

FILED
Court of Appeals
Division II
State of Washington
1/4/2019 3:16 PM

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

NO. 51903-8-II

WHIDBEY ENVIRONMENTAL ACTION NETWORK,

Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD; ISLAND COUNTY,

Respondents.

REPLY BRIEF OF APPELLANTS

Bryan Telegin, WSBA No. 46686
BRICKLIN & NEWMAN, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
(206) 264-8600
Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT IN REPLY	1
A. The County Fails to Show that Ordinance C-71-16 Will Protect the Naas Preserve	1
1. The plain language of ICC 17.02B.430.E does not protect all functions and values	3
2. The county still fails to explain its rejection of a minimum 100-foot buffer for the Naas Preserve.....	7
B. The County Failed to Show that Ordinance C-71-16 Will Protect Prairies, Oak Woodlands, and Herbaceous Balds.....	10
1. The county still fails to justify its refusal to adopt definitional criteria	12
2. The county fails to justify its exclusion of smaller examples of prairie habitat, or the Board’s affirmance of that decision	15
C. The County Fails to Rebut Our Arguments Concerning ETS Plant Species and the Board’s Erroneous Orders on that Issue.	19
II. CONCLUSION.....	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Ferry County v. Growth Mgmt. Hearings Board.</i> , 184 Wn. App. 685, 339 P.3d 478 (2014)	25
<i>Probst v. State Department of Retirement Systems</i> , 167 Wn. App. 180, 271 P.3d 966 (2012)	24
<i>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council</i> , 165 Wn.2d 275, 197 P.3d 1153 (2008)	3, 4
<i>Rios v. Washington Department of Labor and Industries</i> , 145 Wn.2d 483, 39 P.3d 961 (2002)	24
<i>Rivard v. State</i> , 168 Wn.2d 775, 231 P.3d 186 (2010)	4
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 648 P.2d 435 (1982)	6
<i>State v. Mullen Trucking 2005 Ltd.</i> , --- Wn. App. ---, 428 P.3d 401 (2018)	3
<i>State ex rel. Welks v. Town of Tumwater</i> , 66 Wn.2d 33, 400 P.2d 789 (1965)	6
<i>Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board</i> , 161 Wn.2d 415, 166 P.3d 1198 (2007)	9
<i>Whidbey Environmental Action Network v. Island County</i> , 122 Wn. App. 156, 93 P.3d 885 (2004)	1
<i>Yakima County v. East Washington Growth Management Hearings Bd.</i> , 168 Wn. App. 680, 279 P.3d 434 (2012)	1, 9

<u>State Statutes and Regulations</u>	<u>Page</u>
RCW 36.70A.060.....	15
RCW 36.70A.060(2).....	11
RCW 36.70A.172.....	2, 15, 17
WAC 365-190-030(6)(a)	19
WAC 365-190-040(4)(a)	22
WAC 365-190-040(5)(a)(ii).....	13
WAC 365-190-040(5)(b)	17
WAC 365-190-080(4).....	16, 17
WAC 365-190-130(1).....	17
WAC 365-190-130(2)(a)	24
WAC 365-190-130(2)(b)	24
WAC 365-190-130(4)(b)	14, 22
WAC 365-195-900(2).....	2
WAC 365-195-920(1).....	22
WAC 365-196-830(4).....	6, 12
WAC 365-196-830(6).....	16

<u>Island County Regulations</u>	<u>Page</u>
ICC 11.02.030	11
ICC 17.02B.040.A	4
ICC 17.02B.050.B	4
ICC 17.02B.060	23
ICC 17.02B.200.C	14
ICC 17.02B.230.C	17, 18
ICC 17.02B.240.C	11
ICC 17.02B.400	5
ICC 17.02B.400.A.1	5
ICC 17.02B.430.D	3, 5
ICC 17.02B.430.E.....	passim
ICC 17.02B.430.F.....	5, 6

<u>Other Authorities</u>	<u>Page</u>
<i>Loon Lake Prop. Owners Ass'n v. Dep't of Ecology</i> , Eastern GMHB Case No. 03-1-0006c at 5 (Feb. 6, 2004, Order on Motions from Case Nos. 00-1-0016, 03-1-0003, and 03-1-0006)	5
<i>See Kent C.A.R.E.S. III</i> , Central GMHB Case No. 03-3-0012 at 14 (Dec. 1, 2003, Final Decision and Order)	5

I. ARGUMENT IN REPLY

A. The County Fails to Show that Ordinance C-71-16 Will Protect the Naas Preserve.

In our opening brief, we argued that the Growth Board erred in upholding Island County’s revised buffer provision for the county’s only natural area preserve — the Naas Preserve or “NAP” — at ICC 17.02B.430.E. *See Op. Br.* at 21–28.¹ Our argument had two parts. First, the revised language at ICC 17.02B.430.E forbids the imposition of a protective buffer adjacent to the Naas Preserve except when necessary for “species preservation,” a limited goal reflecting only one of the preserve’s many exceptional functions and values *See id.* at 10–11.² Limiting buffers to one isolated value is a patent violation of the GMA, which mandates protection of *all* critical area functions and values, not just some of them.³

¹ The revised text at ICC 17.02B.430.E is quoted in full at page 15 of our opening brief.

