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IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

KITSAP ALLIANCE OF PROPERTY OWNERS,
WILLIAM PALMER, and RON ROSS,

Petitioners/Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, et al.,

Respondents/Appellees.

On Appeal from the Superior Court of the
State of Washington for Kitsap County

PETITIONERS' OPENING BRIEF

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IDENTITY OF PETITIONERS

Petitioner Kitsap Alliance of Property Owners is a private nonprofit corporation that advocates against unreasonable regulation of private property in Kitsap County. Petitioners William Palmer and Ron Ross are residents of Kitsap County and are affected by Kitsap County's updated critical area regulations adopted in Ordinance No. 351-2005 (CAO Update) and Ordinance No. 376-2007 (Remand Ordinance). Petitioners (collectively "KAPO") seek reversal of two decisions entered by the Central Puget Sound Growth Management Hearings Board (Growth Board), which affirmed the County's designation of all shorelines as critical areas and adopted uniform buffers on all shoreline property. *See Hood Canal Env'tl. Council v. Kitsap County*, CPSGMHB No. 06-3-0012c (Final Decision and Order, Aug. 28, 2006) (Initial Decision); *Hood Canal Env'tl. Council v. Kitsap County*, CPSGMHB No. 06-3-0012c (Order Finding Compliance, Apr. 30, 2007) (Compliance Decision).

INTRODUCTION

Enacted as part of its 2005 Critical Areas Ordinance update, Kitsap County's marine shoreline regulations force all shoreline property owners to set aside portions of their private property as "undisturbed natural vegetation areas" as a condition for obtaining a development permit. While ostensibly enacted to protect fish habitat, the County's blanket prohibition against the use and development of private property goes far beyond its intended purpose. The restriction is uniformly applied to all shoreline properties in a

preset amount regardless of whether the proposed use of property will have any impact on fish habitat.

The marine shoreline buffer provisions do not require the County to demonstrate that the “undisturbed natural vegetation areas” are necessary to mitigate an identified impact of proposed development on the regulated properties. Instead, the only determining factor for this set-aside requirement is the fact that the property is located in a shoreline area. Based solely on the zoning character of the property, the ordinance automatically applies to all development applications.

The County’s marine shoreline buffer provisions are unlawful, and the Growth Board’s decisions should be reversed. As a fundamental matter, critical areas within the jurisdiction of the Shoreline Management Act (SMA) are governed only by the SMA. *See Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, __ Wn.2d __, 189 P.3d 161, 162 (2008) (slip op.) (Johnson, J.M., lead opinion) (affirming *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 (2005 WL 3689069) (Dec. 27, 2005)); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699 (2007); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67 (2004). Because Kitsap County lacked the authority to adopt critical area regulations on its shorelines under the Growth Management Act (GMA), its shoreline regulations are invalid.

The County’s marine shoreline buffer provisions impose a uniform restriction on the use and development of all shoreline property. The

provisions do not require the County to establish a connection linking its generalized environmental concerns to any identified direct impact of proposed development, and that renders the County's action unlawful. Without establishing this connection, the "resource area" set-aside requirement violates the GMA's "best available science" requirement and the nexus and rough proportionality constitutional standards set forth by the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and as incorporated in RCW 82.02.020. See *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761 (2002). The Growth Board erred by affirming Kitsap County's unsupported marine shoreline buffers, and its decisions should be reversed.

CITATIONS TO THE RECORD

The record on appeal consists of 8 volumes of administrative record covering the proceedings before the Growth Board, and clerk's papers covering the proceedings on administrative appeal to the Kitsap County Superior Court. The administrative record is divided into volume, tab number, and exhibit number. Appellants will cite the administrative record as follows: AR V [No.], Tab [No.], Index [No.]. The clerk's papers will be cited as "CP."

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The Growth Board erred in concluding that the amendments to the GMA contained in ESHB 1933¹ authorized Kitsap County to adopt critical area regulations on its marine shorelines. (AR V7, Tab 60 at 21-31).

Issue: Whether, under a de novo standard of review, the growth board erred in concluding that Kistap County was authorized to adopt GMA critical area regulations over “shoreline of the state” without complying with the requirements of the SMA?

2. The Growth Board erred in concluding that the marine shoreline buffers adopted in Kitsap County’s Remand Ordinance complied with the GMA’s “best available science” requirements. (AR V7, Tab 60 at 37-45; AR V8, Tab 87 at 5-7).

Issue: Whether, under a de novo standard of review, the growth board erred in concluding that Kitsap County complied with the GMA’s “best available science” requirements when it adopted marine shoreline buffers based on science that had been developed for stream buffers?

3. The Growth Board erred by affirming Kitsap County’s marine shoreline buffer provisions, which require that shoreline property owners set aside a portion of their property as a condition to any development permit. (AR V7, Tab 60 at 45-46).

Issue: Whether, under a de novo standard of review, Kitsap County’s marine shoreline buffer requirements impose a mandatory condition on all development applications without satisfying the essential nexus and rough proportionality requirements of RCW 82.02.020?

STATEMENT OF FACTS AND PROCEDURE

On December 1, 2005, Kitsap County adopted an updated critical areas ordinance (CAO Update) to comply with the GMA’s requirement that planning counties periodically update their CAOs. AR V1, Tab 2, Index

¹ Engrossed Substitute House Bill (ESHB) 1933, Laws of 2003, ch. 321, § 1, *codified at* RCW 90.58.030 and RCW 36.70A.480.

1390.² In relevant part, the CAO Update designated all marine shorelines as “Fish and Wildlife Habitat Conservation Area” critical areas. However, in determining the size of the associated marine shoreline buffer, the County determined:

[W]hile there is scientific data examining the marine-riparian interactions, none suggest protective buffer widths. Accordingly, Kitsap County reviewed the buffers established in 1998 along with the added protection established in Title 22 Kitsap County Shoreline Management Program and made changes in accordance with BAS [best available science].

App. A (Section 3.E.3). As a result, the CAO Update adopted uniform 35-foot buffers for all marine shorelines, based on the existing marine shoreline buffers in the County’s shoreline master program (SMP). AR V7, Tab 60 at 22.

In February of 2006, the Growth Board received two petitions for review challenging, in part, the marine shoreline provisions of Kitsap County’s CAO Update. The first challenge was filed by the Hood Canal Environmental Council petitioners.³ AR V1, Tab 3. The Hood Canal petitioners argued that the CAO Update violated the GMA’s best available science requirement by adopting “inadequate” protection for marine shorelines (*i.e.*, 35-foot buffers). AR V1, Tab 3. The second petition was

² Relevant portions of the CAO Update are attached as Appendix A (App. A) to this brief.

³ Hood Canal Environmental Council, People for Puget Sound, West Sound Conservation Council, Kitsap Citizens for Responsible Planning, Futurewise, Judith Krigsman, Irwin Krigsman, and Jim Trainer (collectively Hood Canal). AR V1, Tab 3.

filed by KAPO, which argued in relevant part that the marine shoreline provisions of the CAO Update were too restrictive in violation of various provisions of the GMA and SMA. AR V1, Tab 2. The Board consolidated the two petitions. AR V1, Tab 7. And on May 8, 2006, the Board granted KAPO's motion to intervene in opposition to Hood Canal's petition.⁴ AR V2, Tab 30. at 5.

On August 28, 2006, the Board issued its Final Decision and Order (Initial Decision) in the consolidated appeal. AR V7, Tab 60 (*Hood Canal Envtl. Council v. Kitsap County*, CPSGMHB No. 06-3-0012c (Final Decision and Order, Aug. 28, 2006) (Initial Decision)). The Board concluded that Kitsap County's 35-foot marine shoreline buffers failed to comply with the GMA. AR V7, Tab 60 at 44. The Board ordered the County to take legislative action to bring its critical area regulations into compliance with the GMA as set forth in the Board's Initial Decision within six months of the decision. AR V7, Tab 60 at 53. KAPO timely petitioned Kitsap County Superior Court for judicial review of the Board's Initial Decision. AR V8, Tab 61.

While KAPO's petition for judicial review was pending, the County adopted a new critical areas ordinance, which increased its marine shoreline buffers to 50 feet on urban shorelines and 100 feet on all semi-rural and rural

⁴ The Board also granted the Suquamish Tribe's motion for intervention in support of Hood Canal. AR V2, Tab 30 at 5. The Tribe participated in the administrative phases of this case, but while judicial review was pending, the Tribe withdrew. The Tribe is not a party to this appeal.

marine shorelines. AR V8, Tab 72, Exhibit B (Ordinance No. 376-2007, Index 1613) (Remand Ordinance).⁵ Both KAPO and the Hood Canal petitioners opposed the marine shoreline buffers adopted in Kistap County's Remand Ordinance, arguing that the County's decision was not based on BAS. AR V8, Tabs 74, 75, 83. Notably, the County had not added any scientific data to the BAS record on remand. Instead, the County reviewed the previous record it relied on to enact the CAO Update, and acceded to the Board's conclusion that the buffers should be enlarged.

On April 30, 2005, the Board issued a Finding of Compliance (Compliance Order) stating that the County's adoption of the Remand Ordinance corrected the deficiencies found by the Board in its Initial Decision. AR V8, Tab 87 at 7 (*Hood Canal*, CPSGMHB No. 06-3-0012c (Compliance Decision, Apr. 30, 2007)). KAPO timely filed a second petition for judicial review with the Kitsap County Superior Court challenging the Compliance Order. AR V8, Tabs 88, 89. Hood Canal did not challenge the Compliance Order.

The trial court consolidated KAPO's petitions challenging the CAO Update (Case No. 06-2-02271-0) and the Remand Ordinance (Case No. 07-2-01310-7). CP 87-90. On July 1, 2008, Kitsap County Superior Court entered a memorandum decision affirming the Growth Board decisions. CP 248-257. KAPO timely appealed.

⁵ Relevant portions of the Remand Update are attached as Appendix B to this brief.

STANDARD OF REVIEW

The GMA requires counties and cities to periodically review and update their critical areas regulations. *See* RCW 36.70A.130(1)(a); WAC 365-195-900(2). KAPO's petition for review challenged provisions of Kitsap County Ordinance 351-2005, which updated and revised the County's critical areas regulations, as being out of compliance with GMA requirements. Generally, the enactment of an ordinance under the GMA is presumed valid and is due deference on review. RCW 36.70A.320; RCW 36.70A.3201. However, "deference ends when it is shown that the county's actions are in fact a 'clearly erroneous' application of the GMA." *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238 (2005).

On appeal from a superior court's decision affirming a Growth Board decision, this Court reviews the Board's conclusions de novo and applies the standards of the Administrative Procedure Act (APA) (RCW 34.05, *et seq.*) directly to the record before the Board. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498 (2006). Of the possible grounds for relief under the APA, three apply here:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

.....

(d) The [Board] has erroneously interpreted or applied the law.

RCW 34.05.570(3).

KAPO's challenges under subsections (a), (b), and (d) are reviewed de novo.⁶ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45 (1998); *Margula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 969 (2003). As demonstrated below, the challenged provisions of Kitsap County's critical areas update and remand ordinance are clearly erroneous and are, therefore, due no deference or presumption of validity.

STANDING OF THE HOOD CANAL PETITIONERS

A petition for review of one aspect of an administrative decision does not open up the entire decision for review. See *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179-80 (1999) (*King County I*) (citing *Wash. Utils. & Transp. Comm'n v. Fed. Energy Regulatory Comm'n*, 26 F.3d 935, 941-42 (9th Cir. 1994)). Instead, each party to an administrative appeal is limited to the issues raised in his or her respective

⁶ Moreover, the growth boards lack authority to review a substantive challenge alleging a violation of constitutionally protected property rights. See *Hood Canal*, Initial Decision at 52 (AR V7, Tab 60 at 45-46) (A claimed violation of property rights must be decided by the Courts, not this Board.); *Whidbey Env'tl. Action Network v. Island County*, WWGMHB, No. 06-2-0023 (Final Decision and Order, Jan. 24, 2007) (Growth boards do not have the authority to determine what property rights exist under Washington law.). As a result, this Court's review of whether the County's ordinance violated the nexus and rough proportionality requirements of RCW 82.02.020 is de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668 (2004); *Weden v. San Juan County*, 135 Wn.2d 678, 693 (1998).

petition for review, or raised in a timely motion to intervene. *Wash. Utils. & Transp. Comm'n*, 26 F.3d at 941-42. In the context of an appeal from a growth board decision, a timely motion to intervene must be filed before the statutory deadline for filing petitions for judicial review of administrative decisions. *See King County I*, 138 Wn.2d at 179-80. Because this appeal arises from a series of petitions challenging Kitsap County's CAO Update and Remand Ordinance, it is necessary to set out the standing of the Hood Canal petitioners to participate in the issues presented in this appeal.

Hood Canal did not participate in any of the issues raised in KAPO's first petition for review before the Growth Board. *See* AR V1, Tab 12 (Prehearing Order). Nor did the Hood Canal petitioners move to intervene in any of KAPO's issues.⁷ Instead, the Hood Canal petitioners' participation throughout the Growth Board proceedings was limited to two issues:

- whether County's exemption of certain Class III and IV wetlands failed to comply with the BAS requirements of the GMA,⁸ and
- whether the County's adoption of 35-foot buffers for marine shorelines failed to comply with the "best available science" requirements of the GMA.⁹

⁷ "[T]here are no intervenors in the KAPO issues." AR V7, Tab 55 at 10 (Transcript of Hearing on the Merits).

⁸ KAPO did not challenge the Board's Compliance Order on this issue; it is not an issue on appeal.

⁹ *See* AR 1, Tab 3 at 3-4 (Hood Canal Petition for Review); AR V1, Tab 12 at 6 (Prehearing Order); AR V6, Tab No. 38 (Hood Canal's Prehearing Brief); AR V7, Tab 48 (Hood Canal's Reply Brief); AR V7, Tab 55 at 9 (continued...)

KAPO's first petition for judicial review (Case No. 06-2-02271-0) sought review of the Growth Board's dismissal of KAPO Issue Nos. 3, 4, 5, 6, 7, and 8. *See* AR V8, Tab 61 at 5-7 (Petition for Judicial Review). In its role as an intervenor in Hood Canal's petition, KAPO also sought review of the Growth Board's decision reversing portions of the CAO Update under Hood Canal Issue 2, which questioned whether the width of Kitsap County's marine shoreline buffers was supported by "best available science." *See* AR V8, Tab 61 at 6.

While the first petition for judicial review was pending, the County adopted in its Remand Ordinance, which expanded the marine shoreline buffers to comply with the Board's final decision and order on Hood Canal Issue No. 2. *See* AR V8, Tab 87 at 2. The Growth Board held a compliance hearing on this issue. Throughout the proceedings, Hood Canal opposed the County's expanded buffers, arguing that the County's decision to adopt expanded buffers was not supported by "best available science." *See* AR V8, Tab 75 (Hood Canal's Response to Kitsap County's Statement of Actions Taken to Comply); AR V8, Tab 83 at 7-14 (Transcript of Compliance Hearing). Ultimately, the Growth Board determined that the County's Remand Ordinance complied with the GMA. AR V8, Tab 87 at 2, 5-7. KAPO filed a second petition for judicial review (Case No. 07-2-01310-7)

⁹ (...continued)
(Transcript of Hearing on the Merits) (limiting Hood Canal's participation to Issues 1 and 2).

challenging the Board's compliance decision on Hood Canal Issue No. 2. AR V8, Tab 89. Hood Canal did not move to intervene.

Both the GMA and Court Rules require that a prospective intervenor make a timely application to participate as a party to specific issues in an action. *See* CR 24(a); WAC 242-02-270. Because the Hood Canal petitioners did not move to intervene in any of the issues raised in KAPO's petition, their standing on appeal is limited to one issue: whether the width of the expanded marine shoreline buffers adopted in the County's Remand Ordinance complied with the GMA's BAS requirement (Hood Canal Issue No. 2, which is addressed in Argument Section II of this brief). Hood Canal lacks standing to participate in any of the other issues raised in this appeal.

ARGUMENT

I

MARINE SHORELINES ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE SMA; THE GROWTH BOARD ERRED IN AFFIRMING GMA AUTHORITY OVER SHORELINES

KAPO's appeal raises a jurisdictional question regarding local government's authority to regulate shoreline property under the GMA after the Legislature adopted ESHB 1933, Laws of 2003, ch. 321, § 1, *codified at* RCW 90.58.030 and RCW 36.70A.480. As explained below, ESHB 1933 reaffirmed the Legislature's intent that "critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the

shoreline management act shall be governed by the growth management act.” RCW 90.58.030 (Findings–Intent No. 3). The effect of ESHB 1933 was unclear when the statute was adopted. Since then, a series of appellate court decisions make it clear that, under RCW 36.70A.480, critical areas within the jurisdiction of the SMA are governed exclusively by the SMA. See *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 189 P.3d at 162¹⁰ (slip op.) (Johnson, J.M., lead opinion) (affirming *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 (2005 WL 3689069) (Dec. 27, 2005)); *Biggers v. City of Bainbridge Island*, 162 Wn.2d at 699; *Biggers v. City of Bainbridge Island*, 124 Wn. App. at 866-67. Kitsap County’s adoption of GMA regulations restricting the use and development of marine shoreline was clearly erroneous and exceeded its authority. This Court should reverse the Growth Board’s decision.

**A. The Growth Board Committed Clear Error
by Concluding That Kitsap County Was
Authorized To Designate All Marine Shorelines
as Critical Areas Subject to GMA Regulation**

It is undisputed that Kitsap County’s CAO Update imposed regulations on shoreline areas that are within the SMA’s jurisdiction. The County’s CAO Update designated all “saltwater shorelines and lakes defined as shorelines of the state in the [SMA] and Kitsap County [SMP]” as Fish

¹⁰ As of the date of filing this brief, mandate in *Futurewise* has been delayed while motions for reconsideration/clarification are pending. However, while mandate is pending, the parties may rely on the *Evergreen Islands* decision affirmed by *Futurewise*. See *Obert v. Env’tl. Research & Dev. Corp.*, 112 Wn.2d 323, 340 (1989).

and Wildlife Habitat Conservation Area critical areas. App. A (KCC 19.300.310). KAPO challenged this designation as violating the GMA and SMA after the Legislature’s adoption of ESHB 1933. AR V7, Tab 60 at 21 (citing KAPO Issue No. 4).¹¹

Although the Growth Board recognized that the amendments contained in ESHB 1933 affected “the relation between GMA critical areas protection and SMA shoreline regulation,”¹² the Growth Board erroneously concluded that it did not have the authority to interpret the amendments to RCW 36.70A.480 contained in ESHB 1933.¹³ AR V7, Tab 60 at 26, n.32; *see also* AR V7, Tab 60 at 27 (“[T]here is no single interpretation of the ambiguity inherent in ESHB 1933—specifically RCW 36.70A.480(5)—but a range of reasonable responses . . .”). The Growth Board concluded that it was required to defer to the County’s interpretation of ESHB 1933. AR V7, Tab 60 at 27-28, n.32. Based on this conclusion, the Board re-characterized KAPO’s issue as: “[H]ow have Central Puget Sound cities and counties construed the overlapping regimes of GMA critical areas regulations

¹¹ The Growth Board addressed KAPO’s challenge on this issue on pages 21-31 of its August 28, 2006, Initial Decision. AR V7, Tab 60.

¹² AR V7, Tab 60 at 25.

¹³ The Growth Board committed clear error by abdicating its role as the quasi-judicial agency charged with the interpretation of the requirements of the GMA for counties and cities. *See* RCW 36.70A.280; *King County*, 142 Wn.2d at 553 (Board’s duty is to interpret the GMA); *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d at 512 (Sanders, J. dissent) (“GMA Boards are the first level to resolve conflicting interpretations in order to resolve land disputes quickly and efficiently.”).

and SMA shoreline management post-ESHB 1933?” AR V7, Tab 60 at 26, n.32.

Kitsap County interpreted ESHB 1933 as authorizing it to adopt new critical area regulations under the GMA until Ecology approved its next SMP update. At that time, jurisdiction over shorelines would transfer back to the SMA. AR V7, Tab 60 at 29, n.35. Based on this interpretation, Kitsap County adopted marine shoreline critical area restrictions without review or approval from Ecology (RCW 90.58.090(4)), and without following the requirements for adopting shoreline regulations under the SMP (such as conducting a shoreline inventory). RCW 90.58.090; RCW 90.58.100. This interpretation of ESHB 1933, however, has been repeatedly rejected by our Supreme Court, Court of Appeals, and at least one growth board. *See Futurewise*, 189 P.3d at 162; *Biggers*, 162 Wn.2d at 699; *Biggers*, 124 Wn. App. at 866-67; *Evergreen Islands*, WWGMHB No. 05-2-0016, at 26. And this interpretation contradicts the plain language of RCW 36.70A.480, which requires that the regulation of shorelines must be accomplished under the SMA. *See* RCW 36.70A.480; RCW 36.70A.481; RCW 90.58.030. The Growth Board’s decision affirming the County’s designation of all marine shorelines as critical areas subject to regulation under the GMA is clearly erroneous and should be reversed.

B. Overview of the SMA and GMA

Some background on the relationship between the SMA and the GMA is useful. The SMA was enacted by citizen initiative in 1971 to protect and manage all reasonable and appropriate uses of the shorelines of Washington State, and to prevent adverse effects to public health, land, vegetation, wildlife, and the rights of navigation. RCW 90.58.020. To achieve these goals, each county and city containing “shorelines of the state”¹⁴ is required to develop a shoreline master program (SMP) setting forth use and development regulations for shoreline areas and incorporating the current shoreline guidelines as promulgated by Washington’s Department of Ecology.¹⁵ RCW 90.58.080; WAC 173-26. In 1995 and again in 2003, the Legislature amended the SMA to require local governments to periodically update their SMPs. RCW 90.58.080(4). Kitsap County enacted its current

¹⁴ The SMA applies generally to all “shorelines of the state,” which include all marine waters, streams, rivers, and lakes of specified sizes and “shorelands.” RCW 90.58.040; RCW 90.58.030(2)(c), (d). “Shorelands” include upland areas within 200 feet from shorelines, floodways, floodplains, and associated wetlands and river deltas. RCW 90.58.030(2)(f). The SMA has jurisdiction over all marine waters and shorelines 200 feet landward of the ordinary high water mark. RCW 90.58.030(2)(d).

¹⁵ A SMP 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.” RCW 90.58.030(3)(b). All SMPs must be approved by the Washington State Department of Ecology. RCW 90.58.090. Once approved, the SMP constitutes the “use regulations for the various shorelines of the state.” RCW 90.58.100(1).

SMP in 1999, and is scheduled to update its SMP in 2012.¹⁶ AR V1, Tab 13 (Kitsap County's SMP); RCW 90.58.080.

Under the SMA, regulation of shorelines requires more than just local action—the development regulations must be approved and adopted by the Department of Ecology. RCW 90.58.090. The SMA requires that shoreline regulations be based on “the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern.” WAC 173-26-201(2)(a); RCW 90.58.100(1). As part of this requirement, local government must develop a shoreline inventory, in which it must incorporate all pertinent and available information, data, and materials relating to its shorelines. WAC 173-26-201(3)(c). If the shoreline regulations include “shorelines of the state,” the local government must also establish shoreline designations that give preference to uses enumerated in RCW 90.58.020, which include public access, recreational uses, single-family residences, and protection of property rights. WAC 173-26-251(3)(c); RCW 90.58.020; RCW 90.58.100. Only after Ecology reviews the proposed development regulations for compliance with the SMA and approves the SMP, do the shoreline regulations become valid state regulations governing

¹⁶ See AR V1, Tab 13 (Kitsap County Shoreline Management Master Program (SMP)). The County's existing SMP already required protections on all marine shorelines, among other requirements, as part of the development permit process. See AR V1, Tab 13 at 42 (Specific Policy 5), AR V1, Tab 13 at 47 (Development Standard 2).

the use and development of shoreline property. RCW 90.58.090(7); WAC 173-26-030(2).

The GMA was enacted in 1990 and 1991 to coordinate the state's growth via comprehensive land use planning, including regulations to address protection of critical areas, increased traffic congestion, school overcrowding, urban sprawl, and loss of agricultural and rural lands. RCW 36.70A.010; *see generally* Richard L. Settle, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867 (1993). The GMA imposes a general obligation to adopt comprehensive land use regulations, including critical areas ordinances, by balancing various nonprioritized planning goals and requirements, including, in relevant part, designating and protecting critical areas while protecting private property rights. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424-25 (2007); RCW 36.70A.020(6), (10). The GMA requires that each planning city and county periodically review and, if necessary, update its comprehensive plan and development regulations. RCW 36.70A.130. As part of this update process, the GMA requires cities and counties to designate and protect critical areas by including "best available science" in its record and developing locally appropriate regulations based on local circumstances and the Act's various planning goals and requirements. RCW 36.70A.172(1); RCW 36.70A.320; RCW 36.70A.3201; *Swinomish*, 161 Wn.2d at 426.

Unlike the SMA, which requires oversight and approval of a state agency, at the GMA's very foundation is the mandate providing local jurisdictions broad deference in planning decisions: the "GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 125-26 (2005); see also WAC 365-195-010(3) (The GMA "process should be a 'bottom up' effort . . . with the central locus of decision-making at the local level.").

The decision of local government to adopt a regulation under the SMA or the GMA will have significant procedural and substantive consequences for property owners.

The GMA has substantial requirements when actions might affect areas defined as "critical areas." RCW 36.70A.172(1). Among other things, the GMA was amended in 1995 to require local governments to designate and protect critical areas using the "best available science"—a benign term with often a heavy price tag. *Id.* The SMA, with its goal of balancing use and protection, is less burdensome.

Futurewise, 189 P.3d at 162 ¶ 2. Indeed, distinct from the current interpretation of the GMA mandate to protect critical areas,¹⁷ the SMA does

¹⁷ Growth boards have interpreted the GMA to elevate protection of critical areas above all other GMA planning goals. For example, the Central Board concluded that protecting the environment is a "statutory priority," and local government is prohibited from asserting the need to balance competing GMA goals (e.g., protection of property rights) as a justification for departing from protecting all functions and values of critical areas. See *Wash. State Dep't of Ecology v. City of Kent*, CPSGMHB No. 05-3-0034 at 13 (Final Decision and Order, Apr. 19, 2006) ("[A] jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements [saving and protecting wetlands].").

not prohibit shoreline development simply because it may fall within the definition of a critical area. Instead, the SMA mandates regulations that coordinate development in sensitive areas:

[T]he SMA does not prohibit all development in the shoreline. Rather, its purpose to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning, *i.e.*, shoreline master plans which must be approved by DOE.

Overlake Fund v. Shoreline Hearings Bd., 90 Wn. App. 746, 761 (1998) (citing RCW 90.58.020). In this regard, the SMA mandates that shoreline property owners have the right to certain permissible uses of property and/or priority shoreline development. *See Biggers*, 162 Wn.2d at 686, 706 (affirming a right to certain shoreline development as recognized in RCW 90.58.020 and RCW 90.58.100). Therefore, preservation of each statute's jurisdiction is essential to preserve recognized substantive rights of private property owners.

1. Partial Integration of the SMA and GMA Resulted in an Erroneous Conclusion That All Shorelines of the State Are Critical Areas Subject to Concurrent Regulation Under the GMA

In 1995, the Legislature partially integrated the SMA and the GMA by adding the SMA's goals and policies as an additional GMA planning goal,¹⁸ and transferring jurisdiction for appeals of shoreline master programs from the shoreline hearings boards to the growth management hearings boards. Laws of 1995, ch. 347, § 311, *codified at* RCW 90.58.190; Laws of

¹⁸ Laws of 1995, ch. 347, § 104, *codified at* former RCW 36.70A.480 (1995).

1995, ch. 347, § 108, *amending* RCW 36.70A.280. This partial integration, however, led to confusion regarding the regulation of shoreline areas as critical areas, and a controversial growth board decision concluding that all shorelines of statewide significance were categorically critical areas, and therefore subject to critical area regulation under the GMA. *See Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-009c, at 17 (Corrected Final Decision and Order, Jan. 9, 2003).

2. The Legislature Established Exclusive Regulatory Jurisdiction of the Shorelines Under the SMA

The *Everett Shorelines Coalition* decision “so conflicted with the law and the established practices that the Legislature acted the next session by enacting a law explicitly rejecting that board’s interpretation.”¹⁹ *Futurewise*, 189 P.3d at 162 ¶ 3 (citing ESHB 1933). The amended law unequivocally stated that critical areas located within shorelines are to be regulated exclusively under the SMA:

The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.

¹⁹ This act is intended to affirm the legislature’s intent that . . . [t]he shoreline management act be read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the decision of the central Puget Sound growth management hearings board in *Everett Shorelines Coalition v. City of Everett*

ESHB 1933, Laws of 2003, ch. 321, § 1(2).

RCW 90.58.030 (Findings–Intent No. 3). This amendment confirmed that local government was required to follow the process set forth in the SMA to develop regulations for the use and development of its shorelines:

The legislature further intends that the quality of information currently required by the shoreline management act to be applied to the protection of critical areas within shorelines of the state shall not be limited or changed by the provisions of the growth management act.

Id.; RCW 36.70A.480(3)(a) (“[T]he protection of critical areas . . . within shorelines of the state shall be accomplished only through the local government’s shoreline master program and shall not be subject to the procedural and substantive requirements of [the GMA].”).²⁰ As unequivocally stated in the GMA, “[n]othing in RCW 36.70A.480 shall be construed to authorize a county or city to adopt regulations applicable to [‘shorelines of the state’] that are inconsistent with the provisions of [the SMA].” RCW 36.70A.481.

²⁰ In turn, the SMA requires that all shoreline development regulations must be reviewed for compliance with the SMA and approved by Ecology. RCW 90.58.090; RCW 90.58.100; *see also* RCW 90.58.090(4) (SMP segment amendments to protect critical areas within SMA jurisdiction must be “consistent with RCW 90.58.020 and applicable shoreline guidelines” as well as providing a level of protection at least equal to the local government’s critical area regulations); WAC 173-26-251(3)(c) (the SMA mandates that shoreline regulations must include designations that give preference to the Act’s prioritized uses and requirements).

3. The “Legislature Meant What It Said”—Critical Areas Within SMA Jurisdiction Are Governed Only by the SMA

Even after the Legislature enacted ESHB 1933, various entities, including state government agencies, local governments, and activist organizations continued to push for interim regulation of shorelines as critical areas under the GMA until such time as the municipality updated its shoreline master program. In *Futurewise*, the City of Anacortes adopted an updated CAO to comply with the GMA. Several environmental activist organizations (collectively “Futurewise”) filed a petition for review, claiming that the County’s CAO update failed to adequately update critical area regulations on its marine shoreline. Futurewise argued that ESHB 1933 required local government to adopt interim GMA critical area regulations for critical areas located in shorelines until such a time as it adopted its next updated SMP. (The city had adopted its most recent SMP in 2000, and was scheduled to revise its SMP by 2012.)

