the plan. It is not known what approach they will recommend.

Commissioner Laing noted that he had previously said he would bring a motion to make the implementation principles actual criteria within the plan. He allowed that since that time there has been a lot of healthy discussion on the issue. The fact is Meydenbauer Bay park is not the Commission's park, not the steering committee's park, and is not the City Council's park, it is the public's park. The Commission exists to represent the public. He said he would support the request to insert a comma after "master plan" and include the words "including the implementation principles" in all the footnotes. The desire to have flexibility is understandable. The park master plan is only a conceptual plan and the public is simply asking to have their concerns addressed as the plan comes to fruition.

Chair Turner agreed. He said it will be important to keep the implementation principles front and center.

Commissioner Hamlin said he agreed with the original staff recommendation not to include the

implementation principles. Commissioner Ferris concurred.

Commissioner Sheffels said she had no problem with the implementation principles. She suggested that if the master plan is included in the Shoreline Master Program the Department of Ecology could exert its authority to review the plan and the issues may never be fully resolved. The implementation principles, however, are sound and should be included.

There was agreement to have the staff return with some recommended language for the Commission to review.

Attention was given next to Phantom Lake. Commissioner Tebelius suggested that so many issues regarding Phantom Lake remain unresolved that the Commission is in no position to make a recommendation. She suggested that a subcommittee be formed to work with staff and the community solely on Phantom Lake issues and then report back to the full Commission.

Answering a question asked by Commissioner Ferris, Ms. Helland said the biggest constraint facing Phantom Lake properties is the wetland. There is a flood plain associated with the lake but a flood plain does not have a buffer requirement.

Commissioner Tebelius pointed out that the Phantom Lake property owners have made the argument that the wetland was artificially created by dumping too much water into the basin in which Phantom Lake exists. She also noted that under state law Phantom Lake must be regulated as a lake, not a wetland, because it exceeds 20 acres in size.

Commissioner Ferris allowed that the issues facing Phantom Lake are all intertwined. To identify the historic ordinary high water mark for the purpose of calculating setbacks could require a number of complicated steps.

Chair Turner agreed that a plethora of intertwined issues are in play with regard to Phantom Lake, including in-flow, out-flow, source point pollution, and ordinary high water mark. Instead of working around them, they should be addressed head-on. Having a subcommittee appointed to focus just on Phantom Lake issues would be a good idea. If that means dealing with other city boards or commissions, that should be done.

Mr. Inghram said the subcommittee idea could have merit, but suggested some compartmentalization may be necessary. First and foremost decisions will need to be made relative to what it will take to move the Shoreline Master Program forward to completion while not letting go of the other elements that may rest with other boards or commissions.

Ms. Helland stressed the need to keep in mind the fact that when the Shoreline Master Program was originally adopted in 1970s Phantom Lake was considered part of the wetland segment of the shoreline program. Accordingly, it has always been regulated as a wetland. Acting in accord with the Commission's direction to avoid layers of regulations to the extent possible, the decision was made to determine which would be the more restrictive approach, shorelines or critical areas associated with wetlands. In the case of Phantom Lake, the critical areas approach is the more restrictive because the setbacks are so large. The draft applies the critical areas regulations, though the state's shoreline permitting process still applies. With that underpinning, there could be offline conversations supported by staff to explore issues such as the point from which setbacks are measured and what the water quality issues are.

Commissioner Laing said the testimony received from the Environmental Services Commission

chair and utilities department director was that their paramount job is protecting the environment and water quality. From the perspective of the Phantom Lake property owners the primary issues are water quantity and quality, both of which seem to stem back to the 1980s and the development in Eastgate. The problems have grown and have been exacerbated since. He suggested the Commission would benefit from seeing a series of aerial photographs to see how the lake level and wetland areas have changed. The issues facing Phantom Lake are environmental issues and there certainly should be something the city can do to address them. The fact that there are water quality issues associated with the discharge into Lake Sammamish speaks to an issue that is larger than just Phantom Lake. The restoration plan of the Shoreline Master Program may be the place to address the issues. Whatever approach is ultimately utilized to address the issues and determine just what the Commission should be doing in the context of the Shoreline Master Program, time is of the essence.

