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No. 72235-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, and  
FRIENDS OF THE SAN JUANS,

Appellants,

v.

GROWTH MANAGEMENT HEARINGS BOARD, WESTERN  
WASHINGTON REGION, and SAN JUAN COUNTY,

Respondents,

2016 FEB -9 AM 9:12  
STATE OF WASHINGTON  
COURT OF APPEALS DIVISION ONE

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REPLY BRIEF OF APPELLANT FRIENDS OF THE SAN JUANS

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### III. INTRODUCTION

Ultimately, San Juan County's ("County") Critical Areas Ordinance ("CAO") must protect the functions and values of designated critical areas ("CAs"). Counties that reject the Best Available Science ("BAS"), like the County did for the seven CAO exceptions that Appellant Friends of the San Juans ("Friends") has challenged here, typically do not protect CAs. Further, where they omit a reasoned analysis for that departure, they also do not "include" the BAS pursuant to the Growth Management Act ("GMA"). Although the County has rationalized its departures, it has not provided a reasoned analysis for them, all of which circumvent the protections otherwise afforded wetlands and Fish and Wildlife Habitat Conservation Areas ("FWHCAs"). AR 5344-45, 5347-48, 5351-52, 5405-410, 5437-442.

In their responses, neither the County nor Common Sense Alliance ("CSA") offers any science that rebuts the ample BAS in the record cited by Friends. On the contrary, the County's BAS citations generally support Friends' position that the exceptions authorize individual and cumulative impacts to wetlands and FWHCAs.

At base, the County requests deference to adopt a bevy of exceptions from CAO protection, including the seven challenged here. The County alleges that substantial evidence supports the Growth

Management Hearings Board (“Board”) decision to grant it that deference. However, the GMA grants counties deference in choosing how to protect CAs, not whether to protect CAs. And the County cannot merely “point to any evidence and demand unbounded deference.” Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 157, 256 P.3d 1193 (2011). The Board did not evaluate whether the exceptions protect wetlands or FWHCAs or departed from BAS based on reasoned analysis, and did not rely on substantial evidence in upholding them.

#### IV. ARGUMENT

The argument below replies to each of the County’s arguments, including its mistaken implication that Friends challenges only findings of fact. Because the CSA Response merely restates its appellate claim that buffers are inappropriate, Friends relies on its Response address it.

##### **A. Friends Does Not Limit Its Challenge to Whether Substantial Evidence Supports the Board’s Decision.**

The County states that Friends’ challenge should be reviewed under the substantial evidence standard, implying that Friends challenged only Board findings of fact. County Response, at 35. However, as Friends stated in each of the issues pertaining to its assignments of error, Friends challenges both Board findings and its legal conclusions. Friends’ Brief of Appellant, at 2-5. Consequently, rather than the circumscribed review

urged by the County, which would omit any evaluation of the Board's legal interpretation, or application of the GMA to the facts here, the appropriate standard of review includes both the error of law and substantial evidence standards. RCW 34.05.570(3); Honesty in Envtl. Analysis and Legislation, 96 Wn. App. 522, 526, 979 P.2d 864 (1999) (hereafter "HEAL").

**B. Failure to Apply Mitigation Sequence**

Apart from the challenged exceptions, the County suggests that Friends seeks to reverse Board findings regarding mitigation. County Response, at 35-36. However, Friends concurs with the Board that "...mitigation has not always been shown to be effective..." and that the mitigation sequence focuses first on avoidance. AR 6276-77. However, where CAO loopholes challenged here reference mitigation, they circumvent the mitigation sequence by first authorizing development and then looking to compensation. For example, the shoreline buffer development provision does not apply the mitigation sequence until after authorizing the buffer reduction. AR 4367-68. Thus, to the extent that Friends' briefing points to the reality of failed compensatory efforts, it merely seeks to ensure that the CAO applies the mitigation sequence.

