

December 2, 2009

San Juan County Council

Dear Council Members,

In July, you requested County and San Juan Initiative staff conduct a series of field trips and workshops to understand community perspectives on the proposed changes to the Critical Areas Ordinance (CAO) and Shoreline Master Program. You appointed an oversight committee of Susan Dehlendorf, Patty Miller, Amy Windrope and Shireene Hale to guide the work of Jim Kramer, consultant and staff to the San Juan Initiative. This letter summarizes the process that was conducted, the comments received during the public gatherings and those submitted in writing. All written comments that were received combined a separate document. The perspectives and recommendations in this letter are Jim Kramer's. They have been reviewed by the Oversight Committee. Shireene Hale, County staff, requested that it be clear that she has not endorsed these recommendations.

In November, public workshops were held on San Juan, Orcas and Lopez Islands. A field trip was also conducted on San Juan and Orcas. The field trip on Lopez was canceled due to weather. Forty to sixty people attended each of the gatherings. We were fortunate to have the technical assistance of local wetland scientists Amanda Azous and Scott Rosenbaum. They graciously offered their services for free to help inform people on wetland science. At the Orcas field trip and workshop we were fortunate to have Dr. Ken Brooks and Department of Ecology staff scientists Eric Stockdale and Paul Anderson.

Prior to the workshops, an issue paper (see attached) was developed. The paper provided background on why the County is considering changes to its environment regulations. It also provided a summary of what the Oversight Committee saw as the key issues based on the previous County held public meetings, discussion in the community and their own understanding of the proposed changes. Prior to public release a draft of the issue paper was circulated to community leaders; county, state and federal agencies; as well as scientists. This initial review helped ensure the issue paper captured the key CAO issues and fairly represented the range of perspectives. The paper was publically available on October 26th and comments received by November 18th were included as part of this summary. People were also informed that they could continue to provide comments to the County after November 18th.

I. Overview

People who attended the workshops and field trips and those who submitted written comments reflected a deep concern for the San Juans, both the human community and the natural environment. People expressed concern about the future of the San Juans in terms of its economic viability, the community's ability to sustain itself from local agriculture and protecting the ecosystem. There was a great deal of concern on the part of affected property owners about the impact of the proposed regulations on current and

future use of their land. There were also questions expressed about how well the current regulations protect the environment and questions about the County's ability to successfully administer current and new regulations with its financial and staffing limitations.

Despite these concerns, there is a path forward that can be successful. There is a significant opportunity for the County to provide leadership by expeditiously addressing the issues raised in the public discussion. This would increase the credibility of the County in the eyes of the community. The potential is real for collaboration and compromise amongst community factions that hold different perspectives on the issues. On certain issues, modifications can be made to the draft ordinance that will close the gap and reduce the degree of opposition to the proposed regulations. Seizing this opportunity is critical to increasing the community's faith in the County while addressing the rights of property owners and the protection of critical areas.

II. Structure of this Paper

The issue paper available in late October focused on five questions:

1. What uses and restrictions in buffers are necessary in wetlands, streams and marine shorelines to protect the environment and provide flexibility for the needs of property owners?
2. What flexibility with buffers is needed for special situations and for previously developed parcels?
3. What approach to buffers for streams, wetlands and marine shorelines will best serve the multiple needs of San Juan County and the community?
4. Where is there need for additional science?
5. How can we best protect the ecological functions of feeder bluffs and beaches and support property owners to protect their homes and structures?

At the public workshops the discussion focused on the first four questions plus additional issues raised by participants that should be considered by the County. Due to time constraints there was little discussion of question five which pertains to shoreline armoring and protection.

This paper summarizes perspectives on each of the four questions, the additional issues raised and the recommendations for next steps.

III. What uses and restrictions in buffers are necessary in wetlands, streams and marines shorelines to protect the environment and provide flexibility for the needs of property owners?

The following exceptions are proposed in the draft CAO within the buffer area.

