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I. PROCEDURAL HISTORY

On May 11, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Pilchuck Audubon Society (**Pilchuck**). The matter was assigned Case no. 95-3-0045.

On June 5, the Board received a Petition for Review from the Tulalip Tribes of Washington (**Tulalip**). The matter was assigned Case No. 95-3-0046.

On June 7, 1995, the Board entered an “Order of Consolidation and Amended Notice of Hearing” (the **First Order of Consolidation**). The First Order of Consolidation assigned Case

No. 95-3-0046 to this consolidated matter.

On June 9, 1995, the Board received a Petition for Review from the State of Washington (the **State**), by and through the Director of the Department of Community, Trade and Economic Development, on behalf of the Director of the Department of Fish and Wildlife and the Director of the Department of Ecology. The matter was assigned Case No. 95-3-0047.

On June 16, 1995, the Board entered a “Second Order of Consolidation and Notice of Hearing” (the **Second Order of Consolidation**). The Second Order of Consolidation consolidated Case No. 95-3-0047 with the earlier consolidated Case No. 95-3-0046, and assigned Case No. 95-3-0047 to the newly consolidated matter and captioned it *Pilchuck, et al., v. Snohomish County*.

On this same date, the Board received a “Motion to Intervene as a Party by Master Builders Association of King and Snohomish Counties” (the **Master Builders’ Motion**).

On July 7, 1995, the Board received a “Snohomish County Realtors’ Motion for Intervention” (the **Realtors’ Motion**).

On July 11, 1995, the Board entered a “Prehearing Order and Order Granting Intervention to Master Builders Association of King and Snohomish Counties and Snohomish County Realtors” (the **Prehearing Order and Order Granting Intervention**). The Prehearing Order and Order Granting Intervention to the Master Builders Association of King and Snohomish Counties (**Master Builders**) and to Snohomish County Realtors (**Realtors**). It also set forth a schedule for motions and briefing, but did not set forth a statement of the legal issues.

On July 31, 1995, the Board entered an “Amended Prehearing Order” (the **Amended Prehearing Order**). The Amended Prehearing Order set forth the statement of legal issues, numbered from 1 through 7.

On August 17, 1995, the Board entered the “Order Granting Snohomish County’s Dispositive Motion to Dismiss SEPA Claims” (the **Order Dismissing SEPA Claims**). In the Order Dismissing SEPA Claims, legal issues Nos. 5(B), 6 and 7 were dismissed with prejudice. Legal issue No. 5(A) was reworded. On this same date, the Board entered an “Order On Motions to Supplement the Record.”

On August 25, 1995 the Board received the “State’s Prehearing Brief,” (the **State PHB**) and “State’s Joinder in Stipulated Exhibit List.”

On August 28, 1995, the Board received a combined “Opening Brief of Pilchuck Audubon Society and Tulalip Tribes of Washington” (**Pilchuck/Tulalip PHB**). Attached to the Pilchuck/Tulalip PHB was the “Declaration of David J. Somers.” On this same date, the Board received the “Declaration of Erik C. Stockdale” and the “Declaration of Scott Breidenbach” from the State.

On October 11, 1995, the Board received “Respondent Snohomish County’s Prehearing Brief” (**County PHB**). Attached to the County PHB were the “Declaration of Larry Adamson,” the “Declaration of Darrell Sorenson,” and the “Declaration of Thomas Rowe.” On this same date, the Board received the “Master Builders Prehearing Brief” (**Master Builders PHB**) and the “Snohomish County Realtors Association’s Prehearing Brief” (**Realtors PHB**).

On October 30, 1995, the Board received the “State’s Reply Brief” (**State Reply**) and a combined “Reply Brief of Pilchuck Audubon Society and Tulalip Tribes of Washington” (**Pilchuck/Tulalip**

Reply). Attached to the Pilchuck/Tulalip Reply was the “Declaration of Ellen Gray.”

On November 2, 1995, the hearing on the merits was held in the Building Conference Room on the 55th floor of Two Union Square in Seattle. Present were Board members Chris Smith Towne and Joseph W. Tovar, presiding. Appearing on behalf of the State were Assistant Attorneys General Maia D. Bellon and Kathryn B. McLeod; on behalf of Tulalip were Jim H. Jones and Mason D. Morissett; on behalf of Pilchuck was David A. Bricklin; on behalf of Master Builders were Alison Moss and Heidi S. Downey; on behalf of Realtors was John W. Hempelmann; and on behalf of the County was Gordon W. Sivley. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates, Tacoma.

At the beginning of the hearing on the merits, the County made two motions to strike. The first was to strike the Declaration of Ellen Gray and pages 41 through 44 of the Pilchuck/Tulalip Reply brief. The second was a motion to strike the portions of the Pilchuck/Tulalip Reply brief that discussed mitigation on pages 53-60. The parties briefly argued both motions. The presiding officer did not rule on either motion to strike, but instead indicated that a ruling would be included in the Final Decision and Order.

ii. RULINGS ON MOTIONS TO STRIKE

The County’s motion to strike the Declaration of Ellen Gray is **granted**. The portion of the motion to strike pages 41 through 44 of the Pilchuck/Tulalip Reply brief is **denied**. The Board will assign the appropriate weight to that portion of the Reply brief. The County’s motion to strike pages 53 to 60 of the Pilchuck/Tulalip Reply brief is **denied**.

iii. FINDINGS OF FACT

1. Between the 1780’s and the 1980’s, the lower 48 states lost approximately 53 percent of all wetlands. Ex. 53, at V-1; *see also* Ex. 38, at 2, and Ex. 46, at 2.
2. Of the approximately 22,500 acres of coastal wetlands present in the Puget Sound in 1800, nearly 14,000 acres have been diked, filled, and converted to other uses. Ex. 102 (1991 Puget Sound Water Quality Management Plan, [**PSWQA 1991 Plan**]), at 25.
3. Over one third of Washington state’s wetlands have been lost and 90 percent of those remaining are considered degraded. Ex. 53, at V-2, and Appendix V-E, at 9 (citations omitted).
4. By 1954, 40 percent of the nation’s wetlands had been destroyed or altered by drainage, dredging, fill, or construction. In the Puget Sound basin, nearly half (14,000 acres) of the coastal wetlands have been converted to upland uses, primarily agricultural and industrial, since 1880, and 50 to 60 percent of riparian (palustrine) wetlands along stream corridors have been lost. Ex. B6, Freshwater Wetlands, Urban Stormwater, and Nonpoint Pollution Control: a Literature Review and Annotated Bibliography, at 1, fn. 1. *See also*, Ex. 102 (PSWQA 1991 Plan), at xiv.
5. In March 1984, the United States Department of the Interior issued a “National Wetlands Inventory,” entitled Wetlands of the United States: Current Status and Recent Trends.” Ex. 37a. The report indicated that:
Approximately 215 million acres of wetlands existed in the conterminous U.S. (i.e., the

lower 48 states) at the time of the Nation's settlement. In the mid-1970's, only 99 million acres remained, leaving just 46% of the original wetland acreage. The U.S. wetland resource for the lower 48 states encompassed 93.7 million acres of palustrine wetlands and 5.2 million acres of estuarine wetlands. Wetlands now cover about 5% of the land surface of the lower 48 states. The total wetland acreage for the lower 48 states amounts to an area roughly the size of California.

Between the mid-1950's and the mid-1970's, about 11 million acres of wetland were lost, while 2 million acres of new wetland were created. Thus, in the 20-year interval, a net loss of 9 million acres of wetland occurred. This acreage equates to an area about twice the size of New Jersey.

Annual wetland losses averaged 458,000 acres: about 440,000 of palustrine losses and 18,000 acres of estuarine wetland losses. This annual loss equals an area about half the size of Rhode Island. Agricultural development was responsible for 87% of recent national wetland losses. Urban development and other development caused only 8% and 5% of the losses, respectively. Ex. 37a, at vii.

6. Seventy-four percent of the nation's wetlands are located on private lands. Ex. 278, at (unnumbered) 4.

7. In June, 1986, the Puget Sound Water Quality Authority (**PSWQA**) published an issue paper, "Habitat and Wetland Protection." The paper indicated:

Several laws passed in the last 15 years have resulted in programs for regulation of essentially all estuarine wetlands and some freshwater wetlands. The rate of loss from conversion of wetlands to other uses has greatly decreased since implementation of these laws. However, there continues to be incremental loss of some estuarine wetlands ... These losses, while small compared to early in the century, can represent significant percentages of some habitat types in given areas. In freshwater wetlands, losses are due primarily to commercial and residential development in both regulated and non-regulated areas.

Although several laws and programs are pertinent to habitat protection in Puget Sound, none is framed specifically for managing wetlands and critical habitats. The Shoreline Management Act does not mandate wetland preservation, the Hydraulic Project Rules are specifically limited to protection of fish resources, and the Clean Water Act is focused more specifically on traditional water quality management. In addition, a significant percentage of wetlands are not covered by state or federal legislation. As a result, there is not a comprehensive program which provides a framework for integrated management of Puget Sound habitats and wetlands. Ex. 37c, at iii-iv (emphasis added).

The paper contained a wetland inventory based on a 1983 study. However, data was only obtained from portions of many counties. For instance, only 43 percent of Snohomish County's 1,342,800 acres was inventoried. The data revealed that Snohomish County had 13,855 acres of estuarine wetlands, 141 acres of lacustrine wetlands, and 6,116 acres of palustrine wetlands for a total of 20,112 acres. Estuarine wetlands are found along the shoreline of Puget Sound with the largest acreages associated with large rivers such as the Snohomish; palustrine

wetlands are associated with lakes, ponds and streams with the acreages based upon county inventories rather than actual wetlands; lacustrine wetlands are open water lakes with relatively small amounts of vegetated wetlands adjacent to them. Ex. 37c, at 5-6, including Tables 1 and 2.

Based on data from a 1983 study, the PSWQA estimated that over 20 percent of wetlands in the Puget Sound counties are unregulated by the state or federal government. Ex. 37c, at 48.

The PSWQA issue paper also indicated that:

Bortelson et al. (1980) have prepared maps and data which indicate the overall changes in habitat for several Puget Sound estuaries (Table 3). These data clearly illustrate the major losses in some areas during a time frame which parallels an apparent decline in abundance of estuarine-dependent resources. Ex. 37c, at 17.

Table 3 indicates that the Stillaguamish River had a -64.0 percent change and the Snohomish River a -74.4 percent change. Ex. 37c, at 17.

8. On December 17, 1986, PSWQA adopted its first Puget Sound Water Quality Management Plan. Ex. 102 (PSWQA 1991 Plan), at 3.

9. In January 1987, the Army Corps of Engineers released its "Wetlands Delineation Manual." See Ex. 159, at 2; 346, 348, 357 and 408.

10. In March 1988, the administrator of the U.S. Environmental Protection Agency designated the Puget Sound as part of the National Estuary Program. Ex. 102 (PSWQA 1991 Plan), at 3.

11. In January 1989, the Army Corps of Engineers released its "Federal Manual for Identifying and Delineating Jurisdictional Wetlands." See Ex. 159, at 2; Exhibits 346, 348, 357, and Ex. III. A.64, at 5.

12. On April 1, 1990, the Washington State Legislature passed Substitute House Bill No. 2929 (Chapter 17, Laws of 1990, 1st Ex. Sess.), what is commonly referred to as the GMA. By September 1, 1991, counties and cities were required to adopt development regulations "...precluding land uses or development that is incompatible with the critical areas..." Ch. 17, §6, Laws of 1990, 1st Ex. Sess., codified at RCW 36.70A.060.

13. On April 21, 1990, Governor Booth Gardner issued Executive Order No. 90-04, regarding protection of wetlands. It directed all state agencies to rigorously enforce their existing authorities to assure wetlands protection. See Ex. 51, at iv, and Ex. 102 (PSWQA 1991 Plan), at 183.

14. In May 1990, the Snohomish County Council adopted an Aquatic Resource Protection Program (**ARPP**). Exhibit A to Declaration of Randy Middaugh, attached to Master Builders' Brief.

