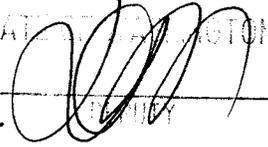


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DIVISION II

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STATE OF WASHINGTON

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

OLYMPIC STEWARDSHIP FOUNDATION,

Petitioner,

v.

WESTERN WASHINGTON GROWH MANAGEMENT HEARINGS
BOARD,

Agency Respondent

and

JEFFERSON COUNTY,

Local Jurisdiction Respondent.

BRIEF OF RESPONDENT JEFFERSON COUNTY

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I. IDENTITY OF RESPONDENT

Jefferson County is the local jurisdiction whose recently enacted Critical Areas Ordinance is the subject of this appeal. Jefferson County is asking this Court to affirm the decision below and to dismiss the appeal of petitioner Olympic Stewardship Foundation (OSF).

II. INTRODUCTION

Jefferson County respectfully asks this Court to affirm the decision of the Western Washington Growth Management Hearings Board finding the Jefferson County Critical Areas Ordinance (CAO) to be in compliance with the Washington Growth Management Act, RCW 36.70A (GMA). The Hearings Board, applying its considerable expertise in interpretation of the GMA, correctly held that Jefferson's County's CAO provisions concerning Channel Migration Zones – as modified by the County in response to the Hearings Board's original order – comply with the requirements of the GMA.

OSF's appeal depends on it proving that the Hearings Board's decision affirming the County's vegetation retention regulation in High Risk Channel Migration Zones, constituted a violation of the "Best Available Science" provisions of the GMA as a matter of law. Yet the Board's decision is consistent with critical areas regulations throughout Washington state, which commonly prohibit logging and other vegetation removal within critical areas such as wetlands, steep slopes and floodplains. Indeed, several Washington counties employ Channel

Migration Zone regulations which are at least as protective in prohibiting vegetation removal in Channel Migration Zones.

The suggestion by OSF that the enforcement of regulations in High Risk Channel Migration Zones violates constitutional standards of nexus and proportionality is without foundation. OSF's comparison of Jefferson County's vegetation retention standards in High Risk Channel Migration Zones to blanket prohibitions on development throughout a county is misplaced. Unlike regulations in other counties which have been invalidated where they require open space set asides on all property, notwithstanding the presence or absence of Critical Areas, Jefferson County's vegetation standards apply only in the Critical Area itself, *i.e.*, within the High Risk Channel Migration Zone. Since Jefferson County's vegetation retention regulation applies only to properties containing the critical areas – and indeed only to those *portions* of parcels which are within the “High Risk” Channel Migration Zone classification, those regulations certainly pass constitutional muster.

Finally, the Court should reject OSF's attempt to raise a new “nonconforming use” issue because it was not preserved below, and because application of the newly enacted statutory language to Jefferson County is likely moot in any event.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Jefferson County believes the issues pertaining to OSF's assignments of error can best be stated as follows:

A. Whether OSF has met its burden of proving that a regulation requiring vegetation retention within a High Risk Channel Migration Zone is an error of law.

B. Whether OSF has met its burden of proving that the vegetation retention regulation in High Risk Channel Migration Zones violates the Constitution.

C. Whether an appellate court should grant considerable discretion to a local jurisdiction's GMA enactments; and whether the Court should accord substantial weight to an agency's legal interpretation where the agency is operating in an area where it has specialized expertise.

IV. STATEMENT OF FACTS

On March 17, 2008, the Jefferson County Board of County Commissioners (BOCC) adopted a Critical Areas Ordinance – Ordinance No. 03-0317-08 (the CAO). The adoption of the ordinance was preceded by several years of scientific and planning analysis, hearings, drafts, reviews and revisions.

OSF appealed the enactment of the CAO. OSF raised several grounds for objection to the CAO, most of which centered on the County's adoption of Channel Migration Zones (CMZs) as a category of critical areas under RCW 36.70A.172 and 36.70A.030(5). A CMZ is a corridor of variable width which includes the current channel of a river plus the adjacent areas through which the channel has migrated or is likely to migrate in a given time frame. The migration of a river creates dangers to private and public property. Moreover, when not restricted, the CMZ

provides aquatic and riparian habitat for fish and other wildlife by ensuring that the fluvial process is accommodated. The principal goal in establishing CMZs is to predict areas at risk for future channel migration due to natural processes and to thereby guide development along the river systems away from the CMZ. (AR 1 at 810).¹

OSF originally argued to the Hearings Board (a) that CMZs are improperly categorized as critical areas because they include land which will not realize its full ecological values until some event in the future; (b) that the County's designation of various classes of CMZs as High Risk/Moderate Risk and Low Risk was not supported by Best Available Science (BAS); and (c) that even if CMZs could reasonably be treated as critical areas, Jefferson County has no power to preclude or restrict development within the CMZs.² (AR 1 at 5-8).

In its November 19, 2008 Final Decision and Order (FDO) the Growth Management Hearings Board for the most part upheld Jefferson County's CAO. The Board rejected OSF's argument that CMZs could not be considered critical areas simply because one cannot predict with

¹ OSF represents that Jefferson County's CMZs can extend "thousands of feet landward in both directions." (Petitioner's Opening Brief, p. 3). This statement is misleading, at best. The only place where CMZs approach that width is on mud flats on Hood Canal, where development of course could not occur in any event. AR 1 at 668, 642. In most locations, the High Risk CMZ is much narrower. *Id.* Likewise, OSF's statement that 600 properties lie within the High Risk CMZ is not supported in the record, and is misleading. The source of OSF's statement are unofficial maps attached to their Response Brief without any scientific support. (AR 2, at 040-044). Moreover, many of the lots referenced by OSF lie only partially within the high risk CMZ, and therefore may be developed. Assertions regarding affected parcels should be stricken.

² OSF raised several other objections to the CAO relating to shoreline jurisdiction, stream buffers and other issues. Those arguments were rejected by the Hearings Board or abandoned. OSF has not appealed those other issues to this Court.

certainty when a river avulsion will occur, nor predict the exact portions of the CMZ which will be occupied by any specific future event. The Hearings Board properly held that the boundaries of CMZs could be designated based on the *risk* of river avulsion. The Hearings Board also rejected OSF's broad contention that the County could not prohibit or regulate development and vegetation removal within CMZs. (AR 1 at 814-816).

