Case No. 31941-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

SPOKANE COUNTY,

Respondent,

v.

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE,

Appellants,

and

HARLEY C. DOUGLASS, INC.,

Respondent,

and

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

BRIEF OF APPELLANTS FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION & FUTUREWISE

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I. INTRODUCTION

Washington State's Growth Management Act (GMA) requires counties and cities to adopt and maintain comprehensive plans and development regulations to provide the public facilities and services needed to support new development.[1] As this brief of appellants will show, the Growth Management Hearings Board (Hearings Board or Board) correctly determined that Spokane County Amendment No. 11-CPA-05 failed to comply with the *Spokane County Comprehensive Plan* policies that require adequate public facilities and services and include other standards for new development.

Petitioner Five Mile Prairie Neighborhood Association is a non-partisan organization that actively promotes quality of life issues for all Prairie residents. Open to all residents of the Prairie, our organization's representatives continually work with the City of Spokane and Spokane County on all issues related to growth, safety, and the character of our neighborhood. The organization has members that are landowners and residents of Spokane County.[2]

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[1] *See for example* RCW 36.70A.020(12) "Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

[2] Certified Administrative Record Page Number (CR) 000003, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, Growth Management Hearings Board Eastern Washington Region (GMHB) Case No. 12-1-0002, Petition for Review p. 3 (Feb. 7, 2012). The Certified Record Page Number refers to the six digit

Petitioner Futurewise is a Washington non-profit corporation and a statewide organization devoted to ensuring compliance with the Growth Management Act. The organization has members that are landowners and residents of Spokane County.[3]

This brief will first outline the key facts, assign errors to the superior court order, identify the standard of review, and show that the Hearings Board had jurisdiction over both the comprehensive plan amendment and rezone at issue in this case. The brief will then show that the Hearings Board correctly interpreted and applied the Growth Management Act (GMA) and Spokane County's Comprehensive Plan. This brief will also document that the Hearings Board's orders are supported by substantial evidence. Therefore, the Five Mile Prairie Neighborhood Association and Futurewise (Five Mile Prairie) Appellants respectfully request that this Court uphold the Hearings Board's order.

II. PROCEDURAL POSTURE

The Five Mile Prairie Appellants were petitioners before the Hearings Board and prevailed on the merits related to this appeal.[4]

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consecutive page numbers the Hearings Board affixed to the bottom of the documents in the Certified Record, other than the transcript.

[3] CR 000004, *Id.* at p. 4.

[4] CR 001029 – 30, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Final Decision and Order (Aug. 23, 2012), at 20 – 21 of 26. Hereinafter FDO.

Spokane County was the respondent before the Hearings Board. Harley C. Douglass, Inc. was an intervenor before the Hearings Board.

Spokane County and Harley C. Douglass, Inc. appealed the Hearings Board's Final Decision and Order to Spokane County Superior Court where they prevailed.[5] The Five Mile Prairie Appellants filed this appeal to the Court of Appeals.

III. ASSIGNMENTS OF ERROR, ISSUES, AND SHORT ANSWERS

Assignment of Error 1: The Hearings Board correctly concluded that it had subject matter jurisdiction over the comprehensive plan amendment and rezone at issue in this appeal and the superior court's conclusion to the contrary was an erroneous interpretation of the law.

Issue 1: Did the Hearings Board correctly interpret the law in concluding it had jurisdiction over the comprehensive plan amendment and rezone in Spokane County Amendment No. 11-CPA-05 and was its decision supported by substantial evidence? Yes.

Assignment of Error 2: The Hearings Board properly dismissed Harley C. Douglass, Inc. from the case before the Hearings Board. The

[5] Clerks Papers (CP) 493 – 96, *Spokane County and Harley C. Douglass, Inc. v. Eastern Washington Growth Management Hearings Board, Five Mile Prairie Neighborhood Association, and Futurewise,* Spokane County Superior Court Case No. 12-2-03759-5 consolidated with No. 12-2-03760-9, Order on Appeal from the Growth Management Hearings Board, Eastern Washington Region pp. 1 – 4 (Aug. 14, 2013).

superior court's conclusion to the contrary was an erroneous interpretation of the law and is not supported by substantial evidence.

Issue 2: Did the Hearings Board correctly interpret and apply the law in dismissed Harley C. Douglass, Inc. from the case before the Hearings Board and was the Hearings Board's decision supported by substantial evidence? Yes.

