NO. 44269-8-II

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

SAVE OUR SCENIC AREA and
FRIENDS OF THE COLUMBIA GORGE, INC.,

Appellants,

v.

SKAMANIA COUNTY,

Respondent.

RESPONSE BRIEF OF SKAMANIA COUNTY

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FOG	Appellants Friends of the Columbia Gorge, Inc., and Save Our Scenic Area
GMA	Growth Management Act, Ch. 36.70A RCW
SEPA	State Environmental Policy Act, Ch. 43.21C RCW

1. INTRODUCTION

Skamania County requests that the Court uphold the Superior Court's decision to dismiss Friends of the Columbia Gorge, Inc., and Save Our Scenic Area's ("FOG's") appeal for two reasons. First, the appeal is time barred as FOG failed to timely appeal the County's 2005 resource lands decision and 2007 Comprehensive Plan. Second, moratorium cessation is not subject to SEPA review.

2005 Natural Resource Lands Decision. The County designated and reviewed its natural resource lands in 2005, through Resolution 2005-35. The Resolution designated roughly half the property the County has direct regulatory control over as GMA resource land. Instead of appealing within 60 days, FOG waited seven years.

2007 Comprehensive Plan. Skamania County updated its Comprehensive Plan in 2007. The Plan identifies the zoning classifications which consistently implement the Plan and does not require adoption of new zoning. If FOG believed the Plan was inconsistent with County zoning, that inconsistency was created when the Plan was revised. Instead of appealing within 60 days of Plan adoption, FOG waited five years.

SEPA Does Not Apply to Moratorium Cessation. Absent a decision to extend a moratorium, it terminates in six months, pursuant to RCW 36.70.795. Moratorium cessation is not an "action" subject to SEPA. Even it were, as a procedural and emergency matter, moratoria are categorically exempt from SEPA review.

The doctrine of finality is a critical component of Washington land use law. Without a finite appeal period, small jurisdictions with limited resources would face endless litigation exposure. They would also share with property owners the uncertainty and costs associated with a lack of finality over adopted planning policies and regulations. This issue is particularly important in Skamania County, which had to lay off half its Planning Department last year and faces further budget cuts in 2013.

Because FOG's appeal is not timely and moratorium cessation is not subject to SEPA, Skamania County requests that the Court affirm the Superior Court's decision to dismiss.

2. FACTUAL BACKGROUND

2.1. Planning in a County with 85% Federal Land

The federal government owns about 850,000 acres, or 85% of the land base in Skamania County.[1] In addition, the Columbia River Gorge National Scenic Area Act protects 80,000 acres, State Forest Trust Lands

[1] CP 73.

encompass 60,000 acres, and private commercial forest lands encompass 40,000 acres.[2] Three percent of the land base remains for residential, industrial and commercial uses.[3] Given this unique situation, in 2005, Skamania County designated roughly half the land it has direct regulatory control over as GMA forest resource land.[4] That decision was not appealed.

The County has a strong economic interest in promoting forest resource use on its federal and state lands and would like to do more to protect the industry, but given federal ownership, GMA's tools are limited.

Historically, the federal forest lands were the lynch pin behind the County's economy. From 1970 through 1991, the National Forest produced 350 million board feet of lumber per year.[5] This resulted in about 10 million dollars in revenue to the County and schools in today's dollars.[6] The State Forest Trust lands produced two million dollars each year, on average, for the County, throughout the 80's and early 90's.[7] Then the Spotted Owl was listed as a threatened species, and production shut down. In less than a decade, timber harvests went from 350 million

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[2] CP 73.
[3] CP 73.
[4] CP 34-35.
[5] CP 73.
[6] CP 73.
[7] CP 73. Receipts are now about $100,000 annually. CP 74.

board feet to a fraction of that.[8] The County went from four full time mills running multiple shifts to one mill, and from 800 full time family wage jobs in the forest to fewer than 24.[9] With the corresponding drop in tax base, the County has depended on federal funding ever since.[10]

Without federal funding, the County would have lain off half its workforce, County schools would lose 40% of their funding, and three of the four school districts would be shuttered.[11] In the mid-County region, 55-65% of the children require subsidized school lunches,[12] and County domestic violence rates are high.

> The unemployment and underemployment in the center of the county has a lot of impacts on the county in terms of service levels. We even have a domestic violence shelter in our county, and in November [2010] alone we had 77 bed nights in that shelter. So we have a very severe economic problem, especially in the center of our county.[13]

If 77 bed nights are extrapolated annually, the figure approaches 1,000. This is in a county of just over 11,000, or 3,755 households.[14]

Skamania County struggles to address these challenges. Some job gains started to occur in the past decade, but then the recession hit. With

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[8] CP 73-74. (Board feet is now under ten million).
[9] CP 74.
[10] Congress has continued to provide rural funding to address logging receipt curtailment resulting in large part from the Spotted Owl's listing. CP 74.
[11] CP 74.
[12] CP 80.
[13] CP 79.
[14] CP 393 (population is just over 11,000; at 2.93 persons per household, that equals 3,755 households).

12.9% unemployment,[15] and lagging behind more urbanized areas of the state, economic development is an imperative.

Consequently, if the County could use GMA to promote forest harvest on its federal and state lands, it would do so. However, GMA simply "designates" land for commercial forest use. Due to preemption and other concerns,[16] GMA's reach over federal land is limited. Nevertheless, given its strong support for the forest industry, the County did designate 39,416 acres for forest use.[17]

2.2. FOG Failed to Appeal the County Resource Lands Decision

Skamania County designated Resource Lands and completed its 2005 GMA review when it adopted Resolution 2005-35.[18] The Resolution:

- Acknowledges 88% of the County is in federal (85%) or state (3%) ownership;
- Acknowledges half the remaining 12% is within the Columbia River Gorge National Scenic Area;
- Identifies the 39,416.19 acres regulated as forest land within the Scenic Area and 4,240.23 acres regulated as agricultural land within the Scenic Area; and,

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[15] CP 75.
[16] *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 953 (9th Cir., 2008), amended opinion. For an example of federal agency view of preemption in Skamania County, *see* CP 391-392, specifically CP 392, ¶ 1.9.
[17] CP 34.
[18] CP 34-35.

- Designates 100% of that acreage as GMA natural resource lands.

The Resolution also finds the County has complied with GMA's natural resource requirements. With this designation of 43,656 acres as GMA natural resource land, and the accompanying findings and conclusions, the County addressed GMA's natural resource designation and review requirements.

On appeal, FOG impermissibly raises an issue it failed to raise before the Superior Court, which is that Resolution 2005-35 does not meet GMA's periodic review requirements at RCW 36.70A.130.[19] FOG's issue in Superior Court was whether the County should have designated more land as natural resource land, not whether the County failed to "review" its designation decision under RCW 36.70A.130.[20] Whether FOG agrees with the action or not, the County acted. FOG failed to timely appeal, and may not raise issues not raised in Superior Court.[21]

This is not FOG's first appeal on this forest lands issue. Plaintiff Save Our Scenic Area filed a similar appeal in 2008, the County asserted

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[19] Brief of Appellants, pgs. 3, and 12-25.
[20] CP 141-144, *see e.g.*, CP 143 ("no reason to appeal or challenge the adoption of Ordinance 2005-35 on August 2, 2005, as it dealt with only the NSA portion of the County."); RP 18-20.
[21] RAP 9.12; *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013).

lack of jurisdiction in its answer, FOG took no action to prosecute the appeal, and after four years of no action, the Court dismissed the appeal for want of jurisdiction.[22] This second appeal was filed seven years too late.

2.3. **FOG Failed to Appeal the 2007 Comprehensive Plan**

Skamania County updated its Comprehensive Plan in 2007.[23] The Plan adopts three land use designations in unincorporated Skamania County: Rural I, Rural II, and Conservancy.[24] The Plan identifies which zoning classifications are consistent with these Plan designations.

> Table 2-1 shows the comprehensive plan designations and the consistency of each potential zoning classification. The Plan Designation to Zoning Classification table is provided to identify those zoning districts that are consistent with each plan designation.[25]

The Plan designates the Unmapped Zoning Classification[26] as consistent with all three Plan designations.[27] FOG may not agree with the 2007 Comprehensive Plan's designation of the Unmapped Zoning Classification as consistent with the three Plan designations, but it is five years too late to appeal.

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[22] CP 372-381.
[23] CP 37-39.
[24] CP 40.
[25] CP 40.
[26] CP 82-85.
[27] CP 211.

