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

NO. 72235-2-I

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.

BRIEF OF RESPONDENT SAN JUAN COUNTY

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I. INTRODUCTION

This case is a consolidated appeal of the decision of the Western Washington Growth Management Hearings Board (“the Growth Board”) considering challenges to four ordinances amending San Juan County’s (“the County”) critical areas regulations. The Growth Management Act (GMA) requires counties and cities to designate and protect critical areas. RCW 36.70A.060(2); RCW 36.70A.130. To satisfy this mandate, the County adopted four ordinances (“the CA Ordinances”). The three ordinances challenged in this proceeding are:

- 1) Ordinance 26-2012: regarding general regulations for critical areas (AR 5303-72);
- 2) Ordinance 28-2012: regarding critical area regulations for wetlands (AR 5381); and
- 3) Ordinance 29-2012: regarding critical area regulations for fish and wildlife habitat conservation areas (“FWHCA”) (AR 5420).

Petitioners, Common Sense Alliance and P.J. Taggares Company (“CSA”) and Friends of the San Juans (“Friends”) have appealed different portions of the Growth Board’s decision.

The Growth Board issued the decision that is the subject of this appeal following a three day hearing. The San Juan County Superior

Court affirmed the decision of the Growth Board. In addition to claims related to the GMA, CSA also raised constitutional issues. Because the Growth Board did not have jurisdiction to decide these issues, they were decided for the first time by the superior court which ruled that CSA's constitutional claims, whether facial or "as applied," were not ripe. The superior court went on to analyze the merits of CSA's constitutional claim and determined that "the CA Ordinances do incorporate best available science, thus providing a scientific basis to ensure nexus and proportionality, at least for purposes of a facial challenge." CP 915. The superior court discussed in detail the site-specific nature of the CA Ordinances and concluded "the Ordinances do not impose restrictions or conditions that apply equally to all uses or all development on all land that contains a critical area." CP 917. As such, the superior court found the CA Ordinances did not violate RCW 82.02.020.

II. RESTATEMENT OF ISSUES RELATED TO APPELLANTS' ASSIGNMENTS OF ERROR

- A. Has CSA met its burden under RCW 34.05.570(3) and established that the CA Ordinances are unconstitutional or a violation of RCW 82.02.020?
- B. Has CSA met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that San Juan County properly designate FWHCAs in compliance with RCW 36.70A.480?

- C. Has CSA met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that the CA Ordinances are supported by best available science?
- D. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issue 34 below?
- E. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issue 29 below?
- F. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issue 27 below?
- G. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issue 28 below?
- H. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issues 37 and 38 below?
- I. Has Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of proving Issue 9 below?

III. STATEMENT OF THE CASE

Balancing the goals and policies of the San Juan County Comprehensive Plan (“Comprehensive Plan”), the goals of the GMA, property rights, and the need and requirement to protect the environment is a difficult and complicated task. The CA Ordinances reflect a fair and reasonable compromise between the views of property rights advocates

such as Petitioner CSA and environmental groups such as Petitioner Friends.

Though there are certainly many ways to achieve compliance with the GMA, a failure to do so in the ways advocated for by the Petitioners does not mean the County failed to comply with the GMA. The record shows the County used a thorough, reasoned, process and adopted development regulations which balance the rights of the citizens of San Juan County with the critical areas designation and protection requirements of the GMA.

The process that led to the adoption of the CA Ordinances was long, arduous, and despite the best efforts of the County to be informative, filled with civilized controversy. The process began in 2006, but was restarted in the Spring of 2010, when the County Council, on the advice of the Prosecuting Attorney, decided to use a three-step process in which it would: (1) identify the best available science (“BAS”); (2) receive recommendations from scientists for revising existing regulations in consideration of the BAS, and (3) consider and adopt regulations to designate and protect critical areas.

A. The Consideration of “Best Available Science”

Building on earlier work, a single document known as the “BAS Synthesis” was written to summarize and describe the BAS that would be

included in the County's review and revision of its critical areas regulations. The BAS Synthesis was based on a review of over 1,900 books, papers, and reports, including many provided by the public in response to the County's call for submittals. *See, e.g.*, AR 5472-03 (Publication of call for submittals). In early February 2011, the County Planning Commission and the County Council held two days of joint meetings to review a draft BAS Synthesis document. AR 5211-14. On June 7, 2011, the County Council approved the BAS Synthesis document and adopted the supporting scientific literature. AR 4854-57.

Next, the Planning Commission and the County Council held meetings and received reports and recommendations from scientists on how existing regulations might be changed in consideration of the BAS. AR 5217-19. Six reports were issued, which set out existing regulations and explained proposed options based upon BAS in general terms. AR 5536-87, 5737-70, 5499-04, 5588-14, 5197-05, 5189-96. These reports, taken together, comprised the "CA science review." Next, the County Council adopted an updated work schedule and public participation plan. AR 5458-67.

B. The Process Used by the County to Designate Fish and Wildlife Conservation Areas

The County followed the process for classifying and designating FWHCA as set out in the WACs. The approach used by the County was

first recognized as being appropriate in *Woodsmanssee v. Ferry County*, when the Growth Board said, “[i]n a perfect world, a landowner could look at a map and determine all the classifications, and therefore, regulations, which apply to his land. ... Ferry County has not created such a map, the law does not require it be done.” EWGMHB Case No. 00-1-0007, FDO, 2-3 (Aug. 18, 2000). In *Woodsmanssee*, the Growth Board recognized the unique difficulties faced by counties with small populations and diverse and vast landscape and said,

[m]aps depicting conditions applicable to specific parcels are not a realistic expectation. For example, regarding designation of critical areas, this Board has held, ‘...we believe where adequate, accurate maps are not available, an onsite inspection at the time of permit application, coupled with existing maps and well-defined standards, meets the requirements of the GMA for designation of critical areas in Ferry County.’

Id. (internal citations omitted).

The ruling in *Woodsmanssee* recognizes the process used by San Juan County in classifying and designating critical areas. The “two step” process explained in WAC 365-190-040 states:

(4) Classification is the first step in implementing RCW 36.70A.170 and requires defining categories to which natural resource lands and critical areas will be assigned.

(a) Counties and cities are encouraged to adopt classification schemes that are consistent with federal and state classification schemes and those of adjacent

jurisdictions to ensure regional consistency. Specific classification schemes for natural resource lands and critical areas are described in WAC 365-190-050 through 365-190-130.

(b) State agency classification schemes are available for specific critical area types, including the wetlands rating systems for eastern and western Washington from the Washington state department of ecology, the priority habitats and species categories and recommendations from the Washington state department of fish and wildlife, and the high quality ecosystem and rare plant categories and listings from the department of natural resources, natural heritage program. The Washington state department of natural resources provides significant information on geologic hazards and aquatic resources that may be useful in classifying these critical areas. Not all areas classified by state agencies must be designated, but such areas may be likely candidates for designation.

(5) Designation is the second step in implementing RCW 36.70A.170.