Commissioner Tebelius said one issue raised by the Phantom Lake community is that they think the setback is excessive. Ms. Helland said the 110-foot setback was established as part of the critical areas ordinance in 2006. Commissioner Tebelius asked if the setback could in fact be changed. Ms. Helland allowed that the size of the setback could be changed. She explained that the critical areas code underwent a best available science analysis and an Environmental Impact Statement, and the setbacks were established under those requirements for application to wetlands typed in a certain way citywide. In the case of Phantom Lake, the associated wetlands are Type A. Phantom Lake has been regulated as a wetland since the early 1970s.

Commissioner Tebelius asked who should resolve the problem of excess water flowing into a designated wetland as the result of uphill development, the uphill property owners or the property owners affected by the wetland. Ms. Helland said there is a broad body of law on the common enemy doctrine and conveyance of stormwater that is neighbor-to-neighbor and not governed by city regulation. The effect of city regulation is that wetlands change over time; in some cases they become starved of water and retract in size, and in some cases more water is added and they grow in size. Systems are dynamic and water flow changes over time. It is common at the time of development to delineate wetlands, and the location of the delineation is staked and determines development parameters. Commissioner Tebelius said she could understand the normal ebb and flow of wetlands, but where a wetland only grows and begins to consume properties and developments, some new approach is called for. Ms. Helland said such solutions are not regulatory in nature. She allowed that wetland growth has impacts because the regulations measure from the edge of the wetland.

Commissioner Laing explained that the common enemy doctrine treats water like a wild animal. The rule is if a cougar runs across your property and onto a neighbor's property and eats the neighbor's goat, you are not liable. But if you catch the cougar and release it on your neighbor's property, you are in fact liable. If water runs across your property and onto your neighbor's property, you are not liable, but if you catch the water in some way and release it onto your neighbor's property, you are liable. Where things get tricky, however, under the common enemy doctrine is that a downhill property owner can take action to defend his property to repel water runoff, so long as they do not capture it and release it onto a neighbor's property. In the case of Phantom Lake, defending against the water would require the installation of sandbags, berms or dikes in the wetland complex, which is not permitted under the regulations. The common enemy doctrine can be availed by uphill property owners, but folks around Phantom Lake cannot. The question is what can be done from a regulatory perspective to allow the Phantom Lake property owners to defend themselves from the common enemy.

Commissioner Ferris asked if under the common enemy law a property owner could open his

gate to allow the cougar to escape more easily without facing liability. He said his understanding is that maintenance of the Phantom Lake outfall is carried out on a sporadic basis at best. One possible solution would be for the homeowners to get together and hire a maintenance person to address the restrictions that occur naturally, allowing the water to flow out more easily. If that is not enough because the inflow has been increased to a point beyond what the outflow can handle, then an engineered solution will need to be identified.

Commissioner Tebelius said it was her understanding that the city in fact has an easement covering the outflow ditch. Given that, the owner of the private property cannot prevent maintenance work from being done on the ditch. Even if it means adding more work, the Commission should take on the task of identifying the solutions.

Commissioner Laing said much of the evidence regarding Phantom Lake points to the culvert on the outlet side of the lake. He said he did not have a clear understanding of who has control over the culvert. That is something that should be discussed in any mediation attempt, and once that is established the focus should turn to who has the responsibility for maintaining or improving it. That will be the equivalent of opening the gate and letting the cougar out, but for better or for worse that will put the problem on the city because there will at different times be a significant increase in the amount of water flowing over the weir and down the hill, ultimately discharging sediment into Lake Sammamish. The water that flows into Phantom Lake is first captured and released by the city, so in principle the city should be responsible for coming up with a detention or controlled release of the water into Lake Sammamish, giving the sediment the opportunity to be filtered out first.

Commissioner Ferris said the primary question is what can be done in the Shoreline Master Program to address the Phantom Lake issues. He suggested recommending to the Council that a committee be set up, separate from the Shoreline Master Program work, with representatives from the Planning Commission, the Environmental Services Commission, the Council and others to focus on solutions for Phantom Lake.

Mr. Inghram agreed to work with Mr. Parks to develop a full list of issues and bring it to the Commission to take a stab at identifying where the different elements fall relative to regulations, policy statements, and transmittal recommendations.