15. On July 1, 1990, the GMA became effective.

16. In September 1990, the Washington State Department of Ecology (**WDOE**) released a Model Wetlands Protection Ordinance to provide guidance to local governments in protecting

wetlands. The ordinance offered a buffer determination method based on wetland rating categories. The rating categories were defined according to functions and values, sensitivity, rarity, and replaceability of the wetland. Recommended buffers were:

Wetland Type Buffer Distance (in feet)

Category I 200 to 300

Category II 100 to 200

Category III 50 to 100

Category IV 25 to 50

Ex. 50, at § 7; *see also* Ex. 51, at vi and 16.

17. In November, 1990, the ARPP was repealed by citizen referendum and by the County Council. Exhibit A to Declaration of Randy Middaugh attached to Master Builders' Brief.

18. On November 20, 1990, PSWQA adopted the 1991 Puget Sound Water Quality Management Plan. According to that plan:

Wetlands are economically, biologically, and physically valuable. More than half of the wetlands along the coasts and riverbanks of Puget Sound have been destroyed by human activity.

The greatest threat to wetlands is the rapid rate of population growth in the Puget Sound basin... Ex. 102, at xix and 182.

19. The 1991 Puget Sound Water Quality Management Plan recommended that federal, state, local and tribal governments establish programs to protect wetlands so that in the short term, no net loss of wetlands function and acreage would occur, and in the long term there would be a measurable net gain of wetlands function and acreage in the Puget Sound. Ex. 102, at 185.

20. On March 15, 1991, the Washington State Department of Community Development [now the Department of Trade, Community and Economic Development (**DTCED**)] filed its "Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas" (the **Minimum Guidelines**), Chapter 365-190 WAC. The Minimum Guidelines became effective on April 15, 1991.

21. On June 28, 1991, the Washington State Legislature passed Reengrossed Substitute House Bill No. 1025 which amended the GMA. Section 21 amended RCW 36.70A.060 to require cities and counties to adopt development regulations to "protect" critical areas, rather than to preclude incompatible land uses. This legislation became effective on July 16, 1991.

22. September 1, 1991, was the deadline for central Puget Sound counties and cities to designate critical areas and to adopt development regulations to protect them. RCW 36.70A.060.

23. In September 1991, the County prepared "Draft Critical Areas Policies" that were never adopted. Exhibit A to Declaration of Randy Middaugh attached to Master Builders' Brief.

24. Also in September 1991, the Washington State Department of Wildlife issued a draft "Management Proposal for Wetlands in Forested Environments" that indicated that wetlands comprise less than five percent of the landscape in western Washington while providing

essential habitat for more than 50 percent of the wildlife species. In addition, the report indicated that Washington had lost more than one third of its wetlands and impacted more than 90 percent of its remaining wetlands. Ex. 49, at 2.

25. According to a study, “Amphibian Distribution and Habitat Characteristics in Lower Puget Sound Wetlands: Biology and Management” conducted by the King County Environmental Division’s Puget Sound Wetlands and Stormwater Management Research Program:

In Washington State it is estimated that freshwater palustrine marshes and forested wetlands have experienced the greatest losses from development and that most of the wetlands lost were between 0.2 and 2.0 hectares in size. Ex. 38, at 2 (citation omitted).

26. In October 1991, WDOE published the “Washington State Wetland Rating System.” See Ex. 61b, at v.

27. In February 1992, WDOE released a report on “Wetland Buffers: Use and Effectiveness.” Ex. 51.

28. In 1992, the National Research Council summarized fifteen categories of wetland functions: flood conveyance; protection from storm waves and erosion; flood storage; sediment control; habitat for fish and wildlife; habitat for waterfowl and other wildlife; habitat for rare and endangered species; recreation; source of water supply; food production; preservation of historic and archaeological values; education and research; source of open space; contribution to aesthetic values; and water quality improvement. See Ex. 53, Appendix V-E, at 2-3.

29. In July 1993, the Forest Ecosystem Management Assessment Team (**FEMAT**) issued a report entitled “Forest Ecosystem Management: An Ecological, Economic, and Social Assessment.” Ex. 53. The report indicated that:

Over a third of Washington state’s wetlands have been lost, and 90 percent of those remaining are considered degraded. Ex. 53, at II-37; at V-2 and Appendix V-E, at 9 (citations omitted).

30. FEMAT further reported that:

... While the Pacific Northwest is not rich in wetlands as a percentage of the total landscape (slightly over 2 percent in Washington and Oregon), a relatively large percentage of total plant species in the Northwest occur in wetlands. This is not unlike the coalescence of animal species in riparian and wetland habitats. The significant percentage of plant species that occur in wetlands relative to the small area of wetlands on the landscape is illustrated in Table V-E-2. Ex. 53, Appendix V-E, at (unnumbered) 8.

31. Table V-E-2 of the FEMAT report reveals that 51 percent of the total number of plant species in Washington are found in wetlands. Ex. 53, Appendix V-E, at (unnumbered) 9.

32. In August 1993, WDOE published a second edition of the “Washington State Wetlands Rating System.” Ex. 61b.

33. In October 1993, the Snohomish County Department of Public Works issued a report, “The State of the Waters: Water Quality of Snohomish County Rivers, Streams and Lakes — 1993 Assessment.” It indicated:

Snohomish County contains extraordinary surface water resources. Within the County there are two major river systems that contribute fresh water to Puget Sound. These are the Stillaguamish River and the Snohomish River, which is formed by the confluence of the Skykomish and Snoqualmie Rivers. There are also many smaller streams that flow directly into Puget Sound or into the Sammamish River and Lake Washington. Several hundred lowland and alpine lakes and numerous wetlands comprise the remainder of the surface water system.

...

However, recent information indicates that the quality of these surface water resources is threatened. For example, only two of the streams and rivers in Snohomish County consistently meet State water quality standards. Other signs of declining quality are diminished fish runs and closed shellfish beds.

These trends are directly linked to population growth and land use changes in the county.... Ex. 45, at 3.

...

A snapshot of the condition of Snohomish County water resources in 1993 would reveal trouble behind the scenes. While some of our waters are still in good shape, most of the rivers, streams, and lakes in the county are not able to provide the full recreational, habitat, and aesthetic benefits they once promised. Ex. 45, at 4.

...

As Table 1 shows, in Snohomish County only the Skykomish River and the North Fork of the Stillaguamish River, both of which are relatively undeveloped, have water quality that fully support their beneficial uses. The Pilchuck River and the South Fork of the Stillaguamish usually meet water quality standards, but are threatened by further development. The Snohomish and lower Snoqualmie Rivers, with more intense agriculture and urban and commercial development, show degraded water quality. The main pollution problems in the major rivers are high levels of bacteria and sediment. The principal sources of these pollutants are agricultural activities, forest practices, and land development.

In comparison to the major rivers, smaller streams and tributaries have more serious water quality problems.... Ex. 45, at 4-6.

34. The Snohomish River is the third largest river entering the Puget Sound region after the Fraser in British Columbia and the Skagit. The Snohomish River estuary system encompasses approximately 10,000 acres. Ex. 37c, at 11.

35. The Snohomish and Stillaguamish Rivers have been designated as Tier 1 "Key Watersheds" in the FEMAT report. Ex. 53, at Table V-H-1. Tier 1 Key Watersheds were selected for directly contributing to conservation of habitat for at-risk anadromous salmonids, bull trout and resident fish species, and have the highest potential for restoration. Ex. 53, at V-46.

36. On January 2, 1994, Pilchuck Audubon Society and Snohomish Wetlands Alliance filed a Petition for Review with the Board, CPSGMHB Case No. 94-3-0002 (*Pilchuck I*), alleging

that the County had failed to designate critical areas and to adopt development regulations to protect those areas.

37. On May 16, 1994, the Board entered a Dispositive Order Granting Stipulated Motion in *Pilchuck I* setting September 16, 1994, as the deadline for the County to designate critical areas and adopt regulations to protect them.

38. On July 6, 1994, the County held its first general public meeting on its critical areas proposals. Core Document (CD) III.A.64, at 2.

39. Between July 11, 1994 and August 11, 1994, Shapiro & Associates (**Shapiro**), the County's consultant on its critical areas ordinance, conducted or attended ten meetings with local interest and community groups including the Pilchuck Audubon Society. CD III.A.64, at 2.

40. On July 18, 1994, the County Council was briefed on the topic of critical areas by County staff and consultants. Ex. 247.

41. On July 27, 1994, the County's Planning Department mailed a newsletter explaining the critical areas process to over 5,000 households, agencies and interest groups. CD III.A.64, at 3.

42. On August 10, 1994, Shapiro submitted a Preliminary Draft Snohomish County Critical Areas Ordinance (CAO) to the County. Ex. 89 and 159. This was the initial draft of the CAO.

43. On August 16, 1994, the County Council was briefed on the proposed CAO by County staff. Ex. 248.

44. On August 18, 1994, the County held a second general public meeting, this time specifically regarding the Preliminary Draft CAO. CD III.A.64, at 2.

45. On August 23, 1994, the Snohomish County Planning Commission (the **Planning Commission**) held a study session on the Preliminary Draft CAO. Ex. 168 and 191.

46. On August 26, 1994, Shapiro issued a Draft Snohomish County Critical Areas Ordinance (the **Draft CAO**). Ex. 88 and 162.

47. On September 27, 1994, the Planning Commission held a public hearing on the Draft CAO. The Planning Commission held a second public hearing on October 3, 1994. Ex. 178.

48. On September 30, 1994, the County issued a determination of non-significance (**DNS**) for the proposed CAO. CD III.A.77.

49. In an October 14, 1994 letter, the Washington Department of Fish and Wildlife recommended specific minimum buffer sizes around wetlands to the County. Ex. 59.

50. On October 25, 1994, the Planning Commission voted six to one to recommend approval of the proposed CAO. Ex. 178.

51. On October 28, 1994, the Board issued a Finding of Noncompliance in *Pilchuck I* containing a recommendation that the Governor impose sanctions on the County if it failed to adopt a critical areas ordinance by November 16, 1994.

52. On October 31, 1994, the County Council was briefed by County staff on the proposed CAO. Ex. 251.

53. On November 7, 1994, the County Council was again briefed on the proposed CAO. Ex. 421.

54. On November 14, 21 and 28, 1994, the County Council held public hearings where it heard testimony on the proposed CAO. Ex. 8 and 28.

55. The County Council accepted written testimony on the proposed CAO until December 5, 1994. Ex. 10.

56. On January 9 and 11, and February 8, 15 and 22, 1995, the County Council met to deliberate on the proposed CAO. No public testimony was accepted at these meetings. Ex. 28 (s); Attachment 5 to County's Brief.

57. On March 7, 1995, the County Council passed Snohomish County Ordinance No. 94-108, an ordinance designating and adopting regulations to protect critical areas (the **Critical Areas Ordinance** or **CAO**) that is the subject of this appeal. Ex. 26.

58. Also on March 7, 1995, the County Council passed Snohomish County Ordinance No. 94-109 that added the CAO to the list of regulations the County uses as substantive authority under the State Environmental Policy Act (**SEPA**). CD III.D.7.

59. Notice of adoption of the CAO was subsequently published. CD III.A.452.

60. On June 28, 1995, the County Council adopted Snohomish County Ordinance No. 95-125

[\[1\]](#)

which adopted its comprehensive plan (the **Plan**).

61. Snohomish County comprises 1,342,720 acres of land. Declaration of Randy Middaugh, at 2.

62. Unincorporated Snohomish County (excluding National Forest lands) contains 597,882 acres or approximately 45 percent of the entire county. Declaration of Randy Middaugh, at 2.

63. Unincorporated Snohomish County contains approximately 119,000 tax parcels. Approximately 96,000 tax parcels are legal building lots. The CAO exempts approximately 40,000 lots or approximately 42 percent of the legal building lots, totaling approximately 37,117 acres. This constitutes approximately six percent of the total acreage of unincorporated Snohomish County. Declaration of Randy Middaugh, at 2.