(a) Pursuant to RCW 36.70A.170, natural resource lands and critical areas must be designated based on their defined classifications. For planning purposes, designation establishes:

- (i) The classification scheme;
- (ii) The distribution, location, and extent of the uses of land, where appropriate, for agriculture, forestry, and mineral extraction; and
- (iii) The general distribution, location, and extent of critical areas.

(b) Inventories and maps should indicate designations of natural resource lands. In circumstances where critical

areas cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization.

(c) Designation means, at a minimum, formal adoption of a policy statement, and may include further legislative action. Designating inventoried lands for comprehensive planning and policy definition may be less precise than subsequent regulation of specific parcels for conservation and protection.

The designation process for FWCHAs called for in WAC 365-190-040 is precisely the process that was followed in San Juan County. The process began with the description of the scientific basis for classification in the BAS Synthesis. The classification utilized the peer-reviewed BAS as well as local science. The scientists reviewed the existing regulations and maps and proposed changes to the regulation and six individual written reports were made. AR 5499-04; 5767-70; 5189-96; 5536-87; and 5588-14.

Next, a set of regulations and performance standards were drafted for public comment together with a presentation of the maps. The Planning Commission held hearings and provided recommended code changes, and finally, the County Council held hearings and adopted the CA Ordinances. The Critical Area Maps are discussed in Ordinance 26-2012 (General Regulations). AR 5308-09. These are the maps, models

and data prepared by scientific experts and resources agencies including the USGS, USDA, WDOE, WDNR, FEMA, FIRM, WDFW, and NOAA. As the Growth Board has noted, “[c]ertainly, reliance on maps and models provided by scientific experts and resource agencies is an appropriate application of best available science for critical area designation. *See, e.g., WAC 365-190-080(3)...*” *Seattle Audubon Society et al v. Seattle*, CPSGMHB Case No. 06-3-0024, FDO at 39, note 16 (Dec. 11, 2006).

Ordinance 26-2012, explains that critical area maps are not intended to serve the same function as the Official Maps, which are the maps showing land use designations and boundaries. AR 5308. Instead, the Critical Area Maps are guidelines, a reference to be used by the landowner and the County. The background section of the Ordinance explains that the maps:

are provided only as a general guide to alert the viewer to the possible location and extent of critical areas. However, the maps may be relied upon by the director as a basis for requiring field investigation or special report. Prior to requiring a field investigation or special report an applicant may request that the director conduct a site visit to evaluate whether a critical area may be present (See procedures in SJCC 18.80.020 and .070).

Id.

When necessary or requested, a site visit and report from the director of San Juan County Community Development will clarify any

uncertainty as to whether critical area habitat is located on a parcel of land.

Id. In salt water habitats and near shore development, development permits for shoreline modifications require an inventory of the site and adjacent shoreline parcels to assess the presence of FWHCAs and their functions. AR 5443. The regulations regarding FWHCAs include tables of allowable and prohibited activities for water quality buffers and tree protection zones. AR 5433. The activities allowed outright and those subject to a permit are also set out in Table 3.10. AR 5439.

C. The Adoption of the Regulations

On December 3, 2012, the San Juan County Council adopted the CA Ordinances amending the County development regulations for critical areas. These regulations were written to protect critical area functions and values while taking into account the specific characteristics of a site, the proposed development on that site, and the type of critical area. The CA Ordinances are an “ecosystem approach” or “performance approach” to land use regulations based upon best available science in contrast to classic “Euclidean zoning” – the separation of property into specific districts with allowable and prohibited uses.

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IV. STANDARD OF REVIEW

A. Standard Used by the Growth Board

The Growth Board adjudicates GMA compliance and invalidates noncompliant comprehensive plans and development regulations. *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 423, 166 P.3d 1198 (2007). The GMA requires the Growth Board to defer to the County's local planning processes and establishes a presumption of validity for development regulations. *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011); RCW 36.70A.320(1). A Growth Board properly finds compliance with the GMA unless it concludes a county's actions are clearly erroneous in light of the record and the goals and requirements of the GMA. *Swinomish* at 423–24; RCW 36.70A.320 (1). An action should be found clearly erroneous if the Growth Board develops a firm conviction that a mistake has been committed. *Id.* Where, within the constraints of the GMA, more than one appropriate planning choice exists, the Growth Board must defer to the County's discretion. *Kittitas County*, at 156.

The presumption of validity creates a high threshold for challengers as the burden is on Petitioners to demonstrate that the challenged ordinances were clearly erroneous in light of the goals and

requirements of the GMA. RCW 36.70A.320. Petitioners/Appellants failed to meet this burden before the Growth Board in this case.

B. Judicial Review

On appeal, the Court reviews the Growth Board's decision, not the superior court decision affirming it, under the Administrative Procedures Act and applies the standards of Chapter 34.05 RCW directly to the record before the Growth Board, sitting in the same position as the superior court. *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). The burden of demonstrating the invalidity of the Growth Board's action is on the party asserting invalidity. RCW 34.05.570(1)(a).

In this case, after receiving hundreds of pages of briefing and attending a three day hearing, the Growth Board issued a 109 page, thorough, and well-reasoned decision. AR 6243-6352. The Growth Board's legal conclusions are reviewed de novo and its findings are reviewed for substantial evidence. *Yakima County v. EWGMHB*, 168 Wn. App. 680, 687, 279 P.3d 434 (2012). The resolution of issues of statutory interpretation is reviewed under the APA's error of law standard in RCW 34.05.570(3)(d). *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). The Court should accord substantial weight to the Growth Board's interpretation of a statute that it administers. *Swinomish Indian Tribal Community*, 161 Wn.2d at 424. A Growth Board

Order is arbitrary and capricious only if it is willful, unreasoning, and made without regard to the facts and circumstances. *Id.* at 687-88; *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011).

V. ARGUMENT

A. Response to Common Sense Alliance and P.J. Taggares Company

CSA alleges five assignments of error pursuant to RCW 34.05.570(a), (d), and (e). Each of the alleged errors stated by CSA is based on fundamental misunderstandings of the CA Ordinances. For example, despite CSA's assertions, the regulations are site specific and take into consideration the presence of existing development areas and roads, drainageways/drainage direction, slopes, rural or urban location, habitat and water quality sensitivity as well as the impacts of the proposed land use. Additionally, CSA alleges that the presence of a critical area subjects "a property" to the critical areas regulations. Brief of CSA, pg. 16. In fact, the applicability of the critical areas regulations is based on proximity to a critical area. This proximity may cause a portion of the property to be subject to regulations, but it does not follow that the entire parcel is subject to critical area regulations merely due to the presence of a critical area somewhere on that parcel. Finally, the GMA requires the County to address cumulative as well as individual

impacts. See WAC 365-196-830(4). The cumulative effects of development were addressed in the best available science and this provided a foundation for the CA Ordinances. AR 3690, 3699, 3821.

1. San Juan County’s site specific approach to critical areas regulations is constitutional and complies with RCW 82.02.020.

