

WHATCOM COUNTY

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Mark Personius, AICP
Director

Memorandum

TO: The Honorable Satpal Sidhu, Whatcom County Executive
The Honorable Whatcom County Council

FROM: Lucas Clark, Planner I

THROUGH: Matt Aamot, Senior Planner

DATE: March 29, 2024

SUBJECT: Docketing Comp Plan & Development Regulation Amendments

Pursuant to state and local law, proposed comprehensive plan and development regulation amendments are docketed for further review by the County Council each year. This year, there are six (6) new applications and a number of previous applications (initiated in past years) on the proposed docket.

New Docket Items Proposed by Staff or Council

Whatcom County has submitted or received new proposals relating to the following topics for consideration of adding to the annual docket of potential comprehensive plan and development regulation amendments in 2024:

- Capital Facilities Planning-move to a seven-year review to align with budget year.
- Whatcom County Code Amendments- allows annual code scrub and other compliance type items as necessary throughout year.
- Permit Review Processing and Timelines-code amendments to comply with SB 5290 starting in 2025.
- Lummi Island Height Limitations-issue raised and request brought to PDS.
- Clean Energy Code Amendments- Council Resolution 2023-044.
- Cannabis Retail in LII within UGA-social equity cannabis license issue raised and request brought to PDS.

Brief descriptions of these proposed amendments are included in the attached draft Exhibit A—Docket.

The Council should determine which of the above proposals to docket for further review. Docketed amendments, as required and appropriate, will be submitted for SEPA review, evaluated by the Planning Department, and go to a public hearing before the Planning Commission prior to returning to the County Council for a final decision. If an amendment is not docketed by Council, it will not go forward.

Completed Items Removed from the Docket

PDS completed review of eight (8) items from last year's docket.

- Zoning Code Density and Lot Size Amendments to Allow Smaller Minimum Lot Sizes and Requiring Minimum Densities.

Status: On 06/20/2023 Council adopted Ordinance #2023-036.

- Allow Propane Reload, Storage, and Distribution Facilities in AG Zone Under Certain Circumstances.

Status: Planning Commission voted to recommend approval on 02/22/24. Scheduled for public hearing and Council decision on April 9, 2024.

- Cherry Point Shoreline Access

Status: This was brought before the Planning Commission on 07/27/23 for review and recommendation. Planning Commission voted to recommend that Council take no action on this issue and remove PLN2022-00005 from the docket. See attached white paper and memo.

- Lake Whatcom Watershed Seasonal Closure Exemption for New Trail Construction

Status: On 2/20/24, Council voted to remove from the Docket.

- Wind Energy System Amendments

Status: On 7/25/23, Council adopted Ordinance #2023-042.

- Sign Regulations Update

Status: This was brought before the Planning Commission on 06/22/2023. Planning Commission voted to recommend that Council take no action on this issue and remove PLN2022-00005 from the docket due to new case law. Minor changes were made to the sign regulations in the annual code scrub at the end of 2023. See attached memo.

- Vacation Rental Regulations

Status: On 07/25/2023 Council adopted Ordinance #2023-041. PDS still awaiting Department of Ecology approval of associated SMP Update amendments and subsequent adoption by County Council before we can move forward with implementation and development of a short-term rental registration system per Council direction.

- Weddings and Special Events

Status: Recommendation made 05/25/2023 to Council Planning and Development Committee. The P&D Committee requested additional time for review. PDS still awaiting direction from the P&D Committee.

Previous Docket Items

In addition to the new proposed docket items, the following projects were docketed for review in previous years. They remain active docket items and are included in the proposed resolution, as review has not been completed:

- 2025 Comprehensive Plan, Development Regulation, and UGA Update

Status: In progress.

- Review/Revise Heavy Impact Industrial (HII) Zone Uses within City UGA

Status: Scheduled for initiation in 2024.

- CIP Update of Capital Facilities and Parks

Status: In progress.

- North Bellingham UGA Expansion (Current Urban Reserve)

Status: Addressed through Comprehensive Plan process.

- Mineral Resource Lands Expansion – Breckenridge Rd.

Status: Addressed through Comprehensive Plan process.

- Mineral Resource Lands – County-wide Designation Process

Status: Addressed through Comprehensive Plan process.

- Code Enforcement Amendments

Status: County Council review anticipated in 2024.

- Agricultural Strategic Plan Implementation

Status: Addressed through Comprehensive Plan process and ongoing.

- Mineral Resource Lands Expansion – North Star Rd.

Status: Addressed through Comprehensive Plan process

Thank you for your consideration of the proposed resolution. We look forward to discussing it with you.

Attachment A:

WHATCOM COUNTY Mark Personius, AICP Planning & Development Services Director
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Memorandum

TO: Planning Commission
FROM: Cliff Strong, Senior Planner
THROUGH: Steve Roberge, Asst. Director
DATE: July 18, 2023
SUBJECT: Discussion and action on docket Item #PLN2022-00005 regarding the provision of public access to the shorelines of Cherry Point

Please review the attached white paper regarding this topic, which contains a recommended action.

Cherry Point Shoreline Access

White Paper, July 18, 2023

Purpose

Council has placed on the 2022 docket item #PLN2022-00005, which reads:

Review and, if necessary, revise County code and the Comprehensive Plan to protect, enhance, and expand public access to shorelines of Cherry Point. The review should include but not be limited to planning to facilitate the development of the Coast Millennium Trail (CMT), land swaps, development mitigation allowances, easements, and land purchases.

This docket item includes several tasks:

- Review and potentially revise CompPlan policies regarding public access, specifically in the Cherry Point Management Area
- Review and potentially revise Whatcom County Code requirements, specifically the requirement(s) for shoreline development to provide public access
- Explore the potential for land swaps easements, and/or land purchases (which is assumed to be for the purpose of providing public access to the beach and/or to facilitate the development of the Coast Millennium Trail)
- Explore what can be done to facilitate the development of the Coast Millennium Trail

This paper, developed by Planning and Development Services with input from Legal and Parks, is intended to explore how this might be accomplished.

Please recognize that there are two ways in which a jurisdiction might obtain public access on private property: through regulatory requirements or through purchase of the property (or an access easement).

