NO. 47641-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY, CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE TRUST, and CRAIG DURGAN, and HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Appellants,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, acting through the WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

OPENING BRIEF OF PETITIONERS OLYMPIC STEWARDSHIP FOUNDATION, et al.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises important questions of statewide significance concerning the implementation of the Shoreline Management Act (SMA), Ch. 90.58 RCW. This Court should overturn the decision of the Growth Management Hearings Board ("Growth Board") approving Jefferson County's Shoreline Master Plan update (the "Update"). The decision warrants judicial relief pursuant to RCW 34.05.570(3), including because the Update goes well beyond statutory limits placed on shoreline regulations and imposes constitutionally invalid exactions on private land not subject to the public trust doctrine.

The Legislature crafted the SMA to allow residential development and use of shoreline properties so long as adverse environmental impacts are minimized. RCW 90.58.020 ("It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses."). Rather than prohibit development, the Legislature chose to encourage preferred uses while "stressing the need that such future development be carefully planned, managed, and coordinated in keeping with the public interest." *State Dep't of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974). Development of single-family homes is a preferred "reasonable and

appropriate" use of the shorelines. WAC 173-26-241(3)(j); RCW 90.58.020.

Despite the SMA's policy of balance, Jefferson County enacted – and the Department of Ecology approved – an Update that (1) severely restricts any future development of private shoreline property based on *presumptions* about the range of *potential* impacts that may or may not occur if residential development is allowed (2) without regard to the efficacy of existing regulations which were already in place to control residential impacts[1] – under which the shorelines remained in good overall condition. Nonetheless, the Update restrictions include a uniform and preset 150-foot buffer, plus a 10-foot construction set aside, on all shoreline properties, regardless of whether the parcel is located in the middle of a built area or along a stretch of untouched rural land. Jefferson County Code ("JCC") § 18.25.270(4)(d)(e). This increases the size of shoreline buffers

[1] *E.g.*, a 50-foot buffer required by the old SMP, growth management restrictions on the creation of new urban-sized lots in rural areas (AR 2466), limits on creation of new impervious surface areas (JCC § 18.30.050, Table 6.1, 10%-25% limit) (**Appendix A-1**), and stormwater controls that require infiltration of runoff. *See* Department of Ecology Stormwater Manual for Western Washington, Vol. III, §§ 3.1, 3.3.5, 3.10-3.11, Vol. V at pp.5-33 through 5-43 (2014), excerpts, Chapters 1, 3, attached to Declaration of Jon Brenner ("Brenner Decl."), dated February 21, 2016, ¶ 11, Exs. J, K and L. The Brenner Declaration (and other referenced declarations) are found in the Olympic Stewardship Foundation's ("OSF") Evidence Submittal re Constitutional Issues filed and served contemporaneously with this Opening Brief. The Jefferson Code requires compliance with the Manual. *See* JCC § 18.30.070 (**Appendix A-2**). Conversion of pervious surface to impervious surface in Jefferson County has been gradual, with an increase in the 10-year period between 1991 and 2001 of only 0.2% (2.8% to 3.0%). Cumulative Impacts Analysis (AR 000005656 at 8,Table 1.

by as much as 300% despite lack of any showing that environmental conditions supported this increase.

Finally, the Update treats the entire shoreline as a "critical area" – despite a Critical Areas Ordinance limiting that designation to certain shorelines – and imposes no-build, vegetation retention restrictions that encompass 80% of the area within the 200-foot SMA upland jurisdiction line, significantly impacting the development rights and value of approximately 3,544 shoreline properties and 1,480 inland shoreline parcels. *See* AR 000007384 (**Appendix A-3**). The area required to be set aside (14.49 square miles) is considerably larger that the City of Port Townsend, which is 9.5 square miles![2] Since the County announced its decision to adopt this Update, the value of shoreline properties have decreased 18.5% while all other properties have maintained their value.[3]

The Growth Board upheld the Update based on its erroneous conclusion that private property rights are "secondary" to the SMA's "primary" purpose of protecting the environment. Final Decision and Order ("Decision"), at 80.[4] Based on that conclusion, the Board misinterpreted several statutory and regulatory provisions to advance only environmental

[2] *See* Declaration of Eugene (Gene) Farr ("Farr Decl.) dated February 19, 2016, ¶¶ 9-11.

[3] *Id*. at ¶ 15.

[4] *See* **Appendix A-3**. For the Court's convenience, cites are to the Decision found in the Appendix. The Decision is in the Record (AR 000007453-7565).

interests (Decision at 31), and relieve the County of the requirement that it demonstrate that any new restrictions are necessary and effective. (Decision at 21, 24). The new buffer conditions also are constitutionally invalid. The Board's ruling is an erroneous interpretation of the SMA and Ecology's regulatory guidelines, exceeds it authority, is unsupported by substantial evidence, violates constitutional principles, and must be reversed under RCW 34.05.370(3).

II. ASSIGNMENT OF ERROR AND ISSUES PERTAINING THERETO

Appellants assign the following errors to the Growth Board's March 16, 2014 Final Decision and Order erroneously dismissing the appeal and affirming Jefferson County's SMP Update.[5]

Error 1. The Growth Board interpreted RCW 90.58.020 as establishing state policy that property rights are "secondary" to the "primary" goal of protecting, restoring, and enhancing the environment. Decision at 31, 80.

[5] The Growth Board made no formal conclusions of law and entered no findings of fact to which Appellants can assign error. RCW 34.05.461(3) ("final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ."). OSF assigns error to language denominated as "Finding," Decision at p. 20 line 7; p, 21, lines21, 23, 25; p. 24, line 14; p 25, line 17; p 26, line 4; p 31, line 9; p. 32, line20; p. 34, line3; p. 35, line 18;'p. 43, line 17; p. 45, line 22; p 49, line 4; p. 50, line26; and p. 52, line 3.. OSF raised as issues before the Board the lack of evidence supporting the Update, including the new marine buffer. *See* Petition, AR 000000025-519, p.12 (Paragraph 6.3, AR 000000036, Issues Nos. 1, 88, 91-94, 170-186, among others, AR 000000048, 000000056-58.

Issue 1. Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the SMA to declare private property rights "secondary" to the SMA's "primary" purpose of protecting the environment.

Error 2. The Growth Board interpreted the phrase, "no net loss," as used in both the Guidelines and Update, to prohibit all new development impacts. Decision at 31-34; 50, 52.

Issue 2. Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the phrase "no net loss" to prohibit all new development impacts, rather than requiring that the landowner minimize or avoid them in so far as practicable.

Error 3. The Growth held that Jefferson County could require forced restoration of conditions not caused by a proposed shoreline development. Decision, at 50, 52

Issue 3: Whether under a *de novo* standard of review, the Growth Board erroneously interpreted the phrase "no net loss" to authorize local governments to require landowners to restore and/or enhance already degraded shorelines as a condition of permit approval.

Error 4. The Growth Board determined that Jefferson County was not required to follow the update requirements set out in WAC 173-26-186 and WAC 173-26-201, and as required by RCW 90.58.020 and RCW

90.58.080(1). As a result, the Board failed to review the Update for compliance with those requirements, and failed to review the County and Ecology's underlying findings and conclusions. Decision at 19-26, 31, 38-42, 44-45, 49.

