

Merrill, Hannah

From: Kaj Ahlburg [REDACTED]
Sent: Wednesday, April 20, 2011 9:20 PM
To: Merrill, Hannah; Merrill, Hannah
Subject: SMP comments
Attachments: Comments on SMP 04_20_11.doc

Dear Hannah,

Please find attached my comments regarding the Shoreline Master Program in the form of a MS Word document. If you should have any trouble opening or reading the document please let me know.

I was given to understand that comments at this stage should be submitted by May 16. If I may, I would like to suggest that the ability for the public to comment as well as the date of the deadline for comments and the e-mail address comments should be directed to be prominently displayed on the main DCD webpage relating to the SMP update (http://www.clallam.net/RealEstate/html/shoreline_management.htm).

Thank you for your consideration.

Regards,

Kaj Ahlburg

Kaj Ahlburg

Port Angeles, WA 98362

April 20, 2011

Comments on Shoreline Master Program Update

General comments

The County should provide an easy way for each Clallam County property owner to determine, by address or Tax ID number, whether his property is or is not subject to SMP restrictions and what those restrictions, if any, are.

Every property owner and prospective buyer should have available clear, concise rules a normal person can understand without hiring a consultant, telling him what can and can not be done on the property, and what, if any, the conditions or requirements are.

The County should prepare and make publicly available a study showing any material economic impact on property owners and businesses in Clallam County of any changes to the existing SMP prior to implementation.

As a general principle, it is fair that the costs of environmentally motivated restrictions on specific properties that benefit others than just the property owner should be borne by the entire community or by the beneficiaries, where an identifiable subgroup, and not solely fall on the affected property owners. The revised SMP should wherever possible rely on incentives for voluntary actions by land owners and county or state funded mitigation rather than unfunded mandates or outright prohibitions imposed on individuals.

The building and realty related industries collectively are the largest private employer in Clallam County. It is of great importance for the economy of the County, job creation, and the availability of affordable housing, that new regulations do not make buying, owning, and building on property in Clallam County less attractive, either by prohibiting it outright, or by adding costs (applications, studies, mitigation) and uncertainty (vague or discretionary rules, decisions removed from the county level).

The character of our County is rural. We already have plenty of parks and government owned forest lands. Privately owned land should be designated under the SMP wherever possible in such a way that residential and agricultural uses, and other uses allowed under the Growth Management Act or current applicable zoning, are not impeded.

As a general matter, the burden of proof that a proposed action is not allowed by the SMP should be placed on DoE or the DCD. The landowner should be presumed innocent until proven guilty.

“No net loss of ecological functions necessary to sustain shoreline natural resources” needs to be clearly defined and balanced with “no net loss of economic function” in the County. There needs to be a materiality concept. Such balancing is permitted by RCW 90.58 and WAC 173-26, as shown below.

Specific comments

Agricultural uses, whether existing or new, should be permitted and furthered all over the County on privately held land, consistently with its rural nature.

Economically, any new commercial activity is desirable for the County. Outright restrictions or prohibitions on non-water-oriented commercial uses (as opposed to mere preferences for water related uses) should be kept to an absolute minimum.

WAC 173-26-201 (2)(e) states that SMPs “shall include provisions that require proposed individual uses and developments to analyze environmental impacts of the proposal and include measures to mitigate environmental impacts not otherwise avoided or mitigated by compliance with the master program.” This requirement for environmental impact statements in each case, and mitigation even where the SMP is being complied with, imposes unduly onerous burdens on land owners and the local economy. The guideline’s literal incorporation into the County SMP should be resisted, relying on the local control and broad discretion provided to local governments.

Existing structures and their protection from erosion should be grandfathered in all cases. DoE guidelines relating to shoreline protection are very unfavorable to property owners: land owner has to pay for a geotechnical report, may not act until three years before there is a “significant possibility” his house will be damaged (what if the experts are wrong and his house, with him and his family in it, get washed away in a storm before then?), very unfavorable treatment for residences not occupied since before 01/01/92 (with questionable statutory authority, as shown below), no provision for lots already owned that require shoreline armoring to protect houses to be built on them, etc. The County, to help preserve the safety of existing homes and the buildability of lots, should enact provisions more favorable to property owners, relying on the substantial discretion and local control granted to it under RCW 90.58 and WAC 173-26. Clallam County’s shorelines are in one of the healthiest conditions of those of any coastal county in our area. New and onerous restrictions are not required.

