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I. INTRODUCTION

Petitioner-Appellant, Bayfield Resources Company (Bayfield), mischaracterizes Thurston County's (County) purpose and decision making process involved in adopting the zoning provision known as the Critical Areas Innovative Technique (CAIT). Upon reviewing the record in this case, it is clear the County's adoption of the CAIT was a thorough and deliberative process, balancing the goals of the Growth Management Act (GMA), including Goal 6, property rights. ch. 36.70A RCW. The record also reveals the CAIT is a zoning technique which only targets sensitive areas for a zoning change to provide less intensive development in those areas. The CAIT amends the zoning scheme requiring certain *unbuildable* areas such as wetlands, landslide hazard areas, high groundwater hazard areas and 100-year floodplains, be excluded when determining how many *building lots* a parcel of land can be divided into.

What Bayfield fails to explain in its briefing is that this zoning decision was the result of many years of litigation which ultimately required the County to make changes to its zoning code. The Western Washington Growth Management Hearings Board (WWGMHB) required the County to provide additional densities in the rural part of the County to

meet the GMA directive of providing a variety of rural densities.¹ Rather than haphazardly rezoning land located within the rural areas, Thurston County used a reasoned approach which took into consideration lands that could not be built on due to sensitive and hazardous features. Getting to this decision was not easy for the County. Through the use of massive public workshops and hearings, members of the public identified the CAIT as its first choice for dealing with the order stemming from the litigation that required rezoning of the rural area. As will be shown below, the County did balance the goals of the GMA, including the property rights goal (goal 6), when it adopted the variation of the CAIT that provided the least amount of impact on a property owner. The Thurston County Superior Court's order upholding the WWGMHB's order must be affirmed as a matter of law.

II. STATEMENT OF THE CASE

Thurston County's adoption of the challenged zoning amendment was in response to a WWGMHB's order that required the County, in part, to provide additional zoning densities in the rural area of the County. AR²

¹ As of the date this brief is signed, the issue of whether the County is in compliance with the GMA by providing a variety of rural densities has not yet been decided. While the Supreme Court has remanded the issue back to the WWGMHB, the County is still considered out of compliance by the WWGMHB on this issue. *Thurston County v. Hearings Bd.*, 164 Wn.2d 329, 360, 190 P.3d 38 (2008).

² Citations to the WWGMHB's administrative record are provided as AR _____. Citations to the Clerk's Papers are provided as CP_____.

600. Some basic facts surrounding the WWGMHB litigation are necessary to understand why the County was making the change in the first place. It must be noted that Bayfield was not involved in the challenge that resulted in the WWGMHB order requiring the County to provide additional density in the rural area.

On July 20, 2005, the WWGMHB issued a Final Decision and Order finding, in part, that Thurston County was out of compliance with the GMA, ch. 36.70A RCW, because the County's zoning scheme failed to provide for a variety of rural zoning densities pursuant to RCW 36.70A.070(5)(b). *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, pg. 16-18 (Final Decision And Order, July 20, 2005) . CP 118-120. The WWGMHB found that Thurston County had too much land zoned at a density of one dwelling unit per five acres.

The GMA expressly requires "a variety of rural densities" in the rural element of the comprehensive plan:

The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate rural densities and uses that

are not characterized by urban growth and that are consistent with rural character.

RCW 36.70A.070(5)(b)

The County concedes that it does predominately provide densities of one dwelling unit per five acres in the rural zone. Respondent's Prehearing Brief at 14. However, the County asserts that it has other designations that are less dense than one in five. *Ibid.* The densities that the County cites as being less intense than one dwelling unit per five acres include designations of natural resource lands. T.C.C. Chapter 20.08A applies to lands in the long-term agricultural district; Ch. T.C.C.20.08D applies to lands in the long-term forestry district; and T.C.C. Chapter 20.62 creates a program for transfer of development rights in long-term commercially significant agricultural lands. Rural lands are lands "not designated for urban growth, agriculture, forest, or mineral resources." RCW 36.70A.070(5). Thus, the designations of low-intensity resource lands do not create a variety of rural densities.

Id. at 16-17.³

Having found the County out of compliance, the WWGMHB imposed a compliance schedule requiring the County to amend its zoning provisions to provide a variety of densities in the rural area by a date certain. *Id.* at 36. The compliance schedule was ordered pursuant to RCW 36.70A.300(3)(b). While the County did appeal the WWGMHB order, the GMA requires a county to continue its compliance effort during the appeal. RCW 36.70A.300(3)(b).

