SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SAN JUAN COUNTY

Donald E. Eaton
Judge

Jane M. Severin
Court Administrator

June 19, 2014

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Re: Common Sense Alliance, et al v GMHB
Superior Court Cause No. 13-2-05190-8 (Consol)

Dear Counsel:

On March 19, 2014 this Court heard argument on the issues presented by the Petition for Review filed by Common Sense Alliance on October 2, 2013 and the issues presented by the Petition for Review filed by Friends of the San Juans on October 3, 2013 in Cause No. 13-2-05193-2. The matters were consolidated under Cause No. 13-2-05190-8 by an Order entered on October 22, 2013. Both Petitions present issues in connection with the Final Decision and Order entered by the Washington State Growth Management Hearings Board ("the Board") on September 16, 2013 in Case No. 13-2-0012c. In addition to hearing oral argument the Court has reviewed the following documents:

1. Brief of Petitioner Friends of the San Juans, filed December 13, 2013;
2. Petitioner P.J. Taggares Company's Opening Brief, filed December 16, 2013;
3. Petitioner Common Sense Alliance's Opening Brief, filed December 16, 2013;
4. Amicus Curiae Brief of Pacific Legal Foundation in Support of Petitioners Common Sense Alliance and P.J. Taggares Company, filed on January 23, 2014;
5. San Juan County's Response Brief, filed January 30, 2014;
6. Common Sense Alliance's and P.J. Taggares Company's Response to Brief of Petitioner Friends of the San Juans, filed January 30, 2014;
7. Petitioner Friends of the San Juans' Brief in Response to Opening Brief of Petitioners Common Sense Alliance and P.J. Taggares Company, filed January 30, 2014;
8. Common Sense Alliance's Reply Brief, filed February 21, 2014;
9. P.J. Taggares Company's Reply Brief, filed February 21, 2014;

10. Petitioner Friends of the San Juans' Brief in Reply to Response Briefs of CSA Taggares and San Juan County, filed on February 21, 2014;
11. Petitioner Friends of the San Juans' Brief in Response to Amicus Curiae Brief of Pacific Legal Foundation, filed February 21, 2014; and
12. Statement of Additional Authority, filed by San Juan County on May 14, 2014.

At the close of oral argument on March 19, 2014 the Court took the matter under advisement. The Court is now prepared to make its rulings on the issue presented by both Petitions.

I. CSA ISSUES.

In Section II of its Opening Brief CSA lists four assignments of error:

A. The Growth Board erroneously applied the law to the facts of this case in approving the CA Ordinances, which as written are in violation of RCW 82.02.020 and constitutional provisions due to the failure to address site-specific conditions, nexus, proportionality and reasonable necessity and must be reversed. RCW 34.05.570(3)(a), (d), and (e).

B. The Growth Board erroneously applied the law to the facts of this case in failing to require San Juan County to follow changes in both the RCWs and WACs governing the designation and protection of critical areas and must be reversed. RCW 34.05.570(3)(d).

C. The Growth Board erred in deciding without substantial evidence in the record and erroneously applied the law to the uncontested evidence in the record in holding that 18 months of secret meetings to develop the form and substance of the County's CA Ordinances complied with the requirement to provide for early and continuous public participation under RCW 36.70A.140 and must be reversed. RCW 34.05.570(3)(d), (e).

D. The Growth Board erroneously applied the law to the facts of this case in directing compliance based on failure to follow the Best Available Science ("BAS") because the Ordinances are not protective due to structural failures described above and must be reversed. RCW 34.05.570(d), (e).

In Section IV, CSA lists the same four alleged errors, although they are stated somewhat differently.

A. DUE PROCESS.

CSA's first listed error raises constitutional and statutory due process challenges relating to issues of nexus, proportionality, and reasonable necessity—issues which all derive from case law and which, in Washington, are now incorporated into the provisions of RCW 82.02.020. The Growth Management Hearings Board correctly determined that it did not have jurisdiction to

address issues of a constitutional nature, even if presented in the context of RCW 82.02.020[1]. Accordingly, the Court will consider CSA's first listed error not as an error by the Board but, under RCW 34.05.570(3)(a), as matters that go directly to the validity of the CA Ordinances.

1. Constitutional Claim.

CSA bases its constitutional arguments on its conclusion that, as a factual matter, the CA Ordinances impose mitigation in the form of buffers without any regard to the possible impact of a proposed project or activity on the area to be protected; without any regard to the relationship between the buffer required and the impact, if any, that would result from the proposed project or activity; and without any regard for the need to require buffers under the particular facts and circumstances presented by the proposed project or activity. More succinctly, the CSA asserts that it cannot be disputed that nexus, proportionality and reasonable necessity are missing from the CA Ordinances and that the only question is whether, as a legal matter, the buffers are the types of encumbrances that fall under the requirements of the Nollan and Dolan line of cases, now codified in RCW 82.02.020.

Friends argues that CSA has abandoned its constitutional claims due to inadequate briefing. Friends correctly points out that CSA's Opening Brief, as it addresses the constitutional issues, does not expressly identify the specific provisions of any particular constitution that it relies on. However, the Opening Brief is replete with references to numerous well known court cases that deal with the very constitutional issues CSA has raised and the decisions in those cases clearly identify the takings clause in the 5th Amendment to the U.S. Constitution and the due process clause of the 14th Amendment to the U.S. Constitution as the provisions at issue. PLF's Amicus Brief specifically identifies the takings clause and CSA's Reply Brief, while again failing to refer to any specific constitutional provision, does present its arguments with express reference to "takings" and "due process". The Court does not find that CSA has abandoned its constitutional claims.

In its Response Brief the County distinguishes between CSA's constitutional claims and its statutory claims under RCW 82.02.02. As to the former, the County argues that an "as applied" challenge is not ripe for review because CSA does not own or even identify a specific parcel of land as to which an as applied challenge could pertain. Section V(B) of CSA's Opening Brief states, in the caption, that the CA Ordinances as written are in violation of statutory and constitutional provisions on their face or as applied. However, neither the facts in the record nor CSA's analysis in Section V(B) provides any support for an "as applied" challenge. Because CSA does not claim to own any property that could be subjected to the requirements of the CA Ordinances, the Court agrees with the County that CSA's "as applied" challenge is not ripe for review. Accordingly, the Court need only rule on CSA's facial challenge.

[1] Olympic Stewardship Foundation v Western Washington Growth Management Hearings Board, 166 Wn.App. 172 (Div 2 2012), fn.21.

The County next argues that CSA has not met the high threshold required for a facial challenge because it has not demonstrated a total taking, i.e. that the very act of passing the regulation denies the owner of all economically viable use of the property. But as CSA correctly states in its Reply Brief, land use regulations may be challenged as unconstitutional takings, as violations of due process, or as both.

While CSA's Opening Brief does not expressly state that its constitutional issue is based only on a claimed due process violation, CSA does not ask the Court to find that there has been a taking, asking instead that the Court find the CA Ordinances unlawful. In addition, CSA's Reply Brief, at page 2, line 42 to page 3 at lines 1-2, makes it clear that their constitutional claim is a due process claim and not a takings claim.

Having concluded that CSA is making a facial challenge, based on a due process argument, the question is whether a facial challenge can be based upon a claimed due process violation, or whether it can only be based on a takings claim. The County argues that it is the latter, citing to Peste v Mason County, 133 Wn.App 456 (Div II 2006). Peste does hold, at pages 471-472, that: "Under a facial challenge to land use regulations, the landowner must demonstrate that the mere enactment of the regulation, and its application to any property, constitutes a taking". But Peste involved the denial of a rezone request and the landowner made both a facial and an as applied challenge. In addition, the landowner asserted both a taking and a due process violation. Significantly, the above quote from Peste is found in that part of the decision that analyzes the landowner's takings claim. Because CSA's claim is based on due process, the takings analysis in Peste is not particularly helpful.

Relying on Citizens Alliance for Property Rights v Sims, 145 Wn.App 649 (2008), CSA argues that it may challenge the CA Ordinances "as written" even though it is not alleging a takings. Citizens involved a facial challenge in which landowners claimed that a King County ordinance violated both RCW 82.02.020 and substantive due process. The trial court granted the County's summary judgment motion dismissing the substantive due process claim as unripe.[2] Accordingly, Citizens does not support CSA's argument that a facial challenge may be based on a claimed due process violation. On the other hand, the Appellate Court found that the County's ordinance did violate RCW 82.02.020.

It is logical that a constitutional due process claim should only be analyzed in connection with an as applied challenge because a due process analysis involves the three prong test first articulated in Presbytery of Seattle v King County, 114 Wn.2d 320 (1990), at page 330:

1. Whether the regulation is aimed at achieving a legitimate public purpose;
2. Whether it uses means that are reasonably necessary to achieve that purpose; and
3. Whether it is unduly oppressive.

