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DIVISION II

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OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS'  
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,  
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,  
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE  
TRUST, and CRAIG DURGAN, and HOOD CANAL SAND &  
GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE  
HEARINGS OFFICE, acting through the WESTERN WASHINGTON  
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF  
WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON  
COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

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**OPENING BRIEF OF PETITIONERS CITIZENS' ALLIANCE  
FOR PROPERTY RIGHTS JEFFERSON COUNTY, et al.**

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## I. INTRODUCTION

The Shoreline Management Act (“SMA”), ch. 90.58 RCW, is intended to balance concerns for the natural environment with concerns for the human environment. This balance is to be achieved by adoption of local Shoreline Master Programs. The Shoreline Master Program (“SMP”) adopted by Jefferson County (“County”) and approved by the Department of Ecology (“Ecology”) shuns this balance and purposively errs in a coordinated attempt to further the natural environment at the expense of the people who live along the shorelines.

The proper policy for a SMP consistent with SMA is explained in *Nisqually Delta Association v. DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

In applying the law, we look first to its overall policy. The SMA does not prohibit development of the state's shorelines, but calls instead for “coordinated planning ... recognizing and protecting private property rights consistent with the public interest.” RCW 90.58.020. Designation of [*even*] a shoreline as of “state-wide significance” does not prevent all development. That designation provides greater procedural safeguards, but permits limited alteration of the natural shorelines, with priority given to “*residences*, ports, shoreline *recreational uses* including ... industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state ...” RCW 90.58.020. [Emphasis added.]

The Court of Appeals provided a succinct and early summary of SMA policy: “The Shoreline Management Act was intended to enhance ordered, advantageous and environmentally sound development, not prohibit it.” *Eickhoff v. Thurston County*, 17 Wn. App. 774, 789, 565 P.2d 1196 (1977).<sup>1</sup> To enhance development, not as this SMP does, effectively prohibit it by overly large buffers, building setbacks to protect the buffers, and a myriad of restrictions and demands on property owners that, in aggregate, prohibit development, pushing owners back from all shorelines of the county that are all treated as “critical areas.”

The search for balance and coordination in shoreland development that has driven the legislature and the courts has been jettisoned by the County, Ecology, and, ultimately, the Growth Management Hearings Board (“Board” or “GMHB”). The result is a SMP overly focused on fish and vegetation at the expense of one class of property owners, those owning real property in the shorelands. This despite a 2010 Cumulative Impacts Analysis (“CIA”) finding that the County’s “shorelines are in relatively good condition ecologically compared to more developed areas of the Puget Sound basin.” (CIA § 2.2, p. 10; Administrative Record (“AR”) 2361.)

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<sup>1</sup> *Eickhoff v. Thurston County* is also known as *Matter of Zittel's Marina*.

In this consolidated appeal (Clerk's Papers ("CP") 446-47), Citizens' Alliance for Property Rights Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively "CAPR") adopt in full the briefing of the Olympic Stewardship Foundation ("OSF") Petitioners and the briefing of Petitioner Hood Canal Sand & Gravel ("Hood Canal").

## II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

CAPR assigns the following errors to the Board's March 16, 2014 Final Decision and Order.<sup>2</sup>

**ERROR 1.** The Board erroneously found the County and Ecology, to the extent required, did use "a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts" as required by RCW 90.58.100(1)(a). FDO at 67 (AR 7519) and FDO at 70 (AR 7522).

**ISSUE 1.** The SMA requires the County "[c]onduct or support such further research, studies, surveys, and interviews as are deemed necessary." RCW 90.58.100(1)(d). Whether under a *de novo* standard of review, the Board erred by upholding the failure of Ecology and the County to: (1) Take into account the social sciences, particularly

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<sup>2</sup> The Growth Board made no formal conclusions of law and entered no findings of fact to which Appellants can assign error. RCW 34.05.461(3) ("final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . .").

economics; and (2) support their regulatory restrictions by physical and biologic science.

**ERROR 2.** CAPR's claim that the adoption of the SMP must comply with the State Economic Policy Act, ch. 43.21H RCW (AR 526), dismissed by the Board for want of jurisdiction (AR 2163), is now properly before the Court and should be affirmed on appeal.

**ISSUE 2.** Whether the County and Ecology adopted a SMP that failed to comply with RCW 43.21H.010 by not giving appropriate consideration to economic values in the promulgation of a rule by state and local government.

**ERROR 3.** The Board erroneously concluded that CAPR failed to establish that the SMP lacks clarity and thereby delegates excessive discretion to regulators in violation of RCW 90.58.020, RCW 90.58.900 or WAC 173-26-191(2)(a)(ii). FDO at 77 (AR 7529).

**ISSUE 3.** The SMP lacks the clarity required of a zoning ordinance, resulting in excessive delegation to regulators. This is compounded by the SMP's claim of liberal construction, thereby violating RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900, and WAC 173-26-176 and -191.

**ERROR 4.** The Board erroneously found that CAPR failed to meet its burden of proof to establish the regulations applicable to common shoreline amenities and restrictions on development in flood-prone areas

are oppressive and result in a *de facto* prohibition of those uses, in violation of RCW 90.58.020, RCW 90.58.100(6), WAC 173-26-201(2)(d) and -221(3)(c)(i). FDO at 83(AR 7535).

**ISSUE 4.** Whether the SMP, in derogation of the common law, must rigorously adhere to the SMA statute. Its failure to do so forces oppressive conditions on property owners violative of substantive due process, an allegation CAPR pleaded in its initial petition for review (AR 525, 527) and which the Board found outside of its jurisdiction. AR 2163.

**ERROR 5.** CAPR's rights to due process were denied by the lack of a neutral tribunal in the first instance of review. Dismissed by the Board as outside its jurisdiction (AR 2163), this claim is now properly before the Court.

**ISSUE 5.** US Supreme Court jurisprudence requires a neutral tribunal in the first instance of review because if a party is denied impartial adjudication in the first instance, that party is deprived of that which it is entitled to under the Due Process Clause.

**ISSUE 6.** Whether this Court should award CAPR reasonable attorney fees and costs under the Equal Access to Justice Act.

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

On December 7, 2009, the County approved a comprehensive update to its SMP. Upon submittal to and review by Ecology, the department

approved the SMP on January 26, 2011, subject to certain required changes. Ecology gave its final approval on February 7, 2014. The new SMP is codified at ch. 18.25 Jefferson County Code (“JCC”).

Under RCW 90.58.190(2)(a) and RCW 36.70A.290(2)(c), CAPR timely petitioned the GMHB for review on April 18, 2014. AR 519-802. On its own motion, the Board issued an Order of Consolidation, dated April 28, 2014, joining CAPR with OSF and Hood Canal. AR 803-10.

CAPR had standing to appear before the Board pursuant to RCW 36.70A.280(2)(b). FDO at 6, line 23 (AR 7458).

On September 5, 2014, the Board issued its Second Amended Prehearing Order, dismissing CAPR’s constitutional claims and its claim under ch. 43.21H RCW, the Washington State Economic Policy Act, as beyond the subject matter jurisdiction of the Board. AR 2163.

On March 16, 2015, the Board issued its FDO denying in its entirety CAPR’s Petition for Review, as well as those of OSF and Hood Canal. AR 7453-565.

CAPR has exhausted the administrative remedies available to challenge the SMP.

CAPR, aggrieved by the FDO and the Second Amended Prehearing Order, timely appealed to the Superior Court of Jefferson County under

RCW 34.05.514. RCW 34.05.530, RCW 36.70A.300(5), WAC 242-03-970(1), and RCW 90.58.190(2)(e). CP 183-314.

By motion of OSF, supported by all parties, the superior court consolidated the petitions for review filed by CAPR, OSF, and Hood Canal. CP 446-447.