³ As can be seen from the cited GMA provision, RCW 36.70A.070(5)(b), a variety of densities may be created through an innovative technique (a zoning technique other than creating new zoning districts). The CAIT is such an innovative technique as it creates different densities based on the amount of critical areas on a parcel of property.

The County's compliance effort was impressive. The County established an extensive public participation work program related to the rural rezone project. This is described as follows in a June 25, 2007 Board Briefing packet:

...

- During December 2005 and January 2006, the county conducted two open houses and four workshops around the county to solicit public input as to what types of land were appropriate for rezoning to lower densities and to review and refine proposed LAMIRD designations. More than 800 workshop participants worked with their neighbors to identify the types of land they deemed suitable for rezoning or shared information pertaining to LAMIRDS. The workshop participant's priorities for the types of lands to rezone are identified in the rural rezoning binder, behind Tab 1, in Attachment 1 to the transmittal letter. Based on information gathered at these meetings, in April 2006 the Board established an area to be studied for possible rezoning to lower residential densities. During the spring of 2006, the Planning Commission formed proposed zoning districts within this study area, developed associated zoning regulations, and refined the preliminary LAMIRD designations.
- In June 2006, the county held a public forum, attended by about 200 people, and conducted an online "virtual forum" so the public could review and comment on these preliminary zoning proposals. The Planning Commission revised the draft proposals based on the comments they received at the forums. In formulating the proposal to provide a variety of rural densities, the Planning Commission carefully considered public input and the types of land that would provide public benefits if rezoned. Benefits of rezoning could include protection of drinking water supplies, avoidance of natural hazards, protection of lands that support family farms and forestry,

preservation of “rural character” and visible open space, retention of wildlife habitat, and shellfish protection.

- On August 3, 2006 the Planning Commission held a public hearing regarding the proposed rural rezoning, LAMIRDs, and amended agricultural lands designation policies. More than two hundred people attended the hearing and sixty-two people expressed a variety of perspectives. Citizens also submitted 161 letters...
- On September 20, 2006 the Board granted the Planning Commission’s request for more time to devise and refine alternative rural rezoning proposals in light of public comments...
- On the January 24, 2007 the Planning Commission and staff briefed the Board regarding three rural rezoning proposals, none of which had majority support. On January 31, 2007 the Board remanded the proposals to the Planning Commission with the direction that they submit a majority proposal. After several worksessions, the Planning Commission decided to recommend to the Board a modified version of the original Option 3 rural rezoning proposal. The original Option 1 is forwarded as a minority proposal...
- The Board directed staff to prepare an “innovative technique” proposal for the public review and to conduct an open house to inform people of the new proposal as well as the Planning Commission’s rural rezoning proposals.

AR 560-561; AR 572-574.

As shown in the preceding information, the County’s public participation program was extensive and continuous from the start.

Following the WWGMHB decision in July of 2005, the County took

immediate action to put into place a program to identify land for potential rezoning. AR 741-751. In establishing criteria for identifying lands to rezone, the County included, among other criteria, lands physically constrained or hazardous to develop as well as lands of high habitat and/or environmental service value. AR 743-751. Included in the material, were maps defining these areas. AR 743-751. At this early juncture, the County decided to forward all options for public review. Exhibit AR 751. The workshop groups prioritized the lands for rural rezone; unbuildable areas consisting of unbuildable lands, hazardous lands, floodplains, riparian areas, wetlands, landslide areas, geologically sensitive areas and conservation areas were the top priority to rezone of the more than 800 workshop participants. AR 560; AR 753-754. During two of its public meetings, the Thurston County Planning Commission discussed the idea of removing critical areas from density calculations. AR 767; AR 779.

Ultimately, three variations of the CAIT along with several rezoning proposals were presented for a public hearing in front of the Thurston County Board of County Commissioners (BOCC). AR 786-791 (informational boards used at the May 2007 Open House); AR 794-795; AR 1015-1020 (public hearing material). The three variations of the CAIT were as follows: (1) exclude the entire critical area and the entire critical area buffer when calculating zoning density of a parcel, (2) exclude the

entire critical area and the half of the critical area buffer when calculating the zoning density of a parcel, or (3) exclude only the critical area when calculating the zoning density of a parcel. County staff and public testimony provided information that lower densities around sensitive areas benefits those areas. AR 656; AR 1016. On August 20, 2007, following the public hearing, the County adopted Ordinance 13884 and Resolution 13885 which included the less restrictive variation of the CAIT (excluding only the critical area when calculating the zoning density). AR 572-592; AR 706-719. It is important to note that the County ordinance only applied the CAIT in the highest density “rural” zoning designations (Rural Residential Resource-One Dwelling Unit Per Five Acres (RRR 1/5) and the Rural Residential-One Dwelling Unit Per Five Acres (RR 1/5) zoning districts). AR 591. These are the same designations that the WWGMHB held in its July 20, 2005 decision caused the County to be out of compliance with the GMA, because the majority of the County was designated one unit per five acres. *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, pg. 16-18, 32-33 (Final Decision And Order, July 20, 2005).

