

1  Expedite  
2  No hearing set  
3  Hearing is set  
Date: November 20, 2009  
Time: 1:30 p.m.  
Judge: Hon. Richard D. Hicks

4 Noted for Oral Argument  
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11 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
12 FOR THURSTON COUNTY  
13

14 OLYMPIC STEWARDSHIP FOUNDATION, ) No. 08-2-02852-3, consolidated  
15 Petitioner, ) with 09-2-01897-6  
16 v. ) **PETITIONER'S**  
17 WESTERN WASHINGTON GROWTH ) **OPENING BRIEF**  
18 MANAGEMENT HEARINGS BOARD, )  
19 Agency Respondent.

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25  
Petitioner's Opening Brief

BRIAN T. HODGES  
Pacific Legal Foundation  
10940 NE 33rd Place, Suite 210  
Bellevue, Washington 98004  
(425) 576-0484 FAX: (425) 576-9565

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## INTRODUCTION

Petitioner Olympic Stewardship Foundation (OSF) is a private nonprofit corporation made up of Jefferson County citizens. OSF and its members focus on the development of effective regulations dealing with the environmental protection and the land use in the County. In 2008, Jefferson County adopted critical areas regulations restricting development in the “high risk” area of “channel migration zones” (CMZ). The regulations impose a 100% vegetation retention standard on private property located adjacent to the County’s major rivers. The purpose of this regulation was to ensure that each of the rivers has a protective buffer if it migrates from its present location. But the regulation encompasses more property than necessary, imposing the 100% vegetation retention standard on approximately 600 parcels of private shoreline property.

OSF seeks a decision invalidating the County’s CMZ regulations and reversing the Growth Board’s Final Decision and Order and Compliance Order, in which the Board concluded that the County’s regulations complied with the Growth Management Act (GMA). The County’s adoption of critical area CMZ regulations under the GMA is invalid because most of the regulated land qualified as a “shoreline of the state,” and is therefore subject to the exclusive jurisdiction of the Shoreline Management Act (SMA). The County’s CMZ regulations also fail to comply with the GMA’s “best available science” requirement because the County failed to follow the process required by law when it adopted the 100% vegetation retention standard. And finally, the County’s CMZ regulations violate RCW 82.02.020 by imposing a uniform and preset condition on all new development within a “high risk” CMZ without any provision for variation of the 100% vegetation retention standard to ensure that the condition actually mitigates an

1 identified impact of the proposed use of property. The County's CMZ regulations  
2 are unlawful and the Growth Board's conclusion that they comply with the GMA  
3 is clearly erroneous.

4 **ASSIGNMENTS OF ERROR AND**  
5 **ISSUES PERTAINING THERETO**

- 6 1. Jefferson County's 2008 critical areas update is invalid because it adopted  
7 critical area regulations that apply to shorelines in violation of the GMA and  
8 *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008),  
9 which establish that the shorelines of the state fall within the exclusive  
10 jurisdiction of the SMA.
- 11 2. The Growth Board erred when it concluded that Jefferson County's decision  
12 to adopt a 100% vegetation retention standard within high risk CMZs  
13 complied with the GMA's "best available science" requirement.
- 14 3. The Growth Board erred when it concluded that Jefferson County's CAO  
15 complied with the GMA, where the regulations impose a 100% vegetation  
16 retention standard as a uniform and preset condition on all new development  
17 without first demonstrating a nexus between the proposed use of property and  
18 the projected impact, and without showing that the limitation on the property  
19 owner's use actually mitigates the identified impact.

20 **CITATIONS TO THE RECORD**

21 The administrative record on appeal consists of 2 Bates-stamped volumes of  
22 the record of the proceedings before the Western Washington Growth Management  
23 Hearings Board, and transcripts from two hearings. Petitioner will cite the  
24 administrative record as follows:

25 AR 1 \_\_\_: Administrative record relating to the Growth Board's Nov. 19,  
2008, Final Decision and Order (Case No. 08-2-02852-3);

AR 2 \_\_\_: Administrative record pertaining to the Growth Board's July 20,  
2009, Compliance Order (Case No. 09-2-01897-6);<sup>1</sup>

TR 1 \_\_\_: Transcript of the Oct. 7, 2008, hearing on the merits; and

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<sup>1</sup> At the time of filing, the Growth Board has not transmitted this portion of the record. OSF will file a corrected brief with citation to AR 2 upon receipt.

1 TR 2 \_\_\_\_: Transcript of the July 15, 2009, compliance hearing.  
2 OSF has also attached the following core documents as appendixes to its brief:

3 App. 1: Excerpts from Jefferson County's CAO

4 App. 2: Growth Board's Nov. 19, 2008, Final Decision and Order

5 App. 3: Growth Board's July 20, 2009, Compliance Order

6 App. 4: *Kitsap Alliance of Property Owners v. Central Puget Sound*  
7 *Growth Management Hearings Board (KAPO)*, – Wn. App. –,  
8 2009 WL 2877934 (slip op., No. 38017-0-II, Sept. 9, 2009).

