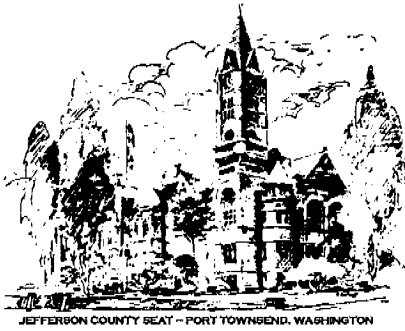


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Questions have arisen concerning Jefferson County's efforts regarding the adoption of a new Shoreline Master Program. Some of them are answered here.

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- Nothing in this document shall guarantee a particular land use development proposal or application or any category of land use development proposals or applications a particular result or a particular benefit allegedly derived from or found within the Shoreline Master Program that is eventually adopted.
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1. Why is Jefferson County rewriting its Shoreline Management Master Program?

The County is obligated to update its Shoreline Master Program (or "SMP," a shorter title) because of RCW 90.58.080(2)(a)(ii), which requires Jefferson County "to develop or amend a master program for regulation of uses of the shorelines of the state consistent with the required elements of the guidelines adopted by the department" on or before December 1, 2011.

2. Why can't the County simply make minor changes to its current SMMP?

Again the text of RCW 90.58.080(2)(a)(ii) controls because the SMP that the County adopts must be consistent with the "guidelines adopted by the department," i.e., the WA State Department of Ecology, hereinafter "Ecology." Ecology's current guidelines became effective in January 2004, some 15 years after the County adopted its SMP, and thus the 1989 SMP is not consistent with the 2004 guidelines (and the science those guidelines are based upon) and minor changes to it will not achieve that consistency. By way of example only, the various designations that can be given to a section of the shoreline have changed and thus the "shoreline

environmental designations" (or "SED") found in the current SMP do not match up with the SED list found in the current Ecology guidelines at WAC 173-26-211. Additionally, this County adopted a GMA Comprehensive Plan in 1998 (readopted in 2004) that has goals and policies for the shoreline that must be reflected and implemented in a new SMP. In general, therefore, the SMP has to be rewritten.

3. Who has paid for this rewrite?

In accordance with RCW 90.58.080(5) and (6) local governments are encouraged to apply for grant funds from Ecology to pay for the work of revising, generating and eventually obtaining approval of a revised SMP. Ecology has provided this County with \$670,000 in grant money for this work, funding that expires at the end of June 2009. The County's General Fund has also helped pay for this work. The contract with Ecology was signed in June 2006 and originally the County was obligated by RCW 90.58.080(5) to have a locally-approved new SMP finished by June 12, 2008. Because the County was making good progress towards a new SMP that deadline was extended to June 12, 2009 as state law allows. Ecology recently expressly approved an extension of that deadline to the end of October 2009.

4. What has lead to creating the October 2009 deadline?

As discussed with the County Commission on February 23, 2009 and May 11, 2009 the County has needed additional time because the process of generating, reviewing and debating a new SMP has taken longer than expected. The decisions in *C.A.P.R.* and *Futurewise* have added time to this process because analysis of those cases both by Ecology and County staff was required. The Planning Commission ("PC") is now meeting weekly instead of every other week and devoting those additional meeting to the Preliminary Draft SMP or "PDSMP."

5. So what is the new self-imposed deadline?

There are a series of deadlines involved. After a Planning Commission Revised Draft SMP is published on June 3, 2009 and made available for comments for two weeks, that same body will hold a public hearing on June 17, 2009. PC deliberations follow and a PC-recommended Final Draft SMP will be submitted to the County Commissioners ("BoCC") by July 27, 2009. DCD will provide its recommendation to the BoCC by August 3, 2009 and then comments will be accepted by the BoCC between the 5th and 24th of August. The BoCC will hold a public hearing on August 24th. The BoCC will deliberate during September 2009 and then locally approve the SMP with delivery of Ecology of the SMP and related documents no later than October 30th.

In sum, the PDSMP becomes the Planning Commission Revised Draft SMP on or before June 3, 2009 which, in turn, transforms into the Planning Commission Final Draft SMP. The Final Draft SMP will be submitted to the BoCC by July 27th and separate DCD recommendations will follow within one week.

