

FILED
Court of Appeals
Division II
State of Washington
11/19/2018 4:42 PM
NO. 51903-8-II

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

WHIDBEY ENVIRONMENTAL ACTION NETWORK,
Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent

v.

ISLAND COUNTY,
Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Superior Court Cause No. 16-2-04747-34
W. Wash. GMHB No. 14-2-0009

BRIEF OF RESPONDENT ISLAND COUNTY

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I. SUMMARY OF ARGUMENT

Like all similarly situated jurisdictions in Washington, Island County is required by the Growth Management Act (“GMA”) to regularly review and update its comprehensive land use plan and critical areas ordinance. RCW 36.70A.130. On June 24, 2015, the Growth Management Hearings Board (“GMHB” or “Board”) determined, upon urging by Petitioner Whidbey Environmental Action Network (“WEAN”), that Island County’s 2014 update of its Fish and Wildlife Habitat Conservation Area regulations (adopted through Ordinance C-75-14) failed to satisfy the goals and requirements of the act, for seven reasons. AR 2418–2420. The GMHB placed Island County on a compliance schedule, and it responded by, *inter alia*, enacting Ordinance C-71-16 a year later.¹ On September 29, 2016, after a hearing, the Board issued an Order Finding Compliance and Continuing Non-Compliance (“Order” or “2016 Order”). CP 12–29. This appeal concerns the “Finding Compliance” portion of that Order.

The question before this Court is a narrow one: Whether or not the Board acted contrary to the law or the facts in the record when it

¹ While Island County’s FWHCA regulations are still codified at Chapter 17.02B Island County Code (“ICC”), they have since been amended, and Ordinance C-71-16 has been repealed and superseded for reasons outside the scope of this appeal. However, as to the issues presented, the current and former code provisions are substantially equivalent. For ease of reference, Island County will generally cite to its current code, unless “former” is indicated with reference to Appendix A. *See also infra*, fn. 8.

determined that passage of Ordinance C-71-16 cured three of the seven issues cited in the June 24, 2015 Order (“2015 Order”).

The Board concluded that Ordinance C-71-16 brought the county into compliance with the GMA in all but one respect, which is not before the Court (the “Continuing Non-Compliance” portion of the 2016 Order). The Board denied WEAN’s subsequent motion to reconsider the portion of the 2016 Order finding compliance. The Thurston County Superior Court affirmed the Board’s 2016 Order and the Board’s denial of WEAN’s motion for reconsideration in a four-page letter ruling. WEAN appeals those determinations.²

Despite previous admonishment for raising issues not properly before the decision maker, WEAN continues to change its argument and complicate the issues in an effort to secure a different result than it obtained before the GMHB and the Superior Court. *See* CP 17, 33–34, 501–502 *et al.* As a consequence, WEAN’s arguments have steadily become further and further removed from the record that was before the Board in 2015. For example, the substance of WEAN’s argument against the County’s buffer provisions for the Naas Natural Area Preserve (“NAP”) has changed at each stage of the proceeding, and neither the

² The merits of the Superior Court’s decision is not under review. “On appeal, this court reviews the *Board’s* decision, not the decision of the superior court.” *King Co. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (emphasis in original).

Board nor the Superior Court took up the new argument that Island County needs to designate and protect the habitats of several historically occurring, but presumed extirpated, floral species.

The court must limit the scope of its review to issues actually developed, carried forward, and decided by the Board. In so doing, Island County believes this court will quickly realize—as the Superior Court did—that WEAN has failed to meet its burden to overcome the presumption of the ordinance’s validity, and affirm the decisions of the GMHB finding compliance and denying reconsideration.

II. STATEMENT OF THE CASE AND SUMMARY OF THE ADMINISTRATIVE RECORD

This controversy stems from a longstanding challenge to Island County’s 2014 Critical Area Ordinance, *WEAN v. Island County*, GMHB Case No. 14-2-0009. AR 3, *et seq.* Among other things, Ordinance C-75-14 served to update the Island County Comprehensive Plan and amend the Island County Code to add more robust Fish and Wildlife Habitat Conservation Area (“FWHCA”) protection regulations. AR 9 *et seq.*

After a Prehearing Conference on WEAN’s 2014 petition, the Board identified and condensed 14 issues ripe for future decision on the merits. AR 115–118, 208–210; *also* CP 189–191. In a Final Decision and Order issued on June 24, 2015, The Board ultimately agreed with WEAN

that seven of those issues required remand to the County for correction and GMA compliance. AR 2418–2420. Three of those issues have been resolved, and the remaining four, or their offspring, are still in litigation:

(6) Do the buffer requirements for Natural Area Preserves³ ([ICC] 17.02B.430E) fail to protect critical areas...or to include the Best Available Science...because they fail to protect all critical area functions, fail to protect this critical area from adjacent development, or fail to provide any buffers or setbacks from adjacent development? (“NAP Buffers” issue, AR 208–209, *see also* CP 16);

(7) In not designating and protecting the habitat of flora listed by the federal or state government as areas where endangered, threatened, or sensitive species have a primary association has Island County, in reviewing and updating its critical area policies and regulations failed to comply with GMA’s requirements for designation and protection of critical areas and inclusion of the Best Available Science...? (“Designation/Protection of Habitat of Flora” issue, AR 209, *see also* CP 20–21);

(8) In not designating and protecting the rare, threatened, and biodiverse habitats of Westside Prairie, Oak Woodland, and Herbaceous Balds, has Island County, in reviewing and updating its critical area policies and regulations failed to comply with GMA’s requirements for designation and protection of critical areas and inclusion of the Best Available Science...? (“Designation/Protection of Westside Prairies, Oak Woodlands, and Herbaceous Balds” issue, AR 209, *see also* CP 20–21);

³ “‘Natural area preserve’ means a natural area which has been: a) Dedicated under the provisions of RCW 79.70.090; or b) Formally committed to protection by a cooperative agreement between a government landholder and the department [of natural resources].” WAC 332-60-050.

(9) In not designating and protecting the habitat of species listed by the Washington Department of Fish and Wildlife as candidates for listing as endangered or threatened or by the U.S. Fish and Wildlife Service as species of concern, particularly Western Toad, has Island County failed to comply with GMA's requirements for designation and protection of critical areas and inclusion of the Best Available Science...? (“Western Toad” issue, AR 209, *see also* CP 23).⁴

The Board has consistently framed all of its decisions and orders in this case in terms of these issues. *Compare, e.g.*, AR 2388 *et seq.*, CP 16–23. The County likewise framed its planning on remand in terms of these issues, to the extent consistent with updated Best Available Science (“BAS”) and local policy-making goals. *See, e.g.*, AR 2718–2719. WEAN did not appeal the Board’s 2015 Order, or otherwise object to the Board’s framing or analysis of the issues raised.

Throughout 2016, the Planning Commission worked with county agents, officers, contractors, peer reviewers, the State, the public, and WEAN⁵ to make sure the next iteration of the Island County Critical Areas Ordinance was consistent with BAS and served to address the issues

⁴ As explained *infra*, the “Western Toad” issue is not before this court.

⁵ WEAN maintained an adversarial posture throughout the legislative process. *See* AR 2724.

identified by the Growth Board in the 2015 Order.⁶ It divided the project into two phases, the first of which resolved the three simpler of the seven issues addressed by the Board,⁷ and the second dealing with the four issues set forth above. AR 2613, 2614 *et seq.*

On July 11, 2016, Island County submitted a final Compliance Report with some 17 Exhibits to the Board. AR 2573–2606 (Compliance Report), AR 2607–2979 (Exhibits). Attached to the report as Exhibit 1 was Ordinance C-71-16, adopted after a public hearing on June 23, 2016. AR 2610–2636 (Compliance Report Exhibit 1: “Ordinance C-71-16”).⁸

Fundamentally, this case concerns whether or not that ordinance brought Island County into compliance with the GMA, as to the issues identified by the Board in the 2015 Order only.

