

FILED

OCT 17 2013

Case No. 31331-0-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

FERRY COUNTY,

Respondent,

v.

GROWTH MANAGEMENT HEARINGS BOARD;
ENVIRONMENTAL AND LAND USE HEARINGS OFFICE;

Respondents,

And

CONCERNED FRIENDS OF FERRY COUNTY; DAVID L.
ROBINSON; FUTUREWISE;

Appellants,

And

SCOTT L. SIMMONS; RIPARIAN OWNERS OF FERRY COUNTY
and FERRY COUNTY CATTLEMAN'S ASSOCIATION, INC.

Respondents.

BRIEF OF RESPONDENT FERRY COUNTY

L. Michael Golden, WSBA# 26128
Golden Law Office P.L.L.C.
298 S. Main Street, Suite 203
Colville, WA 99114 (509) 684-6322
Attorney for Respondent Ferry County

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CASES ii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR..... 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

 A. RESOLUTION OF THIS ARGUMENT BY SUMMARY
 JUDGMENT WAS PROPER..... 4

 B. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND
 STANDARD OF REVIEW 5

 1. Deference is Due the County's Legislative Choices in GMA
 Implementation..... 5

 2. Specific Standards of Review 8

 C. THE GROWTH BOARD ERRED IN CONCLUDING THAT THE
 COUNTY IS IN NON- COMPLIANCE WITH THE GMA
 REGARDING HABITATS AND SPECIES OF LOCAL
 IMPORTANCE 10

 1. The Applicable Statutes and Regulations Vest the County with
 Discretion to Decide Whether Any Habitats and Species Are of
 Local Importance 14

 2. The Growth Board Improperly Shifted the Burden of Proof from
 the Petitioners Before It to the County. 18

 3. The County Complied with the GMA Mandate to Include BAS in
 the Record 20

 4. The County Considered BAS in Regard to Habitat and Species of
 Local Importance in a Reasoned Process 24

 a. The reasoned process for evaluating and not following a
 scientific recommendation need not be based on science..... 24

 b. The Growth Board erred in concluding that the reasoned
 process must be detailed in the Critical Areas Ordinance. 29

 c. The County dealt with BAS in a reasoned process..... 30

V. CONCLUSION 37

TABLE OF CASES

Cases

Campbell v. Ticor Title Ins. Co., 166 Wash.2d 466, 470, 209 P.3d 859 (2009) 5

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 836, 123 P.3d 102, (2005).23, 27, 31

Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 96 Wn. App. 522, 526 (1999) 10

Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd., 172 Wn2d 144, 156,256 P.3d 1193 (2011). 9

Lallas v. Skagit County, 167 Wash.2d 861, 864, 225 P.3d 910 (2009) 5

Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 28 (1999)..... 19

Neighborhood Alliance of Spokane County v. County of Spokane, 261 P.3d 119, 172 Wn.2d 702 (Wash. 2011)..... 4

Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr'gs Bd., 166 Wn. App. 172, 194 (2012) 31, 32

Palermo at Lakeland LLC v. City of Bonney Lake, 147 Wn. App. 64 (2008). 11

Quadrant Corp. v. Wash. State Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 238 (2005)..... 8, 9

Skagit Surveyors & Eng'rs, LLC, v. Friends of Skagit County, 135 Wn.2d 542, 11 546-47(1999). 12

Stewart v. Chevron Chemical Co., 111 Wn.2d 609, 613 (1988) 18

Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 430 (2006) passim

Statutes

Chapter 36.70A RCW 1

RCW 34.05.570(3)..... 9

RCW 36.70A.020 12

RCW 36.70A.030(5) 13

RCW 36.70A.050 10

RCW 36.70A.050(3) 16

RCW 36.70A.060(2) 13

RCW 36.70A.17013, 16, 38

RCW 36.70A.170(2) 23

RCW 36.70A.172 13, 33

RCW 36.70A.172(1) 15, 32

RCW 36.70A.300(5) 5

RCW 36.70A.320(1).....	6, 20
RCW 36.70A.320(2).....	6, 21, 22
RCW 36.70A.320(3).....	7
RCW 36.70A.3201.....	7, 8

Other Authorities

Merriam Webster Dictionary (online ed. 2011).....	14
---	----

Rules

CR 56(c).....	5
WAC 222-16-031.....	25
WAC 232-12-011.....	25
WAC 232-12-014.....	25
WAC 232-12-297.....	25
WAC 365-190-030.....	17
WAC 365-190-030(6).....	19
WAC 365-190-040.....	24
WAC 365-190-040(4)(a).....	16
WAC 365-190-080(4).....	17
WAC 365-190-130.....	17
WAC 365-190-130(2).....	16, 20
WAC 365-190-130(3).....	16
WAC 365-190-130(4)(a).....	17
WAC 365-190-130(4)(b).....	18
WAC 365-195-900.....	31
WAC 365-195-915(1)(b).....	28, 31, 32

I. INTRODUCTION

The proceedings below concerned the County's ongoing efforts to comply with the Eastern Washington Growth Management Hearings Board's (Growth Board's) view of the Growth Management Act (GMA), Chapter 36.70A RCW.

Appellants Concerned Friends of Ferry County, David L. Robinson and Futurewise appeal from summary judgment granted to Ferry County by the Superior Court. CP 2-37. The Superior Court's decision was limited to the sole issue of whether the County acted properly with respect to any obligation under the GMA to designate and protect "habitats and species of local importance." CP 64-65.