However, a challenge to the Board's finding on mitigation would be reviewable here. See Ferry County v. Growth Mgmt. Hearings Bd., 339

P.3d 478, 495-96 (2014). Where a claimed error is clearly disclosed in a related issue, such that the nature of the challenge is clear, the Rules of Appellate Procedure (“RAP”) allow appellate review of administrative decisions in spite of a technical violation. RAP 10.3(g); Ferry County, 339 P.3d at 495-96 (also citing RAP 1.2, which directs courts to liberally interpret the rules). Thus, in Ferry County, the Court of Appeals rejected a claim by Futurewise that a Board finding had become a verity on appeal where Ferry County had not assigned error to the specific finding but had argued the issue in its brief. 339 P.3d at 395-96. Further, just as Futurewise suffered no prejudice when it briefed that issue, the County’s nearly identical argument at superior court shows its awareness of Friends’ position that compensatory mitigation fails to protect CAs. Id.

**C. Excluding Smaller Wetlands from Protection.<sup>1</sup>**

The County does not dispute Friends’ argument that the Board failed to evaluate whether excluding wetlands from the CAO will protect their functions. County Response, at 36-37. The County also fails to identify a reasoned analysis in the record that supports the Board’s approval of the wetland exclusion. Id. Instead, the County relies on

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<sup>1</sup> Although the County titles its section 2, “Issue 34: Wetlands Under 1,000 Square Feet,” the wetland exclusion precludes CAO protections for lower sensitivity wetlands up to 2,500 square feet. AR 4321.

conclusory assertions like, “[t]he record supports the Board’s findings”<sup>2</sup> and “the County identified information in the record supporting this regulation, explained the rationale for the recommendation, identified potential risks to the functions and values of CAs, and identified measures chosen to limit such risks.” County Response, at 37. And the County states that the CAO will protect 97% of mapped wetlands, but fails to note that the exclusion allows development of 100% of unmapped wetlands. AR 4314 (noting that wetlands smaller than 1,000 sq. ft. were not surveyed).

The wetland exclusion departs from BAS without reasoned analysis, and the Board did not conclude otherwise. AR 4142; AR 6314; see Ferry County, 339 P.3d at 503-04. Nor does the record offer a reasoned justification. A reasoned departure requires a rational analysis supported by evidence. Ferry County, 339 P.3d at 502. Here, the County suggested that unspecified “practical purposes” and incomplete scientific evidence about smaller wetlands justifies their exclusion from protection. AR 4314. The County did not quantify the wetland acreage likely to be lost, or establish a compensatory mechanism. Id. This does not qualify as reasoned analysis. See Ferry County, 339 P.3d at 503-04 (county must analyze claimed justification for departure and adopt a precautionary

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<sup>2</sup> The County claims that it addressed Ecology’s concerns, but does not explain how establishing an exclusion that Ecology stated “[is] not consistent with best available science and will not protect wetland functions,” addresses Ecology’s concerns. County Response, at 37; AR 4435-36.

approach in the absence of scientific evidence); also Yakima County v. E. Wash. Growth Mgmt. Hearings Bd., 168 Wn. App. 680, 692-94, 279 P.3d 434 (2012) (adopting stream buffers that protect only some functions without analyzing impacts and disregarding no risk approach in the absence of scientific information); also Stevens County v. Futurewise, 146 Wn. App. 493, 513-15, 192 P.3d 1 (2008) (county failed to conduct reasoned analysis when it applied buffers to only critical habitats that had been formally recognized through government rules or statutes).

Not only did the Board fail to identify a reasoned analysis for the departure from BAS, it did not evaluate whether the CAO protects the functions of the select wetlands. AR 6314-15; Whidbey Env'tl. Action Network v. Island County, 122 Wn. App. 156, 174-75, 93 P.3d 885 (2004). The wetland exclusion is based on exactly the sort of speculation and surmise that the legislature intended to prevent with the BAS requirement. HEAL, 96 Wn. App. at 531.96 Wn. App. at 532-33 (stating that departures from BAS should occur rarely). The Board erred in upholding the wetland exclusion.