A. The Compliance Report and Related Pleadings

The Compliance Report is divided into sections corresponding to the issues identified by the Board for compliance. Section Five of the

⁶ For this paragraph, see generally, *passim* AR 2422–2571; “Compliance Report,” AR 2573–2606; “Exhibits Accompanying Compliance Report,” AR 2607–2979.

⁷ WEAN did not renew argument on these issues in any subsequent pleading, at the hearing on the merits, or in this appeal. WEAN agrees the county is in compliance on those three issues.

⁸ Where the court’s attention is drawn herein to “former ICC 17.02B,” the court is generally directed to Exhibit A of Ordinance C-71-16, found at AR 2623–2627. For the Court’s convenience, Exhibit A of Ordinance C-71-16 is attached to this brief as Appendix A. Where the court’s attention is drawn merely to “ICC 17.02B,” the court is directed to: https://library.municode.com/wa/island_county/codes/code_of_ordinances. See also *supra* fn. 1; *Accord*, Appellant’s Brief (“Brief”), at 5 n. 3.

Report (with relevant exhibits) discusses how the County considered BAS to become compliant with Issue (6) above, regarding the NAP and its Buffers. AR 2582–2589. Section Six of the Report (with relevant exhibits) discusses how the County considered BAS to become compliant with Issues (7), (8), and (9) above, regarding Designation of Flora Habitat; Westside Prairies, Oak Woodland and Herbaceous Balds (“Prairies,” or “The Prairies”);⁹ and the Western Toad. AR 2590–2602.

The substance of the Report (and Island County’s actions on compliance) is well summarized by its opening paragraph:

Island County has designated 12 fish and wildlife habitat conservation areas of local importance, protected Western Toad breeding sites, and required mitigation to ensure no net loss of habitat functions and values within its one natural area preserve. Before taking these actions, although GMA does not require it, the County commissioned technical analysis to ensure its decision making was informed by and based on best available science. The ensuing reports were all subject to internal peer review, with one also subjected to external peer review. The County used BAS to develop proposed regulatory revisions, which underwent an extensive public review process, including 12 hearings, meetings and workshops.¹⁰ The County’s final action to achieve compliance with the Board’s Decision was informed by BAS and consistent with it.

AR 2576; *See also* Ex. 1, 4, 5, *et al.*

⁹ Hereafter, unless the meaning is otherwise plain or a more specific classification is required, these terms are presumed to encompass and refer variously to “Westside Prairies, Oak Woodlands and/or Herbaceous Balds.” *Accord*, Brief, at 7.

¹⁰ Elsewhere it is asserted that 124 meetings and hearings were held. AR 2580, 2603.

Under the same cause number, WEAN responded by submitting, with corresponding exhibits and attachments, a Motion to Supplement the Record, Objections to Finding Compliance, and a Motion for Contingent Sanctions on July 28, 2016.¹¹ AR 3013–3701.¹² WEAN did not file a new petition raising new issues or challenges to Ordinance C-71-16. The County filed a “Reply Brief [Etc.]” on or around August 8, 2016, in which, among other things, it asked for permission to file supplemental briefing to address 208 pages of materials submitted by WEAN with its objections. AR 3706–3747 (with Exhibits and Attachments, AR 3748–3832). This reply drew from WEAN a Request to File Reply Brief and Motion to Strike & Exclude [Etc.] on or around August 11, 2016, and another County reply. AR 3836–3845. The Board ordered on August 12 that Island County would be permitted fifty additional pages to respond to WEAN’s Objections, but no other additional briefing would be accepted on the matter.¹³ AR 3850–3853.

¹¹ *Passim* references to the year 2015 in WEAN’s memoranda throughout this portion of the record appear to be scrivener’s errors.

¹² The Motion to Supplement the Record begins at AR 3013. The Objections to Finding Compliance begins at AR 3057. The Motion for Contingent Sanctions begins at AR 3646.

¹³ The same day, the Board received from WEAN a “Motion of August 9, 2015[sic] to Correct and Supplement the Record,” AR 3858–3864 (plus attachments), and a “Motion of August 10, 2016 to Strike and Exclude.” AR 3903–3916 (plus attachments). Throughout this portion of the record it is sometimes difficult to discern which exhibits, attachments, and declarations correspond to which pleadings.

WEAN filed its “Best Available Science Summaries” on August 17, 2016, with attachments. AR 4038–4045.¹⁴ Island County also submitted a “Best Available Science Summary” on August 17 and a response to WEAN’s *in limine* motions filed on August 12. *See supra* fn. 13; AR 4127–4139. A motion to strike this response with attachments was filed by WEAN on August 19. AR 4144–4147 *et seq.* On September 2, Island County submitted the “Supplemental Brief, Authorized by Board Order [of Aug 12] to Address WEAN’s Late Submittal of 208 Pages of Materials.” AR 4181 *et seq.* (plus Exhibits). This appears to have closed the Administrative Record.¹⁵

B. The Hearing, Order, and Subsequent Appeal.

On August 25, 2018, the Board held a hearing¹⁶ to determine whether or not Ordinance C-71-16 brought Island County into compliance with the 2015 Order and the Growth Management Act. At the Hearing, the Board ruled on the remaining preliminary motions and then heard oral argument from the parties.

¹⁴ A “Request for Official Notice” was also submitted by WEAN on or around Aug. 17. AR 4107–4110.

¹⁵ Appended after these, the Board’s Order Denying Reconsideration is the last document in the Administrative Record.

¹⁶ The county did not “request” it. *Cf.* Brief, at 15. A compliance hearing was mandated by the Board’s 2015 order. AR 2420. In fact, WEAN requested the hearing be held earlier than initially scheduled by the Board, and Island County attempted to get a court order having it stayed.

The Board ultimately ruled in the County’s favor on Issues (6), (7), and (8), and in WEAN’s favor on Issue (9), the “Western Toad” issue. As such, on September 29, 2016, it issued a written Order Finding Compliance [on Issues 6, 7, 8] and Continuing Noncompliance [regarding the Western Toad]. CP 12–30.

As to Issue (6), the Board found that the County had re-examined its previous assumptions which had led to noncompliance, obtained input from the Department of Natural Resources and consulted with experts on BAS. It noted the County had amended ICC 17.02B.430 to ensure “no net loss of habitat functions and values” in the NAP and provide for buffering if necessary to avoid it, as tailored by department review of mandated Biological Site Assessments for any non-*de minimis* development proposal within a 1,000-foot radius of the NAP. CP 16–20. *See* ICC 17.02B.400(A) (former ICC 17.02B.410(A)¹⁷).

As to Issues (7) and (8), the GMHB noted that “habitat of local importance” was an appropriate classification for designating the Prairies as FWHCAs under WAC 365-190-130(2) and that its prior ruling and WEAN’s prior request had contemplated this. CP 20–23.¹⁸ It found that the three ETS flora species identified in the 2015 Order were known to

¹⁷ *See* AR 1353.

¹⁸ Where the Board cites to “FDO” in the 2016 Order, i.e. CP 21 fn. 40, it is referring to its 2015 Order (AR 2372–2420).

have a primary association with those areas. *Id.* It found that designation of those sites as “habitats of local importance” was consistent with and informed by BAS, and that WEAN’s assertion there was a functional difference between “primary association” FWHCA status and “local importance” FWHCA status was unsubstantiated. *Id.* It therefore concluded that WEAN had failed to overcome its burden to prove the County’s decision making was clearly erroneous. *Id.* The remaining five pages of the Board’s Order discuss the Western Toad issue and are not relevant to this appeal. CP 23–28.

WEAN promptly moved for reconsideration of a procedural matter outside the Board’s jurisdiction, and raised for the first time what appears as “Assignment of Error #7”¹⁹ presently before this court. *See* AR 4211–4225; CP 33–34. The Board denied the motion on both grounds by written order of October 28, 2016. CP 31–36.

