

COURT OF APPEALS  
DIVISION II

NO. 38017-0-II

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STATE OF WASHINGTON

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**IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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KITSAP ALLIANCE OF PROPERTY OWNERS, WILLIAM PALMER,  
AND RON ROSS,  
Petitioners,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS  
BOARD, AN AGENCY OF THE STATE OF WASHINGTON, ET AL.,  
Respondents,

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**HOOD CANAL RESPONDENTS' BRIEF**

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Tim Trohimovich, WSBA # 22367  
Futurewise  
814 Second Ave., STE 500  
Seattle, Washington, 98104  
t: 206.343.0681  
f: 206.709.8218  
email: tim@futurewise.org

Counsel for Hood Canal  
Respondents

## TABLE OF CONTENTS

Table of Contents.....	i
Table of Cases.....	iii
I. Introduction.....	1
II. Assignments of Error .....	2
III. Statement of the Case.....	2
IV. Argument .....	4
A. Standard of Review.....	4
B. The application of Kitsap County’s Critical Areas Ordinance within its shorelines jurisdiction is appropriate. ....	6
C. Kitsap County used the Best Available Science to protect and designate its critical areas, as required by the Growth Management Act. 13	
1. Best, Really Valid .....	15
2. Available .....	16
3. Science .....	16
D. Kitsap County’s Critical Areas Ordinance properly designates marine shorelines as critical areas because the best available science showed they were.....	19
E. Best Available Science supports the marine shoreline buffers adopted by the County. ....	28
F. KAPO’s arguments regarding the Shoreline Management Act are outside the scope of this proceeding. ....	39

G. Kitsap County's shoreline buffers do not violate RCW 82.02.020.  
42

V. Conclusion ..... 48

VI. Proof of Service ..... 1

## TABLE OF CASES

### Cases

Burton v. Clark County, 91 Wn.App. 505, 958 P.2d 343 (1998). .....	43, 46
Citizens' Alliance for Property Rights v. Sims, 145 Wn. App. 649, 187 P.3d 786 (2008).....	47
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U. S. 687, 702-03 119 S.Ct. 1624 (1999).....	42
City of Olympia v. Drebeck, 156 Wn.2d 289, 302, 126 P.3d 802 (2006).	43
City of Redmond v Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091, 1093 (1998).....	5
Clark County Natural Resources Council (CCNRC), et al. v. Clark County, et al., WWGMHB Case No. 96-2-0017c, Final Decision and Order (December 6, 1996). .....	15, 16
Davidson v. Hensen, 135 Wn.2d 112, 954 P.2d 1327 (1998).....	10
Diehl v. Mason County, 94 Wash.App. 645, 651, 972 P.2d 543 (1999)....	6
Diehl, et al., v. Mason County, WWGMHB Case No. 95-2-0073 Compliance Order #16 (Aug 23, 2002) .....	34
DOE/CTED v. City of Kent, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19, 2006). .....	18
Dolan v. City of Tigard, 512 U.S. 374 (1994). .....	42, 43, 47
Evergreen Island et al. v. City of Anacortes, WWGMHB Case No. 05-02-0016, Final Decision and Order (Dec. 27, 2005).....	11
Ferry County v. Concerned Friends of Ferry County and Eastern Washington Growth Management Hearings Board, 155 Wn.2d 824, 123 P.3d 102 (2005).....	18, 22

Futurewise et al. v. City of Anacortes et al., 164 Wn.2d 242, 189 P.3d 161 (2008).....	passim
Green Valley, 142 Wn.2d at 553, 14 P.3d at 139. ....	5, 6
Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 96 Wn. App. 522, 530-531, 979 P.2d 864 (1999).....	16
Hood Canal et al. v. Kitsap County, CPSGMHB Case No. 06-3-0012c, Final Decision and Order (Aug. 28, 2006) .....	3, 7, 20, 39
Hood Canal et al. v. Kitsap County, CPSGMHB Case No. 06-3-0012c, Order Finding Compliance (Apr. 30, 2007).....	4
In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) .....	10
Isla Verde Int'l Holdings v. City of Camas, 146 Wn.2d 740, 763, 49 P.3d 867 (2000).....	43, 44, 45
KAPO v. Central Puget Sound Growth Mgmt. Hearings Bd., No. 06-2-02271-0, Memorandum Opinion and Order (Kitsap Super. Ct. Jun. 26, 2008) .....	3
King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000).....	5
King County v. Washington State Boundary Review Bd. for King County, 122 Wn.2d 648, 860 P.2d 1024 (1993).....	40
Nollan v. California Coastal Comm'n., 483 U.S. 825, 107 S.Ct. 3141 (1987).....	42, 47
Obert v. Env'tl. Research & Dev. Corp., 112 Wn.2d 323, 340, 771 P.2d 340 (1989).....	8, 9
Protect the Peninsula's Future & Washington Env'tl. Council v. Clallam County, WWGMHB Case No. 00-2-0008, Corrected Final Decision and Order, Final Decision and Order (December 19, 2000).....	15

Skagit Audubon Society, et al. v. Skagit County, WWGMHB Case No., Final Decision and Order (Aug. 9 2000). .....	17
State v. Gonzalez, 77 Wn.App. 479, 486, 891 P.2d 743 (1995).....	10
Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd., 161 Wn.2d 415, 166 P.3d 1198 (2007)....	14
Swinomish Indian Tribal Community, et al. v. Skagit County, et al., WWGMHB Case No. 02-2-0012c, Compliance Order (December 8, 2003). .....	14
Tulalip Tribes of Washington (Tulalip I) v. Snohomish County, CPSGMHB Case No. 96-3-0029, Final Decision and Order, (Jan. 8, 1997). .....	13, 14, 29
Whidbey Environmental Action Network [WEAN] v. Island County, 122 Wn. App. 156, 93 P.3d 885 (2004). .....	15, 29

**Statutes**

RCW 34.05.570 .....	2
RCW 36.70A.030.....	13, 20
RCW 36.70A.060(2).....	passim
RCW 36.70A.170.....	13, 20, 29
RCW 36.70A.172.....	passim
RCW 36.70A.480.....	7, 19
RCW 82.02.020 .....	43
RCW 90.58.030 .....	6

**Other Authorities**

Black’s Law Dictionary 371, 457, 1307 (5 <sup>th</sup> Edition 1979).....	47
---	----

ESHB 1933, Laws of 2003, ch. 321, §1.....	6, 40
Kitsap County Code 19.200.215(C)(2)(a)(2).....	45
Kitsap County Code 19.200.220(C).....	19
Kitsap County Ordinance 351-2005 .....	14

**Rules**

RAP 12.2.....	8, 9
RAP 12.4.....	8
RAP 12.5.....	8, 9

**Regulations**

WAC 173-26-201.....	41
WAC 365-190-080.....	20
WAC 365-195-905.....	15, 17

## I. INTRODUCTION

This appeal follows the Kitsap County Superior Court's June 26, 2008, Opinion and Order affirming on appeal two decisions by the Central Puget Sound Growth Management Hearings Board ("GMHB" or "Board"). Appellant seeks review of the Board's decision.

Both the Board and Superior Court found against Kitsap Alliance of Property Owners, *et al.* (Appellants herein, collectively, "KAPO"), which had argued that Kitsap County had erred in adopting its Critical Areas Ordinance because, in sum, it 1) designated all of its marine shorelines as critical areas, 2) did not use Best Available Science in designating the marine shorelines as critical areas, and 3) it impinged landowners' property rights protected by the Constitution and the GMA.

