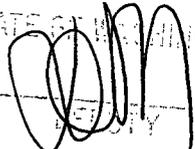


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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROTECT THE PENINSULA'S FUTURE ("PPF"),
Appellant,

WASHINGTON ENVIRONMENTAL COUNCIL ("WEC"),
Respondent,

v.

GROWTH MANAGEMENT HEARINGS BOARD, and
CLALLAM COUNTY,
Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Clallam County argues that the standards in the Growth Management Act for protection of critical areas changed for Clallam County as a result of the legislature's adoption of the Voluntary Stewardship Program ("Program") in 2011. Clallam County argues that pursuant to this 2011 legislation, the County need not:

show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife

as the Court directed it to do in *Clallam County v. Growth Board*, 130 Wn.App. 127, 140, 121 P.3d 764 (2005), *review denied*, 163 Wn.2d 1053 (2008). We later refer to this case as "*Clallam County*."

However, this 2011 legislation has not changed the pre-2011 critical area protection standards that continue to apply to Clallam County. The direction given by the *Clallam County* Court is still applicable for determining if the County's agricultural critical areas exemption complies with the Growth Management Act. Because Clallam County has not even attempted to show that it used best available science to "ameliorate potential harm to the environment and fish and wildlife," the Growth Board errs when it accepts as valid the County's 2001 critical areas exemption that was previously reviewed in *Clallam County*.

The County bases its argument on what it considers to be the "plain meaning" of the 2011 legislation. This legislation, in essence, creates an alternative path for protecting "critical areas within the area where agricultural activities are conducted, while maintaining and improving the long-term viability of agriculture." (RCW 36.70A.700(2); RCW

36.70A.710(1).) However, for “counties that do not choose to participate in this program,” this 2011 legislation continues to rely on the pre-2011 standards considered in *Clallam County*. (*Id.*) It is uncontested that Clallam County did not choose to “participate in this program.”

To make its “plain meaning” argument, the County focuses on the language in RCW 36.70A.735(1)(b). This subsection only applies to counties that after opting-into the Program find that their work program is not approved, fails, or is unfunded. (RCW 35.70A.735.) RCW 36.70A.735(1)(b) then allows similarly-situated counties the option of complying with the Program by adopting Clallam regulations that protect critical areas in areas used for agricultural activities. Clallam County’s “plain meaning” argument is that if counties in the Program can comply with the GMA by adopting such Clallam regulations, the legislature must have determined that the “current” Clallam regulations comply with the GMA.

The County misinterprets the “plain meaning” of RCW 36.70A.735(1)(b). To correctly determine “plain meaning” this Court should consider related statutes. (*Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).) When this Court considers the related statute RCW 36.70A.710(6), it should conclude that the “plain meaning” required Clallam to bring its exemption into compliance with pre-2011 standards by July 22, 2013 before any other county would adopt this exemption. The Growth Board and the County have short-circuited the legislative intent by failing to apply the pre-2011 standards to the Clallam critical areas exemption before dismissing the Growth Board cases.

II. ISSUES BEFORE THE COURT

In the Brief of Appellant at 4-5, six specific major issues are identified. Regarding the first of these major issues, Appellant Protect the Peninsula's Future ("PPF") argues that for counties not in the Program, the 2011 legislation did not change the pre-2011 statutory and caselaw substantive requirements for agricultural critical areas protection.

In response, Clallam County raises an issue. RCW 36.70A.735(1) may allow counties in the Program to comply with the GMA by adopting Clallam agricultural critical areas regulations. Therefore, does the "plain meaning" of the 2011 legislation require the conclusion that the "current" Clallam critical areas exemption complies with the GMA? (Clallam County's Response Brief ("Response") at 3.)

As we discuss in the Introduction (*supra* at 1-2), the "plain meaning" of RCW 36.70A.735(1) must include consideration of RCW 36.70A.710(6) which, under the relevant facts, required Clallam to bring its exemption into compliance with pre-2011 standards before any other county would adopt it.

III. REPLY TO THE COUNTY'S STATEMENT OF THE CASE

A. The GMA Does Contain Sometimes Competing Environmental and Agricultural Goals

In its Response at 1, the County states that the "Growth Management Act ('GMA') requires counties to protect the environment and encourage agricultural activities." In its Response at 4, the County quotes from the goals it relies upon and while there is a GMA goal to "protect the environment," there is no GMA goal to "encourage agricultural activities." The cited agricultural goal, RCW 36.70A.020(8), is to "maintain . . .

agricultural . . . industries” and “encourage conservation of . . . productive agricultural lands.” Yet as the County states, PPF agrees that addressing these two sometimes competing goals has been “tricky” for counties. (*See* Response at 4.)