Following the adoption of Ordinance 13884 and Resolution 13885, Bayfield petitioned the WWGMHB on six distinct issues. AR 1-3. On April 17, 2008, the WWGMHB issued its Final Decision And Order

which held the zoning amendments, including the CAIT, were compliant with the GMA. AR 1074-1110. On May 16, 2008, Bayfield filed a Petition for Judicial Review of the WWGMHB's decision in Thurston County Superior Court, which included a new issue claiming the County's action of adopting the CAIT violated substantive due process. CP 6-10. The Superior Court entered an order dismissing Bayfield's Petition on April 17, 2009 and denied Bayfield's Motion for Reconsideration on May 15, 2009. CP 191-197.

III. ARGUMENT

A. Standard Of Review.

Development regulations are presumed valid, and “[t]he board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(1) & (3). The Washington Supreme Court case of *Thurston County v. Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008), provides the standard of review in a comprehensive fashion.

“To find an action ‘clearly erroneous,’ the Board must have a ‘firm and definite conviction that a mistake has been committed.’” *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006) (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)). The party petitioning for review of a

comprehensive plan has the burden of demonstrating the local government's actions failed to comply with the GMA. RCW 36.70A.320(2). A board must defer to a local government's decisions that are consistent with the GMA. RCW 36.70A.3201.

On review, we stand in the same position as a superior court reviewing a board's decision. *Lewis County*, 157 Wn.2d at 497. Judicial review of board actions is governed by the Administrative Procedure Act, chapter 34.05 RCW. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). The party appealing a board's decision has the burden of demonstrating the invalidity of the board's actions. RCW 34.05.570(1)(a). A board's decision may be challenged on nine different bases. RCW 34.05.570(3).

We review issues of law de novo. *Lewis County*, 157 Wn.2d at 498. Substantial weight is accorded to a board's interpretation of the GMA, but the court is not bound by the board's interpretations. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). A board's order must be supported by substantial evidence, meaning there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Id.* (quoting *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). “On mixed questions of law and fact, we determine the law independently, then apply it to the facts as found by the agency.” *Lewis County*, 157 Wn.2d at 498 (quoting *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002)). Finally, it should be noted that from the beginning the GMA was “riddled with politically necessary omissions, internal inconsistencies, and vague language.” *Quadrant Corp.*, 154 Wn.2d at 232 (quoting Richard L. Settle, *Revisiting the Growth Management Act: Washington's Growth Management Revolution Goes to Court*, 23 Seattle U. L. Rev. 5, 8 (1999)). The “GMA was spawned by controversy, not consensus” and, as a result, it is not to be liberally construed. *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25 (2007) (quoting Settle, *supra*, at 34).

Thurston County v. Hearings Bd., 164 Wn.2d 329, 340-342, 190 P.3d 38 (2008) (footnote omitted). While the above cited case was dealing with a challenge of a comprehensive plan, the same standards apply when challenging an amendment to a GMA county's development regulations. RCW 36.70A.320(1).

Regarding the standard of review, several points are worth emphasizing. First, the CAIT is presumed valid and the burden is on Bayfield to prove the invalidity of the WWGMHB's actions. Second, the WWGMHB is required to defer to the County's decisions that are consistent with the GMA. Finally, the WWGMHB's interpretations of the GMA and how it relates to the CAIT are to be given substantial weight.

B. The County's Adoption Of The CAIT Does Not Violate Substantive Due Process.

Bayfield's substantive due process argument must be rejected as the County's adoption of the CAIT meets all due process requirements. As Bayfield points out, there is a three prong test for determining whether an ordinance meets the requirements of substantive due process. *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907, *cert. denied*, 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990).