By motion of Ecology, supported by the County and opposed by CAPR, OSF, and Hood Canal, on September 23, 2015, the Commissioner of this Court granted direct review under RCW 34.05.518.

#### **IV. STANDARDS OF REVIEW**

CAPR has coordinated its argument with OSF, and without waiving any issues on appeal, defers to OSF's statement of the correct standards of review. This appeal seeks review of findings of fact and conclusions of law entered by the Board in its FDO. This Court reviews the Board's findings of fact for substantial evidence and conclusions of law *de novo*, applying the standards of the Administrative Procedure Act (APA), ch. 34.05 RCW, directly to the record. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (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, 139 P.3d 1096 (2006). The particular standards pertinent will be cited in the arguments below.

However, with respect to the standard of review applied by the Board, the agency ignored the fact that the SMA sets forth separate standards of review for “shorelines” and “shorelines of statewide significance.” The Board was required to apply the clearly erroneous standard, rather than the clear and convincing standard, to non-SSWS shorelines. RCW 36.70A.320(3); *Everett Shorelines Coalition v. City of Everett*, CPSGMHB No. 02-3-0009c (Order Granting Tribes’ Motion) (noting that in an appeal concerning “shorelines,” neither Ecology nor the local government has an edge).<sup>3</sup> Except for overwater structures, shorelines of statewide significance (“SSWS”) were not at issue in the Petitioners’ appeal to the Board.

It would be meaningless for the Legislature to have differentiated between review of issues concerning shorelines and those concerning SSWS if the Board is allowed to bootstrap the higher standard of review to all issues, including those concerning mere “shorelines.” *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1994).

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<sup>3</sup> The final decision and order in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, Case No. 02-3-0009c, issued on January 9, 2003, by the Central Puget Sound Growth Management Hearings Board was a case of first impression interpreting the addition of the Shoreline Management Act into the Growth Management Act. Legislative Finding–Intent–Ch. 321 (2003).

Here, the Board essentially condoned the failure of the County to differentiate between shorelines and SSWS, and its failure to define or identify those shorelands “associated” with shorelines and/or SSWS (contrary to the requirements of WAC 173-22-050), by reviewing all SMP provisions under the higher standard. This reads out the distinct standards of review enacted by the Legislature. In this regard, the Board acted in a legislative role, which it lacks authority to do. *See* RCW 36.70A.280 (limiting Board’s jurisdiction); *see H&H Partnership v. Ecology*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003).

#### IV. ARGUMENT

##### **A. RESPONDENTS FAILED TO “[U]TILIZE A SYSTEMATIC INTERDISCIPLINARY APPROACH WHICH WILL INSURE THE INTEGRATED USE OF THE NATURAL AND SOCIAL SCIENCES AND THE ENVIRONMENTAL DESIGN ARTS.” RCW 90.58.100.**

##### **1. THE SOCIAL SCIENCES WERE IGNORED**

##### **a. THE SMA REQUIRES ECONOMIC ANALYSIS**

The SMA requires that economics be considered in developing a SMP.

In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible ... (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary [and] (e) Utilize all available information regarding hydrology, geography, topography, ecology, *economics*, and other pertinent data ... RCW 90.58.100(1). [Emphasis added.]

Economics is the study of people in the ordinary business of life. It inquires how they get their income and how they use it. On one side, it is the study of wealth and on the other, more important side, a part of the study of people.<sup>4</sup>

As an organization supporting equitable and scientifically sound land use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all, CAPR and its members are concerned with the effects of the SMP on residential properties and small businesses. Single-family residences are a preferred use under the SMA. RCW 90.58.030(3)(e)(vi); WAC 173-27-040(2)(g). WAC 173-26-241(3)(j) notes that “[s]ingle-family residences are the most common form of shoreline development and are identified as a priority use when developed in a manner consistent with control of pollution and prevention of damage to the natural environment.” Yet, in approximately 30,000 pages of the administrative record produced below by Respondents, CAPR has found no economic analysis of how this SMP, with its increased buffers and setbacks, its greater permitting hurdles, and its creation of nonconforming uses and structures, will affect residential

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<sup>4</sup> Alfred Marshall, *Principles of Political Economy*, v. 1, p. 1. Macmillan (1890). Available at [http://books.google.com/books?id=bykoAAAAYAAJ&pg=PR3&source=gbs\\_selected\\_pages&cad=3#v=onepage&q&f=false](http://books.google.com/books?id=bykoAAAAYAAJ&pg=PR3&source=gbs_selected_pages&cad=3#v=onepage&q&f=false)

property values, property insurance rates, opportunities for financing and refinancing, or costs of regulatory compliance (e.g., the expert reports required to meet such new requirements as no net loss standards and mitigation requirements). Nor did CAPR find any analysis of how, in turn, changes in residential property values will affect property tax collections and distribution of the tax burden across the county's entire tax base. Review of the 612 entries in the Bibliography of Scientific and Technical Information Considered, shows no mention of such economic issues.<sup>5</sup> (Bibliography at AR 2366-402.)

It is not that questions pertaining to these issues were not raised by citizens who participated in the local adoption. CAPR, OSF, and others explicitly voiced such concerns. See, for example, AR 2403-9, with 2408-9 being the Resolution of CAPR Jefferson County. Also at AR 2410-35 are CAPR's most extensive comments, within which comments particular to economic concerns are found at AR 2414, 2415, 2418, 2420, 2421, and 2431.

The record compiled by the County and Ecology is replete with concerns about salmon and their habitat but lacks the mandated economic

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<sup>5</sup> Some economic issues pertaining solely to fin-fish aquaculture are mentioned. Late in the SMP adoption process, fin-fish aquaculture became a point of contention between Ecology and the County. None of the Petitioners in this consolidated case have raised issues with respect to fin-fish aquaculture.

component or any real concern with resident people, the subject of the social sciences. But RCW 90.58.100(1)(a) explicitly requires that

[i]n preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible: (a) Utilize a systematic interdisciplinary approach which will insure *the integrated use of the natural and social sciences* and the environmental design arts ... [Emphasis added.]

Ecology has amplified this instruction in WAC 173-26-201(2)(a) where it states local jurisdictions are to “identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern,” in this instance the social science of economics. Once this is done, local jurisdictions are to “base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available.” *Id.*

The absence of economic considerations during the adoption and approval is enough alone for this Court to find the SMP is not in conformity with ch. 90.58 RCW. The Board has erroneously interpreted the law; its order is not supported by substantial evidence; the FDO is arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i).

**b. ADOPTION OF THE SMP VIOLATED THE STATE ECONOMIC POLICY ACT**

The purpose of the State Economic Policy Act is “to assert that it is the intent of the legislature that economic values are given appropriate consideration along with environmental, social, health, and safety considerations in the promulgation of rules by state and local government.” RCW 43.21H.010. The act shares the same code Title as the State Environmental Policy Act, ch. 43.21C RCW.

During the County’s adoption and Ecology’s provisional approval of the SMP, ch. 43.21H RCW, the State Economic Policy Act, required that

[a]ll state agencies and local government entities with rule-making authority under state law or local ordinance shall adopt methods and procedures which will insure that economic values will be given appropriate consideration in the rule-making process along with environmental, social, health, and safety considerations.

RCW 43.21H.020.<sup>6</sup>

But the County had no method or procedure in place to ensure that economic values and impacts were given consideration in its rule making, neither for residences nor businesses. Simply dividing the shorelines into Shoreline Environmental Designation Zones (SEDs), by which the level of human activity is differentiated, is not a process or method by which

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<sup>6</sup> In 2011, after Ecology’s provisional approval but before its final approval of the SMP in 2014, Laws of 2011, ch. 249, § 1 amended this section to read “ [a]ll state agencies and local government entities with rule-making authority under state law or local ordinance *must* adopt methods and procedures which will insure that economic *impacts* and values will be given appropriate consideration in the rule-making process along with environmental, social, health, and safety considerations.” Emphasis added.

economic values are given appropriate consideration in the rule-making process.

