ED WOLFE

CRITICAL AREAS ORDINANCE BRIEFING
3/15/2017

1. Have you, as County Commissioner, critically read the CAO? In the past, some or all County Commissioners relied only on staff briefings.

Who wrote the CAO, and who reviewed it? My experience with County Staff has been there is rarely oversight or review.

The current draft is loaded with illogic, errors and violations of court decisions.

Nowhere is stated the problem this document is intended to solve. Would this document solve the stated problem?

What is the CAO intending to protect?
Which exact species are to be protected by the CAO? Are they listed? The document needs to display a list of critical species and features and the criteria that would provide protection for each.

Kitsap Alliance of Property Owners (KAPO) agrees that certain geographical features are critical to the functioning environment and to protection of threatened and endangered species. We disagree that buffers provide measurable protection for these critical features.

We recommend the term "buffers" be replaced with "no-pesticide, vegetated hardscape setback of 25 feet" from critical areas and add "all water falling on a parcel shall be percolated into the ground without leaving the parcel". A larger hardscape setback from top of slope may be appropriate in landslide prone reaches.

Buffers provide a large workload for County DCD employees and create a tremendous burden of uncertainty for property owners. For individual property owners, this often results

in inaction due to fear of local government. People are not hired and our economy languishes.

First off, let's review recent history. At the first discussion by the BoCC in 2004, Chris Endresen wondered aloud, why were large buffers being proposed, since for many decades, Kitsap had required a 35 foot building setback and no one had ever reported a problem. Prior to the 35 foot rule, **no setback** was required.

Prior to the 35 foot setback rule, buildings were routinely constructed right at the edge of steams. To this day, there has been no proven harm. An example is the property that now hosts the Swim Step Restaurant in Port Orchard. Except for earlier septic problems, now relieved by a sewer hookup, that building causes no provable harm to salmonoids.

During the 2005 CAO update, I took a keen interest. More than any other Kitsap resident or County employee, I attended every meeting and hearing, including those of the Growth Management Hearings Board.

During the 2005 CAO review, Department of Ecology (DOE) informed Kitsap that the county would be deemed "out of compliance" and ineligible for grant money if large buffers were not included in the CAO. The threat of loss of grant money motivated Commissioners Chris Endresen and Patty Lent to vote for the large buffers in the 2005 version of the CAO. Next, we will show the 2005 DOE threat is mute.

Regarding buffers: In *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board (2007)*, paragraph 22: "The Board held that BAS (Best Available Science), and by extension GMA, does not require the county to establish mandatory riparian buffers. Again, we (Washington State Supreme Court) agree with the board". Paragraph 23 further states: "Moreover, the GMA does not require the county to follow BAS; rather it is required to 'include' BAS in its record. RCW 36.70A.172(1). **Thus the county may depart from BAS if it provides a reasoned justification for such departure.**"

During the 2005 Critical Areas Ordinance review cycle Kitsap Alliance of Property owners provided for the record approximately 3,800 peer reviewed studies that showed buffers of 9-15 feet reduced all contaminants to near zero.

Buffer requirements must comply with *Citizens Alliance for Property Rights v. Sims (2008)* regarding proportionality. Buffers must not be over-reaching.

Thanks to the *Swinomish* decision, the Department of Ecology 2005 treat of non-compliance is now gone, so we are free to use common sense in drafting our CAO.

Your attention is drawn to the Kitsap County maps. The upper ones display in yellow, the 95% of Kitsap deemed inside a critical area and thus these parcels become non-conforming. Please note the black dots showing buildings exist on the vast majority of these "critical area" parcels. To date, no measured science has been provided that prove harm to the environment on these non-conforming parcels.

Citizens in 2005 were promised annual reviews of effectiveness of the CAO, but non were conducted. There is no supporting relevant Western Washington science showing buffers are needed or effective.

Rural Kitsap is almost entirely built out. Virtually all structures are built inside what are now deemed "critical areas" or buffers.
What harm has been proven?
Where is this documented?

The second set of maps, in yellow, display the area covers by buffers. The average parcel must provide five technical studies, the expense of which drives up the cost of house construction significantly.

The extent of buffers varies widely from 1000 feet (wellheads, 19.700.730.A.2.), to 250 feet (wetlands 19.200.215.C.2.), to 400 feet for non-endangered bald eagles.

The maps display Kitsap's critical areas and their buffers that are restricted by the current CAO. While a few stream and wetland buffer widths reductions are proposed, updated maps will change but a little.