2.4. **No Critical Area Issues are Before the Court**

There are no critical area issues before the Court,[28] but as FOG mischaracterizes the County's stipulation and Superior Court's ruling on critical areas, the following clarifications are provided.

Skamania County adopted a Critical Areas Ordinance in 1996,[29] which it subsequently amended.[30] Because it lacked an ordinance or resolution documenting completion of the 2005 review, the County stipulated in Superior Court to formally completing its periodic review by December 1, 2013.[31] However, FOG did not move for summary judgment as it asserts, so the Court did not grant FOG summary judgment.[32] Rather, FOG contested the County's stipulation and devoted both argument and four pages of briefing to opposing the County's stipulated periodic review deadline of December 1, 2013.[33] FOG does not raise the stipulated deadline as an error on appeal.

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[28] Appellants Opening Brief, p. 17, FN 23 (no party assigns error to the portions of the Superior Court's decision related to critical areas).
[29] CP 67-69.
[30] CP 54-58. The County has also adopted an optional, Comprehensive Plan environmental element and opted into the legislatively authorized voluntary stewardship program or VSP. CP 43-50; CP 52-53. The VSP is outlined at RCW 36.70A.700-760.
[31] CP 409. The County had already planned on completing its next periodic review in 2015, well before the next review deadline, in 2018. CP 87-92, *see* specifically CP 89
[32] Appellants Opening Brief, p. 17.
[33] CP 106-107 (County's stipulation in opening brief); CP 144-147 (FOG's responsive briefing); CP 409 (County reply).

2.5. **Moratorium Lapse Following 42,663 Acre Rezone**

Most land mapped as Unzoned within Skamania County is federal or state owned, and FOG has stated those acres "are not central to the disputes in this appeal."[34] The state and federal lands are primarily in forest use and no development permits on those lands have been sought from the County during the duration of the moratorium.[35] There are 14,117 acres of private or County owned acres designated as Unzoned, or 1.3% of the County.[36]

The County has devoted significant planning resources to rezoning the privately held acreage from the Unmapped zoning designation to another designation. 42,663 acres in the Western portion of the County was originally mapped as Unzoned, was included in the 2007 moratorium, and is now governed by zoning adopted in May, 2012.[37] With this 42,663 acre rezone, the County's primary rationale for continuing the moratorium, originally adopted five years earlier, no longer existed. Thus, in August, 2012, through Ordinance 2012-08, the County continued the

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[34] CP 21; Brief of Appellants, p. 6, FN 2.
[35] CP 22.
[36] CP 21.
[37] CP 60-65; CP 21.

moratorium for 4,500 acres located in the so called "High Lakes Area,"[38] but otherwise allowed the moratorium to lapse.

2.6. **No Development Where Moratorium has Lapsed**

FOG's briefing suggests the County is about to be overrun by development.[39] The County moratorium ordinances and public debate, which has been lively, reflect similar concerns.[40] This is partly why the County adopted a series of moratorium ordinances over a five year period. But, after rezoning 42,663 acres in 2012,[41] the County realized the moratorium it had become accustomed to was no longer necessary.

Given the County has limited land available for private commercial, industrial, and residential development; a 12.9% unemployment rate; a risk of having to close three out of four school districts; and, 50-65% of school children in the mid-County area on subsidized school lunch, being overrun by development is not an issue.[42] County water supplies further restrict development. Because the County does not operate a water utility, water rights are difficult to secure, and

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[38] CP 30-32; CP 22.
[39] Brief of Appellants, *see e.g.*, pgs. 48-49.
[40] CP 178-181.
[41] CP 21.
[42] CP 73-75.

plats must rely on a single well,[43] land division is limited. For over a decade, the County has not received a single plat application outside an urban area exceeding six lots.[44] And, there have been no development applications on properties previously under moratoria.[45] Against this backdrop, is the fact that County resources for planning have been significantly reduced:

- The County does not have any regular GMA grants to fund its planning work;
- In 2011, the County government moved to four ten-hour shifts instead of a five-day week in order to cut overhead costs;
- The Community Development Department Division was forced to cut half its staff in 2012; and,
- The Board of County Commissioners is looking at further reductions for 2013.[46]

With these challenges, the County faced stark choices. It could abandon all planning, adopt a wide slate of objectives which could not be accomplished with its limited resources, or it could focus resources on the narrow areas of greatest importance. After the 42,663 acre rezone, and following frank and open discussion, which FOG mischaracterizes as a

[43] CP 394; *see also, Dept. of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002).
[44] CP 393.
[45] CP 393.
[46] CP 393.

refusal to diligently and conscientiously complete statutorily required planning work,[47] the County chose the latter approach.[48]

2.7. **Genesis of FOG's Appeal**

FOG may have waited so long to appeal as the appeal is not really about the moratorium or zoning, but the Whistling Ridge Energy Project. The Project is the one bright spot in an economically devastated area. It is a 150 million dollar capital investment in locally produced renewable energy which could almost double the tax base.[49] FOG has filed four appeals related to the Project. [50]

First, FOG appealed the zoning which addressed energy development and would have applied to the Whistling Ridge Wind Energy Project.[51] Second, FOG separately appealed two County land use consistency determinations (prepared pursuant to the state's review

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[47] *See* Brief of Appellants, p. 16, which mischaracterizes the County's approach to its planning obligations. FOG cites to testimony from the Planning Director and a former Commissioner and takes the commentary out of context. Both advocated additional planning work but faced serious economic obstacles. *See e.g.*, CP 75 ("When I came into office, minimal land within the County located outside the Scenic Area was zoned, and our comprehensive plan had not been revised for almost three decades - since 1977. We embarked on a long-range planning process three years ago, to finish work on the zoning code and to update the plan. The process began with a series of all-day Commissioner workshops early in 2008, followed by Planning Commission hearings in the fall.") *See also* CP 178-181, and Section 2.1 of this brief.

[48] CP 87-92 (County's 2012-2016 Work Plan).

[49] CP 394.

[50] Whistling Ridge is not the only economic development project FOG has opposed. FOG also appealed the Broughton Mill project in an appeal rejected by the Oregon Court of Appeals. *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 236 Ore. App. 479, 238 P.3d 378 (2010).

[51] CP 394.

process) to the Columbia River Gorge Commission, which were dismissed.[52] Third, FOG appealed the Governor's Decision approving the Project to Superior Court, and to the State Supreme Court, where the appeal is now pending.[53] Fourth, FOG filed this appeal, incorrectly believing the moratorium applied to Whistling Ridge. FOG's concern is that moratorium cessation would allow the Project,[54] despite state preemption and the moratorium's inapplicability to the Project.[55]

Regardless of the rationale for the appeal, it is time barred and SEPA does not apply to moratorium cessation.

3. RESTATEMENT OF ISSUES

1. Resource Lands. Did the Superior Court properly dismiss FOG's natural resource lands claim because: (a) FOG has conceded the County designated natural resource lands; (b) the County reviewed its natural resource lands designations under GMA, through Resolution 2005-35, in 2005; (c) FOG impermissibly raises a new argument on appeal regarding compliance with RCW 36.70A.130 (GMA's periodic review

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[52] CP 394.
[53] CP 394; CP 383-389.
[54] CP 170-171.
[55] The moratorium only applied to: (1) building permits on 20+ acre parcels created since 2006; (2) plats; and, (3) SEPA Checklists for forest practice conversions. CP 394; CP 314-317. The Project has completed SEPA review, does not require a plat approval, and is located on parcels created before 2006. CP 394; see *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 197 P.3d 1153 (2008) (if a renewables project voluntarily opts into the state's siting process, that process preempts local regulations).

requirement), which was not raised in Superior Court; and (d) FOG's decision to wait seven years to appeal bars this issue?

2. Zoning Consistency With Comprehensive Plan. Did the Superior Court correctly dismiss FOG's claim that the Unmapped Zoning Designation is inconsistent with the County Comprehensive Plan because: (1) FOG's decision to wait five years to appeal the County Plan bars this issue?; (2) a moratorium does not "stay" the appeal period; and, (3) the Plan classifies the Unmapped Zoning Classification as consistent with the Plan?

3. SEPA. Did the Superior Court correctly dismiss FOG's claim that moratorium cessation is subject to SEPA because: (1) moratorium cessation occurs by operation of statute and is not a County action subject to SEPA; (2) moratoria are categorically exempt under SEPA's exemptions for emergencies and procedural issues; and, (3) FOG lacks standing?

