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STATE OF WASHINGTON

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NO.41992-1-II

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

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MIKE AND SUSAN SHAW AND GEORGE AND PATRICIA LANE,

*Respondents,*

vs.

CLALLAM COUNTY AND  
UPPER ELWHA RIVER CONSERVATION COMMITTEE,

*Petitioners.*

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RESPONDENTS' BRIEF ON MERITS

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## **INTRODUCTION**

This appeal involves a request by Shaw for judicial interpreting of language contained within Clallam County's critical areas ordinance. Clallam County's response to this simple request has been to obfuscate on this issue, by asserting that interpretation of such an ordinance can only be done by a growth management hearings board, or that any interpretation of a critical area ordinance is judicial prohibited rule-making or ordinance amendment. The county's opening brief continues this obfuscation. The brief addresses all kinds of issues, but never talks about the actual issues; what is a proper interpretation of the County's ordinance. It is respectfully submitted that a directed analysis of the questions presented by the County in this appeal will demonstrates that they do not address any relevant or important issue, but seek only to sow confusion. Appellants respectfully request that the court conduct a directed analysis of the issues, and are confident that the result of such an analysis will affirm the actions of the trial court.

### **I. IDENTITY OF RESPONDENTS**

Respondents to this appeal on discretionary review are Mike and Susan Shaw and George and Patricia Lane ("Shaw"), who are challenging a Land Use Action by Petitioner Clallam County, and also raising independent constitutional claims against Clallam County.

## **II. STATEMENT OF ISSUES**

1. What is the correct interpretation of the Clallam County Critical Areas Ordinance (“CAO”) Ch. 27.12 of the Clallam County Code (“CCC”), as it relates to Shaw’s request for a critical area determination?
2. Is a Land Use Petition Act (“LUPA”) request for trial court interpretation of a development regulation barred by the Growth Management Act (“GMA”)?
3. Is the proposed order of remand of the trial court beyond its appellate authority under LUPA?
4. Should the trial court have ruled, in a non-final order in a LUPA case, on bifurcated constitutional issues?

## **III. STATEMENT OF FACTS**

Respondents Shaw submitted a request to Clallam County for a critical area determination for a parcel of property owned by them in Clallam County. Unless required by Clallam County’s CAO to obtain a certificate of compliance with that ordinance, their property, if used for a quarry, would not be subject to regulation by Clallam County, as a quarry is a permitted use in the applicable zone. Regulation of their quarry

activity would then lie with the State Department of Natural Resources, AR Exhibit 2, pp. 1-2.<sup>1</sup>

The critical area issue was whether Shaw's property was either a landslide hazard area or an erosion hazard area. Clallam County's CAO provides a procedure for submitting reports of persons who qualify in accordance with the terms of the CAO as able to render "best available information" to the County CAO administrator concerning the application of the CAO to a parcel of property. CCC 27.12.050. Shaw submitted three reports which were accepted by the administrator as being submitted by qualified professionals. AR Exhibit 5 at page 2. All three reports concluded that the property was neither an erosion hazard area, nor a landslide hazard area. AR Exhibit 6 at page 1, Exhibit 7 at page 7, AR Exhibit 8 at page 1.

In a letter dated March 30, 2009, the administrator made inconsistent findings: relying upon the information provided by Shaw in one instance, and rejecting that information in another AR Exhibit 5 at page 3:

1. Pursuant to CCC 27.12.050, the geologic and engineering reports submitted demonstrate that the study site does not meet the designation criteria for landslide hazard area under CCC 27.12.410(1)(a). This conclusion is based on the 2008 and 2009 Little River Quarry Site –

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<sup>1</sup> As did the County, Shaw will refer to the exhibit number of the referenced document in the administrative record.

Geologic Hazard Evaluation Special Reports, prepared by Herbert Armstrong, P.E., and ADA Engineering LLC. This conclusion is *limited* to the information and conclusions presented in the above cited Armstrong, October 2008 and March 2009 geotechnical report supplements to the 1999 Geotechnical Engineering Study.

2. Pursuant to CCC 27.12.050, the submitted geotechnical engineering reports have not satisfactorily demonstrated to the Administrator that all portions of the study site do not meet the designation criteria of erosion hazard pursuant to CCC 27.12.410(1) (b). All areas of the study site that exhibit slopes 40% or steeper, except where consolidated rock is at the surface (i.e., no overlying soils) meet the criteria for erosion hazard.

Shaw appealed the finding that the property was an erosion hazard area to the Clallam County hearing examiner. AR Exhibit 4 at page 1. The hearing examiner found, AR Exhibit 39 at pages 6 and 7, that (1) the language of CCC 27.12.410(1)(b) (iii) did not provide an “exemption” for areas of consolidated rock overlain with shallow soils, (2) that the decision of the administrator was correct that the professional evidence did not demonstrate to the County that the location of the critical area in accordance with the language of CCC27.12.410(1) (b)(iii) was erroneous and (3) that the property was an erosion hazard area. In response to a motion for reconsideration, the hearing examiner amplified her second finding, emphasizing that the evidence presented had to be “to the satisfaction of the administrator,” and finding that, as a matter of law, the

administrator was qualified to “dispute” professional findings. AR Exhibit 42 at page 4.

Shaw appealed to the County Commissioners, ARExhibit 45 at page 1, who dismissed the appeal on the basis that the appeal was a challenge to the validity of the County’s CAO ordinance, which could only be brought before a Growth Management hearings board. Commissioner Resolution 55, June 15, 2010. Shaw appealed this decision of the commissioners to Clallam County Superior Court. CP 583. The court reversed the dismissal and sent the matter back to the commissioners. The commissioners then upheld the hearing examiner’s decisions. CP 740. Shaw appealed again to the Superior Court. CP 750.

After motions by the County to dismiss the appeal, CP 563, 663, the court proceeded to hear the appeal on its merits. The court issued a memorandum opinion on March 4, 2011. CP 126. That opinion found, *in esse*, that the CAO was required to be interpreted in the context of the entire ordinance, with specific reference to the purpose of the language at issue; i.e., to determine whether Shaw’s property was subject to erosion.

The trial court ruled as follows CP133:

Since the Code does not define the phrase, it is incumbent upon the Administrator to apply a meaning that is based upon the definition commonly used by qualified professions in the field when addressing the erosion issue. CCC 27.12.050 is designed to deal with issues such as this,

and the provisions of that section authorize and expect the Administrator to consult with qualified professionals or sources when additional information is needed. The Administrator must exercise his authority in a reasonable manner to assure the proper application of the standards of the Code to a particular site. It is not reasonable to apply meaning to an undefined phrase without scientific impute when the phrase itself is used in a scientific contest.

After consulting with qualified professions and qualified sources the Administrator must exercise his best judgment as to the scientific meaning to be applied to the phrase. Until a meaning based upon Best Available Science is incorporated into the Code itself, the well informed judgment of the Administrator must prevail.