CSA argues the CA Ordinances are “a violation of constitutional rights unlawful under RCW 34.05.570(3)(a) (unconstitutional as written)” and “a violation of the statutory codification of those rights in RCW 82.02.020.” Brief of CSA, pg. 15. Each argument is addressed separately below.

a. The CA Ordinances comply with RCW 82.02.020.

RCW 82.02.020 directs that, “no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the ... development ... of land.” RCW 82.02.020 applies to development conditions adopted pursuant to the GMA. *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 653, 187 P.3d 786 (2008), review denied, 165 Wn.2d 1030 (2009). It does not, however, preclude dedications of land or easements within the proposed development or plat which the county can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply. RCW 82.02.020. In other words, the statute

allows development conditions tied to a specific, identified impact of a development on a community. *Sims*, 145 Wn. App. at 665. This is similar to the nexus and proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), discussed below. The burden to prove that a condition is reasonably necessary as a direct result of the proposed development is on the governmental entity imposing the requirement. *Sims*, 145 Wn. App. at 657.

The superior court ruled that CSA's facial challenge to the CA Ordinances was not ripe on either constitutional due process basis or on the basis of a the statutory requirement for nexus and proportionality as embodied in RCW 82.02.020. CP 915. The superior court was correct to find CSA's vague challenges were not ripe for review absent the application of the regulations to a specific property. Nonetheless, the superior court went on to address the merits of the claim and found it to be without merit. *Id.*

In *Olympic Stewardship Foundation v. WWGMHB*, the court discussed the requirements of RCW 82.02.020 and the "rough proportionality" analysis embodied in the *Nollan/Dolan* standard. 166 Wn. App. 172, 197-198, 274 P.3d 1040, review denied, 174 Wn.2d 1007 (2012). The court held that because the challenged regulations only

prohibited vegetation removal and development within those areas that were determined to be “high risk critical areas,” any dedications of land within the critical areas were de facto “reasonably necessary as a direct result of the proposed development or plat.” *Id.* at 199.

The important rule established by *Olympic Stewardship* is: “Where ‘best available science’ provides a scientific basis for restricting development and disturbance within a critical area, the science ensures that the nexus and proportionality tests are met.” *Id.* This rule was considered on a petition for review to the Washington Supreme Court. CSA has not made a case to abandon this sound rule.

In this case, as in *Olympic Stewardship*, the BAS provides a scientific basis for restricting development and disturbance within and adjacent to critical areas and thus ensures that the nexus and proportionality tests are met. The site specific nature of the challenged regulations ensures that restrictions on development only apply to those areas that contain or are adjacent to critical areas.

The CA Ordinances take into account (1) the critical area being protected; (2) the characteristics of the particular property being developed; and (3) the impact of the proposed development. See for example, SJCC 18.30.110(C) (general exemptions (2), (4), (5), (6), (7), and (8) do not require mitigation); and SJCC 18.30.110(D)(4) (reasonable

use exception allows two sets of options for mitigation). AR 5347. The width of the buffers themselves also varies based on site-specific conditions such as drainage direction, wetland type and water quality sensitivity, stormwater discharge factor, drainageways, the green development option, rural or urban location and the presence of trees. See for example, Ordinance 28-2012, Table 3.6 (Water Quality Buffers). AR 5404. As stated by the Growth Board: “The ordinances take into account the specific nature of a shoreline or wetland and the various factors affecting their protection.” AR 6345.

The restrictions contained in the CA Ordinances are unlike those in the *Isle Verde* and *Sims* cases. In *Isle Verde Int'l Holdings, Inc. v. City of Camas*, the city conditioned approval of a preliminary plat application on a 30 percent open space set aside. 146 Wn.2d 740, 749-50, 49 P.3d 867 (2002). The *Isle Verde* court found the city made no individualized determination that the 30 percent set aside requirement was necessary to mitigate an impact of the proposed development. *Id.* at 765. Similarly, in *Sims*, the King County ordinance at issue limited the amount of space to be cleared on each lot according to the size of the lot. 145 Wn. App. at 653. The amount of land to be reserved had no relation to the impacts of the proposed development. *Id.* at 668. For that reason, the *Sims* court found the ordinance constituted an unlawful in-kind tax. *Id.* at 672.

Isle Verde and *Sims* are distinguishable because in those cases the challenged ordinances required *all* property owners to set aside a portion of their land without relating the restriction to the specific features of the property. In contrast, the regulations contained in the CA Ordinances are related to the assessment of need, as demonstrated in the BAS, and the impacts of the proposed development.

The approach used in San Juan County is similar to the approach approved in *Trimen Development Co. v. King County*, 124 Wn.2d 261, 275, 877 P.2d 187 (1994). In that case, a King County ordinance requiring dedication of open recreational space, or payment of a fee in lieu thereof, for final approval of proposed subdivisions was compliant with RCW 82.02.020 because the amount of land to be dedicated (or fee to be paid) was based on King County's comprehensive assessment of its park needs and on its annual growth report. *Id.* The CA Ordinances and the BAS upon which they are based provide a comprehensive way to assess property, identify areas that protect critical functions, and require that property owners proposing to develop those areas seek a permit or comply with performance standards.

Without providing citations to the CA Ordinances, CSA concludes that the “inflexibility of the ordinances ... is the fatal flaw in the whole county program since the county makes no provision for assessment of

need or reasonable necessity as required by RCW 82.02.020.” Brief of CSA, pgs. 21-22. This incorrect statement demonstrates CSA’s fundamental misunderstanding of the CA Ordinances and the BAS which documents the impacts of development on critical areas. In fact, site-specific flexibility was intentionally built into the CA Ordinances through a variety of mechanisms including exemptions, buffer averaging, and the reasonable use provision, the specific purpose of which is to ensure that no taking occurs.

As the Growth Board found, CSA’s assertions that the “regulations constitute a ‘one-size-fits-all’ approach is belied by an analysis of the regulations themselves.” AR 6342.

First of all, wetlands are rated as to whether they are of high, medium, or low sensitivity to water quality impacts. Additionally, they are rated on their sensitivity to impacts on plants and animals, again using either a high, medium or low sensitivity rating. Some wetlands of medium and low habitat importance are exempted from the regulations.

Actual determination of buffer width is ascertained ‘based on the characteristics of the site and the proposed development, vegetation removal or other site modifications’ and whether runoff water is primarily on the surface or below ground. That site specific analysis includes, among other considerations, a Storm Water Discharge Factor which takes into account vegetation, soils and permeability.

FWHCAs are also subject to the water quality buffer analysis. Tree Protection Zone size determination takes into account the type of water body. TPZs are also subject to

adjustments based on the existence of public roads. Private roads are considered subject to design, runoff flow, traffic and tree canopy coverage.

Id. The first step for this analysis looks at the definitions. Ordinance 26-2012 defines “Buffer zone, strip, or area” as,

either an area designed to separate incompatible uses or activities, or a contiguous area that helps moderate adverse impacts associated with adjacent land uses and that is necessary for the continued maintenance, function, and structural stability of the protected area. Different types of buffers perform different functions.