B. The 2011 Legislation Suggests How The Environment And Agricultural Goals Can Be Harmonized

The 2011 Legislation adopting the Voluntary Stewardship Program (“Program”) suggests how the environmental and agricultural goals can be harmonized when it states an intent of this legislation is:

to protect and enhance critical areas within the area where agricultural activities are conducted, while maintaining and improving the long-term viability of agriculture in the state of Washington and reducing the conversion of farmland to other uses.

(RCW 36.70A.700(2)(a)).

Prior to the adoption of the 2011 legislation, all counties were required to adopt development regulations that protect critical areas (RCW 36.70A.060(2)) and conserve agricultural lands (RCW 36.70A.060(1)). Development regulations to protect critical areas were required to use best available science and give special consideration to anadromous (salmon) fisheries. (RCW 36.70A.172(1).)

The 2011 legislation created an alternative means for protecting critical areas in areas used for agricultural activities:

As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program.

(RCW 36.70A.710(1)(a).) To use this alternative, counties were required to formally opt-into the Program by January, 2012. (RCW 36.70A.710(1)(b).)

Clallam did not opt-in to participate in the Program. (AR 229.)¹ Another intent of the 2011 legislation is to continue to:

Rely upon RCW 36.70A.060 for the protection of critical areas for those counties that do not choose to participate in this program.

(RCW 36.70A.700(2)(c).) There is no intent expressed in the 2011 legislation to change requirements or caselaw regarding what is required to comply with RCW 36.70A.060 for counties that do not opt-into the Program.

C. The 2011 Legislation Required Clallam County To Bring Its Agricultural Critical Areas Exemption Into Compliance with RCW 36.70A.060 Before Any Other County Using The Program Would Adopt Clallam Critical Areas Regulations

In its Statement of the Case, the County argues that:

The statute does not require these four counties [including Clallam] to first revise their regulations [before] adoption of these regulations by another county.

(Response at 10.) However, the 2011 legislation in, RCW 36.70A.710(6), does require Clallam County to bring its critical areas exemption into compliance with RCW 36.70A.060 before any other county using the Program would adopt the Clallam County agricultural critical areas regulations.

¹ This Reply uses the same conventions that were used in the Brief of Appellant to refer to the Administrative Record (“AR”) and to the transcript of the December 3, 2012 Growth Board Motion Hearing (RP1).

IV. ARGUMENT

A. **Clallam County Has Made No Attempt To:
show that by using best available science it
has tailored the exemption to reasonably
ameliorate potential harm to the environment
and fish and wildlife
As Required By Clallam County, 130 Wn. App. At 140**

The *Clallam County* Court, in reliance on pre-2011 legislation, ruled that for Clallam County's agricultural critical areas exemption to be found to comply with RCW 36.70A.060, the County would have to:

show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife

(130 Wn. App. at 140.) The County has made no attempt to make such a showing. In the Brief of Appellant at 13-21, PPF shows that based on pre-2011 caselaw, the County will be unable to show that its "current" agricultural critical areas exemption complies with RCW 36.70A.060.

B. **Clallam County Is Still Required To Show Compliance
With RCW 36.70A.060 And RCW 36.70A.172(1) And
Make The Showing Required By The Clallam County
Court, 130 Wn. App. At 140**

Respondent Clallam County does not argue that its exemption complies with pre-2011 statutes and caselaw. Instead, it argues that the 2011 legislation caused the "current" Clallam agricultural critical areas exemption to be in compliance with the GMA. It bases this argument on its "plain meaning" analysis of RCW 36.70A.735(1). (Response at 13-19.) RCW 36.70A.735(1) is one of the statutes adopted by the 2011 legislation.

Clallam argues that because it was made a "safe harbor" county in RCW 36.70A.735(1), that the legislature necessarily concluded that the "current" Clallam agriculture critical areas exemption complies with the

GMA. (Response at 13-14.) This Court should reject the County's argument, reverse the challenged Growth Board Order on Motion to Dismiss, and remand to the Growth Board affirming the directions given by the *Clallam County* Court, 130 Wn. App. at 140.

1. The Clallam County agricultural critical areas exemption is still required to comply with pre-2011 statutes RCW 36.70A.060 and RCW 36.70A.172(1)

The Clallam County agricultural critical areas exemption is still required to comply with pre-2011 statutes RCW 36.70A.060 and RCW 36.70A.172(1). Prior to 2011, all counties were required to protect critical areas by adopting development regulations under RCW 36.70A.060. RCW 36.70A.172(1) requires such development regulations to use best available science and give special consideration to measures to preserve anadromous [salmon] fisheries. RCW 36.70A.060 also requires all counties to adopt development regulations that conserve agricultural lands. The *Clallam County* Court balanced these two requirements as well as GMA goals, in RCW 36.70A.020(8) and (10), to require the County to:

show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife

(130 Wn. App. at 140.) This remains valid caselaw.