Hood Canal Respondents had filed a separate petition for review of Kitsap County's Critical Areas Ordinance with the Board. Hood Canal argued to the Board that the 35 foot shoreline buffers adopted by the County were inadequate to protect shorelines in a manner consistent with the Growth Management Act. Hood Canal, as a real party in interest, defended the eventual decision of the Board at the Superior Court and continues to do so here.

## **II. ASSIGNMENTS OF ERROR**

Hood Canal Respondents are satisfied with KAPO's statement of the Assignments of Error, with the following exception: Appellants' third assignment of error states that the Growth Board erred in affirming shoreline buffers "which require that shoreline property owners set aside a portion of their property as a condition to any development permit." Hood Canal cannot agree that this is strictly accurate representation of the Board's holding. The Board found that the buffers in question were established using the Best Available Science—a different proposition than affirmatively finding that property owners have to set aside a portion of their property—and the Board specifically demurred on KAPO's constitutional arguments as beyond its GMA-limited purview. Hood Canal perceives KAPO's argument to be that the Board's order violates the constitution on its face because buffers, inherently, impinge upon landowners' constitutionally protected property rights. This is a question beyond the scope of the Board's decision. None of this is to say that Hood Canal suggests this question is not appropriately raised for the first time on appeal, pursuant to the provisions of APA, RCW 34.05.570(3).

## **III. STATEMENT OF THE CASE**

The challenges reviewed by the Superior Court had been filed with the Board seeking review of Kitsap County's updates to its Critical Areas Ordinance ("CAO") which the County had updated, by adoption of Kitsap County Ordinance No. 351-2005, on December 1, 2005, as required by RCW 36.70A.060(2) and RCW 36.70A.172(1).

Before the Board, KAPO was represented by Pacific Legal Foundation which was also a party and which also represented an amicus party. To borrow the Superior Court's summary, KAPO basically argued to the Board that the County's designation of all shorelines as critical areas violated the Growth Management Act ("GMA"). *KAPO v. Central Puget Sound Growth Mgmt. Hearings Bd.*, No. 06-2-02271-0, Memorandum Opinion and Order (Kitsap Super. Ct. Jun. 26, 2008) at 2. Hood Canal Respondents' basic argument to the Board was that the 35 foot buffers adopted by the County were inadequate to protect shorelines. *Id.*

KAPO's and Hood Canal's petitions were consolidated by the Board which in due course issued a Final Decision and Order finding Kitsap County's shoreline buffers out of compliance with the GMA and remanding the case to the County for corrective legislative action. *Hood Canal et al. v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Final Decision and Order (Aug. 28, 2006) (hereinafter "FDO").

KAPO appealed the Board's FDO to the Superior Court. While that appeal was pending, the County adopted corrective legislation as directed after which the Board held a compliance hearing. The Board found the County's new CAO, which included expanded shoreline buffers, compliant with the GMA. *Hood Canal et al. v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Order Finding Compliance (Apr. 30, 2007) (hereinafter "Compliance Order"). The Compliance Order was also Appealed by KAPO and consolidated with its previous appeal.

On review, the Superior Court found that the Board had not erred in finding the County out of compliance in its FDO or in finding the County's corrective legislation to be GMA compliant.

KAPO exercised its right of appeal, giving rise to the instant action.

#### **IV. ARGUMENT**

##### **A. STANDARD OF REVIEW**

A Growth Management Hearings Board

is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations. The Board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and

requirements of [the GMA]. To find an action “clearly erroneous,” the board must be left with the firm and definite conviction that a mistake has been committed.

*King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133, 138 (2000). (Hereinafter, “*Green Valley*”) (internal citations and quotation marks omitted).

Appeals of a Board decision are based on the record before the Board. *City of Redmond v Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091, 1093 (1998). “The burden of demonstrating that the Board erroneously interpreted or applied the law, or that Board’s order is not supported by substantial evidence, remains on the party asserting the error – in this case ...” KAPO. *Green Valley*, 142 Wn.2d at 553.

#### The Court of Appeals

reviews the Board’s legal conclusions de novo, giving substantial weight to the Board’s interpretation of the statute it administers.” *Diehl v. Mason County*, 94 Wn. App. 645, 652, 972 P.2d 543 (1999). In reviewing the agency’s findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997).

*Green Valley*, 142 Wn.2d at 553. “Local governments have broad discretion in developing [comprehensive plans] and [development

regulations] tailored to local circumstances.” *Diehl v. Mason County*, 94 Wash.App. 645, 651, 972 P.2d 543 (1999). Local discretion is bounded, however, by the goals and requirements of the GMA. *Green Valley*, 142 Wn.2d at 561.

**B. THE APPLICATION OF KITSAP COUNTY’S CRITICAL AREAS ORDINANCE WITHIN ITS SHORELINES JURISDICTION IS APPROPRIATE.**

During the pendency of this case, the Washington Supreme Court decided the case of *Futurewise et al. v. City of Anacortes et al.*, 164 Wn.2d 242, 189 P.3d 161 (2008) (“*Anacortes*”). *Anacortes* addressed the applicability of Critical Areas Ordinances within the 200 foot jurisdiction of the Shoreline Management Act (“SMA”). See RCW 90.58.030(2)(f) for the jurisdictional definition. Consideration of *Anacortes* is a necessary prior to argument on the merits because if, as KAPO suggests, marine shorelines are now within the exclusive jurisdiction of the SMA, the balance of the issues in this case—substantially involving the regulation of shoreline buffers under a GMA-promulgated CAO—are largely moot.

The relevant issue in *Anacortes* was what the impact of ESHB 1933, Laws of 2003, ch. 321, §1 was on the regulation of critical areas within the SMA’s jurisdiction. KAPO argues that “Kitsap County’s adoption of

GMA regulations restricting the use and development of shoreline was clearly erroneous and exceeded its authority.”<sup>1</sup> The Board considered the question of ESHB 1933’s impact on the case, and its decision on the matter was informed by its particular, limited statutory role. The Board found that

there is no single interpretation of the ambiguity inherent in ESHB1933 – specifically RCW 36.70A.480(5) – but a range of reasonable responses by local cities and counties in the Central Puget Sound region. The Board will defer to the County’s decision, based on local circumstances, unless persuaded by Petitioners that the County’s approach was clearly erroneous.

FDO at 28-29. While this was likely the only decision the Board could reach, such deference is not required of this Court, and so the question of ESHB 1933’s impact on Kitsap County’s CAO is ripe.

While the opinion of the Supreme Court in *Anacortes* was issued on July 31, 2008, no mandate has yet been issued by the Clerk. A mandate is “the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review.”

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<sup>1</sup> Petitioners’ Opening Brief at 13. To the extent KAPO seeks to argue that the County’s CAO Update for shorelines creates an “irreconcilable conflict” with its SMP, this issue is not properly raised, as it was dismissed by the Board as being raised for the first time in briefing but not included in KAPO’s 9-page issue statement. FDO at 25.

RAP 12.5(a). Generally, an appellate court retains the power to change or modify a decision until issuance of a mandate. RAP 12.2.

In fact, Motions for Reconsideration pursuant to RAP 12.4 have been filed with the Supreme Court by Futurewise, the State of Washington, and four amici Washington counties, making any reliance upon the opinion of the Court in the instant case premature.