AR 5317.

The buffers contained in the challenged regulations are merely the starting point. From there, the relevant details of the particular development proposal are examined to determine any necessary or allowable adjustments. For example: SJCC 18.30.150.E.(1)(a) at Step 6 allows a buffer reduction in an Urban Growth Area (AR 5403); SJCC 18.30.150(E)(1)(b) at Step 3 allows habitat buffer averaging (AR 5405); SJCC 18.30.160(E)(1)(b) at Step 2 requires a coastal geologic buffer when applicable to the site and at Step 4 requires tree protection zones in areas that have trees (AR 5436). Accordingly, buffer widths are not inflexible or generic requirements established in a vacuum or without regard to the proposed development or the property.

CSA complains that “[b]y imposing the buffer requirement by ordinance based on proximity alone, the county removes any discretion to base the requirement for a buffer and the size of the buffer on local circumstances and a record demonstrating the ‘reasonable necessity’ required for a valid program.” Brief of CSA pg. 21. This is inaccurate. For example, water quality buffers are intended to achieve 60% pollution removal. AR 0111. Once again, the size of the buffer necessary to achieve the targeted pollution removal varies depending on the specifics of each property.

In sum, the CA Ordinances use flexible limitations on proposed development adjacent to areas expressly identified for protection due to their sensitivity to the impacts resulting from such development. The County established buffers around these areas based on the intensity of development and the harm scientifically proven to occur. These buffers are the starting point for County staff to evaluate plans when a particular development proposal is submitted. There are numerous factors that take into consideration the particulars of the development and the harm to the specific critical area.

Throughout the County there is habitat for many species which the BAS found deserving of critical area regulation. In undertaking to protect these areas the County has adopted a flexible approach that takes into

account the site-specific conditions on the property, the proposed development, and the need for protection. The approach used by the County assures that the CA Ordinances are not “arbitrary and discriminatory.” Finally, to protect property rights, the CA Ordinances retain and improve on a property owner’s right to use land by application of the reasonable use exception and the respect for existing nonconforming uses and structures. AR 5346-48 and 5352-53.

b. CSA has not established a violation of substantive due process.

CSA also alleges the CA Ordinances do not meet the “nexus” and “rough proportionality” tests - also called the “*Nollan/Dolan*” tests, after the United States Supreme Court’s decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). For the same reasons as stated above, CSA has not met its burden of establishing a constitutional violation.

In *Nollan*, the Court held that the United States Constitution’s Fifth Amendment “takings clause” requires an “essential nexus” between the negative impacts that a private property use generates and the conditions or prohibitions imposed to restrict that use of private property. 483 U.S. at 837. Seven years later, the United States Supreme Court announced in

Dolan that the “takings clause” contains a “rough proportionality” test requiring the government to “make some sort of individualized determination that the required dedication [of private land] is related both in nature and extent to the impact of the proposed development.” 512 U.S. at 391. As the United States Supreme Court repeated in *Lingle v. Chevron U.S.A. Inc.*, the *Nollan* and *Dolan* analysis “involve[s] a special application of the doctrine of unconstitutional conditions,” required “in exchange for a discretionary benefit conferred by the government,” such as a permit. 544 U.S. 528, 547, 125 S.Ct. 2074 (2005) (internal quotations omitted). *Lingle* confirmed the limitation that the examination of nexus and rough proportionality only apply in rare and “special” circumstances, and further stated, “*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings.” *Id.* at 544. The federal Courts of Appeal have been consistent in their limited application of *Nollan/Dolan*.

CSA argues that the CA Ordinances do not contain “a rational link demonstrating nexus proportionality or reasonable necessity under the specific circumstances between the project and the condition to be imposed” as required by *Nollan/Dolan*. Brief of CSA pg. 18. CSA incorrectly attempts to shift the burden of proof of demonstrating a constitutional violation of the law to the County, citing to *Dolan*. Brief of

CSA pg. 16. *Dolan* is distinguishable because it did not involve a facial challenge. The correct rule to apply is that an ordinance is presumed constitutional, and the challenger bears a heavy burden to prove that a land use regulation constitutes a taking. *Peste v. Mason County*, 133 Wn. App. 456, 472, 136 P.3d 140 (2006). CSA cannot shift the burden to the County. CSA bears the high burden of establishing a constitutional challenge and has not done so here.

c. Nexus and proportionality are satisfied by adopting regulations supported by the BAS.

The County has met the requirements of the law by adopting a regulatory approach that is supported by BAS. The controlling case law is *Kitsap Alliance of Property Owners (KAPO) v. CPSGMHB*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) review denied 171 Wn.2d 1030 (2011), cert denied 132 S.Ct 1792 (2012). In *KAPO*, a property owners group appealed Kitsap County's critical area ordinance which required 50 and 100 foot buffer zones in marine shoreline areas. *Id.* The appellants in *KAPO* raised the same due process argument raised by CSA in this case. *Id.* at 272. The *KAPO* Court held:

'If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited.' If the local government used the best available science in adopting its critical areas regulations, the permit decisions it bases on

those regulations will satisfy the nexus and rough proportionality rules.

Id. at 273 (citing *Honesty in Env'tl. Analysis & Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 34, 979 P.2d 864 (1999) (emphasis added). Simply stated, regulations based upon best available science satisfy the nexus/proportionality requirement. Neither the Washington State Supreme Court, nor the United States Supreme Court has chosen to upset this rule when asked to do so in petitions filed with those courts in the *KAPO* case.

The CA Ordinances are based upon best available science. The BAS provides the linkage necessary to satisfy nexus and proportionality under RCW 82.02.020. Because the CA Ordinances resulted from the consideration and use of BAS, the nexus and proportionality standards have been necessarily met and CSA's claims fail.

2. San Juan County properly designated shorelines in accordance with RCW 36.70A.480.

CSA contends that the County did not "specifically designate any shoreline areas as FWHCAs." Brief of CSA pg. 29. Per the requirements of WAC 365-190-130, the County considered each habitat listed; but the County did not simply designate the boundaries of each habitat. For example, WAC 365-190-130(2)(f) lists "waters of the state." The County considered all waters of the state, and then designated only lakes and streams, finding that other waters and aquatic FWHCAs planted with

game fish by a government or tribal entity were adequately protected under other categories of FWHCAs. AR 5423.

The points made by CSA are based upon RCW 36.70A.480 and WAC 365-190-030(6)(a), which states, “Fish and Wildlife Habitat Conservation Areas” are “areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term.” (Emphasis added).

The problem with the analysis offered by CSA is that it gives undue emphasis to one part of the regulations and the conjunctive “and” without looking at the regulation as a whole, as is required. CSA’s historical analysis omits the fact that in 2010, the Department of Commerce reorganized many sections of its regulations regarding critical areas in WAC 365-190-080. The words called out by CSA were not added in 2010, they were simply moved from one section to another. Former WAC 190-165-080(5) used the *exact words* to describe the sources and methods that counties are to use in classifying and designating critical areas.