Shaw proposed an order containing timelines for the administrator's decision and retention of jurisdiction by the superior court. This proposal was based upon the inherent delay in a remand that required repeating all stages of the administrative review process. Clallam County vehemently objected to this proposed form of order. CP 123. The court then issued a supplemental memorandum opinion, CP 119, and crafted its own order. CP 115. The supplemental memorandum opinion noted the necessity for speedy resolution of LUPA cases and the broad authority granted to the court to fashion a remedy by RCW 36.70C.140. CP 110 and 111. The court's order remanded the case to the administrator to make the decision noted above; set a timeline for the decision, granted all parties the right to provide information to the administrator, and retained jurisdiction in the superior court under the pending LUPA action. CP 116. The order

specifically contemplated that the trial court would make a final decision in the case when it received the administrators' definition which applied to petitioner's property. CP116

The County first tried to appeal this ruling under this cause number. After the Court of Appeals determined that the order appealed from was not final, the notice of appeal was converted to a motion for discretionary review. This motion was granted by the commissioner and the decision affirmed by the court.

#### IV. ARGUMENT OF COUNSEL

1. An Ordinance's "Plain Meaning" is to be Ascertained From the Words Used Within the Context of the Overall Ordinance to be Construed.

a. The "Plain Meaning" Maxim of Construction.

In determining the meaning of an ordinance, the rules of statutory construction are to be applied. *Conner vs. City of Seattle*. 153 Wn. App 673, 223 P.3d 1201 (2009), pet. for rev. den. 168 Wn.2d 1040, 223 P.3d 889 (2010). The County argues that interpretation of its CAO is to be based solely upon the dictionary meanings of the words used in CCC 27.12.410(1)(b)(iii); which argument it describes as being the "plain meaning" maxim of construction. County opening brief at pages 22-26. If the "plain meaning" maxim ever had the narrow meaning urged by the County, it has not had such a meaning since the ruling in *DOE vs.*

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*Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002). In *Campbell & Gwinn*, the court noted the existence of two lines of cases discussing this maxim of construction. The first line of cases stated that the language of the statute itself was determinative and the statute as a whole should only be used to guide interpretation if there was ambiguity.<sup>2</sup>

The second line of cases held that the context of the statute should be considered to determine if a “plain meaning” could be ascertained. The court adopted the second approach as the more appropriate formulation of the “plain meaning” maxim, 146 Wn.2d 11:

Under this second approach, the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation of the plain meaning rule provides the better approach because it is more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305, 312, 884 P.2d 920 (1994).

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<sup>2</sup> The County cites to *Campbell & Gwinn* as supporting its plain meaning argument, County's brief at 21. Unfortunately for the County, it cites only to the discussion of the first line of cases, 146 Wn.2d at 9-10, a line of cases rejected on the next page. 146 Wn.2d at 11.

In a case arising under the GMA, the court made a similar formulation of the rule, *Quadrant Corporation, v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132(2012):

We have previously acknowledged that, in interpreting the GMA, as in other matters of statutory construction, "the Supreme Court is the final arbiter." *King County*, 142 Wash.2d at 555, 14 P.3d 133 (quoting *Nat'l Elec. Contractors Ass'n*, 138 Wash.2d at 19, 978 P.2d 481. "The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature." *Id.* To discern legislative intent, "the court begins with the statute's plain language and ordinary meaning," but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole. *Id.* at 555, 560, 14 P.3d 133.

Recent cases continue to adhere to this statement of the "context" rule, not the older and now discredited formulation upon which the County bases its construction argument. *See, e.g., Five Corners Family Partners vs. State*, 173 Wn.2d 296, 309, 268 P.3d 892 (2011), *State vs. City of Spokane Valley*, Div. 3, Ct. of Appeals Docket No. 29675-0-III (2012).

Of the cases cited by the County to support its formulation of the plain meaning rule, several predate *Campbell & Gwinn, supra*,<sup>3</sup> and are inapposite to a determination of the construction rule to be applied. The

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<sup>3</sup> *Dennis vs Department of L&I*, 109 Wn.2d 467, 745 P.2d 1295(1987); *Grant vs. Spellman*, 99 Wn.2d 815, 664 P.2d 1227 (1983); *TLR, Inc. vs. Town of LaCenter*, 68 Wash. App 29, 841 P.2d 1276 (1992).

remaining two cases cited by the County confirm the *Campbell & Gwinn* rule, *Quadrant Corp. vs. Cent. Puget Sound Hearings Board*, 154 Wn.2d 224, 239, 110 P.2d 1132 (2005):

The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature. To discern legislative intent, “the court begins with the statute's plain language and ordinary meaning,” but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context related provisions and the statute as a whole. (Citations omitted)

*Bosteder vs. City of Renton*, 155 Wn.2d 18, 42, 117 P.2d 316 (2005):

We always begin by looking at the plain meaning of a statute, but in discerning this meaning we take into account all of the text in the statute and in related statutes that help discern legislative intent.

The County’s last argument for its formulation of the context rule is that deference must be given to the interpretation of the ordinance by the local officials, and that deference requires application of the strict dictionary meaning rule used by the County. Brief at 25. That principle only applies if the local government officials act in accordance with the ordinance. If they do not do so, then their interpretations can, and should be, ignored. As stated in *Sylvester vs. Pierce County*, 148 Wn.2d 813, 823, 201 P.3d 381 (2009) the court grants only:

Such deference as is due the construction of a law by a local jurisdiction with expertise, so long as that interpretation is not contrary to the statute's plain language. RCW 36.70C.130(1)(b); see, *Port of Seattle v. Pollution*

*Control Hearings Bd.*, 151 Wash.2d 568, 587, 90 P.3d 659 (2004).

Shaw agrees that the “plain meaning” rule of construction is appropriate to use to interpret the County’s CAO. Under the proper formulation of this rule, Shaw prevails on the interpretation issue, as discussed *infra* beginning at 1.b. Indeed, it is the interpretation by the County of its own ordinance that ignores the applicable rules of construction. The result is that the County is construing its ordinance in direct contravention of its terms, in order to reach its desired result.

b. Interpreted in its Context, the County’s CAO Establishes an Administrative Process for Making Critical Area Designations.

Clallam County’s CAO creates a comprehensive procedure for determining whether a particular piece of property is a critical area. The ordinance, as a whole, does not use isolated sections for its administration. The creation of this orderly and comprehensive process begins with the Ordinance’s opening section; its purpose. Appendix I

The purpose of this chapter is to identify and protect critical areas as required by the Growth Management Act of 1990 (Chapter 36.70A RCW) and to implement the goals and policies of the Clallam County Comprehensive Plan, Title 31 of the Clallam County Code (CCC), by establishing general requirements and regulations. In the administration of this chapter, Clallam County will consult with regulatory agencies and utilize best available science. (*Emphasis added.*)

This section establishes two principles of importance to the consideration of the Shaw application for a determination of critical areas status of their property. First, the ordinance establishes “general requirements and regulations.” This suggests that the ordinance is not intended to be definitive. Second, in the “administration” of the ordinance the County will use “best available science.” This language effectively rebuts two of the County’s arguments - that only “best available information” is relevant to the issues, and that “best available science” only applies in the context of adoption of development regulations. County brief at 25. By the County ordinance’s own language, the concept also applies to the “administration” of the ordinance.

This purpose is put into effect by CCC 27.12.050 Appendix II:

The location and extent of critical areas shall be designated by Clallam County based upon best available information from qualified professional sources. Clallam County shall develop, and make available to the public, maps or other data bases, as appropriate, which show the location, extent, and classification of regulated critical areas as accurately as feasible. This information shall be advisory and used by the Administrator in determining the applicability of the standards of this chapter to a particular location or development proposal site. When additional information is required as to the location or extent of a critical area that may be affected by a proposed development activity, the Administrator may require additional information or may hire a qualified professional at the applicant’s expense. Any land, water, or vegetation that meets the criteria of critical area designation under this chapter which is not

identified on maps or other publicly available documents shall be subject to the provision of this chapter.