² *See also* AR 2394 (discussing the preserve’s other values, including for scientific research, teaching, scenic beauty, and as a living museum of our natural heritage).

³ *See Whidbey Envtl. Action Network v. Island County*, 122 Wn. App. 156, 174–75, 93 P.3d 885 (2004) (“[T]he GMA requires that the regulations for critical areas must protect the ‘functions and values’ of those designated areas. This means *all* functions and values.”) (emphasis added; internal footnote omitted); *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 692, 279 P.3d 434 (2012) (“The GMA requires regulations for critical areas to protect *all* functions and values of the designated areas, not just some of the values”) (emphasis added); AR 2393 (“the protection goal [under the GMA] is broader than simply species protection, including preservation of areas of geological, natural historical, or similar features of scientific or educational value, and as places of natural historic and natural interest and scenic beauty, and as living museums of the original heritage of the state.”).

Island County agrees that the Naas Preserve has other important functions and values (beyond species preservation), and that the GMA requires their protection. *See* Resp. Br. at 18. But the county still fails to explain how ICC 17.02B.430.E will actually achieve that objective, or justify the Board’s ruling upholding that provision. Nor could it. The plain language of ICC 17.02B.430.E is clear: “Buffers *shall not* be required adjacent to [Natural Area Preserves] as long as those areas encompass the land required for *species preservation*.” AR 2625 (emphasis added). Under the county’s rule, buffers are not allowed so long as one value (species preservation) is achieved, even if others are threatened or damaged.

Second, we argued that the Board erred in upholding Island County’s decision not to impose a minimum buffer of 100 feet on the southern side of the Naas Preserve, as recommended by the county’s own report on best available science (“BAS”). *See* Op. Br. at 24–28. *See also* AR 4200 (observing that “100 feet was the recommended minimum of a 100–600 foot range”). Under the GMA, counties must comply with BAS unless they provide a “reasoned justification” for their departure. *Yakima County, supra*, 168 Wn. App. at 692; RCW 36.70A.172; WAC 365-195-900(2). The county still has not provided a reasoned justification for rejecting a minimum buffer, or for upholding the Board’s ruling.

1. The plain language of ICC 17.02B.430.E does not protect all functions and values.

On the first part of our argument — that ICC 17.02B.040.E restricts buffers to the singular goal of species preservation — the county obfuscates the issue by pointing to other, more general language at ICC 17.02B.430.D. That provision provides that buffers shall generally be established adjacent to fish and wildlife habitat conservation areas, an umbrella term for many different types of critical areas, “as necessary to protect the ecological integrity, structure and functions of the resource from development induced impacts.” ICC 17.02B.430.D. Citing this, the county argues it can require a buffer for the Naas Preserve to protect any function or value, not just species preservation as stated in ICC 17.02B.430.E, and that ICC 17.02B.430.E “does not create an exception.” Resp. Br. at 17.

But the plain language of ICC 17.02B.430.E does create an exception, as stated in the first sentence of that provision: Buffers “shall not be required” except for “species preservation.” AR 2625. Unlike the more general, default language at ICC 17.02B.430.D, these words deal specifically with natural area preserves. Thus, they control. *See, e.g., State v. Mullen Trucking 2005 Ltd.*, --- Wn. App. ---, 428 P.3d 401, 406 (2018) (“[W]here one statute is specific and the other is general, the specific statute controls regardless of when it was enacted”) (citing *Residents Opposed to*

Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008)).⁴

Next, the county chides us that our reading of the first sentence of ICC 17.02B.430.E “renders the remainder inoperative, and the entirety absurd.” Resp. Br. at 17. Yet, we offered a comprehensive interpretation of that provision. *See* Op. Br. at 22–23. In contrast, while the county claims to be “harmonizing” the language of ICC 17.02b.430.E, it does not even attempt to explain what is meant by the first sentence of that rule: Buffers “shall not be required” except for “species preservation.” AR 2625. The county may not be able to explain this sentence, in light of its litigation position, but the obvious answer is it means what it says. *See, e.g., Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (courts must “give effect to all language, so as to render no portion meaningless or superfluous.”).

Finally, the county attempts to salvage the Board’s order upholding ICC 17.02B.430.E by citing the biological site assessment (“BSA”)

⁴ Nor do the interpretive principles at ICC 17.02B.040.A and .050.B change this fact, despite the county’s citing them for the opposite proposition. *See* Resp. Br. at 18 n.24. Those sections deal with conflicts between Chapter 17.02B of the Island County Code, in its entirety, and other chapters outside the critical areas rules. *See* ICC 17.02B.050.B (“If any provision of *this chapter* conflicts with a provision of *another chapter* of the Island County Code, or the Island County Comprehensive Plan, the more restrictive or protective provision shall apply”) (emphasis added); ICC 17.02B.040.A (same). For conflicts between individual elements of Chapter 17.02B — as in this case — the standard rule applies. Specific provisions control over more general ones.

requirement at ICC 17.02B.400, and the habitat management plan (“HMP”) requirement at ICC 17.02B.430.F, as alternative grounds for protecting other values. *See* Resp. Br. at 19. But they do not solve the problem.

First, like the generic language at ICC 17.02B.430.D, the BSA and HMP requirements are general, and do not trump the prohibition in ICC 17.02B.430.E that buffers “shall not be required” except for species preservation. Plain language still controls.

