



Kitsap County Hearing Examiner

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NOTICE OF HEARING EXAMINER DECISION

November 15, 2011

To: Interested Parties and Parties of Record

RE: Project Name: **Witcher Shoreline Exemption Appeal**
Applicant: **Gordon Witcher**
7412 1st Avenue NW
Seattle, WA 98117
Central Kitsap County, Commissioner District #3
Application: **Shoreline Exemption Appeal**
Case Number: **111013 – 018 (4414-000-009-0003) LIS#11 99535**

Enclosed is the Decision issued by the Kitsap County Hearing Examiner in the above-referenced matter.

As authorized by Kitsap County Code Section 2.10.120, **REQUESTS FOR RECONSIDERATION** of the Hearing Examiner's Decision in this matter must be filed in writing to the Department of Community Development on or before five (5) business days from the effective date of the Decision. Please note Reconsideration will be administered at an hourly rate of \$84.00, accounted for in quarter-hour increments; a minimum of one (1) hour will be charged for any Reconsideration. The balance of the fee for Reconsideration must be paid prior to issuance of the Decision.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS APPEALED, AS PROVIDED UNDER WASHINGTON LAW AND BY KCC 21.04.120 OF THE KITSAP COUNTY LAND USE AND DEVELOPMENT PROCEDURES

The complete case file will be available for review at the Department of Community Development, Monday through Thursday, except holidays, 10:00 a.m. to 4:00 p.m. by calling me at (360) 337-4487 for an appointment.

If you have questions, please contact me at (360) 337-4487.

Sincerely,

A handwritten signature in cursive script that reads "Karen Ashcraft".

Karen Ashcraft
Clerk of the Examiner

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C: Jill Guernsey, jguerns@co.pierce.wa.us
Samuel Rodabough, sam@GSKLegal.pro
David Greetham, Dgreetha@co.kitsap.wa.us

Interested Parties:
(None)

RECEIVED

BEFORE THE HEARING EXAMINER
FOR KITSAP COUNTY

NOV 10 2011

In the Matter of the Appeal of)
)
Gordon Witcher)
)
Of a Shoreline Exemption)
Administrative Decision)

No. 111013 - 018

KITSAP COUNTY DEPT. OF
COMMUNITY DEVELOPMENT

FINDINGS, CONCLUSIONS,
AND DECISION

SUMMARY OF DECISION

The appeal of a shoreline exemption administrative decision by Kitsap County is **GRANTED** for the limited purposes of this appeal, and the shoreline exemption decision remanded to the County Department of Community Development for action in accordance with the decision for this case only.

SUMMARY OF PROCEEDINGS

Background:

On July 26, 2011, Kitsap County granted the Appellant's request for an exemption from a Shoreline Substantial Development Permit with one condition. On August 2, 2011, the Appellant filed an appeal of the granted exemption. The Hearing Examiner issued a Pre-Hearing Order stating the issues upon appeal and scheduling a pre-hearing conference with the parties to the appeal on August 17, 2011. The Hearing Examiner held the pre-hearing conference on September 13, 2011.¹ At the pre-hearing conference, the parties agreed to stipulate to certain facts of the appeal, call no witnesses to testify during the open record appeal hearing, and limit the open record hearing to argument by the parties' attorneys.

Hearing:

The Hearing Examiner held an open record hearing on the appeal on October 13, 2011. The Hearing Examiner left the record open until October 20, 2011 to receive a supplemental hearing brief from the Appellant responding to argument proffered by the County at the hearing.

¹ The appeal concerns proposed single-family residential development on the Appellant's property, located on the west shoreline of Dyes Inlet, at 6112 Chico Way NW in Kitsap County. The County issued a Type II administrative decision dated June 21, 2011 denying the Appellant's request for a critical area buffer reduction on the property. The Appellant filed an appeal of the Type II administrative decision on July 5, 2011. During the Hearing Examiner's September 13, 2011 pre-hearing conference, the Appellant and the County stipulated that the appeal of the County's Type II administrative decision shall be stayed until issue of the Hearing Examiner written decision on the shoreline exemption appeal. See Pre-Hearing Conference Memorandum and Revised Pre-Hearing Order, dated September 20, 2011.

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Testimony:

By agreement of the parties to the appeal during the September 13, 2011 pre-hearing conference, neither party called any witnesses to testify at the open record hearing.

Jill Guernsey, Deputy Prosecuting Attorney, represented the County at the open record appeal hearing. Samuel A. Rodabough, Attorney at Law, represented the Appellant at the open record appeal hearing.²

Exhibits:

1. Letter from Samuel A. Rodabough, Attorney, dated May 13, 2011
 - a. WA ST Joint Aquatic Resources Permit Application (JARPA) , dated May 13, 2011
 - b. Shoreline Ecological Function Analysis – Wetland Resources, Inc., dated April 20, 2011
2. E-mail from Samuel A. Rodabough, dated July 18, 2011
3. Motion for Pre-Hearing Conference &/or Stay of Proceedings, dated July 18, 2011
4. Pre-Hearing Order and Notice of Motion – Kimberly Allen, Hearing Examiner, dated July 20, 2011
5. KC Administrative Decision Shoreline Exemption - David Greetham, dated July 26, 2011
 - a. Statement of Exemption Posting, dated July 26, 2011
 - b. Affidavit of Posting, dated July 26, 2011
6. Stipulation Re: Motion for Stay of Proceedings – Jill Guernsey, Deputy Prosecutor Pierce County, dated July 27, 2011
7. Order on Motion for Pre-Hearing Conference or Stay – Kimberly Allen, Hearing Examiner, dated August 1, 2011
8. Appeal of Administrative Decision with Attachment A - KC Admin Decision & B – Appellant’s Appeal Statement, dated August 2, 2011
9. Motion to Intervene as Party of Record – David S. Mann, Attorney, received August 11, 2011
10. E-mail from Jill Guernsey, Deputy Prosecutor , dated August 10, 2011
11. Opposition to Motion to Intervene, Samuel A. Rodabough, dated August 15, 2011
12. Revised Pre-Hearing Order & Notice of Motion to Intervene – Kimberly Allen, Hearing Examiner, dated August 17, 2011
13. Order Denying Motion to Intervene – Kimberly Allen, Hearing Examiner, dated September 6, 2011
14. E-mail from Gordon Witcher, dated September 20, 2011

² On August 11, 2011 the Office of the Hearing Examiner received a Motion to Intervene from Attorney David S. Mann, which moved to recognize Russ and Jillian Hauge and Matt and Jennifer Tammen as parties of record in these appeal proceedings. The Hearing Examiner denied the motion. See Order Denying Motion to Intervene, dated September 6, 2011.

15. 3/15 Pre-Hearing Conference Memo & Revised Pre-Hearing Order, dated September 20, 2011
16. Opening Brief of Kitsap County Department of Community Development with Chronology & Stipulation of the Parties for Hearing - Jill Guernsey, Deputy Prosecutor, dated September 27, 2011
 - a. 1998 Kitsap County Critical Areas Ordinance (Ord. No. 217-1998), dated May 7, 1998
 - b. Kitsap County Resolution No. 27-1999, dated February 8, 1999
 - i. Dept. of Ecology SMP Register, dated July 26, 2011
 - c. Kitsap County Ordinance No. 376-2007 - Critical Areas Ordinance Amendment, dated February 2, 2007
 - d. Certification of EHB 1653, dated May 18, 2010
 - e. Notice of Hearing Examiner Decision (Case No. 100909-016), dated October 27, 2010
 - f. Decision on Request for Clarification of Hearing Examiner Decision (Case No. 100909-016), dated November 29, 2010
 - g. Court of Appeals Decision in Kitsap Alliance of Property Owners vs. Central Puget Sound Growth Management Hearings Board, dated March 10, 2011
 - h. Supreme Court of Washington - Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board (Review Denied), dated July 20, 2011
 - i. Joint Aquatic Resources Permit Application (JARPA) & Attachments - Witcher Shoreline Exemption, dated May 13, 2011
 - j. Shoreline Ecological Function Analysis – Wetland Resources, Inc., dated April 20, 2011
 - k. Photo from water (1), received October 6, 2011
 - l. Plat of Replat of Eldorado Park Beach – Site Plan, received October 6, 2011
 - m. Shoreline Master Program Updates WSDOE, dated April 20, 2011
 - n. EHB 1653 Clarifies Relation of Critical Area Regulations & Shorelines WSDOE, dated March 19, 2010
 - o. E-mail from Cedar Bouta, WSDOE PDF request from Samuel A. Rodabough, dated September 15, 2011
17. Declaration of Samuel A. Rodabough Exhibits 16J-16M, dated October 6, 2011
18. Appellant's Exhibit & Witness List, dated October 6, 2011
19. Brief of Appellant, dated October 6, 2011
20. Declaration of Alexander "Sandy" Mackie, dated October 6, 2011
21. Responsive Brief of KC DCD – Jill Guernsey, dated October 10, 2011
22. Appeal of Administrative Decision – Attachment – A Revised Notice of Administrative Decision – B Appeal Statement, dated July 5, 2011
23. E-mail from David Greetham – KC documents list, dated October 6, 2011
24. Supplemental Brief of Appellant – Sam Rodabough, dated October 19, 2011

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The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

1. Gordon Witcher (Appellant) requested Kitsap County (County) grant an exemption from a Shoreline Substantial Development Permit (SSDP) under Kitsap County Code (KCC) 22.08.060 for single-family residential development on property located on the west shoreline of Dyes Inlet, at 6112 Chico Way NW, in Kitsap County, Washington.³ *Exhibit 16.I.*
2. Proposed single-family residential development would consist of demolition of an existing single-family residence on the subject property, a historic lot of record located approximately 170 feet from the Dyes Inlet ordinary high water mark (OHWM), and construction of a new single-family residence approximately 57 feet from the OHWM as measured from the south property boundary and approximately 61 feet from the OHWM as measured from the north property boundary. *Exhibit 5; Exhibit 16.I; Exhibit 22.*
3. The County reviewed the application to exempt proposed single-family residential development and granted the exemption under KCC 22.12.010.87(2) (g)⁴ with one condition on July 26, 2011. The condition required compliance with Shoreline Master Program general regulations for Residential Development set forth within KCC 22.28.230. KCC 22.28.230.4.b provides “Setback and buffer requirements for residential development shall be based on the minimum criteria set forth within the Critical Areas Ordinance (Title 19 of this code) in addition to the site specific critical areas requirements.” *KCC 22.28.230.4.b.* The County issued the exemption decision and condition in accord with KCC 22.12.010.87(b), which states, in relevant part:

An exemption from the substantial development permit process is not an exemption from compliance with the act or the local master program, or from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act.