Critical areas shall not include those lands where a qualified professional or qualified professional sources demonstrate to the satisfaction of the Administrator that maps or other information used to identify the location and extent of critical areas are in error. Qualified professional sources shall mean the following for each of the designated critical areas listed below:

.....

(3) Geologic Hazard Areas. Written recommendations or published reports from state or federal agencies charged with identification of geologic hazards, or by a geotechnical or civil engineer or geologist licensed in the State of Washington who is knowledgeable of regional geologic conditions and who has professional expertise in geologic hazard evaluation. (*Emphasis added.*)

This section creates a process applicable to all critical areas, in which a “map or other information” is advisory, and is to be construed in regard to a particular proposed development activity. Additional information may be considered in making a determination as to whether a specific piece of property is an erosion hazard area.

This section of the ordinance also contains a “catch-all” phrase:

Any land, water or vegetation that meets the criteria of critical area designation under this chapter which is not identified on maps or other publically available documents shall be subject to the provisions of this chapter.

The County argues that this clause should be taken in isolation, and means that if a site is a critical area; the provisions of the remainder of

CCC 27.12.050 cannot be used to find that a location is not a critical area. The section is indeed a “catch-all” designed to bring all critical areas within the initial ambit of the ordinance. It cannot be construed to exclude any such areas from being administered under the totality of the provisions of the CAO.

The ordinance section used by the County to override both the purpose and “official designation” sections of its own ordinance is CCC 27.12.410(1)(b)(iii) Appendix III:

(b) **Erosion Hazard Areas.** Lands meeting the following classifications shall be designated as erosion hazard and are subject to the requirements of this chapter.

(i) Landslide hazard areas.

(ii) Areas of existing erosion activity which causes accelerated erosion, sedimentation of critical areas, and/or threatens public health, safety, and welfare.

(iii) Any slope forty (40) percent or steeper with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(iv) Concave slope forms equal to or greater than fifteen (15) percent with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(v) Soils classified by the soil survey of Clallam County as having a moderate, severe, or very severe erosion hazard potential.

CCC 27.12.410(2) Appendix III, then states:

(2) Designation. Lands classified as landslide, erosion or seismic hazards are hereby designated as geologically hazardous areas and are subject to the procedures and standards of this chapter and section. Geologically hazardous areas shall be mapped whenever possible. These maps shall be advisory and used by the Administrator to provide guidance in determining applicability of the standards to a property. (*Emphasis added.*)

Again, the CAO recognizes the ordinance language is “advisory” and is to be applied to a specific property. The “official designation” section of the CAO is one of the “procedures and standards” of the entire ordinance. It cannot simply be avoided because the County does not like its implications.

The CAO administrator did not exercise the duties and discretion given to him by the ordinance, in deciding that Shaw’s property was an erosion hazard area. He relied solely upon the dictionary meaning of the words used in CCC 27.12.410(1)(b)(iii). Construed as a whole, the ordinance requires that he do far more than that. He should have considered the materials submitted by Shaw to decide if the Shaw property was an erosion hazard zone; just as he used those materials to decide that the Shaw property was not a landslide hazard area. The trial court’s decision recognized this failure to follow the ordinance’s language, and ordered a procedure where that language could be followed, which also allowed all parties to the litigation to participate in that process.

2. The GMA is Inapplicable to this LUPA Appeal.

a. The GMA Does Not Require Legislative Designation of Critical Areas.

The County suggests in its brief (p. 23-24) that the GMA requires legislative determinations of critical areas, and that no administrative site-specific procedure can exist. No authority is cited for this proposition, its only support being a reference to RCW 36.70A.170 and citation to vague and general language from two hearing board decisions. RCW 36A.70A.170 states only that critical areas are to be protected:

1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:

.....

(d) Critical areas.

Neither of the hearing board decisions cited by the County support the proposition that designation of critical areas can only be done legislatively. *Pilchuk, et al., vs. Snohomish County*, CPSGMB No. 95-3-0047 (FDO, Dec. 6, 1995) states only that critical areas are required, but states nothing about how the process of their designation is to occur. *Victoria and Roberta Moore vs. Whitman County*, EWGMHB NO. 95-1-0002 (FDO Aug. 16, 1995), notes that designation creates “the general distributed location and extent” of critical areas, but also notes that “where critical areas cannot be readily identified, those areas should be designated

by performance standards or definition.” In neither of these cases is there any suggestion of a mandatory method by which critical areas must be designated. From this paucity of authority, the County then leaps to the conclusion that “counties must first, legislatively adopt designation and classification regulations.”

The County’s bold and unsupported statement that only legislative bodies may designate critical areas is contrary to existing authority; indeed, it is a perversion of the discretion granted to local governments under the GMA. RCW 36.70A.320(1):

The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community. (Emphasis added.)

Thus, a local government may choose to exercise discretion in its designation of critical areas. In *Evergreen Islands Futurewise and Skagit*

*Audubon Society vs. City of Anacortes*, WWGMHB Case No. 05-2-0019

(final Decision and Order) at page 36-37, the Board stated:

RCW 36.70A.172(1) requires that BAS must be substantively included in the formulation of development regulations. We do not read RCW 36.70A.172 to require another BAS investigation for issuing permits. Even though CTED's "example code" recommends the use of BAS in permitting decisions, the Board cannot require its use for these decisions if the GMA does not. While the definite use of best available science in application of policies and regulations to permits might produce better results on the ground, as CTED's "example code" recommends, the Board only judges the compliance of development regulations within the parameters of the goals and requirements of the Act.

Similar language is found in *City of Bonney Lake, et. al vs. Pierce County*, CPSGMHB NO. 0-5-3-0016(2005), *supra*: "The Board defers to the decision of the County authority regarding the application of [GMA policies]."

The model code developed by the Department of Commerce, referenced in the above case, proposed a system by which BAS could be applied in the permitting process, as opposed to a legislative only process. The suggested Ordinance is Appendix A to the Critical Areas Assistance Handbook issued by the then CTED in November of 2003. (Copy of relevant sample code provisions are in Appendix IV.)

The Clallam County CAO's method of identifying critical areas is a process. The superior court's action found that the administrator did not

follow that process in making his determination that Shaw's property was an erosion hazard area. CCC 27.12.010 says that the County will use "best available science" in interpretation of the ordinance. CCC 27.12.050 says that the maps and other criteria are advisory, and that the administrator may use "best available information" to determine whether a particular piece of property is an erosion hazard area. CCC 27.12.050 says that areas are not erosion hazard areas when recognized experts state they are not. CCC 27.12.050 and CCC 27.410(2) make all possible erosion hazard areas subject to the terms of the ordinance. Those terms include the procedures of CCC 27.12.050. The court's order compelled the administrator to follow the terms of the County's own ordinance.

b. The GMA Does Not Prohibit Trial Courts From Interpreting Development Regulations.

Subsequent to the adoption of the GMA, challenges to the validity of entire ordinances are required to be presented first to Growth Management Hearing Boards. The superior courts retain the authority to decide issues which arise under an adopted development ordinance, in a LUPA proceeding.