[2] Because the appellate court resolved the challenge to the County's ordinance on a non-constitutional basis, the Court of Appeals did not consider the facial challenge on due process grounds.

As stated in Presbytery, at page 331, the third inquiry will usually be the difficult and determinative one because it requires a balancing of the public's interest against those of the property owner, the latter being essentially a matter of economic loss. In order to measure the economic loss to a property owner a court must have specific facts that can arise only from knowing how a particular activity or project on a particular parcel of land would be effected by the challenged regulation. To determine if a regulation is overly oppressive the Court needs to consider the amount and percentage of value loss; the extent of remaining uses; past, present and future uses; the temporary or permanent nature of the regulation; the extent to which the owner should have anticipated such regulation; the feasibility for the owner to alter the proposed use or development project. Presbytery, at page 331. None of that can be evaluated and thereby balanced against the public's interest in the absence of a specific proposed project or activity on a specific parcel of land.

CSA's Opening Brief references numerous cases in support of its constitutional claim, to include: Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Koontz v. St. Johns River Water Mgmt. Dist., 133 S.Ct. 2586 (2013); Unlimited v. Kitsap County, 50 Wn.App. 723 (1988); Dolan v. City of Tigard, 512 U.S. 374 (1994); Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740 (2002). In each of those cases the challenge was an as applied challenge. The only cases cited in CSA's Opening Brief that involved facial challenges are Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board, 96 Wn.App. 522 (1999) and Citizens Alliance for Property Rights v. Sims, supra. As indicated above, Citizens' due process claim was dismissed as unripe. To the extent Citizens involved challenges under RCW 82.02.020, they are discussed below.

The focus of the challenge in HEAL was on the alleged failure by the City of Seattle to comply with the best available science requirement of RCW 36.70A.172(1) in formulating an amendment to its critical areas ordinance. CSA correctly quotes one portion of the holding in HEAL, found at page 533, to-wit: "Therefore, the policies and regulations adopted under GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications." But CSA ignores the next sentence, which makes it clear that the holding goes no further than to point out that, if a local government fails to incorporate, or if it otherwise ignores, best available science, the result may be the enactment of policies and regulations that will not pass constitutional muster if they are later used as a basis for imposing conditions on, or denying, a land use permit application. Also ignored is the following statement at page 871: "If the City failed to use best available science here in making its policy decisions and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under Nollan and Dolan."

The Court in HEAL did not strike down the facially challenged Seattle ordinance, holding only that a challenge to regulations that don't appropriately incorporate best available science could, at an appropriate time, be made an as applied challenge. The matter was remanded to the Growth

Board for a determination of whether the critical area policies adopted by Seattle comply with RCW 36.70A.172, the statutory provision concerning the use of best available science.

The Court concludes that CSA's facial challenge, alleging a constitutional due process violation, is not ripe.

2. 82.02.020 Claim.

In its facial challenge the CA Ordinances, CSA asserts not only a violation of constitutional due process requirements, but a violation of RCW 82.02.020. Because RCW 82.02.020 is generally recognized as being essentially a codification of the due process requirements articulated in the Nollan/Dolan line of cases, the initial question for this Court is whether a facial challenge, based on the statute, is even appropriate. If the test under the statute is the same three prong test set forth in Presbytery, the Court would necessarily conclude, as it did with respect to CSA's constitutional due process claim, that it is not appropriate.

CSA directs the Court's attention to HEAL and Citizens Alliance, both facial challenges, and to Isla Verde. However, Isla Verde was not a facial challenge and HEAL did not challenge the critical areas regulations on the basis of failing to comply with RCW 82.02.020. Only Citizens Alliance offers any support for CSA's statutory argument, as the appellate court did uphold a facial challenge based on a finding that King County had failed to meet its burden to show that its land clearing ordinance fell within any exception to RCW 82.02.020. The Court notes, however, that the issue of ripeness was not presented to either the trial court or the Court of Appeals. In that regard, the Court also notes that Division 2 of the Court of Appeals did address the ripeness issue in footnote 21 of its decision in Olympic Stewardship, a case also involving a facial challenge to a critical areas ordinance.

In Olympic Stewardship the challengers argued that Jefferson County's vegetation removal regulation was facially invalid because it violated the constitutional nexus and rough proportionality requirements embodied in RCW 82.02.020. Before addressing that issue, and ultimately concluding that the regulation did not violate the requirements, the Court, at page 196, pointed out that it was assuming "without deciding" that the statutory issues were properly before it. In footnote 21, also at page 196, the Court stated:

> "We question whether the claim is properly raised here. Specifically, we question whether the claim could only be brought as a separate superior court action, whether the claim is ripe where the (challenger) has not proposed a specific development, whether the (challenger) has standing to assert the claim.... Because neither party raised these issues, we will resolve the question on the merits."

The Court is persuaded that, because ripeness was not raised as an issue in Citizens Alliance, its holding should not be construed to mean that a statutory facial challenge is proper. The better reading is that the Court of Appeals elected, as it did in Olympic Stewardship, to resolve the

issue on the merits without deciding if the issue, having not been raised, was even properly before it.

This Court concludes that CSA's facial challenge to the CA Ordinances is not ripe on either a constitutional due process basis or on the basis of the statutory requirement for nexus and proportionality as embodied in RCW 82.02.020.

3. Merits of Claim.

Given the lack of clear decisional law on the question of ripeness in connection with a facial challenge based on RCW 82.020.020, the Court has considered the merits of CSA's nexus and proportionality arguments as they apply to those portions of the CA Ordinances that regulate uses and developments on land adjoining the critical areas—i.e. the buffers and Tree Protection Zones. In its Reply Brief CSA acknowledges that the CA Ordinances meet the first of the three Presbytery tests: that they are aimed at achieving a lawful government purpose. CSA only argues that they fail to meet the other two tests: reasonable necessity and undue burden. RCW 82.02.020 expressly provides that it does not preclude dedications of land or easements within a proposed development or plat if the local government can demonstrate they are reasonably necessary as direct result of the proposed development or plat.

As stated in Olympic Stewardship, at page 197, the statute requires that development conditions be tied to a specific, identified impact of development on the community. It is generally understood that this statutory requirement is essentially the "Nollan/Dolan" nexus and rough proportionality requirement. In Olympic Stewardship the Court of Appeals concluded, at page 199, that the nexus and rough proportionality tests are met where "best available science" provides a scientific basis for the regulations that restrict development and disturbance within a critical area. This Court can discern no reason why the use of best available science cannot equally serve as a basis for implementing regulations that restrict development in buffer zones or protection zones that are adjacent to critical areas and critical to the proper functioning of those areas, and CSA has failed to articulate any meaningful rationale for making such a distinction.

The Court concludes that the CA Ordinances do incorporate best available science, thus providing a scientific basis to ensure nexus and proportionality, at least for purposes of a facial challenge. Whether or not the application of the CA Ordinances to a particular project on a specific parcel of land might be found lacking in proportionality or unduly burdensome could only be determined in connection with an as applied challenge.

Regarding the merits of CSA's statutory nexus and proportionality arguments, the Court also concludes that the CA Ordinances do not, at least facially, impose restrictions that give no regard to the specifics of a given proposal or to the particular characteristics of the specific property in question. In fact, both the wetlands regulations (SJCC 18.30.150) and the fish and wildlife habitat conservation area (FWHCA) regulations (SJCC 18.30.160) include multiple provisions that distinguish them from the essentially "one size fits all" provisions of the King County

ordinance at issue in Citizens Alliance or the uniform 30% parcel set aside ordinance in Isla Verde.

SJCC 18.30.150(D) exempts certain wetlands from any regulation, based on size and a habitat sensitivity rating, and the exempted wetlands would not require any wetland buffers whatsoever. For wetlands that are not exempt, SJCC 18.30.150(E) sets forth a detailed site-specific procedure for determining the size of a wetland buffer, particularly as regards the water quality component. Development or activities in areas that are more than a specified distance[3] from a non-exempt wetland do not have to comply with the regulations. (SJCC 18.30.150(A)) Development of activities that do not drain to a wetland also do not have to comply. (SJCCC 18.30.150 (E) (Figure 3.1) Even if located within the specified distance, and regardless of the direction of drainage, many activities or uses are allowed within any required wetland buffer, all as specifically set forth in Table 3.8[4] which includes all other uses that will not adversely impact wildlife functions and values.

As part of the procedure for determining the size of the water quality component of a wetland buffer, a composite stormwater discharge factor must be calculated on the basis of a formula that includes consideration of multiple site-specific characteristics. In addition, a buffer adjustment is available for so-called green development, based on particularized design and construction methods an owner may elect to use.