4. ARGUMENT

4.1. Standard of Review

4.1.1. Summary Judgment

Summary judgment is granted where there is no genuine issue of material fact precluding dismissal as a matter of law.[56] Before the Court are legal issues over whether FOG's appeal is timely and SEPA applies to moratorium cessation. There is no material fact in dispute.

There is no dispute over when the County acted to update its Comprehensive Plan, including Plan adoption of language identifying the Unzoned Map Designation as consistent with all three Comprehensive Plan designations.

There is no dispute over when the County acted to designate GMA natural resource lands. The dispute in Superior Court related to whether the County should have designated additional resource land.[57] This is irrelevant to the jurisdictional issue of whether FOG failed to timely appeal.

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[56] CR 56(C).
[57] Brief of Appellants, CP 141-144.

"Summary judgment is proper when a reasonable person could come to only one conclusion based on the evidence."[58] Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present specific facts showing that there is a genuine issue for trial.[59] While FOG disputes County policy choices, these disputes have no bearing on whether the County took action which FOG failed to appeal, or on the interpretation of a statutory exemption. The Superior Court correctly granted the County's motion for summary judgment.

4.1.2. Deference to Local Planning Decisions

While a summary judgment decision is reviewed *de novo* on appeal, before the Court are local land use planning decisions made pursuant to GMA, SEPA, and Ch. 36.70 RCW. Deference to local planning decisions is accorded. Absent clear error, a GMA decision, which is presumed valid, is upheld.[60] And, "[c]onsiderable judicial deference is given to the construction of legislation by those charged with its enforcement."[61]

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[58] *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 358, 247 P.3d 816 (2011).
[59] *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350-351, 144 P.3d 276 (2006).
[60] RCW 36.70A.320.
[61] *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979); *see also East v. King County*, 22 Wn. App. 247, 256, 589 P.2d 805 (1978).

4.2. **43,656 Acre Resource Lands Designation and Review**

Like nine other rural counties in Washington, Skamania County partially plans under GMA.[62] Partially planning counties are to designate natural resource lands, which are agricultural, forest, and mineral resource lands with long-term commercial significance.[63] Skamania County had a deadline of 1991, with a 2005 review requirement. The legislature provided a 36-month optional extension.[64]

Skamania County complied with GMA's requirement to designate resource lands and completed its 2005 review when it adopted Resolution 2005-35. On appeal, FOG concedes that the County has designated natural resource lands.[65] The County, through Resolution 2005-35, also complied with GMA's review requirement.

With a "review," counties are "to take action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the requirements of this chapter...."[66] Absent new statutory requirements necessitating

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[62] CP 28.
[63] *See* RCW 36.70A.030(2), (8), (10), and (11).
[64] RCW 36.70A.130(4) and (6); RCW 36.70A.170 (1991 natural resource designation deadline).
[65] Appellants Opening Brief, p. 19, FN 24.
[66] RCW 36.70A.130(4).

amendments, no revision is required.[67] The title of Resolution 2005-35 describes the action taken:

> **Resolution 2005-35. (Determining the designation of forest and agricultural land in the National Scenic Area and the adoption of development regulations under Skamania County Code Title 22 – National Scenic Area, meets the requirements of RCW 36.70A for the conservation of agricultural, forest and mineral resource lands)**[68]

The Resolution includes findings on government land ownership and Scenic Area regulations.[69] The Resolution explains that the County's National Scenic Area regulations designate 39,416 acres as forest land and 4,240 acres as agricultural land. These designations:

> [P]rovide for the conservation of land to be used for forest, agriculture, and mineral resource uses, the protection from encroachment of residential uses from adjacent lands, requires a 500 foot notification to surrounding property owners, and has specific setbacks on adjacent uses....[70]

The Resolution concludes:

> **NOW THEREFORE, BE IT RESOLVED,** that the Skamania County Board of Commissioners has determined the designation of forest and agricultural lands within the National Scenic Area and the development regulations adopted under SCC Title 22 meets the requirements of the Growth Management Act (RCW 36.70A) for the

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[67] *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 329, 343-345, 190 P.3d 38 (2008).
[68] CP 34-35, emphasis in text.
[69] CP 34-35.
[70] CP 34-35.

> conservation of forest, agricultural, and mineral resource lands.[71]

With this Resolution, the County designated its natural resource lands and complied with GMA's review requirements.[72] FOG had 60 days to appeal.[73] FOG waited seven years. Its appeal is now time barred.

4.2.1. FOG Impermissibly Raises a New Issue

FOG impermissibly raises an issue it failed to raise before the Superior Court.

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.[74]

FOG is precluded from raising a new issue on whether Resolution 2005-35 addressed GMA's review requirements, including its new public participation issue.[75] While FOG's complaint did raise the question of whether GMA's "review requirement" was met,[76] FOG failed to raise the issue on summary judgment, and is precluded from doing so now.

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[71] CP 34-35, emphasis in text.
[72] CP 34-35.
[73] RCW 36.70A.290(2).
[74] RAP 9.12; *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013) (on appeal, only issues "called to the trial court's attention" may be addressed).
[75] Appellants Opening Brief, pgs. 3, 12-25.
[76] Appellants Opening Brief, pgs. 17 and 19, FN 24. FOG cites to CP 3-5, 11-12, and 16-17, which are citations to its complaint.

4.2.2. GMA does not Require Redundant Reviews

Even if the new issue were permissible, there is no GMA prohibition against simultaneously designating natural resource lands "where appropriate"[77] and taking "action to review and, if needed, revis[ing]" plans and regulations to ensure GMA compliance.[78]

While Skamania County was late in meeting its deadline to designate natural resources lands, that in no way precludes it from determining, as it did in 2005, that its designation of resource lands has met "the requirements of the Growth Management Act (RCW 36.70A) for the conservation of forest, agricultural, and mineral resource lands."[79]

Because the County adopted a resolution determining its natural resource designation met GMA requirements, it completed its 2005 review for GMA compliance. Unlike the Court of Appeal's *Thurston County*[80] decision, Resolution 2005-35 adopts GMA revisions. Resolution 2005-35 specifically identifies the lands the County designated as GMA resource land and includes findings on GMA compliance.

FOG may not be satisfied with the degree of County review, or the extent of the designation, but that is not the question. The only question is whether the County "reviewed" its plans and regulations, and "if needed"

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[77] RCW 36.70A.170.
[78] RCW 36.70A.130(4).
[79] CP 34.
[80] *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 137 Wn. App. 781, 796-797, 154 P.3d 959 (2007), rev'd in part on appeal, 164 Wn.2d 329, 190 P.3d 38 (2008) (county did not revise the agricultural lands designation criteria under appeal).

revised same to comply with GMA.[81] This is precisely what Resolution 2005-35 does.

FOG fundamentally misapprehends GMA's "review" requirements. Contrary to FOG's briefing, although the Supreme Court's *Thurston County*[82] decision did not address all issues before the lower court, the Supreme Court did reverse the Court of Appeal's interpretation of the scope of GMA's periodic review requirements. During a review, the County is not required to revise its natural resource designations, **unless** relevant GMA provisions have been amended.

> The Court of Appeals reasoned any limitation on the type of challenge that may be brought against an update "would undermine the purpose of requiring periodic reviews." The court recognized the importance of finality in land use decisions but noted the legislature, by requiring the seven year update, determined "the benefits to the public of keeping abreast of changes in the law outweigh the benefits of finality to landowners." **We disagree**. ...
>
> **We hold a party may challenge a county's failure to revise a comprehensive plan only with respect to those provisions that are directly affected by new or recently amended GMA provisions**.... This rule provides a means to ensure a comprehensive plan complies with recent GMA amendments, recognizes the original plan was legally deemed compliant with the GMA, and preserves some degree of finality. ...

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[81] RCW 36.70A.130(4).

[82] *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008). The lower court decision is published at *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 137 Wn. App. 781, 154 P.3d 959 (2007).

