

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

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| <p>AGENDA TITLE: Proposed Critical Areas Ordinance No. 398 Updating Critical Areas Regulations, Phase II</p> <p>DEPARTMENT: Planning and Development Services</p> <p>PRESENTED BY: Joseph W. Tovar, FAICP, Director Matthew Torpey, Planner II</p> |
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PROBLEM/ISSUE STATEMENT:

On February 13, 2006 the Shoreline City Council heard public comment related to all documents, amendments and comments received since October 24, 2005. At this meeting the public hearing was closed by a vote of Council, however, no deliberations regarding the ordinance have taken place. At this point in the critical areas ordinance update process it is appropriate to hold deliberations on the proposed update and any proposed amendments to the Planning Commission recommended draft.

Attached to the staff report are proposed amendments from Deputy Mayor Fimia and Councilmember Way and Councilmember Gustafson. Additionally, two staff proposed amendments are included as well. The final attachment to the staff report is a brief analysis of each of the proposed amendments that considers staff's ability to administer the proposed code amendments if they are adopted.

As the Council deliberations and decision making runs its course, should the Council choose to make amendments to the Planning Commission recommended draft, staff will make the proper adjustments to the code language and bring Ordinance 398 back before the Council for final adoption in early March.

FINANCIAL IMPACT:

The Washington State Department of Community, Trade and Economic Development awarded the City of Shoreline a grant of \$42,000 to update the Development Code, environmental procedures, and regulations. City of Shoreline staff and consultants have provided the attached draft critical area code update while keeping expenditures within granted amount.

RECOMMENDATION

The Planning Commission recommends that Council approve Ordinance No. 398.

ATTACHMENTS

- Attachment A: Councilmember Fimia's Proposed Amendment
- Attachment B: Councilmember Way's Proposed Amendments
- Attachment C: Councilmember Gustafson's Proposed Amendments
- Attachment D: Staff Proposed Amendments
- Attachment E: Staff Analysis of the Proposed Amendments

Approved By: City Manager  City Attorney __

Deputy Mayor Fimia's Proposed Critical Area Ordinance
Amendments for Consideration at the February 27, 2006 City
Council Meeting

- **20.80.085 Pesticides, Herbicides and Fertilizers on City Owned Property
(New Section)**

Pesticides, herbicides and fertilizers which have been identified by state or federal agencies as harmful to humans, wildlife, fish, shall not be used in a city-owned riparian corridor, shoreline habitat or its buffer, wetland or its buffer, except as allowed by the Director for the following circumstances:

1. When the Director determines that an emergency situation exists where there is a serious threat to public safety, health, or the environment and that an otherwise prohibited application must be used as a last resort.
2. Compost may be used for native plant revegetation projects in any location.

Councilmember Janet Way's Proposed Critical Area Ordinance
Amendments for Consideration at the February 27, 2006 City Council
Meeting

- **20.80.030(L) –Partial Exemptions**

L. When it can be demonstrated that there will be no adverse affect, the following activities may be allowed within critical areas and their buffers: educational activities, scientific research, and outdoor recreational activities, including but not limited to interpretive field trips, bird watching, public beach access including water recreation related activities, ~~and the use of existing trails for horseback riding~~, bicycling and hiking, that will not have an adverse effect on the critical area;

- **20.80.030(P) – Partial Exemptions**

P. Mitigation projects related to utilites construction in critical areas or their buffers.

- **20.80.050 Notice to Title**

Do not adopt Planning Commissions Recommendations for SMC
20.80.050(A)

- **20.80.080(F)- Alterations or development of critical areas- standards and criteria.**

F. Monitoring, measuring and reporting the impact to the Planning Director and taking the appropriate corrective measures.

- **20.80.470- Streams**

A. "Type I streams" are those streams identified as "Shorelines of the State" under the City Shoreline Master Program.

B. "Type II streams" are those ~~natural~~ streams that are ~~not Type I streams and are either perennial or intermittent~~ and have salmonid fish use and ~~have one of the following characteristics:~~ and have one of the following characteristics:

1. Salmonid fish use;
2. Demonstrated salmonid habitat value as determined by a qualified professional
3. Significant recreational value.

C. "Type III Streams" are those streams with perennial (year round) or intermittent flow with channel width of two feet or more taken at the ordinary high water mark and are not used by salmonid fish and have no potential to be used by salmonid fish.