³ The property subject to the exemption request is identified by tax parcel number 44140000090003. *Exhibit 16.I.*

⁴ KCC 22.12.010(2)(g) provides, in relevant part, that the following shall not be considered a “substantial development” under ch. 22.12 KCC:

Construction on shorelands by an owner... of a single-family residence for their own use or for the use of their family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof. “Single-family residence” means a detached dwelling designed for and occupied by one family including those structures and developments within a contiguous ownership which are a normal appurtenance.

KCC 22.12.010.87(b). The County posted notice of the granted exemption on the subject property on July 26, 2011. *Exhibit 5; Exhibit 5.B.*

Appeal

4. The Appellant filed an appeal of the granted exemption with the County on August 2, 2011. The issues raised in the appeal statement were:
- a. Is the shoreline exemption decision unlawfully conditioned to the extent that it can be construed to require compliance with the critical areas ordinance?
 - b. Does the shoreline exemption fully comply with all applicable provisions of the Shoreline Management Master Program?

Exhibit 8. Following the pre-hearing conference of the parties, at which the parties agreed to stay a related appeal of a County Type II critical areas buffer reduction administrative decision, the issues upon appeal were further refined by the parties as follows:

- a. Was the County shoreline exemption administrative decision lawfully conditioned on compliance with the County's critical areas ordinance?
- b. What is the applicable setback requirement under the shoreline master program?

Exhibit 15.

Facts Stipulated by the Parties to the Appeal – Chronology and Related Facts

5. The parties to the appeal stipulate to the following dates and corresponding description of event:
- 1971: Voters of the state enact Shoreline Management Act, codified at chapter 90.58 RCW.
 - 1998: Kitsap County adopts Ordinance 217-1998, a critical areas ordinance (1998 CAO). The 1998 CAO did not impose any buffers on those fish and wildlife habitat conservation areas that are marine shorelines with a semi-rural or rural designation, including Witcher's property. The 1998 CAO did, however, impose a 35-foot building setback from OHWM on such properties. See former KCC 18.16.315, Table 4, Saltwater Shorelines.
 - 2/8/99: Kitsap County adopts Resolution 27-1999, a shoreline master program update (1999 SMP) and submits it to Washington State Department of Ecology (Ecology) for approval. Ecology approves the 1999 SMP on February 8, 1999. The 1999 SMP was codified at Title 22 KCC. The SMP provides, in relevant part:

Setback and buffer requirements for residential development shall be based on the minimum criteria set forth within the Critical Areas Ordinance (title 19 of this code) in addition to the site specific critical areas requirements.

KCC 22.28.230(4) (c). The 1999 SMP, with the exception of a few minor amendments that were subsequently submitted to, and approved by Ecology, as amendments to the County's shoreline master program (none of which are relevant here), remains the same SMP that is currently in effect in Kitsap County.

- 1/17/2004: Ecology issues new guidelines in WAC 173-26 (2004 Guidelines), to assist local jurisdictions in the implementation of the SMA.
- 2/26/2007: Kitsap County adopts Ordinance 376-2007 (2007 CAO), an amendment to the critical areas ordinance. The 2007 CAO imposed a 100-foot buffer, as measured from OHWM, on those fish and wildlife habitat conservation areas that are marine shorelines with a semi-rural designation, including Witcher's property. It also imposed an additional 15-foot building setback from the edge of the buffer.
- 11/5/09: Witcher applies to Kitsap County Department of Community Development (DCD) for a critical areas variance to construct a single-family residence a minimum of 57 feet from OHWM.
- 3/18/10: EHB 1653 is adopted by the State Legislature.
- 6/29/10: DCD issues administrative decision approving Witcher's critical areas variance application, subject to conditions.
- 7/15/10: Russ Hauge, Matthew Tammen, and Jennifer Tammen appeal approval of critical areas variance to Hearing Examiner.
- 10/28/10: Hearing Examiner issues decision on Hauge/Tammen appeal, granting appeal and remanding to DCD "for reconsideration in accordance with all of KCC 19.100.135 variance criteria."
- 12/2/10: Hearing Examiner issues Order on Motion for Clarification.
- 3/10/11: Court of Appeals issues decision in Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board, 160 Wn.App. 250 (2011) (KAPO II).
- 5/16/11: Witcher applies for shoreline exemption to demolish existing single-family residence, located approximately 170 feet from OHWM, and to construct a single-family residence a minimum of 57 feet from OHWM.
- 6/23/11: DCD issues administrative decision denying Witcher's remanded application for a critical areas variance.
- 7/5/11: Witcher timely appeals DCD's denial of critical areas variance application.
- 7/12/11: The Washington State Supreme Court denies the Petition for Review in KAPO II.
- 7/26/11: A telephone conference is held in which David Greetham, Environmental Planner, DCD informs Witcher that the County will be granting the shoreline exemption later that afternoon. David Greetham, Jill Guernsey (as special counsel for Kitsap County), Samuel A. Rodabough (as counsel for Witcher), and David Mann (as counsel for interested parties Hauge/Tammen) participate in telephone conference.
- 7/26/11: DCD grants Witcher's application for a shoreline exemption, subject to a condition of compliance with the critical areas ordinance.
- 8/2/11: Witcher timely appeals the shoreline exemption.