Assignment of Error 3: The Hearings Board correctly concluded that the Medium Density Residential comprehensive plan amendment and rezone in Spokane County Amendment No. 11-CPA-05 violated the GMA and was inconsistent with the *Spokane County Comprehensive Plan* and development regulations. The superior court's conclusions to the contrary were erroneous interpretations of the law and not supported by substantial evidence.

Issue 3: Did the Hearings Board correctly interpret the law in concluding that Spokane County Amendment No. 11-CPA-05 violated the GMA and was inconsistent with the *Spokane County Comprehensive Plan* and development regulations and were the Hearings Board's conclusions supported by substantial evidence? Yes.

Assignment of Error 4: The Hearings Board correctly made a determination of invalidity for Spokane County Amendment No. 11-CPA-

05 and the superior court conclusion to the contrary was an erroneous interpretation of the law and not supported by substantial evidence.

Issue 4: Did the Hearings Board correctly interpret the law in making a determination of invalidity for Spokane County Amendment No. 11-CPA-05 and was the Hearings Board's conclusion supported by substantial evidence? Yes.

IV. FACTS

As part of Spokane County's 2011 annual update, or amendments, to the *Spokane County Comprehensive Plan* and zoning regulations, the county adopted Amendment No. 11-CPA-05.[6] Amendment No. 11-CPA-05 re-designated 22.3 acres from "Low Density Residential" to "Medium Density Residential" and rezoned the 22.3 acres from "Low Density Residential" to "Medium Density Residential."[7] This land is vacant except for some utility structures.[8] A preliminary plat for the Redstone subdivision was approved for this site 2007. "The preliminary plat includes 38 lots, 26 for single family dwellings and 12 for duplexes for a

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[6] CR 000010 – 14, Spokane County Resolution 11-1191 In The Matter of the 2011 Annual Comprehensive Plan Map and Text Amendments, Zoning Amendments and Urban Growth Area Amendment, Files 11-CPA-01, 11-CPA-02, 11-CPA-03, 11-CPA-04, 11-CPA-05, 11-CPA-06, 11-CPA-07 and 10-CPA-05 Findings of Fact and Decision pp. 4 – 8 (December 23, 2011). Hereinafter Spokane County Resolution 11-1191.

[7] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05."

[8] CR 000218, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 1 of 9.

total of 50 dwelling units."[9] The preliminary plat of the approved subdivision is attached to the *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05*.[10] According to the *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05*:

> The Comprehensive Plan and zoning designations in this area [around the comprehensive plan amendment and rezone] are as follows:
> To the north is Low Density Residential
> To the south is Low Density Residential
> To the east is Low Density Residential
> To the west is Low Density Residential[.][11]

The 22.3 acres the County designated Medium Density Residential and zoned Medium Density Residential is entirely surrounded by land with a comprehensive plan designation of Low Density Residential and Low Density Residential zoning.[12]

The Spokane County Hearings Examiner summarized the established residential neighborhood character as part of the findings of fact in the decision to approve the preliminary plat for the Redstone subdivision on the 22.3 acres re-designated by 11-CPA-05:

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[9] CR 000220, *Id.* at p. 3 of 9.
[10] CR 233, *Id.* at Preliminary Plat Redstone Exhibit D.
[11] CR 000220 – 21, *Id.* at pp. 3 – 4 of 9.
[12] CR 000220 – 21, *Id.* at pp. 3 – 4 of 9; CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05" map.

> 44. The land located near the site to the north and west is vacant and undeveloped; except for an electrical power substation, overhead transmission lines and a high-pressure underground gas pipeline; and except for some single-family homes on acreage parcels located west of the site along the north side of North Five Mile Road.
>
> 45. The land lying further to the north, and the land located northeast of the site, generally consists of single-family homes on more urban-sized lots; along with some duplexes located along the east side of Waikiki Road.
>
> 46. The land located near the site to the east consists of single-family homes on acreage parcels, and vacant land containing utility easements. Some single-family homes on urban-sized lots are located further to the east, along the west side of Waikiki Road. The land lying south of the site across North Five Mile Road generally consists of single-family homes on mostly urban-sized lots.[13]

There are no multi-family dwellings near this site.[14] Amendment No. 11-CPA-05 will authorize a 200 unit multi-family development at densities of 8 to 10 dwelling units per acre with parking lots around the buildings.[15] While there are no multi-family dwellings near the site, there are "Medium" and "High Density Residential" comprehensive plan

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[13] CR 000192, Michael C. Dempsey, *Spokane County Hearing Examiner, RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision* p. 7 (March 30, 2007).