In *Woods vs. Kittitas County*, 162 Wn.2d 597, 174 P. 3d 25 (2007), the question was whether a trial court had jurisdiction to consider under LUPA a claim that a site-specific re-zone violated the GMA. The

Supreme Court upheld a Court of Appeals decision that a trial Court could only determine whether the re-zone complied with the adopted comprehensive plans and development regulations. 162 Wn.2d at 603. In its analysis of the jurisdictional question, the Court first noted that, axiomatically, GMA hearing boards cannot decide site specific issues; they are concerned only with issues of compliance with the GMA of comprehensive plans and development regulations. 162 Wn.2d at 610. The Court then confirmed this by noting that GMA contains no language permitting hearing boards to review site-specific issues, and this power cannot be inferred, because the GMA is not to be literally construed. The court stated, 162 Wn.2d at 613-614:

The land use planning choices reflected in the comprehensive plan and regulations "serve as the foundation for project review." RCW 36.70B.030(1).

....

This presents a potential problem. Assuming that a project permit must be consistent with development regulations or a comprehensive plan, there is the potential that the actual regulations or plan are not consistent with the GMA. As noted above, a comprehensive plan or development regulation's compliance with the GMA must be challenged within 60 days after publication. RCW 36.70A.290(2). Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the

GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed. *Skagit Surveyors*, 135 Wash.2d at 565, 958 P.2d 962. This Court's "role is to interpret the statute as enacted by the Legislature . . . we will not rewrite the [GMA]." *Id.* at 567, 958 P.2d 962. Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA.

The effect of this discussion is that the language of development regulations must be followed when site-specific land use decisions are being made. If the development regulation is not consistent with the GMA, it still must be followed.

Similarly, *Somers vs. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001), involved a challenge by neighbors to a sub-division approved because it complied with the applicable development regulations, on the basis that those regulations themselves did not comply with the GMA. The Court held that, since the challenge was to the compliance of a development regulation with the GMA, no challenge was possible through LUPA, and the permit was affirmed.

Several recent cases reinforce this point. In *Feil vs. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 259 P.3d 227 (2011), the Supreme Court affirmed a decision of a Growth Management Hearings Board that it did not have jurisdiction to review the approval by Chelan County of the overlay of a permit for a pedestrian and bike trail onto an agricultural zone. The court cited first to RCW 36.70A.030(7):

7) "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36B.020(4) was then cited by the court:

4) "Project permit" or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.

The approval by the County of a bike trail on a single piece of property through the application of the overlay zone was described as a "site specific" decision, which was not the adoption of a development regulation. As such, it was subject only to LUPA review.

In *BD Lawson Partners LP vs. Central Puget Sound Hearings Board*, 165 Wn. App 677, 269 P.3d 300 (2011), a similar analysis resulted

in a decision that an ordinance providing for approval of Master Planned Developments (MPDS), was a permit application, and not a development regulation. The analysis focused on the ordinance's requirement for permits to allow MPDs, in determining that the ordinance was not a development regulation.

At issue in this case is a request by Shaw for a determination of whether a single piece of property constitutes a critical area under a development regulation. By the language of both RCW 36.70A.030(7) and RCW 36.70B.020(4), *supra*, such a permit application is not a "development regulation" but a "project permit."

If the CAO adopted by the County, presumed valid under GMA, contained no language allowing site-specific CAO determinations considering "best available science" (CCC27.12.010 ) or "best available information" (CCC27.12.050), then it would indeed be impossible for Shaw to request that the County make a site-specific decision using the information provided by him. The challenge here is to the interpretation of an adopted development regulation, and a trial court has jurisdiction to decide that issue under LUPA under the holding of *Woods*.

Petitioners' final words in response to the County's argument about interpretation of its ordinance is brief and direct; this is the process that the County created in the adoption of its CAO. It must live with it. If

it doesn't like it, change it. Until that happens, the development regulations must be followed.

c. Ordinance Interpretation is Not "Judicial Rulemaking."

Throughout its brief, the County refers to the actions of the superior court in refusing to follow its dogged and improper statement of the "clear meaning" maxim as ordering an "amendment" to the County's CAO, or engaging in judicial "rulemaking" or of "concocting" a remand that avoids the process of adoption of GMA ordinances (*see, e.g.*, brief at 2, 17, 27, 29, 30). This is based first upon the County's argument that CCC 27.12.410(1)(b)(iii) can only be construed by a literal application of its words. Secondly, the County is essentially arguing that a development regulation adopted under GMA cannot be interpreted by the courts at all. The County is asserting that it can interpret its ordinance, but that the courts may not. No authority is cited for this emasculation of the authority of the courts to interpret ordinances, only vague and unsupported references to "GMA mandates" (County brief at 22) or "comprehensive statutory overlays" (County brief at 27).

In its discussion of interpretation of ordinances as judicial rule making the County cites to *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007). The issue in this case was whether Snohomish

County was properly protecting certain fish resources and properly applying BAS in its protection efforts. In holding that the County had complied with its duties, the Court stated:

In reaching this determination, we began by reviewing how the GMA instructs local governments to employ BAS. The legislature has expressly delegated to counties and cities the function of developing the specific means for protecting critical areas. See, RCW 36.70A.320(1). Under the GMA, counties and cities “have broad discretion in developing . . . [development regulations] tailored to local circumstances.” *King County*, 142 Wash. 2d at 561, 14 P.3d 133 (alteration in original) (quoting *Diehl v. Mason County*, 94 Wash. App. 645, 651, 972 P.2d 543 (1999)). Moreover, the GMA does not require the County to follow BAS; rather, it is required to “include” BAS in its record. RCW 36.70A.172(1). (*Emphasis added.*)

Again, the language of this case supports the idea of broad discretion in the County, not the application of a strict statutory scheme that prohibits judicial interpretation. Again, it does not state that critical areas may only be designated by the legislative action of a local government’s governing board.

No GMA “straitjacket” exists to protect adopted development regulation from being interpreted by the Courts. The very suggestion of such a rule runs counter to the Supreme Court’s statement that it is the “final arbiter” of the GMA; *Quadrant Corporation vs. State of Washington Growth Management Hearing Board, supra.*

3. The Trial Court had Authority to Enter its Remand Order.

Under LUPA, trial courts do not receive testimony, but review the administrative record created by the local government, and rule on questions of law and fact as an appellate court would. This is mandated by RCW 36.70C.130(1), which specifies that review will be on the record. Many cases note this aspect of the process.

The trial court referred to RCW 36.70C.140 as the basis for the exercise of its authority to require a remand, the taking of additional evidence, and then a re-review of the results of that remand. The statute reads:

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

In *Asche vs. Bloomquist*, 132 Wn. App. 784, 793, 113 P.2d 475 (2006), this court noted that a trial court, in a LUPA action had the authority to issue a decision that “redressed” the wrongful issuance of a building permit, which included the ability to stop construction of a residence once begun under a building permit determined through LUPA to have been improperly issued. Similarly here, the trial court’s order proposes only to finally resolve the interpretation question presented to the

court. The ability to do what the trial court has done comes from the broad grant of authority of RCW 36.70C.140.