Second, the BSA requirement may be waived whenever the Planning Director determines — without *any* formal analysis of a project’s potential effects — that “the proposed development would result in only *minor* impacts.” ICC 17.02B.400.A.1 (emphasis added). Yet, the county has no standards for determining when impacts will or will not be “minor” — a term that is left conspicuously undefined in the Island County Code.

The Growth Board has held that “vague unenforceable ‘ad hoc’ standards” are insufficient under the GMA.⁵ This includes ad hoc determinations about what is “minor” and what is “major.”⁶ Likewise, our Supreme Court has held that “[a]n ordinance must be clear, precise, definite

⁵ *See Loon Lake Prop. Owners Ass’n v. Dep’t of Ecology*, Eastern GMHB Case No. 03-1-0006c at 5 (Feb. 6, 2004, Order on Motions from Case Nos. 00-1-0016, 03-1-0003, and 03-1-0006) (found at CP 467–73).

⁶ *See Kent C.A.R.E.S. III*, Central GMHB Case No. 03-3-0012 at 14 (Dec. 1, 2003, Final Decision and Order) (found in the record at CP 475–93; failure to provide “clean and unambiguous direction” about the difference between “minor” and “major” permit modifications does not comply with GMA).

and certain in its terms, and an ordinance vague to the extent that its precise meaning cannot be ascertained, is invalid.” *State ex rel. Welks v. Town of Tumwater*, 66 Wn.2d 33, 35, 400 P.2d 789 (1965). Here, “minor” may mean “lesser” or “inferior,” two other vague and malleable terms, but it is not the same as “de minimis” or “negligible,” as the county implies⁷ — and certainly not clear enough to ensure consistency with the GMA’s “no net loss” standard at WAC 365-196-830(4). Even if the BSA requirement could be used to shore up the deficiencies of ICC 17.02B.430.E, the exception is too vague for any real guarantee of protection.

Third, the county admits the HMP requirement — the vehicle for deciding whether a buffer is necessary — is entirely discretionary. *See* Resp. Br. at 19. *See also* ICC 17.02B.430.F (HMP “may” be required, not must). It too does not trump the clear prohibition at ICC 17.02B.430.E that buffers “shall not be required” except for species preservation.⁸

The county is right that we are not “advocates” for the view that species preservation is the only value worth protecting. *See* Resp. Br. at 18. But that is the rule the county adopted. The Board’s 2016 Order should be

⁷ *See* Merriam-Webster’s online dictionary at <<https://www.merriam-webster.com/dictionary/minor>>.

⁸ *See, e.g., Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982) (“Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.”).

reversed and the county should be directed to protect *all* functions and values at the Naas Preserve. The fix could be as simple as deleting the first sentence of ICC 17.02B.430.E, which the county cannot explain anyway.

2. The county still fails to explain its rejection of a minimum 100-foot buffer for the Naas Preserve.

On the second part of our argument — that the county should have adopted a minimum 100-foot buffer to the south of the preserve — the county does little more than attack strawman arguments we never made. These include the county’s false assertions that we want a “one-size-fits-all” buffer that cannot be enlarged on a case-by-case basis (*see* Resp. Br. at 22, 23), and that we want a buffer around the entirety of the Naas Preserve, even though lands to the east, west, and north are already developed (*id.* at 23). The county also suggests that the only purpose for a buffer is to protect the two golden paintbrush populations at the preserve (*id.* at 23), even though it is the rare, old-growth forest at the southern end of the preserve that needs a buffer to protect *it* from strong southerly winds. *See* AR 2754; 3508.

Contrary to the county’s mischaracterizations, WEAN’s argument has consistently been that the county should impose a *minimum* buffer of 100 feet along the *southern* edge of the preserve, to protect the *rare forest ecosystem* (not the golden paintbrush populations), but that the minimum buffer width may still be *enlarged* on a case-by-case basis. This can be seen

clearly in WEAN's objection to the county's compliance report, quoted below:

The County's consultants identified forest clearing on the southern boundary of the NAP as a threat due to increased wind exposure potentially causing windthrow within the NAP. WEAN, County staff, and findings within the adopted ordinance also note this function and the potential impact from forest clearing on that protective function. The County's consultants noted that forested buffers of at least 100 feet are necessary, a minimum distance roughly consistent with that recommended in a large interagency review provided by WEAN. While larger buffers may be needed, there is no science in the record supporting windthrow buffers of less than 100 feet. Yet the County has not established *any* minimum buffers at all.

. . . By failing to require at least this minimum buffer to protect the forested portion of the NAP from windthrow, the county has failed to protect this critical area or include the [best available science] in so doing.

AR 3073–74 (internal footnotes omitted; emphasis in original).⁹

Putting the county's strawman arguments aside, there is little left of its defense of the Board's order on this issue. The fact remains that best available science — from the county's own consultants — recommends a *minimum* buffer of 100 feet, even if a larger buffer may be needed in some cases. *See, e.g.*, AR 4200 (“100 feet was the recommended minimum of a 100–600 foot range”). The law is clear that if the county desires to depart

⁹ We also stated this position clearly in our opening brief. *See* Op. Br. at 27, n.9 (explaining that WEAN never advocated for a “firm buffer width,” but only “a minimum buffer width that could be adjusted upwards”).

from best available science, it must provide a “reasoned justification.” *See Yakima County, supra*, 168 Wn. App. at 692. Yet, the county has never squarely addressed our position. By failing to adopt a minimum 100-foot buffer along the southern border of the Naas Preserve, the county departed from best available science and its refusal to squarely confront the issue is not a “reasoned justification” by any standard.