64. Snohomish County Director of Planning and Development Services Steve Holt testified before the County Council on February 15, 1995 that there were 119,630 tax parcels, of which 96,000-97,000 were legally created lots. By exempting plats created since 1969, Mr. Holt indicated that 43,870 lots would be exempted, of which 26,302 are formal plats and an estimated 17,000 are short plats. Attachment 5a to County's Brief, at 4-5. *See also* Ex. 293.

IV. DISCUSSION AND CONCLUSIONS

The heart of the allegations of substantive noncompliance is couched in Legal Issue No. 2, which deals with the alleged failure of the provisions of Ordinance 94-108 cumulatively to comply with the requirements of RCW 36.70A.040(3) and RCW 36.70A.060(2), and to be directed by the goals of RCW 36.70A.020(8), (9), (10) and (13). The Board will therefore begin its review with Legal Issue No. 2, and set forth a number of holdings regarding the Act's fundamental requirements. With that basis in place, we then turn to Legal Issue No. 1, which raises sub-issues (a) through (x), and finish with Legal Issues 3, 4 and 5(a).

Legal Issue No. 2

Cumulative Failure of Ordinance 94-108 to Protect Critical Areas and Be Guided By GMA Goals. Do the provisions of Ordinance 94-108 cumulatively fail to comply with the requirements of RCW 36.70A.040(3) and .060(2) that the County shall adopt development regulations that protect critical areas, and cumulatively fail to comply with the requirements of RCW 36.70A.020 to be directed by the goals of RCW 36.70A.020(8), (9), (10), and (13)?

It is helpful to begin with a recognition that the central dispute in this case is: how much discretion does the GMA confer upon local governments as they carry out their duty to “designate” and “protect” critical areas? The theoretical spectrum ranges from “maximum designation and protection/minimum discretion” at one end to “minimum designation and protection/maximum discretion” at the other. Pilchuck/Tulalip characterizes the positions of the County/Master Builders/Realtors as occupying the latter extreme. The County/Master Builders/Realtors attack the positions of Pilchuck/Tulalip as being at the other extreme. In briefs and oral argument, these two camps question one another’s motives, and complain at having their positions defined as extreme.

Pilchuck/Tulalip agrees that balancing the planning goals is appropriate for the preparation of the comprehensive plan and implementing development regulations, but argues that the protection mandate of RCW 36.70A.060 exists apart from a duty to comply with the goals, and, because the compliance date to protect critical areas precedes adoption of the comprehensive plans, it conveys a higher order duty. Pilchuck/Tulalip Reply, at 5. These petitioners point to the County’s PHB, at 4-5, as an admission that the County bowed to political pressure from property rights advocates rather than meet its GMA duty to designate and protect critical areas. Pilchuck/Tulalip also argue that the County/Master Builders/Realtors never provided evidence to support their assertion that more rigorous critical areas regulations would drive up the cost of housing, nor did the respondents credibly explain how the ambiguities in the CAO would frustrate the timeliness and certainty objectives of RCW 36.70A.020(7).

With respect to the economic development goal (RCW 36.70A.020(5)) cited by the Master Builders, Pilchuck/Tulalip argues that, by its very terms, it “takes a back seat” to “the capacities of the state’s natural resources.” Pilchuck/Tulalip Reply, at 9. Pilchuck/Tulalip and the State also assert that the exemptions cover a large number of the parcels in the entire county (43,870 parcels, Finding of Fact No. 64) and that, for those areas, the CAO does not meet the Act’s requirements to protect critical areas.

The State argues that no evidence is present in the record to provide a scientific rationale or basis for exemption of so many parcels. The State does concede that it may be appropriate to discharge storm water directly into some wetlands or to use wetlands as stormwater retention/detention facilities. However, the State contends that the weight of scientific evidence shows that it is not appropriate to do so with all wetlands. State Reply, at 13. It also argues that the County’s failure to include buffers for Class 4 wetlands leaves those critical areas unprotected. State PHB, at 14. The State quotes Shapiro on the subject of why a 25 foot buffer had been recommended as evidence

that the County knew that buffering is necessary for protection.

It further argues that SEPA cannot be relied upon to provide the substantive outcome that the GMA requires (i.e., to protect critical areas) because SEPA is a procedural law. State PHB, at 10. The State also argues that it is inadequate for the County to rely on federal regulations, such as the Endangered Species Act, in view of the fact that such regulations could readily be repealed. State Reply, at 10.

The County argues that the petitioners ask the County to “turn back the clock” and restore wetlands to what they once were — a mandate which is beyond the scope of the County’s duty under the Act. It also argues that the petitioners equate “protect” with “preserve” and contends that the GMA provides only general guidance rather than setting forth a minimum standard of protection. It further points out that the Act does not even define the word “protect” and that the Minimum Guidelines issued by DCTED are just that, guidelines, and not mandatory minimum standards.

The County argues that its duty under the Act in designating and protecting critical areas is to balance the “environmental protection” goal (RCW 36.70A.020(10)) with other goals, most prominently the property rights goal (RCW 36.70A.020(6)). County PHB, at 35. In oral argument, the County argues that the legislative body legitimately responded to strong public opposition to regulations that excessively intrude upon private property rights, and cited as evidence of such sentiment the fact that, in recent years, the county’s voters had approved a referendum to overturn a prior wetlands regulation and turned out of office several elected officials. It concedes that its CAO does not provide as much protection as prior County policies, but argues that this lesser degree of rigor is within the County’s discretion under GMA. County PHB, at 63. It argues that variations in buffer width requirements recognize the need for more land-intensive development in urban areas. County PHB, at 45.

The County complains that the petitioners speculate, without any basis in fact, that any administrative discretion reserved to the County staff in the CAO will be abused, and asks that the Board apply the “presumption of validity” to the administrative actions of staff. County PHB, at 43.

Master Builders argues that the Act, and the Board’s case law, calls for a “weighted application” of the planning goals and that there is an “inherent tension” between and among the goals. *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006 (1993), at 13-14. It argues that the County has discretion to adopt regulations that provide a “reasonable level of protection” rather than the maximum level of protection that the petitioners suggest. With regard to reliance upon other laws outside the CAO to protect critical areas, Master Builders cites to the Procedural Criteria, at WAC 365-195-700, for the proposition that the existence of such laws “should profoundly influence, limit and shape planning and decision making under the act.”

Master Builders disputes Pilchuck’s contention that the exemptions in the CAO constitute a third of the County’s acreage. While the CAO exempts 42 percent of the legal building lots in unincorporated Snohomish County, this represents only 6 percent of the land area. Finding of Fact No. 63. Regarding the CAO provisions for discharging stormwater into wetlands, Master Builders

argues that this has been misstated by petitioners. Rather than blanket permission for such discharges, the CAO requires an evaluation to first see if this can be avoided, then how such action can be minimized, then how any remaining negative impacts can be mitigated.

Realtors argues that the lack of a buffer next to Class 4 wetlands does not mean that they are unprotected. It cites a cover letter from Shapiro to the County which says that the recommended buffers are “bigger than (needed) in order to provide a safety margin.” St. Ex. 89. Realtors also argues that the GMA does not require a CAO to incorporate by reference other regulations in order to rely upon those regulations to satisfy a portion of the Act’s direction to protect critical areas.

Finally, Realtors contends, in view of the mix of evidence in the record, the required balancing of the Act’s goals and the GMA’s silence regarding buffer widths, that for the Board to remand the CAO would invade the jurisdiction of both the County and the legislature.

Discussion

The Board’s analysis begins with a recitation of the relevant provisions of the Act. RCW 36.70A.040(3) provides in pertinent part:

Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: (a) The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210; (b) the county and each city located within the county shall designate critical areas, agricultural lands, forest lands, and mineral resource lands, and adopt development regulations conserving these designated agricultural lands, forest lands, and mineral resource lands and protecting these designated critical areas, under RCW 36.70A.170 and 36.70A.060;...(Emphasis added.)

The provision directing designation of critical areas is RCW 36.70A.170, which provides:

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

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;

(b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(d) Critical areas.

(2) In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.(Emphasis added.)

The provision directing adoption of critical areas regulations is RCW 36.70A.060(2) which provides:

Each county and city shall adopt development regulations that protect critical areas that are

required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992. (Emphasis added.)

Critical areas are defined at RCW 36.70A.030(5) as follows:

"Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas.

Designation of Critical Areas

The Board's evaluation of what lands are required to be designated and protected must begin with the definitions of "designate" and "protect." Neither of these words is defined in the Act.

The Board has previously addressed the meaning of the word "designate." The Board held that:

When a statute does not define a material term, the word should be given its ordinary meaning. In ascertaining common meaning, resort to dictionaries is acceptable. *TLR, Inc. v. Town of La Conner*, 68 Wn. App. 29, 33, ___ P.2d ___ (1992). To "**designate**" means:

To indicate, select, appoint, nominate, or set apart for a purpose or duty, as to designate an officer for a command. To mark out and make known; to point out; to name; indicate. *Black's Law Dictionary* 402 (5th ed. 1979).

In addition to this definition, DCD has offered insight into the question in its Minimum Guidelines. WAC 365-190-020, the purpose section, states:

The intent of this chapter is to establish minimum guidelines to assist all counties and cities state-wide in classifying agricultural lands, forest lands, mineral resource lands, and critical areas. These guidelines shall be considered by counties and cities in designating these lands.

...

In recognition of these common concerns, classification and designation of natural resource lands and critical areas is intended to assure the long-term conservation of natural resource lands and to preclude land uses and developments which are incompatible with critical areas.... *Gutschmidt*, at 19.

(Emphasis in original.)

The duty under RCW 36.70A.170 is therefore to "indicate, specify or point out" which lands meet the definition of critical areas. The Board notes that the direction to designate critical areas is not qualified or limited. It does not say designate some, as opposed to all, critical areas. Had the legislature intended for local governments not to designate all critical areas, it could have explicitly achieved such an end by including exemptions, similar to SEPA. *See*, for instance, RCW 43.21C.035, .037 and .038; specific exemptions; .110(1)(a), duty to prepare rules providing for exemptions. It did not do so. Therefore, the plain language of the Act requires that *all* lands that meet the definition of critical areas are to be designated.

The Board has previously addressed the question of *when* such designation must occur. Clearly,

the September 1, 1991 deadline is the deadline for designating critical areas. RCW 36.70A.170. In *Gutschmidt*, the Board held that by the deadline, local governments were required to either designate critical areas or to establish a process to implement designations through performance standards over time. Such a process does not require local governments to immediately map all critical areas within their jurisdictions. This is consistent with the Minimum Guidelines, which contemplate a performance standard approach to designation. See WAC 365-190-040. Part of the Board's rationale was that the city lacked the resources and the legal authority to gather the necessary parcel-specific information in order to identify the presence of critical areas throughout its jurisdiction. As difficult as such a task would be for a city of ten square miles, it would be a herculean undertaking for a county.

Thus, the Board holds that the Act requires local governments to designate *all* lands within their jurisdictions which meet the definition of critical areas. Therefore, any exemptions, exclusions, limitations on applicability or other regulatory provisions which result in not designating *all* critical areas, are prohibited. The requirement to designate may be met by designating or mapping known critical areas now or by adopting a process to designate or

[2] map them as information becomes available. Nonetheless, the designation of critical areas was required by September 1, 1991 (unless the deadline was extended six months pursuant to RCW 36.70A.380). The County missed its initial deadline by three and one-half years.

Protection of Critical Areas

We turn now to the question of what the RCW 36.70A.060 mandate to protect requires. Having held that local governments must designate all critical areas, but have some discretion as to *how* they do so, we need to answer one other internal question before we address what is meant by “protect.” All lands that meet the definition of critical areas must be so designated, but must all lands that are designated as critical areas be subject to regulations that protect critical areas? The Board answers in the affirmative. RCW 36.70A.060(2) requires local governments to: “... adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170...” (emphasis added). This sentence lacks any qualifying language to suggest that regulated critical areas are a subset of all critical areas. **The Board holds that *all* lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all critical areas must be protected in the same manner or to the same degree.**

It is significant to note that the legislature did not simply direct that cities and counties adopt regulations to *implement* their critical areas designations pursuant to RCW 36.70A.170. Instead, the legislature directed that local governments were to *protect* those areas. This conveys both a higher order of directiveness and a higher order of urgency. Even the legislature's choice of the term “critical” to describe these areas conveys an importance greater than, for example, “natural systems” or “environmentally sensitive” areas. Finally, the fact that the legislature directed that critical areas were to be designated and protected before any other GMA planning proceeded,

underscores the paramount importance that it intended for this statutory mandate.