The Growth Board rejected this argument, concluding:

[T]he express legislative intent in enacting ESHB 1933 is to provide that critical areas within the jurisdiction of the Shoreline Management Act be governed by the Shoreline Management Act, while all other critical areas are governed by the Growth Management Act.

Evergreen Islands, WWGMHB No. 05-2-0016, at 26. Based on the plain language of ESHB 1933, the Board ruled that critical area regulations in shorelines “must meet the requirements for a segment of a master program relating to critical areas in the shorelines . . . [and] must be submitted to

Ecology for review and approval.” *Evergreen Islands*, WWGMHB No. 05-2-0016, at 29. On July 31, 2008, our Supreme Court affirmed the *Evergreen Islands* decision, concluding that “the legislature meant what it said . . . [c]ritical areas within the jurisdiction of the SMA are governed *only* by the SMA.” *Futurewise*, 189 P.3d at 162 ¶ 3 (Johnson, J.M., lead opinion) (emphasis added).

Futurewise and *Evergreen Islands* are not outliers. In 2007, our Supreme Court similarly concluded that “the SMA is the exclusive source of shoreline development regulation.” *Biggers*, 162 Wn.2d at 699. In *Biggers*, the City of Bainbridge Island enacted rolling moratoria imposing a three-year freeze on permit applications for shoreline development. *Biggers*, 162 Wn.2d at 687-89. In justifying the rolling moratoria, Bainbridge Island argued, in part, that the GMA granted the authority to enact rolling moratoria. The *Biggers* court invalidated the moratoria and explained that, “[t]he GMA does not displace the SMA as the framework for statewide shoreline regulation.” *Biggers*, 162 Wn.2d at 700.

The protection of Washington’s shorelines for all citizens is an important state constitutional interest reflected in the SMA enacted by the people. No local government may impose regulations that are in conflict with the state’s general laws. Here, the City’s imposition of repeated moratoria was unconstitutional and unlawful.

Biggers, 162 Wn.2d at 702 (Johnson, J.M., lead opinion). The Supreme Court’s *Biggers* decision affirmed this Court’s earlier holding that the SMA governed shoreline areas: “The GMA clearly specifies that chapter 90.58 RCW (the SMA) governs the unique criteria for shoreline development. In

other words, the SMA trumps the GMA” *Biggers*, 124 Wn. App. at 867. There is simply no authority permitting local government to adopt GMA critical area regulations on shoreline property that is located within the SMA’s jurisdiction. The Growth Board erred and its decisions should be reversed.

II

KITSAP COUNTY’S MARINE SHORELINE BUFFERS FAILED TO COMPLY WITH THE BEST AVAILABLE SCIENCE REQUIREMENT

The marine shoreline buffers adopted in the County’s Remand Ordinance do not comply with the GMA’s “best available science” requirement. The GMA requires that local government designate and protect critical areas. RCW 36.70A.060(2); RCW 36.70A.172(1). In developing critical area regulations, local government “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” RCW 36.70A.172(1); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 832 (2005). Our courts have interpreted the GMA’s “best available science” provisions to require that local governments include and consider relevant scientific information in developing its critical areas ordinances. *Whidbey Env’tl. Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 173 (2004); *Honesty in Env’tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532 (1999) (“best available science” mandate is meant to preclude local authorities from relying upon

“speculation [or] surmise” when protecting critical areas); *Ferry County*, 155 Wn.2d at 835 (Local government must provide a “scientific foundation, evidence of analysis, and a reasoned process to justify [critical area regulations.]” (citation omitted)).

Kitsap County’s Remand Ordinance adopted expanded 50- and 100-foot marine shoreline buffers based on science that had been specifically developed to address interior stream buffers. *See* AR V8, Tab 87 at 5 (Compliance Order) (concluding that marine shoreline buffers were supported by two BAS sources: Christopher May, *Stream-Riparian Ecosystem in the Puget Sound Lowland Eco-Region*),²¹ and Knutsen and Neaf, *Management Recommendations for Washington’s Priority Habitats: Riparian*).²² Contrary to the GMA’s requirement that “best available science” must address all of the functions and values of a designated critical area,²³ the County’s stream science did not address all of the functions and values of the marine shoreline environment. *See id.*

The “best available science” requirement does not permit local government to adopt critical area regulations based on inapplicable science. Instead, the GMA requires the County to include relevant “best available

²¹ AR V8, Tab 72, Index 91.

²² AR V8, Tab 72, Index 318.

²³ *WEAN*, 122 Wn. App. at 174-75 (“[T]he GMA requires that the regulations for critical areas must protect the ‘functions and values’ of those designated areas. This means all functions and values.” (footnote omitted))

science” to ensure that the regulation of a critical area is based on a reasoned analysis of *appropriate* science:

[Critical areas] are deemed “critical” because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.

HEAL, 96 Wn. App. at 533.

The decision most directly on point is *WEAN*, 122 Wn. App. 156. In *WEAN*, the Court of Appeals upheld a growth board decision concluding that Island County had failed to include BAS when it developed stream buffers. The county’s record included several scientific studies regarding streams; however, the county relied on studies that did not focus on all of the functions and values applicable to streams. *WEAN*, 122 Wn. App. at 174. For example, where wildlife studies had been done, the county’s habitat study “was limited to ‘the [marine] shoreline environment of Island County’ and ha[d] questionable application to interior stream buffer issues.” *WEAN*, 122 Wn. App. at 173 (footnote omitted). As a result, the Court concluded that because the studies relied upon to develop stream buffers were based on science that did not address all of the actual functions and values of streams, the county violated RCW 36.70A.172(1). *WEAN*, 122 Wn. App. at 174-75.

As in *WEAN*, Kitsap County did not include “best available science” demonstrating that the inland stream buffer sizes related to the functions and

values of marine shorelines.²⁴ See AR V8, Tab 72 at 11-13. The Board improperly assumed that such a correlation existed, which is precisely the type of speculation and surmise that the “best available science” requirement prohibits.

[T]he obvious purpose of the 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 preservation, *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. Spear, 520 U.S. 154, 176-77 (1997) (reasoning adopted in *HEAL*, 96 Wn. App. at 531) (emphasis added).

Kitsap County’s marine science in the “best available science” record established that stream riparian areas have different functions and values from marine shorelines. See, e.g., AR V6, Tab 42, Index 556 at 4 (“Riparian habitats associated with marine and standing water systems (ponds, lakes, wetlands) have different characteristics [from stream riparian areas].”). Kitsap County admitted that the science developed for inland stream buffers was not directly applicable, “[a]s in the case of lakes and ponds, the functions associated with marine riparian areas are a mix of similarities and contrasts to riverine riparian areas.” AR V6, Tab 42, Index 114 at 20 (noting the “scarcity of scientific data examining the marine-riparian interactions”). As

²⁴ Neither the Board’s decision nor the County’s rationale cites any BAS that correlates stream buffers to the functions and values of marine and lake shorelines. See AR V8, Tab 87 at 5-7; AR V8, Tab 72 at 11-13.

a result, the County concluded that its BAS record “[did] not identify specific [buffer] widths based on direct scientific evidence.” AR V6, Tab 42, Index 114 at 20.

Moreover, the County’s “best available science” record establishes the lack of scientific evidence necessary to establish a connection between the marine shoreline buffers and any identified impact of development. For example, the authors of the most direct scientific study on marine riparian buffers, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystems, Pacific Region*,²⁵ concluded that the current state of marine science is insufficient to support uniform and preset buffers on all marine shoreline properties:

There are insufficient data in the scientific literature to recommend generic or region-wide setback distance ... in marine riparian habitats. Further research is needed to determine buffer widths for various vegetation units that compose the marine riparian. In addition to research on biological functions such as fish food supply (e.g. for juvenile salmon rearing) and spawning (e.g. surf smelt and sandlance), studies need to be conducted on physical factors such as soil integrity.

....

. . . Because of the variation in potential damage, the dimensions of the setback may have to be modified by site specific conditions such as slope stability. . . . not all types of backshore habitat have the potential to act as sediment corridors through the marine riparian. In addition, not all industrial developments have the potential to create disruptive sediment supplies through the marine riparian.

²⁵ AR V6, Tab 42, Index 1363 (Colin Levings & Glen Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystems, Pacific Region* (Fisheries and Oceans Canada, 2001)).

AR V6, Tab 42, Index 1363 at 14 (emphasis added). The authors concluded that there is almost no relevant science supporting marine shoreline buffers: “There are insufficient data in the scientific literature to recommend generic or region-wide setback distances Research papers on the importance of marine riparian habitat, as fish habitat in the Pacific region, are virtually absent from the peer reviewed literature.” AR V6, Tab 42, Index 1363 at 14.

These scientific opinions constitute the conclusions of marine scientists contained in studies that were included in the record and qualified as “best available science.” The Growth Board erred in affirming the County’s disregard of relevant science contrary to the County’s regulatory goals. *See Ferry County*, 155 Wn.2d at 837-38 (a county “cannot choose its own science over all other science”); *see also* RCW 36.70A.172(1); *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d at 421. The Growth Board erred in concluding that Kitsap County had complied with the GMA’s “best available science” requirements and its decisions should be reversed.

III

KITSAP COUNTY’S MARINE SHORELINE BUFFER REQUIREMENT VIOLATES RCW 82.02.020

Finally, the method that the County adopted for implementing its marine shoreline buffers violates Washington’s impact fee statute, RCW 82.02.020. This statute strictly limits local government’s authority to impose a dedication as a condition on development to those circumstances

where it can demonstrate that the exaction is “reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.” RCW 82.02.020. Here, Kitsap County violated RCW 82.02.020 by imposing a uniform and preset marine buffer requirement on all shoreline development, without regard to the individual circumstances of the property and proposed development.

Washington’s impact fee statute prohibits local government from imposing “any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings.” RCW 82.02.020. The statute does, however, recognize a limited exception: “[T]his section does not preclude dedications of land or easements within the proposed development or plat which the county . . . can demonstrate are reasonably necessary as a direct result of the proposed development.” RCW 82.02.020.

Our courts have interpreted this exception as codifying the nexus and proportionality requirements of *Nollan* and *Dolan*.²⁶ See, e.g., *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 274 (1994); see also *Sparks v. Douglas County*, 127 Wn.2d 901, 913 (1995); *Cobb v. Snohomish County*, 64 Wn. App. 451, 467-68 (1991). As a result, in order to exact a dedication of property as a condition of development, local government must first “show that the development . . . will create or exacerbate the identified public problem.” *Burton v. Clark County*, 91 Wn. App. 505, 521 (1998). If the

²⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374.

County is able to establish a nexus, it must next “show that its proposed solution to the identified public problem is ‘roughly proportional’ to that part of the problem that is created or exacerbated by the landowner’s development.” *Burton*, 91 Wn. App. at 523. Stated another way, the “‘rough proportionality’ test measures the relationship between the conditions placed on the use of property and the *negative* impacts of that use that would justify the denial of the proposed use in the first instance.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676 (1997).

Conditions imposed on property that do not comply with the nexus and rough proportionality requirements are “unauthorized, constitute an illegal tax fee or charge and result in an unjust enrichment to the City.” *Henderson Homes v. City of Bothell*, 124 Wn.2d 240, 244 (1994); *see also Isla Verde*, 146 Wn.2d at 755 (“RCW 82.02.020 requires strict compliance with its terms. . . . [A development condition] is invalid unless it falls within one of the exceptions specified in the statute.”). Kitsap County bears the burden of demonstrating strict compliance with the nexus and rough proportionality requirements of RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 759; *Home Builders Ass’n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 346-47 (2007).

**1. Kitsap County’s Marine Shoreline
Buffer Provisions Require a Dedication
of Property as a Condition on Development**

The first inquiry under RCW 82.02.020 is whether Kitsap County’s marine shoreline buffer requirements constitute either a direct or indirect tax,

fee, or charge on development. Buffers are such common land control devices that it is easy to forget that a buffer imposed as a condition on development constitutes an exaction that is subject to RCW 82.02.020. As Division One of this Court recognized:

[T]he policies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.

...

Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate.

HEAL, 96 Wn. App at 533-34 (footnotes omitted).²⁷

Here, Kitsap County's CAO requires that shoreline property owners set aside all property within a marine shoreline buffer as "undisturbed natural vegetation areas." App. A (KCC 19.300.315(A)(1)). The buffer requirements are automatically imposed as a uniform and preset condition on all shoreline development applications. Specifically, the County Code requires that, as a condition for project approval, all shoreline property owners must identify the marine shoreline buffer on a binding site plan, and file a deed limiting the property owner's use of his or her property:

²⁷ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374. In *Dolan v. City of Tigard*, the United States Supreme Court held that a mandatory buffer to control stormwater runoff would constitute a taking unless the local government was able to demonstrate nexus and rough proportionality. *Dolan*, 512 U.S. at 380, 389.

Project applicants shall sign a “Critical Area and Buffer Notice to Title” . . . to be filed with the Kitsap County auditor on all development proposals subject to this title and containing any critical area or its buffer. After review, the department will condition critical area development in accordance with this title. These standards will be identified on the approved notice to title, which shall run with the land in accordance with this title. This title shall serve as an official notice to subsequent landowners that the landowner shall accept sole responsibility for any risk associated with the land’s identified critical area.

App. A (KCC 19.100.150; KCC 19.300.315(A)(8); KCC 19.800 (Appendix E - Kitsap County Critical Area and Buffer Notice)).

Our Supreme Court has concluded that a mandatory set-aside condition on development constitutes an in-kind indirect “tax, fee, or charge” under RCW 82.02.020. In *Isla Verde*, a property developer sought a permit to build a 51-lot subdivision on 13.4 acres in the City of Camas. *Isla Verde*, 146 Wn.2d at 746. Camas placed a condition requiring that 30 percent of the land be set aside as open space on its approval of the preliminary plat. *Isla Verde*, 146 Wn.2d at 749-50. The developer challenged the set aside development conditions. *Isla Verde*, 146 Wn.2d at 750. As a threshold matter, the *Isla Verde* court held that the “open space set aside condition is an in kind ‘tax, fee, or charge’ on new development” under RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 759.

The Court reasoned that RCW 82.02.020 “contemplates that a required dedication of land or easement is a tax, fee or charge.” *Isla Verde*, 146 Wn.2d at 757-58; *see also San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 24 (1987) (shifting general social costs onto developer is an in-

kind tax). The *Isla Verde* court also noted several cases in which Washington courts have held that comparable conditions on development constituted in-kind taxes, fees, or charges under RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 758-59.²⁸ Similarly, in *Citizens' Alliance for Property Rights v. Sims*, the Court of Appeals concluded that a CAO provision requiring that all rural property owners set aside 50 to 65 percent of their property as a "natural resource area" as a permit condition constituted an in-kind indirect "tax, fee or charge" under RCW 82.02.020. *Citizens' Alliance for Property*

²⁸ Citing

Vintage Constr. Co. v. City of Bothell, 135 Wn.2d 833, 959 P.2d 1090 (1998) (RCW 82.02.020 applicable where ordinance required dedication of five percent of land for parks or payment of \$400 per lot in lieu thereof . . .) (adopting opinion of the Court of Appeals in *Vintage Constr. Co. v. City of Bothell*, 83 Wn. App. 605, 922 P.2d 828 (1996)); *Trimen*, 124 Wn.2d 261, 877 P.2d 187 (RCW 82.02.020 applicable where ordinance required dedication of land for open space or payment of fee in lieu thereof . . .); *Henderson Homes*, 124 Wn.2d 240, 877 P.2d 176 (RCW 82.02.020 applicable where condition required payment of \$400 per lot park mitigation fee); *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 698-99, 26 P.3d 943 (RCW 82.02.020 applicable where condition required frontage improvements for drainage along adjacent boulevard), *review denied*, 145 Wn.2d 1002, 35 P.3d 380 (2001); *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994) (RCW 82.02.020 applicable where voluntary agreement required payment of \$3,000 per lot or provision of offsite traffic improvements); *View Ridge Park Assocs. v. City of Mountlake Terrace*, 67 Wn. App. 588, 839 P.2d 343 (1992) (RCW 82.02.020 applicable where ordinance required developers to construct onsite recreational facilities or pay a fee in lieu thereof).

146 Wn.2d at 758.

Rights v. Sims, 145 Wn. App. 649, 660-61 ¶¶ 24-25 (2008).²⁹ Kitsap County’s mechanism for imposing its marine shoreline buffers constitutes a dedication of land for public use as a condition on a development permit,³⁰ which is an in-kind, indirect “tax, fee or charge” under RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 757-58; *Citizens’ Alliance for Property Rights*, 145 Wn. App. at 660-61 ¶¶ 24-25.

2. The County Cannot Demonstrate That Its Marine Shoreline Buffers Satisfy the Nexus Requirement

Kitsap County purportedly adopted its marine shoreline buffers to protect fish habitat from the impacts of development and use of private property. While protection of the environment is generally recognized as serving the public interest, the United States Supreme Court has “refuted the

²⁹ As of the date of filing this brief, mandate has been delayed because King County filed a petition for review. While mandate is pending, this Court may rely on the decision of the Superior Court, which also concluded that King County’s 50 percent to 65 percent set aside requirement constituted an in-kind, indirect tax, fee, or charge on development. *Citizens’ Alliance for Property Rights v. Sims*, Snohomish County Superior Court, No. 04-2-13831-9, Memorandum Decision at 3 (Dec. 21, 2006).

³⁰ A public dedication can be accomplished through designation on a plat: “The intent to dedicate property for public use is evidenced by presenting for filing a final plat or short plat that shows the dedication on its face. Acceptance by the public is evidenced by approval of the final plat or short plat for filing with the appropriate governmental unit.” *Richardson v. Cox*, 108 Wn. App. 881, 884, 891 (2001); *see, e.g.*, RCW 58.17.110(2) (“Dedication of land to any public body . . . imposed under RCW 82.02.050 through RCW 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat.”); RCW 58.17.020(3) (“The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.”).

notion that a regulation designed to protect the public interest by preventing harm is automatically immune from takings liability.” James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Env'tl. Aff. L. Rev. 1, 13 (2002) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992)). The County still bears the burden of establishing a connection between the regulated development (all development and use of shoreline property) and the impact on an identified public problem (damage to fish habitat).

In order to establish nexus, therefore, Kitsap County “must show that the development . . . will create or exacerbate the identified public problem.” *Burton*, 91 Wn. App. at 521.³¹ Kitsap County cannot meet its burden of establishing an essential nexus between any use and/or development and the needs of marine fish habitat because it chose to base its marine buffers regulations on inapplicable stream science. *See* AR V8, Tab 87 at 5 (Compliance Order); Argument Section II, *supra*. As a result, its marine shoreline buffers violate the nexus requirement of RCW 82.02.020 and constitute an unlawful “tax, fee, or charge” on development.

³¹ The County cannot satisfy this burden by casual reference to the public interest goal; instead, the County is required to establish “a close causal nexus between the burdens imposed by the regulations, and the social costs that would otherwise be imposed by the property’s unregulated use.” R.S. Radford, *Of Course a Land Use Regulation That Fails To Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Env'tl. L. Rev. 353, 390 (2004) (citing *Nollan*, 483 U.S. at 838-39). “It is the requirement of a cause-effect nexus, not just an ends-means fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners.” *Id.* at 391.

3. The County Cannot Demonstrate That Its Marine Shoreline Buffers Satisfy the Rough Proportionality Requirement

The County cannot satisfy the rough proportionality requirement as a matter of law. The County imposed its marine shoreline buffers as a uniform and preset condition on all shoreline development. The essence of the proportionality requirement is that an exaction must be sufficiently “specific to the site.” *Trimen*, 124 Wn.2d at 275. Our Supreme Court has held that a condition on development that is applied in a uniform and preset amount to all properties violates the rough proportionality requirement of RCW 82.02.020:

The statute mandates that a municipality must demonstrate that a dedication is “reasonably necessary as a direct result of the proposed development or plat” We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community. *RCW 82.02.020 does not permit conditions that satisfy a “reasonably necessary” standard for all new development collectively; it specifically requires that a condition be “reasonably necessary as a direct result of the proposed development or plat.”*

Isla Verde, 146 Wn.2d at 761 (emphasis added) (internal citations omitted).

A set-aside requirement cannot be “uniformly applied, in the preset amount, regardless of the specific needs created by a given development.” *Isla Verde*, 146 Wn.2d at 763.

Isla Verde’s holding is not unique. In *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95 (1994), the city imposed exactions on development based on a share of the “cumulative impact” of all the new development in its subdivisions, regardless of the specific impact of a

particular development. *Castle Homes*, 76 Wn. App. at 106. As a result of the “cumulative impact” approach, the court found that the city’s approach did “not take into account the direct impact of each separate subdivision location and the differing street distribution impacts of each” and held that the mitigation impact fees violated RCW 82.02.020. *Castle Homes*, 76 Wn. App. at 108. “[W]hen exacted without limitation to the direct impact, [the fees] are not appropriate and are in derogation of the law.” *Castle Homes*, 76 Wn. App. at 109.

Similarly, in *Citizens’ Alliance for Property Rights*, a citizen group challenged King County’s adoption of a King County critical area provision that automatically required rural property owners to set aside 50 to 65 percent of their land as a “resource area” in a uniform and preset manner as a condition on development. King County’s ordinance did not take into consideration whether or not proposed rural development will actually result in any increased impacts to identified critical areas, and did not take into account whether existing regulations or other site-specific management practices could satisfactorily mitigate any impacts of development. As a result, Division One of the Court of Appeals concluded that King County’s set-aside requirement failed to satisfy the proportionality requirement that a condition on development must be impact specific:

[T]he failings of the ordinance before us are highlighted by the precise point made in *Trimen* and the dissent in this court’s decision in *Henderson Homes*. KCC 16.82.150 imposes a uniform requirement for cleared area on each lot, unrelated to any evaluation of the demonstrated impact of proposed development. While the ordinance before us

prescribes clearing limits in proportion to the size of the lot, it fails to relate the clearing limit to the nature and extent of the proposed development on the lot. Although KCC 16.82.150 contains other criteria, none address *the requirement that the clearing limits be impact specific*, as the statute requires. Thus the necessary proportionality that is required to fulfill the statutory exception is not satisfied.

Citizens' Alliance for Property Rights, 145 Wn. App. at 668-69 ¶ 48 (emphasis added). Because Kitsap County has chosen to adopt its marine shoreline buffers by imposing a mandatory, uniform, and preset condition on all shoreline development applications, its buffers violate the rough proportionality requirement of RCW 82.02.020.

CONCLUSION

For the foregoing reasons, KAPO respectfully requests that this Court reverse the Board's Final Decision and Order and Compliance Order and conclude that the County's attempt to regulate all shorelines of the state as critical areas violated RCW 36.70A.480 and RCW 90.58.030 and is invalid. Moreover, KAPO requests that this Court reverse the Board's decisions affirming the County's imposition of uniform and preset buffers as a condition on all development of marine shoreline property.

DATED: October 24, 2008.

Respectfully submitted,



BRIAN T. HODGES
(WSBA No. 31976)

Attorney for Petitioners/Appellants

DECLARATION OF SERVICE BY MAIL

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004.

On October 27, 2008, true copies of PETITIONERS' OPENING BRIEF were placed in envelopes addressed to:

Lisa J. Nickel
Deputy Prosecuting Attorney for Kitsap County
614 Division Street, MS-34A
Port Orchard, WA 98366-4674

Tim Trohimovich
John T. Zilvany
Futurewise
814 Second Avenue
Suite 500
Seattle, WA 98104

Martha P. Lantz
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Olympia, WA 98504-0110

Alexandria K. F. Doolittle
1026 32nd Avenue East
Seattle, WA 98112

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COURT OF APPEALS
DIVISION II
08 OCT 28 PM 12:26
STATE OF WASHINGTON
BY [Signature]
DEPUTY

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 21st day of October, 2008, at Bellevue, Washington.



BRIAN T. HODGES

APPENDIX A

**EXCERPTS FROM AR V1, Tab 13, Core Document 2
(CAO Update, Ordinance 351-2005)**

RECEIVED

APR 12 2006

ORDINANCE NO. 351-2005

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD

ORDINANCE REGARDING GROWTH MANAGEMENT,
REVISIONS TO TITLE 19 (CRITICAL AREAS)

BE IT ORDAINED:

Section 1. General Findings. The Kitsap County Board of Commissioners makes the following findings:

- A. The Growth Management Act (GMA), RCW 36.70A, requires that local governments protect the environment and enhance the state's high quality of life, including air and water quality and the availability of water.
- B. The GMA, specifically RCW 36.70A.170(1)(d) and RCW 36.70.060 (2), requires the designation of critical areas and the adoption of development regulations to protect those critical areas. Critical areas are defined in RCW 36.70A.030(5) as "(a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."
- C. Pursuant to RCW 36.70A.130, Kitsap County is required to review and, if needed, revise its development regulations protecting critical areas ("Critical Areas Ordinance") to ensure that the regulations comply with the requirements of GMA. Kitsap County adopted its last Critical Areas Ordinance (CAO) on May 7, 1998 through Ordinance 217-1998.
- D. Pursuant to RCW 36.70A.172, Kitsap County is required to include the best available science ("BAS") in developing and updating policies and development regulations to protect the functions and values of critical areas, and to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.
- E. The GMA requires local governments planning under GMA to accommodate future population growth as forecasted by the office of financial management and requires counties to include a rural element in their comprehensive plans. Kitsap County is required to plan under the GMA and has adopted a comprehensive plan that includes all of the required elements under GMA.
- F. Kitsap County's efforts to accommodate growth and to protect critical areas, resource lands and rural lands are guided by Countywide Planning Policies and the Kitsap County Comprehensive Plan ("Comprehensive Plan"). The Kitsap County Board of Commissioners

functions and values. The updated mitigation ratios are based on best available science and allow for more site-specific flexibility with enhanced goals, objectives and performance standards than previous mitigation guidelines.

4. The BOCC amended the section on regulated and non-regulated wetlands. Specifically, the threshold area of regulated versus non-regulated, Category IV, lower-functioning wetlands was reduced from 10,000 square feet to 7,500 square feet. This was based on a consideration of best available science that recognizes the value of small, isolated, lower functioning wetlands in providing some hydrologic, water quality and habitat functions but at a very reduced capacity than larger, higher functioning wetland areas.

E. Fish and Wildlife Habitat Conservation Areas

1. The BOCC incorporated the Washington State Department of Natural Sources (DNR) water typing system for streams found in WAC 222-16-030.
2. The BOCC also adopted updated buffer widths for these new water types based on the best available science applicable to Kitsap County, which indicates that the size of riparian buffers is directly related to conserving the existing stream resource, the water quality and habitat functions and anadromous fisheries. Kitsap County was careful to base its buffers on the BAS reflective of the lowland, urbanizing contexts like Kitsap County, rather than that science based on steep-sloped forestland areas where the environmental needs are entirely different (which represents the bulk of published scientific work). The adopted buffer widths serve to protect the riparian functions associated with the various stream types, including water quality, sediment and erosion control, microclimate, the contribution of large woody debris and also provide for general levels of protection for mammals and bird habitats.
3. The BOCC adopted minor revisions to CAO saltwater and lake shoreline buffers in accordance with BAS. While there is scientific data examining the marine-riparian interactions, none suggest protective buffer widths. Accordingly, Kitsap County reviewed the buffers established in 1998 along with the added protection established in Title 22 Kitsap County Shoreline Management Program, and made changes in accordance with BAS. These changes provide an acceptable level of conservation for important shoreline habitat features, ensure a no net loss of riparian functions, and address the consideration to anadromous fish.

- F. Geologically Hazardous Areas – The geologically hazardous areas chapter was last updated in 1999, using BAS. During the current update process, it was reviewed again and found to be within acceptable ranges of current BAS as well as provide opportunities for more site-specific protections through the requirement of a geotechnical report. Language was,

19.100.150 Critical area and buffer notice to title

Project proponents/applicants shall file/sign a "Critical Area and Buffer Notice to Title" (see Chapter 19.800 Appendix E) to be filed with the Kitsap County Auditor on all development proposals subject to this title and containing any critical area or its buffer. After review of the development proposal, the department will condition critical area development in accordance with this title. These standards will be identified on the approved notice to title, which shall run with the land in accordance with this title perpetuity. This notice shall serve as an official notice to subsequent landowners that the land owner shall accept sole responsibility for any risk associated with the land's identified critical area.

Notice to Title may not be required in cases where the clearing or building footprint for minor new development will not adversely impact a critical area or its buffer (i.e., normal repair and maintenance, not adjacent to a critical area). Lack of such notice on a specific parcel does not indicate that Kitsap County has determined critical areas or buffers do not exist on that parcel.

Section 14. Kitsap County Code Section 19.100.155 last amended by Ordinance No. 217-1998 is amended as follows:

19.100.155 General Application requirements, general

- A. All applicants for major new development are required to meet with the department prior to submitting an application subject to the ~~Title 17 of Kitsap County Code~~ Kitsap County Zoning Ordinance; all applicants for construction of a single-family dwelling ~~minor new development~~ are encouraged to do so. The purpose of this meeting is to discuss Kitsap County's zoning and applicable critical area requirements, to review any conceptual site plans prepared by the applicant and to identify potential impacts and mitigation measures. Such conference shall be for the convenience of the applicant, and any recommendations shall not be binding on the applicant or the county.
- B. The applicant must comply with the standards and requirements of this ~~chapter~~ title as well as standards relating to Title 12 Kitsap County Code (sStormwater Management) set forth by the department ~~of Public Works~~, as now or hereafter amended. To expedite the permit review process, the department shall be the lead agency on all work related to critical areas. Development may be prohibited in a proposed development site based on criteria set forth in this title; the Applicant should first determine whether this is the case before applying for permits from the ~~Public Works Department~~.

potential buffer 200 feet of areas designated as fish and wildlife habitat conservation areas, as categorized in Section 19.300.310, below. The purpose of this chapter is to identify regulated fish and wildlife habitat conservation areas and establish habitat protection procedures and mitigation measures that are designed to achieve no net loss of fish and wildlife species and habitats due to new development or regulated activities. It is further stated that the intent of this chapter is to:

- A. Preserve natural flood control, stormwater storage, and drainage or stream flow patterns;
- B. Prevent turbidity and pollution, control siltation, protect nutrient reserves, and maintain water flows and quality for anadromous and resident fish, marine shellfish and forage fish; and
- C. Encourage non-regulatory methods of habitat retention whenever practical, through mechanisms such as education and the open space tax program.

