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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION II

KITSAP ALLIANCE OF PROPERTY OWNERS,
WILLIAM PALMER and RON ROSS

Petitioners

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, et al.

Respondents

RESPONDENT KITSAP COUNTY'S OPENING BRIEF
In Opposition to Petitioners' Opening Brief

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I. INTRODUCTION

As an appeal from an administrative body, this case is solely about whether the Central Puget Sound Growth Management Hearings Board (Board) erred in affirming Kitsap County's Critical Areas Ordinance (CAO). This case is not, and cannot be, about whether the County's CAO complies with other GMA issues or other statutes that were never properly raised before the Board. Consideration of such issues would harm the integrity of the administrative system and would be in blatant defiance of the well established administrative process.

Before the Board, Respondents Kitsap Alliance of Property Owners, William Palmer, and Ron Ross (collectively KAPO) challenged the County's CAO as going "too far" and infringing on their private property rights because, allegedly, the County improperly designated marine shorelines as critical areas and did not include Best Available Science (BAS). The Board disagreed and affirmed the County's CAO as compliant with the Growth Management Act's requirement to protect critical areas and found that KAPO had failed to satisfy its burden of proof to show otherwise. In the superior court, KAPO again argued improper designation and noncompliance with BAS, and added a constitutional claim. The superior court rejected all of KAPO's arguments and affirmed the Board's decision upholding the County's CAO. Apparently because

KAPO has not previously prevailed on any asserted issue, KAPO here switches gears and introduces new issues that were not raised before the Board and do not fall within an exception to the general prohibition on raising new issues. Not only must these issues be dismissed as a procedural matter, but substantively they fair no better and must be rejected.

KAPO argues that the buffers established for marine shorelines within the County's CAO are "uniform" "set-asides" unsupported by any identified impacts from development. To the contrary, the buffers in the CAO are not uniform, but are based upon the existing and future development allowed in the various areas, and are amply supported by BAS contained in the record, as required by GMA. KAPO's argument to the contrary directly conflicts with the clear evidence in the record. KAPO also argues, for the first time, that the CAO improperly regulates shoreline areas because, they claim, these areas are within the exclusive jurisdiction of the Shoreline Management Act. Not only is this a new issue improperly raised on appeal, but KAPO's legal authority is inapplicable and not controlling in this case. Finally, KAPO argues that the County's CAO violates RCW 82.02.020. Again, not only is this a new issue that must be dismissed, but the record shows clearly that the County's CAO has the nexus with and is roughly proportional to the harm

to be prevented. KAPO's appeal must be denied.

II. STATEMENT OF THE CASE

A. The Growth Management Act and Critical Areas

The Washington state legislature enacted the Growth Management Act (GMA), Chapter 36.70A RCW, in 1990 and 1991 to, in part, combat “uncoordinated and unplanned growth” and pronounce a common goal of “conservation and the wise use” of land.¹ The legislature specifically found that unplanned growth and the lack of a stated goal “pose[d] a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.”²

One of the first tasks imposed by GMA on local governments was the designation of critical areas, which GMA defines as “(a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservations areas; (d) frequently flooded areas; and (e) geologically hazardous areas.”³ Once designated, local governments must then “protect the functions and values of critical areas” and “give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.”⁴ This protection

¹ RCW 36.70A.010.

² *Id.*

³ RCW 36.70A.060(2); RCW 36.70A.170(1)(d).

⁴ RCW 36.70A.172(1). “Anadromous fish means fish whose life cycle includes time spent in both fresh and salt water.” AR Tab 13: Core Document 2 – CAO Ordinance

requirement applies to all jurisdictions, regardless of whether they choose to plan under GMA or not.⁵ The need to protect critical areas was obvious:

The protection of critical areas is essential to preserving our natural environment and protecting the public's health and safety. Protecting critical areas helps reduce exposure to risks, such as landslides or flooding, and maintains the natural elements of our landscape. Critical areas provide a variety of benefits: clear drinking water, enhanced water quality, wildlife habitat, and managed flood risks, to name a few. Protection of critical areas is necessary to preserve these benefits and to reduce the hazards associated with some critical areas. The functions and values of critical areas, once lost, can be costly or even impossible to replace.⁶

GMA also established three regional Growth Management Hearings Boards to hear and resolve challenges regarding compliance with GMA.⁷ The Central Puget Sound Growth Management Hearings Board (Board) reviews challenges to legislative actions by the counties of King, Pierce, Snohomish, and Kitsap and the cities therein.⁸ In addition, the

351-2005 at KCC 19.150.115. On submittal of the Administrative Record (AR) to court, the Central Puget Sound Growth Management Hearings Board indicated that the Administrative Record was contained in 3-ring binders with tabs consistent with the table therein and that the substantive documents submitted to the Board during the underlying case would be found with the tabbed document with which they were submitted. For example, AR Tab 42 is the County's Prehearing Brief in the case before the Board and each Index Record attached thereto can also be found within Tab 42. Therefore, the County will herein cite to the tabbed document as AR Tab __, and cite to an attached index record as AR Tab __: Index __.

⁵ RCW 36.70A.060(2).

⁶ AR Tab 37: Index 592 – CTED, *Critical Areas Assistance Handbook* at 4.

⁷ RCW 36.70A.250.

⁸ RCW 36.70A.250(1)(b). The Eastern Board only has jurisdiction over matters involving all counties east of the Cascades, and the Western Board only has jurisdiction

legislature appointed the Department of Community, Trade, and Economic Development to provide technical assistance to counties in adopting their comprehensive plan and development regulations, including the CAO.⁹

B. Shoreline Critical Areas

From the very beginning, GMA governed all critical areas regardless of their location in the environment.¹⁰ This was despite the existence of the Shoreline Management Act (SMA), Chapter 90.58 RCW, first adopted in 1971, which governs all waters of the state and shorelands two hundred feet from the ordinary high water mark.¹¹ In 1995, the Legislature partially integrated the two statutes. Through this change, all goals and policies of the SMA became GMA's 14th goal and the review of appeals regarding local shoreline management plans were transferred to the growth boards.¹² In January 2003, the Central Puget Sound Growth Management Hearings Board interpreted this change to mean that all shorelines of statewide significance were automatically critical areas and were to be protected under a no net loss standard supported by Best

over matters involving all counties west of the Cascades, with the exception of the four counties subject to the Central Board's jurisdiction. RCW 36.70A.250.

⁹ RCW 36.70A.050, RCW 36.70A.190; *see also Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 232, 110 P.3d 1132 (2005).

¹⁰ RCW 36.70A.170; RCW 36.70A.030(5).

¹¹ RCW 90.58.040; RCW 90.58.020.

¹² RCW 36.70A.480(1); RCW 36.70A.280(1).

Available Science.¹³

A few months later, in May 2003, the Governor signed into law Engrossed Substitute House Bill (ESHB) 1933, which purported to right the wrong analysis committed by the Board. The law clarified that critical areas within the shoreline jurisdiction are not automatically critical areas, but may be designated as such if they meet the definition of a critical area under GMA.¹⁴ The new law also stated that the SMA is to govern critical areas within the shoreline jurisdiction “as of the date the department of ecology approves a local government’s shoreline master program adopted under applicable shoreline guidelines....”¹⁵

Since the adoption of this language, the Department of Community Trade and Economic Development, the Department of Ecology, and most other local jurisdictions have interpreted the “as of the date” language to be future tense, or prospective – meaning that the transfer of jurisdiction over critical areas in the shoreline from the GMA to the SMA would occur upon the next date (i.e., after 2003) that Ecology reviews and approves a comprehensive update to the local SMP.¹⁶ This is the language that was

¹³ *Everett Shorelines Coalition v. City of Everett*, CPSGMHB Case No. 02-3-0009c, Final Decision and Order (January 9, 2003).

¹⁴ RCW 36.70A.480(5).

¹⁵ RCW 36.70A.480(3)(a). Interestingly, in the findings associated with ESHB 1933, the Legislature stated that the Central Board did not have the benefit of any applicable guidelines, which suggests that there were none at the time of ESHB 1933. ESHB 1933, Laws of 2003, ch. 321 at §1.

