Washington REALTORS®

Presents

A Background Paper on the Shoreline Master Program Updates and Critical Areas Ordinance Review: Effective Participation and Comment

May 2010

Washington Association of REALTORS®
P.O. Box 719
Olympia, WA 98507-0719
Toll Free: 1-800-562-6024
Direct: 360-943-3100

Authored by:

Dennis D. Reynolds
Dennis D. Reynolds Law Office
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
206-780-6777

Introductory Note from Washington REALTORS®

The Washington State Legislature mandated that all cities and counties with shorelines of the state update their local shoreline plans consistent with the Shoreline Management Act and regulations adopted by the State Department of Ecology, the "SMA Guidelines," WAC Chapter 173-27. These local plans, called Shoreline Master Programs, must contain use regulations governing all shorelines of the state which include all saltwater shorelines and uplands within 200 feet of the ordinary high water mark, associated wetlands, streams or rivers in excess of 20 CFS average annual flow, and lakes of 20 acres or more. In addition, local governments are to review existing Critical Areas Ordinances adopted under the Growth Management Act which could result in changes to these laws. Critical Areas Ordinances address distinct types of environmentally sensitive areas located in uplands and shorelines.

Many of our members have asked for more information about the Shoreline Master Programs, Critical Areas Ordinances, the scope of the regulations that may be imposed on private property, and how to participate in the update and review process. The purpose of this paper is to provide background information about updating Shoreline Master Programs and the review of Critical Areas Ordinances. This information will help our members be more effective participants in local community processes to update Shoreline Master Programs and Critical Areas Ordinances. We want to thank attorney Dennis Reynolds and his firm for contributing this paper so that our members can be better informed about the Shoreline Master Program Updates and Critical Areas Ordinance Review.

Sincerely,

Washington Association of REALTORS®

Introductory Note from the Author

Thousands of shoreline property owners are facing a Shoreline Master Program Update and/or Critical Areas Ordinance Review process that could result in new and more restrictive land use regulations on their properties. This paper grew out of a need to prepare these property owners and others to be effective advocates in the update or review process by providing them with important background principles and strategies for meaningful public participation and comment. I appreciate this opportunity to assist the Washington Association of REALTORS®, its members, and these property owners.

Dennis D. Reynolds dennis@ddrlaw.com

Dennis D. Reynolds Law Office www.ddrlaw.com/

Dennis D. Reynolds is a 1972 graduate of the University of Washington Law School where he was a member of the law review. He was employed by the Washington State Office of Attorney General from 1972-1984. In that capacity, he handled numerous complex environmental and major project licensing matters, and regulatory disputes involving enforcement of state laws. He also drafted new laws and regulations. As a private attorney, he has represented local governments, public utilities, port districts, state and local home builder and realtor associations, and private property owners and businesses on land use, environmental, shoreline, Indian Law, and other matters involving local, state and federal regulation. Dennis is the owner of the Dennis D. Reynolds Law Office on Bainbridge Island. He was named a "Best Lawyer" in several categories by *Washington CEO Magazine* in 2008.

TABLE OF CONTENTS

I. INTRODUCTION

This paper will provide a reasoned perspective and approach on the use of science and State agency guidance when reviewing updates to Shoreline Master Programs (SMPs) and/or Critical Areas Ordinances (CAOs). SMP updates occur under the Shoreline Management Act (SMA)[1] and "review" of CAOs is pursuant to the Growth Management Act (GMA)[2]. Under the guise of vague regulatory standards such as "no net loss" of shoreline functions and values, or "protection" of critical area functions and values, public agencies are seeking to have local governments enact what would essentially be bans upon long accepted and traditional shoreline uses (private docks, bulkheads, single-family residential homes, lawns and family play areas sited anywhere near the shoreline), on the one hand, and the phase-out of existing development on the other through the administration of nonconforming use regulations enacted under the SMA and GMA.

With the best of intentions, the Washington Legislature was convinced that SMP Updates and CAO Reviews were required because, in part, the underlying science has "changed." However, it is not the science that has materially changed, but the regulatory agencies' willingness to preclude common accepted development and use of shorelines based upon speculative "cumulative impacts" and application of the "precautionary principle."[3]

The regulatory proposals emanating from the State agencies for local adoption are the creation of internal "working groups" with no official status. These groups have enacted "guidelines" for protection of so-called "environmentally sensitive areas" which do not have the force and effect of law. These guidelines have never been critically reviewed through the public review and adoption process associated with state regulations, nor by the Washington Legislature's Oversight Committees, *e.g.*, the Joint Administrative Rules Committee.[4]

The lead on the SMA and GMA regulatory initiatives is the State of Washington Department of Ecology (Ecology). It has compiled its view of "best available science" and marketing this science to local jurisdictions as the "be all and end all." The involved local jurisdictions are often understaffed and overwhelmed in terms of dealing with the State mandated review and update processes. Funds are typically not available to local governments to hire their own consultants, leaving many to hire those preferred by public agencies as a condition to grant funding or simply accept Ecology's science with no critical review or assessment of its validity in light of local circumstances. Thus, it is difficult to obtain objective third-party review of the agency "science."

Along with agency pressure, there is an economic component. State agencies, in particular the Department of Ecology, administer grant programs to pay for much of the cost of local government's update process relating to shoreline use regulations. Actual experience demonstrates that under the guise of administering the grants, Department of Ecology officials often attempt to dictate substantive results which undermine any meaningful comment by the public on regulatory proposals provided by Staff to local decision-makers.

This is indeed a perfect storm for property owners, but particularly for rural property owners. To make matters worse, existing lawsuits or threats of lawsuits, or new legislative directives, are causing the Puget Sound Partnership (PSP) and the Federal Emergency

Management Administration (FEMA) to recommend proposals which are layered upon regulatory systems set out in the SMA and the GMA. This places unnecessary pressure on local governments to follow the prescribed (or agency) approach when less onerous alternatives are available to accomplish the same outcome.

While this paper will focus on the SMP and CAO update and review processes, the author urges citizens and involved associations, including the Washington REALTORS®, to consider new legislation, in particular, the creation of a State Science Panel whose purpose would be to critically review the agency-generated science and internal guidelines. In addition, amendments to the Administrative Procedure Act appear to be in order to prohibit *ad hoc* agency group "guidelines" from being used as part of the update or review process unless they are adopted as rules and regulations. Finally, thought should be given to enacting legislation mandating Economic, Social, Environmental and Energy (ESEE) analysis balancing consequences of regulatory alternatives considered for adoption.

II. BACKGROUND AND PLANNING PRINCIPLES

The thrust of SMP updates and Critical Areas Ordinance reviews is upon shorelines and certain critical areas, in particular, wetlands and fish and wildlife conservation areas. At the outset, it appears that some background on the SMA and the GMA and the relationship of these two laws would be helpful.[5]

The Legislature enacted the SMA in 1971 to protect and manage the shorelines of Washington to foster all reasonable and appropriate uses, while protecting against adverse effects to public health, land, vegetation, wildlife, and the rights of navigation.[6] The SMA has jurisdiction over all marine waters and shorelines 200 feet landward of the ordinary high water mark, both salt and fresh water.[7]

The SMA requires that local governments develop master programs for the regulation and use of their shorelines.[8] A "master program" is the "comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020."[9] All master programs must be approved by the Washington State Department of Ecology.[10] Once approved, the master programs "constitute [the] use regulations for the various shorelines of the state."[11]

The GMA was enacted in 1990 to coordinate the State's future growth via comprehensive land use planning.[12] As part of this update process, the GMA requires cities and counties to designate "critical areas," to be protected through enactment of development standards and regulations.[13] Critical areas are defined in the GMA to include "fish and wildlife habitat conservation areas."[14] They also include wetlands, aquifer recharge areas, hazardous slopes and frequently flooded areas. The term "protected" is a change from the original standard of "precluding" use and development.

Washington State's separate regulatory system for use and development within shoreline areas has a sound basis in the law, public policy and common sense. Uplands regulated under the GMA are remote from shoreline and marine areas have different environments. In addition,

while upland uses can be sited in many areas, water dependent uses and developments have no choice but to use the shorelines. Thus, the SMA and GMA provide legal standards that differ significantly. The GMA standard for determining consistency or validity of a local regulation promulgated as part of a CAO is essentially whether the adopted law "protects" critical areas, a relatively restrictive standard but not one of total preclusion.[15] The SMA standard is one which allows "alterations" to the shoreline, (especially for water dependent uses) with imposition of "practical" or "feasible" mitigation. The SMA also provides for permitted uses in the shorelines of the state, and sets priorities for certain shoreline uses and developments.[16]

A. SMA and GMA Integration: The 1995, 2003, and 2010 Legislation

In 1995 the Legislature partially integrated the SMA and the GMA, transferring jurisdiction for appeals of shoreline master programs to the Growth Management Hearings Boards.[17] In addition, the goals and policies of the SMA were "added as one of the goals of this chapter [36.70A, the GMA]. RCW 36.70A.480." With these changes, shoreline master program use regulations were then considered as part of a county's or city's development regulations.[18] Otherwise, the Legislature retained regulation of shorelines exclusively under the SMA, including critical areas located within shorelines.[19]

In 2003, the Central Puget Sound Growth Management Hearings Board took a look at the issue and concluded that "all shorelines of statewide significance are critical areas by definition subject to CAO limits." *See Everett Shorelines Coalition v. City of Everett*.[20] Before the case could reach the appellate courts, the Legislature stepped in, adding new language to the Growth Management Act to the effect that shorelines are not automatically critical areas.[21] The Legislature also made a provision for shoreline regulations to be the superseding regulation once they were approved in updated or new shoreline master programs.[22] Thus, by 2003, State law continued to separate shoreline use regulation from critical areas regulation. Washington's shorelines may contain critical areas, but the shorelines are not critical areas simply because they are shorelines of state-wide significance as determined by the 2003 legislation.[23]

One would have thought that the limited integration of the GMA and the SMA was clear by 2003, but not to the Department of Ecology. Ecology issued "directives" to local governments in Washington State, advising that GMA enacted CAO controlled critical area regulation within shoreline areas until an SMP was updated.[24]

Then the courts stepped in. In *Biggers v. Bainbridge Island*, the City of Bainbridge Island argued that provisions of the GMA applied to shoreline development, regardless of the SMA or the City's SMP.[25] The Supreme Court disagreed, stating that the GMA clearly specifies that the SMA governs the unique criteria for shoreline development, and "[i]n other words, the SMA trumps the GMA in this area."[26] In *Futurewise, et al. v. WWGMHB*[27], the State Supreme Court unequivocally ruled that areas under SMA jurisdiction are exclusively regulated by that law, not the GMA.

