

**CAO REVIEW COMMITTEE
MEETING NOTES – AUGUST 19, 2008**

Attendees:

Committee Members: Todd Goldsmith, Barbara Thomas, Amy Windrope, Patty Miller, John Evans, Teri Williams, Stephanie Buffum Field, Stephanie O’Day, Ryan Drum, and Mary Masters (alternate for Jim Slocomb, MRC).

Public: Jack Cory (Island Guardian), Barbara Rosenkotter (San Juan Lead Entity), Jeff Hansen (MRC), Don Jeanette, Gordy Peterson, Pauli Gavora,

Staff and Consultant Present:

Shireene Hale, Senior Planner, Community Development and Planning Dept.
Maya Borhani, Staff Assistant, C., D., and P. Dept.

Time and Location:

8:30 a.m. – 4:00 p.m., Islanders Bank Annex, 225, Blair St., Friday Harbor.

Next Meeting:

Tuesday, September 16, 2008
10:00 a.m. – 3:00 p.m., Lopez Library Meeting Room, 2225 Fisherman Bay Rd, Lopez Island

Meeting:

- Introductions
- Agreement on agenda change: Shireene Hale (CAO process), Citizen Input, Update on CARA ordinance, and Review of Public Participation Plan (while waiting for Tim Gates, CTED, to arrive).
- Shireene Hale: Overview of CAO process for public in attendance.
 - a. GMA mandate;
 - b. 5 types of CAOs;
 - c. CAO committee appointed by County Council, to review law, science and existing regs, to come up with a set of recommendations that meet the law and are acceptable to the community.

- d. Realtor cards mailed to homeowners, CAO issues addressed there (e.g. buffers) – but done in a “scare” way, not how CAO works
- Discussion:
 - Disagreement with Shireene regarding remark that the county will always let you develop your property, citing a recent case with a client who only received “recreational use” approval
 - Shireene described “reasonable use exception” for CA development; and, there may be other reasons why a property is undevelopable.
- Citizen Input:

Jack Cory: Disagree with Shireene’s view of the realtor mailer – CAO will help to make some properties unbuildable, i.e. setbacks; sewer restriction. CA designation will also affect the \$\$ value of a property

Don Jeanette: Lives on waterfront, and feels waterfront landowners really take care of their properties (compared to rundown places seen inland on island)

Jeff Hansen: Works with Shireene on outreach about CAO committee:

 - Helping make the county website more user-friendly;
 - Keeping it updated with approved meeting notes, and other basic and background info about GMA requirements, etc;.
- Update on CARA Ordinance
 - a. Section C 1-5 moved into “activities requiring inspection” – no prohibited businesses/usages
- Discussion:
 - Landfills?
 - Exempted (state requirement)
 - RE: business that need inspecting - part of UDC filters them, based on impact
 - “conditional use permits” are so all issues will be looked at; no guaranteed ‘yes’, but all uses discussed are allowable for home/cottage industry
 - Scheduled to go to County Council 10/14/08 – will use small mailing budget to send postcards to property owners about the meeting
 - RE: Minority Report – on county website, and also sent to County Council with the majority report
 - Question about commercial use (Todd)
 - Question about reference to chemicals (Ryan) – “prevent from coming in contact with ground surface” vs. “use of product with manufacturer’s directions” – If they’re on the ground, they’re in the water.
- Review adopted Public Participation Plan and Council approved funding for public outreach

- Shireene handed out existing plan (Res.# 56-2006, 10-24-06) – this is what we have now – it’s been suggested we do more or different (5-minute review)
- Discussion on the CAO Public Participation Plan:
 - “They were dreaming” when this was written
 - Shireene – We had hoped that BAS would be simple, the (ordinance) process quick; instead we discovered the need (for public participation) was more comprehensive than this.
 - Amount of Marine Biology contract \$\$ spent so far?
 - Probably less than half, with some for Jamie Glasgow’s upcoming visit, and some for wetlands
 - Do we have an obligation to implement this plan? (or amend and implement)
 - Shireene – Yes.
 - Explanation by Shireene about the consultant who was let go, as their work was not thorough enough for CAO purposes
 - Some felt county has not spent time on public outreach; others begged to disagree
 - Gap between expectations, and level of science people want
 - Request to see county revisit this budget
 - Shireene – Not within purview of this group to reallocate county funds, unfortunately
 - Question about Shireene facilitating?
 - Shireene – Doesn’t think it’s a good idea because she can’t do all three jobs effectively
 - Current plan designed to satisfy public agencies (CTED, etc;) – it gives guidance in terms of what County Council wants to see. But how can we use this as a guideline for a CAO public participation plan?
 - Addendum to this document?
 - More info on county website – presence there hasn’t been as effective as possible – no money in the budget?
 - Jeff Hansen now on board for this task, working with Shireene on updating and improving web presence
- Public Input:
 - Jack Cory: Don’t change agenda, because the public is coming expecting to hear topics at scheduled times.
 - Daytime meetings (during business day) are not fair\
- Tim Gates, CTED

