

No. 39411-1-II

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

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**BAYFIELD RESOURCES COMPANY,**

Petitioner-Appellants

v.

**WESTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD,  
THURSTON COUNTY, ADAMS COVE GROUP, and  
FUTUREWISE,**

Respondents-Appellees

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**OPENING BRIEF OF APPELLANT**

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**ORIGINAL**

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## I. ASSIGNMENTS OF ERROR

### A. Superior Court Errors

1. The Superior Court erred in concluding that the Critical Area Amendment does not violate the right to substantive due process:

a. The Superior Court erred in concluding that the Critical Area Amendment is reasonably necessary when prior regulations adequately protect critical areas. CP 157.

b. The Superior Court erred in concluding that less density results in better protection to critical areas. CP 157.

c. The Superior Court erred in concluding that the Critical Area Amendment resulted in less density near critical areas. CP 157.

d. The Superior Court erred in concluding that regulations that cause significant economic loss are not unduly oppressive when less drastic regulations are available. CP 157.

e. The Superior Court erred in concluding it could ignore *HEAL v. Central Growth Management Hearings Board* in its analysis of whether a critical area protection was constitutional. Verbatim Report of Proceedings, May 15, 2009, page 18.

2. The Superior Court erred in concluding that the Western Washington Growth Management Hearings Board (“Western Board” or “Board”) based its decision on a proper legal interpretation and substantial evidence. CP 158.

**B. Western Board Errors**

1. The Western Board erred in concluding Goal 6 of the GMA does not require local governments to ensure that regulations restricting subdivisions are not arbitrary and discriminatory. AR 1100<sup>1</sup>

2. The Western Board erred in basing its decision on post-hoc arguments rather than substantial evidence. AR 1101.

**II. ISSUES PRESENTED**

The following issues pertain to the assignments of error in Section I above:

1. Whether the Critical Area Amendment facially violates Bayfield’s substantive due process rights. Assignment of Error A.1.

2. Whether the Critical Area Amendment must also be set aside because the Western Board’s decision erroneously interprets and applies the GMA’s Goal 6 and is not based on substantial evidence.

Assignments of Error A.2, B.1., and B.2.

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<sup>1</sup> Citations to the Western Board’s administrative record are provided as “AR \_\_\_.”

### **III. STATEMENT OF THE CASE**

#### **A. Statement Of Facts**

##### **1. Bayfield's Rural Lands**

Bayfield owns several parcels of land totaling approximately 700 acres in rural Thurston County. AR 500. These parcels vary in size. AR 495, 499. The parcels also have varying amounts of critical areas, such as wetlands, on them. *Id.* For example, Parcel 12913140000<sup>2</sup> is a 232-acre parcel with approximately 65% critical areas according to current County information. *Id.* Parcel 12924120700 is a 20-acre parcel with more than 50% critical areas. *Id.* Bayfield has worked with the County and other organizations to establish conservation easements to set aside sensitive areas and promote the County's rural character. AR 487.

##### **2. County Regulations Before The Critical Area Amendments**

Before the County enacted the Critical Area Amendment at issue in this case, Bayfield's land was zoned to allow one home for every five acres (1:5). This zoning allowed subdivision of larger parcels into five-acre lots. In addition, the County's critical area regulations protected wetlands and other critical areas by limiting or prohibiting development and requiring buffers between development and the critical area. In

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<sup>2</sup> See annotated Thurston County Map at AR 499.

addition, the County code provided an incentive to property owners to provide for rural character by allowing greater density if certain additional measures were taken. *See* TCC 20.30A.060.

These prior regulations would have allowed Bayfield to divide Parcel 12913140000 and Parcel 12924120700 into 46 lots and four lots, respectively. AR 495. On each lot, the County code would protect critical areas with buffers. In addition, using the County's planned development incentive program, Bayfield would have been eligible for even more lots.

In August 2002, Bayfield discussed the County's incentive program with the County to make sure that lands constrained by critical areas could be used to increase density on other Bayfield lands. The County confirmed in writing Bayfield's understanding of this incentive program stating that Bayfield would receive density credits during subdivision for protecting a riparian critical area. AR 500.

### **3. Ordinance 13884**

On August 20, 2007, the County amended its comprehensive plan and associated development regulations. AR 418-32, 434-56 (Resolution 13885 and Ordinance 13884). The Ordinance reduced residential densities in the County's rural areas using two methods.