Parcel(s) of Interest

The Council has expressed an interest in obtaining public access to properties located at the end of Gulf Road in the Cherry Point Management Area (Figure 1. Vicinity Map), though staff hasn't been provided an exact location or extent of Council's interest. There are three property owners along this stretch of shoreline: Pacific International Holdings, LLC; Cherry Point Industrial Park, LTD; and Alumet Corp./Intalco Aluminum Corp. (Figure 2). From the assessor's map, it appears that Pacific International owns the tidelands on their parcels, but the others do not. There are currently no development proposals on any of these parcels, though Pacific International occasionally uses their properties for off-loading equipment from barges. (See Appendix D: Site Photos.)

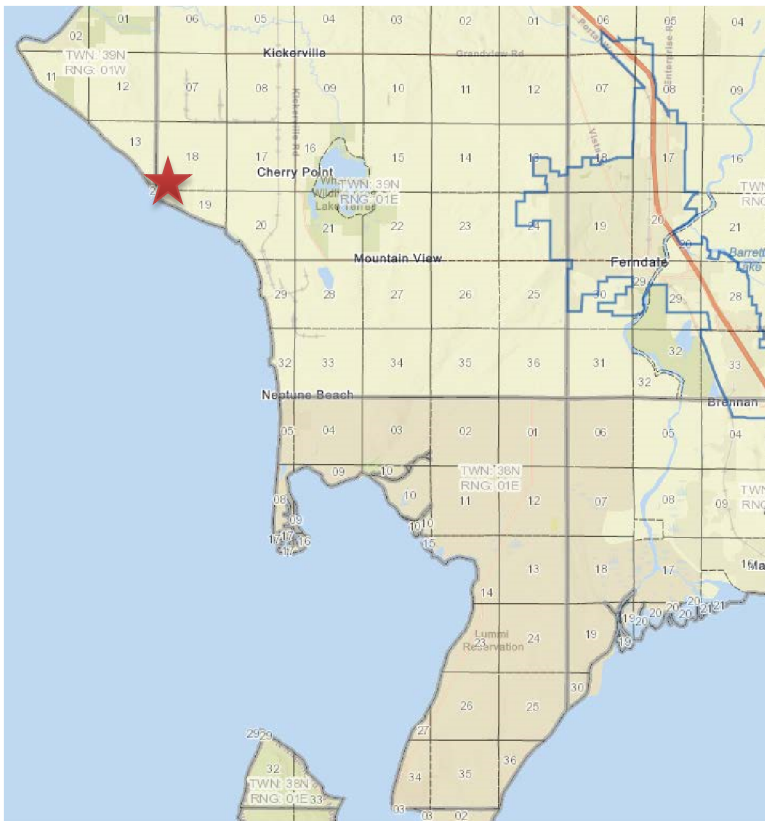


Figure 1. Vicinity Map

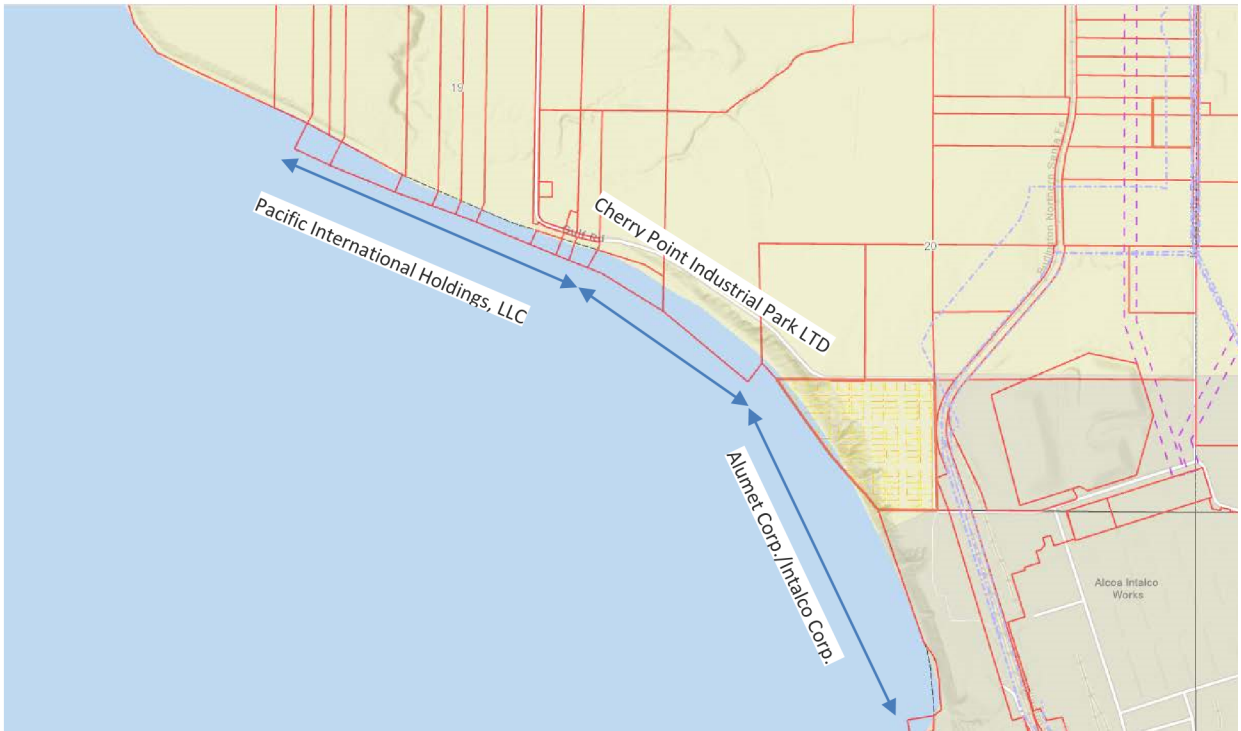


Figure 2. Possible Parcels of Interest

Public Access Legal Issues

State Policy

State policy regarding the use of Washington shorelines prioritizes protection, preservation, and public access/recreation. Private ownership is recognized, but uses are restricted and prioritized. Waterdependent commercial/industrial uses are one of the named priority uses (see Shoreline Management Act (SMA), below).

90.58.020. Legislative findings--State policy enunciated--Use preference

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation...

The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest...