> Limiting the scope of failure-to-revise challenges recognizes the original comprehensive plan was legally deemed GMA compliant. A comprehensive plan is presumed valid upon adoption, RCW 36.70A.320(1), and is conclusively deemed legally compliant if it is not challenged within 60 days. The seven year update does not strip the original comprehensive plan of its legal status as GMA compliant, and we will not presume the legislature intended such a drastic measure in the absence of statutory language to that effect. **If the laws have not changed, the comprehensive plan remains GMA compliant**.
>
> Finally, limiting failure-to-revise challenges to those aspects of a comprehensive plan directly affected by new or substantively amended GMA provisions serves the public policy of preserving the finality of land use decisions.[83]

Contrary to the Supreme Court's *Thurston County* decision, FOG is asking the Court to require the County to not only complete a second, and redundant 2005 review, but to do so when there is no new statutory requirement which might require the 2005 designation decision to be revised.

In any case, the County remains subject to GMA's periodic review requirements, and its next GMA review is due June 1, 2017.[84] With no duty to "re-review" the 2005 decision, no GMA amendments relevant to the natural resource lands designation, and an upcoming review, finality should be respected, and the Superior Court's dismissal affirmed.

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[83] *Thurston County v. Western Wash. Growth Mgmt. Hrgs. Bd*, 164 Wn.2d 329, 343-345, 190 P.3d 38 (2008), emphasis added.
[84] RCW 36.70A.130(5)(c)

4.2.3. County Designation and Review is "Presumed Valid"

Skamania County is presumed to be in compliance with GMA, and absent clear error, its GMA decisions are affirmed.[85] Under GMA, a local jurisdiction's plans and regulations are presumed valid. Absent a finding of non-compliance by the Growth Management Hearings Board or court, a county is deemed to be in statutory compliance.[86] As such, the County's 2005 decision to designate 43,656 acres as resource land is presumed compliant. The Department of Commerce does not determine GMA compliance and is not required to track periodic review compliance in non-GMA counties.[87] Commerce does not even regulate under GMA. The legislature only authorized the agency to adopt guidance.[88] Five days before filing its complaint, FOG's attorney obtained an e-mail from a staff member stating the County was "out of compliance with the critical areas/resource lands regulations update requirement...."[89] The e-mail was not forwarded to the County, and Commerce failed to consult with the County. Further, there is no GMA requirement to prepare "zoning classifications for commercial forest land."[90]

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[85] RCW 36.70A.320.
[86] RCW 36.70A.320(1), (2), and (3).
[87] RCW 36.70A.106. Skamania County provides notice opportunities to Commerce, as it does other state agencies, but there is no GMA requirement to submit documentation of periodic review completion to Commerce. *See* Brief of Appellants, p. 21.
[88] RCW 36.70A.050.
[89] CP 165; CP 18. The e-mail is dated September 6, 2012, the complaint was signed September 11, 2012.
[90] Appellants' Opening Brief, p. 23.

GMA's only requirement is to "designate" natural resource lands.[91] There is no requirement for a non-GMA county to adopt commercial forest lands zoning. While the County committed to further work on zoning generally when it adopted the moratoria, no moratorium ordinance contained or committed to any specific zoning or legislative enactment, as final regulations would be developed through the public process.[92] Regardless, as Resolution 2005-35 recognized, the County had already adopted commercial forest lands zoning.[93]

Having failed to identify a statutory requirement for the County to take further action, and given the presumption of validity, there is no GMA requirement for the County to "re-review" its designation decision. As FOG never moved for summary judgment below, the Court cannot grant summary judgment in favor of FOG, and the Superior Court's decision should be affirmed.[94]

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[91] RCW 36.70A.170.
[92] *See e.g.*, CP 256-258.
[93] CP 34 ("[T]he development regulations in Skamania County Code (SCC) Title 22 - Nation Scenic Area designated 39,416.10 acres as forest land ... and designated 4,240.33 acres as agricultural land....").
[94] Appellants' Opening Brief, pgs. 10, 17, and 24-25 ("The Court of Appeals should reverse the Superior Court's decision, grant summary judgment in favor of Plaintiffs on their GMA natural resource periodic review claims....")

4.3. **FOG Failed to Appeal the 2007 Comprehensive Plan**

4.3.1. FOG's Appeal is Time Barred

The County updated its Comprehensive Plan in 2007.[95] FOG waited five years to appeal. The appeal is now time barred. In non-GMA counties such as Skamania County, GMA appeals are filed in Superior Court within 60 days.[96] In Superior Court, FOG did not contest this appeal period and may not do so on appeal.[97] Even if the 60 day appeal period did not apply to claims brought under the Planning Enabling Act, Ch. 36.70 RCW, a shorter period of 30 days would.

> The consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays.[98]

Where a challenge to a street vacation ordinance "was not commenced until 38 days after the ordinance at issue was enacted," and a necessary party "was not joined in the action until 78 days after that date," the appeal

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[95] CP 37-39.
[96] *Moore v. Whitman County*, 143 Wn.2d 96, 18 P.3d 566 (2006); RCW 36.70A.290(2).
[97] RAP 9.12; *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013).
[98] *Federal Way v. King County*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991); *see also Jewell v. Kirkland*, 50 Wn. App. 813, 820, 750 P.2d 1307 (1988).

was filed too late.[99] "Given the requirement that decisions directly affecting the use of land be promptly determined we can only hold that this lengthy delay in challenging the ordinance was unreasonable ...."[100] Where the appeal period is not statutorily set forth, the analogous appeal period is 30-days.[101]

> [W]here ... there is no other appeal period prescribed by statute or local ordinance governing the type of land use action involved, the appeal must be brought within 30 days of the municipality's or agency's final decision. ... We are not persuaded ... that the policy reasons for having shorter appeal periods in land use cases do not apply to areawide rezones.[102]

The County took an appealable action in 2007 just as occurred in *City of Federal Way* and *Brutsche v. City of Kent*.[103] Consequently, even if FOG had contested the use of a 60 day appeal period in Superior Court, waiting five years to raise a challenge is well beyond the 20 day appeal period for appealing County Commissioner decisions,[104] the standard 30 day appeal period for land use decisions, and GMA's 60 day appeal period.

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[99] *Federal Way v. King County*, 62 Wn. App. at 540.
[100] *Federal Way v. King County*, 62 Wn. App. at 540, emphasis added.
[101] *Concerned Organized Women and People Opposed to Offensive Proposals, Inc. v. The City of Arlington*, 69 Wn. App. 209, 215-216, 847 P.2d 963 (1993). Because RCW 58.17.180 was amended in 1995 to utilize LUPA procedures, which provide a 21-day appeal period, the courts are likely to apply this shorter period.
[102] *Brutsche v. City of Kent*, 78 Wn. App. 370, 380 and FN 11, 898 P.2d 319 (1995), internal citations omitted.
[103] *Federal Way v. King County*, 62 Wn. App. 530, 815 P.2d 790 (1991); *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995).
[104] RCW 36.32.330.

4.3.2. Moratoria Do not Suspend Appeal Periods

The County's 2007 Comprehensive Plan was adopted well after the legislature enacted RCW 36.70.545 in 1990.[105] If FOG believed the Plan and Zoning Code were inconsistent under RCW 36.70.545, FOG's duty to appeal was triggered in 2007.

Adopting a moratorium does not suspend the appeal period. To the extent there is an inconsistency between the Comprehensive Plan and Zoning Code, that inconsistency was created when the County adopted the Plan. The duty to appeal was triggered then. A moratorium may suspend development, but it does not cure plan and zoning inconsistencies or suspend an appeal period for five years. Lacking a published opinion to support this extraordinary contention, FOG points to a Growth Board decision, which as FOG recognizes, is not binding on the Court,[106] and is not on point.

The Board found, for purposes of its jurisdiction, that a moratorium was a development regulation.[107] The Board did not hold that that adopting a series of rolling moratoria indefinitely suspends appeal periods. Such an approach is inconsistent with *Federal Way* and *Brutsche*

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[105] As of 1992, development regulations non-GMA counties "shall not be inconsistent with the county's comprehensive plan...." RCW 36.70.545.
[106] Brief of Appellants, p. 32, FN 34.
[107] *Master Builders Ass'n of King & Snohomish Counties v. City of Sammamish*, Growth Management Hearings Board No. 05-3-0030c (August 4, 2005).

v. City of Kent.[108] as Section 4.3.1 discusses, which is incorporated here. Moratorium cessation simply allows development to proceed under the preexisting plans and regulations, which remain in place, unless timely appealed, or subsequently revised. The duty to appeal is triggered when a plan or regulation is adopted, not at some uncertain point in the future, after a series of moratoria expire.