Commissioner Sheffels said one possible solution would be to establish in the Shoreline Master Program the ordinary high water mark requested by the Phantom Lake homeowners. That would provide a mark from which a separate committee could base its solutions. Mr. Inghram said the lake elevation is clearly a key issue, but he cautioned that until he has a complete list of issues facing the Phantom Lake homeowners it will not be possible to say whether or not that is the only issue that needs to be addressed in the Shoreline Master Program. There was consensus that establishing an ordinary high water mark for the lake in the Shoreline Master Program would be a good first step.

**\*\*BREAK\*\***

Chair Turner opened the floor to a presentation by Marty Nizlek.

Ms. Sandra Rice, 312 West Lake Sammamish Parkway NE, yielded her time to Mr. Nizlek.

Mr. Mike Lunenschloss, 2242 West Lake Sammamish Parkway SE, also yielded his time to Mr. Nizlek.

Mr. Nizlek, 312 West Lake Sammamish Parkway NE, asked to have his presentation and materials included as a part of the record. He noted that previously he had shared with the Commission pictures of the Lake Sammamish weir and the transition area and noted that a curvature was taken out of the river and replaced with a straight channel; written materials related to the date of the installation; a cross section of the outlet and figures relative to the amount of water it is supposed to carry; information related to the establishment of a base elevation of 26 feet at the top of the weir; had noted that a decline in the outflow of nearly 50 percent had been documented over a seven- or eight-year period; had shown the causes using copious pictures; and had documented that the declining outflow has resulted in a rise in the lake surface elevation. He added that he had previously reflected on what the increase in lake level has meant for those who live on the shoreline, and had shared photographs showing the types of damage. In September 2010 King County officials visited the site along with lake residents and as a result adopted a seven- or eight-point program, three of which have been accomplished but need to continue into the future, namely the mowing of the channels of the weir, cutting back the center channel growth, and removing those cuttings. Some benefit resulted from those actions as charted in a declining number of days over the ordinary high water mark established for the lake by the state. The county discovered an illegal rock dam which prevents boat navigation. They are still debating the best way to remove the debris that has built up over the last 20 years. No monitoring report has been drafted yet. The county is advocating a long-term re-meander project that will carry with it distinct risks. Nothing has been funded.

Mr. Nizlek said the county has the desire to make improvements along similar rivers, including the Cedar River which has experienced major problems with logs. One of the projects in the WRIA-8 report, to which Bellevue is a party, is the Cedar River floodplain restoration re-meander project. Public records released by the county's prosecuting attorney's office indicate that in 2011 there was an \$8 million settlement in a near-drowning case involving an artificially recreated natural environment. On July 22, 2011, the City Council was made aware of the fact that the city is affected by that.

The flood control project on the Sammamish River has been decertified by the Corps of Engineers for deficiencies, primarily due to obstructions being put in the river. The county has been notified by the chief of operations division at the Corps regarding various problems they have noted, including the need to notify the public about the impacts that were coming down the stream. The Commissioners were provided with a series of generalities concerning what needs to be accomplished, and some distinct recommendations.

Mr. Nizlek said the question will be raised concerning whether or not an ordinary high water mark of 27 feet can be used. He provided the Commission with documentation, including correspondence from the Department of Ecology, in that regard.

Mr. Lunenschloss said outflow is the crux of the issue, whether the focus is on Phantom Lake or Lake Sammamish. He said the obstructions must be cleared.

Commissioner Tebelius asked Mr. Nizlek if anyone has refuted the analysis in the materials provided by him regarding what has caused an increased water level in Lake Sammamish. Mr. Nizlek said no one has done so. The county is in fact on record as agreeing with the Washington Sensible Shorelines Association (WSSA) figures regarding the rising lake level, and that led to the meetings that occurred and the subsequent action program.

