

## ORDINANCE NO. 1259

**AN ORDINANCE OF THE CITY OF GIG HARBOR, WASHINGTON, RELATING TO DEVELOPMENT IN AREAS OF SPECIAL FLOOD HAZARD AND WITHIN 200 FEET LANDWARD OF AREAS OF SPECIAL FLOOD HAZARD; MAKING FINDINGS OF FACT; AMENDING CHAPTER 18.10 OF THE GIG HARBOR MUNICIPAL CODE TO REQUIRE A HABITAT ASSESSMENT OR LETTER FROM NMFS OR FEMA ESTABLISHING COMPLIANCE WITH THE ENDANGERED SPECIES ACT; PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.**

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WHEREAS, in *National Wildlife Federation and Public Employees for Environmental Responsibility v. Federal Emergency Management Agency, et al.*, 345 F. Supp. 2d 1151 (2004), the United States District Court for the Western District of Washington ruled that the Federal Emergency Management Agency ("FEMA") must undergo formal consultation under Section 7 of the Endangered Species Act ("ESA") because the implementation of the National Flood Insurance Program ("NFIP") may affect listed species found in the Puget Sound Region; and

WHEREAS, as a result of the consultation, National Marine Fisheries Service ("NMFS") issued a Biological Opinion on September 22, 2008, that documented the adverse effects of FEMA's NFIP on listed species found in the Puget Sound Region, which includes Puget Sound Chinook Salmon, Puget Sound Steelhead and Southern Resident Killer Whales; and

WHEREAS, cities that participate in the NFIP must demonstrate compliance with the Biological Opinion by choosing one of three options provided by FEMA: Option #1 - adopt the FEMA-developed ESA compliant model ordinance; Option #2 - meet FEMA checklist for ESA compliance with current regulations; or Option #3 - permit by permit demonstration of ESA compliance; and

WHEREAS, the City originally pursued review by FEMA for Option #2 but that option could not become effective until the City completes the update of its Shoreline Master Program, so the City adopted Option #3 on an interim basis under Ordinance No. 1223, as extended by Ordinance No. 1234, then on September 24, 2012 re-adopted the provisions on an interim basis under Ordinance No. 1248 for a period of six months, which may be further extended by separate ordinance until this Ordinance goes into effect; and

WHEREAS, permanent adoption of Option #3 would require the City to maintain documentation from the applicant obtained from a habitat assessment or Section 7 consultation with NMFS, that demonstrates compliance with the ESA. This

documentation would be maintained by the City with the applicable permit file and available for FEMA review upon request; and

WHEREAS, pursuant to RCW 36.70A.106(3), the proposed regulations were forwarded to the Department of Commerce on September 17, 2012 and review was granted on September 18, 2012; and

WHEREAS, the City's SEPA Responsible Official issued a determination of non-significance for this ordinance on February 13, 2013; and

WHEREAS, on February 25, 2013, the Gig Harbor City Council held a public hearing and first reading of this ordinance; and

WHEREAS, on February 27, 2013, the Washington State Department of Ecology provided comment on this ordinance, requesting the City to submit the ordinance to the Department of Ecology for final approval in accordance with RCW 86.16.041; and

WHEREAS, the Gig Harbor City Council has determined that adoption of Option #3 is in the best interests of the public health, safety and welfare;

WHEREAS, the Gig Harbor City Council has expressed its continuing interest in pursuing Option #2 at such point that the city's Shoreline Master Program is approved by the Department of Ecology and becomes effective; and

WHEREAS, the Planning Director will reexamine the city's potential for utilizing the Option #2 approach once the Department of Ecology approves the City's Shoreline Master Program and it becomes effective;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Findings. The recitals set forth above are hereby adopted as the Gig Harbor City Council's findings in support of the development regulations established by this ordinance.

Section 2. Section 18.10.040 – Definitions – Amended. Section 18.10.040 of the Gig Harbor Municipal Code is hereby amended to incorporate the following definitions in alphabetical order, with subsection designations and internal references amended accordingly:

"Biological Opinion" means that certain opinion issued by the National Marine Fisheries Service on September 22, 2008, recommending changes to the implementation of the National Flood Insurance Program in order to meet the requirements of the Endangered Species Act in the Puget Sound watershed.

“Biologist, qualified” means a person who possesses a bachelor’s degree from an accredited college in biology, a branch of biology, limnology, biometrics, oceanography, forestry or natural resource management, with experience preparing reports for the relevant type of habitat.

“Endangered Species Act” or “ESA” means 16 U.S.C. 1531 *et seq.*, as amended.