¹⁶ See e.g., AR Tab 60 – *Hood Canal Environmental Council v. Kitsap County*,

the subject of dispute in *Futurewise* upon which KAPO relies. At this time, *Futurewise* is not final and is merely a plurality decision which only reinstates the Western Washington Growth Management Hearings Board's decision, which is not binding on Kitsap County.

C. Kitsap County's Critical Areas Ordinance Update

Kitsap County first adopted its CAO in 1998 and in 2003 began the long and contentious process of updating it, as required by RCW 36.70A.130.¹⁷ One of the considerations during the update was the inclusion of Best Available Science ("BAS"), which evaluates the functions and values of critical areas and evaluates possible protections to them from known harms caused by development.¹⁸ To comply with the BAS requirement, the County convened a Technical Review Committee ("TRC") to help gather and evaluate BAS and to make recommendations to the County for updating the CAO.¹⁹ The TRC was composed of representatives with appropriate subject matter expertise from local and state natural resource agencies, tribes, and various community stakeholder

CPSGMHB Case No. 06-3-0012c, Final Decision and Order (FDO) at 26-28 (August 28, 2006).

¹⁷ AR Tab 15: Index 1349 – CAO Public Participation Timeline; AR Tab 13: Core Document 2 – CAO Ordinance 351-2005 at §1.C.

¹⁸ RCW 36.70A.172 requires counties to "include the best available science in developing policies and development regulations to protect the functions and values of critical areas." See also AR Tab 37: Index 592 – CTED, *Critical Areas Assistance Handbook* at 10-11, 19-23.

¹⁹ AR Tab 42: Index 627 – BAS TRC materials; AR Tab 37: Index 114 – Kitsap County, *A Summary of Best Available Science Review* at 7-8.

groups, including some of the appellants here.²⁰

With the help of the discussions and science provided through the TRC,²¹ as well as science provided by the public during the comment periods, the County evaluated and included BAS into the CAO. Along with the various drafts, the County developed a “Summary of Best Available Science” to explain, in layman terms, the science relied upon by County,²² and then a “Science Support Document” to explain and highlight the changes between the CAO drafts.²³ In these documents, the evaluation process for BAS was made apparent. The County used CTED’s BAS criteria in WAC 365-195-900 through –925 to evaluate the incoming scientific information, determine whether they qualified as BAS, identified whether they were relevant scientific information, and assessed their applicability to Kitsap County’s critical areas.²⁴ The BAS indicated that buffers were generally appropriate protection measures and could be tailored to match the existing habitat with the anticipated harm.²⁵

After providing opportunities for public review and comment, including formal hearings and otherwise, the County held four days of

²⁰ AR Tab 42: Index 627 – BAS TRC materials.

²¹ AR Tab 42: Index 1332 – BAS TRC summary.

²² AR Tab 37: Index 114 – Kitsap County, *A Summary of Best Available Science Review*.

²³ AR Tab 37: Index 109 – Kitsap County, *Science Support Document*.

²⁴ Many members of DCD Staff are scientists with degrees and education that enable them to effectively and logically evaluate the BAS that was developed through the CAO update process. AR Tab 42: Index 1367 – Kitsap County DCD Credentials.

²⁵ AR Tab 37: Index 114 – Kitsap County, *A Summary of Best Available Science Review*;

public deliberations finally adopting the County's CAO Update, Ordinance 351-2005, on December 1, 2005.²⁶ KAPO appealed the ordinance to the Board, as did a number of environmental groups. After a motion to dismiss and a hearing on the merits, the Board denied every single one of KAPO's claims. KAPO had failed to prove their claims that the designation of all of the County's marine shorelines as critical areas failed to comply with RCW 36.70A.480(5), that the County's reliance on non-KAPO science failed to comply with GMA's BAS requirements, that the County's buffers were not based on BAS, that the County's CAO violated property rights, that the CAO was unenforceably vague, and that the County's CAO was arbitrary and discriminatory.²⁷ On remand from the Board's decision that the some of the County's marine shoreline buffers were not large enough,²⁸ KAPO also failed to convince the Board

AR Tab 37: Index 109 – Kitsap County, *Science Support Document*.

²⁶ AR Tab 42: Index 1386 – Kitsap County Board of Commissioner Minutes for Nov. 14, 2005; AR Tab 42: Index 1387 – Kitsap County Board of Commissioner Minutes for Nov. 28-30 and Dec. 1, 2005; AR Tab 13: Core Document 2 – CAO Ordinance 351-2005 and §2.

²⁷ AR Tab 60 – FDO. By failing to brief them here, KAPO has clearly abandoned all issues not argued in its Opening Brief. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). The failure to brief an issue on appeal within the opening brief results in the abandonment of that issue. It cannot be resurrected in the reply brief. Such is too late and a court cannot consider it. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977), *rev'd on other grounds*.

²⁸ The CAO had also been challenged by environmental groups alleging that it had not gone far enough. The Board decided the County had, in two limited places, not gone far enough, and remanded for modifications on the County's marine shoreline buffers and the exemption of certain wetlands. The County took action and after another hearing, the Board deemed it compliant with the Growth Management Act. AR Tab 87 – *Hood Canal*, CPSGMHB Case No. 06-3-0012c, Order Finding Compliance

that BAS did not support the County's new shoreline buffers, and the Board upheld the County's current CAO as GMA compliant.²⁹

D. Kitsap County's Current Shoreline Buffers

Within the current CAO, the challenged marine buffers are not uniform. Instead, the buffers vary depending on the type of shoreline environmental designation imposed under the County's Shoreline Management Program (SMP) as these designations reflect the various existing physical conditions within the particular designation and also serve to differentiate the kind and intensity of allowed future development there.³⁰ Consistent with these designations and with BAS indicating that the higher the intensity of development, the lower the quality of critical area to be protected,³¹ the County imposed a 50-foot buffer for shorelines designated urban, and a 100-foot buffer for shorelines designated semi-rural and rural.³² These buffers were properly affirmed by the Board and should be affirmed here.

(OFC)(April 30, 2007).

²⁹ AR Tab 87 – OFC. KAPO argues that on remand both the environmental groups and KAPO believed the County's new buffers were unsupported by BAS, implying that the opinions of KAPO and the environmental groups were aligned. KAPO Opening Brief at 7. Nothing could be farther from the truth. The environmental groups believed that even the expanded shoreline buffers were not large enough. *See e.g.*, AR Tab 78 – Hood Canal's Response to County' Statement of Actions Taken to Comply.

³⁰ *See generally*, AR Tab 13: Core Document 1 – Kitsap County's SMP at KCC Chapter 22.16. These designations are not "zoning" as KAPO asserts.

³¹ A more detailed and complete explanation of this can be found at AR Tab 72 – Kitsap County's Statement of Actions Taken to Comply (SATC) at 16-20 and citations therein.

³² AR Tab 72: Index #1613 – Ordinance 376-2007 at 6. The other designations of

III. STANDARD OF REVIEW & DEFERENCE

Growth boards are administrative agencies whose decisions may be appealed to court under the Administrative Procedures Act (APA), Chapter 34.05 RCW. Under the APA, this court sits in the same position as the superior court and applies the APA standards directly to the Board's decision and record.³³ The court's review is limited to what was presented to the Board; it "cannot consider matters outside the record or presented for the first time on appeal."³⁴ The court reviews legal issues *de novo*, and factual issues based on substantial evidence in the record.³⁵ Even as to legal issues, courts give substantial weight to the Board's interpretation of the statute it administers,³⁶ and gives "substantial deference to agency views when it bases its determination on factual matters, especially factual matters that are complex, technical, and close to the heart of the agency's expertise."³⁷

The burden of proving that the agency's decision is invalid rests

conservancy and natural also have their own buffer widths, but these were not challenged and so have remained unchanged.

³³ *Stevens County v. Loon Lake Property Owners Ass'n*, 146 Wn. App. 124, 129, 187 P.3d 846 (2008)(citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)).

³⁴ RCW 34.05.554; RCW 34.05.558; *Loon Lake*, 146 Wn. App. at 129.

³⁵ RCW 34.05.570.