- a. Trails, stairs or raised walkways for pedestrian use, not exceeding five feet in width, providing they are constructed of non-treated wood, are designed to sheet flow runoff into adjacent vegetation, and are designed to minimize soil erosion and impacts on water quality.

- b. Non-structural improvements and maintenance that do not damage the wetland or buffer.
- c. Replacement of non-native vegetation with native vegetation.
- d. Restoration or enhancement designed to protect soil, water, vegetation or wildlife that meets applicable State and Federal requirements.
- e. Exceptions and exemptions allowed under 18.30.110.C, D, & E.
- f. Fences.
- g. Wildlife viewing structures less than 200 square feet in size.
- h. Legal structures and uses existing on (the date these requirements are adopted), that are located within a wetland buffer, may continue in accordance with 26SJCC 18.40.310 and 18.80.120, and in addition the developed area within a buffer maybe expanded up to 25%, provided the expansion does not further encroach toward the wetland. All development occurring after the above effective date shall count toward this 25% maximum.
- i. Orchards and gardens, provided no chemicals are used.

In addition to the list above, agriculture is currently exempt from compliance with the CAO regulations and there is a statewide moratorium on adopting new regulations for agriculture.

There are two issues expressed about the proposed list of uses: 1) It does not provide for all the activities that land owners want and 2) there is concern that allowing all these uses without restriction will damage the environmental processes, functions and habitats of critical areas. Each of these concerns is discussed in further detail below.

There were a number of suggestions and additions to the list of activities to allow in the buffers:

1. Allow all existing uses to be maintained and expanded if site was vested.
2. Allowed uses should vary by type of wetland and existing buffer condition.
3. Landscaping.
4. Uses permitted under Island County CAO i.e. recreation and fire mitigation.
5. Allow for some pesticide use.
6. Permit the use of pressure treated wood.
7. Works of art.
8. Creating ponds for water storage.
9. Restoration.
10. Stormwater control.
11. Handicap access.
12. Clarify maintenance.
13. Eliminate confusing language between what is allowed and what is not allowed.
14. Docks.
15. Low impact development and sustainable development.
16. Clarify restrictions on roads and utilities.

In addition to the suggestions for more and clarified uses in buffers, concern was expressed about the impact of the allowed uses on the function of the buffer and its ability to protect the adjacent wetland, stream and marine shoreline. The current proposal does not restrict the percent of the buffer that can be modified except existing developed areas can be increased by 25 percent. Concern was expressed by the Department of Ecology and others that the current proposal does not restrict landowners from completely altering the buffer. Conversely, if the buffer is not an intact buffer of native vegetation there was less concern about some of the proposed uses.

There was also concern that allowing an expansion of 25 percent for current development in a buffer was unfair to property owners that had small developed areas and it was suggested the expansion should be based on square footage.

Recommendation: Consider the existing condition of the buffer in determining what new uses should be permitted and their extent in the buffer. Allow for expansion of existing uses based on a square footage amount or limited to a percentage of the buffer.

IV. What more flexibility with buffers is needed for special situations?

If the current CAO buffer widths are increased it will affect property owners that have existing uses in the expanded buffer areas as well as properties where the critical area and buffer constitute a substantial portion of the parcel. Nonconforming and reasonable use exceptions attempt to address these circumstances. In cases where the buffer requirements are not consistent with a property owner's interest for use of their property, the Citizen's Committee recommended an option for property owners to apply for a Critical Areas Stewardship Plan that would allow a site specific approach rather than compliance with the standard buffer requirements. The issues that were raised in regard to nonconforming, reasonable use and the Critical Areas Stewardship Plan (CASP) are addressed separately below.