As a result, the opinion in *Anacortes* is not yet the law of the land and is, therefore, not yet binding authority, even were the Court to conclude that the holding in the case was dispositive in the case at bar. KAPO suggests that *Anacortes* is still good authority during the pendency of the motions for reconsideration, i.e. absent a mandate. In support of this proposition, KAPO cites *Obert v. Env'tl. Research & Dev. Corp.*, 112 Wn.2d 323, 340, 771 P.2d 340 (1989) (en banc). *Obert* was a partnership dispute in which a group of limited partners brought action against the general partner, seeking an injunction against the general partner from taking any further actions and an order compelling the general partner to turn over books and records and provide accounting. An ancillary issue at the Supreme Court was the assertion that “that the Court of Appeals erred when it ‘allowed’ the limited partners to continue to act in reliance on the trial court decision pending receipt of the Court of Appeals mandate.”

*Obert*, 112 Wn.2d at 340. The Supreme Court referred to RAP 12.2, cited *supra*, and found that from

the plaintiffs' perspective, such an action was thoroughly unnecessary. For in fact, *until the Court of Appeals issues its mandate pursuant to RAP 12.5, a decision of the Court of Appeals does not take effect.* RAP 12.2. Furthermore, in the event a petition for review is granted, no authority exists for the Court of Appeals to enter its mandate. RAP 12.5. Thus, in this case, it was appropriate for the parties to continue to rely upon the trial court's ruling.

*Id.* (emphasis supplied). Hood Canal thus fails to apprehend in what way this case stands for the proposition that *Anacortes* is binding authority absent the issuance of a mandate by the Supreme Court. It would appear to stand for the opposite proposition, in fact. The same conclusion obtains with respect to the decision of the courts below because, as *Obert* points out, no mandate can issue below once the Supreme Court has granted a petition for review.

Even assuming the contrary, however, the lead decision of the Supreme Court in *Anacortes* is expressed as a plurality opinion. While the lead opinion in the case, as argued by KAPO, did suggest that “critical areas within the jurisdiction of the SMA are governed exclusively by the

SMA,”<sup>2</sup> the actual holding of the lead opinion was: “The decision of the trial court is reversed, and the decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated.” *Anacortes*, 164 Wn.2d 164. This opinion was joined by four justices and signed “result only” by a fifth, Justice Madsen. As a result, there is no majority opinion; the lead opinion is, rather, a plurality.

It is axiomatic that a plurality opinion has only limited precedential value and is not binding on the courts. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (citing *State v. Gonzalez*, 77 Wn.App. 479, 486, 891 P.2d 743 (1995), *review denied*, 128 Wn.2d 1008, 910 P.2d 481 (1996)). Where, as in the case of *Anacortes*, there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds. *Davidson v. Hensen*, 135 Wn.2d 112, 954 P.2d 1327 (1998). In the instant case, no decision garnered a majority, resulting in the narrowest ground being the outcome which Justice Madsen endorsed. Thus the outcome of *Anacortes* endorsed the approach to CAO regulation

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<sup>2</sup> Petitioners’ Opening Brief at 13.

within SMA jurisdiction adopted by the Western Washington Growth Management Hearings Board.

So even assuming, for the sake of argument, that the decision in *Anacortes* is the law of the land, the effect of that would be to reinstate the decision of the Western Washington Board. What the Board said with respect to CAO regulation within Shoreline jurisdiction is that CAOs continue to regulate critical areas within Shoreline's jurisdiction, but that

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new CAO (to the extent it applies in the shorelines) constitutes the segment of its master program which governs protection of critical areas in the shorelines. Review of the critical areas segment of Anacortes' master program is governed by the SMA and those new regulations become effective only after they have been presented to and approved by Ecology under the direction provided in ESHB 1933, that is, as containing regulations that protect the functions and values of critical areas in the shorelines.

*Evergreen Island et al. v. City of Anacortes*, WWGMHB Case No. 05-02-0016, Final Decision and Order (Dec. 27, 2005) at 30.

Ultimately then, if KAPO is correct that *Anacortes* is good law, leaving aside the parties' substantive arguments about the size of buffers, Hood Canal would agree that this case must be remanded to the Board with instructions to remand to the County for submission of the CAO provisions constituting shoreline segments for approval to Ecology.

On the other hand, such a procedural remand may not be necessary. Because no final word from the Supreme Court appears imminent, this Court may undertake independent analysis of the question of applicability of CAOs within Shoreline Jurisdiction. Were the Court to elect to do this, the non-plurality opinion in *Anacortes* is instructive.

Justice Chambers wrote:

Whether we look only at the timing provision of RCW 36.70A.480(3)(a) or at the larger statutory scheme, we should reach the same conclusion. The 2003 legislature intended to transfer protection of the relevant critical areas from the GMA to the SMA as municipalities enact, and Ecology approves, new shoreline master programs. Deciding otherwise does violence to the legislature's clearly expressed purpose that management of critical areas under the SMA take on some of the features of management under the GMA. Since the majority reaches a contrary conclusion, I respectfully dissent.

*Anacortes*, 164 Wn.2d at 251 (Chambers, J., dissenting).

At any rate, the *Anacortes* case does not stand for the proposition that critical areas within the jurisdiction of the SMA are governed exclusively by the SMA. Accordingly, Hood Canal's arguments regarding designation by Kitsap County of its marine shorelines as critical areas under the County's CAO are not moot.

**C. KITSAP COUNTY USED THE BEST AVAILABLE SCIENCE TO PROTECT AND DESIGNATE ITS CRITICAL AREAS, AS REQUIRED BY THE GROWTH MANAGEMENT ACT.**

Critical areas are defined by the Growth Management Act to include wetlands and fish and wildlife habitat conservation areas. RCW 36.70A.030(5). Revised Code of Washington 36.70A.172(1) mandates that local governments designate critical areas, and that they “shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.” RCW 36.70A.060(2). In defining what “protect” requires the Central Board has found that the Growth Management

Act’s requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such eco systems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such eco systems within a watershed or other functional catchment area.

*Tulalip Tribes of Washington (Tulalip I) v. Snohomish County*, CPSGMHB Case No. 96-3-0029, FDO, 1997 WL 29145 (Jan. 8, 1997) at 7; and *Swinomish Indian Tribal Community, et al. v. Skagit County, et al.*,

WWGMHB Case No. 02-2-0012c, Compliance Order, 2003 WL 23305927 (December 8, 2003 at 22-23, quoting *Tulalip I.*

The courts have supported this holding. The Supreme Court, for example, just last year concluded that: “In short, under GMA regulations, local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises.” *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 436, 166 P.3d 1198 (2007).

In this case, the County’s Ordinance properly defines fish and wildlife habitat conservation areas as those areas that support regulated fish or wildlife species or habitats, typically identified by known point locations or specific species (such as den or habitat), or by habitat areas or both. Kitsap County Ordinance 351-2005, at 19.300.310(A).

Counties and cities must consider “best available science” (BAS) in the adoption of development regulations. RCW 36.70A.172. Those regulations, in turn, must “protect the functions and values of critical areas.” RCW 36.70A.060(b). As the Court of Appeals has held, this requires the protection of “... all functions and values.” *Whidbey*

*Environmental Action Network [WEAN] v. Island County*, 122 Wn. App. 156, 174-175, 93 P.3d 885 (2004) *reconsideration denied* July 12, 2004, *review denied* 153 Wn.2d 1025, 110 P.3d 756 (Mar 29, 2005). These requirements must be fulfilled to meet the GMA's planning goals that include conserving natural resource habitat, and protecting the environment. RCW 36.70A.020(9) and (10)

### **1. Best, Really Valid**

“‘Best’ means that within the evidence contained in the record a local government must make choices based upon the scientific information presented to it[.]” and the characteristics of a valid scientific process. *Clark County Natural Resources Council (CCNRC), et al. v. Clark County, et al.*, WWGMHB Case No. 96-2-0017c, Final Decision and Order, 1996 WL 716195 (December 6, 1996) at 7, WAC 365-195-905.

