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Kitsap County Commissioners
614 Division Street
Port Orchard, WA 98366

Dear Commissioners,

Attached please find a marked up copy of the Critical Areas Ordinance published for Public Review. My comments are inserted below the section to which they apply.

In addition to my specific comment, I offer the following observations”

1. Throughout the Title there is a clear presence of strong advocacy for wetlands, trees, fish, eagles, wildlife, other “environmental” considerations, and a “public good” none of which are identified for protection under our Constitution. Absent in the document is any advocacy for individual rights and the rights associated with private property both of which are specifically protected under the Constitution. Exactly how can this misrepresentation of constitutional, delegated authority be defended?
2. I completed a detailed review of the original CAO in 2005 only to find that the individual Commissioners did not read the entire document or have sound knowledge of its contents before adoption. I most sincerely request that, because of the substantial impact this document (CAO Revision) will have on the economic growth of the County, the opportunity for affordable housing, and the constitutionally protected rights associated with private property, that the Commissioners dedicate such time and energy as may be required to fully comprehend the provisions and consequences of this Title.
3. Perhaps the single most evident missing element of this revision is any explanation for the need for revision. This Title has been in existence since 2005. At the time the 2005 Title was addressed, the county assured citizens that a set of benchmarks would be established to assess effectiveness of the provisions off the Title and that periodic (annual) reviews would be completed. Although it is apparent that no formal benchmarks or initial conditions have been established upon which to base “no net loss” or similar assessments, the county has continued to accumulate data associated with new permit applications. It must be assumed that in the intervening eleven years, since the 2005 adoption, the county has completed some independent field field surveys and

- compiled records based on factual occurrence that would support modifications to the Title (either additional restrictions or easing restrictions), No such information is provided or even referred to. Have independent field surveys been completed to first establish benchmarks and then to document actual conditions at a precise period in time? If not, what is the sense of noting requirements like “no net loss” if there is nothing to assess loss against? It would appear that this revision is being made for the sake of revision and that any new rules, requirements, and restrictions are based in administrative process rather than actual observed data. Is that the appropriate way to approach this project?
4. Because individual citizens have devoted many hours of study and research to properly assess the provisions of the proposal and then documented them clearly for review, I recommend that a full public hearing to address each and every one of the comments be conducted. In the past, staff has been allowed to consolidate and merge comments and present those they considered appropriate for Commissioner understanding. While staff does provide a necessary function in the governance of the county and the maintenance of legislative actions, they are not responsible to the citizens and cannot act instead of the Commissioners.
 5. The proposed Title is excessively long and arduous, is repetitive, and creates and uses a language that is not compliant with common use of words. The result is a document that rather than being user friendly (user being the property owner/developer) it is beyond the reasonable comprehension of the average citizen. As such, it automatically places the citizen at a disadvantage. If it is true that ignorance of the law is no excuse for non-compliance it is equally true that presenting law in a manner that precludes understanding is also unlawful. Not being facetious, it almost appears that the authors of this Title set out to make it virtually impossible for any single individual to understand or be in compliance with the provisions of the Title.
 6. Notwithstanding that GMA identifies the constitutionally protected rights associated with property to the other twelve “priorities, The Commissioners are, by law, responsible to be in compliance with the provisions of the Constitution. The GMA cannot create law or regulation that violate a primary right of citizens. CAO provides the primary example of administrative and regulatory takings that violate property rights and ignore the constitutional provisions for eminent domain.
 7. The CAO, in its provisions for entry onto private property and other wise throughout the Title, attempts to impart a perception that county agents have authority to enter onto property for purposes of survey or verification of geophysical conditions on the property. The reality is that without explicit permission of the property owner, no person may enter that

- property without a proper warrant, except in response to a direct emergency involving public safety, life and property. Rather than establishing a lengthy paragraph about how an inspector or agent might gain access to property, please simply state the very specific requirements for such access.
8. The Title enjoys continuance of the “notice to title” as a means’ of documenting” the existence of a critical area or buffer on a property. This requirement, other than being a clear example of extortion, has several, problems. Since the provisions of the Title do not become active until an application for permit is tendered, any property without a permit request is not effectively subject to the provisions. That amounts to selective enforcement of the law, a condition specifically prohibited by the constitution. As written, the creation of “notice” is absolute and final. There is no means to revise, remove, or cancel the “notice”. This means that any future revisions to this document, any subsequent court decisions, or any natural act that modifies the conditions that existed at time of “notice” are not basis for revision. Finally, the simple act of placing a restrictive “notice to Title” has a direct and lasting impact on the fiscal value of the property in question and represents a clear taking. That neither DCD nor the Auditor, in his property assessments, understand this negative impact does not speak well for the educational background of those staff personnel.
 9. Over the 12 years since the adoption of the original CAO, there have been numerous GMHB findings and court cases involving both GMA, CAOs and property rights in general. It does not appear that staff is conversant with those decisions or simply elected not to reflect the findings in this revision. A complete listing of those rulings and findings considered and reflected in the proposal would go a long way toward better understanding what the county is actually being responsive to. Because the constant conflict between apparent environmental protection regulation and property rights is addressed in the courts and administrative hearings, the results of those actions should be considered and should frame the affected parts of the CAO. The citizens have a right to know as do the Commissioners before acting on this proposal. Unfortunately, it would appear that staff is acting more as an agent of Department of Natural Resources rather than in the best interest of the citizens of Kitsap County. Once again, staff has taken the position that most strenuous and restrictive implementation of DNR guidance is appropriate to avoid any negative results in potential conflicts with or appeals by citizens. The proper role of the county, and especially staff, is to, propose those rules and regulations that, while in compliance with underlying law, create the least burden on and impose the least restrictions on citizens. That is clearly not the process or objective in this proposal.

10. The burden of the County (and the State) to provide staff personnel with qualifications equal or superior to those designated to prepare studies and reports to support permit applications is not clearly established. It is important to note that when a licensed individual contracts to perform a specific task for another, that individual incurs a fiduciary duty to perform and a liability for the product presented. Any time the county, in its review and comment process, contests or refutes the content of a presented report, they are effectively challenging the product present by the licensed professional. The equally or superior qualification requirement should be obvious, as should a certain liability for the county should the contested matter or objection not be sustained.
11. The nature and detailed level of the various studies and reports required of the applicant in this Title must be considered both from the consideration of practical contribution to the goal and objective of the Title and the cost for such work. That cost to complete the required reports does not add value to any project but does impact the total cost of the project. Simply stated, it is an imposed up front cost that must be met before the first spade of dirt is turned. In most cases the cost will be included in the financing cost of the project and will be subject to interest payments for the life of the financing periods. Thus not only has the county added substantially to the apparent cost of the project but also to the actual cost with no specific gain for the applicant. While that cost may be passed on to subsequent owners or investors in the project, that cost is also the first to disappear in a market down turn and is most difficult to recover. This has direct impact on the economic health of the county both in the ability to attract new business development and to provide a dependable affordable housing market.

As a result of my review of the CAO Proposal and the number of errors, omissions, and conflicts with constitutional protections contained in the proposal, I strongly recommend that the County apply for delayed compliance and regroup to prepare and present a document that is more closely aligned with the best interests of the citizens. I also strongly recommend that a strong property rights advocate be added to the proposal preparation group.
Respectfully,

Jack Hamilton