Memorandum

DATE: **May 25, 2006**

TO: **Planning Commission**

FROM: **Joseph W. Tovar, FAICP**
Director, Planning and Development Services
Matt Torpey, Planner II

RE: **Proposed Permanent Regulations amending provisions for Hazardous Trees and creating new provisions for Critical Area Stewardship Plans that would enable the limited cutting of trees and other non-hazardous vegetation in critical areas**

I. Planning Commission meetings of May 18 and June 1

The Planning Commission held a public hearing on May 18, 2006 to solicit oral public comment regarding the staff proposed amendments to the Shoreline Municipal Code that would adopt permanent language regarding the hazardous tree code as well as establish a Critical Areas Stewardship Plan. At the May 18 public hearing, 21 citizens provided oral comment. At the end of the meeting, Chair Piro left the hearing open for members of the public who did not comment, or would like to comment on changes to the proposed ordinance. The proposed changes are included in the packet for the June 1 meeting as Attachment A.

At the June 1 meeting it is anticipated that the Commission will take additional public comment and begin deliberation on the staff proposed amendments.

II. Proposed Changes to the Draft Code

Staff received several suggestions that a list of City approved arborists be established and a process formed so that the applicant for an exemption to the hazardous tree regulations would not have to pay two arborists in order to remove a tree. Staff believes that this approach to hazardous tree review is worth considering. The proposed code language is included as Attachment A.

III. Planning Commission Comments and Questions.

1. During deliberations at the May 18 meeting, staff was asked to investigate the definition of “trails”.

The Shoreline Municipal Code (SMC) does contain a definition of trails. Trails are defined as, "any path, track, or right-of-way designed for use by pedestrians, bicycles, or other nonmotorized modes of transportation." This definition is very similar or in some cases identical to the definition of "trails" used by several other jurisdictions in the Puget Sound region. The term "trails" is also used in various sections of the SMC, Comprehensive Plan and Park Master Plan, these sections are outlined in Attachement B.

Rather than redefining "trails", staff has proposed language in the code provisions for trees to give the Director the discretion to determine whether a "trail" is a designated trail for purposes of constituting a "target." In making such determinations, the Director could consult the above-cited definition, as well as any adopted City Comprehensive Plan or Park Master Plan map.

2. How does the *Viking v. Holm* case affect this proposed ordinance?

Included in this packet as Attachment C is a memorandum from Ian Sievers, City Attorney and Joe Tovar, Director of Planning and Development Services which discuss the relevance and effect of prior litigation, including *Viking,* on the City's authority and discretion to craft these regulations.

IV. Public Comment

The Planning and Development Services Department has received a number of additional written comments; these are included as Attachment D. As previously mentioned, the hearing was left open for members of the public who did not comment, or would like to comment on items new to the proposed ordinance.

V. Next Steps

This meeting is a continuation of the public hearing and deliberations from the May 18 hearing. If no additional members of the public choose to speak at this meeting, the Planning Commission may choose to close the hearing and begin deliberations. If deliberations are not concluded by the end of the meeting, the Commission may choose to continue deliberations to another date.

ATTACHMENTS:

#A Proposed Hazardous Tree Regulations
#B Trails Information
#C Memorandum from City Attorney and PADS Director
#D Public Comment Letters

20.50.310.A Exemptions from permit

1. Emergency situations on private property involving danger to life or property or substantial fire hazards.

    a. Statement of Purpose – Retention of significant trees ~~and vegetation~~ is necessary in order to utilize natural systems to control surface water runoff, reduce erosion and associated water quality impacts, reduce the risk of floods and landslides, maintain fish and wildlife habitat and preserve the City's natural, wooded character. Nevertheless, when certain trees become unstable or damaged, they may constitute a hazard requiring cutting in whole or part. Therefore, it is the purpose of this section to provide a reasonable and effective mechanism to minimize the risk to human health and property while preventing needless loss of healthy, significant trees ~~and vegetation~~.