The Board has specifically rejected the “contention that ‘best’ under RCW 36.70A.172(1) includes one, and only one, scientific document.” *Protect the Peninsula's Future & Washington Env'tl. Council v. Clallam County*, WWGMHB Case No. 00-2-0008, Corrected Final Decision and Order, Final Decision and Order 2000 WL 1869951 (December 19, 2000) at 3.

The broader the range of valid science, “the broader the range of discretion allowed” to a county. *CCNRC*, FDO at 7, Where a county incorporates scientific conclusions of equal validity to the other science in the record into its policies or regulations, the county’s choice will not be disturbed. *Honesty in Env’tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 530-531, 979 P.2d 864 (1999).

## **2. Available**

“‘Available’ means not only that the evidence must be contained in the record, but also that the science must be practically and economically feasible[.]” to be implemented as shown by evidence in the record. *CCNRC*, FDO at 7.

## **3. Science**

“[S]cience is a process involving methods used to understand the workings of the natural world. This process consists of four stages: ‘making observations, forming hypotheses, making predictions from these hypotheses, and testing those predictions.’” *Skagit Audubon Society, et al. v. Skagit County*, WWGMHB Case No., Final Decision and Order (Aug. 9

2000) at 10, *aff'd in part, rev'd in part* by *Swinomish Indian Tribal Community v. W. Washington Growth Mgmt. Hearings Bd.*, Case No. 01-2-00278-1, Letter Opinion (Thurston Super. Ct. November 16, 2001) see *Skagit Audubon Society, et al. v. Skagit County*, WWGMHB Case No., Order in Response to Court Remand (Sept.. 6 2002).

The characteristics of a valid scientific process include: findings that have been critically reviewed by qualified scientific experts in the field; the methods used are standard in the field or peer reviewed; the conclusions are logical and the inferences reasonable given the data and methods; the data has been analyzed using standard or peer reviewed quantitative or statistical methods; the data and findings are placed in their proper context; and the assumptions, analytical techniques, and conclusions are well referenced to the relevant, credible scientific literature. WAC 365-195-905. Not all forms of science have all of these characteristics of a valid method, but the more characteristics incorporated, the more reliable the science is likely to be. WAC 365-195-905.

When a local government is adopting development regulations to protect all functions and values of critical areas it must consider best available science, and “shall give special consideration to conservation or

protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1). The standard for determining whether a local government adequately included best available science when making policy and regulations under the GMA has been set out by the Washington Supreme Court in *Ferry County v. Concerned Friends of Ferry County and Eastern Washington Growth Management Hearings Board*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005). The Central Board has also addressed the issue in *DOE/CTED v. City of Kent*, CPSGMHB Case No. 05-3-0034, Final Decision and Order (Apr. 19, 2006) at 42.

Based upon those cases, the four factors to consider are: (1) the scientific evidence contained in the record; (2) whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; (3) whether the decision made by the local government was within the parameters of the GMA as directed by the provisions of RCW 36.70A.172(1); and (4) whether there is a justification of departure from best available science.

Here the county did not attempt to make a “reasoned justification” for a departure from best available science. In that way this case differs

from the situation in the *Swinomish Indian Tribal Community*, 161 Wn2d 415.

**D. KITSAP COUNTY’S CRITICAL AREAS ORDINANCE PROPERLY DESIGNATES MARINE SHORELINES AS CRITICAL AREAS BECAUSE THE BEST AVAILABLE SCIENCE SHOWED THEY WERE.**

Prior to any discussion of the validity of marine shoreline buffers adopted by Kitsap County, it bears keeping in mind that the buffers are not absolute. Taking wetland buffers, for example, the Kitsap Code provides that “[m]odifications to buffer widths may be considered provided that mitigation sequencing is first demonstrated to first avoid, then minimize, and as a last resort, mitigate for unavoidable reductions or alterations to the required wetland buffers.” Kitsap County Code 19.200.220(C).

The GMA does not require the County to create new science before adopting its CAO. The way KAPO has cast its argument would require the County to conduct a detailed scientific inventory of its entire shoreline, in order to comply with the BAS requirement. RCW 36.70A.480(5) provides that:

[s]horelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical area provided by

RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2).

When designating critical areas the GMA mandates that counties and cities:

- (i) Consider the guidelines provided by CTED (RCW 36.70A.170(1));
- (ii) Include best available science (RCW 36.70A.172(1));
- (iii) Give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries (RCW 36.70A.172(1))

As the Board pointed out in the Final Decision and Order (FDO), CTED's guidelines for fish and wildlife habitat conservation area designations are at WAC 365-190-080(5)(a)-(b). Fish and wildlife habitat conservation areas include:

- (i) areas with which endangered, threatened, and sensitive species have a primary association;
- (ii) habitats and species of local importance;
- (iii) commercial and recreational shellfish areas;
- (iv) kelp and eelgrass beds; herring and smelt spawning areas;
- (v) naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat;
- (vi) waters of the state;
- (vii) lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; or
- (viii) state natural areas preserves and natural resource conservation areas.

In addition, WAC 365-190-080(5)(b) provides that counties may consider the following when classifying and designating these areas:

- (i) Creating a system of fish and wildlife habitat with connections between larger habitat blocks and open spaces;
- (ii) Level of human activity in such areas including presence of roads and level of recreation type (passive or active recreation may be appropriate for certain areas and habitats);
- (iii) Protecting riparian ecosystems
- (iv) Evaluating land uses surrounding ponds and fish and wildlife habitat areas that may negatively impact these areas;
- (v) Establishing buffer zones around these areas to separate incompatible uses from the habitat areas; and
- (vi) Restoration of lost salmonid habitat.

This is exactly the process followed by the County in this case. As described below, the science in the record provides substantial evidence supporting the Growth Board's factual finding that best available science underlies Kitsap County designation of all of its shoreline as a critical area. Chinook salmon, and summer chum, are designated as threatened under the Endangered Species Act. See v. 3, tab 38, Index No. 779, NOAA. Final Critical Habitat Designations in Washington, Oregon, Idaho, and California for Endangered and Threatened Pacific Salmon and Steelhead, (August 12, 2005) at 1. The Washington Supreme Court has

acknowledged that waters of the state, such as Hood Canal and Puget Sound, which provide fish and wildlife habitat are and that areas providing habitat for endangered and threatened species are fish and wildlife habitat conservation areas.

¶ 15 Fish and wildlife habitat conservation areas include areas where ETS species have a primary association, habitats and species of local importance, and waters of the state that provide fish and wildlife habitat. WAC 365-190-080(5). Counties and cities should “classify seasonal ranges and habitat elements with which federal and state listed endangered, threatened and sensitive species have a primary association and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.” WAC 365-190-080(5)(c)(i)

*Ferry County*, 155 Wn.2d at 832 (footnotes omitted).

The science in the record demonstrates that the threatened chinook and summer chum salmon are especially dependant on estuaries and marine shorelines, and use nearshore marine and estuarine areas extensively for both juvenile migration, and adult chinook habitat. Index See v. 3, tab 38, No. 590, CAO on CD. Gregory D. Williams and Ronald M. Thom, *White Paper: Marine and Nearshore Modification Issues* (Sequim, WA: Battelle Marine Sciences Laboratory, Pacific Northwest National Laboratory, April 17, 2001) at 12.