Also of consideration is RAP 9.11, which permits an appellate court to request a trial court to take additional evidence before the appellate court completes review. Trial courts in LUPA proceedings sit as appellate courts. *Chaney vs. Fetterly*, 100 Wn. App. 140,145, 995 P.2d 1284 (2000).

Acceptance of the County's argument that the trial court could not take the action it did in its order of remand, would establish the principle that RCW36.70C .140 is meaningless, as trial courts can only remand LUPA cases back to the administrative process. The interpretation of the statute would violate the principle that all portions of a statute must be given meaning.

4. The Constitutional Claims are Not Ripe for Decision.

At the request of Clallam County, the trial court bifurcated Shaw's claims of misinterpretation by the County of its ordinance, from Shaw's claims that the land use action of the County should be reversed because it violated Shaw's constitutional rights under RCW 36.70C. The court first proposed to resolve the interpretation claims, and only reach the constitutional claims if the interpretation decisions did not resolve the case. After bifurcation, the claims have been dealt with by the trial court

only by its refusal to consider the County's repeated requests that those claims be dismissed before they have been subject to adjudication. The County again requests in its brief that the constitutional claims be dismissed.

Shaw would first submit that this request is premature. The constitutional issue has not been addressed by the Superior Court, as it has yet to enter even a final order on the interpretation issue.<sup>4</sup>

The County's argument for this dismissal is that the prior decisions of the County on similar land use applications can never form the basis of a constitutional claim. The County first curiously posits a situation in which, if its interpretation of its ordinance is found to be incorrect, then prior approvals will not support a constitutional claim. (County brief at 31-32.) This argument is both utterly superfluous and premature to the point of irrelevancy. If the County's decision is reversed because of an error in interpretation of its own ordinance, then there is no need to reach the alternate theory of invalidity of the decision on a constitutional basis.

It is only in the event that it is determined that the County's interpretation of its ordinance is correct that the constitutional challenge to the land use action must be reached. The County misapprehends the thrust

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<sup>4</sup> In an inexplicable statement the County complains that the court's failure to dismiss the bifurcated constitutional claims demonstrates that the court has *not* fulfilled its duty to "first resolve land use appeals on non-constitutional grounds." County brief at 31.

of that challenge. Shaw will attempt to prove, if this claim is reached, that the County has previously approved other quarries with steep slopes that qualify as erosion hazard areas as the ordinance has been applied to Shaw's property, but without requiring those quarries to comply with the County's CAO. However, Shaw will also have to prove that the difference in treatment occurred as the result of a constitutionally discriminatory purpose. If no such discriminatory purpose can be shown, then Shaw's constitutional claim will fail. There can be different treatment in similar situations, but only if there is no discriminatory purpose. Thus, as the County correctly argues, a mere difference in treatment under a zoning law as the result of a mistake is not enough to establish a constitutional claim requiring similar treatment. But, if there is a discriminatory purpose to the difference in treatment, then a constitutional claim for invalidity can be proven.

Shaw has not yet had an opportunity to pursue this claim, because of the County requested bifurcation order. Dismissal of these claims at this time would be premature and unfair.

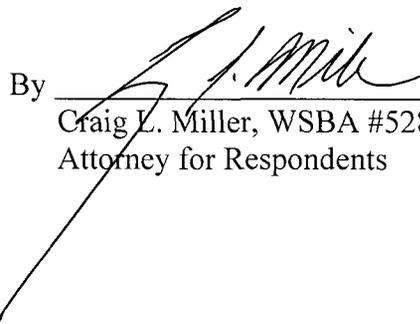
## **VI. CONCLUSION**

The County's brief argues for statements of applicable law for which no underlying authority is provided. As examples of this type of argument, the County argues: (1) the "plain meaning" maxim of

construction refers to dictionary meanings. (2) There is a “comprehensive statutory framework” which requires legislative designation of critical areas. (3) Interpreting of an ordinance is “amendment” of that ordinance. The authority cited for these propositions is not applicable, or non-existent. The best the County can do is argue “...it is clear...” (Brief at 23) that its unsupported statements of the law are correct. Shaw respectfully requests that the court not follow such ill supported and illogical arguments, and affirm the decision of the trial court, remanding for completion of the case as outlined by the trial court’s order of remand.

Respectfully submitted this 20<sup>th</sup> day of June 2012.

MILLER, FREEDMAN & ASSOCIATES, P.S.

By   
Craig L. Miller, WSBA #5281  
Attorney for Respondents

## APPENDICES

### Appendix I

CCC27.12.010:

The purpose of this chapter is to identify and protect critical areas as required by the Growth Management Act of 1990 (Chapter 36.70A RCW) and to implement the goals and policies of the Clallam County Comprehensive Plan, Title 31 of the Clallam County Code (CCC), by establishing general requirements and regulations. Furthermore, the purpose is to protect public health, safety and welfare, and maintain or enhance the biological and economic resources of the County while respecting legally established private property rights.

This chapter is adopted under the authority of the Growth Management Act, Chapter 36.70A RCW, the Planning Enabling Act, Chapter 36.70 RCW and the Clallam County Charter, as now or hereafter amended. This chapter supplements the development requirements contained in the various chapters of the Clallam County Code by providing for additional controls and measures that are necessary to protect critical areas.

In the administration of this chapter, Clallam County will consult with regulatory agencies and utilize best available science. Provisions of this chapter shall be considered the minimum necessary to protect regulated critical areas; shall be liberally construed to serve the purposes of this chapter; and shall be deemed neither to limit nor repeal any other powers under State statute or County regulation.

## Appendix II

CCC 27.12.050:

The location and extent of critical areas shall be designated by Clallam County based upon best available information from qualified professional sources. Clallam County shall develop, and make available to the public, maps or other data bases, as appropriate, which show the location, extent, and classification of regulated critical areas as accurately as feasible. This information shall be advisory and used by the Administrator in determining the applicability of the standards of this chapter to a particular location or development proposal site. When additional information is required as to the location or extent of a critical area that may be affected by a proposed development activity, the Administrator may require additional information or may hire a qualified professional at the applicant's expense. Any land, water, or vegetation that meets the criteria of critical area designation under this chapter which is not identified on maps or other publicly available documents shall be subject to the provision of this chapter.

Critical areas shall not include those lands where a qualified professional or qualified professional sources demonstrate to the satisfaction of the Administrator that maps or other information used to identify the location and extent of critical areas are in error. Qualified professional sources shall mean the following for each of the designated critical areas listed below:

(3) Geologic Hazard Areas. Written recommendations or published reports from State or federal agencies charged with identification of geologic hazards, or by a geotechnical or civil engineer or geologist licensed in the State of Washington who is knowledgeable of regional geologic conditions and who has professional expertise in geologic hazard evaluation. (*Emphasis added.*)

### Appendix III

CCC 27.12.410:

(1) Classification. The following definitions and terms shall be used in classifying geologically hazardous areas:

(a) Landslide Hazard Areas. Lands potentially subject to mass movement due to a combination of geologic, topographic, and hydrologic factors. The following classifications shall be designated as landslide hazards and are subject to the requirements of this chapter:

(i) Areas of historic, existing or ongoing landslide activity as evidenced by downslope movement of a mass of materials including rock, soils, fills, and vegetation.

(ii) Glaciolacustrine silt and clays on terraces.

(iii) Slopes fifteen (15) percent or steeper with a combination of: slowly permeable silt and clay interbedded sand and gravel, and sidehill springs or seeps from perched water tables.

