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No. 72235-2-1

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

**COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, AND
FRIENDS OF THE SAN JUANS,**

Appellants,

v.

**GROWTH MANAGEMENT HEARINGS BOARD, WESTERN
WASHINGTON REGION, AND SAN JUAN COUNTY,**

Respondents.

**REPLY BRIEF OF APPELLANTS COMMON SENSE ALLIANCE
AND P.J. TAGGARES COMPANY**

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I. REPLY TO THE ARGUMENTS OF SAN JUAN COUNTY

San Juan County makes a number of arguments in its opposition to the appeal of Common Sense Alliance and P.J. Taggares (herein referred to as CSA). On review, however, the arguments are contrary to statutory and regulatory requirements for the classification and designation of critical areas and without factual support in the record. The arguments below have focused on the Fish and Wildlife Habitat Conservation Area buffers, particularly as applied to shorelines of the state, as that is where the errors below are most evident. As will be noted below, however, the arguments also pertain to the wetland buffers, which have also been challenged. The Growth Board decision upholding the County's action is erroneous and must be reversed. RCW 34.05.570(3)(d)(e).

A. The County is Bound by RCW 82.02.020 in the Adoption and Administration of the Critical Area Ordinances.

San Juan County does not contest the core CSA position that the water quality buffer and tree protection zone imposed on Fish and Wildlife Habitat Conservation Areas ("FWHCA")—as applied under the terms of SJCC Section 18.30.160(A-E) (AR 040128-49)—do not meet the nexus and proportionality requirements of RCW 82.02.020.

Instead, the County relies on the generic taking cases to conclude RCW 82.02.020 is inapplicable. The County's argument for the appropriate standard is whether the regulation deprived property owners of

all economically beneficial use of their property, citing *Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074 (2005).

What the County fails to note is that the *Lingle* court recognized the exception to the “all economically beneficial use” standard for development exactions

The [exceptions] involved a special application of the “doctrine of unconstitutional conditions,” *which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property.* 512 U.S., at 385, 114 S.Ct. 2309. Pp. 2085-2087.

Lingle, 544 U.S. at 530 (emphasis added). CSA is not alleging a *Lucas*¹ type “total regulatory taking,” but rather the “unconstitutional condition” violation under *Nollan*² and *Dolan*,³ giving rise to the RCW 82.02.020 claim which is a complete and sufficient means in this case to invalidate the County critical area ordinances under review. The *Lingle* court specifically recognized this basis of objection, which is at the heart of the CSA claim: “A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a ‘physical’ taking, a *Lucas*-type total regulatory taking, a *Penn Central*

¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

² *Nollan v. California Coastal Comm.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677 (1987).

³ *Dolan v. Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

taking, *or a land-use exaction violating the Nollan and Dolan standards.*” *Lingle*, 544 U.S. at 530 (emphasis added).

The case against the San Juan County critical area buffers as applied to FWHCAs under SJCC 18.30.160(A)(B)(E)⁴ involves development-related exactions subject to the unconstitutional conditions limitations noted in *Lingle* and in Washington state. RCW 82.02.020 and related cases provide the proper standard for review.

1. The buffer required by Ordinance 29-2012, SJCC 18.30.160(E), is a development exaction not a mere zoning ordinance.

The County’s theory is that the buffer is no more onerous than a setback or other zoning limitation and therefore must be judged by the *Lucas* total-taking standard discussed in *Lingle*. But the ordinances and the best available science adopted by the County belie that point.

First, the ordinance is applicable not to all properties within a district as is common with zoning ordinances, but only those properties whose owners elect to exercise development rights granted under the County Codes, SJCC 18.30.160(A)(E) (AR 040128-9, 040134-49).

Second, the best available science makes it clear that the County is imposing much more than a “setback” when it imposes a “water quality buffer.”

⁴ And Wetlands discussed below, SJCC 18.30.150(E).

... the term **buffers** refers to terrestrial areas surrounding a wetland, stream, waterbody or other area of high ecological, geological, or hydrological importance, and *whose purpose is to reduce or prevent impacts to the functions of the protected resource*, such as may occur from adjacent land uses. In comparison, **setbacks** are regulatory tools used to protect land from encroachment by structures, but do not generally specify how the setback area must be managed. Like setbacks, buffers are measured a specified distance between a development and the resource being protected. *Unlike setbacks, buffers usually are considered off-limits to some activities and land uses which themselves may impact the functions of the resource being protected.*

Best Available Science Synthesis, Chapter 3, Marine Fish and Wild Habitat Conservation Areas, p. 64 (AR 005743) (emphasis added). As noted in the Findings, the function of the buffer is described as follows: “For protection of water quality functions, these regulations use the water quality buffer sizing procedure included in the wetland section of these amendments, with a predicted pollutant removal efficiency of 60%.” Ordinance 29-2012, Finding XIII(g) (AR 04012). “When considered with existing erosion control and stormwater management requirements, particularly those for more intense development, this should adequately protect functions associated with water quality.” *Id.* Indeed, “[t]he purpose of buffers and Tree Protection Zones is to protect existing

functions and values of the FWPCA to be protected.” Ordinance 29-2012, Finding XVIII (AR 040127).

The restrictions on use of a property burdened by the tree protection or water quality buffers reflect the significant “off limits” activities that result when the buffer is imposed.

2. Structures, Uses and Activities Allowed and Prohibited in and over Aquatic FWPCAs and their Water Quality Buffers and Tree Protection Zones.

Development activities, removal of vegetation and other site modifications *are limited or prohibited within aquatic* FWPCAs and their water quality buffers and Tree Protection Zones.

SJCC 18.30.160(E)(2) (AR 040138). The ordinance then provides a three-page list of allowed and prohibited activities—emphasizing the prohibited or limited nature of allowed uses. *See* Ordinance 29-2012, pp. 18-22 (AR 040138-42) attached as Appendix 1 hereto.