6. What is meant by the phrase "locally approved?"

Local approval of the SMP is the first of three steps that will occur before the SMP has the force of law in this County. Local approval via a Resolution of the BoCC will occur before October 30, 2009. Ecology then reviews the SMP and must also reject, approve the SMP or approve with recommended changes. See RCW 90.58.090(1) which states that a "master program shall become effective when approved by the department," i.e., Ecology. The final step will be adoption of the SMP via a BoCC Ordinance, to give it the effect of local law, after Ecology approval.

7. How long will Ecology approval take?

Ecology will need some six to twelve months to review and make a decision regarding the SMP this County sends to it. However, Jefferson County should be in compliance before the December 1, 2011 deadline set for us by state law.

8. What is the standard by which Ecology will judge the locally-approved SMP?

There are three standards that Ecology must apply. They are laid out in RCW 90.58.090(3), (4) and (5) as follows:

"(3) The department shall approve the segment of a master program relating to shorelines unless it determines that the submitted segments are not consistent with the policy of RCW 90.58.020 and the applicable guidelines.

(4) The department shall approve the segment of a master program relating to critical areas as defined by RCW 36.70A.030(5) provided the master program segment is consistent with RCW 90.58.020 and applicable shoreline guidelines, and if the segment provides a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).

(5) The department shall approve those segments of the master program relating to shorelines of statewide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the statewide interest. If the department does not approve a segment of a local government

master program relating to a shoreline of statewide significance, the department may develop and by rule adopt an alternative to the local government's proposal."

Regarding critical areas the Growth Management Act at RCW 36.70A.480(4) contains similar text as RCW 90.58.090(4) above, i.e., the GMA requires that any SMP must provide a level of protection to GMA "critical areas" within the shoreline jurisdiction "that is at least equal to the level of protection provided to critical areas by the local governments [GMA-derived] critical areas ordinances."

9. Do the rules surrounding "best available science" apply when generating a new SMP?

No. Best available science, a term of art found in the GMA at RCW 36.70A.172, is made specifically not applicable to the adoption of an SMP by RCW 36.70A.480(3)(c).

10. What part does science play in generating a new SMP?

Despite the answer to the prior question, science plays a very important part in preparing an SMP. Pursuant to RCW 90.58.100(1):

"(i)n preparing the master programs (Ecology) 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; (c) consider all plans, studies inventories and systems of classification made or being made by federal, state, regional or local agencies or by organizations dealing with the pertinent shorelines of the state."

This is carried over into the Ecology guidelines at WAC 173-26-201(2)(a) which contains the following relevant text requiring reliance upon the most current, accurate and complete scientific and technical information available:

(a) Use of scientific and technical information. To satisfy the requirements for the use of scientific and technical information in RCW 90.58.100(1), local governments shall incorporate the following two steps into their master program development and amendment process.

First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science. Local governments should also contact relevant state agencies, universities, affected Indian tribes, port districts and private parties for available information.

.....
Second, base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available. Local governments should be prepared to identify the following:

The County has been diligent in using science to determine the text of the SMP. The reader is referred to the Final Shoreline Inventory and Characterization Report dated November 2008 and the Cumulative Impacts Study from February 2009.

11. Is there discretion on the part of the County Commission to reduce the size of the standard buffer widths from what is found in the current draft?

Yes. The County Commissioners, in their legislative role, because they are the elected policymakers always have discretion to enact legislation which differs in substance from what is proposed by staff or the Planning Commission. Regarding buffers the PDSMP serves to implement the statutory requirement that a GMA 'critical area' in the shoreline jurisdiction be at least as protected as that 'critical area' would be if it were upland and thus governed by GMA-derived development regulations. The PDSMP does this by incorporating the substance of the County's CAO (Ch. 18.22 JCC) into the SMP.¹ See the PDSMP at Ch. 1.6 at p. 1-4 and 1-5.² If a GMA-derived buffer and an SMP-derived buffer are either contiguous or overlapping, then "the landward-most edge of all such buffers and setbacks shall apply." See Ch. 6.1.D.8 at p. 6-5. In sum, the SMP, regardless of what text it

¹ Procedural aspects of Ch. 18.22 JCC, the CAO, will NOT apply within the shoreline jurisdiction, specifically "permit, non-conforming use, appeal and enforcement decisions within the shoreline jurisdiction shall be governed by the [SMP]." See the PDSMP, Ch. 6.1.D.1, p. 6-4. Similarly, conflicts between Ch. 18.22 and the SMP will be governed by the SMP. Ch. 6.1.D.2, p. 6-4.