SJCC 18.30.110(C) exempts the maintenance, repair, remodel, or replacement of existing structures on the condition there be no further intrusion into critical areas and that the actions not have an additional adverse effect on the functions and values of critical areas. Subsection .110(C) also exempts the installation, construction, replacement or modification of certain utility lines; the removal of hazard trees; forest practices regulated under the provisions of Chapter 76.09, RCW; and vegetation clearing for fire protection of existing buildings. Perhaps most significantly, SJCC 18.30.110(D)(1) provides a reasonable use exception for the very purpose of insuring that the regulations are not applied in specific instances where their application would constitute the taking of private property for a public use without just compensation being made.

SJCC 18.30.160(A) provides that uses or activities that are not within 200 feet of a FWHCA do not have to comply with the regulations. Subsection .160(E)(1) sets forth a site-specific procedure for determining the size of vegetative buffers and tree protection zones (SJCC 18.20.160(E)(1). It includes three components, two of which (tree protection zones and coastal geologic buffers) are only included in the calculation if the characteristics of a particular property dictate, i.e., if there are trees in the subject area or if the area is subject to erosion by currents, tidal action or waves. (SCC 18.30.160(E)(1)) The third component is the water quality buffer. As discussed above, a water quality buffer is not required if the proposed development does not

[3] 205 feet as originally enacted; 300 feet as modified by Ordinance 2-2014, adopted after the GMHB decision under review in this proceeding.
[4] Table 3-5 in Ordinance 2-2014

drain to a wetland, and where a buffer is required the sizing process is site specific, particularly regarding the water quality component.

As with wetland buffers, many uses and activities are allowed within the buffers required by the FWHCA regulations, again to include other uses that will not adversely impact the functions and values of aquatic FWHCAs. (Table 3.10[5]) In addition, Subsection .110(E)(6) allows for reduced buffers when the development is within a shoreline area and views of the water are blocked by existing houses on adjoining parcels. Last, the general exemptions in SJCC 18.30.110(C) and the reasonable use exception in SJCC 18.30.110(D)(1) apply to FWHCA regulations as well as the wetland regulations.

All of the above provisions in the CA Ordinances clearly demonstrate that, at least facially, the Ordinances do not impose restrictions or conditions that apply equally to all uses or all development on all land that contains a critical area. It cannot be said that, at least facially, they impose an undue burden on landowners in San Juan County.

B. DESIGNATE AND PROTECT.

CSA's second listed error is that, with respect to the FWHCA regulations, the Growth Board erroneously applied the law to the facts when it concluded that San Juan County complied with the current statutory and regulatory requirements governing the process for designating and protecting shoreline[6] critical areas. The Court reviews errors of law de novo, but does give substantial weight to an agency's interpretation of a law that it administers. CSA asserts three legal bases for its argument that the Board erred.

1. Failure to Specify.

CSA first argues that RCW 36.70A.480(5) requires the County to map those specific areas of the shoreline that have been properly designated as critical areas, and that the Board's conclusion to the contrary, relying on Pilchuck v Snohomish County, Case No. 95-3-0047c, FDO 12/6/95, is error because the adoption of RCW 36.70A.480(5) in 2003 rendered the holding in Pilchuck meaningless. CSA points out that former WAC 365-190-090, in effect prior to 2003, did allow performance standards to be used to identify critical areas at the time of applications, and argues that the passage of RCW 36.70A.480 means that the County's reliance on performance standards and site-specific designations at the time of application is no longer acceptable and the Board was in error when it failed to recognize that. CSA also points out that, even if the procedure adopted by the County and approved by the Board may be appropriate in non-shoreline areas, the provisions of RCW 36.70A.480, being specifically intended to address the applicability of GMA's critical areas regulations to land located within shoreline areas, must be construed in a way that recognizes the legislature's intent to assure that all shorelines are not necessarily to be

[5] Table 3.8 in Ordinance 2-2014

[6] All shorelines in San Juan County are "shorelines of statewide significance," but are referred to herein simply as shorelines.

considered critical areas under GMA. Thus, CSA argues, "specifically designate" should be understood as prohibiting local jurisdictions from simply designating all shorelines as critical areas.

The County agrees that RCW 36.70A.480(5) prohibits an automatic designation of all shorelines as critical areas, but argues that the County did not do that. The County also argues that the Growth Board was correct in finding that the process used by the County to designate the FWHCAs complies with the statutory and regulatory requirements; that performance standards, with site specific designations to be accomplished at the time a development permit application is submitted, is not contrary to RCW 36.70A.480(5). RCW 36.70A.480(5) provides that shorelines of the state are not to be considered critical areas "except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2)." RCW 36.70A.030(5) defines critical areas as including fish and wildlife habitat conservation areas. WAC 365-190-030(6)(a) defines fish and wildlife habitat conservation areas as "areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term."

RCW 36.70A.060(2) provides that each county shall adopt development regulations that protect critical areas that are "to be designated under RCW 36.70A.170." RCW 36.70A.170(1)(d) provides that each county shall "designate where appropriate" critical areas and RCW 36.70A170(2) provides that in making those designations, "counties…shall consider the guidelines established pursuant to RCW 36.70A.050."

RCW 36.70A.050(1) provides that "… the department shall adopt guidelines … to guide the classification of … critical areas … ." Subsection (3) provides that the guidelines "shall be the minimum that apply to all jurisdictions … to assist … in designating the classification … of critical areas." The department is defined in RCW 36.70A.030(6) as "the department of commerce."

Acting pursuant to its authority under RCW 36.70A.050, the Department of Commerce adopted Minimum Guidelines, found in Chapter 365-190, WAC. WAC 365-190-040(3) provides that "all counties … must review, and if needed, update their … critical area designations." It also acknowledges that "Legal challenges to some updates have led to clarifications of the ongoing review and update requirements … and the process for implementing those requirements." It then states that the "process description in this section incorporates those clarifications… ."

Most significantly, WAC 365-190-040(5) then provides that, with respect to designating critical areas (the second important step):

> "(a) Pursuant to RCW 36.70A.170, natural resources lands and critical areas must be designated based on their defined classifications. For planning purposes, designation establishes:
>
> (i) The classification scheme;
> (ii) The distribution, location, and extent of the uses of land, where appropriate, for agriculture, foresty, and mineral extraction; and
> (iii) The general distribution, location and extent of critical areas. (Underlining added.)
>
> (b) Inventories and maps should indicate designations of natural resource lands. In circumstances where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization." (Underlining added.)

In addition, WAC 365-190-080(1) provides that counties must consider the Minimum Guidelines when designating critical areas. And -080(4) provides that counties "should designate critical areas by using maps and performance standards." More to the point, -080(4)(a) states that counties "should rely primarily on performances standards..." and that the standards should be applied "to protect critical areas when a land use permit decision is made."

In rejecting CSA's argument that the County failed to properly classify and designate FWHCAs, the Growth Board found that the County's method for both classification and designation of critical areas complied with the Minimum Guidelines in WAC 365-190-040. In doing so, the Board citied Pilchuck as authority for the proposition that mapping of specific fish and wildlife habitat conservation critical areas is not a GMA requirement. CSA correctly points out that the decision in Pilchuck pre-dates the adoption of RCW 36.70A.480 in 2003 and that, prior to 2003, WAC 365-190-040 specifically allowed for performance standards to be used to identify critical areas at the time of application. But the 2010 amendments to WAC 365-190-040 did not eliminate the use of performance standards, though it did remove the statement that performance standards "are preferred." It also did not eliminate the practice of specifically identifying critical areas at the time of a permit application, though it did remove the statement that performance standards "will be" applied upon application. Likewise, the 2010 amendments to -080 did not eliminate the language about performance standards or application of the standards at the time of permit processing.

CSA is also correct in explaining that the passage of ESHB 1933 in 2003, amending RCW 36.70A.480, was a reaction by the legislature to the decision in Everett Shorelines Coalition v City of Everett, CPSGMHB No. 02-3-0009c, Correct FDO 1/9/03. But the purpose for the amendment was to overrule the Central Growth Board's holding that all shorelines in the state are, per se, critical areas. Nothing in amended .480 expressly mandates precise mapping of shoreline critical areas as a part of the adoption of critical area ordinances or prohibits the

designation method set forth in the Minimum Guidelines. The only new requirement in amended .480 is that shorelines not be considered critical areas unless specific areas:

> 1. Are found to qualify for a critical area designation based on the definition in RCW 36.70A.030(5), a definition that includes fish and wildlife habitat conservation areas; and
>
> 2. Have been so designated per RCW 36.70A.060(2) – which requires that critical areas be designated under RCW 36.70A.170, which provides that, in making the designation, local government must consider the Minimum Guidelines that are set forth in WAC 365-190, which Guidelines include the very method the County used – designation by performance standards, with specificity determined during permit processing.