- 8/2/11: Hearing Examiner issues Order on Motion for Pre-Hearing Conference or Stay, approving stipulation of the parties to combine Witcher's appeal of the denial of the critical areas variance with Witcher's appeal of the shoreline exemption.
- 9/20/11: Hearing Examiner issues Pre-Hearing Conference Memorandum and Revised Pre-Hearing Order.
- Ongoing: The County remains in the process of completing a comprehensive master program update. See RCW 90.58.030(3)(c) (defining a "comprehensive master program update" as master program that fully achieves the procedural and substantive requirements of the department guidelines effective January 17, 2004, as now or hereafter amended). The County estimates that the update will not be completed until mid-2012, with potential Ecology approval sometime thereafter.

Exhibit 16.

Facts Stipulated by the Parties to the Appeal – Additional Facts

6. The parties to the appeal stipulate to the following additional facts:
- The parties agree, and DCD does not dispute, that for purposes of Witcher's shoreline exemption, Witcher's property contains "a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the [County's] development regulations to protect critical areas" and that Witcher's proposal is "redevelopment" or "modification" as used in RCW 36.70A.480 (3) (c) (i). (EHB 1653, 2010 Laws of Washington c. 107, sec. 2).
 - The parties agree, and the County does not dispute, that the 2007 CAO (Ordinance 376-2007) was neither submitted to, nor approved by, Ecology as an amendment to the County's shoreline master program.
 - The parties agree, and DCD does not dispute, that based upon the evidence submitted by Witcher (specifically the Shoreline Ecological Function Analysis, dated April 20, 2011, by Wetland Resources, Inc.) that Witcher has met his burden of proving that Witcher's redevelopment or modification will meet the definition of "no net loss of shoreline ecological functions" as set forth in RCW 36.70A.480 (3) (c) (i). (EHB 1653, 2010 Laws of Washington c.107, sec.2.).

Exhibit 16.

Argument on Appeal

Appellant's Argument on Appeal

The Appellant argues that the County's shoreline exemption was unlawfully conditioned to the extent it can be construed to require compliance with the County's current critical areas ordinance (CAO), because the condition arguably violates Engrossed House Bill (EHB) 1653. The Appellant asserts that EHB 1653 sec. 2(3)(c), codified at RCW 36.70A.480(3)(c)(i), provides an exception to the otherwise required application of development regulations adopted under the Growth Management Act within shorelines of the state until the Washington Department of Ecology (DOE) approves a comprehensive master program update under RCW 90.58.030. The Appellant contends that the exception provides for redevelopment or

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modification of an existing use or structure, legally located within shorelines of the state and established or vested on or before the effective date of the local CAO, if it meets one of two criteria: redevelopment or modification is consistent with the local government's master program and the local government determines no net loss of shoreline ecological functions will result; or redevelopment or modification is consistent with the master program and the existing CAO.⁵ Appellant also asserts that DOE must review and approve an amendment to the CAO under Washington Administrative Code (WAC) 173-26-191(2) (b) for the amended CAO to be properly part of an SMP. The Appellant cites 1999 and 2008 Shorelines Hearings Board decisions to support the argument.

Applying the argument to this case, the Appellant asserts the County's 2007 CAO amendments are not properly part of its SMP, as defined under RCW 36.70A.480(3)(c)(i), because they were not reviewed and approved by DOE.⁶ Thus, the Appellant asserts, the proposed project need only comply with the County's 1998 CAO, effective at the time of County SMP approval by DOE on February 8, 1999. The Appellant argues that the proposed project does comply with the 35-foot wide building setback from OHWM required for properties designated semi-rural or rural under the 1998 CAO. Moreover, the Appellant argues and the County concedes that the proposed project will result in no net loss of shoreline ecological functions. *Brief of Appellant.*

Appellant also contests the County's assertion that KCC 22.04.040, part of the County's 1999 SMP approved by DOE, incorporates the County's 2007 CAO by reference through the section's general reference to future code amendments. The Appellant argues that KCC 22.04.040 does not incorporate the 2007 CAO into the County SMP by reference according to 1999 and 2004 Shorelines Hearings Board decisions,; canons of statutory construction, and EHB 1653. *Supplemental Brief of Appellant.*