Ecology was still not satisfied. Along with some local governments, it pressured the 2010 Washington Legislature to enact Engrossed House Bill 1653 (EHB 1653). This act purports to clarify the integration of Shoreline Management Act policies with the Growth Management Act. EHB 1653 went one step further than the 2003 legislation, specifying that

development regulations enacted under the GMA to protect critical areas located within shorelines of the state apply until the Department of Ecology approves either a comprehensive master program update or a segment of a master program relating to critical areas, or a new or amended master program approved by the Department. A revision or update of the CAO ordinances is not considered a comprehensive SMA or segment update to a master program. In other words, the GMA trumps the SMA until Ecology (1) approves a comprehensive master program update, (2) a "segment" of a master program, or (3) a new or amended master program after March 1, 2002. The new law applies retroactively to July 27, 2003. Its retroactive application is being challenged in *KAPO v. Kitsap County*.[28]

B. An Updated SMP Will Govern Critical Areas Within the Jurisdiction of the SMP

EHB 1653 is clear that once Ecology adopts and approves[29] a new master program, or SMP segment, critical areas located with shorelines will be governed under the SMP and the SMA, not the GMA CAO. The law states, "Upon Department of Ecology approval of a shoreline master program or critical area segment of a shoreline master program, critical areas within shorelines of the state are protected under Chapter 90.58 RCW are not subject to procedural and substantive requirements [of the GMA]."[30] Until then, the regulation of critical areas within shorelines is governed by GMA CAOs.

The 2010 law also states that the SMP shall provide a level of protection of critical areas located within shorelines of the state that "assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by Department of Ecology guidelines adopted pursuant to RCW 90.58.060(6)."[31] The exception is if a local jurisdiction's SMP does not include land necessary for buffers for critical areas that are found within shorelines. If not, then the local jurisdiction must continue to regulate those critical areas and their required buffers pursuant to the GMA.[32]

The Legislature has provided that shorelines of the State are not considered "critical areas" except to the extent that they qualify as critical areas pursuant to the definition found in the GMA provided by RCW 36.70A.030(5), and they are designated as such by a local government pursuant to RCW 36.70A.060(2). But not all shorelines are critical areas. That seems clear, but most local governments still are confused. For one, overworked Staff can be pressured to simply suggest "wholesale integration" of the existing CAO standards in order to move along an SMP update then ask that the public agencies such as Ecology concur, and Ecology will do so. Second, those favoring a high level of environmental protection will urge wholesale integration of CAOs because the standard under those ordinances ("protect") is more stringent than the balancing principles of the SMA. On the last point, the State Guidelines for revising SMPs acknowledge that there is a "balance" regarding the use and development of the shorelines:

> The policy goals for the management of shorelines harbor potential for conflict. The act recognizes that the shorelines and the waters they encompass are "among the most valuable and fragile" of the state's natural resources. They are valuable for economically productive industrial and commercial uses, recreation, navigation, residential amenity, scientific research and education. They are

> fragile because they depend upon balanced physical, biological, and chemical systems that may be adversely altered by natural forces (earthquakes, volcanic eruptions, landslides, storms, droughts, floods) and human conduct (industrial, commercial, residential, recreation, navigational). Unbridled use of shorelines ultimately could destroy their utility and value. The prohibition of all use of shorelines also could eliminate their human utility and value. Thus, the policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state. The act calls for the accommodation of "all reasonable and appropriate uses" consistent with "protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life" and consistent with "public rights of navigation." The act's policy of achieving both shoreline utilization and protection is reflected in the provision that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, in so far as practical, any resultant damage to the ecology and environment of the shoreline area and the public's use of the water." RCW 90.58.020.[33]

The State Guidelines provide the foundation for updated SMPs and anchoring comments of their text is strongly encouraged. Thus, reference to them in comment letters is strongly encouraged. The quoted language from the State Guidelines is based upon a long series of cases which have construed the SMA as allowing reasonable use and development of the shorelines of the state.[34] As a general matter, the SMA declares that it "is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses."[35]

Many assert that a new SMP must provide protection for critical areas within shoreline jurisdiction "at least equal to that" found in a GMA CAO. The 2010 legislation does not say that, having changed the standard from "at least equals" to one of assuring "no net loss to shoreline ecological functions." These terms do not mean "just use the CAO."

The "no net loss of ecological functions" concept is stated as one of the "Governing Principles" of the State Guidelines. The idea is that SMP provisions, to the greatest extent feasible, protect existing ecological functions and avoid new impacts to habitat and ecological functions. However, the State Guidelines explicitly allow impacts to ecological functions "necessary to achieve other objectives of RCW 90.58.020," for example, priority for single-family uses and recreational moorage.[36] In such case, impacts are to be mitigated. As one experienced land use attorney has stated:

> Thus, the "no net loss of ecological functions" applies to no net loss of existing conditions through sequencing applied to authorized new development to ensure that the end result maintains existing conditions – sequencing refers to avoid, minimize, mitigate, in that order.

. . . . .

> The intent of the Guidelines is clear. The SMP must regulate new development and redevelopment to ensure "no net loss of ecological conditions," but "no net loss" does not mean "no development" or "no impact." Rather, the SMP must balance competing objectives. New development and redevelopment in the shoreline area is expected to occur based on, for example, the SMA's priority for single family uses and recreational moorage. At the same time, the SMP must endeavor to avoid, minimize, and mitigate shoreline environment impacts caused by that new development or redevelopment. The regulation should accomplish this on a project by project basis when shoreline permits are required, and on an overall, aggregate basis for projects exempt from shoreline permitting.[37]

Here is the problem: CAOs seek to preclude but SMPs allow development, even in critical areas, if mitigation is provided to ensure "no net loss." That is the goal, not that the regulations be "identical." It is advised that citizens do not fall into the trap of comparing regulations, but rather, focus on the effect of the regulatory proposal. The functions of GMA and SMA shorelines, especially marine areas and beaches, differ from upland critical areas. Also, all shorelines are not properly classified as "critical areas." Further, the SMA allows preferred uses (with mitigation) in critical areas. For example, a single-family owner occupied home can be built within "wetlands" on shorelines.[38] Thus, regulating critical areas under the SMA will result in more balanced regulations, and therefore, integration of the GMA CAO into the SMA SMP should be avoided if at all possible.

Several regulatory options are available to protect critical areas located within shorelines and their functions and values than "preclusion" of development achieved through a wholesale GMA CAO integration. For one, the SMA permit system is already set in place, including its use of project mitigation to minimize impacts. Local governments can establish "no significant net loss" as a performance standard, and allow property owners/applicants to demonstrate how they will achieve that standard through a site specific analysis as part of the local permitting process. This approach would include consideration of reasonable project mitigation. The prejudice of some against the use of the existing permit system is remarkable and should not be condoned by citizens and property owners. Two, adaptive management is also an available tool. The State Guidelines must include a "mechanism" for documenting results for all project review actions and decisions in shorelines which is an explicit recognition of adaptive management.[39]

C. Generic Buffers are Legally Suspect

Imposition of large "one size fits all" no-build buffers or setbacks on the shorelines (typically 150 feet is the preference for shorelines), or no-build vegetation protection zones (often going towards 60-80 percent in shorelines) is legally suspect. The State Guidelines do not mandate use of large marine buffers, especially to developed areas.

Although in the GMA context, as construed by the State Supreme Court, large mandatory buffers along streams are not required to achieve the GMA "no harm" standard. The context of

the Court's ruling was a concern if the buffers would result in mandated restoration of the built environment. The Court said, "No," since restoration is not a requirement in the GMA.[40] The case is helpful since the SMA likewise does not mandate restoration, but the expressed purpose of buffers include restoration concepts.

The State Guidelines make it clear that SMPs "shall contain requirements for buffer area zones around wetlands within shoreline jurisdiction," but they contain no such mandatory requirement to "critical freshwater habitats" including larger lakes or streams, or the nearshore marine area.[41] What is generally required for SMPs is "vegetation conservation," but the State Guidelines specifically recognize that such provisions cannot be applied to existing development: "Like other master program provisions, vegetation conservation standards do not apply retroactively to existing uses and structures."[42]

There are both statutory constraints as well as constitutional limitations which place in serious doubt the legality of large generic buffers. Starting with the statutory framework, RCW 82.02 establishes that generic buffers and associated "vegetation preservation" set asides are illegal because they are a prohibited tax on new development. In the *Citizens Alliance* case[43], the Court of Appeals held that King County failed to meet its burden to show limits on land clearing to a maximum of 50 percent of site coverage or more was not an illegal tax, fee or charge on development of land as prescribed by RCW Chapter 82.02. The Appeals Court held not only that the vegetation clearing limit was a "tax, fee, or charge" but that there was no showing that the generic standard was reasonably necessary to ameliorate impacts directly related to a proposed site development and also that its effect was disproportionate to any possible impacts caused by clearing rural lands. Thus, the limitation was struck down as violative of RCW 82.02.