The fact that the Department of Commerce moved the language from a regulatory “method” to a “definition” fortifies the County’s position that this language must be read in conjunction with the other

provisions of the WACs that concern the sources of information and methods used to classify and designate critical areas.

Applying these rules of statutory construction, the phrase in WAC 365-190-030(6) “and which, if altered, may reduce the likelihood that the species will persist over the long term” needs to be read in conjunction with the “fish and wildlife habitat conservation” regulations in WAC 365-190-130(1) and with the process for designating FWHCAs in WAC 365-190-040. San Juan County properly used all three sections to guide its work. When read as a whole, the effect of an alteration to FWHCAs can be examined at the time of an application for development. It is not required that the portions of each property subject to the regulations be selected in the designation process.

CSA attempts to turn the definition of “Fish and Wildlife Habitat Conservation Area” in WAC 365-190-030(6) into a mandate to “map out” or use a metes and bounds description of specific properties that may be critical areas and to evaluate each part of every landowners’ property that may be a critical area habitat and may be developed or altered in the future.

This approach was not used by the County for several reasons. To begin, it is impossible to know the extent to which land will be “altered” until an application for development or other activity is submitted to the

County. Also, given the diversity of habitat, the number and range of species and the amount of shoreline in San Juan County, that approach is simply not practical. Additionally, because much of this habitat is expected to remain unaltered for a period of time, it is preferable to have an approach that is triggered by proposals rather than one that attempts to speculate about unspecified future proposals that may “alter” habitat. Finally, and perhaps most importantly, the GMA does not require a parcel-by-parcel approach.

The regulations of the Department of Commerce and the decisions of the Growth Board reflect an understanding of the limitations of a small county and appropriately allow the approach used in San Juan County: habitat areas are mapped out generally, well-defined standards are created, and permit action for development triggers the process for review.

CSA asserts that the Growth Board case *Tahoma Audubon Society v. Pierce County*, “ruled specifically that leaving the designation to the time of development violated RCW 36.70A.480(5) and could no longer be accepted.” Though the citation provided by CSA is confusing at best, this Growth Board case actually held the exact opposite of what CSA presents. Following the passage of ESHB 1933 and its codification as amendments to RCW 36.70A.480, Pierce County deleted marine shorelines and marine shoreline vegetation buffer requirements from its critical areas regulations.

Tahoma Audubon Society v. Pierce County, CPSGMHB Case No. 05-3-0004c, FDO, pg. 49 (July 12, 2005). The Growth Board found that while the amendments to RCW 36.70A.480 “prohibit blanket designation of all marine shorelines (or indeed, all freshwater shores) as critical fish and wildlife habitat areas, the GMA requires application of best available science to designate critical areas, explicitly recognizing that some of these will be in the shorelines.” *Id.* The *Tahoma Audubon* case simply does not fit the facts here and is not helpful.

Before the Growth Board, CSA argued the County was required to map specific geographic locations as critical areas within shorelines. AR 6333. The Growth Board found that the County’s method for both classification and designation of critical areas complied with the Minimum Guidelines promulgated by the Department of Commerce in chapter 365-190 WAC. AR 6334. The Growth Board further found that the County’s system is site specific and that “the extent of alterations [to critical areas] is more easily considered when a specific development project is proposed.” AR 6335-6336.

The approach used in San Juan County coincides closely with the approach used in Jefferson County and Whatcom County. In *CPCA/OSF v. Jefferson County*, Jefferson County was found to have performed its duty in designating the critical area and assigning it a prescriptive buffer in

order to protect the functions and values of the critical area as required by the GMA. WWGMHB Case No. 08-2-0029c, FDO (Nov. 19, 2008). Jefferson County did not examine every property to designate a critical area, but it did request that property owners seeking relief from the requirements of the CA Ordinances submit a Biological Site Assessment (BSA) to demonstrate that the alterations proposed by the property owner would not adversely affect the functions and values of the critical area. *Id.*

In *Citizens For Rational Shoreline Planning, et al v. Whatcom County and Washington State Department Of Ecology et al.*, Whatcom County evaluated critical areas without regard to their status as shorelines. WWGMHB Case No. 08-2-003, FDO (April 20, 2009). The Growth Board explained why shorelines were properly designated in that case:

RCW 36.70A.480(5) permits Shorelines of the State to be considered critical areas when specific areas located within these shorelines qualify for critical area designation based on the definition of critical areas set forth in RCW 36.70A.030(5) and they have been designated as such by the local government....The County CAO designates as critical areas all areas that are of critical importance to the maintenance of special status fish, wildlife and/or plant species. For example, the County designates the habitat of priority fish species such as Chinook, Coho, Chum, Pink, and Sockeye salmon as critical areas. These species occur throughout the shoreline rivers and streams of Whatcom County. As Ecology points out, virtually all of the shoreline streams and rivers in the County contain or are presumed to contain a current population of salmonids or are areas with a historic population of salmonids which the County seeks to restore.

In short, the County developed a record in its CAO, CAO maps, and Shoreline Inventory which supports the designation of Whatcom County's shorelines as a type of critical area — specifically, fish habitat. ... RCW 36.70A.480(5) provides that areas within the shoreline may qualify for designation based on the definition of critical areas provided by RCW 36.70A.030(5). That section provides that critical areas include “fish and wildlife habitat conservation areas”. The record in this case shows that these shorelines were designated as critical areas because of their role as fish and wildlife habitat conservation areas. Therefore, the Board does not find this designation to be clearly erroneous.

WWGMHB Case No. 08-2-003, FDO at 9-11 (April 20, 2009) (internal footnotes omitted) (emphasis added).

CSA’s complaint is with the outcome – that the majority of the shoreline in San Juan County is affected by the CA Ordinances – not the process and justification for the rules. This is similar to the argument based on RCW 36.70A.480(5) that was made and rejected in Whatcom County.

It is correct that critical areas are located throughout the shoreline; that is due to the character of the shoreline in San Juan County. These are not “universal buffers.” None of the challenged ordinances make shorelines *per se* critical areas. The application of buffers to the shoreline areas are not caused by the fact that they are shorelines alone, but because areas shoreward of the ordinary high water mark are directly adjacent to,

for example, critical habitat for Chinook salmon, shellfish areas, eelgrass beds, or kelp beds. AR 6353-71.

Most shorelines are, in ecological terms, the “edge” of two habitats, aquatic and terrestrial. AR 3704. Textbook ecological principles state that the edge is a very rich and important ecological place. The fact that some areas may have already been “altered” or developed may or may not make a difference in terms of the functions and values these lands hold for the species in the adjoining ecological community. The BAS Synthesis recognized the conditions in San Juan County and referred to reports of the current conditions. AR 3467-3997. In this way, the science and the landscape of San Juan County were incorporated into the CA ordinances adopted by the County.

San Juan County has designated its critical areas in a manner consistent with the approaches used by Jefferson County and Whatcom County and approved by the Growth Board. The Growth Board correctly found that the County’s designation of shoreline areas complies with the GMA. CSA has not met its burden of establishing error.