## 9 STATEMENT OF FACTS

### 10 A. Jefferson County's Channel Migration Zone Regulations

11 A CMZ is an area adjacent to a river that includes all land that the river could  
12 potentially occupy in the future as a result of avulsion and/or meandering if the river  
13 is unconstrained and the banks are left unprotected. JCC 18.10.030. The County  
14 designated CMZs along its major rivers, the Duckabush, Dosewallips, Big Quilcene,  
15 Little Quilcene, and the Lower Hoh Rivers as a category of "geologically hazardous  
16 areas." JCC 18.10.030; JCC 18.22.160(3)(g), (h), (i). The County delineated areas  
17 within each of the CMZs by potential or anticipated risk. JCC 18.10.030; JCC  
18 18.22.160(2)(d). The CMZ regulations only apply to the "high risk" portion of a  
19 CMZ, which the County defined as "those non-disconnected portions of the channel  
20 that are likely to migrate within a 50-year timeframe." JCC 18.10.030; JCC  
21 18.22.160(2)(d). All areas designated as containing a "high risk" CMZ are subject  
22 to a 100% vegetation retention requirement. JCC 18.22.170(4)(d). The breadth of  
23 potential channel beds and erosion areas causes the County's mapped "high risk"  
24 CMZs to extend from dozens to thousands of feet landward in both directions of  
25 existing channels. AR 2 at \_\_\_\_; *see also* AR 1 at 235 ("CMZs can also extend from



1 hillslope to hillslope across the entire valley bottom.”). And as a result, the CMZ  
2 regulations apply to approximately 600 parcels of private property. AR 2 at \_\_\_\_.

3 **B. Legislative and Procedural History**

4 The GMA does not identify CMZs as a category of critical areas requiring  
5 protection under the Act. RCW 36.70A.030. Instead, the County’s decision to  
6 regulate CMZs under the GMA came from a settlement agreement with an  
7 environmentalist organization, Washington Environmental Council (WEC). In 2001  
8 and 2004, Jefferson County adopted critical area regulations. WEC was not  
9 satisfied with the extent of environmental protections, and filed two petitions for  
10 review with the Western Washington Growth Management Hearings Board  
11 (WWGMHB No. 01-02-0013; WWGMHB No. 05-2-0006). The County settled  
12 with WEC agreeing, in part, to include regulations that require site specific review  
13 for development within CMZs in its next critical areas update: “The regulations will  
14 provide the opportunity for site specific buffer review for development proposed  
15 within channel migration zone buffers. This review will be based on circumstances,  
16 such as topography, that are specific to the proposed development site.” AR 1 at  
17 489.

18 Shortly after the settlement agreement was finalized, Jefferson County began  
19 the process of amending its critical areas regulations. On March 17, 2008, Jefferson  
20 County adopted its critical areas update (AR 1 at 11-21), which was published on  
21 March 26, 2008. AR 1 at 3. Instead of adopting the permitting process agreed to  
22 in the settlement, the County imposed a 100% vegetation retention standard on all  
23 property within a “high risk” CMZ without regard to site-specific conditions. On  
24 May 23, 2008, OSF filed a Petition for Review with the Growth Board seeking  
25 review under RCW 36.70A.280(1)(a). AR 1 at 2-23. OSF challenged the portions

1 of the County's CAO that designated and regulated CMZs as critical areas. AR 1  
2 at 5-8. After briefing and a hearing on the merits, the Growth Board upheld the  
3 County's designation of CMZs as critical areas, but reversed the critical area  
4 regulations concluding that the County had violated the GMA's "best available  
5 science" provisions. App. 2 at 49-50 (Conclusions of Law K, L, M). On remand,  
6 the County made corrections to its CMZ regulations as suggested in the Growth  
7 Board's Final Decision and Order, and the Board concluded that the revised  
8 Ordinance was in compliance with the GMA. App 3. OSF timely filed petitions for  
9 review.