CSA argues that the methodology described in WAC 365-190-040(5)(b) was rejected by the Central Board's decision in Tahoma Audubon Society v. Pierce County, CPSGMHB Consolidated Case No. 05-3-0004c, FDO 7/12/15.[7] The Central Board did reject Pierce County's site-by-site assessment process, to be performed during the permit application process, but only because Pierce County had deleted all marine shorelines from its list of designated critical areas. As the Board explained, the BAS developed by Pierce County specified that a continuum of suitable habitat was essential for salmon survival and the "piecemeal scheme doesn't address the need for continuity." FDO at page 41 Accordingly, the Board concluded the site-by-site procedure failed to meet the requirement of using best available science.

Viewed properly, it is apparent that the Central Board's rejection was not a blanket rejection of the methodology set forth in WAC 365-190-040(5)(b) and -080(4)(a), but rather a focused rejection resulting from Pierce County's failure to classify any of its marine shorelines as critical areas, despite its BAS. This Court finds the following statements by the Central Board to be particularly helpful in understanding the significance of ESHB 1933 in the context of the arguments by CSA:

> "Because ESHB 1933 did not alter the BAS requirement or the heightened protections for anadromous fish in RCW 36.70A.172(1), it reinforces the Legislature's clear intent that local jurisdictions are to protect marine shorelines consistent with these mandates. *Id.* The legislature is deemed to have knowledge that the vast majority of marine shorelines constitute vital fish and wildlife habitat conservation areas, … ." FDO, at page 49.

The Court concludes that the Minimum Guidelines in Chapter 365-190, WAC apply to all critical areas, including shorelines and that the 2003 amendment to RCW 36.70A.480 does not compel a different conclusion. Accordingly, CSA has failed to meet its burden to show that the Growth Board committed error in approving the County's site-by-site methodology for designation of FWHCAs.

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[7] Friends agrees with CSA that the holding in Tahoma prohibits a site-by-site assessment, but argues that San Juan County properly designated FWHCAs when it adopted the CA Ordinances.

2. Failure to Consider

CSA next argues, on pages 26 of its Opening Brief, that the Growth Board committed error when it stated, at page 92 of the FDO, that San Juan County considered the areas to be classified and designated. It alleges that this statement by the Board was an error for two reasons:

a. There is nothing in the record to support a finding that, in designating the FWHCAs, the County considered the "if altered" requirement of WAC 365-190-030(6); and

b. There is nothing in the record to support a finding that the County complied with the provision in WAC 365-190-130(2) that only requires local government to consider the areas and habitats listed therein for possible classification and designation, as opposed to mandating that all of the listed areas be classified and designated.

Based on the alleged absence of substantial evidence in the record, CSA asks the Court to find that the Board's conclusion that San Juan County complied with the Minimum Guidelines is in error and to reverse that conclusion under RCW 34.05.570(e)(3).

a. If Altered [WAC 365-190-030(6)]

In approving San Juan County's methodology for designating FWHCA's the Growth Board specifically approved the County's decision to consider the "if altered" requirement of WAC 365-190-030(6) when a specific project is proposed. FDO, at page 93. In doing so the Board was interpreting the law and not making a finding that the County had already fully complied with the "if altered" requirement in WAC 365-190-030(6). As indicated above, the Court does not agree with CSA that the Board committed an error of law in approving San Juan County's methodology for designating FWHCAs, to include its decision that the "if altered" requirement be considered at the time a permit is sought. Because the Board concluded that the County could fulfill the "if altered" requirement at a later time, it obviously did not make a finding that the County had already considered the "if altered" requirement. Having made no such finding, there is no need to determine if the record would support such a finding.

b. Inclusion of All. [WAC 365-190-130(2)]

CSA correctly points out that WAC 365-190-130(2) does not require local government to include the entire list of fish and wildlife habitat conservation areas in its critical areas regulations. Rather, it lists areas that "must be considered" for inclusion. The Court agrees that the quoted phrase, particularly when read in conjunction with the 2010 revision to RCW 36.70A.480(5), clearly directs local government to consciously evaluate and determine which, if any, of the areas and habitats listed in WAC 365-190-130(2) are in fact located within its shoreline areas and therefore appropriately subject to classification and designation as FWHCAs.

However the mere fact that all of the areas listed in WAC 365-190-130(2) might be listed as critical areas by a local jurisdiction does not mean the local jurisdiction failed to engage in the required deliberative process.[8] CSA has not provided any reference to any portion of the record that affirmatively supports its contention that the County did not engage in the deliberative process required by WAC 365-190-130(2), arguing instead, at page 25 of its Opening Brief, that the County must not have done so because of the following statement in the BAS Synthesis, FWHCA, Chapter 3, pages 1-2:

> "State regulation (WAC 365-190-130) also requires certain habitats to be considered fish and wildlife HCA priorities for conservation, protection and management."

In quoting that statement from the BAS Synthesis, CSA has modified the quote by placing the word "requires" in bold. CSA then asserts, page 26, that the quoted statement "is not what WAC 365-190-130 requires; rather, it requires that the types of habitat listed must be *considered* for classification and designation." But that requirement is exactly what is stated in the BAS Synthesis: "State regulation … requires certain habitats *to be considered* … ." (Italics added) Having placed the word "requires" in bold, rather than the phrase "to be considered," CSA asks the Court to conclude that the authors of the BAS Synthesis and, as a consequence, the County understood that they were required to include the entire list from WAC 365-190-130(2) and that, accordingly, the County necessarily did so without deliberation. CSA erroneously states, at page 37 of its Opening Brief, that "… the scientists on which the County relied misstated the law, stating that the listed habitats were required to be included as critical areas, rather than to be considered… ." As just observed, the scientists did not misstate the law. They did not say the listed habitats were required to be included. They only said that there was a requirement that they must be considered.

There is nothing in the record to indicate that the County did not comply with the requirement in WAC 365-190-130(2) by engaging in a deliberative process when it decided to list those areas and habitats that are set forth at SJCC 18.30.160(B). Pursuant to RCW 36.70A.320(1), development regulations adopted pursuant to Chapter 36.70A RCW are presumed to be valid upon adoption. CSA has failed to meet its burden to prove that the Board's conclusion regarding the County's compliance with the Minimum Guidelines is not supported by substantial evidence.

3. Failure to Provide Guidance.

CSA argues that, even if it is appropriate for the County to finalize the designation of FWHCAs at the time of a permit application, the CA Ordinances fail to provide sufficient guidance to administrators regarding how to designate those areas. As a result, it asserts, the Board erroneously applied the law to the facts when it allowed the County to rely on the "primary association" between a listed species and a listed habitat as the sole criterion for the designation. However, CSA provides no analysis of the alleged error in the Board's decision on this point,

[8] The County takes the position that it did not include all of the areas and habitats listed in -130(2), but whether it did or didn't is not dispositive of the issue raised by CSA.

instead focusing on its underlying argument that the CA Ordinance regulating FWHCA's violates a fundamental principle of fairness because it contains no objective criteria to guide the decision-making process. Unfortunately, neither the County nor the Friends have included in their briefing any discussion of this alleged error by the Board; nor have they addressed CSA's underlying argument about the lack of fundamental fairness resulting from the absence of any criterion other than the "primary association" request.

SJCC 18.20.160 defines "primary association" as "...areas that provide fish and wildlife habitat ...", but it does not in any way set forth the specific criteria by which a determination is to be made on whether a particular area does or does not provide such habitat. But as the Board correctly noted, definitions are not required to include adequate standards for appropriate and consistent administration of regulations so long as the standards are included somewhere in the regulations. The Board then pointed out that CSA had the burden of showing that the FWHCA regulations as a whole fail to include sufficient standards to provide adequate administrative guidance and concluded that CSA had failed to meet that burden. The question for the Court is whether that conclusion of the Board is an error of law.

Just as the Board faced difficulty in analyzing CSA's argument regarding the "primary association" issue, this Court finds it difficult to analyze CSA's argument that the Board committed an error of law when it concluded that CSA failed to meet its burden of proof on the "primary association" issue. Rather than address the standard by which this Court is to review the Board's conclusion and then offer specific arguments to show how that conclusion of the Board fails to meet that standard, CSA asks the Court to directly address its underlying argument on the primary association issue. Had the Board concluded that "primary association", without more, does provide sufficient guidance for the County's administrators to determine how to designate FWHCAs, the Court could review that conclusion under the error of law standard. But that's not what the Board concluded and CSA has provided no citations to the record and has offered no analysis by which the Court can evaluate the conclusion that the Board did reach – i.e., that CSA failed to meet its burden of proof.