³⁶ *Gold Star Resorts Inc. v. Futurewise*, 140 Wn. App. 378, 386, 166 P.3d 748 (2007); *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

³⁷ *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn. App. 723, 737-738 137 P.3d 78 (2006) (citing *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997)).

wholly on petitioners.³⁸ A court may only grant relief when petitioners satisfy their burden on one or more of the bases identified in the APA.³⁹ KAPO has claimed three here: (1) the Board's decision or the County's CAO is unconstitutional (RCW 34.05.570(3)(a)); (2) the Board's decision was outside its authority (RCW 34.05.570(3)(b)); and (3) the Board erroneously interpreted or applied the law (RCW 34.05.570(3)(d)). Significantly, KAPO does not appeal the Board's decision under RCW 34.05.570(3)(e) and therefore does not allege that the Board's decision was not based on substantial evidence. As no finding of fact has been challenged, they are verities on appeal.⁴⁰

To better appreciate the burden KAPO must satisfy here, it is important to understand the standards of review governing the Board's decision and KAPO's failure thereby. Under GMA, a local government's development regulations are presumed valid upon adoption.⁴¹ GMA also requires that deference be given to a local government's planning decisions.⁴² Petitioners, therefore, have a heavy burden to prove that a government's actions are noncompliant.⁴³ They must show that the

³⁸ RCW 34.05.570(1)(a).

³⁹ RCW 34.05.570(3).

⁴⁰ RAP 10.3(g); *Boyd v. Kulczyk*, 115 Wn. App. 411, 63 P.3d 156 (2003).

⁴¹ RCW 36.70A.320(1).

⁴² RCW 36.70A.3201; *see also Kitsap County v. CPSGMHB*, 138 Wn. App. 863, 158 P.3d 638 (2007); *Quadrant Corporation v. CPSGMHB*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

⁴³ RCW 36.70A.320(2).

regulation is clearly erroneous in view of the entire record and in light of the goals and requirements of GMA.⁴⁴ To find an action “clearly erroneous,” the Board must be left with a firm and definite conviction that a mistake has been made.⁴⁵

While a court’s review of a Board’s decision is governed by the APA, and the APA requires that deference be given to the Board’s decision,⁴⁶ deference to the local government also continues. In *Quadrant*, the Supreme Court clarified the balance between the APA’s deferential standard to an agency decision and the various GMA provisions providing deference to the County:

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.⁴⁷

Fortunately in this case, deference to the Board and the County is one and the same because the Board properly gave deference to the County in how it accomplished the protections for critical areas required by GMA and affirmed the County’s CAO regulations.

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⁴⁴ RCW 36.70A.320(3)(the Board *shall* find compliance unless the county’s action is clearly erroneous in light of the entire record before it).

⁴⁵ *Dep’t of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁴⁶ RCW 34.05.570; *Quadrant*, 154 Wn.2d at 238 n.7.

⁴⁷ *Quadrant*, 154 Wn.2d at 238 (internal footnotes and citations omitted).

IV. ARGUMENT

A. Kitsap County's regulation of marine shorelines through the CAO is appropriate and within the jurisdiction of the GMA.

KAPO's claim that the County's CAO cannot regulate marine shorelines must be dismissed as it is both an inappropriate issue on appeal and is incorrect. First, it is not a proper issue under RCW 34.05.570(3). Second, it is a new issue and does not satisfy any exception to the prohibition on new issues. Finally, if the Court decides to consider it, KAPO's argument must fail. The cases upon which KAPO relies are not controlling and both the GMA and the SMA clearly allow the County's CAO to govern in this case.

1. *The County's jurisdiction is not a proper issue under APA.*

This issue appears to address KAPO's challenge based on RCW 34.05.570(3)(b), which questions whether the Board had jurisdiction to make its decision.⁴⁸ KAPO's argument, however, admittedly focuses instead on whether the County had jurisdiction to enact the challenged CAO provisions. Except as to whether the Board correctly interpreted or applied the law as to the County's jurisdiction, a direct challenge to the County's jurisdiction is not one of the grounds for relief under the APA.⁴⁹

⁴⁸ Notably, under RCW 36.70A.280(1), the Board has jurisdiction to determine compliance with the SMA or the GMA if such issues are properly raised.

⁴⁹ RCW 34.05.570(3).

Accordingly the issue must be rejected. Furthermore, as discussed below, the Board could not have erred in interpreting or applying the law regarding the County's jurisdiction as it was not an issue raised before the Board.

2. *This is a new issue that must be rejected.*

The APA clearly provides that on judicial review, “[i]ssues not raised before the agency may not be raised on appeal” subject to exceptions not applicable here.⁵⁰ It is also a well established rule of case law. The failure to raise issues during the course of an administrative hearing will preclude their consideration in an appeal on the record.⁵¹ The Supreme Court has explained the importance of such rule and why it must be followed:

This rule is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking. ...[R]ules like RCW 34.05.554 further the purposes of (1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and

⁵⁰ RCW 34.05.554.

⁵¹ *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 860 P.2d 1024 (1993). *Griffin v. Department of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816, 825 (1979). See also, *Wells v. WWGMHB*, 100 Wn. App. 657, 683, 997 P.2d 405 (2000); *Manke Lumber Co., Inc. v. CPSGMHB*, 113 Wn. App. 615, 53 P.3d 1011 (2002).

perhaps even obviating judicial involvement.

We also note that reversal of an agency on grounds not raised before the agency could have a seriously demoralizing effect on administrative conduct. Knowing that even decisions made with the utmost care might be reversed on heretofore undisclosed grounds, administrative agencies could become careless in their decision-making.⁵²

The question of the County's jurisdiction to adopt marine shoreline buffers within its CAO was never raised before the Board. Nowhere in KAPO's fifteen page Petition for Review does KAPO assert that the County lacked authority.⁵³ Rather, KAPO's Petition challenged the County's CAO as not in compliance with GMA, implying that GMA is the proper governing statute, and specifically challenged the County's designation of shorelines as critical areas under RCW 36.70A.480(5).⁵⁴ Also, in KAPO's Prehearing and Reply Briefs before the Board, KAPO never once argued that the SMA was the exclusive means for regulating marine shorelines.⁵⁵ Rather, KAPO merely argued the improper designation issue based on its belief that the County did not conduct a "sufficient" inventory and that such designation created a conflict between

⁵² *BRB for King County*, 122 Wn.2d at 668-669 (internal citations omitted).

⁵³ See AR Tab 2 – KAPO's Petition for Review to the Board.

⁵⁴ *Id.* RCW 36.70A.480(5) provides that shorelines of the state are not automatically critical areas unless they fall within the definition of a critical areas under GMA. Notably, this issue is not raised within KAPO's Opening Brief here and must be dismissed as abandoned if KAPO attempts to reassert it on Reply. *City of Spokane v. White*, 102 Wn. App. 955, 963 10 P.3d 1095 (2000).

⁵⁵ See generally AR Tab 37 – KAPO Prehearing Brief; AR Tab 47 – KAPO Reply Brief. KAPO also never challenged the County's CAO as violating the SMA, as it claims in

the SMA and the GMA.⁵⁶ In fact, KAPO confirmed, “KAPO does not contend that Kitsap County cannot apply critical area rules in the shorelines, or that such rules may, in certain circumstances be preemptive of otherwise priority shoreline uses and activities.”⁵⁷ Accordingly, the authority of the County to regulate was never questioned.

On appeal to superior court, KAPO continued its argument that the County had improperly designated all of its marine shorelines as critical areas.⁵⁸ KAPO did not raise the issue of the County’s jurisdiction. In fact, KAPO clearly admitted that it was not arguing that the regulation of marine shorelines could only occur under the SMA, which it argues now, but that “KAPO has consistently argued that the County’s blanket designation of all its shorelines as critical areas violated RCW 36.70A.480(5), which is part of the GMA...The County can only regulate critical areas under the GMA if they qualify for such designation under the [GMA.]”⁵⁹ Significantly, the superior court did not address the jurisdiction issue, but rather addressed the issue KAPO actually raised, which was whether the designation violated RCW 36.70A.480(5).

its Opening Brief at 14.

⁵⁶ See AR Tab 37 – KAPO’s Prehearing Brief at 8-13; AR Tab 47 – KAPO’s Reply Brief at 9-19.

⁵⁷ AR Tab 37 – KAPO’s Prehearing Brief at 10.

⁵⁸ CP 13; CP 116-117; CP 237.

⁵⁹ CP 237.