2. The 2011 legislation expresses no intent to change the caselaw that interprets RCW 36.70A.060 including the *Clallam County* caselaw

The 2011 legislation expresses no intent to change the caselaw that interprets RCW 36.70A.060 including the *Clallam County* caselaw. The

2011 legislation creates an alternative to complying with RCW 36.70A.060 that is only applicable to counties that opt-into the Program.

As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program.

(RCW 36.70A.710(1).) Clallam County did not opt-into the Program. (*Supra* at 5.) Nothing in the purpose-intent section of the 2011 legislation supports a conclusion that this legislation intended to change what is required for compliance with RCW 36.70A.060. (*See* RCW 36.70A.700.) To the contrary, an expressed intent of the 2011 legislation is to continue to:

Rely upon RCW 36.70A.060 for the protection of critical areas for those counties that do not choose to participate in this program.

(RCW 36.70A.700(2)(c).) Continued reliance on RCW 36.70A.060 means continued reliance on this pre-2011 statute as it has been interpreted by the Growth Board and Courts.

As discussed earlier, the County has not shown, and cannot show, that its exemption complies with RCW 36.70A.060. (*Supra* at 6.) PPF asks this Court to reject the Clallam County and Growth Board interpretation of the 2011 legislation and instead find that the analysis provided in *Clallam County*, 130 Wn. App. at 140, still applies to the Clallam County agricultural critical areas exemption.

C. **A “Plain Meaning” Interpretation Of RCW 36.70A.735(1) Does Not Support The Growth Board and County Conclusion That Clallam’s “Current” Agricultural Critical Areas Exemption Necessarily Complies With The GMA**

A “plain meaning” interpretation of RCW 36.70A.735(1) does not support the Growth Board and County conclusion that Clallam’s “current” agricultural critical areas exemption complies with the GMA. The Growth Board and County perform a “plain meaning” analysis of the 2011 legislation by only considering the language in RCW 36.70A.735(1). (Response at 13-14; AR 229-33.) As discussed in the Brief of Appellant at 28-29;

[The plain] meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question

citing to *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

1. **RCW 36.70A.710(6) requires Clallam to review its exemption and bring it into compliance with RCW 36.70A.060 before any other county would be able to adopt Clallam agricultural critical areas regulations**

Under the relevant facts, the 2011 legislation provides that Clallam County is required by RCW 36.70A.710(6) to review its existing agricultural critical areas exemption and, if necessary, bring it into compliance with RCW 36.70A.060 before any other county using the Program would be able to adopt it.

RCW 36.70A.710(6)(a) states in relevant part:

Except as otherwise provided in (b) of this subsection, within two years after July 22, 2011, a county must review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities:

(i) If the county has not elected to participate in the program, for all unincorporated areas;

Clallam County did not elect to participate in the Program. (*Supra* at 4.)

As will be demonstrated below, RCW 36.70A.710(6)(b) is not applicable to Clallam County. Therefore, the 2011 legislation gave Clallam County until July 22, 2013 to review and, if necessary, to bring its agricultural critical areas exemption into compliance with RCW 36.70A.060 in consideration of the *Clallam County* Court ruling. In the Brief of Appellant at 21-23, PPF explains that the earliest that another county using the Program would be able to adopt Clallam regulations under RCW 36.70A.735(1)(b) would be after July 15, 2015. This Court can take official notice that no county has yet acted under RCW 36.70A.735(1).

The “plain meaning” of RCW 36.70A.735(1)(b) would allow a similarly-situated county in the Program, if its work program is not approved, fails, or is unfunded, to adopt Clallam regulations to protect critical areas as they specifically apply to agricultural activities. But the 2011 legislation intended any such adoption to occur after the County had reviewed these critical areas regulations under RCW 36.70A.710(6) and revised them, if necessary, to comply with RCW 36.70A.060. Because of the issuance of the challenged Order on Motion to Dismiss (AR 226-236), Clallam has not yet attempted to comply with the requirements of RCW 36.70A.710(6).

2. If Clallam adopts new regulations pursuant to RCW 36.70A.710(6) in order to comply with RCW 36.70A.060, it would be these new regulations that would be adopted under RCW 36.70A.735(1)(b)

If Clallam adopts new regulations pursuant to RCW 36.70A.710(6) in order to comply with RCW 36.70A.060, it would be these new regulations that would be adopted under RCW 36.70A.735(1)(b). (Brief of Appellant at 29-31.) The now-current Clallam agricultural critical areas exemption would no longer be available for adoption under RCW 36.70A.735(1)(b) because it would then be a “former” regulation. The County and PPF agree that only then-current regulations can be adopted by other counties under RCW 36.70A.735(1)(b). (Brief of Appellant at 29.)

