

No. 40272-6-II

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

OLYMPIC STEWARDSHIP FOUNDATION,

Petitioner,

v.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,

Agency Respondent.

On Appeal from the Superior Court of the
State of Washington for Thurston County

PETITIONER'S REPLY BRIEF

BRIAN T. HODGES
(WSBA No.31976)
Pacific Legal Foundation
10940 NE 33rd Place, Ste 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STANDARD OF REVIEW	2
ARGUMENT AND AUTHORITIES	3
I. THE COUNTY’S PROHIBITION ON ANY DEVELOPMENT OF PRIVATE PROPERTY WITHIN A CMZ VIOLATES THE GMA’S “BEST AVAILABLE SCIENCE” PROVISION	3
A. Jefferson County Failed To Create a Record Demonstrating That Its Uniform Vegetation Retention Standard Was the Product of a Reasoned Process	3
B. The County Fails To Show That Its Vegetation Retention Standard Satisfies The Constitutional Nexus and Rough Proportionality Tests Incorporated in The GMA’s “Best Available Science” Requirement	7
1. Development Conditions Must Satisfy Nexus and Rough Proportionality Regardless of Their Purpose	8
2. The County Fails To Demonstrate That Its 100% Vegetation Retention Standard Satisfies The Nexus and Rough Proportionality Tests	10
3. RCW 82.02.020 Does Not Require That a Property Owner Formally Dedicate Land for a Condition To Be Subject To The Nexus and Proportionality Tests	13
C. The County’s Reference to Other CMZ Regulations is Irrelevant	13

	Page
II. JEFFERSON COUNTY'S REFUSAL TO COMPLY WITH RETROACTIVE AMENDMENTS TO THE GMA IS NOT MOOT	15
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	5
<i>Brundridge v. Fluor Federal Services, Inc.</i> , 164 Wn.2d 432 (2008)	17
<i>Burton v. Clark County</i> , 91 Wn. App. 505 (1998)	10-11
<i>Citizens' Alliance for Property Rights v. Sims</i> , 145 Wn. App. 649 (2008), <i>rev. denied</i> , 203 P.3d 378 (2009)	8-11, 13
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38 (1998)	3
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	9
<i>Ferry County v. Concerned Friends of Ferry County</i> , 155 Wn. 2d 824 (2005)	3, 7
<i>Friends of Skagit County v. Skagit County</i> , No. 96-2-0025, 1998 WL 637160 (W. Wash. Growth Mgmt. Hearings Bd. Sept. 16, 1998)	7
<i>Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 96 Wn. App. 522 (1999)	4-5, 9, 11
<i>Isla Verde Int'l Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740 (2002)	8-11, 13
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 138 Wn. 2d 161 (1999)	18
<i>Orwick v. City of Seattle</i> , 103 Wn. 2d 249 (1984)	18
<i>Presbytery of Seattle v. King County</i> , 114 Wn.2d 320 (1990)	9

	Page
<i>State v. Eaton</i> , 168 Wn.2d 476 (2010)	18
<i>Swinomish Indian Tribal Cmty. v. The Western Wash. Growth Mgmt. Hearings Bd.</i> , 161 Wn.2d 415 (2007)	7, 10
<i>Wells v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 100 Wn. App. 657 (2000)	19
<i>Woods v. Kittitas County</i> , 162 Wn.2d 597 (2007)	19
<i>Young v. Pierce County</i> , 120 Wn. App. 175 (2004)	9-10

Statutes

RCW 34.05	2
34.05.570(3)(a), (d)	2-3, 13
34.05.570(3)(d)	7
76.09.040(3)	15
82.02.020	2, 8-11, 13
WAC 173-26-221(2)(c)(iv)	15
173-26-221(3)(b)	15
222-23-010-030	15

County Codes

Clark County Code § 40.240.880	14
Jefferson County Code § 18.22.080	16
§ 18.22.140	16

	Page
§ 18.22.170(1), (4)(d)	8
King County Code § 21A.24.045	14
§ 21A.24.275(A)	14
§ 21A.24.365(D)	14
Kitsap County Code § 19.150.180	14
§ 19.300.315	14
Pierce County Code § 18E.10.140(H)(4)	14
§ 18E70.040.B	14
Snohomish County Code § 30.62B.330	14
Whatcom County Code § 16.16.310(c)(5)(b)	14
§ 16.16.355	14