The water quality buffer and the Tree Protection Zones imposed by Ord. 29-2012, SJCC 18.30.160, for developing properties on the shorelines of the state, are “buffers” imposed at the time of development activity as a result of the development activity. As such, the “water quality” buffer and Tree Protection Zones are nothing more than stormwater control mechanisms and habitat management requirements, focusing on the use of naturally functioning conditions to assure a degree of water treatment (60% pollutant removal in the case of the water quality

buffer). Ord. 29-2012, Finding XIII quoted above (AR 040124-6). The water quality buffer and tree protection zone are imposed as a condition of development to protect the environment from the consequences of development. By any fair use of the term, they are development exactions subject to the “unconstitutional conditions” limitations of *Nollan, Dolan*, and RCW 82.02.020

RCW 82.02.020 is applicable to development exactions in this state no matter how labeled and as such RCW 82.02.020 is applicable to the administration of the San Juan County Critical Areas Ordinance 29-2012 and the buffer and other requirements of SJCC 18.30.160(A)(B)(E).

2. The County’s efforts to validate the Ordinance under *Trimen v. King County* must fail for lack of comparable considerations of nexus and proportionality.

The County attempts to support its water quality program as similar to the parks fee program upheld in *Trimen Dev’t Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994) because it permits modification based on site conditions. (County Br. at 18.) In *Trimen* the County had identified the impact of new housing developments on the need for parks and set out a plan to provide parks in the neighborhoods where they were needed, with proportionality assured by having different rates based on project impact and local needs—the classic nexus/proportionality formulation. The San Juan County program has

none of these protections and *Trimen* better demonstrates what is missing in the County program, not why it should be approved.

The fatal error in the County argument is that regardless of need in a given location and regardless of consequences of development, both material elements in validating the ordinance in *Trimen*, a stormwater control/water quality buffer is required on shoreline development proximate to critical areas—and that is unlawful.

3. The County FWHCA Ordinance 29-2012 and buffers of SJCC 18.30.160(E) are applicable to all shoreline properties deemed critical areas regardless of impact.

The County argues that CSA’s “universal application” of FWHCA buffers to shoreline properties compliant is “not true” and “without citation.” (County Br. at 20.) CSA has never argued that the buffers apply to all shoreline properties.⁵ By Code, the buffers apply to “uses and activities in or within 200 feet of fish and wildlife habitat conservation areas as defined in SJCC Title 18 (the Unified Development Code).” Ord. 29-2012, SJCC 18.30.160(A) (AR 040128).

A FWHCA buffer under SJCC 18.30.160(E) applies to and is applied at the time of development activity to any shoreline property within 200 feet of a listed critical area—regardless of impact. The

⁵ Although given the breadth of the definitions in SJCC 18.30.160(B)(C) and the imposition of buffers on any developing property within 200 feet of a listed habitat, that may well be the practical result.

application is universal to the set of properties with the requisite proximity to a listed habitat once a development activity occurs.

In looking at the impact of the buffers it is clear that the County intended to provide the water quality filter benefits (stormwater control) spelled out in the Best Available Science Synthesis noted above and the County Findings XIII and XVIII (AR 040124-7). As a result, a “buffer” in San Juan County is a stormwater control easement enforced through development regulations using naturally functioning conditions to assure a certain degree of water quality in the associated runoff.⁶

San Juan County notes the flexibility of the water quality buffer, which may differ in size based on certain local factors. The problem with the argument is that regardless of the modifications, a buffer is still imposed without regard to the impact of the project or the need of the critical area.

The King County ordinance invalidated in *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008) had similar alteration provisions, which recognized specific site conditions and allowed a degree of modification. But in the King County rural open space requirements for the ostensible benefit of stormwater control, as in

⁶ In this regard it is no different than the “open space” requirement invalidated in *Citizens v. Sims*, forcing an open space requirement on all rural properties for water quality purposes with no evidence in the record that universal imposition was either necessary or appropriate.

the San Juan County ordinance on buffers, none of the modifications were tied to the need or potential stormwater impact of proposed development. More importantly, none of the adjustments in either case allowed for the elimination of the buffers if not reasonably necessary based on the facts of that particular case. The ability to modify based on specific conditions, but without regard to reasonable necessity in the first place was not sufficient to save the King County ordinance in *Sims*, and is not sufficient to save the San Juan County ordinances in this case either. The evil to be cured is the imposition of a buffer without any demonstration of site-specific need.

Under the facts of this case this Court has no option but to find that the San Juan County tree protection zones and water quality buffers imposed by SJCC 18.30.160(A)(B)(E) violate the *Nollan* and *Dolan* unconstitutional conditions referenced above, as enforced in Washington state through RCW 82.02.020, and as noted in the primary brief and uncontested on response. The San Juan County water quality buffers and tree protection zones for Fish and Wildlife Habitat Conservation Areas fail to meet those standards and should be invalidated. RCW 34.05.570(3)(d)(e).

B. The Buffer Program Adopted by San Juan County is Not Supported by the BAS

The County's principle defense to the RCW 82.02.020 argument is that its buffer program is supported by science and so long as the program is supported by science there is no violation. (County Br. at 24, *et sec.*) The County relies on *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 255 P.3d 696 (2011) ("*KAPO*") and *Olympic Stewardship Foundation v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 274 P.3d 1040 (2012) (and other cases) and tries to argue from those cases that where the County can point to and considers best available science, that is good enough.

It is significant to note that all of the cases relied on by the County were based on the 1991 regulations and the definitions of the WAC and the 2010 modifications were not at issue. Nor were the specification issues of RCW 36.70A.480(5). The question in *KAPO* was whether the science supported the required buffer widths. The record contained reports supporting the widths proposed and reports in opposition. In the face of conflicting reports in the record, the court agreed the Growth Board's approval had not been clearly erroneous.