3. Under the “plain meaning” standard, the 2011 legislation intended Clallam to review and, if necessary, revise its exemption to comply with RCW 36.70A.060 (and the *Clallam County* ruling) and then other counties that would be able to adopt Clallam regulations using RCW 36.70A.735(1)(b) would be able to adopt these compliant regulations

Under the “plain meaning” standard, the 2011 legislation intended Clallam to review and, if necessary, revise its exemption to comply with RCW 36.70A.060 (and the *Clallam County* ruling) by July 22, 2013. Then other counties that would be able to adopt Clallam regulations using RCW 36.70A.735(1)(b) would be able to adopt these compliant regulations.

The legislature, presumed to be aware of the *Clallam Court* ruling, did not know if the “current” Clallam exemption was in compliance with RCW 36.70A.060. If, as the County and Growth Board contend, the legislature intended the language in RCW 36.70A.735(1)(b) to mean that the “current” Clallam exemption necessarily complied with the GMA, then the

legislature would have exempted Clallam from the review required by RCW 36.70A.710(6). It did not exempt Clallam from that review. The legislature should be presumed not to require Clallam to do a useless act. (*Guinness v. State*, 40 Wn.2d 677, 689, 246 P.2d 433 (1952) (“the courts will presume the legislature does not indulge in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment”).) A review would be a useless act if the legislature knew that the Clallam exemption complied with RCW 36.70A.060.

Therefore, this Court should find that the legislature did not conclude that the “current” agricultural critical areas regulations of Clallam County were necessarily already in compliance with the GMA. (Brief of Appellant at 28-29.)

The Growth Board erred by dismissing the Growth Board cases without holding the remand hearing as directed by the *Clallam County* Court.

4. **The phrase “if necessary, revise development regulations adopted under this chapter to protect critical areas” in RCW 36.70A.710(6)(a) requires such regulations to be revised if the regulations do not “protect critical areas” as required by RCW 36.70A.060**

RCW 36.70A.710(6)(a) requires that Clallam County:

must review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities.

The meaning of the phrase “if necessary, revise development regulations adopted under this chapter to protect critical areas” is contested. The Brief

of Appellant at 26 states:

the intent of RCW 36.70A.710(6) is to require Clallam County, and all other counties that did not opt-into the [Program], to bring their Agricultural Critical Areas Regulations into compliance with RCW 36.70A.060 and RCW 36.70A.172(1) by an established deadline.

In its Response at 22, the County states:

[RCW 36.70A.710(6)] requires Clallam County to revise its regulations only if it determines that such revision is **necessary**. Clallam County has the discretion to revise its regulations or not.

PPF requests that this Court clarify that RCW36.70A.710(6) in the 2011 legislation requires Clallam County to revise its agricultural critical areas exemption if it cannot show that the existing exemption complies with RCW 36.70A.060. This showing should rely on the *Clallam County* Court ruling and be independent of RCW 36.70A.735.

While Clallam County retains discretion to revise its regulations, that discretion is limited to being consistent with the goals and requirements of the Growth Management Act. (RCW 36.70A.3201.) Revisions that are necessary for “development regulations adopted under this chapter to protect critical areas” are revisions that are necessary to achieve compliance with RCW 36.70A.060.

RCW 36.70A.700(2)(c) states an intent to “Rely upon RCW 36.70A.060 for the protection of critical areas” for counties like Clallam that are not in the Program. The *Clallam County* Court specified what Clallam needed to show for compliance with RCW 36.70A.060. RCW 36.70A.710(6) should be interpreted to require Clallam to review its exemption and revise it if necessary to show compliance with RCW

36.70A.060 in consideration of the *Clallam County* ruling. The Growth Board erroneously interpreted or applied the law when it dismissed the Growth Board cases before Clallam showed compliance with RCW 36.70A.060 in consideration of the *Clallam County* remand.

The term “necessary to protect” in RCW 36.70A.110(4) was analyzed in *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 11-14, 57 P.3d 1156 (2002). The term “necessary” was given the dictionary definition which includes “needed to bring about a certain effect or result.” (*Id.* at 12.) This more restrictive definition was found appropriate because it was consistent with legislative intent to protect rural areas. (*Id.* at 12-13.) Similarly in the instant case, this more restrictive definition is appropriate because it is consistent with legislative intent to protect the environment. (RCW 36.70A.020(10).) It is also consistent with the legislative requirement for Clallam County to use RCW 36.70A.060 to protect critical areas by development regulations.