The first method—not at issue in this appeal—rezoned specifically identified properties from a zoning of one unit per five acres to a lower density of one unit per 10 acres (1:10) or one unit per 20 acres (1:20). AR 439-44 (setting new zoning densities); AR 456 (identifying zoning of each parcel). For these specifically identified properties, the County studied the areas and based its decisions on whether down-zoning<sup>3</sup> made sense in light of environmental concerns. *See* AR 189-96 (evaluating environmental concerns underlying rezoning decisions); AR 513 (minutes describing County deliberation over rezoning particular areas).

In some cases, the County concluded down-zoning would provide additional environmental protection. AR 436 (finding related to benefits of 1:10 and 1:20 zoning in particular areas). In other cases, the County concluded that reducing density by down-zoning would actually exacerbate environmental concerns and decided not to down-zone those areas. AR 490 (describing County discussion that some low density uses are more environmentally damaging, and excluding areas on that ground).

The second method of down-zoning—the amendment at issue in this appeal—applied to properties zoned one unit per five acres that had

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<sup>3</sup> The phrase “down-zoning” refers to rezoning property to allow less dense or less intense use. For example, changing the zoning from one home (or unit) per five acres to one unit per 10 acres is down-zoning.

any amount of critical areas on the property (“Critical Area Amendment” or “Amendment”). AR 453-54 (ordinance amending TCC 17.15.335). For these properties, the Critical Area Amendment in effect down-zoned the parcels by limiting the ability of those landowners to subdivide their property. *Id.* Specifically, the Critical Area Amendment requires the owner to subtract the area covered by the critical areas from the area used to calculate the number of allowed lots for subdivision. *Id.*

In sharp contrast to the direct down-zoning process in the first method—which evaluated particular areas by conducting studies and mapping and evaluating each individual parcel—the Critical Area Amendment relied on no scientific information at all, mapped no properties for critical areas, and did not determine what benefits, if any, the restriction on subdivision would produce. AR 411-413 (staff report describing Innovative Technique Proposal); Transcript of Western Board at 70, ll. 11-13 (admitting County “didn’t have science before them” in passing Critical Area Amendment).

The complete absence of information as to which properties the Amendment affected and to what extent made it impossible for the County to tell—as it did in the case of direct down-zoning—whether these de facto down-zones actually provided any environmental benefit.

Consequently, County staff advising the Board of County Commissioners on the proposal, questioned whether there would be any benefit to these subdivision restrictions at all. AR 411-12. Specifically, the staff report noted that reducing density because of the presence of critical areas would not seem to matter, in most cases, because these critical areas were already adequately protected by the existing critical areas ordinance.

#### **4. Effect On Rural Properties With Critical Areas**

The Critical Area Amendment's effect on rural properties with critical areas is significant. For example, the Critical Area Amendment would require Bayfield to subtract the 151 acres in Parcel 12913140000 that are comprised of critical areas from the total of 232 acres. Bayfield then would apply the one home per five-acre calculation to the remaining 81 acres. This approach would yield a potential subdivision of 16 lots, rather than the 46 lots under the old code. AR 495. Parcel 12924120700 could not be divided at all, resulting in a loss of three lots available under the old code. Each lot would still be subject to the critical area buffers. The Critical Area Amendment similarly affects other Bayfield parcels and other rural land owners.

**B. Procedural History**

Bayfield filed a timely petition for review to the Western Board challenging the validity of the critical area density reduction technique under the GMA. Among other things, Bayfield argued that the Critical Area Amendment violated Goal 6 of the GMA, which protects property owners from arbitrary and discriminatory action. The Western Board held that Goal 6 did not protect the right to subdivide and that even if it did substantial evidence supported the Board's conclusion.

Bayfield appealed the Western Board's decision to Superior Court under the Washington Administrative Procedure Act ("APA"). In addition to the infirmities raised to the Western Board, Bayfield argued that the Critical Area Amendment violated its constitutional right to substantive due process. Bayfield could not and did not raise the constitutional issue to the Western Board because the Board does not have jurisdiction to hear constitutional issues. The Superior Court upheld the Board and concluded that the Critical Area Amendment did not violate substantive due process. Bayfield filed a Motion for Reconsideration, which the Court denied. CP 159-171.

#### IV. SUMMARY OF ARGUMENT

The constitution and state statutes protect a property owner from unreasonable regulation of its property. Before the GMA was enacted, these protections applied to project-level actions, such as subdivisions or permit approvals—so-called applied challenges—and to government actions such as comprehensive plan provisions and development regulations before the filing of an application for a specific project—facial challenges.