Accordingly, at no point in this three-plus year appeal process has KAPO ever asserted that the County was not authorized to regulate marine shorelines under its CAO. Because the Board, which is charged with interpreting both the GMA and the SMA, never had the opportunity to address this issue, it must be rejected.⁶⁰

KAPO implies in its Opening Brief that the Board did actually address the new issue when it discussed ESHB 1933.⁶¹ An examination of the Board's discussion, however, reveals that this discussion was limited to how other jurisdictions have reviewed ESHB 1933 as it applied to RCW 36.70A.480(5) and the designation of critical areas, the issue KAPO did properly raise. As noted above, the Board rejected KAPO's additional SMA-GMA conflict issue as it was not in the Petition.⁶²

The County also anticipates that KAPO will urge the Court to consider this new jurisdictional issue under RCW 34.05.554(1)(d)(i), which allows consideration if justice so requires based on a change in controlling law. The "law" upon which KAPO relies is ESHB 1933, which was adopted in 2003. It is not new. The uncertain case of *Futurewise* is merely an interpretation of that law, although not binding here as discussed below. KAPO's admission that *Futurewise* was not a

⁶⁰ See AR Tab 60 – FDO at 26-7.

⁶¹ See KAPO's Opening Brief at 14-15.

⁶² AR Tab 60 – FDO at 26.

change but merely a confirmation⁶³ also belies the inapplicability of RCW 34.05.554(1)(d)(i). KAPO may then argue that RAP 2.5(a)(1) allows it to raise jurisdictional issues. This rule applies, however, to the subject matter jurisdiction of the reviewing body, such as the Board or the trial court.⁶⁴ Here, KAPO is arguing that the County lacked jurisdiction to enact certain regulations. This exception to the prohibition on new issues does not apply. This issue must therefore be dismissed as improperly raised.

3. *Futurewise and Biggers are inapplicable to this case.*

If the court decides to address this issue, KAPO's reliance on *Futurewise v. Western Washington Growth Management Hearings Board*⁶⁵ and *Biggers v. City of Bainbridge Island*⁶⁶ is misguided. First, *Futurewise* is not yet final as no mandate has yet been issued. A mandate is "the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review."⁶⁷ Until a mandate has been issued, the court retains the power to change or modify the opinion.⁶⁸ Currently, two motions for

⁶³ See KAPO's Opening Brief at 15.

⁶⁴ *Laffranchi v. Lim*, 146 Wn. App. 376, 190 P.3d 97 (2008); *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

⁶⁵ *Futurewise v. WWGMHB*, 164 Wn.2d 242, 189 P.3d 161 (2008). No mandate has yet been issued as motions for reconsideration are still pending.

⁶⁶ *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

⁶⁷ RAP 12.5(a).

⁶⁸ RAP 12.2.

reconsideration are pending that may change, and hopefully clarify, the plurality holding, which the County believes is contrary to the Legislature's intent and the rules of statutory construction.⁶⁹ Accordingly, the opinion in *Futurewise* is not yet the law of the land and reliance thereon is premature.⁷⁰

Second, the holding in *Futurewise* upon which KAPO relies is a plurality opinion, which has very limited precedential value.⁷¹ The only binding portion of any such opinion is the one that garnered a majority of the votes.⁷² In *Futurewise*, the only portion to do so was the affirmation of the Western Board's decision.⁷³ Accordingly, even if final, the only effect of that case would be to reinstate the previous decision of the Western Board, which is not binding on Kitsap County.⁷⁴

Biggers is also not controlling. *Biggers* does not address the effect of ESHB 1933, nor does it address or even mention the City's CAO and

⁶⁹ The County will not attempt to argue the merits of *Futurewise* here as KAPO does in its Opening Brief, at 16-25. Nevertheless, the County believes that the dissent made the correct analysis and that the motions on reconsiderations will bear this out.

⁷⁰ If this case is still pending at the time the Supreme Court issues its opinion, the County will request leave to file supplemental pleadings to address the opinion.

⁷¹ *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (citing *State v. Gonzalez*, 77 Wn. App. 479, 486, 891 P.2d 743 (1995), review denied, 128 Wn.2d 1008, 910 P.2d 481 (1996)). See also *Harris v. Drake*, 116 Wn. App. 261, 270, 65 P.3d 350 (2003) and cases cited therein.

⁷² *Davidson v. Hensen*, 135 Wn.2d 112, 954 P.2d 1327 (1998).

⁷³ Justices J.M. Johnson, C. Johnson, Sanders and Bridge formed the four-vote plurality with Justice Madsen concurring in the result only. Justices Chambers, Alexander, Owens and Fairhurst formed the four vote dissent. *Futurewise*, 164 Wn.2d 242.

⁷⁴ RCW 36.70A.250(2).

its relationship with the SMA. In fact, there is no mention of ESHB 1933 anywhere in the opinion. Instead, *Biggers* focused solely on the ability of the City to impose a moratorium on the shoreline. In discussing the moratorium, only the four justice plurality opinion makes the generalized statement upon which KAPO relies that the SMA is the exclusive source of shoreline jurisdiction.⁷⁵ The fifth vote by Justice Chambers concurred only in the result to overturn the moratorium, and was based on the length of the moratorium and not on the authority of the City to enact it.⁷⁶ Accordingly, the statement regarding the exclusivity of the SMA is of no precedential value and is not binding.⁷⁷ As neither case is applicable, KAPO has failed to satisfy its burden of proof.

4. *RCW 36.70A.480(6) authorizes a CAO to regulate shoreline critical areas.*

Even if this court determines that *Futurewise* or *Biggers* is final and applicable to this case, the exclusivity of the SMA as argued by KAPO is incorrect. Within the very amendments to the SMA and the GMA by ESHB 1933, the Legislature clearly allowed the CAO to govern shoreline critical areas in certain instances. For example, RCW

⁷⁵ *Biggers* 162 Wn.2d at 699. This statement was made by the plurality of Justices J.M. Johnson, Alexander, Sanders and Bridge. Justice Chambers concurred only in the result; Justices Fairhurst, C. Johnson, Owens and Madsen dissented.

⁷⁶ *Biggers*, 162 Wn.2d at 702.

⁷⁷ *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (citing *State v. Gonzalez*, 77 Wn. App. 479, 486, 891 P.2d 743 (1995), review denied, 128 Wn.2d

36.70A.480(5) allows a shoreline of the state to be designated and protected as a critical area under GMA if it satisfies the definition of a critical area under GMA:

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).*⁷⁸

If it was the Legislature's intent to prevent any and all GMA regulation on the shoreline, they would not have included this provision to allow it.

In another and more significant example, through RCW 36.70A.480(6) the Legislature not only allowed the GMA to regulate shorelines, but actually required it if buffers were not provided for within the SMP:

If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by RCW 90.58.030(2)(f), then the local jurisdiction *shall* continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).⁷⁹

This provision essentially recognizes the important function buffers play in protecting critical areas and provides that buffers will be required

1008, 910 P.2d 481 (1996)).

⁷⁸ RCW 36.70A.480(5)(emphasis added).

⁷⁹ ESHB 1933, Laws of 2003, ch. 321 §5 codified at RCW 36.70A.480(6)(emphasis added).

regardless of the regulation applied. Using almost the exact same language, RCW 90.58.030(2)(f), referenced therein, allowed local governments to adopt buffers in their SMP for critical areas within the shoreline.⁸⁰ Similarly, RCW 36.70A.060(2), also referenced therein, commands local governments to “adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.” Through BAS, buffers are the most commonly applied protection.⁸¹ Accordingly, buffers can be imposed through either the SMA, through the SMP, or the GMA, through the CAO. RCW 36.70A.480(6) mandates that if the SMP does not include buffers that the CAO “continue to regulate those critical areas and their required buffers....”

Here, the County’s current SMP does not contain provisions for buffers.⁸² Rather, buffers are imposed only through the County’s CAO in accordance with Best Available Science as will be discussed below. Because the County’s master program does not establish buffers to protect shoreline critical areas, the County’s CAO must continue to govern.

⁸⁰ RCW 90.58.030(2)(f)(ii).

⁸¹ See generally e.g., King County CAO at KCC Chapter 21A.24; Snohomish County CAO at SCC Chapter 30.62; Pierce County CAO at Title PCC 18E. These regulations can be judicially recognized under ER 201; *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005).