On November 23, 2016, WEAN petitioned Thurston County Superior Court for review of the “Finding Compliance” portion of the 2016 Order and the Order Denying Reconsideration. CP 1–11. After an exchange of briefing (CP 62–92; 155–186; 452–465, excluding attachments), a hearing was held on November 21, 2017. *See* CP 494. The

¹⁹ “Whether the county’s new designations for westside prairies, oak woodlands, and herbaceous balds violate the GMA by failing to protect smaller examples of those habitat types?” Brief, at 4.

superior court issued a letter ruling on April 19, 2018. *Id.* WEAN appealed to this Court on May 17, 2018. CP 504. The Superior Court’s opinion was reduced to an Order of Dismissal (with Findings of Fact and Conclusions of Law)²⁰ on June 12, 2018. CP 510–515.

“The question of whether a county is in compliance with the GMA is an issue over which the GMHB has exclusive subject matter jurisdiction.” *Somers v. Snohomish Co.*, 105 Wn. App. 937, 945, 21 P.3d 1165 (Div. 1, 2001) (vacating trial court decision regarding GMA challenge for want of subject matter jurisdiction). Therefore, the Superior Court correctly declined to hear any argument that had no basis in the Board’s 2016 Order, and this court must do the same. The Court should review this case in light of the three issues initially identified by the Board in the 2015 Order, a view the GMHB maintained “on compliance” in 2016, and a framework observed by the Superior Court in 2018.

III. RESTATEMENT OF ISSUES

1. Did the Board err in concluding that the County’s code amendments took action to protect the borders of the Naas Natural Area Preserve—specifically the potentially vulnerable forest community at the

²⁰ Meanwhile, the County has amended its code to address the “Western Toad” issue on compliance. The Board has concluded the County is now in full compliance with its 2015 Order, and dismissed Cause No. 14-2-0009. WEAN appealed that order as well. A decision on the merits, as of this writing, is pending from Thurston County Superior Court. *WEAN v. GMHB*, 17-2-04695-34. A motion to consolidate that litigation with the case at bar was denied at a previous posture.

southern boundary—and was consistent with the Board’s 2015 Order, Best Available Science, and the GMA?

2. Did the Board err in finding that the County’s designation of 12 mapped and listed Prairie sites served to bring the County into compliance with the GMA as to both Issues (7) and (8) of the Board’s 2015 Order?

3. Did the Board err in finding compliance with its order to designate and protect as FWHCAs the Prairie habitats of three specific Endangered, Threatened, and Sensitive (“ETS”) plant species where those species are known to be primarily associated?

4. As to a new issue raised on reconsideration, did the Board err in finding WEAN failed to meet its burden to prove the County’s Critical Areas Ordinance is GMA noncompliant, in that it does not explicitly designate unidentified “smaller examples” of Prairies as critical areas?

IV. ARGUMENT

A. Standard of Review

1. Procedurally.

This court sits in the same position as the Superior Court and applies the Administrative Procedure Act (“APA”) standards²¹ directly to the administrative record before the Board. *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 187, 274

²¹ RCW 34.05.570(3).

P.3d 1040 (Div. 2, 2012). “The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.” *Whidbey Envtl. Action Network v. Island Co.*, 122 Wn. App. 156, 165, 93 P.3d 885 (Div. 1, 2004). “Under the APA, judicial relief is appropriate only if the person seeking judicial relief has been substantially prejudiced by the action complained of.” *Ferry Co. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 339 P.3d 478 (Div. 3, 2014). A correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact. *WEAN*, 122 Wn. App. at 168.

WEAN gives lip service to the APA, stating variously that the Board erroneously interpreted or applied the law, that its factual findings are not supported by substantial evidence in the record, and/or that it acted arbitrarily and capriciously. RCW 34.05.570(3)(d),(e),(i). But it has not actually framed its arguments on appeal in terms of the APA or the Board’s order. Rather, it mounts a new attack against the county.

As pointed out to the trial court, it is the GMHB’s order under direct review, not Island County’s actions. *See* CP 98. This court reviews the Board’s legal conclusions *de novo*, giving substantial weight to the Board’s interpretation of the statute it administers. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007). Where the Board’s findings of fact are

reviewed under RCW 34.05.570(3)(e), the substantial evidence test is used. *Id.* “The test of substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *King Co. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (citation omitted). When there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *Rios v. Wash. Dept. of Labor and Ind.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

2. *Substantively.*

In reviewing comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous. *See* CP 14, RCW 36.70A.320. In order to find the County’s action clearly erroneous, the Board must have been “left with the firm and definite conviction that a mistake has been made.” *Id.*; *Dept. of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

In sum, the burden remains on WEAN to overcome the presumption that the challenged provisions of Ordinance C-71-16 were compliant with the GMA, and demonstrate that the County’s process or

result was clearly erroneous in light of the goals and requirements of the act.²² *See* CP 14; RCW 36.70A.320(1), (2).

The GMA requires cities and counties to protect the functions and values of critical area ecosystems. Development regulations must preserve the existing functions and values of critical areas and may not allow a net loss of the functions and values of the ecosystem containing the impacted or lost critical areas. CP 15 (*citing* RCW 36.70A.030(5), WAC 365-196-830(4); *Swinomish*, at 430). However, the GMA does not impose a duty to “enhance” critical areas. *Swinomish*, at 429–430. In deciding how best to preserve existing functions, local jurisdictions must consider the Best Available Science. *Swinomish*, 161 Wn.2d at 430–431. The GMA does not require BAS be followed if there is a reasoned justification for the departure.²³ *Id.*

B. The Board was correct to accept the County’s tailored case-by-case approach to buffer requirements for the NAP boundaries, which was based on BAS and considerate of WEAN’s public comments.

1. WEAN’s first argument calls for an absurd interpretation of unambiguous language.

First, WEAN appears to be arguing that the Planning Department is forbidden from requiring buffers adjacent to the NAP so long as those

²² If WEAN is able to satisfy this burden, the court may take any action consistent with RCW 34.05.574(1).

²³ While that is the rule, Island County does not believe it has strayed from BAS in this case.

areas encompass the land required for species preservation. It argues that the language of ICC 17.02B.430(E) italicized below “precludes buffers in all other circumstances.” Brief, 22. This argument was “not well taken” by the Board. CP 19.

Buffers shall not be required adjacent to [Natural Area Preserves] so long as these areas encompass the land required for species preservation. The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within these areas to ensure no net loss of habitat functions and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.

WEAN’s interpretation of this code provision is untenable. Buffers are mandated under ICC 17.02B.430(D) (“*shall* be established,” emphasis added) for *all* FWHCAs, including those in the NAP, “as necessary to protect the ecological integrity, structure and functions of the resource from development induced impacts. Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity.” ICC 17.02B.430(E) does not create an exception to that requirement.

Moreover, Petitioner advances an interpretation of one sentence of the section that renders the remainder inoperative, and the entirety absurd. This is contrary to the rule that “regulations are interpreted as a whole,

giving effect to all the language and harmonizing all provisions,” as the Board correctly did in its analysis of the buffer language. *Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002); see CP 19. “Rules of statutory construction apply to administrative regulations.” *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). “Only statutes that are ambiguous require judicial construction, and statutes are not ambiguous simply because different interpretations are conceivable. Constructions that would yield unlikely or absurd results should be avoided.” *Densley v. Dept. of Retirement Systems*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (internal citations omitted).

ICC 17.02B.430(D) and (E)—and the remainder of the chapter—are easily harmonized when read together.²⁴ The County’s 2016 amendment to the NAP buffer language at ICC 17.02B.430(E) (the struck through and underlined language in attached Appendix A, discussed at CP 19) clearly anticipates that buffers may be required adjacent to the NAP under any circumstance that would result in a “net loss of habitat functions and values” of any kind, by its terms and as shown below. WEAN’s assertion to the contrary is forced. Surely, it does not actually believe this interpretation is correct, and would never advocate for it.

²⁴ See also ICC 17.02B.040(A), 050(B), mandating use of the most restrictive of potentially competing regulations.

Also, ICC 17.02B.400²⁵ requires that a qualified professional prepare a Biological Site Assessment for any non-*de minimis* development proposal within 1,000 feet of the Naas NAP. CP 19. If the County determines that the proposal will result in *any* loss of habitat functions and values (no reference is made to just species preservation), a buffer tailored to the impact of the development and the sensitivity of the habitat is required. ICC 17.02B.430(E).