Issue 4. Whether under a *de novo* and substantial evidence standards of review, the Growth Board erroneously interpreted the policy of RCW 90.58.020 to provide that (a) the County was not required to comply with the regulatory provisions requiring that local government demonstrate the necessity and effectiveness of new restrictions before updating an SMP; and (b) Ecology's agency action ensures implementation of the SMA "coordinated planning" directive.

Error 5. The Growth Board dismissed as waived several arguments that had been raised, briefed, and/or incorporated by reference in OSF's briefs below. Decision at 12-14.

Issue 5. Whether under a *de novo* standard of review, if not harmless error, the Growth Board erroneously applied the law, engaged in unlawful procedure, failed to follow prescribed procedure or failed to decide all issues requiring resolution when it refused to review issues actually raised and briefed.

Error 6. The Growth Board concluded that the County's critical areas ordinance, as incorporated by reference into the Update, satisfied the requirements of the SMA and Guidelines. Decision at 48-49.

Issue 6. Whether under the *de novo* and substantial evidence standards of review the Growth Board erred by concluding that the County's critical areas ordinance, incorporated by reference into Update, satisfied the update requirements set out in the SMA and Guidelines.

Error 7. The Growth Board affirmed a 41% expansion of the Natural Shoreline designation.

Issue 7. Whether the Growth Board erred in upholding the Natural Shoreline designation expansion.

Error 8. The Board entered a Final Decision and Order upholding Ecology's approval of the Update.

Issue 8. Whether the Board erred in concluding that the Update was compliant with the Shoreline Management Act and WAC Chapter 173-26, the Implementing Guidelines for the Update.

Error 9. Whether OSF's claim that the Update imposed mandatory conditions on new development permits in violation of the unconstitutional conditions doctrine dismissed by the Board for want of jurisdiction should be affirmed on appeal. Decision at 6-7, 45. This claim is now properly before the Court.

Issue 9. Whether the Update violates the takings clauses of the Washington and United States Constitution by allowing the County to exact conservation buffers and public access easements as a mandatory condition of permit approval when such conditions violate the unconstitutional conditions doctrine because the exactions are (a) imposed in a preset and uniform manner, and (b) wholly unrelated to the actual impacts of the proposed developments.

Issue 10. Whether this Court should award Appellants attorney fees under the Equal Access to Justice Act.

III. STATEMENT OF THE CASE

A. Owners of Shoreline Property Hold Several Well-Recognized and Constitutionally Protected Property Rights.

This case involves a government decision to adopt severe regulatory restrictions on the use and enjoyment of private property. A brief overview of the rights inherent in shoreline property ownership begins with the general proposition that the term "property" refers to the collection of protected rights inhering in an individual's relationship to his or her land. *United States v. General Motors Corp.*, 323 U.S. 373, 378, (1945). Among these are the rights to possess, use, exclude others, and dispose of the property. *Id*. In addition, shoreline property owners hold several "'special

rights' with regard to the water and foreshore."[6] *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 707-08 (2010); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: the Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1439 (2005). These additional rights include the rights of access to the water, to use the water for certain purposes, to receive accretions and relictions, and to defend one's property against the elements. *See*, *e.g.*, *Stop the Beach*, 560 U.S. at 708; *Cubbins v. Mississippi River Comm'n,* 241 U.S. 351, 363-64 (1916). Many of those rights are recognized by the SMA, which includes the "preferred" right to build a single family residence and appurtenant structures; the right to make recreational use of the shoreline; and the right to protect one's home against damage or loss due to erosion. RCW 90.58.020; RCW 90.58.100(6). Each of these rights is protected by the constitution. *Manufactured Hous. Comm'ties of Wash. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000) (A

[6] In Washington, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). Wash. Const., Art. XVII, Sec. 1; *Caminiti v. Boyle,* 107 Wn.2d 662, 669, 732 P.2d 989 (1987). The area subject to the "public trust" does not include lands above the high water mark. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203, (2004) ("No Washington case has applied the public trust doctrine to terrestrial wildlife or resources."); *see also* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 585 (1992) (An attempt to expand the public trust to upland properties may give rise to a claim for an uncompensated taking).

"regulation [that] destroys one or more of the fundamental attributes of ownership" will violate the Takings Clause).

B. The SMP Update

In February 2014, Ecology approved Jefferson County's comprehensive SMP update. CP 11 (OSF Petition 11).[7] Despite many public comments and public meetings and hearings, the new SMP is actually the product of a small group of agency regulators and Jefferson County Department of Community Development staff. Many comments pointed out that this group had a narrow, predetermined focus to stop development and force restoration.[8] *See, e.g.*, AR 000005418. Staff did not even consider the old SMP or compare its provisions to the new SMP regulations. Staff commenced the update using an unadopted 2000 draft (Res. No. 77-09, AR 000002562) and the Whatcom County draft SMP as a template. (AR 000004670-4709).

The County prepared only a very limited scientific record to support the Update, which record is summarized in the Cumulative Impacts Assessment (CIA) (AR 000005645-5721) and *Final Shoreline Inventory*

[7] The SMP is codified in the Code as JCC Chapter 18.25. *See* **Appendix A-5** hereto. The record cite to the Update is AR 000000065-337. The County's Critical Areas Ordinance is codified as JCC Chapter 18.22. *See* **Appendix A-6** hereto.

[8] The Chair of the Jefferson County Planning Commission pointed out the Staff predisposition to the Growth Board of County Commissioners and that as a result, **meaningful comment** on the SMP did not occur. *See* AR 000003140-47.

and Characterization Report – Revised (2008) (Inventory). (AR 000003451-3720). The County conceded that the Inventory was only intended to "characterize, in a general manner, the ecosystem processes that shape and influence conditions along each reach of the County's shoreline." Inventory at 1-2; AR 000003464-65. Indeed, due to gaps in data and the general nature of the analysis, the Inventory cautioned that, "in many cases," determining the actual conditions of a shoreline property "will require additional, site-specific/time-specific data and/or analyses."[9] *Ibid*.

Relying on the "general recommendations," the County concluded that a generic 150-foot marine buffer standard (and 10-foot setback) would be large enough to ensure that *if* a shoreline property is providing any of the potential benefits to the marine environment, the benefits will be protected. That conclusion, however, only takes into account the alleged, general needs of the environment – it does not consider how *little* land would be needed to protect existing conditions from adverse environmental impacts. WAC 173-26-201(2)(e)(ii)(A) (Regulations must "not result in required mitigation in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions.").

[9] The Inventory was only intended as general guidance, reporting significant differences in the ecological conditions throughout the County—which is to be expected, given that an inlet along Hood Canal is very different from the Pacific coast.

Despite the SMA mandate for "coordinated planning" (RCW 90.58.020), and the Guidelines' mandate to assess the beneficial aspects of the existing regulatory regime before developing an Update (WAC 173-26-186(8)(d)(iii)), neither the County nor Ecology analyzed the effectiveness of existing shoreline regulations as part of its update process and the Growth Board erred in upholding this oversight.[10] *See* Decision at 20. *See also* OSF Evidence Submittal, Declaration of Robert F. Cousins dated February 18, 2016 ("Cousins Decl."), ¶¶ 5, 6, 16, 21, setting out the current regulatory regime. Instead, the Update was adopted based on the assumption that "any use/development that would cause a net loss of ecological functions or processes" must be prohibited. (CIA at 2; AR 000005650). Thus, the County and Ecology viewed only potential "loss" without consideration of the benefits of existing regulations or differences in discrete shoreline parcels and development proposals. *Ibid*.