County's Argument on Appeal

In response to the Appellant's argument, the County asserts that its 2007 CAO requiring a 100 foot wide buffer from the OHWM and an additional 15 foot wide building setback is properly part of its SMP. The County asserts that the County's SMP has required compliance with the County's CAO since 1999, when DOE reviewed and approved the County SMP. At the open record hearing, the County argued that the 1999 submittal reviewed and approved by DOE included KCC Section 22.04.040, which provides:

Uses, developments, and activities regulated by the master program are also reviewed pursuant to the Kitsap County Comprehensive Plan, the Washington State Environmental Policy Act, the Kitsap County Zoning Code (Title 17 of this code), the Critical Areas Ordinance (Title 19 of this

⁵ The Appellant asserts and the County concedes that proposed single-family development on the Appellant's property constitutes "redevelopment" under RCW 36.70A.480 (3) (c) (i). *Brief of the Appellant, at 11; Exhibit 16.*

⁶ Both parties concede the County is currently in the process of completing a comprehensive master program update. *Exhibit 16.*

code), the View Blockage Resolution (Chapter 17.450 of this code), and various other provisions of federal, state, and county law. The applicant must comply with all applicable laws prior to commencing any use, development, or activity. This applies to the above-referenced codes as amended in the future.

The County also asserts that failure to apply the County's CAO to shorelines in this case would counter the intent of EHB 1653, as determined by Washington appellate courts in *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wn.App. 250 (2011) (*KAPO II*), that CAOs apply to shoreline critical areas until the local SMP is updated to include those areas. The County argues that neither EHB 1653 nor *KAPO II* required that CAOs be approved by DOE to apply to shoreline areas, if adopted after the effective date of the local SMP, and that to require such would contravene legislative intent that "development regulations adopted under the growth management act to protect critical areas apply within shorelines of the state as provided in section 2 of this act." *Responsive Brief of Kitsap County Department of Community Development*, at 2, citing EHB 1653, sec. 2. The County cites the court's decision in *KAPO II* for the proposition that CAOs become effective once they are adopted. According to the County's argument, there is no authority for DOE to approve CAOs. *Opening Brief of Kitsap County Department of Community Development*; *Responsive Brief of Kitsap County Department of Community Development*.

CONCLUSIONS

Issues on Appeal

The Appellant raises the following questions of law on appeal:

- a. Was the County shoreline exemption administrative decision lawfully conditioned on compliance with the County's critical areas ordinance?
- b. What is the applicable setback requirement under the shoreline master program?

Jurisdiction

The Hearing Examiner is authorized to hear and decide appeals of a decision by the County shoreline administrator⁷ granting an exemption from a Shoreline Substantial Development Permit (SSDP). The hearing procedure shall be the same as that set forth for a hearing on a shoreline permit, requiring one open record public hearing before the hearing examiner. *Kitsap County Code (KCC) 2.10.070; KCC 21.04.080.A; KCC 22.08.050*. The Hearing Examiner may affirm, deny, modify, or reverse upon appeal. *Kitsap County Hearing Examiner Rules of Procedure for Land Use Applications and Appeal of Administrative Decisions, Chapter II: Rules of Appeal of Administrative Decisions 2.12.1d (June 2009)*.

⁷ "Shoreline Administrator" means the director of the Kitsap County department of community development or his or her appointed designee. *KCC 22.12.010.77*.

Criteria for Review

The Appellant raises two questions of law upon appeal; the facts of this case are not in dispute. While Washington courts grant substantial deference to a municipality's interpretation of its own ordinances,⁸ in this case the Hearing Examiner is asked to interpret state law concerning components of a shoreline management master program under the Shoreline Management Act and provisions of the state Growth Management Act set forth in RCW 36.70A.480. Thus, the Hearing Examiner reviews and decides these questions of law de novo. *Christianson v. Snohomish Health District*, 133 Wn.2d 647 (1997) (questions of law are reviewed de novo).

Conclusions Based on Findings

Neither the Appellant nor the County dispute that proposed single-family residential development on the Appellant's property is exempt from the requirement to obtain a shoreline substantial development permit (SSDP) under the Shoreline Management Act, Ch. 90.58 RCW. In accord with KCC 22.12.010(1)(e), which authorizes local governments to attach conditions to the approval of exempted developments or uses "as necessary to ensure consistency of the project with the [Shoreline Management] Act and the local master program," the County attached a condition of approval requiring compliance with the setback and buffer provisions of County's CAO. Compliance would require that redevelopment on the Appellant's property comply with a 100 foot wide buffer from the OHWM and additional 15 foot wide building setback. The County argues the condition is lawful because the County SMP incorporates prospective amendments to the CAO by reference.⁹ Thus, the pivotal issue in this case is to determine whether the County's 2007 CAO buffer and setback requirements are indeed part of the County SMP, absent specific DOE approval.

