Merrill, Hannah

From: pearl hewett [redacted]
Sent: Tuesday, November 27, 2012 12:54 PM
To: zSMP
Cc: Karl Spees; Jo Anne Estes; Norman MacLeod; Brian and Brooke; WILLIAM PALMER; Ed B; harry bell; mary pierce pfaff; Jay Petersen; notac@olypen.com; Keith Olson
Subject: SMP comment on GMA Consistency Review and general comments on CAO issues.

Comment on SMP update
Pearl Rains Hewett Trustee
George C. Rains Sr. Estate
Member SMP Committee

I received this information From: CAPR San Juan Island.
There are similarities on private property concerns with GMA, CAO, DOE, BAS, SMP Updates, taking, due process, and legal cases are sited.
It may be in Clallam County's best interest to review the legal and other documented information.

There are GMA and the Comprehensive Plan issues.
"Goals of the GMA require Preserving and Protecting critical areas, not restoring them to a natural state. In CAPR v. King County, King County tried to argue that the GMA required them to set aside large areas for watershed, open space and wildlife habitat. The court ruled GMA did not give the government the right to violate RCW 82.02 by placing uniform tax (buffer) on all property." (145 Wn. App. 649 (7/7/2008)

Fairly consider both the public interests and the interests of private property owners, while using these guidelines to avoid unconstitutional regulation." (Attorney General's Advisory Memorandum 2006)
(Attorney General's Advisory Memorandum pg. 10, December 2006)

The 5th Amendment to the Constitution "Takings Clause"
In addition to constituting a taking, a land use regulation that too drastically curtails an owner's use of property may also effect a denial of substantive due process. Presbytery v. King County, 114 Wn.2d 320, 329 (1990); Orion Corp. v. State, 109 Wn.2d 621 (1987).

The Due Process Clause protects citizens from government actions that are "arbitrary, unreasonable, and capricious." Pruneyard **Shopping Center v. Robbins, 447 U.S. 74, 84-85 (1980). In Washington State**

Permanently encumbering a large percentage of the land in Clallam County County with buffers is a most intrusive way to accomplish environmental protection when less oppressive solutions are feasible.

Note: the Western Washington GMHB cases cited below:

read on if you are concerned

P O Box 1866 Friday Harbor, WA 98250 Phone: 360-378-6473 FAX: 360-378-6473 Email: iwp@rockisland.com
Citizens' Alliance for Property Rights is a nonprofit non-governmental organization working with like-minded organizations and citizens to protect the right to the reasonable use and enjoyment of private property.

We support equitable and scientifically sound land use policies that do not require private property owners to bear the full financial burden and unreasonable regulation of activities for public benefits enjoyed by all. http://www.proprights.org/ 11/26/12 To: San Juan County Council From: CAPR San Juan

Re: Consistency Review and general comments on CAO issues.

Dear Council Members,

The CAO as drafted imposes restrictions that are inconsistent with the GMA and the Comprehensive Plan (RCW 36.70A.040. (4) (d)). . . *the county and each city that is located within the county shall adopt a comprehensive plan and development regulations that are* ***consistent with*** *and implement the comprehensive plan . . .*

1. The draft CAO is not consistent with requirements to protect rural character.

"2.3.C Rural Lands Goal: To maintain and enhance the rural character of the County. Rural lands are intended to retain the agricultural, pastoral, forested, and natural landscape qualities of the islands while providing people with choices of living environments at lower densities or use intensities than those in Activity Centers."

"2.3.C 10. Establish clearly defined Rural land use designations which promote and preserve the rural character of the islands while meeting the varied needs of island residents."

The CAO as drafted imposes restrictions that are not consistent with the above section because they impose restrictions that require permission for rural landowners to engage in traditional activities in developed areas that are more closely characterized by urban use intensities instead of rural. (RCW 36.70A.070 (4) (b))

2. The CAO process has violated the Governance Section 1.2 of the Comprehensive Plan.

1.2 San Juan County government will:

1.Conduct the public's business in a manner that is ethical, responsive, accessible, impartial, and ***open to county citizens***

By conducting closed meetings, due process has been compromised. Members of the County Council formed a sub-group formally called the "CAO Implementation Subcommittee." This group met many times in closed, unnoticed sessions. The Subcommittee included 3 members of the County Council, Administrator, Planning Staff, Consultants, members of DOE, and others. These meetings set the course of this CAO process while excluding members of the public and the press. This is not consistent with the requirements of the Governance Element of the Comprehensive Plan and is a violation of the OPMA. Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

3. The CAO is also inconsistent with Governance Section 1.2, 4. & Land Use 2.2.A 1.

"4. ***Ensure that private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.***

2.2 A 1. Balance the public's interest in the management of community growth and its associated impacts, with the protection of individual property rights . . ."