4.3.3. The Plan and Zoning are Consistent

Even if FOG's appeal was timely, there is no inconsistency between the Plan and the zoning. The Plan specifically identifies the zoning which is consistent with and may implement the Plan. Table 2-1 shows the Comprehensive Plan designations which are consistent with each zoning designation. The Plan identifies a number of zoning classifications, including the Unmapped Zoning Designation.[109] The Plan states the Conservancy designation may be implemented through the Unmapped Zoning designation, which the County originally adopted in 1985.[110] Thus, if a parcel has both a Conservancy designation and an Unmapped Zoning designation, the two are consistent. FOG cannot meet its burden of proof to demonstrate there is an inconsistency, and certainly

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[108] *Federal Way v. King County*, 62 Wn. App. 530, 815 P.2d 790 (1991); *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995).
[109] CP 369.
[110] CP 368-370; CP 82-85.

cannot demonstrate the County's actions are "arbitrary, capricious, or contrary to law."[111] The Superior Court properly dismissed the appeal.

4.4. Moratorium Lapse is not Subject to SEPA

4.4.1. Moratorium Lapse is not a SEPA "Action"

Moratorium lapse is not a "[n]ew and continuing" activity, "[n]ew or revised agency" regulation or procedure, or a "[l]egislative proposal" which triggers SEPA.[112] A moratorium is a discretionary mechanism to preserve the status quo to allow for the enactment of substantive legislation which is subject to SEPA. Absent compliance with statutory prerequisites, a moratorium automatically lapses within six months.[113]

Ordinance 2012-08 is consistent with this statutory authority. The Ordinance does not enact the moratorium lapse. That is automatic. Instead, the County "modified and extended" the moratorium with respect to a portion of the County, but allowed the moratorium to otherwise lapse by operation of statute.[114] To the extent there was an "action" which could be subjected to SEPA review, it was the continuation of the moratorium over 4,500 acres, not the statutorily required cessation. Consequently, there was no SEPA "action" for FOG to appeal in Ordinance 2012-08.

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[111] Brief of Appellants, p. 29; *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 949 P.2d 370 (1998).
[112] WAC 197-11-704; RCW 43.21C.030(2)(c); RCW 43.21C.031(1).
[113] RCW 36.70.795.
[114] CP 322.

There is no legal duty for the County to continue the moratorium indefinitely. Indeed, within the shoreline area, the State Supreme Court has reversed rolling moratoria and narrowly construed moratoria authority.[115] Before the Superior Court, FOG failed to point to a single case, statute, or regulation which even suggested SEPA applies to moratoria.

Adopting a series of moratorium ordinances over a five year period does not make those ordinances a permanent fixture of the County's regulatory structure, which cannot lapse without the County first completing SEPA review. Such an approach would violate RCW 36.70.795, which requires a moratorium to terminate within six months.

The plain language within the entirety of a statute is reviewed to give effect to legislative intent and avoid absurd results.[116] RCW 36.70.795 is not ambiguous. Moratoria are authorized, but absent compliance with specified steps, they automatically expire in six months.

> **A moratorium ... adopted under this section may be effective for not longer than six months**, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium ... may be renewed for one or more six-month

[115] *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), plurality opinion. The legislature subsequently amended Ch. 90.58 RCW, at RCW 90.58.590.
[116] *Department of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10 and 11-12, 43 P.3d 4 (2002); *Tingey v. Haisch*, 159 Wn.2d 652, 663-664, 152 P.3d 1020 (2005) (courts avoid "absurd" interpretations of the law).

> periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.[117]

Requiring SEPA review before moratorium cessation potentially forces the County to violate RCW 36.70.795. Preparing an environmental impact statement is costly and time consuming, particularly if appeals ensue.[118] As the County lacks the funds to prepare such a document, the result would be indefinite maintenance of the moratorium, in violation of RCW 36.70.795.

FOG's reliance on *Byers v. Board of Clallam County Comm'rs*,[119] for the proposition that before statutory expiration occurs, SEPA must be complied with, is misplaced. *Byers* dealt with not a moratorium, but enactment of a comprehensive regulatory structure with 30 pages of regulations:

> [T]he term "interim" is somewhat a misnomer when applied to the Clallam County resolution. The ordinance here involved is actually a detailed zoning code which, according to its title, establishes 'the boundaries of areas to be known as zones to which the use classifications are applied, and within which zones the heights of buildings, areas of lots, building sites and yard spaces are regulated...' It includes 30 pages of detailed zoning regulations. Any so called "interim zoning" ordinance of such detail, scheduled to be effective for 4 years, must be adopted pursuant to ...

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[117] RCW 36.70.795, emphasis added.
[118] *See e.g.*, CP 75 (County's environmental review for an earlier ordinance was remanded for EIS preparation). In large part due to resource constraints, Whistling Ridge was permitted through the state's siting process, rather than locally.
[119] 84 Wn.2d 796, 529 P.2d 823 (1974).

> RCW 36.70. This is particularly true where, as here, there has been no determination that an "emergency" exists which requires "interim zoning." "Interim zoning," under RCW 36.70.790 ... is not intended to be used as a means of adopting a virtually complete zoning ordinance for a relatively extended period of time.[120]

The Board in *Master Builders* relied on *Byers*, as there, a city was utilizing moratoria as a permanent stall tactic to avoid adopting a comprehensive regulatory structure. Once the city allowed the moratorium to lapse by operation of statute, the Board found compliance.[121] Here, the exact opposite occurred.

Skamania County adopted comprehensive zoning regulations governing 42,663 acres, and then allowed the moratorium to lapse as a result ("The subarea plan final zoning was adopted in May 2012 so the moratorium can be modified.")[122] The rezone was subject to SEPA; moratorium lapse was not.

The County's moratorium was originally adopted to address an emergency.[123] In voting for the more limited moratorium, a former County Commissioner remained concerned that an emergency situation

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[120] *Byers v. Board of Clallam County Comm'rs.*, 84 Wn.2d at 800-801.
[121] *Master Builders Ass'n of King and Snohomish Counties v. City of Sammamish*, Growth Management Hearings Board No. 05-3-0027 (October 20, 2005). (The cause numbers for the two Board decisions are distinct as the Board segregated the original case, but the later compliance decision addressed the noncompliant moratorium.)
[122] CP 323.
[123] CP 30-32.

remained, and questioned how much land should be subject to the statutory lapse.[124] However, by allowing the moratorium to lapse, Skamania County's intent was not "to open the door to unplanned and unregulated development on thousands of acres of land," and create an emergency situation.[125] Rather, the County came to terms with the fact that its worst fears concerning development had not happened. Something far worse had.

With a depleted tax base, high unemployment, and funding cuts necessitating laying off County staff, the issue was not dealing with an influx of development, but the fact that because there was not any development, maintaining basic government services and operations had become the overriding concern.[126]

FOG may prefer maintenance of a permanent moratorium by forcing the County to prepare an environmental impact statement it cannot afford, and would likely be litigated, but such an approach violates RCW 36.70.795. Application of SEPA to moratoria is also antithetical to the purpose of a moratorium, which is adopted on an emergency basis and

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[124] CP 180-181; *see also* Brief of Appellants, pgs. 41-42.
[125] Appellants' Opening Brief, pgs. 48-49.
[126] See section 2.1, which is incorporated herein.

contains no substantive standards, and is statutorily required to terminate within six months, absent affirmative action to continue it.[127]

4.4.2. SEPA's Categorical Exemption for Emergencies

Moratoria are emergency enactments, and are therefore exempt from SEPA.[128] "Because the interim ordinance was passed in response to an emergency situation, the County did not violate SEPA's mandate."[129] FOG has never challenged the County's declaration of emergency as applied to moratorium adoption or taken the position that SEPA applies to moratorium enactment. If moratorium adoption is exempt, then its automatic, statutory cessation is as well, because the expiration is built into the original adoption decision.

Once the emergency ceases, if SEPA is to apply, it could only be applied to a decision to continue the moratorium, **not** its automatic lapse. Although the non-binding Board decision FOG relies on does not address SEPA's emergency exemption, this approach is consistent, as the Board

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[127] RCW 36.70.795.
[128] WAC 197-11-880 ("Actions that must be undertaken immediately or within a time too short to allow full compliance with this chapter, to avoid an imminent threat to public health or safety, to prevent an imminent danger to public or private property, or to prevent an imminent threat of serious environmental degradation, shall be exempt.")
[129] *Jablinske v. Snohomish County*, 28 Wn. App. 848, 853, 626 P.2d 543 (1981).

found GMA compliance after the city's moratorium was allowed to lapse by operation by statute.[130]

FOG's failure to timely appeal County planning decisions cannot be cured by requiring moratorium cessation to undergo SEPA review. Not only is cessation not a SEPA action, but as moratoria are categorically exempt, no SEPA review is required before a moratorium automatically lapses per statutory directive.