The County may then require a Habitat Management Plan to determine the impact to habitat and “the appropriate buffer width for the proposed development based on the site-specific analysis,” which “shall rely on best available science and be prepared by a qualified professional.” ICC 17.02B.430(F). Additionally, any impact will require a mitigation plan under ICC 17.02B.080. “If buffers are required,” no unmitigated development can occur in them, and a mitigation plan becomes a condition of approval on the underlying permit. ICC 17.02B.070(F), .080.

Contrary to WEAN’s assertion that Island County prohibited itself from imposing buffer protections for all but one critical area function, the County’s amendments to the table at ICC 17.02B.430(E) was based on BAS indicating that buffer management is particularly appropriate at the

²⁵ Formerly ICC 17.02B.410, *see* CP 19; AR 1353.

southern boundary of the NAP,²⁶ with reference made to the ecosystem at large, not one particular function:

Where the rare forest community extends south beyond the boundaries of the NAP onto the Camp Casey property, buffer management provisions are warranted to ensure that the forest community within the NAP is adequately protected from edge effects, in particular blowdown susceptibility.

AR 2754 (Compliance Report, Ex. 37: “BAS Report (NAP)).

The GMHB explicitly reviewed this amendment in light of the whole record and the statute it is charged with administering, and WEAN has failed to show that its interpretations and conclusions were erroneous. CP 16-20.

2. *There is no scientific or evidentiary support for a uniform 100-foot buffer around the NAP.*

As for WEAN’s new plan to set a minimum 100-foot setback to protect from the potential for “windthrow” or “blowdown” at the southern boundary of the NAP,²⁷ the County expressly considered BAS on this issue and echoed WEAN’s concerns in drafting this section. At that time, WEAN had requested that any development proposed for property

²⁶ See map at AR 2585.

²⁷ “WEAN’s expressed concern regarding buffers for the forest community at the NAP boundary was not raised during the initial phase of this matter. At that time, WEAN challenged the County’s decision to not require buffers to protect adjacent properties from controlled burning, a prairie management tool, and resulting smoke.” CP 17. During public comment, WEAN asked for 100-foot buffers to “address smoke impacts on neighboring properties associated with fire management,” not blowdown susceptibility AR 2629–2630. On appeal, WEAN combines the two arguments.

adjacent to the southern boundary of the Naas/Admiralty Inlet NAP be set back a minimum distance equal to 1.5 times the height of the tallest tree, an argument it has since apparently abandoned. AR 2631.

The County responded to this comment with information gleaned from its BAS report:

The proposed language [by WEAN] is stated as being based on a DNR permit exemption (for the agency's internal use) for hazard trees (no tree removal permit needed if a hazard tree is 1.5 times its height from the structure.) However, for purposes of protecting habitat functions and values, the consultant's concern was edge effects on forested areas when trees are removed. The Planning Commission recommended adopting language which would impose buffering based on proposal intensity relative to the impacted resource. This recommendation focuses directly on preserving the resource's ecological values and is consistent with best available science.

Compare id., Compliance Report Ex. 37.

Now on appeal, to argue that BAS mandates a 100-foot buffer around the entire Naas NAP, WEAN twists language in the county's BAS reports discussing the value the element of the forest *outside* the NAP at the southern boundary *already* provides as a buffer for the rest of the forest community *within* the NAP.

The court is invited to re-read WEAN's quoted language of the report with the first sentence emphasized, instead of the second:

The forested area on the Camp Casey parcel²⁸ 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 (Knutson and Naef 1997). Knutson and Naef (1997) identify 100 feet as generally sufficient to protect habitats from blowdown risk. Alternatively, Kelsey and West (2001) note that wind velocities remain elevated up to 600 feet into a buffer, and that wider buffers up to that distance [to] allow for selective thinning may be appropriate for areas subject to blowdown.

AR 2754 (emphasis added); *compare* Brief 25.

So far from “searching in vain for any evidence in the record supporting a buffer requirement of less than 100 feet,” the court will search in vain for any evidence that *would* support an artificially mandated, uniform 100-foot buffer for the NAP. The above paragraph stands for the opposite proposition—in the one area where buffer management is most likely to be appropriate because existing buffers may not provide sufficient protection, it may need to be up to 600 feet!

Rather than select an arbitrary buffer distance, the County followed BAS. The Board observed that the County had obtained input from DNR and learned the borders of the Naas Preserve were already “designed to include the remaining prairie soils at this location, which is the habitat for golden paintbrush, and the entire forest community occurrence, which

²⁸ The Camp Casey parcel’s relationship to the NAP is discussed at length in Exhibit 45 to the County’s Compliance Report.

secondarily serves as a buffer from edge effects for the two golden paintbrush populations on the preserve...

The immediate adjacency of roads, development and cultivated fields made decision-making regarding the placement of a boundary for this site fairly straight forward. That is, we have captured within our boundary all of the remaining natural habitat within the immediate vicinity.”

CP 18, *quoting* Compliance Report, Ex. 40.

Nevertheless, the BAS obtained by the County indicated buffer management may still be appropriate to protect the forest community at the Southern boundary from blowdown effects which could intrude the forest community element in extreme cases up to 600 feet. As can be seen, WEAN’s one-size-fits-all 100-foot buffer may not be protective enough for the southern boundary, and may be wholly unnecessary for the remainder, where roads, farmland, and other pre-GMA footprints truncate the existing NAP. Therefore, Island County rejected that approach, as it was obliged to do.

Furthermore, if another area should ever be designated as an NAP in Island County, with different risks and resources, the minimum 100-foot buffer area demanded by WEAN for Admiralty Inlet may be grossly inadequate. AR 3722–3723. The county’s case-by-case 1,000-foot review approach, however, will provide a buffer protection mechanism for any other plat designated in the future.

To summarize: Buffers are not *always* required adjacent to the NAP, so long as those areas encompass the land required for species preservation. On compliance, the County's due diligence and BAS research confirmed that the NAP totally encompasses the area needed for species preservation, but revealed a risk of negative edge effects for the forest element due to blowdown susceptibility, specifically at the southern boundary. Therefore, buffering may indeed be appropriate to protect this critical area, and the code amendments contemplate buffers being required in some cases.

In fact, the various provisions of the critical areas ordinance operate together to ensure that buffers will be established if and when development is proposed *at any boundary* that will result in *any* net loss of habitat function and value for *any reason*. BAS indicates this risk is of biggest concern for the forest on the SPU property at the Southern boundary.²⁹ By identifying and shoring up that risk in its ordinance, Island County complied with the Board's prior order, and this action was consistent with the goals and requirements of the GMA.

In affirming the county's actions, The Board recognized again that buffer requirements can be determined when appropriate on a case-by-

²⁹ At least, as far as WEAN's objections are concerned. Other situations could be imagined which would also need to be reviewed on a case-by-case basis.

case basis, and that requiring buffers where they are *not* necessary or appropriate is to mandate enhancement not required by the GMA. *See Swinomish*, 161 Wn.2d at 430 (“BAS, and by extension the GMA, does not require the county to establish mandatory riparian buffers.”).

The court should affirm the Board’s resolution of WEAN’s original Issue (6). WEAN has failed to meet its burden of showing that the Board’s conclusions were erroneous, or that the Board’s order was arbitrary and capricious.

C. The Board properly found GMA compliance with the County’s designation and protection of twelve specific Prairie Habitat FWHCAs where ETS Flora are known to have a primary association.

In its objections to finding compliance, WEAN invented a totem pole of FWHCA classifications and placed “primary association” habitats higher than “habitats of local importance.” AR 3069 *et seq.* But the Board’s Orders in 2015 and 2016 make it clear that the GMHB understands that classification of the Prairies as “habitats of local importance” resulted in the same protection in this case that classification as “primary association” habitat would have produced—either label results in designated FWHCA status for the subject areas with the full protections of the Critical Areas Ordinance. At least, it did not believe that designation of the one as opposed to the other was invalid under the GMA.