The Act does not define the terms “protect” or its derivative, “protection.” Nor is there a definition of “protect” or “protection” in the Minimum Guidelines or the CAO. However, the Procedural Criteria define “protection” at WAC 365-195-825(2)(b):

"Protection" ... is construed to mean measures designed to preserve the structure, values and functions of the natural environment or to safeguard the public from hazards to health and safety. (Emphasis added.)

The Board agrees with the County’s argument that the Procedural Criteria, like Minimum Guidelines, are advisory rather than mandatory. *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 22. However, in this particular instance the Board concludes that DCTED’s definition is close to the mark. This conclusion is buttressed by the dictionary meaning of the derivative term “protect” in *Webster’s New Riverside University Dictionary*, 1988. That reference defines “protect” as: “To keep from harm, attack, or injury: GUARD.” *Webster’s*, at 946. This meaning is synonymous with the word “preserve” in the Procedural Criteria definition. Thus, combining these definitions, **the Board holds that the Act’s directive that local governments are to “protect” critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas.** Critical areas “values” and “functions” are well documented in the literature generally, and the record in this case specifically. *See* Finding of Fact No. 30. The Board construes “structure” in this context to refer to natural physical system(s), including the inter-relationship of certain critical areas, such as wetlands, to other critical areas. The focus here is on the structural integrity of the whole critical areas system and its ability to continue serving the values and functions, even in the circumstance that a portion of the whole is compromised or lost.

Significantly, the Board’s holding focuses on the preservation of the *structure, value and functions* of critical areas rather than the critical areas themselves. It is the structure, value and functions of critical areas that are inviolate, not the critical areas themselves. This may seem a subtle nuance, but its meaning is profound. It means that the “protect critical areas” mandate does not equate to “do not alter or negatively impact critical areas in any way.” While the preservation of the structure, value and functions of wetlands, for example, is of paramount importance, the Act does not flatly prohibit any alteration of or negative impacts to such critical areas. The Act could have said “do not alter critical areas” or “do not create negative impacts on critical areas”, but it did not do so. By focusing on the structure, value and functions of critical areas, the Act requires that these attributes and values be protected, within the context of the whole. Obviously, a natural system is comprised of constituent parts and, at some point, alteration to the parts will affect the ability of the whole to serve its “values” and “functions.” For this reason, the alteration or impacts upon even portions of the whole must be done only for good reason and sparingly. **The Board holds that the Act’s requirement to protect critical areas means that the structure, value and functions of such natural systems are inviolate. While local governments have the discretion to adopt development regulations that may result in**

localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. This holding comports with the “no net loss” concept which acknowledges the necessity of occasionally damaging and even eliminating certain wetland critical areas, provided that such impacts or losses are offset or replaced, for example by creating replacement wetlands off-site. *See* Finding of Fact No. 13.

Applying the above holdings to the facts in the instant case, the Board finds that the CAO fails to designate, and therefore also fails to protect, all critical areas. Whether by exclusion (by not designating critical areas lands that meet the definition) or by exemption (by exempting from regulation lands that are designated as critical areas), the effect is the same. For example, the CAO results in placing any critical areas that may exist in over 43,000 parcels beyond the reach of the protections that the Act requires. It is immaterial whether the County’s estimate that these parcels total only 6 percent of the County is more accurate than the claim made by Pilchuck/Tulalip that one third of the County’s land area is involved. Undisputed was that these parcels collectively total 60 square miles of private land. This is over twice the land mass of the County’s largest city (Everett is 27 square miles). In view of the paramount importance of the structure, values and functions of critical areas, omitting such a large area from the operation of the CAO’s provisions to protect critical areas is an egregious violation of the Act.

The County does have considerable discretion in determining specifically how it is going to

[\[3\]](#) protect critical areas. As held above, it also has the discretion to adopt regulations that permit some impact to or even eliminate localized critical areas, provided that there is no net loss of the structure, values and functions of such critical areas

Class 4 Wetland Buffers

Turning to the matter of zero buffer width next to Class 4 wetlands, the Board notes that although both the State and the County cite to the recommendations of Shapiro, each reaches a different conclusion. The Shapiro language in question states:

Finally, with regard to the recommended buffers, we have attempted to recommend buffers that reflect the state of scientific knowledge regarding the role and effectiveness of buffers. It should be noted that the quantitative data available on buffer function do not necessarily concur with recommendations offered by a variety of agency personnel. Several reasons exist for this discrepancy. First, and probably foremost, the data on buffer effectiveness are still relatively sparse, with studies scattered in sites all over the U.S. As a result, buffer recommendations tend to be greater than the scientific data suggest in order to provide an extra margin of safety. These increased buffer widths generally are not justified by data from the existing studies. *Stip. Ex. 89.*

While this statement is equivocal enough that both sides cite to it, it does provide a reasonable and rational basis for saying that provision of a minimum buffer is the prudent approach, even with respect to Class 4 wetlands. The County points to the “extra margin of safety” language to

make the argument that, in at least some instances, a buffer is an excessive imposition that may or may not yield desired results. The Board concludes that both the State and the County are half right.

Shapiro does not flatly state that the preponderance of scientific evidence absolutely requires a buffer width of at least 25 feet for every wetland in every instance, or even that there absolutely must be buffers in every instance. However, Shapiro clearly conveys that such a setback is advisable. The State presented persuasive evidence and argument that some of the most fecund and sensitive wetlands are the small ones, which would include many that would be rated as Class 4 under the County's scheme. Ex. 53, at Appendix V-E. *See also* Finding of Fact No. 24. The Board also concludes from the evidence presented that there are circumstances where non-wetland areas upland of Class 4 wetlands do provide important wildlife habitat or other functions vital to the "structure, values and functions" of these critical areas." However, the Board is unpersuaded that this is true with respect to all Class 4 wetlands, and can conceive of limited circumstances that justify reducing to zero the required buffer widths upland from to Class 4 wetlands. For example, in order to maintain a reasonable use of the property, it may be necessary to encroach upon an otherwise required setback or buffer area. In such cases, the "structure, values and functions" of the critical areas on-site or nearby would need to be analyzed and appropriate consideration given to the grading plan, placement of buildings, impervious services and activity areas on-site, and use of construction management techniques. However, the balancing of site-development potential and protection of on-site critical areas requires a case-by-case approach rather than a blanket regulation or exemption.

Urban/Rural Critical Areas

Turning to Master Builders' argument that it is appropriate and necessary to treat urban critical areas differently than rural ones, the Board sees no such direction or authority in the Act. The GMA requires designation and protection of critical areas and makes no qualifying statement that, for example, urban wetlands are any less important or deserving of protection than rural

[4]

ones. As a practical matter, past development practices may have eliminated and degraded wetlands in urban areas to a greater degree than rural areas, but the Board rejects the reasoning that this provides a GMA rationale for not protecting what is left.

The Board also rejects the Master Builders' and Realtors' argument that critical areas protections within the urban area are somehow fundamentally at odds with "compact urban development" and the anti-sprawl direction of RCW 36.70A.020(1) and (2) and RCW 36.70A.110. Their argument is generally that, as more land in the urban area is set aside for critical areas, it reduces the land available for development where infrastructure and services presently exist, and thereby forces the County to extend the urban growth area further into the rural area. This argument has a certain superficial appeal, but it dissolves upon close examination. The notion that critical areas are incompatible with urbanization fails at both the project level and the county-wide UGA setting level.

At the project level, there are many examples in the region of critical areas that exist and thrive

immediately adjacent to intensive urbanized uses. These include residential projects, both single-family and multi-family, free-standing office buildings, as well as entire office parks and even manufacturing sites. The Board takes official notice of the Boeing Plant Expansion project in Everett, the Bellefield Office Park in Bellevue, and the Heronfield Apartment Complex in Kirkland. In each instance, intensive urbanization occurred with varying degrees and methods of site development standards to protect the structure, values and functions of the immediately adjacent wetlands.

At the county-wide level, the Board agrees with the County/Respondent Intervenor argument that the UGA land supply is not to be larger than necessary to serve the projected twenty years of growth. However, both this Board (*see Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001 (1994), at 10) and the 1995 legislature (by adoption of Section 2 of EHB 1305, Chapter 400, Laws of 1995) acknowledged the propriety of a “reasonable land supply market factor.” *See also Bremerton, et al., v. Kitsap County* CPSGMHB Case No. 95-3-0039 (1995), at 42.

The requirement that critical areas are to be protected in the urban area is not inconsistent with the Act’s predilection for compact urban development. The Board has previously held to the contrary, in a prior case, *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 94-3-0010(1994), the Board concluded that:

"Compact urban development" does not require that the urban environment be exclusively a built environment, nor that the built environment be of a homogenous intensity, form or character. Other provisions of the Act will require that the urban landscape be interspersed with natural systems, passive and active open space and a variety of public facilities. For example, UGAs must include "greenbelts and open space areas" (RCW 36.70A.110(2)), and critical areas must be protected (RCW 36.70A.060), regardless of whether they are inside or outside of the UGA. *Association of Rural Residents*, at 19. (Footnote omitted. Emphasis added.)

In sizing their UGAs, both King and Pierce counties have included a “discount factor” whereby they estimated the amount of land in the urban areas that would be removed from availability for urban development. The largest portion of such factors consists of public rights-of-way and critical areas. This is a legitimate exercise to harmonize the Act’s mandates that counties and cities protect critical areas while at the same time sizing the UGA in a way that does not needlessly convert non-urban land to urban uses.

As identified above, a county-wide data base identifying the location and cumulative land area of critical areas can be maintained. Such an evolving critical areas data base, in conjunction with data bases monitoring a variety of indicators, such as the rate and location of new development, can help identify the need for appropriate adjustments to comprehensive plans, development regulations, and ultimately, the UGA land supply. GMA plans and regulations are neither written in shifting sand, nor etched in immutable stone. This reflects the iterative and interactive nature of

planning under the GMA. ^[5]

The CAO fails to fully designate all critical areas pursuant to RCW 36.70A.170 and also fails to comply with the requirements of RCW 36.70A.040(3) and RCW 36.70A.060(2). It will therefore be remanded to the County to be repealed, or revised so as to meet the requirements of the Act and the holdings contained in this Order. Because the CAO is remanded for failing to meet the requirements of .040(3) and .060(2) to protect all designated critical areas, the Board need not and will not rule on whether the CAO fails to be guided or directed by the goals of RCW 36.70A.020(8), (9), (10) and (13).

Legal Issue No. 1

Failure of Particular Sections of Ordinance 94-108 to Designate and Protect Critical Areas, Be Guided By GMA Goals, and Consider Minimum Guidelines. Did the County, in adopting the following sections of Ordinance 94-108, fail to comply with the requirements of RCW 36.70A.040(3), .060(2) and .170, to designate critical areas, to consider the minimum guidelines established by DCTED, to adopt development regulations that protect critical areas, and/or to comply with the requirements of RCW 36.70A.020 to be directed by the goals of RCW 36.70A.020(6), (8), (9), (10), and (13):

Legal Issues No. 1(a),(c),(d),(g), and (h)

(a) Snohomish County Code (SCC) 32.10.030 limiting the application of the critical areas ordinance to development activities not expressly exempted.

(c) SCC 32.10.040, which exempts approximately one-third of the county's land base from the ordinance's coverage.

(d) The exemption provisions of SCC 32.10.040, the mineral extraction exemption provisions of SCC 32.10.420(1), and related definitions.

(g) SCC 32.10.110(11) which limits the definition of "erosion hazard areas", and .110(23) which limit the definition of "landslide hazard areas," to areas sloping 33 percent or more; and SCC 32.10.410 and .420 which accordingly do not regulate development activity in areas with erosion and landslide hazards that slope less than 33 percent.