The intent of this Section is to:

- ~~A. Preserve natural flood control, stormwater storage and drainage or stream flow patterns;~~
- ~~B. Control siltation, protect nutrient reserves and maintain stream flows and stream quality for fish and marine shellfish;~~
- ~~C. Prevent turbidity and pollution of streams and fish or shellfish bearing waters;~~
- ~~D. Preserve and protect habitat adequate to support viable populations of native wildlife in Kitsap County; and,~~
- ~~E. Encourage non-regulatory methods of habitat retention whenever practical, through education, and the Open Space Tax Program.~~

Section 28. Kitsap County Code Section 19.300.310 last amended by Ordinance No.217-1998 is repealed and reenacted as follows:

19.300.310 Fish and Wildlife Habitat Conservation Area Categories.

- A. General. Fish and wildlife habitat conservation areas are those areas that support regulated fish or wildlife species or habitats, typically identified by known point locations of specific species (such as a nest or den) or by habitat areas or both.
- B. Classification and Designation. The following categories shall be used in classifying and designating fish and wildlife habitat conservation areas:

1. Streams. All streams which meet the criteria for Type S, F, Np or Ns waters as set forth in WAC 222-16-030 of the Washington Department of Natural Resources (DNR) Water Typing System, as now or hereafter amended, Table 19.300.310 (See also Chapter 19.800, Appendix "B").

Table 19.300.310. DNR Water Typing System

<u>Water Type</u>	
<u>Current DNR Water Typing</u>	<u>Previous DNR Water Typing</u>
<u>Type S</u>	<u>Type 1</u>
<u>Type F</u>	<u>Type 2 and 3</u>
<u>Type Np</u>	<u>Type 4</u>
<u>Type Ns</u>	<u>Type 5</u>

2. Shorelines.

- a. Saltwater Shorelines, and Lakes 20 Acres and Greater in Surface Area. Those saltwater shorelines and lakes defined as shorelines of the state in the Shoreline Management Act of 1971 and the Kitsap County Shoreline Management Master Program, as now or hereafter amended. Shorelines include Type S waters as set forth in WAC 222-16-030 (DNR Water Typing System) as now or hereafter amended; commercial and recreational shellfish areas; kelp and eelgrass beds; and forage fish spawning areas.
- b. Lakes Less Than 20 Acres in Surface Area. Those lakes which meet the criteria for Type F, Np, and Ns waters as set forth in WAC 222-16-030, as now or hereafter amended. This includes lakes and ponds less than twenty acres in surface area and their submerged aquatic beds, and lakes and ponds planted with game fish by a governmental or tribal authority.

3. Wildlife Habitat Conservation Areas.

a. Class I Wildlife Habitat Conservation Areas.

- (1) Habitats recognized by federal or state agencies for federal and/or state listed endangered, threatened and sensitive species documented in maps or databases available to Kitsap County.
- (2) Areas targeted for preservation by the federal, state and/or local government which provide fish and wildlife habitat benefits, such as important waterfowl areas

identified by the U.S. Fish and Wildlife Service; or

(3) Areas that contain habitats and species of local importance.

b. Class II Wildlife Habitat Conservation Areas.

Habitats for state listed candidate and monitored species documented in maps or databases available to Kitsap County and its citizens, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.

19.300.310 — Fish and wildlife conservation area categories

~~A. Classification. The following categories shall be used in classifying Fish and Wildlife Habitat Conservation Areas:~~

- ~~1. Streams: All streams which meet the criteria for Type 1, 2, 3, 4 and 5 waters as set forth in WAC 222-16-030 of the DNR Water Typing System (See Section 800).~~
- ~~2. Saltwater Shorelines, and Lakes 20 Acres and Greater in Surface Area: Those saltwater shorelines and lakes defined as Shorelines of the State in the Shoreline Management Act of 1971 and the Kitsap County Shoreline Master Program, as now or hereafter amended. Shorelines include: Type 1 waters as set forth in WAC 222-16-030, (DNR Water Typing System) as now or hereafter amended; commercial and recreational shellfish areas; kelp and eelgrass beds; and herring and smelt spawning areas.~~
- ~~3. Lakes less than 20 Acres in Surface Area: Those lakes which meet the criteria for Type 2, 3, 4 and 5 waters as set forth in WAC 222-16-030, as now or hereafter amended. This includes lakes and ponds less than twenty (20) acres in surface area and their submerged aquatic beds, and lakes and ponds planted with game fish by a governmental or tribal authority.~~
- ~~4. Wildlife Conservation Areas:
 - ~~a. Class I Wildlife Conservation Areas:
 - ~~i. Habitats recognized by Federal or State agencies for Federal and/or State listed *endangered, threatened and sensitive species* documented in maps or data bases available to Kitsap County and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.~~~~~~

- ~~ii. Areas targeted for preservation by the federal, state and/or local government which provide fish and wildlife habitat benefits, such as important waterfowl areas identified by the U.S. Fish and Wildlife Service.~~
- ~~iii. Areas that contain habitats and species of local importance.~~

~~b. Class II Wildlife Conservation Areas:~~

- ~~i. Habitats for State listed candidate and monitored species documented in maps or data bases available to Kitsap County and its citizens, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.~~
- ~~ii. Habitats which include attributes such as comparatively high wildlife density; high wildlife species richness; significant wildlife breeding habitat, seasonal ranges or movement corridors of limited availability and/or high vulnerability. These habitats may include caves, cliffs, islands, meadows, old growth/mature forest, snag rich areas, talus slopes, and urban natural open space.~~

Section 29. Kitsap County Code Section 19.300.315 last amended by Ordinance No. 217-1998 is repealed and reenacted as follows:

19.300.315 Development Standards.

A designated fish and wildlife habitat conservation area with its buffer is subject to the regulatory provisions of this chapter. Those regulated uses identified below within designated fish and wildlife habitat conservation areas shall comply with the performance standards outlined in this chapter.

A. Buffers and Building Setbacks.

- 1. Buffers. Buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Buffers shall be maintained along the perimeter of fish and wildlife habitat conservation areas, as listed in Table 19.300.315. Refuse shall not be placed in buffers.

Table 19.300.315: Fish and Wildlife Habitat Conservation Area Development Standards

Streams			
<u>Water Type</u>	<u>Buffer Width</u>	<u>Minimum Building Setback</u>	<u>Other Development Standards</u>
<u>S</u> <u>Segments of Big Beef Creek, Curley Creek, Chico Creek, Burley Creek, Union River, Blackjack Creek and Tahuya River</u>	<u>200 feet</u>	<u>15 feet beyond buffer</u>	<u>Where applicable, refer to the development standards in Chapters 19.200 (Wetlands) and 19.400 (Geologically Hazardous Areas). Where such features occur on site, the more restrictive buffer or building setback shall apply.</u>
<u>F</u>	<u>150 feet</u>	<u>15 feet beyond buffer</u>	
<u>Np</u>	<u>50 feet</u>	<u>15 feet beyond buffer</u>	
<u>Ns</u>	<u>50 feet</u>	<u>15 feet beyond buffer</u>	
<u>Saltwater Shorelines and Lakes</u>			
<u>Shoreline Designation¹</u>	<u>Buffer Width</u>	<u>Minimum Building Setback</u>	<u>Other Development Standards</u>
<u>Urban, Semi-Rural and Rural shorelines and Lakes less than 20 acres</u>	<u>35 feet</u>	<u>15 feet beyond buffer</u>	<u>See subsection 19.300.315.A. Where applicable, refer to the development standards in Chapters 19.200 (Wetlands) and 19.400 (Geologically Hazardous Areas). Where such features occur on site, the more restrictive buffer or building setback shall apply.</u>
<u>Conservancy</u>	<u>50 feet</u>	<u>15 feet beyond buffer</u>	
<u>Natural</u>	<u>100 feet</u>	<u>15 feet beyond buffer</u>	
<u>Wildlife Habitat Conservation Areas</u>			
<u>Class I</u>	<u>Buffer widths and setbacks will be determined through a mandatory Habitat Management Plan (HMP)</u>		
<u>Class II</u>	<u>Site-specific conditions will determine the need for the preparation of a HMP</u>		

as defined in Title 22 Kitsap County Code (Shoreline Management Master Program)

2. Buffer Measurement. Distances shall be measured from the ordinary high water mark (OHM) or from the top of the bank where the OHM cannot be identified. Buffers shall be retained in their natural condition. It is acceptable, however, to enhance the buffer by planting indigenous vegetation, as approved by the department. Alteration of buffer areas and building setbacks may be allowed for development authorized by Section 19.100.140 (Reasonable Use Exception), Section 19.100.125 (Exemptions), Section 19.100.130 (Standards for Existing Development) or Section 19.100.135 (Variances). The buffer width shall be increased to include streamside wetlands, which provide overflow storage for stormwaters, feed water back to the stream during low flows or provide shelter and food for fish. In braided channels, the ordinary high water mark or top of bank shall include the entire stream feature.
3. Buffer Widths and Setbacks for Shorelines. The building setback or buffer width for new development shall be based on the Kitsap County Shoreline Management Master Program environment designation, or as required by Chapter 17.450, (View Blockage Requirements), as now or hereafter amended, whichever is greater. (Note: Setbacks for Conservancy-Public Lands to be determined by the Kitsap County Shoreline Management Master Program.)
4. Provision for Decreasing Buffer.
 - a. In lieu of going through the formal variance process, an administrative reduction to buffer widths for streams may be granted subject to the requirements of this section. Where an applicant demonstrates pursuant to the variance criteria that buffer widths cannot be met, a habitat management plan (HMP) will be required that shall meet the requirements as described in Chapter 19.700 (Special Reports). The department may decrease the buffer if, after consultation with the Washington State Department of Fish and Wildlife, and review of the HMP, the department determines that conditions are sufficient to protect the affected habitat. The department may reduce the buffer width by up to fifty percent for construction of a single-family dwelling or up to twenty five percent for all other development, but the buffer shall not be less than twenty-five feet. Reductions of greater than twenty five percent for single-family dwellings will be a Type II decision and require notification (see Chapter 19.800 Appendix F). Granting of a reduced buffer shall be the minimum necessary for the permitted use. When applicable, the order of sequence for buffer reductions shall be as follows:
 - ai. Use of buffer averaging, maintaining one hundred percent of the buffer area under the standard buffer requirement;

ii.b. Reduction of the overall buffer area by no more than twenty-five percent of the area required under the standard buffer requirement ;

iii.e. Enhancement of existing degraded buffer area and replanting of the disturbed buffer area;

div. Use of alternative on-site wastewater systems in order to minimize site clearing;

ve. Infiltration of stormwater where soils permit; and,

vi.f. Retention of native vegetation on other portions of the site in order to offset habitat loss from buffer reduction.

b. Only stream buffers are eligible for administrative buffer reductions.

19.300.315 — Development standards

~~Those regulated uses identified below within designated Fish and Wildlife Habitat Conservation Areas shall comply with the performance standards outlined in this Section.~~

~~A. Buffers and Building Setbacks:~~

~~Buffers or setbacks shall be maintained along the perimeter of Fish and Wildlife Habitat Conservation Areas, as listed in Table 4. Distances shall be measured from the ordinary high water mark (OHM) or from the top of the bank where the OHM cannot be identified. Buffers shall be retained in their natural condition. It is acceptable, however to enhance the buffer by planting indigenous vegetation, as approved by the Department. Alteration of buffer areas may be allowed for water dependent and water related activities subject to (D) below, and for development authorized by Section 140 (Reasonable Use Exception), Section 120 (General Exemptions), Section 130 (Standards for Existing Development) or Section 135 (Variances). The buffer width shall be increased to include stream side wetlands which provide overflow storage for stormwaters, feed water back to the stream during low flows or provide shelter and food for fish. In braided channels, the Ordinary High Water Mark or Top of Bank shall be defined so as to include the entire stream feature. Refuse shall not be placed in buffers.~~

Table 4: Fish and Wildlife Habitat Conservation Area Development Standards

CATEGORY	BUFFER WIDTH STANDARD	MINIMUM BUILDING SETBACK	OTHER DEVELOPMENT STANDARDS
Streams			
Water Type			
1	100 feet	15 feet beyond buffer	<p>For minor new development the Department may reduce the buffer width by up to 25% through an administrative buffer reduction process when review with the Washington State Department of Fish and Wildlife determines that conditions are sufficient to protect the affected habitat. The buffer shall not be less than 25 feet.</p> <p>Where applicable, refer to the development standards in Sections 200 (Wetlands) and 400 (Geologically Hazardous Areas). Where such features occur on a site, the more restrictive buffer or building setback will apply.</p>
2	100 feet	15 feet beyond buffer	
3	100 feet	15 feet beyond buffer	
4	50 feet	15 feet beyond buffer	
5	25 feet	15 feet beyond buffer	
Saltwater Shorelines, Lakes – 20 Acres and greater (Defined as Type 1 Waters of the State)			
Shoreline Designation			<p>For minor new development an administrative building setback reduction may be allowed but the setback shall not be less than 25 feet (see Variance Criteria Section 135). Where applicable, refer to the development standards in</p>
Urban	None	25 feet	
Semi-Rural	None	35 feet	
Rural	None	35 feet	
Conservancy	None*	50 feet	

Natural	100 feet	15 feet beyond buffer	Sections 200 (Wetlands) and 400 (Geologically Hazardous Areas). Where such features occur on a site, the more restrictive buffer or building setback will apply.
* The buffer width for all major new development shall be 100 feet with a 15 foot minimum			
Lakes - Less than 20 Acres (Non-type 1 Waters of the State)			
Zoning Designation			Where applicable, refer to the development standards in Sections 200 (Wetlands) and 400 (Geologically Hazardous Areas). Where such features occur on a site, the more
Urban Residential	None	50 feet	
Commercial	None	50 feet	
Industrial	None	50 feet	
Rural Residential	None	35 feet	
Wildlife Habitat Conservation Areas			
Class I	Buffer widths and setbacks will be determined through mandatory Habitat Plan.		
Class II	Site specific conditions will determine the need for the preparation of a Habitat Plan for buffer widths and setbacks.		

- ~~1. **Buffer Widths and Setbacks for Shorelines.** The building setback or buffer width for new development shall be based on the Kitsap County Shoreline Master Program Environment designation, or as required by the View Blockage Resolution (No. 240-1984), as now or hereafter amended, which ever is greater. *(Note: Setbacks for Conservation Public Lands to be determined by the Kitsap County Shoreline Management Master Program.)*~~

- ~~2. **Provision for Decreasing Buffer:** For minor new development the Department may decrease the buffer in consultation with the Washington State Department of Fish and Wildlife, and after review of a mitigation plan when required, if the County determines that conditions are sufficient to protect the affected habitat. A Habitat Plan (Section 700) may be required. The Department may reduce the buffer width by up to 25%, but the buffer shall not be less than 25 feet. Granting of reduced buffer shall be the minimum necessary for the permitted use. The order of sequence for such buffer reductions shall be as follows:
 - ~~a. use of buffer averaging maintaining 100% of the buffer area under the standard buffer requirement;~~

 - ~~b. reduction of the overall buffer area by no more than 25% of the area required under the standard buffer requirement;~~

 - ~~c. enhancement of existing degraded buffer area and replanting of the disturbed buffer area;~~

 - ~~d. the use of alternative on-site wastewater systems in order to minimize site clearing;~~

 - ~~e. infiltration of stormwater where soils permit; and,~~

 - ~~f. retention of existing native vegetation on other portions of the site in order to off set habitat loss from buffer reduction.~~~~

5. **Provision for Increasing Buffer.** The department may increase the buffer width whenever a development proposal has known locations of endangered or threatened species for which a habitat management plan indicates a larger buffer is necessary to protect habitat values for such species, or when the buffer is located within a landslide or erosion hazard area.

6. **Buffers for Streams in Ravines.** For streams in ravines with ravine sides ten feet or greater in height, the buffer width shall be the minimum buffer required for the stream type, or a buffer width that extends twenty-five feet beyond the top of the slope,

whichever is greater.

7. Channel Migration Zones. In areas where channel migration zones occur outside of Urban Growth Areas (as of the date of the adoption of this title), the buffer distance shall be measured from the edge of the channel migration zone.
8. Protection of Buffers. Buffer areas shall be protected as required by the department. The buffer shall be identified on a site plan and filed as an attachment to the notice as required by 19.100.150 (Critical Area and Buffer Notice to Title).
9. Building or Impervious Surface Setback Lines. A building or impervious surface setback line of 15 feet is required from the edge of any fish and wildlife habitat conservation area buffer. Minor structural or impervious surface intrusions into the areas of the setback may be permitted if the department determines that such intrusions will not adversely impact the fish and wildlife habitat conservation area. The setback shall be identified on a site plan and filed as an attachment to the notice as required by 19.100.150 (Critical Area and Buffer Notice to Title).

B. Class I Wildlife Habitat Conservation Areas Development Standards.

All sites with known Class I wildlife habitat conservation areas will require, for all development permits, the submittal and approval of a habitat management plan (HMP) as specified in Chapter 19.700 (Special Reports). In the case of bald eagles, an approved bald eagle management plan by the Washington State Department of Fish and Wildlife (WDFW), meeting the requirements and guidelines of the bald eagle protection rules (WAC 232-12-292), as now or hereafter amended, shall satisfy the requirements for a habitat management plan (HMP). In the case of listed fish species, a HMP shall be required if a buffer reduction is proposed under the provisions of 19.300.315.A. An HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation.

C. Class II Wildlife Habitat Conservation Area Development Standards. All development within designated Class II wildlife conservation areas may require the submittal of a habitat management plan (HMP). An HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation. The requirement for an HMP shall be determined during the SEA/critical areas review on the project.

D. Stream Crossings. Any private or public road expansion or construction which is allowed and must cross streams classified within this title, shall comply with the following minimum development standards:

1. Bridges or bottomless culverts shall be required for all Type S or F streams that have salmonid breeding habitat. Other alternatives may be allowed upon submittal of a habitat management plan that demonstrates that other alternatives would not result in significant impacts to the fish and wildlife conservation area, as determined appropriate through the Washington State Department of Fish and Wildlife (WDFW), Hydraulic Project Approval (HPA) process. The plan must demonstrate that salmon habitat will be replaced on a 1:1 ratio.

2. Crossings shall not occur in salmonid spawning areas unless no other feasible crossing site exists. For new development proposals, if existing crossings are determined to adversely impact salmon spawning or passage areas, new or upgraded crossings shall be relocated as determined by the Washington State Department of Fish and Wildlife (WDFW).

3. Bridge piers or abutments shall not be placed in either the floodway or between the ordinary high water marks unless no other feasible alternative placement exists.

4. Crossings shall not diminish flood carrying capacity.

5. Crossings shall serve multiple properties whenever possible.

6. Where there is no reasonable alternative to providing a culvert, the culvert shall be the minimum length necessary to accommodate the permitted activity.

E. Stream Relocations. Stream relocations for the purpose of flood protection and/or fisheries restoration shall only be permitted when adhering to the following minimum performance standards and when consistent with WDFW hydraulic project approval (HPA):

1. The channel, bank and buffer areas should be replanted with native vegetation that replicates a natural, undisturbed riparian condition; and

2. For those shorelands and waters designated as frequently flooded areas pursuant to Chapter 19.500, a professional engineer licensed in the state of Washington shall provide information demonstrating that the equivalent base flood storage volume and function will be maintained.

3. Relocated stream channels shall be designed to meet or exceed the functions and values of the stream to be relocated.

F. Pesticides, Fertilizers and Herbicides. No pesticides, herbicides or fertilizers may be used in

fish and wildlife habitat conservation areas or their buffers, except those approved by the U.S.EPA or Washington Department of Ecology for use in fish and wildlife habitat conservation area environments. Where approved, herbicides must be applied by a licensed applicator in accordance with the safe application practices on the label.

G. Land Divisions and Land Use Permits. All proposed divisions of land and land uses (subdivisions, short subdivisions, short plats, long and large lot plats, performance based developments, conditional use permits, site plan reviews, binding site plans) that include fish and wildlife habitat conservation areas shall comply with the following procedures and development standards:

1. The open water area of lakes, streams, and tidal lands shall not be permitted for use in calculating minimum lot area.
2. Land division approvals shall be conditioned so that all required buffers are dedicated as open space tracts, or as an easement or covenant encumbering the buffer. Such dedication, easement or covenant shall be recorded together with the land division and represented on the final plat, short plat or binding site plan, and title.
3. In order to avoid the creation of non-conforming lots, each new lot shall contain at least one building site that meets the requirements of this title, including buffer requirements for habitat conservation areas. This site shall also have access and a sewage disposal system location that isare suitable for development and does not adversely impact the fish and wildlife conservation area.
4. After preliminary approval and prior to final land division approval, the department may require that the common boundary between a required buffer and the adjacent lands be identified using permanent signs. In lieu of signs, alternative methods of buffer identification may be approved when such methods are determined by the department to provide adequate protection to the buffer.
5. In order to implement the goals and policies of this title; to accommodate innovation, creativity, and design flexibility; and to achieve a level of environmental protection that would not be possible by typical lot-by-lot development; the use of the performance based development process is strongly encouraged for projects within designated fish and wildlife habitat conservation areas.

H. Agricultural Restrictions. In all development proposals that would permit introduction of agriculture to fish and wildlife habitat conservation areas, damage to the area shall be avoided by the installation of fencing located not closer than the outer buffer edge.

I. Trails and Trail-Related Facilities. Construction of public and private trails and trail-related facilities, such as benches, interpretive centers, and viewing platforms, may be allowed in fish and wildlife habitat conservation areas or their buffers pursuant to the following standards:

1. Trails and related facilities shall, to the extent feasible, be placed on existing road grades, utility corridors, or other such previously disturbed areas.
2. Trails and related facilities shall be planned to minimize removal of trees, shrubs, snags and important wildlife habitat.
3. Viewing platforms, interpretive centers, benches and access to them, shall be designed and located to minimize disturbance of wildlife habitat and/or critical characteristics of the affected conservation area.
4. Trails and related facilities shall generally be located outside required buffers. Where trails are permitted within buffers they shall be located in the outer portion of the buffer and a minimum of twenty-five feet from the stream edge, except where stream crossings or viewing areas have been approved.
5. Trails shall generally be limited to pedestrian use unless other more intensive uses, such as bike or horse trails have been specifically allowed and mitigation has been provided. Trail width shall not exceed five feet unless there is demonstrated need, subject to review and approval by the department. Trails shall be constructed with pervious materials unless otherwise approved by the department.

J. Utilities. Placement of utilities within designated fish and wildlife habitat conservation areas may be allowed pursuant to the following standards:

1. The normal and routine utility maintenance or repair authorized in Section 19.100.125 shall be allowed within designated fish and wildlife habitat conservation areas, subject to best management practices.
2. Construction of utilities may be permitted in fish and wildlife habitat conservation areas or their buffers, only when no practicable or reasonable alternative location is available. Utility construction shall adhere to the development standards set forth in 5 and 6, below. As required, Special Reports (Chapter 19.700) shall be reviewed and approved by the department.
3. Construction of sewer lines or on-site sewage systems may be permitted in fish and wildlife habitat conservation areas or their buffers when the applicant demonstrates it is

necessary to meet state and/or local health code requirements; there are no other practicable alternatives available, and construction meets the requirement of this chapter. Joint use of the sewer utility corridor by other utilities may be allowed.

4. New utility corridors shall not be allowed in Class I or II fish and wildlife habitat conservation areas (19.300.310 B and C) except in those circumstances where an approved HMP indicates that the utility corridor will not significantly impact the conservation area.

5. Utility corridor construction and maintenance shall protect the environment of fish and wildlife habitat conservation areas and their buffers.

a. New utility corridors shall be aligned when possible to avoid cutting trees greater than twelve inches in diameter at breast height (four and one-half feet) measured on the uphill side.

b. New utility corridors shall be revegetated with appropriate native vegetation at not less than pre-construction vegetation densities or greater, immediately upon completion of construction, or as soon thereafter as possible due to seasonal growing constraints. The utility entity shall ensure that such vegetation survives.

c. Any additional corridor access for maintenance shall be provided wherever possible at specific points rather than by parallel roads. If parallel roads are necessary, they shall be of a minimum width but no greater than fifteen feet; and shall be contiguous to the location of the utility corridor on the side away from the conservation area.

6. Utility corridor maintenance shall include the following measures to protect the environment of regulated fish and wildlife habitat conservation areas.

a. Utility towers shall be painted with brush, pad or roller and shall not be sandblasted or spray painted, unless appropriate containment measures are used, nor use lead-base paints.

b. No pesticides or fertilizers may be used in fish and wildlife conservation areas or their buffers, except those herbicides approved by the U.S.EPA and the Washington State Department of Ecology. Where approved, herbicides must be applied by a licensed applicator in accordance with the safe application practices on the label.

K. Bank Stabilization. A stream channel and bank, bluff, and shore may be stabilized when documented naturally occurring earth movement presents an imminent threat to existing structures (defined as requiring a building permit pursuant to Chapter 14.04 Kitsap County

Building and Fire Code), public improvements, unique natural resources, public health, safety or welfare, or the only feasible access to property, and, in the case of streams, when such stabilization results in maintenance of fish and wildlife habitat, flood control and improved water quality.

1. Bluff, bank and shoreline stabilization shall also be subject to the standards of Title 22 Kitsap County Code (Shoreline Management Master Program), and of Title 15 Kitsap County Code (Flood Hazard Areas). Documentation of earth movement and/or stability is provided through 19.700.725 (Special Reports), geological and geotechnical report requirements.

2. Where bank stabilization is determined to be necessary, soft-shore protective techniques may be required over other types of shoreline protection. Techniques include, but are not limited to beach nourishment, coarse beach fill, gravel berms, vegetation plantings, and placement of large, woody debris (logs and stumps). Special consideration shall be given to protecting the functions of feeder bluffs.

3. Bulkheads and retaining walls may only be utilized as an engineering solution where it can be demonstrated through a geotechnical report (see 19.700.725) that an existing residential structure cannot be safely maintained without such measures, and that the resulting retaining wall is the minimum length necessary to provide a stable building area for the subject structure. A variance pursuant to Section 19.100.135 must be obtained in all other cases.

4. The department may require that bank stabilization be designed by a professional engineer licensed in the state of Washington with demonstrated expertise in hydraulic actions of shorelines. Bank stabilization projects may also require a Kitsap County site development activity permit per Title 12 Kitsap County Code (Stormwater Management) and a Hydraulic Project Approval (HPA) from the WDFW.

L. Fencing and Signs. Prior to approval or issuance of permits for land divisions and new development, the department may require that the common boundary between a required buffer and the adjacent lands be identified using fencing or permanent signs. In lieu of fencing or signs, alternative methods of buffer identification may be approved when such methods are determined by the department to provide adequate protection to the buffer.

M. Forest Practice, Class IV General and Conversion Option Harvest Plans (COHP's). All timber harvesting and associated development activity, such as construction of roads, shall comply with the provisions of this title, and with Title 12 (Stormwater Management) and Title 22 (Shoreline Management) Kitsap County Code, including the maintenance of buffers, where required.

N. Road/Street Repair and Construction. When no other reasonable or practicable alternative exists road or street expansion or construction is allowed in fish and wildlife habitat conservation areas or their buffers, subject to the following minimum development standards:

1. The road or street shall serve multiple properties whenever possible;
2. Public and private roads should provide for other purposes, such as utility corridor crossings, pedestrian or bicycle easements, viewing points, etc.; and
3. The road or street construction is the minimum necessary, as required by the department, and shall comply with the department's guidelines to provide public safety and mitigated stormwater impacts; and.
4. Construction time limits shall be determined in consultation with WDFW in order to ensure habitat protection.

~~1. **Buffer Widths and Setbacks for Shorelines.** The building setback or buffer width for new development shall be based on the Kitsap County Shoreline Master Program Environment designation, or as required by the View Blockage Resolution (No. 240-1984), as now or hereafter amended, which ever is greater. (Note: Setbacks for Conservation Public Lands to be determined by the Kitsap County Shoreline Management Master Program.)~~

~~2. **Provision for Decreasing Buffer:** For minor new development the Department may decrease the buffer in consultation with the Washington State Department of Fish and Wildlife, and after review of a mitigation plan when required, if the County determines that conditions are sufficient to protect the affected habitat. A Habitat Plan (Section 700) may be required. The Department may reduce the buffer width by up to 25%, but the buffer shall not be less than 25 feet. Granting of reduced buffer shall be the minimum necessary for the permitted use. The order of sequence for such buffer reductions shall be as follows:~~

- ~~a. use of buffer averaging maintaining 100% of the buffer area under the standard buffer requirement;~~
- ~~b. reduction of the overall buffer area by no more than 25% of the area required under the standard buffer requirement;~~
- ~~c. enhancement of existing degraded buffer area and replanting of the disturbed buffer area;~~

~~d. the use of alternative on-site wastewater systems in order to minimize site clearing;~~

~~e. infiltration of stormwater where soils permit; and,~~

~~f. retention of existing native vegetation on other portions of the site in order to offset habitat loss from buffer reduction.~~ **3. Provision for Increasing Buffer:** The Department may increase the buffer width whenever a development proposal has known locations of endangered or threatened species for which a Habitat Management Plan indicates a larger buffer is necessary to protect habitat values for such species; or when the buffer is located within a landslide or erosion hazard area.

~~4. Streams in Ravines Buffers:~~ For streams in ravines with ravine sides 10 feet or greater in height, the minimum buffer width shall be the minimum buffer required for the stream type, or a buffer width which extends 25 feet beyond the top of the slope, whichever is greater.

~~5. Conditional Buffer Alterations:~~ Water dependent structures and utilities may alter the required buffer when no other reasonable or practicable alternative exists and the development is consistent with the Kitsap County Shoreline Master Program. Any alteration of a buffer shall be the least necessary and shall require, except for approved water dependent uses for minor new development, an approved Habitat Management Plan which adequately protects habitat values.

~~6. Dedication of Buffers:~~ Buffer areas shall be dedicated as permanent open space tracts, functioning as critical areas buffers or as required by the Department.