East Kitsap County's shorelines account for nearly half of the nearshore habitat in south and central Puget Sound for threatened Chinook salmon and bull trout populations from those areas. See v. 3, tab 38, Index No. 307, Letter from Futurewise, Washington Environmental Council, People for Puget Sound, and West Sound Conservation Council, detailing comments, recommendations and suggestions on the 2nd draft (July 1, 2005) at 13, *citing* East Kitsap Salmon Recover Group meeting minutes. Marine intertidal, nearshore, and sub-tidal areas provide critical habitat for salmon; they provide food, refuge from predators, and a transition zone to physically adapt to saltwater. All juvenile salmon move along the shallows of estuaries and nearshore areas during their out-migration to the sea. Returning salmon and some resident stocks use nearshore habitats as feeding areas as well. See v. 3, tab 38, Index No. 590, CAO on a CD. Gregory D. Williams and Ronald M. Thom, *White Paper: Marine and Nearshore Modification Issues* (Sequim, WA: Battelle Marine Sciences Laboratory, Pacific Northwest National Laboratory, April 17, 2001) at 12. This report has been identified as best available science in *Washington State Office of Community Development, Citations of the Best Available Science for Designating and Protecting Critical Areas* (March 2002) at 23. This document is also in Index No. 590. These are all functions and

values that must be protected to the standard of “no net loss” under the GMA.

The importance of preserving salmon habitat is equaled by preserving sources of food. The significance of insect fallout from riparian vegetation in juvenile salmon (and juvenile and adult cutthroat trout) diets in the marine environment is just being realized, and may play an important role in early marine survival. See v. 3, tab 38, Index No. 590, CAO on a CD. Jim Brennan, Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems pp.13-14 in Lemieux, J.P., Brennan, J.S., Farrell, M., Levings, C.D., and Myers, D. 2004. Proceedings of the DFO/PSAT sponsored Marine Riparian Experts Workshop, Tsawwassen, BC, February 17-18, 2004. Can. Man. Rep. Fish. Aquat. Sci. No. 2680. One study discusses this point with specific regard to some of the shorelines of Kitsap County:

The success of salmon feeding in shallow estuarine and marine areas may have an important influence on the early marine growth and survival of the fish utilizing these areas for rearing (Pearce et al., 1982). Successful feeding and growth depends upon the availability of preferred prey in the right space and time. In the nearshore environment, dietary studies of juvenile salmonids have been sporadic, but have shown interspecific differences in prey selectivity, and intraspecific differences in space and time. However, for those species of salmonids (i.e., cutthroat trout, chinook and chum salmon) known to be most

dependent upon shallow nearshore waters, insects derived from the terrestrial environment appear to play an important role in the diets of these species (Brennan and Higgins unpublished data, in review).

Several studies have shown that chum salmon prey on terrestrially derived insects in northwest estuaries. Simenstad (1998) found that summer chum collected in Hood Canal preyed upon insects. In the central Puget Sound Basin, Cordell et al. (1998, 1999a,b) found that insects were a dominant prey item in chum stomachs and consisted of chironomid fly larvae, pupae/emergent adults, dipteran flies, and spiders.

*Id.*

Juvenile salmon also depend on nearshore small creek mouths and sub-estuaries (often referred to as pocket estuaries) and marsh environments for migration, rearing, and shelter from predators. Studies have found that juvenile salmon use these creek mouths regardless of whether spawning occurs in these creeks. Record v. 3, tab 38, Index No. 332, Letter to the County from WEC, Westsound Conservation Council, Futurewise, and People for Puget Sound (November 14, 2005) at 9 (citing Eric Meamer, Aundrea McBride, Rich Henderson, and Karen Wolf. The Importance of Non-Natal Pocket Estuaries in Skagit Bay to Wild Chinook Salmon: An Emerging Priority for Restoration, May 2003. Skagit System Cooperative Research Department.)

Surveys of salmon utilization in north Hood Canal tidal creek mouths and marsh environments indicate these areas are equally as critical to salmon in the Puget Sound as eelgrass beds. *Id.* (citing Ron Hirschi, Thomas Doty, Aimee Keller, and Ted Labbe. Juvenile Salmonid Use of Tidal Creek and Independent Marsh Environments in North Hood Canal: Summary of First Year Findings, 2003. Port Gamble S’Klallum Tribe Natural Resources.) Another prevalent species found on the shorelines of Kitsap County is Pacific Herring. Record v. 3, tab 38, Index No. 590, CAO on a CD, Washington State Department of Fish and Wildlife *Pacific Herring* at 2. Pacific herring are a key source of food for salmon, orcas, and sea birds. Record v. 3, tab 38, Index No. 332 at 10. The Puget Sound Action Team reported that herring are found specifically along the shores of the Port Gamble area, shorelines between Port Madison and Port Orchard, and the Seabeck area. Record v. 3, tab 38, Index No. 778, State of the Sound 2004 (January 2005) at 48 Puget Sound Action Team, Office of the Governor.

Surf smelt are also found in Kitsap County’s marine shorelines. Index No. 590, CAO on a CD, *Washington State Department of Fish and*

*Wildlife Forage Fish Surf Smelt* – Biology, Documented surf smelt spawning grounds at 2.

KAPO argues that Kitsap County's erred in adopting expanded 50 and 100 foot marine shorelines based upon science that had not been specifically developed for application to shorelines.<sup>3</sup> As just discussed at some length, a great deal of science concerning the impact of inland and shoreline waterways is to be found in the County's record.

As summarized in *Tahoma Audubon Society v. Pierce County*, CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005), the standard under the GMA is: whether best available science was used to protect critical fish and wildlife habitat conservation areas on marine shorelines; (2) whether county regulations give priority to anadromous fish, (3) whether the county's regulations protect the functions and values of marine shorelines as salmon habitat, and (4) whether a vegetative buffer is required. *Pierce County*, at 37. The GMA does not require a detailed inventory of shorelines in order to designate them as critical areas. As long as a county has complied with GMA mandates when designating marine shorelines as critical and has relied on

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<sup>3</sup> Petitioners' Opening Brief at 26.

best available science, the County's designation process is compliant with the GMA. While KAPO has suggested at pages 26-29 of its Opening Brief that more or different science should have been used by the County, this fails to meet KAPO's burden of proof, especially in light of the substantial evidence in the record supporting Kitsap County's decisions. Kitsap County properly culled the various studies in the record and determined that the BAS revealed that its inland waterway and marine shorelines are habitat for Chinook and chum salmon and therefore must be designated as critical areas. This is what the BAS requirement calls for. Kitsap County's decision to designate all shorelines in this particular County as critical areas is well supported by the best available science in the record. Kitsap County has also taken seriously the GMA's mandate to give special consideration to conservation and protection measures necessary to preserve or enhance anadromous fisheries. Therefore, particularly given the state and federal focus on the waters of the Puget Sound and Hood Canal, Kitsap County has properly designated those shorelines that need protection and preservation as critical areas.

**E. BEST AVAILABLE SCIENCE SUPPORTS THE MARINE SHORELINE BUFFERS ADOPTED BY THE COUNTY.**

Marine shoreline buffers of widths eventually adopted by Kitsap County are called for by the best available science in the record in order to protect the functions and values present in Kitsap County's marine shoreline areas. KAPO's argument that the Board erred in not finding that the buffers are too large, in the face of the overwhelming evidence in the record, fails. After a county or city has designated its critical areas, according to the GMA the county "shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170." RCW 36.70A.060(2). In defining what "protect" requires the Central Board written:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such eco systems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such eco systems within a watershed or other functional catchment area.