The Presbytery court established a 3-prong test for making this determination: (1) is the regulation aimed at achieving a legitimate public purpose; (2) does it use

means that are reasonably necessary to achieve that purpose; (3) is it unduly oppressive to the landowner. *Presbytery*, at 330. If an ordinance is invalid under a substantive due process analysis, the proper remedy is to strike the ordinance. *Presbytery*, at 331-32.

In applying the substantive due process test we give deference to legislative policy decisions. *Guimont*, at 609, n.10 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 595, 8 L. Ed. 2d 130, 82 S. Ct. 987 (1962)). **"If the court can reasonably conceive of a state of facts warranting the legislation, those facts will be presumed to exist."** *Tekoa Constr., Inc. v. Seattle*, 56 Wn. App. 28, 34, 781 P.2d 1324 (1989), *review denied*, 114 Wn.2d 1005, 788 P.2d 1079 (1990) (citing *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 27, 586 P.2d 860 (1978)).

Jones v. King County, 74 Wn. App. 467, 479, 874 P.2d 853 (1994)

(footnote excluded) (emphasis added).

Thurston County's adoption of the CAIT does not violate substantive due process. First, the CAIT is aimed at achieving a legitimate public purpose. As provided above, Thurston County's adoption of the CAIT was in response to the WWGMHB's order finding the County out of compliance with the GMA because it did not provide a variety of rural densities. *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, pg. 16-18 (Final Decision And Order, July 20, 2005).⁴ One way of providing a variety of densities is the use of an

⁴ That issue was recently remanded back to the Growth Board. "We remand the case to the Board to consider whether the various densities identified by the County in the rural element and/or the use of innovative zoning techniques are sufficient to achieve a variety of rural densities." *Thurston County v. Hearings Bd.*, 164 Wn.2d 329, 361, 190 P.3d 38 (2008). This issue has not been resolved as of the date of this brief.

innovative zoning technique such as the CAIT. RCW 36.70A.070(5)(b). The legislature, through the GMA, requires counties to provide a variety of rural densities. RCW 36.70A.070(5)(b). This is not something the County decided on its own; this is a legislative directive for sound planning which the County provided through adoption of Ordinance 13884. AR 573.⁵ The fact that the legislature requires counties to provide a variety of rural zoning densities implies that this planning device is aimed at achieving a legitimate public purpose.

Additionally, the CAIT specifically provides less density in unbuildable areas that are hazardous or sensitive: high groundwater hazard areas, wetlands, marine bluff hazard areas, landslide hazard areas, 100-year floodplains, submerged lands of lakes and land below the ordinary high water mark of water bodies. AR 591. This is consistent with the finding of the Western Washington Growth Management Hearings Board (WWGMHB) that the CAIT “provides additional open space and limits the amount of impervious surfaces surrounding sensitive areas, conserves

⁵ Bayfield argues that the County changed its story regarding the purpose of the CAIT. See Opening Brief of Appellant, Pg. 14. However, the findings within the Ordinance clearly explain that one of the reasons for adopting the CAIT was to provide for “additional variety of densities throughout the rural county...” AR 573. During the hearing in front of the WWGMHB, the County made it clear to the WWGMHB and the attorneys for Bayfield that it made a mistake in the briefing regarding the purpose provided by the County in the ordinance. Verbatim Report of Proceedings, pp. 35-37, February 28, 2008. To now argue the County changed its story without also providing the entire “story” regarding the County’s admission is misleading.

wildlife habitat in the rural area and provides additional protection for the environment in the County's highest density rural district." AR 1107-1108. Providing less intense development on parcels containing sensitive areas and its related wildlife is a means reasonably necessary to provide less pressure on the sensitive areas.⁶ Furthermore, as the County has argued and the BOCC stated, the CAIT is an innovative technique that provides for a variety of rural densities.

A similar challenge to a Mason County decision to provide a variety of rural densities was rejected by this Court.

Here, the County adopted and amended its CP and DRs to comply with the GMA as the Growth Board ordered, a legitimate state purpose. Further, the GMA mandates that the County designate both rural areas and a variety of densities within its boundaries. RCW 36.70A.070(5). The County's designation of rural areas and densities was a means reasonably necessary to achieve the legitimate state purpose of complying with the GMA.