The Hearings Board did find, however, that the County was out of compliance with regard to two aspects of the CAO's treatment of CMZs. Specifically, the Board held: (1) that the County needed to further support and define the basis for its classification of High Risk, Moderate Risk and Low Risk CMZs; and (2) that the County should modify its blanket prohibition of vegetation removal within all properties containing CMZs, noting that there is greater risk of avulsion in "High Risk" zones, and vegetation removal regulations should vary depending on the level of risk. (AR 1 at 836-837).

Those two issues of non-compliance were subsequently addressed and corrected by the County through Ordinance No. 06-0511-09, which included amendments to the CAO designed specifically to satisfy the concerns raised by the Hearings Board. Specifically, Jefferson County Ordinance No. 06-0511-09 clarified the basis for its classifications of High Risk, Moderate Risk and Low Risk CMZs, and confirmed that only those areas within the High Risk classification are to be regulated under the

CAO. JCC 18.22.160(d). The ordinance also makes clear that vegetation removal is prohibited only within High Risk CMZs. (See, JCC 18.22.170(4)(d); AR 2 at 180).

In its Order on Compliance, dated July 20, 2009, the Hearings Board determined that Jefferson County's CAO is now compliant with the GMA. (AR 2 at 181).

OSF appealed the Hearings Board's findings of compliance to Thurston County Superior Court. OSF argued to the trial court that the County's prohibition on vegetation removal within High Risk CMZs is not supported by Best Available Science, or does not satisfy the "nexus" and "rough proportionality" requirements of RCW 82.02.020. The trial court, the Honorable Richard D. Hicks rejected OSF's appeal, holding that OSF had failed to satisfy its steep burden of proof under the Growth Management Act, the Administrative Procedures Act and applicable caselaw. The Hearings Board's decision was affirmed by order dated January 4, 2010. (CP 241-245).

This appeal followed. The primary issue preserved by OSF in this appeal is OSF's contention that the Hearings Board erred as a matter of law in affirming Jefferson County's vegetation retention requirement in High Risk CMZ's. OSF argues that the Hearings Board's decision fails as a matter of law to satisfy the "Best Available Science" provisions of RCW 36.70A.172, or that the vegetation retention regulation violates

constitutional requirements of “nexus” and “rough proportionality.”³ OSF has also added a new issue not raised before the trial court, *i.e.*, the recent amendment of RCW 36.70A.480, and its effect on treatment of existing shoreline structures as “conforming uses.”

Jefferson County submits that its CMZ regulations are well supported within the record, and are consistent with the Growth Management Act and Washington caselaw relating to protection of Critical Areas. OSF’s appeal should be denied, and the Hearings Board’s orders should be affirmed.

V. ARGUMENT

A. Standard of Review

The burden of proof which OSF faces in this appeal is a formidable one. OSF is asking the Court to hold that Jefferson County’s adoption of its Critical Areas Ordinance – and the Growth Management Hearings Board’s approval of that ordinance – should be overturned and determined to be erroneous as a matter of law with regard to its CMZ provisions. This, despite the clear direction from the Washington legislature and the Washington Supreme Court that a local government’s GMA enactments must be afforded considerable deference, and that the Hearings Board’s interpretation of the GMA is also to be granted substantial weight.

³ OSF does not contend that the record contains no substantial evidence supporting the County’s protection standards for High Risk Channel Migration Zones. Instead, OSF relies entirely on its argument that the Board’s approval of the CMZ regulations was erroneous as a matter of law (RCW 34.05.570(3)(d)), or constituted a violation of the constitution. (RCW 34.05.570(3)(a)).

The 1997 amendments to the Growth Management Act expanded the deference which must be afforded to a County's legislative authority in GMA enactments. RCW 36.70A.320(1). In any challenge to the provisions of a Comprehensive Plan or development regulations, or amendments thereto, the Hearings Board should find compliance unless the County's action was "clearly erroneous" in view of the entire record. RCW 36.70A.320(3). In order to find a county's action clearly erroneous, the court must be left with the "firm and definite conviction that a mistake has been made." King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 14 P.3d 133 (2000); Whidbey Environmental Action Network v. Island County, 122 Wn. App. 156, 93 P.3d 885 (2004), rev. den. 153 Wn.2d 1025; City of Arlington v. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d 768, 779 (2008).

The Washington Supreme Court, acknowledging the legislature's clear directive on this point, has confirmed that the strong deference which is afforded a local jurisdiction in implementing GMA ordinances is greater than the normal deference afforded to administrative agencies under the Administrative Procedure Act:

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.

Quadrant Corp. v. Growth Management Hearings Board, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

The usual deference which is given to a local government's GMA enactment is even stronger in this case because the Growth Management Hearings Board, utilizing its considerable expertise in interpreting the GMA, has concurred with Jefferson County's action and has concluded that the GMA *supports* Jefferson County's treatment of CMZs as critical areas, including its vegetation retention regulations (AR 1 at 825; 836; AR 2 at 180-181). In reviewing the Hearings Board's action, this Court applies the Administrative Procedures Act, RCW 34.05. The Court can reverse only if the Board has misapplied the law. HEAL v. Growth Management Hearings Board, 96 Wn. App. 522, 979 P.2d 864 (1999).

In Petitioner's Opening Brief, OSF repeatedly states that this Court's review of the Hearings Board's legal determination is *de novo*. But it fails to include the settled qualification that the Court should accord substantial weight to an agency's interpretation of the law where that agency is operating within its field of expertise. Fox v. Department of Retirement Systems, 154 Wn. App. 517, 523, 225 P.3d 1018 (2009). This principle has been held specifically applicable in the context of Growth Management Hearings Board decisions:

We review the Board's legal conclusions *de novo*, while giving substantial weight to its interpretation of the statute it administers.

Diehl v. Mason County, 94 Wn. App. 645, 972 P.2d 543 (1999).

The courts grant deference to the Hearings Board’s interpretation of the GMA because the Board has singular expertise in dealing with that statute. HEAL, *supra*, 96 Wn. App. at 526 (1999). A party challenging a Hearings Board’s decision has the burden of proving that the action is invalid. RCW 34.05.570(1)(a). King County v. Growth Management Hearings Board, *supra*, 142 Wn.2d at 552.