Nonconforming Use

This issue generated a significant amount of discussion and many concerns were expressed by property owners who have existing uses and critical areas on their property. Although, the nonconforming use exception is intended to protect property owners that have legally established uses and structures, the term "nonconforming" carries a negative connotation and they worry that the regulations will make it more difficult to continue their regular activities. They are also concerned there will be additional requirements like having to perform expensive critical areas surveys if they want to maintain or expand current uses. There is a perception that the County and State intend through regulation to discourage and ultimately eliminate nonconforming uses and structures. At the meetings, State and County officials clearly stated their policy under the Growth Management Act that supports continuation of legally established nonconforming uses and structures.

Public suggestions for the nonconforming exception included:

- a. Base the allowed expansion of existing uses and structures on a square footage rather than percentage.
- b. The cost to get County approval for maintaining existing uses and structures should not be increased.
- c. Allowing only 24 months to rebuild a damaged structure is too short and that 4-5 years was more reasonable based on permitting and insurance requirements.
- d. Allow the current developed area of property to be vested and allow property owners more flexibility within this existing developed area versus placing specific restrictions on configuration of structures and uses.
- e. Extend the time allowed for nonconforming uses to be ceased prior to them being considered abandoned.
- f. Change the name so that property owners don't perceive a negative implication from the term "nonconforming".

Recommendation: Ask for DOE's position in writing on the continuation of nonconforming uses for both shoreline and upland parcels. Add language into the code that better supports and reinforces that these structures and uses are legal and that the County is committed to allowing them to be maintained and retained. Ensure that it is not more expensive or burdensome to get County approval for property owners to maintain nonconforming uses. Allow for more than 24 months to rebuild damaged structures.

Reasonable Use

The reasonable use exception typically included in local government critical area ordinances provides an exception of the regulations in order to prevent an unconstitutional taking of private property by the government. Typically reasonable use exceptions allow an area of a property to be developed for its intended use even if it is not consistent with the buffer or critical areas regulations. Local governments have wide discretion in developing appropriate reasonable use standards. However, state agencies and others have expressed concern that if the exception standards are too flexible they may allow significant impacts to the environment. The Citizen's Committee proposal significantly reduced the area allowed for development under the reasonable use exception. In some instances the area was reduced from 20,000 to approximately 5,000 square feet and included the driveway in the calculation. It is not clear how many properties would be affected by the proposed changes in the size of buffers and the extent of the impact on critical areas.

Public suggestions and comments for the reasonable use exception included:

- a. Keep current allowance for reasonable use.
- b. Don't include roads in calculation.
- c. Concern about forcing homes closer to the County road.

- d. The thresholds for the amount of development are at increments of five acres but many lots considered to be five acres are slightly less due to old inaccurate survey methods.
- e. There were questions and concerns about the proposal to require mitigation of impacts for any site development over 2,500 square feet.
- f. Lots that were vested under previous County land use decisions should be allowed to develop under the previous regulations.

Recommendation: Calculate the potential number of lots and critical areas that could be affected in order to better understand and communicate the true impact of this section. There is potential to reduce the controversy over this section simply by making it clear how many parcels are affected. Consider other means to regulate driveways and consider excluding the driveway in the calculation due to the wide variety of potential scenarios. Confirm and address item d. above to ensure lots are not inadvertently impacted.

Critical Area Stewardship Plan

In addition to the nonconforming and reasonable use provisions, the Citizen's Committee recommended an option for property owners to apply for a Critical Areas Stewardship Plan (CASP) that would allow a site specific approach rather than compliance with the standard buffer requirements. At a minimum the CASP must provide equal protection of the water quality, habitats, functions, processes and values found on or associated with the site, when compared to the protection afforded by meeting the prescriptive requirements of the Critical Areas Ordinance. The property owner would be responsible for developing this plan in consultation with a qualified professional, and proposed actions must be supported by the Best Available Science.

In general, people expressed support for the CASP but wanted to make sure it was not overly expensive or the process too burdensome to complete. Some people supported the County hiring experts to review a proposed CASP and others strongly objected. Several wetlands experts questioned the potential subjective nature of the current proposal and suggested experts be consulted in the design of the language to ensure it could be consistently applied.