Peste v. Mason County, 133 Wn. App. 456, 474, 136 P.3d 140, review denied, 159 Wn.2d 1013 (2007). As explained above, deference must be given to the County's policy decision and if the court can conceive of a

⁶ Bayfield's attempt to argue the County should provide "best available science" to support the decision is improperly before this Court. This was not an argument brought in its Petition For Review to the WWGMHB. AR 1-3. RCW 36.70A.290(1) restricts a decision of the WGMHB to issues presented in Bayfield's statement of issues in the petition for review. It is disingenuous of Bayfield to try and slide in the same "Best Available Science" (BAS) argument that the WWGMHB specifically excluded. "We note that Bayfield has not raised the failure of the County to rely on BAS as an issue in this appeal and therefore will not consider whether the County's technique is supported by BAS." AR 1097.

state of facts warranting the legislation, those facts will be presumed to exist. *Jones v. King County*, 74 Wn. App. 467, 479, 874 P.2d 853 (1994). Through workshops, members of the public picked unbuildable areas as their highest priority for providing less density through rezoning. AR 753-754. Clearly, the County's adoption of the CAIT was aimed at achieving a legitimate public purpose of compliance with the GMA (providing a variety of rural zoning densities) and by reducing densities around sensitive and hazardous land.

Bayfield's attempt to argue that *Isla Verde Int'l v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) applies to this case has no merit. *Isla Verde* involves conditions imposed on a specific development proposal, not whether an innovative zoning technique that provides a variety of rural densities violates substantive due process and the GMA. To argue that a county must determine impacts of future development proposals prior to making a zoning decision is nonsensical. The County can't read the future and determine if a zoning change is reasonably necessary as a direct result of all future development proposals' impacts. That is why *Isla Verde* applies to conditions imposed on a specific development proposal and not to zoning techniques. *Isla Verde* has no application to the facts of this case.

The second prong of the test is likewise met. The Court in *Presbytery* interprets this part of the test as whether the regulation uses a means that tends to achieve the purpose. *Presbytery of Seattle v. King Cy.* at 331. The CAIT is an innovative way of providing additional variety of densities and does provide less density near sensitive and hazardous areas. For example, prior to the adoption of the CAIT if a 40 acre parcel in the one dwelling unit per five acres zone includes 20 acres of wetlands it could be divided into 8 developable lots (one unit per five acres). After the adoption of the CAIT, it would no longer be allowed to include the unbuildable areas in the density calculation and could be divided into 4 developable lots (one unit per ten acres). Using this zoning technique throughout all of rural Thurston County zoned one unit per five acres will provide additional variety of densities while at the same time reducing residential development near sensitive and hazardous areas. The CAIT is a means that does realize the purpose it set out to achieve: provide additional variety of densities to meet the WWGMHB order and to reduce density near sensitive areas.⁷ This is consistent with the holding in *Peste*.

⁷ Bayfield places emphasis on the County's stance in Ordinance 13884 that it already provided a variety of densities. The problem with Bayfield's position is that at the time of the adoption of Ordinance 13884 the County was under a WWGMHB Order of Noncompliance on the issue of variety of rural densities. The WWGMHB found that the County did not provide a variety of rural densities. That Order of Noncompliance is still in affect.

Here, the County adopted and amended its CP and DRs to comply with the GMA as the Growth Board ordered, a legitimate state purpose. Further, the GMA mandates that the County designate both rural areas and a variety of densities within its boundaries. RCW 36.70A.070(5). The County's designation of rural areas and densities was a means reasonably necessary to achieve the legitimate state purpose of complying with the GMA.

Peste v. Mason County, 133 Wn. App. 456, 474, 136 P.3d 140, *review denied*, 159 Wn.2d 1013 (2007).

Finally, the County meets the third part of the substantive due process test as the CAIT is not unduly oppressive. As stated in the facts above, the GMA requires the County to provide a variety of rural densities. The WWGMHB found the County did not provide a variety of rural densities. The County has not been found in compliance with regard to this issue. The CAIT is not unduly oppressive to the landowner as it only applies to unbuildable land in the County's *highest* rural zoning districts, i.e. the Rural Residential and Rural Residential Resource one unit per five acres districts. AR 573. While going through the compliance process, the County had the option of blanket zoning changes in these highest rural density areas to create a variety of zoning densities. That would be more oppressive, however, as it would lower the density for parcels that may have been entirely buildable. Instead, the County decided

the least restrictive way to provide a variety of densities was to exclude land that the owner had no legitimate expectation to use.