Thus, in this appeal, we have a case of “deference times two,” because both the County’s enactment of its Critical Areas Ordinance, and the Hearings Board’s interpretation and application of the GMA to that enactment, are entitled to considerable deference by this Court. Where the local jurisdiction and the Growth Management Hearings Board *concur* with regard to the validity of a GMA enactment, that concurrence will not ordinarily be second-guessed by the courts:

Where the resulting ordinance is supported by the record, we will not substitute our judgment for that of a county’s legislative authority, nor will we reverse a board’s decision that followed a mandatory presumption of validity based on review of the entire record.

Futurewise v. Hearings Board, 141 Wn. App. 202, 218, 169 P.3d 499 (2007).

It would be a rare circumstance where a court would determine that a GMA enactment was clearly erroneous and legally invalid, notwithstanding the concurrence of the county and the Growth Board as to its appropriateness. Indeed, it is noteworthy that *none* of the cases cited

by OSF in its Opening Brief involved a reversal of a Growth Management Hearings Board's finding of GMA *compliance* by the local jurisdiction.

As explained in greater detail below, OSF has failed to satisfy the "clearly erroneous" standard in its challenge to Jefferson County's Critical Areas Ordinance. While OSF expresses disagreement with specific provisions of the Critical Areas Ordinance, mere disagreements are insufficient to warrant reversal. Broad conclusory allegations of noncompliance are insufficient to satisfy the clearly erroneous standard of review. Island County Citizens Growth Management Coalition v. Island County, WWGMHB Case No. 98-2-0023 (FDO June 1, 1999).

Further, OSF is unable to establish that the Hearings Board's approval of the vegetation retention requirement in High Risk CMZs constitutes an error of law under the APA. In view of the considerable weight which is to be afforded determinations by Growth Management Hearings Boards in such matters, the Court should decline to find that the Board's approval of Jefferson County's CAO was an error of law, or a violation of the constitution.

B. A County's Use of Best Available Science is Entitled to Deference on Review.

OSF's challenge to the Critical Areas Ordinance essentially involves a disagreement as to the County's use of Best Available Science (BAS) in connection with vegetation standards in High Risk CMZs. Yet it is settled that a mere disagreement between the parties as to the applicable BAS is not sufficient to warrant a finding of noncompliance with the

GMA. Furthermore, in view of the deference afforded local jurisdictions in applying BAS, and the deference granted to the Growth Management Hearings Board's interpretation of the GMA, there is no basis to conclude that the vegetation retention provision of Jefferson County's Critical Areas Ordinance is invalid as a matter of law.

RCW 36.70A.172 and WAC 365-195-900 mandate that counties include Best Available Science in developing policies and regulations to protect the functions and values of critical areas. The Washington Supreme Court has recently emphasized the broad discretion which must be afforded to counties and cities in determining how to fulfill the GMA mandate of protecting Critical Areas:

The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas. See, RCW 36.70A.3201. Under the GMA, counties and cities "have broad discretion in developing [development regulations] tailored to local circumstances."

Swinomish Tribal Community v. Western Washington Growth Management Hearings Board. 161 Wn.2d 415, 430, 126 P.3d 1198 (2007).

The GMA also stresses that when adopting regulations to protect critical areas "special consideration" is to be given to protection and conservation measures which preserve and enhance habitat for salmonids. RCW 36.70A.172; Swinomish Tribal Community, supra. Channel Migration Zones surely fall within this area of special consideration, as the Jefferson County CAO Advisory Group noted in its Recommendations:

In his book King of Fish: The Thousand Year Run of Salmon, Dr. David Montgomery (2003) identifies CMZs as the ultimate fish habitat. Because of the high productivity of the forested channel migration zones, the Hoh River CMZ and some tributaries with CMZs have been designated as an important west coast salmon and wildlife refugia corridor.

AR 1 at 715.

In determining Best Available Science relative to critical areas, a local jurisdiction may draw from a wide variety of sources, but it is encouraged to use information that local, state or federal natural resource agencies have determined to constitute BAS. WAC 365-195-905(2). Jefferson County has done so with regard to its Critical Areas Ordinance. (See, e.g., AR 1 at 676-704; AR 1 at 627-635; AR 1 at 711-712).

The caselaw is clear that where a GMA enactment reflects scientifically respectable conclusions, mere disagreement by a petitioner as to which studies and opinions should be relied upon is not a basis to set aside the County's judgment. A county is afforded considerable discretion in selecting the appropriate BAS to rely upon. Moreover, the courts should leave it to the local jurisdiction and the Hearings Board to work through the adequacy of BAS:

Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, is first in the province of the city or county to decide. Then, if challenged, it is for the Growth Management Hearings Board to review. The legislature has given great deference to the substantive outcome of that balancing process.

HEAL, *supra*, 96 Wn. App. at, 530-31. In other words, the “balancing” of appropriate BAS is ordinarily to be undertaken between the local jurisdiction and the Hearings Board through the GMA hearing and compliance process. It is only in the most extraordinary circumstance that a reviewing court should conclude that both the local jurisdiction’s exercise of discretion in enacting GMA regulations, and the Hearings Board’s affirmance of the County’s action should be viewed as invalid.

It is significant that the primary case relied upon by OSF in arguing that the County did not satisfy the GMA’s provisions regarding BAS is Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 123 P.3d 102 (2005). Indeed, the case is cited at least fifteen (15) times in OSF’s Opening Brief. Yet even a cursory review of that case reveals its highly irregular circumstances. In Ferry County, the County elected to ignore scientific recommendations made by state agencies and tribes with regard to designating habitat for endangered and threatened species. 155 Wn.2d at 836. Instead, the County relied entirely on two letters written by a wildlife biologist in Alaska with no familiarity with wildlife in Ferry County. The letters did not utilize the scientific method nor rely on cited scientific studies, but rather indicated that the individual’s opinion (that there were only two endangered, threatened or sensitive species warranting protection in Ferry County) was based on “various field guides and big game texts.” *Id.* at 837. The so-called expert conducted no on-site observations and conferred with no other

experts. Under these extreme facts, the Growth Management Hearings Board properly concluded that Ferry County had not utilized Best Available Science in choosing not to list other species. The Supreme Court agreed with the Hearings Board, stating at page 836:

The information relied upon by the county does not rise to the level of scientific information and, therefore, cannot possibly qualify as BAS.