To meet RCW 82.02.020's "reasonably necessary" requirement, or nexus, an ordinance or land use decision containing a development condition or exaction must be tied to a specific, identified impact of a development on a community.[44] RCW 82.02.020 places the burden on the local government to demonstrate nexus.[45] To do so, a local government "must show that the development . . . will create or exacerbate the identified public problem."[46] This means that a local government must demonstrate a nexus between the condition and the impact caused by development to legally impose project mitigation.[47] "It is the requirement of a cause-effect nexus, not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners."[48]

Application of RCW 82.02 to SMPs promulgated and approved under the SMA is in question. The Court of Appeals, Division I, recently ruled in *Citizens for Rational Shoreline Planning, et al. v. Whatcom County, et al* that RCW 82.02 requirements do not apply to an approved Shoreline Master Program.[49] In that case, the question of integration of a GMA CAO into the SMP was not explicitly reached. The *Whatcom County* case will be appealed to the State Supreme Court, so the question of application for RCW 82.02 is still open if the Supreme Court accepts review. The question of whether sections of an SMP that simply integrates a GMA CAO which is subject to RCW 82.02 is definitely still open. In the *Citizens Alliance* case, a GMA CAO was at issue and struck down.

There are significant questions regarding the validity of large generic buffers and vegetation set asides under SMA "consistency requirements." Specifically, the SMA includes obligations to protect property rights. Large buffers could be challenged as "inconsistent" with the SMA, and thus, illegal since state regulations must implement the core enabling law. In addition, buffers can essentially prohibit exempt development, such as single-family homes, which is another inconsistency.

The Department of Ecology continues unfazed, stating:

> **Q:** Aren't requirements for shoreline vegetation buffers a "taking" of private property rights?
>
> **A:** No. The U.S. Constitution allows state and local governments to limit private property activities provided it's for a legitimate public benefit and they do not deprive the landowner of all reasonable use of the property. For example, state and local governments can adopt regulations that prevent sediment from running off private property and entering a salmon-spawning stream. These regulations protect salmon, a public resource.
>
> Buffers do not deprive landowners of all reasonable use of their property and, in fact, all property tends to benefit from reasonable setbacks and buffers. In those limited instances where the buffer precludes or significantly interferes with a reasonable use, the property owner may obtain a variance.[50]

Ecology's views do not square with case law interpreting the United States and Washington State Constitutions nor the SMA. Case law construing constitutional requirements establishes rigorous requirements for nexus and proportionality which have been set forth by the United States Supreme Court and elaborated upon in Washington.[51] Simply put, government cannot deny or condition a proposal because of perceived generalized impacts not directly related to the proposal. The reason for requiring the municipality to demonstrate the impact of the development is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[52]

D. Both the SMA and GMA, Properly Construed, are Protective of Private Property Use and Development

Local government and the Department of Ecology must assess the impact of the proposed SMP Amendment on property rights. The right to own and use private property is protected by the State Constitution.[53] While property rights, like other fundamental rights, are subject to regulation, that regulation must follow reasonable standards.[54]

It is not enough to generally cite "the science" and act upon guesses or fears. Hypothetical impacts – "[are] not enough to deny private property owners fundamental access to the application review process, or protection and use of their property."[55] In *Biggers*, the City of Bainbridge Island's decision to impose an outright prohibition based on theoretical harm

according to the Supreme Court served to exacerbate the "mistaken belief that protecting the environment and private property rights are mutually exclusive interests."[56]

Outright prohibitions against private docks, beach access, stairs, bulkheads and other common shoreline developments and uses, or large generic buffers or set asides, appear contrary to the SMA's policy of balancing the efficient use of shoreline resources with a property owner's right to use and enjoy his own property.[57] In *Biggers*, the Supreme Court concluded that shoreline property owners have a right, under the SMA, to have their land use permits accepted and reviewed by local government to determine whether the proposal is consistent with the SMA.[58]

Nothing in the SMA requires local government to impose outright prohibitions on shoreline development.[59] Instead, the SMA calls for "coordinated planning . . . recognizing and protecting private property rights consistent with the public interest."[60] Our Courts have repeatedly recognized this policy of balancing property rights and the environment:

> The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. The state has developed shorelines through improvement of parks and ramps, construction of bulkheads, ferry docks, etc. As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.[61]

For the past 30 years, local governments have achieved the balance between property rights and the environment largely through the permit process, where a proposal's consistency with the policies of the SMA can be determined on its own merits. The SMA provides more than sufficient guidance to have this determination made on a permit-by-permit basis without the need for blanket prohibitions or bans. Indeed, the SHB regularly reviews permit applications for private docks for their potential impacts to views, navigation, and ecological resources.[62] Our Courts have similarly reviewed appeals of permit applications for private development of the shoreline for compliance with the SMA on a case-by-case basis.[63]

The well-established practice of using the permit process to balance the needs of the shoreline environment with property rights is embodied in the SMA's "no net loss" policy, under which local government is required to consider a proposal's consistency with the SMA by measuring a project's impacts against potential mitigation to determine whether the proposed use would result in a net loss of existing shoreline functions.[64]

Shoreline owners should insist that the imposition of blanket prohibitions on common shoreline development combined with generic buffers violates the SMA's fundamental policy of "recognizing and protecting private property rights consistent with the public interest," and warrants review.[65] Such prohibitions also effectuate regulatory takings. *See* Office of Attorney General Guidelines for Regulatory Taking, which state:

> In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public

> good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power still must be examined to determine whether they unlawfully take private property for public use without providing just compensation. This relationship between takings laws and regulation is sometimes explained as looking at whether a regulation has the effect of forcing certain landowners to provide an affirmative benefit for the public, when the burden of providing that benefit is one that should actually be carried by society as a whole.[66]

As part of the SMP Update or CAO Review process, shoreline property owners should require that local government conduct a thorough property rights/regulatory taking analysis before enacting any revisions to SMPs or CAOs. This is not the first step that either local government or the Department of Ecology wants to do, but the State Guidelines require it.[67] Forcing preparation of a regulatory taking analysis makes a good record for review to the courts, on the one hand, and on the other, would help achieve more balanced regulation. In addition, discussing property rights and limitations on government regulation will help local decision-makers and the Department of Ecology appreciate that the debate is not simply about environmental protection.

The GMA is also protective of property rights. Planning Goal 6 of the GMA states that "private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions."[68] In addition, other GMA policies promote natural resource industries and encourage economic development.[69]

III. PUBLIC PARTICIPATION AND COMMENT

A. Statutory Obligations to Allow and Provide for Meaningful Public Comment and Participation

There are strong public participation and notice requirements under the GMA. [70]The GMA also contains an affirmative obligation for local governments to ensure public participation:

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation n the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for board dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in

> response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.[71]

The Growth Management Hearings Boards have consistently upheld the public participation requirements. If local governments fail to abide by notice and other procedural requirements, the Boards have invalidated the work product. Stating as much, there is no case which addresses just how effective public comment must be. This is a concern. As set out below, it is questionable whether local governments truly have an open mind to public comment when the Department of Ecology Staff during an SMP Update or CAO Review process is lobbying for certain positions ostensibly to meet either "best available science," the State Guidelines for SMP updates, or requirements of a State grant.

For a SMP Update, there are obligations on local government to ensure that all persons and entities with an interest "are provided with full opportunity for involvement in both the development and implementation …."[72] The State Guidelines provide:

> Prior to submittal of a new or amended master program to the department, local government shall solicit public and agency comment during the drafting of proposed new or amended master programs. The degree of public and agency involvement sought by local government should be gauged according to the level of complexity, anticipated controversy, and range of issues covered in the draft proposal. Recognizing that the department must approve all master programs before they become effective, early and continuous consultation with the department is encouraged during the drafting of new or amended master programs. For local governments planning under chapter 36.70A RCW, local citizen involvement strategies should be implemented that insure that early and continuous public participation consistent with WAC 365-195-600.
>
> At a minimum, local government shall:
>
> (1) Conduct at least one public hearing to consider the draft proposal;
>
> (2) Publish notice of the hearing in one or more newspapers of general circulation in the area in which the hearing is to be held. The notice shall include:

> (a) Reference to the authority(s) under which the action(s) is proposed;
>
> (b) A statement or summary of the proposed changes to the master program;
>
> (c) The date, time, and location of the hearing, and the manner in which interested persons may present their views; and
>
> (d) Reference to the availability of the draft proposal for public inspection at the local government or upon request;
>
> (3) Consult with and solicit the comments of any persons, groups, federal, state, regional, or local agency, and tribes, having interests or responsibilities relating to the subject shorelines or any special expertise with respect to any environmental impact. The consultation process should include adjacent local governments with jurisdiction over common shorelines of the state;[73]

B. Strategies on How to be Effective in the Public Comment and Participation Process

1. Base Information

Before an SMP can be updated, certain mandatory documents and information must be prepared as a base for decision making. One is a Shoreline Inventory and Characterization Report. The State Guidelines for an SMP Update require "actual specification" of the extent of existing structures and shoreline development and an evaluation of the effectiveness of the existing shoreline regulatory system.[74] The stated information is critical to good decision making, but local governments often have superficial analyses of what is on the ground and how the SMP has been working through the years. It is critical that anyone participating in the process force development of sound base information. Without this information, Staff and the Department often step in and impose regulations based upon the "precautionary principle." In other words, because there are unknowns, it is safer to regulate than to allow continuance of accepted and common shoreline development.

