SMP – Rational Decision Making & Nonconformity – Nov. 3, 2010

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When this SMP started, I said to WSSA - this is not about science, it's about land use. Since then, we've spent a lot of time on the science, presumably because the WAC requires it – but now I realize, we've spent a lot of time on it, because it underpins the perception that there's a reason for the proposed regulations. As one commissioner declared last meeting, "I've come to accept the science is indefinable".

So – setting aside the science, what do we have left to guide our decision-making?

Last meeting, the Commission was directed to make policy decisions based on a subjective social/political orientation - not base on rational thinking, not based on cause-and-effect - but based on a particular moral argument of precaution.

The Precautionary Principal espouses the belief that under conditions of substantial scientific uncertainty, environmental regulations should err on the side of caution in order to prevent harm. It moves the … burden of decision-making from scientists to policy makers, and advises local governments to take action, even in the absence of evidence of harm - and notwithstanding the costs.

The difficulty with this thinking of course, is that all of life involves risk. What we are left with is a "standard-less" strategy. How many times have we all asked staff, what is No Net Loss and how is it measured? This strategy does not establish what we should take precaution to protect.

We've been told the WAC requires it, or some variation of this. We must keep in mind that all law is subject to interpretation – after all, that's why we have lawyers and the courts.

So back to these darn regulations and the fact the Commission needs to address them.

If we are to not rely on the science, then a rational person might assume we must rely on reason. That would mean that government should show the cause-&-effect relationship - between the proposed solution to the identified problem, that is roughly proportional to that part of the problem – and, that is created or exacerbated by the landowner's development.

The Washington State Court of Appeals has said, a condition on development must "mitigate a direct impact that has been identified as a consequence of a proposed development" (Cobb*). And, under RCW 82.02.020 – the burden rests on the government to prove that essential nexus, or rough proportionality, has been satisfied, or else the development condition constitutes an illegal tax, fee, or charge.

So – tonight's agenda –it's the focal point of the whole SMP process – the creation regulatory non-conformity!

It's significant that it's a non-legislative anomaly, as this means jurisdictions/agencies have used the courts to influence non-conforming land use codes without due legislative process. The agenda says:"The SMA does not specifically address nonconforming uses", so "Ecology adopted (default) rules (that) apply only if a jurisdiction… doesn't address nonconforming uses." I'll give you those "rules" – the reference is of no consequence.**

It's also noteworthy that the Commission has not actually accepted the proposed 50 ft setback, because changing the setback is the key to creating a regulatory framework for the proposed non-conformity. And - the Options Matrix? – it's a smoke screen to make you feel that the residents have not been damaged "too badly" – after all, they have "Choices/Options".

I'm not sure what it would take under the Options Matrix to get to a 25 ft setback, but I DO know a rational homeowner would NOT do "the best" option – to remove 75% of their bulkhead to move 10-15 ft closer to the water?! The Options Matrix has not been designed to allow flexibility at all, but to dis-incentivize an owner from deviating from the new 50 ft setback.

And – what of social/political orientation?

Tonight's agenda says: "..continuation of …nonconforming uses can interfere with… ability to **achieve new policy**…, (and that) property improvement… (must be allowed)… in the **early years of policy implementation**"... (that) the "purpose of the shoreline setback is to **phase out residential use** (in) the setback area" - what's next – the full 200 ft? ** See Pg 5 & 7 – COB staff memo

This is NOT about science or the environment; this is about social/political policy shift.

Rational regulations are possible. It's quite simple - if it doesn't make logical sense, don't do it.

There is an expression: Your property and your money are only yours until the government finds higher and better use for it….

*Cobb,64 Wash. Appeal. at 467-68

**See Pgs 3-5 & 7, excerpted from COB staff memo (10-27-10) for 11-3-10 Planning Meeting (Attached) and WAC 173-27-080 "default" nonconforming language from DOE