(h) SCC 32.10.110(21), (33), (38), and (41), .510, .520, and .560, which in combination significantly reduce the level of protection for streams and wetlands that are regulated, eliminate protection of large amounts of streams and wetlands, and ensure net loss of streams and wetland area and functional value.

The sections cited in these legal issues either explicitly exempt or exclude critical areas from designation or from protection, or they have that effect. The Board notes that Legal Issue No. 1(c), as framed, presumes a fact that was disputed. The Board does not rely upon that disputed fact.

Instead, the focus of our analysis with regard to Issue 1(c) has been on the exemption itself in SCC 32.10.040, regardless of the amount of land it ostensibly fails to govern. Parties used portions of SCC 32.10.040, such as subsection (8), to indicate how the entire section violates the Act. The Board has previously discussed SCC 32.10.040(8) which deals with the exclusion of 43,000 parcels from critical areas protections, in its discussion of Legal Issue No. 2 above. Accordingly, that provision has already been determined not to comply with the Act.

Conclusion regarding Legal Issues Nos. 1(a), (c), (d), (g), and (h)

The sections cited in these legal issues do not meet the requirements of RCW 36.70A.040(3), RCW 36.70A.060(2) and RCW 36.70A.170 because they do not designate and protect critical areas. As held above regarding Legal Issue No. 2, the Act requires that all critical areas be designated and that all designated critical areas be protected. Some of the sections, such as SCC 32.10.040, are exemptions on their face, while the operation of .110(1) constitutes, in effect, an exemption of any slopes less than 33 percent.

Exemption, exclusion, limitation of applicability, or other drafting mechanisms that achieve the same effect, do not constitute designation and protection of critical areas. Local governments do have discretion as to *how* and even *the degree to which* they protect, but the inescapable conclusion from a plain reading of the Act is that critical areas must be protected.

It is equally important to recognize that the statute at bar is the Growth Management Act, not the Growth Stoppage Act or the Growth Prohibition Act. The Board observed above that the requirements of RCW 36.70A.170 and RCW 36.70A.060 do not flatly prohibit any impacts upon or even loss of, for example, wetlands. Instead, the Board construes the Act's mandates to protect critical areas, while also meeting the Act's other directives to accommodate growth (*see* RCW 36.70A.040, RCW 36.70A.110), as a requirement for "no net loss" of the "structure, functions and values of critical areas", as opposed to "no net loss of a single square foot of the critical areas themselves." This reading of the Act provides the legal and the literal room for local governments to direct and permit growth - but to do so in a manner that protects critical areas.

Legal Issues Nos. 1(e), (i), (t), (u), and (v)

(e) SCC 32.10.065(1) and (2) which provide that the critical area ordinance's provisions supersede the use of all policies contained in subarea plans, including circumstances where the protections arising under such plans were greater than the protections provided under the ordinances.

(i) SCC 32.10.510 which base classifications of streams upon determinations of use by "substantial" and "significant" numbers of anadromous or resident game fish, without defining such terms.

(t) "Section 4" of Ordinance 94-108 which requires the department to investigate programs pertaining to, but which do not require, analysis of functional values at individual wetland level and at broader watershed level, or a habitat corridor network.

(u)Section 1 of Ordinance 94-108, which fails to adopt sufficient protection for areas with a critical recharging effect on aquifers used for potable water.

(v)Section 2 of Ordinance 94-108, which fails to adopt sufficient protections for frequently flooded areas.

Discussion

The petitioners did not explicitly brief these issues. WAC 242-02-570(1) provides:

A petitioner, or a moving party when a motion has been filed, shall submit a brief on each legal issue it expects a board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order. (Emphasis added).

The petitioners have therefore abandoned Legal Issues Nos. 1(e),(i),(t),(u), and (v), and the Board will not address them.

Conclusion regarding Legal Issues Nos. 1(e), (i), (t), (u), and (v)

Legal Issues Nos. 1 (e)(i)(t)(u) and (v) were abandoned and will be dismissed with prejudice.

Legal Issue 1(f)

SCC 32.10.110(9) which omits forest practices from the definition of "development activity."

Pilchuck contends that SCC 32.10.110(9) fails to comply with the GMA because the definition of "development activity" does not explicitly include forest practices. Pilchuck contends that the County's definition is too "restrictive." Pilchuck PHB, at 28. Pilchuck notes that the Planning Commission's recommended definition of "development activity" included Class 4 general forest practices and Class III forest practices with conversion option harvest plans. Pilchuck PHB, at 29, fn. 27. Accordingly, Pilchuck contends that because the County Council explicitly removed this language, the Council's intent is clear: that forest practices do not constitute development activities. Pilchuck Reply, at 47. Instead, Pilchuck contends that the County should not have, in effect, exempted forest practices from the CAO. Pilchuck Reply, at 48.

In response, the County contends that forest practices are covered by SCC 32.10.030, a June 30, 1995, "administrative interpretation" that explicitly indicates that all forest practice approvals for Class 4 Generals and Class III Conversion Option Harvest Plans shall be reviewed for compliance with the CAO. County's Brief, at 28; *see also* Attachment 4 to County's Brief, at 2. SCC 32.10.110(9) defines "development activity" as:

... any construction, development, earth movement, clearing, or other site disturbance which either requires a permit, approval or authorization from the county or is proposed by a public agency.

This definition is broadly worded. Therefore, if forest practices do not involve earth movement or clearing, they certainly involve a "site disturbance." **The Board holds that SCC 32.10.110(9)**

does not violate the GMA. Although the definition of “development activity” proposed by the Planning Commission would have made it crystal clear that the specified forest practices constituted development activities, the failure to list them, or any other specific land use, building or other development practice that needs county permits, approval or authorization, or is proposed by a public agency, does not violate the Act.

Conclusion regarding Legal Issue 1(f)

The CAO’s definition of “development activity” at SCC 32.10.110(9) complies with the GMA even though it does not explicitly refer to forest practices.

Legal Issue 1(j)

SCC 32.10.110(7) and (14), .210, .310 and .320, which fail to define, designate and protect all fish and wildlife habitat conservation areas specified in the WAC 365-190.

RCW 36.70A.170 requires cities and counties to designate critical areas while RCW 36.70A.060 requires them to adopt development regulations that protect those designated lands. The Act defines “critical areas” to include “fish and wildlife habitat conservation areas.” RCW 36.70A.030 (5). Unlike wetlands, which constitute a subset of critical areas and are defined by the Act (*see* RCW 36.70A.030(17)), the GMA does not define “fish and wildlife habitat conservation areas.” Moreover, unlike wetlands, where the State of Washington has prepared a “Model Wetlands Ordinance” (*see* Finding of Fact 16), no such equivalent document exists for fish and wildlife habitat conservation areas. Furthermore, unlike wetlands which are immobile and relatively static, fish and wildlife populations are not.

RCW 36.70A.170(2) does require cities and counties to “consider” the State’s Minimum Guidelines when designating critical areas. The definition section of these guidelines, WAC 365-190-030, does not include “fish and wildlife habitat conservation areas” either. However, WAC 365-190-080 defines the phrase as follows:

(5) Fish and wildlife habitat conservation areas. Fish and wildlife habitat conservation means land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. This does not mean maintaining all individuals of all species at all times, but it does mean cooperative and coordinated land use planning is critically important among counties and cities in a region. In some cases, intergovernmental cooperation and coordination may show that it is sufficient to assure that a species will usually be found in certain regions across the state. (a) Fish and wildlife habitat conservation areas include:

- (i) Areas with which endangered, threatened, and sensitive species have a primary association;
- (ii) Habitats and species of local importance;
- (iii) Commercial and recreational shellfish areas;
- (iv) Kelp and eelgrass beds; herring and smelt spawning areas;
- (v) Naturally occurring ponds under twenty acres and

their submerged aquatic beds that provide fish or wildlife habitat;(vi) Waters of the state;(vii) Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity; or(viii) State natural area preserves and natural resource conservation areas.

In contrast, the CAO defines “fish and wildlife habitat” as:

- (a)Streams and wetlands regulated under Part 500 of this chapter;
- (b)areas with which critical species listed as endangered or threatened under federal law have a primary association; and
- (c)saltwater-related habitat including kelp and eelgrass beds, shellfish areas, and herring and smelt spawning areas.SCC 32.10.110(14).

The Board notes that the County did not define “fish and wildlife habitat *conservation areas*” but instead adopted a definition of what would appear on its face to be a broader area, “fish and wildlife habitat.”

Pilchuck contends that the CAO fails to comply with the GMA because it fails to designate and protect all fish and wildlife habitat conservation areas specified in Chapter 365-190 WAC. Pilchuck makes four basic arguments.First, it contends that the CAO’s definition of wildlife and habitat is too narrow, thus eliminating protections for “non-critical species” found outside of streams, wetlands and buffers.Pilchuck’s PHB, at 45-49.Second, Pilchuck claims that the CAO’s stream and wetland buffers are too narrow to protect wildlife.Pilchuck PHB, at 50.Third, Pilchuck maintains that the habitat management plan provisions of the CAO are too vague and grant the County’s Planning and Development Services Director too much discretion to the point that no mitigation of fish and wildlife impacts would be required.Pilchuck PHB, at 51.Finally, Pilchuck alleges that the CAO fails to recognize that “wildlife - like humans - commute” and therefore the CAO fails to provide protection to wildlife coming into Snohomish County from King County.Pilchuck PHB, at 52.

In response, the County contends that the Minimum Guidelines are advisory only and not binding upon it.Furthermore, it argues that:

... In streams, wetlands and their buffers, wildlife protection is not limited to threatened or endangered species.In fact, there are no specific limitations to wildlife protection in those areas.Therefore, when analyzing stream, wetland and buffer functional values and impacts ..., an applicant must analyze all wildlife species’ habitat impacts.County’s PHB, at 36-37.

The strange nature of regulations that are a “minimum” but yet only “guidelines” has previously been reviewed.The Board agrees with the County that the State’s Minimum Guidelines are advisory in nature and not binding upon the County.A county must only consider the Minimum Guidelines.*Gutschmidt*, at 19.**The Board holds that Pilchuck has not shown that the County failed to consider the Minimum Guidelines.**

More important than whether the County considered the Minimum Guidelines is whether the County’s CAO complies with the Act’s requirements.Implicit in Pilchuck’s argument is the position that the Act requires cities and counties to absolutely protect each fish and wildlife

species in every portion of a city or county. The Board rejects such an argument. The overriding purpose of the GMA is to “manage” growth — not to prohibit it. As set forth in the Minimum Guidelines, the purpose for designating and protecting fish and wildlife habitat conservation areas is to “maintain species in suitable habitats within their natural geographic distribution.” An interpretation of RCW 36.70A.060 and .170 that fish and wildlife must be protected everywhere within the state, would certainly put a drastic halt to further “growth.” The legislature did not intend such a sweeping agenda when it enacted RCW 36.70A.170 and .060.

Instead, the legislature’s intent is evidenced by the definition of “critical areas” itself. **The Board holds that the legislature required cities and counties to designate fish and wildlife habitat conservation areas only; the legislature did not mandate that cities and counties designate**

[\[7\]](#)

every parcel of land that constitutes fish and wildlife habitat. Had critical areas been defined as including “fish and wildlife habitat,” then cities and counties may have been forced to protect fish and wildlife everywhere in a city or county. That however, is not the situation before us.

The Board next turns to examining what the County actually undertook with its CAO. The County defined “fish and wildlife habitat” areas. SCC 32.10.110(14). As noted above, the County did not define “fish and wildlife habitat *conservation areas*” even though that is the phrase used in the Act. In one of its earliest cases, the Board held that when the Act fails to define a term or phrase, cities and counties are entitled to adopt their own definitions as long as those definitions are consistent with the goals and requirements of the Act. *Tracy*, at 23. Pilchuck has not overcome its burden of showing how this definition fails to comply with the Act.