The difference between the Ferry County case and the present controversy could not be more stark. In this case, the breadth and scope of the scientific literature reviewed and evaluated by Jefferson County in reaching its conclusions regarding definition, delineation and protection of CMZs is impressive indeed. (See, AR 1 at 220-295; AR 1 at 501-528). Further, the studies specific to Jefferson County rivers that the County relied upon were peer reviewed, with extensive references, and undertaken in conjunction with federal and state agencies, including the U.S. Department of the Interior, the Bureau of Reclamation and NOAA. (AR 1 at 297-334; AR 1 at 343-430). Moreover, on review, the Hearings Board in this case held unambiguously that Jefferson County's CMA regulations were supported by BAS. (AR 2 at 181).

OSF's reliance on HEAL v. Central Puget Sound Management Hearings Board, 96 Wn. App. 522 (1999) in regard to BAS is also misplaced. It should be noted that in HEAL, the Hearings Board had concluded that it did not have jurisdiction to review a city's use of BAS. The Court of Appeals concluded that the Hearings Board did in fact have

jurisdiction, and remanded to the Hearings Board to evaluate the BAS relied upon by the city. 96 Wn. App. at 536.

In contrast, in this case the Western Board did in fact consider OSF's argument that vegetation retention in High Risk CMZs was not supported by BAS. The Board thoroughly examined the County's BAS and concluded that there was "no question" that the BAS in the record supported a vegetation removal limitation, adding that "OSF's contention is without merit." (AR 2 at 181).

OSF inaccurately suggests that the Hearings Board's approval of Jefferson County's CAO constitutes an error of law because the County adopted "the most aggressive measures" to protect CMZs. (Petitioner's Opening Brief, p. 12). This statement is mistaken, as OSF surely knows. The record reflects that Jefferson County's CAO regulations do not apply at all to development within "Low Risk" and within "Moderate Risk" Channel Migration Zones. Nor does the CAO create buffers along the High Risk CMZs. Rather, the regulations apply *only* to those areas designated as "High Risk," i.e., those for which it has been determined likely that avulsion and channel migration will occur within 50 years. (JCC 18.22.170(4)(d)). (AR 2 at 178-180).

The Court should note that in its original Petition and its brief to the Hearings Board, OSF argued that the County's treatment of CMZs was inappropriate because, OSF contended, it would apply to *all* CMZs, regardless of risk and indeed throughout all properties which *contained* a

CMZ. (AR 1 at 171, 174). In response to the Board's November 19, 2008 FDO, the County amended its regulations to clarify that the CAO would apply *only* within High Risk CMZs and that it would only apply to those portions of a particular property that were within the High Risk CMZ zone. (JCC 18.22.170(4)(d)). In other words, if a property is only partially within a High Risk CMZ, the portion of the parcel outside the High Risk CMZ line would be unaffected by the CAO's provisions regarding CMZs. (AR 2 at 178-79, AR 2 at 22, 25).

Applying its considerable expertise in interpreting the GMA, the Hearings Board had noted in its original November 19, 2008 Final Decision and Order that Best Available Science would support even a prohibition on development within areas which are likely to flood within *100 years*. The Board stressed that its concern did not relate to the 100 year timeframe – which would in fact be supported by BAS - but rather to potential confusion in the ordinance as to whether the County was applying the 50 year timeframe or the 100 year timeframe for “High Risk” CMZs:

The Board does not find error in Jefferson County's use of a 100 year time period as a basis for High Risk CMZs as the scientific documentation utilized similar timelines, with the timeline used for a CMZ delineation affecting the relative area included within the CMZ. However, it is the uncertainty as to what timeline the County's CMZ maps actually reflect in regards to risk that concerns the Board.

(AR 1 at 817).

In responding to the Board's concern, Jefferson County amended the CAO to remove the uncertainty, to make clear that only High Risk CMZs are regulated under the CAO, and that its High Risk classification applies only to lands likely to be occupied by the stream channel within the *50 year* time frame. In other words, even though the Hearings Board had observed that BAS would support "High Risk" critical areas treatment of lands which are likely to be occupied within 100 years, the County adopted a more conservative approach, restricting CMZ regulations to properties likely to be occupied within 50 years.

Upon receiving the clarification from the County, the Hearings Board concurred that the County's treatment of vegetation retention regulations were now consistent with BAS, and that OSF's argument regarding BAS was groundless:

OSF's assertion that the County's 100% vegetation requirement is not supported by BAS was raised by OSF in its Petition for Review (Issue 6). The Board addressed the issue in the FDO and concluded only that a blanket restriction on removal of vegetation that was not linked to the functions and values it was intended to protect was not supported by BAS. That blanket restriction applied to the entirety of the property containing a designated CMZ or its buffer. The Board's concern was the retention requirement's applicability regardless of the associated probability of risk, which would not be equal within the entire CMZ, let alone on the entirety of a property only a portion of which was within the CMZ. **There was no question that BAS in the record supported a vegetation removal limitation so long as it was related to the probability of risk. The County has addressed the Board's concern by limiting the requirement to high risk CMZs alone.** OSF's contention is without merit.

AR 2 at 181. (Emphasis added).

In short, it is clear that the revised CAO provisions relating to CMZ protection are much more conservative than would be permitted by the GMA. The County elected to protect only the High Risk part of the CMZ, despite science-based recommendations from tribal experts that would have applied a more restrictive designation. It is therefore curious that OSF would suggest to this Court that Jefferson County CAO's treatment of CMZs constitutes the "most aggressive" approach, when the record and the history of the case clearly show this not to be accurate. While OSF wishes that the County had employed even more lenient standards for allowing disturbances in CMZs, the County's judgment is well supported by the scientific literature, the mandates of the GMA and applicable caselaw, as the Hearings Board properly found. The County's ordinance, and the Hearings Board's conclusion that the CMZ regulations are compliant with GMA, should be affirmed by this Court.

C. OSF Has Failed to Establish that the CAO's Vegetation Retention Requirement is Invalid.

OSF does not meet its burden of showing as a matter of law that the County's treatment of CMZs is not supported by BAS. Protection of CMZs is increasingly recognized as vital to ensuring (a) protection of river functions; (b) protection and enhancement of salmonid habitat; and (c) protection against catastrophic flooding and the property damage and loss of life which can follow. (AR 1 at 711-712).

The court should hold that OSF has failed to satisfy its burden of proving that the County's Critical Areas Ordinance is clearly erroneous, and that the Hearings Board's legal interpretation of the GMA is invalid.