The GMA's Goal 6 recognizes these protections by requiring local governments to ensure that GMA comprehensive plans and development regulations do not take property. Goal 6 also requires local governments to protect landowners' property rights "from arbitrary and discriminatory action" when the local governments adopt comprehensive plans and development regulations under the GMA.

A plan or regulation that facially violates the constitution would by definition fail to comply with the GMA's Goal 6. Likewise, a regulation that is adopted in a way that ignores rules that apply at the project level to protect property rights creates the likelihood that the regulation will fail constitutional or statutory tests when applied at the project level. The GMA seeks to avoid this result by requiring local governments to ensure

they are protecting property rights when adopting comprehensive plans and development regulations.

The Superior Court and Western Board ignored these fundamental principles in two ways.

First, the Critical Area Amendment violates substantive due process, and the Superior Court erred in ruling to the contrary. Specifically, the Amendment unreasonably restricts the subdivision of property in violation of substantive due process protections. The Amendment is unnecessary and unduly oppressive. The Superior Court erred in its conclusion to the contrary, and that error is grounds for reversal under RCW 34.05.570(3)(a).

Second, the Amendment is arbitrary and discriminatory. The Western Board based its contrary conclusion on an erroneous interpretation of the law, and the record is devoid of evidence supporting the Western Board's conclusion. The Superior Court erred in upholding the Western Board. These errors are grounds for reversal under RCW 34.05.570(3)(d)-(e).

## **V. ARGUMENT**

### **A. Grounds For Relief And Standard Of Review**

Bayfield brings this petition pursuant to the APA. Under the APA, the Court may grant relief from agency orders on nine grounds. RCW

34.05.570(3). Bayfield's petition requests relief on three of those grounds, the first of which is that the County's Amendment on which the Board's Order is based "is in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a). Because the Board lacked jurisdiction over constitutional issues and the APA allows constitutional challenges to the ordinance on which the Board based its order, Bayfield properly raised this claim first with the Superior Court.<sup>4</sup>

Bayfield also requested relief on two additional grounds: (1) that the Western Board erroneously interpreted or applied the law. RCW 34.05.570(3)(d); and (2) that the Western Board's Order is not supported by substantial evidence. RCW 34.05.570(3)(e). Under the APA, the Court of Appeals reviews the Board's decision from the same vantage point as the trial court. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 801 (1998). With regard to the Board's decision, the court reviews de novo a question of whether an agency has erroneously interpreted or applied the law. *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526 (1999)

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<sup>4</sup> *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997) (excusing exhaustion requirements where Board lacked jurisdiction to hear issue); *Roth v. Lewis County*, WWGMHB No. 04-2-0014c (Order on Motion to Dismiss 9/10/2004) at 6 ("The GMA does not confer upon the boards the authority to determine constitutional claims."). Western Board decisions may be found at <http://www.gmhb.wa.gov/western/decisions/index.html>.

(“*HEAL*”). The court may accord some deference to an agency’s interpretation of its own statute, but the court is not bound by the agency’s determination. *Id.*

The court reviews agency factual determinations to see whether they are supported by substantial evidence when viewed in light of the whole record. *Id.* To meet the substantial evidence test, the agency must have had “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Id.* (internal quotation marks and citations omitted).

Finally, with regard to the relief that may properly be granted in this proceeding, this Court has broad discretion under the APA to “fashion a remedy that requires an agency to comply with the law,” and may enjoin, set aside, stay, or remand an agency action. *Boeing Co. v. Gelman*, 102 Wn. App. 862, 871 (2000); *see also* RCW 34.05.574 (discussing APA’s relief).

**B. The Critical Area Amendment Violates Substantive Due Process**

**1. Substantive Due Process Protects The Right To Subdivide Property Free From Unreasonable Regulation**

The constitution’s substantive due process protections limit a local government’s use of its police powers to regulate property. *See Isla Verde*

*Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 766-68 (2002).

Substantive due process specifically protects a property owner's right to subdivide property free from unreasonable regulation. The Superior Court erred in concluding that the Critical Area Amendment did not violate Bayfield's right to substantive due process.

The *Isla Verde* court explained how substantive due process protects the right to subdivide as follows:

[W]hile a municipality has authority to make appropriate provisions for the public health, safety, and welfare, and to condition plat [subdivision] approval accordingly, it does not have authority to require a developer "to shoulder an economic burden, which in justice and fairness the public should rightfully bear." *Weden v. San Jan County*, 135 Wn.2d 678, 706, 958 P.2d 273 (1998) (quoting *Orion Corp. v. State*, 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987)).

*Isla Verde*, 146 Wn.2d at 766.