The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) **Increase public access to publicly owned areas of the shorelines;**
- (6) **Increase recreational opportunities for the public in the shoreline;**
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary...

Takings

Whatcom County cannot “take” access from owners. Public access is a goal for publicly owned areas. For private areas, Whatcom County has some limited regulatory authority to require public access to the shoreline. Typically, regulatory public access is achieved through permitting conditions that require such access as mitigation for development. For instance, development that restricts access should mitigate such restriction by providing alternate access. Such mitigation must be proportionate to the impact of the development, or it might constitute a “taking.” The government cannot “take” property without providing compensation. Nor can it force an owner to accept compensation in exchange for access (public shoreline access is not a typical candidate for an eminent domain process, which requires a showing of public necessity).

Access to Privately Owned Tidelands

A private owner may exclude the public from the owner’s privately-owned tidelands. A line of reported Washington cases holds that taking clams from private tidelands constitutes theft (i.e., the land and its resources are not public). The following unreported case states the rule more directly:

We hold that, under existing authority, the public trust doctrine does not allow pedestrian use of private beach property without the owner's permission.¹

¹ *Kellogg v. Harrington*, 149 Wash. App. 1054 (2009). Note that, when covered with water, tidelands are considered “navigable waters,” and the owner may not exclude the public during those times (from boating, wading, swimming, etc.).

Purchase

Whatcom County may bargain with private property owners for access via purchase or exchange. A purchase might be for full ownership (ownership in fee) or for an easement written to allow public access. Owners may voluntarily provide/donate access. Legal issues owners might be concerned about when voluntarily providing access include liability and maintenance. Whatcom County can offer to assume liability and maintenance obligations.

Regulatory Path

One way for jurisdictions to obtain a legal right for public access is to require it be provided as a condition of development. To be on sure footing, the jurisdiction should have their land use policies in order and clear requirements in their code, which Whatcom County does as explained below. Having state law supporting such a requirement is also helpful. On this front, PDS believes Whatcom County is in good shape.

Shoreline Management Act (SMA)

Through the SMA “The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department (Ecology), in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference that:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) **Increase public access to publicly owned areas of the shorelines;** (emphasis added)
- (6) **Increase recreational opportunities for the public in the shoreline;**
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary. (RCW [90.58.020](#))

Thus, one of the primary goals of jurisdictions’ Shoreline Management Programs (SMP) is to increase public access to the shoreline. In Whatcom County, this mandate is achieved through goals, policies, and regulations in our SMP, which is comprised, in part, of portions of our Comprehensive Plan and WCC Title 23 (Shoreline Management).

(Note that in the below references staff is referring to the Comprehensive Plan and Title 23 as approved by Council through our 2020 Periodic Update. However, we are still awaiting Department of Ecology approval of that update. Nonetheless, the goals, policies, and regulations are still relatively the same, though the references may be different than those found in the online versions.)

Comprehensive Plan Goals and Policies

Staff has reviewed the CompPlan goals and policies specific to public access. Though paraphrased for this discussion, a complete, non-paraphrased list of these is found in Appendix A: Pertinent CompPlan Goals & Policies.

One (of 9) of the overall goals of Whatcom County’s Shoreline Management Program is to increase public access to our public shorelines, provided that private rights, public safety, and shoreline ecological functions and processes are protected (Goal 11B.) Under this goal are six policies further describing how this goal is to be achieved (Policies 11B-1 through 11B-6). Particularly germane to achieving docket item PLN2022-00005 are two policies that direct us to “where appropriate, acquire access to publicly owned tidelands and shorelands...” (Policy 11B-3) and “require physical or visual access to shorelines as a condition of approval for shoreline development activities...” (Policy 11B-5) Additional guiding goals and policies can be found under the headings of:

- Recreation (Goal 11C and Policies 11C-1 – 7)
- Shorelines of Statewide Significance (Policies 115-10 and 11)
- General Policies (Policies 11Y-1 – 7)

- Shoreline Use and Modification Policies
 - Industrial and Port Development (Policy 11II-4(b))
 - Cherry Point Management Area (Policy 11JJ-4)
 - Recreation (Policy 11NN-1 – 9)

While each of these goals and policies are different in their details, what they all boil down to is that the County should be ensuring that adequate public access to our public shorelines is provided, commensurate with anticipated growth, through a combination of public investment and private exactions, provided that private property rights, ecosystem functions, and public safety and are protected. It is these goals and policies (along with state law) that form the legal basis for our regulations that require public access be provided by shoreline development (see below). And they should guide how the County operates in terms of our recreation planning and capital investment strategies.

Whatcom County Code Requirements

Based on the CompPlan goals and policies discussed above (in particular, those dealing with how development of the shoreline should be handled), Whatcom County has adopted implementing land use regulations addressing public access. (See Appendix B: Pertinent Code Provisions). Most pertinent to addressing docket item PLN2022-00005 are the general public access regulations (WCC 23.30.060) and use and modification regulations for Industrial and Port Development (WCC 23.40.120) and the Cherry Point Management Area (WCC 23.40.125).

Per WCC 23.30.060, all commercial, industrial, and residential (of more than 4 units) development must provide public access (with a few exceptions). Sections 23.40.120 and 23.40.125 reiterate this requirement for industrial uses and uses within the Cherry Point Management Area. Please note, though, that public access can come in several forms, including both physical and visual access.

Summary of CompPlan and Code Review

The CompPlan and Whatcom County Code already contain adequate goals, policies, and code provisions to address when and how public access must be provided by shoreline development within the confines of state and federal law. Such provisions are only a requirement when someone proposes shoreline development. Public access can be required through the permitting process provided there is a nexus and the requirement is proportional to potential impacts.

Purchase of Property or Easements

Another way to obtain shoreline access would be to purchase or otherwise obtain the property or an easement over it, which is one of the directives in the docket item.

Coast Millennium Trail Plan

In their docket item, Council referenced possible connection to the Coast Millennium Trail (CMT) as a way of obtaining public access to the parcels of interest.

In the late 1990's a lot of energy by multiple jurisdictions and private partnerships was put into the planning and development of the Coast Millennium Trail, extending from Skagit County to White Rock, B.C. Staff has found a January 2000 draft master plan², though we find no record of it being finalized or adopted. Unfortunately, there are no maps or graphics in the draft plan.