The CAIT isn't something unusual or new. The County has similar provisions in its development regulations that apply within the County's urban growth boundaries. AR 544. The public picked unbuildable lands as the most obvious areas to rezone. AR 753-754. The application of the CAIT will not alter the planned use of the property as it still allows a developer to develop the buildable portions of the property, just with less density. It is important to note the County chose the least intrusive of the three alternatives that were presented at the public hearing. AR 786-789. The County is still allowing property owners to include the unbuildable critical area buffers when calculating density. These buffers can be quite extensive. For example, a buffer for a class one wetland is 200 feet. Chapter 17.15, Table 10, Thurston County Code. The County balanced the public's interest and those of the landowner. In order to address providing additional variety of density, the County decided to apply the CAIT to unbuildable portions of property and limit it to the critical areas only and not the buffers. The County's use of the least restrictive CAIT proposal is not unduly burdensome on property owners. There is no credible evidence in the record that proves otherwise. Accordingly, the County's adoption of

the CAIT does not violate substantive due process and should be upheld as a matter of law.

C. The WWGMHB's Decision Was Not In Error Regarding Whether Goal 6 Covered The Right To Subdivide.

Bayfield's focus on goal six misapplies the law. The GMA provides 13 goals that are used to *guide* the planning done by municipalities.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. *The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:*

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional

differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. 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.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.

RCW 36.70A.020 (emphasis added). As RCW 36.70A.020 points out, the goals are not listed in order of priority. Goal six is *not* to be applied over

all other goals. The County is required to *balance* the goals which include promoting a variety of residential densities (Goal 4), protecting the environment (Goal 10), enhancing the State's quality of life (Goal 10), retaining open space (Goal 9), conserving fish and wildlife habitat (Goal 9), encouraging citizen involvement in the planning process (Goal 11), etc.

The Board's conclusion ignores the GMA's balancing of the 13 planning goals and fails to implement the GMA's clear mandate that cities and counties are to make planning decisions—not boards... There are 13 planning goals that must be balanced and harmonized with others. This balancing and harmonizing is within the discretion of the cities and counties.

Lewis County v. Hearings Bd., 157 Wn.2d 488, 524, 139 P.3d 1096

(2006). The County can and did use all the goals for guidance, along with the legislative directive to provide a variety of rural densities.

Bayfield argues that the WWGMHB's decision should be reversed because the decision doesn't recognize the right to subdivide property as a constitutionally protected property right under Goal 6. Initially, it must be pointed out that this argument is moot. The WWGMHB did analyze Goal 6 with the assumption that Bayfield had provided a recognized property right under the goal. "Even if Bayfield had provided a recognized property right, it must still show that the County's action was arbitrary and discriminatory... Bayfield has not established the arbitrary or discriminatory nature of the County's Critical Areas Innovative Technique

or otherwise proven a violation of Goal 6 of the GMA.” AR 1100, AR 1102. Bayfield’s argument that the WWGMHB’s conclusion about the right to subdivide warrants reversal is moot as the WWGMHB did assume Bayfield had a recognized property right.

Even if the Court does consider Bayfield’s argument on the right to subdivide, Bayfield forgets the legislature has directed counties to provide a variety of rural densities. RCW 36.70A.070(5)(b). Within the rural area of Thurston County, there will be property with different densities. Not all property in the County or the State of Washington will be able to subdivide at the same rate. Interpreting Goal 6 to require all property to be subdivided in the same manner is misguided. Bayfield has not provided one case that supports its underlying argument that a County can’t adopt regulations intended to provide a variety of densities as required under the GMA. Instead, Bayfield again relies on *Isle Verde*, a case involving a specific development proposal and not one dealing with the legislative directive to provide a variety of rural densities thorough innovative *zoning* techniques. Unlike an open space condition provided in *Isla Verde*, the CAIT was specifically adopted as a zoning technique and only applies to the amount of unbuildable critical areas found on property in the highest density rural zoning district.

As indicated above, substantial weight is accorded to the WWGMHB's interpretation of the GMA. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Here, the WWGMHB has interpreted Goal 6 as not protecting the right to have the same subdivision opportunities as someone else that has different characteristics on their property and/or different applicable zoning rules. The WWGMHB was operating under the facts of this case. The County's amendment did not take away one's right to subdivide buildable land. It only took certain unbuildable areas out of the density calculation. Before and after the CAIT was adopted, the areas excluded from the density calculations were never going to be built on. The WWGMHB's interpretation is reasonable under the facts of this case.