Rule of Court

RAP 2.5(A)	17
------------------	----

Miscellaneous

EHB 1653	1, 16-19
EHB 1653 § 2(3)(b)	16
EHB 1653 § 2(3)(c)(i)	16, 18
EHB 1653 § 5	18

Page

Washington Department of Ecology, *available at*
[http://www.ecy.wa.gov/programs/sea/shorelines/smp/
mycomments/jefferson.html](http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/jefferson.html) (last visited, July 15, 2010) 17-18

INTRODUCTION

The County's failure to create a record demonstrating that its 100% vegetation retention standard was the product of a reasoned process violates the Growth Management Act's (GMA) "best available science" provision as a matter of law. Jefferson County's response to OSF's arguments is devoid of evidence in the record explaining how or why the County developed its 100% vegetation retention standard on all private property located in a "high risk" Channel Migration Zone (CMZ). There is simply no record showing the reasoning behind the County's decision to impose a 100% retention standard (as opposed to a 75%, 50%, or 25% standard), or demonstrating why it decided that landowners must preserve *all* vegetation. Nor is there any evidence that the County considered its own "best available science" concluding that bank protection would effectively reduce the risk of channel migration.

Without a record of a reasoned process, the County cannot demonstrate that its 100% retention standard is reasonably necessary to mitigate a direct impact of the proposed development. The Growth Management Hearings Board erred when it upheld the County's CMZ regulations without the required record of a reasoned process. And the Legislature's recent enactment of Engrossed H.B. 1653 (EHB 1653) requires

reversal of the County's non-conforming use provisions. OSF respectfully requests that this Court reverse the Growth Board's decisions and remand the matter for further proceedings to bring the County's critical areas ordinance into compliance with the GMA.

STANDARD OF REVIEW

Jefferson County asks this Court to review OSF's appeal under a standard of review that it calls "deference times two." County Resp. Br. at 7-11. This standard, however, is not set out in the Administrative Procedures Act, Ch. 34.05 RCW, which controls in this case. It appears that the County cobbled together several inapplicable standards—the standard of review before the Growth Board and the standards applicable to substantial evidence challenges and statutory interpretation by expert agency—to formulate a non-existent standard. County Resp. Br. at 7-11. The County mistakes OSF's appeal as arguing that the Board's conclusions were not supported by substantial evidence in the record. OSF's appeal, however, argues that the Growth Board erroneously applied the GMA and violated the constitutional principles incorporated into RCW 82.02.020 when it entered a series of conclusions of law in its final decision and order and compliance order. OSF Opening Br. at 2-3. These challenges are brought under RCW

34.05.570(3)(a) and (d), and are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45 (1998).

ARGUMENT AND AUTHORITIES

I

THE COUNTY'S PROHIBITION ON ANY DEVELOPMENT OF PRIVATE PROPERTY WITHIN A CMZ VIOLATES THE GMA'S "BEST AVAILABLE SCIENCE" PROVISION

A. **Jefferson County Failed To Create a Record Demonstrating That Its Uniform Vegetation Retention Standard Was the Product of a Reasoned Process**

Jefferson County's response brief does not address OSF's argument that the Growth Board misapplied the GMA's "best available science" provision when it upheld the County's CMZ regulations without a record demonstrating that the uniform 100% vegetation retention standard was the product of a reasoned process. County Resp. Br. at 24-30; *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 834-38 (2005) (The County was required to create a record showing that it engaged in a reasoned process demonstrating how and why it developed its critical area regulations.). Instead, the County addresses OSF's arguments as if they simply challenge the Growth Board's decision under the substantial evidence standard. County Resp. Br. at 27-30. But the County's post-hoc substantial evidence arguments are irrelevant because the County failed to create a

contemporaneous record demonstrating that its decision to prohibit all development of private property within “high risk” CMZs was the product of a reasoned process.