The FWHCA regulations are presumed valid under RCW 36.70A.230(1) and CSA's failure to explain to this Court what evidence it provided the Board in its effort to meet its burden of proof to overcome that presumption on the primary association issue is fatal.

C. PUBLIC PARTICIPATION.

CSA's third listed error is that the Growth Board erred when it found that San Juan County complied with the GMA requirement that it provide for early and continuous public participation in the process by which it developed the CA Ordinances. In its Opening Brief CSA briefly addresses this issue by stating only that it adopts and incorporates the public participation argument set forth in P.J. Taggares' Opening Brief. The Court will therefore address the issue in Section II, below.

D. HIGH RISK.

CSA's fourth listed error is that the Growth Board erroneously applied the law to the facts when it remanded the CA Ordinances back to San Juan County with a requirement that they be revised to increase the areas to be covered or the buffers and other restrictions to be imposed. More specifically, CSA focuses on the Board's finding that the 60% reduction buffer limit was outside of the recommended limits suggested by the Washington Department of Ecology and, as such, the CA Ordinances were high risk and the lack of an adaptive management program rendered the program not protective of critical areas.

CSA identifies three errors that it asserts are the basis for the Board's erroneous remand. However, the first two are essentially the same—that there is nothing in the BAS to show that: 1) water quality at the 60% reduction level is tied to either harm or the "no net loss" provision in RCW 36.70A.480(4); and 2) there is nothing in the BAS to suggest that all of San Juan County's shorelines need to meet more than 60% retention to meet the "no net loss" requirement. The third asserted basis for the Board's error is that the CA Ordinances require a property owner to capture and treat water from off their property (upland water) which, they argue, amounts to a mandate to improve or restore a situation, something local government cannot do under GMA.

1. BAS.

In its Response Brief the County refers the Court to specific portions of the BAS in support of its argument that the buffers and tree protection zones are based on the BAS. The County also refers the Court to Olympic Stewardship Foundation v WWGMHB, 166 Wn.App. 172 (2012) for its holding that the requirement to include BAS in the decision-making process for critical areas regulations does not mean that a county is required to explain in detail how its BAS supports its regulations as long as it identifies the scientific studies it relied on. Here, each of the County's CA Ordinances (#26-2012, #28-2012; and #29-2012) provide in the Background section that the applicable science related to the ordinances was revised and summarized in the BAS documents that were adopted by Resolution #22-2011. Those BAS documents are part of the record that was before the Board when it made its decision.

In reviewing an agency's action the Court reviews alleged errors of law de novo. If the alleged error is that the agency has erroneously interpreted or applied the law to the facts the Court should accord substantial weight to the Board's interpretation of a law that it administers. Here, CSA's concerns relate to the Board's interpretation and/or application of the "no net loss" provision in RCW 36.70A.480(4) and the BAS requirements of RCW 36.70A.172 and WAC 365-190-910, all of which are laws that the Board administers. Accordingly the Court should give substantial weight to its interpretation of those laws. Kittitas County v EWGMHB, 172 Wn.2d 144 (2011).

The FDO includes a thorough discussion and analysis of the buffer widths in the CA Ordinances and the pollutant reduction standards sought to be achieved by those buffers, as both CSA and

the Friends raised numerous issues concerning those aspects of the Ordinances. In doing so the FDO makes specific reference to portions of the BAS that it considered in undertaking that analysis. The Board concluded that the County's final decision to require pollutant removal rate that could be as low as 60% represented a departure from the BAS; that the minimum water quality buffer widths fall outside the range that would be supported by the BAS; and that the habitat buffers also fail to fall within the ranges supported by the BAS. It was on that basis that the Board remanded the CA Ordinances to the County for revisions to increase the protection for which the buffers are intended.

Giving appropriate weight to the Board's interpretation of the law as applied to the facts pertaining to the buffer widths and the pollutant reduction standards set forth in the CA Ordinances, the Court does not conclude that the Board erroneously applied the law to the facts. The Board clearly articulated its conclusions, with multiple specific references to the BAS and the shortcomings of the Ordinances. CSA has failed to meet its burden of proof on the BAS issue.

2. Requirements to Restore.

CSA asserts that the CA Ordinances require a property owner to capture and treat upland water from off their property regardless of whether the property owner has increased the quantity or decreased the quality of water being captured as a result of the project or activity being undertaken by the property owner. This, it argues, is a mandate to improve or restore and therefore is a violation of the "requirement that GMA may force mitigation, but restoration is not required." However, CSA fails to provide the Court with a reference to the particular provisions in the CA Ordinances that contain the alleged mandate to restore. CSA also does not cite any provision in the GMA that contains the requirement it suggests is being violated. Nor has CSA provided the Court with a reference to any briefing it filed with the Board in which it identified such portions of the CA Ordinances or the GMA provisions it considers to have been violated.

The County's Response Brief does not include any discussion of the CSA's assertion regarding mandatory restoration. The Friends' Response Brief briefly addresses the issue, arguing that the CAO does not require restoration and that, in any event, the GMA does not prohibit counties from requiring restoration. Friends points to the holding at pages 429-30 of Swinomish Indian Tribal Community v WWGMHB, 161 Wn.2d 415 (2007), where the Court stated that the legislature has not imposed a duty to enhance critical areas, although it does permit it.

Because CSA has failed to identify which portions of the CA Ordinances it considers to be a mandate to improve or restore upland water and has failed to identify any provision in the GMA that would prohibit what CSA asserts is an unpermitted mandate to capture and treat upland water, the Court is not persuaded that CSA's arguments on these matters establish that the Board erroneously applied the law to the facts when it remanded the CA Ordinances back to the County for revision.

II. PJT ISSUES.

A. SUBSTANTIVE ISSUES.

PJT asserts the same fundamental error as that presented by CSA in regard to the alleged failure of the County to have properly designated and classified the critical areas. In Section V(A) of its Opening Brief, PJT addresses not only the alleged failure to properly follow the required procedures for designating and protecting critical areas, CSA's second issue, but also CSA's fourth issue—lack of adequate guidance in connection with the primary association definition. Having addressed those issues in Section I, above, the Court finds nothing in PJT's arguments that would suggest a different conclusion.

PJT also makes essentially the same due process claim as has CSA, alleging violations of both the constitutional and statutory (RCW 82.02.020) requirements of nexus, proportionality and reasonable necessity—except that PJT's claims are directed only at the FWHCA regulations. The Court's analysis and conclusions concerning CSA's constitutional and statutory claims apply equally to PJT's claims despite the fact that PJT does own land that is subject to the FWHCA regulations. However, because PJT has not applied for a permit to use or develop its property, its challenge, like CSA's, is a facial challenge. And, like CSA, PJT does not allege a takings, only due process violations. Accordingly, the Court's conclusion that facial challenges alleging violations of constitutional or statutory due process claims are not ripe apply equally to PJT's facial challenges. Likewise, the Court's conclusion, based on the holding in Olympic Stewardship, that "best available science" can satisfy the Nollan/Dolan tests for buffer regulations, as well as regulations pertaining to the critical areas themselves, applies equally to PJT's facial challenges to the FWHCA Ordinance.

B. PROCEDURAL ISSUE.

1. Implementation Team.

As indicated above, both CSA and PJT have alleged a procedural error relating to the public participation requirement in RCW 36.70A.140. While CSA's Opening Brief characterizes the issue as one of "secret meetings" and actions "behind closed doors", PJT's analysis (adopted by and incorporated by reference into CSA's Opening Brief) makes it clear that it (and therefore CSA as well) are not alleging an open public meetings violation under Chapter 42.30, RCW.

RCW 36.70A. 140 requires all counties planning under GMA to establish and broadly disseminate a public participation program to identify procedures that will provide the public with early and continuous participation in the process by which comprehensive plans and development regulations are adopted and amended. Pursuant to Section .140, the procedures required must address seven specific aspects of public participation:

1. Broad dissemination of proposals and alternatives;

2. Opportunities for written comment;

3. Public meetings after effective notice;

4. Provisions for open discussions;

5. Communication programs;

6. Information services; and

7. Consideration of and response to public comments.

And as PJT acknowledges, the statute, in recognition of the fact that the hearings process is complex, requires only substantial compliance.

PJT's public participation argument is focused entirely on the role played by the County's Critical Area Ordinance Implementation Team in the development of the CA Ordinances. PJT asserts that the form and substance of the BAS and the draft ordinances were determined by the Implementation Team, comprising County staff, three County Council members and a variety of scientists acting as a committee—and that this group worked in closed door meetings between October 2010 and April 2012. PJT argues that the Implementation Team conducted substantial discussion in these closed meetings and that the materials they developed regarding the final form and substance of the regulatory approach were not made available for public review until April 2012.