D. "Type IV streams" are those streams and natural drainage swales with perennial or intermittent flow with channel width less than two feet taken at the ordinary high water mark that are not used by salmonid fish.

- **20.80.480(H) – Restoring Piped Watercourses**

- 1. The city encourages the opening of previously channelized/culverted streams and the rehabilitation and restoration of streams both on public property or when a property owner is a proponent in conjunction with a new development.

2. When piped watercourse sections are restored, a protective buffer shall be required of the stream section. The buffer distance shall be based on an approved restoration plan, regardless of stream classification, and shall be a minimum of 10 to 25 feet at the discretion of the director to allow for restoration and maintenance. The stream and buffer area shall include habitat improvements and measures to prevent erosion, landslide and water quality impacts. Opened channels shall be designed to support fish access, unless determine to be unfeasible by the City.

Councilmember Rich Gustafson's Proposed Critical Area Ordinance
Amendments for Consideration at the February 27, 2006 City Council
Meeting

- **SMC 20.80.470 Classification**

F. For the purposes of this section, "salmonid fish use" and "used by salmonid fish" is presumed for:

1. Streams where naturally recurring use by salmonid populations has been documented by a government agency;
2. Streams that are fish passable or have the potential to be fish passable by salmonid populations from Lake Washington or Puget Sound, as determined by a qualified professional based on review of stream flow, gradient and barriers and criteria for fish passability established by the Washington Department of Fish and Wildlife; and

- **SMC 20.80.330(F) Required Buffer Areas (Wetlands)**

F. Wetland buffer widths may be modified by averaging buffer widths as set forth herein. Buffer width averaging shall be allowed only where the applicant demonstrates to the City:

1. The ecological structure and function of the buffer after averaging is equivalent to or greater than the structure and function before averaging;
2. That the total area contained within the buffer after averaging is no less than that contained within the standard buffer prior to averaging.
3. Buffer averaging will not result in a buffer width being reduced by more than 25 percent of the required buffer as set forth in Table 20.80.330B and in no case may the buffer be less than the stated minimum width.

4. A habitat survey shall be conducted within the area of concern in order to identify and prioritize highly functional fish and wildlife habitat within the study area.

The City may require buffer averaging to be designed to protect areas of greater sensitivity and function based on the recommendations of a wetland report prepared by a qualified professional.

- **SMC 20.80.480 Required Buffer Areas (Streams)**

- F. Stream buffer widths may be modified by averaging buffer widths as set forth herein. Buffer width averaging shall be allowed only where the applicant demonstrates to the City:

1. The ecological structure and function of the buffer after averaging is equivalent to or greater than the structure and function before averaging;
2. That the total area contained within the buffer after averaging is no less than that contained within the standard buffer prior to averaging.
3. Buffer averaging shall not result in the buffer width being reduced by more than 25 percent of the required buffer as set forth in the table in subsection B of this section and in no case may the buffer be less than in the stated minimum width.

4. A habitat survey shall be conducted within the area of concern in order to identify and prioritize highly functional fish and wildlife habitat within the study area.

The City may require buffer averaging to be designed to protect areas of greater sensitivity and function based on the recommendations of a stream report prepared by a qualified professional.



Memorandum

DATE: January 31, 2006

TO: City of Shoreline Councilmembers

FROM: Matt Torpey, Planner II

RE: Staff recommended amendments to the Draft Critical Areas Ordinance

The current draft version of the CAO contains a clerical error that should be corrected as well as one code section that requires removal as a result of a recently adopted State law. Planning and Development Staff recommends that the Council amend the code to include the following changes.

1. Remove the word "open" from SMC 20.80.460(A). This will make it consistent with the draft version of the definition of "Stream" in SMC 20.20.046(S).
2. Staff has been notified by Community Trade and Economic Development that inclusion of language that dictates where mobile homes may and may not be placed within the City of Shoreline is no longer legal per Senate Bill 6593 adopted in the 2004 legislative session. Staff recommends removal of SMC 20.80.380(H).

Staff Analysis of Potential Administrative Issues Related to Proposed CAO Amendments

The bulleted zoning code sections below use ~~strikethrough~~ and underlining to show how the Planning Commission proposed language would be deleted or added, respectively, by the amendments offered by Councilmembers Fimia, Gustafson or Way. These are followed by a brief staff comment or analysis where appropriate.