- a) His role as Growth Management Services Program – helps local communities to implement GMA
 - b) Telling people how SMA and GMA interact has gotten harder
 - c) Supreme Court ruling (to reinstate the Growth Management Board’s Anacortes decision) doesn’t take effect till mandate is issued; 20 days before mandate, in which all parties have a chance to reconsider decision
 - d) DOE and CTED filing motion to reconsider
 - e) Decision has a lead opinion, signed on by 5 justices; but 1 signed on for only “results only.” This is a precedent (plurality decision), but can’t tell what decision means
 - f) The way the decision is issued, can’t really tell what it means
- Questions:
 - Dissatisfaction with Tim’s description of the situation, based on what Randy Gaylord had said at our last meeting
 - Special recommendations for what CAO Committee should do, RE: this decision?
- Tim Gates:
 - a) We could weigh risks of different actions, but there’s no certainty for right now. Could wait for legislature to clarify intent. Through 2003s amended SMA and GMA (ES-HB-1933), “critical areas shall be governed by SMA, not CAO.” But in terms of land use, there are “tons” of overlapping regulations. But it’s less than clear when that transfer was to occur.
 - b) Case history, and question of timing: Retroactive interpretation (effective immediately) - go back to SMP, to existing regs; whereas the State thought transfer takes place in the future, slowly – Prospective interpretation, to be done when SMP is due (2012, SJCounty). W. Washington Hearing Board did not agree. with Anacortes (not retro), nor State; instead, 3rd timing option: in the future, and whenever you adopt a CAO that covers shoreline areas. Appealed by CTED; won = PROSPECTIVE. Supreme Court case overturned hearing Board, upheld Anacortes.
 - c) Thinks that this decision would only apply in Western Board jurisdictions (not statewide)
 - d) Court accepts motions for reconsideration almost never; hopeful they will this time. CTED will tell the court this decision will be “hard to live with.”

- Discussion:
 - While waiting for Court, CAO committee should do what?
 - Tim – Options: 1) Wait. Hope Court or legislature clarifies (could take to May/June of 2009); 2) Comprehensive SMP update now; 3) Look to WWHBBoard – follow old decision reinstated, run through DOE; at same time, submit to DOE an updated SMP within CAs. Either way, there will be disagreement: risk-based approach. Since most of our CAs are in shorelines, it makes sense to proceed as if WWHB rules.
 - No time to wait for legislature’s clarity (so should “set aside” shorelines for now). But if we don’t address shorelines in CAO, and clarity comes along later, then what?
 - Current SMP has not CA protection
 - Shireene – GMA mandates we designate CAs wherever they occur, and put programs in place to protect them. (Example of eelgrass, salmon, shellfish.) If we postpone that work and try to put in an SMP, are we in compliance with GMA (per CAs)?
 - Complete mess between SMPs and Growth Management regs: need a legislative fix
 - How about basic protections of CAO, then phased SMP amendments?
 - Overlays (between SMP and GM) in entire county, not just shorelines
 - No place for discussion of docks, shoreline buffers in our CAO now; but discussion of steep slopes, and vegetation issues will fit in our CAO.
 - SMP or CAO protections better? (overlap)
 - Feeling that State has not supported county enough
 - Barbara Rosenkotter (Lead Entity) – including Salmon would be “legally defensible”: can we be GMA compliant *without* covering salmon in the nearshore? Concern this committee will be unable to meet GMA compliance and protect listed species within the county.
 - Tim Gates – San Juan County not alone in having older SMP that we thought we had purview to cover in CAO
 - Citizen – DOE can adopt “emergency regs” to protect during CAO process
 - Tim Gates - potentially adopt a rule to allow to do CAO, address ALL CAs (including shorelines) at the same time, and submit an updated SMP that says those CAs apply.
 - Citizen – Can DOE make rules? Answer – (Tim Gates) Not if they conflict with the laws.
 - Tim – Many local governments relying on CAOs to make sure SMPs are okay; older SMPs and newer CAOs are very different things, and hard to harmonize. Supreme Court decision makes it even harder.
 - What if we continued independent of Supreme Court decision, and consider shorelines with CAO? Some felt would be against the law; others disagreed.
 - Tim – Conflicted views within decision itself. Meanwhile, DOE coming up with alternatives, like an emergency rule for submitting limited SMP amendments.