[14] CR 000222, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.

[15] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).

designations a little over a mile southeast of the site.[16] So there is a variety of densities in this part of the urban growth area.

The *Regional Land Quantity Analysis for Spokane County Summary Report* concluded:

> The County's population projection expects the addition of 113,541 people in the County's UGA between the years 2010 and 2031. The current UGA has the capacity to include 117,800 additional people. This result shows that the increase in population can be accommodated within the current UGA and that there is an additional excess of capacity equaling 4,259 people.[17]

So the amendment is not required to accommodate the County's projected population growth.

There are no market studies in the record showing that the proposed Redstone subdivision is not feasible under current market conditions. Nor is there a market study in the record showing that a multi-family development at this site is feasible under current market conditions.

V. STANDARD OF REVIEW

In the *Kittitas County v. Eastern Washington Growth Management Hearings Board* decision, the Supreme Court of Washington State

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[16] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing).

[17] CR 000133, Planning Technical Advisory Committee, *Regional Land Quantity Analysis for Spokane County Summary Report* p. 1 (October, 2010 Amended May, 2011); CR 000097, Futurewise's Comment Letter to the Spokane County Planning Commission p. 3 (Sept. 14, 2011).

succinctly stated the standard of review for appeals of Hearings Board decisions:

> ¶ 14 Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly to the record before the board. *Lewis County,* 157 Wn.2d at 497, 139 P.3d 1096; *Quadrant Corp.,* 154 Wn.2d at 233, 110 P.3d 1132. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) *de novo. Thurston County,* 164 Wn.2d at 341, 190 P.3d 38. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is " 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' " *Id.* (internal quotation marks omitted) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents " 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.' " *City of Redmond,* 136 Wn.2d at 46–47, 959 P.2d 1091 (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6,* 118 Wn.2d 1, 14, 820 P.2d 497 (1991)).[18]

"Under the judicial review provision of the APA, the 'burden of demonstrating the invalidity of [the Hearings Board's decision] is on the party asserting the invalidity.'"[19] In this case that is Spokane County and Harley C. Douglass, Inc. The Five Mile Prairie Appellants may argue and

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[18] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011).
[19] *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002) citing RCW 34.05.570(1)(a).

the appellate court may sustain the Hearings Board's order on any ground supported by the record even if the Hearings Board did not consider it.[20]

"Substantial weight is accorded to a board's interpretation of the GMA, but the court is not bound by the board's interpretations."[21] In interpreting the GMA, the courts do not give deference to local government interpretations of the law.[22] On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Hearings Board.[23] The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Hearings Board.[24]

In considering this appeal, it is important to note that appeals by citizens and citizen groups are the mechanism that the Governor and Legislature adopted to enforce the GMA.[25] Unlike some laws, such as Washington's Shoreline Management Act, there is no state agency that reviews and approves or disapproves the non-transportation related provisions of GMA comprehensive plans and development regulations.

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[20] *Whidbey Envtl. Action Network ("WEAN") v. Island County*, 122 Wn. App. 156, 168, 93 P.3d 885, 891 (2004).
[21] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).
[22] *Kittitas County,* 172 Wn.2d at 156, 256 P.3d at 1199.
[23] *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).
[24] *Callecod v. Wash. State Patrol,* 84 Wn. App. 663, 676, 929 P.2d 510, 516 n.9 (1997) *review denied Callecod v. Wash. State Patrol*, 132 Wn.2d 1004, 939 P.2d 215 (1997).
[25] *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 175 – 77, 979 P.2d 374, 380 – 82 (1999).

The responsibility to appeal noncompliant comprehensive plans and development regulations to the Hearings Board is that of citizens and groups such as the Five Mile Prairie Appellants.