The Growth Board erroneously interpreted and applied the law when it did not consider RCW 36.70A.710(6) when it interpreted RCW 36.70A.735(1) to conclude that the “current” Clallam exemption necessarily complied with the GMA.

5. RCW 36.70A.710(6)(b) does not extend the time beyond July 22, 2013 for Clallam to review its exemption and bring it into compliance with RCW 36.70A.060

RCW 36.70A.710(6)(b) potentially extends time for a county not in the Program to review its agricultural critical areas regulations and bring

them into compliance with RCW 36.70A.060. This statute does not extend time for Clallam County. RCW 36.70A.710(6)(b) states:

A county that between July 1, 2003, and June 30, 2007, in accordance with RCW 36.70A.130 completed the review of its development regulations as required by RCW 36.70A.130 to protect critical areas as they specifically apply to agricultural activities is not required to review and revise its development regulations until required by RCW 36.70A.130.

Clallam County completed review of its development regulations pursuant to RCW 36.70A.130 when it adopted Resolution No. 77, 2007 on August 28, 2007. (AR 207-09.) August 28, 2007 is not between July 1, 2003 and June 30, 2007 so RCW 36.70A.710(6)(b) did not extend time for Clallam County to bring its agricultural critical areas regulations into compliance with RCW 36.70A.060.

- a) PPF requests that this Court resolve the error that occurred when the Growth Board failed to take official notice of Resolution No. 77, 2007 for the purpose of demonstrating RCW 36.70A.710(6)(b) does not apply to Clallam County

PPF requests that this Court resolve the error that occurred when the Growth Board failed to take official notice of Resolution No. 77, 2007 for the purpose of demonstrating RCW 36.70A.710(6)(b) does not apply to Clallam County. (Brief of Appellant at 4, Error No. 7.) PPF has requested that this Court recognize Resolution No. 77, 2007 for this purpose. (Brief of Appellant at 37.) RCW 34.05.558 states:

Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.

First, this Court can take judicial notice that Clallam County Resolution No. 77, 2007 (AR 207-09) updating development regulations pursuant to RCW 36.70A.130, was adopted on August 28, 2007 such that time was not extended by RCW 36.70A.710(6)(b) because this is not a disputed issue of fact and therefore is not subject to the limitations of RCW 34.05.558. The County agrees with the fact that RCW 36.70A.710(6) required Clallam to “review and, if necessary revise” by July 22, 2013 without a time extension. (Response at 22.) Second, the “agency record for judicial review as defined by this chapter” is defined in RCW 34.05.559(1) which states:

the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action. The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue subject to the provisions of this section.

Appendix A-1 to A-3 hereto provides copies of the Certification of the Record and Index to the Certified Record both transmitted to the superior court by the Growth Board. Resolution No. 77, 2007 is at pages AR 207-09 in the certified record and therefore is part of the agency record for judicial review that may be considered by the Court to resolve disputed facts.

On October 22, 2012, PPF submitted a motion to the Growth Board to supplement the 2001 record on the Clallam County agricultural critical areas exemption with documents that included Resolution No. 77, 2007 as proposed Exhibit 1039. (AR 99-210; *see particularly* AR 118-21 and AR 207-09.) The presiding officer denied the PPF request to supplement the

record with respect to Exhibit 1039. (AR 211-16; see particularly AR 215.) At the telephonic motion hearing, PPF made an oral request for the first time for the Board to take official notice of law of Resolution No. 77, 2007 pursuant to WAC 242-03-630(4) which allows the Board to take official notice of county resolutions. (RP1 at 7-11.) The presiding officer stated “the decision of whether to take notice will be addressed in our order.” (RP1 at 11.)

The challenged Order on Motion to Dismiss addresses some of PPF’s requests made at the motion hearing but fails to address PPF’s request for the Board to take official notice of law of Resolution No. 77, 2007. (AR 229.) If, after this explanation, this Court does not recognize Resolution No. 77, 2007 for the purpose of demonstrating RCW 36.70A.710(6)(b) does not extend time to comply with RCW 36.70A.710(6)(a) for Clallam County, then PPF requests that this Court take actions authorized by RCW 34.05.562(1)(b) and, if necessary, RCW 34.05.562(2)(c) to allow Resolution No. 77, 2007 to be considered by this Court.