Nor is this a case like *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, cited by the county for the proposition that “BAS, and by extension the GMA, does not require the county to establish mandatory . . . buffers.” Resp. Br. at 25 (quoting 161 Wn.2d 415, 430, 166 P.3d 1198 (2007)). In *Swinomish*, the issue was whether BAS required the county to impose stream buffers when lands within the proposed buffers were too degraded to currently serve a buffer function (the trees were already cleared). Reasoning that the GMA requires protection, but not restoration of “habitat functions and values that no longer exist,” the Court held it did not. *Swinomish*, 161 Wn.2d at 431.

The same is not true here, where there is no dispute that trees outside the preserve currently serve an important buffer function. *See* AR 2754 (explaining “[t]he forested area on the Camp Casey parcel likely provides buffer functions for the forest community within the NAP, and given the exposed location of the NAP to southwest winds, these functions include

limiting blowdown risk to trees within the NAP.”). Our point here is simply that these trees should be protected so they *continue* to serve the important function of protecting the old-growth forest within the preserve.

And finally, nor is a minimum (but enlargeable) buffer unheard of. That is the exact same approach the county uses for streams and wetlands. *See* 17.02B.420.E, -.460.D.5 (allowing case-by-case enlargement of minimum stream and wetland buffers).

Like the county, the Board never addressed WEAN’s actual argument that a minimum buffer should be required along the Naas Preserve’s southern boundary. Instead, it made findings only on the strawman argument (never advanced by WEAN) that the county should adopt a uniform, inflexible buffer in all cases. *See* AR 4200; Op. Br. at 27, n.9. By failing to provide a reasoned justification for its rejection of BAS, the county violated the GMA. The Board’s 2016 Order is not supported by substantial evidence, is arbitrary and capricious, and should be reversed.

B. The County Fails to Show that Ordinance C-71-16 Will Protect Prairies, Oak Woodlands, and Herbaceous Balds.

Next, we challenged Island County’s failure to properly designate westside prairie, oak woodland, and herbaceous bald habitats (collectively “prairies”) as protected critical areas under the GMA. *See* Op. Br. at 38–47. As above, our argument had two parts.

First, we challenged the county’s decision to designate these areas solely through an uncertain, indefinite map depicting where these habitats “might” occur, but with no definitional criteria to determine exactly what on-the-ground conditions will be protected. *See id.* at 38–41.

Our point was that the terms “prairie,” “oak woodland,” and “herbaceous bald” are not self-evident. And although the Washington Department of Fish and Wildlife (“WDFW”) has published a set of diagnostic criteria for determining where these habitats occur, *see* AR 1427–31, without similar definitional criteria in the Island County Code, it is unknown how the county will define them in the future when development is proposed. *See* AR 3612. In short, the county’s new map says generally where to start looking for prairie habitat — sometimes by little more than a large circle drawn around an indefinite area of land, or by a star denoting a point location (not even approximating extent of the actual habitat). *See* Op. Br. at 18. But it does not clarify what on-the-ground characteristics will be protected, or how to find them, as required by the GMA. *See, e.g.*, RCW 36.70A.060(2).¹⁰

¹⁰ This is akin to protecting “steep slopes” without defining what is “steep.” *Compare* ICC 11.02.030 (defining steep slopes by grade percentage and rise). It is also akin to protecting wetlands without defining the term or how to delineate where the wetland begins and ends. *Compare* ICC 17.02B.240.C (adopting federal manual for wetland delineation). Just because a term has some familiarity in common parlance does not mean it is not technical, or that it can be applied consistently and defensibly without adopting a formal standard.

Second, we challenged the county’s exclusion of smaller prairie sites from its critical area designations. *See* Op. Br. at 4, 41–46. Excluding any prairie habitat is not supported by BAS and violates the “no net loss” policy of the GMA. *See, e.g.,* AR 1569 (“[s]ince *all* prairie is imperiled, *all* prairie is important and should be conserved *no matter what size*”) (emphasis added); WAC 365-196-830(4) (no net loss). The reason—as explained in WEAN’s comments to the county—is that “smaller sites . . . are important for maintaining diversity of plant species that are not widely distributed.” AR 3611. If you take away any of the small patches where these species still grow, they are “much more vulnerable to extirpation and that extirpation will be permanent.” *Id.* This is one of the reasons why WDFW’s definition of westside prairie — a statewide “priority habitat” and BAS under the GMA — does not contain a size threshold. *Id.*

1. The county still fails to justify its refusal to adopt definitional criteria.

With respect to the lack of definitional criteria for imperiled prairie habitat, the county says we never raised this issue below. *See* Resp. Br. at 40. But that is false. Below is an excerpt from WEAN’s argument on this issue before the Board, from our objection to the county’s compliance report. The need for definitional criteria was clearly stated:

The County ultimately designated nine polygons from a GIS layer of Grasslands and Oak Woodlands created by the

Washington Natural Heritage Program and four point locations taken from a study performed for the Whidbey-Camano Land Trust. We . . . here raise the issue of the County's failure to include a definition of prairies in the ordinance. Just as with, *i.e.*, wetland mapping, the polygons are generalized; there is "prairie" within them, but the entire area within the polygons is not "prairie." Without a definition it is not possible to actually delineate and define the habitat to be protected. Without the critical area being defined, it is impossible to consistently delineate and protect the prairie within the mapped polygons, making designation and protection arbitrary and potentially violating GMA's property rights goal. This problem becomes even more acute in regard to the four point locations. How far from the mapped points the designated area extends is anyone's guess.