Recommendation: Include the CASP in the CAO but evaluate the current proposal with wetland experts and other land use and development professionals to determine how it can be consistently, efficiently and effectively applied. Encourage the Conservation District to develop the expertise to develop CASPs for property owners and partner with them to identify funding mechanisms.

V. **What approach to buffers for streams, wetlands and marine shorelines will best serve SJ County?**

There are several issues in regard to the buffers. First, is the proposal to significantly increase the size of some of the buffers without having clearly defined the local problem and second is how the buffers were determined.

The Citizen's Committee proposal to increase buffer sizes raised significant concerns. People questioned the need to increase the width of the buffer significantly over current requirements. The Citizen's Committee based their recommendations on one of DOE's guidance options. DOE offers several approaches to buffer widths. This guidance was developed based on the research and expert opinion about conditions in Western Washington. It was difficult for people to know the extent of the problem in the San Juans and whether there has been any significant damage from current activities to local critical areas. It was acknowledged that many of the wetlands and streams have long ago been altered from their original natural condition by human activity, invasive species and other factors. It was also acknowledged the current condition of the buffer determines what functions it can provide successfully. People suggested that property owners be encouraged but not regulated to improve the condition of the buffers and critical areas on their property. It was also suggested that some functions could be provided by new technology and land practices.

The issue paper and public workshops identify several approaches for determining buffer widths based on the experience of other areas. The range of approaches discussed included: prescriptive buffers where the width is fixed, variable buffers based on site conditions, and buffer performance standards based on the site conditions. People saw the potential value of each. There was considerable interest in having the predictability of fixed buffers but concern that they were too restrictive in some areas and not restrictive enough in others. A variable approach like the one used in Island County was supported by a number of people, including the DOE, because it was based on actual site conditions. There was concern expressed about the County's ability to administer a tailored approach with its financial constraints and lack of technical expertise.

The field trip on Orcas Island focused on wetlands and development issues in Eastsound. There was a clear identification of the challenges of accommodating the anticipated population increase to the Urban Growth Area, creating community amenities, managing stormwater, protecting wetlands and maintaining water quality in Eastsound. Many people expressed the need to consider a special management plan for Eastsound and the opportunity to maximize the benefits for both the human and physical environment.

Recommendations: Clarify for the public what current or future problems need to be addressed and why larger buffers are being proposed. Provide specific examples in the San Juans. Pursue a multi-faceted approach to buffer size that provides certainty of fixed buffers while allowing tailoring to on-site conditions that provides property owners the opportunity develop a unique approach for their property. Consider approaches and partnerships that inspire property owners who want to restore

degraded critical areas and buffers. Ask County Staff and Eastsound Planning and Review Committee to pursue a special area management plan for Eastsound to address the multitude of human and environmental issues.

VI. What additional science and information is needed?

As mentioned above there were significant issues raised about the extent of damage from current regulations and the justification for more stringent requirements. Many people pointed out that the research supporting bigger buffers was not conducted in the San Juans. Others pointed out that many of the functions for buffers like protection of water quality would be the same in San Juans as it is in other parts of western Washington. The work in Island County to assess the conditions of local wetlands and document historic changes was mentioned by a number of people and supported to advance the discussion in the San Juans.

Many expressed the concern that the legal definition of wetlands included areas that most people would not think of as a wetland and that the definition covers much larger areas than most people would expect. It was also acknowledged that County maps of wetlands are inaccurate. While the majority of the participants understood the water quality functions of wetland buffers, many remain unclear on the habitat aspect of the wetland buffer and what is required for different species. These factors all combine to make it difficult for the property owner and others to know where some of the wetlands are and how the regulations are designed.

Recommendations: Evaluate the applicability and value for the San Juans of the scientific assessment conducted for Island County. Evaluate Island County buffers, DOE's Buffer Alternative 3, and the to proposed San Juan County draft CAO to see which one or combination best addresses the issues raised above. Develop a means to map and classify the critical areas so people can know in advance where they are located. Use wetland scientists with San Juan experience to assist in tailoring regulations. Consider incorporating some of the wetland identification tools made available to Island County citizens into the resources available in the San Juans.