² All references to the PDSMP in this Memo relate to the December 3, 2008 version.

includes, will have to satisfy the tests listed above in Question #8 above, i.e., for example, does the new SMP satisfy the guidelines and/or the state law,.

12. What will be affected by the new SMP?

The County is preparing a new SMP which will contain development regulations that presumably will be codified at Chapter 18.25 JCC. The existing SMP should remain available to the planners because certain permit applications that have vested to it.

According to RCW 36.70A.480(1), those portions of an SMP dealing with goals and policies are considered Comp Plan elements while all other portions of an SMP are considered to be development regulations or code.

13. Is the 150 foot buffer that is found in Article 6 a complete "no-touch zone"?

No.

14. If it isn't a "no-touch zone" what can I do in that buffer?

Initially, note that "water-dependent and water-related uses" such as docks, piers and floats are permitted uses within a shoreline buffer as long as they can comply with all other aspects of the SMP. See PDSMP, Ch. 6.1.E.3, p. 6-7 and 6-8. Stairs down to the beach would appear to be permitted as part of "beach access structures accessory to a single family residen[ce]" per Ch. 6.1.E.3.iv, p. 6-7.

Single family residences are permitted on lots made non-conforming by their insufficient depth as measured landward of the ordinary high water mark if other constraints can be met, per Ch. 6.1.E.1, p. 6-6 & 6-7. For non-conforming lots there is also the common-line setback option at Chapter 6.7, p. 6-18 and 6-19 of the PDSMP. Note well that lots that are non-conforming as to the standard buffer will constitute about 12 % of all the shoreline parcels, which is 3 % of the shoreline acreage.

Distinct from structures such as docks, stairs and residences, the Preliminary Draft SMP also allows "[u]p to twenty (20) percent of the buffer area, or at least 15 linear feet of the water frontage, whichever is greater, [to] be retained as open space and used for shoreline access.per Ch. 6.1.D.8, p. 6-5. This would allow a property owner to use the buffer area for a lawn or to create a five foot wide trail (with five feet cleared on either side of the trail) in accordance with Ch. 6.4.B.4.v, p. 6-16.

A landowner also has available the Critical Area Stewardship Program found in the SMP at Chapter 6.1.D.11 (p. 6-6 of the PDSMP), which refers you to the current CAO and also buffer reduction or averaging, Section 6.1.D.9 of the SMP, which also refers the reader to the current CAO, at p. 6-5.

15. There has been much concern about the rules that will apply when a residence is destroyed by an Act of God such as a fire, for example, why is 75% destruction a threshold question the property owner has to be concerned with?

The 75 % threshold, i.e., whether the destruction of the development did or not exceed “75% of the replacement cost of the development,” is only significant if the development in question was non-conforming. The 75% threshold with respect to non-conforming uses has its foundation in WAC 173-27-080(8).

Where the destruction ratio was no more than 75% of replacement cost, then the development can rebuild at the same location. For a single family residence and in the absence of any expansion of the residence via reconstruction a shoreline variance is not required.

If the destruction ratio exceeds 75%, then both a single family residence and any other development must, if the lot is conforming, rebuild in a way that conforms with the new SMP meaning, for example, that when possible the rebuilt structure must be landward of the landward edge of the standard buffer. Recognizing that a single family residence will often be located on a non-conforming lot, under those circumstances the residence can be rebuilt at its non-conforming location. See the attached chart.

The applicable WAC and the text found in the PDSMP conform to well-established Washington case law stating that while local governments may discourage the existence of legal, non-conforming uses because, by definition, they do not comply with the current zoning standards, the courts also recognize that a legal, non-conforming use already in place is a recognized property right that cannot be easily erased. See for this general proposition *Rhod-A-Zalea v. Snohomish Cty.*, 136 Wn. 1, 959 P. 2d 1024 (1998) (legal non-conforming use can be subject to subsequently enacted police power or health and safety regulation.)