- Citizen – Who shoulders the burden of proof for new shoreline regs if SMA doesn't offer adequate protection?
- Instead of debating further, come up with specific decisions for our legal counsel; get direction for County Council, Ron, and Pete
- GMA mandates salmon, which are not even mentioned in SMA
- Question about legislature making it easier for counties with less resources to not have the same hoops/requirements as larger counties. (Tim – possible.)
- Tim – When we hear back from the court, we can offer something solid to go on
- 139 Puget Sound counties and cities have completed their CAOS
- Reiteration: “parking lot/sidebar” for shoreline issues

***** 5-minute break *****

- Goals for CAO Committee, RE: public participation, regulations, and process

a) Step 1: Brainstorm on potential goals

b) Shireene: Focus first on ordinance goals

c) Discussion:

- What are CAs supposed to do (Amy's notes): maintain endangered/sensitive/threatened species and their listed habitats through public education, and keep regulatory intrusion into people's lives to a minimum.
 - Goal for group to feel good about what goes forward before it does so
 - Planning horizon that takes into account next 40 years
 - Identify native species that do not have resilience to sustain viable populations if current pattern of land use and regulatory control is not changed; vitality of islands for future generations
 - Shireene: State has already identified at-risk species.
 - Reply: Goal to focus on things important to SJCounty, which might be broader than what the State is doing (i.e. islands have more species than State has identified)
 - How do we avoid doing complete flora/fauna of SJCounty (which has not been done yet)
 - Focus regs on ecological function (want clean H2O, so a buffer is how you get there)
 - Institute/maintain programs to monitor changes in native species populations and environmental conditions w/ annual public report
 - Expand programs for public purchase of significant species habitat
 - Emphasize incentives to accomplish CAO compliance (Public Benefit Rating System)
 - Write a CAO that is easy to administer
 - Less flexibility, with more clarity (tip towards clarity over flex)

- Funding (for enforcement) must be 100%
- Develop regs that meet requirement of GMA
- Shireene: minimum, want regs to meet law; secondarily, create voluntary programs to get citizens to comply
 - There may be times when one of our goals may be in conflict with another of our goals, and we must be clear. When writing ordinance, tie ordinance language to a goal.
- RE: species: What IS native? i.e. cactus introduced by Salish – ALL species?
 - Shireene: Mandate tells us which species – it’s not all.
 - Since education isn’t part of mandate, how to fund and make it happen?
 - Suggestion: Grants, industry, non-profits
 - Program goals, or ordinance goals?
 - Mandate different from voluntary education, which takes longer and needs a regulatory piece to fall back on
 - Maintain “no net loss”

***** LUNCH *****

- GOALS DISCUSSION (con’t):
 - Shireene: Put old stuff back in (as is); put stuff we did today as “goals under consideration”?
 - Test questions (for goals/process): 1) How do we align with our goals? 2) Do we reach consensus?
 - As Planning Commission, with 9 focus points that helps their process along
 - Suggestion for 2 documents – one with legal stuff we have to do, other with ideas “under consideration”
 - Further concern that public participation is not getting its due
 - Difference between public participation and public awareness: goal to make people aware; they have a choice to participate or not
 - Question about Jeff’s outreach mission – way to utilize \$\$ spent there?
 - Suggestion that committee members write letters to editor, educational articles (not positional) RE: CAO work, as form of outreach (post on website as well)
 - RE: this section of ordinance: should we keep working on it, or have public meetings first?
 - Agreement to “keep on course.” Finish draft, put ad in paper w/ 3 top points about what ordinance will do, have public meetings, reconsider input, take to Planning.
 - Subcommittee formed to work with Jeff on outreach ideas and implementation (Patty, John and Amy new subcommittee members)
 - Need for CAO committee members to be present at public meetings to own what we’ve made
 - At public meetings for this section, let public know what we’ll be working on next