D. If This Court Cannot Resolve This Matter On A “Plain Meaning” Analysis, It Should Consider The Fact That The Board’s Website Erroneously Reported That The Relevant Growth Board Cases Were Closed When The 2011 Legislation Was Being Drafted

If this Court cannot resolve this matter on a “plain meaning” analysis, it should consider the fact that the Board’s website erroneously reported that the relevant Growth Board cases were closed when the 2011 legislation was being drafted. The Brief of Appellant at 38-39 describes a procedural error made by the Board when it failed to rule on a PPF request for the Board to take official notice of screen shots from the Board’s business records. This

is similar to the Growth Board's failure to rule on the PPF request for official notice of Resolution No. 77, 2007. The Response at 14-15 argues that because the statute's meaning is plain and unambiguous, it is not appropriate for the Court to consider legislative history and extrinsic evidence. PPF agrees. However, if this Court finds the statute ambiguous, it should consider the screen shots from the Board's business records at AR 146-47. For the same reasons presented *supra* at 15-17, this Court can consider these screen shots because they present undisputed facts and are in the agency record for judicial review.

E. PPF Requests That This Court Consider RCW 36.70A.710(6) And Other Statutes To Get The Plain Meaning Of RCW 36.70A.735(1)

PPF requests that this Court consider RCW 36.70A.710(6) and other statutes to get the plain meaning of RCW 36.70A.735(1). The Response at 16-17 claims that PPF advocates for additional words to be read into the statute. That is not true.

RCW 36.70A.735(1)(b) allows certain counties to adopt certain Clallam regulations after certain conditions have been met. The parties have agreed that the Clallam regulations that can be adopted are the then-current regulations. (Brief of Appellate at 29.) RCW 36.70A.735(1)(b) allows certain counties to adopt these "then-current" regulations whether or not they actually comply with RCW 36.70A.060.

Of course, it is not possible for the 2011 legislature to know if future (then-current) Clallam regulations will comply with RCW 36.70A.060. But when new regulations are adopted by Clallam County, those regulations will be subject to a petition for review under RCW 36.70A.290 that can result in

any non-compliant regulations being brought into compliance with RCW 36.70A.060.

Just as the 2011 legislature cannot know if future (then-current) Clallam regulations will actually comply with RCW 36.70A.060, the 2011 legislature did not know if the existing Clallam regulations were in compliance with RCW 36.70A.060. That is why the 2011 legislation required Clallam to “review and, if necessary, revise” its existing exemption by July 22, 2013 to come into compliance with RCW 36.70A.060. (RCW 36.70A.710(6); *supra* at 9-14.) Any necessary revisions were intended to occur before any other county could adopt the Clallam regulations pursuant to RCW 36.70A.735(1)(b). (*Id.*) PPF did not seek to read additional words into RCW 36.70A.735(1)(b), but rather to have this Court consider all that legislature has said in the GMA including in the 2011 legislation in order to discern the legislative intent of the legislation. (*Supra* at 9.)

F. PPF’s Interpretation Of The Plain Meaning Of RCW 36.70A.735(1) Does Not Lead To An Absurd Result

PPF’s interpretation of the of the plain meaning of RCW 36.70A.735(1) does not lead to an absurd result.

1. Consider the Growth Board’s example of an absurd result.

The County and the Growth Board describe a scenario where they begin with the assumption that the Clallam exemption does not comply with RCW 36.70A.060. They argue that in the future a county next door would be able to comply with the GMA by adopting the Clallam exemption using RCW 36.70A.735(1)(b). But Clallam County using the same exemption

would not be in compliance. They argue that this is an absurd result. (Response at 18; AR 232; RP1 at 39.)

When this scenario was presented at the Motion Hearing, PPF's attorney answered, "Well, it is." (Response at 18; RP1 at 39.) The County and Growth Board conclude that it is the assumption that creates the absurd result and therefore the assumption must be wrong.

PPF's attorney went on to explain that this scenario was absurd but not because the assumption was wrong. Rather it was absurd because it ignored that RCW 36.70A.710(6) required the County to bring its exemption into compliance with RCW 36.70A.060 by July, 2013. (RP1 at 39-41.) PPF's attorney said, "Well, no one can adopt the Clallam County regulations until after mid-2015." (RP1 at 40.) With consideration of the requirements of RCW 36.70A.710(6), Clallam County should demonstrate compliance with RCW 36.70A.060 before mid-2015 and after mid-2015, another county can adopt Clallam's compliant regulations without an absurd result. The County and PPF agree that the only regulations that could be adopted by the other county would be Clallam's then-current regulations. (*Supra* at 11.)

2. PPF's interpretation of the plain meaning of RCW 36.70A.735(1)(b) does not create an internal conflict in that statute

The Response at 16-17 argues that the word "or" between subsections (i) and (ii) in RCW 36.70A.735(1)(b) must mean that the inclusion of Clallam regulations in subsection (i) means that Clallam regulations cannot be in subsection (ii) which includes regulations that:

have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities.

