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Supreme Court No. 92251-9

IN THE SUPREME COURT 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 TO SAN JUAN COUNTY'S ANSWER

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C. INTRODUCTION

Appellant Friends of the San Juans (“Friends”) submits this Reply to address Respondent San Juan County’s (“County”) newly raised issue claiming that Friends seeks review of new arguments and materials. San Juan County’s Answer to Friends of the San Juans’ Petition for Review (“Answer”), at 1. In its Answer, County asked: “[w]hether review is proper under RAP 13.4(b) when the Appellant failed to raise these arguments at the Growth Board, Superior Court, or Court of Appeals.” Answer, at 1 (Issue No. 1).¹ In conjunction with that issue, County avers that Friends attempts to “distort the record and procedural history of this case in an effort to manufacture a case for appeal.” *Id.* Notwithstanding its aggressive rhetoric, County ultimately identifies only one argument, and none of the issues Friends has presented for review, as novel.²

The Petition for Review (“Petition”) expressly seeks review of six assignments of error posed to the Court of Appeals below. Although Friends has consistently raised these errors, County did not challenge them as new arguments in either of the appeal to Superior Court or the Court of

¹ Friends does not reply to County’s second issue because it appears to generically restate Friends’ more specific issues, and thus has been addressed by Friends’ briefing below.

² In asserting newly raised arguments, County may have contemplated arguments raised to demonstrate this case’s suitability for Supreme Court review pursuant to Rule of Appellate Procedure (“RAP”) 13.4(b). Some of those arguments necessarily address the considerations of RAP 13.4(b).

Appeals. To the extent that County challenges the two overarching issues that Friends set forth to focus the Court's inquiry,³ it fails to notice that Friends repeatedly set forth a variation on those two issues under each of its assignments of error to the Court of Appeals.

In reviewing these issues about the inclusion of Best Available Science ("BAS") and protection of critical areas, it is important to note that this case has never been about whether County had the BAS at its disposal when crafting the Critical Areas Ordinance ("CAO"). County did have the BAS. Instead, this case asks whether a decisionmaker should review the BAS when there is a dispute about its recommendations. This Case also seeks the Court's assistance in defining the scope of the requirement to include BAS so that counties will know, for example, whether non-scientific speculation justifies a departure from scientific recommendations. Last, this case asks whether the Growth Management Act ("GMA") requires the protection of critical areas regardless of a justification. Friends raised these issues at each stage below.

D. ARGUMENT

Friends' Petition asks this Court to review six Assignments of Error that Friends presented to the Court of Appeals. Petition, at 1. The

³ Because County did not specify which arguments or materials it believes were raised for the first time, this reply demonstrates that Friends has consistently raised below all of the issues and assignments of error offered for the Court's review.

Petition places that request within the context of two issues that Friends had also presented to the Court of Appeals, with its assignments of error. Compare Petition, at 1 with Friends of the San Juans' Brief of Appellant, Wash. Ct. App. Cause No. 72235-2-I, 2-5 (filed Nov. 5, 2014) ("Appellant Brief"). Further, the lone argument that County identifies as new--that future shoreline development should be consistent with the CAO rather than nonconforming development--was presented to the Growth Management Hearings Board ("Board"). Administrative Record ("AR"), at 4051-52. Friends' issues and assignments of error are not new.

1. The Petition Asks the Court to Review Six Assignments of Error that Friends Raised to the Court of Appeals.

Friends seeks this Court's review of the first six assignments of error decided by the Court of Appeals below. Petition, at 1. The Petition identifies two overarching legal issues to focus that inquiry:

- (1) did the Board and Court of Appeals uphold six exceptions to protection under the CAO without reasoned justification for departing from BAS? And
- (2) does the GMA require County to protect critical areas whether or not it offers a justified departure?

These issues largely resemble the issues that Friends identified for the Court of Appeals as pertaining to its assignments of error. See Appellant Brief, 2-5. For example, in assigning error to the Board's conclusion that Friends did not meet its burden in proving that excluding wetlands from

protection conflicts with the GMA, Friends asked whether the Board erroneously interpreted or applied the GMA requirement to protect wetlands and to include BAS. Id. at 2. Because the inclusion of BAS requires a determination that a county has relied upon a reasoned justification when it departs from BAS, the Court of Appeals erred in failing to evaluate whether County's excuse for the departure constituted a reasoned justification. Common Sense Alliance, et al., v. Growth Mgmt. Hearings Bd., No. 72235-2-I, Unpublished Opinion, 22-24 (Aug. 10, 2015). Friends posed similar issues for each of the six assignments of error it seeks to have reviewed here.

Friends raised nearly identical issues at San Juan County Superior Court. For example, Friends asked whether the Court should "reverse the Board's conclusions on Issue 27 below because Friends demonstrated that a 'Tree Protection Zone' fails to protect critical areas or include BAS, and the Decision thus erroneously interpreted or applied the GMA, is not supported by substantial evidence, or is arbitrary and capricious?" CP No. 18, Brief of Petitioner Friends of the San Juans, 2-3 (filed Dec. 13, 2013). This issue addresses both the GMA requirement to protect critical areas regardless of reasoned justification and whether the Board included BAS.