Courts apply a three-part test to determine if regulations violate substantive due process rights: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner." *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330 (1990). The Amendment violates Bayfield's rights to substantive due process because the density reductions imposed on subdivisions are not reasonably necessary and are unduly oppressive.

As noted above, a regulation must serve a public purpose to satisfy *Presbytery's* first test. During the course of adopting the Critical Area Amendment and defending it before the Board and Superior Court, the County changed its story regarding the Amendment's purpose. At first, the County claimed it needed to adopt the Ordinance to achieve a variety of rural densities under the GMA. After the Court of Appeals upheld the County's comprehensive plan as providing a variety of rural densities, the County asserted that the Critical Area Amendment was not necessary to achieve a variety of rural densities and that its purpose was to protect critical areas. AR 545, 549.

The Superior Court's written decision upheld the Amendment based on the purpose of protecting critical areas. In its oral ruling on Bayfield's Motion for Reconsideration, the Superior Court extended its ruling to the purpose of providing for a variety of rural densities. Verbatim Transcript of Proceedings May 15, 2009, page 18, lines 13-25. As discussed below, the Ordinance violates substantive due process regardless of which purpose the County intended it to serve.

**2. If The Amendment’s Purpose Is To Protect Critical Areas, Then It Is Unnecessary And Unduly Oppressive**

**a. The Amendment Is Not Reasonably Necessary**

The *Presbytery* court explained that the second prong for evaluating substantive due process requires that “the regulation must tend to solve [the public] problem” for which it is adopted. *Presbytery*, 114 Wn.2d at 330. The Critical Area Amendment is not reasonably necessary and does not “tend to solve” a problem because the County’s critical area regulations already sufficiently protect critical areas.

Specifically, the GMA required the County to adopt development regulations to protect critical areas by 1991. RCW 36.70A.060(2). These regulations must ensure that there will be no net loss of critical area functions. *See ICCGMC v. Island County*, WWGMHB No. 98-2-0023 (Final Decision and Order 6-2-99). Thus, the County’s existing regulations “solve the problem” of protecting critical areas by achieving no net loss.

Once the County’s regulations achieve no net loss to critical areas, the problem of protecting critical areas is solved. Adding additional regulations—such as the Ordinance’s critical area density reductions—does not provide more protection because net impacts have already been reduced to zero. The Amendment’s density reductions do not “tend to

solve” the problem of developmental impacts to critical areas and, therefore, fail *Presbytery*’s second prong. 114 Wn.2d at 330.

Indeed the County was aware of this precise problem when it adopted the Ordinance because the County staff report analyzing the Critical Area Amendment had reached the same conclusion. AR 413. Specifically, the staff indicated that if the County’s other critical area regulations complied with the GMA (as the law has required since 1991), “it would not generally matter” if the County reduced density on lands with critical areas as proposed by the Amendment. *Id.* In other words, the staff is saying that reducing density does not tend to solve the problem of developmental impacts to critical areas because the County’s other critical area regulations accomplish that purpose. The Critical Area Amendment, by the staff’s own analysis, is not reasonably necessary to protect critical areas and fails *Presbytery*’s second prong.

In the face of the County staff’s statement that reducing density based on critical areas (without property specific analysis) would generally not matter in protecting such areas, the Superior Court ruled that the Amendment meets *Presbytery*’s second prong. In this regard, the Superior Court erred in several ways.

First, the court stated without explanation that the Amendment could be reasonably necessary, even if prior regulations already adequately protected the critical areas. CP 157. As explained above, if the prior regulations were adequate to “solve the problem,” the Critical Area Amendment would not be necessary at all—much less “reasonably” necessary.

Second, the Superior Court incorrectly concluded that reduced residential densities would protect critical areas. CP 157. As just discussed, the densities do not achieve more protection and are redundant. As discussed in Section V(C)(2), no evidence in the record supports the Superior Court’s assertion; the record evidence supports the opposite conclusion.

Third, the Superior Court’s conclusion that the Critical Area Amendment reduces density near the critical area was flawed. Under the Amendment, neighboring properties immediately adjacent to the critical area are free to develop one home per five acres. In other words, if a wetland is present on one owner’s property, but surrounded on three sides by other properties, the Amendment leaves densities at one home per five acres for most of the area surrounding the critical area. CP 167-168 (Exhibit A to Bayfield’s Motion to Reconsider).

In sum, the Critical Area Amendment is not reasonably necessary for a public purpose, and the court's conclusion to the contrary should be reversed.