The Board also notes that the County’s definition of fish and wildlife habitat, although certainly not identical to that suggested by the Minimum Guidelines for fish and wildlife habitat conservation areas, is similar. Thus, for purposes of this appeal, the Board treats the CAO’s definition of “fish and wildlife habitat” as meeting the requirements for designating, through performance standards, “fish and wildlife habitat conservation areas.” The fact that the County has elected to make this designation by relying upon performance standards has previously been discussed by the Board. **Although the CAO neglected to utilize the words “conservation areas” in its definition and substantive portions (SCC 32.10.110(14) and Part 300 respectively), the Board holds that the CAO, as interpreted by the Board, does comply with the requirement of RCW 36.70A.170(1) to designate the fish and wildlife habitat conservation areas portion of critical areas.** The Board will **remand** the CAO, however, with instructions for the County to add the terms “conservation areas” to the phrase “fish and wildlife habitat” at SCC 32.10.110(14) and Part 300.

The Board now determines whether the Act requires protection of all species of fish and wildlife found in designated “fish and wildlife conservation areas” and, if so, whether the CAO affords such protection. The legislature did not limit the protection of fish and wildlife habitat conservation areas to just certain species. If the legislature intended to limit the application of RCW 36.70A.170 and .060 to certain species, it would have specified the fish and wildlife so

protected. As an example, the Board must presume that the legislature was aware of the federal Endangered Species Act (ESA). If the legislature intended the GMA's fish and wildlife habitat conservation area requirements to apply to only species covered by the ESA, it would have specified that. **Therefore, the Board holds that RCW 36.70A.170 and .060 require cities and counties to designate fish and wildlife habitat conservation areas and adopt development regulations to protect them for all species of fish and wildlife found within them.**

The question remains whether the CAO protects all species within its designated fish and wildlife conservation areas. **The Board holds that the CAO does comply with RCW 36.70A.170 and .060 because the County designated and protected fish and wildlife habitat conservation areas for all fish and wildlife.**

Part 300 of the CAO is labeled "Fish and Wildlife Habitat." SCC 32.10.310 provides:

(1) All stream, wetland and riparian ^[8] habitat is protected pursuant to Part 500 of this chapter. In addition, when these habitat areas contain critical species ^[9] listed as endangered or threatened by the state or federal governments, they shall also be protected pursuant to SCC 32.10.320.

(2) All fish and wildlife habitat not otherwise protected pursuant to subsection (1) shall be protected pursuant to the requirements of SCC 32.10.320.

In turn, SCC 32.10.320 is entitled "habitat management plan" and provides in part that such a plan "is required" under the following circumstances:

(1)... the Priority Habitats and Species maps or Natural Heritage Program maps maintained by the department, or other information, indicates the presence of the following on the site:

(a) areas with which critical species listed as endangered or threatened under federal law have a primary association; or

(b) saltwater-related habitat as described in 32.10.110(14c). ^[10]

On its face, SCC 32.10.310(1) protects any species found in stream, wetland and riparian habitat in Snohomish County. It is less clear whether "critical species" found outside stream, wetland and riparian habitat are protected. The Board must determine to what the phrase "these habitat areas" in the second sentence of SCC 32.10.310(1) refers. On the one hand, it could mean the "stream, wetland and riparian habitat" referenced in the first sentence of subsection (1). If so, the CAO affords no protection to "critical species" whose habitat of primary association is somewhere other than a stream, wetland or riparian area. See definition of "fish and wildlife habitat" at SCC 32.10.110(14).

On the other hand, "these habitat areas" may refer to "fish and wildlife habitat" generally as the title to this part of the CAO suggests. The Board adopts this latter interpretation. The CAO is presumed valid. Therefore the Board must adopt an interpretation that is consistent and complies with the Act. Accordingly, under this interpretation, "critical species" are afforded protection wherever they are found in Snohomish County by SCC 32.10.320.

"Critical species" are the only type of species mentioned in SCC 32.10.310(1). By necessary

implication, all “non-critical species” found in any stream, wetland and riparian habitat are also protected. Subsection (1) does not provide any protection to “non-critical species” located outside stream, wetland and riparian habitats. Yet, pursuant to the CAO’s definition of “fish and wildlife habitat” conservation areas, these areas include “saltwater-related habitat including kelp and eelgrass beds, shellfish areas, and herring and smelt spawning areas.” SCC 32.10.110(14)(c). Obviously, “saltwater-related habitat” is different from freshwater “streams, wetlands and riparian” areas. Therefore, to determine whether non-critical species are protected in saltwater-related habitat, one must turn to SCC 32.10.310(2).

At first glance, one concludes that “non-critical species” are protected outside of stream, wetland and riparian habitat because subsection (2) indicates that “[A]ll fish and wildlife habitat not otherwise protected pursuant to subsection (1) shall be protected pursuant to the requirements of SCC 32.10.320.” One therefore needs to examine SCC 32.10.320 to verify this conclusion. That provision of the CAO mandates a habitat management plan if saltwater-related habitat is mapped or other information indicates the presence of it. Accordingly, non-critical species found in saltwater-related habitat are also protected by the CAO.

The Act requires cities and counties to protect all fish and wildlife found in designated fish and wildlife habitat conservation areas. Here, the County has defined “fish and wildlife habitat” conservation areas to include all streams, wetlands and riparian areas, areas where threatened and endangered species have a primary association, and saltwater-related habitat. *See* SCC 32.10.110 (14). Although Pilchuck would have preferred a far more inclusive definition of habitat conservation areas, the County was not obliged to agree. Even if the County’s definition were inconsistent with the State’s “Minimum” Guidelines, the CAO’s definition does not violate the Act.

SCC 32.10.310 and .320, coupled with Part 500 of the CAO, were adopted to protect these fish and wildlife habitat conservation areas. The next question before the Board is whether the protections afforded by these regulations are adequate. The record is clear that various state agencies felt that the size of buffers adopted by the County was inadequate. The Board notes that other jurisdictions have adopted larger buffer areas and that such an option was and remains available to Snohomish County by amendment of the CAO. Nonetheless, the legislature has given virtually no direction as to the appropriate level of protection, and has required only that non-binding, advisory “Guidelines” be prepared as regulatory direction. Therefore, **the Board holds that the petitioners have failed to meet their burden of showing that the adopted fish and**

[11]

wildlife habitat conservation area protections do not comply with the Act.

Likewise, the Board holds that petitioners have not met their burden of showing that the Act imposes a duty upon the County to protect wildlife that uses habitat on both sides of the county line, and more importantly, how the County violated that duty. The Board notes that pursuant to RCW 36.70A.100, the County’s comprehensive plan must be consistent with King County’s comprehensive plan. Therefore, the Board may be required to revisit this issue when it reviews the County’s comprehensive plan.

Conclusion regarding Legal Issue 1(j)

The CAO's provisions at SCC 32.10.110(7) and (14), .210, .310 and .320 as they relate to "fish and wildlife habitat" comply with the requirements of the Act at RCW 36.70A.170 and .060 except those relevant provisions which fail to refer to "fish and wildlife habitat *conservation areas*."

Legal Issue 1(k)

SCC 32.520(2) and (4), which provide no buffers for category 4 wetlands.

The Act does not explicitly require buffers around wetlands, nor can the Board conclude that the protection of wetlands will always require a buffer being provided. On the other hand, the Board has held that the Act does require the protection of the "structure, function and values" of both "wetlands critical areas" and "wildlife habitat conservation critical areas." The evidence in the record strongly suggests that a vital symbiotic relationship often exists between such wetland and upland critical areas (such as wildlife habitat), and provides the scientific and policy rationale for wetland buffer areas.

There may be an apparent conflict between the Act's direction to protect wetland critical areas and their potential upland wildlife habitat critical areas on the one hand, and the Board's conclusion on the other hand that the Act does not explicitly require buffers. The Board reconciles this apparent conflict by determining that the Act's mandate for protection requires either a buffer, or a functionally equivalent protection for all wetlands, including category 4 wetlands. It may well be that some or even most category 4 wetlands can be protected by means other than a buffer. However, if there are going to be no buffers next to category 4 wetlands, the County needs to have some other mechanism that will protect these areas. The provisions of SCC 32.10.560 appear to be such a mechanism; however, due to the exemption of category 4 wetlands at issue here, it is not clear that such mitigations would come to bear.

Conclusions Regarding Legal Issue 1(k)

The provisions of SCC 32.520(2) and (4), which provide no buffers for category 4 wetlands, do not meet the requirements of RCW 36.70A.060 to protect critical areas. These sections are **remanded** to the County with instructions to add buffers and/or a mechanism to assure that a site-specific and/or project-specific evaluation will take place before a performance standards alternative to a buffer is approved.

Legal Issue Nos. 1(l), (m), (n), and (s)

(l) SCC 32.10.540 which allows construction of single family residences and ordinary residential improvements in wetlands, wetland buffers or stream buffers on existing legal lots.

(m) SCC 32.10.550, which makes necessary elements of a critical area study discretionary.

(n)SCC 32.10.550, which does not require the critical area study, resulting stream and wetlands classifications, and resulting mitigation and stream relocation plans to be prepared by qualified experts.

(s)SCC 32.10.610, which provides for a "reasonable use allowance," without requiring protection from adverse impacts that result to critical areas from such "reasonable use."

The common thread in these legal issues is the administrative discretion to make regulatory judgments, subject to criteria, that the CAO assigns to the County's Director of the Department of Planning and Development Services (the **Director**). Much of the argument presented by petitioners is speculative, assuming that any discretion that is assigned to the Director will be abused with the result that critical areas will not be protected. The Board must look at the words in the CAO to see if, on their face, they create a regulatory scheme that meets the goals and requirements of the Act. In so doing, **the Board holds that, while the County's regulatory scheme puts its Director in a very challenging position, and subject to intense pressures from many directions, it is within the County's discretion to regulate in this manner.**

The Act in general, and the critical areas regulations topic in specific, is an attempt to balance a variety of public policy objectives. The primacy of the Act's mandate to protect critical areas must not be minimized; however, the timeliness and predictability of the permit process are also high-

order public policy objectives. In addition to the guidance of RCW 36.70A.020(6) and (7), ^[12] the Board is aware that much of the ongoing focus of regulatory reform is a search for ways to increase the flexibility and predictability of the local government development permit process. In the present instance, the County has identified one way to achieve a modicum of flexibility, certainty and timeliness with regard to critical area matters. The successful delegation of such decisions to administrators will depend largely upon the diligence, competence and judgment of the individuals that local governments place in such roles, yet it is not the place of this Board to make personnel decisions, nor to evaluate their performance.

What is within our realm are the development regulations that provide administrators with clear and detailed criteria so that, in wielding professional judgment, the Director has regulatory "sideboards" and policy direction. Failure to provide such parameters does not just place an administrator in an uncomfortable position — it would undermine, perhaps fatally, the duty of the legislative body to articulate in its adopted development regulations its expectations and

^[13] requirements with regard to critical areas protection.

The Board holds that each of the above cited sections of the CAO provide clear criteria to the Director.

Conclusions regarding Legal Issues Nos. 1(l), (m), (n), and (s)

The petitioners have not shown that sections of the CAO cited in Legal Issue Nos. (l), (m), (n) and (s) do not meet the requirements of RCW 36.70A.040(3), .060(2) and .170.

Legal Issue No. 1(o)

SCC 32.10.570 which allows certain development activities in streams, wetlands and buffers and SCC 32.10.570(1), which allows development in streams (and is therefore inconsistent with RCW 75.20.100 and Ch. 220-110 WAC).

Section 32.10.570 allows for certain development activities in areas regulated under the CAO. Pilchuck addresses subsection (1), streams; subsection (2), wetlands; and subsection (4), buffers. The allowed development activities include utility facilities; roadways and bridges; stormwater and flood control facilities; habitat modification; trails; fishing access; development activities allowed under the Shoreline Management Act; and golf courses. Such activities are allowed only after a critical area study pursuant to SCC 32.10.550, and mitigation meeting the requirements of SCC 32.10.560.