Honesty in Env'tl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL), is instructive of the “reasoned process” requirement. *Id.*, 96 Wn. App. 522, 532-34 (1999). In *HEAL*, the City of Seattle had adopted amendments to its steep slope regulations as part of its critical areas update. *Id.* at 525. The City’s stated purpose for its new regulation was to protect property and the public by preventing erosion of steep slopes. *Id.* The legislative record, however, contained reports from geotechnical engineers concluding that the city’s prohibition against steep slope disturbance would not effectively prevent erosion.¹ Nevertheless, Seattle adopted its steep slope regulations without discussing the dissenting scientific viewpoints.²

Seattle argued that the GMA’s “best available science” provision did not require that it engage in any sort of substantive review of the competing science. *HEAL*, 96 Wn. App. at 529-30. The court rejected the argument and concluded instead that the identification of critical areas is a uniquely

¹ See *City of Seattle Respt’s Br.*, Wash. Ct. App. Div. 1 No. 40939-5-I at 3-7 (Dec. 17, 1997).

² See *id.* at 7.

scientific inquiry that should identify the “nature and extent of [the critical areas’] susceptibility” to damage that will in fact result from use or development of the property. *Id.* at 533. Moreover, the court held that the GMA does not grant local government boundless discretion because critical areas policies that restrict the use of private property must not be unduly precautionary, or based on “speculation and surmise.” *Id.* at 531 (quoting *Bennett v. Spear*, 520 U.S. 154, 176 (1997)). The Court of Appeals held that Seattle’s steep slopes regulation failed to comply with the GMA, concluding that a local government “cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make.” *HEAL*, 96 Wn. App. at 533-34.

Jefferson County repeats Seattle’s errors. The County’s legislative findings state that it adopted its CMZ regulations in order to protect property and people from the risk of damage or harm due to channel migration. AR 2 at 17 (legislative finding 40). But the legislative record is silent on how the 100% vegetation retention standard is necessary to achieve the County’s stated purpose for the regulation. There is no discussion of a 100% vegetation retention standard in the “best available science,” critical area committee notes, or even the County’s February 12, 2008, Staff Report proposing the CMZ regulations. *See* AR 1 at 465 (The only regulatory

restriction discussed is a 30-foot building setback.). During the hearing before the Growth Board, the County explained that the reason it decided to impose a 100% vegetation retention standard was not to mitigate against the risk of channel migration, but instead to “ensure that the stream has a protective buffer in the future even if the stream were to move away from its present location”—a purpose wholly unrelated to the County’s legislative statement of purpose. Oct. 7, 2008, RP at 50. The record, however, does not support that explanation either. The County’s Best Available Science Review confirms that its 50-150-foot stream buffers were sufficient to provide bank roughness and woody debris, both of which could slow (but not effectively mitigate against) channel migration. *See* AR 1 at 505 (The County’s stream buffers “will protect the vast majority of the functions and values provided by riparian vegetation to maintain high quality fish habitat and riverine functions.”). In fact, the only critical area committee report discussing tree retention concluded that channel migration “*is especially prevalent where a mature riparian or floodplain forest and abundant sediment supply exists, such as on rivers in Jefferson County.*” AR 1 at 719 (emphasis added).

The County’s decision to mandate that all property owners within “high risk” CMZs (which range from dozens to thousands of feet landward

from the river) preserve the existing vegetative conditions on their land to promote the growth of mature forests is inexplicable without a record demonstrating that the County engaged in a reasoned process of evaluating the science. The Growth Board could not properly apply the GMA's "best available science" requirement without a record of the County's reasoned process. *See e.g., Swinomish Indian Tribal Cmty. v. The Western Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 421 (2007) (The County is required to create a record explaining why it departed from conclusions in the scientific record.); *Friends of Skagit County v. Skagit County*, No. 96-2-0025, 1998 WL 637160, at *12 (W. Wash. Growth Mgmt. Hearings Bd. Sept. 16, 1998) (The County is required to evaluate on the record all proposed solutions recommended by "best available science.") (cited favorably by *Ferry County*, 155 Wn.2d at 834-35). The Growth Board's decision upholding the County's critical areas ordinance should be reversed and remanded. RCW 34.05.570(3)(d).