In its FDO the Growth Board noted that San Juan County does not dispute the fact that an Implementation Team did have a role in developing the CA Ordinances and that it's members did meet privately and without notice to the public. Yet the Board concluded that the role played by the Implementation Team did not constitute a violation of the public participation requirement of RCW 36.70A.140, basing that decision on its determination that CSA and PJT had failed to provide sufficient evidence to support their argument that the Implementation Team crafted the merits of the CA Ordinance program. PJT and CSA now ask this Court to find that the Board's determination that they failed to properly support their public participation claim is not supported by the record.

In reviewing the seven specific requirements of RCW 36.70A.140 the Court notes that PJT and CSA do not identify which of the seven they allege the County failed to comply with. The record is clear that there were numerous public meetings, public hearings, opportunities for public comment, and broad discussion of proposals and alternatives. There is no evidence of ineffective notice of public meetings and no allegations that the County failed to provide communication programs or information services, or that the County failed to respond to public comments.

The statute does not prohibit staff meetings or the use of committees in the process of crafting development regulations, nor does it require that all staff or committee meetings at which the evolving regulations are discussed be conducted in public.[9] In fact, the concern of PJT and CSA is not that the County's process included the use of an Implementation Team. Rather, it is that the Team determined the form and substance of the program; conducted substantive discussions; and created the final form and substance of the regulatory approach.

The Growth Board found that CSA and PJT had submitted no evidence to support their allegations that, as the Board characterized it, the Implementation Team "crafted the merits" of the CA Ordinance program. CSA and PJT do point to some evidence in the record that could be construed as supporting their claim, but that evidence is, at best, minimal and essentially inconclusive—in part because their claim is one of degree: that the Implementation Team went too far and, in doing so, violated the public participation requirement of the statute.

When reviewing an agency's determination that a party before it, on whom rests the burden of proof, has not provided sufficient evidence to meet its burden, the Court reviews the record before the agency to determine if the evidence provided by that party was such that a fair minded person could only conclude that the party with the burden had met their burden. Given the relatively limited amount of evidence presented to the Board by PJT, the Court is not persuaded that the Board erred in concluding that CSA and PJT failed to meet their burden of proving that the role played by the Implementation Team was such that the County violated RCW 36.70A.140. The Court is convinced that the spirit of RCW 36.70A.140 was fully observed by the County. The Background Section in each of the three CA Ordinances recite the history of public participation, going back to March of 2006, and clearly demonstrate that if there was any error in affording the Implementation Team too much latitude it was an error that would fall within the exception contemplated by the legislature when it provided that errors in exact compliance shall not render the development regulations invalid.

2. Additions to the Record.

PJT and CSA also argue that the Board erred when it denied, in part, CSA's Motion for Additions to the Index of the Record. That Motion sought to add information that CSA asserted it had recently discovered and which it believed to be supportive of its argument on the public participation issue. The Board granted CSA's Motion in part and denied it in part, finding that CSA had failed to establish that five pages identified as a County planner's notes from a 2011 meeting of the Implementation Team were necessary or would be of substantial assistance to the Board because the existence and activities of the Team were already clearly established by the record.

[9] As noted above, the claim here is not that the County violated the Open Public Meetings Act. In that regard, Division One of the Court of Appeals recently affirmed a trial court determination that the process by which San Juan County adopted the CA Ordinances did not violate the OPMA, an allegation that was aimed at the very same use of the Implementation Team in connection with the adoption of the CA Ordinances. Citizens Alliance for Property Rights Legal Fund v San Juan County, No. 70606-3 (April 28, 2014)

The other documents the Board refused to add to the record were hundreds of emails and attachments that the County had made available to a CSA member more than one year before the Motion was filed. Copies of the emails were not provided for the Board to review as to their content. Noting that the Motion was made nearly a month after the deadline for motions to supplement the record and only approximately three weeks before the hearing on the merits, and finding that CSA had failed to establish that these documents were only recently discovered or were necessary or would be of substantial assistance, the Board denied the request.

Evidentiary rulings by the Board are reviewed for abuse of discretion. Given the lateness of CSA's Motion, both in terms of the passage of the deadline for such motions and the fact CSA had had the documents for over a year, as well as the impending hearing date, the Board's ruling was not an abuse of discretion.

III. FRIENDS' ISSUES.

Friends has appealed the Board's Final Decision and Order on seven of the 52 issues it had presented, arguing that, as to all but one[10], the Board erroneously interpreted or applied the law; that the Decision is not supported by substantial evidence; and that the Decision is arbitrary or capricious. Trial courts acting in an appellate capacity review growth board decisions under the standards for review set forth in RCW 34.05.570(3). Standards for review, unlike burdens of proof and quantum of proof, apply only in appellate proceedings. Standards for review concern the amount of deference the reviewing tribunal will afford the decision of the lower tribunal. They range from "arbitrary and capricious", the most deferential, to "de novo," in which no deference is given. "Clearly erroneous" is the standard that gives more deference than any other than "arbitrary and capricious."

In applying the appropriate standard of review the reviewing tribunal must be aware of the evidentiary standards (burden of proof and quantum of proof) that were applicable during the hearing that resulted in the appeal. The Court will therefore address those standards first. Pursuant to RCW 36.70A.320(1), development regulations are presumed to be valid upon adoption. Pursuant to Subsection .320(2), the burden is on the party challenging the regulation to overcome that presumption by demonstrating that the regulation is not in compliance with the GMA. Pursuant to Subsection .320(3), a growth management hearing board is required to find compliance unless it determines that the challenged regulation is clearly erroneous in view of the entire record before it and in light of the goals and requirements of the GMA. "Clearly erroneous" is a standard of review in which a decision will be upheld by a reviewing tribunal unless the tribunal is left with a firm and definite conviction that a mistake was made. And in the context of the GMA, growth boards are expressly required by RCW 34.05.3201 to grant deference to counties and cities in how they plan for growth because of the broad range of discretion given to them under the GMA.

[10] Friends' Brief does not assert that the Board acted arbitrarily or capriciously with respect to its third issue (Issue #28 below), concerning Tree Zone averaging.

As applied in the present case, Friends had to meet the burden imposed by RCW 36.70A.320(2) to prove to the Board that the challenged portions of the CA Ordinances did not comply with the GMA. To meet that burden Friends had to persuade the Board that the adoption of those portions by San Juan County was clearly erroneous. To do so, the Board had to be left with a firm and definite conviction that the County had made a mistake. And as to each of the seven appealed issues, the Board made a finding that Friends had failed to meet that burden.

Since the Board's rulings on the seven issues Friends has now appealed were all based on findings that Friends' had not met its burden of proof, this Court reviews those findings under the substantial evidence standard in RCW 34.05.507(3)(e). The substantial evidence standard is somewhat less deferential than the clearly erroneous standard, but a reviewing tribunal will uphold the lower tribunal's finding if there was a sufficient quantity of evidence to convince a fair-minded person of the correctness of the finding even if a different result was conceivable. Kittitas County v. Kittitas County Conservation, 176 Wn.App 38 (2013). And in applying that standard, the reviewing tribunal is to view the evidence, or lack thereof, in the light most favorable to the party that prevailed.

Because the finding of the Board on each of Friends' seven appealed issues was that it had not met its burden of proof because it did not provide sufficient evidence, the Court must apply the substantial evidence standard somewhat in reverse. Rather than ask if Friends provided a sufficient quantity of evidence to convince a fair-minded person, the Court must ask whether a fair-minded person could find that the quantity of evidence produced by Friends was insufficient, even if a different result was conceivable. In summary: viewing the evidence in the light most favorable to San Juan County, could a fair-minded person have found, as the Board did, that Friends failed to prove that the County's adoption of the challenged portions of the CA Ordinances was clearly erroneous?

A. ISSUE #9 BELOW: RUE.

SJCC 18.30.110(D) establishes a reasonable use exception (RUE) that provides a property owner with two options to develop his or her property if it is determined that compliance with the CA Ordinances would deprive the owner of all economic or beneficial use of his or her property. To be approved for the RUE, an owner must also meet six other criteria set forth in Subsection .110(D)(7). The purpose for the RUE is to avoid the taking of private property without just compensation. The planning goals set forth in RCW 36.70A.020 include an express prohibition on taking private property for public use without just compensation being made. The RUE is clearly included in the CA Ordinances in order to meet that mandate.

Friends challenged the RUE in Issue #9 to the Board by asserting that it violates the GMA because it allows unmitigated impacts and substantial unmitigatable impacts that don't protect critical areas; does not include the BAS; frustrates the GMA goals 9 (conserve fish and wildlife habitat) and 10 (protect water quality); and is available through the provisional use process rather

than the conditional use process. Friends also asserted that San Juan County had not evaluated the cumulative impact of the RUE.