The confusion presumably arises because of the following statement found in RCW 90.58.030(3)(e)(i): “repair of existing structures or developments, including damage by accident, fire or elements” does not constitute “substantial development,” a state law that contains no percentage threshold. However, that particular RCW is not limited to “non-conforming” uses as is WAC 173-27-080(8).

16. For the aggrieved person what is the appeal process?

The SMP is not ripe for appeal until such time as Ecology has approved or disapproved of the proposed SMP sent to it by the local government, i.e., Jefferson County, per RCW 36.70A.290(2)(c).

17. If someone is aggrieved by the Jefferson County SMP to whom do they appeal?

They appeal to the Western Washington Growth Management Hearings Board in accordance with RCW 90.58.190(2)(a).

18. So what can we expect to have happen if and when Ecology approves our SMP?

As stated above, any group or person aggrieved by the approved SMP will have 60 days from the date when the "notice of approval" was published in THE LEADER to file a Petition for Review ("PFR") with the Western WA Growth Mgmt. Hearings Board or "WWGMHB."

19. What is the jurisdiction of the Western WA Hearings Board?

The WWGMHB only has the jurisdiction granted to it by RCW 36.70A.280(1)(a) and that jurisdiction is limited to determining if the challenged action by the local government complies with the SMA, SEPA and the GMA.

20. What will be the ground rules in that situation?

The burden of proof to prove non-compliance with the SMP before the WWGMHB will remain at all times with the Petitioner(s). See RCW 90.58.190(2)(d).

21. Has any other County gone through the adoption and appeal process?

Yes. Whatcom County has seen the WWGMHB uphold its updated SMP as lawful.

22. Where can I find the decision of the Hearings Board finding that the Whatcom SMP is lawful?

Look for the Final Decision and Order dated April 20, 2009 in the case entitled *Citizens for Rational Shoreline Planning, Jepson v. Whatcom Cty., Ecology WWGMHB #08-2-0031*. It is available on the web page for the WWGMHB.

23. What was the substance of the decision concerning the Whatcom County SMP?

The substantive issues were decided in a manner favorable to Whatcom County in the decision dated April 20, 2009.

On the public participation claim of the Petitioners the WWGMHB ruled that there had been sufficient opportunities for public participation before Whatcom County sent the “locally approved” SMP to Ecology. They also ruled, more importantly, that although Ecology had recommended changes in the SMP back to Whatcom County, the SMA required only Ecology to implement public comment opportunities during its review period. Thus, once the SMP got back to Whatcom County for adoption the County was not statutorily required to hold another public hearing because the County basically chose to adopt the changes Ecology had recommended without making any substantive changes. One Board member dissented from this conclusion.

The Petitioners in *Citizens for Rational* also challenged the setbacks (standard buffers), which were based on GMA “critical areas” as allegedly far exceeding the requirement of the guidelines (Ch. 173-26 WAC) that the SMP insure that development achieve “no net loss.” However, when required to brief this issue the Petitioners failed to do so, forcing the WWGMHB to rule the issue was abandoned.

Those Petitioners also challenged the designation of shorelines as GMA “critical areas.” This argument was rejected by the Hearings Board because the scientific record generated by the county clearly showed that the one lake and three bays in question were “fish and wildlife habitat conservation areas,” a type of GMA “critical area.”

24. What should we know about Citizens’ Alliance for Property Rights v. Sims, 145 Wn. App. 649 (2008), also known as the King County Critical Areas Ordinance case?

The most important thing to know about the *C.A.P.R.* case was that by the time this case reached the Court of Appeals it was solely a challenge to one section of the King County clearing and grading Ordinance in Superior Court, a challenge that did NOT allege non-GMA compliance. Thus, it most accurate to state that the decision known as *Citizens’ Alliance* was a challenge to only one portion of the Ordinances intended to protect critical areas.³ Note well the Central Puget Sound GMHB had separately found the King County CAO to be GMA-compliant.

25. If C.A.P.R. did not involve a challenge based on GMA, on what basis was the King County clearing and grading Ordinance challenged?