Bayfield's additional argument that RCW 82.02.020 protects a developer's right to subdivide at a *maximum density* is also misplaced.⁸ There is nothing in RCW 82.02.020 that would require the WWGMHB to interpret Goal 6 as protecting a developer's right to subdivide under the facts of this case. The WWGMHB properly provided deference to the County's decision to exclude unbuildable land from density calculations as the WWGMHB found the CAIT was consistent with its interpretation

⁸ This argument was never raised in front of the WWGMHB and therefore is untimely. *Leer v. Whatcom Boundary Review Bd.*, 91 Wn App. 117, 121, 957 P.2d 251 (1998), *review denied*, 136 Wn.2d 1030 (1998).

of the goals of the GMA. RCW 36.70A.3201. The WWGMHB's interpretation of the GMA is to be afforded substantial weight. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Bayfield's argument that the right to subdivide is protected by RCW 82.02.020 must be rejected.

D. The WWGMHB's Decision That The CAIT Did Not Violate Goal 6 Is Supported By Substantial Evidence.

Bayfield challenges the WWGMHB's decision finding the County in compliance with Goal 6 which requires property rights of landowners be protected from arbitrary and discriminatory actions. RCW 36.70A.020(6). While Bayfield attempts to separate out the two prongs of goal six, the WWGMHB interpreted this provision of the GMA as follows.

The Board has previously stated that in order for petitioners to prevail in a challenge based on Goal 6, they must prove that the action taken by the local jurisdiction is both arbitrary and discriminatory; showing only one is insufficient to overcome the presumption of validity that is accorded to local jurisdictions by the GMA.

...

The Board has previously set forth the following definitions for these terms:

Arbitrary: an ill-conceived, unreasoned, or ill-considered action

Discriminatory: to single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation

CP 1100-1101.

Bayfield argues that the WWGMHB's conclusion that the CAIT is not arbitrary and discriminatory is not supported by substantial evidence. Bayfield would like the County to present a scientific journal proving that less homes, people, domestic pets, cars, impervious surface near sensitive and hazardous areas can benefit those areas and the wildlife living there. First, the record is chock full of evidence showing the County's adoption of the CAIT was not arbitrary. The evidence demonstrates the County was appropriately balancing the 13 GMA goals found in RCW 36.70A.020. As the facts point out, Thurston County implemented a comprehensive public participation program that included open houses, public workshops, public hearing and public meetings. AR 560-561; AR 572-574. Approximately 20 months before the CAIT was adopted, more than 800 participants of the public workshops selected unbuildable lands as the top priority for lands to be rezoned. AR 753-754. The County was in the middle of a compliance effort and was being required to provide additional variety of densities in the rural area. The County considered three different variations of the CAIT and held a public hearing for discussion on the three variations. AR 786-789. County staff provided the BOCC with comprehensive summaries of written and oral public

comments from the public hearing. AR 643-698. The County held more than one public briefing/meeting following the hearing to deliberate on the public hearing information. AR 700; AR 702; AR 704. Ultimately, the County balanced the property rights of all property owners when it chose the least restrictive variation of the CAIT. Additionally, it chose an innovative technique that applied to lands that property owners couldn't develop in the first place.

Government action is not arbitrary unless it is completely baseless. *State v. Ford*, 110 Wn.2d 827, 330-31, 755 P.2d 806 (1988). The action of the County in adopting the CAIT was not baseless or unreasoned/ill-considered. One purpose of the CAIT is to provide additional variety of rural densities as required by the GMA. AR 573. Additionally, the public and the County chose the CAIT because it lowered the density of land that contained unbuildable areas that were hazardous and sensitive. AR 753-754. That basis made sense to the 800 workshop participants. AR 753-754. As the WWGMHB pointed out, a lower density has the direct affect of providing additional open space and limits the amount of impervious surfaces surrounding sensitive environments in the County's highest density rural district.⁹ The County's action was not arbitrary.

⁹ The WWGMHB is not expected to leave its common sense behind and hold a hearing with blank minds as Bayfield seems to argue. *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005).

Finding that the County's adoption of the CAIT was not arbitrary should resolve this issue. As provided above, the WWGMHB's interpretation of Goal 6 requires a challenging party to prove the action taken by the local jurisdiction is both arbitrary and discriminatory; showing only one is insufficient to overcome the presumption of validity that is accorded to local jurisdictions by the GMA. AR 1100. However, the WWGMHB did not error in concluding that the CAIT was not discriminatory. The WWGMHB has interpreted the GMA's use of the term discriminatory within Goal 6 as, "to single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation." CP 1101. The WWGMHB properly concluded that the CAIT does not single out a class of person without a rational basis.

Substantial weight is accorded to a board's interpretation of the GMA. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). For over 13 years, the WWGMHB has consistently interpreted the definition of discriminatory actions under Goal 6 of the GMA.