Large buffers are taken arbitrarily for public use similar to an "easement" or "tax" in a discriminatory manner, without compensation, in exchange for development permits. The CAO as drafted and the "wetland maps" put the burden of proof on the property owner to demonstrate that their land can be developed without harming the functions and values of critical areas. This may be impossible in some cases because the functions and values are not clearly defined in the CAO or are ambiguous and may be based on the subjective and arbitrary decision of the "administrator" (see below). Some legal parcels cannot be developed under this ordinance thus discriminating against some property owners and not others.

("Critical area functions and values" means the beneficial roles served by critical areas and the values people derive from these roles . . .")

Arbitrary buffers create a discriminatory "tax" on some parcels not others.

***"Goals of the GMA require Preserving and Protecting critical areas, not restoring them to a natural state. In CAPR v. King County, King County tried to argue that the GMA required them to set aside large areas for watershed, open space and wildlife habitat. The court ruled GMA did not give the government the right to violate RCW 82.02 by placing uniform tax (buffer) on all property."* (145 Wn. App. 649 (7/7/2008)**

There is a common question that has been frequently asked and has yet to be adequately answered. Is a single-family residence built to today's standards really a cause for environmental concern? What harm does a house cause?

The County must be very careful how they answer this question. There must be clear science that defines exactly what harm a house causes before they adopt laws that place burdensome restrictions upon certain landowners who must grant large portions of their land in order to solve a perceived problem that they did not cause.

The findings from the Wetlands Section state:

X. The BAS provides little peer reviewed, direct evidence that San Juan County's existing regulations are not protecting the functions and values of wetlands

It should be noted that there was no evidence of water quality or habitat issues existing in the County either. Where no problem exists, where is the need for additional regulations that are not even consistent with the Comprehensive Plan? The goal of protecting critical areas is already Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

being met.

According to Washington's Attorney General, *"In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem.* ***Third, is the regulation unduly oppressive on the landowner?*** *Failing to consider and address each of these questions may lead to a substantive due process violation."* (Attorney General's Advisory Memorandum pg. 10, December 2006)

The 5th Amendment to the Constitution "Takings Clause" is applicable when the government exercises its police power to enact regulations that interfere with private property. The concept relies upon establishing that

the government has gone too far in regulation and judges the interference of government by looking at the impact on the property. The takings analysis looks to the entire parcel and is concerned only with the extent of the government's interference with property rights. **Factors to Consider in a Regulatory Takings Analysis.** *Regulatory action that deprives property of all value constitutes a taking of that property.* ***Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by balancing the economic impact against two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions — is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective****?"* (Attorney General's Advisory Memorandum 2006)

CAO regulations may be invalid if they deny "due process" by allowing the government to arbitrarily and unreasonably interfere with individual property rights. A Substantive Due Process claim under the United States constitution asks a court to override the judgment of a political branch of government and invalidate an ordinance or statute because the action of that law is in some way illegitimate. Substantive due process requires two elements, (1) the existence of a protected interest or "right", and (2) proof that the government arbitrarily or capriciously (unreasonably) interfered with that right. Brian Hodges of the Pacific Legal Foundation's comments: *"****In addition to constituting a taking, a land use regulation that too drastically curtails an owner's use of property may also effect a denial of substantive due process. Presbytery v. King County, 114 Wn.2d 320, 329 (1990); Orion Corp. v. State, 109 Wn.2d 621 (1987). Substantive due process and takings claims are alternatives,*** *representing separate sources of constitutional protection. Id. While the Takings Clause limits government power by requiring just* Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

compensation when the government takes private property, ***the Due Process Clause protects citizens from government actions that are "arbitrary, unreasonable, and capricious.****" Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 84-85 (1980). In Washington State, even if a regulation is insulated from a takings challenge, it still must withstand the due process test of reasonableness. Guimont v. Clarke, 121 Wn.2d at 608. A three-fold inquiry is necessary to determine: "(1) whether the regulation is aimed at achieving a legitimate public purpose, (2) whether it uses means that are reasonably necessary to achieve that purpose, and (3) whether it is unduly oppressive on the landowner." Guimont, 121 Wn.2d at 609; see also, Orion Corp. v. State, 109 Wn.2d at 646-47; West Main Assocs. v. Bellevue, 106 Wn.2d 47, 52 (1986); Lawton v. Steele, 152 U.S. 133 (1894); Goldblatt v. Hempstead, 369 U.S. at 594-95."*

Permanently encumbering a large percentage of the land in San Juan County with buffers is a most intrusive way to accomplish environmental protection when less oppressive solutions are feasible.