⁸² AR Tab 13: Core Document 1 – Kitsap County’s SMP.

KAPO's argument that it cannot must, therefore, fail.

The County anticipates that KAPO will argue that RCW 36.70A.480(6) means only that CAO buffers apply to shoreline critical areas when the buffer falls outside of the 200 foot shoreline jurisdiction. KAPO is wrong based on the plain language of the provision and rules of statutory interpretation. When interpreting a statute, the primary goal is to determine and give effect to the intent of the drafter and the statute's underlying policies.⁸³ Intent is first determined by looking at the text of the statute and its plain language.⁸⁴ In this review, a court looks not only to the words themselves and their ordinary meaning, but to statutory context, related statutes, background facts, rules of grammar, and special usages identified by the legislative body.⁸⁵ A court is to "also consider the subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another."⁸⁶ Further, the regulation must be considered as a whole, giving meaning to all of its parts.⁸⁷ No language should be rendered superfluous.⁸⁸ Strained meanings and absurd results

⁸³ *Clark v. City of Kent*, 136 Wn. App. 668, 672, 150 P.3d 161, 162-163 (2007); *State v. Mullins*, 128 Wn. App. 633, 116 P.3d 441 (2005).

⁸⁴ *Clark*, 136 Wn. App. at 672.

⁸⁵ *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002).

⁸⁶ *Tesoro Refining and Marketing Co. v. State, Dept. of Revenue*, -- Wn.2d --, 190 P.3d 28 (Aug 14, 2008). *See also, Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007).

⁸⁷ *Clark*, 136 Wn. App. at 672.

⁸⁸ *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156 Wn.2d 696, 699, 131 P.3d 905 (2006).

are to be avoided and common sense must not be abandoned.⁸⁹ Where a word or phrase is not defined in the statute, it will be understood in its usual and ordinary sense, which can be gleaned from a standard dictionary.⁹⁰ Finally, and most importantly, “the spirit or purpose of an enactment should prevail over express but inept wording.”⁹¹

KAPO’s interpretation of RCW 36.70A.480(6) is wrong, first, under the plain meaning of the provision. The very clear words of the section states that it applies only to the local government’s “master program” – to the SMP itself, not its jurisdiction. The SMA defines “master program” as

the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies enunciated in RCW 90.58.020.⁹²

It is when this plan does not include buffers for critical areas does the provision apply. Second, also under the plain reading of the section, where the plan does not include buffers, the CAO “shall continue to regulate those critical areas and their required buffers.” The critical areas referenced in this section are necessarily within the shoreline jurisdiction

⁸⁹ *Clark*, 136 Wn. App. at 672.

⁹⁰ *Mullins*, 128 Wn. App. 633; *In re City of Kent*, 1 Wn. App. 737, 739, 463 P.2d 661 (1969).

⁹¹ *Group Health Co-op. v. City of Seattle*, 146 Wn. App. 80, 189 P.3d 216 (2008).

⁹² RCW 90.58.030(3)(b).

(otherwise the SMP would not apply) and yet the Legislature specifically required the CAO to regulate them. Third, under KAPO's argument, RCW 36.70A.480(6) would be unnecessary and superfluous, contrary to the well-established rules of statutory interpretation. The SMP applies only within 200 feet of the ordinary high water mark;⁹³ the CAO already applies outside of the 200 feet. If RCW 36.70A.480(6) only allowed the CAO to apply outside the 200-foot boundary, it would not change what already occurs.

Finally, KAPO's interpretation leads to an absurd result. The language of RCW 36.70A.480(6) and the provisions referenced therein reflects its purpose to ensure that critical areas are protected by buffers regardless of whether the GMA or the SMA applies. If the SMP contains buffers, it shall govern; if, however, there are no buffers in the SMP, the CAO must govern. KAPO's interpretation would defeat this purpose because even if the SMP did not contain buffers, only the buffers outside the 200 foot jurisdiction would apply, leaving a large 200-foot gap between the shoreline critical area and the "protective" buffer. This interpretation makes no sense, is absurd, and is contrary to the plain language of the statute and the clear intent of Legislature. It should be rejected.

⁹³ RCW 90.58.030(2)(f)(defining shorelands).

In sum, KAPO's claim that the County lacks the authority to regulate marine shorelines through its CAO must be rejected as it is a new issue that was never raised before the Board and has been improperly raised on appeal. Additionally, the cases upon which KAPO relies are not controlling and RCW 36.70A.480(6) clearly allows the CAO to regulate shoreline critical areas in this case.

It should be noted here that KAPO's challenge is no longer to the County's designation of all of its marine shorelines as critical areas under RCW 36.70A.480(5). Nowhere in its Opening Brief does KAPO make this argument. It, accordingly, has been abandoned.⁹⁴ To the extent the court wishes to rule on this issue, KAPO has not met its burden of proof and cannot resurrect an abandoned issue on reply.⁹⁵

B. Kitsap County's marine shoreline buffers comply with Best Available Science.

In its second issue, KAPO challenges the County's marine buffer widths as noncompliant with GMA's BAS requirement. The first theory KAPO advances is that the BAS in the record allegedly does not show that lowland stream science can be used to establish marine shoreline buffers.

⁹⁴ *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981)(citing *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28-29, 593 P.2d 156 (1979)).

⁹⁵ *Id.*; *City of Spokane v. White*, 102 Wn. App. 955, 963 10 P.3d 1095 (2000). The County's substantive response to this issue is explained in the County's Prehearing Brief (AR Tab 42 at 30-36) before the Board and in the County's Opening Brief in Superior Court (CP 188-197). Relevant information was also presented the County's

The second theory is that the BAS does not establish a connection between the need for marine shoreline buffers and the harm caused by development because scientists admit that there is a need for more information. In other words, the record does not support the CAO. Both theories are incorrect and must fail.

As a general matter, both arguments must also fail because these arguments are necessarily factual, not legal, in nature and KAPO has failed to assert that the Board's decision was not based on substantial evidence in the record.⁹⁶ As noted above in Section III, Petitioners' Opening Brief invokes only three APA standards and this one is notably absent. These arguments must therefore be rejected. Additionally, the relevant portion of the case KAPO believes is "most directly on point" is, significantly, based directly and solely on RCW 34.05.570(3)(e), which has not been alleged here.⁹⁷ In *Whidbey Environmental Action Network v. Island County (WEAN)*,⁹⁸ the court reviewed the record before the Western Board and determined that the Western Board's decision was

SATC (AR Tab 72 at 6-22) and the County's Reply SATC (AR Tab 80 at 3-14)

⁹⁶ RCW 34.05.570(3)(e) states, "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 this chapter;"

⁹⁷ See KAPO's Opening Brief at 29.

⁹⁸ *Whidbey Environmental Action Network (WEAN) v. Island County*, 122 Wn. App. 156, 93 P.3d 885 (2004).

supported by substantial evidence in the record.⁹⁹ The Western Board was, therefore, correct to find that BAS did not support Island County's buffers. Because *WEAN* is based on an allegation not raised here, it is inapposite to KAPO's claims.

Even if the court decides to consider the substantive issue of whether the County's CAO was supported by BAS, KAPO's claim also fails as discussed below.

1. *The County's marine shoreline buffers are supported by BAS.*¹⁰⁰

KAPO claims that the science upon which the County relied to establish its marine shoreline buffers did not address all the functions and values of the marine shoreline environment because it was not directly applicable.¹⁰¹ This claim is based on the erroneous belief that the County relied only on two BAS sources, relied solely on science addressing freshwater riparian shorelines (streams), and that nothing in the record explained that stream science can be applicable to marine shorelines. KAPO is, again, incorrect.

⁹⁹ *WEAN*, 122 Wn. App. at 170, 171.

¹⁰⁰ The County's CAO establishes four different marine shoreline buffers for five different environmental designations: urban, semi-rural, rural, conservancy, and natural. See AR Tab 72 – Kitsap County's SATC at Exhibit B: Ordinance 376-2007 at §5 (Table KCC 19.300.315). Only the buffers for urban, rural, and semi-rural shorelines were challenged and are the only buffers at issue here.

¹⁰¹ See KAPO's Opening Brief at 26-28.