The *Olympic Stewardship* case actually supports the CSA argument. In that case the County had originally required that the entirety

of a channel migration zone be included as a no cut buffer to protect the environment. The Growth Board invalidated that provision for lack of support. *CPCA/OSF v. Jefferson County*, WWGMHB Case No. 08-2-0029c, FDO (Nov. 19, 2008). In the second round the Growth Board and the Court of Appeals upheld the buffer in a specified high hazard zone because the science showed that retention of trees in the 50 feet adjacent to the bank in a high hazard area was important to preserve the integrity of the bank from the cutting effects of flood waters. *Olympic Stewardship, supra*. That type of specific scientific support is precisely the type of science that will support a buffer requirement to protect lives and safety. And the buffer was only imposed on “high hazard” channel migration zones—where the science said it was needed for public health and safety purposes.

That case is factually distinguishable from the present case. Here, the science supports the notions that marine habitats are important, can be threatened by upland development, and buffers “can be important” in proper locations where they “may” serve a necessary function to protect habitat which “could be” affected by development. But the science contains no inventory of shoreline habitats sufficient to distinguish condition, size or importance in a manner sufficient to make the differentiation between habitat and critical habitat as defined in WAC 365-

190-030(6).⁷ Such generic science with its can’s, should’s, and may’s reminds one of the “could offset” language found inadequate in *Dolan*:

Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation *could offset* some of the traffic demand on these nearby streets and lessen the increase in traffic congestion

...

“[t]he findings of fact that the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand.”

Dolan v. City of Tigard, 512 U.S. 374, 389 (1994). In all of the encyclopedic science adopted by the County there is no support for the rule—implicit in the mandatory buffers that all shoreline-related development activity will in fact cause harm—requiring a buffer to mitigate potential damage. As in *Dolan*, the science provides no basis for the buffers required.

The agency maps adopted by the County, SJCC 18.30.160(C), show possible locations of habitats, but the maps were for “reference purposes only” and the regulations make it clear that “Not all areas

⁷ The Best Available Science adopted by the County is generic and not specific to the County or any particular shoreline habitat or condition. As evidenced in Appendix 2 attached hereto (excerpts from the BAS Synthesis) the science speaks to that which “can occur” or “can affect” particular habitat or improvements. The BAS speaks to where buffers “can have implications for water quality,” “can improve water quality” and development activities, and “can adversely affect water bodies” (see highlighted examples in Appendix 2).

classified by state agencies as potential habitat must be designated, but such areas may be likely candidates for designation.” WAC 365-190-040(5)(b). The adopted maps based on habitat type only may well encompass the entirety of the island shorelines in one form or another since the regulations direct the Planning Director to require the FWPCA buffers in any of the listed habitats (regardless of size, condition or location) if found within 200 feet of the property undergoing development review. SJCC 18.30.160(A)(E).

But nothing in the ordinances or science supports the proposition that water quality buffers and tree protection zones are reasonably necessary in *all* shoreline development cases where a listed habitat is within 200 feet of the regulated shoreline. The science relied on by the County does not support the actions taken. As such, the FWPCAs and water quality buffers and tree protection zones in SJCC 18.30.160(A)(B)(E) and Growth Board decision supporting it are without support of substantial evidence in the record and require reversal. RCW 34.05.570(3)(e).

C. The San Juan County Critical Area Ordinance is Invalid for Failure to Follow Statutory and Regulatory Changes.

The County argues that it complied with the statutory requirements of RCW 36.70A.480(5) and the minimum guidelines of Chapter 365-190

WAC for designating FWHCAs in shorelines by adopting performance criteria and having the critical area specifically designated by the Planning Director if any of the listed habitats found at San Juan County Code 18.30.160(B)(E) (AR 040129-32, 040134-49) are present.

The County's primary argument, adopted by the Growth Board in approving the County regulations below, is that the regulations allow critical areas to be designated by description. The County refers to the Growth Board case *Woodmansee v. Ferry County*, EWGMHB Case No. 00-1-0007, FDO, 2-3 (Aug. 18, 2000) and WAC 365-190-040(5)(b) authorizing designation of critical areas by performance standards in support of this argument. According to the County, the "designation process for FWHCAs called for in WAC 365-190-040 is precisely the process that was followed in San Juan County." County Br. at 8.

The problem with the County's argument is that the regulation relied upon in the *Woodmansee* decision was adopted in 1991 and carried forward into the 2010 changes⁸ and fails to account for significant changes in both the statute and regulations subsequently adopted by the State that require a change in that result.

⁸ "In circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions. so they can be specifically identified during the processing of a permit or development authorization." WAC 365-190-040(5)(b).

1. The County process fails to follow material changes in the statute adopted after the 1999 *Woodmansee* case.

The first problem with the County's argument is that the *Woodmansee* decision and regulation cited therein pre-dated a series of material changes to the legislation dealing with shorelines and critical areas (RCW 36.70A.480(5)) adopted in 2003. This new section resulted in two distinct sections dealing with designation of critical areas.

The original designation requirement in GMA reads: (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate...(d) Critical areas." RCW 36.70A.170. The more recent amendment in 2003 reads as follows:

(5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2).

RCW 36.70A.480(5). Because both provisions are clearly stated and can be read together, rendering no provision superfluous, it is up to the courts to require compliance with both. San Juan County and the Growth Board ignored the 2003 amendment and for that reason the decision is based on an error of law and must be reversed. RCW 34.05.570(3)(d).

The first rule of statutory interpretation is to ascertain the intent of the Legislature from the words used. *O.S.T. ex rel. G.T. v. BlueShield*, 181 Wn.2d 691, 335 P.3d 416, 419 (2014). In looking at the two statutes and reading them together, as a whole, there is no ambiguity and the two may easily be read together. *See In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810, 817 (1998) (“[E]ach provision of a statute should be read together with related provisions to determine the legislative intent underlying the entire statutory scheme”).