~~B. Class I Wildlife Conservation Areas Development Standards:~~ All development as described within this Ordinance or within 200 feet of designated Class I Wildlife Conservation Areas shall adhere to the following standards:

~~1. All sites with known locations of Class I Wildlife Conservation Areas or sites within 200 feet to known locations of Class I Wildlife Conservation Areas will require, for all development permits, the submittal and approval of a Habitat Management Plan as specified in Section 700 (Special Reports) by the Department. In the case of bald eagles, an approved Bald Eagle Management Plan by the Washington State Department of Fish and Wildlife, meeting the requirements and guidelines of the bald eagle protection rules (WAC 232-12-292), as now or hereafter amended shall satisfy the requirements for a Habitat Management Plan (HMP). An HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation.~~

~~2. All new development within ranges and habitat elements with which Class I Wildlife have a critical habitat may require the submittal of a Habitat Management Plan (HMP) as specified in Section 700 (Special Reports). An HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land-use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation. The requirement for an HMP shall be determined during the SEPA/Critical Areas review on the project.~~

~~C. Class II Wildlife Conservation Area Development Standards: All development within designated Class II Wildlife Conservation Areas shall adhere to the following standards:~~

~~All major new development within Class II Wildlife Conservation Areas may require the submittal of a Habitat Management Plan (HMP). An HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land-use intensity, buffers, setbacks, impervious surfaces, erosion control and retention of natural vegetation. The requirement for an HMP shall be determined during the SEPA/Critical Areas review on the project.~~

~~D. Stream Crossings: Any private or public road expansion or construction which is allowed and must cross streams classified within this Ordinance, shall comply with the following minimum development standards:~~

~~1. Bridges or bottomless culverts shall be required for all Type 1, 2 and 3 streams which have Salmonid breeding habitat. Other alternatives may be allowed upon submittal of a Habitat Management Plan which demonstrates that other alternatives would not result in significant impacts to the Fish and Wildlife Conservation Area, as determined appropriate through the Washington State Department of Fish and Wildlife, Hydraulics Project Approval process. The plan must demonstrate that salmon habitat will be replaced on a 1:1 ratio.~~

~~2. Crossings shall not occur in Salmonid spawning areas unless no other feasible crossing site exists. For new development proposals, if existing crossings are determined to adversely impact salmon spawning or passage areas, new or upgraded crossings shall be located as determined necessary through coordination with the Washington State Department of Fish and Wildlife;~~

~~3. Bridge piers or abutments shall not be placed in either the floodway or between the ordinary, high water marks unless no other feasible alternative placement exists;~~

~~4. Crossings shall not diminish flood carrying capacity;~~

~~5. Crossings shall serve multiple properties whenever possible.~~

~~6. Where there is no reasonable alternative to providing a conventional culvert, the culvert shall be the minimum length necessary to accommodate the permitted activity.~~

~~E. Stream Relocations: Stream relocations for the purpose of flood protection and/or fisheries restoration shall only be permitted when adhering to the following minimum performance standards and when consistent with Washington State Department of Fish and Wildlife Hydraulic Project Approval:~~

~~1. The channel, bank and buffer areas should be replanted with native vegetation that replicates a natural, undisturbed riparian condition; and,~~

~~2. For those shorelands and waters designated as Frequently Flooded Areas pursuant to Section 500, a professional engineer licensed in the State of Washington shall provide information demonstrating that the equivalent base flood storage volume and function will be maintained.~~

~~3. Relocated stream channels shall be designed to meet or exceed the functions and values of the stream to be relocated.~~

~~F. Pesticides, Fertilizers and Herbicides: No pesticides, herbicides or fertilizers may be used in Fish and Wildlife Conservation Areas or their buffers, except those approved by the EPA, and approved under a DOE Water Quality Modification Permit for use in Fish and Wildlife Habitat Conservation Area environments. Where approved, herbicides must be applied by a licensed applicator in accordance with the safe application practices on the label.~~

~~G. Land Divisions and Land Use Permits: All proposed divisions of land and land uses (Subdivisions, Short Subdivisions, Short Plats, Long and Large Lot Plats, Planned Unit Developments, Conditional Use Permits, Site Plan Reviews, Binding Site Plans) which include Fish and Wildlife Habitat Conservation Areas shall comply with the following procedures and development standards:~~

~~1. The open water area of lakes, streams, and tidal lands shall not be permitted for use in calculating minimum lot area.~~

~~2. Land division approvals shall be conditioned so that all required buffers are dedicated as open space tracts, or an easement or covenant encumbering the buffer. Such dedication, easement or covenant shall be recorded together with the land division and represented on the final plat, short plat or binding site plan.~~

3. ~~In order to avoid the creation of non-conforming lots, each new lot shall contain at least one building site that meets the requirements of this Ordinance, including buffer requirements for habitat conservation areas. This site must also have access and a sewage disposal system location that are suitable for development and does not adversely impact the Fish and Wildlife Conservation Area.~~
4. ~~After preliminary approval and prior to final land division approval, the Department may require the common boundary between a required buffer and the adjacent lands be identified using permanent signs. In lieu of signs, alternative methods of buffer identification may be approved when such methods are determined by the Department to provide adequate protection to the aquatic buffer.~~
5. ~~In order to implement the goals and policies of this Ordinance, to accommodate innovation, creativity, and design flexibility, and to achieve a level of environmental protection that would not be possible by typical lot by lot development, the use of the Planned Unit Development process (Kitsap County Zoning Ordinance 1994) is strongly encouraged for projects within designated Fish and Wildlife Habitat Conservation Areas.~~

~~**H. Agricultural Restrictions:** In all development proposals which would permit introduction of agriculture to Fish and Wildlife Habitat Conservation Areas, damage to the area shall be avoided by one of the following methods:~~

1. ~~Implementation of the farm conservation plan agreed upon by the Kitsap Conservation District and the applicant, to protect and enhance the water quality of the aquatic area; and/or,~~
2. ~~Fencing located not closer than the outer buffer edge.~~

~~**I. Trails and Trail-Related Facilities:** Construction of public and private trails and trail-related facilities, such as benches, interpretive centers, and viewing platforms, may be allowed in Fish and Wildlife Habitat Conservation Areas or their buffers pursuant to the following standards:~~

1. ~~Trails and related facilities shall, to the extent feasible, be placed on existing road grades, utility corridors, or other such previously disturbed areas;~~
2. ~~Trails and related facilities shall be planned to minimize removal of trees, shrubs, snags and important wildlife habitat;~~
3. ~~Viewing platforms, interpretive centers, benches and access to them, shall be designed~~

and located to minimize disturbance of wildlife habitat and/or critical characteristics of the affected conservation area.

4. Trails, in general, shall be set back from streams so that there will be no or minimal impact to the stream from trail use or maintenance. Trails shall be constructed with pervious surfaces when feasible.

J. ~~Utilities:~~ Placement of utilities within designated Fish and Wildlife Habitat Conservation Areas may be allowed pursuant to the following standards:

1. The minor utility development authorized in Section 120 shall be allowed within designated Fish and Wildlife Habitat Conservation areas, subject to best management practices.
2. Construction of utilities may be permitted in Fish and Wildlife Habitat Conservation Areas or their buffers, only when no practicable or reasonable alternative location is available and the utility corridor meets the requirements for installation, replacement of vegetation and maintenance outlined below, and as required in the filing and approval of Special Reports (Section 700) which may be required by this Ordinance.
3. ~~Sewer or On-site Sewage Utility:~~ Construction of sewer lines or on-site sewage systems may be permitted in Fish and Wildlife Habitat Conservation Areas or their buffers when the applicant demonstrates it is necessary to meet State and/or local health code requirements; there are no other practicable alternatives available; and construction meets the requirement of this section. Joint use of the sewer utility corridor by other utilities may be allowed.
4. New Utility Corridors shall not be allowed in Fish and Wildlife Habitat Conservation areas with known locations of federal or state listed endangered, threatened or sensitive species, heron rookeries or nesting sites of raptors which are listed as state candidate or state monitor, except in those circumstances where an approved Habitat Management Plan indicates that the utility corridor will not significantly impact the conservation area;
5. ~~New Utility Corridor Construction:~~ Utility corridor construction and maintenance shall protect the environment of Fish and Wildlife Habitat Conservation Areas and their buffers.
 - a. New utility corridors shall be aligned when possible to avoid cutting trees greater than 12 inches in diameter at breast height (four and one-half feet) measured on the uphill side.

b. ~~New utility corridors shall be revegetated with appropriate native vegetation at not less than pre-construction vegetation densities or greater, immediately upon completion of construction or as soon thereafter as possible due to seasonal growing constraints. The utility shall ensure that such vegetation survives;~~

e. ~~Any additional corridor access for maintenance shall be provided wherever possible at specific points rather than by parallel roads. If parallel roads are necessary, they shall be of a minimum width but no greater than 15 feet; and shall be contiguous to the location of the utility corridor on the side away from the conservation area.~~

6. ~~Utility corridor maintenance shall include the following measures to protect the environment of regulated Fish and Wildlife Habitat Conservation Areas.~~

a. ~~Utility towers should be painted with brush, pad or roller and should not be sandblasted or spray painted, nor should lead base paints be used.~~

b. ~~Pesticides, fertilizers and herbicides: No pesticides or fertilizers may be used in Fish and Wildlife Conservation Areas or their buffers, except those herbicides approved by a licensed applicator in accordance with the safe application practices on the label.~~

K. ~~Bank Stabilization:~~ ~~A stream channel and bank, bluff, and shore may be stabilized when naturally occurring earth movement threatens existing structures (defined as requiring a Building Permit pursuant to the Uniform Building Code), public improvements, unique natural resources, public health, safety or welfare, or the only feasible access to property, and, in the case of streams, when such stabilization results in maintenance of Fish and Wildlife Habitat, flood control and improved water quality. Bluff, bank and shoreline stabilization shall also be subject to the standards of the Kitsap County Shoreline Master Program, and any floodplain management plan adopted by the Board of Commissioners.~~

~~Where bank stabilization is determined to be necessary, bioengineering or other non-structural methods should be the first option for protection. Bulkheads and retaining walls may only be utilized as an engineering solution where it can be demonstrated that an existing residential structure cannot be safely maintained without such measures, and that the resulting retaining wall is the minimum length necessary to provide a stable building area for the proposed structure. A variance pursuant to section 18.16.135, must be obtained in all other cases. The Department may require that bank stabilization be designed by a professional engineer licensed in the State of Washington with demonstrated expertise in hydraulic actions of shorelines. Bank stabilization projects may also require a Kitsap County Site Development Activity Permit and Hydraulic Project Approval from the Washington Department of Fish and Wildlife.~~

~~Nonstructural shoreline protective techniques are preferred to bulkheads or other types of shoreline armoring. Nonstructural techniques include but are not limited to: beach nourishment; coarse beach fill; gravel berms; vegetation plantings and bioengineering.~~

~~L. Fencing and Signs: Prior to approval or issuance of permits for land divisions and new development, the Department may require the common boundary between a required buffer and the adjacent lands be identified using fencing or permanent signs. In lieu of fencing or signs, alternative methods of buffer identification may be approved when such methods are determined by the Department to provide adequate protection to the buffer.~~

~~M. Forest Practice, Class IV General and Conversion Option Harvest Plans (COHPs): All timber harvesting and associated development activity, such as construction of roads, shall comply with the provisions of this Ordinance, and the Stormwater Management Ordinance, including the maintenance of buffers, where required.~~

~~N. Road/Street Repair & Construction. Any private or public road or street expansion or construction which is allowed in a Fish and Wildlife Habitat Conservation Area or its buffer shall comply with the following minimum development standards:~~

- ~~1. No other reasonable or practicable alternative exists and the road or street crossing serves multiple properties whenever possible;~~
- ~~2. Expansion or construction of any private or public road, shall only be allowed when adverse impacts cannot be avoided;~~
- ~~3. Public and private roads should provide for other purposes, such as utility crossings, pedestrian or bicycle easements, viewing points, etc.; and,~~
- ~~4. The road or street construction is the minimum necessary, as required by the Department of Public Works, and shall comply with the Department of Public Works' guidelines to provide public safety and mitigated stormwater impacts.~~
- ~~5. Construction time limits shall be determined in consultation with the Washington Department of Fish and Wildlife in order to ensure habitat protection.~~

Section 30. Kitsap County Code Section 19.400.405 last amended by Ordinance No. 217-1998 is amended with changes as follows:

APPENDIX B

**AR V8, Tab 72, Exhibit B2
(Remand Ordinance, Ordinance 376-2007)**

ORDINANCE NO. 376-2007

ORDINANCE REGARDING GROWTH MANAGEMENT,
REVISIONS TO TITLE 19 (CRITICAL AREAS)

BE IT ORDAINED:

Section 1. General Findings. The Kitsap County Board of Commissioners makes the following findings:

1. On December 1, 2005, the Kitsap County Board of Commissioners (Board) adopted Ordinance 351-2005, enacting new amendments to the 1998 Kitsap County Critical Areas Ordinance.
2. In February 2006, appeals were filed with the Central Puget Sound Growth Management Hearings Board (CPSGMHB) challenging various provisions of the 2005 Critical Areas Ordinance (CAO). In one appeal, the Hood Canal Environmental Council and others asserted that Kitsap County's CAO provided inadequate protection for wetlands and marine shorelines. In another appeal, Kitsap Alliance of Property Owners and others asserted that Kitsap County's CAO was too restrictive. The CPSGMHB consolidated these appeals into one: *Hood Canal v. Kitsap County*, CPSGMHB Case No. 06-3-0012c.
3. On August 28, 2006, the CPSGMHB issued its Final Decision and Order denying Kitsap Alliance of Property Owners' appeal, but granting Hood Canal Environmental Council's appeal, and remanding the challenged wetland and shoreline provisions back to Kitsap County. *Hood Canal v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Final Decision and Order (August 28, 2006). The CPSGMHB determined that Kitsap County's exemption of small, isolated Category III and Category IV wetlands under a certain size was not compliant with the Growth Management Act (GMA) and the Best Available Science (BAS) in Kitsap County's record. The CPSGMHB also determined that Kitsap County's 35-foot buffers on marine shorelines designated Urban, Semi-Rural, and Rural were not compliant with the GMA because they were not supported by the BAS in Kitsap County's record.

Section 2. Procedural Findings. The Kitsap County Board of Commissioners makes the following findings regarding the process and public participation aspects for amending Kitsap County's Critical Areas Ordinance (CAO):

1. Between September and December 2006, the Kitsap County Department of Community Development reviewed the record established during the 2005 CAO update for the Best Available Science related to the remand issues.
2. In December 2006, Kitsap County Staff developed and published a work plan to amend the 2005 CAO and achieve compliance as ordered by the CPSGMHB.

3. On December 11, 2006, following timely and effective public notice, the Kitsap County Board of Commissioners (Board) held a work-study session to discuss and review and proposed work plan, the remand issues, and various options for amending the CAO to achieve compliance.
4. On December 19, 2006, following timely and effective public notice, the Kitsap County Planning Commission (Planning Commission) held a work-study session to discuss and review the proposed work plan, the remand issues, and various options for amending the CAO to achieve compliance.
5. On December 28, 2006, Kitsap County Staff issued a memo to the Planning Commission explaining the background of the proposed changes and identifying the proposed changes to the CAO for the Planning Commission's consideration. This memo was posted to the County's website, mailed to all interested parties, and made available to the public.
6. On January 9, 2007, following timely and effective public notice, the Planning Commission held a public hearing from 6:30-10:00 PM to hear public testimony on the proposed amendments. Over 150 citizens attended and were invited to comment orally and in writing. The Planning Commission held the comment period open to allow for the submittal of additional comments prior to their scheduled deliberations.
7. On January 19, 2007, Kitsap County Staff issued a memo to the Planning Commission summarizing the status of the remand effort and transmitting key items of Best Available Science that were identified and relied upon by the CPSGMHB in their remand order. This memo was posted on the County's website and made available to the public, along with its attachments.
8. On January 22, 2007, following timely and effective notice, the Board of County Commissioners held a public afternoon briefing session at which the Board was apprised of the status of the remand effort and the upcoming Planning Commission deliberations.
9. On January 23, 2007, following timely and effective public notice, the Planning Commission began deliberations on the proposed amendments. This public meeting was continued to January 26, 2007, at which time the Planning Commission concluded their deliberations and voted on recommendations to the Board.
10. On February 7, 2007, Kitsap County Staff issued memo to the Board of County Commissioners summarizing the recommendations to the CAO voted on by the Planning Commission. This summary was posted to the County's website, mailed to all interested parties, including the Planning Commission, and made available to the public.
11. On February 8, 2007, Kitsap County Staff issued a Fact Sheet clearly comparing the existing CAO provisions with the proposed changes to the CAO and answering common questions asked by the public.

12. On February 12, 2007, following timely and effective public notice, the Board of County Commissioners held a public hearing to hear public testimony on the proposed amendments, taking into account the recommendations of the Planning Commission and the recommendations of Kitsap County Staff. The Board held the comment period open to allow for the submittal of additional comments prior to their scheduled deliberations.
13. On February 13, 2007, the Planning Commission formally adopted its Findings of Facts explaining the rationale for its recommendations.
14. On February 14, 2007, the Board of County Commissioners began deliberations on the proposed amendments, as recommended by the Planning Commission and Kitsap County Staff. The public meeting was continued to February 21, 2007 to have additional time to review the record. It was then continued to February 26, 2007, the Board's regular Monday morning public meeting that is televised, to ensure greater public dissemination. The Board is aware that this is one business day past the deadline set by the Growth Board. However, the Board felt it was very important to make its decision at a televised meeting given the affect of these changes throughout the County. At the February 26, 2007 meeting, the Board voted to adopt changes to the 2005 CAO in accordance with the remand order.

Section 3. General Substantive Findings. The Kitsap County Board of Commissioners makes the following substantive findings regarding the amendments to Kitsap County's Critical Areas Ordinance (CAO):

1. Pursuant to RCW 36.70A.172, and WAC 365-195-900 through -925, the following amendments to the CAO are based on and supported by BAS. These amendments protect the functions and values of critical areas, and give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.
2. By removing the wetland exemptions identified by the CPGMHB and by requiring mitigation for functions impacted by development, Kitsap County is protecting all functions and values of each identified wetland. No wetland function will be lost.
3. By increasing the buffers for marine shorelines Kitsap County is protecting the full range of the applicable functions and values that are present in the critical area. Kitsap County chose not to, at least not at this time, differentiate among the various resources within the marine shoreline, the County is committed to conducting a nearshore habitat assessment in the near future to be able to more specifically understand and protect these resources.

Section 4. Kitsap County Code Section 19.200.210, last amended by Ordinance 351-2005, is amended as follows:

A. General

1. Wetlands are those areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do

support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, estuaries, marshes, bogs, and similar areas. For regulatory purposes, wetland delineations shall be determined by the Washington State Wetlands Identification and Delineation Manual, March 1997, or as amended hereafter.

2. Kitsap County uses the Washington Department of Ecology Washington State Wetland Rating System for Western Washington, revised 2004, or as amended hereafter, to categorize wetlands for the purposes of establishing wetland buffer widths, wetland uses and replacement ratios for wetlands. Wetlands shall be generally designated as follows:

B. Regulated Wetlands. (See Chapter 19.800 Appendix A for more detailed description).

1. Category I Wetlands: Category I wetlands are those regulated wetlands that include but are not limited to rare, unique wetland types that are more sensitive to disturbance than most wetlands and that contain ecological attributes that are impossible to replace within a human lifetime. Category I wetlands score 70 points or more out of 100 on the wetlands ratings systems.
2. Category II Wetlands: Category II wetlands are those regulated wetlands that score between 51-69 points out of 100 on the wetlands ratings system.
3. Category III Wetlands: Category III wetlands are those regulated wetlands, ~~2,500 square feet or greater,~~ that score between 30-50 points on the wetlands ratings system. Activities affecting isolated, non-mosaic Category III wetlands that are less than 2,500 square feet may be allowed provided that the wetlands report identifies the specific wetland function affected or at risk, and the proposed mitigation to replace the wetland function, on a per function basis.
4. Category IV Wetlands: Category IV wetlands are those regulated wetlands, ~~7,500 square feet or greater,~~ that score less than 30 points out of 100 on the wetlands ratings system. Activities affecting isolated, non-mosaic Category III wetlands that are less than 2,500 square feet may be allowed provided that the wetlands report identifies the specific wetland function affected or at risk, and the proposed mitigation to replace the wetland function, on a per function basis.
5. Wetlands intentionally created from non-wetland areas to mitigate conversion of other wetlands.
6. Mosaic wetlands as defined at 19.150.695.

C. Non-Regulated Wetlands.

- ~~1. Category III Wetlands: Isolated wetlands less than 2,500 square feet.~~
- ~~2. Category IV Wetlands: Isolated wetlands less than 7,500 square feet.~~

- 3.—Created Wetlands: Wetlands created intentionally from a non-wetland site that were not required to be constructed as mitigation for adverse wetland impacts. These may include, but not limited to irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment ponds, farm ponds not contiguous, as defined in this title, and landscape amenities.

D. Criteria for Determining Wetlands Divided by a Manmade Feature.

1. When a wetland is divided by a manmade feature (e.g., a road embankment), the wetland shall be rated as if it is not divided, if there is a perennial or intermittent surface water connection between the two wetlands and either of the following criteria is met:
 - a. It can be demonstrated that the separate wetlands were one discrete wetland prior to construction of the manmade feature. This may be accomplished through an analysis of secondary information such as aerial photographs and soils maps; or
 - b. The two separated wetlands can be shown to function as one wetland. This shall be determined based on normal conditions (i.e., in the absence of unauthorized activity, the wetlands possess similar vegetative or wildlife assemblages or hydrologic regime).
2. Separated wetland areas may be rated jointly in the absence of a perfectly level culvert where it can be demonstrated that a level surface water connection is present within the culvert that permits flow of water, fish, or other organisms in both directions. Separated wetland areas may also be rated jointly in the absence of a perfectly level culvert with two-way water flow if the bottom of the culvert is below the high water marks in the receiving wetland or if the high water marks on either side differ by six inches or less in elevation.
3. Connecting Mosaic Pattern Wetlands. In cases where the wetlands to be categorized are smaller than one acre in size and separated from each other by 100 feet or less (on average), the DOE mosaic methodology shall be used to determine the wetland category. The area of the wetlands must be greater than 50 percent of the total combined area of wetland and upland for the patchwork to be categorized as one wetland. The boundary of the mosaic wetlands must reflect the ecological interconnectedness of the wetlands within the mosaic. The County will not accept mosaic boundaries drawn to minimize the area of wetland within the mosaic.

Section 5. Kitsap County Code Section 19.300.315(A), last amended by Ordinance 351-2005, is amended as follows:

A. Buffers and Building Setbacks.

1. Buffers. Buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Buffers shall be

maintained along the perimeter of fish and wildlife habitat conservation areas, as listed in Table 19.300.315. Refuse shall not be placed in buffers.

Table 19.300.315: Fish and Wildlife Habitat Conservation Area Development Standards			
Streams			
Water Type	Buffer Width	Minimum Building Setback	Other Development Standards
S Segments of Big Beef Creek, Curley Creek, Chico Creek, Burley Creek, Union River, Blackjack Creek and Tahuya River	200 feet	15 feet beyond buffer	Where applicable, refer to the development standards in Chapters 19.200 (Wetlands) and 19.400 (Geologically Hazardous Areas). Where such features occur on site, the more restrictive buffer or building setback shall apply.
F	150 feet	15 feet beyond buffer	
Np	50 feet	15 feet beyond buffer	
Ns	50 feet	15 feet beyond buffer	
Saltwater Shorelines and Lakes			
Shoreline Designation¹	Buffer Width	Minimum Building Setback	Other Development Standards
Urban	<u>50 feet</u>	<u>15 feet beyond buffer</u>	Where applicable, refer to the development standards in Chapters 19.200 (Wetlands) and 19.400 (Geologically Hazardous Areas). Where such features occur on site, the more restrictive buffer or building setback shall apply.
Urban, Semi-Rural and Rural shorelines and Lakes less than 20 acres	<u>35 feet</u> <u>100 feet</u>	15 feet beyond buffer	
Conservancy	50 feet	15 feet beyond buffer	
Natural	100 feet	15 feet beyond buffer	
Wildlife Habitat Conservation Areas			
Class I	Buffer widths and setbacks will be determined through a mandatory Habitat Management Plan (HMP)		

Table 19.300.315: Fish and Wildlife Habitat Conservation Area Development Standards	
Class II	Site-specific conditions will determine the need for the preparation of a HMP

¹as defined in Title 22 Kitsap County Code (Shoreline Management Master Program)

2. Buffer Measurement. Distances shall be measured from the ordinary high water mark (OHM) or from the top of the bank where the OHM cannot be identified. Buffers shall be retained in their natural condition. It is acceptable, however, to enhance the buffer by planting indigenous vegetation, as approved by the department. Alteration of buffer areas and building setbacks may be allowed for development authorized by Section 19.100.140 (Reasonable Use Exception), Section 19.100.125 (Exemptions), Section 19.100.130 (Standards for Existing Development) or Section 19.100.135 (Variances). The buffer width shall be increased to include streamside wetlands, which provide overflow storage for stormwaters, feed water back to the stream during low flows or provide shelter and food for fish. In braided channels, the ordinary high water mark or top of bank shall include the entire stream feature.

3. Buffer Widths and Setbacks for Shorelines. The building setback or buffer width for new development shall be based on the Kitsap County Shoreline Management Master Program environment designation, or as required by Chapter 17.450, (View Blockage Requirements), as now or hereafter amended, whichever is greater. (Note: Setbacks for Conservancy-Public Lands to be determined by the Kitsap County Shoreline Management Master Program.)

4. Provision for Decreasing Buffer.
 - a.—In lieu of going through the formal variance process, an administrative reduction to buffer widths for streams, except for urban, conservancy and natural shorelines, may be granted subject to the requirements of this section. Where an applicant demonstrates pursuant to the variance criteria that buffer widths cannot be met, a habitat management plan (HMP) will be required that shall meet the requirements as described in Chapter 19.700 (Special Reports). The department may decrease the buffer if, after consultation with the Washington State Department of Fish and Wildlife, and review of the HMP, the department determines that conditions are sufficient to protect the affected fish and wildlife habitat conservation area. The department may reduce the buffer width by up to fifty percent for construction of a single-family dwelling or up to twenty-five percent for all other development, but the buffer shall not be less than twenty-five feet. Administrative buffer reductions may be allowed for rural, semi-rural shoreline environments and lakes less than 20 acres where a vacant parcel has a common property line with two or more lots which abut the ordinary high water line and which are developed with structures. In these cases, the standard buffer may be reduced to the greater of 50 feet or the average of the standard buffer and setbacks of the structures on the adjacent properties. All other

Reductions of greater than twenty-five percent for single-family dwellings will be a Type II decision and require notification (see Chapter 19.800 Appendix F). Granting of a reduced buffer shall be the minimum necessary for the permitted use. When applicable, the order of sequence for buffer reductions shall be as follows:

- i. Use of buffer averaging, maintaining one hundred percent of the buffer area under the standard buffer requirement;
- ii. Reduction of the overall buffer area by no more than twenty-five percent of the area required under the standard buffer requirement;
- iii. Enhancement of existing degraded buffer area and replanting of the disturbed buffer area;
- iv. Use of alternative on-site wastewater systems in order to minimize site clearing;
- v. Infiltration of stormwater where soils permit; and,
- vi. Retention of native vegetation on other portions of the site in order to offset habitat loss from buffer reduction.

~~b. Only stream buffers are eligible for administrative buffer reductions.~~

5. Provision for Increasing Buffer. The department may increase the buffer width whenever a development proposal has known locations of endangered or threatened species for which a habitat management plan indicates a larger buffer is necessary to protect habitat values for such species, or when the buffer is located within a landslide or erosion hazard area.
6. Buffers for Streams in Ravines. For streams in ravines with ravine sides ten feet or greater in height, the buffer width shall be the minimum buffer required for the stream type, or a buffer width that extends twenty-five feet beyond the top of the slope, whichever is greater.
7. Channel Migration Zones. In areas where channel migration zones occur outside of Urban Growth Areas (as of the date of the adoption of this title), the buffer distance shall be measured from the edge of the channel migration zone.
8. Protection of Buffers. Buffer areas shall be protected as required by the department. The buffer shall be identified on a site plan and filed as an attachment to the notice as required by Section 19.100.150 (Critical Area and Buffer Notice to Title).
9. Building or Impervious Surface Setback Lines. A building or impervious surface setback line of 15 feet is required from the edge of any fish and wildlife habitat conservation area buffer. Minor structural or impervious surface intrusions into the areas of the setback may be permitted if the department determines that such intrusions will not adversely

impact the fish and wildlife habitat conservation area. The setback shall be identified on a site plan and filed as an attachment to the notice as required by Section 19.100.150 (Critical Area and Buffer Notice to Title).

10. Buffer and Building Setbacks for Water Dependent Activities: The department may allow an administrative alteration to the required buffer and building setback for water dependent activities when no other reasonable or practicable alternative exists and the development is consistent with the Kitsap County Shoreline Management Master Program. Any alteration of a buffer or building setback shall be the minimum necessary and shall require an approved habitat management plan which identifies and adequately protects any affected fish and wildlife habitat conservation area.

Section 6. The provisions in this Ordinance were adopted at the Kitsap County Board of Commissioners public meeting on February 26, 2007 and became effective upon that date.

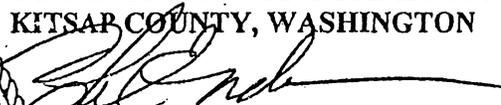
Section 7. If any sentence, section, provision, or clause of this ordinance or its application to any person, entity or circumstance is for any reason held invalid or unconstitutional, the remainder of the ordinance, or the application of the provision to other persons, entities, or circumstances is not affected.

Section 8. Should any amendment to Kitsap County Code Title 19 that was passed by the Board during its deliberations be inadvertently left out, the explicit action of the Board as discussed and passed shall prevail upon subsequent review and verification by the Board.

DATED this 26th day of Feb, 2007.

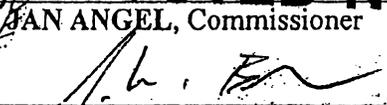
BOARD OF COUNTY COMMISSIONERS
KITSAP COUNTY, WASHINGTON



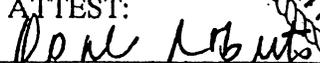

CHRIS ENDRESEN, Chair

VOTED NO

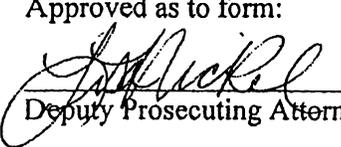

JAN ANGEL, Commissioner


JOSH BROWN, Commissioner

ATTEST:


Opal Robertson
Clerk of the Board

Approved as to form:


Deputy Prosecuting Attorney

APPENDIX C

**Excerpts from AR V7, Tab 60
(Final Decision and Order)**

1 Hood Canal challenged the County's exemption from CAO regulation of certain small,
2 isolated, low-function wetlands. KCC 19.200.210.C. Based on the ruling of the Court of
3 Appeals (Division II) in *Clallam County v. Western Washington Growth Management*
4 *Hearings Board*, 130 Wash. App. 127, 140, 121 P.3d 764 (2005), the Board determined
5 that the exemption does not comply with RCW .020(9) and (10), .060, .130, .170, and
6 .172. [Legal Issue No. 1]
7

8
9 KAPO challenged the County's designation of all its shorelines as fish and wildlife
10 habitat conservation areas [KCC 90.300.310], arguing that under RCW 36.70A.480(5)
11 the County was required to identify the specific areas of its shorelines that are critical
12 areas, using best available science (BAS). KAPO particularly objected to the
13 designation of shorelines that are a fully-developed, built environment. The Board
14 determined that the County relied on the resource-mapping and other scientific data
15 provided by state and federal resource agencies as BAS in designating all its shores as
16 fish and wildlife habitat conservation areas. The Board determined that KAPO failed to
17 carry its burden of proof on the issue. [Legal Issue No. 4]
18

19 KAPO further challenged the County's use of "uniform buffers in the built environment"
20 as not supported by BAS. KAPO cited to science which it provided to the County
21 critiquing the County's buffer-based approach to protecting functions and values of
22 wetlands and shorelines and proposing alternatives. The Board found that the County
23 considered KAPO's scientific submittals and instead chose a buffer-based approach
24 which was supported by BAS in the County's record. KAPO further challenged the
25 buffer regulations, when applied in the built environment, as following a "restoration"
26 model rather than "protection," lacking criteria to guide administrative discretion, void
27 for vagueness, and infringing on property rights. The Board concluded that KAPO failed
28 to carry its burden of proof on these issues. [Legal Issue Nos. 5, 6, and 8]
29
30

31 Hood Canal challenged the 35-foot buffer width adopted to protect marine shorelines
32 designated as Urban, Semi-rural, and Rural under the County's Shoreline Management
33 Program (SMP) [KCC 19.300.310]. The County cited to science in its record supporting
34 the buffer as providing the low end of protection for sediment control and pollution
35 removal. However, the Board determined that the County's marine buffer regulations
36 are keyed to SMP land-use classifications, rather than to the functions and values of the
37 County's marine shorelines as fish and wildlife habitat conservation areas, as required
38 by RCW 36.70A.172(1). The BAS in the County's record supports the designation of all
39 the County's marine shorelines as fish and wildlife habitat conservation areas, but those
40 areas have a range of functions and values depending, for example, on use by particular
41 species. While acknowledging that some specific marine shoreline areas are already
42 identified and protected under other provisions of the CAO – for example, estuaries and
43 creek mouths, eagle nests, and steep bluffs – the Board found that the County's SMP-
44 based regulation is not an application of BAS to protect shoreline habitat functions and
45 values; thus the CAO Update fails to comply with RCW 36.70A .020(9) and (10), .060,
46 .130, .170, and .172. [Legal Issue No. 2]
47
48
49
50

The Board remanded Ordinance 351-2005 to Kitsap County to take legislative action to bring the Ordinance into compliance with the GMA as set forth in this Final Decision and Order.