B. The County Fails To Show That Its Vegetation Retention Standard Satisfies The Constitutional Nexus and Rough Proportionality Tests Incorporated in The GMA's "Best Available Science" Requirement

Jefferson County does not dispute that its vegetation retention standard automatically applies to all development applications for property located within a "high risk" CMZ without exception. *See County Resp. Br.*

at 31-36; JCC 18.22.170(1), (4)(d). Nor does the County dispute that its uniform, preset 100% vegetation retention standard violates RCW 82.02.020 as interpreted by *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 763 (2002), and *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 663 (2008), *rev. denied*, 203 P.3d 378 (2009).³ See County Resp. Br. at 31-36. Instead, the County argues that *Isla Verde* and *Citizens' Alliance* do not apply to critical area regulations. See County Resp. Br. at 31-36. The County's arguments lack merit.

1. Development Conditions Must Satisfy Nexus and Rough Proportionality Regardless of Their Purpose

Nothing in *Isla Verde* or *Citizens' Alliance* limits the applicability of RCW 82.02.020's nexus and rough proportionality requirement to critical area regulations. To the contrary, our Supreme Court held that, even where it is clear that a development may cause some impacts to an environmentally sensitive area, the record must demonstrate the extent or significance of the negative impact and how the condition will mitigate for that impact for a

³ *Isla Verde*, 146 Wn.2d at 763 (A development condition cannot be “uniformly applied, in the preset amount, regardless of the specific needs created by a given development.”); *Citizens' Alliance*, 145 Wn. App. at 665 (The nexus and proportionality limits of RCW 82.02.020 do not permit local government to impose conditions “that are reasonably necessary for all development, or any potential development.”).

condition to satisfy the nexus and rough proportionality tests.⁴ *Isla Verde*, 146 Wn.2d at 762, 763 (Development conditions “may not be imposed automatically, but must be tied to a direct impact of the proposed development.”). Division I of this Court similarly held that “no Washington law supports the County’s argument” that critical area regulations adopted under the GMA were “exempt from the requirements of RCW 82.02.020.” *Citizens’ Alliance*, 145 Wn. App. at 663; *see also HEAL*, 96 Wn. App. at 533-34 (RCW 82.02.020 applies to critical area regulations); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (a condition on development is subject to nexus and rough proportionality, *regardless of its purpose*).

The County does not address the holdings of *Isla Verde*, *Citizens’ Alliance*, or *HEAL* on this issue. Instead, the County cites three inapplicable cases for the proposition that other Court decisions have recognized or upheld environmental regulations. Resp. Br. at 32-34 (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 323 (1990) (Affirming dismissal of an inverse condemnation claim “based upon the owner’s failure to exhaust its administrative remedies.”); *Young v. Pierce County*, 120 Wn. App. 175, 184-

⁴ The property at issue in *Isla Verde* included woodland areas, steep slopes, and wildlife habitat. *Isla Verde*, 146 Wn.2d at 762. The Court acknowledged that the proposed development would impact environmentally sensitive areas, but the City was unable to show a connection between its mandatory 30% open space condition and the impact of the development. *Id.*

85 (2004) (Affirming LUPA decision that Pierce County's critical areas regulations applied to property designated as containing "unverified wetlands." The Court was neither asked, nor did it decide, whether the County's wetland buffers complied with the GMA or RCW 82.02.020.); *Swinomish Indian Tribal Cmty.*, 161 Wn.2d 415 at 430-31 (Affirming the Growth Board's conclusion that the GMA does not require a local government to establish mandatory buffers.)). None of these cases address the issues raised in this appeal. They are irrelevant. Our Supreme Court's decision in *Isla Verde* is binding and requires reversal of the Growth Board's decision upholding the uniform 100% vegetation retention standard.

