

June 29, 2010

Margaret Norton-Arnold, Facilitator  
Shoreline Master Program Task Force  
Kitsap County Department of Community Development  
619 Division Street M/S 36  
Port Orchard, WA 98366

Dear Ms. Norton-Arnold:

**The purpose** of this letter is to provide comments on the draft Shoreline Master Program Task Force Goals and Principles:

The June 17, 2010 SMP Task force meeting included a presentation on the Community Visioning survey and a discussion of the overarching goals of the SMP update. Task Force member comments were solicited and a draft summary of these comments was distributed to the Task Force members via a June 23 email. The Kitsap Alliance of Property Owners provides the following comments on the draft.

**General Comments:**

The goals of the Kitsap County SMP update must be consistent with the goals of The Shoreline Management Act and its implementing WAC 173-26. Specifically, to plan for and foster all reasonable and appropriate uses of the shoreline -- in a manner that ensures shoreline development is planned and coordinated to prevent harm to public health and the environment. This is a "balanced" approach that, among other things, gives priority to the construction of single family residences and includes requirements to assure the protection of these residences and appurtenant structures against damage or loss due to shoreline erosion.

As can be seen from the following, some of the goals presented in the draft document are inconsistent with the Act and the WAC and must be revised. The titles of the comments correspond to the titles of the draft document.

**Health of the Shoreline Ecosystem:**

Paragraph 1): This paragraph should be reworded to recognize that the fundamental requirement of WAC Chapter 173-26 is to ensure *no net loss of ecological function* from future development. The existing statement of a goal to "restore this fragile ecosystem"

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*"The small landholders are the most precious part of a state." - Thomas Jefferson*

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is not supported by WAC requirements – nor is this the intent of the Shoreline Management Act. It should be removed as a Task Force goal. Indeed, other agencies, such as the Puget Sound Partnership, are working to develop a science-based restoration program for Puget Sound, and any restoration should be under their aegis and not the purview of current SMP updates.

Paragraph 3): Erring on the side of caution (i.e. the precautionary principle) is a discredited theory of regulation. Furthermore, it does not represent the balanced approach to shoreline development and protection described in the SMA or the WAC. It, therefore, should not be a part of the Task Force goals. This principle originated at the 1992 UN Conference on Environment and Development in Rio de Janeiro. It stated that “Where there are threats of *serious or irreversible damage*, lack of scientific certainty shall not be used as a reason for postponing-cost-effective measures to prevent environmental degradation.” It was never intended to be applied to all situations involving risk to the environment – as the unintended consequences produce risks of their own, often including enormous cost impacts, No less of an authority than president Obama’s regulatory czar, Cass Sunstein, in an essay in the journal *Daedalus* two years ago, called the precautionary principle “incoherent” and “paralyzing”, and acknowledged that “Precautions cannot be taken against all risks”.

### **Use of Sound Science:**

The definition of “good science” is not found in WAC 173-26-201.2, which only says what scientific and technical information is to be used in SMP updates. Ecology’s definition of valid science is actually found in their SMP *Frequently Asked Question* publication found at <http://www.ecy.wa.gov/pubs/0906029.pdf> as previously noted in an email from another Task Force member.

### **Shoreline Economics and Development:**

Paragraph 1): The recommendation for multiple use facilities (e.g. sharing of docks) should not be a part of the SMP update. It may make sense for tightly populated shorelands such as on Lake Washington, however, the private docks in Kitsap Co. are generally not numerous or closely spaced. Nor is there scientific justification for such policy as these private docks pose virtually no risk to salmon or other aquatic life.

### **Respect for Private Property Rights:**

The title of this section should be changed to “Protecting Private Property Rights” The draft should be changed to quote section of WAC 173-26, Section 186, which says that “Local governments should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.” The AG memo on avoiding unconstitutional takings provides useful guidance, but it should be noted that it is only internal guidance, not a formal Attorney General’s Opinion. Thus it is inappropriate to state that “the Task Force will adhere to Ecology’s guidance in its (land use) policy deliberation”. It is, therefore, requested that this

statement be removed. Indeed, aside from WAC 173-26 itself, none of Ecology's SMP guidance documents have been subject to the state's Administrative Procedures Act and none of them carry the weight of law – leaving the county considerable freedom in constructing their SMP update.

An additional paragraph is requested under the "Protecting Private Property Rights" section as follows:

EHB 1653 was crafted with the support of Kitsap County and was passed by the 2010 legislature with wide support from organizations that included The Department of Ecology, The Department of Commerce, Futurewise and other environmental organizations, The Farm Bureau, The Association of Washington Business, and many others. Among other things, on an interim basis it provided that:


"...a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use or may be redeveloped or modified if (A) The redevelopment or modification is consistent with the local government's master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas."

This approach, which was not contested, will protect existing property from the legal risks associated with becoming "nonconforming" and should be a goal for the SMP update.

**Final Comment:** The Community Survey results, like those of most other polls and surveys, were highly dependent on the questions that were asked and the population that participated. The county's survey was problematic in both of these areas; therefore, the results should not be awarded a high degree of credibility in the planning process.

Your prompt attention and response to these comments would be appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Bob Benze". The letters are fluid and connected, with a prominent "B" at the start.

Bob Benze