Under the first provision, RCW 36.70A.170, all critical areas must be classified and designated. And the performance criteria of WAC 365-190-040(5)(b) may be used in most cases where the area is difficult to locate. But after 2003 the Legislature carved out a more restrictive requirement for critical areas in shorelines, as quoted above. Where shorelines are concerned, the Legislature required counties to be more explicit and “specifically designate” those areas which meet the definition of critical areas (for FWHCA that would be WAC 365-190-030(6)). If that is not done, the shoreline area is “not” a critical area. There is no reference to satisfying the specification requirement by using definitions or performance standards to be applied at the time of the development.

The Legislature is of course presumed to know the existing state of the law and the cases pertaining thereto. *See Bob Pearson Const., Inc. v.*

First Cmty. Bank of Wash., 111 Wn. App. 174, 179, 43 P.3d 1261, 1263 (2002). Thus, when adopting RCW 36.70A.480(5) the Legislature was presumed to know the provisions of RCW 36.70A.170 and the regulations and cases interpreting it, including the *Woodmansee* case and the 1991 version of WAC 365-190-040(5) relied on by the County for its actions. When the Legislature changes the language of a statute, in this case by adding RCW 36.70A.480(5) in 2003, with full knowledge of the prior law and cases, it is presumed to have changed the law. *Id.*

The reliance of the County and the approval of the Growth Board⁹ of providing “performance criteria” for FWHCAs on the shorelines of San Juan County is contrary to the requirements of RCW 36.70A.480(5) and thus the decision below was an erroneous application of the law to the facts of the case and requires reversal. RCW 34.05.570(3)(d).

2. The classification and designation program adopted by the County failed to comply with the 2010 regulatory changes as well.

When looking at the habitats listed as FWHCA critical areas in the County Code, SJCC 18.30.160(B) and (E) (AR 040129-31, 040134-49), the list conforms directly to the list in the regulations.

⁹ The Growth Board “expertise” in GMA matters is given no weight in statutory interpretation. “Moreover, an administrative determination will not be accorded deference if the agency’s interpretation conflicts with the relevant statute.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549, 556-57 (1992).

The question is whether the listed habitats are “considered” critical areas as stated in the BAS, or to be the subject of an objective evaluation to determine which habitats on the list in what location and condition should be classified and designated critical areas. San Juan County chose the former approach and that is unlawful.

The 1991 regulation dealing with FWHCA stated: “(2) Fish and wildlife habitat conservation areas include ... [the list] ...” WAC 365-190-080(5) (pre 2010 language). In 2010, following the Legislature’s adoption of RCW 36.70A.480(5), the FWHCA regulations language was changed to read: “(2) Fish and wildlife habitat conservation areas ~~include~~ that must be considered for classification and designation include:... [the detailed list] ...” WAC 365-190-130(2) (showing change in bill format).

When the agency changes the language of listed habitats for FWHCAs from “include” to “must be considered for classification and designation include,” a change is intended from rote copying of the list to a requirement that the County consider specific habitats on the list in light of the other two new provisions governing classification and designation of critical areas in shorelines.

1. The statutory change referenced above that stated that shorelines were not critical areas except to the extent they meet specific definitions, RCW 36.70A.480(5); and

2. The new definition adopted at the same time that the language change was made in WAC 365-190-130(2): “(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.*” WAC 365-190-030(6)(a) (emphasis added.)¹⁰

CSA’s argument is RCW 36.70A.480(5) and the 2010 regulations cited above must be read as a whole to ascertain the requirements for classifying and designating Fish and Wildlife Habitat Conservation Areas on shorelines of the state. Not all of the listed habitats in WAC 365-190-130(2), but only those which the BAS shows (1) serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and (2) which, if altered, may reduce the likelihood that the species will persist over the long term. By listing all of the potential fish and wildlife habitats in WAC 365-190-130(2) without regard to the criteria of WAC 365-190-030(6), the County failed to follow the new

¹⁰ The remainder of the section provided examples, but did not add to or detract from the definition; “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.” WAC 365-190-030(6)(a).

requirements to classify and designate them on shorelines only as they meet the requirements of WAC 365-190-030(6).

The County's argument is that the change in language of the definition reflects no change in regulatory intent, because the same language concerning survival of the species was merely transferred from a different location. But the 1991 regulatory language the County cites states: "(i) Counties and cities *should classify seasonal ranges and habitat elements with which 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 maintain and reproduce over the long term." WAC 365-190-080(5)(c) Sources and methods(i) Statutory Authority: RCW 36.70A.050, 91-07-041, 365-190-080, filed 3/15/91, effective 4/15/91 (emphasis added).

The language relied on by the County is materially different from the language quoted by CSA above and the change is not simply "a change of location" without substantive meaning as suggested by the County. The "sources and methods" language referenced by the County speaks to "seasonal ranges" of listed species that "should" be classified. Prior to 2010, there was no corresponding definition of fish and wildlife habitat, and there was no statutory language requiring that fish and

wildlife habitat “must be” specifically designated in accordance with the definition and the listing of habitats.

Reading the legislative and regulatory changes as a whole—recognizing that where regulatory changes are made the Legislature and agencies are aware of prior language and interpretations and changes are intended—the 2010 regulatory changes imposed a duty on the local governments to consider each of the habitats listed for classification and designation, but “specifically” designate and classify as fish and wildlife habitats on shorelines only those which met the new definition, a much different directive than the 1991 language followed by the County and erroneously upheld by the Growth Board.

As is evident from the record and the discussion below, the County made no effort to specifically designate FWHCA critical areas in the shoreline of San Juan County, leaving possible designation to the County staff at the time of permit application, and adopted the pre-2010 rather than the post-2012 formulation for identifying all listed habitats as critical areas without regard to the definition in WAC 365-190-030(6).

Both the Legislature and the regulatory agencies made material changes in the statute and regulations respectively, which San Juan County ignored. The County has not denied the allegation, but rather

attempts to justify its actions based on outdated cases and previous regulations.