3. The BAS supports the use of buffers and tree protection zones.

The County included the BAS in adopting the use of buffers and tree protection zones. See inter alia, AR 3535-63, 3704-23, 3788-94,

3816-21. Furthermore, the County adopted an appropriate, site-specific approach.

In *Olympic Stewardship Foundation v. WWGMHB*, the court elaborated on what it means to “include” BAS in the decision-making process. 166 Wn. App. 172, 274 P.3d 1040, review denied, 174 Wn.2d 1007 (2012). The Court rejected the contention that a county must explain how the science supports a regulation. *Id.* Instead, the court accepted Jefferson County’s argument that “where a GMA enactment reflects scientifically respectable conclusions, mere disagreement by a petitioner as to which studies and opinions should be relied upon is not a basis to set aside the County’s judgment.” *Id.* at 189.

This case presents us with a situation in which the County identified numerous scientific studies that it relied on in adopting the vegetation regulation but did not explicitly analyze on the record how these studies supported its decision to prohibit vegetation removal in high-risk CMZs adjacent to five county rivers. We agree with the Board that the County complied with RCW 36.70A.172(1)’s ‘best available science’ requirement.

Id. at 192-193.

We do not read Concerned Friends of Ferry County as imposing a duty on a county to describe each step of the deliberative process that links the science that it considers to the adopted policy or regulation. Nor does the relevant Department of Commerce regulation impose such a duty—rather, it requires that counties ‘address ... on the record ... [t]he relevant sources of best available scientific information included in the decision-making.’ WAC 365–

195–915(1)(b). Here, because the County complied with this requirement, we conclude that the Board correctly applied RCW 36.70A.172(1).

Id at 194-195.

CSA alleges that the best available science is “boilerplate fish science” yet CSA does not provide any actual evidence or legal authority to support its claim. Brief of CSA, pg. 35. These blanket assertions do not meet CSA’s high burden of establishing error under RCW 34.05.570(3)(a),(d) or (e). CSA states, “[m]ere proximity gives rise to the requirement for a buffer, derived from a table regardless of impact, habitat conditions, location, condition or need.” Brief of CSA, pg. 37. In fact, the CA Ordinances take all of these items into consideration. See SJCC 18.30.150(E) and SJCC 18.30.160(E)(1). AR 0690, 0725-0729, 0731. Other misstatements by CSA are likewise refuted by the record in this case. For example, the BAS contains a great deal of discussion regarding the need for buffers on upland property. See AR 3934-3936 (discussing stormwater runoff and stormwater management); AR 3937 (discussing stormwater impacts on water quality); AR 3544-3549 (discussing wetland buffer widths to achieve to protect water quality).

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4. The “Other Issues” Raised by CSA are not property before the Court.

The arguments presented by CSA under the heading “Other Issues” appear to be raised for the first time in this appeal and should be disregarded by the Court pursuant to RAP 2.5.

B. Response to Friends of the San Juans

On the seven issues appealed by Friends, the Growth Board ruled that Friends had not met its burden of proof. These issues are reviewed under the substantial evidence standard in RCW 34.05.570(3)(e) to determine whether there exists a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 47, 308 P.3d 745 (2013). In doing so, the Court must view the evidence in the light most favorable to the County and accept the Growth Board’s views regarding the credibility of witness and the weight to be given reasonable but competing inferences. *Id.*

1. Mitigation

Friends repeatedly argues that mitigation is not successful and should not be relied on to meet the requirements of the GMA. Brief of Friends, pgs. 25, 30, 48. Friends raised this issue before the Growth Board (Friends Issue 11) and the Growth Board stated, “[w]hile mitigation has

not always been shown to be effective, the County's first focus in its CAO's is avoidance. Mitigation of impacts is an acceptable practice; it is one of the steps included in 'mitigation sequencing.'" AR 6276. The Growth Board then cited to the WACs adopted by the Department of Ecology setting forth the steps of mitigation sequencing. AR 6277. The use of mitigation is supported by the BAS. AR 3553-56, 3660, 3663.

The Growth Board found that Friends did not meet its burden of establishing a violation of the GMA with respect to mitigation. *Id.* Friends did not appeal this finding. Unchallenged findings are verities on appeal. *Hertzke v. State Dept. of Retirement Systems*, 104 Wn. App. 920, 927, 18 P.3d 588 (2001). Friends' arguments regarding the alleged inadequacies of mitigation sequencing is thus not properly before the Court and should be disregarded.

2. Issue 34: Wetlands Under 1,000 Square Feet

Friends alleges the Growth Board erred in finding Friends failed to meet its burden of establishing that the exemption for small wetlands contained in SJCC 18.30.150(D) violates the GMA.

The Growth Board found that while the BAS did not support a general exemption for small wetlands, it did state that for "practical purposes, local jurisdictions may want to vary such thresholds based on 'among other things, wetland importance.'" AR 6315 (citing AR 3534 and

5760). The Growth Board further found that the County had addressed concerns from the Department of Ecology regarding this exemption. *Id.* (citing AR 4435-36 and 5396). The record supports the Growth Board's findings. Unlike the cases cited by Friends, in this case the County addressed the requirements of WAC 365-195-915 and the fact finder determined the County's reasoning was justified.

Specifically, the *WEAN* case is distinguishable because in that case there was nothing in the record to support the county's exemption regarding agricultural land, rather the county relied on a balancing of GMA goals to support its decision. *Whidbey Environmental Action Network v. Island County (WEAN)*, 122 Wn. App. 156, 184, 93 P.3d 885 (2004). The record in this case shows that the County used aerial and LiDAR imagery to perform an analysis and estimated that with the proposed exemptions the regulations would protect more than 97% of the County's mapped wetlands, including all wetlands with a habitat importance sensitivity rating of "High." AR 5389. In accordance with WAC 365-195-915, 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 critical areas, and identified measures chosen to limit such risks. *Id.* Friends has failed to meet its burden on this issue.

3. Issue 29: Shoreline Buffer Reduction

SJCC 18.30.160(E)(6) allows reduction of water quality buffers and tree protection zones within shoreline jurisdictions if existing houses on adjoining waterfront parcels are closer to the water than what is specified in the regulations. AR 5442-43.

The Growth Board acknowledged that such reductions are allowed “if and only if the proposed development ‘will result in no net loss of shoreline ecological functions’ or, in the event of view blockage by nearby development, adverse impacts are identified, minimized and mitigated.” AR 6310 (citing 5427, 5443).

Friends appears to argue that the Growth Board erred because “although the CAO calls for compensation for adverse impacts, it does not address the BAS that reveals the low likelihood of replacing lost functions.” Brief of Friends, pg. 25. As discussed above, the Growth Board rejected Friend’s claims regarding the alleged inadequacies of mitigation. That finding, having not been challenged, is now a verity in this appeal. *Hertzke*, supra. Friends does not meet its burden by merely disagreeing with the BAS used by the County. Nor does Friends meet its burden by alleging that the County could have written different regulations.