The adoption of a SMP is the adoption of a “rule.” Whether an agency's action is rule making, despite bearing some other label, is determined under the Administrative Procedure Act (APA). *McGee Guest Home, Inc. v. Department of Social and Health Services of State of Wash.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). In relevant part, the state APA defines a rule as

any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; ... (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; ... The term includes the amendment or repeal of a prior rule ...

RCW 34.05.010(16).

To determine whether an agency action is a “rule,” the rule needs to be of general applicability to all members of a particular class. *Faylor's Pharmacy v. Department of Social and Health Services* 125 Wn.2d 488, 495, 886 P.2d 147 (1994). There is no dispute that the County's SMP applies to all owners and users of shoreline property in Jefferson County. Violation of the SMP subjects a person to fine and imprisonment. JCC 18.25.790. RCW 90.58.230 authorizes the Attorney General and private attorneys general to bring suit for damages against “[a]ny person subject

to the regulatory provisions of this chapter who violates any provision of this chapter ...” Things that one could do with property before the adoption of this SMP cannot be done now. Development that was perfectly in conformity with developmental regulations before its adoption are now “nonconforming” and subject to additional restrictions (JCC 18.25.660), thereby revoking “the enjoyment of benefits or privileges conferred by law.” That the SMP is an APA “rule” is beyond dispute.

But the State Economic Policy Act is more ignored than observed in Washington law. Only two cases cite it, both in passing. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 82-83, 11 P.3d 726 (2000), a minimum streamflow case, observes that

[s]everal statutes recognize that water is essential to the state's growing population and economy as well as necessary to preserve instream resources and values. RCW 90.54.010(1)(a); RCW 90.03.005 (describing policy of water use yielding maximum net benefits from both diversionary use of waters and retention of water instream to protect natural values and rights); RCW 90.54.020(2) (generally same); *see also* RCW 90.82.010; RCW 43.21C.030(2)(b) (State Environmental Policy Act of 1971); *RCW 43.21H.010 (state economic policy act)*. However, none of these statutes indicate that they are meant to override minimum flow rights once established by rule, none conflict with the statutes authorizing or mandating rules setting minimum flows, and none conflict with the specific statutes respecting priority of minimum rights. [Emphasis added.]

The second case, *Swinomish Indian Tribal Cmty. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 585, 311 P.3d 6 (2013), another minimum streamflow case, simply quotes the *Postema* language above.

CAPR does not argue that the State Economic Policy Act overrides the SMA, only that the act stands as a law of equal stature that the County and Ecology were bound to follow but apparently felt they could ignore despite the concerns with economic impacts voiced by local citizens.

Even without recourse to the State Economic Policy Act, courts have recognized the importance of the economic aspects of the SMA. See, for example, *Clam Shacks of America, Inc. v. Skagit County*, 45 Wn. App. 346, 350, 725 P.2d 459 (1986), *decision aff'd*, 109 Wn. 2d 91, 743 P.2d 265 (1987).

The SMA uses two main approaches to shoreline regulation: a planning process and a permitting process. The central element of the planning process is the local master program. The Act gives responsibility to local governments to develop the master programs. RCW 90.58.050. The programs, which constitute the use regulations for the area, are to take into account the following elements: *economic development*, public access, recreation, transportation, land use, conservation, and historical, cultural, scientific, or educational value. Since the programs constitute use regulations for the various shorelines, they then form the basis for the subsequent decisions in the permitting process. [Emphasis added.]

With marine and stream buffers taking 80% of the entire shoreline jurisdiction, nonconforming structures and lots will be widespread.<sup>7</sup> The stigma of nonconformity is widely recognized by the courts and commentators. “[T]he public intent is the eventual elimination of nonconforming uses.” 8A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, 3<sup>RD</sup> ED (2014): § 25:186: *Policy to Minimize Nonconforming Uses*.

“The policy of zoning legislation is to phase out a nonconforming use.” *Anderson [v. Island County]*, 81 Wn.2d [312, 323], 501 P.2d 594. This is because “[n]onconforming uses are disfavored under the law. *Open Door Baptist Church v. Clark County*, 140 Wn.2d 143, 150, 995 P.2d 33 (2000).”

*McMilian v. King County*, 161 Wn. App. 581, 592, 255 P.3d 739 (2011).

The status becomes illegal but tolerated for now. But how can a SMA compliant single-family structure suddenly become non-complaint when the SMA RCW 90.50.020 polices have not changed?

How extreme the County’s position on nonconformity can be seen in the SMP’s definition of Alteration, nonconforming structures at JCC 18.25.100(1)(u).

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<sup>7</sup> RCW 90.58.030(2)(d) “‘Shorelands’ or ‘shoreland areas’ means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter....” With marine and stream buffers of 150 feet, plus 10 foot setbacks, 160 feet divided by 200 feet yields 80 percent.

Alteration, nonconforming structures means any change or rearrangement in the supporting members of existing buildings, such as bearing walls, columns, beams, girders, or interior partitions, as well as any changes in doors, windows, means of egress or ingress or any enlargement to or diminution of a building or structure, horizontally or vertically, or the moving of a building from one location to another. This definition excludes normal repair and maintenance, such as painting or roof replacement, but includes more substantial changes.

What conceivable effect can changing an interior partition, or a window, or a door have on marine habitat? This is simply a means of devaluing these properties and driving people off the shorelines of unincorporated Jefferson County.

Certainly, the County could have anticipated that the stigma attached to nonconforming uses and structures would have economic and social effects, effects the County was required to quantify and consider. Further, Ecology was required to ensure the County did consider these before it approved the SMP. Both Respondents failed their duties.

Nonconformity is but a single example of an economic issue the County, and Ecology, were required by the SMA and the State Economic Policy Act to consider. They did not. The Board did not have jurisdiction to issues pertaining to ch. 43.21H RCW.

## **2. THE PHYSICAL AND BIOLOGICAL SCIENCES DO NOT SUPPORT THE LAND-USE RESTRICTIONS IMPOSED BY THE SMP**

The SMA requires a rigorous application of *all* the relevant sciences to development of a SMP. The US Supreme Court, writing of a similar requirement in the Endangered Species Act, said:

[T]he obvious purpose of the scientific 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 preservations, we think it readily apparent that another objective ... is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

*Bennett v. Spears*, 520 U.S. 154, 176-177, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). This view was adopted and cited by this Court in discussing the “best available science” that the Growth Management Act requires in the designation of critical areas. *HEAL v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 531, 979 P.2d 864 (1999). *See also Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d. 102 (2005).

While the totemic phrase “best available science” is not used in the SMA – the SMA demands even more, requiring the *doing* of research when the needed science is not available (RCW 90.58.100(1)(d)) – the County and Ecology cannot claim that they are allowed a standard lower than that discussed in *Bennett*, *HEAL*, and *Concerned Friends*. This is

particularly true when this SMP (unlawfully) treats all shorelines as critical areas where people's economic activities are severely circumscribed.

The data needed to craft a useful and law-abiding SMP is not in the record. The County's *Cumulative Impacts Analysis (CIA)* and *Final Shoreline Inventory and Characterization Report – Revised November 2008 (Report)* are incomplete.<sup>8</sup> They lack both field verification and a thorough analysis of existing conditions since they are based only upon photos and literature, much of the latter not pertaining to the unique estuarial waters of eastern Jefferson County. The County thereby violates the Part III Guidelines (WAC 173-26-171 to 251) for revision or adoption of a new SMP. WAC 173-26-201(3)(c) mandates that

[l]ocal government *shall*, at a minimum, and to the extent such information is relevant and reasonably available, collect the following information: (i) Shoreline and adjacent land use patterns and transportation and utility facilities, including the extent of existing structures, impervious surfaces, vegetation and shoreline modifications in shoreline jurisdiction. [Emphasis added.]