Yet when the language of statutes and regulations are changed, the change is binding on the regulatory agencies and may not be ignored. That is precisely what San Juan County did, and it provides ample basis for this Court to reverse the decision of the Growth Board approving designation by performance criteria when the regulatory scheme had been amended to require much more for critical areas on shorelines of the state.

D. The Defects in the FWHCA Water Quality Buffers and Tree Protection Zones Apply Equally to the Wetland Buffers in Ordinance 28-2012, SJCC 18.30.150.

As noted in CSA's primary brief, the reasons for voiding the FWHCA water quality buffers and tree protection zones apply equally to Wetland buffers under SJCC 18.30.150(A-E) (AR 040092- 112) as violating RCW 82.02.020 and suffer from the same BAS defect—there is no requirement for any link between the project impact and the mitigation required, and there is no justification for a buffer on developing properties with a 200-foot gap between the property being developed and the wetland to be protected. The County has provided no separate defense with respect to those provisions different from the arguments for the FWHCA buffers.

As such, the wetland buffers are clearly stormwater control and habitat-related buffers subject to RCW 82.02.020 and the BAS is silent on the universal need regardless of impact. For that reason SJCC 18.30.150(A) (AR 040092- 3) applicability to wetlands within 205-feet of project under review and (E) (AR 040097-112) protective measures, water quality habitat and tree protection buffers (which have the same buffers as FWHCA buffers) should all be declared in violation of the minimum standards of RCW 82.02.020, and utterly without support in the BAS both on need for the buffer when no impact is found and need for the buffer when a critical area is up to 205 feet away. For these reasons the approval of the San Juan County critical area ordinance 28-2012 sections referenced, SJCC 18.30.150(A) and (E) (AR 040092-3, 040097-112), are unlawful as an erroneous application of the law to the facts of the case and without support of substantial evidence in the record and must be reversed. RCW 34.05.570(3)(d)(e).

II. SUMMARY AND CONCLUSION

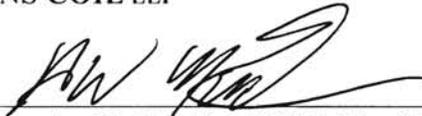
The FWHCA buffers hang like the Sword of Damocles over shoreline property owners in San Juan County. On the one hand they are told that their property has not been designated as a FWHCA critical area, but at the moment of development (or any earth moving activity) they are immediately burdened with buffers from habitat they cannot see that may

be hundreds of feet away from their property. And the burden is imposed whether they increase, decrease, or make no change to the total flow or quality of water off site or the shade or nutrient benefits of the trees.

The buffers in FWHCA and Wetland sections of the San Juan County Code, as implemented through Ord. 28-2012, SJCC 18.30.150(A)(E), and Ord. 29-2012, SJCC 18.30.160(A)(B)(E) fail to meet the minimum statutory and regulatory requirements for imposition of development exactions on private properties in Washington state, are unenforceable and fail to protect critical areas as required by RCW 36.70A.060(2) and the Growth Board decision upholding those ordinance is erroneous and must be reversed. RCW 34.05.570(3)(d)(e).

DATED: February 5, 2015

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Table 3.9
Tree Protection Zone Evaluation Area

<u>Type of Water Body¹</u>	<u>Tree Protection Zone Eval. Area (measured horizontally)</u>
<u>Type F (Type 2 or 3) streams, lakes, ponds designated as FWHCAs, and marine waters designated as FWHCAs</u>	<u>110 feet from Ordinary High Water Mark or Bank Full Width²</u>
<u>Type Np (Type 4) streams</u>	<u>50 feet from Bank Full Width</u>
<u>Type Ns (Type 5) streams</u>	<u>30 feet from Bank Full Width</u>
<u>Type Ns (Type 5) streams flowing less than 6 months per year</u>	<u>Stream banks must be vegetated.</u>

¹ Stream types under both the new and old classification systems shown (see WAC 222-16-030 and 031).

² Within urban growth areas this may be reduced to 50 feet if adverse impacts are identified and mitigated in accordance with SJCC 18.30.110.

Step 5. Averaging of Tree Protection Zones. Averaging of Tree Protection Zones allows reduction of the zone in specified locations on the property proposed for development, vegetation removal or other site modification, in conjunction with increases of the zone in other areas, so that the total area of the zone is unchanged. The applicant may average the Tree Protection Zone if all of the following criteria are met:

- a. Averaging is necessary to accomplish the purposes of the proposal, and no reasonable alternative is available;
- b. The total total area contained within Tree Protection Zones after averaging is no less than that contained within the Zones prior to averaging;
- c. Only areas with trees located within 200 feet of the OHWM or bank full width will be counted toward the required area of the Tree Protection Zones; and
- d. In no case shall the Tree Protection Zones be reduced to less than the water quality buffer or 70 feet, whichever is greater;

Step 6. Adjustments.

Buffers and Tree Protection Zones Do Not Cross Some Roads. Buffers and Tree Protection Zones do not extend across public roads. For private roads, buffers and Tree Protection Zones do not extend across the road when the road design, flow of runoff, quantity of traffic, and/or gap in tree canopy result in an area that does not support functions and values of the FWHCA to be protected, as determined by a qualified professional.

Step 7. Proceed to evaluate compliance with protection requirements for other types of FWHCAs in subsection 18.30.160.F.

2. Structures, Uses and Activities Allowed and Prohibited in and over Aquatic FWHCAs and their Water Quality Buffers and Tree Protection Zones.

Development activities, removal of vegetation and other site modifications are limited or prohibited within aquatic FWHCAs and their water quality buffers and Tree Protection Zones. Allowable activities vary depending on whether the activity is within a Tree Protection Zone or a water quality buffer, and are described separately below.

a. Tree Protection Zones are divided into two sections: Zone 1 consists of the first 35 feet adjacent to the water, beginning at the OHWM, or for streams, the bank full width. Zone 2 is the remainder of the Tree Protection Zone.