Although the Appellants have the right to file the opening brief, by agreement between the parties, Respondent Ferry County is filing the opening and reply briefs.

II. ASSIGNMENTS OF ERROR

Did the Superior Court properly grant summary judgment to Ferry County in regard to the Growth Board's decision regarding habitats and species of local importance? Specifically:

- (1) Does the GMA require counties to designate and protect any habitats or species of local importance, or is the determination of local importance at the sole discretion of the locality?
- (2) Did the Growth Board impermissibly shift the burden of proof to the County by not requiring the petitioners before it to demonstrate that BAS was not included in the record?
- (3) If the Growth Board did not impermissibly shift the burden of proof, was BAS regarding habitats and species of local importance included in the record or was there any BAS that was not included in the record?
- (4) With respect to the County's actions regarding habitats and species of local importance, did the County engage in a reasoned legislative process in light of BAS?

III. STATEMENT OF THE CASE

Over the past several years, Ferry County has been engaged in litigation before the Growth Board and other tribunals regarding whether its Comprehensive Plan and Development Regulations — including its Critical Areas Ordinance — comply with the GMA. In response to this litigation, on July 25, 2011, the County enacted Ordinance Nos. 2011-01 and 2011-02 in an effort to bring its Comprehensive Plan and Development Regulations into compliance with the County's obligation to designate and protect critical areas under the GMA.

Appellants Concerned Friends of Ferry County, David Robinson, and Futurewise filed objections with the Board on September 7, 2011, alleging that Ferry County Ordinance Nos. 2011-01 and 2011-02 failed to bring the County's Comprehensive Plan and Development Regulations into compliance with the GMA. AR 63. On October 7, 2011, the parties participated in a compliance hearing before the Board in GMHB Case Nos. 97-1-0018, 01-1-0019, and 06-1-8 0003. AR 63

On December 1, 2011, the Board issued a Compliance Order, concluding that all or portions of Ferry County Ordinance Nos. 2011-01 and 2011-02 failed to comply with the GMA. See, AR 90-104. The Board addressed GMHB Case No. 01-1-0019 via a separate order. Critical to this Motion, the Growth Board ruled:

As to designation of Fish and Wildlife Habitat Conservation Areas, the Board finds and concludes as follows:

- There is no substantial evidence in the record to support a County finding that BAS [Best Available Science] was included in designating Ferry County's Fish and Wildlife Habitat Conservation Areas.
- Ferry County failed to include the Best Available Science in designating (1) Areas where ETS [Endangered Threatened or Sensitive] Species have a Primary Association, and (2) Habitats and Species of Local Importance. Ordinance 2011-02 designations

of Fish and Wildlife Habitat Conservation Areas (relating to ETS Habitats and Species, and Species of Local Importance) were clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

- Other parties, such as Scott Simmons, Riparian Owners of Ferry County, and Ferry County Cattleman's Association limited their participation to the issues presented in a separate matter before the Growth Board, GMHB Case No. 01-1-0019.
- On remand, Ferry County should provide a reasoned justification for departing from Best Available Science in designating Fish and Wildlife Habitat Conservation Areas.

AR 97-98.

Issues regarding Endangered, Threatened, and Sensitive (ETS) species were not part of the summary judgment below, but are the subject of the County's ongoing legislative actions referenced above.

IV. ARGUMENT

A. RESOLUTION OF THIS ARGUMENT BY SUMMARY JUDGMENT WAS PROPER

Appellate review of summary judgment is *de novo*.

Neighborhood Alliance of Spokane County v. County of Spokane, 261 P.3d 119, 172 Wn.2d 702 (Wash. 2011); *Lallas v. Skagit County*, 167 Wash.2d 861, 864, 225 P.3d 910 (2009) (*citing*, *Campbell v. Ticor Title Ins. Co.*, 166 Wash.2d 466, 470, 209 P.3d

859 (2009)). CR 56(c) authorizes summary judgment to parties when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The purpose of the summary judgment procedure is to resolve cases where no trial is needed because facts are not in dispute. Because the Court's review under the APA is generally on the record of the agency below, judicial review under the APA is particularly suited to resolution by summary judgment.

B. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, AND STANDARD OF REVIEW

The APA governs this Court's review of the Growth Board's decision. RCW 36.70A.300(5). The interaction between the GMA and the APA creates a unique standard of review — deference is owed the County's legislative decision, and not the Growth Board's Decision. See, e.g., *Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wn. App. 365 (2008); *Sherman v. State*, 128 Wn.2d 164 (1995).

1. Deference is Due the County's Legislative Choices in GMA Implementation

One of the core premises of the GMA is the principle of deference to local decision making. This principle manifests itself in several forms. Most basically, the Legislature has long dictated that

"comprehensive plans and development regulations, and amendments thereto, adopted under [the GMA] are **presumed valid** upon adoption." RCW 36.70A.320(1) (emphasis added). As a corollary principle, the Legislature placed "**the burden . . . on the petitioner** [before the Growth Board] to demonstrate that any action taken by a state agency, county, or city under [the GMA] is **not** in compliance with [the GMA]." RCW 36.70A.320(2) (emphasis added).

The Legislature further mandated that "[t]he board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3) (emphasis added). Growth Boards are statutorily obligated to defer to local decision making, rather than imposing their own policy preferences. RCW 36.70A.320(3).

In 1997, the Legislature re-emphasized that the Growth Boards were not to impose their own policy preferences, but must defer to local decision-making:

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the

requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan their growth... Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances... **[T]he ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.**

RCW 36.70A.3201 (emphasis added).