The reason for this one-sided inquiry is made clear by the record. The County expressed a desire to "go beyond" the "minimum" required by the SMA to provide for a "net gain" (rather than "no net loss") for important shoreline ecological processes and functions by requiring new properties to

[10] The Inventory further cautioned that it was not intended to provide a "full evaluation of the effectiveness of the SMA or the County's existing shoreline policies or regulations." AR 000003464.

be redeveloped "… in accordance with the new policies and regulations." AR 000005650 (CIA); AR 000002566 (Res. No. 77-09).

C. Documented Local Circumstances Were Ignored

The County's justification for tripling the size of the buffers on properties mostly zoned large lot (one dwelling unit per five acres) was ostensibly for the protection of general shoreline functions. Decision, at 42-43. Yet, the County's analysis of its shorelines reported that they were in overall good condition, and most of the pollutant loading identified was due to upland agricultural (manure and fertilizer), public uses (wastewater treatment), and stormwater runoff, which are largely beyond the reach of SMA jurisdiction. *See* AR 000005678, 000005697 (CIA at 30, 49); AR 000002578 (Res. No. 77-09). As for marine waterfront homes the CIA concluded that "[i]n and of itself, residential development probably does not have major adverse effects on shoreline resources." AR 000005652 (CIA at 4). Further, any platting of new lots was "less than one percent in most cases" (CIA at 42, AR 000005609) and creation of new impervious surface between 1991 to 2001 was 0.02% (AR 000005666).

D. Impact of the New Regulations

The Update massively expanded regulatory restrictions on the development and use of shoreline property. The County deemed all privately owned property adjacent to a shoreline "critical areas." Decision

at 20 ("Jefferson County has designated its marine shorelines ... as critical areas."). Under the prior SMP and current CAO, however, shoreline critical areas (and buffers) were limited to important spawning areas, steep or hazardous slopes, and wetlands or associated wetlands.

The 1998 SMP contained five environmental designations: Urban, Suburban, Conservancy, Natural, and Aquatic. AR 000002463-64. Most of the County shorelines were mapped Conservancy or Suburban, permitting low density residential and recreational use "provided those activities do not significantly degrade or deplete resources and respect limiting environmental conditions." *Ibid*. The new SMP severely restricts those development rights by enlarging the "Natural" Shoreline Environment – an area subject to "the highest level of protection possible" (AR 000005716 (CIA at 68)) – from eleven percent (11%) of the County's shorelines to forty-one percent (41%).[11] AR 000002463.

The 1998 SMP only required a 50-foot buffer on shoreline properties. But the new SMP requires a 150-foot buffer plus a 10-foot building setback which "…shall be retained in the natural condition" except for "minor pruning." JCC§ 18.22.270(5)(a)(iii); JCC § 18.25.270(4)(d) and

[11] In the former SMP, the only shoreland areas classified as all "Natural" were the tidal flats at the northwest corner of Suquamish Harbor, and some of the sand spits and islands. Other areas were classified as Mixed Natural and Conservancy or Suburban. These included areas with marshes, estuaries, or feeder bluffs where the Natural classification ended at the High Water Mark or the top of the bluff. AR 000002463-64.

JCC § 18.25.270(e)(i)-(iii). In tandem with its "no build" 150-foot marine buffer, the JCSMP imposes a severe vegetation set aside. JCC § 18.25.310 sets a 20% limit on vegetation removal within "the required buffer area or 15 linear feet of the water frontage, whichever is greater."

The record is replete with testimony that the onerous new buffer and setback requirements severely impact residential home development and use. *See*, *e.g.*, OSF Exhibits OSF-12, 15, 17, 21, 22, 24, 25, 27, 29, 34, 37, 38, 40, 41, 43, 44 (40% reduction in value), 46 (loss of view), 48, 51, 64, 71 (no room to build), 73, 87 (no room to build), 94, 123, 145, 146, 156 (no room to build), 156 (1000 square feet buildable area out of 250,000 square feet owned), 220 (most lots in Port Ludlow Master Community not 150 feet deep), 289, 299, 300, 317, 332, and 354 (AR 000002734, 2739, 2758, 2762, 2763, 2766, 2767, 2770-71, 2788, 2814, 2818-19, 2819-20, 2821, 2828, 2829, 2831-32, 2834, 2845, 3100-102, 3123-24, 3126, 2127, 3130, 3134-35, 3166, 3198-99, 3445-50, 3835, 3836, 3943-44, 3947) (Summary of Comments). AR 000005750-5845; *See also* OSF Evidence Submittal, Declaration of Dennis Schultz dated February 19, 2016 ("Schultz Decl."), ¶ 16.

The Code provisions allowing for minimal adjustments to the prescriptive buffers are not effective. JCC §§ 18.22.270(6), .350(1), .460. First, the standard buffer can only be decreased by 25%. JCC

§ 18.22.270(6)(b). Second, when allowed for the marine buffer, in most contexts it is for unpermitted work on already developed lots. Declaration of Leann Ebe McDonald dated February 19, 2016 ("McDonald Decl."), ¶ 17, Ex. B. Third, it is very expensive. McDonald Decl., ¶¶ 28-29. Fourth, the required mitigation, which authorizes the County to demand that the owner go beyond a "no net loss" standard and provide for restoration and enhancement of the shoreline, is costly. *Ibid*. *See* JCC § 18.22.350(1). Fifth, lot size and configuration preclude possible reduction in many instances. Schultz Decl., ¶¶ 17-24.

E. Proceedings Below

OSF[12] challenged the Update before the Growth Board. AR 000000025-519. OSF contended that the County and Ecology failed to follow the statutory and regulatory rules for developing and adopting a new SMP. AR 000002461-62; AR 000002467-74. Specifically, OSF argued that the County's record did not support its decision to impose a uniform 150-foot buffer on all new marine development. AR 000002484-86. OSF also argued that the County's SMP violates the nexus and rough proportionality standards as set out by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. Tigard*,

[12] Appellants J. Eugene Farr, Wayne and Peggy King, Anne Barton, Bill Eldridge, Bud and Val Schneider, and Ronald Holsman are members of OSF. OSF Petition, p.2, CP 2.

512 U.S. 374 (1994). AR 000002482-84. It challenged the blanket designation of marine shorelines as "critical areas," as well as the "conservancy" and "natural" designations. AR 000002486-91; AR 000002493-94.

The Growth Board rubber-stamped Ecology's approval of the SMP, dismissing many of OSF's arguments without citation to facts or law. The Board placed no burden on Ecology or the County to show their work (affirming buffer size without any analysis of local conditions. In fact, the Board outright rejected the argument that the SMA and Guidelines required the County and Ecology to justify the new SMP regulations, concluding that a *required* SMP update is exempt from the rules governing all other SMP updates. Decision at 19-20. This administrative appeal (CP 1-182) is now before this Court upon a transfer from the Jefferson County Superior Court pursuant to RCW 34.05.518.