The State Guidelines also mandate preparation of a Cumulative Impacts Assessment (CIA) "… that **identifies**, **inventories** and ensures meaningful understanding of the current and potential ecological functions provided by affected shorelines."[75] A compliant CIA must be proposed before a new SMP can be adopted. The CIA must also consider and assess the benefits provided by existing regulations and project mitigation imposed under the SMA permitting and State Environmental Policy Act (SEPA) authority. On this last point, the State Guidelines require a cumulative impact analysis which includes such analysis, along with an evaluation of reasonably foreseeable future development:

> Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act . . . Evaluation of such cumulative impacts

> should consider: (i) **Current circumstances** affecting the shorelines and relevant natural processes; (ii) Reasonably foreseeable future development and use of the shoreline: and (iii) **Beneficial effects** of any established regulatory programs under the other local, state, and federal laws.[76]

Just as for the Shoreline Inventory and Characterization Report, anyone participating in the SMP Update process should not let local government off the hook if a superficial CIA is prepared. In particular, there is a tendency to ignore other regulatory systems. This can be a crucial oversight. Existing regulatory systems include the State Environmental Policy Act, storm water management regulations, updated health regulations, the State Hydraulic Code for overwater development, and many other laws such as Section 404 Clean Water Act provisions for docks or bulkheads.

Participants in the update and review process should insist that decision-makers look at the percentage of development on shorelines, and current permit activity. This information is important to determine what is "reasonably foreseeable" in the coming years. Typically, local governments want to look at past statistics as to plat development and ignore the current effect of Growth Management Act large lot zoning. With imposition of GMA rural density requirements creation of small lots in the future is greatly restricted. In comparing past statistics and future projections, anyone participating in the process must hold local government to the consequences of its GMA zoning, which demonstrates that future intense development upon rural shorelines is not expected. Often this is ignored, along with the beneficial aspects of other existing laws and regulatory systems.

Finally, citizens should force local governments to show their work. An SMP is to be updated to "reflect changing circumstances, new information or improved data."[77] Staff should specify the underlying justification for an SMP Update with a tie-in to the quoted factors.

2. Cause and Effect

When participating in the SMP or CAO update or review process, participants should demand a "direct cause and effect analysis" to support any new regulations. Often, SMP updates or CAO reviews proceed on the fundamental misperception that certain activities such as shoreline armoring or other types of development have created significant adverse impacts to the shoreline environment. At the outset of ESA salmon listings, the state agencies such as Ecology, developed precautionary policy guidance due to many unknowns related to salmon recovery and the knowledge gaps in the science at the time. Since then, new science studies have emerged, adding to current knowledge and indicating certain uses and activities on shorelines or streams are not as "harmful" as once thought. The problem is the "best available science" at the state level has not been updated, nor some of the guidance documents. And with strapped budgets at all levels of government, particularly the state level, change is slow. By default, the local regulators adopt the agency "best available science." The issue also facing local regulators is understanding the assumptions made when using science to inform policy choices for local decision-makers in light of local conditions and community vision as expressed in comprehensive plans. If there is to be a battle over science, this is the battlefield. Local citizens and associations should urge their county commissioners or city council to hire independent

expert review of the best available science. Also, any Science Technical or Advisory Committees should not be composed just of agency personnel or regulators.

The alleged "cause and effect," particularly for shoreline development, is not black and white. The Department of Ecology and other researchers have recently commented that the effects of bulkheads have not been documents.[78] To illustrate with one example, Staff and the public agencies often talk about adverse impacts to sediment transport rates among other negative effects associated with shoreline armoring. But the cited supporting science relates to huge down beach structures that were built decades ago before modern regulatory systems which now require that bulkheads be placed at or above the ordinary high water mark. A review of the literature demonstrates that adverse impacts, if any, are much less with structures at or above the ordinary high water mark than with those placed way down the beach as was the historic practice.

As to CAOs, the requirement is to "review and, if needed, revise [the] Comprehensive Land Use plan and development regulations to assure the plan and regulations comply with the requirements of this chapter …."[79] The presumption of Staff and the State agencies as to CAOs seems to be that there is no question but that amendments to the CAO are required, but the law requires only a "review." Citizens participating in the CAO review process should insist that local governments audit the success of the CAO to date, as is required for the SMP Update in terms of development of the Shoreline Inventory and Characterization Report and the CIA. Only if the audit shows documented consequences of significance should changes to the existing CAO be considered.

3. Generalized Concern is Not Science

The standards for proper use of science differ to an extent between the SMA and the GMA. The GMA standard is "best available science."[80] The SMA standard is to "utilize a systematic interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts …."[81] For SMP Updates, local governments and Ecology must:

> (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;
>
> (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;
>
> (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;
>
> (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

> (f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.[82]

As set out above, best available science is to be used in designating and protecting critical areas regulated under the GMA. While BAS is not explicitly a factor for an SMP update, scientific information must be considered and assessed.[83] The science cannot be used in isolation from all of the other planning goals specified in the GMA or the SMA.[84] For instance, the purpose of the BAS requirement is to ensure that critical area regulation is not based upon speculation and surmise.[85] Thus, counties and cities have the authority and obligation to balance scientific evidence among the many goals and factors set out in the GMA and the SMA, to fashion locally appropriate regulations based on the evidence and local circumstances. In this regard, science does not mandate the form or extent of GMA CAO regulation, but departures from BAS must be justified by local circumstances and a showing how an alternative approach achieves no net loss.[86] In other words, science must be included in the record and considered, but need not be followed if there is a reasoned justification for a departure.

A serious matter is the effect of science urged by some regulators without regard to requirements to protect private property rights. The *Heal* court held that a restriction of the use of property that is insufficiently supported by best available science violates constitutional; nexus and proportionality standards[87] As noted, the State Guidelines for SMP Updates mandate protection of property rights.[88]

The purpose of science is to ensure that regulations are based on a reasoned analysis of appropriate science and meaningful, reliable, and relevant evidence.[89] With this purpose in mind, the most that can be said is that there is little scientific study of marine riparian zones at this time. The major work relevant to Puget Sound lowlands areas is the Canadian Manuscript Report of Fisheries and Aquatic Science, No. 2680. This report has been analyzed by Kitsap County staff in the context of consideration of marine buffers by the Board of County Commissioners, who confirmed that "…it was felt no good science currently exists to recommend vegetation buffer widths in the (marine habitat zone) at this time."

It is submitted that the studies often relied upon to support large riparian or marine buffers are out of context or irrelevant to Western Washington. For instance, the studies show that the:

- Majority of gathered BAS is from the East Coast and Midwest agricultural uses, such as feed lots, row crops and the spraying of chicken manure on fields then irrigating to study impacts.

- Northwest rain patterns are different from the East Coast and Midwest, receiving major rains in the winter, not the summer months.

- BAS gathered in the Northwest is primarily for logging near streams in rural areas.

- BAS indicating that vegetated buffers are needed for wildlife habitat is not relevant to commercial zones and high density residential areas.

- BAS indicating the need for trees and shade to provide micro climate comes from the Midwest, the East Coast and the West Coast in remote forest areas and is based on protecting the temperature from rising in small shallow streams. The concept of micro climates does not apply to a large tidal body like Puget Sound or the Straits of Juan de Fuca.

- BAS in the Northwest demonstrates that streams in recently logged areas with no tree cover have better salmon production than those with tree buffers and shade. The increased warmth allows for faster growth of salmon and better survival rate.

- Shade could never cover or cool baitfish spawning beds. On the hottest summer days in Puget Sound, the sun is high in the sky and strikes all beaches directly except the upper 10 feet of northerly facing beaches with very tall trees on the shoreline or very tall banks – a rare occurrence.

Some that urge more restrictive regulation reference the study *Marine and Estuarine Shoreline Modification Issues*. However, insofar as the Study addressed marine shoreline buffers, it ultimately concluded that the current science is inconclusive and that additional study is required:

> [F]unctions of marine riparian vegetation need to be better documented in the scientific literature in order to create adequate policies for protection (*e.g.*, functional buffer widths) and restoration . . .Experimental research now will allow us to fill knowledge gaps, learn from our actions, and minimize repetition of failures and wasteful expenditure of resources.
>
> . . . . .
>
> [T]he upper limit of the nearshore zone includes that area landward some distance from the intertidal zone. The strongest intertidal-upland coupling occurs where bluffs provide sediments that nourish beaches, where upland transition (*e.g.*, dune) vegetation stabilizes the beach, and where fringing vegetation shades the intertidal zone and contributes insects (*i.e.*, fish prey) and leaf litter (*i.e.*, primary production) directly into the aquatic environment. This marine riparian zone also provides buffers from upland noise and water runoff. The characteristics and landward extent of the upland portion of the nearshore zone is unquantified and still requires directed research to define.[90]

A question is how to deal with the near shore areas where young salmon reside and migrate for several months per year. There is no science stating extensive buffers are required to protect this species' sporadic use of the near shore area, especially where the existing condition is a rural zoning which does not allow intensive new development or urban areas with a highly developed waterfront. Existing regulations preclude virtually any new development or construction during this period of use.[91]

While the justification for blanket buffers for all shorelines is the perceived need to protect critical habitat for salmon, in *Tahoma v. Pierce County*,[92] the Central Board rejected a wholesale designation of marine shorelines as critical areas and commented favorably on the work the County consultants did distinguishing "high value" and "low value shorelines."[93] Notably, the record in that case included a detailed marine shoreline inventory and ranking of areas according to their quality as habitat for salmon in response to a listing of Chinook Salmon under the Endangered Species Act.[94]

The Attorney General reached similar conclusions to those in the *Tahoma* case in response to a legislative inquiry. The Attorney General concluded: (1) that blanket treatment of SMA shorelines as critical areas was not sufficient, and (2) that in passing ESHB 1933, the Legislature intended local governments to engage in a more detailed and discriminatory process to identify what is critical about a shoreline as part of its review criteria before designating the SMA regulated shoreline as a critical area.