"Ultimately, the people of Washington State are best served when state and local governments aspire to adopt the fairest possible approaches for accomplishing important public purposes. We therefore encourage government decision-makers to seek effective regulatory approaches that ***fairly consider both the public interests and the interests of private property owners, while using these guidelines to avoid unconstitutional regulation."*** **(Attorney General's Advisory Memorandum 2006)**

4. The CAO is inconsistent with Section 2.2.B Economy

Goal:To support a broad-based, diversified, stable, year-round economy which provides a range of goods, services and employment opportunities serving the needs of County residents, while safeguarding the rural, residential, agricultural, and marine nature of the County.

The CAO will have negative impacts on our local economy. The County Council **(DOE) has refused to address these SMP impacts on Clallam County**. Economic consequences and cost to the taxpayers of these

draft CAO regulations related to enforcement, compliance, compensation for takings, litigation, and potential tax shifts, have not been considered. Most importantly, the change in values of real estate, the effect on the retail and construction industries has been ignored.

The County Council has been asked repeatedly to address the economic impacts of the CAO regulations. So far in the process this Council has not taken economic concerns seriously or even had a serious discussion about how these regulations can possibly be consistent with the GMA goals or the goals of the Comprehensive Plan.

5. Comprehensive Plan Section 2.2.B, Clear and Predictable Regulations Required

GMA Goal 7. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability. Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

2.2.B Policies:

*1.Provide a **predictable development atmosphere** for the local economy through the formulation of clearly defined land use designations, regulations and standards. (Emphasis added)*

The CAO is not consistent with the goals and policies that require a fair and predictable permitting process. Note the Western Washington GMHB cases cited here:

• A local government has the duty of enacting Development Regulations that are understandable. *WEC v. Whatcom County* 95-2-0071 (FDO, 12-20-95).

• Where ordinances do not contain specific standards for deciding in advance whether a project does or does not qualify for approval under the policies of the Comprehensive Plan, the implementing Development Regulations do not comply with the GMA. *CMV v. Mount Vernon* 98-2-0006 (FDO, 7-23-98).

• Clear regulations are essential for GMA compliance. Where multiple interpretations are shown or are possible, compliance has not been achieved. *FOSC v. Skagit County* 96-2-0025 (Compliance Order, 9-16-98).

It is a clear that the CAO is inconsistent with the policy regarding "predictable development atmosphere." This process has been a moving target that is anything but "predictable." Anyone who has tried to follow this process over the years has had a difficult ordeal trying to keep up with the many versions of this legislation. The drafts moved from the Planning Commission to staff to the Council have changed significantly. The piecemeal adoption process of one section at a time has made it almost impossible for any landowner to make sense of this legislation.

Definitions of what constitutes harm, definitions of no net loss, mitigation, non conforming structure, native vegetation, streams, tree protection zones, habitat, and others are ambiguous, imprecise, and open the door to subjective interpretation by an administrator. In any case they do not create a predictable atmosphere for development.

According to staff, some type of critical area exists on every parcel of land in San Juan County. To prove otherwise the landowner may need to hire expensive consultants, go through complicated formulas, and hire attorneys only to conclude that he may or may not be able develop the property under certain conditions, including giving up large portions of property for the public good if certain mitigation procedures are followed into the future. This is not a predictable development atmosphere by any definition.

This CAO has strayed far from the goals and policies of the Comprehensive Plan. It is focused far more upon excluding development than in protecting critical areas.

6. CAO is not consistent with the goals regarding critical areas.

2.5.B Critical Areas

Goal 3: Establish Critical Area requirements that are balanced and related to impacts.

The Draft CAO Wetlands and Fish & Wildlife Sections are not consistent with the goals and policies of the Comprehensive Plan. In the Finding stated above, "The BAS provides little peer Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

reviewed, direct evidence that San Juan County's existing regulations are not protecting the functions and values of wetlands."