**b. The Amendment Is Unduly Oppressive**

The Critical Area Amendment also fails *Presbytery's* third prong because it is unduly oppressive. In reviewing the third prong, the court considers (a) the nature of the harm to be avoided; (b) the availability and effectiveness of less drastic measures; and (c) the economic loss suffered by the property owner. *Presbytery*, 114 Wn.2d at 331. The court may also consider the seriousness of the public problem, the extent to which the landowner's property contributes to the problem, the degree to which the regulation solves the problem, and the feasibility of less burdensome solutions. *Id.*

Here, "the nature of the harm to be avoided" is virtually nonexistent because the County's other critical area regulations protect critical areas from the harm of development—County staff said as much. AR 413. In addition, the critical area regulations that existed before the Amendment are both available and effective. Moreover, the economic loss to rural property owners is significant. Bayfield explained to the County that the Amendment's impact on just one of its parcels,

comprising less than a third of its total acreage, would reduce the number of potential lots from 46 to 16. AR 495. The County does not dispute that the Critical Area Amendment imposes an economic loss on Bayfield for every lot subtracted from a potential subdivision because of the presence of critical areas. This economic loss results in no additional protection of critical areas and, therefore, is unduly burdensome.

The County staff report makes the point that the existing regulations are a less drastic way to protect critical areas by noting that a disadvantage of the Amendment when compared to other alternatives being considered by the County is that “[p]roperties that are impacted by the existing and proposed critical area regulations would be further impacted [by the critical area density reduction].” AR 412. The staff’s reference to “further impact[]” beyond the other critical area regulations confirms that a less drastic way to protect critical areas, according to staff, is to use the generally applicable critical areas regulations—rather than the density reductions derived from the presence of critical areas proposed in the Critical Area Amendment. Rather than analyze the issue, the Superior Court dismissed Bayfield and other rural land owners’ economic losses with the conclusory statement that “[u]nmet expectations do not arise to the level of unduly oppressive regulation.” CP 157. An owner’s

economic loss is an important consideration under *Presbytery*, and economic loss where there is no off-setting public benefit is unduly oppressive.

In addition, the GMA requires the County to base its critical area protections on the best available science in part to avoid these unnecessary and unconstitutional results. RCW 36.70A.172. A fundamental purpose of this requirement is to ensure that the regulations satisfy the constitution's requirement that regulations address an impact caused by a proposal and are proportionate to that impact. *HEAL*, 96 Wn. App. at 531-32. The County has conceded that it relied on no science in passing the Critical Area Amendment. *See* Western Board Transcript at 70, ll. 11-13 ("The County didn't have science before them, I'll admit to that. The County didn't have science before them.").

The County's failure to produce any scientific basis for reducing densities of subdivisions to protect critical areas means it cannot demonstrate the extent to which a landowner's property contributes to the problem or the degree to which the regulation imposes a solution that is proportionate to the owner's contribution to the property. *HEAL*, 96 Wn. App. at 531-32. Such regulations are unduly oppressive and fail *Presbytery*'s third prong. *Presbytery*, 114 Wn.2d at 331-32. Rather than

address the application of *HEAL* to the constitutional issue, the Superior Court erroneously stated that it was not necessary to address it.<sup>5</sup>

**3. The Ordinance States That It Is Not Needed To Create A Variety Of Rural Densities And, Therefore, Fails All Three Of *Presbytery's* Tests**

Although the County argued and the court concluded that the Amendment achieves the purpose of achieving a variety of rural densities, the Ordinance itself refutes this point and fails all three of *Presbytery's* tests.

With regard to the “public purpose” prong, the Ordinance states, “the County’s consideration of additional innovative techniques and amendments to rural zoning is no longer in response to the WWGMHB July 20, 2005 Final Decision and Order.” AR 436. (Ordinance 13884). The Ordinance further states, “Thurston County has always maintained that it provides a variety of rural densities through innovative techniques.” *Id.* The County cannot state in its Ordinance that it has already met the public purpose of achieving a variety of rural densities and then argue in court that the Critical Area Amendment’s purpose is to achieve a variety

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<sup>5</sup> The Superior Court states that Bayfield did not raise this argument. This assertion is wrong on two counts. First, Bayfield could only raise *HEAL* as part of a constitutional argument before the court because the Board lacked jurisdiction. Second, Bayfield did raise *HEAL* to the court and Western Board. CP 66 and Transcript of the Western Board at 64-68; AR 822-825 (Bayfield’s Prehearing Reply to the Western Board at 4-7). The argument before the Board was that the failure to consider best available science produced regulations that were arbitrary and discriminatory and, therefore, noncompliant with Goal 6. *Id.*

of rural densities. While no doubt providing a variety of rural densities could be a legitimate public purpose in certain circumstances, the Ordinance itself makes clear that this was not its purpose.