> [A]t least since the 2003 amendments to the SMA and GMA, it is clear that no shoreline of the state, including shorelines of statewide significance, is to be treated as automatically qualifying for critical area designation under the GMA. Rather, each jurisdiction is expected to evaluate its shorelines to determine the extent to which they contain areas meeting the "critical area" definitions set forth in RCW 36.70A.030(5).[95]

It is important to recognize that the best available science requirement is not only intended to provide protection for critical areas, but is also intended to protect economic and property interests from unsupported and unduly preclusive regulation:

> [T]he obvious purpose of the scientific requirement that each agency "use the best scientific and commercial data available" is to ensure that [environmental regulations] not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the ESA's overall goal of species preservations, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives. *Bennett v. Spears*, 520 U.S. 154, 176-177 (1977) (reasoning adopted in *Heal*, 96 Wn. App. At 531). In this regard, the Washington State Supreme Court held that local government must provide a "scientific OSF, evidence of analysis, or a reasoned process to justify [critical area regulations].[96]

4. Local Circumstances

The need to consider local circumstances cannot be over-emphasized. It is amazing how often this critical point is overlooked by Staff at local and State government levels. For example, substantial portions of rural Western Washington are in public ownership or in conservancy

designations which are largely off limits to development. Due to enactment of Growth Management Act large lot zoning provisions, creation of small new lots in rural areas is a thing of the past.[97] Restoration programs which can improve shoreline functions and values seem to be never recognized in the regulatory process, including the beneficial aspects of those programs. The State Environmental Policy Act overlaid upon existing regulatory systems is typically not considered. The State Guidelines provide substantial discretion to local governments to consider local circumstances[98], as does the GMA.[99]

5. Inter-Agency Guidelines Do Not Control

The State of Washington Department of Ecology and Department of Fish and Wildlife have manuals on wetlands policies for certain wildlife habitat. These have not been adopted pursuant to the Administrative Procedures Act, Chapter 34.04 RCW. Therefore, these policies do not have the force of law. They are also skewed by a narrow perspective. As one scientist has stated:

> What constitutes an allowable cost is not a matter solely of science. These deliberations require multi-faceted consideration of all of the consequences of the decision to include the effects on natural resources **and** the legal, social, political and economic consequences of the decision. Resource agencies must follow legislative mandates and rigorous rule making procedures before environmental criteria are codified in regulatory (RCW) or administrative (WAC) codes. Natural resource agencies such as the Department of Ecology and the Department of Fish and Wildlife are not generally charged with making multi-faceted appraisals, they are charged with protecting fish and wildlife, water, air, soil and sediment quality, etc. These one-dimensional tasks lead to one-dimensional thinking that is evident in the *Best Available Science* (Sheldon *et al*, 2005) written by WDOE and even more so in the WDFW recommendations of (Knutsen and Naef, 1997) describing perceived wetland and stream buffer requirements for protecting water quality and wildlife.[100]

The WDFW has identified certain fish and wildlife species or habitat that it considers a priority for management and conservation, and has published a document entitled "Management Recommendations for Priority Species" which is intended to "assist" reviewing agencies, planners, landowners and members of the public in making land use decisions. By design, these Management Recommendations are merely "generalized guidelines" without the force of law: "[These] Management recommendations are not intended as site-specific prescriptions but as guidelines for planning." *See* WDFW, Management Recommendations for Priority Species, Volume IV, Introduction (May 2004).

When local governments designate critical areas, the Washington Administrative Code ("WAC") provides that they "may" use the information, and advises that WDFW's priorities are not necessarily shared by all:

> Counties and cities should determine which habitats and species are of local importance. Habitats and species may be further classified in terms of their relative importance. Counties and cities may use information provided by the Washington department of wildlife to classify and designate important habitats and species. Priority habitats and priority species are being identified by the department of wildlife for all lands in Washington State. While these priorities are those of the department, they and the data on which they are based may be considered by counties and cities. [101]

In some SMP Updates, such as Jefferson County, the local government is asking the Department to bless its proposed SMP Amendment as "required" because the proposals set out in the amended SMP will "compare favorably" to recommended shoreline protection strategies offered by the Aquatic Habitat Guidelines Working Group. If one looks at the website for the "working group," it states that the agencies involved in the multi-agency project "do not necessarily endorse any of the information provided by these links," which include the guidelines the Working Group favors. If one reads further, it is acknowledged that the guidelines are based upon the Working Group's personal perception of "ecological values" and their assumptions about how ecosystems function, and "our priorities for protecting aquatic systems." The Working Group's membership includes no policy-maker. The Working Group's guidelines are not adopted as rules and regulations under the Administrative Procedures Act, RCW 34.04. Further, none of its suggested guidelines involve any analysis for consistency with SMA policies, nor protection or consideration of private property rights. The result is a narrowly, focused "expert" viewpoint that is advocated with the power of the state behind it without public review and comment via consideration or adoption of rules and regulations. Under the Washington Administrative Procedures Act, "general policies" (if the guidelines could be so considered) are illegal and unenforceable unless adopted as a rule or regulation which includes a public review and comment process.[102]

6. Internal Consistency Requirements and Consistency With the GMA Comprehensive Plan

Pursuant to the limited GMA/SMA integration, review of a new or revised SMP is measured not only against compliance with the policies and requirements of the SMA and the Shoreline Guidelines[103] but also the "internal consistency" provisions of RCW 36.70A.070, RCW 36.70A.040(4), RCW 35.63.125 and RCW 35A.63.105.[104] What this means is that an SMP (or CAO) must be consistent with Comprehensive Plan policies and its own provisions must be internally consistent. Commencing with consistency with the Comprehensive Plan, almost all comprehensive plans provide significant protections for private property rights. There are also typically strong plan policies to enhance the rural economy, provide for only moderate growth in rural areas, protect existing lots of record and property rights, urge affordable housing and rural recreational opportunities, and promote the development of tourism and tourist-related activities. In urban areas where development historically focused along water, there are similar types of policies including increased density, mixed use development, and economic development around streams and other water bodies. These policies should be emphasized in any comment letters.

Turning to internal consistency provisions, the typical draft SMP submitted by Staff to a local decision-maker references SMA exemptions for single-family residential developments, private docks, and single-family protective bulkheads, for example, but then essentially regulate these common shoreline developments and uses out of existence by either outright bans or by over-regulation by use of conditional use permits or onerous use criteria. On the former, updates will typically reflect the creation of new environmental designations in which common shoreline uses and developments are either prohibited or made conditional uses. For a conditional use, the Department of Ecology makes the final permit decision, not a local government. This creates an internal inconsistency.

7. Be Aware of Over-Designation of Restrictive Shoreline Environments or Critical Areas

A major focus of the public agencies is establishing new buffers of 150 feet in width. The "larger buffer-oriented" proposals are designed to implement a strategy that buffers must be part of any critical area or shoreline management program and should be adopted wholesale as part of any SMP or CAO update. Proponents of this strategy urge that the science of buffers is well suited to "built environments," is properly directed to existing conditions, and/or can prevent "future impacts." This approach ignores current GMA rural zoning requirements, impermissibly assumes unrestricted future development and does not consider the efficacy of existing regulatory systems.

The large buffer strategy is at the heart of a "de facto" restoration program designed to return the land to some pristine prior undeveloped state or condition, even though there is no authority under the SMA or the GMA to restore or rehabilitate shoreline areas or regulate the built environment. This is the inevitable result, because imposition of large buffers makes existing uses and developments nonconforming. As set out below, uses and structures are highly disfavored under the law and legally can be phased out of existence. The better approach is to establish clear performance standards for a site-specific analysis of the impacts of proposed development, including the possible imposition of buffers on a case-by-case basis. For instance, the City of Seattle's CAO simply establishes additional standards for development within established marine zones.

The designation of more "critical areas," including fish and wildlife conservation areas and associated marine under the GMA and SMA has been pushed by the State of Washington Departments of Ecology and the WDFW. To an extent, the Department of Community, Trade and Economic Development ("CTED") (now the Department of Commerce) has endorsed the concept of larger buffers as well.[105] However, Commerce specifically cautions against uncritical acceptance of the compilations of published lists of "science" relating to buffers, and strongly suggests that local governments critically examine the applicability of the published materials to make sure recommendations are appropriate for local land use and conditions. In this regard, the Commerce Guidelines state:

> The standard buffer widths presume the existence of a relatively intact native vegetation community in the buffer zone adequate to protect the wetland functions and values at the time of the proposed activity.[106]

Some comment letters will likely suggest a "precautionary approach," asserting buffers are needed because the existing shoreline is "degraded" or the science "unclear." There is no record of extensive shoreline degradation in rural Western Washington, but it is true that the Central Growth Management Hearings Board has alluded to the "immature science dilemma,"[107] suggesting imposition of buffers in the face of doubt without regard to their efficacy. How this approach is reconciled with the GMA and SMA planning goals, and the case law is not explained, and the Board does not have the last word here, which is reserved to the courts. A precautionary principle is not one of the GMA and SMA planning goals.[108] The GMA and the SMA instruct and authorize local government to consider and balance all GMA planning goals (including protection of property rights) in order to develop locally appropriate critical area regulations.[109] A precautionary approach is unacceptable for benign, common development.