³ The King County CAO was adopted via a different Ordinance (#15051) than the clearing and grading Ordinance (#15053) and they are codified in Title 21A and Title 16, respectively, of the King County Code. It is Ordinance #15053, Section 14, now codified at King County Code Section 16.82.150 that is the sole subject of the appellate decision in *Citizens’ Alliance*.

Instead those plaintiffs sought relief under common-law causes of action such as “substantive due process” and an alleged violation of RCW 82.02.020, which prohibits a local government from imposing a direct or indirect tax, fee or charge upon the applicant as a condition of a permit. It was an innovative attack on an Ordinance. Note well that the *C.A.P.R.* plaintiffs conceded the King County Ordinance included ‘best available science’ and properly balanced the 14 GMA goals.

26. In what regard was C.A.P.R. innovative?

Usually a claim that RCW 82.02.020 has been violated arises in the context of an applicant who obtained a permit but feels aggrieved by a condition imposed on the permit that he feels constitutes a direct or indirect tax, fee or charge. *C.A.P.R.* is different because it is the first instance where RCW 82.02.020 was used to challenge a development regulation rather than a condition attached to a land use development permit. Similarly, all of the cases relied upon in to reach the decision in *C.A.P.R.* arose in the context of an allegedly unlawful permit condition.

27. What were the facts of C.A.P.R.?

The challenged provision of the King County clearing and grading Ordinance mandated set aside zones for parcels zoned rural area residential. If the parcel was smaller in size than 1.25 acres than only 50% of the parcel plus the area needed for access, utilities and septic could be cleared. Between 1.25 acres and 5 acres, 50% had to remain untouched and above 5 acres the acreage cleared could not exceed the greater of 2.5 acres or 35% of the total acreage. The set aside zones were truly no touch zone because at most one could graze animals in such zones and no activity that would have required a county permit was allowed in the set aside areas.

28. What was the reasoning the Court of Appeals used to reach its decision in C.A.P.R.?

The plaintiffs in *C.A.P.R.* attacked the Ordinance based on RCW 82.02.020, which prohibits local governments from obtaining directly or indirectly a tax, fee or charge from a developer unless certain exceptions to the general prohibition apply. The public policy supporting such a statute is that a specific land use development cannot be forced to solve a societal problem that it did not worsen.

So in order to be lawful and not contrary to RCW 82.02.020 the SMP or any development regulation has to satisfy the “nexus” and “proportionality” tests laid out in *C.A.P.R.*, which draws on various WA State cases and the two seminal U.S Supreme Court cases from about 15 to 20 years ago, *Dolan* and *Nollan*.

Our Division within the Court of Appeals (Div. II) has defined “nexus” and “proportionality” in *Burton v. Clark County*, 91 Wn. App. 505 (1998). There the Court of Appeals stated that “nexus” is satisfied when there is a relationship between the identified public problem (or “IPP”) and the proposed solution to that problem. Similarly, the rule on “rough proportionality” from the *Burton* case is, in essence, two questions: does the project worsen the IPP and, if so, is application of the regulation to the proposed project proportionate, i.e., commensurate with the worsening of the IPP that the specific project will cause?

Without both “nexus” and “rough proportionality” indicated in the text of the SMP and the record below, the King County Ordinance would be in violation of RCW 82.02.020. The King County Ordinance failed the “rough proportionality” test because “it fail[ed] to relate the clearing limit to the nature and extent of the proposed development on the lot.”

29. Did King County appeal the decision reached in Citizens’ Alliance?

Yes, the County sought review at the State Supreme Court but the State Supreme Court denied review, leaving the Court of Appeals decision as good law.

30. What should I know about those two U.S. Supreme Court cases?

The two cases are among the leading case on the “takings” clause of the Fifth Amendment to the U.S. Constitution, which states that there shall not be a taking of property by the government without payment of just compensation.

The “nexus” test comes from *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). There the Nollans successfully asserted that a permit condition that required them to provide an easement for the public across their beach constituted a ‘taking.’ Why? Because the Court concluded that the Nollan residence did NOT interfere with the public’s ability to traverse the beach and thus the Nollan’s request to build a residence neither worsened nor alleviated the identified public problem.