Perhaps realizing this was not a winning argument, WEAN also unsuccessfully attempted to advance new, unsubstantiated arguments on compliance regarding other plant species that were not reviewed by the Board in 2015. As the Board and the Superior Court recognized, those arguments should have been developed in a new petition, and the Court of Appeals lacks jurisdiction to resolve them in the first instance. *See Somers v. Snohomish Co.*, 105 Wn. App. 937, 945, 21 P.3d 1165 (Div. 1, 2001) (finding GMHB has exclusive jurisdiction over original theories under the GMA).

1. *“Non-prairie ETS plant species” were not before the Board in either 2015 or 2016, and the new species identified by WEAN in its brief are either already protected or completely unknown to science in Island County.*

WEAN’s arguments in support of its related “Assignments of Error” 3 and 5 will be addressed here.³⁰ Neither has any support in the record and both contain misrepresentations of fact.

In its 2015 Order, the Board was primarily concerned about a lack of protection (i.e. critical area status) for The Prairie systems as *habitats*, which made previous designation of three protected ETS plant *species* that

³⁰ “Whether the county’s new plant habitat designations fail to protect endangered, threatened, and sensitive plant species that are not associated with the county’s prairie habitat?”

“Whether the county’s new plant habitat designations fail to protect historically reported endangered, threatened, and sensitive plant species that may still exist?” Brief, at 3.

have a primary association with those habitats illusory. The three flora species are *Castilleja levisecta* (Golden Paintbrush³¹), *Meconella oregano* (White Meconella), and *Sericocarpus rigidus* (White-top Aster). See AR 2405–2406.

It is important to realize that neither the Board nor WEAN selected these three flora species out of thin air. They were brought to the Board’s attention because Island County designated the three *species* as protected at least as of 2014 through Ordinance C-75-14. AR 56. It had also designated several others, including *Fritillaria camschatcensis*, or “black lily,” which WEAN now claims is unprotected. Brief, 30 (*contra* AR 56, 2202; ICC 17.02B.230). But the *habitat* of the black lily was also protected through the 2014 Ordinance, whereby Crockett Lake was designated a Habitat of Local Importance.³² AR 2215–16.

Because the goal of Ordinance C-75-14 was to update Island County’s Fish and Wildlife *Habitat* Conservation Areas, it is no surprise that the Board focused on *habitats* of species that would be without

³¹ This species is occasionally referred to as the Golden “Indian” Paintbrush. See current ICC 17.02B.230.

³² Crockett Lake is now regulated through the Island County Shoreline Master Program. See ICC 17.02B.200(B). Crockett Lake is 600-700 acres in size. See AR 2216. To cite another example, the Bulb-bearing water-hemlock should also have been protected through the county’s wetland regulations. See AR 2214 (“The species is a wetland obligate.”)

protection absent consideration for designation as FWHCAs through the updates to Chapter 17.02B.

“In its adoption of Ordinance C-75-14, the County designated some [ETS] plants as species of local importance. It did not designate Westside Prairie, Oak Woodland, and Herbaceous Bald *habitats* as FWHCAs.” AR 2397 (emphasis added). In other words, the Board clearly conceptualized WEAN’s original Issues (7) & (8) as two sides of the same coin, in 2015 and again on compliance in 2016:³³

According to the [county’s 2015] BAS Report, the Golden Paintbrush, White Meconella, and White-top Aster “...occur in prairie habitats, [~~and~~] where the term prairie in this document is used as a general descriptor for wet and dry prairies, herbaceous balds, and herbaceous communities atop coastal bluffs.” The record thus establishes these three ETS species have a primary association with the County’s prairies and herbaceous balds. WAC 365-190-130(2) directs jurisdictions to consider and designate areas where endangered, threatened and sensitive species have a primary association. The County’s prairies have such an association with the three referenced plant species.

AR 2405, *cited at* CP 22, fn. 43.

Contrary to Petitioner’s assertion that the “issue” of unidentified ETS species and their unnamed habitats was “left open for the county to

³³ WEAN did not object to the Board thus condensing the issues and it did not file a motion for reconsideration or otherwise appeal/ seek clarification of the 2015 Order. Instead, it condemned Island County on compliance for following the Board’s lead, charging it with “misstating” and “conflating” the issues. AR 3082.

resolve on remand,”³⁴ the Board re-affirmed that its focus on compliance in 2016 was how the County had taken action to protect the habitats of the known ETS species previously identified by BAS but left undesignated:

WEAN’s Issues 7, 8, and 9, and the Board’s decision, focused on habitat as opposed to specific species and the Board’s [2015] ruling addressed that focus: whether or not the County had appropriately designated the habitat of federal or state listed flora with which those species had a primary association.

2016 Order, CP 21–22, fn. 40.

At any rate, to the extent WEAN even developed this argument below, it offered no science or evidence on compliance as to what non-prairie species it had in mind or how they should be protected, and the habitat of the only species it identifies on appeal (black lily) has been protected since at least 2014. AR 2214 (“The following plant species are included on the County’s protected species list in the *existing* code.” (emphasis added)).

WEAN similarly failed to plead up or offer evidence in support of its “Assignment of Error” #5, which does not withstand scrutiny and contains rather careless misstatements of fact. WEAN claims that the Board erred in not requiring Island County to designate and protect unidentified habitat areas of four “historic” ETS plant species explicitly named for the first time on appeal: the pink fawn lily, the Texas toadflax,

³⁴ Brief, at 29.

California buttercup, and Scouler’s catchfly. Brief, 34. This argument was taken up post-compliance³⁵ and was not evaluated by the Board or the Superior Court. Therefore, this Court should decline to rule on this claim as a matter of first impression.³⁶

Even if the court does reach this argument on the merits, WEAN offers no science or evidence that any of these four species have inhabited Island County since at least prior to 1977, if ever. Instead, to back up its theory that the County must designate and protect their unknown habitats, it cites a July 2015 “User Guide and Data Dictionary” for the Washington Natural Heritage Program, that indicates a species labeled “historic” by the WNHP is not necessarily extirpated. Brief, 35; AR 3634. This document is obviously not BAS, but a guide for interpreting a table listing ETS species from 2015. WEAN then argues that in the absence of scientific data on the location of these plants, the County was mandated to take a “precautionary or no risk approach” and “strictly limit[.]” development and land use activities—apparently all across the island—until the uncertainty is resolved. Brief, 36.

³⁵ It springs from AR 3082–3086. While WEAN apparently directed the Planning Commission to the WNHP List in a May 19, 2016 comment, it did not identify which species it believed still inhabited Whidbey Island, or provide BAS on how the unnamed species should be located or protected. *See* AR 3743.

³⁶ This is especially true given that the Board seems to have suggested a willingness to hear a properly renewed and developed argument on this basis. *See* CP 21, fn. 39.

First, the Board directed the County to protect the habitats of White-top Aster, White Meconella, and Golden Paintbrush specifically (i.e. Prairies), because those were the plant species on the ETS list in 2014 known to inhabit Whidbey Island, as revealed by BAS. *See* AR 2231–2233. It appears no additional non-historic species were added to the list between 2014 and 2016,³⁷ when the county reviewed BAS again on compliance, and WEAN did not argue that additional ETS plants had been discovered on Whidbey (or Camano) Island between 2014–2016. It merely argued that the County needed to find a way to protect the unknown habitats of the “presumed extirpated” historic plants anyway.

Secondly, WEAN’s assertion to the Court that “one of these [four] species was rediscovered after 20 years” has no basis in the record. Brief, 36. The unnamed species WEAN claims to have re-discovered circa 2000–2001 is not one of the four species named in this section of its brief, but *Sericocarpus rigidus*, the White-top Aster. *Compare id*; AR 3524, 3377. This is not a harmless misstatement, as the White-top Aster was on Island County’s “Protected Species List” before WEAN’s 2014 Petition was submitted, and on compliance in 2016, the County designated and

³⁷ *Compare* AR 2348, 3775, with the exception of *Leptosiphon minimus*, nowhere else discussed in this record.

protected the habitats of White-top Aster—that is, the Prairies, discussed here throughout.