8. Restoration is Not Required

The support for large marine buffers appears to be based upon the perceived need to protect and "restore" the shoreline. If so, this approach is overly broad and unsupported by the law. The GAM and the SMA do not mandate restoration through regulatory means. The Western Washington Growth Management Hearings Board has correctly observed that:

> All of the above quotes from the RCW and the WAC reflect an overall intent to assure no further degradation, no further negative impacts, no additional loss of functions or value of critical areas. Further, WAC 365-195-410(2)(b) focuses efforts on those natural areas that can be maintained; not on imposing burdens on farmers to retrofit or return natural conditions of habitat areas long since altered. "Critical areas should be designated and protected whenever the applicable natural conditions exist." … There is no mention in the definition to improve or enhance the structures, values and functions, only to 'preserve' them.[110]

At page 24, the Board states that "[W]e find that RCW 36.70(A).060(2) and .040(1) do not require buffers on every stretch of every watercourse containing or contributing to a watercourse bearing anadromous fish, to protect the existing functions and values of FWHCAs." Further, at page 26, the Board states that "we also find that the requirement to consider conservations and protection measures necessary to protect, or enhance anadromous fisheries does not mean that all these measures must be regulatory."

9. Cumulative Impacts

Cumulative impacts are often misunderstood and misapplied by local governments and the state agencies in the SMP Update or CAO Review process. As set out above, for an SMP Update, a cumulative impacts assessment must be prepared. Typically, these assessments presume impacts without documentation. Further, a cumulative impacts analysis typically does not identify the positive effects of current regulatory laws. A cumulative impacts analysis must be done on a system wide basis, logically, the geographic boundaries of the involved local government. Further, cumulative impacts are to be assessed in the "aggregate" against the "no net loss" standard. In other words, if there have been positive developments on restoration of

critical areas or shorelines, or their protection by taking land out of the private ownership via conservation easements, government purchases, or private land bank purchases, these beneficial aspects must be factored in. However, almost never are they considered. Instead, presumptions are made that there are "incremental impacts" to every development, and those "add up" in some undefined subjective way to justify extreme regulatory limitations and even outright bans of common shoreline uses and developments such as private docks and bulkheads.

A cumulative impacts analysis cuts both ways. If presumptions are made that every development has some type of impact, then the beneficial aspects of existing regulatory systems and private and public restoration efforts must be considered as well. Included should also be the work of the Puget Sound Partnership, addressed below, an agency charged to administer programs which are to lead to the restoration of Puget Sound over the next approximate 20-years via implementation of its "Action Agenda." A good argument can be made that the envisioned restoration programs once implemented take away cumulative impact concerns.

When addressing cumulative impacts, it is strongly urged that local governments not be allowed to set as a goal that insignificant and even theoretical impacts must be prevented. Generalized statements such that "any use/development that would cause a net loss of ecological functions or processes" must be expressly prohibited to avoid cumulative impacts are totally off base. The correct perspective is that measurable impacts must be minimized and mitigated to avoid cumulative impacts. Also off base are presumptions that a new SMP must be "more protective of the shoreline environment than the existing SMP". This is not a proper frame of reference unless there is a supporting cause-and-effect analysis.

Factoring in project mitigation, as well as private and public restoration programs, there is no basis to presume any use or development will cause a net loss of ecological functions or processes. In other words, normal use and development of land is not a "threat." There is nothing in the SMA requiring that new regulation be "more protective than in the past." The Legislature has provided no such performance standards to Ecology. Most importantly, the "no net loss" standard set out in the SMP Guidelines is not intended to prevent all impacts from shoreline use and development. That standard would be impossible to attain. The standard is to minimize impacts to the extent "possible or feasible"[111] for water dependent and other uses that require the shoreline, or have been traditionally allowed on the shoreline, including single-family residential development. Each shoreline development is responsible to identify potential impacts, and to implement specific measures to offset those impacts such that the post-development condition is no worse than the pre-development condition.

Special care should be given to prohibiting any requirements for an individual "cumulative impacts analysis." Ecology has issued a report on its Guidelines for "no net loss," which states in part:

> For such commonly occurring and planned development, policies and regulations should be designed without a reliance on an individualized cumulative impact analysis. Local government shall fairly locate the burden of addressing cumulative impacts.

> For development projects that may have un-anticipated or uncommon impacts that cannot be reasonably identified at the time of master program development, the master program policies and regulations should use the permitting or conditional use permitting processes to ensure that all impacts are addressed and that there is no net loss of ecological function of the shoreline after mitigation.

Cumulative impacts should be limited to dealing with highly built environments primarily urban shorelines, or urban areas, not rural areas or low intensity developments such as single-family residential use of rural shorelines.

C. Have the Department of Ecology's Grant Programs Compromised Citizens' Rights to Meaningful Comment?

For both SMP updates and CAO reviews, the State of Washington has set up programs to assist local governments. The GMA grant program is set out in RCW 36.70A.500 and is administered by the Washington State Department of Commerce. In particular, the GMA process supports use of an Environmental Impact Statement, and for local governments to develop procedures for review of development permit applications that are based upon integrated plans, to set up a monitoring system for elements of the built environment, regulatory programs which coordinate with State, Federal and Tribal governments as to project review, those which seek to achieve important State objectives such as economic development, protection of areas of statewide significance, and siting of essential public facilities, and which help establish programs for effective citizen and neighborhood involvement that "contribute to greater likelihood that planning decisions can be implemented with community support…."[112] Commerce's administration of the GMA grant program is one of measured help and guidance, with deference to local discretion and primacy of decision-making..

There are also grants available for SMP updates. These can be found in RCW 90.58.080(6)(a). There are some problems with the Ecology-administered grant program for SMP Updates. For one, the grants often set out a three-year time period to complete the update process which can be difficult to meet. Local governments become pressured to complete the work within the specified grant period which can result in cutting out the public in terms of meaningful effective comment. Secondly, Ecology assigns a contact or grant administrator to work with local governments on the SMP Updates. It is typical to have correspondence or emails going back and forth between Ecology and local planners to the effect that certain proposals urged by citizens will not be approved because they are "inconsistent" with the SMA Guidelines. The problem is that the assigned officials do not make the final decision to approve or disapprove a local SMP Update – that is reserved for the Director. Often overlooked is the role set out between local governments and Ecology as to administration of the SMA:

> This chapter establishes a cooperative program of shoreline management between the local government and the state. Local government shall have the primary responsibility for initiating the planning required by this chapter and administering the regulatory program consistent with the policy and provisions of this chapter. The department shall act primarily in a supportive and review

> capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of this chapter.[113]

D. Comprehensive Overview of Non-Conforming Use Laws in Washington, with Emphasis on How Non-Conforming Uses Affect Homeowners, and Their Ability to Expand, Modify, Rebuild Existing Homes

A hot topic in any SMP Update or CAO review is how to deal with nonconformity if large generic buffers or vegetation protection set asides are employed as regulatory tools. WAC 173-27-080 provides a standard definition of a nonconforming use or development if a local government does not have one in its existing SMP:

> Nonconforming use or development means a shoreline use or development lawfully constructed or established prior to the effective date of the act or applicable master program … which does not conform to present regulations or standards.

In simplest terms, a nonconforming use or development is one that would not be approved as a new development under existing laws, but was lawfully established or constructed. Included are developments, uses and lots that were legally established prior to the effective date of the current SMP and do not conform to current lot size standards.

Any time the government looks to change laws it becomes critical to determine what, if any, uses or developments will become nonconforming. Why is that? Because the courts have stated that local governments are free to preserve, limit, **or terminate** nonconforming uses and developments subject only to the broad limits of applicable enabling acts and the Washington State constitutional protections for private property rights. While nonconforming uses occasionally are described in terms of vested property rights, the fact is that they can be phased out over time, possibly without any compensation to a property owner. In short, in the general framework of the Constitution and case law, Washington State local government has significant flexibility to address nonconforming uses.

There is a fair amount of variability in treatment of nonconforming uses between local jurisdictions. There is also a fair amount of uniformity, in that all local governments treat nonconforming uses or structures as disfavored. Ecology has promulgated "default" standards that apply in the absence of local shoreline regulations set out in WAC 173-27-080. These provide:

- Nonconforming structures may be maintained, repaired and enlarged as long as they do not extend further into areas where new construction would not be allowed.

- Nonconforming uses are generally allowed to continue but cannot be enlarged or expanded.

- Single-family residences can be expanded with a conditional use permit.

- A nonconforming development that is damaged to an extent not exceeding 75% of its replacement cost may be reconstructed.[114]

The Washington Administrative Code also addresses nonconforming lots:

> An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

The Department of Ecology has stated in writing that the purpose of the SMA's nonconforming use provisions is to phase out nonconforming uses and structures, such to bring all development and use up to current standards. *See* Attachment I. Confronted with this, Ecology officials have now issued a more vaguely worded "explanation" that "Ecology does not expect nor is it asking local governments to eliminate all nonconforming development from shorelines." *See* Attachment II. That does not provide much comfort when under the plain meaning of the State shoreline regulations, and case law, nonconforming uses and structures are at high risk of being phased out, especially structures which are totally destroyed by fire or some other perturbation.

The 2010 Legislature sought to provide some relief. It enacted Engrossed House Bill 1653 which specifies that under circumstances where a city or a county has integrated its Growth Management Act CAO with its SMA SMP to protect critical areas within shorelines of the State, until the Department of Ecology approves a new master program update or segment of the SMP, a "use" or development which is "legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified" under certain circumstance. Specifically, the use may be continued or modified if:

> (A) The redevelopment or modification is consistent with the local government's master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas.[115]

The problem with the relief provided by the Legislature is that it is interim.

So what to do? There are several options. One, nothing dictates that a local government or Ecology when updating an SMP must declare historic uses or structures "nonconforming," in particular, since the State Guidelines only apply to new development. Government has total

discretion to apply new ordinances and regulations prospectively only to undeveloped lots or parcels. Two, in the alternative, existing development and uses can be grandfathered through imposition of an exemption, including its redevelopment or a certain percentage of expansion. Third, for nonconforming lots, a local government could provide relief where lot dimensions preclude compliance with buffer requirements, *e.g.*, use of a common line setback approach whereby new development need only meet a setback adjoining built parcels have already established. Governments can also customize rules based on local shoreline conditions as to structures and uses. For instance, for redevelopment of existing lots or structures, instead of making these parcels nonconforming as to buffers or setback requirements, government could provide incentives that allow benign uses or structures such as single-family homes or appurtenances to continue but improve conditions over time through voluntary restoration efforts, *e.g.*, controlling non-native invasive species, the "benign nonconformities" approach.