(iv) Soils mapped and described by the Soil Survey of Clallam County, Washington, issued February 1987, as amended, classified as having a severe or very severe erosion hazard potential.

(v) Planar slope forms sixty-five (65) percent or steeper with vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(vi) Concave slope forms twenty-five (25) percent or steeper with vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(vii) Any slopes greater than eighty (80) percent subject to rockfall during seismic shaking.

(viii) Marine coastlines including marine bluffs potentially unstable due to wave action or mass wasting and littoral dune systems which border the ordinary high water mark.

(ix) Ravines with a vertical relief of ten (10) or more feet in depth except areas composed of consolidated rock.

(x) Channel meander hazard. Areas subject to the natural movement of stream channel meanders associated with alluvial plains where long-term processes of erosion and accretion of the channel can be expected to occur. Such meander hazards are characterized by abandoned channels, ongoing sediment deposition and erosion, topographic position, and changes in the plant community, age, structure and composition. These areas do not include areas protected from channel movement due to the existence of permanent levees or infrastructure improvements such as roads and bridges constructed and maintained by public agencies. These areas also do not include areas outside the meander hazard which may be subject to rapid movement of the entire stream channel or avulsion.

(xi) Any area located on or adjacent to an active alluvial fan or debris flow, presently or potentially subject to inundation by debris or deposition of stream-transported sediments.

(xii) Slopes that are parallel or sub-parallel to planes of weakness, such as bedding planes, joint systems and fault planes in subsurface materials.

(b) Erosion Hazard Areas. Lands meeting the following classifications shall be designated as erosion hazard and are subject to the requirements of this chapter:

(i) Landslide hazard areas.

(ii) Areas of existing erosion activity which causes accelerated erosion, sedimentation of critical areas, and/or threatens public health, safety, and welfare.

(iii) Any slope forty (40) percent or steeper with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(iv) Concave slope forms equal to or greater than fifteen (15) percent with a vertical relief of ten (10) or more feet, except areas composed of consolidated rock.

(v) Soils classified by the soil survey of Clallam County as having a moderate, severe, or very severe erosion hazard potential.

(c) Seismic Hazard Areas. Lands meeting the following classifications shall be designated as seismic hazard and are subject to the requirements of this chapter.

(i) Landslide hazard areas and materials.

(ii) Artificial fills especially on soils listed in subsection (1)(c)(iii) of this section and areas with perched water tables.

(iii) The following soil types described within the Clallam County soil survey as beaches, Mukilteo muck, Lummi silt loam, Sequim-McKenna-Mukilteo complex, and Tealwhit silt loam.

(iv) Other areas as determined by the Clallam County Building Official pursuant to 1997 Washington State Uniform Building Code, Chapter 18, as amended.

(2) Designation. Lands classified as landslide, erosion or seismic hazards are hereby designated as geologically hazardous areas and are subject to the procedures and standards of this chapter and section. Geologically hazardous areas shall be mapped whenever possible. These maps shall be advisory and used by the Administrator to provide guidance in determining applicability of the standards to a property. Sites which include geologically hazardous areas which are not mapped shall be subject to the provisions of this section and chapter. These maps may be based on the following information sources:

- (a) Sweet Edwards/EMCOM Hazard Rating Maps;
- (b) Coastal Zone Management Atlas;
- (c) Soil Survey of Clallam County;
- (d) U.S.G.S. Topographic Maps;
- (e) Aerial photos; and
- (f) Recent geologic events.

## Appendix IV

7. **Chemical Applications.** The application of herbicides, pesticides, organic or mineral-derived fertilizers, or other hazardous substances, if necessary, as approved by the [city/county], provided that their use shall be restricted in accordance with state Department of Fish and Wildlife Management Recommendations and the regulations of the state Department of Agriculture and the U.S. Environmental Protection Agency;<sup>8</sup>
8. **Minor Site Investigative Work.** Work necessary for land use submittals, such as surveys, soil logs, percolation tests, and other related activities, where such activities do not require construction of new roads or significant amounts of excavation. In every case, impacts to the critical area shall be minimized and disturbed areas shall be immediately restored; and
9. **Navigational Aids and Boundary Markers.** Construction or modification of navigational aids and boundary markers.

*The Washington Department of Fish and Wildlife recommends restricting the use of pesticides and herbicides in many types of habitat. Additionally, the Washington State Department of Agriculture and/or the U.S. Environmental Protection Agency have regulations specific to the use of pesticides, fertilizers, and other chemicals that must be adhered to under federal law, and generally appear on the packaging. A jurisdiction should understand and identify which chemicals are acceptable in specific critical areas prior to approving chemical applications.*

### CRITICAL AREA PROJECT REVIEW PROCESS

#### X.10.170 General Requirements

- A. As part of this review, the [city/county] shall:
  1. Verify the information submitted by the applicant;
  2. Evaluate the project area and vicinity for critical areas;
  3. Determine whether the proposed project is likely to impact the functions or values of critical areas; and
  4. Determine if the proposed project adequately addresses the impacts and avoids impacts to the critical area associated with the project.
- B. If the proposed project is within, adjacent to, or is likely to impact a critical area, the [city/county] shall:
  1. Require a critical area report from the applicant that has been prepared by a qualified professional;
  2. Review and evaluate the critical area report;
  3. Determine whether the development proposal conforms to the purposes and performance standards of this Title, including the criteria in *Review Criteria* [Section X.10.280];

<sup>8</sup> More information on commercial and residential use of chemicals can be found in the Washington State Department of Ecology's *Guidance Document for Establishment of Critical Aquifer Recharge Areas Ordinances*, Version 3.0, Publication #97-30; and from the Washington State Department of Agriculture, <http://agr.wa.gov>.

7. **Chemical Applications.** The application of herbicides, pesticides, organic or mineral-derived fertilizers, or other hazardous substances, if necessary, as approved by the [city/county], provided that their use shall be restricted in accordance with state Department of Fish and Wildlife Management Recommendations and the regulations of the state Department of Agriculture and the U.S. Environmental Protection Agency;<sup>8</sup>
8. **Minor Site Investigative Work.** Work necessary for land use submittals, such as surveys, soil logs, percolation tests, and other related activities, where such activities do not require construction of new roads or significant amounts of excavation. In every case, impacts to the critical area shall be minimized and disturbed areas shall be immediately restored; and
9. **Navigational Aids and Boundary Markers.** Construction or modification of navigational aids and boundary markers.

*The Washington Department of Fish and Wildlife recommends restricting the use of pesticides and herbicides in many types of habitat. Additionally, the Washington State Department of Agriculture and/or the U.S. Environmental Protection Agency have regulations specific to the use of pesticides, fertilizers, and other chemicals that must be adhered to under federal law, and generally appear on the packaging. A jurisdiction should understand and identify which chemicals are acceptable in specific critical areas prior to approving chemical applications.*

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4. Assess the potential impacts to the critical area and determine if they can be avoided or minimized; and
5. Determine if any mitigation proposed by the applicant is sufficient to protect the functions and values of the critical area and public health, safety, and welfare concerns consistent with the goals, purposes, objectives, and requirements of this Title.