- **20.80.030(L) –Partial Exemptions**

- L. When it can be demonstrated that there will be no adverse affect, the following activities may be allowed within critical areas and their buffers: educational activities, scientific research, and outdoor recreational activities, including but not limited to interpretive field trips, bird watching, public beach access including water recreation related activities, ~~and the use of existing trails for horseback riding,~~ bicycling and hiking, that will not have an adverse effect on the critical area;

The staff believes that, as drafted, this amendment is problematic. However, the problem we see can be fixed fairly easily.

Our concern is that the use of the word “no” is absolute. If *any* human activity occurs in a critical area or its buffer it is difficult to imagine that there would be absolutely *no* adverse effect (i.e., impact), however minor. If Council wishes to use this phrase, staff would advise adding a qualifying word like “no **undue** adverse effect. While this addition would require the staff to exercise some judgment in evaluating the potential effect of such activities, the omission of such a qualifier would likely result in the staff having to prohibit them. This did not appear to be the intent of the maker of the amendment.

- **20.80.030(P) – Partial Exemptions**

- P. Mitigation projects related to utilites construction in critical areas or their buffers.

Staff does not anticipate any administrative issues if this amendment is adopted.

- **20.80.050 Notice to Title**

- Do not adopt Planning Commissions Recommendations for SMC 20.80.050(A)

The proposed amendment is very problematic, and staff urges the Council not to adopt the amendment (i.e., we recommend that you do adopt the Planning Commission recommendation on this point). As the code now reads, this section requires that property owners place critical areas into separate tracts whenever a permit is requested. In many cases, this could result in the creation of a non-conforming lot and arguably constitute an illegal taking of private property without compensation.

For example, if an property owner with a stream in his back yard came in for a simple deck permit, the code as it is currently written would require the applicant to place a portion of their lot into a separate tract, dedicate it to a land trust, or place it in an easement. All of these options would result in a loss of property to the applicant. It is definitely a deterrent for any citizen to legally seek a construction permit. The Planning Commission's recommended language cures this problem, and staff would recommend it.

- **20.80.080(F)- Alterations or development of critical areas- standards and criteria.**
Monitoring, measuring and reporting the impact to the Planning Director and taking the appropriate corrective measures.

Staff does not anticipate any administrative issues if this amendment is adopted.

- **20.80.085 Pesticides, Herbicides and Fertilizers on City Owned Property (New Section)**

Pesticides, herbicides and fertilizers which have been identified by state or federal agencies as harmful to humans, wildlife, fish, shall not be used in a city-owned riparian corridor, shoreline habitat or its buffer, wetland or its buffer, except as allowed by the Director for the following circumstances:

1. When the Director determines that an emergency situation exists where there is a serious threat to public safety, health, or the environment and that an otherwise prohibited application must be used as a last resort.
2. Compost may be used for native plant revegetation projects in any location.

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2. That the total area contained within the buffer after averaging is no less than that contained within the standard buffer prior to averaging.
3. Buffer averaging will not result in a buffer width being reduced by more than 25 percent of the required buffer as set forth in Table 20.80.330B and in no case may the buffer be less than than the stated minimum width.

4. A habitat survey shall be conducted within the area of concern in order to identify and prioritize highly functional fish and wildlife habitat within the study area.

The City may require buffer averaging to be designed to protect areas of greater sensitivity and function based on the recommendations of a wetland report prepared by a qualified professional.

Staff does not anticipate any administrative issues if this amendment is adopted.

- **20.80.470- Streams**

A. "Type I streams" are those streams identified as "Shorelines of the State" under the City Shoreline Master Program.

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1. Salmonid fish use;
2. Demonstrated salmonid habitat value as determined by a qualified professional
3. Significant recreational value.

C. "Type III Streams" are those streams with perennial (year round) or intermittent flow with channel width of two feet or more taken at the ordinary high water mark and are not used by salmonid fish and have ~~no potential to be used by salmonid fish.~~

D. "Type IV streams" are those streams and ~~natural drainage swales~~ with perennial or intermittent flow with channel width less than two feet taken at the ordinary high water mark that are not used by salmonid fish.

The adoption of this amendment would revert the typing of streams back to the same code language that we have today with one small change. Under Type II streams, section B-2 previously read "potential for salmonid use" and is now changed to "Demonstrated salmonid habitat value as determined by a qualified professional." Although "potential for salmonid use" and the "habitat value" are not the same, administration of the code section will not change.