1. Jefferson County Properly Identified CMZs as Critical Areas Under GMA.

OSF argued to the Hearings Board that Jefferson County did not have authority to treat CMZs as critical areas. OSF noted that CMZs are not specifically identified in RCW 36.70A.030(5). But as OSF concedes, the list of critical areas in RCW 36.70A.030(5) is not exclusive. A county specifically has authority to designate critical areas so long as such designations comply with the Best Available Science requirements of the GMA. Tracy v. City of Mercer Island, CPSGMHB No. 92-3-0001, at 22-23 (FDO, January 5, 1993). The great majority of counties on Puget Sound have adopted critical areas treatment for CMZs. (AR 1 at 609, 713).

CMZs are broadly recognized in the scientific community as important natural features of healthy river systems and, indeed, are vital to the continuing ecological integrity of riparian systems:

While not directly referenced in the 1990 Growth Management Act (GMA), channel migration zones (CMZs) are clearly identified as important fish and wildlife habitat, resource, and hazard areas in the gray, white, and peer reviewed scientific literature, which includes many studies from the Olympic Peninsula, as well as in regulatory policies (BAS provided from CMZs, Thurston County BAS).

CMZs incorporate all five GMA-defined critical areas – wetlands, flood prone areas, geologically hazardous or erosion hazard areas, critical aquifer recharge areas, and

fish and wildlife habitat conservation areas in a mosaic of complex habitat types.

AR 1 at 711-712. The importance of CMZs in providing habitat for salmonids further supports their designation as critical areas. The migrating channel may include side channels or comprise multiple channels which provide benefit to salmonid spawning and rearing habitat by increasing the complexity of the channel. Further, the erosion that results from migrating channels provides recruitment for spawning gravel from adjacent river banks, topples adjacent trees into the channel, thereby providing the large woody debris which creates diverse habitat for spawning, rearing and migration.

Nor is it relevant that the full ecological value of CMZs may only be realized at a future date. There are numerous examples of critical areas whose full significance comes into play only at some undetermined time in the future. For example, Frequently Flooded Areas are lands which under normal circumstances are free from hydrological events. However, because there is a reasonable likelihood that such areas will be flooded at some time in the future, a county or city may – and indeed probably must – designate such lands as critical areas, and must provide for their protection. See, RCW 36.70A.030(5).

The same is true with regards to geologically hazardous areas. A hillside may appear to have none of the expected characteristics of a critical area for years, or even for decades, unless a trained geologist or geomorphologist studies the soil and hydrology and slope and determines

that the hillside is at risk of future failure. Of course, no one can predict the exact year or identify the exact boundaries of the next landslide event. But geomorphology allows experts to delineate hazard areas based on reasonable risk of future failure. Based on that science, a county may of course set critical area boundaries around landslide-prone areas. RCW 36.70A.030(5). Indeed a local government may prevent development all together if the risk of slope failure is significant.

Similar considerations make it appropriate to protect land within CMZs and prohibit removal of vegetation. OSF has argued that because there is only the *potential* for future channel migration, the County should ignore the risk until problems, such as erosion and property damage, arise. But it is appropriate and commonplace to apply regulations to protect against risk. OSF's argument incorrectly assumes that risks and probabilities are not part of science. Yet the approach taken by the Perkins study is systematic and incorporates the risks associated with channel migration based on several criteria. (AR 1 at 342-354).

2. The Adoption of Prescriptive Protection Standards Applicable to CMZs Was Appropriate.

OSF argues in this appeal that even if it is proper for Jefferson County to regulate development in CMZs, the County should not be permitted to subject CMZs to the prescriptive protection standards (i.e., no vegetation removal in High Risk zones) applicable to landslide hazard areas or other critical areas. OSF claims there is inadequate analysis in the record as to whether such regulations are necessary for CMZs. Yet here

again, OSF is falling back on the argument that the BAS utilized by Jefferson County is simply not to OSF's liking. In reality, the studies and summaries referenced and incorporated by Jefferson County do indeed indicate that the risks to property from a river flood are comparable to the risks posed by landslides in erosion hazard areas. (AR 1 at 719-720).

Just as buffers and restrictions on development and vegetation removal in landslide areas are reasonable as a protection against loss of life and property damage so, too, similar restrictions are appropriate as protection against the risk of catastrophic flooding which occurs when a river avulses and occupies a different portion of the channel migration zone. The Western Growth Board so held in Diehl v. Mason County, WWGMHB Case No. 07-2-0010, in approving regulations in frequently flooded areas:

The issue of allowing new residential construction in frequently flooded areas is a question of protection of critical areas. Pursuant to WAC 365-195-825(2)(b), "protection" of critical areas also means to "safeguard the public from hazards to health and safety." Whether to allow new residential construction in a frequently flooded area is a matter of hazards to public health and safety.

FDO, 1/16/2008, p. 11. Regulations proscribing development in flood control zones are a proper exercise of the police power. Maple Leaf Investors, Inc. v. State Dept. of Ecology, 88 Wn.2d 726, 730, 733, 565 P.2d 1162 (1977).

It is reasonable and appropriate for Jefferson County to treat CMZs as a species of erosion hazard areas. The County's designation of CMZs

as a category of geologically hazardous areas is consistent with the express language of the GMA. RCW 36.70A.030(9) defines “geologically hazardous areas” as follows:

“Geologically hazardous areas” means areas that because of their susceptibility to *erosion*, earthquake or *other geological events*, are not suited to the siting of commercial, residential or other development consistent with public health or safety concerns. (Emphasis added).

While OSF may wish that citizens be allowed to clear and develop property wherever they want, and assume the risk of catastrophic loss, the County clearly has authority under its Police Power to regulate and, where necessary, preclude development and disturbances in areas prone to future catastrophes, and in wildlife habitat areas. Tekoa Construction v. Seattle, 56 Wn.App. 28, 34, 781 P.2d 1324 (1989), rev. den., 114 Wn.2d 1005; Rains v. Fisheries, 89 Wn.2d 740, 746, 575 P.2d 1057 (1978).

3. The County Properly Prohibited Vegetation Removal in High Risk CMZs.

OSF argues that BAS does not support prohibitions on logging and other vegetation removal in High Risk CMZs. But BAS demonstrates that prohibitions on vegetation removal in critical areas are reasonable and indeed, common throughout the state of Washington. It is unanimously accepted that logging should not be permitted in high quality wetlands. Indeed, most jurisdictions apply considerable buffers *beyond* the actual wetland, within which vegetation removal is limited or disallowed. (AR 1 at 503). Similarly, counties routinely protect streams (including channel

migration zones), by imposing buffers beyond the stream itself, ranging from 100' to 200' in width. (AR 1 at 505; AR 1 at 608).