The Legislature was not alone, however, in recognizing that local control had been too often eroded by the Growth Boards. After analyzing the importance of RCW 36.70A.3201, the State Supreme Court stated as follows:

In the face of this clear legislative directive, we now hold that **deference to county planning actions**, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general
Thus a board's ruling that fails to apply this "more deferential standard of review" to a county's action is not entitled to deference from this court.

Quadrant Corp. v. Wash. State Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 238 (2005) (emphasis added). In other words, although appeals under the APA generally require the court to accord deference to the agency's decision, that is not the case with appeals from a Growth Board decision.

The Supreme Court re-affirmed this conclusion, holding that Growth Boards, in considering county planning choices, must give deference to choices that are compliant with the GMA. In response to an argument that a county needed to have more than anecdotal evidence to support a decision, the Court of Appeals ruled boards “must consider anecdotal evidence provided by counties” and “must defer” defer to local planning decisions as between different planning choices that are compliant with the GMA. *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 156, 256 P.3d 1193 (2011).

2. Specific Standards of Review

Under the APA, this Court may reverse the Growth Board's decision on any or all of the following grounds:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under [the APA];

...

(i) The order is arbitrary or capricious;

RCW 34.05.570(3).

Thus, like the Growth Board, this Court defers to the County's planning action unless the action is clearly erroneous. *Quadrant Corp.*, 154 Wn.2d at 238. Issues of law are reviewed de novo. *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd*, 96 Wn. App. 522, 526 (1999). Findings of fact are reviewed by whether substantial evidence supports the Growth Board's findings. *Id.* Substantial evidence is that sufficient to persuade a fair minded, rational person of the truth of the matter. *Id.* As identified above, this case deals with several types of questions, involving different standards of review.

First, does the GMA require counties to designate and protect any habitat or species of local importance, or is the determination of local importance at the sole discretion of the locality? This is a question of law for resolution *de novo* by the Court.¹

¹ This is not a case where the Growth Board's interpretation of the GMA should be given particular weight because it is administering the GMA. It is the Department of Commerce which has the role of promulgating interpretative guidelines for designating critical areas. See, RCW 36.70A.050.

Second, did the Growth Board reverse the burden of proof by not requiring the petitioners before it to demonstrate that BAS was not included in the record? This is a question of law, subject to *de novo* review.

Third, if the Growth Board did not improperly reverse the burden of proof, was BAS regarding habitats and species of local importance included in the record, and was there any BAS that was not included in the record? These are questions of fact. To the extent that the Growth Board's decision is based on an assumption that BAS was not included, the Decision is not supported by substantial evidence.

Fourth, in regard to habitats and species of local importance, was there a reasoned legislative decision in light of BAS? Determining the reasonableness of a legislative decision is reviewed under the "arbitrary and capricious" standard of review. *Palermo at Lakeland LLC v. City of Bonney Lake*, 147 Wn. App. 64 (2008).

C. THE GROWTH BOARD ERRED IN CONCLUDING THAT THE COUNTY IS IN NON-COMPLIANCE WITH THE GMA REGARDING HABITATS AND SPECIES OF LOCAL IMPORTANCE

The GMA was originally adopted in 1990, largely in response to growing pains in the Puget Sound region, including traffic congestion, school overcrowding, urban sprawl, and loss of rural lands. *Skagit Surveyors & Eng'rs, LLC, v. Friends of Skagit County*, 135 Wn.2d 542, 11 546-47(1999). The purpose of the GMA is to ensure comprehensive land use planning in that area, as well as other local jurisdictions that chose to plan under the Act, including Ferry County.

To this end, the Legislature adopted thirteen unranked planning goals to guide comprehensive land use planning and implementation through development regulations with the following subsection numbers and headings: (1) Urban growth; (2) Reduce sprawl; (3) Transportation; (4) Housing; (5) Economic development; (6) Property rights; (7) Permits; (8) Natural resource industries; (9) Open space and recreation; (10) Environment; (11) Citizen participation and coordination; (12) Public facilities and services; and (13) Historic preservation. RCW 36.70A.020 ("the following goals are not listed in order of priority").

As part of their development regulations implemented under the GMA, counties must enact regulations that designate and protect critical areas). RCW 36.70A.060(2), .170, .172. "Critical

areas" include wetlands, critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, and—especially pertinent here— fish and wildlife habitat conservation areas. RCW 36.70A.030(5).

Although the GMA requires counties to include BAS in developing critical areas regulations, it does not create a technocracy, *i.e.*, a society managed by scientific and technical experts. RCW 36.70A.172. By legislative design, the GMA recognizes that science isn't always clear, regional differences matter, and local decision making is paramount.

In addition to the repeated legislative mandate of local discretion, this local discretion also extends to the requirement to designate and protect "critical areas." See, RCW 36.70A.170 (requiring counties to "designate where appropriate ... critical areas". By definition, something that is "critical" is "indispensable" or "vital." Merriam Webster Dictionary (online ed. 2011). In other words, not everything can be "critical." Consistent with a preference for local decision making, if there is a question regarding whether something is, or isn't, "critical", the local legislative body's determination is paramount.