IV. STANDARD OF REVIEW

This Court reviews the Decision pursuant to the standards set forth in RCW 34.05.570(3) of the Administrative Procedure Act (APA). *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt.*

Hearings Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). Here, OSF contends that the Growth Board's decision is in violation of constitutional provisions; the Growth Board engaged in unlawful procedure or decision-making process; the decision is based on erroneous interpretation or application of the law; the decision is not supported by substantial evidence; the Board did not decide all issues on appeal; and the decision is arbitrary or capricious. RCW 34.05.570(3)(a), (c), (d), (e), (f), (i).

Challenges under subsections (a), (b), (d), and (f) raise questions of law and are reviewed de novo. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Errors alleged under subsection (e) are mixed questions of law and fact, where the reviewing court determines the law independently, then applies it to the facts as found by the Board. *Id*. For the purposes of subsection (i), arbitrary and capricious actions include "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Id*. Additionally, because the Board failed to include factual findings in its decision and order as required by RCW 34.05.461(3), all issues concerning lack of substantial evidence should be resolved in OSF's favor. *See Weyerhaeuser Co. v. Department of Revenue*, 16 Wn. App. 112, 114-15, 553 P.2d 1349 (1976) (When facts are not in

dispute, an appellate court is required to make a *de novo* review independent of agency's decision.).

V. ARGUMENT

OSF joins the challenge by Citizens' Alliance for Property Rights that the Update is invalid for the reasons set out in its Brief.

A. Because SMA Requires that Local Government Balance the Environment and Property Rights, the Board Erred When It Approved the Update on the Ground that Private Property Rights Are "Secondary" to Protection of the Environment.

The Growth Board's decision is tainted by its erroneous conclusion that under the SMA, private property rights are "secondary" to the "primary" purpose of protecting the environment.[13] Decision at 80. As a result, the Board misconstrued several statutory provisions and regulatory guidelines as advancing the goal of environmental protection without regard to property rights. Not only is the Growth Board's interpretation of the SMA contrary to the plain language and policy of the statute, it conflicts with decisions of our Supreme Court. Under the APA, this Court must reverse an agency decision that is based on an erroneous interpretation of the law, or is outside of the agency's authority.[14] RCW 34.05.570(3); *Diehl*

[13] This Court reviews an agency's interpretation of a statute de novo, with the objective of giving effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *State ex rel. Citizens Against Tolls (CAT) v. Murphy,* 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

[14] This will not be the first time the Growth Board must be corrected for failure to apply SMA policy. In 2003, the Growth Board ruled that "the primary and paramount policy mandate that the board gleans from a complete reading of RCW 90.58.020 … is one of

v. Western Wash. Growth Mgmt. Hearings Bd., 153 Wn.2d 207, 213, 103 P.3d 193 (2004).

The Growth Board's error is clear. It selectively quoted the pro-environment terms from the legislative findings and statement of policy in RCW 90.58.020 to make it appear that the Legislature intended that environmental interests will trump private property rights:

> [T]he Board finds that RCW 90.58.020 establishes a state policy to manage shorelines with an emphasis on the maintenance, protection, restoration, and the preservation of "fragile" shoreline "natural resources," "public health," "the land and its vegetation and wildlife," "the waters and their aquatic life," "ecology," and "environment."

Decision at 31. This attempt to reset state policy fails. The Legislature's intent for balancing is plain and unequivocal. The SMA states that "[i]t is **the policy of the state** to provide for the management of the shorelines of the state **by planning for and fostering all reasonable and appropriate uses**." RCW 90.58.020 (emphasis supplied). The provision explains that "coordinated planning is necessary in order to protect the public interest

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shoreline preservation, protection, enhancement and restoration." *Shorelines Coalition et al. v. City of Everett, et al.*, CPSGMHB Case No. 02-3-0009C, Final Decision and Order, p.15 (Jan. 9, 2003). After issuance of the Board's decision, the Legislature intervened, enacting Chapter 321 of the Laws of 2003. Therein, the Legislature stated that the SMA shall be: "… read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the decision of the Central Puget Sound Growth Management Hearings Board in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*."

associated with the shorelines of the state **while, at the same time, recognizing and protecting private property rights** consistent with the public interest." *Id*. (emphasis supplied). The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development or continued use, repair and maintenance of existing structures or developments: "**[a]lterations** of the natural conditions of the shorelines and shorelands **shall be** recognized by the department." RCW 90.58.020 (Emphasis supplied.) Single-family homes are expressly recognized as a priority use of the shorelines, which falls within allowed alterations. RCW 90.58.020; WAC 173-27-241(3)(j).[15] SMPs shall "insure that strict implementation of a program will not create unnecessary hardships or thwart the policy" of "fostering all reasonable and appropriate uses." (RCW 90.58.100(5)).

The SMA does contain qualifications to the effect that uses shall be preferred which are "consistent with the control of pollution and prevention of damages to the natural environment …." RCW 90.58.020. The language then continues: "… or are unique to or dependent upon the use of the state's shorelines." *Id*. The Legislature in proposing the SMA made the policy

[15] The SMA was adopted by the people as an Initiative submitted by the Washington Legislature. *See* Jeffrey Crooks, THE WASHINGTON SHORELINE MANAGEMENT ACT OF 1971, Washington Law Review, Volume 29, No.2, February 1974, p.424. The Voters Pamphlet assured citizens that the SMA if adopted would not prohibit development or exact public rights for a "tranquil environment." AR 000007224-337.

choice that "single-family residences and their appurtenant structures [shall be given priority]." RCW 90.58.020. Yet, the Growth Board focused solely on the words "control" and "prevention," ignoring the word "priority," and preference accorded to water-dependent waterfront homes. This is error. The term "priority" is defined as: "something that is more important than other things and that needs to be done or dealt with first; … something given or meriting attention before competing alternatives."[16]

In addition, the Board's interpretation of state policy directly conflicts with binding case law, holding that, while the SMA emphasizes protection of natural shorelines, it simultaneously allows for development, expressing the intent to protect private property rights and to foster all reasonable and appropriate uses of the shorelines.

> The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development. … As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks.

Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *see also Nisqually Delta Ass'n v. City of*

[16] http://www.merriam-webster.com/dictionary/priority.

DuPont, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012) (noting that protecting private property is an express policy of the SMA). The Board's error is manifest and must be reversed. *King Cty.*, 142 Wn.2d at 555 (Where the Supreme Court has interpreted a statute, its interpretation is final and binding).

B. RCW 90.58.080 Does Not Allow Unfettered Discretion to Adopt New Shoreline Regulations

The Board was mandated to ensure that the Update was compliant with SMA policies and the Guidelines for updating shoreline master programs, consistent with the policy of fostering appropriate development. *See* RCW 36.70A.480(3)(a); RCW 90.58.080(1). The Board failed to fulfill that mandate, and its decision must be reversed.

The Guidelines allow changes to an SMP *only* if Ecology and the County can show that they are "…deemed **necessary** to reflect changing local circumstances, new information or improved data."[17] WAC 173-26-

[17] The term "necessary" is defined as: "so important that you must do it or have it; unable to be changed or avoided; absolutely needed; of an inevitable nature." *See* http://www.merriam-webster.com/dictionary/necessary. The same qualifier applies as to imposition of buffers to protect critical areas. *See* RCW 36.70A.480(6).