**D. New Nonconforming Shoreline Buffer Development.**

In its terse response, the County does not dispute Friends' claims that the Board failed to assess whether authorizing new nonconforming development of shoreline buffers includes BAS or protects FWHCAs.

County Response, at 38. Indeed, the County omits any citation to BAS. The County also does not address the Board's failure to identify a reasoned analysis for the County's departure from BAS in authorizing the development of shoreline buffers. Id.

In addition to eschewing Friends' substantive legal arguments, the County offers Board findings without citing support in the record. For example, the County refers approvingly to the Board statement that the buffer reduction is allowed only if the proposed development "will result in no net loss of shoreline ecological functions." County Response, at 38 (citing AR 6310). However, the CAO does not require no net loss. AR 4367-68. To the extent that the CAO seeks mitigation, its mandate to reduce shoreline buffer based on neighboring development circumvents the mitigation sequence's priority steps, like avoidance of impacts. Id. The buffer reduction therefore sidesteps the CAO's mitigation sequence and conflicts with the BAS that recommends compensatory mitigation only as a last resort. AR 6276-77; AR 4367-68; AR 4407, 4416, 4571-78, 5520 (conclusion in pre-adoption County review of draft CAO that, "[m]itigation projects are, however, often unsuccessful, avoidance of impacts is more likely to protect critical areas...").

The County also did not offer any BAS in response to Friends' argument that shoreline buffer development will impose non-compensable

impacts on species like salmon and the forage fish that feed them. AR 3680. The County's Best Available Science Synthesis ("BAS Synthesis") states that "[h]abitat alteration that affects available food and refuge, such as reduced eelgrass presence or altered marine riparian vegetation communities, represent [sic] a significant risk to salmonids.... Adverse impacts may be expected from direct vegetation removal, or indirectly through water quality impacts that effect [sic] vegetation structure in the nearshore zone." Id. (emphasis added). This is important for Puget Sound Chinook salmon, which "use San Juan County's nearshore and marine waters throughout the year, both as feeding and rearing juveniles as well as migrating adults, making these areas an essential part of salmon recovery in Puget Sound." AR 3677. For forage fish, the BAS Synthesis identifies the importance of "[p]rotection of the marine riparian forest along the backshore of beaches" for cooling spawning habitat for forage fish. AR 3663. The BAS Synthesis also emphasizes the adverse impacts of bulkheads, which become more likely as new development moves closer to the shoreline. Id. The BAS Synthesis concludes its surf smelt discussion by acknowledging that "the effectiveness of mitigation actions will in many cases be uncertain...(i.e., providing what is believed to be suitable habitat, may not result in use of the area by spawning forage fish)." AR 3663-64. And "[m]itigating impacts to forage fish spawning habitat may

not be feasible...” AR 3664.

These impacts of the marine buffer development exception conflict with express GMA protections for salmon, which mandate that counties “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” RCW 36.70A.172(1). The GMA’s BAS regulations declare that “[t]he inclusion of the best available science in the development of critical areas policies and regulations is especially important to salmon recovery efforts, and to other decision-making affecting threatened or endangered species.” WAC 365-195-900(3). The BAS regulations direct special consideration to habitat protection measures based on BAS relevant to stream flows, water quality and temperature, spawning substrates, instream structural diversity, migratory access, estuary and nearshore marine habitat quality, and the maintenance of salmon prey species. WAC 365-195-925.

Eliminating buffer protections based on nonconforming development does not achieve no-net-loss; instead it improperly grandfathers development patterns that impact shoreline functions. The Board erred and did not rely on substantial evidence in upholding that exception. See Island County Citizens Growth Mgmt. Council v. Island County, WWGMHB No. 98-2-0023c, FDO, 51-52 (March 6, 2000); Clark County Natural Res. Council v. Clark County, WWGMHB Case No. 96-2-

0017, Compliance Order, 8 (Nov. 2, 1997).