### 10 STANDARD OF REVIEW

11 This case is an administrative appeal from two decisions of the Western  
12 Washington Growth Management Hearings Board in *Citizens Protecting Critical*  
13 *Areas and Olympic Stewardship Foundation, et al. v. Jefferson County*, No. 08-2-  
14 0029c (Final Decision and Order, Nov. 19, 2008) and (Compliance Order, July 20,  
15 2009). On appeal from a Growth Board decision, this Court reviews the Board's  
16 conclusions de novo and applies the standards of the Administrative Procedure Act  
17 (RCW 34.05, *et seq.*) directly to the record before the Board. *King County v. Cent.*  
18 *Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553 (2000). Under the  
19 APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet  
20 any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash.*  
21 *Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498 (2006). Of the possible grounds  
22 for relief under the APA, three apply here:

23 (a) The order, or the statute or rule on which the order is based,  
24 is in violation of constitutional provisions on its face or as applied;

25 (d) The agency has erroneously interpreted or applied the law;  
[and]

1 (e) The order is not supported by evidence that is substantial when  
2 viewed in light of the whole record before the court, which includes the  
3 agency record for judicial review, supplemented by any additional  
4 evidence received by the court under this chapter.

4 RCW 34.05.570(3). Challenges under subsections (a) and (d) are reviewed de novo.  
5 *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38,  
6 45 (1998). Subsection (e) directs the Court to grant relief when the Board's order  
7 is not supported by substantial evidence. *Ferry County v. Concerned Friends of*  
8 *Ferry County*, 155 Wn.2d 824, 833 (2005). While the enactment of an ordinance  
9 under the GMA is generally presumed valid (RCW 36.70A.3201), this "deference  
10 ends when it is shown that the county's actions are in fact a 'clearly erroneous'  
11 application of the GMA." *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*,  
12 154 Wn.2d 224, 238 (2005). As demonstrated below, the challenged provisions of  
13 Jefferson County's critical areas update and remand ordinance are clearly erroneous,  
14 and, therefore, are due no deference or presumption of validity.

## 15 ARGUMENT AND AUTHORITIES

### 16 I

#### 17 JEFFERSON COUNTY'S CMZ REGULATIONS 18 ARE INVALID IN THE SHORELINE AREAS

19 The CMZ regulations are invalid because the County adopted them under the  
20 wrong statute. All of the rivers at issue in this appeal qualify as "shorelines of the  
21 state."<sup>2</sup> App. 2 at 16-17. Property up to 200 feet landward from the Ordinary High  
22

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23 <sup>2</sup> There is no dispute that the rivers designated as containing CMZs in Jefferson  
24 County's critical areas update qualify as "shorelines of the state." "The regulations  
25 at issue for OSF in this case relate primarily to the County's adoption of Channel  
Migration Zones (CMZs) for four of its most prominent rivers. The Board Notes all  
(continued...)

1 Water Mark (or the edge of the floodway when one is present) constitutes shoreline  
2 property subject to the jurisdiction of the SMA. RCW 90.58.030(2)(f). The  
3 “protection of critical areas . . . within shorelines of the state *shall* be accomplished  
4 *only* through the local government’s shoreline master program.” RCW  
5 36.70A.480(3)(a) (emphases added); RCW 90.58.030 (Finding–Intent) (“The  
6 legislature intends that critical areas within the jurisdiction of the [SMA] shall be  
7 governed by the [SMA] and that critical areas outside the jurisdiction of the [SMA]  
8 shall be governed by the [GMA].”); *Futurewise v. W. Wash. Growth Mgmt.*  
9 *Hearings Bd.*, 164 Wn.2d 242, 245 (2008) (“Critical areas within the jurisdiction of  
10 the SMA are governed only by the SMA.”) (J. James Johnson, lead opinion).  
11 Critical area regulations on shorelines that do not follow the procedural and  
12 substantive requirements of the SMA are invalid. RCW 90.58.090(1); *Kitsap*  
13 *Alliance of Property Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*  
14 *(KAPO)*, – Wn. App. –, 2009 WL 2877934 (slip op., No. 38017-0-II, Sept. 9, 2009);  
15 *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 at 29-31 (Final  
16 Decision and Order, Dec. 27, 2005).

17 Despite this statutory mandate, Jefferson County enacted its CMZ critical  
18 areas regulations under the GMA, and did not follow the procedural and substantive  
19 requirements of the SMA. Prior to the hearing before the Growth Board, the County  
20 recognized this error, but instead of correcting its CAO, the County issued a Code  
21 Interpretation directing the planning department not to enforce critical area

22 \_\_\_\_\_  
23 <sup>2</sup> (...continued)

24 of these rivers are within the jurisdiction of the SMA and therefore land located  
25 within 200 feet of either side of the rivers falls under the jurisdiction of the SMA.”  
App. 2 at 16-17; *see also* App 2. at 49 (Conclusion of Law H); App. 3 at 3-4.