Last, all of these issues reflect the original issues that Friends posed to the Board in its Prehearing Brief. Administrative Record ("AR")

4002-068. Friends included such issues as No. 29:

[d]oes the FWHCA Ordinance's mandatory reduction of shoreline water quality buffers and Tree Protection Zones by up to 100% to accommodate water views, at SJCC 18.30.160.E.6, contravene RCW 36.70A.020(9, 10), .040(3), .060(2, 3), .130(1), and .172(1) by failing to protect FWHCAs, failing to include BAS, and frustrating the GMA goals to promote open space and recreation and protect the environment?

AR 4051-52. Thus, Friends asks the Court to resolve the same issues that it raised before the Board in 2013. To answer those questions, the Court must resolve conflicts between the decision below and decisions of Division 3 of the Court of Appeals and this Court, as identified in the Petition.

Last, in asserting a lone example of new argument, County omits support for its position that the Court should disregard Washington's preference for conforming uses in determining whether to grant the Petition. Answer, at 10-11. Moreover, Friends argued to the Board that the CAO's generous direction to reduce shoreline setbacks on parcels between lots with nonconforming setbacks conflicts with GMA requirements to include BAS and protect critical areas. E.g., AR 4051-52 (averring that "shoreline buffer reductions based on neighboring setbacks do not protect CAs and do not include BAS."). Friends made the same argument

to the Court of Appeals. Appellant's Brief, at 24-32. County did not object when Friends continued to raise this argument at the Court of Appeals. For the purposes of demonstrating a need for Supreme Court resolution, Friends properly identified the conflict between the Court of Appeals decision appealed here and the declaration from the Court of Appeals in Jefferson County v. Seattle Yacht Club that nonconforming uses are disfavored. 73 Wn. App. 576, 590-91, 870 P.2d 987 (1994).

2. Friends Relies Upon Materials in the Record.

County offers no support for its assertion that Friends seeks to rely on new material and to distort the record.⁴ The Petition offers citation to only briefs and the administrative record. See, e.g., Appendix to Petition (attaching: (1) Court of Appeals decision; (2) Board decision; (3) excerpts from the ordinances under review; and (4) Washington Department of Ecology comment letters that formed part of the record before the Board's review). Thus, Friends did not offer any new evidence.

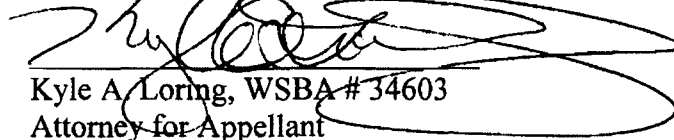
E. CONCLUSION

The Answer contends that the Petition inappropriately raises new arguments for the first time on appeal, and suggests further that Friends

⁴ Friends addresses this assertion because it may be incorporated into Issue No. 1.

relies on new materials for support. With one exception, the Answer does not identify those purportedly new arguments or materials. Consequently, Friends respectfully requests that the Court reject that issue and accept review of this vital inquiry into the scope of the GMA's protections for critical areas.

Respectfully submitted this 23rd day of October, 2015.



Kyle A. Loring, WSBA # 34603
Attorney for Appellant
FRIENDS OF THE SAN JUANS

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE,)	
P.J. TAGGARES COMPANY, and)	No. 92251-9
FRIENDS OF THE SAN JUANS)	
)	CERTIFICATE OF
Appellants,)	SERVICE
)	
v.)	
)	
GROWTH MANAGEMENT)	
HEARINGS BOARD, WESTERN)	
WASHINGTON REGION, and)	
SAN JUAN COUNTY,)	
)	
Respondents.)	
)	

I, Kyle A. Loring, declare:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on October 23, 2015, I caused to be delivered in the manner indicated below a true and correct copy of: **REPLY TO SAN JUAN COUNTY'S ANSWER** in the above-titled cause to:

Amy S. Vira
Deputy Prosecuting Attorney
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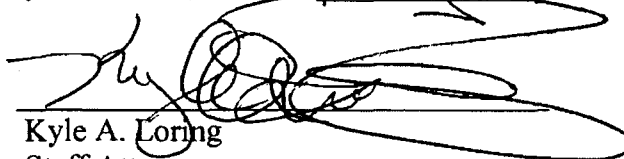
Original filed with:

Washington State Supreme Court
Supreme@courts.wa.gov

By Email

I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated this 25th day of October, 2015, at Friday Harbor, Washington.



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OFFICE RECEPTIONIST, CLERK

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Subject: RE: E-filing in Case No. 92251-9 by Friends of the San Juans

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Supreme Court Clerk's Office

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Sent: Friday, October 23, 2015 2:32 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Amy Vira <amyv@sanjuanco.com>; DionneP@atg.wa.gov; bth@pacificlegal.org
Subject: E-filing in Case No. 92251-9 by Friends of the San Juans

Dear Supreme Court Clerk,

Please accept for electronic filing the attached Reply to San Juan County's Answer and Certificate of Service in Common Sense Alliance, at al. v. GMHB, Case No. 92251-9. The person filing these documents is:

Kyle A. Loring, WSBA # 34603
360-378-2319
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Sincerely,

Kyle Loring

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Protecting the San Juans, preserving our quality of life, for more than 35 years

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