4.4.3. SEPA's Categorical Exemption for Procedural Matters

There are no substantive standards adopted by moratorium cessation. When a moratorium ceases, there is simply a reversion to the status quo and the underlying regulatory structure. Moratorium cessation "relat[es] ... solely to governmental procedures," and is exempt from SEPA.

> The proposal or adoption of legislation, rules, regulations, resolutions or ordinances, or of any plan or program relating solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment shall be exempt.[131]

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[130] *Master Builders Ass'n of King and Snohomish Counties v. City of Sammamish*, Growth Management Hearings Board, No. 05-3-0027 (October 20, 2005).

[131] WAC 197-11-800(19); *see also Dioxin/Organochlorine Center v. PCHB*, 131 Wn.2d 345, 362, 932 P.2d 158 (1997) ("SEPA and its amendments present a statutory scheme in which uniform rules are established to identify actions generally exempt from SEPA without the necessity of further review.").

Simply because FOG has become accustomed to the moratorium does not create some substantive, legal right for it to be indefinitely maintained. Such an approach is not consistent with the concerns over rolling moratoria the Supreme Court identified in *Biggers*,[132] or with RCW 36.70.795.

4.4.4. FOG Lacks Standing

Standing is an "indispensable part of petitioner's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof."[133] If the petitioner lacks standing, the court is without jurisdiction, and dismissal is required. Although the City raised standing in its summary judgment motion, the Court did not rule on standing. As a jurisdictional prerequisite, the Court may dismiss FOG's appeal on this basis alone,[134] in addition to being an independent legal basis supporting the Superior Court's decision to dismiss the appeal.

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[132] *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), plurality opinion. Note, Ch. 90.58 RCW was subsequently amended, at RCW 90.58.590 to clarify municipal authority to adopt moratoria within shoreline areas.
[133] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).
[134] RAP 2.5(a); *see also State v. Weber*, 99 Wn.2d 158, 161-163, 659 P.2d 1102 (1983).

In SEPA cases "the petitioner must allege an 'injury in fact,' *i.e.*, that he or she will be 'specifically and perceptibly harmed' by the proposed action," and be within the "zone of interests" SEPA protects.[135]

> [W]hen a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself. If the injury is merely conjectural or hypothetical, there can be no standing.[136]

"Unless a litigant can demonstrate a direct stake in the controversy, *i.e.*, that he will be specifically and perceptibly harmed, he cannot invoke judicial intervention.[137] In *CORE*,[138] an appeal was dismissed when the evidence did not support petitioner's assertions of injury from changes in hydrologic functioning of creeks running between his property and the development. In *Trepanier*, the petitioner failed to establish injury-in-fact where "the overall level of development permitted under the new code will not be significantly higher or lower than under the existing code."[139] The city ordinance had reduced densities, and petitioner had argued that

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[135] *Trepanier v. City of Everett*, 64 Wn. App. 380, 382-83, 824 P.2d 524 (1992).
[136] *Id.* at 383; *see also Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *see Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) ("An interest sufficient to support standing to sue, however, must be more than simply the abstract interest of the general public in having others comply with the law.").
[137] *Concerned Olympia Residents for the Environment v. City of Olympia*, 33 Wn. App. 677, 684, 657 P.2d 790 (1983).
[138] *Id.*
[139] *Trepanier v. City of Everett*, 64 Wn. App. at 384.

this would increase densities in other locations. The injury was viewed as speculative, and the *Trepanier* court dismissed the appeal.

FOG's interests are not within SEPA's zone of interests and FOG cannot demonstrate it has suffered a concrete injury. Moratoria are categorically exempt, as requiring compliance for emergency and procedural matters could thwart SEPA's environmental protection objectives. Moratorium lapse allows legally authorized development to proceed once applications are submitted. The existing legal structure is not altered. Any alleged injuries are speculative, and arise not from moratorium cessation, but from the existing zoning, which FOG failed to appeal. Consequently, FOG cannot demonstrate injury-in-fact.

FOG, despite its alleged fears of rampant development, produces no evidence that this is likely. As addressed in Section 2.6, which is incorporated here, no development applications have been submitted within the lands on which the moratorium has lapsed.[140] And, in the broader context, there is little development occurring within the County. Not one land division exceeding six lots outside an urban area has occurred in a decade.[141] As for Whistling Ridge, as Section 2.7 addresses, although the project has taken four years to site due to litigation, the State

[140] CP 393.
[141] CP 393.

has permitted it and the moratorium did not apply. There is no injury related to moratorium cessation.

This lack of development is one reason the County tax base is shrinking. Community Development has lost half its staff, 55-65% of school children in the mid-County area receive subsidized school lunch, and without federal funding the County would lose three of four school districts.[142]

FOG raises concerns about development. But, development is not injuring FOG, nor is it likely too. The real injury is that there is no development necessitating moratorium continuation.

5. CONCLUSION

FOG files two claims years past the appeal deadline and a moratoria cessation claim, to which SEPA does not apply.

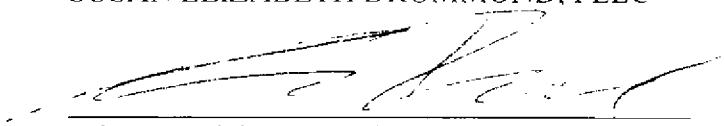
[142] CP 393; CP 80; CP 74.

The County requests that the Court affirm the Superior Court's decision to dismiss FOG's appeal.

DATED this 28th day of May, 2013.

ADAM NATHANIEL KICK
Prosecuting Attorney for Skamania County, and

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC



Adam N. Kick, WSBA #27525
Susan Elizabeth Drummond, WSBA #30689
Attorneys for Respondent Skamania County

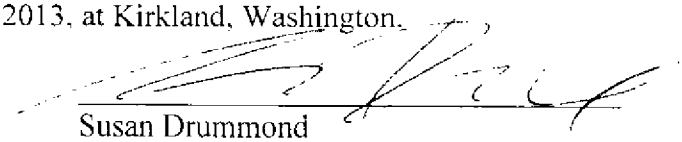
CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, I served the foregoing RESPONSE BRIEF OF SKAMANIA COUNTY on the parties listed below by First Class U.S. Mail, postage prepaid, and e-mail.

Nathan J. Baker Friends of the Columbia Gorge, Inc. 522 SW 5th Avenue, Suite 720 Portland, OR 97204-2100 nathan@gorgefriends.org	J. Richard Aramburu Aramburu & Eustis, LLP 720 Third Avenue, Suite 2112 Pacific Building Seattle, WA 98104-1860 rick@aramburu-eustis.com
Gary K. Kahn Reeves, Kahn, Hennessy & Elkins 4035 SE 52nd Avenue P. O. Box 86100 Portland, OR 97286-0100 gkahn@rke-law.com	

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is correct.

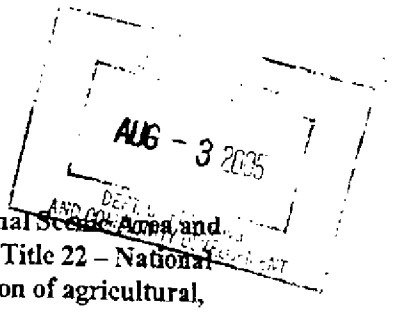
Signed May 28, 2013, at Kirkland, Washington.