The “rough proportionality” test comes from *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 104 (1994). Per *Dolan*, decided 7 years after *Nollan*, a permit condition must not only have a “nexus” to an identifiable impact, it must also be “roughly proportional” to the impact being mitigated, i.e., it can’t be killing a fly with a bullet from a pistol. A permit condition that required the landowner to dedicate a portion of their property to a bike path to alleviate extra traffic congestion the development would cause was found by the U.S. Supreme Court to possibly satisfy the “nexus” and “rough proportionality” tests if the City presented more evidence in that regard. A permit condition that required the

landowner to dedicate a portion of their land for a public greenway to minimize possible flooding of the adjacent river was found by the Supreme Court to have failed the “rough proportionality” test because the City had not demonstrated that there were not other less intrusive ways to protect the floodplain without depriving the landowner of her property.

31. Would adoption of the Preliminary Draft SMP rise to the level of a “taking” that would require “just compensation” pursuant to the federal and state constitutions?

This question can only be answered after adoption of an updated SMP and the filing of a challenge to the SMP which will jointly serve to crystallize a particular “case or controversy” that can be litigated and decided.

32. Didn't the State Attorney General prepare a document intended to help local governments analyze their regulatory actions in light of the “takings’ clauses found in the federal and state constitutions?

Yes, the Attorney General created such a document, entitled “Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property.” He was required to do so and to periodically update this document pursuant to RCW 36.70A.370(1). It is available at the web site for the WA State Attorney General. Here is the link:

[http://www.atg.wa.gov/uploadedFiles/Home/About the Office/Takings/2006%20AG O%20Takings%20Guidance\(1\).pdf](http://www.atg.wa.gov/uploadedFiles/Home/About%20the%20Office/Takings/2006%20AG%20Takings%20Guidance(1).pdf)

33. What does the Attorney General's document on “takings” say?

While it is not possible to describe in this memo the nuances and details of the Attorney General's document, which contains 16 single-spaced pages of explanatory text and an Appendix of 25 single-spaced pages, that document does lay out five questions the local government should be considering when it contemplates adopting or amending a regulation. Those questions are:

1. Does the regulation result in a permanent or temporary physical occupation of private property?
2. Does the regulation deprive the owner of all economically viable uses of the property?

3. Does the regulation deny or substantially diminish a fundamental attribute of property ownership?⁴
4. Does the regulation require a property owner to dedicate a portion of property to a grant or easement? And
5. Does the regulation have a severe economic impact on the landowner's economic interest?

The answers to these questions will be very fact specific.

34. What is the significance of the Futurewise case?

The full name of the case is *Futurewise v WWGMHB*, 164 Wash.2d 242, 189 P.3d 161 (2008). It is important for the reader because in that case the State Supreme Court has ruled that only the SMA can regulate critical areas (a term of art from the GMA) when those critical areas are within the shoreline jurisdiction. The case was decided 5-4, with one Justice in the majority agreeing only with the result, meaning she did not accept the logic of the majority decision only the result.

35. What are the facts of Futurewise?

The facts of Futurewise are found in the underlying Hearings Board case.

The case arises from the City of Anacortes adopting a stand-alone CAO in 2005. Environmental groups appealed to the WWGMHB and among the appeal issues was the allegation that the new CAO insufficiently protects the marine shorelines critical areas.

Anacortes responded by pointing to ESHB 1933 that "transferred protection of critical areas of shorelines of the state to a local shoreline master program," or, differently stated, the City stated its approved and extant SMP provided adequate protection to the marine shorelines, ESHB 1933 intended to immediately transfer governance of shoreline critical areas to the local SMP and thus the Hearings Board does not have jurisdiction over this allegation. This is the position accepted by the majority of the State Supreme Court in *Futurewise*.

The Petitioners agreed they could not ignore ESHB 1933 but argued (as the dissent did at the State Supreme Court) that jurisdiction over critical areas that happen to be within the shoreline jurisdiction did not transfer to the applicable SMP until such time as Ecology had guidelines in place AND a new applicable SMP was approved by Ecology pursuant to those guidelines. You will recall that the BIAW had successfully knocked out Ecology's first attempt to re-write its guidelines.

⁴ There are three fundamental attributes of property ownership: the right to own or possess the property, the right to sell the property and the right to exclude others from your property.