    b. For purposes of this section, "Director" means the Director of the Department of Planning and Development Services and his or her designee.
    c. For purposes of this section, "peer review" means an evaluation performed by a qualified professional retained by and reporting to the Director. The Director may require that the cost of "peer review" be paid by the individual or organization requesting either an exemption or critical areas stewardship plan approval under this section.
    d. In addition to other exemptions of Subchapter 5 of the Development Code, SMC 20.50.290-.370, a permit exemption request for the cutting of any tree or clearing vegetation that is an active and imminent hazard (i.e., an immediate threat to public health and safety) shall be granted if it is evaluated and authorized by the Director under the procedures and criteria set forth in this section.
    e. For trees ~~or vegetation~~ that pose an active and imminent hazard to life or property, such as tree limbs or trunks that are demonstrably cracked, leaning toward overhead utility lines, or are uprooted by flooding, heavy winds or storm events, the Director may verbally authorize immediate abatement by any means necessary.
    f. For hazardous circumstances that are not active and imminent, such as suspected tree rot or diseased trees or less obvious structural wind damage to limbs or trunks, a permit exemption request form must be submitted by the property owner together with a <u>tree evaluation</u> ~~risk assessment~~ form. Both the permit exemption request form and risk assessment form shall be provided by the Director.
    g. The permit exemption request form shall include a grant of permission for the Director and/or his qualified professionals to enter the subject property to evaluate the circumstances. Attached to the permit

exemption request form shall be a risk assessment form that documents the hazard and which must be signed by a certified arborist~~, registered landscape architect,~~ or professional forester.

h. ~~No permit exemption request shall be approved until the Director reviews the submitted forms and conducts a site visit. The Director may direct that a peer review of the request be performed at the applicant's cost, and may require that the subject tree(s) vegetation be cordoned off with yellow warning tape during the review of the request for exemption.~~ The Director shall provide a list of City approved arborists. Persons seeking an exemption under this provision shall choose an arborist from this list. The arborist shall make a professional recommendation as to the level of hazard of the subject tree in accordance with the standards of the International Society of Arboriculture. The final determination of a hazardous tree shall be decided by the Director.

i. Approval to cut or clear vegetation may only be given if the ~~Director~~ City approved arborist concludes that the condition constitutes an actual threat to life or property in homes, private yards, buildings, public or private streets and driveways, sidewalks, ~~recreational trails~~, improved utility corridors, ~~or~~ access for emergency vehicles~~.~~ and any trail as proposed by the property owner and approved by the director for purposes of this section.

j. The ~~Director~~ City approved arborist shall ~~authorize~~ recommend only such alteration to existing trees ~~and vegetation~~ as may be necessary to eliminate the hazard and shall condition the recommendation ~~authorization~~ on means and methods of removal necessary to minimize environmental impacts, including replacement of any significant trees. All work shall be done utilizing hand-held implements only, unless the property owner requests and the Director approves otherwise in writing. The Director may require that all or a portion of cut materials be left on-site.

(The remainder of this section is not proposed to change.)

City of Shoreline Trails Information

From SMC 8.12.010 Definitions.

G. “City of Shoreline open space, trail or park area” means any area under the ownership, management, or control of the city of Shoreline parks, recreation and cultural services department.

M. “Trail” means any path, track, or right-of-way designed for use by pedestrians, bicycles, or other nonmotorized modes of transportation. [Ord. 195 § 1, 1999]

From SMC 8.12.210 Trail use.

A. For the purposes of this section, “travel” shall be construed to include all forms of movement or transportation on a trail, including but not limited to foot, bicycle, horse, skateboard, roller skates and roller blades.

B. Trails are open to all nonmotorized users unless otherwise designated and posted. Trail restrictions may be posted at park entrances, trailheads or, in some cases, on individual trails.

C. Every person traveling on a trail shall obey the instructions of any official traffic control device or trail sign unless otherwise directed.