*Tulalip I*, FDO at 7 and *Swinomish Indian Tribal Community*, Compliance Order at 23-24 (quoting *Tulalip I*). Pursuant to RCW 36.70A.172, Counties and cities must consider BAS in the creation of development regulations, which must, in turn, "protect the functions and values of

critical areas.” RCW 36.70A.060(b). As the Court of Appeals has previously held, this requires the protection of “all functions and values.” *WEAN*, 122 Wn. App. at 174-175. These requirements must be fulfilled to meet the GMA’s planning goals that include conserving natural resource habitat, and protecting the environment. RCW 36.70A.020(9) and (10). The adopted marine shoreline buffers are supported by the record Kitsap County had before it. In fact, there is scientific evidence which suggests that the County’s buffers are still not wide enough to protect the functions and values of marine shoreline areas.

KAPO argues that “[n]either the Board’s decision nor the County’s rationale cites any BAS that correlates stream buffers to the function and values of marine and lake shorelines.”<sup>4</sup> It may be true that such a verbatim statement of connection does not appear in the record, but a recent study in the record on the relationship between local wildlife species and their habitat makes the point that protection of the entire water system supports wildlife, that is healthy *riparian systems* along marine shorelines support abundant and diverse assemblages of wildlife. Record v. 3, tab 38, Index No. 590, Riparian Functions and the Development of

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<sup>4</sup> Petitioners’ Opening Brief at 28, fn. 24.

Management Actions in Marine Nearshore Ecosystems at 11. In fact the science goes so far as to call for “intact” systems:

Healthy (i.e., intact and functional) riparian systems along marine shorelines support abundant and diverse assemblages of wildlife. For example, in our review of the 335 wildlife species known to inhabit all of King County, Washington (King County 1987; Kate Stenberg, personal communication), we identified 263 wildlife species (9 amphibians; 5 reptiles; 192 birds; 57 mammals) known, or expected to have an association with riparian habitat on marine shorelines in Puget Sound.

*Id.*<sup>5</sup>

Whether the particular species is dependent upon riparian areas for all of the essential functions of its life cycle, or only for a specific life stage, “the availability and condition of riparian habitat can be a determining factor in their survival.” Record v. 3, tab 38, Index No. 590, Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems at 11.

Vegetative buffers provide shade that prevents desiccation of organisms living in marine riparian buffers.

[S]olar radiation (which leads to increased temperatures and desiccation) has long been recognized as one of the classic limiting factors for upper intertidal organisms and plays an

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<sup>5</sup> Though this study refers to King County, the habitat and urbanizing context of King County can be likened to that of Kitsap County.

important role in determining distribution, abundance, and species composition (Calvin and Ricketts 1968; Connell 1972; and others). Foster et al. (1986), in their literature review of causes of spatial and temporal patterns in intertidal communities found that the most commonly reported factor responsible for setting the upper limits of intertidal animals is desiccation. Although the influence and importance of shade derived from shoreline vegetation in the Puget Sound nearshore ecosystem is not well understood, it is recognized as a limiting factor to be considered and has prompted investigations to determine direct linkages between riparian vegetation and marine organisms. One such link is the relationship between shade and surf smelt, a common nearshore forage fish found throughout the Puget Sound basin (see Penttila 2001).”

Record v. 3, tab 38, Index No. 590, CAO on a CD. Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems at 12.

KAPO states unequivocally that the “record establishes the lack of scientific evidence necessary to establish a connection between the marine shoreline buffers and any identified impact of development.”<sup>6</sup> This is not accurate. One such place where the impact of development is identified is *White Paper on Marine and Estuarine Shoreline Modification Issues* details some of the effects of development on marine riparian habitat.

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<sup>6</sup> Petitioners’ Opening Brief at 29.

Record v. 3, tab 38, Index No. 590, White Paper: Marine and Estuarine

Shoreline Modification Issues at 40-41. The *White Paper* provides:

Residential and commercial development and impervious surfaces in upland habitats and watersheds can increase storm water runoff, sediment erosion, and loading of nutrients and toxic pollutants resulting in the degradation of water quality in areas of extensive shoreline modification. Increases in shoreline development from housing can increase local nutrient loading to the point of eutrophication (Short and Burdick 1996)

\* \* \*

Shoreline modifications usually involve riparian vegetation removal, which displaces trees and shrubs that normally overhang onto beaches. A substantial mass of allochthonous leaf material can enter the marine system and be transported offshore during extreme high tides (Thom and Albright 1990)...Loss of woody debris also reduces shallow protective cover and nutrients. Light levels in nearshore habitats are increased when anthropogenic shoreline alterations remove overhanging riparian vegetation, which provides shade that regulates heating of the upper intertidal zone. Shade reduces mortality and desiccation stress to insects, marine invertebrates, as well as to fish eggs laid by intertidal spawning fish species, including sand lance and surf smelt (Pentilla 1996, Pentilla 2000). Likewise, the increase in artificial lighting that often accompanies anthropogenic shoreline alterations can modify fish behavior and predator avoidance (Simenstad et al. 1999, Azuma and Iwata 1994). Conversely, shading by anthropogenic shoreline alterations may also unnaturally reduce local light levels, reducing primary productivity rates and eliminating critical shallow water vegetated habitats.

*Id.*

The scientific evidence above specifically addresses the basis for buffers and is reflective of those assessments of the importance of the relationship between species that inhabit the shorelines of Kitsap County and marine riparian shoreline buffers.

The Boards have acknowledged that buffers can be consistent with implementation of the best available science. The Western Washington Growth Management Hearings Board, for example, held that “[u]nder this record, it is clear that WDFW [Washington Department of Fish and Wildlife], and others, consider 100 feet a minimum for [habitat conservation area] buffers.” *Diehl, et al., v. Mason County*, WWGMHB Case No. 95-2-0073 Compliance Order #16 (Aug 23, 2002), 2002 WL 2007137 at \*6. WDFW is currently drafting marine-habitat GMA/CAO guidelines for local jurisdictions in which minimum marine riparian buffers of 150 feet in width are recommended. Record v. 3, tab 38, Index No. 307 at 14 (citing Personal Communication from Daniel E. Penttila, WA Department of Fish and Wildlife to the Honorable Dean Maxwell Mayor of the City of Anacortes, p. 2 (December 30, 2004).

In fact, a publication by WDFW recommends that a Riparian Habitat Area of 76 meters (250 feet) be set for Shorelines of the State, and

Shorelines of Statewide Significance. Record v. 3, tab 38, Index No. 318, Knutson, and Naef. *Management Recommendations for Washington's Priority Habitats*, p. 87 (December 1997). Department of Fish and Wildlife. The rationale for marine buffers are the same as for riparian buffers on freshwater streams and wetlands, filtration for water quality maintenance, wildlife habitat, maintenance of certain microclimate functions, beach shading, nutrient inputs (including juvenile salmonid prey items), bank stabilization, and production of woody debris. *Id.*; Record v. 3, tab 38, Index No. 590, CAO on a CD. Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems at 12.

Puget Sound and Hood Canal are “shoreline[s] of statewide significance,” due to their unique ecological and economic resources. RCW 90.58.030(2)(e)(ii).

The State Legislature has determined Hood Canal to be a rich source of recreation, fishing, aquaculture, and aesthetic enjoyment for its citizens. However, Hood Canal is suffering from nutrient pollution that stimulates excessive algae blooms; decay of the algae robs the water and fish of oxygen. These low oxygen levels have caused extensive fish kills

and could threaten the long-term viability of marine life. Record v. 3, tab 38, Index No. 778, at page ii. In response to this situation, the 2005 Legislature designated Hood Canal as an aquatic rehabilitation zone in order to provide a statutory framework for future regulations and programs directed at recovery. Record v. 3, tab 38, Index. No. 307, at 15-16.