090 (emphasis supplied); *see Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 54-56, 202 P.3d 334 (2009) (Guidelines provide that local government may amend a SMP when necessary to reflect changing local circumstances, new information or improved data). The Guidelines require that, as part of the process of determining whether additional regulations are necessary, the government should consider the "[b]eneficial effects of any established regulatory programs under other local, state, and federal laws." WAC 173-26-186(8)(d)(iii). Further, the Guidelines state that, "Before establishing specific master program provisions, local governments **shall** analyze the information gathered … and as necessary **to ensure effective shoreline management provisions**, address the topics below, where applicable." WAC 173-26-201(3)(d) (emphasis supplied). This requires that "regulations and mitigation standards" must be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i).

Without discussing WAC 173-26-186(8) and WAC 173-26-201, the Growth Board concluded that "Jefferson County does not need to 'justify adoption of a new SMP' as OSF's Issue No. 1 alleges." Decision at 20. *See also* Decision at 19 ("The Board concludes that neither the SMA nor the Guidelines require an analysis of how an existing regulatory scheme would

protect shorelines as compared to an amended SMP."). According to the Board, those WAC provisions are only applicable to *voluntary* updates, not *mandatory* updates – a conclusion unsupported by the SMA.

In addition, the Board concluded that the County complied with the Guidelines, without making any factual findings to support its conclusion, and despite the evidence in the record to the contrary. Thus, the conclusion is not supported by substantial evidence. The County's CIA contains no explicit consideration of the effectiveness of existing regulations (including its former 50-foot buffer). Nor could the CIA draw any conclusion about the effectiveness of the 150-foot buffer requirement because a buffer's functionality will vary widely based on a variety of site specific conditions: "[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of impervious surface and vegetated cover." AR 000005679 (CIA, p.31).

Simply, the old SMP was approved as SMA-compliant under SMA policies that have not changed. Some reason – other than the mere passage of time – is required in order to replace the old, effective regulatory program with an entirely new set of regulations.

1 The Record Does Not Support Designating All Marine Shorelines as "Critical Areas"

The Board's refusal to review the Update under the requirements of WAC 173-26-186 also resulted in a conflict between the County's shoreline regulations and critical areas ordinance (CAO), in violation of the SMA's coordination goal. The Update purports to both incorporate the CAO by reference and designate all shorelines as "critical areas" subject to the generic 150-foot buffer. *See* Decision at 20. The County's CAO, however, does not include a blanket "critical areas" designation for marine shorelines. *See* Cousins Decl., ¶ 20; Brenner Decl., ¶ 14, Exs. B-E. Instead, consistent with the Legislature's clarifying amendments to the SMA and GMA,[19] the CAO lists a series of factors that must be found present for a shoreline to qualify for protection.[20] JCC § 17.22.200.

This inconsistency persisted because the Board failed to enforce the rule that all regulations incorporated into an SMP be actively reviewed for compliance with the SMA and Guidelines. WAC 173-26-191(2)(b); *McQuarrie v. City of Seattle*, Shoreline Hearings Board No. 08-033, 2009

[19]Ecology did not appeal the CAO in this regard, so its designation is binding under the doctrine of finality and cannot be collaterally attacked. *See Samuel's Furniture, Inc. v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002).

[20] RCW 36.70A.480(5) ("Shorelines of the state shall not be considered critical areas under this chapter 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)")

WL 1169254, at *8 (Apr. 27, 2009); *see also Faben Point Neighbors v. City of Mercer Island*, Shoreline Hearings Board No. 98-963, 1999 WL 394737, at * 8 (May 5, 1999) (Ecology's duty to review and approve provisions incorporated by reference into an SMP update is "a duty to approve knowingly" – it cannot simply rubber-stamp laws incorporated by reference.).

Ecology offered no argument or evidence that it independently reviewed the CAO's designation of all shorelines as "critical areas" or the buffer provisions for compliance with the SMA, and the Growth Board cited no evidence of such a review. Decision at 48-49. That is because Ecology did not engage in the required review. This requirement is not just a matter of procedure. Ecology will concede that the County's CAO was based on a record compiled in 2000, under the GMA's less stringent science requirement, and before the GMA criteria for designation of "critical areas" was modified in 2010 to ensure focus only on "truly important" habitat as Fish and Wildlife Conservation Areas. AR 000002487.

The Growth Board's decision to uphold a blanket critical areas designation directly conflicts with the SMA, which calls for a multitude of uses on the shorelines – from the very protected natural areas to the heavily utilized urban areas (which may include terminals and a host of water dependent, water oriented uses). If all shorelines were designated critical

areas with mandatory buffers, the State would be unable to achieve its legislative policy for shorelines: "to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020. The Board's approval of the SMP without the required CAO review was unlawful and must be reversed.

2 The Record Does Not Support Expanded Buffers on Shoreline Properties

The Growth Board's erroneous view of state policy also resulted in a failure to properly analyze the County's buffer requirement under the standards set out in the SMA and Guidelines. As the Board noted in its decision, the County chose to impose a uniform 150-foot marine buffer on all shoreline development, despite science recommending buffers ranging anywhere from 50 to 450-feet in width depending on a variety of local conditions.[21] Decision at 44-45, 69-70. The Board generally referenced the Inventory and CIA as justification for the County's decision without any substantive analysis of the report – let alone, any analysis under the requirements of WAC 173-26-186 and WAC 173-26-201, *e.g.,* the positive

[21] Science is a pretext. The 150 foot buffer chosen for Jefferson County was actually a policy choice unrelated to science *per se*. It was picked because Whatcom County had used this size. The Director of Ecology stated that that Whatcom County SMP was "the template" for Jefferson County. *See* AR 000004166. Ecology told the public it does "not require 150 foot buffers." AR 000005440-41. The buffers are ostensibly justified by: (1) "safety" (loss of homes) (*see* AR 000004010-4011); (2) consistency with the Jefferson County Critical Areas Ordinance which imposes a 150-foot buffer on select shorelines; (3) the fact that Whatcom County adopted a 150-foot buffer (*see* AR 000005440-41); and (4) because Ecology wanted this buffer to serve as a model for other jurisdictions (*see* AR 000003167-3172 and AR 000004670-4709, among others).

effect of current regulations. *Id*. Instead, the Board concluded that application of a generic buffer would achieve "no net loss." *Id*. The Board's decision is an erroneous interpretation and application of the law (as discussed above) and is not supported by substantial evidence.[22]

OSF does not ask this Court to resolve a debate among scientists. Instead, reversal is necessary because the County: (1) relied on generalized science to impose overly broad restrictions; (2) imposed buffers without regard to statutory/regulatory limitations on mitigation; (3) failed to critically evaluate the buffer against the term "necessary;" and (4) accepted as evidence legal argument that the County was monitoring permit success is lieu of actual evidence. *See* Decision at 25, N.85.