**E. Tree and Other Vegetation Removal in Tree Zones.**

The County's Response does not dispute Friends' position that the Board failed to evaluate whether tree removal in Tree Protection Zones fails to protect the functions and values of FWHCAs, and fails to identify BAS that supports its method for devegetating and developing tree zones. County Response, at 39-42.

Moreover, the County's citations to the record support Friends' position. The County states that "[t]ree protection zones for aquatic FWHCAs are intended to protect general functions associated with water, such as water temperature, and inputs of leaves, needles, wood and organic materials that support the aquatic food web," and then cites to three papers that, rather than suggesting that the County's porous tree zones can function as protective buffers, discuss the effectiveness of naturally vegetated buffers. County Response, at 39. For example, the Kleinschmidt paper proposes to protect streams with "riparian buffers," defined as "naturally vegetated terrestrial area[s] bordering streams and rivers." AR 4995. Likewise, the Wenger and Fowler paper addresses "riparian buffers," which are "strip[s] of naturally vegetated land along a stream or river which is protected to maintain healthy aquatic ecosystems and to provide a range of other environmental, economic, and social

benefits. AR 5111 (emphasis added). And page 6 of the Brennan document defines buffers for its purpose as “separation zones...that are relatively undisturbed by humans and thus represent mature vegetation consistent with the potential of the site.” AR 4945 (emphasis added). Thus, the County’s citations do not suggest that trees alone support FWHCA functions. Instead, they would require largely undisturbed buffers composed of mature vegetation and avoid actions like vegetation removal on shorelines and bluffs, disturbing native vegetation in riparian areas, and building in riparian buffers. AR 4978-79, 5112.

The County’s other BAS citations also support the retention of riparian vegetation. For example, the BAS Synthesis recommends retaining marine riparian vegetation, characterizing it as “an important component of nearshore habitat throughout the Puget Sound region...including San Juan County.” AR 3704. The BAS Synthesis explains that marine riparian areas contain elements of both aquatic and terrestrial ecosystems and notes that buffers that can extend hundreds of feet inland from the shoreline are “likely to be an important management strategy for protecting marine HCAs.” AR 3704, 3710-11.

In addition, while the County’s BAS Synthesis discusses the role that trees play for such functions as large woody debris in riparian buffers, nowhere does it suggest that vegetated buffers would be complete with

trees alone. Indeed, the heading at Chapter 3, page 60 refers to “shoreline vegetation” and those at Chapter 4, pages 22-28 refer to the “Effects of Removal of Streamside Vegetation on Aquatic Life,” and “Effects of Removal of Riparian Vegetation on Wildlife.” AR 3704, 3788, 3793.

In addition, the tree and vegetation removal conflicts with the County’s citation to the BAS Synthesis at AR 3824. That text states that “[t]he density of vegetation (e.g., basal area or percent canopy closure) in a buffer, corridor, or patch – or in the landscape generally – also influences habitat value for some species, perhaps as much or more than buffer width....” AR 3824 (emphasis added). The BAS Synthesis then cites to several studies that found declining numbers and varieties of bird species with decreasing vegetation density. Id.

Notwithstanding the studies’ support for protecting riparian vegetation, the County relies on them to authorize actions in tree zones like: (1) with the exception of vegetation overhanging aquatic FWHCAs, the removal of all vegetation other than trees; (2) the construction of houses and their associated driveways and other development 35 feet from the waterward edge; (3) removal of 20% of the foliage every year; and (4) the removal of 40% of the volume of trees over 6 inches at diameter breast height every 10 years in the portion of the zone starting 35 feet from the waterward edge. AR 4363.