The County pointed out to the Board that Friends' Prehearing Brief included, at page 22, only a seven line statement referencing the RUE provision and observing that the County had elected not to follow siting criteria recommended by the Department of Commerce and had failed to evaluate the cumulative impacts of the RUE. At page 33 of the FDO the Board stated that it agreed with San Juan County that Friends' argument on Issue #9 consisted of mere assertions and that Friends did not relate those assertions to specific results that would rise to the level of a GMA violation. The Board found that Friends had not met its burden of proof as to Issue #9.

On Issue #9 Friends argues that the Board erred when it failed to substantially address its' arguments on the Issue, specifically by failing to examine whether the RUE protects critical area functions and values. Friends is correct that the Board did not substantively address its arguments, but it did so only after concluding that Friends had failed to relate its general assertions about the impacts that development can have on critical areas to any specific result that would be attributable to the RUE. Thus, while Friends assertions may be well founded in general, the question for the Court is whether the Board erred in finding that Friends had not met their burden to demonstrate that the RUE will necessarily result in a failure to protect critical areas that rises to the level of a GMA violation and that the County's inclusion of the RUE in its CA Ordinances was therefore clearly erroneous.

If Friends' arguments concerning the RUE were to be strictly applied it would mean that absolutely no change to the naturally occurring environment could ever be allowed in or near wetlands or FWHCAs because the BAS indicates that every man-made change will have some negative impact. The very purpose of the RUE is to allow some development that may have an impact on critical areas when, to do otherwise, would deny an owner all economic or beneficial use of the owner's property. Friends may be right in arguing that the protection of critical areas required under the GMA cannot be disregarded in favor of lesser GMA planning goals, but a reasonable use exemption is necessary to fulfill the express mandate of RCW 36.70A.020(6). With one exception, Section .020 sets forth goals that only require planning jurisdictions to "encourage," "promote," and "reduce". But .020(6) is not a goal. It is, instead, an unconditional mandate that private property shall not be taken. That mandate can only be accomplished by provisions such as the RUE.

The Board, knowing that the GMA does not absolutely prohibit all development in or near wetlands and FWHCAs, found that, in challenging the RUE, Friends had failed to relate the general BAS supported understandings about the impact of all development to the specific consequences of allowing some development under the RUE. In failing to do so, the Board ruled that Friends had not met its burden of proof. The Court finds no error in that ruling.

B. TREE REMOVAL AND TREE ZONE AVERAGING.

Friends' Issues #27 and #28 below challenged numerous aspects of the buffer system for FWHCAs, including challenges to some of the Tree Protection Zone provisions. The Board ruled in favor of the Friends on several of those challenges, but against the Friends on the issue of tree removal (Issue #27) and Tree Protection Zone averaging (Issue # 28)

1. Tree Removal.

With respect to Issue #27, Friends argues that the Board erred by upholding a Tree Protection Zone that does not protect all FWHCA functions that are left unprotected by the water quality buffer. The premises to this argument is that FWHCA functions are left unprotected by the water quality buffers. The Court is aware that San Juan County adopted Ordinance No. 2-2014 on March 5, 2014, amending the CA Ordinances in response to the remand in the Board's FDO. Among the amendments is an increase of almost 50% in the size of the wetland buffers, from 205 feet to 300 feet. Because wetland buffers have been substantially increased in size, the premise to the Friends argument, that the Tree Protection Zone does not compensate for functions not protected by the water quality buffers, is somewhat undermined. It may no longer be relevant to consider whether Friends had proven its premise to the Board, as the functions protected by the significantly larger water quality buffers are necessarily increased and may no longer, if they ever did, result in Tree Protection Zones that fail to comply with the GMA.

Assuming Friends premises remains valid, the Court notes that, as with several of Friends' other issues, discussed below, its argument would ultimately leave no room for regulations that establish minimum thresholds or set maximum limits, rather than to always assure absolute zero impact. The tree removal allowances in SJCC 18.30.160(E)(2)(a) are limited in many respects, and are all intended to eliminate or significantly minimize any adverse impacts. To absolutely assure no adverse impacts whatsoever, no alteration of the existing natural environment would ever be allowed. The GMA does not require absolute protection in every circumstance and so the issue in reviewing regulations that allow some impact is always one of judging the degree of impact that is possible in light of any minimum threshold or maximum limits set forth in those regulations. Since some alteration is allowed, planning jurisdictions can comply with the GMA by adopting regulations that establish acceptable thresholds and limits. In reviewing the thresholds and limits adopted by a planning jurisdiction the Board, after granting the deference required by RCW 36.70A.3201, must determine if the particular threshold and limits have been proven to be clearly erroneous.

Regarding tree removal, the Board found that the thresholds and limitations in SJCC 18.60.160(E) (2)(a) had not been shown by Friends to be clearly erroneous. The Court is satisfied that the Board did not err. A fair minded person could make that finding after considering the evidence, or lack of evidence, in the record before the Board.

2. Tree Zone Averaging.

Regarding Issue #28 below, Friends argues that the Board erred when it failed to evaluate whether the "impacts authorized"[11] by the Tree Zone Averaging provision in the FWHCA Ordinance protect critical areas. SJCC 18.30.160(E)(1) sets forth the procedures for determining the size of vegetative buffers and Tree Protection Zones that are necessary to protect aquatic FWHCAs. It is a seven step procedure that involves three components, one of which is the establishment of a Tree Protection Zone for areas, if any, where trees are located.

Step 5 in the sizing procedure allows for an adjustment to the borders of the Tree Protection Zone, referred to as "averaging", by reducing the Zone in certain places in exchange for increasing it in others, with the requirement that the total protected area cannot be decreased. In addition, averaging is allowed only if certain criteria are met, one of which is that the averaging is necessary because no reasonable alternative is available. This criterion, along with the requirements that the total area within the zone may not be less than the area contained within the zone before averaging and may not be reduced to a width that is less than the water quality buffer or 70 feet, whichever is greater, are what led the Board to find that on Issue #28 Friends had not met its burden to prove that the County's decision to allow averaging was clearly erroneous.

While it is possible that the averaging provision could, in some cases, result in more impact to a critical area, the degree of reduced protection and the frequency with which the reduction might occur are both clearly minimized, and perhaps even entirely eliminated, by the criteria set forth in the regulation. More importantly, the Court agrees with CSA and the County that, at least with respect to this issue, the concern of Friends are best left to specific challenges rather than finding the averaging provision to be non-compliant with the GMA. It is clear that the criteria for averaging are an attempt to ensure no impact and, if not possible, to assure that any impact is within acceptable limits. If, in a particular circumstance, it was thought that the County had allowed averaging that fails to afford the same level of protection that would be achieved without averaging, an interested party could then assert a challenge.

C. ISSUE #29: SHORELINE BUFFER REDUCTION.

SJCC 18.30.160(E)(6) authorizes reduced buffer and Tree Protection Zones in situations where existing houses on adjoining waterfront parcels are closer to the water than what is specified in the protection standards set forth in Section .160(E). However, a reduction is only authorized if adverse impacts, if any, are identified by a qualified professional and then mitigated in conformance with SJCC 18.30.110. SJCC 18.30.110(F) sets forth the Critical Area Mitigation Requirements. It requires that all mitigation plans be developed by a qualified professional; that critical area reports, critical area delineations and BAS documents supporting the proposal be

[11] As stated, Friends appears to assume that the averaging provisions authorize impacts when, in fact, the provisions authorize adjustments that may have impacts.

provided; that the assessment of adverse impacts on critical area functions and values be based on BAS; that monitoring and adaptive management plans be included; and that the project be monitored for three years or until it has been determined that the plan has succeeded.

Section .110(F)(8) then sets forth the approval criteria for mitigation plans. For areas located outside the shoreline Subsection (F)(8)(d) requires the proposed development to either avoid adversely impacting the functions and values of critical areas or, when not possible, to mitigate the impacts so there will be no net loss. But for areas located within the shoreline, Subsection (F)(8)(e) does not expressly impose that same requirement. Instead, it provides that areas within the shoreline are required to be consistent with the mitigation sequence outlined in SJCC 18.30.160(E)(7). SJCC 18.30.160(E)(7) sets forth Standards and Requirements for Shoreline Modifications. But because it is incorporated by the reference found in SJCC 18.30.110(F)(8)(e), it also applies to the shoreline buffer reduction provisions of SJCC 18.30.160(E)(6).