This priority of local discretion runs another level deeper in regard to habitats and species of local importance. Unlike other critical areas, such as wetlands, which are always to be designated as critical, habitats and species of local importance are the only critical area which depend entirely on a value-laden judgment made at the local level, the result of asking "is this species important to our local community?" The GMA does not allow counties to characterize wetlands as being non-critical. In regard to habitats and species of local importance, however, the Legislature clearly left the determination of local importance, and whether they are critical, to the discretion of the local legislative body. As explained in further detail herein, under the GMA, in "designating and protecting critical areas", counties are obligated to "**include** the best available science in developing policies and development regulations to protect the functions and values of critical areas," RCW 36.70A.172(1)(emphasis added), but the science need not dictate the legislative action of adopting ordinances. The Supreme Court stated the rule succinctly:

[T]he GMA does not require the County to follow BAS; rather, it is required to "include" BAS in its record.

Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt.

Hearings Bd., 161 Wn.2d 415, 430 (2006).

1. The Applicable Statutes and Regulations Vest the County with Discretion to Decide Whether Any Habitats and Species Are of Local Importance.

The Growth Board's analysis of habitats and species of local importance indicates that it believes that, if there is any science that suggests a species is important to someone, it and its habitat must be designated:

[T]he omission here of all 22 species of possible local importance supports a finding that the ordinance was not generated using BAS

AR 97. The Growth Board's view is essentially that, because these species exist and they are not protected as Endangered, Threatened or Sensitive species, then the County must provide critical area designation to protect them. However, taken as a whole, the legislative desire reflected in these provisions to retain local planning discretion to accommodate local circumstances is unmistakable. Critical areas must be designated "where appropriate," RCW 36.70A. 170, and the Department of Commerce's "guidelines ...shall allow for regional differences that exist in Washington State." RCW 36.70A.050(3). Thus, under the guidelines, various types of potential habitat need only "be

considered" for designation, WAC 365-190-130(2), and various factors "should" or "may" be considered in making such designations. WAC 365-190-130(3). Counties "are encouraged" to use classification schemes that are consistent with state and federal schemes. WAC 365-190-040(4)(a), and generally "should rely" on performance standards in protecting fish and wildlife habitat. WAC 365-190-080(4).²

WAC 365-190-030 provides the definitions applicable to the guidelines for designating critical areas:

(2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include: (a) Areas where endangered, threatened, and sensitive species have a primary association; (b) Habitats and species of local importance, as determined locally;

WAC 365-190-130 (emphasis added).

² This discretion even extends to endangered, threatened, and sensitive species:

Counties and cities **should** identify and classify seasonal ranges and habitat elements where federal and state listed endangered, threatened and sensitive species have a primary association and which, if altered, may reduce the likelihood that the species will persist over the long term.

WAC 365-190-130(4)(a) (emphasis added).

- (4) ...
- (b) Habitats and species areas of local importance. Counties and cities should identify, classify and designate locally important habitats and species. **Counties and cities should consult current information on priority habitats and species [PHS] identified by the Washington state department of fish and wildlife.** Priority habitat and species information includes endangered, threatened and sensitive species, but also includes candidate species and other vulnerable and unique species and habitats. While these priorities are those of the Washington state department of fish and wildlife, they should be considered by counties and cities as they include the best available science. The Washington state department of fish and wildlife can also provide assistance with identifying and mapping important habitat areas at various landscape scales. Similarly, the Washington state department of natural resources' natural heritage program can provide a list of high quality ecological communities and systems and rare plants.

Id. at (4)(b)(emphasis added). Use of the word "'Should' may be interpreted as discretionary, indicating merely a recommendation or preference." *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609, 613 (1988).

(6)(a) "Fish and wildlife habitat conservation areas" are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems,

communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. **Counties and cities may also designate locally important habitats and species.**

(b) "Habitats of local importance" designated as fish and wildlife habitat conservation areas include those areas **found to be locally important by counties and cities.**

WAC 365-190-030(6) (emphasis added). Similar to the word "should," the "term 'may' in a statute has a permissive or discretionary meaning." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 28 (1999).

(19) "Species of local importance" are those species that are of local concern due to their population status or their sensitivity to habitat alteration **or that are game species.**

Id (emphasis added).³

Tellingly, under the non-binding WAC Guidelines, a county must only "consider" the DFW's PHS information for possibly designating areas that might be important locally as conservation

³ The WAC Guidelines' recognition that species of local importance could include *game species* implicitly recognizes that habitats and species of local importance are a completely different type of fish and wildlife habitat conservation area. For all others, species are to be protected, but the guidelines recognize a species that might be considered locally important as a game species for a purpose inconsistent with protection.

areas. WAC 365-190-130(2). The Growth Board erred in making the designation as mandatory, when even the non-binding WAC Guidelines only indicate that such a designation is discretionary. In this regard, the Growth Board's analysis also improperly failed to defer to the County's decisions.

In light of all of this, it is difficult to imagine an area relating to fish and wildlife habitat conservation in which counties are afforded greater discretion than in the decision whether to designate *any* species as a species of local importance. The Growth Board erred as a matter of law by assuming and asserting that a County **must** designate one or more habitats and species of local importance.

2. The Growth Board Improperly Shifted the Burden of Proof from the Petitioners Before It to the County.

As addressed above, the GMA provides that the County's ordinances are presumptively valid upon adoption. RCW 36.70A.320(1). In light of this, the Legislature placed "**the burden . . . on the petitioner** [before the Growth Board] to demonstrate that any action taken by a state agency, county, or city under [the GMA] is not in compliance with [the GMA]." RCW 36.70A.320(2) (emphasis added). Here, the Growth Board concluded that:

- There is no substantial evidence in the record to support a County finding that BAS was

included in designating Ferry County's Fish and Wildlife Habitat Conservation Areas.