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I. BACKGROUND¹

In February 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review (**PFR**) challenging Kitsap County’s (**Respondent** or the **County**) adoption of Ordinance No. 351-2005 (**CAO Update**) amending the County’s critical areas regulations (**CAO**). A PFR was received from Hood Canal Environmental Council, *et al.* (**Hood Canal** or **Petitioners**) on February 27, 2006, and the matter was assigned Case No. 06-3-0010, hereafter referred to as *Hood Canal, et al. v. Kitsap County*. Hood Canal challenges Kitsap’s CAO Update as noncompliant with various provisions of the Growth Management Act (**GMA** or **Act**) alleging that it provides inadequate protection for wetlands and marine shorelines.

A PFR was received from Kitsap Alliance of Property Owners, *et al.* (**KAPO**) on February 28, 2006, and the case was assigned CPSGMHB Case No. 06-3-0012. KAPO challenges Kitsap County’s CAO Update for enacting regulations that are too restrictive,

¹ The complete chronology of procedures is set forth in Appendix A.

1 in violation of various provisions of the GMA, the State Environmental Policy Act
2 (SEPA), and the Shoreline Management Act (SMA).
3

4 The cases were consolidated as CPSGMHB Consolidated Case No. 06-3-0012c (*Hood*
5 *Canal, et al. v. Kitsap County*). Notice of Hearing and Order of Consolidation (March 3,
6 2006). Board member Bruce C. Laing was the Presiding Officer for the consolidated
7 case.
8

9 The Prehearing Conference was conducted on March 30, 2006 and the Prehearing Order
10 (PHO) issued on April 3, 2006. In the PHO, the Board listed eight legal issues to be
11 addressed in the consolidated case – Legal Issues 1 and 2 as stated in the Hood Canal
12 PFR and Legal Issues 3 through 8 summarizing the statement of issues in the KAPO
13 PFR.²
14

15 On March 30, 2006, the Board received Respondent's Index of the Record (**Index**). The
16 Index lists 1,045 items by Index number. On April 12, 2006, the Board received the
17 following Core Documents (**Core Doc**) from Kitsap County:
18

- 19 • **Core Doc 1** - Shoreline Management Master Program, February 8, 1999
- 20 • **Core Doc 2** - Redline/strike-through version of Ordinance 351-2005
- 21 • **Core Doc 3** -Map titled Kitsap County Wetlands and Hydric Soils, August 2005
- 22 • **Core Doc 4** - Map titled Kitsap County Streams and Surface Water – 2005 Data –
23 Fish Habitat Water Type Codes, December 2, 2005
- 24 • **Core Doc 5** - Map titled Kitsap County Shoreline Master Plan Environmental
25 Designations, March 22, 2004
26
27
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32
33 Motions Practice
34

35 In April 2006, the Board received a number of motions. Suquamish Tribe moved to
36 intervene on the side of Petitioner Hood Canal. KAPO moved to intervene in opposition
37 to Hood Canal and on the side of the County in regard to Hood Canal issues. Hood Canal
38 moved to supplement the record with various exhibits. Kitsap County moved to dismiss
39 KAPO's Legal Issue No. 7, alleging SEPA violations, on the grounds that KAPO lacks
40 SEPA standing.
41

42 Briefing on the motions was timely filed, and on May 8, 2006, the Board issued its Order
43 on Motions. The Order on Motions granted Kitsap County's Motion to Dismiss Legal
44 Issue No. 7, denied Hood Canal's Motion to Supplement the Record, granted KAPO's
45 Motion to Intervene on behalf of Respondent Kitsap County, granted Suquamish Tribe's
46 Motion to Intervene on behalf of Petitioner Hood Canal and denied Suquamish Tribe's
47 Motion to Intervene on behalf of Kitsap County in opposition to Petitioner KAPO.
48
49

50 ² The full statement of KAPO's Legal Issues is set forth in Appendix B at p. 59-68. Hereafter they are
referenced as 'KAPO PFR Issue xx.'

1
2
3
4 Briefing and Hearing on the Merits
5

6 All briefs on the merits were timely filed and are referenced herein as follows:
7

- 8
- 9 • Intervenor Suquamish Tribe's Opening Brief (**Suquamish PHB**)
 - 10 • Petitioner KAPO's Prehearing Brief (**KAPO PHB**)
 - 11 • Petitioner Hood Canal's Prehearing Brief (**Hood Canal PHB**)
 - 12 • Respondent Kitsap County's Prehearing Brief (**County Response**)
 - 13 • Response of Intervenor KAPO to the Prehearing Briefs of Petitioner Hood Canal
14 and Intervenor Suquamish Tribe (**KAPO Intervention**)
 - 15 • Petitioner KAPO's Reply Brief (**KAPO Reply**)
 - 16 • Petitioner Hood Canal's Reply Brief (**Hood Canal Reply**)
- 17

18 The briefs were accompanied by exhibits, most of which were numbered according to the
19 County's Index numbers and are so referenced herein.
20

21 On May 26, 2006 the Board received the "Motion of Pacific Legal Foundation [PLF] and
22 Kitsap County Realtors Association [KCAR] to File a Brief Amicus Curiae" [*Amicus*
23 **Motion**] and the "Brief *Amicus Curiae* of Pacific Legal Foundation and Kitsap County
24 Association of Realtors" [*Amicus* PLF] with three exhibits.
25

26 KAPO's PHB included a Request for Reconsideration of Board's Order Dismissing
27 KAPO's SEPA Claims.
28

29 The County's Response included a Motion to Deny and/or Strike Portions of Proposed
30 Amicus Curiae Brief of PLF/KCAR, and a response to KAPO's Motion for
31 Reconsideration on SEPA Issues.
32

33
34 Prior to the Hearing on the Merits, the Board issued its Order Denying KAPO's Request
35 for Reconsideration of the Board's Order on Motions Dismissing Legal Issue No. 7
36 (SEPA Claims) (June 19, 2006). The Board also issued its Order Granting *Amicus* and
37 Granting Motion to Strike (June 20, 2006). This Order granted the PLF/KCAR Motion to
38 file *Amicus Curiae* Brief, limiting PLF/KCAR to briefing on just Legal Issue No. 4, and
39 granted the County's Motion to Strike Section II of the *Amicus* Brief.
40

41
42 The Hearing on the Merits was convened at 10:03 a.m. and adjourned at 3:37 p.m. on
43 June 26, 2006, in Room 2430, 900 Fourth Avenue, Seattle, Washington. Present for the
44 Board were Board Members Margaret Pageler, Edward McGuire and Bruce Laing,
45 Presiding Officer; also present were Board Law Clerk Julie Taylor, and Board Externs
46 Kris Hollingshead and Brian Payne. Petitioner Hood Canal was represented by
47 Alexandria K. Doolittle and John T. Zilavy. Petitioner/Intervenor KAPO was represented
48 by Alexander W. Mackie and Heather L. Burgess. Respondent Kitsap County was
49 represented by Lisa J. Nickel, accompanied by Patty Charnas. Intervenor Suquamish was
50 represented by Mark L. Bubenik. Amicus PLF/KCAR was represented by Andrew C.

1 Cook. Reporting services were provided by Christy Sheppard of Byers and Anderson,
2 Inc.

3
4 During the HOM the following exhibits were entered:

- 5 • **HOM 1:** Map entitled: Kitsap County, Washington – FISH AND WILDLIFE
6 HABITAT – January 18, 2005;
- 7 • **HOM 2:** Map entitled: Kitsap County, Washington – CLASS 1 WILDLIFE
8 CONSERVATION AREAS – for ESA Listed Salmon Species – October 2003;
- 9 • **HOM 3:** Appendix 1 to KAPO PHB, consisting of 21 aerial photographs
10 numbered 1-A through 1-T.
11

12
13 At the Hearing, the Board requested Petitioner KAPO to provide a map showing the
14 locations of the shorelines shown in the HOM 3 photographs. On June 30, 2006, the
15 Board received from KAPO copies of HOM 1 and HOM 2 showing the locations of
16 HOM 3 photographs, which the Board marked as follows:

- 17 • **HOM 4:** Copy of HOM 1 showing the general locations of HOM 3 photographs;
- 18 • **HOM 5:** Copy of HOM 2 showing the general locations of HOM 3 photographs.
19

20
21 The Board ordered a transcript of the proceedings. The transcript was received on July 6,
22 2006, and is cited herein as **HOM Transcript**.

23
24 On August 9, 2006, Board Member Margaret Pageler replaced Board Member Bruce
25 Laing³ as Presiding Officer for this case.
26

27
28 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF**
29 **REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS**

30
31 Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature
32 directed the Boards to hear and determine whether the challenged actions were in
33 compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The
34 legislature directed that the Boards "after full consideration of the petition, shall
35 determine whether there is compliance with the requirements of [the GMA]." RCW
36 36.70A.320(3); *see also*, RCW 36.70A.300(1). *Ferry County v. Concerned Friends of*
37 *Ferry County, et al. (Ferry County)*, 155 Wn.2d 824, 833,123 P.3d 102 (2005): "The
38 Board adjudicates compliance with the GMA and must find compliance unless a county's
39 or city's action is clearly erroneous."
40

41
42 Petitioners challenge the County's adoption of the CAO Update, adopting updated critical
43 areas regulations. Comprehensive plans and development regulations, and amendments
44 thereto, adopted by Kitsap County pursuant to the Act, are presumed valid upon adoption.
45 RCW 36.70A.320(1).
46

47
48
49 ³ Bruce Laing's service on the Board was extended by Governor Gregoire until August 9, 2006. Board
50 member David Earling, who replaced Bruce Laing as the third member of this Board on August 10, 2006,
took no part in the decision of this case.

1 The burden is on the Petitioners to demonstrate that the actions taken by the County are
2 not in compliance with the Act. RCW 36.70A.320(2).
3

4 Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines
5 that the actions taken by [Kitsap County] are clearly erroneous in view of the entire
6 record before the board and in light of the goals and requirements of [the GMA].” For
7 the Board to find Kitsap County’s actions clearly erroneous, the Board must be “left with
8 the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD*
9 *I*, 121 Wn.2d 179, 201 (1993).
10

11 The GMA affirms that local jurisdictions have discretion in adapting the requirements of
12 the GMA to local circumstances and that the Board shall grant deference to local
13 decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201.
14 Pursuant to RCW 36.70A.3201, the Board will grant deference to Kitsap County in how
15 it plans for growth, provided that its policy choices are consistent with the goals and
16 requirements of the GMA. The State Supreme Court’s most recent delineation of this
17 required deference states: “We hold that deference to county planning actions that are
18 consistent with the goals and requirements of the GMA . . . cedes only when it is shown
19 that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.”
20 *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings*
21 *Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (En Banc 2005).
22
23

24 The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . .
25 . by the goals and requirements of the GMA.” *King County v. Central Puget Sound*
26 *Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133,
27 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and
28 notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly
29 when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements
30 and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wash. App.
31 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth*
32 *Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154
33 Wn.2d 224, 240 (2005).
34
35

36 The scope of the Board’s review is limited to determining whether a jurisdiction has
37 achieved compliance with the GMA with respect to those issues presented in a timely
38 petition for review.
39
40

41 42 **III. BOARD JURISDICTION AND PRELIMINARY MATTERS**

43 **A. Board Jurisdiction**

44 The Board finds that the Petitioners’ PFRs were timely filed, pursuant to RCW
45 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to
46
47
48
49
50

1 RCW 36.70A.280(2)⁴; and that the Board has subject matter jurisdiction over the
2 challenged ordinance, which amends the County's critical areas regulations, pursuant to
3 RCW 36.70A.280(1)(a).

4 **B. Prefatory Note**

5
6 The Board addresses the legal issues in the following order:⁵

- 7
8
9 A. Legal Issue No. 3 – Public Participation (KAPO PFR Issue A.1-A.7)
10 B. Legal Issue No. 1 – Wetlands Exemption (Hood Canal PFR Issue 1)
11 C. Legal Issue No. 4 – Shorelines Designations (KAPO PFR Issue B.1-B.6)
12 D. Legal Issues No. 5 and No. 6 [D.4 and D.5] – BAS and Critical Area Buffers
13 in the Built Environment (KAPO PFR Issues C.1-C.5, D.4 and D.5)
14 E. Legal Issue No. 2 – Marine Shoreline Buffer Widths (Hood Canal PFR Issue 2)
15 F. Legal Issues No. 6 and No. 8 – Enforceability and Property Rights (KAPO PFR
16 Issues D.1-D.3, D.6, F.1-F.7)
17
18
19

20 **IV. THE CHALLENGED ACTION**

21
22 Beginning in 2003, Kitsap County undertook to update its critical areas regulation (CAO)
23 in compliance with requirements of the Growth Management Act. The Act requires
24 counties and cities in the Central Puget Sound region, including Kitsap County, to review
25 and update their comprehensive plans and development regulations to ensure compliance
26 with the GMA. RCW 36.70A.130. This review "shall include ... consideration of critical
27 area ordinances" [.130(1)(c)]. The legislative deadline for this review was originally set
28 at December 1, 2004, then extended to December 1, 2005. [.130(4), (8), (10)].
29

30 For two full years Kitsap County worked on its CAO update, assembling best available
31 science, convening an extensive and thorough public process, and considering various
32 alternatives. See generally, Section V.A below.
33

34 The County's process was highly contentious. County staff and officials heard from
35 advocates for stricter regulation, including Petitioners Hood Canal, *et al.*, and Intervenor
36 Suquamish Tribe, and from advocates for a reduced amount of regulation, including
37 Petitioners KAPO and *Amici* Pacific Legal Foundation, *et al.* Various state agencies also
38 provided comment on the issues under consideration by the County.
39
40
41
42

43
44 ⁴ Petitioner KAPO's Legal Issue No. 7 was dismissed for lack of SEPA standing. Order on Motions (May
45 8, 2006).

46 ⁵ Legal Issue No. 7 – SEPA Process – was dismissed on motions. The PHO states Legal Issue 7 as follows:
47 *Did Kitsap County violate (fail to comply with) the State Environmental Policy Act, Chapter 43.21C RCW,*
48 *in the adoption of Ordinance 351-2005 when material changes were made in the regulations after the*
49 *County had issued an MDNS on August 4, 2004 for the June 22, 2004 Draft Critical Areas Ordinance, and*
50 *none of the material changes made in 2005 were subject to supplemental environmental review as required*
by Chapter 43.21C RCW and supporting regulations, Chapter 197-11 WAC? [Intended to reflect Issue E,
pp. 8-9 of the KAPO PFR].

1 On December 1, 2005, Kitsap County adopted Ordinance No. 351-2005 (CAO Update),
2 updating its critical areas regulations. Two challenges were timely filed with the Board
3 and consolidated in this proceeding.
4
5
6

7
8 **V. LEGAL ISSUES AND DISCUSSION**
9

10 **A. Legal Issue No. 3 – Public Participation**
11

12 In Legal Issue No. 3,⁶ Petitioner KAPO asserts that Kitsap County violated the public
13 participation requirements of the GMA in enacting the CAO Update. The PHO states
14 Legal Issue No. 3 as follows:
15

16 *Legal Issue No. 3. Did Kitsap County fail to comply with the public*
17 *participation process required by RCW 36.70A.020, Goal 11, RCW*
18 *36.70A.035, RCW 36.70A.140, and/or WAC 365-190-040(2)(4) in adopting*
19 *Ordinance 351-2005? [Intended to reflect Issue A, pp. 3-4 of the KAPO*
20 *PFR].*
21

22
23 ***Applicable Law***
24

25 One of the planning goals of the GMA is to “encourage the involvement of citizens in the
26 planning process.” RCW 36.70A.020(11). This goal is underscored by specific statutory
27 requirements. RCW 36.70A.035 mandates reasonable notice procedures and requires
28 that, if legislative changes to a proposed plan or development regulation are considered
29 after the close of public comment, an opportunity for public review and comment shall be
30 provided before the final vote.
31

32 RCW 36.70A.140 provides:
33

34 Each county and city that is required or chooses to plan under RCW
35 36.70A.040 shall establish and broadly disseminate to the public a public
36 participation program identifying procedures providing for early and
37 continuous public participation in the development and amendment of
38 comprehensive land use plans and development regulations implementing
39 such plans. The procedures shall provide for broad dissemination of
40 proposals and alternatives, opportunity for written comments, public
41 meetings after effective notice, provision for open discussion,
42 communication programs, information services, and consideration of and
43 response to public comments.
44
45

46
47 ***Statement of Facts***
48
49
50

⁶ The full text of Issue No. 3 [KAPO PFR Issue A], is set forth in Appendix B.

1
2 Division II of the Court of Appeals, in its recent review of a decision of the Western
3 Washington Growth Management Hearings Board, explained the limitations on
4 exemptions from critical areas regulations that counties may enact based on local
5 circumstances.
6

7
8 If the County, to meet its local conditions, wants to exempt a number of
9 small farms, it must then show that by using best available science it has
10 tailored the exemption to reasonably ameliorate potential harm to the
11 environment and fish and wildlife. And the regulations must specifically
12 address any threatened harm peculiar to the number and size of farms
13 exempted. ...
14

15 The County may expand its exempt agricultural land to meet its local
16 conditions. But the County must balance such expanded exemption with
17 corresponding restrictions that take into account the specific harms
18 threatened by the expanded class of farm lands.
19

20 *Clallam County v. Western Washington Growth Management Hearings Board (Clallam*
21 *County)*, 130 Wash. App. 127, 140, 121 P.3d 764 (2005). The Board reads the Court's
22 opinion to require CAO exemptions to be supported by some analysis of cumulative
23 impacts and corresponding mitigation or adaptive management.
24

25
26 Here, Kitsap County has not expanded its small wetlands exemption; in fact, the
27 exemption has been somewhat narrowed. But there is no evidence in the record of the
28 likely number of exempt wetlands, no cumulative impacts assessment or adaptive
29 management, and no monitoring program to assure no net loss. In light of the Court's
30 guidance in *Clallam County*, which the Board finds controlling, the Board is persuaded
31 that a mistake has been made; Kitsap's wetlands exemption is **clearly erroneous**.
32

33 *Conclusion*

34
35 The Board finds and concludes that the action of the County in exempting certain
36 wetlands from protection under its CAO **fails to comply** with RCW 36.70A.130, RCW
37 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060, RCW 36.70A.170 and
38 36.70A.172. The Board **remands** Ordinance 351-2005 to the County to take legislative
39 action consistent with this order.
40

41 **C. Legal Issue 4 – Shorelines Designations**

42 Both groups of Petitioners challenge Kitsap County's shoreline protections, with
43 Petitioner KAPO (supported by Amicus PLF) saying that they go too far and Petitioners
44 Hood Canal (with Intervenor Suquamish) saying that they don't go far enough.
45
46
47
48
49
50

1 In Legal Issue No. 4, KAPO challenges the County's decision to designate all its
2 shorelines as critical areas. KAPO contends that the broad designation is contrary to
3 RCW 36.70A.480(5) and not based on science.
4

5 In Legal Issue No. 5, as part of its opposition to buffers generally, KAPO asserts that
6 "blanket buffers" on County shorelines violate the GMA because they are not supported
7 by BAS. [Discussion at V.D, below].
8

9
10 In Legal Issue No. 2, Hood Canal asserts that the 35-foot buffer requirements for marine
11 shorelines are too small to protect the functions and values of the shorelines and are
12 inconsistent with BAS. [Discussion at V.E, below]
13

14 The PHO states KAPO's Legal Issue No. 4 as follows:²⁴
15

16 *Legal Issue No. 4: Did Kitsap County fail to comply with RCW 36.70A.480(5)*
17 *in adopting KCC 19.300.310(A),(B) through the adoption of Ordinance 351-*
18 *2005? [Intended to reflect Issue B, pp. 4-5 of the KAPO PFR].*
19

20 *Applicable Law*

21
22 RCW 36.70A.170(1) requires counties to designate critical areas. Critical areas are
23 defined in the GMA to include "fish and wildlife habitat conservation areas" - a term
24 which is not otherwise defined in the Act. RCW 36.70A.030(5)(c). Concerning
25 designation of critical areas, the GMA requires that a county or city:
26

- 27 • "shall consider the guidelines" provided by CTED [.170(2)],
- 28 • "shall include best available science" [.172(1)] ,
- 29 • "shall give special consideration to conservation or protection measures necessary
30 to preserve or enhance anadromous fisheries." [.172(1)]
31

32 The GMA contains a special provision with respect to designating critical areas along or
33 within shorelines of the state – RCW 36.70A.480(5) (Emphasis added):
34

35
36 (5) Shorelines of the state *shall not* be considered critical areas under
37 this chapter *except* to the extent that specific areas located within
38 shorelines of the state qualify for critical area designation based on the
39 definition of critical areas provided by RCW 36.70A.030(5) and have been
40 designated as such by a local government pursuant to RCW
41 36.70A.060(2).
42

43 The Legislature charged CTED with developing guidelines for critical area designation,
44 RCW 36.70A.050, and required CTED to provide counties and cities with technical
45 assistance in complying with the GMA. RCW 36.70A.190. In *Ferry County v.*
46 *Concerned Friends of Ferry County, et al., (Ferry County)*, 155 Wn.2d 824, 835 n.9, 123
47 P.3d 102(2005), the Supreme Court's recent ruling concerning application of best
48
49
50

²⁴ The full text of Legal Issue No. 4 [KAPO PFR Issue B] is set forth in Appendix B.

1 available science to the designation of fish and wildlife habitat conservation areas, the
2 Court underscored the importance of following the guidelines developed by CTED at the
3 Legislature's behest. CTED's guidelines for fish and wildlife habitat conservation area
4 designation are at WAC 365-190-080(5)(a)-(b).²⁵
5

6 *Statement of Facts*
7

8 Kitsap County's CAO Update designates all saltwater shorelines, stream segments with
9 flow greater than 20 cubic feet per second, and lakes greater than 20 acres as critical
10 areas under the category of "fish and wildlife habitat conservation areas." The section of
11 the CAO Update designating fish and wildlife habitat conservation areas on shorelines is
12 codified as KCC 19.300.310, and the development standards for these areas are at KCC
13 19.300.315. In this part of its CAO Update, Kitsap County largely retains the CAO
14 designations and buffer widths it adopted for its shorelines in 1998.
15

16 The County's record indicates discussion of this proposal over at least a 22-month public
17 process. Meeting materials provided to the TRC in February 2004 and rather sketchy
18 TRC meeting notes indicate that the County staff presented and discussed with the TRC
19 the various species associated with the proposed fish and wildlife habitat conservation
20
21
22

23 ²⁵ (a) Fish and wildlife habitat conservation areas include:
24

- 25 (i) Areas with which endangered, threatened, and sensitive species have a primary
26 association;
- 27 (ii) Habitats and species of local importance;
- 28 (iii) Commercial and recreational shellfish areas;
- 29 (iv) Kelp and eelgrass beds; herring and smelt spawning areas;
- 30 (v) Naturally occurring ponds under twenty acres and their submerged aquatic beds
31 that provide fish or wildlife habitat;
- 32 (vi) Waters of the state;
- 33 (vii) Lakes, ponds, streams, and rivers planted with game fish by a governmental or
34 tribal entity; or
- 35 (viii) State natural area preserves and natural resource conservation areas.
- 36 (b) Counties and cities may consider the following when classifying and designating
37 these areas:
- 38 (i) Creating a system of fish and wildlife habitat with connections between larger
39 habitat blocks and open spaces;
- 40 (ii) Level of human activity in such areas including presence of roads and level of
41 recreation type (passive or active recreation may be appropriate for certain areas
42 and habitats);
- 43 (iii) Protecting riparian ecosystems;
- 44 (iv) Evaluating land uses surrounding ponds and fish and wildlife habitat areas that
45 may negatively impact these areas;
- 46 (v) Establishing buffer zones around these areas to separate incompatible uses from
47 the habitat areas; and
- 48 (vi) Restoring of lost salmonid habitat.
49
50

1 areas along County shorelines. Index 1367; see, e.g., January 21, 2004, "Fish and
2 Wildlife Habitat Conservation Areas – Best Available Science Review."²⁶
3

4 County staff reviewed their First Draft CAO Update provisions for fish and wildlife
5 habitat conservation areas with the Planning Commission on July 20, 2004. Ex. 2-E, at
6 220-225. Designation of shorelines as fish and wildlife habitat conservation areas, the
7 relation between GMA and SMA regulations, and the role of buffers or site-specific
8 protections such as habitat management plans were actively discussed. *Id.*
9

10 The County's December 2004 Summary of Best Available Science Review identifies
11 Fish and Wildlife Habitat Conservation Areas as including saltwater shorelines, lakes
12 greater than 20 acres, stream-segments with flow greater than 20 cubic feet per second,
13 and some lesser streams. Index 114, at 14. The summary of BAS also notes that
14 "[S]pecies supported by these [habitat conservation] areas include ... salmon, shellfish,
15 kelp, eelgrass, large and small mammals, birds, amphibians, reptiles and a wide variety of
16 invertebrates." *Id.* In addition, it is noted that Class I habitats are "habitat areas for
17 species listed as endangered, threatened or sensitive by federal and state agencies; areas
18 targeted for preservation by federal, state and/or local government that provide fish and
19 wildlife benefits; areas that contain habitats and species of local importance." *Id.*
20
21

22 The County's Science Support Document, issued May 17, 2005, in connection with its
23 Second Draft CAO Update, identifies proposed shoreline buffers - increasing stream
24 buffer widths for streams with listed fish species and reducing buffers for streams without
25 fish. Index 109, at 9. For saltwater and lake shorelines, the County proposed no change
26 to the 1998 35-foot buffer width for Urban, Semi-rural and Rural shorelines [as identified
27 in the County's Shoreline Management Program], no change to the 100 foot buffer width
28 for Natural shorelines, and a revised range of 0-100 feet in buffer width for Conservancy
29 shorelines depending on development. *Id.* at 10. The Science Support Document stated
30 that the County's proposed buffers, in combination with the Shoreline Management
31 Program (SMP), "provide an acceptable level of conservation for important shoreline
32 habitat features, ... ensure no net loss of riparian functions, and address the consideration
33 to anadromous fish."²⁷ *Id.*
34
35
36

37 On September 2, 2005, the federal government designated the marine nearshore of Puget
38 Sound [waterward of extreme high tide] as critical habitat for Puget Sound Chinook and
39 Hood Canal Summer Chum. Index 779. Both of these species are considered
40 "threatened" under the Endangered Species Act, 16 USC 35, Sec. 1531-1544.
41

42 In Kitsap County, the issue of saltwater shoreline designation remained open for public
43 discussion. At the October 31, 2005, Planning Commission meeting, KAPO member and
44 Planning Commissioner Mike Gustavson made a motion (which carried) that Kitsap
45 County identify specific critical areas for protection within marine shorelines, rather than
46
47

48 ²⁶ Salmon and trout species considered in this analysis included summer and fall chum, coho, fall Chinook,
49 winter steelhead, and coastal cutthroat.

50 ²⁷ The County's Shoreline Management Program requires a 15 foot building setback from the buffer and an
additional setback from the top of bluffs. County Response, at 25.

1 an overall designation. Appendix 2-Q, at 12-15; KAPO Reply, at 17, fn. 10. However,
2 after further deliberation, the County retained its general designation of shorelines as fish
3 and wildlife habitat conservation areas and retained the 35-foot buffer requirement for
4 Urban, Semi-rural, and Rural shorelines.
5

6 *Discussion and Analysis*

7 Positions of the Parties

8
9
10
11 Petitioner KAPO argues, first, that the County violated RCW 36.70A.480(5) by
12 designating *all* its shorelines as critical areas, rather than applying a detailed assessment
13 of the specific habitat or lack thereof along each stretch of shore. KAPO PHB, at 8-11.
14 Second, KAPO contends that there is no science in the record, nor did the County
15 undertake a reasoned process that would justify a wholesale designation of the County's
16 shorelines as habitat conservation areas. *Id.* KAPO asserts that the County has failed to
17 "show its work," and that the designation and regulation of critical areas on the County's
18 shorelines – KCC 19-300-3110 and .315 – do not comply with RCW 36.70A.480(5). *Id.*
19 at 10.
20

21
22 Petitioner KAPO also introduces a new issue which was not stated in the detailed 9-page
23 statement of issues in KAPO's PFR – "Whether the County's failure to provide a specific
24 exemption for SMP-permitted uses in the CAO creates an irreconcilable conflict between
25 Kitsap County's CAO (Title 19) and the County's SMP (Title 22)." KAPO PHB, at 11-
26 13.
27

28
29 Amicus Curiae PLF relies upon RCW 36.70A.480(5), which provides that shorelines of
30 the state are not *per se* critical areas. PLF at 3-4. PLF argues that Kitsap's designation of
31 all its shorelines as fish and wildlife habitat conservation areas is a *per se* designation that
32 is clearly erroneous. *Id.* Like KAPO, PLF contends that the County "failed to show its
33 work," and that, until the County "properly designates the specific areas ... that satisfy as
34 GMA critical areas, the shorelines should continue to be regulated under the County's
35 'shoreline master program.'" *Id.* at 5-6.
36

37
38 The County responds that the County indeed based its designations on best available
39 science and that its record demonstrates consideration of the scientific information
40 provided by competent federal and state agencies. County Response at 34-35. The
41 County points to mapping of virtually its entire Hood Canal shoreline for summer chum
42 habitat, its Puget Sound shoreline for Chinook habitat, and significant areas for herring
43 spawning grounds and shellfish beds.²⁸
44
45

46
47
48
49
50

²⁸ See e.g., Index 778, Puget Sound Action Team mapping of Puget Sound Herring Spawning Areas, in
State of the Sound 2004; Index 779, NOAA Final Critical Habitat Designations in Washington ... for
Endangered and Threatened Pacific Salmon and Steelhead (Aug. 12, 2005); Index 1367, WDFW and Point
No Point Treaty Tribes Summer Chum Salmon Conservation Initiative (Apr. 2000), identifying the Hood
Canal nearshore of Kitsap County as summer chum migratory habitat; Index 1367, Puget Sound Action
Team Shellfish Growing Areas (Mar. 2004), at Figure 1.