- Direct mailing to property owners?
 - Shireene: Money to do 2 such mailings; 1 before public meetings?
 - Suggestion to contact local cartoonists, and John Clancy (and other performance/stand-up comedy artists) to publicize CAO process
- Review of “General” sections of 4/08 ordinance draft
 - a) “18.30.110 Critical Areas. A. Purpose”:
 - Leave “shoreline” out
 - Under DEFINITIONS: ADD “no net loss”; “protected species”; “protected habitats.”
 - Take out “ecological functions and processes”, as that phrase is from SMA?
 - But, we have “functions and processes” in uplands as well
 - Definition of “no net loss” = “fish and wildlife habitat conservation areas” - it’s not species, it’s the habitat
 - DECISION to take out “species” and “shoreline” – LEAVE “ecological functions and processes”
 - Flag “shoreline” to store in “parking lot” for after Supreme Court clarification
 - RE: Steward & Assoc. consultant work – does explain some science, so stays in as part of our overall science (won’t use them again)
 - What about references to anadromous fish?
 - Barbara Rosenkotter: This is the exception to the rule about not saying “species”
 - At the end of “Purpose” add: “..including giving special protection to anadromous fish (salmon).”
 - ADD to definitions: “anadromous fish”
 - Shireeen, Barbara R.: Okay.
 - Decision: Take out “ecologically sensitive and/or hazardous.”
 - b) “B. Applicability”:
 - Question about designation of 300’ (basis of it?)
 - Safer saying “buffers” or “already defined buffers”?
 - DECISION: change “300 feet” to “their defined buffers”
 - Review goal questions as we said we’d do (does ordinance language reflect our goals?)
 - RE: Voluntary/educational element – codify the voluntary program?
 - Shireene: RE: Jefferson County – section at end of “General” for voluntary suggestions
 - Question about needing language of “300 feet” to ensure OVERLAY is covered?
 - As buffers connote a wide range, use the word in “General” section; then, in each section, specify sizes of buffers by area
 - Definitions of “buffers” vs. “setbacks” – discussion of differences between them
 - A buffer doesn’t mean you can’t DO anything within the buffer; it depends on which CA it buffers

- There are certain “no touch buffers”
 - As whole county is now a designated CARA, we have to narrow down our language
 - Discussion of CARA, RE: 3rd definition for “critical areas”
 - DECISION: language to put in: “conditions in the field take precedent;” “county maps are indicators only;” and, add sentence to clarify “does not apply” to # 3 (CARAs)
- c) “E. Reasonable Use Exception.”
- Tim Gates’ opinion as it stands so far?
 - Role of BAS? How do we achieve “no net loss” and balance with other GMA goals?
 - Tim: Reasonable use exception is granted based on criteria – our ordinance is saying, automatically, that there is some part of your parcel you can use. Need this safety valve, or could be government taking (illegal). So you build safety valves into CAs specs. No usage is very specific to substandard parcels that are heavily encumbered. Use of variance criteria.
 - Other options: stewardship, conservation?
 - Tim: Make language as clear as possible. From State’s side, Reasonable Use Exceptions can be big loopholes (for environment, and property buyers both). Need to look at exactly how this would apply. With Whatcom Co., DOE asked them to show what effects would be; they did careful analysis, and showed DOE there wouldn’t be any.
 - Exemptions for building or residence or pertinent structures?
 - Tim: Typically, yes. If you buy a parcel that’s physically buildable, the minimum reasonable use is usually a single-family residence. Will do more research for other language of what’s been used and tested. Add term to “Definitions” section?
 - Question for Tim: Precedent for homesites platted in early 1900s that are now unbuildable? And, what is the definition of a “home”?
 - Does “buildable” mean “possible” or “allowed”? (example of archaeological precedent of humans living in marshes – possible; currently not “allowable”)
 - Tim: Language here holds up – a lot of jurisdictions have adopted these wordings. Get clarity up front, but make the ordinance small enough that you can work with it
 - Need to define “reasonable economic use”
 - Shireene: RE: BAS – our obligation under GMA? In looking at CTEDs guidance doc and court cases, case studies say give attention to BAS, but don’t have to mirror?
 - Tim: GMA language says “counties and cities must include BAS...”. So, if your CAO ordinance is going to vary widely from what BAS says, you need to document what that variance is. For example: the example ordinance requires site specific habitat management plans – this is embodied in code to include BAS; but we put off till time of occurrence the specific habitat variance plan. Ways to make sure BAS is met.