1 regulations within the shoreline jurisdiction.<sup>3</sup> AR 2 at \_\_\_\_\_. The County also  
2 acknowledged, in its recitals to the revised CAO, that it lacked authority to adopt  
3 critical area regulations on its shorelines. (AR 2 at \_\_\_\_\_ (Ord. 06-0511-09 at 1-2).)  
4 Nonetheless, the final CAO still imposes critical area restrictions on “the footprint  
5 of the active stream channel” and all areas where the channel is “likely” to migrate  
6 within 50 years, regardless of whether the property is subject to the exclusive  
7 jurisdiction of the SMA. JCC 18.10.030; JCC 18.22.170(4)(d) (“Within a high risk  
8 CMZ, vegetation removal shall not be allowed.”).

9 The only reason this clear-cut issue is on appeal is because the Growth Board  
10 concluded that it lacked jurisdiction to review whether the portions of the CMZ  
11 regulations that applied to shoreline areas complied with the SMA.<sup>4</sup> App. 2 at 17,  
12 49. But OSF’s petition argued that Jefferson County’s actions violated RCW  
13 36.70A.480(3)(a), which prohibits local government from adopting critical area  
14 regulations for shoreline property under the GMA. AR 1 at 7 (Petition for Review,  
15 Issue D.2); AR 1 at 165-67. The Growth Board’s refusal to review whether the  
16 County failed to comply with the GMA constituted clear error and should be

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18 <sup>3</sup> According to the County Code, a code interpretation does not constitute an  
19 amendment to the code and can be withdrawn at any time. JCC 18.40.350-.380.

20 <sup>4</sup> The Growth Board noted that the County’s shoreline CMZ regulations constituted  
21 segment updates to its shoreline master program that must be submitted to the  
22 Department of Ecology for review and approval before adoption. App. 2 at 17, 49.  
23 The County, however, has taken no action to have its shoreline CMZ regulations  
24 reviewed or approved under the SMA. And as a result, the County’s CMZ  
25 regulations remain in violation of the GMA and SMA. *See* RCW 90.58.090(1) (A  
segment update to a local government’s shoreline master program is only effective  
after it has been reviewed and approved by the Department of Ecology.).

1 reversed. *See KAPO*, slip op. at 10 (reversing and remanding a CAO that adopted  
2 critical area regulations on shorelines, directing the Growth Board to remand the  
3 CAO to the local jurisdiction for further proceedings consistent with the SMA).

## 4 II

### 5 THE CMZ REGULATIONS FAIL 6 TO COMPLY WITH THE GMA'S "BEST AVAILABLE SCIENCE" REQUIREMENT

7 The County's CMZ regulations also fail under the GMA's "best available  
8 science" requirement (RCW 36.70A.172(1)) because the County's record does not  
9 demonstrate that it followed the process required by law when adopting a 100%  
10 vegetation retention standard on all property within a "high risk" CMZ. AR 1 at  
11 173-75. Our Supreme Court explained that RCW 36.70A.172(1) requires that local  
12 government include evidence in the record that it considered valid scientific  
13 evidence, competing evidence, all proposed solutions, and other factors to develop  
14 locally appropriate critical area regulations. *Ferry County*, 155 Wn.2d at 834-38.  
15 This "reasoned process" requirement is necessary because the GMA's mandate to  
16 protect critical areas is to be accomplished in a balanced fashion. The process is not  
17 one-sided and local government is not given *carte blanche* to adopt the most  
18 aggressive measures to protect, restore, or enhance the environment. *Swinomish*  
19 *Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415,  
20 421 (2007). RCW 36.70A.172(1) imposes a substantive limitation on overly  
21 precautionary critical area restrictions, requiring that local governments ensure that  
22 critical areas regulations are supported by a degree of analytical rigor and scientific  
23 scrutiny. *E.g., Honesty in Env'tl. Analysis & Legislation v. Cent. Puget Sound*  
24 *Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 532-34 (1999). The "best  
25 available science" provision, applied properly, serves the dual purpose of

1 (1) requiring that local government establish the necessary scientific and factual  
2 foundation to support development regulations that will restrict or condition the use  
3 of private property, and (2) precluding local authorities from relying upon  
4 “speculation or surmise” when imposing regulations on the use of private property.  
5 *Ferry County*, 155 Wn.2d at 837-38; *HEAL*, 96 Wn. App. at 532-34. In this case,  
6 there is nothing in the record demonstrating that Jefferson County engaged in a  
7 reasoned process when it adopted a 100% vegetation retention standard for all  
8 property within a high risk CMZ.<sup>5</sup> See AR 1 at 577-81 (County’s Pre-Hearing Brief,  
9 avoiding all discussion of the *Ferry County* requirement). The lack of evidence in  
10 the record violates the rule from *Ferry County* and warrants reversal. RCW  
11 34.05.570(3)(d), (e).