Recommendations more aggressive than WDFW's call for increased buffers appear in the record. Suggestions for marine riparian buffer widths between 60 and 600 meters (roughly 1968 ½ feet) can be found in the scientific literature. One of the authors included in the record, Brennan, has synthesized several studies in the following excerpt:

Knutson and Naef (1997), Desbonnet et al. (1994), and Wenger (1999) have performed extensive literature reviews to determine buffer widths required to maintain riparian functions for wildlife. For Washington State, Knutson and Naef (1997) determined that the average width reported to retain the riparian function for wildlife habitat was 287 feet (88 meters). In their review of the literature on wildlife habitat protection, Desbonnet et al. (1994) show recommendations of 60-100 meters for general wildlife habitat, 92 meters for the protection of significant wildlife habitat, and 600 meters for the protection of critical species. Unfortunately, there has been little discussion of, and even less effort to preserve marine riparian areas for wildlife species in Puget Sound, or elsewhere. This has resulted in a dramatic loss and fragmentation of riparian habitat and associated wildlife.

Record v. 3, tab 38, Index No. 590, CAO on a CD. Jim Brennan, Riparian Functions and the Development of Management Actions in Marine Nearshore Ecosystems p. 11 in Lemieux, J.P., Brennan, J.S., Farrell, M., Levings, C.D., and Myers, D. 2004. Proceedings of the DFO/PSAT sponsored Marine Riparian Experts Workshop, Tsawwassen, BC, February 17-18, 2004. Can. Man. Rep. Fish. Aquat. Sci. No. 2680.

Finally, a study undertaken by Watershed Ecology, LLC, entitled *Stream-Riparian Ecosystems In the Puget Sound Lowland Eco-Region*, is the study relied upon most heavily by the County in making its decision on marine shoreline buffer widths. Record v. 3, tab 38, Index No. 1192, at 10 and Record v. 3, tab 38, Index No. 91: Christopher W. May, *Stream-Riparian Ecosystems In the Puget Sound Lowland Eco-Region A Review of Best Available Science* (Watershed Ecology LLC, 2003).

This study makes an overall recommendation of a 30 meter (98 foot) buffer width for a healthy and forested corridor, suggesting that more may be needed in alternate circumstances, such as the degraded environment of a city. *Id.* at 26.

KAPO asserts that best available science requires a finding that each particular parcel has the functions and values protected by the CAO

before a buffer can be applied.<sup>7</sup> Under this reasoning, the County would be required undertake an individualized analysis of specific geographical units and make individualized findings regarding each one, for each function or value present, and then craft a buffer system which might include thousands of varied designations throughout the County. At the outset, it is unclear what the appropriate unit of analysis for this process would be: should shorelines be measured in ecological terms, with the vegetation, water depth, etc. marking delineations? If so, how specific must the delineations be? Should they be measured by the real property parcel? What if a real property parcel incorporates completely different shorelines in ecological terms, or, conversely, is adjacent to another parcel with identical shorelines?

Thankfully, Kitsap County need not address these questions to comply with the requirements of the GMA. The best available science requirement requires only that the local government make a diligent effort to incorporate BAS in its policymaking decisions. The science in the

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<sup>7</sup> Petitioners' Opening Brief at 27-28, "...Kitsap County did not include 'best available science' demonstrating that the inland stream buffer sizes related to the functions and values of marine shorelines."

record does not support a more specific set of buffers than the County arrived at.

The Board's finding that the County rightly crafted a buffer system with reference to the science in the record is consistent with the requirements of the GMA. As described in detail above, the science in the record supports Kitsap County's designation of its shorelines, including its marine shorelines, as critical habitat because they all support endangered, threatened, or sensitive fish species. The BAS also supports the protection of critical habitat functions by imposing a minimum buffer width of either 50 feet or 100 feet, depending on the type of area.

**F. KAPO'S ARGUMENTS REGARDING THE SHORELINE MANAGEMENT ACT ARE OUTSIDE THE SCOPE OF THIS PROCEEDING.**

As noted above at footnote 1, to the extent KAPO seeks to argue that the County's CAO Update for shorelines conflicts with its SMP, this issue is not properly raised, as it was dismissed by the Board because the issue was raised for the first time in briefing but not included in KAPO's 9-page issue statement. FDO at 25. In the first part of its argument, KAPO engages in extensive argument regarding the interplay between the Growth Management Act and the Shoreline Management Act. As

described in detail above, the County has designated critical areas and shoreline buffers based upon evidence in the record, as required by the GMA, not by virtue of their status as shorelines of statewide significance under the SMA. KAPO's argument about the interplay between the SMA and GMA must fail, therefore, because the issue before the Court is a review of the Board's decision which necessarily limited itself to compliance with the GMA.

The Ordinance in question here was enacted under the Growth Management Act. As discussed at the outset of this Brief, the only question involving the SMA which is relevant to the instant case is whether CAOs adopted pursuant to the GMA can be held to apply to territory falling within SMA jurisdiction. Prior to the passage of ESHB 1933, all Critical Areas Ordinances were enacted under the Growth Management Act, regardless of whether they were located on a shoreline or inland. In this case, all of KAPO's issues to the Board were framed under the Growth Management Act, not the SMA. As the Washington State Supreme Court has held:

The Washington Administrative Procedure Act, RCW 34.05, provides that on judicial review of administrative action, "[i]ssues not raised before the agency may not be raised on appeal..." RCW 34.05.554. *See also, Griffin v. Department of*

*Social & Health Serv.*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979); *Kitsap Cy. v. Department of Natural Resources*, 99 Wn.2d 386, 393, 662 P.2d 381 (1983). This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.

*King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668-669, 860 P.2d 1024 (1993) (footnote 12 omitted).

Thus, KAPO's arguments regarding the Shoreline Management Act, apart from the jurisdictional issue previously identified, are inappropriate in this forum, as the case under review was decided solely upon the Growth Management Act, and KAPO is barred from arguing that the SMA should have been applied by the Board.

Even assuming KAPO's argument about the implications of *Anacortes* are correct, the Washington Department of Ecology guidelines for preparing shoreline master programs require exactly the type of information that Kitsap County relied upon in this case. WAC 173-26-201(3)(c) requires counties and cities to "[g]ather and incorporate all pertinent and available information, existing inventory data and materials from state agencies, affected Indian tribes, watershed management planning, port districts and other appropriate sources." To be included in the inventory the information is to be "reasonably available." *Id.* Thus,

the substance of the SMA provides no aid to KAPO's arguments here, even if it was applicable. As pointed out above, if KAPO is correct that *Anacortes* is good law, the only implication of the SMA's application would be that this case must be remanded to the Board with instructions to remand to the County for submission of the CAO provisions constituting shoreline segments for approval to Ecology.