- Ferry County failed to include the Best Available Science in designating ... Habitats and Species of Local Importance.

AR 97-98.

There is evidence of BAS in the record, as addressed below, but to the extent that there was BAS that was **not** included in the record, it was the burden of the petitioners below to identify BAS that was not included in the record. The Growth Board articulated no science that was available that should have been included in the record, presumably because the Petitioners offered none. To conclude that there was no substantial evidence in the record to support a finding that BAS was included in the record would necessarily require that there be some BAS that was excluded. Otherwise, the Growth Board has simply reversed the burden of proof by forcing the County to prove a negative--that there is no BAS that was not included.

Given there was no evidence of available science that was excluded from consideration, the Growth Board's ruling is itself not supported by substantial evidence. It is also contrary to RCW

36.70A.320(2) because it shifted the burden of showing BAS was excluded from the Petitioner below to the County.

3. The County Complied with the GMA Mandate to Include BAS in the Record

The Growth Board's Decision is internally inconsistent and wrong in regard to the County's duty to generate science to support its legislative decisions. At one point, the Board recognizes that "a county need not develop scientific information through its own means, it must rely on scientific information and must analyze that information using a reasoned process." AR 92 (underlining by Growth Board).

In the next paragraph, however, the Growth Board concluded that "[i]f a county chooses to disagree with or ignore scientific recommendations and resources provided by state agencies or Indian tribes, which a county could do, the county must unilaterally develop and obtain valid scientific information." AR 92 (citing, *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 836, 123 P.3d 102, (2005)).

2 n. 13). The court in *Ferry County* did not rule that a county must develop and obtain valid scientific information at any point in time. The requirement is to include best **available** science; if the science

is not available, it need not be created. This is particularly true in regard to habitats and species of local importance because "importance" is not necessarily a scientific term.

The County should and did consider all best **available** science about habitats and species that might be considered important from a local perspective. See, AR 1484-86. It considered what was available. AR 1291. It is not required to develop and obtain valid scientific information to support its decision not to designate a critical area.

The guidelines referred to in RCW 36.70A.170(2), established by the Department of Commerce, state that counties should consult current information on priority habitats and species [PHS] identified by the Washington Department of Fish and Wildlife (DFW). WAC 365-190-040. The PHS information provided is reproduced at AR 629 and 1484-86.

After explaining that protection of habitat measures sometimes are unnecessary, (AR 693), Karin Divens from DFW explained that its information was merely in the nature of recommendations:

[PHS] is a recommendation verses [sic] a requirement. We're not going to say that you have to

do that. We're not going to require it because we have no authority to do that.

AR 694. In light of all this, the Planning Commission entered findings of fact that state:

Ferry County has reviewed the Washington State Department of Fish and Wildlife's Priority Habitat and Species list. There are currently no candidate species or species of concern that have been identified as species of local importance.

AR 336; *see also*, AR 337.

The Board of Commissioners entered its own findings of fact in Resolution 2011-41:

The Board of County Commissioners have reviewed the Washington State Fish and Wildlife's candidates species for possible habitat and species of local importance list on a species by species basis as well as best available science in the record"

AR 1291.

The County expressly and specifically cited numerous legal and/or scientific sources in formulating its regulations. These include, but are not limited to:

- Natural Resources Conservation Service Field Office Technical Guide;
- Soil Conservation Service, National Cooperative Soil Survey;
- WAC 222-16-031, Interim Water Typing System;

- WAC 232-12-011, Wildlife Classified as Protected Shall Not be Hunted or Fished;
- WAC 232-12-014, Wildlife Classified as Endangered Species;
- WAC 232-12-297, Endangered, Threatened, and Sensitive Wildlife Species Classification;
- Washington Department of fish and Wildlife, Classification System for Priority Habitat, updated February 4, 1998;
- Washington Department of Fish and Wildlife, Priority Habitat and Species Program, initiated 1989;
- Washington Department of Fish and Wildlife Maps (Fish Planting);
- Letter from Karin Divens, Department of Fish and Wildlife Priority Habitats and Species Biologist, to Irene Whipple, March, 25, 2010;
- Transcription of discussion with Karin Divens at the Planning Commission regular meeting, April 14, 2010;and
- Letter from Karin Divens, Department of Fish and Wildlife Priority Habitats and Species Biologist, to Honorable Joe Bond, April 26, 2010.

AR 2838-42. These provisions indisputably constitute applicable BAS compliant with the GMA.

The County consulted with DFW regarding its information on priority habitats and species. This is what the WAC Guidelines suggest. The County did not fail to include BAS in its record.

4. The County Considered BAS in Regard to Habitat and Species of Local Importance in a Reasoned Process.

In addition to inclusion in the record, BAS must then be used in a reasoned legislative process, but this does not dictate a result. *Swinomish*, 161 Wn.2d at 431. Thus, even with respect to the protection of critical areas, the GMA implements the principle of local decision making, rather than creating a technocracy.

a. The reasoned process for evaluating and not following a scientific recommendation need not be based on science.

The Growth Board concluded that in regard to fish and wildlife conservation areas, BAS "must be included in the record — the County must rely on scientific information and must analyze that information using a reasoned process, *i.e.*, a **scientific methodology**. AR 94 (emphasis added) (*citing, Ferry County*, 155 Wn.2d at 836-37). It is this last point on which Ferry County most strenuously disagrees, especially in regard to habitats and species of **local importance**.