AR 3095–96 (footnotes omitted).¹¹

As for the county's substantive response on this issue, it concedes that the new critical areas map is not a "final" designation of prairie habitat, and that a final designation will need to be made by the county's planning staff on a project-by-project basis. *See Resp. Br.* at 44. The county goes on to cite a number of "tools" it will use to make a final designation in the future, including the BSA requirement, the county's definition of "primary association habitat," and other maps, data, and lists compiled by WDFW. *See Resp. Br.* at 44.

¹¹ In the quote above, the "four point locations" refer to the areas marked with stars on the county's map, which we discussed at pages 46–47 of our opening brief. There, we explained that the starred locations do not even meet the foundational requirement of showing the "extent" of the critical area. *See Op. Br.* at 12, 46–47; WAC 365-190-040(5)(a)(ii). *See also* AR 3755 (discussing lack of geospatial data). The county does not respond to this argument.

But nowhere does the county say that any of these tools contain binding definitional criteria for determining exactly what is a “westside prairie,” what is an “oak woodland,” and what is an “herbaceous bald.” Indeed, the county’s new position that definitional criteria are hidden somewhere in the morass of tools sited in its brief is belied by its own rulemaking, in which it made the affirmative decision to *exclude* such criteria over WEAN’s request. *See* Op. Br. at 42–43; AR 3612.

Nor does the county say that it is bound by law to use the diagnostic criteria for westside prairies, oak woodlands, and herbaceous balds established by WDFW — which, by definition, constitute best available science under the GMA. *See* WAC 365-190-130(4)(b). That would be a simple thing to say, and to identify in the code, if it were true.¹²

By failing to adopt definitional criteria, the county has, in effect, made no designations whatsoever. It has drawn a map for where to begin

¹² At page 44 of its brief, the county says it has incorporated relevant WDFW and NHP maps, data, and lists into the Island County Code. But it does not cite any code provision where these sources of information are incorporated, or clarify whether these sources include WDFW’s diagnostic criteria for westside prairie, oak woodland, and herbaceous balds. The closest it comes is its citation to a Parametrix report referenced at ICC 17.02B.200.C. *See* Resp. Br. at 44 n.51. But the county ignores that the document is only referenced for its maps, which, under the plain terms of ICC 17.02B.200.C, “do not provide a final critical areas designation.” (The document also does not contain any maps of westside prairies, oak woodlands, or herbaceous balds.) Finding information in the record — in a document that clearly pre-dates the current rulemaking and describes prairies as only of “potential” concern, *see* AR 2349 — does not mean the county is bound by any particular definition when it does its final designation on a case-by-case-basis under Ordinance C-71-16. Yet, that is exactly the problem.

looking for these habitats, in areas where they “might” occur, *see* AR 2665, but it has not codified what on-the-ground characteristics or features will in fact be recognized and protected. The Board’s ruling that Island County cured its violations of RCW 36.70A.060 and RCW 36.70A.172 (AR 4202) — mandating designation and protection of critical areas — was arbitrary and capricious and is not supported by substantial evidence.

2. The county fails to justify its exclusion of smaller examples of prairie habitat, or the Board’s affirmance of that decision.

On the county’s decision to not designate or protect smaller examples of the county’s remaining prairie habitat, the county’s response has four parts. Each is based on a misunderstanding of the facts and law.

First, the county says that we did not challenge the Growth Board’s findings affirming the county’s omission of smaller remaining prairie sites. *See* Resp. Br. at 41–42. But we challenged every element of the Board’s findings in the large block quote at page 41 of the county’s brief.

For example, the Board relied on the county’s outside peer reviewer’s purported agreement with the county’s BAS report, but we showed that the peer reviewer was laboring under the false assumption that the county designated *all* remaining prairie sites (which it did not). *See* Op. Br. at 42, n.16. The Board relied on the county’s position that, when viewed in isolation, ““some small areas of remnant prairie are likely to support only

limited habitat functions.” Resp. Br. at 41 (quoting CP 34). In contrast, even smaller, remnant examples of prairie habitat meet the WDFW’s criteria for priority habitat; which is, by definition, best available science under the GMA and has no size threshold. *See* Op. Br. at 43; AR 3891. We also explained that even smaller sites are needed to maintain biodiversity across the entire prairie ecosystem, and so cannot be fully assessed in isolation. *See* Op. Br. at 43.¹³ Last, the Board found that protecting all remaining prairie habitat would be difficult to administer, and that the county chose a “more proactive” approach of mapping larger examples “up front,” not bit-by-bit through an individualized permit review process. *See* Resp. Br. at 41. In contrast, we explained that the Board’s reasoning is based on a false dilemma; the county can do both.¹⁴ We also explained that, under the Growth Board’s own precedent, administrative burden is not a reason to ignore best available science. Op. Br. at 45–46.