The 2008 revision to the Whatcom County Comprehensive Parks, Recreation, and Open Space (CPROS) Plan incorporated recommendations regarding the CMT. Those recommendations have carried through to the most recent CPROS Plan (2016). The CMT is referenced in the following sections of the most recent Whatcom County Parks, Recreation, Open Space Master Plan:

- Page 32 – Reference to WC Comprehensive Plan policy 9C-24 that as regards the CMT, the county should “Continue to develop trail corridors, particularly off-road segments such as the airport connector and shoreline access”

² https://wcog.org/wp-content/uploads/2012/10/cmt_plan.pdf

- Page 58 – Parks should “acquire public trail easements/trailheads for the Bay to Baker, Nooksack, Nooksack Loop, and Coast Millennium Trails”
- Page 59 – As resources permit, parks should “... assist communities, districts and local efforts to acquire and develop” trail corridors including the Coast Millennium Trail.
- Page 64 – using funding from certain existing and recommended sources, “County Council may acquire, develop, maintain, and operate regionally-significant trail systems indicated within this plan on a countywide basis. Where appropriate, monies will be allocated to and/or combined with monies provided by the Port, cities, park and recreation districts, state agencies, and non-profit organizations for regionally significant projects” including the CMT.

At present, there are a few existing segments of trail that are or could be incorporated into the CMT. In the broader area around the parcels of interest these include existing share-used paths at Semiahmoo, the recently completed Berm in Birch Bay, and recently completed bike lanes along Marine Drive at the edge of the City of Bellingham. Figure 3, below, shows the potential conceptual routing of the CMT as identified in the 2000 CMT master plan. This proposed routing is adjusted to reflect the potential for the route to incorporate an existing trail on BP property as noted on the map. It should be emphasized that the routing shown on this map is entirely conceptual as no conversations have been held or are ongoing with potential landowners in this area.

In keeping with the recommendation of the 2016 CPROS plan, it is appropriate to envision alternate routing for the CMT in this area, including through the subject parcels. Given there is no active development proposal for the subject parcels, purchase of easements or outright acquisition of parcels would be the remaining option, for which it would need to be budgeted. Consideration of such opportunities would need to be considered in light of other priority trail corridors identified in the CPROS plan and in consideration of other acquisition opportunities in the area.

Recommendation

The CMT and access are not currently on the CIP or funded for acquisition. One option is to revise the CPROS Plan and budget to prioritize and fund acquisition and/or development of access.

The alternative is to wait for the property owners to apply for a development permit, at which time PDS can require that public access be provided, though it will need to be proportionate to the impact of the development. Our Shoreline Management Program contains the necessary policies and code to require public access to the shoreline, so amendments to the code are not necessary.

Planning and Development Services recommends that Council remove PLN2022-00005 from the docket with no action taken.

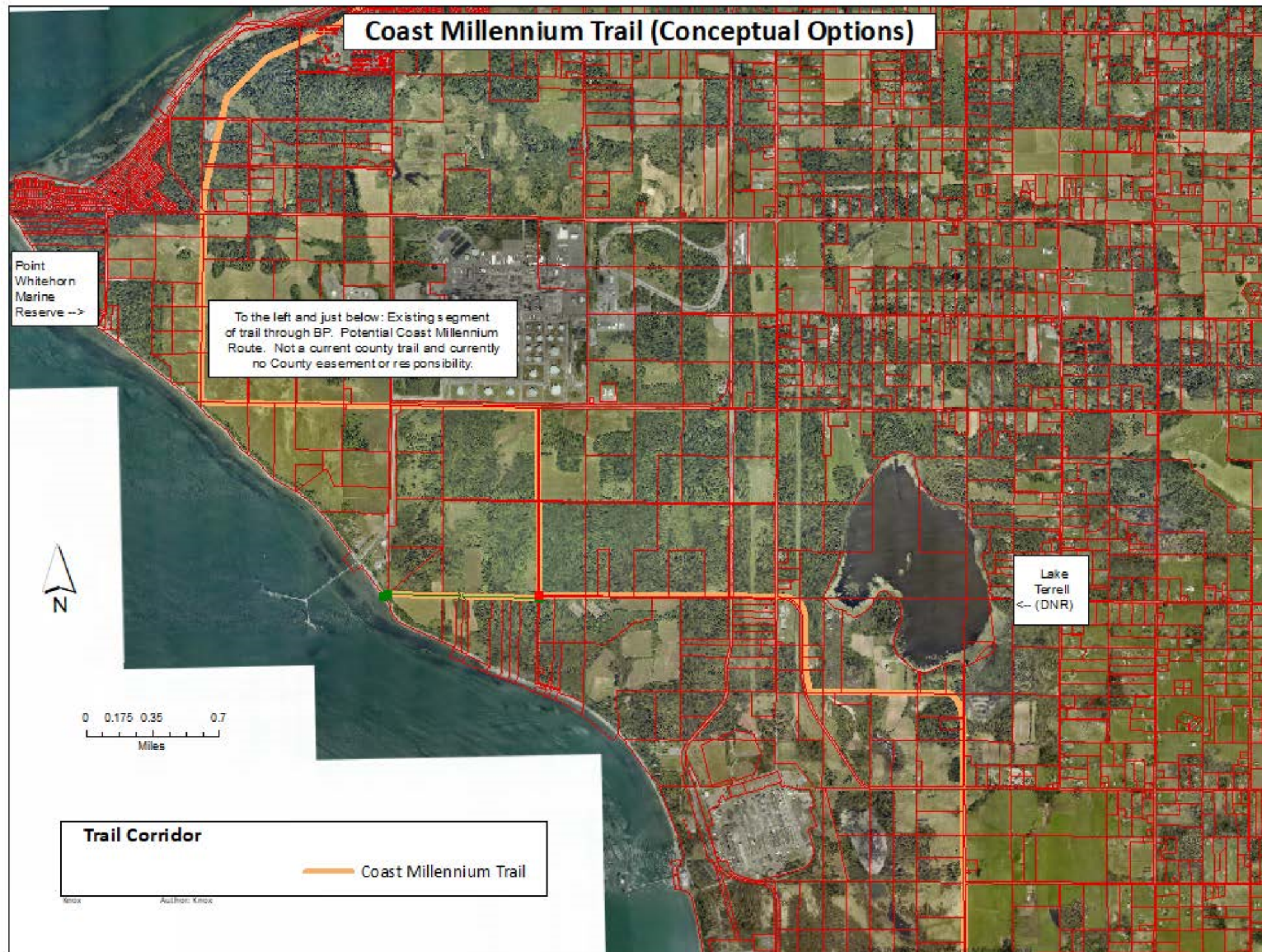


Figure 3. Coast Millennium Trail (Conceptual Options)

Appendix A: Pertinent CompPlan Goals & Policies (Chapter 11, Shorelines)

The following is a compilation of the CompPlan goals and policies specific to public access. All are found in Chapter 11 (Shorelines).