D. No motorized vehicles shall be allowed on city of Shoreline trails. For the purposes of this section, “motorized vehicles” means any form of transportation powered by an internal combustion or electric motor. This includes but is not limited to motor vehicles, golf carts, mopeds and all terrain vehicles. This section shall not apply to wheelchairs powered by electric motors, or authorized maintenance, police or emergency vehicles. [Ord. 195 § 1, 1999]

From the Comprehensive Plan

T36: Develop an off-street trail system that serves a recreational and transportation
function. Preserve rights-of-way for future non-motorized trail connections, and utilize utility easements for trails when feasible.

GOAL 5 from the Parks Master Plan

Seek to develop a diverse Citywide trail system linking key community elements such as parks, greenways, open spaces, regional trail systems, transportation nodes, neighborhoods, churches, and community businesses.

PR 21: Identify opportunities to develop pedestrian and bicycle connections in and around the City to expand connectivity of community amenities with a specific focus on linking neighborhoods with parks.

PR 22: Develop trail systems within parks and in the Interurban right-of-way focusing on linking these systems with existing, planned and future local and regional trails through coordination with Planning and Public Works and where possible enhancing historic watersheds.
PR 23: Support Transportation efforts to implement the “Green Street” program.

MEMORANDUM

TO: Shoreline Planning Commission

FROM: Ian Sievers, City Attorney
Joe Tovar, Director of Planning and Development Services

SUBJ: Private property rights and the City's critical areas regulations

DATE: May 25, 2006

In commenting on the proposed amendments to the City's regulations regarding hazardous trees and the creation of the Critical Areas Stewardship Plan, several individuals have raised the issue of private property rights. Some of them have cited prior appellate decisions concerning the enforcement of private covenants as well as last summer's Washington State Supreme Court decision in *Viking v. Holm*.

Innis Arden Club Board member Michael Jacobs, Innis Arden resident John Hollinrake, as well as the Club's attorney, Peter Eglick, have argued that these cases stand for the proposition that Shoreline's development regulations are legally obligated to allow for private property owners to exercise their covenanted rights to cut trees for views, even if those trees are located in designated critical areas. See the letters from Peter Eglick, (dated May 8, 2006) and John Hollinrake, (dated May 14, 2006) and hearing testimony by Michael Jacobs (minutes of the Planning Commission's May 18, 2006 public hearing). A number of other Innis Arden residents have given testimony in support of this position (e.g., see email of May 23, 2006 from Pamela Smit).

City staff is well familiar with the litigation cited by Mssrs. Jacobs, Hollinrake, and Eglick, as well as the Innis Arden view covenants, and prior litigation interpreting those covenants. We do dispute the degree of relevance and relative weight that the City is obligated to assign to the Innis Arden view covenants in light of the cited judicial pronouncements and the statutory mandate to the City to protect critical areas (RCW 36.70A.060).

The cited decisions by then-King County Superior Court judge Anne Ellington, court-appointed special masters, and the Court of Appeals involve adjudication of private rights between private parties. Neither the City of Shoreline, nor its regulatory predecessor King County, was named in any of that litigation as a party, nor was any local government directed by the courts to take any action as a result of those view covenant

decisions. As staff has earlier indicated, the City of Shoreline is not a party to the Innis Arden view covenants or cited litigation, did not approve the covenants, is not named in them, does not interpret or enforce them, and is not bound by them. Nor was the City's regulatory predecessor, King County. Nothing in the arguments made by Mssrs. Jacobs, Hollinrake, or Eglick, alters our conclusion.

The City is likewise well aware of the *Viking* decision, as well as the facts in that case. The facts in *Viking* can be easily distinguished from the facts before the Planning Commission here. The covenants under review in *Viking* limit the minimum residential lot sizes to half acre lots (i.e., they are *more* restrictive of private property rights than the city-adopted zoning) – in contrast, the Innis Arden view covenants direct the cutting of trees to protect private views, regardless of whether the trees are in environmentally sensitive areas (i.e., they are *less* restrictive of private property rights than the city-adopted zoning).

Thus, the question before the Court in *Viking* was whether a private covenant can be more restrictive than the local zoning, a question that the Court answered in the affirmative. The Court did not have before it the question of whether a private covenant that is less restrictive than the local zoning (e.g., cutting trees in a critical area for views) somehow binds the local government to alter its GMA mandated protection of critical areas to also be less restrictive.