The WWGMHB struggled with the ambiguity found in RCW 36.70A.480(3)(a)'s opening clause: "[a]s of the date [Ecology] approves a local government's [SMP] adopted under applicable shoreline guidelines, the protection of critical areas ... within shorelines of the state shall be accomplished only through the SMP."

The WWGMHB realized that if the transfer of governance to the SMP did not occur until a new SMP was approved by Ecology, then for some local jurisdictions there would be continued GMA governance in the shoreline jurisdiction until their statutory deadline, which could be as late as December 2011. The WWGMHB concluded that the State Legislature did not enact ESHB 1933 in 2003 with the thought that it would not take effect (and require SMP governance inside the shoreline jurisdiction) until up to 8 years later. That same logic was used by the State Supreme Court majority opinion.

However, while Anacortes was right that the SMP governed immediately, the WWGMHB also found that because the new CAO would be impacting development in the shoreline jurisdiction that CAO was ALSO an amendment to the City's 2000 SMP. Therefore, the WWGMHB ruled that it could not rule upon the allegation that marine shorelines were not being adequately protected by the new CAO until such time as the CAO, as it impacts shorelines, was approved or rejected by Ecology. Only after it was reviewed and analyzed as an SMP amendment by Ecology could it then be appealed to or reviewed by the WWGMHB. Before that time such a claim was premature or in legalese not 'ripe.'

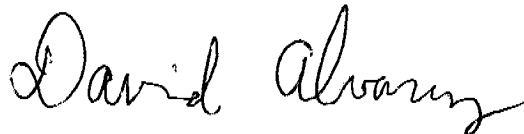
36. What happened next, how did the case get to the State Supreme Court?

Futurewise, with a new ally (Dept. of Ecology), appealed the WWGMHB decision that its claims about the marine shorelines were not ripe. In November 2006 Thurston County Superior Court accepted the Futurewise argument that the SMP did not govern critical areas in the shoreline jurisdiction until the SMP update is approved by Ecology. The City of Anacortes in December 2006 appealed that decision to the Court of Appeals and because the issue was of statewide significance it went straight to the State Supreme Court.

37. Why is it important to know so many details about the Hearings Board case that led to the State Supreme Court decision in Futurewise?

The Hearings Board case must be studied closely because of the cryptic holding of the Supreme Court in the *Futurewise* case: "[t]he decision of the trial [Superior] court is reversed, and the decision of the [WWGMHB] upholding Anacortes is reinstated."

David Alvarez, Chief Civil DPA



Rebuilding a Non-conforming Structure After Fire/Flood/Natural Damage

PDSMP Article 2 Definition

Nonconforming structure means a structure which does not conform to the dimensional regulations of this Program, including but not limited to setback, buffer, height, lot coverage, density, and building configuration

	<p>Non-conforming Structure: Single Family Residential</p>	<p>Non-conforming Structure: (NOT single family residential)</p>
<p>Damage up to 75% replacement cost</p>	<ul style="list-style-type: none"> • Rebuild same location/configuration as previous. • Apply w/in 6 months, complete reconstruction w/ in 2 years. • Shoreline Variance permit not required • Administrative review for Shoreline Substantial Development Permit Exemption (if no expansion) 	<ul style="list-style-type: none"> • Rebuild same location/configuration as previous. • Apply w/in 6 months, complete reconstruction w/in 2 years. • Any expansion/enlargement or relocation w/ in the buffer may require a Shoreline Variance.
<p>Damage exceeding 75% replacement cost</p>	<ul style="list-style-type: none"> • Shoreline Variance permit not required • Administrative review for Shoreline Substantial Development Permit Exemption (if no expansion) <p>Conforming Lot:</p> <ul style="list-style-type: none"> • Rebuild to comply w/ new SMP if possible. <p>Non-Conforming Lot:</p> <ul style="list-style-type: none"> • Rebuild same location/configuration as previous if not able to meet new SMP requirements. 	<ul style="list-style-type: none"> • Rebuild to comply w/ new SMP. • Any expansion/enlargement or relocation w/ in the buffer may require a Shoreline Variance.

Also:

- Replacement of any non-conforming structures or buildings or portions thereof within the Aquatic or Priority Aquatic shoreline area (waterward of ordinary high water) shall comply with Program requirements for materials that come in contact with the water pursuant to PDSMP Article 6.