Please note that they are presented as amended through the 2020 Shoreline Management Program Periodic Update. Though they have not yet been formally adopted by Council, as we are awaiting the Department of Ecology's (DOE) review and approval of the update, Council has approved them via Resolutions Nos. 2021-056 and 2022-027. Unless the DOE requires additional amendments, staff anticipates full adoption in late 2022. Nonetheless, for the most part these goals and policies exist currently.

Governing Principles

D. Regulation of private property to implement SMP goals such as public access and protection of ecological functions and processes must be consistent with all relevant constitutional and other legal limitations. These include, but are not limited to, civil rights guaranteed by the U.S. and state Constitutions, pertinent federal and state case law, and state statutes, such as RCW 34.05.328 and 43.21C.060 and Chapter 82.02 RCW.

Overall Shoreline Management Program Goals and Objectives

Public Access

Goal 11B: Increase the general public's ability to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and/or to view the water and the shoreline from adjacent locations; provided, that private rights, public safety, and shoreline ecological functions and processes are protected consistent with the U.S. and state Constitutions, state case law, and state statutes.

Objectives:

- 11B-1: Locate, design, manage, and maintain public access in a manner that protects shoreline ecological functions and processes and the public health and safety.
- 11B-2: Design and manage public access in a manner that ensures compatibility with water-dependent uses.
- 11B-3: Where appropriate, acquire access to publicly owned tidelands and shorelands. Encourage cooperation among the County, landowners, developers, and other agencies and organizations to enhance and increase public access to shorelines as specific opportunities arise.
- 11B-4: Provide and protect visual access to shorelines and tidelands.
- 11B-5: Require physical or visual access to shorelines as a condition of approval for shoreline development activities commensurate with the impacts of such development and the corresponding benefit to the public, consistent with constitutional limitations.
- 11B-6: Develop and manage public access to prevent adverse impacts to adjacent private shoreline properties and developments.

Recreation

Goal 11C: Provide opportunities and space for diverse forms of water-oriented recreation.

Objectives:

- 11C-1: Locate, develop, manage, and maintain recreation areas in a manner that protects shoreline ecological functions and processes.

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- 11C-2: Provide a balanced choice of water-oriented public recreational opportunities regionally. Ensure that shoreline recreation facilities serve projected County growth in accordance with the level of service standards established in the Comprehensive Plan and related goals and policies, the Comprehensive Park and Recreation Open Space Plan, the Whatcom County Bicycle Plan, and the Natural Heritage Plan.
- 11C-3: Acquire additional recreation and public access areas with a high recreation value prior to demand to assure that sufficient shoreline recreation opportunities are available to serve future recreational needs.
- 11C-4: Encourage cooperation among public agencies, nonprofit groups, private landowners, and developers to increase and diversify recreational opportunities through a variety of means including incorporating water-oriented recreational opportunities into mixed use developments and other innovative techniques.
- 11C-5: Recognize and protect the interest of all people of the state by providing increased recreational opportunities within shorelines of statewide significance and associated shorelands.
- 11C-6: Encourage private and public investment in recreation facilities.
- 11C-7: Locate, design, and operate recreational development in a manner that minimizes adverse effects on adjacent properties as well as other social, recreational, or economic activities.

Shorelines of Statewide Significance

- Policy 11S-10: Public access development in extremely sensitive areas should be restricted or prohibited. All forms of recreation or access development should be designed to protect the resource base upon which such uses in general depend.
- Policy 11S-11: Public and private developments should be encouraged to provide trails, viewpoints, water access points, and shoreline-related recreation opportunities whenever possible. Such development is recognized as a high priority use.

General Policies

Public Access

- Policy 11Y-1: Use and development that provide an opportunity for substantial numbers of people to enjoy the shorelines of the state are a preferred use.
- Policy 11Y-2: Physical or visual access to shorelines should be incorporated in all new development when the development would either generate a demand for one or more forms of such access, and/or would impair existing legal access opportunities or rights. As required by the governing principles, all such conditions should be consistent with all relevant constitutional and other legal limitations on regulation of private property.
- Policy 11Y-3: Public access should be provided for water-oriented uses and non-waterdependent uses and developments that increase public use of the shorelines and public aquatic lands, or that would impair existing, legal access opportunities.

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- Policy 11Y-4: Non-water-related uses or activities located on the shoreline should provide public access as a public benefit.
- Policy 11Y-5: Public access area and/or facility requirements should be commensurate with the scale and character of the development and should be reasonable, effective, and fair to all affected parties including but not limited to the landowner and the public.
- Policy 11Y-6: Public access design should provide for public safety and minimize potential impacts to private property, individual privacy, and shoreline ecological functions and processes.
- Policy 11Y-7: Shoreline development by public entities, such as local governments, port districts, state agencies, and public utility districts, should provide public access measures as part of each development project, unless such access is shown to be incompatible due to reasons of safety, security, or impact to the shoreline.

Shoreline Use and Modification Policies

Industrial and Port Development

Policy 11II-4(b): Industrial and port developments should provide opportunities for physical and/or visual shoreline access in accordance with the public access policies, including recreational use of undeveloped shorelines not needed for port or industry operations; provided, that such uses are safely compatible with facility operations.

Cherry Point Management Area

Policy 11JJ-4: Public Access.

- a. Where appropriate, industrial and port development within the Cherry Point management area should provide public beach and shoreline access in a manner that does not cause interference with facility operations or present hazards to life and property. This may be accomplished through individual action or by joint, coordinated action with other developers and landowners, for example, by setting aside a common public access area.
- b. Special emphasis should be given to providing public beach and shoreline access for recreational opportunities including but not limited to crabbing, small craft launching, surf fishing, picnicking, clamming, and beach walking.
- c. Public access within the Cherry Point management area should be consistent with the Whatcom County Parks and Recreation Open Space Plan.