The most impactful **scientific study** I have encountered is *"Coho Salmon Spawner Mortality in Western US Urban Watershed: Bio-filtration Prevents Lethal Storm Water Impacts"*, Julian A. Spomberg, et.al. Journal of Applied Ecology 8 October 2015, which shows an average of 50% of returning adult coho salmon die in urban streams before spawning due to highway runoff. The study showed 100% mortality in 2 to 24 hours when exposed to runoff materials. When the runoff was cleaned with an inexpensive bio-filter, the mortality dropped to 0%. Continuing to fail to treat highway runoff assures extinction of these fish.

So, we have the scientific justification and the Supreme Court authority to delete buffers. Now we need only the will.

Now to a few details that will show the draft is far from ready to be reviewed by even the Planning Commission:

"19.100.110 **Applicability**
A. Kitsap County shall not grant any permit, license or other development approval to alter the condition of any land, water or vegetation, or to construct or alter any structure or improvement, nor shall any person alter the condition of any land, water or vegetation, or construct or alter any structure or improvement for any development proposal regulated by this title, except in compliance with the provisions of this title. Failure to comply with the provisions of this title shall be considered a violation and subject to enforcement procedures as provided for in this title." This paragraph precludes gardening, or even pulling a weed and violates *Citizens Alliance for Property Rights v. Sims (2008).*

F. Even if a permit is not required, the ordinance applies.

Benchmarks. The ordinance shows only the purpose of protecting critical areas is the Growth Management Act (GMA) stated requirement of "no net loss of functions and values". Throughout the document, **Kitsap County has provided no benchmarks** of baseline functions and values, so the document has no mechanism for assessing "no net loss". In the case of endangered and threatened species (primarily salmon), there is neither measure of baseline populations, nor objective population goals. Thus, there is no way to measure harm or progress with either a Water Quality Monitoring Program (WQMP) or a Salmon Habitat Monitoring Program (SHMP), as required in CAOs by the *Swinomish Indian Tribal Community, Western Washington Growth Management Hearings Board (2007)* decision.

How does "enhancing" wetlands square with the GMA policy of "no net loss"? (See 19.200.205.A. and Table 19.200.250)

There is no table of contents to show section titles, and no index. How does one read the document?

Danger Tree. Please read 19.100.130.B. and explain why any sane person would ever declare they have a danger tree, when a non-danger tree is easily just quietly cut down, as is common practice.

Results of the following court decisions need to be applied in the CAO text:

Swinomish Indian Tribal Community v. Western Washington Growth management hearings Board (2007) (buffers not required if justification is provided).

Lucas v. South Carolina Coastal Commission (1992) (takings via regulation prohibited) (See 19.200.220(E), 300 foot septic setback)

Koontz v. St. Johns River Water Management District (2013) (precludes off-site and practical alternative mitigation and mitigation banks and buffer averaging.) (See 19.200.250.C.2. and 19.200.260.)

Nollan v. California /Coastal Commission (1987) (mitigation cannot result in property extortion and must reflect nexus

and proportionality. Precludes out-of-category mitigation. Precludes buffer averaging, see 19.200.220.B.)

Dolan v. City of Tigard (1994) (requires mitigation nexus and precludes out-of-category mitigation)

Hearing Examiner not allowed to make "final decision" and guarantee of direct access to Superior Court (See 19.100.140.A.):
* *City of Monterey, CA v. Del Monte Dunes at Monterey, LTD (1999)*
* *U.S. Army Corps of Engineers v. Hawkes Co., et. al. (2016)*
* *Sackett v. U.S. EPA (2012)*

McCready v. City of Seattle (1994) (right of entry requires warrant) (See 19.100.170)

Citizens Alliance for Property Rights v. Sims (2008) mitigation must not be over-reaching)

U.S. Army Corps of Engineers v. Hawkes Co. et.al. (2016) (precludes off-site compensatory mitigation requirement)

If DCD is relying of "Best Available Science", as was alleged in 2005, what is the BAS justification for reducing wetland and stream buffers in the current draft?

"Notice to Title" gives us real trouble. It should be restricted only to the actual critical area, and not include the associated buffer, because the buffer width has changed with time. How will DCD notify property owners?

Allow "functionally equivalent vegetation" as an option to "existing native vegetation" throughout. There's no discernable or functional difference between a native rhododendrum and a hybrid rhododendrum, yet the hybrid is prohibited.

Why was 19.200.225.A. deleted and not shown as a strike-out? Surely docks could apply to lakes and wetlands.

19.300.D. adds "wildlife corridors" without showing it as a new item. Do "wildlife corridors" have any credibility?

19.400 Geologically Hazardous Areas: There's no way to track the mark-up.