Second, the county argues that protecting all remaining prairie habitat would somehow violate the GMA — for example, the Act’s goal of “creating a system of fish and wildlife habitat with connections between

¹³ *Compare* WAC 365-196-830(6) (observing that “Some critical areas . . . may constitute ecosystems or parts of ecosystems that transcend the boundaries of individual parcels and jurisdictions, so that protection of their function, and values should be considered on a larger scale”).

¹⁴ *See* Op. Br. at 45; WAC 365-190-080(4) (“Counties and cities should designate critical areas by using maps *and* performance standards”) (emphasis added).

larger habitat blocks and open spaces.” Resp. Br. at 42 (quoting WAC 365-190-130(1)). But the GMA requires protection of critical areas. *See, e.g.*, RCW 36.70A.172. There is no contradiction in protecting all of them.

Third, the county argues that it chose to protect “the sites identified as best candidates for recovery and conservation” by listing them at ICC 17.02B.230.C and depicting them on the new critical areas map. *See* Resp. Br. at 43. But this is just another iteration of the county’s false dilemma, which was echoed by the Board. There is no reason why the county could not have mapped and listed those very same examples of larger prairie habitat, as it did in Ordinance C-71-16, *while also* adopting definitional criteria to protect other examples of prairie habitat where and when they are found — consistent with BAS. *See* Op. Br. at 45. Yet, neither the county nor the Board ever addressed our argument head on — always treating it as an “either/or” proposition — contrary to the clear preference for definitional criteria in the GMA. *See* Op. Br. at 40; WAC 365-190-040(5)(b); WAC 365-190-080(4).

Finally, the county attacks our example of the fawn lily in an attempt to show that WEAN has not demonstrated any instance in which a failure to designate smaller prairie sites will have real-world impacts. *See* Resp. Br. at 43, n.50. We cited the fawn lily as an example of one species that has historically contributed to the diversity and character of Whidbey Island’s

prairie ecosystem, but that that is known to occur at only four sites today (on less than 1,000 total square feet of land, *see* AR 3523) — and where the county’s decision to omit smaller areas endangers half the known occurrences. *See* Op. Br. at 43–44, n.18. In response, the county argues that the fawn lily’s habitat is fully protected through designations at the Naas Preserve and Deception Pass at Goose Rock — implying those are the only places where the species has been found. Resp. Br. at 43, n.50.¹⁵

Yet, the fawn lily was not spotted at the Naas Preserve, but across the road, where the area is not protected (the species also has not been spotted there for decades). *See* AR 3611 n.13. In contrast, two other sites where the species has been observed — West Beach Road and the corner of Van Dam and Zylstra roads — meet the WDFW definition of westside prairie but are not protected. *Id.*, n.14.¹⁶ As a result, up to two thirds of this species’ current habitat may be imperiled by the county’s decision to omit smaller prairie sites. *See* AR 3523. The fawn lily was, and remains, a clear

¹⁵ The county also attacks the messenger, describing WEAN’s comment letter on this point as merely “legal argument.” Resp. Br. at 43, n.50. But the author — Steve Erickson, WEAN’s conservation director — has extensive experience in the fields of botany and ecology. *See* AR 3872–78 (Erickson CV). The county’s own BAS report cites to Mr. Erickson’s work. *See* AR 2218. And his work is cited by other studies which the county relied upon. *See* AR 994, 1055, 1778, 1779, 1791–92, 2195, 3872. He is a qualified and respected expert in his field.

¹⁶ ICC 17.02B.230.C does list a “golden paintbrush site” at West Beach as an area of local importance. But this does not help the fawn lily as it is located in an area where golden paintbrush has been extirpated. *See* AR 3523 n.12.

example of how “protection of only the larger sites would significantly reduce overall prairie biodiversity because some species have most of their occurrences at smaller sites,” *id.*, an issue the county and Board never addressed. *Compare* WAC 365-190-030(6)(a) (requiring protection of “rare or vulnerable ecological systems, [or] communities”).

The record contains no evidence rebutting WEAN’s position, supported by BAS, that all remaining prairie habitat is ecologically valuable, extraordinarily rare, and should be protected. *See, e.g.*, AR 1569 (“[s]ince all prairie is imperiled, all prairie is important and should be conserved no matter what size.”). Without definitional criteria, there is no guarantee the county’s remaining prairie habitats will be protected. Even smaller, unmapped sites are important for maintaining diversity of species and protecting against local extirpation. *See* AR 3611, 3523. And the county’s principal reason for omitting smaller prairie sites — administrative burden — is not a reason to ignore best available science. The Board’s 2016 Order finding compliance, and its order on reconsideration, was arbitrary, capricious, and not supported by substantial evidence.