The Court in *Swinomish* concluded that "[a] County may depart from BAS if it provides a reasoned justification for such a

departure." *Swinomish*, 161 Wn. 2d at 430 (citing, *Ferry County*, 155 Wn.2d at 837-38).

Critically, the "reasoned justification" for departing from BAS does not need to be based on science itself. Nor is the requirement to provide a "reasoned justification" a particularly high bar. *Id.*, at 431 (discussing Skagit County's decision not to impose riparian buffers). The Court interpreted the WAC Guidelines to merely require that a County "address ... on the record ... the relevant sources of best available scientific information included in the decision making," and nothing more. *Id.*, (citing, WAC 365-195-915(1)(b)). In light of this, local importance does not need be based on scientific methodology.

The Supreme Court has clarified that BAS does not trump all other requirements of the GMA. Indeed, BAS may necessarily need to yield to the statutory mandate of local deference:

[T]he requirements to be guided by the "best available science" (BAS) in developing critical areas regulations and to "give special consideration" to protecting anadromous fisheries arguably conflict with the legislature's directive that growth management hearings boards defer to local balancing of "local circumstances," if that local balancing is not in favor of critical areas.

Id., at 426. "Reasoned justification" for choosing not to follow BAS does not need to be based on science itself.

The Growth Board took the opposite view:

In the *Swinomish* case, the Washington Supreme Court held that the GMA's requirement to protect critical areas does not impose a requirement to enhance critical areas by, for example, requiring farmers to replant areas adjacent to streams that were lawfully cleared in the past. The omission of mandatory stream buffers from Skagit County's critical areas ordinance was justified departure from Best Available Science because the mandatory buffers would impose an obligation to enhance that goes above and beyond the GMA's duty to protect. In other words, BAS needs to be included in the decision-making process, but science cannot create new duties not imposed by law.

In the present case, the record contains BAS relating to the designation and protection of Fish and Wildlife Habitat Conservation Areas. But nothing in the record suggests that this BAS would create any new duties not already imposed by law.

AR 97 (footnotes omitted, emphasis in the original). The Growth Board's attempt to distinguish *Swinomish* is based on a distinction without a difference. Indeed, in the *Swinomish* decision, the Supreme Court upheld Skagit County's decision to apply no buffers whatsoever on large salmonid-bearing critical areas, including the Skagit and Samish Rivers, which the State has identified as "the most significant watershed in Puget Sound in terms of salmon

recovery." *Swinomish*, 161 Wn.2d at 425. In *Swinomish*, Skagit County reasoned that applying no buffers would be justified because imposing buffers would be detrimental to the agricultural community, and because much of the natural riparian vegetation had already been destroyed in prior centuries:

Here, the county justified its decision to not require mandatory riparian buffers on the basis that doing so would "impos[e] requirements to restore habitat functions and values that no longer exist." This was based on a recognition of the fact that the vegetation that had made up the riparian buffers along streams and rivers was cleared long before there was a legal impediment to doing so. If the omission of mandatory buffers from the County's critical areas ordinance is a departure from BAS, it is a justified departure of the kind that is tolerated by the GMA.

Id., at 431 (citations omitted).

Unlike Skagit County in the *Swinomish* decision, which upheld the County's decision to apply no buffers whatsoever to several of the largest salmon bearing streams in the State, Ferry County has merely decided there are no habitats and species of local importance in addition to the species that are already protected on a federal or state level. Moreover, the County did not ignore local species or the BAS that referenced local species. It created a process whereby habitats and species could be nominated as habitat and species of local importance. AR 134-35.

Also, in the Ferry County decision, the Supreme Court recognized that the WAC Guidelines may assist in determining whether a County has complied with the BAS requirement. See, *Ferry County*, 155 Wn.2d at 835 n.9, 838-39 (citing, WAC 365-195-900 through -925). However, the Court of Appeals recently interpreted the WAC Guidelines as not "imposing a duty on a county to describe each step of the deliberative process that links the science that it considers to the adopted policy or regulation." *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 166 Wn. App. 172, 194 (2012). Instead, WAC Guidelines merely require that a County "address ... on the record ... the relevant sources of available scientific information included in the decision-making," and nothing more. *Id.* (citing, WAC 365-195-915(1)(b)). Here, the County addressed BAS and related decision making on the record.

We do not read *Concerned Friends of Ferry County* as imposing a duty on a county to describe each step of the deliberative process that links the science that it considers to the adopted policy or regulation. Nor does the relevant Department of Commerce regulation impose such a duty — rather, it requires that counties "address ... on the record ... [t]he relevant sources of best available scientific information included in the decision making." WAC 365-195-915(1)(b). Here, because the County

complied with this requirement, we conclude that the Board correctly applied RCW 36.70A.172(1).

Olympic Stewardship Found., 166 Wn. App. at 194-95.

In the instant case, the County did address the sources of BAS (AR 1484-86, 2838-42) and considered it all. AR 1505-08. The Growth Board erred in concluding that deviation from a recommendation from a scientist be justified solely on scientific bases.

b. The Growth Board erred in concluding that the reasoned process must be detailed in the Critical Areas Ordinance.

The Growth Board ruled:

The ordinance language in Section 9.01 contains no indication that BAS was included in or analyzed with a reasoned process.

AR 96. The GMA creates no obligation that the reasoned process for dealing with science be outlined in the ordinance itself. Rather, it must be "included in the record". *Swinomish*, 161 Wn.2d at 430.