The Shoreline Management Act (SMA), Ch. 90.58 RCW et seq., defines when a master program becomes effective and what constitutes the official master program. RCW 90.58.090(1), as amended by SSB 5192, Laws of 2001, ch. 277 provides that a "master program, segment of a master program, or an amendment to a master program shall become effective when approved by the [Department of Ecology] as provided in subsection (7) of this section." Subsection (7) provides a "master program or amendment to a master program takes effect when and in such form as approved or adopted by the [Department of Ecology]," and that the "Department shall maintain a record of each master program, the action taken on any proposal for adoption or amendment of the master program, and any appeal... the department's approved document of record constitutes the official master program." *RCW 90.58.090(1)*. According to the DOE SMP Register last updated on July 26, 2011 (Register), the DOE last reviewed and approved the County SMP on February 8, 1999, after the County made changes to the proposal required by DOE. The Register describes the proposal as a "complete rewrite" of the SMP.

⁸ See, e.g., RCW 36.70C.130 (1) (b); *McTavish v. City of Bellevue*, 89 Wn.App. 561, 564 (1988).

⁹ The parties stipulate that the 2007 CAO was never reviewed and approved as a shoreline master plan amendment by DOE. *Finding 6 (emphasis added)*. According to the parties' joint stipulation, DOE last formally reviewed and approved the County SMP in 1999.

The SMA and its implementing regulations also describe the criteria by which the DOE approves a proposed master program, segment, or amendment. Upon receipt of a proposed master program or amendment, following public comment and local government response to comment, the DOE “shall... either approve the proposal as submitted, recommend specific changes necessary to make the proposal approvable, or deny approval... where no alteration of the proposal appears likely to be consistent with the policy of RCW 90.58.020 and the applicable guidelines.” *RCW 90.58.090(2) (d)*.¹⁰

In this case, the DOE did require changes before it approved the County SMP on February 8, 1999, but let stand language making general reference to the County “Critical Areas Ordinance” and to “the above-referenced codes as amended in the future”¹¹ in determining the proposal, as amended, would be consistent with applicable guidelines in effect at the time¹² and the policy of RCW 90.58.020, which has remained unchanged since 1995. *RCW 90.58.020; Laws of 1995, ch. 347, s.301*. Thus, the County argues that it is permissible under the SMA to amend prospectively by general reference to local codes, as amended in future, rather than make specific reference to local codes effective on a particular date. The County asserts that if it were not permissible then DOE, charged with complying with the SMA and applicable guidelines, would have required changes to this language as well, prior to its approval in 1999.

The SMA section governing approval of master program segments concerning critical areas would appear to lend support for the inference that an approved and effective SMP may make general reference to local codes as amended in the future. Concerning critical areas, DOE “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

¹⁰ “Guidelines” means “those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs.” *RCW 90.58.030(3) (b)*.

¹¹ The language of the 1998 ordinance, as adopted, states in relevant part: “exemption from the permit requirements does not exempt the activity, development, or use from complying with the policies of the Act or the Master Program,” *Exhibit A Part I (A)(2)(c)*; “setback and buffer requirements for residential development shall be based on the minimum criteria set forth within the Critical Areas Ordinance in addition to the site specific critical areas requirements,” *Exhibit A Part VII (S)*; and “[u]ses, developments, and activities regulated by the master program are also reviewed pursuant to... the Critical Areas Ordinance (Title 19 of this code)... The applicant must comply with all applicable laws prior to commencing any use, development, or activity. This applies to the above-referenced codes as amended in the future,” *Exhibit A Part I Section 14, Exhibit 16.B*.

¹² See WASHINGTON STATE REGISTER 04-01-117 (December 17, 2003). In 1995 the state legislature directed Ecology to update the guidelines, which had not been revised since 1972 and did not account for advancements in science and shoreline management practices nor the recent passage of Washington’s Growth Management Act. Ecology proposed a first draft in 1999 and adopted a substantially revised draft in 2000 that was challenged in court. The final version of the guidelines was adopted on December 17, 2003 and became effective January 17, 2004. See <http://www.ecy.wa.gov/programs/sea/SMA/guidelines/index.html> (last accessed October 30, 2011).

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).” RCW 90.58.090(4) (*emphasis added*). The current version of RCW 90.58.090(4) was enacted by the Legislature in 2003. See Laws of 2003, ch. 321, sec. 3.

However, as the agency charged with implementing the SMA, DOE has promulgated guidelines governing the SMP approval process in 2003 that do not support this inference. WAC 173-26-191(2) lists the “basic components and content required in a master program.” Current guidelines concerning procedures for including other documents in a master program by reference are set forth in WAC 173-26-191(2) (b), which states in relevant part:

For the purposes of completeness and consistency, local governments may include other locally adopted policies and regulations within their master programs. For example, a local government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter. This can ensure that local master programs are consistent with other regulations.

Shoreline master programs may include other policies and regulations by referencing a specific, dated edition... In the approval process the department will review the referenced development regulation sections as part of the master program... If the development regulation is amended, the edition referenced within the master program will still be the operative regulation in the master program. Changing the referenced regulations in the master program to the new edition will require a master program amendment.