12 **A. The County Failed To Engage in a Reasoned**  
13 **Analysis of the Scientific Record, Resulting in an**  
14 **Overbroad and Imprecise Designation of CMZs**

15 Evidence of a reasoned process is absolutely necessary to determine why and  
16 how the County chose to adopt a “high risk” designation that included more land  
17 than necessary to protect property from potential channel migration. Unlike typical  
18 critical areas, “[t]he object of identifying CMZ is to ensure that the stream [has] a  
19

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20 <sup>5</sup> Due to the County’s lack of record and argument on this issue, the Growth Board  
21 took it upon itself to search the record to find *any* support for vegetation retention.  
22 See App. 2 at 37-38. The Board was only able to find two references regarding the  
23 role of riparian vegetation in CMZs. See App. 2 at 38. But, as discussed below,  
24 neither of the references support the County’s adoption of a 100% retention standard  
25 —and more importantly, the Board’s *post hoc* review of the record cannot be relied  
on as a substitute for the County’s duty to engage in a reasoned process. *Ferry*  
*County*, 155 Wn.2d at 837 (requiring record demonstrating *the County*—not the  
Growth Board—engaged in a reasoned process).

1 | *protective buffer in the future.*” Tr. 1 at 29. The focus on including all *potential*  
2 | future locations of channel migration lead the County to include in its CMZ  
3 | designations land that will not be affected by channel migration.

4 | The studies that designated and delineated the CMZs along the Duckabush,  
5 | Dosewallips, Big Quilcene, and Little Quilcene rivers reported uncertainty in  
6 | determining what property will in fact be affected by channel migration:

- 7 | • The designation of CMZs includes “important” mapping errors,  
8 | resulting in uncertainty of  $\pm 100$  feet. AR 1 at t 331.<sup>6</sup>
- 9 | • While channel migration is “likely” in designated high risk areas, “[i]t  
10 | is not possible to predict which sites will actually be occupied due to the  
11 | stochastic nature of multiple variables.” AR 1 at 361.<sup>7</sup>
- 12 | • Areas within the delineated “high” and “medium” risk areas “will  
13 | probably not be occupied by the river channel during the next century.  
14 | AR 1 at 361.
- 15 | • When mapping areas of “high risk,” the science “*assumed* that new  
16 | meander bends or avulsions would occur at all likely sites.” AR 1 at 361  
17 | (emphasis added).
- 18 | • The delineation of CMZs included areas that are at increased risk due to  
19 | the public works projects (such as levees and dikes)—not natural  
20 | changes in the river.<sup>8</sup> AR 1 at 355 n.1-2, AR 357 n.2.

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17 | \_\_\_\_\_  
18 | <sup>6</sup> This study provided the data for the delineation of CMZs along the Duckabush,  
19 | Dosewallips, Big Quilcene, and Little Quilcene rivers.

20 | <sup>7</sup> The 2006 Perkins Geosciences study that designated and delineated CMZs along  
21 | the Duckabush, Dosewallips, Big Quilcene, and Little Quilcene rivers.

22 | <sup>8</sup> In this circumstance, the County’s 100% vegetation retention standard constitutes  
23 | a regulation that condemns private property for public use. *See Dickgieser v. State*,  
24 | 153 Wn.2d 530, 534-35 (2005) (Where government action results in a taking or  
25 | damage of private property without formally exercising eminent domain, the  
property owner may bring a claim for inverse condemnation.); *Fitzpatrick v.*  
*Okanogan County*, 143 Wn. App. 288, 302-03 (2008) (Evidence that the  
(continued...))



1 The science that designated and delineated CMZs on the Hoh River is even more  
2 imprecise, because the study was commissioned by the Hoh Tribe to create a worst  
3 case scenario in order to assess the unconstrained risks of channel migration to tribal  
4 infrastructure. AR 1 at 423. The study purposely delineated CMZs “with no  
5 consideration of roads, buildings and bank armoring,” despite the fact that  
6 approximately 21% of the Hoh River’s banks contained rock armoring. AR 1 at  
7 366, 423 (explaining that the Hoh tribe wanted to learn the potential reach of CMZs  
8 if the river had no shoreline protection); AR 1 at 425 (“No Disconnected Migration  
9 Areas were subtracted from the CMZs based on the presence of roads, housing or  
10 bank armoring.”). The science for the Hoh CMZs purposefully overstated the actual  
11 risk of channel migration.

12       Jefferson County was required to create a record explaining how and why it  
13 adopted “high risk” delineations that included: (1) land delineated as “high risk”  
14 based on data errors and/or assumptions; (2) land that will probably not be affected  
15 by channel migration; (3) land that is protected from channel migration by bank  
16 armoring or other structures; and (4) land that is at increased risk due to public  
17 works projects. The Growth Board committed clear error by affirming the County’s  
18 adoption of CMZ regulations without evidence of the required reasoned process.  
19 RCW 34.05.570(3)(d), (e).