The GMA simply requires counties to "include the best available science in developing policies and development regulations." RCW 36.70A.172. The County expressly found that this occurred here:

[B]ased on public input, review and analysis of best available science (BAS) pertinent to Ferry County

and other relevant information, the Planning Department developed the Critical Areas Ordinance and Comprehensive Plan tailored to address the [Board's most recent substantive] compliance orders.

AR 2846 (emphasis added).

There is no requirement that the entire legislative record dealing with scientific information be reproduced in the text of a critical areas ordinance itself.

c. The County dealt with BAS in a reasoned process.

In addition to deciding that deviations from scientific information be based on scientific information, the Growth Board concluded that the County's analysis of the various potential habitat and species of local importance was not reasoned:

For example, as to the decision not to list the Golden Eagle, the reasoning was solely economic impact, with no reference to science. For several other species the reasoning was that logging or grazing is "under other jurisdictions," with no reference to science. Under the GMA, Ferry County can list whatever species it deems appropriate if it supports its decision by BAS.

AR 97 (footnotes omitted).

The question is whether the County's legislative reasoning was arbitrary and capricious. The answer to that question cannot be separated from the overwhelming legislative direction that local discretion is paramount, especially in regard to determining what

habitats and species are important to Ferry County. The question is **not** what is important to the state at large, the Growth Board, the DFW, the Petitioners below or anyone else. The Growth Board simply has no business substituting its judgment about a purely local issue.

Nevertheless, the County's designation of habitats and species of local importance was not unreasoning or arbitrary and capricious. Delving into the record will show this to be true. The Board of County Commissioners expressly found that the County's "economic base is hampered and in decline due to the lack of private ownership of the land." AR 1293, 334. Given this, the Commissioners further found that "human health and safety concerns and sustainable economic development is of the utmost importance to Ferry County." *Id.* In light of these findings, as well as other local circumstances and the lack of clear BAS concerning species or habitat of species which are only important locally, the County reasonably found that no species, not already protected because it was an ETS species, was important enough locally at this point in time to justify designating areas to conserve habitat for such species.

In regard to the priority species which the WAC Guidelines encourage counties to consider in regard to potential habitat and species of local importance, the County dealt with each one of them in a reasoned process. The DFW provided a list of 31 species entitled "Fish and Wildlife Priority Species occurring in Ferry County." AR 1484-86. However, for four species, the "species distribution does not include Ferry County."⁴

Two species are federally listed as threatened, the Canada Lynx and the Grizzly Bear.⁵ Seven species are ETS species which are being addressed in other revisions to the County's critical areas ordinance.⁶ That leaves 18 species on the DFW's PHS list that would be considered as potential habitats and species of local importance. As addressed below, each of the following species was dealt with in a reasoned manner:

Columbia Spotted Frog
Western Toad Golden Eagle Northern Goshawk
Merlin

⁴ Those species are the Ferruginous Hawk, Loggerhead Shrike, Juniper Hairstreak, and Shepard's Parnassian. See, AR 1484-1486.

⁵ The DFW considered one species not to require conservation of habitat because it was "not likely to be impacted by rural residential development," namely, the Wolverine, AR 1485-86.

⁶ Those species are the Bald Eagle, the Peregrine Falcon, the Flammulated Owl, the Common Loon, the Fisher, and the Gray Wolf. AR 1484-1486.

Black-Backed Woodpecker
White-Headed Woodpecker
Lewis' Woodpecker
Pileated Woodpecker
Vaux's Swift Yellow-billed Cuckoo
Western Grebe
Preble's Shrew
Merriam's Shrew,
Townsend's Big Eared Bat
Bull Trout
Silver-Bordered Fritillary
California Floater

AR 1505-08, reflecting the County's analysis of these species.

The County dealt with each of these species in a reasoned manner, as opposed to an arbitrary and capricious manner. Each has a particular reason for not being listed locally and some have multiple reasons. In regard to the Columbia Spotted Frog, the Western Toad, the Golden Eagle, the Merlin, the Yellow-billed Cuckoo, the Western Grebe, the Townsends' Big Eared Bat, the Bull Trout, the Silver-Bordered Fritillary and the California Floater, the habitat for these species are wetlands and/or streams or other riparian areas. *Id.* Although addressing each one separately, the County Planning Commission noted that wetland and riparian regulations and buffers are already in place, making an additional conservation area for these species certainly not critical. *Id.* In regard to several species whose habitat includes forested areas,

the County recognized the fact that forest practices are generally under the jurisdiction of the federal government (on federal land), tribal government (within the reservation for the Colville Bands and Tribes) and the Department of Natural Resources (for state forest land). *Id.* As such, the County cannot conserve any of these areas for the following species: the Black-backed Woodpecker, the Golden Eagle, the Lewis' Woodpecker, the Northern Goshawk, the Pileated Woodpecker, the Vaux's Swift, the White-headed Woodpecker, the Juniper Hairstreak, the Townsend's Big Eared Bat, and the Wolverine. *Id.* Similarly, the habitat for the following animals is subject to other jurisdictions which issue grazing leases, namely, the Merriam's Shrew, and the Preble's Shrew. *Id.* Additionally, the breeding habitat for the Loggerhead Shrike is only on the Okanogan portion of the Colville Reservation. *Id.* It is reasonable, and certainly not arbitrary and capricious, to conclude that designation of a fish and wildlife conservation area is not "appropriate" as provided in RCW 36.70A.170 when other entities control the alteration of habitat.