(RCW 36.70A.735(1)(b)(ii).) To determine the meaning of the word “or” we consult a dictionary. (*Swinomish Indian Tribal Community v. Growth Board*, 161 Wn.2d 415, 428, 166 P.3d 1198 (2007).) The first two definitions of “or” are:

1. (used to connect words, phrases, or clauses representing alternatives).
2. (used to connect alternative terms for the same thing).

(Webster’s Encyclopedic Unabridged Dictionary of the English Language, Thunder Bay Press (2001).) Therefore the word “or” can separate alternatives or alternative terms for the same thing. Therefore there is no internal inconsistency created by having Clallam regulations fit under both RCW 36.70A.735(1)(b)(i) and (ii).

G. Compliance With RCW 36.70A.060 Or Compliance with the Voluntary Stewardship Program Are Alternatives To Protect Critical Areas But These Alternatives Do Not Comply With The Same Standards

Compliance with RCW 36.70A.060 or compliance with the Voluntary Stewardship Program are alternatives to protect critical areas. (RCW 36.70A.710(1)(a).) Compliance with the GMA can be achieved with either alternative but the alternatives are not judged against the same standards. The County argues that a county may be “bumped” out of the Program and back into compliance with RCW 36.70A.060 by adopting Clallam regulations. (Response at 21-22.) But the fallback provisions in RCW 36.70A.735(1) may only be used by counties in the Program where their work plan is not approved, fails or is unfunded. (RCW 36.70A.735.) These counties remain

in the Program (and are not “bumped” out) when they apply the alternatives in subsections (a), (b), (c), or (d) in RCW 36.70A.735(1).

With the alternatives in subsection (a), (b), and (c), a county does not have to adopt development regulations that it shows are in compliance with RCW 36.70A.060. (*See* Brief of Appellant at 27.) In alternative (a) a county adopts a work plan and need not adopt any development regulations at all. (RCW 36.70A.735(1)(a).) In alternative (b) a county just adopts development regulations of certain other counties (which may include Clallam) without having to make a showing itself that the other county’s regulations actually comply with RCW 36.70A.060. (RCW 36.70A.735(1)(b).) In alternative (c) a county adopts regulations approved by the Department of Commerce which may or may not be shown to comply with RCW 36.70A.060. (RCW 36.70A.735(1)(c).) It appears that the intent of the legislature in RCW 36.70A.735(1)(d) is for the development regulations to show compliance with RCW 36.70A.060.

It is true as the county states, that compliance with any alternative is compliance with the GMA. (Response at 22.) However, a county such as Clallam that is not in the Program may not show compliance with RCW 36.70A.060 by showing compliance with a provision that only applies to counties in the Program. RCW 36.70A.710(6) sets a deadline for counties not in the Program to assure that their agricultural critical areas regulations comply with RCW 36.70A.060.

H. If PPF Prevails, It Should Be Awarded Statutory Attorney Fees and Costs.

If PPF prevails, it should be awarded statutory attorney fees and costs pursuant to RCW 4.84.350 and/or pursuant to RCW 4.84.010 and RCW 4.84.080.

V. CONCLUSION

PPF incorporates herein by reference the Conclusion section of the Brief of Appellant at 46-48. This Court should find that the plain meaning of the 2011 legislation in consideration of the ruling in *Clallam County v. Growth Board* (“*Clallam County*”), 130 Wn.App. 127, 140, 121 P.3d 764 (2005), *review denied*, 163 Wn.2d 1053 (2008) requires Clallam to:

show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife

(130 Wn. App. at 140) in order to show compliance with RCW 36.70A.060.

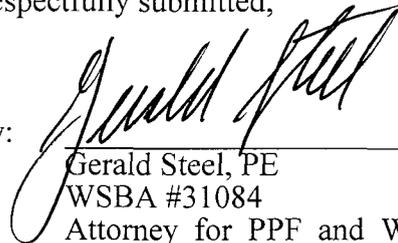
Because the County has not yet made this showing, PPF requests that this Court reverse the Growth Board 2012 Order and the Superior Court 2013 Order, reinstate Growth Board Case Numbers 00-2-0008 and 01-2-0020, reinstate the noncompliance and invalidity on CCC 27.12.035(7) that existed before the Growth Board 2012 Order was issued and direct the Growth Board to expeditiously set a new compliance hearing to bring the County’s regulations that protect critical areas in areas of preexisting and ongoing agricultural into compliance with RCW 36.70A.060 and RCW

36.70A.172(1).

Dated this 26th day of April, 2014.