In attempting to define "arbitrary and discriminatory" actions, we note first that the Legislature has used the conjunctive (and) rather than the disjunctive (or) form. This indicates a legislative intent that the protection is to be from actions which are together "arbitrary and

discriminatory". The term arbitrary connotes actions that are ill-conceived, unreasoned, or ill-considered. The term discriminatory involves actions that single out a particular person or class of persons for different treatment without a rational basis upon which to make the segregation.

Achen v. Clark County, WWGMHB Case No. 95-2-0067, pg. 18-19 (Final Decision and Order, Sept. 20, 1995). Bayfield fails to cite to any cases that suggest the WWGMHB's interpretation is incorrect. Accordingly, the WWGMHB's definition must be accorded substantial weight.

Adoption of the CAIT by the County does not single out a particular person or class of persons for different treatment without a rational basis. First, there is no case law supporting the position of Bayfield.¹⁰ Differentiating between property containing unbuildable areas and property without unbuildable areas has never been held to be discrimination. Property owners that buy land containing unbuildable wetlands or other sensitive areas have never been defined as a protected

¹⁰ Bayfield only provides hypotheticals in support of its position. Bayfield's examples ignores that cluster subdivisions must meet design standards which includes maintaining rural character (Thurston County Code (TCC) 20.30A.010, TCC 20.30A.070); the example ignores that the County currently **does not provide a density bonus for cluster subdivisions** pursuant to Thurston County Ordinance 14198 so there is no increased density; the example ignores that the development proposal is required to meet the State Environmental Policy Act (ch. 43.21C RCW). As stated by the Supreme Court of the United States, "[T]his court must deal with the case in hand and not with imaginary ones"... "A statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are'." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1193, 170 L. Ed. 2d 151, 164 (2008). Bayfield's hypotheticals must be rejected as they are not based in reality. Taking a flawed illustration to make a point has no support in the law.

“class of persons.” If this were the case, no zoning law would ever be upheld. All land would have to be zoned with exactly the same regulations, notwithstanding the fact that the GMA requires a variety of rural densities. A zoning technique which is based upon the characteristics of property does not single out a class of persons and, therefore, the WWGMHB did not error in finding the County’s action was not discriminatory.

Finally, the adoption of the CAIT was based on rational and thorough decision making. As stated above, the WWGMHB required the County to provide additional variety of densities as part of a GMA compliance process. It wasn’t the County that created the requirement to provide a variety of densities in the rural area; the GMA contains the mandate.¹¹ When asked which land should be rezoned, the public spoke and chose unbuildable land as their top choice. AR 753-754. Three variations of the CAIT were presented to the public and the BOCC at a public hearing. AR 786-789. The County chose the CAIT with the least impact on property owners as the unbuildable buffer areas are still allowed to be used for density calculations. AR 591. Also, the County only applied the CAIT to land within the highest rural zoning designation,

¹¹ If Bayfield doesn’t believe providing additional variety of rural densities is a rational basis, it needs to take that issue up with the legislature.

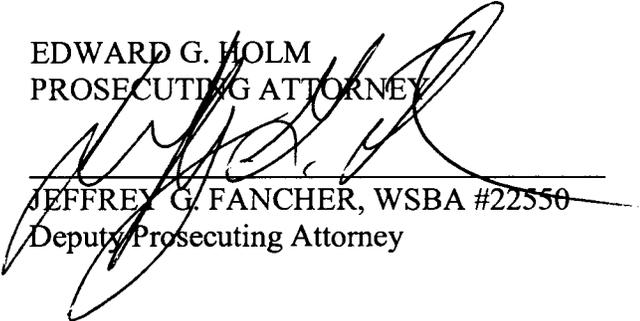
one dwelling unit per five acres. AR 591. It can't be disputed that less density/development near critical areas means less homes, impervious surface, people, cars, runoff, noise, etc., around sensitive/hazardous areas that contain wildlife. While the critical areas ordinance may provide protection for the existing quality of a certain sensitive area, there is nothing in the law that prevents enhancement of critical areas or the protection of wildlife that lives in and around critical areas. These are all rational basis for implementing the CAIT. The WWGMHB's decision that the CAIT was not discriminatory is supported by substantial evidence.

IV. CONCLUSION

For all of the reasons provided above, the WWGMHB order finding the County's adoption of the CAIT must be affirmed as a matter of law.

DATED this 10 day of November, 2009.

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