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24 <sup>8</sup> (...continued)

25 government’s construction of a dike that caused a river channel to migrate and  
damage private property supported claim for inverse condemnation.).

1 **B. The County Failed To Consider Alternative, Less-Drastic**  
2 **Solutions Proposed by the “Best Available Science”**

3 The County is required to demonstrate that it considered each of the  
4 alternative solutions presented by the “best available science.” *Ferry County*, 155  
5 Wn.2d at 834-35 (citing *Friends of Skagit County v. Skagit County*, No. 96-2-0025,  
6 1998 WL 637160, at \*12 (W. Wash. Growth Mgmt. Hearings Bd. Sept. 16, 1998)).  
7 Here, the science proposed several alternatives that would have a less drastic impact  
8 on private property rights than the County’s 100% vegetation retention standard.  
9 Those alternatives included armoring the edge of the historic channel, protecting  
10 existing structures, and installing emergency bank protection. AR 1 at 427-29. The  
11 record does not demonstrate that the County considered these solutions.

12 There is no indication in the record of how the County arrived at its 100%  
13 vegetation retention standard (as opposed to, say, a 25%, 50%, or 75% standard).  
14 While the science did propose retaining vegetation as one possible way to minimize  
15 the potential of channel migration, it did not address the amount of vegetation that  
16 should be retained to achieve this goal. AR 1 at 427-29. In fact, the science  
17 cautioned that vegetation retention is not without consequence. The 2004 Perkins  
18 Geosciences study discussed this issue in detail, concluding that, while riparian  
19 vegetation may provide some local benefits (such as protection of the immediate  
20 adjacent bank), log jams caused by large woody debris actually accelerate erosion,  
21 avulsion, and channel migration. AR 1 at 409. The study concluded as follows:

- 22 • Log jams initiate bends in straight channel segments;
- 23 • Log jams increase the erosion rate by blocking the channel  
24 and causing it to shift laterally;

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- 1 • Log jams were associated with 4 of the 9 major meander  
2 bends and caused some of the highest short term erosion  
3 rates;
- 4 • Meander log jams cause side channels because they force  
5 water to flow in a new direction;
- 6 • Small and large log jams were associated with a 2,000-foot  
7 wide unstable area resulting in numerous side channels and  
8 channel migration over a 30-year period;
- 9 • Log jams generally cause the river to shift a distance of 1-3  
10 channel widths; and
- 11 • The lower rate of avulsion since 1964 may be due to  
12 reduction in LWD log jams.

13 AR 1 at 409. Studies like this (concluding that vegetation retention can be both  
14 beneficial and harmful to the natural environment and existing development)  
15 underlie the requirement that local government follow an analytic process to  
16 evaluating the “best available science” in the record. *Ferry County*, 155 Wn.2d at  
17 837-38; *HEAL*, 96 Wn. App. at 532-34. The County’s CMZ regulations do not  
18 comply with the GMA because there is no evidence in the record that the County  
19 followed the required analytic process. The Growth Board’s decisions should be  
20 reversed.

### 21 III

#### 22 JEFFERSON COUNTY’S 100% VEGETATION 23 RETENTION STANDARD VIOLATES RCW 82.02.020

24 The method the County adopted for implementing its 100% vegetation  
25 retention standard violates RCW 82.02.020 and is invalid. The GMA’s grant of  
broad planning discretion is not boundless—critical area regulations must comply  
with existing limitations on local government authority, such as the constitutional  
nexus and rough proportionality requirements as incorporated into RCW 82.02.020:

1 [P]olicies and regulations adopted under GMA must comply with the  
2 nexus and rough proportionality limits the United States Supreme  
3 Court has placed on governmental authority to impose conditions on  
4 development applications. If a local government fails to incorporate,  
or otherwise ignores the best available science, its policies and  
regulations may well serve as the basis for conditions and denials that  
are constitutionally prohibited.

5 Simply put, the nexus rule permits only those conditions  
6 necessary to mitigate a specific adverse impact of a proposal. The  
7 rough proportionality requirement limits the extent of the mitigation  
8 measures, including denial, to those which are roughly proportional to  
the impact they are designed to mitigate. Both requirements have also  
been incorporated into the GMA amendments to RCW 82.02  
authorizing development conditions.

9 *HEAL*, 96 Wn. App. at 533-34 (citing *Nollan v. California Coastal Comm'n*, 483  
10 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) (footnotes omitted).