It is also significant that the Growth Management Act provisions at issue in *Viking* (urban densities) are less directive than the provisions at issue here (the mandate to protect critical areas). Citing law Professor Richard Settle, the court noted "most GMA requirements are conceptual, not definitive and often ambiguous." The goals to *encourage* development within urban areas (RCW 36.70A.020(1)) and to *reduce* conversion of undeveloped land into low-density development (RCW 36.70A.0020(2)) are far less directive than the GMA requirement to ***protect*** critical areas. RCW 36.70A.060 states:

> "(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170…"
> In designating critical areas all jurisdiction shall consider minimum guidelines adopted by the State. RCW 36.70.050.

Underlined emphasis added.

The *Viking* court found that covenants restricting density were not in conflict with pubic policy as set by the Shoreline City Council's balancing of urban density goals with other goals such as protecting private property rights and open space. Since 2000, Shoreline has struck a balance between protecting property rights and protecting the environment. This balance reflects the critical area mandates mentioned above. The stewardship plan proposal now pending is an effort to fine tune this balance by enabling a greater degree of protection of property rights (e.g., view covenants) even in these areas, provided that the applicant can demonstrate that no net loss of critical area functions and values will result.

The Club's own litigation that tested the view covenants against King County's sensitive area ordinances is consistent with our approach that covenants may be more restrictive than critical area protections, but may not frustrate their enforcement. The following portions of the 1992 special master's report in *Innis Arden Club v. Binns* illustrate this relationship:

> "King County stated that some of the trees that the Respondents are concerned with may be in stream buffer areas…Tetlows' lot adjoins a ravine with a stream at its base. The slopes of the ravine are 40% or greater… Based on Exhibits 14,15, and 16, the letter from King county to Tetlow/Moren/McGee dated 6/2/92, as well as the view of the premises, the County's consent to trim trees on Tetlows' lot would be needed."
>
> "The letter of March 13, 1992 from Bottheim of King County to Ness states that a permit to alter vegetation within 50 feet of such a slope would be required and that the only permitted alterations would be removal of diseased or hazard trees, trimming and limbing for view enhancement, trail construction or stream/wetland enhancement. …Consent to trim any trees on the east side of Ness' property should be obtained from King County, should there be a decision to trim the Ness' trees."

To sum up, the staff believes that the Innis Arden Club's representatives have over-stated the effect of prior litigation, including *Viking*, on the City of Shoreline's discretion to adopt development regulations that protect critical areas. The Supreme Court has consistently held that such a decision is within the discretion of the legislative body. "Balancing the GMA's goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies." *Viking* at p. 128. The staff does not believe the current limits on view covenants under the existing critical areas ordinance will deny owners in Innis Arden of reasonable use of their properties, nor do we understand this to be their argument. Moreover, any owner with this claim would have relief available under the critical areas reasonable use permit.

At the same time, however, the staff reiterates its earlier position that the Planning Commission and City Council may take note of the fact of the view covenants, such as those in Innis Arden, and consider them as <u>one factor</u> when crafting development regulations. Thus, the staff believes that the range of the City's discretion includes the ability to consider regulatory tools whereby a property owner could propose limited cutting of trees in critical areas for view purposes, provided that the supplicant can demonstrate that such limited cutting would not result in a net loss of the values and functions of critical areas. Thus, the proposed language for critical areas stewardship plans would create the opportunity for the City to provide some reasonable accommodation of view covenants, adding value back into the covenants, while still meeting its statutory mandate to protect critical areas.

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Due to the large number of pages, all comment letters the City received in regards to hazardous trees regulations and critical areas stewardship plans are being provided to the Planning Commission under separate cover. Comment letters can be viewed online at the City's website: http://www.cityofshoreline.com/cityhall/departments/planning/ordinances/trees.cfm, or in-person in the Planning & Development Services Department: 1110 N. 175th St., Shoreline, Suite 107. Copies are available for a fee. If you have any questions, please contact Jessica Simulcik Smith at 206.546.1508 or jsmith@ci.shoreline.wa.us.