1 KAPO replies that there was very little public input or discussion about making the entire
2 shoreline a critical area and no public discussion about integration of the County's CAO
3 and SMP. KAPO Reply, at 5. KAPO insists that reliance on the federal salmon habitat
4 designation is not a valid substitute for the "reasoned analysis" required by the Court in
5 *Ferry County*, 155 Wn.2d at 853, and the inventory or similar documentation that the
6 Board approved in *Tahoma Audubon Society v. Pierce County (Tahoma Audubon)*,
7 CPSGMHB 05-3-0004c, Final Decision and Order (July 12, 2005). KAPO Reply, at 18-
8 19.
9

10
11
12
13 Board Discussion

14
15 *The Board will not hear new issues.*

16
17 In arguing that Kitsap County's CAO Update for shorelines creates an "irreconcilable
18 conflict" with its SMP, KAPO seeks to introduce an issue that was not included in its
19 PFR's 9-page issue statement. See, Appendix B (in particular, B.1-B.6). RCW
20 36.70A.290(1) *forbids* the Board to issue opinions "on issues not presented to the board
21 in the statement of issues, as modified by any prehearing order." Accordingly, the Board
22 **strikes** KAPO PHB, pages 11-13.
23

24
25 *Interaction between statutory regimes for GMA critical areas and SMA shorelines*

26
27 ESHB 1933 amended RCW 36.70A.480 in an attempt to clarify the relation between
28 GMA critical areas protection and SMA shoreline regulation. On their face, the GMA
29 provisions concerning critical areas require integration with the SMA regulatory regime
30 for shoreline management.
31

32
33 Critical areas are defined in the Growth Management Act to include wetlands, critical
34 aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded
35 areas and geologically hazardous areas. RCW 36.70A.030(5). Fish and wildlife habitat
36 conservation areas are defined in CTED's minimum guidelines as set forth above. WAC
37 365-190-080(5)(a). CTED's guidelines further require that certain marine shorelines –
38 shellfish areas, kelp and eelgrass beds, herring and smelt spawning areas – "**shall be**
39 **classified as critical areas.**" WAC 365-190-080(5)(c)(iii) and (iv).²⁹
40

41
42 City and county updates to their critical areas regulations are required (1) to include best
43 available science (**BAS**) in designation and regulation, (2) to protect functions and values
44
45
46
47
48

49
50 ²⁹ In *Ferry County*, 155 Wn.2d at 835 fn. 9, the Supreme Court underscored the importance of following
the CTED guidelines in applying best available science to the designation of fish and wildlife habitat
conservation areas.

1 of critical areas, and (3) to give special consideration to the preservation and
2 enhancement of anadromous fisheries. RCW 36.70A.172(1).³⁰
3

4 The Shoreline Management Act, RCW 90.58, requires local development and adoption of
5 shoreline master programs and regulations, with a legislated update cycle.³¹ Areas within
6 SMA jurisdiction include:
7

- 8 • Marine waters and shorelands 200 feet landward of ordinary high water
9 mark;
- 10 • Streams and rivers greater than 20 cubic feet per minute mean annual flow
11 – and associated 200-foot shorelands;
- 12 • Lakes larger than 20 acres – and associated 200-foot shorelands;
- 13 • The 100-year floodplain and all wetlands within the floodplain; and
- 14 • Wetlands and river deltas associated with any of the above.

15
16
17 RCW 90.58.030(d), (e), (f), (g), and (h). Unlike CAOs and other GMA enactments,
18 Shoreline Master Programs and amendments must be submitted to DOE for state
19 approval prior to their becoming effective.
20

21
22 *How do Central Puget Sound cities and counties construe ESHB 1933?*³²
23

24 Since the enactment of ESHB 1933 in 2003, the Board has been presented with a number
25 of challenges to local CAO enactments involving **critical areas**, as defined by the GMA,
26 that are within **shorelines**, as defined by the SMA. Since ESHB 1933, at least six CAO
27 updates have been challenged before this Board – three counties and three cities. First,
28 no jurisdiction whose CAO update has been appealed to this Board has omitted CAO
29 regulations for wetlands, freshwater shorelines, or floodplains on the basis of ESHB
30 1933. Similarly, no jurisdiction, to our knowledge, has submitted its CAO update to DOE
31 for approval under the SMA. Central Puget Sound counties and cities appear to agree that
32 – *for wetlands, freshwater shorelines, and floodplains* - the current round of CAO
33 updates is a GMA process that must be based on the GMA best available science
34 provisions notwithstanding the interaction with SMA land use designations.
35

36
37 For example, King County's CAO update, which included rivers, streams, lakes, and
38 wetlands, was not submitted to DOE for SMA approval. King County Ordinance No.
39

40
41 ³⁰ Central Puget Sound cities and counties were required by statute to complete updating their critical areas
42 regulations by December 1, 2004, a deadline that was legislatively postponed to December 1, 2005, with
43 additional allowance for "reasonable progress." RCW 36.70A.130 (4), (8), (10).

44 ³¹ SSB 6012, also adopted by the 2003 Legislature along with ESHB 1933, amended the SMP update
45 deadlines to phase in coordination with the deadlines for CAO updates under the GMA; the legislative
46 scheme calls for coordinated updating of CAOs and SMPs every seven years, beginning in 2012.
47 DOE/CTED Q&A on ESHB 1933, at 4-5.

48 ³²The Board is mindful of the Washington Supreme Court's admonition that Growth Management Hearings
49 Boards must be cautious about "filling the gaps" in the GMA and must defer to reasonable local
50 government application of the statute based on local circumstances. See *Quadrant*, 154 Wn.2d 224.
Therefore the Board asks: how have Central Puget Sound cities and counties construed the overlapping
regimes of GMA critical areas regulations and SMA shoreline management post-ESHB 1933?

1 15051; see, *Keesling CAO v. King County*, CPSGMHB Case No. 05-3-0001, Final
2 Decision and Order (July 5, 2005). Similarly, the City of Mukilteo's updated wetlands
3 regulation was not submitted to DOE for approval. City of Mukilteo Ordinance No. 1112;
4 see *Pilchuck V v. City of Mukilteo*, CPSGMHB Case. No. 05-3-0029, Final Decision and
5 Order (Oct. 10, 2005). In other words, these jurisdictions construed their updates as GMA
6 actions, not SMA actions.
7

8
9 The City of Kent's critical areas update was appealed to the Board by DOE and CTED.
10 City of Kent Ordinance No. 3746; see *DOE/CTED v. City of Kent (DOE/CTED)*,
11 CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr.19, 2006). The state
12 agencies challenged Kent's failure to include best available science in its wetlands
13 regulations – a GMA challenge. Kent's Ordinance No. 3746 also amended Kent's
14 protections for streams, lakes, and a portion of the Green River and its floodplain, but
15 neither the City of Kent nor the state agencies suggested that any of these shorelines
16 should be protected under the SMA regime rather than as GMA critical areas.
17

18 The only area of ambiguity on the question appears to be concerning *salt-water (marine)*
19 *shorelines*. ESHB 1933 clarified that shorelines of statewide significance are not critical
20 areas simply because they are shorelines of statewide significance. RCW 36.70A.480(5)
21 reads:
22

23
24 Shorelines of the state shall not be considered critical areas under this
25 chapter [GMA] except to the extent that specific areas located within
26 shorelines of the state (1) qualify for critical area designation based on the
27 definition of critical areas provided by RCW 36.70A.030(5) and (2) have
28 been designated as such by a local government pursuant to RCW
29 36.70A.060(2).
30

31 (Numeration added). On its face the statute does not apply exclusively to marine
32 shorelines, but a few jurisdictions have read it so.
33

34
35 In updating its critical areas regulations, Pierce County read ESHB 1933 to preclude
36 designating marine shorelines uniformly as GMA critical areas. Pierce County's CAO
37 update included lakes, rivers, streams, and wetlands. Pierce County Ordinance Nos.
38 2004-56s; see *Tahoma Audubon Society, et al, v. Pierce County*, CPSGMHB 05-3-0004c,
39 Final Decision and Order (July 12, 2005). Pierce County also designated significant
40 portions of its marine shorelines as critical areas, for example, where steep slopes, salt-
41 marshes, eelgrass or shellfish beds, smelt spawning areas, heron rookeries or eagle nests
42 were present. *Id.* Appendix C, Finding of Fact No. 20, at 62. The draft ordinance under
43 consideration in Pierce County designated all marine shorelines as fish and wildlife
44 habitat conservation areas, but the County Council, in enacting the CAO, deleted
45 references to marine shorelines as fish and wildlife habitat conservation areas, in reliance
46 on the ESHB 1933 language that shorelines of the state are not *per se* critical areas.
47 Appendix C, FoF Nos. 3, 15, 16. Significantly, Pierce County did not argue that ESHB
48 1933 precluded its critical area designations of shorelines of the state in general - for
49
50

1 lakes, rivers and streams, or other marine shoreline habitat values – only for fish and
2 wildlife habitat as it concerned salmon.³³
3

4 Pierce County's BAS record included a detailed marine shoreline inventory and ranking
5 of areas according to their quality as habitat for salmon, commissioned by Pierce County
6 as part of its response to the ESA Chinook salmon listing, FoF #12-13. The Board found
7 that the County's record supported the conclusion that not all the County's salt-water
8 shore should be designated fish and wildlife habitat conservation area, but remanded the
9 ordinance to the County for designation and protection of those areas of the shoreline
10 consistent with the inventory of salmon habitat in the County's record. *Id.* at 53. On
11 remand the County designated 29 miles of marine shoreline (out of a total of 179 miles)
12 as high-value salmon habitat, and protected them with a 100-foot vegetated buffer; the
13 Board found compliance. Order Finding Compliance (Jan. 12, 2006).
14

15
16 On the other hand, some jurisdictions – like Kitsap County - have designated *all* their
17 marine shorelines as critical areas. The City of Shoreline, for example, designates all its
18 marine shorelines as fish and wildlife habitat conservation areas; Shoreline also protects
19 streams and wetlands as critical areas without reference to the SMA. City of Shoreline
20 Ordinance No. 398; see *Garwood v. City of Shoreline*, CPSGMHB Case No. 06-3-0021,
21 Order of Dismissal, (June 5, 2006) (settled).
22

23
24 The Board finds that there is no single interpretation of the ambiguity inherent in ESHB
25 1933 – specifically RCW 36.70A.480(5) – but a range of reasonable responses by local
26 cities and counties in the Central Puget Sound region.³⁴ The Board will defer to the
27
28
29
30
31

32 ³³ Two other challenges are pending before the Board on similar facts. The City of Tacoma adopted
33 updated critical areas regulations that designate streams and riparian areas, wetlands, floodplains, and fish
34 and wildlife habitat conservation areas, specifically including shellfish harvest areas, kelp and eelgrass
35 beds, and herring and smelt spawning areas. City of Tacoma Ordinance No. 27431; see *Citizens for a*
36 *Healthy Bay, et al., v. Tacoma*, CPSGMHB Case No. 06-3-0001 (settlement extension). A consortium of
37 environmental organizations has challenged the Tacoma CAO for failure to properly designate marine
38 shorelines as critical areas.

39 The City of Bainbridge Island adopted a critical areas update under the GMA which regulates wetlands,
40 streams and floodplains. City of Bainbridge Island Ordinance No. 2005-003; see *Suquamish Tribe v. City of*
41 *Bainbridge Island*, CPSGMHB Case No. 06-3-0006 (settlement extension). However, the ordinance states
42 that "Marine Critical Areas" – defined to include commercial and recreational shellfish areas, kelp and
43 eelgrass beds, marine and estuarine waters, and herring, sand lance and smelt spawning areas – are
44 expressly regulated under the City's Shoreline Master Program. The Suquamish Tribe has challenged the
45 Bainbridge CAO for failure to designate marine shorelines as critical areas.

46 ³⁴ The Board notes that the Washington Courts of Appeals appear to differ on their opinion as to the
47 interaction of the GMA and the SMA. Compare *Biggers v. City of Bainbridge Island*, 124 Wash. App. 858
48 (Div. II 2004) (holding RCW 36.70A.480 dictates that the SMA policies and regulations take priority over
49 those adopted under the GMA, provided the provisions are internally consistent with the statutes
50 enumerated in RCW 36.70A.480(3)) to *Preserve Our Islands v. Shorelines Hearings Board*, 137 P.3d 31
(Div. I 2006) (disagreeing with the *Biggers* Court, holding that RCW 36.70A.480 requires that regulations
implementing the GMA and the SMA be harmonized in the process of overall land use planning and
regulation; that the County's SMP goals and policies are part of the GMA comprehensive plan).

1 County's decision, based on local circumstances, unless persuaded by Petitioners that the
2 County's approach was clearly erroneous.³⁵
3

4 *KAPO has not demonstrated that Kitsap's designation of its marine shorelines as critical*
5 *areas is clearly erroneous. There is ample evidence in the record, cited and relied on by*
6 *the County, which supports its action.*
7

8
9 Kitsap County's CAO Update is presumed valid; Petitioners bear the burden of
10 demonstrating non-compliance with the GMA.

11
12 RCW 36.70A.480(5) provides that shorelines of the state are only critical areas where (1)
13 they qualify for critical area designation based on the definition of critical areas provided
14 by RCW 36.70A.030(5) and (2) they have been so designated by a local government
15 pursuant to RCW 36.70A.060(2). Here, on the record before it, Kitsap County (1)
16 concluded that its shorelines qualified as fish and wildlife habitat conservation areas,
17 under the definition of .030(5)(d) as clarified by WAC 365-190-080(5)(a), based on the
18 facts provided by state and federal resource agencies, and so (2) designated them in the
19 CAO Update. On its face, the County's action is consistent with RCW 36.70A.480(5).
20

21
22 RCW 36.70A.172 requires the inclusion of best available science in designation of
23 critical areas. The Board finds that the County's record includes science and technical
24 information from state and federal agencies mapping or otherwise designating Kitsap
25 County shorelines as critical habitat for fish and wildlife, including numerous species and
26 habitats of concern – anadromous fish [Index 779, 1367], forage fish spawning grounds
27 [Index 590, 778], kelp and eelgrass, shellfish beds. See maps at HOM Ex. 1 and 2. For
28 example, specific to Kitsap shorelines, recent studies by WDFW and Suquamish Tribe
29 document Puget Sound Chinook salmon migrating within the east Kitsap County
30 nearshore. The Port Gamble S'Klallam Tribe has documented utilization of the Hood
31 Canal nearshore by Hood Canal summer chum salmon and Puget Sound Chinook. These
32 are Endangered Species Act (ESA) listed species. Index 1292, at 2.
33

34
35 • The April 2001 White Paper entitled Marine and Estuarine Shoreline Modification Issues
36 [Index 590] provides detailed information about the use of Puget Sound marine nearshore
37 areas by various fish populations during specific portions of their life cycles: "It may be
38 emphasized," the authors say, "that two salmon species (fall Chinook and summer chum
39 salmon) federally listed as threatened under the Endangered Species Act in Puget Sound,
40 are also the most estuarine/shoreline dependent species/stocks in the region." *Id.* at 12.
41

42
43 Based on this science, Kitsap County states: "[P]laces where listed, endangered,
44 threatened, and sensitive species have a primary association, places with commercial and

45
46 ³⁵ Kitsap County construes ESHB 1933 as follows: Currently, the SMP governs *what* can be built; the CAO
47 governs *where* it can be built. This is in effect during the transition period between when ESHB 1933 was
48 enacted and when a local jurisdiction updates its SMP. This relationship will change when Kitsap County
49 updates its SMP in accordance with RCW 90.58.080, at which time the protection of critical areas in
50 shorelines is transferred to the SMP. In accordance with RCW 36.70A.480(3)(a), the protection of critical
areas in the shoreline remains under the CAO until the DOE approves the County's SMP that has been
updated under the shoreline guidelines adopted in 2003. County Response at 42-42.

1 recreational shellfish beds, places with kelp and eelgrass beds, and places with spawning
2 areas are worthy of designation ...[as are small areas in between] ... to create a
3 connected system of fish and wildlife habitat.... Kitsap County's entire marine shoreline
4 consists of one or more of these areas." County Response, at 35.
5

6 However, Petitioner KAPO and Amicus PLF seek to impose a "show your work"
7 requirement. KAPO PHB, at 10; Amicus PLF, at 5-6. It would appear that Petitioner
8 KAPO construes "show your work" to mean that the County must "conduct independent
9 analysis and research." *Id.* Petitioner KAPO contends that the County may not rely on
10 federal habitat designations undertaken for another purpose but must conduct its own
11 shoreline inventory or "independent analysis" and show in the record its own "reasoned
12 process." KAPO Reply, at 12-19.
13

14
15 The Board, however, reasons that the "best *available* science" requirement includes the
16 word "available" as an indicator that a jurisdiction is not required to sponsor independent
17 research but may rely on competent science that is provided from other sources. Here,
18 Kitsap County's January 2004 BAS document on Fish and Wildlife Habitat Conservation
19 Areas [Index 1367] cited to the King County BAS review, Bellevue's Critical Areas
20 Update BAS paper, the Christopher May 2003 study, and a WDFW Summer Chum
21 Conservation Initiative – science that was available and regionally relevant. While the
22 CAO was still under discussion and public review, NOAA issued its September 2, 2005
23 designation of Puget Sound nearshore as critical habitat for Puget Sound Chinook and
24 Hood Canal summer chum [Index 779]; the County relied on this science as well.³⁶ The
25 Board concludes that the County appropriately relied on available science.
26
27

28 The same analysis applies equally to the County's designation of lake shores and streams
29 as fish and wildlife habitat conservation areas. [KAPO PFR Issues B.2, B.3, B.5]. The
30 County was within its discretion, consistent with RCW 36.70A.480(5), in determining
31 that these shorelines (1) qualify for critical area designation based on the statutory
32 definition of critical areas and (2) so designating them.
33

34
35 The Board notes that the County here has in many respects adopted its prior regulations
36 for shorelines. These designations and buffer restrictions have been in place since 1998
37 and were under active discussion in Kitsap's CAO update process from at least the TRC
38 meetings of February 2004 to the Planning Commission meetings of October 2005.
39 Petitioner KAPO has had ample opportunity to make its case with specific facts if there
40 were specific stretches of shoreline that should *not* be designated as fish and wildlife
41 habitat. Instead, the Board has been provided with hypotheticals, rhetorical questions and
42 conclusory arguments. In contrast, the Board notes that the County's record includes a
43 study identifying juvenile Chinook salmon habitat even in the highly urbanized Sinclair
44 Inlet between Bremerton and Port Orchard. Index 774. Similarly, several of Kitsap
45 County's herring spawning areas, identified by the Puget Sound Action Team's 2004
46 State of the Sound Report, are in highly urbanized areas – Port Orchard/Port Madison, for
47 example. Index 778.
48
49

50

³⁶ See also sources cited at fn. 28, *supra*.

1 The Board finds and concludes that Petitioner KAPO **has not met its burden of proving**
2 that Kitsap County's CAO Update failed to comply with RCW 36.70A.480(5) in its
3 designation of shorelines as fish and wildlife habitat conservation areas.
4

5
6 **Conclusion**

7 The Board finds and concludes that Petitioner KAPO **has not carried its burden of**
8 **proof** with respect to Legal Issue No. 4 [KAPO PFR Issues B.1, B.2, B.3, B.5, B.6]
9 concerning critical areas designations along shorelines. The Board is not persuaded that
10 the action of Kitsap County in adopting the fish and wildlife habitat conservation area
11 designations along County shorelines – KCC 19.300.310, .315 – is clearly erroneous or
12 fails to comply with RCW 36.70A.480(5). Legal Issue No. 4 is **dismissed**.
13
14

15
16
17
18
19 **D. Legal Issue No. 5 and No. 6 [D.4 and D.5] - Critical Area Buffers in the Built**
20 **Environment**

21
22 In Legal Issue No. 5, Petitioner KAPO challenges the buffer requirements in the CAO
23 Update as not based on best available science, as required by RCW 36.70A.172(1), when
24 applied in the built environment.
25

26
27 The PHO states KAPO's Legal Issue No. 5³⁷ as follows:
28

29 *Legal Issue No. 5. Did Kitsap County fail to include best available science as*
30 *required by RCW 36.70A.172 in adopting provisions in KCC Chapters*
31 *19.100, 19.200 and 19.300 through the adoption of Ordinance 351-2005?*
32 *[Intended to reflect Issue C, pp. 5-6 of the KAPO PFR].*
33

34 In Legal Issue No. 6, subsections D.4 and D.5, KAPO challenges the County's reliance
35 on two specific references: Christopher May, *Stream Riparian Ecosystems in the Puget*
36 *Sound Lowland Eco-Region: A Review of Best Available Science*, Watershed Ecology
37 LLC (2003) (*May*) and K.L. Knutsen and V.L. Naef, *Management Recommendations for*
38 *Washington's Priority Habitats: Riparian*, Washington Department of Fish and Wildlife
39 (1997) (*Knutsen & Naef*).
40

41
42 **Statement of Facts**

43
44 As discussed above, Kitsap County's BAS review began in November 2003 with the
45 convening of a Technical Review Committee (TRC) which included representation from
46 each of the parties to this proceeding. KAPO was represented by Dr. Don Flora,³⁸ a
47 qualified scientist who provided Kitsap with scientific references and quotations
48
49

50 ³⁷ The full text of KAPO's Legal Issue 5 [PFR Issue C] is set forth in Appendix B.

³⁸ Dr. Flora's abbreviated resume is at Index 1262.

1 throughout the process of developing and adopting the CAO. See, e.g., Index 255, 534,
2 559, 647, and 804. Dr. Flora opposes prescriptive buffers because, according to Dr. Flora,
3 they are too often based on studies in places with dissimilar soil, climate, vegetation and
4 development patterns. See, generally Index 804 (Aug. 26, 2005 letter to J. Bolger) at 5.
5 Dr. Flora urges an array of alternatives such as low-impact development practices and
6 good stormwater management, taking into consideration the buffering functions already
7 provided by suburban lawns and gardens, and paired with a campaign to reduce use of
8 lawn and garden chemicals. Index 647.
9

10
11 Petitioner KAPO provided input from several other scientists, notably Dr. Robert
12 Crittenden³⁹ and Dr. J. Buell. Dr. Crittenden submitted two papers critiquing DOE's
13 *Wetlands Vol. 1 and Vol. 2* and other science which Kitsap proposed to rely on for BAS.
14 Index 123, 448.⁴⁰ Dr. Crittenden challenged DOE's "mechanistic model" of wetlands
15 buffers and asserted that the primary flaw in these reports was that they were the result of
16 a desire to reach consensus, rather than on-the-ground research.⁴¹ Dr. Buell provided two
17 opinion pieces concluding that one-size-fits-all buffers are not the most effective strategy
18 for protection of critical areas. Index 123, 124.
19

20
21 In order to sort and organize the scientific reports and opinions submitted by various
22 participants in the CAO review process, Kitsap County planning staff – with scientific
23 credentials of their own [see Index 1367] – evaluated the "science," including the KAPO
24 input, and tested it against the BAS criteria developed by CTED in compliance with
25 RCW 36.70A.050.⁴² The County developed a review process which they called the "BAS
26 Ellipse" to guide them in applying the CTED factors to the scientific submissions in the
27 record. Index 1025. The County staff determined that some of the material submitted by
28 KAPO was non-scientific (e.g., four documents authored by KAPO's attorney – Index
29 272, 273, 1209, 1210 - and one by KAPO spokesperson Karl Duff – Index 317) and some
30 was expert opinion, but largely it was not peer-reviewed and was accorded less weight by
31 County staff. County Response at 54, 58-59.⁴³ County staff identified eight studies
32 submitted by KAPO as within the "zone" of BAS. Index 414, 416-421, 654. These
33 studies were analyzed by County staff with notes to the file. Index 413, 424-429, 527.
34

35
36 While considering the documents and BAS provided by KAPO, the County ultimately
37 chose to rely on other sources of BAS as the basis of its CAO regulations update. The
38 CAO Update states that Kitsap's wetlands buffer regulations are based on DOE's
39 *Wetlands Vol. I* (see, Index 109 at 7), marine and lake shorelines buffers are based on
40

41
42 ³⁹ Dr. Crittenden's resume is at Index 874.

43 ⁴⁰ DOE's rebuttal of Dr. Crittenden's critique of *Wetlands I* was provided to the County. Index 1037.

44 ⁴¹ Index 448, at 2, 6-7: "They used group processes to reach their decisions; in particular ... the Delphi and
45 consensus processes."

46 ⁴² The CTED criteria include peer review, use of standardized and replicable scientific methods, logical
47 conclusions and reasonable inferences, based on data that has undergone qualitative analysis, containing
48 information and data that is put into context, citation to relevant credible literature and other pertinent
49 information. WAC 365-195-905(a)(1)-(6).

50 ⁴³ For a complete listing of documents submitted by KAPO as "science documents," see KAPO PHB at 54,
fn. 59, 55 at fn.60.

1 *May* (see Index 109, at 10), and buffers for streams are based on both *May* and *Knutson*
2 & *Naef* (see Index 109, at 9). In applying this science, the Ordinance asserts:
3

4 [the] County was careful to base its buffers on the BAS reflective of the
5 lowland, urbanizing context like Kitsap County, rather than that science
6 based on steep-sloped forested areas where the environmental needs are
7 entirely different (which represents the bulk of published work).
8

9
10 Ordinance 351-2005, Section 3.E(2)

11
12 ***Discussion and Analysis***

13
14 Positions of the Parties

15
16 KAPO challenges Kitsap's enactment of buffer-focused CAO update regulations. In
17 KAPO's opinion, a buffer-only approach is not BAS, at least not when applied
18 uniformly across the built environment. KAPO PHB, at 29. KAPO points out that
19 many areas subject to buffering requirements are already developed and that the science
20 relied on by the County primarily deals with the functions of critical areas in the natural
21 environment – or perhaps subject to forestry or agricultural activities. KAPO contends
22 that the County's record has no specific science "supporting the effectiveness and
23 appropriateness of buffers to protect critical areas and function in the built
24 environment." *Id.* at 31. KAPO looks to DOE *Wetlands Vol. I*, relied on by the County
25 for wetlands regulations, and finds no science on wetland buffer effectiveness in the
26 built environment. *Id.* at 34. Similarly, according to KAPO, *May* provides no science
27 on shoreline buffers along a built-out shore [*id.* at 37] and *Knutsen & Naef* provides no
28 scientific basis for buffers along streams in the built environment. *Id.* at 38-40.
29
30

31 KAPO points out that the County acknowledges that an on-site report is the "best
32 available science," [Ordinance 3.C]; therefore, KAPO concludes, universal buffers are
33 not BAS.
34

35
36 Kitsap counters that merely alleging lack of science in the County's record does not
37 meet the GMA burden of proving the County's action "clearly erroneous." County
38 Response at 48-49. Kitsap relies on the four-part test articulated by the Board in
39 *DOE/CTED*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19,
40 2006) at 42:
41

- 42 (a) Scientific evidence contained in the record
43 (b) Analysis of evidence by a reasoned process
44 (c) Decision within the parameters of the science
45 (d) Justification for departure from BAS, if any
46

47
48 The County states that only the first part of the test is challenged by KAPO with respect
49 to buffers. County Response, at 49. The County states there is no real allegation by
50 KAPO that the County failed to conduct a reasoned process or that the buffers are not

1 within the scope of the science in the County's record;⁴⁴ further, KAPO is not
2 complaining about a departure from science in the County's record. *Id.* at 49-50, also
3 47, citing KAPO PHB at 28, n. 21.
4

5 The County asserts that the science it relied on indeed took into consideration the effects
6 of urban development. County Response at 52. The County cites DOE's *Wetlands Vol. I*
7 which notes in the introduction that "studies on buffers in urban and suburban settings
8 conducted in the Pacific Northwest region are clearly relevant." Index 590. DOE's
9 wetland rating system includes intensity of adjacent land use as one of the criteria in
10 scoring the functions and values of a wetland. *Id.* Further, the County points out that the
11 documents relied on by KAPO "do not actually advocate for no buffers within the built
12 environment;" rather they "are heavy in denouncing the science relied upon by the
13 County and weak in providing their own BAS to support smaller buffers that still protect
14 the whole range of functions and values required to be protected." *Id.* at 53-54.
15
16

17 The County contends that it effectively evaluated the KAPO submissions, using the
18 CTED guidelines as an objective screen [BAS Ellipse – Index 1025] to determine
19 whether a document was competent science. As to the eight KAPO documents that
20 qualified as competent science in the County's screen, upon analysis Kitsap determined
21 they had "limited value due to their tenuous applicability to Kitsap County, their focus on
22 protecting forestry production rather than the functions and values of critical areas, or
23 their limited practical relevance to developing and updating a regulatory scheme." *Id.* at
24 61.
25
26

27 In rebuttal, KAPO objects to the lack of documentation to show that "the County engaged
28 in any meaningful consideration of the KAPO submissions that presented competing
29 perspectives regarding the effectiveness of buffers." KAPO Reply, at 33. KAPO
30 characterizes the County's reference to its "BAS Ellipse" as an "ex post facto scientific
31 analysis" of KAPO's documents and states that there is no evidence the County staff or
32 legislative body ever actually engaged in such an analysis. *Id.*⁴⁵
33
34

35 Board Discussion

36
37 The first leading case to explain the GMA's BAS requirement is *Honesty in*
38 *Environmental Analysis and Legislation v. Seattle (HEAL)*, 96 Wash. App. 522, 979 P.2d
39 864 (1999). *HEAL v. City of Seattle*, heard by this Board as CPSGMHB Case No. 96-3-
40 0012, Final Decision and Order (Aug. 21, 1996), involved the City of Seattle's
41 regulations for landslide-prone slopes. The City's revised policies and implementing
42 regulations called for minimizing disturbance and enhancing existing vegetative ground
43 cover. HEAL challenged the City's action, arguing that engineered solutions were "best
44 available science" for stabilization of landslide-prone slopes. In the proceedings before
45
46

47 ⁴⁴ Compliance with this part of the test is challenged by Hood Canal and Suquamish with respect to marine
48 shoreline buffers, however.