This type of information needs be gathered before a SMP can be updated and the shortcomings, if any, of the existing SMP fixed. However, the Report does not contain such specification or evaluation as it does not adequately relate shoreland conditions to marine habitats. In this

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<sup>8</sup> See OSF brief for further on this point.

regard, the Report concedes it is “not intended as a full evaluation of the effectiveness of the SMA existing shoreline policies or regulations.” AR 2443. Sufficient detail regarding existing development or conditions is not provided. Necessary information has not been gathered.<sup>9</sup> To compensate for this flaw, the adopted SMP places the burden on property owners and applicants to assess cumulative impacts and to identify the shoreline environment where a proposed use will be sited.

The *Cumulative Impacts Analysis* (“CIA”) is also deficient as it fails to (1) meaningfully evaluate the effectiveness of existing regulatory systems or (2) evaluate current conditions. The Part III Guidelines mandate a CIA “that identifies, inventories and ensures meaningful understanding of the current and potential ecological functions provided by affected shorelines.” WAC 173-26-186(8)(a). A compliant CIA must be completed before a new SMP can be approved Ecology. This CIA impermissibly assumes impacts without documenting them. (See discussion of local quantitative analysis at section V(C)(1) below.) The CIA fails to adequately consider and assess the benefits provided by existing regulations and project mitigation imposed under the SMA permitting and State Environmental Policy Act (SEPA) authority. The Part III Guidelines

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<sup>9</sup> The County’s expert admits that “the scope of this effort did not include field verification of shoreline conditions ...” *Final Shoreline Inventory and Characterization Report – Revised November 2008* at 1-2. AR 2443.

for revision of a SMP require a cumulative impact analysis that includes such analysis, along with an evaluation of reasonably foreseeable future development.

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act ... Evaluation of such cumulative impacts should consider: (i) *Current circumstances* affecting the shorelines and relevant natural processes; (ii) Reasonably foreseeable future development and use of the shoreline; and (iii) *Beneficial effects* of any established regulatory programs under the other local, state, and federal laws.

WAC 173-26-186(8)(d), emphasis added. This CIA does not meet these standards.

The CIA talks in generalized terms of the need to prevent adverse impacts “on near shore drift, beach formation, juvenile salmonids migratory habitat and other shoreline functions.” CIA at 51 (AR 2363). It also refers to impacts on eel grass and other critical fish habitat. Yet, the Department of Fish and Wildlife’s regulations implementing the State Hydraulic Code, WAC 222-110-285, *Single-family Residence Bulkheads in Saltwater Areas*, provide for all of these concerns. WDFW regulates these issues closely through its Hydraulic Project Approval process.<sup>10</sup>

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<sup>10</sup> <http://wdfw.wa.gov/licensing/hpa/>

The restrictions of the SMP can be expected to create conflicts with ch. 77.55 RCW, a general law of the State binding on the County under the Washington Const. art. XI, §11. RCW 77.55.141 grants the Department of Fish and Wildlife the responsibility to permit shore protection.<sup>11</sup>

Ecology's approval of the SMP further violates RCW 34.05.272, which requires, among other things, identification of the sources of information reviewed and relied upon by the agency in taking significant agency action. "Peer-reviewed literature, if applicable, must be identified, as well as any scientific literature or other sources of information used. The department of ecology shall make available on the agency's web site the index of records required under RCW 42.56.070 that are relied upon, or invoked, in support of a proposal for significant agency action." RCW 34.05.272(2)(a). Ecology has taken the position that its approval of the SMP Update is not a "significant agency action," thus its failure to identify scientific information supporting its decision on its website is not violative of the statute. However, Ecology views its approval of the SMP

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<sup>11</sup> RWC 77.55.141(1) In order to protect the property of marine waterfront shoreline owners it is necessary to facilitate issuance of permits for bulkheads or rockwalls under certain conditions.

(2) The department shall issue a permit with or without conditions within forty-five days of receipt of a complete and accurate application which authorizes commencement of construction, replacement, or repair of a marine beach front protective bulkhead or rockwall for single-family type residences or property under the following conditions ...

as one of state-wide importance – i.e., akin to a blueprint SMP for other jurisdictions to follow – as it stated in its request for expedited review by this Court. In this regard, approval of the SMP has become a “significant legislative rule” as defined in RCW 34.05.328, which is subject to RCW 34.05.272(3).

The science for the expanded buffers is not in this administrative record. Disparate studies are cited, something like an average taken, and thus are 150 foot buffers justified. This is the bald political ascension of a viewpoint that holds private property owners should provide public goods, even if the public goods are of no proven value. (See discussion of a local quantitative analysis at V(C)(1) below.)

This complete revision of the SMP also causes a logical conundrum when applying the doctrine of no net loss. As the shoreline conditions are in “relatively good condition ecologically” with 30 foot setbacks (AR 2724), it is not explained why 150 foot buffers are now needed, on the same properties, to ensure no net loss. The base line for determining no net loss is what exists and the County’s own CIA says that what exists is “good.” Citing technical literature, much of it dated, is not explaining. It is simply a way of hiding a policy preference. It is regulation “on the basis of speculation or surmise” which will lead to “economic dislocation.” *Bennett*, 520 U.S. at 176-177.

In preparing the SMP, RCW 90.59.100(1)(a) requires Ecology and the County “utilize a systematic interdisciplinary approach which will insure the integrated use of the natural sciences ...” But here, the social sciences were ignored and the natural sciences given but a cursory look, in spite of the fact that RCW 90.59.100(1)(d) instructs them “to conduct or support such further research, studies, surveys, and interviews as are deemed necessary ....”

Upon the arguments here advanced, the SMP violates RCW 90.58.020, 100(1) and 100(2), and .620, and WAC 173-26-201(2), -211, -221(2), -231(2), -241(2), (3), and -251(3). The Board’s FDO upholding the County and Ecology has erroneously interpreted the law; its order is not supported by substantial evidence; the FDO is arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i).

**B. THE VAGUENESS OF THE SMP RESULTS IN AN EXCESSIVE DELEGATION OF DISCRETION TO THE REGULATORS**

The SMA demands clarity in a SMP. The County’s SMP fails to attain the level of clarity required of a zoning ordinance that is in derogation of the common law. *Batchelder v. City of Seattle*, 77 Wn. App. 154, 159, 890 P.2d 25 (1995) (“The master program, as required by RCW 90.58.100, is essentially a ‘zoning code’ for the shorelines, which specifies kinds and types of development allowed.”) As a zoning ordinance, the

SMP needs to be clear what is allowed and what is prohibited. But this SMP is abstruse, thereby giving excessive discretion to the county employees who will enforce it. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 777, 129 P.3d 300, amended on reconsideration (2006) (“Zoning ordinances must be specific enough to limit arbitrary and discretionary enforcement of the law.”) See also *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744 (1993).

Zoning statutes and ordinances restrict the free use of land by the owner. As a result, they are in derogation of the common law, and courts apply a strict construction in favor of the landowner which allows the least restricted use of property. Courts are careful not to extend restrictions on the use of land by implication or *interpretation*. To satisfy due process requirements, the public purpose served by a zoning law must adequately outweigh a landowner's right to do as he or she sees fit with the property. Courts liberally interpret procedural provisions relating to zoning laws which protect a landowner's right freely to use his property. The same rules of construction which apply to statutes also apply to zoning ordinances...