A similar analysis applies to prohibiting logging and other disturbance in CMZs. Indeed, in view of the GMA's strict requirement that critical areas regulations reflect "special consideration" for maintaining salmon habitat, the retention of vegetation in CMZs is clearly appropriate. The Jefferson County CAO Advisory Group noted as much in its analysis of applicable Best Available Science:

Mature forests and the complex habitats and myriad functions they provide along rivers are the keystone to healthy salmon habitat in the Pacific Northwest.

* * *

The greater the complexity provided by CMZ forests and flood plain vegetation, the greater the storage of water in a river channel. Standing vegetation and downed wood slows flowing water, and downed woody debris in the channel creates pools (pond storage) Bolton, et al. (2001) and stores sediment that become vegetated islands, restarting the succession of native plants that eventually become flood plain forests.

AR 1 at 716. The Advisory Board thus rejected a solution that would involve removal of vegetation in CMZs and confinement of the river channel in concrete armor:

Suggestions that removal of vegetation and confinement of the river channel so as to protect private land from erosion are unfortunately in direct conflict with the goal of protecting and maintaining viable wild fish stocks.

AR 1 at 719.

A healthy mixture of tree and shrub roots provides protection against bank erosion. Well forested rivers are more stable than those that have been denuded of vegetation. (AR 1 at 260-261). Vegetation along rivers adds an element of roughness which enhances bank accretion and reduces the power of the stream. (AR 1 at 241). Where the BAS demonstrates that the removal of riparian vegetation increases the capacity of the river to erode but the BAS has not specified the precise percentage of vegetation that must be retained, it is logical to adopt the protective approach taken by the County, i.e., prohibiting vegetation removal within “High Risk” CMZs.

In providing for vegetation retention within High Risk CMZs, Jefferson County considered authoritative sources such as the Washington Department of Fish & Wildlife, whose scientists recommend that riparian vegetation be undisturbed. And where the 100 year flood plain exceeds recommended buffers, WDFW recommends that the vegetation protection should go to the outer edge of the floodplain. (AR 1 at 705-708). Similarly, the Washington Department of Ecology in its shoreline regulations requires local governments to analyze information regarding CMZs to “ensure effective shoreline management provisions . . . to supply amounts and distribution of woody debris sufficient to sustained physical complexity and stability.” WAC 176-26-020(6); 176-26-201(3)(d)(i)(D). (See AR 1 at 717; AR 1 at 425).

Forest Practices regulations in the state similarly restrict removal of trees within CMZs. WAC 222-16-010; WAC 222-23-020. Further, tribal scientists advocated for even greater prohibitions on disturbance in CMZs, than those ultimately adopted by Jefferson County. (AR 611-612; AR 619-620).

Federal agencies similarly advise that vegetation be retained in CMZs. As noted in the CAO Advisory Group's report, the National Marine Fisheries Service (NMFS) stresses the importance of identifying the CMZ so as to ensure that the stream has a protective buffer in the future, even if the stream were to move away from its present location. (AR 1 at 714). Likewise, the U.S. Fish & Wildlife Service (USFWS) emphasizes the need to fully incorporate protection for CMZs on low gradient alluvial streams, including 150 foot vegetated buffers on either side of the 100 year flood plain so that they encompass "one site-potential tree height" at most locations and provide sufficient width to filter most sediment from non-channeled surface runoff. (AR 1 at 714).

The CAO Advisory Group also noted the importance identified by several scientific studies in retaining trees in CMZs along rivers:

Large trees provide the structure upon and around which channels, pools, and islands are built, forming and protecting flood plain forests. Channels formed by erosion all around large wood provide new and rich habitats for colonization by juvenile and adult fish. (Abbe 2002, Collins 2001, Montgomery 2002, 2004, Rot 1996).

(AR 1 at 716).

The primary studies relating to channel migration in Jefferson County rivers provided BAS in support of retention of vegetation. The Perkins study for the Dosewallips, Duckabush and Quilcene Rivers identified “wandering rivers” as those characterized by water movement around forested islands. This discussion indicates that vegetation assists in stabilizing substrates and resisting the erosive forces of moving water. (AR 1 at 356). Further, the Perkins report identifies removal of Large Woody Debris (LWD) as causing greater stream incision and entrenchment. (AR 1 at 358). The Lower Hoh River Channel Migration Study discusses the importance of woody vegetation in substrate stabilization within fluvial systems. The study found that once the forested floodplain vegetation was removed, substantial erosion occurred and new channels began forming in the cleared areas. (AR 1 at 371). The study also indicates that erosion rates increased along those portions of the Hoh River that had been cleared and that downed woody material helps deflect water flows away from stream banks:

Further upstream of the Hoh River, the Bureau of Reclamation’s Channel Migration Study found much higher erosion rates downstream from Olympic National Park than within the Park. (Bountry et al., 2004). Clearing of old growth forests appears to be an important factor responsible for higher erosion rates downstream from the park boundary. Considerably more erosion occurred on the north bank, which had been cleared, than on the south bank. Large trees can “form stable snags when they are recruited to the river, thereby increasing bank roughness and deflecting erosive flows away from the bank.” (Abbe et al., 2003).

(AR 1 at 407).

OSF asserts that the Hoh River study concluded that preserving forests within the flood plain “was ineffective to reduce the risk of channel migration.” Petitioner’s Opening Brief, pp. 15-16. The statement is incorrect. As the Perkins Hoh River Study makes clear, intact forests (of functional size) do indeed protect against channel erosion. The key is letting the forest grow to functional size, which is what the Jefferson County CMZ 100% Vegetation Retention standard will do. The relevant portion of the Perkins Report is as follows:

Approach 5 – Preserve Flood Plain Forest. This approach consists simply of retaining the existing dense forest on the flood plain. It could be combined with any of the previous four approaches. Unless eroded by the river, the forest would buffer buildings from tsunamis. Patches of forest that managed to survive bank erosion would eventually grow large enough to slow channel migration by increasing bank roughness and creating stable log jams. The forest would also benefit fish habitat by providing LWD and bank roughness.

AR 1 at 429.