To allow for a view or for fire hazard reduction, minor trimming and pruning of the foliage of trees within both Zone 1 and Zone 2 is permitted provided the health of the trees is maintained, trees are not topped, and all branches and foliage overhanging aquatic FWHCAs is retained. In no case shall more than 20% of the foliage of a tree be removed during one 12 month period

Within Zone 1 no tree removal is allowed (though pruning is allowed in conformance with the above requirements). Within Zone 2 construction of one primary structure, and/or limited tree removal to allow for a filtered view from the primary structure, are allowed in conformance with all of the following:

i. The structure, impervious areas, and areas where soils will be graded, compacted or where the organic soil horizon will be removed, are located landward of the water quality buffer;

ii. Appropriate BMPs are used to minimize erosion, sedimentation, and soil disturbance;

iii. No more than 40% of the volume of trees over 6 inches dbh are removed in any 10 year period;

iv. Stocking levels for trees \geq six inches dbh will not be reduced to less than:

(A) Softwood stands such as Douglas fir (>66% softwood volume): 80s.f. basal area per acre including the area covered by any structures (approximately equivalent to 21% canopy cover);

(B) Mixed wood stands (34%-66% softwood volume): 70 s.f. basal area per acre including the area covered by any structures; and

(C) Hardwood stands such as maple (<34% softwood volume): 50 s.f. basal area per acre including the area covered by any structures;

v. The remaining forest consists of trees that are multi-aged and are well distributed across the Tree Protection Zone;

vi. All vegetation overhanging aquatic FWHCAs is retained; and

vii. For primary structures to be located in Zone 2, there is a low probability of increased windthrow of trees within Tree Protection Zones as determined by a qualified professional.

b. Water Quality Buffers. Structures, uses and activities that are listed as "Yes" uses in Table 3.10 below are allowed within aquatic FWHCAs and required water quality buffers, subject to compliance with other sections of the San Juan County Code. State or federal requirements, administered by the WA Department of Ecology, WA Dept. of Fish and Wildlife, WA Dept. of Natural Resources, and U.S. Army Corps of Engineers, may also apply to these areas.

Table 3.10
Structures, Uses and Activities Allowed in and over Aquatic FWHCAs and Their Water Quality Buffers

<u>Activity</u>	<u>Aquatic FWHCA (the area within the water)</u>	<u>Buffer</u>
a. <u>Outdoor uses and activities that do not involve modifying the land or vegetation, and that will not adversely affect the functions and values of FWHCAs.</u>	YES	YES
b. <u>The harvesting of wild plants and foods in conformance with applicable regulations and in a manner that is not injurious to the natural reproduction of native plants, provided the harvesting does not require tilling soil, planting, or changing existing topography, water conditions, or water sources, except when allowed as an agricultural activity under (e) or (f) below.</u>	YES	YES
c. <u>Removal of invasive plants; planting of native plants; vegetation management activities intended to preserve and maintain specific habitats for rare species; and vegetation management activities implemented as part of a habitat management plan developed or approved by a local, state or federal agency.</u>	YES	YES
d. <u>Agricultural activities conducted in accordance with a voluntary stewardship program developed pursuant to RCW 36.70A.705, with the exception of the construction of agricultural structures which are subject to the same provisions as other structures.</u>	YES	YES
e. <u>With the exception of the construction of agricultural structures, agricultural activities, including seasonal and recurrent activities, existing or in development during the year prior to the effective date of this ordinance, provided they do not result in additional adverse impacts to the functions and values of FWHCAs. This can include changing the type of farming, management practices, and crops within the existing geographic area already in use (such as in the rotational management of farmland) as long as the change does not result in additional adverse impacts to FWHCA functions and values. Agricultural structures are subject to the same provisions as other structures. (Note: See definition of "garden" in SJCC 18.20.070.)</u>	YES	YES
f. <u>Aquacultural activities including seasonal and recurrent activities, existing or in development during the year prior to the effective date of this ordinance, provided they do not result in additional adverse impacts to the functions and values of aquatic FWHCAs. This can include changing the type of aquaculture, management practices, and products within the existing geographic area already in use, as long as the change does not result in additional adverse impacts to FWHCA functions and values. Aquacultural structures are subject to the same provisions as other structures. Aquacultural activities are also subject to the requirements of SJCC Chapter 18.50.</u>	YES	YES
g. <u>With the exception of the construction of agricultural structures, new and expanding agricultural activities that are consistent with appropriate best management practices (BMPs) that will ensure no net loss of the functions and values of aquatic FWHCAs. The BMPs must be described in a farm management plan or other comprehensive agricultural management document prepared or approved by WSU Cooperative</u>	NO	YES