Susan Drummond

Tab 1

Resolution 2005-35
Natural Resource Lands Decision, CP 34-35



RESOLUTION 2005-35

(Determining the designation of forest and agricultural land in the National Scenic Area and the adoption of development regulations under Skamania County Code Title 22 – National Scenic Area, meets the requirements of RCW 36.70A for the conservation of agricultural, forest and mineral resource lands)

WHEREAS, pursuant to the Growth Management Act (RCW 36.70A), each county shall adopt development regulation to assure the conservation of agricultural, forest, and mineral resource lands, and that such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals; and,

WHEREAS, over eighty percent (88%) of the land within Skamania County is in public ownership either within the Gifford Pinchot National Forest or is owned by the State of Washington; and,

WHEREAS, half of the remaining twenty percent (12%) is located within the Columbia River Gorge National Scenic Area and is regulated locally with development regulations that are consistent with the Columbia River Gorge Management Plan and the National Scenic Area Act; and,

WHEREAS, the development regulations in Skamania County Code (SCC) Title 22 – National Scenic Area designated 39,416.10 acres as forest land (SMA Forest, GMA Commercial Forest, and GMA Large Woodland) meeting the intent of RCW 36.70A, and designated 4,240.23 acres as agricultural land (SMA Agriculture and GMA Large-Scale Agriculture) meeting the intent of RCW 36.70A; and,

WHEREAS, the forest and agricultural designations provide for the conservation of land to be used for forest, agriculture, and mineral resource uses, the protection from encroachment of residential uses from adjacent lands, requires a 500 foot notification to surrounding property owners, and has specific setbacks on adjacent uses to assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals; and,

WHEREAS, the County adopted SCC Title 22 on December 21, 1993, and the provision have been in effect since adoption;

NOW THEREFORE, BE IT RESOLVED, that the Skamania County Board of Commissioners has determined the designation of forest and agricultural lands within the National Scenic Area and the development regulations adopted under SCC Title 22 meets the requirements of the Growth Management Act (RCW 36.70A) for the conservation of forest, agricultural, and mineral resource lands.

PASSED IN REGULAR SESSION this 2nd day of ~~July~~ August 2005.

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

SKAMANIA COUNTY
BOARD OF COMMISSIONERS

Chairman

Commissioner

Commissioner

ATTEST:

Clerk of the Board

Approved as to form only:

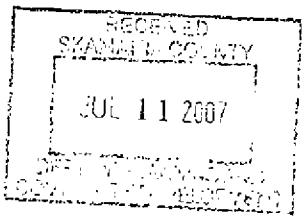
Skamania County Prosecuting Attorney

AYE 3
NAY 0
ABSTAIN 0
ABSENT 0

Tab 2

Ordinance 2007-25
Comprehensive Plan Update

(Including Plan excerpts, CP 37-39, 368-369, and zoning chart, CP 370)



RESOLUTION 2007-25

(Adopting, Endorsing and Certifying by Motion the Skamania County 2007 Comprehensive Plan and Associated Maps)

WHEREAS, RCW 36.70 authorizes Counties to engage in creation of Comprehensive Plans and the adoption and certification thereof by motion; and,

WHEREAS, the creation, adoption and certification of Comprehensive Plans and subarea plans are considered a legislative process and not subject to RCW 36.70C; and,

WHEREAS, the Washington State Legislature in 1990 Passed the Growth Management Act (RCW36.70A) requiring all counties to prepare or update their Comprehensive Plans to provide guidance to bring their ordinance into compliance with the Critical Areas requirements and the Commercial Resource Protection requirements and,

WHEREAS, on March 20, 2007 the Board of County Commissioner's (BCC) initiated the draft of the 2007 Comprehensive Plan. This draft includes the Critical Areas Best Available Science guidance and,

WHEREAS, on March 28, 2007 a Determination of Non-Significance (DNS) was issued and reviewed under the State Environmental Policy Act (SEPA) was completed, since no appeals were filed and,

WHEREAS, on March 27, 2007 a draft plan and a 60-day notice of intent to adopt were sent to Washington State reviewing agencies meeting the notice requirements of the Growth Management Act and,

WHEREAS, the Planning Commission held a workshop on April 17, 2007 to discuss the draft plan and associated maps and,

WHEREAS, the Planning Commission, having provided proper notice in the official newspaper of general circulation, and with a quorum present, conducted a public hearing on the March 20, 2007 BCC Initiated Comprehensive Plan and associated maps on May 1, 2007 at the Rock Creek Center at 7:00 p.m. and,

WHEREAS, After all those attending the hearing were given the opportunity to speak, the public hearing was closed to public testimony at the end of the evening on May 1, 2007. The public hearing was continued to May 15, 2007 for the Planning Commission deliberations on map and text and,

WHEREAS, Due to constraints, no deliberations were held on May 15, 2007, so at the conclusion of the May 15, 2007 public hearing; the public hearing was continued a second time to May 22, 2007 for deliberations on the map and text and,

WHEREAS, On May 22, 2007 after reviewing the public testimony, both written and oral, discussing and analyzing the testimony, the Planning Commission recommended to accept the 2007 Board of County Commissioner's Initiated Draft Comprehensive Plan and to recommend that the County Commissioners review and accept the following changes:

A. Correct all reference to the Swift Subarea Plan throughout the document to be pending Swift Subarea Plan.
B. Modify the land use designation map Figures 2-2 and 2-3 to remove the Swift Subarea on the map and in the Legend (the area should be shown as Conservancy).
C. Modify Policy E.2.2 to state - review the effects of development on fish species, which include anadromous fish and other species protected under the Federal Endangered Species Act and require mitigation such as riparian habitat enhancement and water quality treatment.
D. Add new sentence to end of Policy E.4.1, however, unmapped wildlife habitat areas and sites may be identified during the development review process.
E. The words Mt. Adams should be added on page 41 after the words Mt. St. Helens and before the words Columbia River Gorge in the paragraph and Policy E.3.6 should be amended to remove the words, "enter at your own risk."
F. Add new Policy E.4.6 - Encourage All Terrain Vehicle (ATV) use and motorized off road vehicle (ORV) use to be located in appropriate areas of private land outside of critical resource areas.
G. Add map of Mt. St. Helens Volcanic Hazard Area and Mt. Adams Area into Chapter 3 as Figures 3-1 and 3-2 with reference included on page 42.

WHEREAS, the Board of County Commissioners reviewed the Planning Commission proposed changes at workshop on June 25, 2007; and,

WHEREAS, RCW 36.70.440 allows the Board of County Commissioners to approve by motion and certify the Comprehensive Plan, after receipt of the report and recommendation of the planning agency without further reference to the planning commission, provided that the plan conforms either to the proposal as initiated by the county commissioners or the recommendation thereon by the planning commission. No further pubic hearings are required since the planning agency issued its report within 90 days of the Board of County Commissioners Initiating the draft text and maps; and,

NOW THEREFORE, BE IT RESOLVED, that the Skamania County Board of Commissioners adopts and endorses the Final 2007 Comprehensive Plan and Associated Plan Maps as recommended by the Planning Commission.

PASSED IN REGULAR SESSION this 10th day of July 2007.

SKAMANIA COUNTY
~~BOARD OF~~ COMMISSIONERS

Chairman

Commissioner

Commissioner

BOARD OF COMMISSIONERS
SKAMANIA COUNTY WASHINGTON
CLERK OF THE BOARD

ATTEST:

Clerk of the Board

Approved as to form only:

Skamania County Prosecuting Attorney

AYE 3
NAY ___
ABSTAIN ___
ABSENT ___

CHAPTER 2: LAND USE ELEMENT

Introduction

The Land Use Element of the Skamania County 2007 Comprehensive Plan provides policy guidance for the uses of land throughout the entire unincorporated county, which range from residential, commercial and industrial structures to farm and forestry activities, to open spaces and undeveloped environmentally sensitive areas. The goals and policies contained in the Land Use Element provide the guidance as to how and where these uses should be located, and what type of overall land use pattern should evolve as Skamania County develops over the next 20 years. However, because of several unique conditions and policy issues, the analysis and policies for each of the four subareas are contained in separate subarea plans. Figure 2-1 shows the geographical location of the four subarea plans within Skamania County.

The Comprehensive Plan provides the overall community vision, goals, and general policies for future development in Skamania County. It does not, however, provide all the details. Precise standards, such as building setbacks, permitted uses within a particular zoning district or appropriate types of stormwater management systems are included in the various implementing ordinances (official controls).

The Land Use Element provides a guide to public development toward which public utilities and public services planning can be directed and provides a guide to private development by indicating those areas most suitable and economical for development.

Land Use Designations

There are three (3) land use designations in unincorporated Skamania County, outside of the specific subarea plans. These three designations are Rural I, Rural II, and Conservancy, and are differentiated from one another by intensity and types of uses, which may occur in each area. The idea of three different developmental areas was the central concept of the 1977 Comprehensive Plan "A" and has been continued in the 2007 Comprehensive Plan.