“Habitat Assessment Report” means a report prepared by a qualified biologist that assesses the proposed development and identifies potential impacts, required mitigation, and whether or not the development adversely affects water quality, water quantity, flood volumes, flood velocities, spawning substrate and/or floodplain refugia for listed salmonids under the requirements of the Endangered Species Act.

“Likely to Adversely Affect” or “LAA” means the effects of the development will result in short- or long-term adverse effects on listed species or designated habitat area.

“May Affect, Not Likely to Adversely Affect” or “NLAA” means the effects to the listed species or designated critical habitat are insignificant and/or discountable.

“No Effect” or “NE” means the development has no effect whatsoever to the listed species or designated critical habitat.

“Riparian Buffer Zone” includes all parcels located within 200 feet landward from the +9 elevation (NGVD 1929 datum).

Section 3. Section 18.10.050 – Amended. Subsection A of section 18.10.050 of the Gig Harbor Municipal Code is amended as follows:

18.10.050 General Provisions.

A. Lands to Which this Chapter Applies. This chapter shall apply to all areas of special flood hazards within the jurisdiction of the city of Gig Harbor. Section 18.10.100 also applies to areas that include Riparian Buffer Zone within the jurisdiction of the city of Gig Harbor.

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Section 4. New Section 18.10.100 – Compliance with Endangered Species Act – Added. A new section 18.10.100 is added to the Gig Harbor Municipal Code to read as follows:

18.10.100 Compliance with Endangered Species Act.

A. No development permits may be issued on any parcel partially or fully within the Area of Special Flood Hazard or Riparian Buffer Zone unless the Planning Director or designee, after review of a Habitat Assessment Report provided by applicant, has determined the development meets the standards of NE or NLAA, or the applicant submits a letter from the National Marine Fisheries Service or the Federal Emergency Management Agency stating that the development complies with the requirements under the Biological Opinion and the ESA.

B. The Planning Director or designee shall review the Habitat Assessment Report to determine whether the development meets the standard of NE, NLAA or LAA. If the Planning Director or designee determines that the development is LAA, then the City may not issue the development permit unless the development is redesigned to a point where the assessment is NLAA or NE. If a development cannot be redesigned to meet the standard of NLAA or NE, the development may only be permitted if the applicant submits a letter from National Marine Fisheries Service or the Federal Emergency Management Agency demonstrating concurrence through a consultation under Section 7 or 4(d) of the ESA or issuance of an incidental take permit under Section 10 of the ESA. The Habitat Assessment Report and/or concurrence letter from National Marine Fisheries Service or the Federal Emergency Management Agency shall be retained in the permit file.

Section 5. New Section 18.10.110 – Exemptions – Added. A new section 18.10.110 is hereby added to the Gig Harbor Municipal Code to read as follows:

18.10.110 Exemptions. The following development is exempt from the requirement for Habitat Assessment review and concurrence letter set forth in Section 18.10.100:

- A. Repair or remodel of an existing building in its existing footprint, including buildings damaged by fire or other casualties;
- B. Removal of noxious weeds;
- C. Replacement of non-native vegetation with native vegetation;
- D. Lawn and garden maintenance;
- E. Removal of hazard trees;
- F. Normal maintenance of public utilities and facilities; and
- G. Restoration or enhancement of floodplains, riparian areas and streams that meet federal and state standards.

Section 6. Code Reviser's Note. The Code Reviser is hereby requested to remove the note preceding the provisions of chapter 18.10 of the Gig Harbor Municipal Code.


Section 7. Repeal; Savings. Ordinance No. 1248, and any ordinance extending the provisions of Ordinance No. 1248, are hereby repealed, but shall remain in force and effect until the effective date of this ordinance.

Section 8. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 9. Effective Date. Pursuant to RCW 86.16.041(1), this ordinance shall take effect 30 days from filing with the Department of Ecology, unless the department of Ecology disapproves the ordinance within that 30-day period.

PASSED by the Council and approved by the Mayor of the City of Gig Harbor, this 11th day of March, 2013.

CITY OF GIG HARBOR

  
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Mayor Pro Tem Steven K. Ekberg

ATTEST/AUTHENTICATED:

  
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Molly M. Towslee, City Clerk

APPROVED AS TO FORM:  
Office of the City Attorney

  
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Angela S. Belbeck

FILED WITH THE CITY CLERK: 02/20/13  
PASSED BY THE CITY COUNCIL: 03/11/13  
PUBLISHED: 03/20/13  
FILED WITH DEPARTMENT OF ECOLOGY: 03/22/13  
EFFECTIVE DATE: 04/21/13  
ORDINANCE NO: 1259