Commissioner Tebelius asked if WSSA was asking the Commission to adopt an ordinary high

water mark for Lake Sammamish of 27 feet. Mr. Nizlek said that is one of the items recommended for setbacks; for bulkheads and docks a study likely should be conducted. The city of Redmond has put funds into rectifying the weir situation on Lake Sammamish; Bellevue could elect to put money in as well. Bellevue staff have argued that Bellevue does not have a dog in the fight, but the fact is Bellevue residents are fighting for their properties that are being pulled into the lake. As long as the lake level remains high the ordinary high water mark is being shifted. Maintaining an inflow and outflow balance, and monitoring quantity as well as quality, must be done. The repair of damaged structures and property should be allowed without the imposition of additional regulatory requirements.

Commissioner Ferris pointed out that the most recent additions to the draft Shoreline Master Program picks up those items.

Commissioner Tebelius asked if the city's nonregulatory program can be included in the Shoreline Master Program or if it is something the Commission should recommend in the transmittal to the Council. Mr. Nizlek said his recommendation was that it be explicitly included in the language of the Shoreline Master Program.

Commissioner Sheffels said it appeared to her that maintenance of the outflow is the critical issue, but pointed out that the Commission cannot do anything about it. She suggested that WSSA should continue to work with the county and the Corps of Engineers to see solutions put in place. Mr. Nizlek said the group has gone to great extent to coordinate with, report to and stimulate changes at the county level. County staff are recommending a long-term project over further actions to remove the buildup of sediment and so forth. WSSA will continue to seek to influence decision makers. The city should also serve in an advocacy role.

Commissioner Sheffels asked if the city of Sammamish has been asked to contribute funding as the city of Redmond has apparently done. Mr. Nizlek said he did not know if Redmond has yet followed through on its promise to contribute. The city of Sammamish has not been approached but the suggestion to do so is a good one.

Commissioner Sheffels asked Mr. Nizlek if he thought the remeandering project would be successful in the long run. He replied that remeandering is a process by which the river would be allowed to cut its own course. The remeandering project on the Cedar River included a number of complications; a lawsuit was nearly filed, and there was a request from the city of Renton to the county to remove the logjams that broke loose during the flooding. The Corps of Engineers created the weir and the lake has developed on the assumption that the water levels would be maintained. Remeandering may seem easy to do, but the physics dictates that the straighter the shot the better the flow; every bend will diminish the flow capacity. On top of that, trying to reintroduce natural elements will come with an increase in risk where logs can break loose; that is what was reflected in the \$8 million settlement.

Commissioner Ferris agreed that plugging of the outfall associated with the weir is causing the ordinary high water mark to rise, but pointed out that without the weir the summer lake level would drop substantially. The weir has advantages and disadvantages. On natural lakes that have not been altered by man, the ordinary high water mark rises and falls for natural reasons. No title for any property owner along the lakeshore includes a fixed ordinary high water mark. Each property owner has the responsibility of developing their properties in ways that allow for the natural rising and falling of the lake water level. Bellevue does not control the land on which the outflow occurs, nor does it control the majority of the water coming into the lake, and it should not be the obligation of all the taxpayers in Bellevue to support the individual property

owners along Lake Sammamish who have made their own assumptions about fixed water levels. Bellevue certainly should include policy language regarding repair and replacement, and policy language could be drafted that talks about supporting King County and the efforts of other cities but the Commission cannot obligate the city's financial or staff resources.

Mr. Nizlek said he was not advocating the removal of the weir. Beyond the weir there is an illegal rock dam, and WSSA has requested removal of the impedance but has been denied. The illegal dam has built up with debris and sediment and is affecting the water level above the 27-foot level. For the most part, Lake Sammamish lakeshore property owners have abided by the established setbacks. He agreed that almost half of the inflow into the lake comes from Issaquah Creek, but that is not the only inflow. Because the outflow is partially blocked, even marginally high storms cause the water level to increase.

Mr. Lunenschloss said the property next to his has a catch basin that was installed two or three years ago by the city. When it was developed the person on who's property the basin is located asked the city if it would be maintaining it, because his expectation was that it would fill up with gravel. A representative for the city made it clear that the city does not maintain catch basins on private property. The property was subsequently sold and the new owner is constructing a new house on it. The city was asked to clean out the catch basin, but the response was no.