OSF's Supplemental Evidence Submittal sets out that the science relied upon (freshwater riparian studies) is inapplicable to most marine environments since a true "marine riparian zone" does not exist in most cases because of the effects of bluffs and other shoreline features. *See* Schaumburg Report. The key studies are in fact "syntheses of syntheses." Essentially, an unofficial marine riparian workshop "group" has blessed the

[22] On review, this Court must determine whether substantial evidence supports the Growth Board's decision when viewed in light of the whole record. *May v. Robertson*, 153 Wn. App. 57, 74 (2009). Under this standard, generalizations about potential environmental impacts are not sufficient to qualify as substantial evidence. *See May*, 153 Wn. App. at 92-94 (refusing to vacate shoreline permit on the basis of "generalities" not tied to fact-based evidence). *See also Biggers*, 162 Wn.2d at 695, 218 P.3d 211 (Undocumented presumptions, hypotheticals or narrow agency perspective to "regulate at all cost" is not a legally sufficient basis to preclude common shoreline development, *e.g.,* bulkheads.).

concept that freshwater science should be used to support marine buffers, with no public or peer review of that conclusion or the resulting buffer recommendations. *See Preserve Responsible Shoreline Management et al. v. Bainbridge Island and Ecology*, Case No. 14-3-00012, p.36 (Final Decision and Order dated April 6, 2015). The group's recommendations were made in isolation without consideration of the positive effect of current regulations. The studies offered a variety of buffer recommendations, ranging from 50 to 450 feet in width, depending on several site-specific factors (such as slope, soil type, existing development, neighboring uses, etc.). In sum, the compilation of science for the Update as to the buffer included only eight papers with no explicit marine shoreline study. AR 000007204-08. Decision at 69-70. The "cause-and-effect" of marine development is highly disputed. *See* Flora studies, AR 000003898-3923.

The County's buffers – incorporated from its CAO – were adopted pursuant to RCW 36.70A.480(6), which provides that SMPs "shall provide a level of protection to critical areas … **necessary** to sustain shoreline natural resources." (Emphasis supplied). Consistent with that directive, the Guidelines allow changes to an SMP *only* if Ecology and the County can show that they are "…deemed **necessary** to reflect changing local

circumstances, new information or improved data." [23] WAC 173-26-090 (emphasis supplied). The Board, however, held that those provisions did not apply to the Update and refused to address whether the new buffers are necessary.

Such review is both required and warranted – particularly where the CIA concludes that shorelines remained in overall good condition with significantly smaller buffers and that residential development will not adversely impact ecological function. *See infra,* p.13. By focusing solely on whether the buffers fell within the range recommended by science, the Board answered the wrong question. At issue was whether the County and Ecology made the required showing of *necessity* taking into account all factors, not just "the science."

As one example, the science emphasizes the need for a buffer to treat stormwater runoff assessing infiltration rates provided by intact vegetation of various types. The CIA reported that "[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of

[23] The term "necessary" is defined as: "so important that you must do it or have it; unable to be changed or avoided; absolutely needed; of an inevitable nature." *See* http://www.merriam-webster.com/dictionary/necessary.

impervious surface and vegetation cover." How can the County seriously impose extensive buffers for perceived water quality protection, ostensibly based upon science, without factoring in already existing local BMPs policies found in the CAO, surface water management regulations, zoning code 25% maximum site disturbance or clearing limits, the one dwelling unit per five acres maximum residential density under GMA rural zoning, and the fact that very few shoreline parcels can be replatted? The Board's failure to answer this question constitutes reversible error.

Presumably, Ecology and the County will contend that "no net loss" justifies the policy choice to impose greatly expanded new buffers. However, key to the "no net loss" standard is the requirement that each local government determine the existing condition of its shorelines at the time the SMP is enacted in order to provide a baseline from which the parties can determine whether a development proposal will or will not impact ecological functions. *E.g.*, WAC 173-26-201(2)(a), -201(3). Without such a baseline, there is no way to accurately determine whether mitigation proposals go far enough or go too far, as expressly required by the SMA and Guidelines. The record shows that the major scientific symposium convened by "Marine Riparian Experts" deemed the "most desired management tool"(over buffers) was a "shoreline mapping system that would include both biological and physical attributes …." AR 000002956.

The Growth Board's decision to uphold the Update violates the letter and policy of the SMA and must be reversed.

The baseline development process consists of three demanding steps: (1) identify the ecological processes and functions; (2) assess them; and (3) identify specific measures necessary to protect and/or restore the ecological functions and ecosystem-wide processes.[24] WAC 173-26-201(2)(d)(A)(i)-(iii). Minimum requirements for the shoreline inventory are set out in the Guidelines.[25] WAC 173-26-201(3)(d)(i)(v) requires collection of information as to the extent of existing structures and shoreline development, **existing** conditions **and regulations** which could affect shorelines, and an evaluation of the information gathered. WAC 173-26-201(3)(d). This information **must** be gathered before a SMP can be updated. *Id*. Added to the requirements specified above, a local government **must "**…prepare a characterization of functions and ecosystem-wide process…." WAC 173-26-201(3)(d)(A).

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[24] The functions to be identified and assessed are found in WAC 173-26-201(2)(d)(1)(C).

[25] The Board knows what is required. It stated in *Bainbridge Island*: "The City's fine-scale 2004 Battelle Nearshore Habitat Characterization, Ex. 147, and 2010 Coastal Geomorphic/ Feeder Bluff Mapping, Ex. 117, gave the City specific documentation and mapping of shoreline geomorphic conditions – drift cells, feeder bluffs, shoreline slopes, landslide hazards – and biological resources – eelgrass meadows, forage fish spawning areas, shellfish beds, and other critical habitats. This properly informed the SMP regulation of docks and other over-water structures." *PRSM v. Bainbridge Island and Ecology*, Final Decision and Order, p.83. The City of Bainbridge Island reports are found in the Declaration of Jon Brenner, ¶ 10, Exs. H-I.

The Guidelines state the characterization "may" be of a generalized nature. However, the Inventory and CIA in this case are not just generalized – they are incomplete, lacking analysis of the conditions observed against actual shoreline development and uses *as regulated* under the "existing" regulatory regime.[26] Without the latter, only impacts are considered, *but not* the "net effect."

Although the Inventory (in Section 1.0) is touted as documenting the "inventory" and "analysis" required by WAC 173-26-201(3), it is basically a description. Section 4.0 has the misleading title "Reach Inventory **and Analyses**" but there is no specific analysis. AR 000003563 (emphasis supplied) There is characterization to an extent in the Report, but no analysis of cause-and effect, that is the required "evaluation." The Inventory does not contain the required specification or evaluation of the ecosystem or functions. It is "at the broad watershed scale." AR 000003478.[27]

The Inventory is incomplete and flawed in other respects. Critical, necessary information has not been gathered, in particular, to evaluate the impact of new regulations on private property owners. The Inventory acknowledges that its maps are for "informational purposes only," without

[26] *See* AR 000002465.

[27] Ecology states that the Report is the "foundation" of the SMP Update. AR 000003999. The County's Consistency Analysis is highly critical of the Report. AR 000002659-61 (Consistency Analysis, pp.25-27).

any detail as to existing development or conditions. AR 000003465. Zoning and land use and critical areas are not shown. The "...effects on shoreline function and process are not analyzed at either a shoreline segment or ecosystem scale" (*Id.*, p.28), and such processes are characterized only "…in a general manner." AR 000003464. Generally, according to the Consistency Analysis, the Inventory does not address shoreline vegetation, *Id*. p.29, and "the Report does not include a comprehensive discussion of habitat function or processes at an ecosystem scale." *Id*. p.29. The Inventory needs a "landscape assessment." *Id.,* AR 000002663. Table 2 of the Consistency Analysis takes 38 pages to list all of the needed changes to the Inventory. Without accurate information, it is impossible to measure gains against losses to determine "net loss."