Pilchuck asserts that the record fails to demonstrate that such activities do not, collectively, cause adverse impacts to critical areas, and that there will be no net loss of functional values of wetlands. Pilchuck also challenges the use of case-by-case review of such projects. It uses golf courses as a specific example of a permitted development activity which will have adverse impacts on adjacent critical areas.

The County argues that the limited types of activities which are potentially allowed in those areas, together with the mandatory study and mitigation requirements, serve to protect critical areas. In the specific instance of golf courses, it points to the requirement of subsection .570(4)(i) to maintain the functional values of affected buffers.

The Board looks to the record to ascertain whether a petitioner can overcome the presumption of validity accorded a local government's challenged action. RCW 36.70A.320. While the Pilchuck Prehearing Brief contains several references to the record regarding potential significant impacts from golf course construction and operation, or any other development activities listed in .570, it has failed to demonstrate that golf courses, or similar developments, could not be constructed and

operated under the CAO and still protect critical areas. Pilchuck has failed to meet its burden . [15]

Conclusion regarding Legal Issue 1(o)

The CAO's provision at SCC 32.10.570 complies with the GMA.

Legal Issue 1(p)

SCC 32.10.570. .580(2) and .590(1)(a), which provide no standards or criteria for protection of critical areas impacted by (1) certain development activities in streams, wetlands, and buffers; (2) "innovative" designs that deviate from ordinance protection requirements; and, (3) projects allowed pursuant to a "reasonable use allowance."

As previously indicated, all critical areas must be designated and protected; none can be exempted or excluded from designation or protection. However, cities and counties can vary the

degree or method of protection given to designated critical areas dependent upon the circumstances. Pilchuck alleges that SCC 32.10.570 violates the GMA. Due to its length, the Board will not quote the entire provision here. The preamble to SCC 32.10.570 provides:

The following development activities may occur in streams, wetlands and buffers regulated under this chapter, but will require a critical area study which meets the requirements of SCC 32.10.550 and mitigation which meets the requirements of 32.10.560.

SCC 32.10.570(1) then lists allowed development activities in streams, subsection (2) the allowed development activities in wetlands, and subsection (4) allowed development activities in buffers.

The Board notes that the petitioners have not specifically identified Legal Issue No. 1(p) in their prehearing brief. The Board further notes that the validity of SCC 32.10.570 was at issue in Legal Issue No. 1(o). The Board could treat this issue as abandoned but for isolated references in the briefing to the CAO provisions in question. **Nonetheless, the Board holds that the petitioners have not meet their burden of showing how this section does not comply with the Act.**

Although petitioners ask the Board to speculate how the County in bad faith might apply these provisions, the Board will never presume that future actions of government will be taken in bad faith. Instead, the Board will assume that prospective governmental actions will be taken in good faith in an effort to comply with the Act. This assumption will be made regardless of whether the jurisdiction has been repeatedly found in noncompliance in the past. That certainly is not the case with Snohomish County.

Pilchuck next contends that SCC 32.10.580(2) does not comply with the Act. That provision states:

To utilize the provisions set forth in SCC 32.10.570, .590 or .600, applicants must submit a critical area study unless the area is exempt under 32.10.510(3) or a study is not required under other provisions of this chapter. The county will review the critical area study and proposed development activity in accordance with the following criteria:

(a) The development activity will not:

(i) adversely affect water quality;

(ii) destroy, damage or disrupt a fish and wildlife habitat area;

(iii) adversely affect drainage or storm water detention capabilities; or

(iv) lead to unstable earth conditions or erosion;

(b) the impacts are the minimum necessary to accommodate the development activity and are fully mitigated in accordance with SCC 32.10.560;

(c) any disruption to a critical area will occur in the least sensitive area; and

(d) critical areas or buffers temporarily disrupted during construction will be restored.

(Emphasis added.)

The Board has previously held that cities and counties cannot exempt or exclude any critical areas from being designated or protected. **Therefore, the Board holds that to the extent that SCC 32.10.580(2) involves exemptions listed in SCC 32.10.510(3), it does not comply with the Act.** This portion of the CAO will have to be amended to delete the reference to SCC 32.10.510(3) so that all applicants intending to utilize the provisions set forth in SCC

32.10.570, .590 or .600, will have to submit a critical area study.

[16]

Pilchuck also challenges SCC 32.10.590(1)(a). The preamble to SCC 32.10.590 authorizes the concept of innovative development design. It provides:

In conjunction with an application for a development permit, an applicant may request approval of an innovative design which addresses wetland and stream protection and preservation in a creative manner that deviates from the standards set forth in SCC 32.10.520 and .570.

Such design proposals are limited by SCC 32.10.590(1) which provides:

General. An applicant who requests that a development permit application be considered under the performance and design criteria of this section shall submit the following information:

(a) A critical areas study prepared and submitted in accordance with the requirements of section 32.10.550; and

(b) a conceptual site development plan drawn to scale which technically and visually illustrates the development potential achievable for the project site, and demonstrates that the innovative design proposal will achieve a net improvement in the functional value of the streams and wetlands and their buffers over that existing on the subject property and that which is achievable using the provisions of SCC 32.10.520, .530 and .570.

Subsection .590(1)(a), in and of itself, could be seen as lacking standards and criteria sufficient to protect critical areas. However, when read together with subsection (1)(b), which requires an applicant with an innovative design to demonstrate that the proposal will achieve a net improvement in the functional value of existing streams and wetlands, and .590(2), criteria for approval, the provision is consistent with the critical areas protection required by the Act. **The Board holds that the petitioners have failed to meet their burden of showing how SCC 32.10.590(1)(a) violates the GMA.**

Conclusion regarding Legal Issue 1(p)

The CAO's provisions at SCC 32.10.570, .580(2) and .590(1)(a) comply with the Act's requirements for designating all critical areas (RCW 36.70A.170) and adopting development regulations to protect them (RCW 36.70A.060) except for the portion of SCC 32.10.580(2) that involves exemptions of small wetlands specified in SCC 32.10.510(3).

Legal Issue No. 1(q)

SCC 32.10.570(2)(j), which provides a blanket allowance of stormwater retention facilities in wetlands and streams (and is therefore inconsistent with Ch. 90.48 RCW and Ch. 173-201A WAC).

SCC 32.10.570(2)(j) provides that: "Allowed development activities under this chapter [include] ... stormwater detention/retention facilities." Petitioners argue that this allows overly broad discretion to the County to allow such facilities, resulting in undue impacts upon and loss

of wetlands and streams. The County and Master Builders argue that the allowance of SCC 32.10.570(2)(j) is conditioned by other provisions of the CAO.

For example, the preamble to SCC 32.10.570 provides that:

The following development activities may occur in streams, wetlands and buffers regulated under this chapter, but will require a critical area study which meets the requirements of SCC 32.10.550 and mitigation which meets the requirements of 32.10.560.

The provisions of SCC 32.10.550 include content requirements for critical area study(ies) and SCC 32.10.560 identifies mitigation requirements for:

... loss of area or functional value of wetlands, streams and buffers regulated under this chapter. When mitigation is required by this chapter, it shall address restoration, rehabilitation, and compensation in accordance with the following requirements ...

Conclusion regarding Legal Issue No. 1(q)

The provisions of SCC 32.10.570(2)(j) must be read in the context of the entire CAO, including specific citations to other provisions which occur within that section itself. Consequently, **the Board holds that SCC 32.10.570(2)(j) does not violate the GMA.**

Legal Issue No. 1(r)

SCC 32.10.590 which allows designs that deviate from ordinance protection requirements to create a loss in individual functional values.

The Board has addressed whether SCC 32.10.590 complies with the Act in its discussion of Legal Issue No. 1(p) above.

Conclusion regarding Legal Issue No. 1(r)

SCC 32.10.590 does not violate the GMA.

Legal Issues No. 1(w)

The provisions of Ordinance 94-108 in their entirety which fail to preclude urbanization within proximity of critical areas at densities that will adversely impact critical areas and the survival of fishery resources dependent thereupon.

To the extent that Legal Issue No. 1(w) deals with whether the County's UGA boundaries or densities adopted in its comprehensive plan comply with the Act, the Board will not address this issue since the comprehensive plan is not before it in this case.

The Board will address Pilchuck's concerns that the County cannot properly deduct acreage for critical areas from designated UGAs if the County does not know the location of its critical areas. This complaint is an attack on the use of performance standards in which the County will determine on a case-by-case basis the extent of its critical areas at the time development permits are sought. See SCC 32.10.210. The use of performance standards is recommended in the Minimum Guidelines for "... circumstances where critical areas (e.g., aquifer recharge areas,

wetlands, significant wildlife habitat, etc.) cannot be specifically identified...”WAC 365-190-040 (1).

The Board holds that where critical areas are known, cities and counties cannot rely solely upon performance standards to designate these areas. Here, SCC 32.10.210 provides in part that there are “... no maps designating critical areas, except as otherwise indicated in this chapter....” Maps specifically referenced in the CAO include seismic hazard area maps (SCC 32.10.110(35)); volcanic hazard areas (SCC 32.10.110(46) and .460; priority habitats and species maps (SCC 32.10.310(1)); and the State Department of Natural Resources “Official Water Type Maps” (SCC 32.10.550(1)(c)). **The Board thus holds that the petitioners have not met their burden of showing how the CAO’s use of performance standards violates the Act.**

Conclusion regarding Legal Issue No. 1(w)

The Board will not determine in this appeal whether the County’s urban growth areas or the densities established in its comprehensive plan comply with the GMA. The County was authorized to rely on performance standards to identify critical areas on a case-by-case basis.

Legal Issue 1(x)

The provisions of SCC 32.10.250(2) and .610(4) which preclude appeal by aggrieved parties other than the applicant of county action on applications for a “reasonable use allowance?”

Pilchuck contends that SCC 32.10.610(4) “... is flawed because it deprives citizens an opportunity to administratively appeal a decision by the director to grant a reasonable use allowance. Every other decision made pursuant to the ordinance is subject to appeal by ‘any

person aggrieved’” Pilchuck PHB, at 62. ^[17] SCC 32.10.610(4) provides:

The applicant may appeal a decision of the director on a reasonable use allowance application to the hearing examiner pursuant to the provisions of Chapter 2.02 SCC.

Although Pilchuck is correct in pointing out that SCC 32.10.610(4) limits administrative appeals to only applicants, Pilchuck has failed to meet its burden of showing how this provision violates the GMA. Persons dissatisfied with the director’s decision still have the right to appeal to superior court.

Conclusion regarding Legal Issue No. 1(x)

The CAO’s provisions at SCC 32.10.250(2) and .610(4) do not violate the GMA.

Legal Issue No. 3

Failure of Ordinance 94-109 to Designate and Protect Critical Areas, Be Guided By GMA Goals, and Consider Minimum Guidelines. To the extent that Ordinance 94-108 fails to comply with the requirements of the Growth Management Act mentioned in issues 1 and 2, does Ordinance 94-109 similarly fail to comply?

Ordinance 94-109 was adopted to comply with SEPA. It is not a GMA enactment. Therefore, it is not subject to meeting the requirements of GMA.

Conclusion No. 3

The Board has no jurisdiction to determine if Ordinance 94-109 meets the requirements of the GMA.

Legal Issue No. 4

Public Participation. Did the County, in the process of adopting, and in adopting, Ordinance 94-108, fail to be guided by the public participation goal of RCW 26.70A.020(11), and violate the public participation requirement of RCW 36.70A.140, by making substantial changes to the draft of Ordinance 94-108 after the close of the record, thereby depriving the public of reasonable opportunity to comment upon the changes, including without limitation the provisions of SCC 32.10.030, .040, .065, .110(7, 9, 11, 14, 21, 23, 28, 33, 41), .420, .510, .520, .530, .560, and .570(2.j, 4.i), individually and collectively?

The CAO, Ordinance 94-108, was adopted on March 7, 1995. Finding of Fact No. 57. The County adopted its Plan on June 28, 1995. Finding of Fact No. 60. Therefore, the CAO was adopted before the Plan. Because regulations to implement a comprehensive plan pursuant to RCW 36.70A.120 cannot be adopted until the plan is adopted, the CAO is not an implementing regulation. Instead, it is an *interim* regulation. This is true notwithstanding the fact that the CAO's adoption preceded adoption of the Plan by just four months rather than by three and a half years, which would have been the case had the County met the Act's mandate to adopt regulations to protect critical areas by September 1, 1991. *See* RCW 36.70A.060(2).