Commissioner Laing said Commissioner Ferris was correct in saying there is nothing the Planning Commission can do to make the city commit resources to any project, nor can the Commission make the Council adopt the Commission's preferred Shoreline Master Program. The weir on Lake Sammamish is outside the city's regulatory jurisdiction and as such it is beyond the Commission's purview to talk about it. It is possible, however, that the jurisdictions of King County, Bellevue, Redmond and Issaquah could do should they choose to work collectively. The Commission has no voice over that approach, but citizens do have the right to make their voices heard before those who do have the authority to act.

Continuing, Commissioner Laing said what the Commission does have before it is the issue of the ordinary high water mark on Lake Sammamish. He said he recently researched all of the decisions of the Shoreline Hearing Board relating to permits on Lake Sammamish over the last couple of decades, and focused specifically on issues dealing with the ordinary high water mark. He said he also researched all Washington case law on ordinary high water mark, and generally Shoreline Hearings Board decisions on how the ordinary high water mark is determined on lakes. There is a 2001 Shoreline Hearings Board decision out of Sammamish, a 2003 decision out of Bellevue, and a 2004 decision, also out of Sammamish. What is interesting about those decisions is that the Department of Ecology elected to visit the sites between October and November to delineate the ordinary high water mark, whereas the property owners tended to get their delineations done in June. It is therefore not surprising that the difference was often around one foot. The Department of Ecology in 2000 came up with an ordinary high water mark of 28.5 feet NVGD, where as King County traditionally has used 27 feet, which is a foot higher than the elevation of the top of the weir. In each of the three cases, the properties had just been annexed into the their respective jurisdictions but the property owners had vested permits under the county's ordinances. The property owner delineations were always between 26 and 27 feet, whereas the Department of Ecology calculations were always between 28 and 30 feet.

Commissioner Laing said a weir is an overflow dam and is used to fix the elevation of a body of water behind it. Once the lake level behind the weir reaches a certain height, the water is supposed to flow over the top and exit the lake. There are some key words in the definition of ordinary high water mark, including "common," "usual," "so long continued," and "all ordinary

years.” Seasonal fluctuations do not enter into the definition. Flooding events are not taken into account, nor should manmade structures that are not properly being maintained. The circumstances facing Lake Sammamish do not warrant establishing an ordinary high water mark based on time of year. The Shoreline Hearings Board held the same view in a seminal case from 1998. In its finding, the Shoreline Hearings Board did not buy the argument made by the Department of Ecology that a two-week period of flooding on the lake in question was sufficient to alter any upland vegetation and establish a new ordinary high water mark. A Washington Court of Appeals decision from 2010 regarding Lake Chelan found that the ordinary high water mark is set by reference to elevation. The Mercer Island Shoreline Master Program that has been sent to the Department of Ecology amends its definition of ordinary high water mark for Lake Washington to be 28.67 feet NVGD, and 25.10 feet NAVD. The Department of Ecology in 2009 sent a letter to Bellevue city staff relative to measuring setbacks in the shoreline that allows for using the elevation data.

Commissioner Laing said the use of elevation data has been established in common practice, has been endorsed by the Shoreline Hearings Board and the Washington Court of Appeals, and is included in the Mercer Island Shoreline Master Program. Bellevue should therefore have no issue with using 27 feet as the ordinary high water mark.

Chair Turner said it would seem logical for lakeshore property owners to expect the level of Lake Sammamish to remain relatively constant around 27 feet given the engineering work that went into the development of the outlet weir. He allowed that while the Commission cannot really do anything about that directly, it would be reasonable to support that ordinary high water mark.

Commissioner Tebelius commented that while the Lake Sammamish weir was under the control of the Corps of Engineers, it was periodically cleaned out and generally maintained. When the transfer was made to King County the expectation was that the county would continue to do the same. However, the county did not do that and in fact when they cut back the vegetation they left the cuttings lie in the channel, which tended to plug up the channel. They have since made the attempt to remove those cuttings. Long-term residents on the shores of Lake Sammamish all say in the past there was never a time when their docks flooded. With more water flushing into the lake, dock flooding has become a regular event.

