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No. 72235-2-1

**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.

CSA/TAGGARES

Response to Brief of Appellant Friends of the San Juans

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I. INTRODUCTION

Appellants Common Sense Alliance and P.J. Taggares Company (“CSA/Taggares”) respond to Brief of Appellant Friends of the San Juans as follows. Friends of San Juan (“FOSJ”) brief on the merits for its appeal brings seven assignments of error to this Court from the September 6, 2013 Decision of the Growth Management Hearings Board decision (AR 006243-6352) concerning the Critical Areas Ordinance of San Juan County including:

- Excluding smaller wetlands;
- Shoreline buffer reductions;
- Tree and vegetation removal in the tree zones;
- Certain buffer averaging;
- Removal of 20% of Buffer foliage and 505 of a buffer tree canopy;
- Allowance of 4,000 ft sq of gardens in FWHCA and Wetland buffers; and
- Reasonable use exceptions.

II. CSA/TAGGARES RESPONSE TO THE FOSJ ISSUES

- A. **The buffers sought to be extended by the FOSJ appeal have no proper basis in the record.**

CSA/ Taggares will leave to the County the detailed factual responses to the FOSJ claimed errors. CSA/ Taggares objection to the appeal by FOSJ stems from the fact that the buffers which FOSJ wants to

extend in each case, beyond what the Board allowed, all arise from defined development activity proximate to a critical area alone (within 150-200 feet in most cases), without regard to consequences of the activity. There is no attempt to equate the need for the buffer based on possible impact to the defined critical area by reason of the specified development activity.

As pointed out in the CSA/Taggares primary brief in this consolidated appeal, the imposition of buffer or open space requirements in response to development activity alone, without regard to consequence is unlawful. RCW 82.02.020, *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Citizens' Alliance for Prop. Rights v. Simms*, 145 Wn. App. 649 (2008).

In any case, where the government seeks to intrude on the property for the purpose of restricting use to enhance environmental or other governmental objectives due to identified development activity, it is the burden upon the government to demonstrate:

- the reasonable necessity for the buffer under the circumstances of each particular case, and
- the rough proportionality between the burdens imposed by the buffer and the impact caused by the development under review.

RCW 82.02.020 and cases cited above.

As is evident from the record in this case and the absence of any evidence in support of such proposition in the brief of the Friends of San Juans, that record does not exist in this case.

As such, the Court is requested first to examine the underlying merits of the buffers at issue, as addressed by CSA/Taggares and rule that the appeal of FOSJ should be denied for lack of support in the record and the erroneous application of the law to the facts of the case as provided by RCW 34.05.570(3)(d)(e).

B. The FOSJ reliance on *Pilchuck v. Snohomish County* is misplaced.

A final point should be made about FOSJ reliance on the *Pilchuck v. Snohomish County*, CPSGMHB 95-3-0047, FDO (Dec. 6, 1995) (*Pilchuck II*). What the brief fails to point out is that decision was appealed to Superior Court and as a result of that decision the Central Puget Sound Growth Management Hearings Board reevaluated its decision in *Pilchuck II* in a case sub nom *Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB 96-3-0029, FDO, 7 (Jan. 8, 1997).¹ In the subsequent case the Board corrected its assumption that all critical areas were inviolate and rather that it is the system which requires consideration and that minor modifications, not inimical to the system, were certainly

¹ For purposes of clarification the pertinent language from *Pilchuck II* and *Tulalip* are included as Appendix A to this Brief.

appropriate. FOSJ's absolutist approach is more in concert with *Pilchuck II* and not the revised flexibility allowed in Tulalip and should be rejected.

III. CONCLUSION

FOSJ seeks to expand an already overly restrictive view of critical area buffers which were not lawfully established in the first place. For this reason the appeal of Friends of the San Juans should be rejected.

DATED: January 5, 2015

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APPENDIX

A

Significantly, the Board's holding focuses on the preservation of the *structure, value* and *functions* of critical areas rather than the critical areas themselves. It is the structure, value and functions of critical areas that are inviolate, not the critical areas themselves. This may seem a subtle nuance, but its meaning is profound. It means that the "protect critical areas" mandate does not equate to "do not alter or negatively impact critical areas in any way." While the preservation of the structure, value and functions of wetlands, for example, is of paramount importance, the Act does not flatly prohibit any alteration of or negative impacts to such critical areas. The Act could have said "do not alter critical areas" or "do not create negative impacts on critical areas", but it did not do so. By focusing on the structure, value and functions of critical areas, the Act requires that these attributes and values be protected, within the context of the whole. Obviously, a natural system is comprised of constituent parts and, at some point, alteration to the parts will affect the ability of the whole to serve its "values" and "functions." For this reason, the alteration or impacts upon even portions of the whole must be done only for good reason and sparingly.

The Board holds that the Act's requirement to protect critical areas means that the structure, value and functions of such natural systems are inviolate. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. This holding comports with the "no net loss" concept which acknowledges the necessity of occasionally damaging and even eliminating certain wetland critical areas, provided that such impacts or losses are offset or replaced, for example by creating replacement wetlands off-site. *See* Finding of Fact No. 13.

Pilchuck v. Snohomish County, CPSGMHB No. 95-3-0047, FDO, 16-17 (Dec. 6, 1995).

In view of the Decision on Appeal, and the additional evidence and argument presented in the instant case, the Board concludes that it is appropriate to revise, clarify and amplify the Pilchuck II holding. For purposes of comparison, the Board repeats below language from the Pilchuck II holding, showing new language with underlining and deleted language with strike-throughs:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the ~~structure~~, values and functions of such ~~natural~~ ecosystems are inviolate must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the ~~structure~~, value and functions of such ~~natural~~ ecosystems within a watershed or other functional catchment area.

Thus, local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. See *Pilchuck II*, at 20. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located are not diminished. The nature of ecosystems necessitates that such site-specific judgments, *e.g.*, whether to allow filling in a small wetland, be made in the context of the likely impact on the function and values of the larger system. This means that, in the circumstance that a local government permits elimination of a wetland, for example, it has a duty to assure that the net values and functions of the ecosystem are not diminished. How far afield it must look to make this determination is dependent on the specific circumstances, whether it is at the level of an entire a watershed ecosystem, a sub-basin, or other functional catchment area.

Tulalip Tribes of Washington v. Snohomish County, CPSGMHB 96-3-0029, FDO, 7-8 (Jan. 8, 1997).

The Board affirms its *Pilchuck II* holding, as modified above, and enters the following holding in the present instance:

The Board holds that the Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the values and functions of such ecosystems must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the value and functions of such ecosystems within a watershed or other functional catchment area.

Id. at 9 emphasis supplied.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury under the laws of the State of Washington, declare that on January 5, 2015 they caused to be served: (1) RESPONSE OF APPELLANTS COMMON SENSE ALLIANCE AND P.J. TAGGARES COMPANY TO FRIENDS OF THE SAN JUANS BRIEF; and (2) this DECLARATION OF SERVICE on the parties as indicated below:

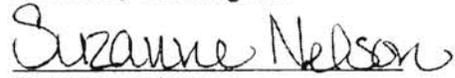
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