C. The County Fails to Rebut Our Arguments Concerning ETS Plant Species and the Board’s Erroneous Orders on that Issue.

Finally, we challenged the Board’s orders affirming Ordinance C-71-16 notwithstanding major problems with the county’s selective

designation of habitat for plant species listed as threatened, endangered, or sensitive (“ETS” species) by the state and federal governments. *See* Op. Br. at 28–38. Our arguments concerned the county’s failure to designate habitat for non-prairie ETS species (*id.* at 29–31); its failure to designate habitat for four historic species that the county wrongly described as “presumed extirpated” (*id.* at 34–38); and its failure to properly classify the habitat it did designate as only of local importance, not as habitat where the species have a “primary association” (*id.* at 31–34).

Of these issues, the county’s discussion of historic vs. “presumed extirpated” species is perhaps the most blatant disregard of BAS.

First, there can be no doubt that this issue was timely raised below. Following the Board’s 2015 order (rejecting the county’s original view that plants are not protected under the GMA), the county acknowledged WEAN’s concerns about historic species being wrongly classified as “extirpated” as part of the County’s self-described “remand issues.” *See* AR 2632–33, 3377, 3471. The county’s consultants created a new record to determine which species and species habitat should be protected to comply with the Board’s 2015 order. *See, e.g.*, AR 2758, 3471. The county raised this issue in its compliance report, and in its reply. *See* AR 2601, 3743. WEAN addressed it in its objections. *See* AR 3086. And the county knew what species WEAN was referring to. *See* AR 2632 (discussing WEAN’s

request for designation of pink fawn-lily, Texas toadflax, California buttercup, and Scouler's catchfly — the four historic species discussed in our opening brief).

Nor was this issue beyond the scope of the “on compliance” portion of proceedings before the Board. The county is right that the Board's first order (in 2015) identified three species that have primary association habitat in the county's prairies (white-top aster, white meconella, and golden paintbrush), and that was enough to remand the matter back to the county. *See* AR 2405. But as the county has candidly admitted, “[t]he GMHB made no finding regarding whether other ETS species had a primary association with other habitats in Island County.” CP 105. That issue was left open for the county to address on remand. And while the Board later concluded in 2016 that three *and only three* ETS species have primary association habitat in Island County, *see* AR 4203, it is that very holding — rejecting WEAN's argument that *all* ETS plant species should be protected — that is at issue.

On the merits, the county argues that we provided “[n]o scientific response rebutting the presumption of extirpation” for the four historic species omitted from the county's designations, and describes the difference between “historic” and “extirpated” as merely a matter of “semantics.” Resp. Br. at 34. But the “presumption of extirpation” is a complete artifice.

Under the GMA, the county is required to consult the very list we provided of these species — *i.e.*, the list of rare plants maintained by the Washington Department of Natural Resources, Natural Heritage Program (the “NHP List”) — which is, by definition, BAS under the GMA. *See* WAC 365-190-130(4)(b), -040(4)(a).¹⁷ On that list, the four species discussed in our opening brief — pink fawn-lily, Texas toadflax, California buttercup, and Scouler’s catchfly — are listed as “historic” species in Island County (denoted by the letter “H”) based on prior observations. *See* AR 3775. According to the State’s expert agency on this issue, and the author of the list itself, “historic” is a term of art denoting that these species “*may* exist but ha[ve] not been verified recently.” AR 3634 (emphasis added).

For a species on the potential brink of survival, that is a big distinction, and there is no basis in science for simply “presuming” they are extirpated — especially when the county’s consultants did not, to our knowledge, perform any field work or searches to confirm whether they still exist, and where the county’s “presumption” appears to be the product of a simple misreading of the NHP List. *See* AR 3771. Instead, this is exactly the situation where the GMA’s precautionary principle should be applied. *See* Op. Br. at 36; WAC 365-195-920(1). If an applicant comes to the

¹⁷ *See also* AR 3619 (“The WNHP Data Set is the most authoritative source of rare plant and ecosystem presence information for Washington State.”).

county to build a shopping mall, or a shed, or to clear and grade a driveway on what turns out to be the last remaining site of one these historic species, the species should be protected under the GMA’s mandate to protect rare and valuable ecological communities. They should not be plowed over and destroyed, making the “presumed” extirpation real and permanent.¹⁸

Next, on the distinction between habitat listed under the rubric of “primary association,” on the one hand, and habitat listed as only being of “local importance,” on the other, the county writes at length to rebut our arguments that (1) the Board’s 2015 Order found specifically that the county failed to designate “primary association” habitat for the county’s ETS plant species; and (2) that the distinction has real-world significance. *See* Resp. Br. at 34–40; Op. Br. at 31–34.

¹⁸ We also note that the county’s discussion of white-top aster at pages 31 and 32 of its brief is misplaced. We did not cite that as an example of a species that is still unprotected, but of a species that was rediscovered after a long period of thinking it was extirpated — to show that simply because a species is “historic” does not mean it has vanished completely, as the county presumes. As for the county’s complaint that it does not know what type of habitat is associated with the four historic species, *see* Resp. Br. at 32, that could be solved by designating them under the rubric of “primary association” habitat, which would include anywhere they are found and any contiguous habitat needed for their survival. *See* ICC 17.02B.060 (“Areas of primary association for protected flora . . . include both the immediate area where the species occurs and the contiguous habitat necessary for its long term persistence”). The point is, if they are found, they should be preserved, not killed. That is the precautionary approach mandated by the GMA.