Recreation

- Policy 11NN-1: Shoreline recreational development should be given priority for shoreline location to the extent that the use facilitates the public's ability to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline. Where appropriate, such facilities should be dispersed along the shoreline in a manner that supports more frequent recreational access and aesthetic enjoyment of the shoreline for a substantial number of people.
- Policy 11NN-2: Recreational developments should facilitate appropriate use of shoreline resources while conserving them. These resources include, but are not limited to: accretion shoreforms, wetlands, soils, groundwater, surface water, native plant and animal life, and shore processes.

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- Policy 11NN-3: Recreational developments and plans should provide the regional population a varied and balanced choice of recreation experiences in appropriate locations. Public agencies and private developers should coordinate their plans and activities to provide a wide variety of recreational opportunities without needlessly duplicating facilities.
- Policy 11NN-4: Trail links between shoreline parks and public access points should be encouraged for walking, horseback or bicycle riding, and other non-motorized vehicle access where appropriate. The Whatcom County Comprehensive Park and Recreation Open Space Plan should be considered in design and approval of public trail systems.
- Policy 11NN-5: Access to natural character recreational areas, including but not limited to beaches and fishing streams, should be a combination of linear shoreline trails or easements and small parking or access tracts to minimize user concentration on small portions of the shoreline.
- Policy 11NN-6: Recreation facilities should incorporate public education regarding shoreline ecological functions and processes, the role of human actions on the environment, and the importance of public involvement in shorelines management. Opportunities incorporating educational and interpretive information should be pursued in design and operation of recreation facilities and nature trails.
- Policy 11NN-7: Reasonable physical or visual public access to shorelines should be provided and integrated with recreational developments in accordance with WCC 23.30.070 (Public Access).
- Policy 11NN-8: Recreation development should be located only where utility and road capability are adequate, or may be provided without significant damage to shore features commensurate with the number and concentration of anticipated users.
- Policy 11NN-9: Cooperative efforts among public and private persons toward the acquisition and/or development of suitable recreation sites or facilities should be explored to assure long-term availability of sufficient public sites to meet local recreation needs.

Appendix B: Pertinent Code Provisions (WCC Title 23)

The following is a compilation of the WCC provisions specific to public access. All are found in Title 23 (Shoreline Management Program).

Please note that they are presented as amended through the 2020 Shoreline Management Program Periodic Update. Though they have not yet been formally adopted by Council, as we are awaiting the Department of Ecology's (DOE) review and approval of the update, Council has approved them via Resolution Nos. 2021-056 and 2022-027. Unless the DOE requires additional amendments, staff anticipates full adoption in late 2022. Nonetheless, for the most part these regulations exist currently.

Chapter 23.30 General Regulations

23.30.060 Public Access.

- A. All shoreline substantial development, shoreline conditional use permits, or developments of more than four residential lots or dwelling units shall provide public access. When appropriate, provisions for adequate public access shall be incorporated into such proposals, including land division. An applicant shall not be required to provide public access if the decision-maker determines that one or more of the following conditions apply:

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1. Providing the access, easement, alternative amenity, or mitigating the impacts of public access is unreasonably disproportionate to the proposed development;
 2. The proposed development has already been considered as part of a larger development project that has previously provided public access as part of the development permitting process.
 3. The proposed development is for the subdivision of property into four or fewer parcels.
 4. The proposed development consists of only agricultural activities.
 5. Provision of public access on the site would pose a health or safety risk to the public due to the nature of the proposed use or activity or the location of public access, or would be infeasible due to security requirements associated with the proposed development.
 6. Provision of public access at the proposed development site would result in a net loss of shoreline ecological function that cannot be effectively mitigated or avoided, or would pose a risk to threatened and/or endangered species listed under the Endangered Species Act.
 7. The proposal consists solely of a new or expanded utility crossing through shoreline jurisdiction, serving development located outside shoreline jurisdiction, provided that no adverse impacts to existing public access result.
- B. Prior to deciding public access is not required pursuant to subsection (B)(1)(a) through (e) of this section, the county must determine that all reasonable alternatives have been exhausted; including, but not limited to:
1. Regulating access by such means as maintaining a gate and/or limiting hours of use;
 2. Designing separation of uses and activities (e.g., fences, terracing, use of one-way glazing, hedges, landscaping, etc.); and
 3. Providing for access at a site geographically separated from the proposal such as a street end, vista, tideland, or trail system.
- C. Public access shall consist of a dedication of land or a physical improvement in the form of a walkway, trail, bikeway, corridor, viewpoint, park, deck, observation tower, pier, boat launching ramp, dock or pier area, or other area serving as a means to view and/or physically approach public waters, and may include interpretive centers and displays.
- D. Where public access planning as described in WAC 173-26-221(4)(c) demonstrates that a more effective public access system can be achieved through alternate means, such as focusing public access at the most desirable locations, the County may institute master program provisions for public access based on that approach in lieu of uniform site-by-site public access requirements.
- E. Where there is an irreconcilable conflict between water-dependent shoreline uses or physical public access and the maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority.
- F. Alternate off-site provision of public access to shorelines may be used upon approval as a means of offsetting identifiable on-site impacts. If public access is demonstrated to be infeasible or inappropriate on site due to significant interference to operations or hazards to life and property, alternative visual access opportunities (such as a viewpoint, observation tower, or other areas serving as a means to view public waters (such as an interpretive center and displays explaining maritime history and industry) may be provided at a location not directly adjacent to the water; provided, that visual access to the water is provided.
- G. Public access provided by shoreline street ends, public utilities, and rights-of-way shall not be diminished (RCW 35.79.035 and 36.87.130).
- H. Shoreline development by public entities shall include public access measures as part of each development project.