And again, reading the portions of the record cited by WEAN in its brief together, the species that it is aware of being recently re-discovered and placed on the NHP List is not *Silene scouleri* (“Scouler’s catchfly”), but *Sericocarpus rigidus*—White-top aster again. See Brief, 36.³⁸ Protection of the habitat of White-top Aster is exactly what Island County accomplished by enacting Ordinance C-76-16.

Third, the “precautionary or no risk approach” encouraged by WAC 365-195-920 discusses the potential “harm of critical areas or uncertainty about the risk to critical area function,” not individual historic flora species that have not been observed for above forty years. Cf. Brief, 36. Even if WEAN claims to have the information now, there is nothing *in the record* to establish what kind of ecosystem these historic species might inhabit—again, they have not been seen in any habitat since at least 1977.

Contrary to the rule WEAN would derive from *Ferry Co. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 339 P.3d 478 (2014), Island County is not charged with the impossible task of “maintaining all individuals of all species at all times,” and halting all development until this occurs. See WAC 365-190-130(1).

³⁸ Citing AR 3377, n. 5; AR 3524, n. 15; AR 3872.

In *Ferry County*, the county entirely failed to designate and protect some ETS animal species *known to exist* in its jurisdiction because their breeding habitats had not been identified by the Dept. of Fish & Wildlife (“DFW”). *Ferry Co.*, at 705, 742 (“The ordinance fails to designate the majority of locally vulnerable species and their associated habitats in Ferry County... Breeding habitats are not the only habitats needing protection.”). In fact, in its draft critical areas ordinance, Ferry County had *removed* protections for ETS species and their habitats. *Id.* at 704. Here, in contrast, neither WEAN, nor DFW, nor the county’s BAS indicates any known area in Island County supporting these plant species. There is no basis for protecting their unknown habitats under WAC 365-190-130 or *Ferry County*. In fact, it was a *Ferry County* problem that resulted in noncompliance in this case in 2015, and that problem was resolved by designating the known habitats of the ETS species identified by BAS.

WEAN did not submit a single piece of science anywhere in this record to support regulations aimed at preserving the habitats of pink fawn lily, Texas toadflax, California buttercup, or Scouler’s catchfly, or even to assume that a single specimen of any of these species has been documented on Whidbey Island since at least 1977, if ever. As the county has learned from this litigation, designating a flora species for protection without identifying and protecting its habitat is a fool’s errand.

Nevertheless, the Planning Director still reached out to its BAS consultants for advice on this issue. AR 3771.³⁹ The Department then passed that information onto WEAN through the public comment matrix. *See* AR 4013. No scientific response rebutting the presumption of extirpation was given.

WEAN now argues the semantics of “historic” vs. “extirpated” on appeal, without citing to any finding of fact or conclusion of law made by the Board on this issue (there is none). The Court should reject this unsubstantiated claim with no foundation in the record, as the Superior Court did. CP 513. WEAN has not met its burden of showing that the county’s fact-based approach to its ETS plant species habitats was inconsistent with BAS, the GMA, or the Board’s prior order. In fact, it has not pointed to any evidence at all.

2. *The Board found Island County compliant with the GMA and its prior order explicitly because the county designated the habitat of the relevant ETS species as “locally important,” not despite it.*

First and foremost, the Board specifically directed the county to designate the Prairie habitats as “locally important,” not as “primary association” habitat. *See* AR 2408, 2418. But this pedantic distinction misses the point: Island County was out of compliance with the GMA

³⁹ Only paragraph 2 is relevant to this specific argument.

because it neglected to designate the known habitats of previously designated ETS flora species as critical areas at all.

As the Board explained in its 2016 Order of Compliance:

WEAN now objects to the County's decision to designate these areas [the habitats of the three ETS species] as habitats of local importance, contending such a designation fails to provide adequate protection. It argues that the GMA and BAS mandate a higher designation although it cites no statutory provision or BAS from the record requiring that. The Board specifically found:

WAC 365-190-130(2)(b) *directs jurisdictions to consider habitats and species of local importance for classification and designation.* Although the record establishes these areas constitute *rare or vulnerable ecological systems and habitat or habitat elements* (RCW 36.70A.030(6)(a)), the County did not designate Westside prairies, Oak woodlands and herbaceous balds as habitats of local importance. [citing 2015 Order at 37 (AR 2408)] (emphasis included in the original)

On compliance the County designated twelve areas as FWHCAs of local importance, five more than the seven prairie or oak woodland sites earlier BAS information in the record disclosed. Protection is provided as addressed above on page 8 and footnote 29.

WEAN has failed to meet its burden to establish that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. The County has achieved compliance on Issues 7 and 8.

CP 23.

RCW 36.70A.170(2) requires jurisdictions to "designate" critical areas. Designation is the second step in implementing RCW 36.70A.170,

classification being the first. RCW 36.70A.050. Critical areas must be designated based on their defined classifications and designation establishes “the general distribution, location, and extent of critical areas.” WAC 365-190-040(5). The WAC lists nine classifications of resources that jurisdictions “should consider designating as FWHCA.” WAC 365-190-130. Designation as FWHCA results in the same critical area protection in Island County, regardless of which classification triggers it, and there is nothing in the WAC which suggests any one classification takes priority over any other. ICC 17.02B.200 (“All areas within the County meeting these criteria are hereby designated critical areas and are subject to the provisions of this chapter.”)

Moreover, classification as primary association habitat and locally important habitat is not mutually exclusive, and they will often overlap—they do overlap in this case, where the Board has found and the County agrees that the Prairies designated locally important are also primarily associated with three of the species in its protected flora list. Contrary to WEAN’s argument on appeal that “greater protections [are] given to primary association habitat than to habitat deemed only to be of ‘local’ importance,” ICC 17.02B.040(A) mandates that “if a conflict exists between this chapter and another chapter or planning policy, the more restrictive shall apply.” *Accord* ICC 17.02B.050(B) (“the more restrictive

or protective provision shall apply”). But it is not even true that primary association habitat receives more robust critical area protection than locally important habitat.

Wherever primary association is established, buffers “shall be based on management recommendations provided by the [Washington State Department of Fish and Wildlife (“WDFW”) PHS Program] and shall consider site-specific conditions and recommendation of qualified professional [sic].” ICC 17.02B.430(E). Application of this regulation is provided for FWHCAs designated as “habitats of local importance” as well by operation of ICC 17.02B.430(F)⁴⁰ and (G)⁴¹ in tandem with 17.02B.440(C).⁴² These protections are further buttressed by the 1,000 foot Biological Site Assessment review procedures mandated for all FWHCAs by ICC 17.02B.400 (former ICC 17.02B.410), discussed by the Board at CP 19, fn. 29, and also incorporated into its analysis of this issue. CP 22.

Finally, “primary association” classification mainly contemplates designating habitats of ETS animal species, because its functionality relies

⁴⁰ “If in reviewing the BSA and proposal, the County determines that impacts to a protected species or habitat may occur as a result of a proposal a habitat management plan (HMP) may be required...”

⁴¹ “The HMP may be combined with the BSA. *The HMP must be consistent with the management recommendations adopted by the [WDFW]...*” (emphasis added)

⁴² “The Planning Director shall also have the authority to require the preparation of a HMP, consistent with the requirements of section 17.02B.430.G which must be approved by [WDFW] and signed by the landowner prior to issuing a permit for the proposed activity.”

on the State ETS animal species lists at former WAC 232-12-014 and WAC 232-12-011 for operation.⁴³ *See* ICC 17.02B.200(A)(1). Those lists plainly exclude flora. *This is not to say that plant habitat cannot be designated in Island County as an “area with a primary association with ETS species,”* an argument that the Board generally rejected,⁴⁴ it just simply is not the usual function of this classification.⁴⁵

To the extent it can be argued that “habitat of local importance” is a more “static” classification than “primary association” habitat (which analysis does not bear out),⁴⁶ this should not be of concern to WEAN, as the very term “locally important” implies a level of permanent recognition and special consideration. *See* ICC 17.02B.200(A)(5).