49 ⁴⁵ From the outset, KAPO has complained that the County's documentation or lack thereof is frustrating,
50 the indexing is inaccurate and marred by inappropriate editorializing, and the record is incomplete. See,
e.g., KAPO Reply, at 33, fn. 25.

1 the Board, the City laid out the expert opinion and information upon which it relied for a
2 “natural systems” solution, and HEAL spent its argument in either discrediting the City’s
3 science or establishing its own “engineered system” approach. The Board ruled that the
4 GMA required deference to the City’s choice as between two scientifically-supported
5 approaches, each based on “evidence of presumably equal dignity.” *HEAL*, at 14-15,
6 citing *State of Louisiana v. Verity*, 853 F.2d 322, 329 (5th Cir. 1988).
7

8
9 Much of HEAL’s Prehearing and Reply Briefs [like KAPO’s in the
10 present case] is dedicated to explaining the extensive amount of scientific
11 information and expert opinions that HEAL and others presented to the
12 City. The Board must assume that the City included that information and
13 those opinions in its development of the challenged amendments. HEAL’s
14 complaint is that the City failed to heed that externally supplied
15 information, and instead based its decision upon its own data.
16

17 *HEAL*, at 15. The Board found the City of Seattle had complied with the BAS
18 requirement, as competent science in the record supported the City’s approach, and the
19 Court of Appeals affirmed.
20

21
22 The case before us presents a similar situation. Kitsap County has developed and adopted
23 regulations relying on prescriptive buffer widths to protect the functions and values of
24 wetlands, streams, lake and marine shorelines. The County relies on science concerning
25 the functions generally performed by vegetated buffers – sediment and pollutant capture,
26 wildlife habitat and the like. Contrary to KAPO’s assertions, there is site-specific
27 flexibility, through buffer averaging, habitat conservation plans, off-site mitigation
28 options, variances, and reasonable use provisions.
29

30
31 KAPO presents science (or a critique of the County’s documents) which supports site-
32 specific protections, pointing out that the County’s own BAS indicates the superiority of
33 site-specific measures. For KAPO, especially where homes, lawns and gardens, shopping
34 malls and parking lots, docks and shoreline armoring create a variety of impacts on the
35 resource to be protected, “universal buffers” are unsupportable. KAPO argues that BAS
36 requires the County to eliminate uniform buffer requirements in the built environment
37 and find a more fine-tuned and site-specific mechanism for protecting critical areas.
38

39
40 Kitsap County analyzed the information presented by KAPO and concluded that some of
41 it was not science⁴⁶ and that several of the science documents were opinion pieces
42 entitled to little weight. The Board generally concurs. Nevertheless, giving KAPO and its
43 consultants the benefit of the doubt, *HEAL* reminds us that the choice of a city or county,
44 when faced with competing options for protecting critical areas – *each based on*
45

46
47 ⁴⁶For example, Planning Commissioner Mike Gustafson requested that the Planning Commission be
48 provided with copies of materials presented by KAPO’s attorney Alexander Mackie at a Kitsap County
49 Board of Realtors meeting. The attorney’s papers [CLE power point and presentation, and ‘White Paper’
50 prepared for Realtors – Index 272, 273, 1209, 1210] were accordingly forwarded to the Planning
Commission with a staff cover-memo stating that they “do not meet the requirements of Best Available
Science.” Index 569.

1 *competent and current science* – is entitled to deference. Kitsap County chose the
2 prescriptive buffer approach, with flexible alternatives, because it found the BAS
3 supporting that approach more persuasive⁴⁷ and because it was administratively feasible.
4 The Board is not persuaded that the County’s choice was erroneous.
5

6 The Court of Appeals in *HEAL* explained that the purpose of the best available science
7 requirement is to ensure that critical areas regulations are not based on speculation and
8 surmise, but on meaningful, reliable, relevant evidence. *HEAL*, 96 Wash. App. at 531.
9 The *HEAL* Court explained that critical areas "are deemed critical because they may be
10 more susceptible to damage from development. The nature and extent of this
11 susceptibility is a uniquely scientific inquiry. It is one in which the best available science
12 is essential to an accurate decision about what policies and regulations are necessary to
13 mitigate and will in fact mitigate the environmental effects of new development." *Id.* at
14 532-33.
15

16 In *DOE/CTED*, the City of Kent’s BAS consultant advised the City that a site-specific
17 evaluation of each wetland/buffer complex would allow the most effective and tailored
18 regulation to protect functions and values, but would be impracticable; therefore a
19 prescriptive approach – applying standard buffer widths to broad categories of wetlands –
20 “must protect the most vulnerable systems and should therefore err on the side of
21 protecting more rather than less in terms of both acreage and function.”⁴⁸ *DOE/CTED*, at
22 32.
23

24 KAPO specifically challenges the BAS that the County relied on for its decision to use
25 buffers to protect critical area functions. According to the recitals in the Ordinance, the
26 County’s marine and lake shorelines buffers are based on *May*, and the buffers for
27 streams are based on both *May* and on *Knutsen & Naef*. See Index 109, at 9, 10. KAPO’s
28 argument is that the “limited summary analysis” of these science sources in the County’s
29 ordinance is insufficient to demonstrate a BAS basis for buffer-based protections of
30 critical areas in the built environment.⁴⁹ KAPO PHB, at 36, 38-39.
31

32 The Board is not persuaded that the County’s reliance on these science sources as BAS
33 was clearly erroneous. Without question the County engaged in a deliberative process,
34 reviewing and comparing various studies, analyses, and recommendations and chose
35 accordingly. KAPO has not met its burden of proving that the County’s resultant
36 37
38
39

40
41 ⁴⁷ A site-specific approach may *not* be best science, as the Board pointed out with respect to marine
42 shorelines protections in *Tahoma Audubon*: “Deferring salmon habitat protection to a site-by-site analysis
43 based on *disaggregated factors* is inconsistent with Pierce County’s best available science. The County’s
44 record documents the interactive functions of marine shorelines and demonstrates that ‘near shore areas,
45 beaches and bluffs form a dynamic system’ that is essential to shore birds, forage fish, and salmonids.
46 Nothing in the science amassed by the County supports disaggregating the values and functions of marine
47 shorelines. ‘The highest quality shorelines ... [featured] multiple process-related indicators (feeder bluffs,
48 salt marsh, eelgrass beds) that greatly increase their habitat function.’” *Tahoma Audubon*, at 40 (citations
49 omitted) emphasis supplied.

50 ⁴⁸ The City of Kent chose a prescriptive system, but then failed to assess the functions and values to be
protected and failed to require effective buffer widths to protect those functions. *Id.* at 30.

⁴⁹ KAPO critiques the study by *Knutsen & Naef* at length. KAPO Intervention, at 8-14.

1 adoption of a buffer-based regulatory program for protection of certain critical areas,
2 including in the built environment, fails to comply with RCW 36.70A.172(1).
3
4

5 **Conclusion**

6 The Board finds and concludes that Petitioner KAPO **has failed to carry its burden of**
7 **proof** with respect to Legal Issue No. 5 [KAPO PFR Issue C.1-C.5] and sub-issues of
8 Legal Issue 6 [KAPO PFR Issue D.4 and D.5]. The Board is not persuaded that Kitsap
9 County's regulations requiring buffers as a means of protecting the functions and values
10 of certain critical areas, including in the built environment, are clearly erroneous or non-
11 compliant with RCW 36.70A.172(1). Legal Issue No. 5 [KAPO PFR Issue C.1-C.5] and
12 sub-issues of Legal Issue 6 [KAPO PFR Issue D.4 and D.5] are **dismissed**.
13
14
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16
17

18 **E. Legal Issue No. 2 – Marine Shoreline Buffer Widths**

19 The PHO states Hood Canal's Legal Issue No. 2 as follows:
20
21

22 *Legal Issue No. 2. Does the adoption of Ordinance 351-2005, adopting an*
23 *updated and revised critical area ordinance, fail to comply with RCW*
24 *36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060,*
25 *RCW 36.70A.170 and 36.70A.172 when it requires buffer widths on urban,*
26 *semi-rural and rural saltwater shorelines of 35 feet when such widths fail to*
27 *consider the best available science and fail to protect the functions and values*
28 *of these shoreline areas as required by the GMA?*
29
30

31 **Applicable Law**

32 For Legal Issue 2, Petitioner Hood Canal relies on the sections of the GMA set forth
33 previously which require local jurisdictions to update their critical areas regulations and
34 to designate critical areas and protect their functions and values, in a process which
35 includes BAS and gives special consideration to anadromous fisheries: RCW
36 36.70A.060, .130, .170, and .172.
37
38
39

40 For Legal Issue 2, Hood Canal also relies on GMA Planning Goals 9 and 10:
41

42 **RCW 36.70A.020**

43 (9) Open space and recreation. Retain open space, enhance recreational
44 opportunities, conserve fish and wildlife habitat, increase access to natural
45 resource lands and water, and develop parks and recreation facilities.
46

47 (10) Environment. Protect the environment and enhance the state's high
48 quality of life, including air and water quality, and the availability of
49 water.
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Statement of Facts

In the CAO Update, Kitsap County essentially retained its 1998 marine shoreline CAO regulations, which prescribed a 35-foot buffer for all marine shorelines within the Urban, Semi-rural and Rural designation under Kitsap's Shoreline Management Program. The Ordinance Findings state:

“...while there is scientific data examining the marine-riparian interactions, none suggests protective buffer widths. Accordingly, Kitsap County reviewed the buffers established in 1998 along with the added protection established in Title 22 Kitsap County Shoreline Management Program and made changes in accordance with BAS. These changes provide an acceptable level of conservation for important shoreline habitat features, ensure a no net loss of riparian functions, and address the consideration to anadromous fish.”

Ordinance Section 3.E.3.

The County's Critical Areas Ordinance Science Support document states that the County's shoreline buffers are based on Christopher May's 2003 *Stream-Riparian Ecosystems in the Puget Sound Lowland Eco-Region; a Review of Best Available Science (May)*. [Index 1192, at 10]

Discussion and Analysis

Positions of the Parties

Petitioner Hood Canal contends that the County failed to include best available science when setting marine riparian buffers at just 35 feet for Urban, Semi-rural and Rural shorelines. Hood Canal PHB at 9. Hood Canal indicates that they “marshaled substantial science on marine riparian buffers” and provided it to the County, yet the County's findings in Ordinance Section 3.E.3 state that there is no science in the record to support a marine riparian buffer width. *Id.* at 11.

Hood Canal notes that the County's Critical Areas Ordinance Science Support document [Index 1192, at 10] states that the County's shoreline buffers are based on *May*, yet *May* recommends a 30-meter buffer (98 feet) for a healthy forested corridor, suggesting wider buffers under other circumstances. Hood Canal argues that Kitsap did not substantively consider science but retained its previously-established marine buffers, which are outside the scope of BAS, without reasoned justification. *Id.* at 18-20.

Intervenor Suquamish Tribe asserts that the County's Urban, Semi-rural and Rural shoreline designations are 68% of its saltwater shorelines and that a mere 35-foot buffer does not provide the necessary “protection against further pollution, sediment problems, eagle perch trees, and share for foraging fish.” Suquamish PHB, at 7.

1
2 Kitsap County responds by asserting that, while the presence of marine life along its
3 shorelines supports designation of shorelines as critical areas, it does not require the size
4 of buffers urged by Hood Canal or the Tribe. The County points out that, compared to
5 studies of the functions and values of freshwater riparian buffers, there has been less
6 study of marine riparian areas; so the County extrapolated from studies of the freshwater
7 environment to find support for its 35 foot marine shoreline buffer. County Response at
8 25-28. Since its Urban, Semi-rural and Rural shorelines are largely already developed
9 with residences, the County focused on water quality functions, rather than providing
10 wildlife corridors, for example. *Id.* at 29. The County found support in *May* for a 30-foot
11 buffer for the bottom range of protection of water quality riparian functions. *Id.*
12
13

14 KAPO is an Intervenor with respect to this issue in the Hood Canal case. KAPO objects
15 to “universal buffers,” and argues that the larger buffers advocated by Hood Canal,
16 Suquamish and the state agencies “fail to comply with the GMA to the extent that the
17 buffers effectively treat the entire marine shoreline as a critical area without the specific
18 designation that RCW 36.70A.480(5) requires.” KAPO Intervention at 3.
19
20

21 In rebuttal, Hood Canal asserts that Kitsap is doing what the Supreme Court forbade in
22 *Ferry County* – ignoring the best available science in favor of the science it prefers.
23 Citing *Ferry County*, 155 Wn.2d at 824, 833 (2005). Here, according to Hood Canal,
24 Kitsap has not only ignored other sources of good science but even ignored specific
25 recommendations within *May*, the study on which it purportedly relies, ignoring the
26 current science that does not provide its desired outcome and “relying on the oldest, least
27 restrictive studies included in the publication.” Hood Canal Reply, at 8. Hood Canal cites
28 this Board’s recent decision in *DOE/CTED*, where the Board stated: “retention of an
29 obsolete, albeit comfortable system, makes a mockery of and totally ignores the
30 requirements of RCW 36.70A.130(1) that local cities and counties must update CAOs
31 based upon BAS, which is continually being refined.” *Id.*, citing *DOE/CTED*, at 34.
32
33

34 Board Discussion

35
36 *Marine buffers keyed to SMP land use classifications – not to critical area “functions*
37 *and values”*
38

39 Kitsap County’s marine buffer widths are assigned based on SMA land use
40 classifications, not based on the functions and values of the critical area designation –
41 here, fish and wildlife habitat conservation areas. The GMA requires the County to
42 “adopt development regulations that *protect* critical areas” – RCW 36.70A.060(2) - that
43 are required to be designated - RCW 36.70A.170 – and reviewed and updated – RCW
44 36.70A.130(1)(c). RCW 36.70A.172(1) provides:
45
46

47 In designating and protecting critical areas under this chapter, counties and
48 cities *shall include the best available science* in developing policies and
49 development regulations *to protect the functions and values* of critical
50 areas. In addition, counties and cities *shall give special consideration to*

1 conservation or protection measures necessary to preserve or enhance
2 *anadromous fisheries*.

3
4 (Emphasis supplied).

5
6 In the matter before us, Kitsap County chose a buffer-based regulatory scheme to protect
7 the functions and values associated with marine shorelines designated as fish and wildlife
8 habitat conservation areas. However, the County has not differentiated among the
9 functions and values that may need to be protected on shorelines that serve, for example,
10 as herring and smelt spawning areas, juvenile chum rearing areas, Chinook migratory
11 passages, shellfish beds or have other values. Rather, they have chosen an
12 undifferentiated buffer width that is at or below the bottom of the effective range for
13 pollutant and sediment removal cited in *May*. And they have applied that buffer to SMP
14 land use classifications, not to the location of specific fish and wildlife habitat.
15
16

17 In the public process leading up to adoption of these provisions of the CAO, state
18 resource agencies urged the County to *differentiate* ecological resources on the shoreline
19 and also to differentiate protection levels for urban and rural areas.⁵⁰ WDFW urged
20 Kitsap to specifically identify the most important shoreline reaches to be protected and to
21 adopt significantly larger [150-250 feet] marine shoreline buffers. “WDFW requests that
22 the County have kelp and eelgrass beds, shellfish areas, forage fish spawning areas,
23 feeder bluffs, riparian areas, and juvenile salmon migration corridors as separate listed
24 categories. *This will allow specific protection to be applied to these critical areas....*”
25 Index 1293 (WDFW letter Aug 6, 2004), at 7 (emphasis supplied).
26
27

28 The Puget Sound Action Team, the agency with primary responsibility for coordinating
29 the state’s efforts to protect the Puget Sound and Hood Canal and their aquatic resources,
30 commented that Kitsap’s proposed buffers “*appear to be based primarily on land use*
31 *classifications*” rather than being designed to protect nearshore functions and values.
32 Index 789 (Aug. 10, 2005 letter) at 2-3 (emphasis supplied). PSAT emphasized the
33 importance of “primary association” areas to the recovery of ESA-listed Puget Sound
34 Chinook, identifying specific Kitsap-shoreline sub-basins – Hood Canal, Admiralty Inlet,
35 Central Puget Sound, and Port Madison/Sinclair Inlet. *Id.* PSAT recommended that
36 Kitsap protect shoreline features essential to “primary association” habitat for salmonids,
37 as well as for forage fish beach spawning areas. *Id.*
38
39

40 In public testimony before the Planning Commission PSAT’s spokesman urged:
41 “*Explicitly designate* primary association areas along the marine shoreline for
42 anadromous fish such as juvenile salmon (providing a list of the primary association
43 areas)” Ex. 2-M, at 275 [PSAT testimony at Sept. 22, 2005, Planning Commission public
44 hearing]. “The proposed standard buffer widths for all urban, semi-rural and rural
45 shorelines may put critical nearshore processes, functions and values at risk.” *Id.*
46
47

48
49 ⁵⁰The Board notes that KAPO’s illustrative exhibits (HOM Ex. 3: KAPO Appendix 1) show areas of
50 highly-developed shoreline. All but one of these photos is of Urban or Semi-rural areas; only one is Rural
(HOM Ex. 3: 1-M, N) and that’s a lake, not a marine shoreline. See HOM Ex. 4, 5. Several of the photos
show wooded bluffs which suggest wildlife corridors or other habitat.

1
2 The flaw is illustrated by the fact that eelgrass, kelp, and shellfish beds are protected by
3 larger buffers if they happen to be off shores designated Natural or Conservancy, while
4 the same critical resources – eelgrass, kelp, shellfish – have just 35 feet of buffer off the
5 Urban, Semi-rural or Rural shore.⁵¹ Protection for critical areas *functions and values*
6 should be based first on the needs of the resource as determined by BAS.
7

8
9 The Board recognizes that *some* of the marine shoreline functions and values essential to
10 salmon are protected by Kitsap’s regulations for streams, wetlands and geologically
11 hazardous areas. There are 200-foot buffers on the banks and estuaries of Kitsap’s seven
12 salmon streams (Type S), 150-foot buffers on smaller fish-bearing streams (Type F),
13 buffers on wetlands (30-200 feet), including salt marshes on the shoreline, and
14 protections including setbacks from the top of shoreline bluffs. KCC 19.200.220.A;
15 19.300.315A; 19.400.415.B.
16

17 Here Kitsap County has opted to designate its whole shoreline as critical area but then
18 has not followed through with the protection of *all* the applicable functions and values. In
19 particular, it has disregarded the advice of the responsible state agencies and without any
20 solid science – rather, an appeal to the *lack* of applicable science – on which to base its
21 rejection.
22

23 *The “Immature Science” Dilemma*
24

25 The GMA recognizes that science is a dynamic enterprise and that scientific
26 understandings will grow over time. Thus, in addition to requiring that best available
27 science be used substantively to develop critical areas regulations [.172(1)], the GMA
28 requires that CAOs be updated on a regular cycle [.130(1)(c)]. As the Supreme Court
29 admonished in *Ferry County*: “a [city or county] cannot choose its own science over all
30 other science and cannot use outdated science to support its choice.” *Ferry County*, 155
31 Wn.2d at 837-838 (emphasis supplied).
32
33

34 Kitsap County contends that appropriate marine buffer widths have not yet been
35 determined by the scientists, therefore reenactment of its 1998 marine buffer widths,
36 which provide sediment and pollution control, is a reasonable application of BAS.
37

38 The Board takes **official notice** of the state and federal focus on Puget Sound/Hood Canal
39 and on local salmon species. In the last seven years, the federal government has listed
40 several species of Puget Sound/Hood Canal anadromous fish under the Endangered
41 Species Act. In response, communities around the Sound, through collaborative
42 watershed planning and other efforts, have sponsored studies and nearshore inventories to
43 learn how best to protect salmon and other aquatic resources. The Governor has launched
44 an initiative to clean up Puget Sound and the Hood Canal, underscoring the imperative
45 for shoreline communities to prevent pollutants from entering the waters of the state. The
46
47

48 ⁵¹ The County’s attorney was unable to answer this question at the Hearing on the Merits. See generally,
49 HOM Transcript, at 46-48. [McGuire: “Related to the eelgrass, herring spawning areas, shellfish areas –
50 how does the identification of those areas correspond to the urban, semirural, and rural versus natural and
conservancy areas?”]

1 State Legislature in the 2005 Legislative Session enacted new legislation declaring Hood
2 Canal an “aquatic rehabilitation zone” and establishing “a statutory framework for future
3 regulations ... directed at recovery of this important aquatic resource.” RCW 90.88.005.
4

5 One result of the federal, state and local commitment to protecting aquatic resources has
6 been a wealth of scientific research. The Board notes that many such studies and study-
7 compilations express the need to know more; after all, a good scientist is in the business
8 of asking the next question and testing the next hypothesis, so one expects a caveat at the
9 beginning of a scientific report saying that more studies are needed.⁵² In the last several
10 years, the Board has considered several cases where one or another party attempted to
11 rely on the scientists’ caveat to assert that there was not enough relevant science to
12 support a CAO decision. In each case, the record in fact contained a number of relevant,
13 current, and local sources of BAS.
14

15
16 In *Tahoma Audubon* the Board said:
17

18 The Board takes official notice that nearshore salmon habitat assessments
19 are being or have been conducted in many Puget Sound locations since the
20 federal ESA listing of Puget Sound Chinook salmon in 1999. A number of
21 these reports, in Pierce County’s record here, begin with the observation
22 that there is more science on interior wetlands and stream riparian buffers
23 than on marine shorelines, but cumulatively the studies appear to the non-
24 scientist to have built a wealth of information.
25

26
27 The Board finds the County’s “immature science” argument unpersuasive.
28 A decade ago the science of wetland buffers was uncertain [*see Pilchuk II*,
29 where the consultant’s report stated: “The data on (wetland) buffer
30 effectiveness are still relatively sparse, with studies scattered in sites all
31 over the U.S.”] but the Board and the Court of Appeals in *WEAN* required
32 Island County to use the best science available. *WEAN*, 122 Wash. App. at
33 173.
34

35
36 *Tahoma Audubon*, at 43, and fn. 27 [see multiple Puget Sound-specific studies cited at
37 38-44]. See also, *Samson v. City of Bainbridge Island*, CPSGMHB Case No. 04-3-0013,
38 Final Decision and Order (Jan. 19, 2005), at 19, and studies on Puget Sound marine
39 nearshore environments listed at fn. 25 [affirmed, Thurston County Superior Court No.
40 05-2-0031-3, Apr. 17, 2006].
41

42 Similarly, there are multiple studies in Kitsap County’s records which may provide a
43 basis for identifying and protecting functions and values of marine shorelines as fish and
44 wildlife habitat conservation areas, particularly when designations are linked to shoreline
45 resources to be protected, rather than to SMP land use categories.⁵³
46

47
48 ⁵² The 2004 Proceedings of the DFO/PSAT-Sponsored Marine Riparian Experts Workshop, cited by the
49 County as demonstrating scientific inconclusiveness on marine buffer widths, was in fact a meeting of
50 scientists to lay out a further research agenda. Index 1364.

51
52 ⁵³ See, e.g., “Marine and Estuarine Shoreline Modification Issues,” G. D. Williams and R. M. Thom,
Batelle Marine Sciences Laboratory for WDFW, April, 2001. Index 590.

1
2 “Special consideration” to measures to preserve or enhance anadromous fisheries
3

4 The State’s resource agencies and CTED were unanimous in their objections to Kitsap’s
5 buffer provisions for Urban, Semi-rural and Rural marine shorelines.⁵⁴

6 The Puget Sound Action Team provided Kitsap with a wealth of expertise and advice. In
7 an August 10, 2005 letter to Kitsap, PSAT referenced and attached their June 28, 2005
8 submittal to NOAA of “Regional Nearshore and Marine Aspects of Salmon Recovery in
9 Puget Sound” as part of the Draft Puget Sound Salmon Recovery Plan. The study
10 identified marine shoreline buffers as a key protection measure: “Effective marine buffers
11 can protect critical nearshore processes, functions and values at risk throughout the
12 marine shoreline for the benefit of biological resources such as forage fish spawning
13 areas (herring, sand lance, and smelt), kelp and eelgrass beds, shellfish growing areas,
14 and beaches that serve as migratory corridors for juvenile salmonids.” Index 789, at 2-3.
15 While acknowledging that few Puget Sound empirical studies directly answer the marine
16 shoreline buffer width question, PSAT recommended that “these buffers should, if
17 following a precautionary approach, be at least as protective as those the county has
18 proposed for fish-bearing freshwater shorelines (Table 4: 200 foot buffer for Type S
19 streams).” *Id.* See also, Ex. 2-M, PSAT testimony at Sept. 22, 2005, Planning
20 Commission public hearing, at 275.
21
22

23
24 From the beginning of the County’s process, WDFW was emphatic: “The proposed
25 saltwater shoreline buffers are inadequate according to BAS. It is unclear what
26

27 Riparian vegetation affects the quality of aquatic habitats by increasing slope stability,
28 providing erosion protection, and buffering against pollution and sediment runoff.
29 Marine riparian vegetation also performs a number of increasingly recognized habitat
30 functions at the interface of aquatic and terrestrial zones. For example, overhanging
31 riparian vegetation provides shading that regulates microclimates important to intertidal
32 invertebrate distribution and surf smelt spawning. Vegetated riparian zones deliver
33 organic matter and invertebrate prey to the nearshore and create complex structure that is
34 important for fish (e.g., refuge and spawning) and wildlife (e.g., bird nesting and
35 roosting).

36 *Id.* at 9, citations to nine studies omitted.

37 [Marine riparian vegetation] is a key element of shoreline ecological function and has a
38 significant impact on habitat value, both in the riparian zone itself, and in adjacent
39 aquatic and terrestrial areas. Riparian vegetation contributes to maintenance of fisheries
40 habitat and water quality, functioning as shade, cover for fish and wildlife, organic
41 matter input, and source of insect prey. It may have particularly high value in Puget
42 Sound because of its contributions to marine forage fish that utilize the upper intertidal
43 for spawning and to juvenile salmonids for cover and foraging.

44 *Id.* at 62, citations to five studies omitted.

45 See also, Brennan and Culverwell, 2004 *Marine Riparian: An Assessment of Riparian Functions in Marine*
46 *Ecosystems* [Index 776, at 4] (recommending minimum buffer widths of 89 feet for limiting pollution). The
47 Brennan & Culverwell work in particular, reports on studies correlating freshwater and marine riparian
48 functions: “Although marine riparian systems have not been subject to the same level of scientific
49 investigation, a growing body of evidence suggests that riparian systems serve similar functions regardless
50 of the salinity of the water bodies they border [citing studies].” Index 776.

⁵⁴ Ironically, KAPO asserts that Kitsap County’s CAO is a product of County capitulation to agency
pressure. KAPO PHB, at 5-6.

1 justification is being used by Kitsap County to stray from the BAS.” Index 1292 (Aug.
2 26, 2004), at 2.⁵⁵ A year later, WDFW commented that Kitsap’s proposed marine
3 shoreline buffers posed “perhaps the most significant adverse impacts to fish and wildlife
4 resources.” Index 795 (Aug. 26, 2005), at 2.⁵⁶ The agency noted that Urban, Semi-rural
5 and Rural shorelines constitute the County’s largest shoreline zones and “the proposed
6 35-foot buffer is far below that which best available science describes as necessary to
7 protect fish and wildlife habitat along the shorelines.” WDFW suggested either the 250-
8 foot marine shoreline buffer recommended by CTED or “at a minimum, a buffer setback
9 similar to that provided for Type S streams.” *Id.*

11 CTED urged Kitsap to follow the advice of WDFW and the Puget Sound Action Team or
12 the example of King County (115-foot marine shoreline buffer) or Whatcom County
13 (proposed 150-foot marine shoreline buffer). Index 312 (Aug. 10, 2005), at 3.

15 These comment letters cite to relevant science in the County’s record – for example, the
16 Lemieux report – *Proceedings of the DFO/PSAT Sponsored Marine Riparian Experts*
17 *Workshop* (2004) [Index 509 Riparian Function] – indicating that in many respects
18 marine riparian functions parallel freshwater stream riparian functions, and that similar
19 protective schemes are appropriate for protecting salmon and other marine habitat
20 functions and values.

22 The Board is persuaded that the County’s adoption of a 35-foot buffer based on SMP
23 land use classifications **does not comply** with the GMA mandate to include BAS in
24 protecting the functions and values of critical areas and is **clearly erroneous**. While
25 acknowledging the difficulty of the questions the County has attempted to address, the
26 Board is left with a definite and firm conviction that a mistake has been made. This is
27 especially so in light of the statutory requirement that, in protection of critical areas, cities
28 and counties give special consideration to the preservation and enhancement of
29 anadromous fisheries. RCW 36.70A.172(1).⁵⁷

31 Similarly, the County was not guided by the GMA goals to “conserve fish and wildlife
32 habitat” and “protect the environment.” RCW 36.70A.020(9) and (10).

34 *Conclusion*

36 The Board finds and concludes that the CAO Update, in adopting a 35-foot marine
37 shoreline buffer for its Urban, Semi-rural and Rural shoreline classifications, **does not**
38 **comply** with RCW 36.70A.130, RCW 36.70A.060, RCW 36.70A.170 and 36.70A.172

41 ⁵⁵ See also Index 625 (Mar. 10, 2004 WDFW letter) at 5: “WDFW recommends that the County modify
42 the CAO buffer requirements to meet BAS standards with an additional emphasis on anadromous fish
43 species protection,” (appending relevant science).

44 ⁵⁶ See also Index 1292, at 2-3, citing *Lemieux, et. al.*, for the proposition that marine riparian systems serve
45 similar functions to freshwater riparian systems – functions including soil and slope stability, nutrient input,
46 fish prey production [terrestrial insects such as spiders and aphids which juvenile salmon consume],
47 sediment control, microclimate, water quality, habitat structure, and shade. Index 1293 (WDFW Aug. 6,
48 2004) contains the same material at 8.

49 ⁵⁷ *May’s* Table 7, summarizing “Riparian Research on Wildlife Habitat,” list studies indicating buffer
50 widths of 30 meters (minimum) for Chinook salmon and cutthroat trout, and 20-70 meters for “salmonids.”
The summary does not indicate the extent to which the cited studies may assess stream-based (as distinct
from marine) salmon habitat values. *May*, at 42.