Commissioner Ferris referred to the diagram of the weir provided by Mr. Nizlek and noted that the weir is designed with a capacity of 1500 cfs at an elevation of 29 feet. The low level of the weir is what the ordinary low water mark would be, but that would not be the ordinary high water mark. As the water rises it flows over the next level up, and because the weir is sloped back the weir continues to be able to increase its capacity for outfall as the water level continues to rise. Mr. Nizlek said the elevation at the bottom of the low-flow notch in the weir has always had water flowing in it, at least in recent times. The cut was made to always have something for migrating salmon to pass through. As the water rises, it encounters willows on either side of the channel. What has been allowed to happen is logjams amongst that growth, clogging the channel and making it difficult for the water to exit the lake. The design is intended to accommodate both ten-year winter storm and 40-year spring storm events, which could raise the lake level to as high as 29 feet, at which elevation the weir will permit an outflow of 1500 cfs.

Commissioner Ferris said it appeared to him that the weir design in fact accommodates an ordinary high water mark of 29 feet. Mr. Nizlek said the 29-foot elevation design aims to accommodate a ten percent chance storm. The studies done to establish an ordinary high water mark for Lake Sammamish should not have been done, and legally cannot be done, by the

average citizen, nor can it be done by the average staffer at the city or the Department of Ecology. A qualified surveyor is required, and the determination is not made based on the current water level or the level where debris is found along the lakeshore; the determining factor is growth and location of specific types of plants. With the rising lake level persisting for so long, the ordinary high water mark is being artificially shifted higher.

Commissioner Laing said he had some fundamental differences with Bellevue's 2004 statistical study. Where one samples an artificially high shoreline, the results will be wrong even if good confidence intervals are chosen and all the math is done correctly. A better study would be to take the daily gauge data from the Army Corps of Engineers and run develop confidence interval from it. Something less than a standard deviation from the mean should be used to determine the ordinary high water mark. King County used 27 feet as the ordinary high water mark until it no longer had the regulatory jurisdiction of the shorelines. The weir is designed to accommodate a higher elevation of water because there will be times when more water flows into the lake. There is plenty of latitude to use elevation data in determining ordinary high water mark. Using 27 feet as the point from which to measure setbacks makes perfect sense.

Commissioner Hamlin said it was his understanding that the 27 foot elevation demarcation was actually arrived at in a study that used only four data points. The 28.2 foot elevation was calculated using 27 data points and was both peer reviewed and approved by the Department of Ecology.

Commissioner Laing reiterated that measurements taken after the outlet channel blockages had formed, causing the lake level to rise, simply are not valid. The data points, regardless of how accurately they were measured, would be based on an artificially created environment.

Mr. Nizlek suggested that when the study was done that yielded the 28.2 foot elevation someone should have jumped up and asked why the water level was increasing.

Commissioner Sheffels asked about the illegal rock dam previously mentioned by Mr. Nizlek. He explained that during the enhanced clearing process undertaken by King County, the obstructing structure was discovered. It is only a foot or so tall and is constructed of bedrock piled across the channel. The Department of Fish and Wildlife, one of the agencies that issues permits, has stated that the structure is not a huge problem, and has also stated that because there are currently salmon passing nothing can be done immediately to rectify the situation.

Mr. Inghram pointed out that the draft Shoreline Master Program has a specific ordinary high water mark listed. He said it can be left as it is at 28.2 or changed to another number very easily. What will take more creative thinking is determining what policy language is needed, if any, if the issue should be addressed in the restoration plan, and if the Commission will be making recommendations to the Council for capital improvement projects and taking an advocacy position.

Commissioner Ferris voiced support for establishing an elevation from which to measure setbacks. Under that approach, should the lake level rise the property owners will not be penalized. The Commission certainly could include language encouraging the maintenance of the inflows and outflow by the proper regulatory bodies. Mr. Inghram said it would be an easy matter to separate those within the city from those outside the city.

Commissioner Tebelius noted her support for incorporating the 27-foot level rather than the 28.2-foot level, which is artificially inflated.

Commissioner Ferris pointed out that if the 27-foot level is established, a property owner could construct a bulkhead at that mark only to see the water two feet higher during a ten-year storm event, not accounting for heavy wave action.

From the audience Mr. Dallas Evans commented that building in the 100-year flood plain is prohibited. The ordinary high water mark designation is the point from which structure setbacks are measured.