Here, the Board did not direct Island County to designate Prairies as primary association habitat. Rather, it directed the County to designate the Prairie habitats as locally important in perpetuity *because* of their primary association status with the documented ETS species, and the County did just that. WEAN would have a more compelling argument if it

⁴³ The WDFW ETS lists are now recorded at WAC 220-610-010 and WAC 220-200-100. While there are similar state-promulgated flora lists available, they do not appear to be codified in the Washington Administrative Code.

⁴⁴ *See* AR 2397 *et seq.*

⁴⁵ This may be more practical than anything—flora is less likely to walkabout the county and associate with new habitats than fauna is.

⁴⁶ Given, e.g., the broad discretion vested in the Planning Department in determining the boundaries of critical areas, discussed *infra*.

could prove that the sites chosen for local importance here did not in fact “include both the immediate area where the species occurs and the contiguous habitat necessary for its long term persistence.” *See* ICC 17.02B.060 (Definition of “Primary association”).

But this would be an impossible burden to carry in this procedural posture, where WEAN did not challenge a specific land use action taken by the Planning Department, but the Critical Areas Ordinance at large. More importantly, WEAN continues to disregard that *all* impactful development proposals within 1,000 feet of a critical area require a biological site assessment, regardless of area classification. The individualized county review mandated by ICC 17.02B.400(A) (former ICC 17.02B.410(A)) was crucial to the Board’s decision finding compliance in this matter, as it cited that regulation over and over again in its analysis. *See* CP 19, 22–23, 34.

WEAN did not carry its burden of proving the county’s regulatory scheme is invalid or fails to meet the goals and requirements of the GMA, in light of the entire record. WEAN has shown no basis to invalidate the GMHB’s ruling on these issues under the APA. The Board recognized with approval that the County was able to ~~kill~~ protect two birds with one stone, by designating the 12 listed sites at ICC 17.02B.230(C) as locally important. The Board concluded this was consistent with its prior order,

BAS, and the goals and requirements of the GMA. WEAN has not shown that the Board's conclusions were erroneous, let alone arbitrary and capricious.

D. Island County used BAS to identify and designate the Prairies selected for protection and the court can only rule on WEAN's remaining arguments to the extent the Board reached them on reconsideration.

The Board did not make any other rulings regarding WEAN's original Issues (7) & (8) in its 2016 Order Finding Compliance, but considered one additional argument on Reconsideration⁴⁷ that appears here as "Assignment of Error" Number Seven.⁴⁸ WEAN's appellate "Assignment of Error" Number Six⁴⁹ appears to have been raised for the first time in its Thurston County Petition (*See* CP 8) and was never directed to the Board for decision. The Court should decline to rule on it.

WEAN's argument on appeal regarding "smaller examples of prairies" is in no way, shape, or form framed by the Board's analysis of the issue in the Order on Reconsideration under review. CP 31–36.

⁴⁷ "WEAN's argument at the May 21, 2015 Hearing on the Merits was that the County had failed to designate prairies at all... Then, on compliance, after the County designated 12 sites as FWHCAs of local importance, WEAN argued that designating prairies merely as locally important was insufficient. Now, on reconsideration it raises a different argument: that the County did not designate all prairie remnants." Order on Reconsideration, CP 33–34.

⁴⁸ *Supra* fn. 19.

⁴⁹ "Whether the county's new designations for westside prairies, oak woodlands, and herbaceous balds violate the GMA by failing to clearly define which habitat types are protected and where they are located?" Brief, at 4.

Therefore, it is quoted here at length, as it also properly analyzes the BAS that informed the County's decision making (also ignored by WEAN):

Peer review of The Watershed Company's BAS analysis compared Island County's approach to that of Thurston County. It observed that the Island County approach was "more proactive" as it protects prairies [as well as herbaceous balds, and Oak Woodlands] "by identifying and designating all of these habitats, even if they are currently degraded." The County's designation of those areas is by general location and the County "can use the results of The Watershed Company memo [Exhibit 38 attached to Island County's Compliance Report] to direct conservation and restoration resources to sites most likely to persist and provide habitat for more native species over time." A fact which WEAN fails to acknowledge is that County regulations require a biological site assessment whenever a development proposal is located within 1000 feet of a critical area, including FWHCAs. WEAN also fails to acknowledge that the BAS in the record discloses that some small areas of remnant prairie are likely to support only limited habitat functions. As Island County found in its compliance legislation: "Also habitats and species of local importance must represent either high-quality native habitat or habitat that has a high potential to recover to a suitable condition. These characteristics have also not been identified as being present." Attached to Ordinance C-71-16 was a Staff Summary and Response to Comments Matrix: (The following was a response to WEAN's comment suggesting that all areas meeting WDFW's Priority Habitat and Species criteria be designated.) "The County could have allowed for these areas to be identified on a more ad-hoc basis. However, the County elected to take a more proactive approach, and retained professional consultants to identify qualifying Prairie, Oak Woodlands, and Herbaceous Balds areas up front...

CP 34–35 (parentheticals and quotations in original,
footnotes omitted).

WEAN does not reference or challenge the Board’s findings above, therefore, they are verities on appeal. *See Hilltop Terrace Homeowners Ass’n v. Island Co.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

Though it is not the county’s burden to rebut WEAN’s favored policy choices, the ad-hoc “spot designation” it suggests here would be inconsistent with the GMA’s goal of “creating a system of fish and wildlife habitat with connections between larger habitat blocks and open spaces,” and the GMA’s requirement of “maintaining populations of species in suitable habitats within their natural geographic distribution so that the habitat available is sufficient to support viable populations over the long term and isolated subpopulations are not created.” WAC 365-190-130(1).

Indeed, WEAN’s proposal seems to advocate for a network of “isolated subpopulations” without any evidence submitted such sites are sufficient for habitat management. And as before with its arguments regarding “non-prairie ETS plants,” WEAN argues in non-scientific generalities (“smaller examples of prairie habitat”) while scattering

citations to fragmentary portions of the record, taken completely out of context.⁵⁰

Instead of taking this approach disfavored by the GMA, the County listed the sites identified by BAS as best candidates for recovery and conservation and listed them at ICC 17.02B.230(C). *See* AR 2681–2682. It also attached a map of these areas to Ordinance C-71-16. WEAN did not submit evidence or science sufficient to leave the Board with the conviction that the county’s decision making was clearly erroneous, and the above quoted analysis of the Board is not arbitrary or capricious.

To briefly respond to WEAN’s new argument that “the map isn’t good enough,” the map does not control the boundaries of these area designations as FWHCAs. The Planning Director does, in his application and enforcement of the Island Critical Areas Ordinance, which includes the individualized 1,000 foot radial BSA mandated by ICC 17.02B.400. The Watershed Map attached as Exhibit A to Ordinance C-71-16 is only one of the many tools employed by the Planning Director in discharging his duties:

⁵⁰ That is, in the same manner it would have the county designating FWHCAs. To take one example: WEAN argues in a footnote that it is necessary for the county to protect the prairie habitat of fawn lily allegedly known to only four sites on Whidbey Island. Brief, 43–44 fn. 18. First, the primary source for this information appears to be legal argument written by WEAN and directed to the Planning Commission. AR 3611. Secondly, the two sites where Mr. Erickson claims to have personally observed the fawn lily occurring are *both* protected FWHCAs *and* listed habitats of local importance: the Admiralty Inlet (Naas) NAP and Deception Pass at Goose Rock. *See* ICC 17.02B.230(C).

Map sources showing the approximate location and extent of FWHCA include, but are not limited to critical area maps adopted or commissioned by the County, such as maps included in the Island County Comprehensive Plan, FWHCA Best Available Science and Existing Conditions Report (the Watershed Company and Parametrix, 2014),⁵¹ and WDFW Priority Habitats and Species (PHS) maps, as most recently updated. These maps are to be used as a guide for the County, project applicants, and/or property owners and will be periodically updated as new critical areas are identified. They are a reference and do not provide a final critical areas designation. In the event of a conflict between FWHCA mapping and the designation criteria outlined above, the designation criteria shall control.