The DFW explained in regard to its list of priority habitat and species, that "[s]pecies are often considered a priority only within known limiting habitats (e.g., breeding area) or within areas that

support a relatively high number of individuals (e.g., regular large concentrations). AR 2268. DFW also explained that its list was based on sightings of animals, but not necessarily their breeding habitat. AR 703. Although the DFW's PHS lists are based on sightings, there was still no science to identify their breeding locations, or otherwise critical habitat. In a reasoned process, the County considered this lack of science to not justify the creation of a fish and wildlife conservation areas for these non-ETS species.⁷ Those species for which there was no information about breeding habitat include the Merlin, Vaux's Swift, Western Grebe, the White headed Woodpecker, the Yellow-billed Cuckoo, the Juniper Hairstreak, the Shepard's Parnassian, the Silver-bordered Fritillary, the Bull Trout, Merriam's Shrew, the Townsend's Big Eared Bat, the Wolverine, and the Preble's Shrew. *Cf.* AR 1484-1486 with AR 1505-08. If there is no BAS to identify where a possible conservation area should be created, it is certainly reasonable for the County not to designate an area for these species.

⁷ Some of these species had recommended management plans developed by DFW, but the information was still very limited and provided little to justify setting aside habitat for conservation purposes at the local level.

The Growth Board particularly noted the County's reference to the Golden Eagle, which it chose not to select within its optional power to designate a fish and wildlife conservation area. The record reflects that the County made this choice because "protection of this species will have a negative impact to [the] entire economy of Ferry County." AR 1506. Despite this economic reason, BAS indicated the habitat for the Golden Eagle includes those portions of the County already protected as riparian areas and forested areas that the County has no authority to protect. See, AR 1484.

However, the Golden Eagle is clear example of where the County's express reasoning is that this species does not have local importance for economic reasons, and the assertion of an economic rationale struck a nerve with the Growth Board. The record is clear that the economy of Ferry County is fragile, recognized in findings of fact by the Board of Commissioners. See, AR 1293.⁸ The County contends that in regard to deciding whether habitat and species are of local importance it may use any logical rationale, including one based on

⁸ See also, AR 701, comment by Commissioner Howden recognizing that only 18% of the land within Ferry County is privately owned, which has both economic and practical impacts on the ability of the County to conserve species.

economics, as a reasonable justification for its decision. The Growth Board considers only reasons with a scientific support to be legitimate reasons for not selecting an area for conservation locally. The Growth Board is wrong in that the *Swinomish* decision makes clear that, despite the requirement for BAS to be included in the development of critical areas, science does not trump all other considerations and the economy of the county is worthy of protection.

Again, this is a particular subset of critical areas which is different from all others in its importance or criticality is a purely local decision. Although counties cannot decide that certain wetlands are not critical, they certainly have discretion to determine that certain species and habitat, not already protected in its critical areas ordinance because it is an ETS species, are not otherwise important locally. As in *Swinomish*, the County's decision here falls comfortably within the "broad range of discretion" vested in local jurisdictions balance "priorities and options for action in full consideration of local circumstances." RCW 36.70A.3201. The Board should have recognized this, and found the County in compliance with the GMA on this issue.

V. CONCLUSION

Based on the Administrative Record, Ferry County is entitled to judgment as a matter of law that:

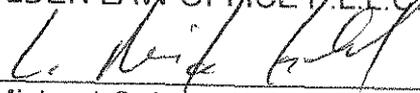
1. After considering potential habitats and species of local importance by reviewing information provided by DFW, Ferry County is not required to find that any habitats or species are of local importance in addition to species which are endangered threatened or sensitive species under state or federal law,
2. The Growth Board improperly altered the burden of proof by finding Ferry County out of compliance with the GMA in regard to the requirement that it include BAS in designating habitats and species of local importance for critical areas purposes without requiring the Petitioner below to identify BAS that was not included in the legislative record; and
3. Ferry County's legislative decision regarding habitats and species of local importance was a reasoned legislative process and not arbitrary and capricious, resulting in compliance with the GMA in regard to designating whether there are any habitats and species of local importance.

Ferry County therefore requests that this Court affirm the decision below.

RESPECTFULLY SUBMITTED this th 16 day of October,

2013.

GOLDEN LAW OFFICE P.L.L.C.



L. Michael Golden, WSBA# 26128
Attorney for Ferry County

PROOF OF SERVICE

I, L. Michael Golden, certify that on 10/16/13, I caused the foregoing document to be filed with or served upon the following persons or entities via the following means:

Growth Management Hearings Board PO Box 40953 Olympia, WA 98504-0953	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail: <u>eastern@eluhwa.gov</u>
David L. Robinson PO Box 151 Curlew, WA 99118-0151 (509) 779-4967	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail: <u>dlobinson49@rcabletv.com</u>
Tim Trohimovich Futurewise 816 Second Avenue, Suite 200 Seattle, WA 98104	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail: <u>tim@futurewise.org</u>
Diane L. McDaniel Senior Assistant Atty. General Administrative Law Division P O Box 40110 Olympia, WA 98504-0110	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail:
Scott Simmons 432 Seylor Valley Road Inchelium, WA 99138	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail:
Renee S. Townsley, Clerk Court of Appeals, Div. III 500 N. Cedar Street Spokane, WA 99201-1905	<input type="checkbox"/> Hand Delivery/Legal Messenger <input checked="" type="checkbox"/> First Class U.S. Mail <i>Original & Copy</i> <input type="checkbox"/> Federal Express Overnight <input type="checkbox"/> E-Mail:

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of October, 2013 at Colville, Washington.



L. Michael Golden