1 and is **clearly erroneous**. The challenged provisions of the Ordinance are **not guided by**
2 GMA goals 9 and 10 - RCW 36.70A.020(9) and (10). The Board will **remand** the
3 Ordinance for legislative action to bring it into compliance with the GMA as set forth in
4 this order.
5

6
7 **F. Legal Issues 6 and 8 – Enforceability and Property Rights**

8
9 Petitioner KAPO challenges the CAO Update as non-compliant with the GMA because
10 the regulations, especially as applied to the built environment, are unenforceable,
11 irrational and in violation of private property rights. The PHO states Legal Issues 6 and 8
12 as follows:⁵⁸
13

14 *Legal Issue No. 6. Did Kitsap County violate (fail to comply with) RCW*
15 *36.70A.050, 060(2) and WAC 365-190-020, 040, 080(5) and RCW 36.70A.172*
16 *in adopting provisions in KCC Chapters 19.200 and 19.300 through the*
17 *adoption of Ordinance 351-2005? [Intended to reflect Issue D, pp. 6-8 of the*
18 *KAPO PFR].*
19

20 *Legal Issue No. 8. Did Kitsap County fail to include best available science to*
21 *protect critical area functions and values as required by RCW 36.70A.060,*
22 *172, and fail to consider and properly apply the limitations under goal RCW*
23 *36.70A.020(6) in adopting Ordinance 351-2005? [Intended to reflect Issue F,*
24 *pp. 9-12 of the KAPO PFR].*
25

26
27 ***Applicable Law***
28

29 For Legal Issues 6 and 8, Petitioner KAPO relies on the sections of the GMA set forth
30 previously which require the designation of critical areas and adoption of development
31 regulations based on BAS: RCW 36.70A.050, 060(2) and .172.
32

33 For Legal Issue 8, Petitioner KAPO also relies on GMA Planning Goal 6 – Property
34 Rights:
35

36
37 **RCW 36.70A.020(6)**

38 Property rights. Private property shall not be taken for public use without
39 just compensation having been made. The property rights of landowners
40 shall be protected from arbitrary and discriminatory actions.
41

42 ***Discussion and Analysis***
43

44 ***Substantive due process and other constitutional issues***
45

46 Many of Petitioner KAPO's issues and arguments rest on substantive due process. KAPO
47 asserts that regulations must be the product of a legitimate objective of government, must
48 be "reasonably necessary" to achieve the stated objective, and must satisfy the
49
50

⁵⁸ The full text of Legal Issues 6 and 8 is set forth in Appendix B.

1 requirements of nexus and rough proportionality. KAPO PHB at 14. KAPO asserts:
2 “[S]ince the County has the burden of proving both objectivity and reasonable necessity
3 ... the Ordinance, as written, is patently and indefensibly vague and unenforceable on
4 these points.” *Id.* at 18. Similarly, KAPO objects that many provisions of the Ordinance
5 are not understandable by the ordinary citizen, lack measurable criteria to guide
6 administrative decision-making, and otherwise are unenforceable due to vagueness. In
7 fact, KAPO asserts “many of the County’s CAO provisions are so vague as to defy
8 ordinary understanding.” *Id.* at 15
9

10
11 KAPO appeals to constitutional principles which are beyond the Board’s jurisdiction and
12 must be reserved for resolution by the courts. The GMA, in fact, imposes no burden on
13 the County to prove objectivity or reasonable necessity; to the contrary, under the GMA,
14 the County’s action is presumed valid upon adoption.
15

16 KAPO asserts that there are GMA compliance questions for the Board to resolve, but
17 KAPO cites to and relies on cases decided on a constitutional basis.⁵⁹ Again, the *Keesling*
18 *CAO* case is instructive. In her challenge to King County’s CAO, Ms. Keesling alleged
19 violation of the property rights goal of the GMA, citing numerous court cases in support.
20 However, when the Board reviewed each of the cases, it found that “the legal precedents
21 relied on by Petitioner here construe state and federal constitutional protections ...
22 Whether or not King County’s rural land use restrictions amount to inverse condemnation
23 or a ‘taking’ must be decided in the courts, not by this Board.” *Keesling CAO*, at 29 (see
24 cases cited at fn. 21).
25

26
27 KAPO’s claims in Legal Issues 6 and 8 [KAPO PFR Issues D and F] based on
28 substantive due process, “void for vagueness,” and “takings” are beyond this Board’s
29 jurisdiction and are **dismissed**.
30

31 Abandoned issues
32

33 KAPO PFR Issue F.4, objecting to the terminology – “habitat,” “function” and “values” –
34 as unduly vague and subjective, and PFR Issue F.5, objecting to the provisions of KCC
35 19.200.225(E), and KCC 19.300.315(G)(2), were not addressed in KAPO’s opening brief
36 and are **abandoned**.
37
38
39
40
41

42 ⁵⁹ As the County notes, KAPO cites to the following as the legal authority for its arguments in these issues:
43 *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990)(considering constitutional
44 takings and substantive due process claims); *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867
45 (2002)(discussing the applicability of RCW 82.02.020, which is not within this Board’s jurisdiction to hear,
46 nor was it even alleged to have been violated in KAPO’s PFR); *Nollan v. California Coastal Comm.*, 483
47 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677(1987)(considering constitutional takings claims and
48 establishing the nexus requirement); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d
49 304 (1994)(considering constitutional takings claims and establishing the reasonable relationship/rough
50 proportionality requirement); *Unlimited v. Kitsap County*, 50 Wash. App. 723, 750 P.2d 651
(1988)(considering constitutional takings claims); and *Anderson v. Issaquah*, 70 Wash. App. 64, 851 P.2d
744 (1993)(considering constitutional due process claims for vagueness).

1
2 We conclude that the plain language of chapter 36.70A demonstrates the
3 *legislature's intent that GMA counties and cities exercise some measure of*
4 *control over preexisting uses in critical areas.* Reading a broad exemption
5 into critical areas regulation for preexisting uses would frustrate, not
6 further, the legislature's intent.
7

8
9 130 Wn.App. at 137 (emphasis supplied).

10
11 Lastly, as to KAPO's assertion that the CAO violates the property rights goal of the
12 GMA because it is arbitrary and discriminatory, again, KAPO has not proved its case.
13 As noted *supra*, a review of the County's records in enacting the CAO, from workshops,
14 to committees, to review of scientific documents, demonstrates that the CAO was
15 adopted through a reasoned process and not on a "whim." The Ordinance is not arbitrary.
16 And, as the County correctly noted in its Response, the CAO applies to all persons within
17 Kitsap County, both property owners and non-property owners. The Ordinance is not
18 discriminatory. Again, see *Keesling CAO*, at 28-33.
19

20 The Board finds that Petitioner KAPO has **failed to carry the burden of proof** with
21 respect to Legal Issues 6 and 8. Further, to the extent that Kitsap County's CAO may
22 apply to existing land uses, including the built environment, this Board is governed by the
23 *Clallam County* holding. Legal Issues 6 and 8 [KAPO PFR issues D.1, D.2, D.3, D.6,
24 F.1, F.2., F.3, F.6, and F.7] are **dismissed**.
25

26 27 *Conclusion*

28
29 The Board finds that Legal Issues 6 and 8 [KAPO PFR Issues D and F] assert
30 constitutional issues. The Board has no jurisdiction over KAPO's constitutional claims,
31 whether substantive due process or property rights. All constitutional claims in Legal
32 Issue Nos. 6 and 8 [KAPO PFR Issues D.1, D.2, D.3, D.6, F.1, F.2., F.3, F.6, and F.7] are
33 **dismissed with prejudice**.⁶⁷
34

35
36 The Board finds and concludes that KAPO has **failed to carry its burden of proof** that
37 the CAO Update violated RCW 36.70A.050, .060(2), .172 or failed to consider and apply
38 GMA Goal 6 – RCW 36.70A.020(6) – as set forth in Legal Issues 6 and 8 [KAPO PFR
39 Issues D.1, D.2, D.3, D.6, F.1, F.2., F.3, F.6, and F.7].⁶⁸ Legal Issues 6 and 8 are
40 **dismissed with prejudice**.
41

42 VI. ORDER

43
44
45
46
47 regulations, but *policies* intended to protect critical areas. RCW 36.70A.172. With this language, the
48 legislature signaled its intent that the counties regulate critical areas, including existing uses, to advance the
49 GMA's goals. RCW 36.70A.020." 130 Wn.App. at 135-36 (emphasis in original).

50 ⁶⁷ The Board understands that these issues are reserved for appeal to the courts.

⁶⁸ KAPO PFR Issues F.4 and F.5 are deemed abandoned and dismissed, *supra*, fn. 59.

1 Based upon review of both Petitions for Review, the briefs and exhibits submitted by the
2 parties, the GMA, prior Board Orders and case law, having considered the arguments of
3 the parties, and having deliberated on the matter, the Board ORDERS:
4

- 5
- 6 1. Petitioner KAPO abandoned Legal Issue No. 3. Alternatively, KAPO did not
7 carry its burden of proof with respect to Legal Issue No. 3, and the Board found
8 that the County complied with RCW 36.70A.020(11), .035, and .140. Legal Issue
9 No. 3 is **dismissed**.
 - 10
 - 11 2. Petitioner KAPO failed to carry its burden of proof with respect to Legal Issue
12 Nos. 4, 5, 6, and 8, challenging Kitsap County's adoption of various provisions of
13 Ordinance No. 351-2005 for failure to comply with RCW 36.70A.480(5), .172,
14 .050, .060(2), and .020(6). Legal Issue Nos. 4, 5, 6, and 8 are **dismissed**.
 - 15
 - 16 3. Kitsap County's adoption of Ordinance No. 351-2005, the Critical Areas
17 Ordinance, was **clearly erroneous** with respect to certain wetlands exemptions
18 and certain marine buffers provisions, as set forth in this order. The Ordinance
19 provisions challenged in Legal Issue Nos. 1 and 2 [KCC 19.200.210 and KCC
20 Table 19.300.315] **do not comply** with the requirements of RCW 36.70A.060,
21 .130, .170, and .172 and **are not guided** by GMA goals RCW 36.70A.020(9) and
22 (10).
23
 - 24
 - 25 4. Therefore the Board **remands** Ordinance No. 351-2005 to Kitsap County with
26 direction to the County to take legislative action to comply with the requirements
27 of the GMA as set forth in this Order.
28
 - 29 5. The Board sets the following schedule for the County's compliance:
30
 - 31
 - 32 • The Board establishes **February 23, 2007**, as the deadline for Kitsap
33 County to take appropriate legislative action.
 - 34 • By no later than **March 9, 2007**, Kitsap County shall file with the Board an
35 original and four copies of the legislative enactment described above, along with a
36 statement of how the enactment complies with this Order (**Statement of Actions
37 Taken to Comply - SATC**). By this same date, the County shall also file a
38 **Compliance Index**, listing the procedures (meetings, hearings etc.) occurring
39 during the compliance period and materials (documents, reports, analysis,
40 testimony, etc.) considered during the compliance period in taking the compliance
41 action.
 - 42 • By no later than **March 19, 2007**,⁶⁹ the Petitioners may file with the Board
43 an original and four copies of Response to the County's SATC.
 - 44 • By no later than **March 26, 2007**, the County may file with the Board a
45 Reply to Petitioners' Response.
46
 - 47
 - 48

49
50

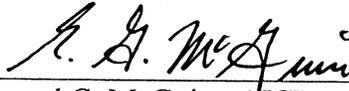
⁶⁹ March 19, 2007, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

1 • Each of the pleadings listed above shall be simultaneously served on each of
2 the other parties to this proceeding, including intervenors, and upon *amici*, at their
3 request.

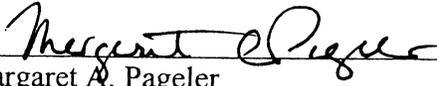
4 • Pursuant to RCW 36.70A.330(1), the Board hereby schedules the
5 Compliance Hearing in this matter for **April 2, 2007, at 10:00 a.m.** The hearing
6 will be held at the Board's offices.⁷⁰ If the parties so stipulate, the Board will
7 consider conducting the Compliance Hearing telephonically. If Kitsap County takes
8 the required legislative action prior to the February 23, 2007, deadline set forth in
9 this Order, the County may file a motion with the Board requesting an adjustment to
10 this compliance schedule.
11
12
13
14
15

16 So ORDERED this 28th day of August, 2006.
17

18 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
19
20
21
22

23 
24

25 Edward G. McGuire, AICP
26 Board Member
27
28

29 
30

31 Margaret A. Pageler
32 Board Member
33
34
35
36

37 Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party
38 files a motion for reconsideration pursuant to WAC 242-02-832.⁷¹
39
40

41 _____
42 ⁷⁰ The Board's office will relocate on October 10, 2006, to Suite 2348, Bank of America Fifth Avenue
43 Plaza, 800 Fifth Avenue, Seattle.

44 ⁷¹ Pursuant to RCW 36.70A.300 this is a final order of the Board.

45 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order
46 to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together
47 with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering
48 the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all
49 other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
50 WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for
filing a petition for judicial review.

APPENDIX D

**AR V8, Tab 87
(Order Finding Compliance)**

1 3. Kitsap County's adoption of Ordinance No. 351-2005, the Critical Areas
2 Ordinance, was **clearly erroneous** with respect to certain wetlands
3 exemptions and certain marine buffers provisions, as set forth in this
4 order. The Ordinance provisions challenged in Legal Issue Nos. 1 and 2
5 [KCC 19.200.210 and KCC Table 19.300.315] **do not comply** with the
6 requirements of RCW 36.70A.060, .130, .170, and .172 and **are not**
7 **guided** by GMA goals RCW 36.70A.020(9) and (10).
8

9
10 4. Therefore the Board **remands** Ordinance No. 351-2005 to Kitsap County
11 with direction to the County to take legislative action to comply with the
12 requirements of the GMA as set forth in this Order.
13

14 5. The Board sets the following schedule for the County's compliance:
15

16 • The Board establishes **February 23, 2007**, as the deadline for
17 Kitsap County to take appropriate legislative action.
18

19 • By no later than **March 9, 2007**, Kitsap County shall file with the
20 Board an original and four copies of the legislative enactment described
21 above, along with a statement of how the enactment complies with this
22 Order (**Statement of Actions Taken to Comply - SATC**). By this same
23 date, the County shall also file a **Compliance Index**, listing the
24 procedures (meetings, hearings etc.) occurring during the compliance
25 period and materials (documents, reports, analysis, testimony, etc.)
26 considered during the compliance period in taking the compliance action.
27

28 • By no later than **March 19, 2007**, the Petitioners may file with the
29 Board an original and four copies of Response to the County's SATC.
30

31 • By no later than **March 26, 2007**, the County may file with the
32 Board a Reply to Petitioners' Response.
33

34 • Each of the pleadings listed above shall be simultaneously served
35 on each of the other parties to this proceeding, including interveners, and
36 upon *amici*, at their request.
37

38 • Pursuant to RCW 36.70A.330(1), the Board hereby schedules the
39 Compliance Hearing in this matter for **April 2, 2007, at 10:00 a.m.** The
40 hearing will be held at the Board's offices. If the parties so stipulate, the
41 Board will consider conducting the Compliance Hearing telephonically. If
42 Kitsap County takes the required legislative action prior to the February
43 23, 2007, deadline set forth in this Order, the County may file a motion
44 with the Board requesting an adjustment to this compliance schedule.
45

46 FDO, at 53-54.
47

48 On March 12, 2007 the Board received "Respondent Kitsap County's Statement of
49 Actions Taken to Comply" (**Kitsap SATC**), and the County's "Compliance Index"
50 (**Compliance Index**). The Compliance Index lists approximately 220 items. *See*
Attachment A to SATC. Also attached to the SATC were 19 Exhibits from the
Compliance Index. To achieve compliance, the County adopted Ordinance No. 376-2007

1 during its remand period. See Attachment B to SATC. Consequently, Ordinance No.
2 376-2007 is the subject of the Board's compliance review.
3

4 On March 21, 2007, the Board received "Suquamish Tribe's Response to the County's
5 Statement of Actions Taken to Comply" (**Suquamish Response**). Attached to the
6 submittal was a copy of an unidentified exhibit, eventually determined to be Compliance
7 Index Ex. 1460.
8

9
10 On March 21, 2007, the Board also received "Response of Petitioner Hood Canal
11 Environmental Council, et al. To Kitsap County's Statement of Actions Taken to
12 Comply" (**Hood Canal Response**). Attached to the submittal were copies of Compliance
13 Index Exs. 1436 and 1492.
14

15 Finally, on March 21, 2007, the Board received "KAPO's Response to Kitsap County's
16 Statement of Actions Taken to Comply" (**KAPO Response**). KAPO attached three
17 exhibits¹ that were not identified as part of the compliance record.
18

19 On March 27, 2007, the Board received "Respondent Kitsap County's Reply RE:
20 Statement of Actions Taken to Comply" (**Kitsap Reply**).
21

22 All filings were timely.
23

24
25 The Board conducted the Compliance Hearing on April 2, 2007, at 10:00 a.m. at the
26 Board's offices Suite 2356, 800 Fifth Avenue, Seattle, Washington. Board Member
27 Edward G. McGuire convened the compliance hearing.² Board Member David O.
28 Earling, Law Clerk, Julie Taylor, and Board Extern, Moani Russell were also present for
29 the Board. Petitioner Suquamish Tribe was represented by Mark Bubenick; Petitioner
30 Hood Canal was represented by Alexandria Doolittle and Keith Scully; Petitioner KAPO
31 was represented by Brian Hodges. Lisa Nickel and Jim Bolger represented Respondent
32 Kitsap County. Also in attendance were: Melody Allen and Planning Commissioner
33 Mike Gustavson. Court Reporting services were provided by Barbara E. Hayden of
34 Byers and Anderson. The Compliance Hearing was adjourned at approximately 11:00
35 a.m. The Board ordered a transcript of the compliance hearing (**CH Transcript**).
36
37

38 On April 9, 2007, the Board received the CH Transcript.
39
40
41

42
43 ¹ Exhibit 1 is a website printout of a Kitsap Sun article dated 2/27/07, entitled "Commissioners Vote in
44 Favor of Larger Buffers" Having been produced after the remand action, this exhibit will not be
45 considered as part of the compliance record. Exhibit 2 is entitled "Advisory Memorandum: Avoiding
46 Unconstitutional Takings of Private Property, dated December 2006, prepared by Attorney General Rob
47 McKenna [Michael S. Grossman, Alan D. Copsy and Katharine G. Shirley, principal authors]. The Board
48 takes official notice of this offering [**Compliance Hearing Ex. 1**]. Exhibit 3 is a summary table of an
49 insurance company survey entitled "The Impact of Nonconforming Status on a Homeowner's Ability to
50 Purchase Insurance Coverage: A Telephone Survey of Insurance Companies." This item is already in the
Compliance Index and is identified as **Compliance Index Ex. 1408**.

² Board Member Margaret A. Pageler, the initial Presiding Office in this case, was unable to attend the compliance hearing due to illness. Ms. Pageler did not participate in reaching this decision.

1 On April 16, 2007, the Board received "Notice of Withdrawal and Substitution of
2 Counsel" from the Suquamish Tribe, indicating that Mark Bubenik was withdrawing his
3 appearance on behalf of the Tribe and Melody Allen is now representing the Suquamish
4 Tribe.
5

6 7 **II. DISCUSSION**

8 FDO Context:

9
10
11 The Board's August 28, 2006 FDO found that Kitsap County's adoption of Ordinance
12 No. 351-2005 was clearly erroneous with respect to *certain wetland exemptions* [Remand
13 Issue 1] and *certain marine buffer provisions*. [Remand Issue 2]. These provisions were
14 found to be noncompliant with the requirements of RCW 36.70A.060, .130, .170, and
15 .172 and not guided by GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)]. See
16 8/28/06 FDO, at 53. The Board's FDO directed Kitsap County to take appropriate
17 legislative action to comply with the requirements of GMA. The County's adoption of
18 Ordinance No. 376-2007 was their response to the Board's FDO.
19

20 **A. Remand Legal Issue 1 – Exemption of Small Wetlands from Regulation**

21
22 On remand, Kitsap County adopted Ordinance No. 376-2007, amending its Critical Areas
23 Regulations. Regarding the Small Wetlands Exemption, the County removed the prior
24 exemption, and "chose to regulate the previously unregulated wetlands through the same
25 standards and enforcement mechanism as applied to other wetlands." SATC, at 4-5; see
26 also Ordinance No. 376-2007, Section 4, at 3-5. The County contends that now all
27 wetlands, regardless of size or isolation are now regulated. *Id.* at 5. Additionally, the
28 County instituted a "compensatory mitigation" program for the previously un-regulated
29 wetlands. *Id.* The County notes that Petitioners Futurewise, People for Puget Sound
30 Hood Canal and KCRP, agreed and supported this approach. *Id.* at 6.
31
32

33
34 In response to the SATC, Petitioners Hood Canal concurred that the County's removal of
35 the small wetland exemption and its chosen path of regulation would comply with the
36 GMA. Hood Canal Response, at 3. The Suquamish Tribe also concurred that the
37 removal of the small wetland exemption satisfied the concerns of the Tribe and would
38 comply with the GMA. Suquamish Response, at 1. Kitsap Alliance of Property Owners
39 (KAPO) did not respond to this issue in their Response to SATC. KAPO Response, at 1-
40 17.
41

42 In the County's reply, the County noted the concurrence, or lack of objection, to the
43 County's remand action regarding small wetlands, and urged the Board to enter a finding
44 of compliance on this issue. Kitsap Reply, at 3.
45

46
47 At the April 2, 2007 Compliance Hearing, Petitioners Hood Canal and Suquamish Tribe
48 affirmed their support of the County's action on this issue. Petitioner KAPO, again, took
49 no position or offered no comment on the removal of the small wetlands exemption. CH
50 Transcript, at 7-8 and 18.

1
2 The Board agrees that the County's adoption of Ordinance No. 376-2007, specifically the
3 removal of the small wetland exemption and subsequent regulation of these wetlands
4 under the regular wetland standards, including the wetland report requirement and
5 compensatory mitigation procedure [Ordinance 376-2007, Section 4, at 3-4], complies
6 with the requirements of RCW 36.70A.060, .130, .170, and .172 and is guided by GMA
7 Goals 9 and 10 [RCW 36.70A.020(9) and (10)]. The Board will enter a **Finding of**
8 **Compliance** in regards to Legal Issue 1.
9

10
11 **B. Remand Legal Issue 2 – Marine Shoreline Buffers**
12

13 On adopting the remand Ordinance No. 376-2007, the County also addressed Marine
14 Shoreline Buffers. *See* Ordinance No. 376-2007, Section 5, at 5-9. The County contends
15 that it modified its noncompliant 35 foot marine shoreline buffers after reviewing the best
16 available science (**BAS**) pertaining to the function and values of the adjacent critical
17 areas, and considering how shorelines are already protected by other means. SATC, at 6-
18 7. As a result of the County's remand review, the County "chose to differentiate between
19 its urban designated shorelines and its rural and semi-rural shorelines. The County then
20 modified its rural and semi-rural shoreline to a buffer width of 100 feet, and its urban
21 shorelines to a buffer width of 50 feet." *Id.* at 8.
22

23
24 Each of the Petitioners asserted that the County's increase in its marine buffer widths was
25 based upon upland Shoreline Management Program (SMP) designations, and not related
26 to the function and values of the critical areas that were to be protected. Suquamish
27 Response, at 3-4; Hood Canal Response, at 3-8;³ and KAPO Response, at 6-15.
28 Additionally, the Suquamish Tribe and Hood Canal Petitioners questioned the County's
29 proposed buffer reduction procedures. *Id.* at 5-6; and *Id.* at 3 and 8, respectively.
30

31
32 The County replied that it had based its designation upon review of the function and
33 values of marine habitats since the buffer widths were derived from the amount of
34 protection to various critical area functions and values could be achieved through various
35 buffer widths. SATC, at 8-16 [rural and semi-rural], 16-22 [urban]; and County Reply, at
36 3-12. The County detailed its evaluation process based upon the same BAS used in the
37 prior proceeding, namely the May and Knutsen and Naef reports.⁴ *Id.* To support its
38 regulatory distinction between urban and rural environments, the County relied upon
39 Pentec Environmental, Key Peninsula, Gig Harbor, and Islands Watershed Nearshore
40 Salmon Habitat Assessment, 2003 – Ex. 1596. Additionally, the County noted that it is
41 embarking upon a shoreline habitat inventory program as part of its required update to its
42 Shoreline Management Program. *Id.*
43

44 At the CH, each party reasserted the claims and arguments made in prior briefing.
45

46
47
48 ³ The Board notes that the primary exhibit Hood Canal relies upon for urging larger buffers (150'), Ex,
49 1436 (1/19/07 Charnas memo), also turns to the SMP designations. *See* Ex. 1436; CH Transcript, at 34..

50 ⁴ Christopher May, Stream-Riparian Ecosystem in the Puget Sound Lowland Eco-Region: A Review of
Best Available Science, 2003 – Ex. 91; and K. L. Knutsen and V.L. Naef, Management Recommendations
for Washington's Priority Habitats: Riparian, 1997 – Ex. 1363.

1
2 Kitsap County has designated all its marine shorelines as Fish and Wildlife Habitat
3 Conservation Areas (FWHCA). In the FDO, the Board found that the County's
4 designation was supported by competent science in the record. However, the Board
5 found that the County's marine shoreline regulations were flawed because, when tested
6 against science in the record: 1) the 35' buffer widths were too narrow to protect the
7 range of habitat functions and values; and 2) the buffers were assigned based upon
8 shoreline master program (SMP) land use designations.
9

10
11 In adopting Ordinance No. 376-2007 the County increased all the marine buffer widths
12 and has identified from science in its record that the chosen widths are within the buffer
13 ranges to protect marine shoreline habitat functions and values.
14

15 The Petitioners focus on the Board's discussion of the County's marine buffers being
16 keyed to SMP land use designations, not the function and values of the critical areas. *See*
17 FDO, at 39-41. Petitioners are correct that the Board was critical of the County's
18 approach to regulating its marine shorelines simply based upon SMP designations.
19 However, as the County correctly points out in its reply, "The Board's basis for
20 discussing the use of Shoreline Management Program designations was the lack of
21 evidence of a link between the upland designations and the nearshore environment. The
22 new BAS in the County's record establishes this evidence [as discussed in the SATC.]"
23 County Reply, at 12. The Board agrees.
24
25

26 As described and discussed in the County's SATC, the County has linked its increased
27 buffer widths for semi-rural, rural and urban⁵ SMP designations, to the function and
28 value of critical fish and wildlife conservation areas. The County showed that the chosen
29 buffer widths provide increased protections to marine habitat by controlling water
30 temperature, sediment, erosion and providing large woody debris, each of which is a
31 contributing factor to habitat protection and conservation. This linkage demonstrates a
32 basis for protection and limiting the amount of pollution and sediment that could cause
33 further degradation to these habitats. This was the missing link in the County's prior
34 effort. *See Seattle Audubon Society v. City of Seattle*, CPSCMHB Case No. 06-3-0024,
35 Final Decision and Order, (Dec. 11, 2006), at 34-35. [Finding that 100' marine shoreline
36 buffer requirement was supported by science in Seattle's record.]
37
38

39 As to the buffer reduction procedures, the County clarified, and Petitioners Suquamish
40 Tribe and Hood Canal acknowledged that the buffer reduction process has limited
41 application, as it is only available for the 50' buffer in the urban areas; it is not available
42 for the semi-rural and rural areas. CH Transcript, at 16-17. Additionally, the County
43 clarified that such buffer reductions could not be granted unless the critical area function
44 and value could be protected. This would typically occur through a habitat management
45 plan. CH Transcript, at 25-26. The Board finds that the County's buffer reduction
46 procedures, which include provisions for habitat management plans and the preservation
47
48
49
50

⁵ Specific characteristics of the County's 8.5 miles of unincorporated urban marine shoreline are identified in Index 1577 and described in the SATC, at 16-18.

1 of the function and values of the critical areas, is not clearly erroneous. *See*, analogously,
2 *Seattle Audubon*, FDO, at 39. [Allowing limited buffer incursions where fully mitigated.]
3

4 The Board notes that, as part of its SMP update, the County is embarking upon an
5 inventory of its shoreline habitats. *See* CH Transcript, at 15, 21, and 28 through 31. The
6 Board agrees that completion of this inventory may enable the County to refine its
7 protections of its marine shorelines. The GMA scheme of protecting critical areas based
8 upon best available science, contemplates that new information will lead to more
9 effective regulation over time. Future marine shoreline designations (or de-designations)
10 will undoubtedly be more fine-grained, and buffers or other protections more directly
11 keyed to site-specific functions and values. However, the present buffers are in place and
12 should not be viewed as “interim.”
13

14
15 The Board finds and concludes that the County’s actions on remand were not clearly
16 erroneous and the Board will enter a Finding of Compliance on Remand Legal Issue 2.
17

18 Conclusions – Remand Legal Issue 1 and 2

19
20 Regarding the small wetland exemption question, Remand Legal Issue 1, the Board finds
21 and concludes that the County’s adoption of Ordinance No. 376-2007, amending Chapter
22 19.200 KCC, **complies** with the requirements of RCW 36.70A.060, .130, .170, and .172
23 and **is guided** by GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)].
24
25

26 Regarding the marine shoreline buffers question, Remand Legal Issue 2, the Board finds
27 and concludes that the County’s adoption of Ordinance No. 376-2007, amending Chapter
28 19.300 KCC, **complies** with the requirements of RCW 36.70A.060, .130, .170, and .172
29 and **is guided** by GMA Goals 9 and 10 [RCW 36.70A.020(9) and (10)].
30
31

32 III. FINDING OF COMPLIANCE

33
34 Based upon review of the August 28, 2006 FDO, the SATC, the written Responses and
35 Reply to the SATC, Ordinance No. 376-2007, the oral arguments of the parties, and
36 having deliberated on the matter as reflected, *supra*, the Board enters a **Finding of**
37 **Compliance** for Kitsap County.
38

39 IV. ORDER

40
41 Based upon review of the GMA, the Board’s August 28, 2006 Final Decision and Order,
42 the Statement of Actions Taken to Comply, Ordinance No. 376-2007, the briefs and
43 exhibits, and presentations made by the parties at the Compliance Hearing, and having
44 deliberated on the matter, the Board ORDERS:
45

- 46
47 • Kitsap County’s adoption of Ordinance No. 376-2007 corrected the
48 compliance deficiencies found by the Board and required by the GMA. The
49 adoption of Ordinance No. 376-2007, amending Kitsap County’s Critical
50 Areas regulations [Chapters 19.200 and 19.300 Kitsap County Code], now

1 **complies** with the goals and requirements of the GMA [RCW 36.70A.060,
2 .130, .170, .172, .020(9) and (10)] as discussed in the Board's August 28,
3 2006 Final Decision and Order. The Board therefore enters a **Finding of**
4 **Compliance** for Kitsap County.
5

- 6
- 7 ■ The matter of Hood Canal, et al., v. Kitsap County, CPSGMHB Consolidated
8 Case No. 06-3-0012c, is **closed**.
- 9

10 So ORDERED this 30th day of April, 2007.

11
12 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
13

14
15
16 
17 _____
18 David O. Earling
19 Board Member

20
21 
22 _____
23 Edward G. McGuire, AICP
24 Board Member
25

26
27
28 Note: This order constitutes a final order, as specified by RCW 36.70A.300, unless a party files a motion
29 for reconsideration pursuant to WAC 242-02-832.
30