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## SHORELINE MASTER PROGRAM – DOES IT REMOVE UNCERTAINTY OR INCREASE IT?

As you may or may not be aware, the County Council has recently adopted updates to the Shoreline Master Program (SMP), with the new regulations effective on October 30, 2017. Although the new regulations apply to all shoreline development, the focus of this article will be on regulations related to residential development in the County.

I recently had the pleasure of processing a waterfront transaction where my clients had numerous questions about what they could change on the property to make the home suitable to them. We were able to process a Residential Pre Application (RPA) at the County and obtain the answers to my client's questions. It was a very positive experience if you don't take into consideration the added expense. Some of the questions and issues that we had and what I learned are listed below:

### **Non-Conforming:**

If the development (typically a single-family residence and/or associated accessory buildings) on the property are closer to the top of bank or ordinary high water mark than allowed by current regulations, the structure(s) are considered "non-conforming". Generally the current regulation is 100 feet. Another common condition that creates non-conformity is if the width of the structure(s) occupies more than 50% of the lot width at the seaward face of the structure(s). Setbacks and lot width coverage regulations have enough variation depending on the individual parcel that assessment is needed on a case-by-case basis. There are additional conditions that can relegate structure(s) and/or use(s) to a non-conforming status, but the 2 listed above are the most common.

If the property has structures that are non-conforming, then proposed new development, expansion and/or repairs, the following steps are necessary:

The structure may be moved, replaced, redeveloped, expanded or otherwise modified on the same parcel provided this work is consistent with the provisions listed below:

The application must demonstrate that the proposed action will not:

1. Result in a net loss of shoreline ecological functions;

2. Increase adverse impacts on the shoreline critical areas;
3. Create a new non-conformance or increase the degree of inconsistency with provisions of this SMP; or
4. Results in hazard to people or property.

In order to demonstrate no net loss of shoreline ecological functions, the application must provide an analysis that addresses any:

- A. Increase in the quantity of pollutants from the site;
- B. Increase in the quantity of surface runoff from the site;
- C. Decrease in trees and other vegetation within buffers and tree protection zones;
- D. Decrease in the stability of the site and other properties; and
- E. Changes to the transport of sediment to and within nearshore areas.

I confirmed that each analysis report prepared to demonstrate compliance would have a validity period of around 5 years unless regulations change. As my clients plan to make the improvements to the property within the next 3 years, the studies and reporting they had done when contemplating their purchase will carry over to their permit application.

In this situation the property was developed starting in the 1970s thru 1980. The 1,974 square foot main home is considered non-conforming due to the proximity to the shoreline. The property was also improved with a small guest home and a single use dock.

If the home had been conforming, then most of the steps listed below would not have been required. As the shoreline rules have become more restrictive over time, a good portion of shoreline houses are non-conforming, so the processes described below would be common for owners wanting to remodel or expand an existing shoreline residence.

As an agent, if a client is considering a property purchase that may be subject to these regulations, I would highly recommend this research be done as part of a feasibility study, prior to closing. The risk is too great to acquire the property and hope for the best.

#### **The Feasibility Contingencies:**

As part of the standard real estate transaction the buyers hired a home inspector to determine if the present condition of the home was suitable to them. The cost of the home inspection was \$595.

We then processed a Residential Pre Application (RPA) with a local land use consultant and he submitted it to the County within a few days. Since the property was located on San Juan Island, the County was able to schedule their site visit and complete their report in a very timely manner. Properties on other islands require additional travel by staff and would take a little bit longer.

The written RPA report issued by the County is valid until the next Critical Areas Ordinance or Shoreline Master Program update which is estimated for about 5 years from now. Once the RPA was submitted to San Juan County, a site visit was conducted and a written response to the project specific questions we submitted was provided. Additionally the report provided general information about setbacks, critical areas, and other regulations. It is important to note that the RPA is not a permit and does not vest the project: only a permit will do that. The cost of the RPA including the County fees was \$2,000.

We confirmed that, **subject to the formal permit process**, it may be possible to increase the size of the main house to allow for an additional bedroom. The home was 1,974 square feet and had one bedroom and a den. With the new regulations, we no longer have a limit on increasing the size of an existing non-conforming residence. Prior there was a 25% increase limitation formula. Now the size of allowable expansion is based on the compliance with regulations 1-4 and subsections A-E referenced above.

We confirmed that the small, existing guest house may be increased in size by adding additional space above as a second story and/or to the back of the dwelling away from the shoreline. In no event could we increase towards the shoreline or increase the size of that structure more than 1,000 square feet unless we removed the range in the kitchen and changed the use from guest house (ADU) to a bunkhouse or studio. My clients were advised it would never be possible to expand closer to the shoreline in the beginning of their research and the RPA report confirmed this.

We confirmed that a garage with living space above could be constructed on the site on the back of the lot, located beyond the tree protection zones. (110 feet from Ordinary High Water Mark - OHWM.) The garage living space may not have a kitchen.

When considering expansion that involves additional bedrooms, the size of the septic system dictates the maximum number of permitted bedrooms on the site. Subject to soil conditions, some systems may be expanded to accommodate additional future bedrooms.

Next, we hired an archaeologist to inspect the site and issue a report on the property as it was revealed that the property is located within an archeological buffer and had an area containing archaeologically sensitive materials. The firm dug several test pits and confirmed that a portion of the property on the shoreline edge contained sensitive material however; no sensitive materials were located near the proposed expansion sites for the remodel or new construction. The report was sent to the State, County and local Tribes for their review and comments. The local Tribe recommended that the construction crew be trained and provided an Inadvertent Discovery Plan (IDP) that was very workable. This plan is provided by our County at no charge. The cost of the archaeologist investigation and report was \$3,000.