VI. ARGUMENT

A. The Hearings Board had subject matter jurisdiction over both the comprehensive plan amendment and rezone approved by Amendment No. 11-CPA-05 and those amendments violated the GMA and were inconsistent with the Spokane County Comprehensive. (Assignment of Error 1 and Issue 1)

1. The Hearings Board had subject matter jurisdiction over the comprehensive plan amendment in Amendment No. 11-CPA-05.

Following *Spokane County v. Eastern Washington Growth Management Hearings Board (McGlades)* and the other applicable appellate decisions, the Hearings Board correctly concluded it had jurisdiction to determine whether Spokane County's comprehensive plan amendment in Amendment No. 11-CPA-05 complied with the GMA.[26] As the Washington State Supreme Court has concluded, "[i]f a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice."[27] Amendment No. 11-CPA-05, the comprehensive plan amendment in this case, amended the *Spokane County*

[26] CR 001012 – 17, FDO at 3 – 8 of 26.
[27] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).

Comprehensive Plan's Land Use Map[28] and the Five Mile Prairie Appellants appealed within 60 days of the filing of the notice of adoption. Therefore, the Hearings Board had subject matter jurisdiction over the comprehensive plan amendment in No. 11-CPA-05.

2. The Hearings Board had subject matter jurisdiction over the rezone in Amendment No. 11-CPA-05 because the Medium Density Residential rezone in this case is not a site-specific rezone authorized by a comprehensive plan.

Also following the applicable statutes and appellate decisions, the Hearings Board correctly concluded it had jurisdiction to determine whether Spokane County's rezone in Amendment No. 11-CPA-05 complied with the GMA and the *Spokane County Comprehensive Plan* and development regulations.[29] The Hearings Board correctly determined that the Medium Density Residential rezone was not "a site-specific rezone authorized by a comprehensive plan" and therefore the Hearings Board had jurisdiction to review the rezones.[30]

Since the Hearings Board and superior court made their decisions in this case, the Court of Appeals has issued two decisions that show that the Hearings Board was correct in concluding it had jurisdiction over the

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[28] CR 000046, Spokane County Resolution 11-1191 Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05.
[29] CR 001012 – 17, FDO at 3 – 8 of 26.
[30] CR 001017, FDO at 8 of 26.

rezone.[31] In *Spokane County v. Eastern Washington Growth Management Hearings Board* this Court wrote:

> ¶ 18 Here, whether the hearings board had subject matter jurisdiction to review amendment 07–CPA–05's rezone depends on whether it is an amendment to a development regulation under the GMA or a project permit approval under LUPA. *Woods,* 162 Wn.2d at 610, 174 P.3d 25; *see* RCW 36.70A.030(7); RCW 36.70B.020(4). The rezone was certainly site specific. *See Woods,* 162 Wn.2d at 611 n. 7, 174 P.3d 25 (stating a site-specific rezone is a change in the zone designation of a " 'specific tract' " at the request of " 'specific parties' " (quoting *Cathcart–Maltby–Clearview Cmty. Council v. Snohomish County,* 96 Wn.2d 201, 212, 634 P.2d 853 (1981))). But the parties dispute whether the rezone was or needed to be "authorized by a comprehensive plan." RCW 36.70B.020(4).[FN2]
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> [FN2]. We address the same dispute in a similar case with consistent reasoning. *See Kittitas County v. Kittitas County Conservation Coal.*, 176 Wn. App. 38, 308 P.3d 745 (2013).
>
> ¶ 19 Under RCW 36.70B.020(4), a site-specific rezone is a project permit approval solely if "authorized by a comprehensive plan"; otherwise, it is "the adoption or amendment of a ... development regulation[ ]." We must interpret this language so as to give it meaning, significance, and effect. *See In re Parentage of J.M.K.,* 155 Wn.2d 374, 393, 119 P.3d 840 (2005) (stating a court must not "simply ignore" express terms when interpreting a statute) ... As we noted in *Spokane County I,* to be "authorized by a comprehensive plan" within the meaning of RCW 36.70B.020(4), the rezone had to be "allowed by an *existing* comprehensive plan." 160 Wn. App. at 281–83,

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[31] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 570 – 72, 309 P.3d 673, 680 – 81 (2013) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, ___ Wn.2d ___, 318 P.3d 279 (2014); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 52, 308 P.3d 745, 751 (2013).