How can regulations be consistent with this goal if the impacts or threats have not been specifically identified? According to the BAS threats are theoretical with questionable applicability to San Juan County or subjective from sources that are known to be biased and **not based on peer reviewed science. San Juan County has failed to draft regulations that are balanced and related to actual impacts. Instead they are based on potential impacts and therefore inconsistent with the Comprehensive Plan.**

7. Reasonable Use Exception is not consistent with the goal to allow for use of property.

2.5.B Critical Areas

Goal 2: Allow for use of property to the greatest extent possible while protecting Critical Area functions and values.

The existing regulations define "reasonable use of a property" as 21,780 SF or 80% of a parcel whichever is less. If this was reasonable in the past and the County cannot point to any harm that this policy has caused, then why is it not still reasonable? The following restrictions change the definition of reasonable significantly and for no valid reason.

Furthermore, if a property owner can mitigate to no net loss standards, why would the County limit or restrict development to the unreasonable standard below? In any case this is not consistent with the goal of "allowing for use of property to the greatest extent possible." This is an extreme regulation that is not consistent with the stated goal to protect private property from takings.

Option Two – With Mitigation

a. Up to 10% of the parcel, or up to one half (1/2) acre (whichever is more) may be developed if adverse impacts to critical area functions and values are mitigated in accordance with subsection 18.30.110.F of this section.

b. Low impact development practices are encouraged in all development under the reasonable use exception and are required for all reasonable use exception development creating a footprint greater than 10,890 sq.ft. in size

The burden for triggering the reasonable use exception is on the property owner to prove that their proposal will meet the requirements based on BAS that is inadequate to establish need in the first place. **The burden should be on the County to prove that functions and values of critical areas will be harmed by the specific development even with a mitigation plan.**

8. Designation of all Shoreline as Critical Areas is not consistent with the Transportation Goals and Policies in the Comprehensive Plan.

General Policies (6.2.A.1-6):

3. In evaluation of proposed transportation facilities, consistency with the land use goals and policies adopted in the Comprehensive Plan and Shoreline Master Program should be a primary criterion.

6.4 MARINE TRANSPORTATION GOALS AND POLICIES Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

Goals:

1.To recognize that marine transportation systems are critical functions in maintaining the quality and character of life in San Juan County.

Section G. Of the CAO General Section specifically addresses the application of the CAO to the shoreline. If all Shorelines of the county are designated as "Critical Areas," the non conforming designation will be applied to all shoreline transportation facilities including but not limited to ferry docks, marinas, boat launches, and other access points important for marine transportation. Section G 1. Imposes impossible standards to meet as applied to existing marine transportation facilities. Upgrading or expanding these facilities will necessarily increase their non-conformity and will have impacts on water quality as defined in the ordinance. Therefore this is not consistent with the right of property owners to maintain, expand, or improve these facilities as concurrency demands with population growth. Section G is also not consistent with the Land Use goal below.

2.2.A 2.Recognize and support the right of property owners to maintain and replace legal, non-conforming uses and structures.

9. Best Available Science is not consistent with GMA standards.

It has been noted in previous comment letters from CARP San Juan that the process for collecting and incorporating BAS into the record has been flawed. It is not reasonable or productive to set a date for citizens to submit BAS and **then reject or ignore any science that does not suit the preconceived plan to institute the large buffer approach** in San Juan County. Science that is relevant to local conditions was submitted after the artificially imposed deadline and it was ignored **while science that does not meet the peer-reviewed standard was used to formulate policy. The Council and staff ignored many valid critiques regarding the way that non-peer reviewed BAS was misapplied to the application of buffers in wetlands and shorelines. This strongly suggests that the current CAO is not consistent with the GMA standards for Best Available Science (WAC 365-195-905(5)(a)).**

Prior to adoption of San Juan County's BAS a section was found to have "factual errors" and had misquoted the science to draw conclusions about sea level rise. **In the document outlining the *"Best Available Science (BAS) for Frequently Flooded Areas ,"* the county makes some pretty basic errors. In an article by Todd**

Meyers he states, *". . . when a government agency misquotes the very studies they claim to be citing and make claims that are clearly contradicted by the data, they deserve to be called out for their inaccuracy."*

The Department of Ecology has provided a large quantity of material in SJC's adopted BAS. However, there may be problems with some of their science. **Several qualified scientists claim that DOE Best Available Science reports have a "built-in anti-human bias," have methodological problems and have not been "peer reviewed." Therefore many of their conclusions should not be accepted as fact and used to leverage land use policy.**

According to Attorney Dennis Reynolds, Ecology's approach to "peer review" has a number of Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

problems. His critique follows:

"One, Ecology believes that it meets peer review requirements simply because some of the publications in its BAS list have been peer-reviewed. Ecology relies upon its list of BAS to make interpretations, which result in sweeping regulatory prescriptions for large buffers for both wetlands and marine areas. It is this interpretation and application which some local scientists like Dr. Kenneth Brooks, challenged as not having been peer-reviewed, not necessarily all of the underlying studies.