We hired a surveyor to locate all of the property boundaries and corners stakes and confirm that no structures encroached on to this property, or from our property on to adjacent properties. The cost of the survey was \$2,800. Additional work will be needed to survey the exact location of the existing and proposed buildings to create a plot plan for the actual permit application submission.

A substantial portion of shoreline parcels may be located in or near a flood zone. If that situation occurs, prior to development, the owner's would need to hire a licensed surveyor to determine the base flood elevation (BFE) for the home and if applicable, process a Letter of Map Amendment (LOMA) so that flood insurance could be waived. The cost of the investigation and preparation/submittal of the LOMA would run around **\$2,200**.

We hired an inspector to inspect the septic system and confirm that the maintenance components were in place and pump the system tank. The cost was **\$221** for the inspection and **\$1,000** for the pumping.

We hired the well drilling firm to take samples of the well water and send them to the Mt Vernon laboratories for testing. As the home had been vacant for a while the first bacteria test failed and the system required a flush. The cost for water testing and analysis of the well was around **\$400**.

We hired a Geomorphologist (earth & environmental sciences manager) to process a biological assessment to support the regulatory requirement demonstrating the proposed development results in no net loss of shoreline ecological function. They conducted a study of the property and proposed mitigation recommendations for the proposed construction to insure no net loss. The cost of the study was **\$3,000**.

This site's protection/mitigation recommendations include a storm water management plan, adding gutters to the building(s), site drainage control, and possible revegetation of native shrubs and trees. As we have a newer Advantex™ septic system, no upgrades were required to insure the quantity of pollutants related to septic waste did not increase. Our land use consultant will be able to prepare the storm water management plan and the typical cost is in the range of **\$1,200-\$1,600**. Due to the age of the home, no gutters had been installed originally so the cost of those will be incorporated into the future remodel budget.

The property also contains an older boat dock. No permits were found for the dock, however it was originally constructed sometime in 1960, before the County planning department and SMP existed. The present condition of the dock will require eventual repairs. Normal maintenance and repair of an existing dock is exempt from shoreline substantial development permit requirements and as a result, the dock can be maintained and repaired or replaced, subject to the conditions in the SMP regulations. The County confirmed this in the RPA report; however, we must comply with the design requirement for grating on the walking surfaces. In order to repair the dock, we will apply for the shoreline exemption "permit" and hire a professional to make repairs compliant to current design. The cost of a shoreline exemption will be **\$1,200** in this case.

The owners may need to hire a marine biologist to complete the biological assessment required to accompany the shoreline exemption application that confirms no increase in adverse impacts on the shoreline critical areas. This should be easily met, as the plan is to only replace the float and not try to increase the size of the dock or alter pilings. In our case, we can combine this study with the one that

addresses no net loss to the shoreline ecological functions for the proposed new building construction and additions, so no additional costs. If this were a standalone assessment for the dock repair or replacement, the cost would be around **\$3,000**.

I found the entire experience very positive. I was able to arrange the answers for my clients with island professionals and County employees. One downside of a standard escrow term of 45 to 60 days is that it is not reasonable to obtain the various reports needed to address client concerns during their feasibility contingency period. In this case, and likely common to other properties, we phased in the professional studies and reports as the results of a previous study had an impact on the next. The next professional was hired only after the last one confirmed we were still able to move forward with the original design ideas. If a client had ordered all of the reports immediately, the time frames may have been met, however; if an increase to the structure had not been allowed, the need for the archeologist or biologist would not have been necessary. In most transactions I believe the professionals will be hired in phases. I would recommend that buyers, sellers and their agents allow for at least 90 days to process this type of complicated transaction so that the service providers and County employees are not under as much pressure.

To expedite the process, a few of the studies could be processed by the seller at their expense prior to marketing the property. I can recommend archaeology, flood insurance determination (BFE) with LOMA if possible, and geological hazard study, as these are standard. The seller must check with a land use consultant or the County prior to ordering any of these reports to make sure they will be required. A seller would be unable to process the study that confirms no net loss to the shoreline ecological functions as it not possible to predict if and what the buyer intends to change to the improvements.

If the lot were unimproved, having the seller arrange for an RPA for a buyer would be beneficial if it was submitted and approved based on maximum capacity. If the buyer elects, they can always reduce the building size.

A client could be spending upwards of **\$15,000-\$20,000** as part of their feasibility study, including standard transaction expenses. If the transaction fails due to any one of the property issues or due to a buyer's contingency such as financing, the buyer is left with **\$15,000** in reports that are worthless to them. The costs above total **\$20,000** but some expenses in this transaction were deferred until after closing.

The process was very informative and the cooperation from the County employees was very helpful. However, I can state that the new regulations have made construction in the shoreline cost more and take longer. It is not a process for those that are easily frustrated. I think the process should be good for all involved; humans and the environment but I make that statement with a slight hesitation, as I have had only one transaction endure this process since the new regulation effective date.

Each waterfront parcel is unique. The conditions found on this site contain some, but not all, of the regulatory hurdles you may encounter. As an example, some areas of the shoreline have been identified

as geologically hazardous, thereby requiring a geotechnical investigation. While not every waterfront parcel will have all of these issues, they need to be evaluated to ascertain the extent and nature of regulatory burdens and issues. The purpose of this article was to share the insight gained about the process, including the most common events and expenses.

If you would like the contact information for the land use consultant, the surveyor, the well purveyor, the septic inspector, the home inspector, the general contractors for the remodel, the archaeologist, the marine biologist and/or the geologist/hydrogeologist), be sure to contact me.

So here is my standard disclosure: This article is for informational purposes only and not intended to be all inclusive of everything you should know about remodeling, repairing or expanding a non-conforming waterfront property in San Juan County.

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