A zoning statute is void for vagueness if it defines an act in a manner that encourages arbitrary and discriminatory enforcement, or the law is so indefinite that people must guess at its meaning. [Footnotes omitted; emphasis added.]

3B SUTHERLAND STATUTORY CONSTRUCTION § 77:7 (7th ed.)

See also *Myrick v. Board of Pierce County Comm'rs*, 102 Wn.2d 698, 707, 687 P.2d 1132 (1984) (“A statute is void for vagueness ... if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.”) “A

vague law impermissibly delegates basic policy matters to [officials] for resolution on an *ad hoc* and subjective basis.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

It is not the SMA that is unclear; it is the County’s SMP. The lack of clarity of the SMP is compounded by its claim for liberal construction. RCW 90.58.900 simply says that “[t]his *chapter* is exempted from the rule of strict construction, and *it* shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.” (Emphasis added.) This in comparison to the overreach of JCC 18.25.080:

This *Program* is exempt from the rule of strict construction; therefore this *Program* shall be liberally construed to give full effect to its goals, policies and regulations. Liberal construction means that the interpretation of this document shall not only be based on the actual words and phrases used in it, but also by taking its deemed or stated purpose into account. Liberal construction means an interpretation that tends to effectuate the spirit and purpose of the writing. For purposes of this *Program*, liberal construction means that the administrator shall interpret the regulatory language of this *Program* in relation to the broad policy statement of RCW 90.58.020, and make determinations which are in keeping with those policies as enacted by the Washington State Legislature. [Emphasis added.]

It is ch. 90.58 RCW that is exempt from strict construction, *not* the SMP. The purpose of liberal construction of the SMA is to give full effect to the Acts “objectives and purposes,” not to authorize a local zoning ordinance to create a maze that allows the personal preferences of local

officials to control private property. The use of words such as “deemed” and “spirit” are open invitations to overreach by the regulators and others opposed to the legitimate use and development of privately owned shorelands. When a law is not “based on the actual words and phrases used in it,” but what an administrator might deem we have entered the realm of lawlessness where citizens cannot know how their land use and land-use proposals will be evaluated.

JCC 18.25.080 should include language stating that land-use ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Due process demands that citizens be clearly informed by the law what is and is not permitted so that they can intelligently and with foreknowledge plan and organize the use of their property.<sup>13</sup>

Even when liberal construction is allowed, our Supreme Court has said “the rules of liberal construction do not contemplate that a statute shall be so interpreted as to make abortive the meaning of words therein employed.” *Boyd v. Sibold*, 7 Wn.2d 279, 289, 109 P.2d 535 (1941). Similarly, “the rules of liberal construction do not contemplate that a statute shall be so interpreted as to ignore the obvious meaning of the

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<sup>13</sup> The County itself takes an inconsistent position with respect to permit Exceptions at JCC 18.25.550(1) where it states that exceptions from Shoreline Substantial Development permits are to be “construed narrowly,” with “[o]nly those developments that meet the precise terms of one or more exemptions” granted an exemption.

words therein employed.” *Public Hosp. Dist. No. 2 of Okanogan County v. Taxpayers of Public Hosp. Dist. No. 2 of Okanogan County*, 44 Wn.2d 623, 629, 269 P.2d 594 (1954) (internal citation omitted).

This interpretative overreach is particularly vexatious considering the vagueness of the SMP’s language. For example only, in JCC 18.25.290(1)(e), 18.25.450(1)(e), 18.25.450(6)(b), 18.25.470(1)(d), 18.25.500(4)(e), 18.25.500(4)(f), and 18.25.500(4)(h) those seeking development permits on *private* property are “encouraged” to offer public access as part of the development. However, all but the simplest permit applications become negotiations between developers and regulators. Loose language in requirements will lead to coercion as regulators seek to obtain what they think is desirable even if not mandated by law.

Similarly, making property owners “address *potential* adverse effects of global climate change and sea level rise” (JCC 18.25.180(2)(j); emphasis added), give regulators an easy opportunity to require of an applicant whatever the regulator’s personally preference. *See also* JCC 18.25.300(1)(b) where applicants for building permits are “encouraged to locate the bottom of a structure’s foundation higher than the level of expected future sea-level rise.”

Upon the arguments here advanced, the SMP violates RCW 90.58.020, RCW 90.58.030(3)(c), RCW 90.58.900, WAC 173-26-176 and WAC 173-

26-191. The Board has erroneously interpreted the law; its order is not supported by substantial evidence; the FDO is arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i).

**C. THE SHOWINGS REQUIRED TO OBTAIN PERMITS FOR COMMON SHORELINE FACILITIES RESULT IN *DE FACTO* PROHIBITIONS OF THESE FACILITIES AND IMPOSE OPPRESSIVE CONDITIONS VIOLATIVE OF THE RIGHT TO SUBSTANTIVE DUE PROCESS**

A defining characteristic of property ownership is the right to make reasonable use of one's land. *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S.Ct. 50, 73 L.Ed. 210 (1928). A person's property rights exist regardless of regulatory restrictions that subsequently burden those rights. *See Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S.Ct. 447, 72 L.Ed. 842 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 48 S.Ct. 447, 72 L.Ed. 842 (1926). Government cannot extinguish a citizen's rights in his or her property by regulation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

**1. THE COUNTY AND ECOLOGY HAVE FAILED TO SHOW CAUSE AND EFFECT BETWEEN COMMON SHORELINE FACILITIES AND PURPORTED DAMAGE TO SHORELINES**

In order to achieve the balancing of citizens' common law rights to use their property as they see fit against the common good, the impact of various human activities on the natural environment must be quantified

whenever possible. Citizens need to know what the results of their actions will be and choose wisely, not be required to blindly surrender their rights and prerogatives as property owners “to agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett*, 520 U.S. at 176-77. Such surrender will lead to “needless economic dislocation,” particularly when the impacts on the economic goods at stake have not been analyzed (*see* section V(A) above). *Id.*

Quantification of the impacts of typical human activities on the natural environment was not done by the County. To prohibit or severely restrict a land use, cause and effect needs to be shown between the use and the purported negative effect. Undocumented presumptions are not a sufficient basis to preclude common shoreline development.

As previously noted, the County’s own shoreline expert, ESA Adolfson, in a view adopted by the County in its *Cumulative Impacts Analysis*, states that the County’s “shorelines are in relatively good condition ecologically compared to more developed areas of the Puget Sound basin.” (§ 2.2, p. 10; AR 2361.) Instead of staying with what was working, e.g., 30 foot shoreline *setbacks* or one foot per bank height for high banks but no *buffers*, the County adopted a SMP with 150 foot shoreline buffers, plus setbacks, applied in a landscape-measurement approach (*see, e.g.*, JCC 18.25.270(4)(d), (e)). Such a blanket approach is not individualized to the

conditions of a particular property and ignores any nexus or proportionality between a particular property development and its possible impact on the shoreline.<sup>14</sup>

In a rigorous statistical analysis of shoreline data collected by Battelle Marine Sciences Laboratory, Sequim, Washington, Donald F. Flora, Ph.D., an experienced researcher in natural processes,<sup>15</sup> found essentially zero correlation between nearshore development and harm to habitat in Puget Sound at places near and similar to the shorelines of Jefferson County. Using Battelle's data from Bainbridge Island shorelines (2009)<sup>16</sup> and east Kitsap County shorelines (2004), and applying regression

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<sup>14</sup> ESA Adolphson acknowledges this in its *Final Jefferson County Shoreline Inventory and Characterization Report – Revised November 2008*. At 5-7 it states: “Depending on the specific nearshore resources being protected and the specific functions being provided by the buffer, recommended widths may differ.” AR 2446.