Mr. Inghram agreed that as educational materials are developed for applicants for building permits in the shoreline jurisdiction, they should include reminders that during major storm events the water level can potentially rise to flood the full 25-foot setback area.

Mr. Nizlek thanked the Commissioners for their thoughtful questions.

Mr. Inghram said the discussion completed the list of items the Commission wanted to cover. Ms. Helland said the changes to the draft will be made in accord with the Commission's discussion and direction, but allowed that additional issues may arise when the draft comes back.

Commissioner Ferris noted that if the changes to the draft are substantial another public hearing will need to be scheduled. Ms. Helland said the decision to schedule another public hearing will not be made until after the draft is revised.

8. OTHER BUSINESS – None

9. PUBLIC COMMENT

Mr. Rory Crispin, PO Box 40443, allowed that Phantom Lake is greater than 20 acres and also allowed that the Shoreline Master Program has language regarding the associated wetlands. He clarified, however, that the wetlands are associated wetlands, but what is being regulated is Phantom Lake. The problem is that the entire city is being regulated as though shorelines are critical areas. The Shoreline Management Act in 90.58.030, and in the Growth Management Act critical areas regulations at 36.A70.480.5, it is made clear that shorelines are not critical areas simply because they are shorelines. The critical areas associated with Phantom Lake need to be delineated. An ordinary high water mark is being assigned to the lake, and a blanket called critical areas is being assigned to the entire shoreline without being delineated. With regard to the ordinary high water mark, he commented that most people seem to want to consider extraordinary high water marks. The problem with the study that was done by the city is that the 27 data points were not with respect to the shoreline but rather marks on pilings and wave wash on the shore; only one of the points dealt with vegetation.

Mr. Charlie Klinge, 11100 NE 8<sup>th</sup> Street, said he recently took his family on a hike along the Lake-to-Lake Trail from Phantom Lake to Wilburton Hill. He said they walked down by the Phantom Lake dock where there is what appears to be a big grass field; it is actually a field of completely saturated mud. Most of the local resident's grass lawns leading down to the lake are in the same condition. The lawns were not planted in the bog, they became bogs after they were planted. From the dock an oil sheen could be seen on the surface of the lake water. The original Shoreline Master Program indicated that the associated wetlands of Phantom Lake are regulated, but it did not say that the entire lake edge was to be treated as a wetland. The fluctuating water levels are having an impact on the entire environment and the plants are having to change their whole program based on where the water is and where the water is not. The lake itself has

changed. The public property is being damaged, and a portion of which cannot be used for its intended purpose.

Mr. Brian Parks, 16011 SE 16<sup>th</sup> Street, spoke as president of the Phantom Lake Homeowners Association. He pointed out that Pond A, which collects surface water from the business park, is city property. In the analogy given earlier, the cougar is in fact captured by the city and released onto neighboring properties. Furthermore, the cougar is poisoned because the landfill leaks into the pond. Utilities says the pond is operating according to industrial standards, the measurement standard for business parks. Thus industrial standard water is being allowed to flow into what is being called an entire wetland complex. The city, an NPDES permit holder, is dumping NPDES stormwater into a private lake and onto private lawns; it is not legal to pass NPDES stormwater on to anyone except for another NPDES permit holder. The ordinary high water mark for Phantom Lake should be set at 260.7 feet for both the shoreline overlay district and the setbacks. The issue of docks on Phantom Lake still needs to be addressed because the idea of a four-foot walkway that goes to no platform and is floating because a pile driver cannot be brought in is not practical. The rise in lake level is not related to natural events, it is directly tied to the construction of buildings in Eastgate. The outflow channel was kept free and clear all winter and yet it still could not keep up with the inflow. Even with maximum maintenance, the outflow channel will not be able to handle the load. The city is requiring SEPA and clearing and grading permits in order to do any work in the outlet channel, which are costly.

Mr. Dallas Evans, 2254 West Lake Sammamish Parkway SE, said the 100-year flood plain elevation on Lake Sammamish is 32.5 feet. In the last 20 years or so the highest the lake level has risen is about 33 feet. It would take some very large swells to get the water up that high.