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- I. Development shall be located, designed, and managed so that impacts on public use of the shoreline are minimized.
 - J. Public access shall incorporate the following location and design criteria:
 1. Where open space is provided along the shoreline, and public access can be provided in a manner that will not adversely impact shoreline ecological functions and/or processes, a public pedestrian access walkway parallel to the ordinary high-water mark of the property is preferred. The walkway shall be buffered from sensitive ecological features and provide limited and controlled access to sensitive features and the water's edge where appropriate. Fencing may be provided to control damage to plants and other sensitive ecological features and where appropriate. Trails shall be constructed of permeable materials and limited to five feet in width to reduce impacts to ecologically sensitive resources.
 2. Public access shall be located adjacent to other public areas, accesses and connecting trails, connected to the nearest public street; and include provisions for differently-abled persons where feasible.
 3. Where views of the water or shoreline are available and physical access to the water's edge is not present or appropriate, a public viewing area shall be provided.
 4. Design shall minimize intrusions on privacy by avoiding locations adjacent to windows and/or outdoor private open spaces or by screening or other separation techniques.
 5. Design shall provide for the safety of users, including the control of offensive conduct through public visibility of the public access area, or through provisions for oversight. The administrator may authorize a public access to be temporarily closed in order to develop a program to address offensive conduct. If offensive conduct cannot be reasonably controlled, alternative facilities may be approved through a permit revision.
 6. Public amenities appropriate to the use of a public access area such as benches, picnic tables and sufficient public parking to serve the users shall be provided.
 7. Commercial developments that attract a substantial number of persons and developments by government/public entities may be required to provide public restrooms, facilities for disposal of animal waste and other appropriate public facilities.
 8. The minimum width of public access easements shall be 10 feet, unless the administrator determines that undue hardship would result. In such cases, easement widths may be reduced only to the extent necessary to relieve the hardship.
 9. The requirement for public access on a specific site may be fulfilled by:
 - a. Participation in a public access plan incorporated in the program; or
 - b. Provision of facilities specified in a permit approval.
 10. Required public access sites shall be fully developed and available for public use at the time of occupancy of the use or activity or in accordance with other provisions for guaranteeing installation through a monetary performance assurance.
 11. Public access facilities shall be maintained over the life of the use or development. Future actions by successors in interest or other parties shall not diminish the usefulness or value of required public access areas and associated improvements.
 12. Public access provisions shall run with the land and be recorded via a legal instrument such as an easement, or as a dedication on the face of a plat or short plat. Such legal instruments shall be recorded with the county auditor's office prior to the time of building permit approval, occupancy or plat recordation, whichever comes first.
 13. Maintenance of the public access facility shall be the responsibility of the owner unless otherwise accepted by a public or nonprofit agency through a formal agreement recorded with the county auditor's office.

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14. Public access facilities shall be available to the public 24 hours per day unless specific exceptions are granted through the shoreline permit process subject to the provisions of subsection (B)(1) of this section.
 15. The standard state-approved logo or other approved signs that indicate the public's right of access and hours of access shall be installed and maintained by the owner. Such signs shall be posted in conspicuous locations at public access sites.
 16. Incentives for public access improvements such as density or bulk and dimensional bonuses shall be considered through applicable provisions of zoning and subdivision regulations.

Chapter 23.40 Shoreline Use and Modification Regulations

23.40.120 Industrial and Port Development. A.

General.

3. Industrial and port uses are allowed subject to specific criteria below:
 - f. Water-oriented industrial and port uses shall provide public access in accordance with the provisions of WCC 23.30.060 (Public Access).
 - g. Non-water-oriented industrial and port uses shall provide public access and/or restoration as follows:
 - i. Public access shall be in the form of unrestricted open space.
 - iii. The requirements i of this section may be modified when:
 - A. The site is designated as a public access area by a shoreline public access plan, in which case public access consistent with that plan element shall be provided; or

23.40.125 Cherry Point Management Area.

C. Public Access.

1. Public access shall be provided in accordance with WCC 23.30.070 (Public Access) unless it is demonstrated that public access poses significant interference with facility operations or hazards to life or property.
2. If public access meeting the criteria above is demonstrated to be infeasible or inappropriate, alternative access may be provided in accordance with WCC 23.30.070 at a location not directly adjacent to the water such as a viewpoint, observation tower, or other areas serving as a means to view public waters. Such facilities may include interpretive centers and displays that explain maritime history and industry; provided, that visual access to the water is also provided.
3. As an alternative to on-site public access facilities, public access may be provided in accordance with a public access plan adopted as an element of the Whatcom County Parks and Recreation Open Space Plan.

Appendix C: Excerpt from the Coast Millennium Trail Draft Master Plan, 2000

The following is excerpted from that plan:

This plan was collaboratively developed by Whatcom County Parks & Recreation, Bellingham Parks & Recreation, the Port of Bellingham, and the Whatcom County Council of Governments. Additionally, a public-private partnership was established in 1999 to pursue this goal, and a CMT Campaign Committee was formed comprising representatives of Whatcom County, the Cities of Bellingham, Ferndale and Blaine, the Port of Bellingham, Washington State Parks, Whatcom County Council of Governments, the Trillium Corporation, and others. Representatives from Lynden, the Lummi Nation, Whatcom Transit Authority, Bellingham/Whatcom County Convention & Visitors Bureau, and other organizations also contributed to the effort. The Campaign Committee's most immediate objectives were to complete the master plan, identify funding sources, begin ground-breaking, and establish a completely signed route, border-to-border, by the year 2000.

The planned CMT consists of a braided corridor of on- and off-street facilities extending northward from the Colony Creek area of northwestern Skagit County to White Rock, British Columbia, just north of the international boundary. The principal route is roughly fifty miles in length, much of it along quiet backroads and existing multi-use trails. The CMT divides just north of Bellingham in order to link the Ferndale community into the system (rejoining near the Lummi River); it divides again at Drayton Harbor (rejoining at Blaine). Several spurs and alternative routes have been identified as well, adding considerably to the total number of miles inventoried for this plan.

The CMT passes through three state parks (Larrabee, Birch Bay and Peace Arch), and a number of city and county parks and natural areas, as well as running close to the marine shoreline in many locations. The route links urban and rural communities to a wide variety of recreation sites, natural areas, viewpoints, water access areas, historic sites, employment centers, tourist destinations, and other connecting trails. Sites of particular interest are noted in Part 3, along with much more detailed descriptions of the trail itself and related facilities.