**2. The County Fails To Demonstrate That Its
100% Vegetation Retention Standard Satisfies
The Nexus and Rough Proportionality Tests**

Jefferson County did not satisfy its burden to demonstrate that its uniform and preset 100% vegetation retention condition on all new development within "high risk" CMZs satisfies nexus and rough proportionality. *Isla Verde*, 146 Wn. 2d at 763; *Citizens' Alliance*, 145 Wn. App. at 668-69. To demonstrate nexus, "[t]he government must show that the development for which a permit is sought will create or exacerbate the identified public problem." *Citizens' Alliance*, 146 Wn. App. at 669 (quoting *Burton v. Clark County*, 91 Wn. App. 505, 521-22 (1998)). Proof of a causal relationship between an identified impact of the development and a public

problem is necessary, because “the necessary relationship will not exist if the development will not adversely impact the identified public problem.” *Id.* To demonstrate rough proportionality, the County must “show that its proposed solution to the identified public problem is ‘roughly proportional’ to that part of the problem that is created or exacerbated by the landowner’s development.”⁵ *Burton*, 91 Wn. App. at 523. A development condition “may not be imposed automatically, but must be tied to a direct impact of the proposed development.” *Isla Verde*, 146 Wn.2d at 763. “RCW 82.02.020 requires strict compliance with its terms.” *Isla Verde*, 146 Wn.2d at 755.

The County fails to address the nexus and proportionality tests, arguing instead:

[W]here an ordinance requires protection of the critical area itself, and the landowner’s property *is* the critical area, the application of the regulation to the landowner provides the nexus. Similarly, the proportionality analysis is satisfied in Jefferson County’s CAO, because the landowner is only required to protect that *portion* of his land which constitutes the critical areas.

County Resp. Br. at 36. This explanation ignores the requirement that the County demonstrate that the regulated development create or exacerbate an

⁵ *HEAL*, 96 Wn. App. at 533-34 (“Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate.”).

identified public problem. The County has not shown how every potential development or use of private property within a “high risk” CMZ will result in an identical, increased risk of channel migration. County Resp. Br. at 31-36. Indeed, it cannot. The “best available science” concluded that actual risk of channel migration will vary based on several site-specific factors such as the existing vegetation conditions (AR 1 at 258-59, 261, 272, 277); whether the lot is cleared, developed, or undeveloped (AR 2 at 40-44); whether the property is protected by existing bank protection (AR 1 at 273-75, 278, 351, 371 428-29, 431); and whether the lot was designated “high risk” due to reported data errors or assumptions in the delineating studies. AR 1 at 278, 331, 361. Without considering the actual impacts of development within a “high risk” CMZ, it is impossible for the County to demonstrate that any proposed use will increase the risk of channel migration.

Without establishing nexus, the County cannot show that its 100% vegetation retention standard is roughly proportional to the risk of channel migration caused or exacerbated by a landowner’s proposed development. The Growth Board erred when it upheld a uniform 100% vegetation retention standard despite binding supreme and appellate court precedent holding that uniform development conditions are unlawful. The Growth Board’s decision should be reversed and remanded for further proceedings to bring the

County's regulations into compliance with the law. RCW 34.05.570(3)(a),
(d).

3. RCW 82.02.020 Does Not Require That a Property Owner Formally Dedicate Land for a Condition To Be Subject To The Nexus and Proportionality Tests

Jefferson County argues in passing that its CMZ regulations are unlike the facts in *Dolan* because the County does not require that regulated property owners formally dedicate a portion of their property. County Resp. Br. at 35-36. This argument is irrelevant. In *Isla Verde*, our Supreme Court held that where a local government could not demonstrate that its development condition satisfies nexus and proportionality, the Court "need not decide whether the set aside provisions require a dedication of land for the purposes of RCW 82.02.020[.]" *Id.*, 146 Wn.2d at 759; *see also Citizens' Alliance*, 145 Wn. App. at 663, 670 (holding that a mandatory clearing restriction is subject to RCW 82.02.020 as an indirect "tax, fee, or charge" on development, even though it does not require a formal dedication of land). Jefferson County offers no reason for this Court to revisit this well-settled issue.

C. The County's Reference to Other CMZ Regulations is Irrelevant

Jefferson County argues that the bare fact that three other counties have regulations limiting development within CMZs supports the Growth Board's conclusion that the County's mandatory 100% vegetation retention

standard complied with the GMA.⁶ *See* County Resp. Br. at 30-31. In fact, there are no court or Growth Board decisions reviewing any of the CMZ regulations for compliance with the GMA's "best available science" requirement. And the other county codes are significantly different from Jefferson County's in that they specifically allow development of private property within a CMZ depending on the type of structure and/or site-specific conditions.⁷ While it may be true that other counties have adopted CMZ regulations, this fact alone proves nothing.