11 RCW 82.02.020 strictly limits local government's authority to impose a  
12 condition on development to circumstances where it can demonstrate that the  
13 condition is "reasonably necessary as a direct result of the proposed development  
14 or plat to which the dedication of land or easement is to apply." Our courts have  
15 interpreted this exception as codifying the nexus and proportionality requirements  
16 of *Nollan* and *Dolan*. See, e.g., *Trimen Dev. Co. v. King County*, 124 Wn.2d 261,  
17 274 (1994); see also *Sparks v. Douglas County*, 127 Wn.2d 901, 913 (1995); *Cobb*  
18 *v. Snohomish County*, 64 Wn. App. 451, 467-68 (1991). When local government  
19 seeks to impose a condition on development, it must first "show that the  
20 development . . . will create or exacerbate the identified public problem." *Burton*  
21 *v. Clark County*, 91 Wn. App. 505, 521 (1998). If the County is able to establish a  
22 nexus, it must next "show that its proposed solution to the identified public problem  
23 is 'roughly proportional' to that part of the problem that is created or exacerbated

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1 by the landowner's development." *Id.* at 523. Stated another way, the "rough  
2 proportionality' test measures the relationship between the conditions placed on the  
3 use of property and the *negative* impacts of that use that would justify the denial of  
4 the proposed use in the first instance." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d  
5 640, 676 (1997).

6 Conditions imposed on property that do not comply with the nexus and rough  
7 proportionality requirements are "unauthorized, constitute an illegal tax, fee or  
8 charge and result in an unjust enrichment to the City." *Henderson Homes, Inc. v.*  
9 *City of Bothell*, 124 Wn.2d 240, 244 (1994); *see also Isla Verde Int'l Holdings, Inc.*  
10 *v. City of Camas*, 146 Wn.2d 740, 755 (2002) ("RCW 82.02.020 requires strict  
11 compliance with its terms . . . [a development condition] is invalid unless it falls  
12 within one of the exceptions specified in the statute."). Jefferson County bears the  
13 burden of demonstrating strict compliance with the nexus and rough proportionality  
14 requirements of RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 759; *Citizens' Alliance*  
15 *for Property Rights v. Sims*, 145 Wn. App. 649, 657 (2008), *rev. denied*, 165 Wn.2d  
16 1030 (2009).

17 **A. The County's 100% Vegetation Retention**  
18 **Standard Constitutes an In Kind, Indirect**  
**"Tax, Fee, or Charge" on New Development**

19 The County's 100% vegetation retention standard constitutes a condition on  
20 development. Recent appellate and Supreme Court cases hold that both an open  
21 space set-aside requirement and a vegetation retention standard constitute  
22 development conditions subject to RCW 82.02.020. *Isla Verde*, 146 Wn.2d at 758-  
23 59; *Citizens' Alliance*, 145 Wn. App. at 660-64. In *Isla Verde*, our Supreme Court

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1 held that a development condition requiring a property owner to set aside 30% of  
2 his or her property as open space to protect the environment and provide critical  
3 habitat constituted an “in kind indirect ‘tax, fee, or charge’ on new development.”  
4 *Isla Verde*, 146 Wn.2d at 759. In *Citizens’ Alliance*, the Court of Appeals held that  
5 requiring all rural property owners to retain 50% to 65% of their lot in natural  
6 vegetation “imposes an in kind indirect ‘tax, fee, or charge’ under RCW  
7 82.02.020.” *Citizens’ Alliance*, 145 Wn. App. at 662. Jefferson County’s 100%  
8 vegetation retention standard is not materially distinguishable from the conditions  
9 invalidated in *Isla Verde* and *Citizens’ Alliance*. The 100% vegetation retention  
10 standard applies to all development applications for property located within a “high  
11 risk” CMZ, and is automatically imposed in a uniform and preset manner at the  
12 time the landowner files a land use application. JCC 18.22.170(1), (4)(d). The  
13 County’s vegetation retention standard constitutes an in kind indirect ‘tax, fee, or  
14 charge’ on development subject to RCW 82.02.020.

15 **B. The County’s Uniform and Preset 100% Vegetation Retention**  
16 **Standard Violates the Nexus and Rough Proportionality**  
17 **Requirements of RCW 82.02.020 as a Matter of Law**

18 The County’s 100% vegetation retention standard contains no provision for  
19 variation of the condition to ensure proportionally. JCC 18.22.170(1), (4)(d). A  
20 development condition cannot be “uniformly applied, in the preset amount,  
21 regardless of the specific needs created by a given development.” *Isla Verde*, 146  
22 Wn.2d at 763. RCW 82.02.020 requires that local government demonstrate that a  
23 condition is “reasonably necessary as a direct result of the proposed development  
24 or plat.” *Isla Verde*, 146 Wn.2d at 761. The statute “does not permit conditions

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1 that satisfy a ‘reasonably necessary’ standard for all new development collectively;  
2 it specifically requires that a condition be ‘reasonably necessary as a direct result  
3 of the proposed development or plat.’ ” *Isla Verde*, 146 Wn.2d at 761; *see also*  
4 *Citizens’ Alliance*, 145 Wn. App. at 665 (“The plain language of the statute does  
5 not permit conditions that are reasonably necessary for *all* development, or *any*  
6 *potential* development.”).