Where facilities currently exist, off-street portions of the route generally consist of mostly level, limestone-surfaced multi-use paths, typically six to ten feet in width. Bellingham's South Bay Trail is a good example of this type of facility (and a good model for much of the new trail development envisioned in this plan). Short paved sections are found at Boulevard Park and Squaticum Harbor in Bellingham, and at Semiahmoo and Blaine. On-street facilities include designated bike lanes in parts of Bellingham and Blaine, undesignated striped paved shoulders at many locations throughout the corridor, and other shared roadways lacking adequate shoulders for walking or cycling. Shared roadways presently account for more than half the CMT corridor. The lack of paved shoulders, combined with heavier traffic volumes, are a particular concern along Marine Drive, Haxton Way, Lake Terrell Road, and Drayton Harbor Road. This plan addresses these concerns.

As additional rights-of-way become available, it is anticipated that off-street facilities will be extended and that they will eventually account for most of the trail miles through the county. On-street facilities, however, will remain important as well, often serving as needed links in the regional bicycle transportation system. This mix of facilities can provide a full complement of recreation and transportation opportunities. Many scenic, educational, interpretive, economic, and environmental benefits can also be realized in concert with trail development, and the overall vision for the Coast Millennium Trail reflects these opportunities.

Appendix D: Site Photos













Attachment B:

WHATCOM COUNTY Mark Personius
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Memorandum

TO: Whatcom County Council
Satpal Sidhu, County Executive
THROUGH: Steve Roberge, Assistant Director; Cliff Strong, Senior Planner
FROM: Lucas Clark, Planner 1
DATE: June 23rd, 2023
SUBJECT: Review of WCC Sign Regulations per Docket Item #PLN2016-00009

Purpose

The purpose of this memo is to relate Planning and Development Services (PDS) findings and recommendation regarding the need to update our sign code in response to the Supreme Court's rulings in *Reed v. Gilbert* (2016) and the *City of Austin v. Reagan National Advertising* (2022).

Background

In 2016, Council placed on the docket item #PLN2016-00009: "Review and revise Whatcom County Code 20.80.400 (Sign Regulations), including updating the code for consistency with the U.S. Supreme Court's decision in *Reed v. Town of Gilbert* (2015)." This item was suggested by Planning and Development Services (PDS), as the *Reed* decision had just been issued. This decision had significant implications for sign codes across the U.S., and PDS thought it a good idea to review our code to ensure compliance with it. In March of 2023 this docket item was updated to include the *City of Austin v. Reagan National Advertising of Austin* (2022).

Essentially, the Court ruled in *Reed* that sign codes need to be content neutral, i.e., that there should be no distinction in allowances based on having to read the content of the sign or knowing the purpose of the sign or who's putting it up. In particular, this ruling affected jurisdictions' ability to regulate off-premise signs, as one would have to know the content of the sign in order to know whether it was on- or off-premises. This affected special events signs, political signs, off-premise commercial advertising signs, and others. Note, though, that the Court did retain jurisdictions' ability to impose standards based on size, building materials, lighting, moving parts, portability, etc., and they further concluded that a jurisdiction can entirely forbid the posting of signs on public property so long as it's done in an evenhanded, content-neutral manner.

However, prior to addressing this docket item, the Court heard another case, *City of Austin v. Reagan National Advertising* (2022). This decision clarified the *Reed* case. In it, the Court held that Austin's on/off-premises sign regulations were not subject to the "strict scrutiny" standard of review that applies to content-based restrictions, but instead that the regulations were content-neutral and therefore subject to the "intermediate scrutiny" standard of review — a much lower burden for a regulation to pass muster under the First Amendment. The Court held that under the Austin regulations:

A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation.

The Court held that the city's on-/off-premises sign regulations were not subject to the "strict scrutiny" standard of review that applies to content-based restrictions, but instead that the regulations were content-neutral and therefore subject to the "intermediate scrutiny" standard of review — a much lower burden for a regulation to pass muster under the First Amendment.

The Municipal Research and Services Center (MRCS) is a nonprofit organization that helps local governments across Washington State better serve their communities by providing legal and policy guidance on any topic. *Their*

bottom Line: "After Austin, local governments can feel confident in retaining (or reinstating) reasonable on-/off-premises sign regulations."

Analysis

Post *Reed v. Gilbert* MRSC guidelines suggest reviewing code for any content-based standards, though post *City of Austin v. Reagan National Advertising* that guidance was tempered for off-premise advertising. A review of the current Whatcom County Code (WCC) Chapter 20.80 was performed to assess its level of compliance with these rulings. In addition, key staff met to discuss whether there had been other issues in permitting, sign pollution, code enforcement, etc.

Staff reviewed the sign code to identify any content-based standards. It was found that WCC primarily regulates through size, building materials, lighting, moving parts, portability, etc. WCC does not allow signs to be in the public right of way, and new off-premise advertising is prohibited (WCC 20.80.410). In April of 1990, there were 18 off-premise advertising signs, and they were allowed to continue under a conditional use permit, but no new off-premise signs were allowed. On-premise signs are allowed, provided they meet the requirements of WCC 20.80.420 to 20.80.465, which primarily regulates size, placement, and lighting.

During the review, staff found that while the current WCC code does not allow temporary signs in the right of way, there is an Executive Order (89-8) that states "The Whatcom County Auditor's Office does not regulate campaign signs." The Washington State Supreme Court holds that political signs must be allowed in the parking strip area of the public right-of-way because this is a traditional public forum. However, this conflicting policy could be corrected in WCC during the annual code scrub.

Staff also reviewed current and historical issues in permitting, sign pollution, and code enforcement. Though some minor issues were identified, these could also be addressed through the annual code scrub.

Conclusions

Based on PDS's analysis, the WCC legally regulates signs consistent with the court rulings. The WCC regulates signs based on size, building materials, lighting, moving parts, portability, etc., not content. The two rulings that triggered the sign regulations to be placed on the docket do not require changes to the WCC. Though a few minor issues were identified through our review, these can be resolved during the annual code scrub.

Recommendations

On June 22, 2023, the Planning Commission voted unanimously to recommend to Council that docket item #PLN2016-00009 be removed from the docket with no further action. This was based on PDS's review and analysis of the code and finding that it complies with the changes in case law.

PDS concurs with the Planning Commission recommendation.