> 250 P.3d 1050 (emphasis added); *see also Woods,* 162 Wn.2d at 612 n. 7, 613, 174 P.3d 25; *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn.2d 169, 179–80, 4 P.3d 123 (2000).
>
> ... Notably, the County concedes the rezone required a comprehensive plan amendment to take effect. This inexorably intertwined the rezone and the comprehensive plan amendment, making them interdependent and putting them in the same basket for hearings board review. In other words, the rezone was premised on and carried out the comprehensive plan amendment. Therefore, the rezone is not a project permit approval under LUPA because the then-existing comprehensive plan did not authorize it. Instead the rezone is an amendment to a development regulation under the GMA because it implements the comprehensive plan amendment. Thus, the hearings board's decision is within its statutory authority. *See* RCW 34.05.570(3)(b).[32]

The facts for Amendment No. 11-CPA-05 are similar to the facts in *Spokane County*. The comprehensive plan designation for this site had to be amended from "Low Density Residential" to "Medium Density Residential" to allow the Medium Density Residential rezone.[33] As the Hearings Board noted Spokane County's Deputy Prosecuting Attorney said at the hearing on the merits, the rezone could not have taken place had the Comprehensive Plan not been amended.[34] Spokane County's

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[32] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 570 – 72, 309 P.3d 673, 680 – 81 (2013).)

[33] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Map Amendment and Zoning Map Change: 11-CPA-05."

[34] CR 001016, FDO at 7 of 26; *Five Mile Prairie v. Spokane County*, Growth Management Hearings Board Eastern Washington Region (GMHB) Case No. 12-1-0002 Transcript (July 19, 2012) p. 38, hereinafter Hearings Board Hearing on the Merits Transcript.

Deputy Prosecuting Attorney said that was Spokane County's interpretation.[35]

The *Spokane County* decision is also consistent with the Spokane County Zoning Code (SCZC). SCZC 14.402.100(1) provides that SCZC 14.402.100 applies to zoning map amendments adopted to implement comprehensive plan amendments.[36] SCZC 14.402.100(7)(a) states that "[t]he action of the Board on a zoning map amendment under this section shall be final and conclusive unless appealed to the Growth Management Hearing Board, pursuant to chapter 36.70A RCW. A person with standing pursuant to RCW 36.70A.280 may file a petition within 60 calendar days after publication of the notice of adoption (4d of this section)."[37] So Spokane County's development regulations provide that the Hearings Board has jurisdiction over the rezone in Amendment No. 11-CPA-05. So the like the rezone in *Spokane County*, the Medium Density Residential rezone at issue in this appeal is an amendment to the development regulations and the Hearings Board had jurisdiction over the rezone in Amendment No. 11-CPA-05.

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[35] CR 001016, FDO at 7 of 26; Hearings Board Hearing on the Board Merits Transcript pp. 39 – 40.
[36] CR 000202, SCZC 14.402.100 1 on page 402-3.
[37] CR 000203, SCZC 14.402.100 7.a on page 402-4.

B. The Hearings Board properly dismissed Harley C. Douglass, Inc. from the case. (Assignment of Error 2 and Issue 2)

WAC 242-03-710 provides in relevant part:

> (1) When a party to a proceeding has, after proper notice, failed to attend a hearing or any other matter before the board or presiding officer, or failed to file a prehearing brief, a motion for default or dismissal may be brought by any party to the case or raised by the board upon its own motion or by a presiding officer. Any order granting the motion shall include a statement of the grounds for the order and shall be served upon all parties to the case.
>
> ....
>
> (3) Within seven days after service of an order of dismissal, default or noncompliance under subsection (1) or (2) of this section, the party against whom the order was entered may file a written objection requesting that the order be vacated and stating the specific grounds relied upon. The board may, for good cause, set aside the order.

Harley C. Douglass, Inc. chose not to file a brief in the case before the Hearings Board, failed to attend the Hearings Board's oral argument, and failed to contact the Hearings Board or any party to indicate that the corporation was not planning to file a brief or attend the hearing on the merits.[38] Harley C. Douglass, Inc.'s attorney was sent the Prehearing Order and the agenda for the Hearings Board's hearing on the merits, so its attorney had notice of the hearing.[39] At the hearing on the merits, the

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[38] CR 001018, FDO p. 9 of 26; Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76.