ICC 17.02B.200(C).

The “designation criteria outlined above” includes the definition of primary association habitat, the WDFW and NHP maps, data, and lists, the county’s “local importance” lists and tables, and other tools. These guidelines operate in tandem with the mandated professional Biological Site Assessment required before any development occurs, the Watershed Map brought to the court’s attention, and the county’s mitigation requirements. They sufficiently protect the ETS plant habitats that were at the heart of Issues (7) and (8) of WEAN’s initial petition.

Those issues were resolved on compliance to the satisfaction of the Growth Management Hearings Board, and this court should defer to its

⁵¹ AR 2179–2350. The characteristics and functions of Westside Prairies, Oak Woodlands, and Herbaceous Balds are also described and defined in this document. *See* AR 2231–2233, 2349.

application of the law it administers and Island County's discretion to make policy and manage its resources.

V. CONCLUSION

WEAN has failed to carry the burden of proving that the Board's ruling in the County's favor on these issues was arbitrary and capricious, or contrary to law or fact. WEAN has failed to establish that Island County's actions "on compliance" were inconsistent with Best Available Science, the GMHB's 2015 Order, or the goals and requirements of the Growth Management Act.

Therefore, the Superior Court's Order dismissing the above cause number and the GMHB's Orders bringing this longstanding litigation to a close must be affirmed. It is WEAN, not Island County, that is seeking a second bite of the apple.

Respectfully submitted this 19th day of Nov., 2018.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By:  _____
Jesse J. Eldred
DEPUTY PROSECUTING ATTORNEY
WSBA # 48496

Island County's Response Brief

Appendix A

Exhibit A

Revised Island County Code Chapter 17.02B

Chapter 17.02B

Island County Critical Areas Regulations

...

Designation, Classification and Mapping

17.02B.200 - Fish and wildlife habitat conservation areas.

...

- C. Mapping: Map sources showing the approximate location and extent of FWHCA include, but are not limited to critical areas maps adopted or commissioned by the county, such as maps included in the Island County Comprehensive Plan, FWHCA Best Available Science and Existing Conditions Report (the Watershed Company and Parametrix, 2014), and WDFW Priority Habitats and Species (PHS) maps, as most recently updated. These maps are to be used as a guide for the county, project applicants, and/or property owners and will be periodically updated as new critical areas are identified. They are a reference and do not provide a final critical areas designation. In the event of a conflict between FWHCA mapping and the designation criteria outlined above, the designation criteria shall control.

17.02B.210 – Western Toad.

Western Toad breeding sites, as documented by scientifically verifiable data from WDFW, or a qualified professional, shall be protected through the County's wetland and stream critical areas regulations, presently codified in Title 17.

17.02B.210-220 - Wetlands: Reserved.

17.02B.220-230 - Geologically hazardous areas: Reserved.

...

Evaluation and Protection Standards

...

17.02B.430 - Protection standards—Other fish and wildlife habitat conservation areas.

...

- D. Buffers shall be established adjacent to FWHCA as necessary to protect the ecological integrity, structure and functions of the resource from development induced impacts. Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity.
- E. The director shall determine the appropriate buffer for FWHCA other than streams based on best available science and the following guidance:

Fish and Wildlife Habitat Conservation Area	Buffer Requirement
Areas with a primary association with endangered, threatened, and sensitive species	Buffer 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.
State natural area preserves, natural resource conservation areas, and state wildlife areas	<p>Buffers shall not be required adjacent to these areas. These areas are assumed to <u>as long as these areas</u> encompass the land required for species preservation. The director may impose a new buffer or increase the applicable buffer if it is determined that a proposed development would infringe on or inhibit use of the entire property for species preservation. <u>The Planning Department shall confirm the public agency establishing and managing the area has included sufficient land within these areas to ensure no net loss of habitat functions and values. If buffers are required, they shall reflect the habitat sensitivity and the type and intensity of activity proposed to be conducted nearby.</u></p>
Species and habitats of local importance	The need for and dimensions of buffers for approved species and habitats of local importance shall be determined on a case-by-case basis by the director according to adopted habitat management plans for the specific resource (section 17.02B.500).

- F. If in reviewing the BSA and proposal, the county determines that impacts to a protected species or habitat may occur as a result of a proposal, a habitat management plan (HMP)

may be required. An applicant may either use a standard HMP maintained by the county (if available) or may choose to complete an HMP for a site-specific analysis to better determine the impact to habitat and to determine the appropriate buffer width for the proposed development based on the site-specific analysis. The preparation and submission of this report is the responsibility of the applicant and subject to approval by the county. The report shall rely on best available science and shall be prepared by a qualified professional.

- G. The HMP may be combined with the BSA. The HMP must be consistent with the management recommendations adopted by the Washington Department of Fish and Wildlife, and the specific attributes of the affected properties, such as, but not limited to, property size and configuration, surrounding land use, and the practicability of implementing the HMP, and the adaptation of the species to human activity.
- H. Standard habitat management plan. Where the county has developed a standard HMP, the applicant may either accept and sign the standard HMP or prepare his or her own HMP pursuant to section 17.02B.430.D. and E. From time to time as the lists of protected species and species of local importance are amended, the county may develop additional standard HMPs, modify adopted standards; and/or delete HMP requirements.

...

17.02B.510 - Designated habitats and species of local importance.

Habitats and species of local importance and protected species that have been approved for designation by Island County include:

A. Protected species list—Flora:

Scientific Name	Common Name	State Status	Federal Status
<i>Agoseris elata</i>	tall agoseris	sensitive	
<i>Sericocarpus rigidus</i>	white-top aster	sensitive	species of concern
<i>Castilleja levisecta</i>	golden indian paintbrush	endangered	listed threatened
<i>Circuta bulbifera</i>	bulb bearing water hemlock	sensitive	
<i>Fritillaria camschatcensis</i>	black lily	sensitive	
<i>Meconella oregana</i>	white meconella	threatened	species of concern
<i>Puccinella nutkaensis</i>	Alaska alkaligrass		

B. Species and habitats of local importance list:

Scientific Name	Common Name	Protected Area	State Status	Federal Status
Ardea herodias	Great blue heron	Nest sites		
Pandion haliaetus	Osprey	Nests		
Dryocopus pileatus	Pileated woodpecker	Nest sites		
Cygnus buccinator	Trumpeter swan	Foraging habitat		
Whidbey Island Game Farm/Au Sable Institute	Not applicable	Property		

C. Native Prairies, Herbaceous Balds and Oak Woodlands, to the extent outside SMP jurisdiction:

1. Deception Pass SP-Goose Rock
2. West Beach/Ebey's Landing Golden Paintbrush Site
3. West Beach – non-native grassland
4. West Beach Road – Unsurveyed Grassland
5. Ebey's Bluff
6. Grasser's Hill (including area locally known as Schoolhouse Prairie)
7. Naas (Admiralty Inlet) Natural Area Preserve
8. Fort Casey State Park Golden Paintbrush site
9. Penn Cove Road
10. San de Fuca schoolhouse
11. Smith Prairie, including Pacific Rim Institute
12. South Smith Prairie

*See Map prepared by Watershed Company dated June 20, 2016. _____

FILED
Court of Appeals
Division II
State of Washington
11/19/2018 4:45 PM
NO. 51903-8-II

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

WHIDBEY ENVIRONMENTAL ACTION NETWORK,
Appellant,

v.

GROWTH MANAGEMENT HEARINGS BOARD,
Respondent,

v.

ISLAND COUNTY,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Superior Court Cause No. 16-2-04747-34
W. Wash. GMHB No. 14-2-0009

DECLARATION OF SERVICE

I, Cassandra S. Cosby, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 19th day of November, 2018, Island County's Response Brief and this Declaration of Service was served on the parties designated below as indicated:

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November 19, 2018 - 4:45 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

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