- Could we establish ordinances so a lay person could assess their own reasonable use?
- Tim: For Wetlands, DOE will provide sample ordinances. 3 different sample ordinances; help prevent a “big dumb buffer.” Or, start with a BDF, and work backward with habitat management plans. DOE like “stewardship plans,” e.g. Island County: wetland description/education – get landowner engaged. Try to build in citizen engagement with regulations.
- Prescriptive method vs. fall back approach.
- Question about financial catch-22 of needing “qualified professionals” to inspect for landowners – other options?
- Tim: As long as there’s final check from the authorities (community training programs for landowners to do some work themselves are okay)
- Question about urban vs. rural: some feel that within a UGA there’s a lesser form of protection, and in rural areas that it’s higher
- Tim: Won’t find cases supporting a distinction. Rather, how do protect all areas the same and still have density? There is some sorting out to do, as some areas won’t be as urban as others
- “consider” BAS, and “balance” decision with other GMA requirements? How?
- “include,” not consider = to substantially consider. Different levels of BAS.
- Does BAS = what’s best for critters?
- Tim: Rather, protect FUNCTIONS of CAs; what’s best for critters w/in CAs?
- Tim: No CAO case that has used DOE example codes has been overturned. Only Island Co. veered from using DOE’s example code. It’s hard to balance certainty with variability.
- Tim: “no net loss” = shorthand for mitigation. Always some loss, but no net loss. Development will have costs; while acknowledged, you still protect the functions of the CA, avoid an ever-shrinking baseline. A concept, not a specific #.
- Example of 12-mile beach forage fish spawning area for which we have no forage fish mitigations banks.
- Tim: What do you do when you have irreplaceable resources (i.e., no new shorelines)? Mitigation strategies haven’t always worked. Acknowledge there might be some loss; identify places where there might be some *restorative process*. Look for better strategies by which to work this out. For really RARE habitats, best to avoid, e.g. forage fish example: probably want to draw a hard line.
- Other counties RE reasonable use exceptions? Also mitigation required with that?
- Tim: Will look at other cases and get back to us.
- Tim: This is never about one case or individual project, either –neither about specific size (or project); rather, more about *cumulative effects* over time, and protecting *functions*. Reasonable use exceptions are not for general use. They only apply to substandard parcels where other requirements can’t be met.

5-minute BREAK

- Housekeeping
 - a) September meetings: 16 and 30th (Tuesdays)
 October meetings: 7 and 21st (Tuesdays)
 then, 1st TUESDAY and 3rd THURSDAY:
 November meetings: 4 and 20
 December meetings: 2 and 18
 - b) Next Task: First draft of “General” and “Fish and Wildlife” sections; then public meetings, and back to committee.
 - c) Process, RE: Minority Reports
 - Minority reports will come *back* to committee with draft ordinance and staff report, to review all three one last time
 - Request to see Planning Commission changes to CARA ordinance, before it goes to County Council. Shireene agreed.

- Evaluation
 - a) Tim Gates’ input helpful
 - b) Recommendation from Barbara Thomas that everyone read the “Takings” literature.
 - c) Shireene: Suggestions to help make process move more quickly?
 - Think about the questions we want answered – frame agenda in terms of *key questions*
 - Deal with big “flash” issues, e.g. Reasonable Use Exceptions
 - Problem with not finishing what we start. Suggestion to model “efficiency in office” techniques, i.e. picking stuff up more than once is not okay (wastes efficiency)
 - Shireene: Different ideas about what’s important, and how we approach it?
 - Finish “General” section next meeting
 - Patty Miller will draft a Goals document
 - How about a carrot of finishing the “General” section; then do Goals
 - One hour of next meeting to be spent on Goals?
 - Set a finite #, e.g. 6 goals we agree on – have Patty, Amy, Shireene draft this ahead of time (next meeting) from summary of goals written down at this meeting.

- Meeting adjourned, 4:10 p.m.