[39] CR 000077 – 83, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Prehearing Order and Order Granting

Hearings Board moved to dismiss the corporation as the Hearings Board's rules allow. The Hearings Board included this order in its Final Decision and Order, included a statement of the grounds for dismissing Harley C. Douglass, Inc., that the company had failed to file a brief and failed to attend the Hearing on the Merits, and served the order on all parties.[40] So all of the requirements of WAC 242-03-710(1) were met.

Harley C. Douglass, Inc. could have filed an objection within seven days of receiving the Final Decision and Order as WAC 242-03-710(3) allows. Harley C. Douglass, Inc. did not do so and so failed to exhaust its administrative remedies. RCW 34.05.534 provides in full that:

> A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review, except:
>
> (1) A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor;

Intervention (April 4, 2012), at 1 – 5 and Declaration of Service (April 4, 2012), at 1 of 1; CR 001007 – 09, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Agenda for Hearing on the Merits (July 13, 2012), at 1 – 2 and Declaration of Service (April 4, 2012), at 1 of 1.

[40] CR 001018, FDO p. 9 of 26; CR 001036, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Declaration of Service (Aug. 23, 2012), at 1 of 1.

> (2) A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required; or
>
> (3) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:
>
> (a) The remedies would be patently inadequate;
>
> (b) The exhaustion of remedies would be futile; or
>
> (c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

Harley C. Douglass, Inc. does not fit under any of the exceptions in RCW 34.05.534. Harley C. Douglass, Inc. is not challenging a rule, so RCW 34.05.534(1) does not apply. No statute provides that Harley C. Douglass, Inc. did not need to exhaust is administrative remedies. So RCW 34.05.534(2) does not apply. RCW 34.05.534(3) does not apply either. The remedy allowed under WAC 242-03-710(3) would have been adequate. There is no indication that exhaustion of remedies would be futile. Finally, there would be no grave irreparable harm to Harley C. Douglass, Inc.'s interests. If the County was sufficient to protect Harley C. Douglass, Inc.'s interests before the Hearings Board as the company

contends, surely the County can protect the corporation's interests in superior court and the court of appeals.[41]

So the Superior Court should have dismissed Harley C. Douglass, Inc.'s Petition for Review. Since the Petition for Review should have been dismissed, the Court must strike the Petitioner Harley C. Douglass, Inc.'s brief since the only reason that the corporation can file this brief is the Petition for Review it filed.

Further, no party raised before the Hearings Board the issue that Harley C. Douglass, Inc. should not have been dismissed.[42] RCW 34.05.554 provides in full that:

> (1) Issues not raised before the agency may not be raised on appeal, except to the extent that:
>
> (a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;
>
> (b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;
>
> (c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or
>
> (d) The interests of justice would be served by resolution of an issue arising from:

[41] CP 276; Brief of Petitioner Harley C. Douglas, Inc. p. 7.
[42] Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76..

> (i) A change in controlling law occurring after the agency action; or
>
> (ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.
>
> (2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

Since that issue was not raised before the Hearings Board, it cannot be raised in this judicial review. None of the exceptions to RCW 34.05.554 apply here.

Harley C. Douglass, Inc.'s attorney was served with the order dismissing the company, so the company could have raised this argument before the Hearings Board as WAC 242-03-710(3) allows.[43] Therefore Harley C. Douglass, Inc. could have reasonably discovered the facts giving rise to the issue. Again, this case is not a rule challenge so RCW 34.05.554(1)(b) does not apply. Harley C. Douglass, Inc.'s attorney was notified of the adjudicative proceeding on behalf of the company, so RCW 34.05.554(1)(c) does not apply.[44] There has been no change in controlling law related to Harley C. Douglass, Inc.'s dismissal after the agency action

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[43] CR 001036, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Declaration of Service (Aug. 23, 2012), at 1 of 1.
[44] CR 000077 – 83, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Prehearing Order and Order Granting Intervention (April 4, 2012), at 1 – 5 and Declaration of Service (April 4, 2012), at 1 of 1; CR 001007 – 09, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Agenda for Hearing on the Merits (July 13, 2012), at 1 – 2 and Declaration of Service (April 4, 2012), at 1 of 1.

and as we documented above the agency action did not occur after the company exhausted its opportunity for relief. The company did not file the objection that WAC 242-03-710(3) allows. So RCW 34.05.554(1)(d) does not apply. So this Court and the superior court below cannot consider issues challenging the dismissal of Harley C. Douglass, Inc. from the Hearings Board's case.