Because the County maintained that it was not necessary to adopt the Critical Area Amendment to comply with the GMA or the Board's Order, the Critical Area Amendment is not "reasonably necessary"—*Presbytery's* second prong. If a regulation "must tend to solve [a public] problem" to satisfy the second prong, then it is not possible to meet this test because the existing regulations already "solve the problem" as the Ordinance asserts.<sup>6</sup> The Ordinance's pronouncement that the County already "provides a variety of densities" admits that the County does not believe the Amendment is necessary to meet the GMA's requirement to provide a variety of densities.

Regarding *Presbytery's* third prong, the Critical Area Amendment is unduly oppressive because it significantly reduces the value of Bayfield's property by limiting density. On the public side, the relevant factors are not present. First, the "seriousness of the problem" factor is low because the County indicates that the Amendment is entirely unnecessary to achieve a variety of rural densities. Regarding "the extent

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<sup>6</sup> The fact that the County did not need to amend its development regulations to comply with a Board order distinguishes this case from *Peste v. Mason County*, 133 Wn. App. 456 (2006), where that court found that Mason County's response to a Board order constituted a legitimate public purpose.

to which the owner's land contributes to the problem," this factor does not support the Amendment because there is no indication that Bayfield's property is part of a problem. To the contrary, the County asserts there is no problem with its provision of rural densities. Therefore, the County cannot argue that Bayfield is contributing to such a problem.

Regarding the factor of "the feasibility of less oppressive solutions," if, as the County asserted in the Ordinance, it was not necessary to achieve a compliant variety of rural densities, then the less oppressive solution of taking no action was available. In addition, the Ordinance includes direct down-zones of property to one unit per 10 acres and one unit per 20 acres. AR 436. As discussed in Section III(A)(3), the County based these down-zones on a rigorous analysis of those areas. A less drastic method of achieving a variety of rural densities would be to retain these direct down-zones, but drop the Critical Area Amendment's de facto down-zones.

In sum, the Critical Area Amendment violates substantive due process regardless of whether the County's purpose was protecting critical areas or providing a variety of rural densities. The County is already accomplishing each of these purposes through existing regulations that make the Amendment unnecessary and more drastic than the existing regulations. In the case of critical areas, the County's critical area regulations achieve no net loss. In the case of a variety of rural densities, the County by its own admission did not need to take action. Regardless

of the purpose, the Critical Area Amendment significantly reduces the value of Bayfield's property without a public benefit. The Critical Area Amendment imposes a condition on subdivision that requires an owner "to shoulder an economic burden, which in justice and fairness" the owner should not bear. *Weden v. San Jan County*, 135 Wn.2d 678, 706 (1998) (quoting *Orion Corp. v. State*, 109 Wn.2d 621, 648-49 (1987)). The Critical Area Amendment violates substantive due process. *Id.*

**C. The Western Board's Decision Upholding The Amendment Erroneously Interprets And Applies The GMA's Goal 6 And Is Not Based On Substantial Evidence**

Counties—such as Thurston County—must comply with the GMA planning requirements, including the adoption of a comprehensive land use plan and development regulations. RCW 36.70A.040. The County adopted the Critical Area Amendment at issue in this case pursuant to the GMA.

The GMA provides a list of 13 planning goals that counties must use for the purposes of guiding the development of comprehensive plans and development regulations. RCW 36.70A.020. Among other goals, the GMA's Goal 6 states:

Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

RCW 36.70A.020(6). The various growth boards have interpreted Goal 6 to include two separate prongs. The first prong applies to takings of private property for public use; the second prong “involves a requirement of protection of a legally recognized right of a landowner from being singled out for unreasoned and ill-conceived action.” *Abenroth v. Skagit County*, WWGMHB No. 97-2-0060c (January 23, 1998). The legally recognized right asserted must be “statutory, constitutional, and/or [recognized] by court decision.” *Id.*

The Western Board’s decision upholding the Critical Area Amendment fails in two ways. First, the Board “erroneously interpreted and misapplied the law” when it determined that Bayfield’s ability to subdivide its property is not a right legally recognized by constitution, statute, or court decision. RCW 34.05.570(3)(d). Second, the Western Board’s decision upholding the Amendment should be reversed because it is not supported by substantial evidence. RCW 34.05.570(3)(e).