The County's concession that the tree zone is not intended to protect species, including amphibians, supports Friends' position that the tree zone does not protect functions unaddressed by water quality buffers. County Response, at 39. The County states that species are protected under SJCC 18.30.160.F. Id. Yet that section expressly offers only "additional protection recommendations and requirements," intended to supplement the more general requirements of the CAO, and offers little habitat protection aside from references to buffers required pursuant to other portions of the CAO. AR 4373, 4376-77 (e.g., directing development to observe wetland buffers for Northern harrier, short-eared owl and Wilson's snipe). Moreover, most of those provisions offer only voluntary recommendations. AR 4373-79.

Last, and as demonstrated by Friends' Brief of Appellant, the use of an approach adopted for northern New England departs from BAS here without reasoned justification. That approach offers significantly greater protection to riparian functions than the CAO, by: (1) precluding any disturbance in Zone 1 (AR 5014); (2) establishing significantly larger buffers of 70 ft. to more than 300 ft. that applied equally to all stream types (AR 5004); (3) setting the waterward edge of the buffers at the edge of floodplains (AR 5003); (4) including factors for adjusting buffers upward (AR 5003); (5) strictly limiting activities in Zone 2 to prevent

impervious surfaces, removal of the organic soil horizon, fertilization or chemical use, significant alterations to the infiltration capacity of the soils, or tree removal that would jeopardize wind-firm conditions (AR 5014); and (6) allowing low-impact tree harvesting that would prevent: (a) new roads (AR 5015); (b) harvesting within 35 feet of perennial surface water features connected to the stream; and (c) harvesting unless soils are frozen solid (AR 5015). That approach also recommended reestablishing native woody vegetation after harvesting, whereas the CAO authorizes permanent ongoing tree removal. AR 5016.

The Growth Board erred when it upheld the tree zone without finding a reasoned analysis for its departure from BAS or analyzing whether it protects the functions and values of FWHCAs.

**F. Averaging Tree Zones.**

Notwithstanding the three pages that Friends' Brief of Appellant devoted to the Board's failure to analyze whether tree zone averaging protects FWHCAs or includes BAS or a justified departure, the County responds that Friends did not argue that tree zone averaging fails to comply with the GMA. County Response, at 42. Like its response on the tree zones generally, the County fails to address these substantive arguments. Compare County Response, at 42-43 with Friends' Brief of Appellant, at 38-41.

Instead, the County states that the BAS discusses tree protection zones and factors that influence water quality. County Response, at 42-43. These statements are untrue and inapposite. Nothing in the thirty pages of BAS cited by the County discusses the novel “Tree Protection Zone”; the BAS discusses generally undisturbed buffers. AR 3700-723, 3788-794. That BAS directly supports Friends’ position that freshwater and marine riparian vegetation plays an essential role in protecting FWHCA functions, and neither of them address buffer averaging, much less tree zone averaging. Id.<sup>3</sup> Any BAS discussion of water quality buffers is inapplicable to the specific claim here, that the County’s tree zone averaging departs from BAS and fails to protect FWHCAs.

The County also charges without support that Friends has “disingenuous[ly]” alleged this issue “for the first time on appeal.” County Response, at 43. However, the County reaches this conclusion after reading only part of Friends’ PreHearing Brief to the Board. The County acknowledges two sentences that Friends dedicated to tree zone averaging in its PreHearing Brief, but enigmatically omits the significant discussion that Friends devoted to the larger issue of buffer averaging, including tree zone averaging, in that brief. Friends addressed the impermissibility of buffer averaging at pages 2 (Ecology’s concerns), 19 (BAS conclusions

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<sup>3</sup> The County’s sole pinpoint cite, AR 3710, also does not address buffer averaging, but does identify recommended buffer ranges from 16 feet to 1,969 feet.

that no scientific information exists to ascertain whether averaging actually protects wetland functions and stating that it should not be used in conjunction with other provisions for buffer reductions), 33-35 (similar habitat buffer averaging), 36 (tree zone averaging), and 39-40 (tree zone averaging). AR 4014, 4031, 4045-47, 4048, 4051-52. Thus, the County's assertion rings hollow; Friends has repeatedly stressed the inconsistency of the CAO's various buffer averaging provisions with the GMA.