Although SJCC 18.30.160(E)(7) also fails to expressly include the requirement that the proposed development have no adverse impact or be mitigated so there will be no net loss, it does incorporate by reference the provisions of WAC 173-26-201(2)(e). The provisions in WAC 173-26-201(2)(e) set forth the environmental impact mitigation measures that must be included in the shoreline master program of all local jurisdictions. It provides for the same mitigation sequencing process that is found in SJCC 180.30.160(E)(7) but, significantly, it also sets forth the express requirement that the mandatory mitigation measures are "to assure no net loss of shoreline ecological functions… ." Although difficult to discern and easy to overlook, there is in fact a requirement in the CA Ordinances that buffer and Tree Protection Zone reductions for property located within the shoreline either have no adverse impact or be mitigated so that there is no net loss.

In rejecting Friends' argument on Issue #29 the Board, at page 67 of its FDO, accepted the County's argument that, because of "the limiting application of SJCC 18.30.160(A)", the buffer reduction is authorized if and only if there will be no net loss of shoreline ecological functions or, in the event of view blockage, adverse impacts are identified, minimized and mitigated. The Court does not read SJCC 18.30.160(A) to require no net loss in connection with the buffer reduction provision in SJCC 18.30.160(E)(6). The no net loss requirement in SJCC 18.30.160(A) appears to apply only to the redevelopment or modification of uses or structures that were lawfully located within the shoreline area on or before the adoption of Ordinance No. 29-2012 (codified as SJCC 18.30.160). However since there is a no net loss requirement for approval of a buffer or Tree Protection Zone reduction, through the reference to WAC 173-26-201(2)(e)(i) that is found in SJCC 18.30.160(E)(7)(a)(ii), the Court agrees with the Board's ultimate decision on Issue #29.

D. ISSUE #34: WETLAND EXCLUSIONS.

SJCC 18.30.150(D) establishes a minimum size threshold that exempts some wetlands from the regulations in the CA Ordinances. Although Ordinance No. 2-2014 amended Section .150(D) in

order to be consistent with the revised wetland rating provisions enacted in response to the Board's remand, the threshold size for unregulated wetlands was not changed. The exemptions apply only to Medium Habitat Importance – Sensitivity wetlands (now Category II and III wetlands) and to Low Habitat Importance – Sensitivity wetlands (now Category IV wetlands).

In its appeal Friends references several growth board decisions in which exemptions based on size were found non-compliant because they were not based on BAS. Here the Board acknowledged that the BAS did not support a general exemption for small wetlands, but then also acknowledged that the BAS did state that for practical purposes local jurisdiction may want to vary such thresholds. In fact the BAS includes an entire section on establishing minimum size thresholds for regulating wetlands (Chapter 2, Section 2.4.4), clearly indicating that some minimum threshold is appropriate. As discussed above, this is the type of issue that should be focused on the particular size of the thresholds adopted by the County, not on the propriety of including a minimum size exemption.

In the Background section of Ordinance No. 28-2012, adopting the wetland regulations now codified in SJCC 18.30.150, the County made certain findings of fact in Section K. Finding XII addresses actions that potentially depart from BAS and, as required by WAC 365-195-915, explains in Finding XII(a) the rationale for including the minimum size threshold for regulating wetlands and identifies the information relied upon in adopting the thresholds. The Board did not acknowledge the potential departure from the BAS or opine on whether the County had complied with the requirements set forth in WAC 365-195-915, finding instead that Friends had not met its burden of proof on Issue #34.

The Court agrees with the County that it did appropriately comply with WAC 365-195-915 by explaining the basis for its decision to include the wetland size exemption and the portions of the BAS that support that decision. Accordingly, the growth board decisions cited by Friends are not on point. Because buffer and Tree Protection Zone reductions are not authorized unless adverse impacts are mitigated under a no net loss standard, the Board's decision should not be reversed.

E. ISSUES #37 AND #38: EXEMPTIONS FOR ORCHARDS, GARDENS, TRIMMING AND PRUNING.

In Issue #37 below Friends challenged 15 exemptions that allow for certain uses, structures and activities in wetland buffers and 18 exemptions that allow for certain uses, structures and activities in FWHCA buffers. The exemptions for wetland buffers were found in the Table 3.8 in SJCC 18.30.150(E)(3), but after the adoption of Ordinance No. 2-2014, amending the CA Ordinances in response to the Board's order of remand, they are now found in Table 3.5 of SJCC 18.30.150(D)(3). The exemptions for FWHCA buffers were found in Table 3.10 of SJCC 18.30.160(E)(2), but are now found in Table 3.8 of SJCC 18.30.160(E)(2). For ease of understanding the Court will refer to the original table numbers and Code sections.

The Board found that Friends had failed to meet its burden of proof on most of the 33 challenged exemptions, but Friends has appealed on only two. First, as Issue #37, the exemptions allowing orchards and gardens in some wetland buffers, item "h" in Table 3.8, and in FWHCA buffers, item "j" in Table 3.10. Second, as Issue #38, the exemptions that allow minor trimming and pruning of the foliage of trees and shrubs in wetland buffers, item "o" in the Table 3.8, and in FWHCA buffers, item "o" in Table 3.10, and also the exemptions that allow limited tree removal in wetland buffers, items "m" and "n" in Table 3.8.[12]

In this appeal Friends addresses Issues #37 and #38 together. Its arguments are essentially focused on assertions that the Board ignored or failed to evaluate the BAS that indicated the exemptions would not adequately protect critical areas. Friends' Opening Brief sets forth numerous examples of adverse impacts identified in the BAS and suggests they will result as a consequence of the exemptions. But Friends once again does not relate the generally understood impacts identified in the BAS to the specific exemptions it is challenging and, most importantly, as those exemptions are limited by the conditions that must be met for approval of an exemption.

Friends also fails to address the mitigating effect that the conditions to approval would necessarily have on any adverse impacts, and it even ignores the existence of the conditions in at least one instance. On page 44 Friends states that agricultural practices impose numerous adverse impacts that fail to protect critical areas, and then specifically mentions the use of nutrients and pesticides. While the use of nutrients and pesticides no doubt have an adverse impact on a critical area, the exemptions for orchards and gardens are expressly conditioned on a prohibition against the use of synthetic chemicals.

In ruling on Friends' challenge to Issue #37 the Board acknowledged that the exemptions for orchards and gardens are not supported by the BAS. But it once again agreed with the County that the departure from the BAS was acceptable because the County had complied with WAC 365-195-915 by explaining its reasons for departing and by identifying risks and measures to limit those risks. Friends disagrees, but the Court notes that the Background section of Ordinance No. 28-2012 (codified as SJCC 18.30.150) includes findings at Section XII, to include Finding "c. Gardens and Orchards." That Finding is specifically referenced by the Board in footnote 226 on page 79 of its FDO.

The Court finds no error in the Board's determination that the County had adequately complied with WAC 365-195-915. The Court also agrees with the Board that because Friends failed to relate the generally understood adverse impacts identified in the BAS to the specific way in which the conditional exemptions for orchards and gardens are written, it failed to meets its burden to prove to the Board that those exemptions, as conditioned, are clearly erroneous.

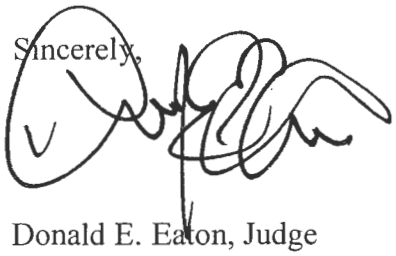
In ruling on Friends issue #38 the Board found that Friends had not adequately supported its arguments that the particular allowances for tree removal and for minor trimming and pruning

[12] Ordinance No. 2-2014 deleted the tree removal exemption from item "n" in the revised and re-numberedTable 3.8.

are in conflict with the BAS. Again, while Friends can point to data in the BAS that discusses in general the adverse impacts that can flow from disturbing or removing trees or vegetation located in buffers, Friends' burden was to demonstrate that the particular allowances set forth in Tables 3.8 and 3.10 are sufficiently harmful to wetland and FWHCAs buffers that they rise to the level of a GMA violation, and that including those allowances in the CA Ordinances was clearly erroneous. Friends has not identified any portions of the BAS that suggest a different specific limit on tree removal or on pruning and trimming of foliage. As noted several times above, regulations that limit, but do not absolutely prohibit, a use or activity do not necessarily fail to comply with the GMA requirement to protect critical areas. Since regulations that are adopted are presumed to be in compliance with the GMA, the allowances in Tables 3.8 and 3.10 are presumed valid. The Board's finding that Friends had failed to meet its burden to prove that allowances are clearly erroneous is a finding that could be made by a fair-minded person and therefore is not error.

Having found no error in connection with any of the issues raised by Petitioners, the Court will not grant the relief requested.

Sincerely,



Donald E. Eaton, Judge

DEE:jms