Jefferson County also directs this Court's attention to the Department of Ecology's guidelines for the implementation of the Shoreline Management

⁶ Only ten other counties address CMZs in their critical areas regulations—a fraction of Washington's 39 counties. AR 1 at 609.

⁷ *See* Kitsap County Code §§ 19.150.180; 19.300.315 (imposing buffers on CMZs but allowing for a 50% reduction of buffer size to allow for construction of a single-family residence, and a 25% reduction for other uses); Snohomish County Code § 30.62B.330 (allowing new development within a CMZ if a property owner installs fish friendly shoreline and bank stabilization); Whatcom County Code §§ 16.16.310(c)(5)(b); 16.16.355 (designating CMZs as erosion hazard, but permitting some development and shoreline protection within CMZ); *see also* King County Code §§ 21A.24.275(A); 21A.24.365(D); 21A.24.045 (permitting development of construction of new dwelling units, nonresidential structures, and expansion of existing structures in severe risk CMZs subject to restrictions); Pierce County Code §§ 18E.10.140(H)(4); 18E70.040.B (discouraging new development within floodway, unless the property is designated to be in a floodway because it is in a CMZ in which case the property owner retains their development and use rights subject to restrictions); Clark County Code § 40.240.880 (imposing a buffer on CMZs, but development can occur in the buffer if necessitated by the proposed use).

Act (SMA) and the Department of Natural Resources' Forest and Fish regulations. *See* County Resp. Br. at 26-27. The County argues that the recognition of CMZs in these regulatory programs justifies its 100% vegetation retention standard. *Id.* The differences between these programs and the County's regulations show just how out of step Jefferson County is with the State's regulatory practices. Unlike the County's CMZ regulations, Ecology's SMA guidelines strictly limit the definition of CMZs to active historic channel beds, and recognize the need to manage—not prohibit—shoreline development within CMZs by including regulations authorizing shoreline stabilization and providing incentives to enhance the environment. *See* WAC 173-26-221(2)(c)(iv); WAC 173-26-221(3)(b). The State's Forest Practices Act imposes restrictions on tree removal within certain portions of a CMZ, but requires compensation for the lost value of timber. RCW 76.09.040(3); WAC 222-23-010-030. Neither of these regulatory programs justifies the County's mandatory 100% vegetation retention standard for all private property within a "high risk" CMZ.

II

JEFFERSON COUNTY'S REFUSAL TO COMPLY WITH RETROACTIVE AMENDMENTS TO THE GMA IS NOT MOOT

Jefferson County's "high risk" CMZ delineations subject existing development located within shorelines of the state to the nonconforming use

provisions of its critical areas ordinance.⁸ See AR 1 at 581-83 (Jefferson County Pre-Hearing Brief (citing JCC 18.22.080, JCC 18.22.140)). However, the retroactive GMA amendments in EHB 1653 prohibit the County from deeming existing and vested development within the shorelines of the state nonconforming:

- (b) *Except as otherwise provided in (c) of this subsection, development regulations adopted under this chapter to protect critical areas within shorelines of the state apply within shorelines of the state until the department of ecology approves [a new SMP].*

EHB 1653 § 2(3)(b) (emphasis added).

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

EHB 1653 § 2(3)(c)(i) (emphasis added). The County does not dispute that its nonconforming use provisions conflict with EHB 1653 § 2(3)(c)(i). See

⁸ AR 1 at (FDO) 16-17 (“The regulations at issue for OSF in this case relate primarily to the County’s adoption of [CMZs] for four of its most prominent rivers. The Board notes all of these rivers are within the jurisdiction of the SMA[.]”).

Jefferson County Resp. Br. at 37-38; *see also* AR 1 at 581-83 (Any existing development within a “high risk” CMZ constitutes a nonconforming use; the County’s critical areas ordinance “places restrictions on any expansion or change of use[.]”).