<p><u>Extension Service or the San Juan County Conservation District. New and expanding agricultural activities must not result in additional adverse impacts to FWHCA functions and values. Agricultural structures are subject to the same provisions as other structures. (Note: See definition of "garden" in SJCC 18.20.070.)</u></p>		
<p><u>h. New and expanding aquacultural activities that are consistent with appropriate best management practices (BMPs) approved by the Dept. of Ecology. The BMPs must be described in a management plan. New and expanding aquacultural activities must not result in additional adverse impacts to FWHCA functions and values. New aquacultural structures are subject to the same provisions as other structures. Aquacultural activities are also subject to the requirements of SJCC Chapter 18.50.</u></p>	<p><u>YES</u></p>	<p><u>YES</u></p>
<p><u>i. Non-compensatory Enhancement. Restoration or enhancement activities not required as project mitigation, provided the activity is approved by the U.S. Fish and Wildlife Service, the Washington State Department of Ecology, Washington State Department Fish and Wildlife, or other responsible local, state, federal, or tribal jurisdiction.</u></p>	<p><u>YES</u></p>	<p><u>YES</u></p>
<p><u>j. Within the water quality buffers of aquatic FWHCAs, the establishment and expansion of orchards and gardens, cultivated and managed with appropriate BMPs, and without the use of synthetic chemicals, provided that:</u> <u>i. They will occupy no more than 4,000 square feet of the buffer;</u> <u>ii. They are installed within the outer 25% of the buffer;</u> <u>iii. Other than fences, no structures or impervious surfaces are constructed or created, and fences will not impede the flow of water or prevent wildlife access to streams, ponds, lakes or shorelines designated as FWHCAs;</u> <u>iv. A buffer of at least 30 feet is retained.</u> <u>v. Trees within Tree Protection Zones are protected in accordance with this section.</u></p>	<p><u>NO</u></p>	<p><u>YES</u></p>
<p><u>k. The construction of trails, stairs, or raised walkways, provided that the improvement:</u> <u>i. Is designed to direct sheet flow runoff into adjacent vegetation;</u> <u>ii. Does not exceed five feet in width;</u> <u>iii. Is constructed of non-toxic materials;</u> <u>iv. Does not include the placement of fill;</u> <u>v. Is consistent with the applicable requirements of subsection 18.30.160.E.5; and</u> <u>vi. For areas within shoreline jurisdiction, the improvement is consistent with the requirements of SJCC Chapter 18.50 and subsection 18.30.160. E.7.</u></p>	<p><u>YES</u></p>	<p><u>YES</u></p>
<p><u>l. Temporary wildlife watching blinds.</u></p>	<p><u>YES</u></p>	<p><u>YES</u></p>
<p><u>m. Drilling and digging of wells, provided they are located within the outer 25% of the water quality buffer, that there are no anticipated adverse impacts to adjoining FWHCAs, that measures are taken to avoid compaction of soils during drilling and development of the well, and that disturbed areas are immediately stabilized.</u></p>	<p><u>NO</u></p>	<p><u>YES</u></p>
<p><u>o. To allow for a view or for fire hazard reduction, minor trimming and pruning of the foliage of trees and shrubs, provided the health of the trees and shrubs is maintained, trees are not topped, and all vegetation overhanging aquatic FWHCAs is retained. In no case shall more than 20% of the foliage of individual trees or shrubs be removed during one 12 month period.</u></p>	<p><u>NO</u></p>	<p><u>YES</u></p>
<p><u>p. If no practicable alternative exists, components of stormwater management facilities</u></p>	<p><u>NO</u></p>	<p><u>YES</u></p>

<u>in conformance with local and state stormwater management requirements and the Tree Protection Zone requirements of this section.</u>		
<u>q. Fences provided they do not impede the flow of water or prevent wildlife access to the shoreline.</u>	<u>NO</u>	<u>YES</u>
<u>r. Stream crossings, and roads and trails in water quality buffers and Tree Protection Zones, in conformance with subsection 18.30.160.E.5.</u>	<u>YES</u>	<u>YES</u>
<u>s. Storage of chemicals.</u>	<u>NO</u>	<u>NO</u>
<u>t. Components of on-site sewage disposal systems in conformance with local and State requirements, provided:</u> <u>i. Appropriate BMPs are used to minimize erosion, sedimentation and soil disturbance;</u> <u>ii. For new systems, trees within Tree Protection Zones are retained in accordance with this section.</u> <u>iii. For replacement of existing, failing systems where there is no other alternative that will meet State requirements (including locating the new system in the same place as the old system), trees within Tree Protection Zones are retained to the greatest extent possible.</u>	<u>YES</u>	<u>YES</u>
<u>u. Development, vegetation removal, or other modification allowed pursuant to an exemption, a reasonable use exception, a public agency/ utility exception, and provisions for non-conforming uses, structures and activities outlined in SJCC 18.30.110.</u>	<u>YES</u>	<u>YES</u>
<u>v. Structures, uses and activities allowed pursuant to an approved variance (see SJCC 18.80.100).</u>	<u>YES</u>	<u>YES</u>
<u>w. Shoreline modifications in conformance with SJCC 18.50 and subsection 18.30.160.E.8.</u>	<u>YES</u>	<u>YES</u>
<u>x. Other uses that will not adversely impact the functions and values of aquatic FWHCAs, considering the Best Available Science.</u>	<u>P/C</u> ¹	<u>P/C</u> ¹

¹“P/C” means Provisional or Conditional Use Permit depending on the level of impacts (see SJCC 18.80.090.

3. Field Marking of Buffers and Tree Protection Zones. Prior to building permit approval, the location of the outer extent of buffers and Tree Protection Zones adjacent to the area that will be developed shall be marked in the field, and the Director may require field approval prior to the commencement of permitted activities. Markings for buffers and Tree Protection Zones shall be maintained throughout the duration of construction activities.

4. For recorded plats, short plats, and binding site plans the applicant shall show the boundary of required buffers and Tree Protection Zones on the face of the plat or plan.

5. Stream Crossings, Roads, and Trails in Water Quality Buffers and Tree Protection Zones. The construction of new or expanded roads, driveways, trails and associated culverts and bridges across streams, buffers and Tree Protection Zones are allowed in conformance with SJCC 18.60.080 - 100 and the following:

APPENDIX 2

Excerpts from BAS Synthesis

Re: Vegetation management

The establishment of buffers (discussed in the Marine Riparian Buffers section) is *likely to be* an important management strategy for protecting marine HCAs. ... Marine riparian areas can be directly impacted by vegetation removal or alteration, or indirectly impacted by changing the physical conditions required by plants that make up the community. Indirect impacts can occur as a result of shoreline armoring or development in buffer areas and the back shore zone. By disturbing riparian vegetation directly, or by altering the physical conditions that determine the type of plants that grow in the nearshore zone, shoreline modifications can affect numerous protected or sensitive species and their habitat.

BAS Synthesis, p. 60 (AR 005739).