Table 2-1 shows the comprehensive plan designations and the consistency of each potential zoning classification. The Plan Designation to Zoning Classification table is provided to identify those zoning districts that are consistent with each plan designation. Those districts, which are not consistent with the plan designations, are not permitted within that plan designation. This information is necessary to determine when, where and under what circumstances these designations should be applied in the future. The table indicates consistency (C) and non-consistency (NC).

Table 2-1. Plan Designation to Zoning Classification Consistency Chart

Zoning Classifications	Comprehensive Plan Designations		
	Rural I	Rural II	Conservancy
Residential 1 (R-1)	C	NC	NC
Residential 2 (R-2)	C	C	NC
Residential 5 (R-5)	C	C	NC
Residential 10 (R-10)	C	C	C
Rural Estates 20 (RES-20)	C	C	C
Community Commercial (CC)	C	NC	NC
Commercial Recreation (CR)	C	NC	NC
Industrial (MG)	C	NC	NC
Forest Land 20 (FL20)	C	C	C
Commercial Resource Land 40 (CRL40)	C	C	C
Natural (NAT)	C	C	C
Unmapped (UNM)	C	C	C

Rural I

The Rural I land use area is intended to foster the optimum utilization of land within the growing areas of the county through provision of public improvements and the allocation of a greater variety of uses than allowed in the other two land use designations. As shown in Table 2-1, all zoning classifications are consistent with Rural I Designations. To provide protection of rural character and separation of incompatible uses, the actual allowable uses, review uses and conditional permitted uses will be further refined in each specific zoning classification (official controls).

The Rural I land use area is that area which is best able to support growth. All of the existing, denser development is within this area. The character of this existing development is essentially rural, and it is not the intention of the plan to significantly alter this character. However, the potential for future development is greater here than other lands within the county. The natural limitations are fewer and water systems, roads and electricity serve most areas. More varied and denser development could take place within this land use category. Therefore, growth in these areas would be encouraged.

The following uses, depending upon on adopted zoning classifications, are appropriate within the **Rural I designation**:

1. Residential (Single, duplex or multi family units)
2. Accessory uses normally associated with an authorized use
3. Home business (cottage occupations or light home industry)
4. Mobile home parks

SECTION V RELATIONSHIP TO COMPREHENSIVE PLAN

5.0.10 PURPOSE AND INTENT

To implement the Skamania County Comprehensive Plan A in a manner which shall be consistent with the Rural I, Rural II, and Conservancy Land Use Areas.

5.0.20 ZONE CLASSIFICATIONS

Zones shall be shown on the Zoning map and its revisions. Zones implement the intent of the three land use area designations of the Comprehensive Plan A and shall be uniformly interpreted and mapped within appropriate area designations. Where the abbreviated designation is used it has the same meaning as the entire zone classification title.

5.0.30

ZONE CLASSIFICATION TITLE	ABBREVIATED DESIGNATION/ MAPPING SYMBOL
Residential 1	R-1
Residential 2	R-2
Residential 5	R-5
Residential 10	R-10
Rural Estate 20	RES-20
Community Commercial	CC
Industrial	MG
Resource Production Zone	For-Ag 10
	For-Ag 20
Natural	NAT
Unmapped	UNM

5.0.40 CONSISTENCY OF ZONE CLASSIFICATIONS WITH LAND USE AREA

The series of zones that shall be adopted herein shall be consistent with the Comprehensive Plan A Land Use Area designations. The matrix indicates consistency (C) and nonconsistency (NC) in the table below.

	Rural I	Rural II	Conservancy
R-1	C	NC	NC
R-2	C	C	NC
R-5	NC	C	NC
R-10	NC	C	C
RES-20	NC	C	C
CC	C	NC	NC
MG	C	NC	NC
For-AG 10	NC	C	C
For-AG 20	NC	C	C
NAT	C	C	C
UNM	C	C	C

Tab 3

Ordinance 2012-08
Moratorium Continuation, CP 30-32

ORDINANCE 2012-08

(AN ORDINANCE TO MODIFY AND EXTEND ON ANY PARCEL LOCATED WITHIN TOWNSHIP 10 NORTH, RANGE 5 EAST AND/OR TOWNSHIP 10 NORTH, RANGE 6 EAST IN UNINCORPORATED SKAMANIA COUNTY: A MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF ANY BUILDING, MECHANICAL AND/OR PLUMBING PERMITS AND/OR SITE ANALYSIS LEVEL II (SALII) APPLICATIONS ON ANY PARCEL OF LAND THAT IS 20 ACRES OR LARGER; THE ACCEPTANCE AND PROCESSING OF LAND DIVISIONS (SUBDIVISION AND SHORT SUBDIVISION); AND THE ACCEPTANCE AND PROCESSING OF STATE ENVIRONMENTAL POLICY ACT (SEPA) CHECKLISTS RELATED TO FOREST PRACTICE CONVERSIONS)

WHEREAS, the Board of County Commissioner adopted the 2007 Comprehensive Plan on July 10, 2007; and,

WHEREAS, the Board of County Commissioner, on December 30, 2008, extended for the third time, the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, on July 28, 2009, the Board of County Commissioners re-established the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, Skamania County is in the process of updating zoning classification for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan; and,

WHEREAS, most of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land or within the Gifford Pinchot National Forest; and,

WHEREAS, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses; and,

WHEREAS, between January 1, 2006 and July 10, 2007, over 230 new parcels (20 acres or larger) have been created through the deed process, which is exempt from the subdivision and short subdivision (short plat) regulations and other environmental review processes; and,

WHEREAS, several comments submitted during the public comment periods related to the draft Comprehensive Plan expressed concern on the number of exempt parcels that have been created since the planning process began and that the exempt parcels do not have any level of review related to critical resource protection, design standards, road maintenance, stormwater or other checks and balances required for residential lots created through the subdivision or short subdivision (short

plat) process; and,

WHEREAS, these new exempt parcels are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act; and,

WHEREAS, allowing new construction on these parcel created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare; and,

WHEREAS, the development within many locations of unincorporated Skamania County, outside of the areas with zoning classifications is located on rugged mountainous terrain, is only accessed though United States Forest Service Roads and private roads, and does not currently have access to electrical power service and land-line telephone service; and,

WHEREAS, continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events; and,

WHEREAS, during the visioning process of the Comprehensive Plan information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development; and,

WHEREAS, the Board of County Commissioners has the authority pursuant to RCW 36.70.795 to adopt a moratorium without holding a public hearing (as long as a public hearing is held on the adopted moratorium within at least 60 days of its adoption) and whether or not there is a recommendation on the matter from the Planning Commission or the Community Development Department, that may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such longer period. A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding of fact are made prior to each renewal; and,

WHEREAS, a work plan for the zoning classification process has been developed; and,

WHEREAS, the Board of County Commissioners finds a sufficient basis to extend the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the adopted 2007 Comprehensive Plan; and.

WHEREAS, the Board of County Commissioners intends for these recitals to constitute its "findings of fact" as required by RCW 36.70.795; and,

NOW, THEREFORE BE IT HEREBY ORDAINED AND ESTABLISHED BY THIS BOARD OF COUNTY COMMISSIONERS AS FOLLOWS: the Board of County Commissioners hereby adopts Ordinance 2012-08 to modify and extend for six months on any parcel located within Township 10 North, Range 5 East and/or Township 10 North, Range 6 East in unincorporated Skamania County: the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits and/or Site Analysis Level II (SALII) applications on any parcel of land 20 acres or larger; the acceptance and processing of land divisions (subdivisions and short subdivisions); and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions.

ORDINANCE NO. 2012-08 IS HEREBY PASSED INTO LAW THIS 21st DAY OF AUGUST 2012.

BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

Chairman

Commissioner

Commissioner

ATTEST:

Clerk of the Board

APPROVED AS TO FORM ONLY:

Skamania County Prosecuting Attorney

AYE 3
NAY
ABSTAIN
ABSENT 1

LAW OFFICES OF SUSAN ELIZABETH DRUMMOND, PLLC

May 28, 2013 - 1:56 PM

Transmittal Letter

Document Uploaded: 442698-Respondent's Brief.pdf

Case Name: Save Our Scenic Area and Friends of the Columbia Gorge, Inc. v. Skamania County

Court of Appeals Case Number: 44269-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Attached is the Response Brief of Skamania County, with three appendices (Tabs 1-3).

Sender Name: Susan E Drummond - Email: **susan@susandrummond.com**

A copy of this document has been emailed to the following addresses:

gkahn@rke-law.com
rick@aramburu-eustis.com
nathan@gorgefriends.org