In sum, the best approach is to avoid use of large buffers or vegetation set-asides which are the main regulatory tools that create nonconforming uses and structures in the first place. These regulatory devices are onerous and extreme, both when imposed and in consequence because they make existing development nonconforming. If used, flexibility should be allowed via use of incentives or performance standards which allow property owners to prepare a site-specific analysis with project mitigation to demonstrate how this standard is met. It is true that this approach is somewhat more expensive and places the burden upon local property owners, but at least the choice ought to be offered. If it is, it should be mandated that any site-specific analysis and mitigation plan prepared by a reputable professional is presumed valid, and the burden is upon Staff to show otherwise.

IV. FEMA AND THE PUGET SOUND PARTNERSHIP COULD TRUMP ANY SUCCESS TO BALANCE REGULATION AND PROPERTY RIGHTS EMBODIED IN NEW OR REVISED SMPs OR CAOs

Without regard to the process for SMP updates and CAO review, there are other possible storm clouds on the horizon. FEMA is pushing adoption of a model ordinance to comply with the Endangered Species Act. As proposed, there would be severe consequences to use and development located within the 100-year floodplain and floodplain habitat in Puget Sound. Analysis of FEMA's regulatory proposals is beyond the scope of this paper. Annexed as Attachment III is a well thought-out comment letter dated April 8, 2010 submitted by the Gordon Derr law firm to FEMA Region 10.

Consideration also needs to be given to the Puget Sound Partnership ("PSP"). The role of the PSP has perhaps been overlooked by many shoreline property owners and developers, and groups which are interested in measured government regulation. The PSP is to be responsible to the Governor, the Legislature and the public for leading the recovery of Puget Sound and achieving results.[116] The Legislature specifically stated that, "… the Puget Sound Partnership [does not] have regulatory authority, nor authority to transfer the responsibility for, or implementation of, any State regulatory program, unless specifically authorized by the legislature."[117] No transfer of authority has been made by the Legislature which abdicates local responsibility under the GMA and the SMA.

The PSP is to respect "local government's authority." Largely, it exists to identify and fund discrete restoration projects, and to facilitate and coordinate collective efforts for restoration of Puget Sound. Towards this end, the PSP is to define a "strategic, basin-wide plan" that sets priorities to restore Puget Sound ("the Action Agenda").[118] To set priorities for restoration, the Legislature specified that a strategic science program be developed, and a biennial science "work plan" be prepared.[119] In addition, the PSP is to create and maintain a repository for data, studies, research, and other information relating to Puget Sound health, and "to encourage the interchange of such information…." The PSP is also to establish a monitoring program, including baselines, protocols, guidelines and quantitative performance measures.

The PSP should be a positive influence on restoration programs which will actually improve shoreline functions and values, such that local governments do not need to be overly concerned that every conceivable impact is known. The devil is in the details, however. PSP has been providing grants to local groups ostensibly to work on its behalf to implement the goals and objectives of the legislation enacting the PSP. The PSP is also establishing "local integrating organizations" ("LIOs") which are to administer any restoration programs. The LIOs have work or "action plans" which are part of the actions approved by PSP in return for receiving grants from that organization. These action plans typically include obtaining "appropriate" updated SMPs and CAOs. Thus, through the LIOs, the PSP, perhaps inadvertently, could be impermissibly involving itself in local regulatory decision-making.

Because of its grant programs, the influence of PSP and the LIOs should not be underestimated. This concern is not hypothetical. RCW 90.71.350 states that the Legislature intends that "all governmental agencies within Puget Sound will exercise their existing authorities to implement the applicable provisions of the action agenda" set out by PSP. If it is determined that a local government is in substantial "non-compliance" with implementing the Action Agenda, after meeting and assessing the matter, the PSP may recommend to the governor that the local entity be ineligible for State financial assistance until the "substantial non-compliance is remedied."[120] This can include where the PSP determines that a statute, rule, ordinance or policy conflicts with or is an impediment to the implementation of the action agenda.[121]

V. CONCLUSION

The SMP Update and CAO Review process can be formidable. The issues are not black and white and in many cases very complex. It is important to recognize that Washington Laws do not require the built environment to be sacrificed for the natural environment but rather that known development impacts be minimized on the natural environment. Our laws require we take a balanced approach, considering the social, economic and natural resource goals when building a community. And always remember we live in a dynamic world without perfect knowledge. The key is to be active and participate in the SMP update and CAO review processes. This writer believes in the basic integrity of government and its officials and employees and appreciate their dedication. Your perspective on the process is needed to help local governments and the Department of Ecology to reach reasoned results.

VI. END NOTES

[1] RCW 90.58.

[2] RCW 36.70A.

[3] The precautionary principle may be a good governmental principle when the use proposed is new and the long term impacts of the use are unknown. That is not the case with residential use of the shoreline, yards and landscaping on the shoreline, bulkheads, and residential docks.

[4] This Committee determines if a proposed order is within the intent of the Legislature. *See* RCW 34.05.610 *et seq*.

[5] A comprehensive discussion is found in Klinge, "A Background Paper on the Shoreline Master Program Updates," March 2010, Washington REALTORS®.

[6] RCW 90.58.020.

[7] RCW 90.58.030(d).

[8] RCW 90.58.080.

[9] RCW 90.58.030(3)(b).

[10] RCW 90.58.090.

[11] RCW 90.58.100(1).

[12] *See* Laws of 1990, 1st Ex. Sess., ch. 17, *codified* at RCW 36.70A.

[13] RCW 36.70A.060(2); RCW 36.70A.172(1).

[14] RCW 36.70A.030(5)(c).

[15] *See* RCW 36.70A.060(2).

[16] RCW 90.58.020.

[17] Laws of 1995, ch. 347, Section 311, *codified* at RCW 90.58.190.

[18] *See* RCW 36.70A.480(1).

[19] *See* RCW 36.70A.480(3).

[20] The Board said:

> Moreover, a close examination of the GMA "critical areas" terminology shows remarkable similarities to the SMA language. For example, the definitions of "wetlands" in the GMA and in the SMA are **identical**. *Compare* RCW 36.70A.030(2) and RCW 90.58.030(2)(h). Wetlands are included in the GMA definition of critical areas, most of which are hydrological "ecosystems." In addition to wetlands, such "ecosystems" include "areas with a critical recharging effect on aquifers used for potable water," "fish and wildlife habitat conservation areas," and "frequently flooded areas." These features collectively constitute the component parts of the hydrologic ecosystems that are "*shorelines of state-wide significance."* Indeed, it is difficult to imagine a shoreline ecology, that is the subject of the SMA planning regime, that **does not** consist of "ecosystem" values and functions defined by wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas and frequently flooded areas. These two regulatory schemes plainly address the same natural landscape, the same natural attributes, and the same natural processes. It is an inescapable conclusion that SMA "shorelines of state-wide significance" are critical areas that are "large in scope, complex in structure and functions, and of a high rank order value." *See Litowitz* and *LMI/Chevron, supra*. In short, **the Board concludes that shorelines of state-wide significance are critical areas subject to both the GMA and SMA.** *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-0009c (January 9, 2003 FDO), at p.22, emphasis added.

Everett Shorelines Coalition v. City of Everett, CPSGMHB No. 02-3-0009c (January 9, 2003 FDO), at p.22, emphasis added.

[21] ESHB 1993; RCW 36.70A.480(5).

[22] RCW 36.70A.480(3).

[23] *See also* Department of Ecology Directive, "Questions and Answers on ESHB 1993," p. 2.

[24] *Ibid.*

[25] *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67, 103 P.3d 244 (Div. 2, 2004).

[26] *Id.*, 124 Wn. App. at 867.

[27] *Futurewise, et al. v. WWGMHB*, 162 Wn.2d 242, 244-45 (2008)

[28] Court of Appeals, Division II, Case No. 38017-0-II.

[29] Under the SMA, amendments to a shoreline master program are not effective until presented to the Department of Ecology for its review and approval. *See* RCW 90.58.080. This is a totally different process than that established for revisions adopted for a local government's critical areas ordinance. By contrast, CAO revisions become effective once they are approved by local municipality's legislative body, whether a board of county commissioners or a city council. Also, the provisions of RCW 36.70A.172, use of best available science, "shall not apply to the adoption or subsequent amendment of the local government shoreline master program and shall not be used to determine compliance of a local government's shoreline master program with chapter 90.58 RCW [the SMA] and applicable guidelines." *See* RCW 36.70A.480(3)(b).

[30] RCW 36.70A.480(3)(d).

[31] RCW 36.70A.480(4).

[32] RCW 36.70A.480(6).

[33] WAC 173-26-176(2).

[34] According to this State's highest court: "The SMA *does not prohibit development of the state's shorelines*, but calls instead for 'coordinated planning . . . recognizing and protecting private property rights consistent with the public interest.'" *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (emphasis added); *see also* RCW 90.58.020.

[35] *See* RCW 90.58.020.

[36] WAC 173-26-201(2)(C).

[37] Klinge, "A Background Paper on the Shoreline Master Program Updates," March 2010, pp.5-6.

[38] The SMA, RCW Chapter 90.58, unequivocally allows "construction on shorelands by an owner … of a single-family residence … for his or her own use …." RCW 90.58.030(3)(e)(vi). The term "shorelands" includes "… **all wetlands** … associated with tidal waters." RCW 90.58.030(2)(d) (emphasis supplied).