The County does contest that the Legislature’s intervening, retroactive amendment of the statute authorizes this Court to review this conflict.⁹ RAP 2.5(a); *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 441 (2008). Instead, the County asks this Court to disregard the clear conflict with the GMA because its failure to comply with EHB 1653 could potentially become moot if the Department of Ecology approves its new shoreline master program during the pendency of this appeal. County Resp. Br. at 38-39. The County’s argument is flawed for two reasons. First, there is no guarantee whether or when Ecology will approve Jefferson County’s shoreline master program.¹⁰ Second, the Legislature intended that the property rights and

⁹ The County asks that this matter be remanded for consideration by the Growth Board so that it can create an administrative record on this issue. County Resp. Br. at 37. But the County fails to identify any additional information needed to resolve this issue of law. *Id.* And given its position before the Growth Board that its nonconforming use provisions apply to existing development within CMZs, further remand and review would be futile. The fact is that there are only three pieces of relevant information: the County’s code provision, its explanation of how the provisions operate, and the plain language of EHB 1653.

¹⁰ More than nine months ago, Jefferson County argued that OSF’s challenge to its application of critical area restrictions to shoreline property was moot
(continued...)

protections created in EHB 1653 § 2(3)(c)(i) be adopted and applied retroactively to July, 2003. EHB 1653 § 5. This Court must implement EHB 1653, and thus must resolve the the conflict between the County's critical areas regulations and the GMA. *State v. Eaton*, 168 Wn.2d 476, 480 (2010) (The purpose of statutory interpretation is to determine and carry out the Legislature's intent.). The conflict between the County's nonconforming use provisions and EHB 1653 is not moot. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. 2d 161, 177-78 (1999) (An issue that has never been decided is not moot.); *Orwick v. City of Seattle*, 103 Wn. 2d 249, 253 (1984) (An issue will only be deemed moot if the court can no longer provide effective relief.). Moreover, questions regarding compliance with the GMA are generally not considered moot where they raise issues that are public in nature and likely to recur, and an authoritative

¹⁰ (...continued)

because of the County's pending shoreline master program update. CP 199. But the County's master program update will not be adopted for some time. Ecology's website states that it is currently reviewing the County's proposed shoreline master program update, which includes over 300 public comments. Jefferson County must prepare a Responsiveness Summary addressing those public comments. Thereafter, Ecology will issue Findings and Conclusions summarizing essential issues raised by the update, the public comments, and the County's responses to the issues and comments. See Washington Department of Ecology website (<http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/jefferson.html>) (last visited, July 15, 2010).

determination is desirable to provide further guidance to the public. *Wells v. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 667 n.10 (2000).

Jefferson County alternatively suggests that this Court should simply leave its nonconforming use provisions in place, and let individual land use applicants challenge the County's code for compliance with the GMA at the time of a permit decision. That approach would effectively affirm the County's nonconforming use provisions despite their clear conflict with EHB 1653, because *Woods v. Kittitas County* bars property owners from challenging County land use decisions on the basis that they violate State policies contained in the GMA (including the new property rights and protections created by EHB 1653). *Id.*, 162 Wn.2d 597, 610, 614 (2007). Property owners will have no avenue to enforce the new laws unless the County is required to update its development regulations to implement EHB 1653.

CONCLUSION

For the foregoing reasons, OSF respectfully requests that this Court reverse the Growth Board's decisions upholding Jefferson County's CMZ regulations, rule that the County's nonconforming use provisions conflict with EHB 1653, and remand the case to the Growth Board for further

proceedings to bring the County's critical areas ordinance into compliance
with the law.

DATED: July 15, 2010.

Respectfully submitted,



BRIAN T. HODGES, WSBA No.
31976

Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Petitioner

DECLARATION OF SERVICE

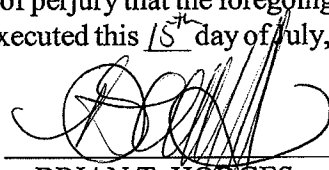
BRIAN T. HODGES declares as follows:

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

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

Mark R. Johnsen (Via U.S. Mail)
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028
Attorney for Jefferson County

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15th day of July, 2010, at Bellevue, Washington.



BRIAN T. HODGES