**1. The Board Erroneously Interpreted And Misapplied Goal 6**

The constitution and statutes protect property owners’ rights to subdivide property free of improper regulation. Therefore, the GMA’s Goal 6 protects property owners from GMA actions that are arbitrary and discriminatory. RCW 36.70A.020(6). The Western Board’s conclusion

that Bayfield’s “ability to subdivide” its property is not “a legally recognized right” protected by the constitution or statute, and therefore not subject to Goal 6 protections,<sup>7</sup> is erroneous and should be reversed.

**a. The Constitution Protects The Right To Subdivide**

As discussed above in Section V(B), the constitution’s substantive due process protections limit the County’s ability to regulate private property, including the ability to place restrictions on subdivision. *See Isla Verde*, 146 Wn.2d at 766-68. Significantly, the County has never contested this simple point in any of its briefings. The right to subdivide property free from unreasonable regulation is a right protected by the constitution and, therefore, is a right within the scope of the GMA’s Goal 6. The Western Board’s conclusion to the contrary must be reversed.

**b. The Right To Subdivide Is Protected By RCW 82.02.020**

State statutes—such as RCW 82.02.020—also protect the right to subdivide property, contrary to the Western Board’s conclusion. Specifically, the statute protects property owners by restricting the County’s ability to require a landowner subdividing property to set aside property for “open space” and other purposes. In *Isla Verde*, the

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<sup>7</sup> AR 1100 (Board Decision at 27).

Washington Supreme Court held that this statute prohibits local governments requiring “open space” as a condition of subdivision unless the local government provides evidence that the open space set aside is necessary to mitigate a direct impact identified as a result of the specific subdivision. *Isla Verde*, 146 Wn.2d at 759.

Here, the Western Board concluded that the Critical Area Amendment creates “open space,” by virtue of reducing density on the property of certain individual landowners. AR 1101 (Final Decision and Order at 28). RCW 82.02.020 clearly protects Thurston County property owners by requiring the County to demonstrate that open space set-asides imposed during subdivision mitigate an impact of the subdivision. *Isla Verde*, 146 Wn.2d at 759; *Citizens’ Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 663 (2008). Because this right is recognized by statute, and the case law interpreting the statute, the protections of Goal 6 clearly apply to a GMA action limiting subdivisions. The Western Board’s conclusion to the contrary should be reversed.

**2. The Western Board’s Decision Is Not Supported By Substantial Evidence**

The Western Board concluded that the critical areas innovative technique is not arbitrary because:

the deducted portion was unbuildable land which a property owner would not have any reasonable expectation of developing. The County's approach provides additional open space and limits the amount of impervious surfaces surrounding sensitive areas, conserves wildlife habitat in the rural area and provides additional protection for the environment in the County's highest density rural district.

AR 1101 (Final Decision and Order at 28); *see id.* 1107 (finding of fact 11). Although, the Board identifies this statement as a "finding of fact," the Board identifies no evidence in the record to support these conclusions.

No evidence supports the assertion regarding an owner's "reasonable expectation of developing property," part of which is a critical area. The Board cites to no evidence in the record.<sup>8</sup> This statement is patently incorrect. Under the previous County regulations, an owner of 10 acres of land with five acres of critical areas had a reasonable expectation of subdividing the property into two lots—some part of each lot would be buildable and some part would be constrained by critical areas. For example, one lot could consist of four acres of critical area and one acre of buildable land. The second lot could consist of one acre of critical areas and four acres of buildable land. Buffers would protect the critical areas

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<sup>8</sup> AR 1101.

from the impact of the home. Under the new regulations no subdivision is allowed.

Not only is there no evidence, to support the Board's conclusion, the only evidence demonstrates that Bayfield asked the County if Bayfield's expectations were correct and the County told Bayfield they were. As discussed in Section III(A)(2) above, TCC 20.30A.060 allows for *increased* density on parcels covered by critical areas, provided those areas are set aside as a "resource use parcel" the County furthered Bayfield's expectations of receiving credit for sensitive areas it voluntarily set aside by confirming in writing that Bayfield would receive credit for additional density if it voluntarily placed riparian areas into conservation easements. AR 500. This increased density was on top of the one home per five acres already allowed.

Similarly, the Western Board cites no evidence to support its findings that the County's approach provides additional open space, reduces impervious surface, conserves fish and wildlife habitat, and provides additional environmental protection. Instead, the Board apparently adopted wholesale the County counsel's post hoc arguments at the hearing:

And I said this in my brief . . . when you downzone, it creates more open space. Do we need to say that in the

findings, oh we're going to downzone and create more open space? No, it's a given. You create more open space. You create more wildlife habitat. Those are the results.<sup>9</sup>

This pronouncement does little more than admit that the County's record lacks any evidence to support its decision and is, therefore, arbitrary.