**G. Buffer Vegetation Cutting.**

The County's Response does not dispute Friends' position that the Growth Board failed to assess whether buffer vegetation removal protects FWHCAs. County Response, at 43-45. In addition, the County omits any response to Friends' argument that the Growth Board erred in upholding substantial vegetation removal in wetland buffers (AR 4333) and water quality buffers for FWHCAs (AR 4365). *Id.* Instead, the County limits its argument to the 20% annual tree limbing authorized in tree zones. *Id.* (citing AR 0174-75).

In responding, the County again cites BAS that supports Friends' position that devegetating buffers impacts CA functions. *E.g.*, AR 4926-36. The Booth document referenced by the County argues against exactly the sort of buffer devegetation authorized by the CAO, stating that "[t]he most commonly chosen thresholds, maximum 10 percent EIA and

minimum 65 percent forest cover, mark an observed transition in downstream channels from minimally to severely degraded stream conditions.” AR 4934 (emphasis added). And “[a]t lower levels of human disturbance, aquatic-system damage may range from slight to severe but is nearly everywhere recognizable with appropriate monitoring tools.” Id. To the extent that the Booth document addresses forest cover, it recommends the retention of half or more of the forest cover across the entire landscape, and the retention of forest cover in headwater areas and around streams and wetlands “to maintain intact riparian buffers.” Id. (emphasis added). Thus, the County’s own chosen BAS expressly condemns its selected approach and supports Friends’ position that devegetating buffers does not protect CAs.

Inexplicably, the County appears to argue that Friends has improperly provided different BAS to the Court than to the Board. County Response, at 44-45. The County avers that “Friends now presents the Court with a lengthy discussion of the science yet the question before the Court is whether the Growth Board erred in its decision based on what Friends presented to the Growth Board not based on what Friends presents to this Court.” County Response, at 44-45. Yet the County does not explain what this science is, or identify any evidence cited by Friends that allegedly falls outside the record. Instead, the County relies on the same

BAS that Friends attached to its PreHearing brief (County Response, at 44 (citing Booth at AR 4926-36 and Semlitsch (without citation), both of which entered the record before the Board only as attachments to Friends' PreHearing Brief. AR 4926-936, AR 4056.

The Growth Board erred in failing to inquire whether the CAO's buffer devegetation provisions protect FWHCAs or whether the County provided a reasoned analysis for departing from BAS in the record that does not support that development.

**H. Developing Orchards and Gardening in Buffers.**

The County argues that unsupported public testimony demonstrates the need for residents to grow food in buffers and thus supercedes the GMA requirement to protect CAs. AR 6321. The County cites to its BAS Synthesis for the proposition that "wetlands and buffers adjacent to wetlands and aquatic FWHCAs represent an important location for growing food," yet the cited portion of the BAS merely identifies the geology of the San Juans and supports Friends' position. County Response (citing AR 3482-88). For example, the BAS Synthesis states that the removal of a protective vegetative cover exposes soil to the impacts of rainfall, especially given the San Juans' shallow soils that are "particularly susceptible to compaction," resulting in harm to streams, wetlands, and marine habitat. AR 3488. And islanders' reliance on groundwater further

supports the need to retain buffers that slow rainfall runoff and allow infiltration into the ground, rather than encouraging their conversion to gardens and orchards. See AR 3485-86 (noting at AR 3486 that “[f]orested conditions result in the least runoff”).

Most importantly, the Board upheld a County pretext for buffer gardening and orchards that does not constitute the requisite reasoned analysis for departing from BAS. See Ferry County, 339 P.3d at 502-04. Such departures should be rare, and must rely on a sufficiently reasoned process for that departure, one that is rational and supported by evidence. Id. In Ferry County, the county failed to provide a reasoned analysis when it refused to list some species on the grounds that they would negatively affect the county’s economy because “nothing in the record analyzes how designating the species could harm private ownership or the economy of Ferry County.” Id. at 504. For example, the record did not show that protecting any species would thwart planned development, or interfere with the county’s mining, logging, or other industries. Id.