<sup>15</sup> BS from University of Washington in Forestry and Geology; MS and PhD from Yale in Forestry; 40-years research experience in the natural sciences; Researcher-in-Charge of several forestry research laboratories in Northwest, Oregon and Alaska; Former technical editor, *Journal of Forestry*; Former head of National Fire Danger Rating System Research; Former head, National Timber Harvest Issues Program; Former affiliate professor, University of Washington; Former Director of Keep Washington Green Association (forest fire prevention), and 80-year family history and experience of Puget Sound shoreline ownership and stewardship. Current area of study involves the review of 3,500+ research papers on buffers, riparian zones, beach functions, and fisheries.

<sup>16</sup> In 2000, Bainbridge Island had a population density of 633.2 persons per square mile. In 2014, Jefferson County has a population of 17.02 persons per square mile. Surely if shoreline-habitat degradation were going to correlate with human activity on the shorelines, one would see it on Bainbridge Island before Jefferson County. These figures are from the Office of Financial Management at <http://www.ofm.wa.gov/pop/popden/>. WAC 242-03-640(1)(b) permitted Board to take notice of such facts when they are “capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively, facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency.” Similarly, this Court may take such notice under Rule of Evidence 201.

analysis and a proper significance test of the regression results, Dr. Flora demonstrated a lack of correlation between the intensity of shoreline developments (called “stressors”) and the condition of shoreline habitats, *both as scored by Battelle, not Dr. Flora.*

Despite an obviously vigorous and fairly complex effort [by Battelle], a relationship between human-installed “stressors” and habitat factors was not found. Statistical analyses of the studies’ data show that little of the variation in ecosystem (habitat) functions can be explained by a large basket of stressors. The correlation of multiple stressors with the welfare of nearshore habitats is not significantly different from zero (Bainbridge Island) or extremely low (East Kitsap County).

Dr. Flora explains that “[s]ome 700 shore segments were analyzed. More than 20 human-imposed ‘stressors’ were rated [by Battelle], from buoys to bulkheads, from paths to pilings, for each shore segment. Also rated [by Battelle] were estimates of habitat extent and welfare, based on 3 to 16 factors.” The correlations between these were “not significantly differ from zero (Bainbridge Island)” and “extremely low (East Kitsap County).” AR 2447-56, quote at 2447. Never mind the next step in scientific analysis if one *does* find significant correlations – searching for *causation* among the variables – here mere correlations are essentially nonexistent and causation is simply assumed by the County and Ecology.

“Theoretical harm” is not enough to justify restrictions on rights of citizens to use their property. There must be “actual, demonstrated harm.”

*Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 687, 169 P.3d 14 (2007). The County has not shown such real harm to its shorelines, certainly not with respect to family residences and their commonly appurtenant structures.

## **2. THE COUNTY AND ECOLOGY HAVE CREATED A *DE FACTO* PROHIBITION OF COMMON SHORELINE FACILITIES**

Without a clear understanding of what causes what in these shorelines, how is one to know which developments will negatively affect shoreline habitats? The variables, putatively dependent (habitat) and independent (development), that Battelle Marine Sciences Laboratory chose to collect on nearby shorelines of Puget Sound show negligible relationship between human developments and marine habitats. When this is combined with the lack of knowledge of exact conditions of the County's shorelines, how can anyone know if a proposed development will result in a net loss to ecological function? Neither Ecology nor the County know what typical shoreline developments cause habitat degradation or what the baseline is for establishing that there has been a loss.<sup>17</sup> Yet, based on this inadequate

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<sup>17</sup> The phrase "no net loss" appears three times in the RCW: In RCW 98.58.140 regarding WSDOT emergency projects where full permitting is too time consuming (added in 2015); at RCW 90.58.620, the section the legislature passed to allow counties and cities to prevent shoreline properties from becoming nonconforming, a section Jefferson County did not avail itself of; and at RCW 36.70A.480(3)(c)(i) where it is an alternative approach to shoreline regulation when a SMP is not in place. All references were added to the RCW after 2009, after Jefferson County's LASMP was adopted. In contrast, the phrase is found 16 times in the WAC, predominantly in titles administered by Ecology. This is agency overreach enshrined in regulation.

scientific base, the County and Ecology have imposed upon property owners a regime of permit requirements that amount to a *de facto* prohibition on common developments.

Consider the showings needed for the simple case of beach access stairs, normal structures appurtenant to single-family residences on high banks. The specific regulations span SMP pages 7-1 to 7-4 (AR 625-8, now codified at JCC 18.25.340), but incorporate by reference the entire SMP and specifically Article 6.3, General Policies and Regulations: Public Access (AR 616-8; now codified as JCC 18.25.290). The latter is one of those sections that impose public access requirements on private owners.

See, for example, JCC 18.25.290(1)(i):

Public access *requirements* on *privately* owned lands should be commensurate with the scale and character of the development and should be reasonable, effective and fair to all affected parties including but not limited to the landowner and the public. [Emphasis added.]

and JCC 18.25.290(1)(e)

Shoreline development by private entities should provide public access when the development would either generate a demand for one or more forms of such access ....

But unless the private development somehow cutoff existing public access, when would taking private property for public use ever be “fair” unless just compensation was paid pursuant to art. I, § 16 of the Washington Constitution? As the US Supreme Court found in *Kaiser*

*Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." The public access portions of the SMP are facially unconstitutional.

These prolix restrictions shift the burden onto the property owner to show that a traditional shoreline use will not negatively affect anything in the nonhuman environment. And added to it all are conditional use permits in all Shoreline Environmental Designations (SEDs). While the SMP definition of "conditional use permit" at JCC 18.25.100(3)(q) might appear to implicate a site-specific application of the regulations, it really adds considerably more layers of regulation while granting even more discretion to the regulators.

Conditional use permit (CUP) means a permit issued by the County stating that the proposed land uses and development activities meet all criteria and all conditions of approval in accordance with the procedural requirements of this code. The intent of requiring a CUP is to accommodate site-specific allowances while ensuring Program requirements are satisfied. As per JCC 18.15, a CUP can be administrative (C(a)) or discretionary (C(d)). For this Program, criteria are described in Article 9 and application review processes are described in Article 10.

Of course, "[f]inal authority for conditional use permit decisions rests with the Department of Ecology." JCC 18.25.590(1). Taken in total, these regulations will work a *de facto* prohibition on beach access structures

unless the county Administrator and the state Director want there to be one at a particular place. The number of grounds for denial or imposing onerous conditions that one must meet rises exponentially as requirement upon requirement is imposed. Forgotten is that single-family residences are a preferred shoreline use and access to the actual shoreline is a major reason why single-family residences are located and built, usually at comparatively greater cost and tax value, on the shoreline. Indeed, in Washington the right to access the waterfront is “often, in fact generally, the greatest value of the property.” *Hudson House v. Rozman*, 82 Wn.2d 178, 184, 509 P.2d 992 (1973).

What can be shown for regulation of beach access stairs can be shown as well for armoring, boating facilities, and all other “modifications” as human activities are referred to by JCC 18.25.330 - .410.

Article 7.2, Boating Facilities: Boat Launches, Docks, Piers, Floats, Lifts, Marinas, and Mooring Buoys, before being codified at JCC 18.25.350, stretched from page 7-4 to 7-16 (AR 628-40). And like Article 7.1, it incorporates regulatory Articles 6, 8, 9, 10, as well as explicitly referencing the public access requirements of JCC 18.25.290. One will find it the virtually impossible to comply with permit requirements. For example, “[b]oating facilities should not be located or expanded where they would: i. Impact critical habitats; or ii. Substantially interfere with

currents and/or net-shoreline drift; or iii. Cause significant adverse effects on aquatic habitat, biological functions, water quality, *aesthetics*, navigation, and/or neighboring uses.” JCC 18.25.350(1)(b), emphasis added.<sup>18</sup>

Boating facilities also face outright prohibitions. In the Priority Aquatic SED, “[r]esidential – Single-user docks, piers, floats, lifts and boat launches accessory to residential or private recreational development are prohibited.” JCC 18.25.350(2)(a)(iii). In the Natural SED, that this SMP makes 41 percent of county shorelines, “[a]ll other boating facilities, including boating facilities accessory to *residential development*, are prohibited. JCC 18.25.350(2)(c)(iv), emphasis added.