While it is true that Ecology has asked the opinions of some outside companies or consultants, the record discloses that there is a select set of consultants whose names frequently appear in Ecology's publications. These "independent reviewers" and personnel from other regulatory agencies have "peer reviewed" Ecology's work. **The perspective of these parties is solely environmental protection**. The selected companies or consultants make a living providing environmental studies for public agencies, including Ecology. This is not true to the definition of independent peer review. The bottom line is that Ecology's approach to peer-review lacks the independent judgment constituted of both reviewers and an editor.

What about Ecology's "science"? Both the courts and the Growth Management Hearings Boards have stated clearly that there is no "bright line definition of BAS." *Ferry County v. Concerned Citizens of Ferry County*, State Supreme Court Case No. 75493-4 (November 17, 2005). BAS is always determined on an individual basis, not by generic studies such as Ecology's BAS list. **Local circumstances must always be taken into account."**

Ecology makes a point of saying that protection of critical areas is a requirement of the Growth Management Act ("GMA") unrelated to a balancing of its goals. That is to say **"the land comes first." That is not what the courts have said. Here is the law set out in full context: *"The County is correct when it asserts that, under the GMA, it is required to balance the various goals of GMA set forth in RCW 36.70A.020. It is also true that when balancing those goals in the process of adopting a plan or development regulation under GMA, a local jurisdiction must consider BAS regarding protection of critical areas. This does not mean that the local government is required to adopt regulations that are consistent with BAS because such a rule would interfere with the local agency's ability to consider the other goals of GMA and adopt an appropriate balance between all the GMA goals. However, if a local government elects to adopt a critical area requirement that is outside the range of that BAS alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice." WEAN v. Island County, et al., State Supreme Court (2007).***

There are legitimate questions as to how BAS has been used by planning staff to write specific policies. Instead of letting the evidence lead to conclusions county staff developed policies that may limit property rights and are now selecting "science" that supports these policies. **BAS should be "included" in the process not concluded**

by the process. Citizens' Alliance For Property Rights San Juan Box 1866, Friday Harbor, WA 98250 360-378-6473, iwp@rockisland.com, www.capr-sanjuan.org

10. The effect of piecemeal adoption of amendments to the comprehensive plan is not consistent with RCW 36.70A.130(2) and 18.90.030B that provides for consideration of amendments annually.

Internal Consistency in the Comprehensive Plan is a GMA requirement (RCW 36.70A.070).

This CAO update process has been a moving target for every member of the public who has tried to follow it. Sections are moved around public comment on certain sections is closed even when substantive changes have been made language in several different ordinances is added and deleted, maps are changed, and multiple versions of the same documents are in the public domain at the same time. **The public should know how all the elements fit together including, overlay maps delineating individual parcels with various critical area designations, Geological Hazards, Wetlands, etc. and how these all effect their property rights. Adopting this CAO by separate ordinances, piecemeal, is wrong.**

How can there be internal consistency between separate sections of the ordinance when the drafts are constantly changing? **Property owners should be able to understand the cumulative effect of various proposals on their property and be able to evaluate them at one time.**

11. Conclusion

It is clear that the CAO as drafted is not consistent with the 14 GMA Goals or with the Comprehensive Plan. This Council has not taken public comments regarding their responsibility to balance the goals and be consistent with our adopted policies seriously. The fact that consistency was ignored throughout the process has led to a flawed Ordinance. A cursory superficial discussion of consistency and limited public testimony taken the very end of the process will not satisfy the law nor will it fix this Ordinance.

The public process has been tainted from the start by the use of the "Implementation Subcommittee" to set the course of this Ordinance. The regulations it contains will have negative and long lasting impacts on our economy, will be unenforceable as applied, will divide our community, and change the island demographic by making development unaffordable to all but a few. This Ordinance seems designed to exclude development rather than its stated purpose to protect the functions and values of critical areas. CAPR San Juan urges this Council to seriously consider changes to this Ordinance for the good of all of the landowners in San Juan County.

Sincerely,

Citizen's Alliance For Property Rights, San Juan

Board of Directors