7       Jefferson County’s 100% vegetation retention standard is imposed in a  
8 uniform and preset manner to all property within a “high risk” CMZ. There is no  
9 mechanism in the CMZ regulations to consider the impacts of a proposed  
10 development in light of site specific conditions, such as geology, soil composition,  
11 slope, age/type of vegetation, presence of log jams, the presence of shore  
12 protection, and the impact of public works projects. *Citizens’ Alliance*, 145 Wn.  
13 App. at 666-67. Nor do the CMZ regulations contain any provision to consider the  
14 efficacy of other critical areas regulations that specifically allow development  
15 within areas designated as “high risk” CMZs (including the County’s shoreline  
16 development regulations, floodplain regulations, and other site-specific  
17 management practices).<sup>9</sup> Jefferson County’s 100% vegetation retention standard  
18 violates RCW 82.02.020, and is therefore invalid and unlawful.

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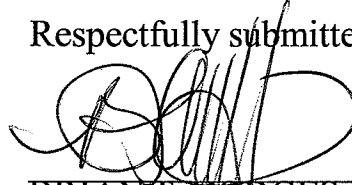
20 \_\_\_\_\_  
21 <sup>9</sup> For example, the County regulates the risk of channel change and flooding in the  
22 Frequently Flooded Areas provisions of its CAO. *See* JCC 18.22.140 (incorporating  
23 the Flood Damage Prevention provisions of its Building Code, JCC 15.15, as part  
24 of the CAO). Contrary to the CMZ regulations, the flood regulations specifically  
25 permit the use and development of property within a floodplain subject to certain  
site-specific conditions (such as a disclaimer of liability, elevating the lowest floor  
of a structure, and floodproofing). *See* JCC 15.15.070-.080.

1 **CONCLUSION**

2 For the foregoing reasons, OSF respectfully requests that this Court reverse  
3 the Board's decisions below and rule that the County's CMZ regulations are  
4 invalid and unlawful.

5 DATED: September 16, 2009.

6 Respectfully submitted,

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8 BRIAN T. HODGES, WSBA No. 31976  
9 Pacific Legal Foundation  
10 10940 NE 33rd Place, Suite 210  
11 Bellevue, Washington 98004  
12 Telephone: (425) 576-0484  
13 Facsimile: (425) 576-9565

14 *Attorney for Petitioner*



1 **DECLARATION OF SERVICE**

2 BRIAN T. HODGES declares as follows:

3 I am a resident of the State of Washington, employed at 10940 NE 33rd  
4 Place, Suite 210, Bellevue, Washington 98004. I am over the age of 18 years and  
5 am not a party to this action. On the below date, true copies of the *Petitioner's*  
6 *Opening Brief* were served to the following as indicated:

7 Bruce Turcott (Via U.S. Mail)  
8 Assistant Attorney General  
9 Licensing & Administrative Law Division  
10 1125 Washington Street SE  
11 P.O. Box 40110  
12 Olympia, WA 98504-0110  
13 *Attorney for Western Washington*  
14 *Growth Management Hearings Board*

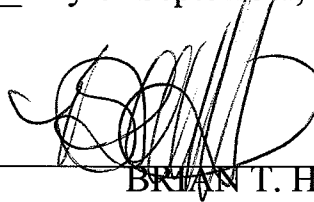
15 Mark R. Johnsen (Via Fed Ex)  
16 Karr Tuttle Campbell  
17 1201 Third Avenue, Suite 2900  
18 Seattle, WA 98101-3028  
19 *Attorney for Jefferson County*

20 David Alvarez (Via Fed Ex)  
21 Jefferson County Prosecuting Attorney  
22 P.O. Box 1220  
23 Port Townsend, WA 98368  
24 *Attorney for Jefferson County*

25 Robert Beattey (Via U.S. Mail)  
Futurewise  
814 Second Avenue, Suite 500  
Seattle, WA 98104  
*Attorney for Amicus Futurewise*  
*(Amicus in administrative proceedings)*

Lauren Rasmussen (Via U.S. Mail)  
Law Offices of Lauren Rasmussen  
1904 3rd Avenue, Suite 1030  
Seattle, WA 98101  
*Attorney for Port Gamble S'Klallam Tribe and*  
*Jamestown S'Klallam Tribes (amici in*  
*administrative proceedings)*

1 I declare under penalty of perjury that the foregoing is true and correct and  
2 that this declaration was executed this 10<sup>th</sup> day of September, 2009, at Bellevue,  
3 Washington.



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BRIAN T. HODGES

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