C. The Board Erroneously Approved Ecology's and the County's Application of "No Net Loss."

The Board upheld the County's use of the phrase, "no net loss," as imposing a substantive requirement that each permit applicant provide for the "maintenance, protection, restoration, and preservation" to ensure no adverse impacts to the shoreline environment. Decision at 31-34; *see also* JCC § 18.25.270(2)(b) ("Uses and developments that cause a net loss of ecological functions and processes **shall be prohibited**….") (emphasis

supplied).[28] Again, the Board goes too far. Contrary to the Update, which demands "no resulting adverse impacts on ecological functions or processes," the "no net loss" standard must be interpreted consistent with the SMA policy of fostering appropriate development by allowing for mitigation and other measures which minimize impacts "insofar as practical." *See* RCW 90.58.020. The Board's approval of a "no impacts" standard conflicts with the letter and policy of the SMA and must be reversed.

The phrase "no net loss" is not defined by the SMA, and does not appear in the Legislature's statement of policy.[29] RCW 90.58.020, .030. Properly construed, "no net loss" is a regional concept gauged over time; otherwise, the term would be misapplied as "no loss," which is how the County defines the terms but then misapplies to individual permit decisions. *Compare* JCC § 18.25.100(14)(e) to JCC § 18.25.270(2)(b).

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[28] In this circumstance, to read "no net loss" as a criterion for permit approval – rather than a legislative goal – is to impose an arbitrary and irrational standard on landowners, a result outside of the Board's and Ecology's authority. RCW 34.05.570(3)(b), (d). Simply put, if a buffer is too large, then it is demanding more land than is necessary to achieve "no net loss." *See Swinomish Indian Tribal Comty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 42, 166 P.3d 1198 (2007) (A regulatory standard calling for protection of existing conditions does not impose a requirement to enhance or restore already degraded critical areas.). Therefore, before finally deciding what size buffer will achieve the "no net loss" standard, it is incumbent on the County to actually identify the existing ecological functions that will be threatened if use of the property is allowed. *Id*. at 430. This it failed to do.

[29] In fact, only one provision of the SMA explicitly mentions "no net loss" in the context of a discreet use or development but that section only applies to redevelopment or modification of legally established homes deemed conforming. RCW 90.58.600.

Instead, Ecology adopted the phrase, "no net loss," as a guiding principle when considering whether or not to approve local government shoreline regulations. WAC 173-26-186 ("Governing principles of the guidelines"). The Guidelines explain that "no net loss" is a compromise between the needs of the environment and development. On the one hand, the Guidelines mandate that an SMP must "…assure, at a minimum, no net loss of ecological functions to sustain shoreline resources…" WAC 173-26-201(2)(a)(i). While on the other hand, the Guidelines require that "regulations and mitigation standards" must be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i). Moreover, the Guidelines explain that "[t]he concept of 'net' . recognizes that any development has potential or actual, short-term or long-term impacts" and that mitigation measures can "assure that the end result will not diminish the shoreline resources and values as they currently exist." WAC 173-26-201(2)(c). "No net loss" recognizes that development *will* occur, and so will impacts. It relies on appropriate planning – not prohibitions – to minimize or mitigate those impacts. *Id*. WAC 173-26-186(1); WAC 173-26-201(2)(i) (allowance of impacts to ecosystems "necessary to achieve other objectives of RCW 90.58.020").

D. The SMP Impermissibly Requires Restoration as a Mandated Condition of Development

The Growth Board erred when it dismissed OSF's argument that the SMP unlawfully required property owners to restore – not protect – shorelines. Decision at 50. The Board ruled on this claim without mention of any SMP language cited by OSF, insisting that that the SMP merely provided for a general policies of shoreline restoration. Nothing could be further from the truth. JCC § 18.25.250 states, in relevant part "(1) **When shoreline development or redevelopment occurs, it shall include restoration and/or enhancement of ecological conditions** if such opportunities exist." (Emphasis supplied). Restoration is also specifically required for approval of new or expanded float plane facilities (JCC § 18.25.350(6)(k)(iii)) and marinas (JCC § 18.25.350(7)(a)(iii)). The new SMP further "encourages" use of nonregulatory methods to protect, enhance and restore ecological functions in the context of residential development. JCC § 18.25.500(1)(j). This permitting standard, which clearly goes beyond the requirements of the SMA's "minimize impacts" standard, unduly burdens existing development rights in violation of WAC 173-26-186, which limits on mitigation to project impacts. It also violates the SMA policy of protecting private property rights, RCW 90.58.020, and was beyond the authority of Ecology to approve. The Growth Board's

failure to address this argument constitutes error and must be reversed pursuant to RCW 34.05.570(3)(b), (d), and (f)**.**

Indeed, the County's desire to impose a restoration standard on private property owners also drove it to classify 41% of its shorelines (most of which had previously been zoned for rural residential uses[30]) as "Natural Shorelines," due to the land's capacity to "return to near natural conditions with minimal or no restoration activity" if development is severely restricted. In its CIA, the County claimed that this massive reclassification was intended to achieve "no net loss" by subjecting properties capable of being returned to natural conditions to "the highest level of protection possible." AR 000005716. Addressing Issue No. 8, this criterion is neither in the SMA nor Guidelines, nor does it reflect actual conditions in Jefferson County.[31] AR 000002493. In addition, supposedly the areas must be "mostly ecologically intact." AR 000005683 (CIA, p.35). Further, the local circumstances obviate any need for an expanded "natural" shoreline designation This is particularly so in Jefferson County. Approximately 77%

[30] Here, it is undisputed that the existing pattern presented by the Jefferson County CMA Comprehensive Land Use Plan is residential zoning (RR) at one dwelling unit per five acres. *See* Schultz Decl., ¶ 22, Exs. A, B, C (Zoning Maps).

[31] The State Guidelines mandate that the environmental designation system "**shall be based** on the existing land use pattern, the biological and physical character of the shoreline, and the goals and aspirations of the community as expressed through the comprehensive plans as well as the criteria in this section." *See* WAC 173-26-211(2)(a) (emphasis supplied.) *See also* WAC 173-26-211(3) (Consistency between shoreline environment designations and the local comprehensive plan).

of the County land is comprised of Olympic National Park or United States Forest Service land off limits to residential development. AR 000002474. The Board's refusal to review or reverse this over-designation constituted error.

E. The SMP's Buffer and Public Access Provisions Violate the Doctrine of Unconstitutional Conditions

The County's decision to use the permit process to compel all shoreline property owners to (1) set aside large tracts of property in generic buffers and (2) dedicate public access easements must satisfy the nexus and proportionality tests set out by the U.S. Supreme Court in *Nollan*, *Dolan*, and *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2594-95, 2599, 186 L. Ed. 2d 697 (2013). *See Dolan*, 512 U.S. at 393-94 (invalidated a stream buffer as an unconstitutional condition); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) (Holding that a critical area buffer imposed as a mandatory condition on a development permit "must comply with the nexus and rough proportionality tests."); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (Critical area buffers "must comply with nexus and rough proportionality

limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.").