[39] WAC 173-26-191(1)(d); *see also* WAC 173-26-201(2)(b) (Adaptation of policies and regulations); WAC 173-26-201(2)(e)(1)(F) (Monitoring Impacts).

[40] *Swinomish Indian Tribal Council v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415 (2007).

[41] Compare WAC 173-26-221(2)(c)(i)(B) with -221(2)(c)(iv).

[42] WAC 173-26-221(5)(a).

[43] *Citizens Alliance for Property Rights, et al v. Sims, et al*, 145 Wn. App. 649, 187 P. 3d 786(2008). *See also, Isla Verde Int'l Holdings v. City of Camas*, 146 Wn. 2d 740, 49 P. 3d 867 (2002).

[44] *Unlimited v. Kitsap Cy*., 50 Wn. App. 723, 727 (1988). *Cobb v. Snohomish County*, 64, Wn. App. 451, 467-68 (Agid J., concurring and dissenting in part) (Internal citations modified); *see also Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761 (2002); *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 242-44 (1994).

[45] *See Isla Verde*, 146 Wn.2d 755056; *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 340 (2007).

[46] *Burton v. Clark County*, 91 Wn. App. 505, 521 (1998).

[47] *Nollan*, 483, U.S. 837 (1987). *See also* R. S. Radford, *Of Course a Land Use Regulation That Fails to Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (local government must demonstrate "a close casual nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property's unregulated use.")

[48] R.S. Radford, IId. at 391.

[49] *Citizens for Rational Shoreline Planning, et al. v. Whatcom County, et al.*, Case No. 63-646-4

[50] Department of Ecology, Frequently Asked Questions, Publication Number: 09-06-029, p.6 (Revised April 2010).

[51] *See. e.g., Nollan v. Cal. Coastal Comm'n, supra.; Dolan v. City of Tigard*, *supra.*; *Benchmark Land Co. v. City of Battleground*, 103 Wash. App. 721, 14 P.3d 172 (2000), *aff'd on other grounds in Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002)*; Burton v. Clark County*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998) (County conditioning of approval of a three-lot short plat on the landowner's dedication of road right-of-way constitutes unconstitutional taking).

[52] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[53] *See* U.S. Const. amend. V; Wash. Const. art. I, § 16; *Mfr'd Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 368 (2000) (Property rights consist of the fundamental rights of possession, use, and disposition).

[54] *State v. Vander Houwen*, 163 Wn.2d 25, 36 (2008); *Mfr'd. Housing*, 142 Wn.2d at 354-55.

[55] *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683 at 687 (J.M. Johnson, J., lead opinion).

[56] *See Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring) ("Done right, master plans can serve both needs.")

[57] *Biggers*, 162 Wn.2d at 687 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring).

[58] *Biggers*, 162 Wn.2d at 687 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702-03 (Chambers, J., concurring).

[59] *See Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726 (1984) (RCW 90.58.020 does not prohibit shoreline uses).

[60] RCW 90.58.020.

[61] *Biggers*, 162 Wn.2d at 697 (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *accord Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243 (2008) (J.M. Johnson, J., lead opinion) ("The SMA meant to strike a balance among private ownership, public access, and public protection of the State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning . . .").

[62] *See, e.g., Fladseth v. Mason County*, Shorelines Hearings Board (SHB) No. 05-026, Conclusions of Law 13-16 (May 2007); *May v. Robertson*, SHB No. 06-031, Conclusions of Law 16-18 (Apr. 2007); *Close v. San Juan County*, SHB No. 99-021, Conclusion of Law 4 (Jan. 2000); *Genotti v. Mason County*, SHB No. 99-011, Conclusion of Law 12 (Oct. 1999).

[63] *See, e.g., Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203-05 (1994) (reviewing shoreline permit decision for compliance with the SMA); *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 355-62 (2000) (upholding Shorelines Hearings Board decision denying permit to construct a dock based on aesthetic and cumulative impacts).

[64] *See, e.g., Sollar v. City of Bainbridge Island*, SHB Nos. 06-024, 06-027, Finding of Fact 10 (Sept. 2007); *Friends of Grays Harbor v. City of Westport*, Environmental and Land Use Hearings Board No. 03-001, Conclusion of Law 24 (Oct. 2005).

[65] RCW 90.58.020.

[66] Office of Attorney General Guidelines for Regulatory Taking, p.7:

> The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions to not result in an unconstitutional taking of private property.

See also RCW 36.70A.370, Protection of Private Property:

[67] WAC 173-26-186(5)

[68] RCW 36.78.020(6).

[69] *See* RCW 36.70A.020(5)(8).

[70] RCW 36.70A.035(1)

[71] RCW 36.70A.140.

[72] RCW 90.58.130.

[73] WAC 173-26-100.

[74] WAC 173-26-201(37)(c).

[75] WAC 173-26-186(8)(a) (emphasis supplied).

[76] WAC 173-26-186(8)(d) (emphasis supplied).

[77] WAC 173-26-090.

[78] *See* Introductory Comments of Peter Ruggiero, Oregon State University ("However, it has not been confirmed in the field or the laboratory whether currents and sediment transport rates will increase or decrease in front of the hardened bulkhead as compared to an unarmored section of beach, and whether the sedimentary environment would be significantly modified".) *See also* comments of Department of Ecology official Mr. Hugh Shipman as to the "limited amount" of science that has been done in Puget Sound on the effects of armoring.

[79] RCW 36.70A.130(1)(a)

[80] RCW 36.70A.172.

[81] RCW 90.58.100(1)(a).

[82] RCW 90.58.100(1)(b)-(f).

[83] *See* RCW 90.58.100.

[84] RCW 36.70A.020; *HEAL v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 979 P. 2d 864 (1999).

[85] *HEAL v. Central Puget Sound Growth Management Hearings Board, supra*.

[86] *See, e.g., Swinomish Indian Tribe v. Skagit County*, WWGMHB, Case No. 02-2-0012C (December 8, 2003), 155 Wn.2d 824, 837-38 (2005).

[87] *Heal*, 96 Wn. App. at 533-34 (emphasis added); *see also Isle Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 763 (2000) (striking down generic open space condition regardless of the specific needs created by a given development).

[88] *See* WAC 173-26-186(5) ("Guiding Principles").

[89] *Heal*, 96 Wn. App. at 533.

[90] Index 590 (G.D. Williams and R.M. Thom, *Marine and Estuarine Shoreline Modification Issues*, Batelle Marine Sciences Laboratory, White Paper submitted to Washington Department of Fish and Wildlife at 81 (Apr. 2001).

[91] *See* State Hydraulic Guidelines, WAC Chapter 220-110.

[92] (CSGMHB No. 05-3-0004C, Order Finding Compliance, January 23, 2006).

[93] *Id*. at 44.

[94] *Id*. at 53.

[95] AGO 2006 No. 2 (January 27, 2006), at 4.

[96] *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835 (2005).

[97] The Department of Ecology has issued a report titled "What Does No Net Loss Mean in the 2003 Guidelines?" In its report, Ecology states: "It is recognized that methods to determine reasonably foreseeable future development may vary according to local circumstances, including demographic and economic characteristics in the nature and extent of the local shoreline."

[98] WAC 173-26-090; WAC 173-26-171(3)(a).

[99] *See*, *e.g.*, RCW 36.70A.070(5)(a).

[100] Dr. Kenneth M. Brooks, *Supplemental Best Available Science Supporting Buffer Widths in Jefferson County*, Washington, p. 3. (2007)

[101] WAC 365-190-080 (5)(c)(ii).

[102] *See* RCW 34.05.010(16); RCW 34.05.375.

[103] WAC Chapter 173-26.

[104] *See* RCW 90.58.190(2)(b); RCW 36.70A.480(3).

[105] *See*, *in general*, *Protection of Critical Areas and the Mythology of Buffers*, by Alexander W. Mackie, "Growth Management In Washington," CLE seminar, November 15-16, 2004, Seattle.

[106] Department of Commerce, Critical Areas Assistance Handbook, Appendix A.

[107] *Hood Canal Environmental Counsel, et al. v. Kitsap County*, CPSGMHB, 06-3-00122, at 41-42 (Final Decision and Order (August 28, 2006) (2006 WL 2644138),

[108] RCW 36.70A.020, RCW 90.58.020.

[109] RCW 36.70A320; RCW 36.70A.3201; *Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wn. App. 127, 139 (2005) (The GMA requires that local government "must balance protecting the environment" against other GMA planning goals.); *Wean*, 122 Wn. App. at 173; *Heal*, 96 Wn. App. at 531-32.

[110] *Swinomish Indian Tribal Community et al. Skagit County* (WW6MHB Case No. 02-2-0012c), p. 1-22 (Dec. 8, 2003).

[111] The Guidelines define feasible as follows:

> "Feasible" means, for the purpose of this chapter, that an action, such as a development project, mitigation, or preservation requirement, meets all of the following conditions: (a) The action can be accomplished with technologies and methods that have been used in the past in similar circumstances, or studies or tests have demonstrated in similar circumstances that such approaches are currently available and likely to achieve the intended results; (b) The action provides a reasonable likelihood of achieving its intended purpose; and (c) The action does not physically preclude achieving the project's primary intended legal use. In cases where these guidelines require certain actions unless they are infeasible, the burden of proving infeasibility is on the applicant. In determining an action's infeasibility, the reviewing agency may weigh the action's relative public costs and public benefits, considered in the short-and long-term time frames.

WAC 197-26-020.

[112] RCW 36.70A.500(4)

[113] RCW 90.58.050.

[114] WAC 173-27-080.

[115] Engrossed House Bill 1653, p.3

[116] RCW 90.71.200, .210, .230.

[117] RCW 90.71.360,

[118] RCW 90.71.300, .310.

[119] RCW 90.71.290.

[120] RCW 90.71.350(3).

[121] RCW 90.71.350(5).