*Stevens County v. Loon Lake Prop. Owners Ass'n*, 146 Wn. App. 124, 131-32 (2008) (where record failed to support County's argument that it followed required steps, Board's decision in favor of County was not supported by substantial evidence).

The County's briefing similarly relies on "self-evident" assertions, rather than evidence, to support the County's decision:

The County did not need to elaborate on this point as it is *self evident* that the innovative technique will mean less development near critical areas, more wild life habitat around critical areas, and more trees and vegetation around critical areas.

AR 545 (County's Prehearing Brief at 13) (emphasis added); *see also id.* 549 (claiming similar benefits without citation). Again, self-serving pronouncements are not evidence. *See* RCW 36.70A.290(4) ("board shall base its decision on the record developed by the city, county, or the state").

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<sup>9</sup> Transcript of Western Board at 72, ll. 10-17.

It is equally clear that the County's simplistic "less density equals more open space benefit" conclusion is wrong. Down-zoning a property does not create more open space or wildlife habitat, or create less impervious surfaces. As just one example, a 10-acre cattle pasture may provide less wildlife habitat (and more environmental damage) than a five-acre home where the majority of the acreage is undeveloped. A house on a 10-acre lot with a 10-acre lawn provides no more, or less, wildlife habitat than two homes with two five-acre lawns. A 4,000-square-foot house on 10 acres may have just as much (or more) impervious areas than two 2,000-square-foot homes on adjacent five-acre parcels.

The County's own code proves this point. The County specifically allows agriculture, logging, and other forest practices on these same lands. *See* TCC 20.09.020 (designating "[a]griculture, including forest practices" as a "primary" use in rural one-unit-per-five-acre zone). There is no evidence in the record that shows that logging creates more wildlife habitat or protects other sensitive areas. These kinds of activities may have more impact and are more common on larger parcels that cannot be subdivided, making the Critical Area Amendment less, rather than more, protective of sensitive areas.

Moreover, the record contradicts the County's post hoc logic. Specifically, the County Commissioners and staff expressly recognized that some rural land uses, such as hobby farms or pastures, are more environmentally damaging than residential use and tended to be more common in larger parcels. AR 490. For these reasons, the Commissioners chose not to reduce densities by down-zoning because it would likely increase, not decrease impacts.

Given the complete absence of any relevant record demonstrating any benefit of the critical areas innovative technique, the Western Board erred in concluding that the County's action was not arbitrary. For similar reasons, and as set forth in detail above, the Western Board's conclusion that the Critical Area Amendment is not discriminatory is not supported by substantial evidence. The Western Board relied on the exact same conclusions about the benefits of open space and impervious surfaces as it did in its analysis of whether the Critical Area Amendment is arbitrary.<sup>10</sup>

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<sup>10</sup> This The Western Board interpreted "discriminatory" as "to single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation." The Western Board's inclusion of the clause "without a rational basis" renders the preceding word "arbitrary" meaningless. The Western Board interprets arbitrary as "unreasoned" or baseless. The Board's interpretation renders the word "arbitrary" a nullity because every discriminatory action – under the Board's definition – is also without a rational basis and therefore arbitrary. Therefore, it is not surprising, that the Western Board relied on the same assumptions to support its conclusions on both points.

The Board again cites to no evidence in the record, and those conclusions are not supported by substantial evidence for the exact same reasons stated above.

## **VI. CONCLUSION**

Bayfield respectfully requests that this Court reverse the Superior Court and Western Board's decisions and strike the Critical Area Amendment. On its face, the Critical Area Amendment is not reasonably necessary to accomplish a public purpose and unduly oppresses owners of property zoned one unit per five acres that is constrained by wetlands and other critical areas. The Amendment therefore violates Bayfield's substantive due process rights.

In addition to the substantive due process violation—which alone requires that the Superior Court's ruling be reversed—the Board erroneously interpreted and applied GMA Goal 6 by concluding that subdivision is not protected from unreasonable regulation by the constitution and state statutes. The Board's decision must also be set aside because the decision was not based on evidence of the quantity or type that a reasonable person would rely on for making a decision having such significant consequences on property rights. For these reasons too, the Critical Area Amendment should be stricken.

DATED this 12<sup>th</sup> day of October, 2009.

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**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury of the laws of Washington State that I caused true and correct copies of the foregoing document to be served on the following individual(s) by the method(s) indicated:

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