As explained in the County's Statement of Actions Taken to Comply (SATC)¹⁰² submitted to the Board on remand, the County's decision to increase its marine shoreline buffer widths was based on a review and synthesis of numerous scientific documents and the applicable, technical rationale derived from them collectively.¹⁰³ While the Board only called out two studies in its Order Finding Compliance, the record and the documents cited within the County's SATC shows that many more were relied upon by the County. And, a good number of these were directly related to the marine shoreline.¹⁰⁴ For example, the County relied on a study by Brennan and Culverwell entitled *An Assessment of Riparian Functions in Marine Ecosystems*,¹⁰⁵ which is a study on the marine shoreline environment. The County also relied on, among others, Lemieux's *Proceedings of the DPF/PSAT Sponsored Marine Riparian Experts Workshop*,¹⁰⁶ on Levings and Jamieson's *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystem, Pacific Region*,¹⁰⁷ on the Suquamish Tribe's study entitled *Dyes Inlet Estuary*

¹⁰² AR Tab 72 – Kitsap County's SATC.

¹⁰³ *Id.* at 6-8.

¹⁰⁴ *Id.* at 8-20 and the citations to the record therein.

¹⁰⁵ AR Tab 42: Index 776 – Brennan, J.S. and H. Culverwell, *Marine Riparian: An Assessment of Riparian Function in Marine Ecosystems* (2004).

¹⁰⁶ AR Tab 42: Index 1364 – Lemieux, J.P. et. al., *Proceedings of the DFP/PSAT Sponsored Marine Riparian Experts Workshop*, Tsawwassen, BC, February 17-18, 2004.

¹⁰⁷ AR Tab 42: Index 1363 – Levings, C. and G. Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystem, Pacific Region* (Research

Study: Chico, Clear, and Barker Estuaries,¹⁰⁸ and on King County's BAS Synthesis called *Best Available Science, Volume 1: A Review of Scientific Literature*,¹⁰⁹ which addressed marine shorelines.

Even those BAS documents that appear on their face to apply only to freshwater shorelines are actually applicable to the marine shorelines to the degree they cover the same functions and values, which is a considerable amount. In the County's SATC, the County explains at length the functions and values associated with marine shorelines, which include: sediment and pollutant control, erosion control/slope stability, food input, habitat structure (including large woody debris), shading, and microclimate.¹¹⁰ These same functions and values are present along freshwater shorelines as well.¹¹¹ Thus, not only does common sense indicate that land adjacent to water provides similar functions, but the BAS in the record also clearly supports this conclusion. For example, the *Brennan and Culverwell* study was initiated to compare the functions of

Document 2001/190, Canadian Science Advisory Secretariat (2001)).

¹⁰⁸ AR Tab 72: Index 780 – Suquamish Tribe, *Dyes Inlet Estuary Study: Chico, Clear and Barker Estuaries* (Fisheries Department 2003).

¹⁰⁹ AR Tab 72: Index 590 – King County, *Best Available Science, Volume 1: A Review of Science Literature* (2004).

¹¹⁰ AR Tab 72 – Kitsap County's SATC at 9-11.

¹¹¹ See e.g., Tab 37: Index 91 – May, C., *Stream Riparian Ecosystems in the Puget Sound Lowland Eco-Region: A Review of Best Available Science* at 23-42; AR Tab 37: Index 556 – Knutsen, K. and V. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* at 27; AR Tab 42: Index 1363 – Levings, C. and G. Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystem, Pacific Region* (Research Document 2001/190, Canadian Science Advisory

marine and freshwater riparian systems. At the outset, the study stated, “Although marine riparian systems have not been subject to the same level of scientific investigation, a growing body of evidence suggests that riparian systems serve similar functions regardless of the salinity of the water bodies they border.”¹¹² As a finding resulting from the study, the paper stated, “both freshwater and marine riparian systems serve almost identical purposes,”¹¹³ and opined that “[u]ntil we have more empirical data to support marine buffer width determinations, we must rely on models or examples in freshwater systems....”¹¹⁴ Other marine riparian experts,¹¹⁵ as well as both King County and the Washington State Department of Fish and Wildlife (WDFW), have come to the same conclusion after their review of best available science. In King County’s BAS review summary, King County stated:

Riparian buffer literature . . . is derived primarily from work pertaining to streams, rivers and wetlands. Few data exist on the marine-riparian interface in the Pacific Northwest. However, in many ways the needs of marine nearshore habitats are similar to those of streams and rivers and thus the buffer widths recommended for riverine

Secretariat (2001) at 4.

¹¹² AR Tab 42: Index 776 – Brennan, J.S. and H. Culverwell, *Marine Riparian: An Assessment of Riparian Functions in Marine Ecosystems* at ii.

¹¹³ *Id.* at iv.

¹¹⁴ *Id.* at 21.

¹¹⁵ See e.g., AR Tab 42: Index 1364 – Lemieux, J.P, et. al., *Proceedings of the DFO/PSAT Sponsored Marine Riparian Exerts Workshop, Tsawwassen, BC, February 17-18, 2004* at viii; AR Tab 42: Index 1363 – Levings, C. and G. Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystem, Pacific Region* (Research Document 2001/190, Canadian Science Advisory Secretariat (2001) at 2.

habitats are also applicable to marine nearshore habitats. For example, as with streams, riparian areas can contribute significant amounts of food for marine fish.... Also marine shorelines can be viewed as similar to riverine shorelines because of energy from tides, waves and currents, i.e., their condition is influenced by energy that scours, transports and deposits sediment and woody debris.¹¹⁶

Similarly, WFDW stated in a letter to the County:

The National Research Council defines riparian areas as transitional between terrestrial and aquatic ecosystems.... Although marine riparian systems have not been as well studied as freshwater riparian systems, many researchers believe that riparian systems serve similar functions regardless of the salinity of the water body. These functions include soil and slope stability; sediment control; wildlife habitat microclimate, water quality, nutrient input, fish prey production (insects which juvenile salmon consume), habitat structure (e.g., large woody debris input) and shade.¹¹⁷

Contrary to KAPO's allegations, the record thus shows that the County's decision to increase shoreline buffers was supported by both marine shoreline BAS and applicable freshwater shoreline BAS. The Board's affirmation of the County's action was thus supported by BAS.

2. *The BAS clearly showed a need to protect and provided a method to do so.*

KAPO next argues that because BAS on marine shorelines references the need for more research, then there is no BAS related to

¹¹⁶ AR Tab 72: Index 590 – King County, *Best Available Science, Volume I: A Review of Science Literature* at 7-23 – 7-24 (internal citations omitted).

¹¹⁷ AR Tab 72: Index 1292 – Washington Department of Fish and Wildlife (WDFW) comment letter dated August 26, 2004 at 2-3.

marine shorelines and the size of buffers needed to protect their functions and values.¹¹⁸ This is simply not true. Many of the same studies that express the need for more data also express the belief that until more is known, marine shorelines can be adequately protected by the use of research developed for freshwater systems. For example, in the *Brennan and Culverwell* study noted above, the scientists urged jurisdictions to look at freshwater science for establishing protective buffers.¹¹⁹ The *Lemieux* paper summarized the scientific literature's conclusions that "the functional mechanisms that apply to inland riparian areas [i.e., freshwater] should be similarly applied to coastal [i.e., marine] areas."¹²⁰ Even the single document cited by KAPO recognizes that many jurisdictions have established protective marine shoreline buffers on freshwater science.¹²¹ KAPO's assertion that there is no basis in the record for the County's actions or the Board's decision to uphold such actions is clearly incorrect.¹²² KAPO's claim should be rejected and the County's CAO upheld.

¹¹⁸ See KAPO's Opening Brief at 29-30.

¹¹⁹ AR Tab 42: Index 776 – Brennan, J.S. and H. Culverwell, *Marine Riparian: An Assessment of Riparian Functions in Marine Ecosystems* at 21.

¹²⁰ AR Tab 42: Index 1364 – Lemieux, J.P. et. al., *Proceedings of the DFO/PSAT Sponsored Marine Riparian Exerts Workshop, Tsawwassen, BC, February 17-18, 2004* at 9.