Rather than strive for objective standards that circumscribe regulatory discretion, this SMP shows a positive preference for subjective standards. For example, JCC 18.25.350(4)(a) regarding boating: “Private boat launches shall be allowed only when public boat launches are unavailable within a *reasonable* distance.” (Emphasis added.) This preference for vague, subjective standards when combined with the layers of regulation

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<sup>18</sup> The definition of Feeder Bluff at JCC 18.25.100(6)(d) is so broad it could include virtually every bluff in Jefferson County. This is significant as some common shoreline uses are prohibited outright where feeder bluffs are present. *What is not defined are the standards for identifying and classifying feeder bluffs.* This is an example of vagueness and resulting discretion allowed to the regulators by the SMP. In essence, this definition creates a new critical area out of whole cloth. See Declaration of Robert F. Cousins, LEG, LHG, particularly ¶¶ 14, 15 regarding the redundancy of feeder bluff restrictions. See Petitioners Olympic Stewardship Foundation, et al.’s Evidence Submittal Re Constitutional Claims.

imposed by both the County and the State work to prohibit the permitting of traditional shoreline land uses – if that is what the regulators desire.

Armoring, a traditional way to protect shoreline property – and one authorized under RCW 90.58.100(6) – faces a similarly subjective and multilayered regulatory regime aimed at prohibiting it in practice when not outright prohibited. For example, in the Priority Aquatic SED, “[n]ew structural shoreline armoring is prohibited, except to protect existing *public* transportation infrastructure and essential *public* facilities, in which case it may be allowed as a conditional use.” JCC 18.25.410(2)(a), emphasis added. In the Natural SED, “[s]tructural shoreline armoring is prohibited except that structural shoreline armoring to protect existing *public* transportation infrastructure and existing essential *public* facilities may be allowed as a conditional use.” JCC 18.25.410(2)(c), emphasis add.

The overuse of conditional use permits continues, as does the push for regulatory “encouragement” of public access to private property. In Shoreline Residential, “[s]horeline armoring structures may be permitted as a conditional use.” JCC 18.25.410(2)(e). Even in the High Intensity SED, “[s]horeline armoring structures may be permitted as a conditional use.” JCC 18.25.410(2)(f). “Proposals, other than single-family residential developments of more than four lots, that involve new or expanded shoreline armoring shall incorporate public access features consistent with

JCC 18.25.290 (Public access).” JCC 18.25.410(6)(h). “When seeking approval for new structural shoreline armoring, the project proponent should include public access that is consistent with JCC 18.25.290 (Public access).” JCC 18.25.410(6)(k).

As a final example of the regulatory overreach of this SMP – of many available – consider development in flood-prone areas. The first of the policies in JCC 18.25.380(1)(a), Flood Control Structures, is that “[t]he County should prevent the need for flood control works by limiting new development in flood-prone areas.” But WAC 173-26-221(3)(c)(i) says “[d]evelopment in flood plains should not significantly or cumulatively increase flood hazard ....” Again, this SMP prefers a subjective goal to be implemented by the regulator to a goal, not increasing flood hazard, subject to accurate quantification.

The regulatory maze visited in this section is at odds with the demands for clarity and distinction found in RCW 90.58.020 and WAC 173-26-201(2)(d).

### **3. THE OPPRESSIVE CONDITIONS IMPOSED ON PERMIT APPLICANTS VIOLATE THEIR RIGHT TO SUBSTANTIVE DUE PROCESS**

Property rights in Washington have long been protected by due process.<sup>19</sup> *See, e.g., Nielson v. Sponer*, 46 Wash. 14, 15, 89 P. 155 (1907).

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<sup>19</sup> US Const. Amends. 5, 14; Constitution of the State of Washington, art. 1, § 3.

“Many of the most important clauses of the Constitution,” including the Due Process Clause, are “focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised raw political power to obtain what they want.” CASS R. SUNSTEIN, 84 COLUM. L. REV. 1689 (1984). That “small group of agency regulators and Jefferson County Department of Community Development (“DCD”) staff” described in the brief of OSF was able to exercise that political power. Through that raw power they have enacted a county SMP that makes county shoreline property owners, certainly a minority of the electorate, cede their property to what those regulators and staff think desirable.

The courts of this state, as well as the US Supreme Court, have used substantive due process to ensure that the government’s exercise of its police power does not work injustices by yielding to “needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.” *Bennett*, 520 U.S. at 177.

Both federal and state substantive due process tests ask whether an ordinance fails a three-part test: (1) is the regulation aimed at achieving a legitimate public purpose; (2) does it use means reasonably necessary to achieve that purpose; and (3) is it unduly oppressive on the landowner? *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907

(1990); *Nebbia v. New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (In the exercise of the police power, “the means selected shall have a real and substantial relation to the object sought to be attained.”)

Here, the use of extraordinary means to protect the shorelines of Jefferson County *might* be a legitimate public purpose if grave damage to those shorelines had been shown. But such damage was not shown, it was only posited. As argued throughout the briefing of CAPR and OSF, the CIA and shoreline inventory have not documented damage. The County’s own expert described the shorelines of the county as generally in good shape. (CIA § 2.2, p. 10; AR 2361.) Using the data collected along the shorelines of nearby Kitsap County and Bainbridge Island by Battelle Marine Sciences Laboratory, Dr. Flora found negligible association between shoreline development and habitat degradation. (See Section V(C)(1) above.)

Without a clearly delineated, current problem with Jefferson County’s shorelines, any means beyond the previous SMP with its smaller buffers and simpler regulations cannot be “reasonably necessary” to achieve its purpose since a legitimate purpose has not be defined.

In evaluating whether a regulation is “unduly oppressive on the landowner,” the court in *Presbytery* considered “the nature of the harm sought to be avoided; the availability and effectiveness of less drastic

protective measures; and the economic loss suffered by the property owner.” *Id.* at 331.

CAPR and OSF have already argued the County’s failure to show the precise nature of the harm to be avoided and how residences along the shorelines might be causing loss of ecological function. Likewise, it has been argued that the previous SMP was doing what was needed to protect the shorelines of the county. This leaves the question of economic loss suffered by the property owners. But this was not addressed by the County at all. *See* section V(A) above.

In evaluating the stated public purpose, the court considers (1) the seriousness of the public problem; (2) the extent to which the landowner’s property contributes to it; (3) the degree to which the regulation solves it; and (4) the feasibility of less oppressive alternatives. *Presbytery*, 114 Wn.2d at 331. A court may strike down regulation where there is no rational connection between the challenged regulation and a legitimate government objective. *Ongom v. State Dept. Of Health*, 159 Wn.2d 132 146-47, 148 P.3d 1029 (2006).

As argued in sections V(A)(1)(a) and (b), the SMA and the State Economic Policy Act required the County to take account of economic impacts of the SMP. The County did not, and Ecology did not before approving the SMP as its rule. *Citizens for Rational Shoreline Planning v.*

*Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011). This has been left to the citizens to do. Based on the analysis of Petitioner Farr, while interior properties in Jefferson County have been appreciating, shoreline properties have “dropped 18.5 percent (1.0 billion dollars) of their assessed value since 2012. The chart also shows typical shoreline properties with losses of about 30 percent of their assessed value during this period of time while inland properties continued to grow in value.” Declaration of J. Eugene Farr Re (1) Land Subject to Shoreline Prescriptive Buffer and Setback Imposed by Jefferson County’s New Shoreline Master Program, and (2) Impact of These Regulatory Impositions on Assessed Property Value, ¶ 16. *See* Petitioners Olympic Stewardship Foundation, et al.’s Evidence Submittal Re Constitutional Claims (“OSF Evidence Submittal”).