This Court should affirm the Hearings Board's dismissal of Harley C. Douglass, Inc. for three reasons. First, the Hearings Board complied with WAC 242-03-710(1). Second, Harley C. Douglass, Inc. did not exhaust the administrative remedies available to it before the Hearings Board and so the company should never have filed its petition for review challenging the Hearings Board's order. Third, no party raised the issue of Harley C. Douglass, Inc.'s dismissal before the Hearings Board and it cannot be raised for the first time on appeal.

C. The Medium Density Residential comprehensive plan amendment and rezone in Amendment No. 11-CPA-05 violated the GMA and were inconsistent with the *Spokane County Comprehensive Plan*. (Assignment of Error 3 and Issue 3)

RCW 36.70A.130(1)(d) provides in full that "[a]ny amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." This is consistent

with one of the Washington Supreme Court's holdings in the *Thurston County* decision: "If a county amends a comprehensive plan, the amendment must comply with the GMA and may be challenged within 60 days of publication of the amendment adoption notice."[45]

Another requirement of the GMA is that the comprehensive "plan shall be an internally consistent document ...."[46] "Consistency means comprehensive plan provisions are compatible with each other. One provision may not thwart another."[47] RCW 36.70A.040(5)(d) also provides that Spokane County must adopt "development regulations that are consistent with and implement the comprehensive plan ...." In addition,

> The Comprehensive Plan conformity requirement in RCW 36.70A.120 applies to both planning activities and capital budget decisions. Comprehensive Plan Amendments must conform to all requirements and standards in the GMA and must not create internal plan inconsistencies.[48]

The Washington State Supreme Court has concluded that "County development regulations must also comply with the requirements of the

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[45] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 347, 190 P.3d 38, 46 (2008).
[46] RCW 36.70A.070; *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 160 Wn. App. 274, 281, 250 P.3d 1050, 1053 (2011) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 171 Wn.2d 1034, 257 P.3d 662 (2011).
[47] *City of Spokane v. Spokane County*, EWGMHB Case No. 02-1-0001, Final Decision and Order (July 3, 2002), at 32.
[48] *Brodeur/Futurewise, et al. v. Benton County*, EWGMHB Case No. 09-1-0010c, Final Decision and Order Resolution 09-162: Rural Lands (Nov. 24, 2009), at 19 (footnote omitted).

GMA. See RCW 36.70A.130(1)(a) ('a county or city shall ... ensure the plan and regulations comply with the requirements of this chapter')."[49]

This brief will show that these requirements were not met. Amendment No. 11-CPA-05's comprehensive plan amendment from "Low Density Residential" to "Medium Density Residential" is not consistent with the GMA or the *Spokane County Comprehensive Plan*. Similarly Amendment No. 11-CPA-05's zoning change from "Low Density Residential" to "Medium Density Residential" is not consistent with the GMA, the *Spokane County Comprehensive Plan*, or the Spokane County development regulations.

1. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.16.

Spokane County Comprehensive Plan Policy UL.2.16 provides in full:

> UL.2.16 Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.[50]

The Hearings Board was correct to conclude that Amendment No. 11-CPA-05 thwarts Policy UL.2.16.[51] The 22.3 acres is not near commercial areas, the site is 0.9 miles from the nearest commercial

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[49] *Kittitas County*, 172 Wn.2d at 164 – 65, 256 P.3d at 1203.
[50] CR 000247, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-6 (2008 Printing).
[51] CR 001024, FDO at 15 of 26.

comprehensive plan designation.[52] The area is not near a public open space.[53] The site does not have good access to a major arterial. Accesses are proposed on Five Mile Road and Waikiki Road.[54] The Staff Report states that "Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan .... Five Mile Road is not listed on the Arterial Road Plan ...."[55] Spokane County Resolution 11-1191 confirms that Waikiki Road is designated as an Urban Minor Arterial.[56] So this property does not have access to a major arterial, only to an Urban Minor Arterial. So this site does not meet any of the three conditions in Policy UL.2.16 that must be met to be an encouraged location for the "Medium Density Residential" comprehensive plan designation and zone.