The Hearings Board properly rejected OSF’s argument that retention of vegetation was not shown to be important to protection of the critical area, i.e., the High Risk Channel Migration Zone:

The importance of vegetation in the fluvial environment has been well documented, especially in regards to its significant role in erosion control, bank stabilization, bank protection, and bank accretion. [Appendix 4 – DOE’s Framework for Delineating CMZs at 31-32 (citing to several studies supporting the benefits of vegetation)]. Vegetation is also important as it serves to provide the recruitment of Large Wooden Debris (LWD) which can prevent bank erosion and serves to direct how and where a channel may migrate. [Appendix 7 – Chapters 4 and 5.]

(AR 1 at 825). The Hearings Board went on to note that “the retention of vegetation is important in that it serves to control erosion, provides for bank stabilization, protects the bank, and reduces bank accretion.” (AR 1 at 834).

In short, BAS surely supports retention of vegetation in High Risk CMZs, just as it supports retention of vegetation in other critical areas, such as wetlands, riparian areas generally, and steep slopes. In its Order on Compliance, the Hearings Board concluded that there was “no question” that the Best Available Science supported vegetation retention regulations in High Risk CMZs:

There was no question that the BAS in the record supported a vegetation removal limitation so long as it was related to the probability of risk. The County has addressed the Board’s concern by limiting the requirement to High Risk CMZs alone. OSF’s contention is without merit.

(AR 2 at 181).

OSF has failed to sustain its burden of proving that the Hearings Board’s approval of the County’s vegetation retention requirements in High Risk CMZs constitutes an error of law.

4. Numerous Washington Counties Employ Comparable Vegetation Retention Standards in CMZs.

The suggestion by OSF that the County’s vegetation retention standard in High Risk CMZs is overly “aggressive,” or “unduly precautionary” is belied by the fact that numerous other Washington counties employ similar standards to protect CMZs. For example, Snohomish County includes within its Critical Areas Ordinance standards

for protection of CMZs. Those standards prohibit clearing activities (except hazard trees) in Channel Migration Zones. SCC 30.62B.330(3).

Kitsap County regulates not only land within CMZs but also places buffers *outside* the CMZs. And while vegetation removal can be allowed within the buffer, it is prohibited within the CMZ itself. KCC 19.400.415; KCC 19.150.170, .180. Similarly, Whatcom County requires not only designation and protection of CMZs, but also a buffer outside the CMZ. WCC 16.16.360; 16.16.740B. In short, OSF's attempt to portray Jefferson County's treatment of CMZs as extraordinary or "unduly precautionary" is unsupportable.

D. Jefferson County's Vegetation Retention Standard Does Not Violate RCW 82.02.020.

OSF argues that the County's CMZ regulations may be violative of constitutional "nexus" and "rough proportionality" requirements incorporated into RCW 82.02.020. That statute prohibits local governments from imposing direct or indirect taxes on landowners for the development of land. The statute has been interpreted to preclude local governments from imposing area-wide development restrictions without a showing of a nexus between the restriction and the impact of the proposed development. But the statute has no application here, because the County has only prohibited vegetation removal and development within those very areas that have been determined to be "High Risk" critical areas.

OSF's reliance on Isla Verde Int'l Holdings v. City of Camas, 146 Wn.2d 740 (2002) and Citizens Alliance for Property Rights v. Sims, 145

Wn. App. 649 (2008) is misplaced. Those cases involved ordinances which required all property owners to set aside a portion of their land as open space, whether or not the land contains critical areas. For example, in Citizens Alliance, King County's regulation required property owners throughout the rural areas of the county to keep 50% to 65% of their property in native vegetation, whether or not the properties were in or near designated critical areas. 145 Wn. App. at 657-58. The court held that a property owner could not be required to take steps to protect the functions of critical areas without a showing that development on his property would in fact impact the critical area. In this case, on the other hand, Jefferson County's restriction on vegetation removal applies **only to the critical areas themselves**, i.e., those areas that are within the High Risk CMZ.

In contrast to the blanket set-asides throughout rural areas in Citizens Alliance, Jefferson County's CMZ regulations are comparable to regulations throughout the state (and throughout the country) which prohibit development *in critical areas* such as wetlands, steep slopes and floodplains. Prohibitions on development and disturbances in critical areas are routinely upheld. Indeed such prohibitions are common even in substantial buffer areas *beyond* the critical area itself. For example, in Presbytery of Seattle v. King County, 114 Wn.2d 320, 325, 787 P.2d 907 (1990) the Washington Supreme Court recognized as valid a King County

ordinance which prohibited construction within a wetland and its buffer zone and which included a “native growth protection easement.”

And in Young v. Pierce County, 120 Wn. App. 175, 84 P.3d 927 (2004) the Washington Court of Appeals held that Pierce County had properly enjoined the clearing of trees and removal of other vegetation both within wetlands and within the mandatory 150 foot wetland buffer. 120 Wn. App. at 185. Even more recently, the Washington Supreme Court noted the extensive discretion which is afforded cities and counties in establishing “mandatory buffers along rivers and streams.” The Supreme Court noted that such buffers typically contain “indigenous shrubs and trees.” Swinomish Tribal Committee v. WGMHB, *supra*, 161 Wn.2d at 430. While the Court held in Swinomish that Skagit County was not *required* to establish mandatory vegetative buffers along critical areas, the opinion makes clear that it is within the discretion of a county to do so. Id. at 429-30.

If the courts were to accept OSF’s argument, no county or city could enact an ordinance prohibiting development or clearing in a wetland, landslide area, floodplain or other critical area because, according to OSF, the “nexus and rough proportionality” evaluation cannot be undertaken until a landowner submits a development application to develop in the wetland or on the dangerously steep slope. This would be both impractical and inefficient. The GMA mandates that counties and cities designate and protect critical areas within their boundaries. RCW

36.70A.172. Local jurisdictions should be encouraged to map critical areas to provide advance notice to property owners, and to place appropriate prohibitions on degrading the critical areas.

OSF's nexus argument is simply out of place in this context. Where the prohibition on development is applicable *within the critical area itself* (as opposed to an area-wide prohibition on all development, irrespective of the nature of the property), the nexus and proportionality tests are satisfied. For example, in concluding that the City of Camas' blanket 30% open space set-aside for all subdivisions did not satisfy the nexus requirement, the Supreme Court in Isla Verde noted that the set-aside could not be justified as protecting steep slopes because there was nothing in the record to show that the properties in question fell within the steep slope prohibitions in the city code:

The city also contends, however, that its Steep Slope Ordinance supports imposition of the open space condition as a mitigation measure.

* * *

One difficulty with the city's contention is that the record does not establish that under the steep slope ordinance any of the steep slopes here are greater than allowed for development.