The Appellant argues that this regulation provides only one means to incorporate a local CAO within an approved, effective SMP: by reference to a specific, dated edition of the CAO in the SMP. The County argues that this regulation is ambiguous and allows another means of incorporation into the SMP: by providing a general, undated reference to the CAO, which would have the effect of also incorporating future amendments without further DOE review. DOE’s approval of the County SMP in 1999 without a reference a specific, dated edition would appear at first glance to support the County’s argument, but it is important to recognize that WAC 173-26-191(2) (b) was not adopted at the time of County’s 1999 SMP approval.¹³

Yet WAC 173-26-191(2) (b) was effective at the time the County amended its CAO in 2007. To judge whether the 2007 CAO was properly part of the County SMP, one must interpret this guideline. While the County may have relied on its own interpretation of the guideline when it chose not to submit its 2007 CAO to DOE for approval as an SMP amendment, a court would ordinarily give deference to DOE’s interpretation of the guideline, as a regulation DOE is charged to implement.¹⁴ The record, however, contains no evidence of DOE action interpreting

¹³ See WASHINGTON STATE REGISTER 04-01-117 (December 17, 2003).

¹⁴ See, e.g., *Ass’n of Wash. Bus. v. Dept. of Revenue*, 155 Wn.2d 430, 447 n.17 (2005) (an agency is entitled to deference when it adopts an interpretation of an ambiguous statute); *Quadrant Corp. v. Central Puget Sound Growth*

WAC 173-26-191(2) (b) as it applies to this case.¹⁵ Without an agency interpretation on record, the regulation must be interpreted according to its plain meaning, and if ambiguous, according to general canons of construction. Under the accepted canons of construction, the regulation must be interpreted and construed so that all language used is given effect. The plain meaning of the language of the regulation requires a reference to a specific, dated edition if a local government chooses to include a local policy or regulation in its SMP. The County's reading would render the majority of the regulation's second paragraph meaningless and superfluous. Thus, the interpretation of the guideline that gives all its language its full effect is the interpretation that the guideline provides only one means to incorporate a local CAO within an approved, effective SMP: by reference to a specific, dated edition of the CAO in the SMP.

The Appellant's construction of WAC 173-26-191(2) (b) in this way does not render the County's 2007 CAO ineffective. CAOs become effective when they are adopted by local governments. There is no independent requirement that DOE approve the substance of a local government CAO. Nor does this construction confer any authority to DOE to approve a local government CAO. Rather, this regulation states the process by which a local government-approved CAO becomes part of a SMP, where DOE is given the exclusive authority to review and determine if the SMP amendment is consistent with the policy of RCW 90.58.020 and the applicable guidelines.

Interpreting WAC 173-26-191(2) (b) in this way is consistent with legislative intent in enacting EHB 1653 and the language of the act. Following the Washington Supreme Court's plurality opinion in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242 (2008) and the Washington appellate court's decision consistent with the plurality opinion in *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 152 Wn. App. 190 (2009) (*KAPO I*), the Legislature enacted EHB 1653 to "affirm and clarify the legislature's intent relating to the provisions of chapter 321, Laws of 2003." *EHB 1653, sec. 1(1)*. In EHB 1653, the Legislature affirmed that "development regulations adopted under the growth management act to protect critical areas apply within shorelines of the state as provided in section 2 of this act." *EHB 1653, sec. 1(2)*. Thus, CAOs adopted under the GMA do not have unlimited application within shorelines of the state; such CAOs apply within shorelines of the state only as provided in section 2 of the act.

EHB 1653 subsection 2(b) amended RCW 36.70A.480 and states in relevant part:

Mgmt. Hearings Board, 154 Wn.2d 224, 233 (2005) (court accords deference when agency has specialized expertise). See also *Public Utility District No. 1 of Pend Oreille County v. Dept. of Ecology*, 146 Wn.2d 778, 790 (2002).

¹⁵ The DOE publishes the Shoreline Master Program Handbook to assist local planners in meeting SMA requirements and implementing guidelines. According to DOE, a Handbook section entitled "Integration of Critical Areas Ordinances" is still under development and not complete. See <http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html> (last accessed October 30, 2011).

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Except as otherwise provided in (c) of this subsection, development regulations adopted under [ch. 36.70A RCW] to protect critical areas within shorelines of the state apply within shorelines of the state until the [DOE] approves one of the following: a comprehensive master program update, as defined in RCW 90.58.030; a segment of a master program relating to critical areas, as provided in RCW 90.58.090...

Subsection (2)(c) provides that until the DOE approves a comprehensive master program update or segment of master program relating to critical areas under Subsection 2(b), a use or structure legally located within shorelines of the state that was established on or before the effective date of the local government's development regulations to protect critical areas may be redeveloped or modified if the redevelopment or modification is consistent with the local government's master program and the local government determines proposed redevelopment or modification will result in no net loss of shoreline ecological functions.

No Washington court has interpreted subsections 2(b) and 2(c). *Cf. KAPO II* (published in part) (holding only that EHB 1653 is retroactive to July 27, 2003; the court did not reach the issue of an exception for existing use.) The Washington Supreme Court held that when the legislature has not defined a term within the GMA, as with other statutes, it is proper to accord the word its common meaning, and where necessary, consult a dictionary. Additionally, interpretation must consider legislative intent, the statute's subject matter, and the context in which the word is used. *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005) (citing *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 693 (1987)). Read together, the common meaning of the language of EHB 1653 provides that in the interim period before DOE approves a comprehensive master program update or segment of master program under subsection 2(b), redevelopment or modification of an existing shoreline use or structure established on or before the effective date of a local government's CAO may occur if it is consistent with the local SMP and results in no net loss of shoreline ecological functions.