*Local jurisdictions are encouraged to provide applicants with a pre-application opportunity so that property owners and developers can determine whether critical area regulations might apply before extensive plans and engineering information are prepared.*

*The critical area identification form is a tool to be used by the applicant to assist him or her in identifying areas of potential critical areas near the project area. Similar in some ways to a SEPA checklist, the critical area identification form should be straightforward. It asks questions that individual property owners can answer without the help of a scientist or professional consultant (although the jurisdiction may need to provide information to the applicant, such as critical area maps). The questions on the project checklist should be tailored to the local environment and may be consolidated with the SEPA environmental checklist. An outline of potential project checklist questions is included in Appendix F.*

**X.10.180 Critical Area Preapplication Consultation.** Any person preparing to submit an application for development or use of land that may be regulated by the provisions of this Title shall conduct a consultation meeting with the [director] prior to submitting an application for development or other approval. At this meeting, the [director] shall discuss the requirements of this Title; provide critical area maps, scientific information, and other source materials; outline the review process; and work with the activity proponent to identify any potential concerns that might arise during the review process, in addition to discussing other permit procedures and requirements.

**X.10.190 Critical Area Identification Form**

**A. Submittal.** Prior to the [city/county]'s consideration of any proposed activity not found to be exempt under *Exemptions* [Section X.10.130] or allowed pursuant to *Allowed Activities* [Section X.10.160], the applicant shall submit to the department a complete critical area identification form on forms provided by the [city/county].

**B. Site Inspection.** Upon receipt of a project application and a critical area identification form, the [director] shall conduct a site inspection to review critical area conditions on site. The [director] shall notify the property owner of the inspection prior to the site visit. Reasonable access to the site shall be provided by the property owner for the purpose of inspections during any proposal review, restoration, emergency action, or monitoring period.

**C. Critical Area Identification Form Review Process.** The [director or his/her designee] shall review the critical area identification form, conduct a site inspection, and review other information available pertaining to the site and the proposal and make a determination as to whether any critical areas may be affected by the proposal and if a more detailed critical area report shall be submitted.

1. **Decision Indicators.** The [director] may use the following indicators to assist in determining the need for a critical area report:
  - a. Indication of a critical area on the [city/county] critical areas maps that may be impacted by the proposed activity;
  - b. Information and scientific opinions from appropriate agencies, including but not limited to the departments of Fish and Wildlife, Natural Resources, and Ecology;
  - c. Documentation, from a scientific or other reasonable source, of the possible presence of a critical area; or

- d. A finding by a qualified professional or a reasonable belief by the [director] that a critical area may exist on or adjacent to the site of the proposed activity.

**D. Decision on Identification Form**

1. **No Critical Areas Present.** If after a site visit the [director]'s analysis indicates that the project area is not within or adjacent to a critical area or buffer and that the proposed activity is unlikely to degrade the functions or values of a critical area, then the [director] shall rule that the critical area review is complete and note on the identification form the reasons that no further review is required. A summary of this information shall be included in any staff report or decision on the underlying permit.
2. **Critical Areas Present, But No Impact – Waiver.** If the [director] determines that there are critical areas within or adjacent to the project area, but that the best available science shows that the proposed activity is unlikely to degrade the functions or values of the critical area, the [director] may waive the requirement for a critical area report. A waiver may be granted if there is substantial evidence that all of the following requirements will be met:
  - a. There will be no alteration of the critical area or buffer;
  - b. The development proposal will not impact the critical area in a manner contrary to the purpose, intent, and requirements of this Title; and
  - c. The proposal is consistent with other applicable regulations and standards.

A summary of this analysis and the findings shall be included in any staff report or decision on the underlying permit.

3. **Critical Areas May Be Affected by Proposal.** If the [director] determines that a critical area or areas may be affected by the proposal, then the [director] shall notify the applicant that a critical area report must be submitted prior to further review of the project, and indicate each of the critical area types that should be addressed in the report.

**E. [Director]'s Determination Subject to Reconsideration.** A determination regarding the apparent absence of one or more critical areas by the [director] is not an expert certification regarding the presence of critical areas and the determination is subject to possible reconsideration and reopening if new information is received.

If the applicant wants greater assurance of the accuracy of the critical area review determination, the applicant may choose to hire a qualified professional to provide such assurances.

*During project review, a city/county may determine that some or all of the potential environmental impacts of the project have been addressed by its development regulations, comprehensive plan, or other applicable local, state, or federal laws or rules. (See RCW 43.21C.240 and WAC 197-11-158.)*

*The city/county may make this consistency determination during the course of environmental review and preparation of a SEPA threshold determination (including initial consistency review), if the impacts have been adequately addressed in the applicable regulations (see WAC 365-197-030, Integrated Project Review).*

*The notice of application code section of the jurisdiction's land use code should also be updated to include a requirement that critical area reviews, when required, are listed on the notice of application.*

*It is recommended that the jurisdiction determine if a report is required, and insist on submittal of the report, if needed, prior to determining an application complete and issuing the notice of application. The public may be a valuable source for verifying the presence or absence of critical areas.*

*A critical area report is required to include the documentation and address the relevant issues required in the applicable critical area chapter in addition to providing the contents listed here, in Section X.10.210(C). For example, a critical area report for a wetland should include all the information listed here and all the information listed in Section X.20.030 "Critical Area Report – Additional Report Requirements for Wetlands."*

**X.10.200 Public Notice of Initial Determination.** The [city/county] shall notify the public of proposals in accordance with [notice of application section of the local land use code].

A. If the [director] determines that no critical area report is necessary, the [city/county] shall state the reasons for this determination in the notice of application issued by the [city/county] for the proposal.

B. If the [director] determines that there are critical areas on the site that the proposed project is unlikely to impact and the project meets the requirements for and has been granted a waiver from the requirement to complete a critical area report, a summary of the analysis and findings for this decision shall be stated in the notice of application for the proposal.

C. If the [director] determines that critical areas may be affected by the proposal and a critical area report is required, public notice of the application shall include a description of the critical area that might be affected and state that a critical area report(s) is required.

### **CRITICAL AREA REPORT**

#### **X.10.210 Critical Area Report – Requirements**

A. **Preparation by Qualified Professional.** If required by the [director] in accordance with [Section X.10.190(D)(3)], the applicant shall submit a critical area report prepared by a qualified professional as defined herein.

B. **Incorporating of Best Available Science.** The critical area report shall use scientifically valid methods and studies in the analysis of critical area data and field reconnaissance and reference the source of science used. The critical area report shall evaluate the proposal and all probable impacts to critical areas in accordance with the provisions of this Title.

C. **Minimum Report Contents.** At a minimum, the report shall contain the following:

1. The name and contact information of the applicant, a description of the proposal, and identification of the permit requested;
2. A copy of the site plan for the development proposal including:
  - a. A map to scale depicting critical areas, buffers, the development proposal, and any areas to be cleared; and
  - b. A description of the proposed stormwater management plan for the development and consideration of impacts to drainage alterations.
3. The dates, names, and qualifications of the persons preparing the report and documentation of any fieldwork performed on the site;

4. Identification and characterization of all critical areas, wetlands, water bodies, and buffers adjacent to the proposed project area;
5. A statement specifying the accuracy of the report, and all assumptions made and relied upon;
6. An assessment of the probable cumulative impacts to critical areas resulting from development of the site and the proposed development;
7. An analysis of site development alternatives including a no development alternative;
8. A description of reasonable efforts made to apply mitigation sequencing pursuant to *Mitigation Sequencing* [Section X.10.240] to avoid, minimize, and mitigate impacts to critical areas;
9. Plans for adequate mitigation, as needed, to offset any impacts, in accordance with *Mitigation Plan Requirements* [Section X.10.250], including, but not limited to:
  - a. The impacts of any proposed development within or adjacent to a critical area or buffer on the critical area; and
  - b. The impacts of any proposed alteration of a critical area or buffer on the development proposal, other properties and the environment;
10. A discussion of the performance standards applicable to the critical area and proposed activity;
11. Financial guarantees to ensure compliance; and
12. Any additional information required for the critical area as specified in the corresponding chapter.