¹²¹ AR Tab 42: Index 1363 – Levings, C. and G. Jamieson, *Marine and Estuarine Riparian Habitats and Their Role in Coastal Ecosystem, Pacific Region* (Research Document 2001/190, Canadian Science Advisory Secretariat (2001) at 14-15.

¹²² The fact that the County at one time believed smaller buffers were supported by BAS

- C. RCW 82.02.020 does not apply to Kitsap County's marine shoreline buffers, but even if it did apply, the buffers comply with the nexus and rough proportionality requirements.

For the second time, KAPO interjects a new issue on appeal that was never raised before the Board. Further, RCW 82.02.020 does not apply to the County's CAO. This issue should be dismissed. Even if the court were to consider this issue the County's marine shoreline buffers comply with the nexus and rough proportionality requirements.

1. *This is a new issue that must be rejected.*

As already discussed in Section IV.A.1 above, with certain exceptions not applicable here, issues not raised before the Board cannot be raised on appeal to court. RCW 82.02.020 was never identified in KAPO's lengthy Petition for Review and was never argued in its briefs to the Board.¹²³ It is a new issue that must be dismissed. Even if it had been raised, the Board was without authority to hear such claims.¹²⁴ The Board's jurisdiction is strictly limited to determining compliance with GMA based on Chapter 36.70A RCW.¹²⁵ Any such assertion as to RCW

does not make the Board's decision erroneous.

¹²³ AR Tab 2 – KAPO's Petition for Review; AR Tab 37 – KAPO's Prehearing Brief; AR Tab 47 – KAPO's Reply Brief.

¹²⁴ RCW 36.70A.280; RCW 36.70A.300(1); *Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 527, 979 P.2d 864, (1999); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 513, 139 P.3d 1096 (2006) (Concurring/Dissenting opinion recognizing that growth boards do not have authority to hear claims alleging violations of RCW 82.02.020).

¹²⁵ *Id.* RCW 36.70A.280 also identifies the SMA (Chapter 90.58 RCW) and SEPA (Chapter 43.21C RCW) as within the Board's authority to review, but the SMA was not

82.02.020 would have, therefore, been properly dismissed.¹²⁶ Because the court's review here is limited to whether the Board's decision was in error, and can only be based on the standards within RCW 34.05.570(3), the court likewise has no jurisdiction to determine if the Board erred on an issue that the Board would not have been allowed to review.¹²⁷ This issue must be summarily dismissed.

KAPO also never raised this issue in the Petitions for Review to either the superior court or here.¹²⁸ These petitions, by their very nature, determine the specific issues that a court will consider and rule on, and this last issue was notably absent.¹²⁹ Furthermore, the court may only grant relief based on the standards identified in RCW 34.05.570(3) and raised on appeal.¹³⁰ A challenge based on RCW 82.02.020 does not fit within any standard therein and must be dismissed.

2. *RCW 82.02.020 is inapplicable to the County's CAO.*

KAPO believes that County's marine buffers are exactions subject

raised before the Board and KAPO did not pursue an appeal over the Board's determination that KAPO did not have SEPA standing.

¹²⁶ See AR Tab 60 – FDO at 46 n. 59. See e.g., *Open Frame LLC v. City of Tukwila*, CPSGMHB Case No. 06-3-0028, Order of Dismissal at 8-10 (November 17, 2006).

¹²⁷ RCW 34.05.570 (limiting the errors available on review); RCW 34.05.574 (“[T]he court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.”)

¹²⁸ CP 3-15; CP 261-263.

¹²⁹ RCW 34.05.546. This section requires that a petition state “[t]he petitioner's reasons for believing that relief should be granted.” RCW 34.05.546(7).

¹³⁰ RCW 34.05.570(1)(b) (“The validity of agency action shall be determined in

to RCW 82.02.020's prohibition and implies that such belief is based on clear case law. KAPO, again, is wrong. Prior to *Isla Verde v City of Camas*,¹³¹ no case had discussed the applicability of RCW 82.02.020 to anything but clear dedications and fees.¹³² Even *Isla Verde* involved only a clear dedication where title to the open space set-aside was to be transferred.¹³³ That is not the situation here. Very recently, this court stated that even post-*Isla Verde*, the law concerning the legality of a non-dedication, non-fee condition under RCW 82.02.020 was not clear.¹³⁴ The case of *Citizens' Alliance for Property Rights v. Sims*¹³⁵ that KAPO cites has not clarified the waters and is also not yet final.¹³⁶

By its plain language, RCW 82.02.020 only applies to direct or indirect fees or charges, with specific exceptions listed therein.¹³⁷ By definition, exceptions are a subset of what is being regulated. The only exceptions in RCW 82.02.020 that are not clearly monetary payments are dedications and easements:

However, this section does not preclude dedications of land

accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken.”)

¹³¹ *Isla Verde Intern'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740 (2002).

¹³² *Isla Verde*, -- Wn. App. --, 196 P.3d 719 at ¶39 (slip op. Nov. 12, 2008, Div. II).

¹³³ *Isla Verde*, 99 Wn. App. 127, 140 n.3, 990 P.2d 429 (1999).

¹³⁴ *Isla Verde*, -- Wn. App. --, 196 P.3d at ¶40.

¹³⁵ *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649 (2008).

¹³⁶ *Id.* As noted in KAPO's Opening Brief at 36, n.29, the mandate in the *Citizens' Alliance* case has been delayed because the decision, and this issue specifically, has been further appealed to the Supreme Court.

¹³⁷ *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 891, 795 P.2d 712 (1990).

or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.¹³⁸

Both dedications and easements involve the transfer of a property interest. As defined in the subdivision code governing plats, a dedication is defined as “the deliberate appropriation of land by an owner for any general and public uses.”¹³⁹ It is accordingly apparent that the Legislature believed dedications and easements, wherein title is transferred, were indirect fees or charges subject to the general prohibition. To now assume as KAPO argues that critical areas regulations, or any other land use regulation that also does not require the transfer of title,¹⁴⁰ are fees or charges would subject them to the prohibition of RCW 82.02.020, but not the exception. This expansion would absurdly swallow the rule and would effectively render local governments impotent to regulate land use as necessary for the public’s health, safety and welfare. Under the statutory interpretation rules of *Campbell & Gwinn*, this interpretation must be rejected.

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¹³⁸ RCW 82.02.020.

¹³⁹ RCW 58.17.020(3).

¹⁴⁰ KAPO mentions the Notice to Title required by the County’s CAO; however, this does not transfer title or have any additional effect. It merely provides notice that a critical area or its buffer exists on the subject property. See AR Tab 13 – Core Document 2 –

3. *Kitsap County's marine buffers satisfy nexus and rough proportionality.*

Even if the court determines that RCW 82.02.020 applies to the County's marine buffers and is similar to a dedication and decides to review the County's compliance with RCW 82.02.020, despite the issue not having been raised before the Board and despite it being outside the jurisdiction of the Board, KAPO's issue also fails substantively.

To begin, KAPO's assertion that the burden of proof rests with the County on this issue is incorrect and further illustrates the impropriety of this issue here. A local government's action is presumed valid under GMA.¹⁴¹ The heavy burden of proving noncompliance rests with the petitioners.¹⁴² Because this appeal is before the court solely as a result of a challenge to the County's CAO under GMA, KAPO bears the burden. The burden shifts only during the compliance stage after the government's action has been declared invalid, which is not the case here.¹⁴³ KAPO's improper attempt to shift the burden should be rejected as should KAPO's issue for failure to satisfy its burden of proof.

KAPO has failed to show that the County's marine buffers do not have a nexus with or are not roughly proportional to the harm they are

Ordinance 351-2005 at KCC 19.100.150 and Appendix E.

¹⁴¹ RCW 36.70A.320(1).

¹⁴² RCW 36.70A.320(2).

¹⁴³ RCW 36.70A.320(4); *Wells*, 100 Wn. App. at 668-69.

intended to prevent. KAPO asserts that nexus is not satisfied because the County relied on “inapplicable stream science.”¹⁴⁴ Through this argument, KAPO correctly admits that nexus is tied to BAS and that the satisfaction of GMA’s BAS requirement also satisfies any nexus requirement.¹⁴⁵ As the court in *Honesty in Environmental Analysis and Legislation* explained,

[Critical areas] are deemed “critical” because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development.