146 Wn.2d at 761-62. In contrast, the only lands which are subject to vegetation retention in Jefferson County's CAO are the critical areas themselves, *i.e.*, those determined to be within the "High Risk" CMZs.

The Washington cases addressing nexus and proportionality rely in large measure on the U.S. Supreme Court case of Dolan v. City of Tigard,

512 U.S. 374, 114 S. Ct. 2309 (1994). In Dolan, the Supreme Court struck down regulations which required a landowner along a creek to dedicate a public greenway across his property. It was this requirement of a public dedication which ran afoul of the nexus and proportionality requirements. Significantly, the Supreme Court noted that a mere prohibition of development within a flood plain would “obviously” satisfy the nexus and proportionality requirements:

It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek’s 100-year flood plain.

512 U.S. at 387. The Supreme Court struck down the City of Tigard’s regulation, however, because it required public dedication of a greenway system across the Dolan’s property:

But the city demanded more – it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner’s property along Fanno Creek for its greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others.

512 U.S. at 393.

In this case, of course, Jefferson County is not requiring any owner of land in a CMZ to dedicate a trail or otherwise provide the public with an unrelated benefit. Rather, the prohibition on vegetation removal applies only to the critical area itself, and the County does not come into

ownership of private land.⁴ Under these circumstances, the nexus is obvious.

In other words, where an ordinance requires protection of the critical area itself, and the landowner's property *is* the critical area, the application of the regulation to the landowner provides the nexus. Similarly, the proportionality analysis is satisfied in Jefferson County's CAO, because the landowner is only required to protect that *portion* of his land which constitutes the critical area. JCC 18.22.160(d). (AR 2 at 181).

The Washington courts have repeatedly held that a local jurisdiction may prohibit development and disturbance within a critical area. Indeed, RCW 36.70A.172 mandates that counties establish regulations to protect critical areas. Diehl v. Mason County, 94 Wn. App. 645, 658, 972 P.2d 543 (1999). Where BAS provides a scientific basis for restricting development and disturbance within a critical area, then that BAS ensures that the nexus and rough proportionality tests are met. HEAL v. Growth Management Hearings Board, 96 Wn. App. 522, 534, 979 P.2d 864 (1999); Dolan v. City of Tigard, 512 U.S. at 387. OSF's argument that the vegetation retention requirement violates RCW 82.02.020 depends on the assumption that the vegetation requirement did not rely on BAS. Once that assumption has been refuted, as it has been here, the nexus and proportionality argument must also fail.

⁴ Of course, there may be circumstances in which regulation can be deemed to have "taken" a landowner's property notwithstanding his retention of ownership. But where the regulation prohibits development or logging only within the Critical Area itself, nexus and proportionality are present.

E. OSF's Argument Regarding Nonconforming Use Was Not Preserved Below, And Is Likely Moot.

In the last section of its Opening Brief, OSF seeks to litigate an issue which it did not preserve below, and which is therefore not properly before this Court. Specifically, OSF notes that the legislature retroactively amended RCW 36.70A.480 as to its treatment of existing structures within the shorelines of the state. This argument was not preserved below.

In its original appeal to the Hearings Board, OSF raised an issue relating to nonconforming uses. However, OSF does not deny that it failed to preserve the issue at the trial court level. Moreover, the specific issue which OSF has asked this Court to address – the enactment in March 2010 of an amended statute pertaining to shoreline nonconforming uses – was clearly not raised by OSF prior to its Opening Brief on appeal. As such, that issue is not properly before this Court. A party may ordinarily not raise an issue for the first time on appeal. Spokane County v. City of Spokane, 148 Wn. App. 120, 124 (2009).

Jefferson County did not have an opportunity to respond to OSF's argument below and to make a record on appeal. The County should be allowed to respond to new statutory enactments through the normal administrative process. If OSF has a reason to challenge any Jefferson County ordinance or action based on a newly enacted statute, it should do so at the administrative level, and not for the first time at the Court of Appeals.

Moreover, the Court should note that OSF has quoted selectively from the amendment to RCW 36.70A.480, and in so doing has altered its meaning and potential effect. The actual amendment language is clear that the treatment of existing structures on shorelines as “conforming uses” continues only until the Washington Department of Ecology approves the county’s Shoreline Master Program (SMP) and only if a redevelopment is consistent with the County’s SMP. The actual language from House Bill 1653 amending 36.70A.480(c)(i) is quoted below, (language which was omitted by OSF is underlined):

Until the Department of Ecology approves a master program or segment of a master program as provided in (b) of this subsection, a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government’s development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified if: (A) the redevelopment or modification is consistent with the local government’s master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government’s development regulations to protect critical areas.

The amendment language omitted by OSF in its brief is important. Jefferson County has submitted its Shoreline Master Program amendments to the Department of Ecology and is expecting to have its amendments approved by the Department of Ecology this year (2010). By the time this Court has ruled on this appeal, any remand to the Growth Management Hearings Board is unlikely to occur until after the County’s shoreline

amendments are in place. In short, it is probable that any remand on this issue would be moot.

Jefferson County therefore believes that there is no reason for the Court of Appeals to address the new amendment to RCW 36.70A.480 in the context of this appeal. If Jefferson County were to improperly apply nonconforming use standards to a shoreline development, that action could be challenged at that time. There is no evidence, however, that Jefferson County is misapplying the newly enacted amendments. Moreover, as explained above, the issue is likely moot in any event.

VI. CONCLUSION

For all of the above reasons, the Western Washington Growth Management Hearings Board's decision, approving Jefferson County's Critical Areas Ordinance should be approved, and this appeal should be dismissed.

DATED this 14th day of May, 2010.

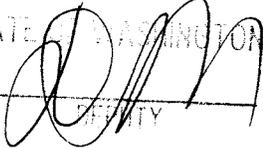
KARR TUTTLE CAMPBELL

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County

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DECLARATION OF SERVICE

STATE OF WASHINGTON
BY  COUNTY

MARK R. JOHNSEN declares as follows:

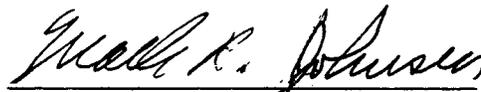
I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101.

I am over the age of 18 years and am not a party to this action. On the below date, true copies of the Brief of Respondent Jefferson County were served to the following as indicated:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of May, 2010, at Seattle, Washington.


MARK R. JOHNSEN