D. Unless otherwise provided, a critical area report may be supplemented by or composed, in whole or in part, of any reports or studies required by other laws and regulations or previously prepared for and applicable to the development proposal site, as approved by the [director].

*A financial guarantee, such as a performance bond or deposit, should be required to ensure implementation of any mitigation that might be necessary to offset impacts to critical areas.*

**X.10.220 Critical Area Report – Modifications to Requirements**

A. **Limitations to Study Area.** The [director] may limit the required geographic area of the critical area report as appropriate if:

1. The applicant, with assistance from the [city/county], cannot obtain permission to access properties adjacent to the project area; or
2. The proposed activity will affect only a limited part of the subject site.

B. **Modifications to Required Contents.** The applicant may consult with the [director] prior to or during preparation of the critical area report to obtain

[city/county] approval of modifications to the required contents of the report where, in the judgment of a qualified professional, more or less information is required to adequately address the potential critical area impacts and required mitigation.

**C. Additional Information Requirements.** The [director] may require additional information to be included in the critical area report when determined to be necessary to the review of the proposed activity in accordance with this Title. Additional information that may be required, includes, but is not limited to:

1. Historical data, including original and subsequent mapping, aerial photographs, data compilations and summaries, and available reports and records relating to the site or past operations at the site;
2. Grading and drainage plans; and
3. Information specific to the type, location, and nature of the critical area.

**X.10.230 Mitigation Requirements**

A. The applicant shall avoid all impacts that degrade the functions and values of a critical area or areas. Unless otherwise provided in this Title, if alteration to the critical area is unavoidable, all adverse impacts to or from critical areas and buffers resulting from a development proposal or alteration shall be mitigated using the best available science in accordance with an approved critical area report and SEPA documents, so as to result in no net loss of critical area functions and values.

B. Mitigation shall be in-kind and on-site, when possible, and sufficient to maintain the functions and values of the critical area, and to prevent risk from a hazard posed by a critical area.

C. Mitigation shall not be implemented until after [city/county] approval of a critical area report that includes a mitigation plan, and mitigation shall be in accordance with the provisions of the approved critical area report.

**X.10.240 Mitigation Sequencing.** Applicants shall demonstrate that all reasonable efforts have been examined with the intent to avoid and minimize impacts to critical areas. When an alteration to a critical area is proposed, such alteration shall be avoided, minimized, or compensated for in the following sequential order of preference:

A. Avoiding the impact altogether by not taking a certain action or parts of an action;

B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps, such as project redesign, relocation, or timing, to avoid or reduce impacts;

C. Rectifying the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas by repairing, rehabilitating,

or restoring the affected environment to the historical conditions or the conditions existing at the time of the initiation of the project;

D. Minimizing or eliminating the hazard by restoring or stabilizing the hazard area through engineered or other methods;

E. Reducing or eliminating the impact or hazard over time by preservation and maintenance operations during the life of the action;

F. Compensating for the impact to wetlands, critical aquifer recharge areas, frequently flooded areas, and habitat conservation areas by replacing, enhancing, or providing substitute resources or environments; and

G. Monitoring the hazard or other required mitigation and taking remedial action when necessary.

Mitigation for individual actions may include a combination of the above measures.

**X.10.250 Mitigation Plan Requirements.** When mitigation is required, the applicant shall submit for approval by [city/county] a mitigation plan as part of the critical area report. The mitigation plan shall include:

A. **Environmental Goals and Objectives.** The mitigation plan shall include a written report identifying environmental goals and objectives of the compensation proposed and including:

1. A description of the anticipated impacts to the critical areas and the mitigating actions proposed and the purposes of the compensation measures, including the site selection criteria; identification of compensation goals; identification of resource functions; and dates for beginning and completion of site compensation construction activities. The goals and objectives shall be related to the functions and values of the impacted critical area;
2. A review of the best available science supporting the proposed mitigation and a description of the report author's experience to date in restoring or creating the type of critical area proposed; and
3. An analysis of the likelihood of success of the compensation project.

B. **Performance Standards.** The mitigation plan shall include measurable specific criteria for evaluating whether or not the goals and objectives of the mitigation project have been successfully attained and whether or not the requirements of this Title have been met.

C. **Detailed Construction Plans.** The mitigation plan shall include written specifications and descriptions of the mitigation proposed, such as:

1. The proposed construction sequence, timing, and duration;

2. Grading and excavation details;
3. Erosion and sediment control features;
4. A planting plan specifying plant species, quantities, locations, size, spacing, and density; and
5. Measures to protect and maintain plants until established.

These written specifications shall be accompanied by detailed site diagrams, scaled cross-sectional drawings, topographic maps showing slope percentage and final grade elevations, and any other drawings appropriate to show construction techniques or anticipated final outcome.

**D. Monitoring Program.** The mitigation plan shall include a program for monitoring construction of the compensation project and for assessing a completed project. A protocol shall be included outlining the schedule for site monitoring (for example, monitoring shall occur in years 1, 3, 5, and 7 after site construction), and how the monitoring data will be evaluated to determine if the performance standards are being met. A monitoring report shall be submitted as needed to document milestones, successes, problems, and contingency actions of the compensation project. The compensation project shall be monitored for a period necessary to establish that performance standards have been met, but not for a period less than five (5) years.

**E. Contingency Plan.** The mitigation plan shall include identification of potential courses of action, and any corrective measures to be taken if monitoring or evaluation indicates project performance standards are not being met.

**F. Financial Guarantees.** The mitigation plan shall include financial guarantees, if necessary, to ensure that the mitigation plan is fully implemented. Financial guarantees ensuring fulfillment of the compensation project, monitoring program, and any contingency measures shall be posted in accordance with *Bonds to Ensure Mitigation, Maintenance, and Monitoring* [Section X.10.400].

#### **X.10.260 Innovative Mitigation**

A. The [city/county] may encourage, facilitate, and approve innovative mitigation projects that are based on the best available science. Advance mitigation or mitigation banking are examples of alternative mitigation projects allowed under the provisions of this Section wherein one or more applicants, or an organization with demonstrated capability, may undertake a mitigation project together if it is demonstrated that all of the following circumstances exist:

1. Creation or enhancement of a larger system of critical areas and open space is preferable to the preservation of many individual habitat areas;
2. The group demonstrates the organizational and fiscal capability to act cooperatively;
3. The group demonstrates that long-term management of the habitat area will be provided; and

*This innovative mitigation section is one example of including allowances for innovative practices within critical areas regulations.*

*Also, keep in mind that new concepts for innovative mitigation, such as habitat banking, are being developed and may be appropriate to include at a later date.*