...
[O]nly the best available science could provide its policy-makers with fact supporting those policies and regulations, which when applied to an application, *will* assure that the nexus and rough proportionality tests are met.¹⁴⁶

Under *HEAL*, then, if a regulation is supported by BAS, it will satisfy both the nexus and rough proportionality requirements. As discussed above in Section B above, the County did comply with the BAS requirement because the County’s marine shoreline buffers were based on marine shoreline science as well as stream science that specifically acknowledged its applicability to the marine environment for similar functions and

¹⁴⁴ See KAPO’s Opening Brief at 37.

¹⁴⁵ *HEAL*, 96 Wn. App. at 533-34.

¹⁴⁶ *Id.*

values. KAPO was wrong there and is wrong here. KAPO's challenge must be rejected.

With regard to rough proportionality, KAPO makes conclusory arguments that the County's marine shoreline buffers are "uniform and preset" and therefore are not tied to the harm to be prevented. Under *HEAL*, the satisfaction of GMA's BAS requirement also satisfies any rough proportionality requirements. Because the County met the BAS requirement, as discussed above, the marine buffers are also roughly proportional.

Even if this Court were to further evaluate the nexus and rough proportionality requirements specifically, KAPO's challenge still fails. To satisfy nexus, the condition must "tend[] to solve or at least alleviate the identified public problem."¹⁴⁷ The BAS relied upon by Kitsap County explains how the regulations imposed have a "nexus" to the problem – in other words, how buffers tend to protect from harm the functions and values of the critical areas. Both GMA and the BAS clearly identify the harm development causes to critical areas. The Legislature specifically stated,

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of

¹⁴⁷ *Burton v. Clark County*, 91, Wn. App. 505, 522, 958 P.2d 343 (1998).

our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.¹⁴⁸

Similarly, the BAS summarized,

Peoples' decisions to live near the water and use its resources for residential, commercial, industrial, and recreational purposes has resulted in significant modifications to the shorelines (i.e., dredging, filling, armoring, clearing and grading, overwater structures, shipping and wastewater disposal). This has in turn negatively impacted the quality of nearshore habitats and the numerous estuarine-dependent species that rely on them.¹⁴⁹

...

Siltation can clog the breathing apparatus (i.e., gills) of fishes and invertebrates, inhibit proper respiratory function in eggs and larvae (suffocation), alter substrates, and bury benthic organisms...

...

Removing vegetation in upland and riparian areas [for development] increases exposure of the land and water to sun and decreases organic matter, resulting in elevated runoff and increased temperatures for water entering marine systems, desiccation of soils and increased stress for animals dependent upon cool, moist conditions....¹⁵⁰

As to how to prevent this harm, the *Brennan and Culverwell* study explained:

The use of riparian buffers and setbacks as tools to protect water quality, prevent erosion, and protect habitat structure

¹⁴⁸ RCW 36.70A.010.

¹⁴⁹ AR Tab 42: Index 776 – Brennan, J.S. and H. Culverwell, *Marine Riparian: An Assessment of Riparian Functions in Marine Ecosystems* at 1.

¹⁵⁰ *Id.* at ii-iii, 16-17; AR Tab 37: Index 556 – Knutsen, K. and V. Naef, *Management Recommendations for Washington's Priority Habitats: Riparian* at 38-77; AR Tab 72: Index 1612 – King County, *Best Available Science, Volume I: A Review of Science Literature* at 7-13. See also CP 207-209 for a more detailed explanation.

and other functions in streams and rivers is well established.¹⁵¹

Buffers and setbacks are essential, functional, and cost-effective tools for preserving important processes and functions, preventing environmental degradation, and protecting valuable coastal resources. Delineating riparian areas and establishing appropriate buffers should be based upon maintaining or reestablishing natural processes and functions in addition to providing for human health and safety and other ecosystem services. This will require scientific investigations that may use freshwater riparian studies as a model for determining functions and benefits....

The scientific support on riparian buffer functions is clear and abundant. There are literally hundreds of articles and dozens of books written on the subject of riparian buffer zones.... Until we have more empirical data to support marine buffer width determinations, we must rely on models or examples in freshwater systems....¹⁵²

Other BAS literature concurs that buffers are an important tool to protect critical areas,¹⁵³ as does CTED regulations, which urge local governments to “establish[] buffer zones around [critical] areas to separate incompatible uses from the habitat areas.”¹⁵⁴ Buffers in general thus tend to solve or at

¹⁵¹ *Id.* at 1.

¹⁵² *Id.* at 21-21.

¹⁵³ See e.g., AR Tab 42: Index 1364 – Lemieux, J.P., *Proceedings of the DFO/PSAT Sponsored Marine Riparian Experts Workshop* at viii; AR Tab 72: Index 590 – King County, *Best Available Science* at 7-15 – 7-16, 7-20 – 7-26. See also, AR Tab 37: Index 91 – May, C., *Stream Riparian Ecosystems in the Puget Sound Lowland Eco-Region: A Review of Best Available Science* at 43, 46-47, 56; AR Tab 37: Index 556 – Knutsen, K. and V. Naef, *Management Recommendations for Washington’s Priority Habitats: Riparian* at 81-91; AR Tab 42: Index 590 – DOE, *Wetlands in Washington State – Volume I: A Synthesis of Science* at 5-3, 5-23 – 5-55.

¹⁵⁴ WAC 365-190-080(5)(b)(v). The legislature apparently agrees that buffers are an appropriate tool to protect critical areas as it has required new Shoreline Management Plans to have “land necessary for buffers for critical areas” before the SMP can regulate shoreline critical areas. RCW 36.70A.480.

least alleviate the identified problem associated with development; they satisfy nexus.

As to rough proportionality, it is satisfied when the condition imposed is “roughly proportional” to the harm to be prevented.¹⁵⁵ The BAS in the record describes the width of buffers needed to protect the various functions and values of critical areas from the harm caused by development. An analysis of this BAS in support of the County’s larger buffers established on remand is detailed in the County’s SATC.¹⁵⁶ In particular, the SATC explained and referenced a graph from one BAS study that was particularly useful because it synthesized numerous BAS studies describing the various functions and values of shoreline critical areas and correlated the range of buffers widths necessary to protect a particular function and value.¹⁵⁷ This graph shows that the County’s buffer widths were within the range identified by BAS and required no more than what the BAS considered necessary to protect the marine shoreline from the identified impacts of development. For example, the 100-foot buffer on rural and semi-rural shorelines was within the mid-range for providing temperature control, the main ingredient in the

¹⁵⁵ *Burton*, 91 Wn. App. at 523.

¹⁵⁶ AR Tab 72 – Kitsap County’s SATC at 11-20.

¹⁵⁷ AR Tab 72 – Kitsap County Statement of Actions Taken to Comply at 12 (*citing* AR Tab 37: Index 114 – *Kitsap County BAS Review* at 18 and Index 91 – May, C.W. *Stream Riparian Ecosystems in the Puget Sound Lowland Eco-Region: A Review of*

microclimate function of marine shorelines. This distance also fell near the mid-range for providing erosion control/sediment removal, nutrient and pollutant removal, and is within the ranges for providing large woody debris and wildlife habitat. Kitsap County's regulations, therefore, are roughly proportional to the harm and require no more than what is suggested by BAS.

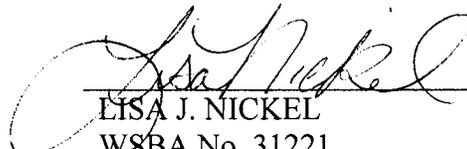
Because the County's buffers have a nexus with and are roughly proportional to the identified problem, the County's regulations satisfy the requirements of RCW 82.02.020, if it applies. KAPO's challenges to the contrary must be dismissed.

IV. CONCLUSION

For the reasons outlined above, Kitsap County respectfully requests that the Board's decision be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

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Best Available Science (Watershed Ecology LLC, 2003) at 56).

CERTIFICATE OF SERVICE

I, Tracy Osbourne, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On December 19, 2008, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Washington State Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402 <input checked="" type="checkbox"/> Via U.S. Mail	Brian T. Hodges Pacific Legal Foundation 10940 NE 33 rd Place, Suite 210 Bellevue, WA 98004 <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via email: bth@pacificlegal.org
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 19, 2008 at Port Orchard, Washington.


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