Here, the County claims that county residents need to produce food with gardens in wetlands and nearby areas on the unsupported grounds that freshwater is limited and summers are dry. AR 6321. It states that its Planning Commission received “considerable input” from unnamed sources, and that it requests that the unmonitored gardens and orchards

apply the following unenforceable half-measures: mowing starting July 15 and without an end-date, the retention of trees (in a garden or orchard), and unspecified “requirements to protect water quality.” County Response, at 46. Yet nothing in the record offers an analysis of opportunities to garden outside of CAs and their buffers, or whether residents have other means for obtaining food outside of gardening in buffers. Moreover, the County’s chosen rationalization relies upon speculative testimony at a public hearing. AR 6321. Thus, the Board did not rely upon substantial evidence in upholding the County’s departure from BAS in the absence of a reasoned justification for converting buffers to gardens and orchards subject to only ambiguous, unenforceable instructions for that development. See Ferry County, 339 P.3d at 502-04.

Further, the County seeks unwarranted deference to rely upon public testimony. See Kittitas County, 172 Wn.2d at 155-57. In Kittitas County, the court rejected the county’s requested deference for public testimony favoring three-acre zoning, holding that “[c]ounties may not cite to *any* fact or opinion and then call for absolute deference,” and that a county’s deference cannot exceed the bounds of the goals and requirements of the GMA. Id. at 157 (emphasis in original). Likewise, here, the County does not warrant deference for testimony that islanders need to garden in buffers. Id. at 155-57.

This unjustified departure is particularly harmful given the impacts that agricultural activities impose on CAs and buffers. Notwithstanding the County's accusation that "Friends has not related any impacts identified in the BAS to the specific exemption at issue, nor has it acknowledged the mitigating effect of the conditions of approval..." Friends briefed the impacts of agricultural practices like gardens and orchards, and cited Ecology's comment that this exception was the most troubling of the CAO's numerous exceptions for development in CAs and their buffers. Compare County Response, at 46 with Brief of Appellant, at 46-47. Impacts associated with farming activities include filling, tilling, draining, ditching, grazing, damming, erosion, replacing native vegetation, altering hydrology regimes, increased sediment, nutrient, and toxic input, habitat fragmentation, soil alteration, roads, noise, invasive plants, and animals. AR 4173. And nothing in the record explains how unspecified "BMPs" or minimal vegetative screening "immediately adjacent to wetlands" avoids those impacts, or similar impacts to FWHCAs. AR 4077-4101. Friends also explained that the CAO does not establish oversight for the orchards and gardens, such as permitting or other review process, and that the CAO provides largely ambiguous instructions for that development. Id.

The Board erred when it failed to analyze whether orchards and

gardens in buffers protect wetland and FWHCA functions or to request a reasoned analysis for the departure from BAS.

**I. Unprotective Reasonable Use Exception (“RUE”).**

The County does not dispute Friends’ argument that the RUE fails to protect CAs and departs from BAS without reasoned analysis. Instead, the County asserts that Friends abandoned its argument. The Board itself did not conclude that Friends abandoned Issue No. 9, instead finding that Friends did not satisfy its burden. AR 6348. The County did not challenge that finding and this Court should not reverse the Board on that unappealed finding.

Friends satisfied its briefing burden by notifying the County of Friends’ position that the RUE authorizes development that fails to protect CAs pursuant to the GMA. See, e.g., State v. Olson, 126 Wn.2d 315, 321-24, 893 P.2d 629 (1995). Friends argued that the RUE does not protect CAs by including BAS because it allows the unmitigated development of up to 2,500 sq. ft. of CAs and buffers or development of up to the larger of ½ acre or 10% of a parcel subject to an attempt at mitigation. AR 4034. Friends further noted inherent risks in processing RUEs under lenient provisional use permits and failing to evaluate the cumulative impacts of RUEs. Id. Friends cited to BAS showing that compensatory mitigation often fails, and should not justify impacts up to ½ acre or more. AR 4030.