While the County asserts that EHB 1653 requires that CAOs adopted under the GMA apply within all shorelines of the state until DOE comprehensive master program update or master program segment approval, the County does not offer guidance what should be done with the language "as provided in section 2 of this act." *EHB 1653, sec. 1(2)*. Statutes should not be interpreted to make one part inoperative; statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *City of Seattle v. Dept. of Labor & Indus.*, 136 Wn.2d 693, 701 (1998). The County's approach would render "as provided in section 2 of this act" essentially meaningless. On the other hand, if given effect, the clause provides a very limited, fact-based exception to compliance with a local government's existing CAO during the interim period preceding DOE comprehensive master program update or master program segment approval. This interpretation of EHB 1653 is also supported by the Legislature's decision to amend subsection 2(4) of the act, changing the level of protection given critical areas within shorelines of the state by SMPs from at least equal to the level of protection provided by local CAOs adopted and thereafter amended to a level that

“assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by [DOE] guidelines...” *EHB 1653, sec. 2(4)*.

Another portion of EHB 1653 also supports the Appellant’s reading of WAC 173-26-191(2) (b). Subsection 1(3) of the act affirms “the adoption or the update of critical area regulations under the growth management act is not automatically an update to the shoreline master program.” *EHB 1653, sec. 1(3)*. This subsection distinguishes between the process used to adopt or update critical areas regulations under the GMA and the process used to update a SMP, and acknowledges that there is an additional process beside adoption or update of critical area regulations that is necessary to update a shoreline master program. When subsection 1(3) is considered in light of the act’s retroactivity to 2003, the Appellant’s reading of WAC 173-26-191(2) (b) best harmonizes the subsection with WAC 173-26-191(2) (b). Indeed, DOE has not chosen to update WAC 173-26-191(2) (b) in response to the enactment of EHB 1653 up to and through its most recent round of guidelines updates adopted February 11, 2011.

Given that guidelines implementing the SMA and EHB 1653 provisions support the conclusion that the County’s 2007 CAO is not properly part of the County’s SMP, the applicable setback is determined by reference to the lawful components of the County SMP effective at the time of complete application for exemption. At the time of appellant’s complete application, KCC 22.28.230.4.b of the SMP mandated that “setback and buffer requirements for residential development shall be based on the minimum criteria set forth within the Critical Areas Ordinance (Title 19 of this code) in addition to the site specific critical areas requirements.” “This code”, at the time the County SMP submittal was reviewed and approved by DOE, means the code in effect in 1999. The County’s 1998 CAO imposes a 35-foot building setback from OHWM on the Appellant’s property. See former KCC 18.16.315, Table 4, Saltwater Shorelines. Findings 1 – 6.

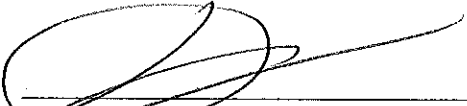
DECISION

Resolution of this matter rests on a complex and very fact-specific set of interactions between the County’s SMP, CAO and EHB 1653. As a general rule, the legislative intent behind EHB 1653 is to allow municipalities a period of time to “catch up” on the process of integrating CAO protections into their SMPs through appropriate DOE approval. In the time between now and integrated SMP approval, the general rule is that the provisions of the municipality’s CAO and SMP must be met for shoreline properties. See KAPO II; see also EHB 1653 sections 1, 2 and 3(a) and (b). However, where the applicant seeks to continue or develop an existing shoreline use, the analysis changes. Under those circumstances, the applicant is governed by EHB 1653 section 2.3(c), which provides that a legally existing use or structure located in a shoreline may redevelop if it is consistent with the SMP and the local government determines that the proposed redevelopment will result in no net loss of shoreline ecological function. This is the process that governs the instant case.

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The Appellant has raised a complex but accurate argument that the DOE guidelines in place at the time the County completed its 2007 CAO amendments required the County to submit the 2007 CAO amendments to DOE, as a SMP amendment. The parties to this appeal have stipulated that the 2007 amendments were never sent to DOE for approval as a SMP amendment. Thus, the condition that proposed development on the Appellant's property must comply with Shoreline Master Program general regulations for Residential Development set forth within KCC 22.28.230 is a properly-imposed condition and means that Appellant must observe a 35-foot building setback from OHWM on his property. This is the setback standard set forth within the County 1998 CAO, which DOE approved as a SMP amendment. No other SMP amendments have since received DOE approval.¹⁶

Decided this 7th day of November 2011.


KIMBERLY A. ALLEN
Kitsap County Hearing Examiner
Sound Law Center

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¹⁶ The Hearing Examiner notes the concerns of the County with respect to future application of the decision. The decision is very fact-specific, relying on the County's own determination of no net loss of ecological function. Moreover, the effect of this decision is prospective only. Submission of the County's 2007 CAO to DOE as an amendment to the existing SMP is an option to abate any ambiguity in application of shoreline exemption review criteria to future applications.