**G. KITSAP COUNTY'S SHORELINE BUFFERS DO NOT VIOLATE RCW 82.02.020.**

KAPO's final objection to the shoreline buffers adopted by Kitsap County revolves around the assertion that they violate Washington's impact fee statute. KAPO argues that the U.S. Supreme Court's *Nollan/Dolan* test bans critical areas protection of shorelines unless a site-specific evaluation of that particular parcel's critical areas and the public benefits of a buffer have been performed. See *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). This assertion does not find support in the common or statutory law. The *Nollan/Dolan* test only applies to permit conditions that require dedications, granting of title to or an easement on private real property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 702-03 119 S.Ct. 1624 (1999). In *City of Monterey*,

the Supreme Court wrote that it had “not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use.” *Id.*

The Washington Supreme Court has specifically limited the application of *Nollan* argued for by KAPO, in *City of Olympia v. Drebeck*. There, the Court found that *Nollan* and *Dolan* addressed only “the authority of a local government to condition development approval on a property owner’s dedication of a portion of land for public use”, *City of Olympia v. Drebeck*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006). Nothing in the Kitsap County’s regulations require the dedication of the marine buffer to the county or any other governmental entity. KAPO’s other citations to authority also relate to circumstances wherein a local government required a dedication of land rather than a limitation on development.

For example, KAPO cites *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 763, 49 P.3d 867 (2000) in support of the contention that in this case “Kitsap County bears the burden of demonstrating strict compliance with the nexus and rough proportionality

requirements of RCW 82.02.020.”<sup>8</sup> KAPO also quotes *Burton v. Clark County*, 91 Wn.App. 505, 958 P.2d 343 (1998), as saying a local government exacting a dedication of property must show the proposed action will create or exacerbate an identified public problem.<sup>9</sup>

What KAPO fails to appreciate, however, is that in *Isla Verde* the regulation at issue required dedication of open space. The Supreme Court wrote:

Specifically, the statute provides that a dedication of land or easement is excluded from the statute's prohibitions if reasonably necessary as a direct result of the proposed development. The statute thus contemplates that a required dedication of land or easement is a tax, fee or charge. Further, this court has recognized that for purposes of RCW 82.02.020 a tax, fee, or charge can be in kind as well as in dollars. *San Telmo Assocs. v. City of Seattle*, 108 Wash.2d 20, 24, 735 P.2d 673 (1987) (requirements that owners of low income rental units provide relocation notice and assistance, and replacement of a specified percentage of the low income housing with other suitable housing or contributing to the low income housing replacement fund in lieu thereof, when residential units are demolished or redeveloped to other use violated RCW 82.02.020 as indirect charge on development).

The open space condition here is comparable to conditions in a number of cases analyzed under RCW 82.02.020. *E.g.*, *Vintage Constr. Co. v. City of Bothell*, 135 Wash.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

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<sup>8</sup> Petitioners' Opening Brief at 32.

<sup>9</sup> *Id.* at 31.

per lot in lieu thereof; developer entered a “voluntary agreement” to pay in lieu fees) (adopting opinion of the Court of Appeals in *Vintage Constr. Co. v. City of Bothell*, 83 Wash.App. 605, 922 P.2d 828 (1996)); *Trimen*, 124 Wash.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; developer paid in lieu fees under voluntary agreement); *Henderson Homes*, 124 Wash.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). Indeed, the Camas ordinance authorizing the set aside condition is quite similar to the ordinance at issue in *Trimen*, which required a dedication or reservation of open space, or a fee in lieu thereof.

*Isla Verde*, 146 Wn.2d at 757-759.

The City of Camas ordinance required all short and long subdivisions in the city to set aside 30 percent of the land as “open space” or the payment of a fee in lieu. *Isla Verde*, 146 Wn.2d at 746-748 and nn. 2 and 3. While dedication of the land to the public was not always required, that was one of the ways it was protected. *Id.* at n. 3. And as argued above, the

Supreme Court clearly analyzed it as a dedication. In contrast, Kitsap County's ordinance and marine riparian buffers only apply if your property is on marine waters. The ordinance does not require the dedication of the buffer or the payment of a fee in lieu of providing or dedicating the buffer. See, e.g., Kitsap County Code 19.200.215(C)(2)(a)(2) (requiring only that development of a single-family project occur outside of the standard buffer of an identified wetland). It is factually distinct from the regulations that must comply with 82.02.020. There is an additional factual distinction between Kitsap's buffers and the facts of *Isla Verde*. In that case, there was no evidence (at least no evidence discussed by the Court) demonstrating an analysis of what benefit the dedication of real property was meant to confer or what harm it was intended to mitigate. The GMA's BAS requirement, on the other hand, has created a great deal of evidence demonstrating the benefit conferred by the County's shoreline buffers in this case.

In *Burton* the issue was dedication of a road on private property, as distinct from the issue here, which again is buffers that are not dedications of land. Buffers are, indeed, limitations on development. But unlike dedications, they do not involve a transfer of the ownership of something

of value from one person to either the government or another individual or group.<sup>10</sup> Buffers do not require the transfer of an ownership interest in anything. Instead, they merely mean that a property owner cannot engage in certain types of construction or land alteration on a small portion of their property, without securing permission.

Even if *Nollan* and *Dolan* did apply, meeting best available science meets the requirements of both tests. As discussed above, best available science supports Kitsap County's shorelines regulations. KAPO cites no case holding that *Nollan* and *Dolan* incorporate additional requirements beyond those already present in the GMA. All tests have thus been met.

It is true that Division I of the Court of Appeals applied RCW 82.02.020 to a GMA critical areas regulation, but the issue *sub judice* in that case was not a buffer requirement. *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 653-656, 187 P.3d 786 (2008). Further, that decision is not final as a petition for review has been filed with the Washington State Supreme Court.

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<sup>10</sup> A dedication is an "[a]ppropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public;" an easement involves "a right of use over the property of another"; a tax is a "a pecuniary burden laid upon individuals or property to support a government". Black's Law Dictionary 371, 457, 1307 (5<sup>th</sup> Edition 1979).

## V. CONCLUSION

For the reasons argued above, KAPO has failed to meet its burden of demonstrating that the Board erred in upholding the County's designation of all marine shorelines as critical areas, remanding the Ordinance back to the County to impose larger buffers protecting those critical areas, and then finding the County's subsequent larger buffers compliant with the Growth Management Act.

Respectfully Submitted this 18<sup>th</sup> day of December, 2008.



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Tim Trohimovich, WSBA # 22367  
Futurewise  
814 Second Ave, STE 500  
Seattle, WA 98104  
tim@futurewise.org  
*Counsel for Hood Canal  
Respondents*

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

DEPUTY

## VI. PROOF OF SERVICE

I, Tim Trohimovich, certify under penalty of perjury under the law of the State of Washington that I am a resident of the State of Washington, I am over 18 years of age, and I am not a party to the above entitled action.

Further on the 18<sup>th</sup> day of December, 2008, I caused the following documents to be served on the following parties in the manner indicated:

### HOOD CANAL RESPONDENTS' BRIEF.

Martha P. Lantz  
Assistant Attorney General  
1125 Washington Street  
P.O. Box 40110  
Olympia, Washington 98504-0110  
*Via prepaid U.S. mail*

Lisa Nickel  
Kitsap County Deputy Prosecuting Attorney  
Civil Division  
614 Division Street, MS-35A  
Port Orchard, Washington 98366-4676  
*Via prepaid U.S. mail*

Brian T. Hodges  
Pacific Legal Foundation  
10940 Northeast 33<sup>rd</sup> Place, Suite 210  
Bellevue, Washington 98004  
*Via prepaid U.S. mail*

Melody L. Allen  
Suquamish Tribe, Office of Tribal Attorney  
15838 Sandy Hook Rd

Suquamish, WA 98392  
*Via prepaid U.S. mail*

Dated this 18<sup>th</sup> day of December, 2008.

Respectfully submitted,

A handwritten signature in black ink, consisting of several loops and a final horizontal stroke, positioned above a horizontal line.

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Tim Trohimovich