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Critical Area Ordinance

Comments submitted by

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My review is of the underlined/strikeout document provided on line.

I used that copy to remind me of the approval process of the 2005 CAO with the strike outs and changes

For a history of the 2005 document and as a member of district 3 planning commission I was remind of the simple fact 6 members of the planning commission submitted a CA0 document containing less stringent setbacks and other restrictions.

District 1 planning commissioners submitted an alternate document known as a Minority Report Doc.

At the time DCD allowed the dueling documents. Commissioner Endersen championed the document during the final approval stage.

Commission's Chris Endresen, Patty Lent voted and approved the 2005 CAO document. Jan Angel voted for the document recommended by two thirds (2/3) of the Planning Commission.

I digress!

The court case and final judgment of the Swinomish Indian v Western Washington has revealed some interesting aspect which must be considered when developing a revise CAO ordinances.

Considerations and changes for a revised document must include court cases dealing with the CAO during the time period of said document.

Needless to say, according to the judgement within several lawsuits of CAO's case studies and ruling must be considered.

A major ruling in the Swinomish v Washington stated regulating documents must have established baselines for measuring an ordinances specified and purposeful outcome. Basically what was gained or lost in order to judge the success of the regulation since the inception of the CAO instituted by the county.

Kitsap County has no baseline of record or a measuring system nor a statistical measuring process in place. Therefore from the beginning of the review process the document is without merit.

The Statement of Purpose or the following Goal Statement cannot be evaluated per the GMA requirement.

With all of the legal bander within the Swinomish case the one overriding decision within the document regulations is the sentence in para 14 "the county(Skagit) has a no harm standard sets the "existing" condition of local critical areas as the baseline for measuring harm.

Para 22 paraphrased states, the board held that BAS, and by extension the **GMA does not require the county to establish mandatory riparian buffers.**

I could continue referencing aspect within this document which basically and in summation states without a CAO baseline established at the time of this ordinance existence and without a comprehensive measuring process the document is mute without an adaptive management plan gained via benchmarked data.

The court determined a GMA can allow a "**No Harm**" criteria in establishing buffers to support the intent within the document.

In reviewing the 2005 underlined/strikeout document. I have issues with the Goal Statement p.2, lines 27-30.

If the functions and values of critical areas are so important? How does the county justify mitigation? A critical area is designated with certain physical and geological specifics to that area. Substituting one area for

another destroys the logic for declaring a wetland as critical. It also conflicts with p.3, line10-12.

P.4, lines 13-16 does nothing more than to add to the permitting requirements to where there were NONE.

19.100.115 Relationship to other county regulations is set up to be without criteria and determination is arbitrary.

P.6 lines 23-24 requires a written request for a time extension changed from 60 to 30 days but does not stipulate DCD required response time? The entire section is arbitrary and puts the subjective determination of "good cause" without criteria.

P.8 Existing Nonconforming Structures: lines 23-29 discussing new construction in a buffer is so confusing it needs rewritten. You're already in a buffer but (20%) increase cannot be located to an existing structure also in the buffer?

P9 Danger Tree removal has no bases for not allowing a property owner from determining if a tree is a danger or liability within or to said property. Why place a burden and cost onto the property owner? Unless the county is accepting the responsibility of damage if the tree falls. This criteria is absurd and needs to be removed.

P44-48 Wetlands: The entire section is without a baseline of statistics which could be used to establish, if a wetland was disturbed or not. No matter what the category. Wetlands are only of value to the wildlife which uses them for habitat. Wetlands are formed because the soil is unable to absorb water. Basically hardpan soil in areas which accumulate water. It also does not take a specialist to figure out what is a wetland and were its boundaries begin. Wear a pair of tennis shoes and the process is easy. It is just another added cost to a developer. The wetland section needs to be rewritten in lieu of the Swinomish Indian v. Western Washington Supreme court decision.

P53-56 How has the Tree Protection section even come into existence? The entire section has within it restrictions which conflict with a property owners ability to determine the surrounding landscape of their

property. For those that determine trees to be a nuisance or danger the ordinance increases the restrictions on a property owner. Not only that; all of the distance changes to buffers were increase. Why?

P86. Section 19.400.415. I understand the considerations of development in geologically hazardous areas. My question is where within DCD is there the expertise to address or make judgements on an entirely new paragraph? Apparently justified pursuant to RCW 36.70A.170?

P90 line 6. Why has native vegetation become such a priority over ornamental or other types of vegetation?

P90 line17-23 Seismic Hazard Development Standards. Curious to know what seismic maps are used and what is their accuracy as permitting is subject to that information?

I have marked up my copy of the underline/strikeout copy taking up a great deal of my time.

I have decided the continuation of referencing my changes of the entire document when in the past recommendations have been ignored.

Based on what I have reviewed and the obvious questions concerning the thought process which originated this document. The current changes of the 2005 CAO have been made without a baseline analysis or follow-on data analysis needed to justify the tightening of buffers and time frames.

In conclusion I would recommend that the Department of Community Development and the Planning Commission read the substance and content of this document.

I also suggest their review consider the court case of **Presbytery of Seattle v. King County.**

I have gleaned from the lengthy court case what I thought the current DCD ordinance had not taken into consideration. Substituting the court reference as the counties.

References are as follows:

"However, **even if the regulation protects the public from harm, and does not deny the owners a fundamental attribute of ownership** (and is thus insulated from a "takings" challenge), **it still must withstand the due process test of reasonableness.**[16] The inquiry here must be whether the police power (rather than the eminent domain power) has exceeded its constitutional limits. To determine whether the regulation violates due process, **the court should engage in classic 3-prong due process test** and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.[17] "In other words, 1) there must be a public problem or `evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must *331 not be `unduly oppressive' upon the person regulated."[18] The third inquiry will usually be the difficult and determinative one."

"If the **regulation is not aimed at a legitimate public purpose**, or uses a means which does not tend to achieve it, or if it unduly oppresses the landowner, then the ordinance *332 will be struck down as violative of due process and the remedy is invalidation of the regulation. No compensation (which properly belongs with a "taking" analysis) is warranted in the face of a due process violation.

I believe the county is in violation of the 3 prong due process test addressed in the court case. Also regulations are to be written in the public interest and do no harm.

Recommend a total rewrite of the 2017 CAO.