The Growth Board correctly stated: “View protection in the San Juan Islands is a significant issue. Under the San Juan County scheme, water quality and tree protection buffer reductions are allowed for that purpose only if adverse impacts are mitigated.” AR 6310. Friends did not meet its burden before the Growth Board and has not met its burden here.

4. Issue 27: Tree Removal in Tree Protection Zone

Friends allege the Growth Board erred in concluding that Friends did not meet its burden regarding tree removal in the Tree Protection Zone. The Growth Board observed that no removal is allowed within the first 35 feet and that beyond that boundary, one primary structure and limited tree removal is allowed subject to seven conditions. AR 6307. The Growth Board’s decision is supported by the record. See AR 3814-17, 3824.

Tree protection zones for aquatic FWHCAs are intended to protect general functions associated with the water, such as water temperature, and inputs of leaves, needles, wood and organic materials that support the aquatic food web. Kleinschmidt, AR 4991-5091; Wenger and Fowler (2000), AR 5101-77; Brennan et al. (2009), AR 4937-4981. The tree protection zones for aquatic FWHCAs are not intended to protect individual species of animals; individual species are protected in Ordinance 29-2012, SJCC 18.30.160.F. AR 5448-57.

In tree protection zones the area within the first 35 feet from the water provides the greatest support to aquatic functions. Kleinschmidt, AR 4991-5091. The San Juan County regulations describe this as Tree Protection Zone 1 and, as noted by the Growth Board, no tree removal is allowed. AR 5438.

Within the remainder of the tree protection zone, described as Tree Protection Zone 2, some tree removal is allowed if the associated requirements are met. AR 5438. One of the requirements is that the remaining forest (after trees are removed) must consist of trees that are multi-aged and well distributed across the tree protection zone – this maintains the forest quality of a tree protection zone. *Id.*

The adopted approach to tree protection zones differs from that in Kleinschmidt and Wenger & Fowler because in San Juan County's regulations the water quality component of the buffer, which is based on more current science, is addressed separately, while the Kleinschmidt and Wenger & Fowler approaches combine protection of functions associated with trees with protection of water quality. AR 4991-5091, 5101-77.

The adopted regulations, SJCC 18.30.160(E)(2)(a), only allow construction of a primary structure within Tree Protection Zone 2 if the proposed location for the structure is outside the water quality buffer and other requirements are met. AR 0174-0175. The primary function of the

trees in Tree Protection Zone 2 is to act as a wind break to prevent blow down (also known as wind throw) of the trees in Zone 1. (leinschmidt, AR 5082. The potential for blow down varies depending on the character and orientation of the landscape, direction of prevailing winds and other factors. Consequently, in addition to incorporating the minimum stocking level requirements from Kleinschmidt, if a primary structure is proposed in Zone 2, the County regulations require an evaluation by a qualified professional to confirm that there will be a low probability of increased blow down after trees are removed. AR 5438. Blow down of trees is discussed in the BAS Synthesis, Chapter 3. AR 3709.

Friends argues that a “full suite of vegetation” is necessary to protect non-water quality functions. Brief of Friends, pg. 35. This argument is misplaced however because the County is not required to protect all wildlife with buffers. See discussion on Designation and Protection above. Tree protection zones are intended to protect functions occurring in and immediately adjacent to the water. AR 5423, 3704-08. Buffers for aquatic FWHCAs, for example, are not intended to protect amphibians. AR 5425. The County was required to comply with, not exceed, the GMA.

Friends frequently cites to the BAS to support its assertions that the regulations adopted by the County should be different. “Where a

GMA enactment reflects scientifically respectable conclusions, mere disagreement by a petitioner as to which studies and opinions should be relied upon is not a basis to set aside the County's judgment.” *Olympic Stewardship Foundation v. WWGMHB*, 166 Wn. App. at 189. In the *Olympic Stewardship* case, the Court rejected the contention that a county must explain how the science supports a regulation. *Id.* It follows, that if a county is not required to “describe each step of the deliberative process that links the science that it considers to the adopted policy or regulation,” the Growth Board reviewing the county’s actions is likewise not required to do so. See, e.g. *Olympic Stewardship*, supra. The Growth Board properly found that the County’s actions were supported by the BAS and that Friends failed to meet its burden in presenting evidence to the contrary.

5. Issue 28: Tree Protection Zone Averaging

Friends argument before the Growth Board and this Court is not that the regulations chosen by the County fail to comply with the GMA, but rather that, in Friends’ opinion, the County could have done better. This is not the standard and does not meet Friends’ burden.

The tree protection zones for streams, lakes, naturally occurring ponds and marine shorelines are discussed in BAS Synthesis Chapter 3, and Chapter 4. AR 3700-3723 and 3788-3794. The factors that influence

water quality, and options for protecting water quality, are discussed in BAS Synthesis Chapter 2. AR 3501-3542. These provisions support the CA ordinances. Specifically, for buffers, the same analysis used in water quality buffers applies. AR 3710.

It is important to note that in its brief to the Growth Board, Friends submitted a mere two sentences to support its claim that the County failed to comply with the GMA. AR 4051. It is disingenuous for Friends to allege the Growth Board erred when it is presenting these arguments for the first time on appeal.

6. Issue 37 and 38: Minor Pruning in Buffers

SJCC 18.30.160(E)(2)(a) allow: (1) minor trimming and pruning, subject to restrictions, to allow for a view or for fire hazard reduction in water quality buffers and wetland buffers; and (2) limited removal of other species of trees, subject to restrictions, to prevent shading of aspens in wetland buffers. AR 0174-0175.

Minor pruning is allowed in buffers and tree protection zones to allow for a view or for fire hazard reduction, so long as the health of the trees and shrubs is maintained and no more than 20% of the foliage of individual trees or shrubs is removed during a 12 month period. This provision is intended to give property owners the ability to do minor pruning in a way that protects: water quality, necessary moisture levels

for frogs and salamanders near wetlands, infiltration of runoff and maintenance of hydrologic functions near wetlands, vegetation over the water, large trees used by cavity nesting birds, and the health of the trees and shrubs that are pruned. The primary scientific documents used in developing the above wetland protection requirements include Booth, et al., which discusses the effect of tree removal on hydrologic processes (AR 4926-36), Semlitsch, et al., which discusses tree removal and amphibians, and the BAS Synthesis Chapter 2, (AR 3539, 3549-52), which includes discussion of how, in San Juan County, some wetland animals benefit from more sunshine and warmer temperatures.

Friends presented the Growth Board with science it preferred, however as already discussed, the question before the Growth Board was not whether the County could have met the requirements of the GMA differently but rather whether the regulations adopted by the County complied with the GMA. The Growth Board found, “Friends’ citations do not support its allegations that ‘removal of up to 50% of the tree canopy’ is contrary to BAS.” AR 6323. While the Growth Board assumed the accuracy of the science provided by Friends, it found the statements did not support Friends’ argument that the regulations conflict with the BAS. *Id.* 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. Friends failed to provide scientific information to meet its burden and the Growth Board properly rejected Friends' challenge.