VII. Additional Issues

A number of additional issues were raised at the workshops and through written comments that should be addressed.

Environmental and Economic Cumulative Impacts

The cumulative impacts of the current and proposed regulations to the environment and property owners have not been identified. There were different perspectives on the economic implications from the proposed regulations. There is no analysis of either the environmental or social implications of the proposed regulations.

Recommendation: Conduct at least a cursory assessment of the environmental and economic effects of the proposed CAO. Encourage groups like the county Economic Development Council to engage in this type of impact analysis as new regulations are proposed.

Vision for the Islands and Role of Critical Areas

It was pointed out that there is a need to have a clear vision for the San Juan human and natural environment. This would ensure that the management of critical areas was achieved in the context of the other visions for the Islands. A number of people expressed the need for sustaining and expanding local food production and many of the most fertile areas for growing food are wetlands.

Recommendation: The County Comprehensive Plan and Vision Statement should be reviewed to determine if they provide sufficient vision and guidance to evaluate whether the CAO will be a tool in achieving the desired outcomes. These documents should be easily accessible for the public and be an integral part of the dialogue.

Enforcement

A number of examples were mentioned of violations of current regulations. There is a perception that there is no enforcement by the County. People questioned whether more restrictive regulations would make any difference if there continued to be no enforcement. People also questioned whether most of the problems with current regulations could be addressed by having more enforcement.

Recommendation: The 2009 draft enforcement ordinance should be considered early in 2010 along with other means to improve compliance with environmental regulations.

VIII. Overall Recommendations

1. Move forward soon on the CAO and Shoreline Master Program. There is public interest and momentum that can build a better set of recommendations and increase confidence in the County. In deciding the path forward consider the following options:
 - a. Proceed with proposed Citizen's Committee draft.
 - b. Redraft ordinance, using Island County ordinance as the starting point.
 - c. Conduct additional science before proceeding.
 - d. Adopt the Comprehensive Plan policies first (Land Use and Water Elements) and then determine the approach for the Critical Areas Ordinance.

In determining how to move forward consider the following criteria:

- a. How can the community interest and momentum to address these issues be increased?

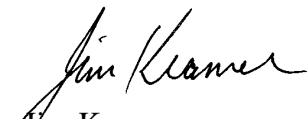
- b. What funding and staffing resources are available and how could these be increased by funding from outside sources like the State and the National Estuary Program Grants from the Environmental Protection Agency?
 - c. What damage will there be to critical areas if there is a delay?
 - d. Will acting soon increase or decrease public support and the commitment of property owners to good stewardship?
 - e. How significant is the threat of a lawsuit if action is not taken and the County is forced by the Growth Management Hearing Board to comply with a mandated schedule for compliance?
2. Consider the current condition and function of the buffer, sensitivity of the critical area and adjacent land use and zoning in setting buffer widths.
 3. Evaluate the practicality of information requirements for permit review and approval by involving developers, contractors, real estate professionals and scientists.
 4. Consider alternative approaches to nonconforming and reasonable uses to address fairness issues and potential environmental impacts.

XI. Conclusion

The Council decision to engage the community in additional dialogue before proceeding on the Critical Areas Ordinance and Shoreline Master Program was wise. The issue paper and following discussions helped better inform participants of the important issues and create more support for moving forward in a manner that can address both the environmental and property rights concerns. The next steps will be crucial to continuing the momentum of public dialogue and finding solutions that truly bridge the many interests of the community. It is quite possible to broaden public support if the Council successfully addresses some of the key issues raised and responds to the recommendations in a timely fashion.

The opportunity to serve you and the community is great appreciated. The Oversight Committee members were instrumental in guiding the process and deserve special appreciation for their hard work.

Sincerely,



Jim Kramer
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