

Critical Areas Ordinances

Overview

All 39 counties must adopt critical areas ordinances (CAO) that designate and protect critical areas within their jurisdiction. Critical areas are defined by state law as:

- 1) Wetlands
- 2) Areas with a critical recharging effect on aquifers used for drinking water
- 3) Fish and wildlife habitat conservation areas
- 4) Frequently flooded areas, and
- 5) Geologically hazardous areas.

Generally, local governments are required to fully update their comprehensive plans and CAOs every seven years, and they can amend their comprehensive plans once a year.

If property owners want to develop a critical area, they are generally required to pay and to mitigate any damage caused, as perceived by the government, by their activities to the ecological functions of the property. The Department of Ecology created a concept of no net loss of functions in critical areas that guides government evaluation of whether the mitigation is sufficient to protect the environment. This doctrine can be used by staff approving permits to ask property owners to replant areas or replace one tree removed with three trees without any consideration of the cost to the property owner.

While the idea of protecting critical areas is a sound one, the implementation can be quite burdensome and go beyond what elected officials might consider reasonable to demand of private property owners.

Best Available Science

Counties and cities are to use the best available science (BAS) in developing policies and development regulations to protect critical areas, yet the Washington Supreme Court has watered-down this requirement by ruling that jurisdictions are allowed to deviate from the science in enacting the legislation if they include their reasons in the hearing record. WAC 365-195-905 provides guidance on BAS, requiring analysis done by credible experts using valid scientific procedures. The characteristics of a valid scientific process include (a) peer review (b) scientific methods (c) logical conclusions and reasonable inferences (d) quantitative analysis (e) sufficient content and (f) references. Local governments have a hard time paying for scientific evaluation of all their land so adequate review does not always take place. There are ample opportunities for citizens and experts to disagree on what is the best science at the local level. Many local governments have been sued by environmental groups arguing for extensive protections as justified by science. The result has been that large buffers (up to 300 feet) and extensive regulation. In many cases, property owners must leave hundreds of feet of land untouched, which reduces the ability to develop or use property and hence reduces property values. In King County's CAO, it tripled prior buffers from 100 to 300 feet buffers (the length of a football field) and limited clearing and grading, thus taking away 50 percent of usage on properties 5 acres or less and 65 percent of land for properties more than 5 acres.

In 2007, due to contentious debate among farmers, local governments, native groups, and the environmental community regarding how critical areas should be handled on farm lands, the Legislature stopped any updates on CAOs applying to agricultural land from May 1, 2007 to July 1, 2010 so that these groups are given the opportunity to reach agreement and develop changes or approaches that can be presented to legislative committees in 2010. The William D. Ruckelshause Center is conducting fact-finding and group discussions to facilitate the negotiations.

Legal and Constitutional Issues

The Washington Supreme Court has declared that local critical areas ordinances cannot be overturned by a referendum of the people in the local jurisdiction.¹

The United States and Washington constitutions contain explicit requirements that property owners be paid compensation when their land is taken for a public use. Many legal experts argue that elements of local CAOs include provisions that qualify as constitutional takings of private property for a public use. Under takings law, the government cannot demand a public benefit be provided by a private party unless there is a nexus to a legitimate state interest and the requirement is proportional to the harm created by the private property owners' use of the land. Any physical occupation of a property is an automatic taking, such as requiring that a property owner post signs declaring land a critical area or demanding public access across the property.

However, property owners have a tough legal hill to climb because in most situations it costs more to fight the local government than to actually do the illegal action requested, and there is no guarantee that they will actually win the argument in local court.

In 2007, the Washington Supreme Court upheld Skagit County's decision not to enact a set buffer width abutting streams and merely require that "farmers are to conduct ongoing agricultural activities so as not to cause harm or degradation to the existing functional values of critical areas." In their legal analysis the court determined that there is a clear distinction between the words protect and enhance, so there is no requirement under the GMA for property owners to replant areas that were "long ago plucked up" because the law focuses on no further degradation of ecological functions, not enhancement. Lastly, the court helped local governments make decisions based on financial or other reasons by stating that the GMA does not require the county to follow best available science so long as it is included in the hearing record and a reasonable justification for a departure is part of the hearing record.²

¹ See *1000 Friends of Wash. v. McFarland*, 150 Wn.2d 165, 168, 149 P.3d 616 (2007).

² *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007).