7. Issue 37 and 38: Orchards and Gardens in Buffers

The adopted regulations specify what is and is not allowed in or near wetlands and aquatic FWHCAs along with actions necessary to prevent adverse impacts. This achieves the goals of avoiding excessive regulation of activities on private property, minimizing the cost of preparing and processing permit applications, improving predictability, and better protecting wetlands and aquatic FWHCAs.

Orchards and gardens are allowed within the buffers of wetlands with a low or medium habitat importance-sensitivity rating and within buffers for aquatic FWHCAs, if: (1) they are established, expanded, cultivated, and managed with appropriate BMPs and without the use of synthetic chemicals; and (2) all restrictions listed in Ordinances 28-2012, (AR 5407) and 29-2012, (AR 5440) are followed. As an isolated community made up of rocky islands, located in the rainshadow of the Olympic Mountains where summers are dry and the only source of fresh water and aquifer recharge is local rainfall, wetlands and buffers adjacent

to wetlands and aquatic FWHCAs represent an important location for growing food. AR 3482-88.

The Planning Commission received considerable input on this issue, and these provisions were adopted to ensure that islanders can grow food locally while also protecting wetlands and aquatic FWHCAs. The provisions include specific measures to minimize impacts, such as the requirement that no mowing occur until after ground nesting birds have left the nest in mid-July, the requirement to protect trees in tree protection zones, and requirements to protect water quality. The County provided a reasoned analysis of any departure from BAS in Ordinance 28-2012. AR 5398.

The Growth Board acknowledged that the challenged provision represents a departure from BAS but went on to find that the County explained its rationale for the departure and also identified possible risks as well as measures to limit such risk in accordance with WAC 365-195-915. AR 6321-22. The County considered the BAS when adopting protection standards for the orchards and gardens in buffers. See AR 3549-50, 3482-88.

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 provided in SJCC 18.30.160(E)(2), Table

3.10(j). AR 0177. Before the Growth Board, Friends provided only the statement that “fewer amphibians *may* survive” (emphasis added) in support of its argument that the provision for orchards and gardens violates the GMA. AR 4060. Having failed to meet its burden before the Growth Board, Friends now argues the Growth Board erred because it did not question the County’s departure from BAS and did not assess whether the regulations are enforceable. Brief of Friends, pg. 45-46. This argument confuses the burden of the parties and the role of the Growth Board. It was Friends burden to present the Growth Board with sufficient evidence in the record to support its claim that the CA Ordinances violate the GMA. Friends failed to do so.

8. Issue 9: The Reasonable Use Exception

The reasonable use exception is set forth at SJCC 18.30.110.D. AR 5346. The County Council explained in Background K.XI of Ordinance 26-2012 that it was adopting the reasonable use exception “to prevent regulatory taking of property and to help ensure consistency with the GMA goals 1, 2, 3 4, 5 and 6 and Comprehensive Land Use Plan Element Section B. 2.5.B. goals 2 and 3 and policy 11.” AR 5306. The reasonable use exception is typically triggered when an entire parcel is a critical area or buffer to a critical area. The reasonable use exception allows up to 2,500 square feet of development area on a parcel when

certain low impact development practices are used or a larger area when mitigation is done. SJCC 18.30.110.D. AR 5346-48. The reasonable use exception is handled like a provisional permit, and there are detailed criteria for granting such a permit. *Id.*

Before the Growth Board, Friends alleged SJCC 18.30.110.D violated five provisions of the GMA, yet Friends failed to provide any support for these allegations. Friends' brief before the Growth Board merely summarized the reasonable use exception and stated that the County did not follow the recommendation of the Department of Commerce. AR 4034. Friends' provided no legal argument or citations to support its claims. *Id.* As such, the Growth Board correctly found that "Friends' argument consists of mere assertions and that it did not relate those assertions to specific results that would rise to the level of a GMA violation." AR 6275.

Having failed to provide evidence to the Growth Board, Friends abandoned this issue. WAC 242-03-590(1) provides in relevant part, "[f]ailure ... to brief an issue shall constitute abandonment of the unbriefed issue." The Growth Board has held, "[a]n issue is briefed when legal argument is provided; it is not sufficient for a petitioner to make conclusory statements, without explaining how, as the law applies to the facts before the Board, a local government has failed to comply with the

Act.” *Snohomish County Farm Bureau v. Snohomish County*, CPSGMHB Case No. 12-3-0008, FDO, at 5 (March 14, 2013). Inadequately briefed issues are considered in a manner similar to consideration of unbriefed issues and should be deemed abandoned. *Sky Valley, et al., v. Snohomish County*, Case No. 95-3-0068c, Order on Motions to Reconsider and Correct, at 3 (April 15, 1996).

At the Hearing on the Merits, Friends acknowledged that its brief paid “short shrift to a couple of issues under their headings” but argued that this was due to page limits (to which all parties had agreed) and that the Growth Board must look at the brief as a whole to determine whether the issues were addressed. Hearing Transcript, pg. 224, lns. 8-19. Neither the Growth Board, nor the County, is required to search through a petitioner’s brief looking for statements that may support an alleged error. It was Friends’ burden to present evidence that the appealed ordinances did not comply with the GMA. Friends abandoned this issue. The ruling of the Growth Board should be affirmed.

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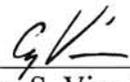
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VI. CONCLUSION

For the Reason's described above, the County respectfully request that the Court affirm the decisions below.

Respectfully submitted this 5th day of January 2015.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: 
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

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,

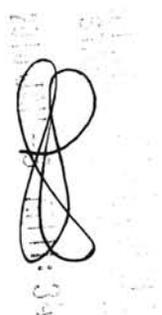
v.

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

Respondents.

NO. 72235-2-I

CERTIFICATE OF
SERVICE

A handwritten signature in black ink is written over a faint, circular stamp. The stamp contains some illegible text and a central emblem. The signature appears to be a stylized name.

Elizabeth W. Halsey 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 January 5, 2015, I caused to be delivered in the manner indicated below a true and correct

copy of Brief of Respondent San Juan County in the above-entitled cause

to:

Alexander W. Mackie
Aubri Nicole Margason
Perkins Coie, LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

By First-Class Mail

Mr. Kyle A. Loring
Friends of the San Juans
P. O. Box 1344
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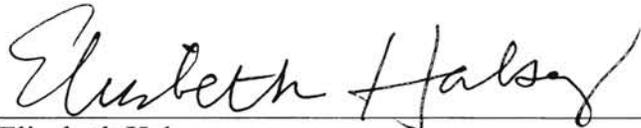
By First-Class Mail

Diane L. McDaniel
Sr. Assistant Attorney General
dianem@atg.wa.gov

By email only

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

Dated this 5th day of January, 2015, at Friday Harbor, Washington.



Elizabeth Halsey
Legal Assistant
San Juan County Prosecutor's Office
350 Court Street
Friday Harbor, WA 98250
(360)378-4101