Respectfully submitted,

By:



Gerald Steel, PE
WSBA #31084
Attorney for PPF and WEC

DECLARATION OF SERVICE

I, GERALD STEEL, under penalty of perjury under the laws of the State of Washington declare as follows: I am the attorney for Appellant. On April 25, 2014, I caused:

1. Reply Brief of Appellant

to be served by email and first class mail postage prepaid to:

Counsel for Clallam County:

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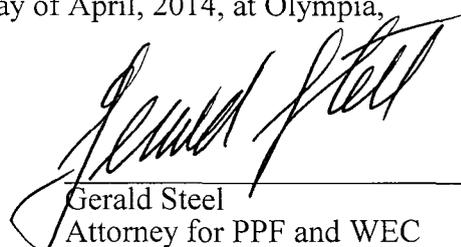
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Dated this 25th day of April, 2014, at Olympia,
Washington.



Gerald Steel
Attorney for PPF and WEC

APPENDIX INDEX

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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
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4 PROTECT THE PENINSULA'S FUTURE,
5 ET AL.

6 Petitioners,

7
8 v.

9
10 CLALLAM COUNTY

11 Respondent.
12

Court Case No. 13-2-00009-1

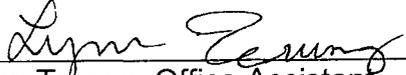
CERTIFICATION OF THE RECORD

(GMHB Case Nos. 00-2-0008 and 01-2-0020)

13 I, Lynn Truong, under penalty of perjury under the laws of the State of Washington, declare
14 as follows:
15

16 I am the Office Assistant to the Growth Management Hearings Board. On the date indicated
17 below, the Certified Record in the above-captioned case was mailed to the Jefferson County
18 Superior Court Clerk's Office. I certify that said record represents a true and correct copy of
19 selected portions of the record maintained at the office of the Growth Management Hearings
20 Board, as stipulated by the parties. The record consists of a total of 236 bates numbered
21 pages. Additionally, I am transmitting the original transcript of the December 3, 2012
22 Hearing on Clallam County's Motion to Dismiss.
23

24
25 DATED this 11th day of March, 2013.

26 
27 _____
Lynn Truong, Office Assistant
28
29
30
31
32

A-1

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY**

PROTECT THE PENINSULA'S FUTURE, ET AL.
Petitioners,

v.

CLALLAM COUNTY

Respondents.

Jefferson County Superior Court
No. 13-2-00009-1

(Case Nos. 00-2-0008
and 01-2-0020)

**INDEX TO THE CERTIFIED
RECORD**

Date	Title	Exhibits/Attachments	By	Bates Nos.
7/24/12	Motion To Set New Compliance Date Along With Briefing And Hearing Schedule; DOS		Gerald Steel	000001-000007
8/6/12	Cover Letter dated August 3, 2012; Notice Of Appearance; COS		George Kresovich	000008-000010
8/10/12	Order On Motion To Set New Compliance Date and Briefing Schedule; DOS		William Roehl	000011-000012
8/27/12	Letter dated August 27, 2012 regarding status conference		William Roehl	000013
9/25/12	Cover Letter Dated Sept 24, 2012; Clallam County's Motion to Dismiss and to Rescind the Order of Invalidity; COS		George A. Kresovich	000014-000089
9/25/12	Email from George Kresovich and email to counsel from Vanessa Smith re: status conference		George Kresovich; Vanessa Smith	000090
10/2/12	Order Setting Briefing Schedule on Clallam County's Motion to Dismiss/Rescind Order of Invalidity; DOS		William Roehl	000091-000092
10/3/12	Motion to Continue Hearing; COS		George Kresovich	000093-000094
10/9/12	Response to Respondent's Motion to Continue Hearing; DOS		Gerald Steel	000095-000096
10/12/12	Order Amending Hearing Schedule; DOS		William Roehl	000097-000098

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Date	Title	Exhibits/Attachments	By	Bates Nos
10/22/12	PPF Response to the County Motion to Lift Invalidity and Dismiss Plus Motion to Supplement in Appendix 3 Hereto	<i>See List of Exhibits, Page 20</i>	Gerald Steel	000099-000210
11/13/12	Order on Motion to Supplement; DOS		William Roehl	000211-000216
11/15/12	Motion to Strike Declarations; COS		George Kresovich	000217-000220
11/26/12	Response to Respondent's Motion to Strike Declarations and Request for Official Notice; DOS		Gerald Steel	000221-000223
11/29/12	Agenda for Hearing on Motion to Dismiss; DOS		William Roehl	000224-000225
12/13/12	Order on Motion to Dismiss; DOS		William Roehl; Nina Carter; Chuck Mosher	000226-000236

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