But on the first point, the record is clear. In 2015, the Board held that the county violated the GMA by not designating ETS plant habitat “*as areas where [ETS] species have a primary association.*” AR 2418 (emphasis added). The word “as” here obviously denotes the type of designation that was lacking, and the Board should not be allowed to retroactively change the entire nature of its ruling by allowing a different category of designation in Ordinance C-71-16.¹⁹

On the second point, it stands un rebutted that regulatory protections are different for the two categories. ETS species are determined by federal and state agencies, while those of merely “local importance” are “determined locally.” *Compare* WAC 365-190-130(2)(a) *with* (2)(b). Reflecting that hierarchy, the county must follow state-level directives for protective buffers for areas designated as primary association habitat, while buffers for habitat of only “local importance” are left to the county’s discretion.²⁰ If ETS species are ever found in new locations, the primary association designation would also allow for automatic protection, while the

¹⁹ *See Rios v. Washington Dept. of Labor and Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002) (agency action arbitrary and capricious where agency ignored its own prior findings); *Probst v. State Dept. of Retirement Systems*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012) (same).

²⁰ *See* ICC 17.02B.430.E (for primary association habitat, but not habitat of local importance, “[b]uffers shall be based on management recommendations provided by the Washington State Department of Fish and Wildlife PHS Program and shall consider site-specific conditions and recommendation of qualified professional.”).

local importance designation would not. *See* Op. Br. at 32; AR 2636. The county cannot be said to have made a reasoned decision when it did not even acknowledge, let alone consider, these important differences that may affect how the species are protected and whether they will survive.

Finally, on the county's omission of non-prairie ETS species from its designations, the county criticizes our example of the black lily (Op. Br. at 30), arguing it is already protected by other county regulations. *See* Resp. Br. at 27 n.32. But under the GMA, that does not pass muster unless the county actually analyzed the protectiveness of those other regulations for these particular species. *See Ferry County v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 741, 339 P.3d 478 (2014) ("There is no evidence that the county analyzed regulations and determined existing regulations were sufficient to protect these 11 species"). The record here does not include such an analysis, and the county's post-hoc rationalizations for omitting designations for non-prairie ETS species should be rejected.

II. CONCLUSION

For the reasons above, and for the reasons for stated in our opening brief, the Board's orders upholding Island County Ordinance C-71-16 under the GMA are arbitrary and capricious, not supported by substantial evidence, and should be reversed.

Dated this 4th day of January, 2019.

Respectfully submitted,
BRICKLIN & NEWMAN, LLP

By: s/ Bryan Telegin
Bryan Telegin, WSBA No. 46686
Attorney for Petitioner Whidbey
Environmental Action Network

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

WHIDBEY ENVIRONMENTAL
ACTION NETWORK (WEAN),

Appellant,

v.

GROWTH MANAGEMENT
HEARINGS BOARD,

Respondent,

ISLAND COUNTY,

Additional Party.

NO. 51903-8-II

(Thurston County Superior
Court Cause No. 16-2-04747-2)

DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the
State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for appellant herein. On the date and in the manner indicated below, I caused the Reply Brief of Appellants to be served on:

Dionne Padilla-Huddleston
Assistant Attorney General
Office of Attorney General
Licensing & Administrative Law Division
800 5th Avenue
Seattle, WA 98104
(Attorneys for Growth Management Hearings Board)

By United States Mail
 By Legal Messenger
 By Federal Express/Express Mail
 By E-Mail to dionnep@atg.wa.gov, amyp4@atg.wa.gov

Dalton Lee Pence
Jesse J. Eldred
Deputy Prosecuting Attorneys
Island County
Law and Justice Center
P.O. Box 5000
Coupeville, WA 98239-5000
(Attorneys for Island County)

By United States Mail
 By Legal Messenger
 By Federal Express/Express Mail
 By E-Mail to l.pence@co.island.wa.us; Gregb@co.island.wa.us;
j.eldred@co.island.wa.us; c.cosby@co.island.wa.us;
ICProsecutor@co.island.wa.us;

DATED this 4th day of January, 2019, at Seattle, Washington.



PEGGY S. CAHILL

BRICKLIN & NEWMAN, LLP

January 04, 2019 - 3:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51903-8
Appellate Court Case Title: Whidbey Environ. Action Network, App v. Growth Management Hearings Board, Resp
Superior Court Case Number: 16-2-04747-2

The following documents have been uploaded:

- 519038_Affidavit_Declaration_20190104151427D2510459_4879.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 2019 01 04 Declaration of Service.pdf
- 519038_Briefs_20190104151427D2510459_3383.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2019 01 04 WEAN Reply Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- DionneP@atg.wa.gov
- amyp4@atg.wa.gov
- c.cosby@co.island.wa.us
- gregb@co.island.wa.us
- j.eldred@co.island.wa.us
- jessie@co.skagit.wa.us
- jessejeldred@gmail.com
- l.pence@co.island.wa.us
- lalseaef@atg.wa.gov

Comments:

Sender Name: Peggy Cahill - Email: cahill@bnd-law.com

Filing on Behalf of: Bryan James Telegin - Email: telegin@bnd-law.com (Alternate Email: cahill@bnd-law.com)

Address:
1424 Fourth Avenue
Suite 500
Seattle, WA, 98101
Phone: (206) 264-8600

Note: The Filing Id is 20190104151427D2510459