Property owners’ current rights to retain or clear existing vegetation should be preserved.

Existing hydroelectric generation facilities (e.g., the Morse Creek dam) should be grandfathered. Regulations should facilitate new small hydroelectric generating facilities to the extent possible. Living off the grid is consistent with the County’s rural character. Government policy should favor the production and consumption of clean, renewable, non-carbon based energy.

How is it proposed to “encourage” joint use piers or docks without threatening landowners with increased costs? Encouragement should not turn into coercion.

Is it customary for boat houses to have no walls? If not, the County should not impose requirements that will make owning waterfront property less attractive to a boat owning potential buyer.

Public access for residential subdivisions of more than four lots in many instances can be onerous for the property owners and not make much sense (for example when one person owns five small contiguous lots on a river with just one house on them). The requirement should be loosened substantially.

Local control

Pursuant to RCW 90.58.050 local government has the “primary responsibility” for planning and administration. DoE “shall act primarily in a supportive and review capacity.”

Under WAC 173-26-171 (3) DoE’s guidelines “allow local governments substantial discretion to adopt master programs reflecting local circumstances.”

Under WAC 173-26-191 (1)(a) SMPs “First ... balance and integrate the objectives and interests of local citizens.”

There is clear authority for local control.

Property rights and economic considerations

Pursuant to RCW 90.58.100 (2) among the nine elements SMPs must include economic development is listed first and use for housing, business and industry is listed fifth, ahead of conservation, which is listed sixth.

Under WAC 173-26-241 (2)(a)(ii) SMPs shall ensure that all provisions concerning proposed development of property are established “to protect property rights”, in addition to protecting health, safety, welfare, land, vegetation, and wildlife.

There is clear authority for balancing economic considerations and property rights with environmental considerations.

WAC is subordinate to RCW

RCW 90.58 is the law passed by the legislature. WAC 173-26 is merely a DoE regulation, which has force of law only as long as consistent with RCW 90.58. WAC 173-26-186 (1) acknowledges that DoE’s guidelines laid out in the WAC “are subordinate to the Act [RCW 90.58]. Any inconsistency between the guidelines and the Act must be resolved in accordance with the Act.”

This becomes relevant when one considers, for example that the Act nowhere mentions the concept of “no net loss of ecological functions”.

It also becomes relevant when the WAC attempts to go further than the RCW authorizes, as in WAC 176-26-231 (3)(a)(iii)(C): “Replacement walls or bulkheads shall not encroach waterward of the ordinary high-water mark or existing structure unless the residence was occupied prior to January 1, 1992, and there are overriding safety or environmental concerns.” By comparison RCW 90.58.100 (6) merely provides regarding shoreline protection that “The standards shall provide a preference for permit issuance for measures to protect single family residences occupied prior to January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment.” The absence of preferential treatment in the statute turned into an outright prohibition in the WAC, and the injunction in the statute to minimize harm to the environment turned into a condition in the WAC that there must be overriding safety or environmental concerns.

Requirements of the Shorelines Management Act of 1971 contained in the RCW need to be fairly rigidly adhered to, while suggestions in the DoE guidelines contained in the WAC, even if phrased as mandatory, can be examined as to suitability for local conditions and, where necessary, modified.

No net loss

WAC 173-26-201 (2) (c) requires policies and regulations that ensure “no net loss of ecological functions necessary to sustain shoreline natural resources.” That appears less restrictive than the shorthand of “no net loss of ecological functions” of any kind often used later in the DoE guidelines. “No net loss” needs to be clearly defined and a materiality concept in the aggregate needs to be incorporated. By ‘in the aggregate’ I mean that the SMP should not look exclusively at “no net loss” on a property by property basis, but overall credit should be given to new developments in Clallam County for the substantial habitat restoration expected from the Elwha dam removal and other restoration projects and the overall healthy state of the County’s shorelines.