Moreover, Friends dedicated more than five pages of its brief to the impacts imposed by development in CAs and their buffers. AR 4016-022.

By briefing these primary defects in the RUE, Friends satisfied the doctrine that Washington courts apply to “decide cases on the merits, disregarding mere technicalities, where possible.” Olson, 126 Wn.2d at 322 (quoting State v. Reader’s Digest Ass’n, Inc., 81 Wn.2d 259, 266, 501 P.2d 290 (1972) (relying upon a predecessor to RAP 1.2(a)). In Daughtry v. Jet Aeration Co., the court held that where the nature of the challenge is clear, and the challenged finding is set forth in the appellate brief, it will consider the merits of the challenge. 91 Wn.2d 704, 710, 592 P.2d 631 (1979). Friends clearly set forth its argument that the RUE’s development of CAs and buffers impacts those CAs and buffers.

Board jurisprudence likewise urges review of Friends’ argument on the merits. The Board’s standard of adequate briefing “does not require a stand-alone legal argument for each cited statutory or regulatory provision.” AR 6024; Snohomish County Farm Bureau v. Snohomish County, CPSGMHB No. 12-3-0008, FDO, 10 (March 14, 2103). Like the issues briefed in that case, Friends addressed the RUE in different sections of its brief, using its Statement of the Case to explain the impacts that RUE-authorized development of CAs would cause, and then arguing throughout its brief that the RUE was not protective. And unlike the

petitioner in Sky Valley v. Snohomish County, upon which the County relies without explanation, Friends did not attempt to replace a legal issue identified in the Prehearing Order with a completely new issue upon submission of its prehearing brief. CPSGMHB No. 95-3-0068c, Order on Motions to Reconsider and Correct, 3-4 (April 15, 1996).

Friends' briefing also complied with the Board rules of practice, which state that "[c]larity and brevity are expected to assist the board in meeting its statutorily imposed time limits." WAC 242-03-590(3). Against that backdrop, the rules of practice direct parties to submit a brief addressing each legal issue presented for board determination. WAC 242-03-590(1). Friends addressed its claim that the RUE fails to protect CAs and further argued its inconsistency with the GMA during the Hearing on the Merits. That claim and must be addressed here.

## **V. CONCLUSION**

On each of the exceptions above, the Board erred in failing to assess whether the exceptions, individually or cumulatively, protect wetlands and FWHCAs. The Board also erred in failing to seek a reasoned justification for departures from BAS, and in upholding departures from BAS without substantial evidence. Friends respectfully requests that the Court reverse the Board's rulings on Issues 9, 27, 28, 29, 34, 37, and 38.

Respectfully submitted this 5th day of February, 2015.

A handwritten signature in black ink, appearing to read "Kyle A. Loring", written over a horizontal line.

Kyle A. Loring, WSBA #34603  
Attorney for Appellant  
FRIENDS OF THE SAN JUANS

No. 72235-2-I

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE, )  
P.J. TAGGARES COMPANY, and )  
FRIENDS OF THE SAN JUANS )

Appellants, )

v. )

GROWTH MANAGEMENT )  
HEARINGS BOARD, WESTERN )  
WASHINGTON REGION, and )  
SAN JUAN COUNTY, )

Respondents. )

**CERTIFICATE OF  
SERVICE**

2015 FEB -9 AM 11:27  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
CLERK

Jana G. Marks declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on August 28, 2014, I caused to be delivered in the manner indicated below a true and correct copy of:

**REPLY BRIEF OF APPELLANT FRIENDS OF THE SAN JUANS**

in the above-entitled cause to:

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By Email only

I make the foregoing statement under penalty of perjury of the  
laws of the state of Washington.

Dated the 5th day of February, 2015, at Friday Harbor,  
Washington.



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