What duty did the County have with regard to public participation when it adopted its CAO? The Board has previously concluded that development regulations adopted pursuant to RCW 36.70A.060 are not subject to the enhanced public participation requirements of RCW 36.70A.140. *See Tracy*, at 13. The County could not have violated a duty it did not have. The Board therefore need not apply the *West Seattle* test, as urged by petitioners, in this case, to determine if the County complied with its own public participation procedures or decide whether those procedures meet the requirements of the Act. At such time as it adopts development regulations, including critical areas regulations, pursuant to RCW 36.70A.040 to implement the plan, the County will be obligated to satisfy the requirements of RCW 36.70A.140 for enhanced public participation.

However, the County was required to comply with the Goals of the Act when it adopted the CAO. RCW 36.70A.020 applies to any type of development regulation and the planning goal at subsection (11) provides:

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

A local government has a duty to “consider” the planning goals. *See Gutschmidt*, at 17. Therefore, the County was required to “consider” public input pursuant to RCW 36.70A.020(11). The petitioners have failed to prove, by a preponderance of the evidence, that the County failed to consider (i.e., be guided by) Planning Goal 11.

Conclusion No. 4

The County, in its adoption of Ordinance 94-108, was guided by the public participation goal of RCW 26.70A.020(11), and was not required to meet the public participation requirements of RCW 36.70A.140.

Legal Issue No. 5(a)

Unlawful Limitation of SEPA review. Did the County, in adopting the provisions of SCC 32.10.060, act inconsistently with the GMA by providing that the protective measures required by Ordinance 94-108 constitute adequate mitigation under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, in all circumstances without engaging in the case-by-case analysis required by SEPA?

SCC 32.10.060 provides:

Relationship to Title 23 SCC Environmental Impacts.

(1) Critical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on critical areas for purposes of Title 23 SCC.

(2) For purposes of environmental review pursuant to the state environmental policy act, Chapter 43.21C RCW, and the Snohomish county environmental policy ordinance, Title 23 SCC, this chapter shall not apply to development permit applications submitted to the department prior to the effective date of this chapter.

The Board holds that the petitioners have failed to meet their burden to show how SCC 32.10.060 fails to meet the requirements of the GMA.

Conclusion regarding Legal Issue No. 5(a)

The petitioners have failed to meet their burden to show how SCC 32.10.060 fails to meet the requirements of the GMA.

V. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

1. Snohomish County Ordinance 94-108, the CAO, is in compliance with the requirements of the Growth Management Act with certain crucial exceptions:

A. All provisions of the CAO that exempt or exclude lands from being designated and/

or protected as critical areas, or have that effect, including but not limited to SCC 32.10.030, .040, .110 (11, 21, 23, 33, 38, 41), .410, .420, .510, .520, and .560. B.SCC 32.10.110 (14), part 300, SCC 32.10.310 and .320, for failure to define and regulate “fish and wildlife habitat *conservation areas*.” C.SCC 32.10.580(2) to the extent it addresses exemptions contained in SCC 32.10.510.

2.The CAO is **remanded** and the County is directed to amend Ordinance 94-108 to bring it into compliance with the GMA, as interpreted by the Board in this decision.Furthermore, because the County has already adopted a comprehensive plan, it is no longer possible for the County to adopt an interim critical areas ordinance.Rather, the critical areas ordinance (s) that the County adopts upon remand must be consistent with and implement its comprehensive plan pursuant to RCW 36.70A.040.This may be accomplished by a free-standing ordinance or by inclusion of a “critical areas chapter” in the County’s yet-to-be-adopted GMA zoning ordinance.In either case, the process used to develop the County’s critical areas ordinance implementing regulations must meet the requirements of RCW 36.70A.020(11) and RCW 36.70A.140, as well as any County adopted local procedures.

3.Legal Issues Nos. 1(e), (i), (t), (u), and (v) have been abandoned and are **dismissed with prejudice**.

4.Pursuant to RCW 36.70A.300(1)(b), the Board directs the County to comply with this Final Decision and Order no later than **5:00 p.m. on Friday, March 1, 1996**.

The County shall file by **5:00 p.m. on Friday, March 8, 1996** one original and three copies with the Board and serve a copy on each of the other parties of a statement of actions taken to comply with the Final Decision and Order.The Board will then promptly schedule a compliance hearing to determine whether the County has procedurally complied with this Order.

So ordered this 6th day of December, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Note:This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

APPENDIX

ARPP	Aquatic Resource Protection Program
CAO	Critical Areas Ordinance
CD	Core Document
DNS	Determination of Non-Significance
DTCED	Department of Trade, Community and Economic Development
FEMAT	Forest Ecosystem Management Assessment Team
PHB	Prehearing Brief
PSWQA	Puget Sound Water Quality Authority
SCC	Snohomish County Code
WDOE	Washington State Department of Ecology

[1] The Board takes official notice of this enactment by the Snohomish County Council. Ordinance 95-125 is the subject of a separate petition for review currently pending before this Board in CPSGMHB Case No. 95-3-0068, *Sky Valley, et al., v. Snohomish County*.

[2] As additional critical areas information becomes available through this site review basis, it can be added to a data base. In *Gig Harbor, et al., v. Pierce County*, CPSGMHB Case No. 95-3-0016 (1995), Pierce County describes its use of a Geographic Information System (GIS) to compile critical areas information that can be displayed in map format and updated as site-specific information becomes available.

[3] For example, while buffers are a logical mechanism to achieve certain kinds of protections, there is no statutory mandate requiring the use of buffers or, if utilized, a uniform width of buffer. Clustering and transfer of development rights mechanisms are among the regulatory options available to local governments in their efforts to protect critical areas. There is also discretion to supplement a regulatory approach to critical areas protection with acquisition of conservation easements or fee simple acquisition of part or all of certain parcels. There is even discretion as to whether to use the four-tier wetlands classification system as recommended by the Minimum Guidelines that is supported by the weight of scientific evidence. In these ways, local governments have discretion in how they go about meeting the Act's mandates to designate and protect critical areas.

[4] The County argued that the mandate in RCW 36.70A.060(2) to "protect" critical areas is less directive than language it replaced. The current language of this subsection was adopted by in 1991 by ReESHB 1025. Chapter 32, Laws of 1991. The former language is shown below with strikethroughs, with the amendatory language shown with underlining:

Each County (~~that is required or chooses to plan under RCW 36.70A.040,~~) and (~~each~~) city (~~within such county,~~) shall adopt development regulations (~~on or before September 1, 1991, precluding land uses or development~~) that (~~is incompatible with the~~) protect critical areas that are required to be designated under RCW 36.70A.170...

The verb "protect" is at least as strong and directive as the phrase it replaced - "preclude land uses or development that is incompatible with." Contrary to the County's assertion, the change cited above did not increase the range of land uses and development activities that local governments could permit in and near critical areas. Also, deletion of the phrase "precluding land uses or development" removes the distinction originally made between how land is *used* (i.e., the uses to which land is put) and how the surface of the land is *developed* or altered (i.e., new contours graded, vegetation removed, pervious surfaces made impervious). This dichotomy could have been read to suggest that

critical areas are, in and of themselves, a use of land, just as resource lands are a use of land (e.g., agricultural, forestry, mining). By eliminating this phrase, it becomes clear that critical areas are a natural attribute of land, rather than a human activity or use to which land is put. Their status as critical areas transcends the land use to which the parcels on which they exist are put. Whether a parcel is committed to agricultural, residential, commercial or industrial use, RCW 36.70A.060(2) requires that any critical areas on it be protected.

[5]

While GMA planning strives to provide local communities with both near-term predictability and long-term direction, the Act clearly acknowledges that change is inevitable. Nowhere is this more obvious than in its provisions regarding annual plan amendments (*see* RCW 36.70A.130(2)) and decennial UGA reviews (*see* RCW 36.70A.130(3)). Over the long-term, new facts become known, new decisions are rendered, local priorities are revisited, statutes and case law evolve and even economic and social trends shift. There are also localized market variables that remain unforeseen despite the most clairvoyant and persuasive of plans. *See Aagaard v. Bothell*, CPSGMHB Case No. 94-3-0011 (1995), at 9. Perhaps the most tangible and pragmatic way to accommodate the dynamic nature of GMA planning is to keep Countywide Planning Policies, Comprehensive Plans and development regulations in three-ring binders.

[6]

WAC 365-190-030 defines “habitats and species of local importance” as follows:

(9) Habitats of local importance include, a seasonal range or habitat element with which a given species has a primary association, and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long-term. These might include areas of high relative density or species richness, breeding habitat, winter range, and movement corridors. These might also include habitats that are of limited availability or high vulnerability to alteration, such as cliffs, talus, and wetlands.

(19) Species of local importance are those species that are of local concern due to their population status or their sensitivity to habitat manipulation or that are game species.

[7]

This holding is consistent with the Act’s other references to “fish” and “wildlife.” RCW 36.70A.020(8), one of the GMA’s planning goals which applies to both comprehensive plans and development regulations, provides:

Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses. Emphasis added.

A second planning goal, RCW 36.70A.020(9), indicates:

Open space and recreation. Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks. Emphasis added.

Furthermore, RCW 36.70A.160, a comprehensive plan provision entitled “Identification of open space corridors--Purchase authorized,” states:

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify open space corridors within and between urban growth areas. They shall include lands useful for recreation, wildlife habitat, trails, and connection of critical areas as defined in RCW 36.70A.030. Identification of a corridor under this section by a county or city shall not restrict the use or management of lands within the corridor for agricultural or forest purposes.... Emphasis added.

Finally, RCW 36.70A.172, “Critical areas--Designation and protection--Best available science to be used,” provides in part:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best

available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries. Emphasis added.

[8]

The CAO does not explicitly define “riparian habitat.” It does however, define “riparian wetlands” at SCC 32.10.110(33) as:

... those wetlands that are fully or partially contained within 100 feet of Type 1, 2 or 3 streams, within 25 feet of Type 4 streams, or within 10 feet of Type 5 streams according to the stream classification system in 32.10.510(1).

[9]

The CAO defines “critical species” as “... all species listed by the federal government as endangered, or threatened.” SCC 32.10.110(7).

[10]

The CAO defines “fish and wildlife habitat” to include: (a) streams and wetlands regulated under Part 500 of this chapter; (b) areas with which critical species listed as endangered or threatened under federal law have a primary association; and (c) saltwater-related habitat including kelp and eelgrass beds, shellfish areas, and herring and smelt spawning areas...

[11]

This holding is limited to this specific issue. Other portions of this Final Decision and Order address Part 500 of the CAO.

[12]

RCW 36.70A.020 provides, in pertinent part:

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability. (Emphasis added.)s

[13]

The legislative body always has an implicit duty to provide sufficient resources to administer the regulatory regime it adopts. With regard to critical area regulations, the County has a specific duty to provide access to the specialized expertise that will be necessary for the Director to render certain of the judgments that the CAO assigns to her or him.

[14]

Legal Issue No. 1(o) as set forth in the Board’s Prehearing Order alleges noncompliance of SCC 32.10.570 with specified provisions of the Act, and also includes, parenthetically, the claim that such noncompliance results in section .570 being inconsistent with to RCW 75.20.100 and Ch. 220-110 WAC. Pilchuck did not brief the portion of the issue involving Title 75 RCW and Ch. 220-110 WAC. Therefore, the Board will deem that part of the issue to have been abandoned, and will not consider it further.

[15]

Board Member Philley did not participate in the Board’s decision regarding this issue since he is a member of a private golf and country club.

[16]

See Legal Issue No. 1(r).

[17]

Pilchuck abandoned its allegation that SCC 32.10.259(2) violated the Act but simply used that provision to bolster its argument that elsewhere in the CAO, any aggrieved person could appeal.