The problem with this in the past has been that for most applications, "qualified professionals" do not agree what constitutes potential salmonid use, or similarly what is good habitat value, it comes down to a value judgement. The Planning Commission's recommended version would require hard science, or documented evidence of the use by fish, or a plan to make a stream area usable by fish.

A second concern we have with this amendment is continued use of “significant recreational value” as a criteria for heightened protection of a critical area. Recall that the purpose of designating critical areas is to protect their ecosystem function and values. While protecting such areas will also create open space, and potentially recreational, amenities, such values must be the byproduct of critical areas protections, not the reason for them. While this is language in the original code text, it is staff’s assesment that such a criterion would not be legally supportable on appeal.

- **SMC 20.80.470 Classification**

F. For the purposes of this section, “salmonid fish use” and “used by salmonid fish” is presumed for:

1. Streams where naturally recuring use by salmonid populations has been documented by a government agency;
2. Streams that are fish passable or have the potential to be fish passable by salmonid populations from Lake Washington or Puget Sound, as determined by a qualified professional based on review of stream flow, gradient and barriers and criteria for fish passability established by the Washington Department of Fish and Wildlife; and

Staff does not anticipate any administrative issues if this amendment is adopted.

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2. When piped watercourse sections are restored, a protective buffer shall be required of the stream section. The buffer distance shall be based on an approved restoration plan, regardless of stream classification, and shall be a minimum of 10 to 25 feet at the discretion of the director to allow for restoration and maintenance. The stream and buffer area shall include habitat improvements and measures to prevent erosion, landslide and water quality impacts. Opened channels shall be designed to support fish access, unless determine to be unfeasible by the City.

It appears likely that increasing the Planning Commission’s recommended minimum buffer for a daylighted stream to 25 feet could act as a dis-incentive to developers or property owners who have a piped water course on their property. Under the proposed regulations, if they left the pipe in the ground, a 10 foot buffer would apply to the pipe. Given that a property developer would already be required to provide professional analysis to support not

instituting a full 25 foot buffer “at the discretion of the director”; staff feels that many applicants would simply choose not to restore piped streams.

- **SMC 20.80.480 Required Buffer Areas (Streams)**

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1. The ecological structure and function of the buffer after averaging is equivalent to or greater than the structure and function before averaging;
2. That the total area contained within the buffer after averaging is no less than that contained within the standard buffer prior to averaging.
3. Buffer averaging shall not result in the buffer width being reduced by more than 25 percent of the required buffer as set forth in the table in subsection B of this section and in no case may the buffer be less than in the stated minimum width.
4. A habitat survey shall be conducted within the area of concern in order to identify and prioritize highly functional fish and wildlife habitat within the study area.

The City may require buffer averaging to be designed to protect areas of greater sensitivity and function based on the recommendations of a stream report prepared by a qualified professional.

Staff does not anticipate any administrative issues if this amendment is adopted.

Mayor Ransom's Proposed Critical Area Ordinance Amendments for Consideration at the February 27, 2006 City Council Meeting

- **20.80.090 Buffer areas.**

The establishment of buffer areas shall be required for all development proposals and activities in or adjacent to critical areas. In all cases, the standard buffer shall apply unless the Director determines that no net loss of functions and values will occur. The purpose of the buffer shall be to protect the integrity, function, value and resource of the subject critical area, and/or to protect life, property and resources from risks associated with development on unstable or critical lands. Buffers shall consist of an undisturbed area of native vegetation established to achieve the purpose of the buffer. If the buffer area has previously been disturbed, it shall be revegetated pursuant to an approved planting plan. Buffers shall be protected during construction by placement of a temporary barricade if determined necessary by the City, on-site notice for construction crews of the presence of the critical area, and implementation of appropriate erosion and sedimentation controls. Restrictive covenants or conservation easements may be required to preserve and protect buffer areas.

- **SMC 20.80.110 Critical Areas Reports (New Section)**

A. The City may require an applicant to provide studies, including information that must be obtained by specific investigations. This provision is not intended to expand or limit an applicant's other obligations under WAC 197-11-100, subject to the following criteria:

1. All costs of preparing the critical areas report and any required supplements shall be borne by the applicant.
2. The Director may, at his discretion, and at the applicant's expense, retain an independent third party review of the applicant's reports, studies and plans.
3. All reports and studies submitted to the City shall be prepared by a qualified professional as defined by section 20.20.042.