SCIENTIFICALLY BASED OPTIONS FOR MARINE RIPARIAN BUFFERS

Due to the importance of riparian vegetation in freshwater and marine systems, the establishment of buffers is commonly regarded as having a key role in protecting aquatic habitat. In general, the term **buffers** refers to terrestrial areas surrounding a wetland, stream, water body or other area of high ecological, geological, or hydrological importance, and whose purpose is to reduce or prevent impacts to the functions of the protected resource, such as may occur from adjacent land uses. In comparison, **setbacks** are regulatory tools used to protect land from encroachment by structures, but do not generally specify how the setback area must be managed. Like setbacks, buffers are measured a specified distance between a development and the resource being protected. Unlike setbacks, buffers usually are considered off-limits to some activities and land uses which themselves may impact the functions of the resource being protected. Buffers are often (but not necessarily) configured to completely encircle a wetland, lake or other resource, whereas setbacks are confined to just a direct path between the development and the resource being protected.

Although information on the application and effectiveness of marine buffers is more limited than for freshwater systems, many of the same physical processes occur, particularly with regard to transport of pollutants, organic material, and food and nutrients from the land to the water (Lemieux et al. 2004). Because riparian *buffers in both stream and marine environments can have implications for water quality in the marine ecosystem*, some references to freshwater buffers are included in this section. Best available science for freshwater and marine riparian environments, particularly related to safeguarding the processes that protect riparian functions, remains an active field of research.

Nonetheless, an extensive body of research and literature has emerged over the last three decades which documents the importance of riparian areas in providing ecological functions related to waters of the state. These functions include the following (Romanuk and Levings 2010, Brennan et al. 2009, Lemieux et al. 2004):

- Water quality maintenance
- Fine sediment control
- Large woody debris delivery and retention
- Microclimate moderation
- Nutrient delivery and retention
- Terrestrial carbon source to nearshore food webs
- Fish and wildlife habitat creation and maintenance
- Direct food support for juvenile salmonids
- Hydrologic based slope stability

There is consensus in the scientific community that marine riparian area buffers are *critical to sustaining many ecological functions* (Desbonnet et al. 1994, Brennan and Culverwell 2004, Lemieux et al 2004, Brennan et al. 2009) however *few studies were found addressing marine riparian buffer functions and identifying and proposing specific distance requirements*. As for freshwater stream riparian areas, these are commonly grouped into three primary categories: water quantity, water quality, and habitat. Development and human *activities can adversely affect* water bodies by impacting the hydroperiod (extent, duration, and timing of flow), or by impacting water quality and habitat either directly or indirectly. This is *especially true* when structures and land uses that discharge generate and discharge pollutants are located in areas that are most likely to flush pollutants into the water (see discussion in Chapter 2). Buffers adjacent to water bodies are therefore key to providing functional benefits related to water quality and habitat. For example, *vegetation in buffers can improve water quality* through capture and uptake, and buffers provide a complex transitional zone between upland and aquatic environments that is important habitat for many species.

Other *factors relevant to the effectiveness of marine buffers*, or of a given buffer width, include the type and intensity of surrounding land development; influence of groundwater; stability of slopes or bluffs; types of pollutants and their sources; vegetation dynamics (such as type and density); susceptibility of the buffer to wind throw, which may require buffers in excess of one site potential tree height (e.g. in areas with high winds, particularly when prevailing winds are perpendicular to the buffer (Murphy, 1995); whether some tree removal will be allowed in the buffer; and geomorphic functions of driftwood or other habitat features that might affect the functions and values of the buffer (Brennan et al. 2009). For example, slopes that are more susceptible to massive failure may require a larger buffer, particularly if existing development is contributing to an increased rate of erosion such as from poor stormwater management or lack of stabilizing vegetation. Likewise, feeder bluffs contributing to spawning beaches may require a larger buffer in order to protect future development while also decreasing the need for shoreline armoring.

In some cases, steep slopes comprised of bedrock may allow for a narrower buffer as slope stability and sediment sources would not be impacted by development. For example, in the San Juan Islands, there can be a nearly vertical slope in basalt that can be very stable. However, water quality and habitat protection *may warrant* additional buffer width. Regarding effects of limited tree removal within buffers, Wenger (1999) suggests that after the first 25 – 50 feet some removal of trees can occur. Kleinschmidt Assoc. (1999) recommends an increase in buffer width for areas with less than 75% canopy closure and recommends that no tree removal be allowed in the first 35 feet, with limited tree removal allowed in the outer portions of the buffer. Murphy (1995) found that more than 58% of potential large woody debris must be maintained to support stream functions. Finally, in areas with high winds, particularly if prevailing winds are perpendicular to the buffer, tree removal may increase the potential for blow down of the remaining trees. (Note: canopy closure and basal area are often used to describe the coverage of trees on a site, with basal area being the cross sectional area of the timber at a point 4 ½ feet from the ground surface).

BAS Synthesis, Chapter 3, pp. 64-65 (AR 005743-4) (emphasis supplied).

No. 72235-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE,
P.J. TAGGARES COMPANY,
AND FRIENDS OF THE SAN
JUANIS,

Appellants,

v.

GROWTH MANAGEMENT
HEARINGS BOARD, WESTERN
WASHINGTON REGION, AND
SAN JUAN COUNTY,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury under the laws of the State of Washington, declare that on February 5, 2015, she caused to be served: (1) REPLY BRIEF OF APPELLANTS COMMON SENSE ALLIANCE AND P.J. TAGGARES COMPANY; and (2) this CERTIFICATE OF SERVICE on the parties as indicated below:

Amy S. Vira
Deputy Prosecuting Attorney
San Juan County Prosecuting Attorney
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Email: amyv@sanjuanco.com
Via First Class Mail and Email

FILED
FEB 11 2015
SAN JUAN COUNTY
CLERK OF COURT

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Via First Class Mail and Email

Signed this 5th day of February, 2015, at Seattle, Washington



Brooke Harkness
Department Assistant