The costs of making permit application for commonplace residential amenities in the shoreline have risen, another economic burden upon property owners. These costs are enumerated in the Declaration of Dennis A. Schultz Re Cost of Shoreline Application and Approval Process as Applied to the Jefferson County Shoreline Master Program and the Declaration of Leann Ebe McDonald Re Complexity and Cost of Shoreline Application Process as Applied to the New Jefferson County Shoreline Master Program. *See* OSF Evidence Submittal.

Upon the arguments here advanced, the SMP violates RCW 90.58.020, RCW 90.58.100(6), WAC 173-26-201(2)(d), WAC 173-26-221(3)(c)(i), and the constitutional right to substantive due process. The Board has erroneously interpreted the law; its order is not supported by substantial evidence; the FDO is arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i). The FDO and SMP are reversible under RCW 34.05.570(3)(a).

**D. PETITIONERS RIGHTS TO DUE PROCESS WERE DENIED BY LACK OF A NEUTRAL TRIBUNAL IN THE FIRST INSTANCE OF REVIEW**

Comprehensive plans and development regulations, including shoreline master programs, are presumed valid on adoption. RCW 36.70A.320(1); *Lake Burien Neighborhood v. City of Burien*, GMHB Case No. 13-3-0012, Final Decision and Order (June 16, 2014), at 3. This presumption creates a high threshold for challengers, who have the burden to overcome the presumption of validity. *Id.* at 3-5.

*Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Wash. Central Puget Sd. Growth Mgmt. Hrgs. Bd., Case No. 14-3-0012, Final Decision and Order at 2 (2015), 2015 WL 1911229.

In *Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), the Court observed that if a party is denied “impartial adjudication in the first instance, that party is deprived of that which it is entitled to under the Due Process Clause” of the 14<sup>th</sup> Amendment. *Concrete Pipe* is a Multiemployer Pension Plan

Amendments Act (MPPAA) case where appellant challenged the amount of pension costs allocated to it by the trustees of appellee. The Court observed that

if the employer were required to show the trustees' findings to be either "unreasonable or clearly erroneous," there would be a substantial question of procedural fairness under the Due Process Clause. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. *Cf. Withrow v. Larkin*, 421 U.S., at 58, 95 S.Ct., at 1470. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.

508 U.S. at 626.<sup>20</sup>

But this is just what the Board requires of those who appeal a SMP. When the appeal concerns shorelines, "[t]he Board shall find compliance unless it determines that the action is *clearly erroneous* in view of the entire record before the board." *Preserve Responsible Shoreline Management* at 5; emphasis in original. And if the appeal concerns shorelines of statewide significance, the threshold of persuasion is even higher.

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<sup>20</sup> Appellant lost its appeal as the Court found that the trustees were acting in an enforcement role, not an adjudicative role, *Concrete Pipe*, 506 U.S. at 618. "The distinction between adjudication and enforcement disposes of the claim that the assumed bias or appearance of bias in the trustees' initial determination of withdrawal liability alone violates the Due Process Clause .... *Id.* at 619. This distinction does not help Respondents here as the GMHB was exercising an adjudicative function.

Where the Board's review concerns shorelines of statewide significance (SSWS), the scope of the Board's review "is narrower and the evidentiary standard is enhanced, consistent with the enhanced protection of the statewide interest over the local interest." *Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, GMHB Case No. 10-1-0011, Final Decision and Order (Apr. 4, 2011), at 4 n.8. The Board shall uphold Ecology's decision regarding approval of a master program unless the board determines, *by clear and convincing evidence*, that the decision is noncompliant with the policy of RCW 90.58.020, the applicable guidelines, or RCW 43.21C. RCW 90.58.190(c). Clear and convincing evidence "requires that the trier of fact be convinced that the fact in issue is 'highly probable.'" *Colonial Imports, Inc. v. Carlton NW., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993) (internal citations omitted). This means that the facts relied upon must be clear, positive, and unequivocal in their implication.

*Preserve Responsible Shoreline Management* at 5-6; footnote omitted, emphasis in original.

No outlier, *Concrete Pipe* follows the Supreme Court's traditional due process jurisprudence.<sup>21</sup> Due process requires a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267 (1972).

We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. Indeed, "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and this "stringent rule may sometimes

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<sup>21</sup> In *Guimont v. City of Seattle*, 77 Wn. App. 74, 86 n.10, 896 P.2d 70 (1995), Division I of this Court found *Concrete Pipe's* rationale applies only to federal economic legislation. This is a crabbed reading that this Court needs to revisit.

bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,” *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). See also *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980); footnote omitted. The Court in *Marshall* also found that plaintiffs are entitled to a *de novo* hearing before an administrative law judge.” *Id.* at 247.

The GMHB is not impartial or detached, and its review is not *de novo*. “The growth management hearings board members are not elected but are appointed by the governor for six-year terms (without legislative confirmation). RCW 36.70A.260.”<sup>22</sup> *Swinomish Indian Tribal Cmty. v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 438, 166 P.3d 1198 (2007), J. M. Johnson, J. *concurring in part and dissenting in part*. The GMHB is not a constitutionally established court; it is not an elected tribunal; its members are appointed by the governor, just as is the director of Ecology who approves the SMPs the Board rules on. RCW 43.21A.050.

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<sup>22</sup> RCW 36.70A.260 was amended by 2010 c 211 § 5, eliminating the reference to board member qualifications. Laws of 2010 c 211, § 4 added board member qualifications to RCW 36.70A.250.

Compounding this error of constitutional magnitude,<sup>23</sup> courts reviewing the Board's decisions grant it deference. "We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues ...." *E.g., City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

Administrative appeals are supposed to ensure that official decisions that affect citizens' property rights are reviewed by an outside, impartial adjudicator. This was not done here. "The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In light of the US Supreme Court's due process jurisprudence, the Board's FDO must be set aside. The FDO and SMP are reversible under RCW 34.05.570(3)(a).

#### **E. PETITIONERS ARE ENTITLED TO THEIR REASONABLE ATTORNEY FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT**

In 1995, the legislature enacted the EAJA, chapter 4.84 RCW, to ensure citizens a better opportunity to defend themselves from inappropriate state agency actions. Laws of 1995, ch. 403, § 901. The relevant statute provides that "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses,

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<sup>23</sup> *See also* Constitution of the State of Washington, Const. art. 1, § 3.

including reasonable attorneys' fees.” RCW 4.84.350(1)  
(emphasis added).

*Costanich v. Washington State Dept. of Social and Health Services*, 164  
Wn.2d 925, 929, 194 P.3d 988 (2008).

Under RCW 4.84.340, all CAPR Petitioners are qualified parties and  
the Board and Ecology are agencies. CAPR requests its fees, other  
expenses, and reasonable attorney fees be awarded to them.

#### V. CONCLUSION

For the reasons above, as well as those argued by OSF and Hood  
Canal, this Court must find the SMP adopted by Jefferson County under  
Ordinance 07-1216-13, and approved by Ecology, not in conformity with  
ch. 90.58 RCW, the Shoreline Management Act. Petitioners request this  
Court vacate the SMP of Jefferson County in its entirety and reinstate the  
County SMP adopted in 1989 until a lawful update can be adopted.

Dated: March 7, 2016

Respectfully submitted,



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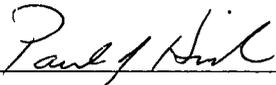
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