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 133 S. Ct. at 2599; *see also Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'"). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may only require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving the public property that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit [that] has little or no relationship to the property."). The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners "are especially vulnerable to the type of coercion that the unconstitutional

conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 133 S. Ct. at 2594 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

Together, the nexus and proportionality tests, which constitute a special application of the doctrine of unconstitutional conditions, hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95, 2599. The County cannot satisfy its burden under these, and made no attempt to do so in the record. *Dolan*, 512 U.S. at 391 (the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner). Under the nexus test, the County was required to "show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998); *see also Nollan*, 483 U.S. at 836-37. If the County was able to establish a nexus, it must next "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." *Burton*, 91 Wn. App. at 523; *see also Dolan*, 512 U.S. at 391 (A condition must be "related both in nature and extent to the impact of the proposed development."). Stated another way, the "'rough proportionality' test measures the relationship between the conditions placed on the use of property and the negative impacts of that use that would justify the denial of the proposed use in the first instance." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676, 935 P.2d 555 (1997). The purpose of these tests is to determine whether the government is taking advantage of the permit to force "some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Proper application of these tests is essential to ensure that the purpose of the constitutional doctrine is met. In *Nollan*, the Court held that a public access condition was invalid because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused. *Id*. at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id*. at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid

regulation of land use but an 'out-and-out plan of extortion.' " *Id*. at 837 (citations omitted).

In *Dolan*, the Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id*. at 386. There must be rough proportionality – *i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. at 391. The Dolan Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and invalidated both permit conditions. *Id.*

1. The Buffer Dedication.

The County's generic buffer requirement constitutes an exaction subject to *Nollan* and *Dolan* because it conditions permit approval upon the transfer of well-recognized interests in property to the public. *KAPO*, 160 Wn. App. at 273. Indeed, Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: "A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property." RCW

64.04.130; *see also Klickitat County v. Wash. State Dep't of Revenue*, 2002 WL 1929480, at *5-6 (Bd. Tax App. June 12, 2002) (An open space area constitutes property and the holder of the conservation interest must pay property taxes unless an exemption applies). Under both Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan, which is the method employed by the County's CAO. *See*, *e.g.*, *Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91, 26 P.3d 970 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

Incorporating the County's critical areas ordinance by reference, the SMP requires that, as a mandatory condition on all new permit approvals, shoreline property owners must designate a buffer on a legally binding document and/or execute a conservation easement. JCC § 18.22.270(9), (10). Thereafter, the conservation area must be "retained in [its] natural condition." JCC § 18.22.270(5)(a).

The County cannot satisfy its burden of demonstrating nexus and proportionality because it has admittedly imposed uniform and preset buffers based on generalized presumptions, not the actual conditions on any given property. Here, nexus requires that the government identify the actual impacts that a proposed development will have on the shoreline ecology. It

cannot satisfy that requirement. To the contrary, its CIA states that "[i]n and of itself, residential development probably does not have major adverse effects on shoreline resources." Nor can the County demonstrate that its uniform generic buffers satisfy proportionality where its CIA concluded that "[t]he effectiveness of riparian buffers for protecting water quality depends on a number of factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, surrounding land uses, and sufficient buffer width and integrity. Soil stability and sediment control are directly related to the amount of impervious surface and vegetated cover." AR 000005679 (CIA, p.31).

Indeed, the very idea that one generic buffer will be sufficiently tailored to mitigate for any adverse impacts in every circumstance – without demanding more land than is necessary – is undone by a fundamental dissonance resonating throughout the SMP. The science recognizes there is significant differences in development and ecological conditions on the various shorelines, ranging from areas of high intensity development, to areas of suburban and rural residential development, to areas of little to no development. The idea that every stretch of shoreline property has identical development and environmental conditions, and will suffer identical impacts from any new development or use, is refuted by the County's science – not to mention common sense. The County's strategy to

overcome its lack of the necessary information is to place the burden on permit applicants to fund scientific studies sufficient to establish how much mitigation may be necessary to offset the impacts of development. That, however, violates one of the essential protections of the unconstitutional conditions doctrine: the burden of justifying an exaction is on the government, not the individual. The County's buffer demands violate the doctrine of unconstitutional conditions.

2. The Public Access Easement.

The SMP requires that landowners dedicate a public access easement across their land as a mandatory condition on certain development applications. *See* JCC § 18.25.290(2)(l). *See also* JCC § 18.25.500(1)(i) (multi-family residential development); JCC § 18.25.500(4)(g) (subdivisions); JCC § 18.25.470(1)(d). The SMP also requires a public access as a condition on the approval of applications for beach access structures (Art 7.1.A.11); new docks or boating facilities JCC § 18.25.350(1)(f); among others.

As established by *Nollan*, a permit condition requiring a public access easement constitutes an exaction subject to the nexus and proportionality requirements. 483 U.S. at 831, 834. The County cannot satisfy either test. Indeed, the stated basis for the County's demand – to provide the public with more opportunities to access and enjoy the waterfront – is wholly unrelated to the affected development permits. JCC

§ 18.25.290. The County's public access demands violate the doctrine of unconstitutional conditions and must be invalidated.

F. The Board's Legal or Procedural Error on "Waiver" of Legal Argument Appears Harmless But if Not Requires Reversal

The Growth Board committed a legal or procedural error that requires reversal but appears harmless because (1) OSF made its arguments below and raises them now to this Court, (2) the Growth Board responded to the arguments and (3) the Growth Board has certified the issues on appeal as needing an answer from this Court because of their public importance. Specifically, the Board "refused" to consider several of OSF's arguments below based on the Board's erroneous conclusion that OSF had "waived" them by failing to cite certain RCW and WAC provisions in its opening brief. Certainly, OSF's opening brief presented several arguments in a succinct manner, but that was neither error nor waiver – it was a result of the Board's instructions. Despite the size of the County's SMP update and a voluminous legislative record, the Growth Board imposed a strict 30-page limit on the opening briefs and encouraged the parties to incorporate the arguments of other parties by reference. AR 000002168. In addition, the Board redrafted the parties' statement of issues to further abbreviate the arguments. AR 000002161. Thus, to avoid repetition and/or duplication, OSF's opening brief below specifically mentioned and incorporated the

other petitioners' briefs by reference and a "run" of the statutory citations alleged "not mentioned" in fact shows that all but a few were cited and argued, but in the order OSF through rational.

G. OSF Should be Awarded its Reasonable Attorney Fees and Costs Under the Equal Access to Justice Act and RAP 18.1

Washington's Equal Access to Justice Act directs the courts to award reasonable attorney fees and costs to a prevailing party who filed suit to oppose unlawful agency action, unless the court finds the agency action "was substantially justified or that circumstances make an award unjust." RCW 4.84.350; *HEAL*, 96 Wn. App. At 535 (WEAJA is applicable to the Growth Board). If OSF prevails, an award of attorney's fees to OSF is warranted because the Board has been repeatedly admonished that it lacks authority to set policy,[32] and has previously been admonished by the Legislature for misinterpreting the policy of the SMA.[33]

VI. CONCLUSION

The Update is an unsupported, unlawful and unconstitutional expansion of regulatory control in violation of RCW 36.70A.300(1) and

[32] *Thurston County v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358, 190 P.3d 38 (2008) and *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

[33] *See* Engrossed Substitute House Bill (ESHB) 1933 Laws of 2003, ch. 321 § 1 (codified at RCW 90.58.030 and RCW 36.70A.480).

should be invalidated pursuant to RCW 36.70A.300 and RCW 36.70A.302.

This Court should reverse the Decision approving the Update.

RESPECTFULLY SUBMITTED this 22 day of February, 2016.

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2016, I caused the document to which this certificate is attached to be hand-delivered for filing:

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I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following via e-mail and Priority U.S. mail as follows:

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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 22nd day of February, 2016.

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