## 10. APPROVAL OF MINUTES

### A. March 14, 2012

Commissioner Tebelius referred to the remarks made by Ms. Louise Park under Petitions and Communications on page 1 of the minutes and suggested adding a comma after “2011” in the first sentence and rewording the balance of the sentence and the paragraph to read “Along with some other businesses that have been operating for two years, there have been some zoning issues encountered. She said they have been working with staff for the past few months trying to resolve the issues. They have also worked with land use consultant Robert Thorpe and land use attorney Charles Klinge. What is needed is a textual code amendment so the use can fit into the code so the business can be kept open.” She asked staff to reword the second sentence of the following paragraph as well so that it is clearer.

Commissioner Tebelius asked if either Mr. or Mrs. Park made any specific request of the Commission that the minutes do not reflect. Mr. Inghram said they did not. He said they indicated there is a problem and said a code amendment is needed, but they did not specifically request the Commission to do anything about it.

Commissioner Tebelius called attention to the testimony of Ms. Irene Leggate on page 2 of the minutes and asked if Ms. Leggate clarified in any way what she meant by “...things have changed...” Mr. Inghram commented that people often say things expecting their listeners to understand their meaning. He said in drafting the minutes staff avoids putting words in the mouths of those who address the Commission.

Commissioner Ferris said he understood Ms. Leggate to be referring to the fact that the

neighborhood has gentrified, but she did not actually say that.

Commissioner Sheffels urged caution in editing other people's comments. She said Commissioners should look at their own comments in the minutes and offer any corrections that are needed, but no assumptions should be made about what others said.

Commissioner Tebelius referred to the motion to approve the agenda on page 3 of the minutes and asked to have the paragraph reworded to read "A motion to approve the agenda was made by Commissioner Tebelius. Second was by Commissioner Hamlin and the motion carried unanimously."

Commissioner Sheffels pointed out that no motion is needed to approve the agenda; in the past it has always been approved by consensus.

A motion to approve the minutes as amended was made by Commissioner Tebelius. Second was by Commissioner Laing and the motion carried without dissent; Chair Turner abstained from voting.

## 11. NEXT PLANNING COMMISSION MEETING

### A. April 25, 2012

Mr. Inghram informed the Commission that staff has some homework to do relative to meeting with different property owner groups. He said there are issues regarding schedule and process to be discussed, but they could be addressed via email in lieu of having a meeting.

Commissioner Ferris noted that the last time the public wanted 45 days between the time the draft was issued and the public hearing in which to review the issues. Adding that to the notice for the public hearing and the time it takes to consolidate the public comments can mean three or four months is needed to work through the cycle once the draft is completed.

Chair Turner suggested that incorporating some of the stakeholders into the review process could lead to an assessment of whether or not a second public hearing will be necessary.

Commissioner Sheffels said some time could be saved by allowing the public extra time to comment on specific issues. That could obviate the need for a second public hearing. Commissioner Hamlin said his only concern with that approach lies in the fact that there are only seven more meeting dates before the end of the summer. Mr. Inghram allowed that there are ways to have some nontraditional conversations with people as opposed to a formal public comment period, and that certainly could be incorporated into the schedule. There are legal assessments to be made to determine if a second public hearing will be required or not, but there is also the question of whether or not the public feels a second public hearing is necessary.

Mr. Inghram said staff had no other items prepped and ready for discussion on April 25. He reviewed with the Commissioners the list of items slated to be on upcoming agendas.

Mr. Inghram said the planning short course could be scheduled for the evening of April 25 if a regular Commission meeting was not called. He also said the Council recently had a person come and talk about facilitation training and there could be some benefit to designing a training session for all of the city's boards and commissions along those lines.

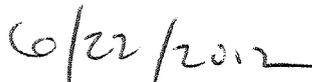
Mr. Inghram noted that approval of the Council will be needed before moving toward the development of any formal group to focus specifically on Phantom Lake issues. Chair Turner and Commissioners Hamlin and Tebelius indicated their interest in participating.

12. ADJOURN

Chair Turner adjourned the meeting at 10:23 p.m.



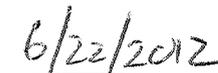
Paul Inghram  
Staff to the Planning Commission



Date



Kevin Turner  
Chair of the Planning Commission



Date