The Hearings Board had other reasons to conclude that Amendment No. 11-CPA-05 violated Policy UL.2.16. As the Hearings Board wrote:

> The Spokane County Planning Commission recommended denial of this proposed amendment by a vote of 4-2. The Planning Commission found that transportation improvements have not kept up with the residential development that has already occurred near the Five Mile

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[52] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing) and provided to the Board. CR 001022, FDO at p. 13 of 26.
[53] CR 000278, *Spokane County Comprehensive Plan Chapter 9 Parks and Open Space* "Open Space Corridors" map (2008 Printing).
[54] CR 000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.
[55] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.
[56] CR 000013, Spokane County Resolution 11-1191 p. 7.

> Prairie, and the proposal fronts on Five Mile Road which is steep, windy and has no accommodations for pedestrians or bicyclists. Five Mile Road will be one of the access points for this proposed development but neither the County nor the developer has any plans for transportation improvements to Five Mile Road.[38]
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> [38] Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012), Attachment S- Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011) [Attachment A], p.9 [CR 000770].[57]

While Spokane County Resolution 11-1191 requires a development agreement between Harley C. Douglass, Inc. and Spokane County, nothing in the requirements for the development agreement provide for any improvements to Five Mile Road.[58] None of this is contradicted by Board of County Commissioner findings.[59] So the Hearings Board was correct to consider the deficiencies of Five Mile Road in analyzing whether the site of the amendment had good access to major arterials based on Policy UL.2.16.

As to *Spokane County Comprehensive Plan* Policy UL.2.16, there is no evidence in the record showing that the Hearings Board was in error. The Hearings Board's order should be upheld.

The County, or developer, may argue that the Washington State Court of Appeals decision in *Spokane County v. Eastern Washington*

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[57] CR 001022, FDO at 13 of 26.
[58] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8 Finding 26.
[59] CR 0000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.

Growth Management Hearings Board controls on the question of Policy UL.2.16.[60] It does not. The comprehensive plan map amendment at issue in that case was immediately adjacent to a shopping center and other commercial properties.[61] This site is 0.9 miles from the nearest commercial comprehensive plan designation.[62] This site is not near a public open space.[63] In addition, this area does not have good access to major arterials. Accesses are proposed on Five Mile Road and Waikiki Road.[64] The Staff Report states that "Waikiki Road is designated as an Urban Minor Arterial by Spokane County's Arterial Road Plan .... Five Mile Road is not listed on the Arterial Road Plan ...."[65] As we documented above, all of the evidence in the record before the Hearings Board supports this factual determination.

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[60] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 332 – 33, 293 P.3d 1248, 1259 – 60 (2013).
[61] *Id.* at 173 Wn. App. at 332, 293 P.3d at 1259.
[62] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing) and provided to the Board. CR 1022, FDO at p. 13 of 26.
[63] CR 000278, *Spokane County Comprehensive Plan Chapter 9 Parks and Open Space* "Open Space Corridors" map (2008 Printing).
[64] CR 000012 – 13, Spokane County Resolution 11-1191 pp. 6 – 7.
[65] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.

2. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* policies on the design and capacity of public facilities and services.

(a) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.20.

Spokane County Comprehensive Plan Policy UL.2.20 provides in full:

> UL.2.20 Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car. Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitations which make connecting systems impractical.[66]

The "Proposed Comprehensive Plan Map Amendment" and "Zoning Map Change: 11-CPA-05" map shows that this area is not arranged in a pattern of connecting streets and blocks, rather it is arranged in a cul-de-sac pattern of unconnected streets disfavored by this policy and the illustration on page UL-7, CR 000248, of the *Spokane County Comprehensive Plan*.[67] Nothing in Spokane County Resolution 11-1191

[66] CR 000248, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-7 (2008 Printing).
[67] CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Map Amendment and Zoning Map Change: 11-CPA-05" map.

requires a pattern of connecting streets and blocks on the site of the new multi-family housing development.[68]

According to the Staff Report, "Five Mile Road is not listed on the Arterial Road Plan, is steep and windy and does not have sidewalks."[69] The Staff Report also documents that "[o]ne of the significant issues raised during this subdivision's public hearing was singular access to Five Mile Road and concerns from property owners that the road was already overloaded with traffic and dangerous due to is steepness and lack of any pedestrian accommodations."[70] And these problems existed before the approved Redstone subdivision which will have 50 units.[71] Amendment No. 11-CPA-05 will authorize a 200 unit multi-family development on the same site.[72] The Planning Commission found that Five Mile Road is steep and has no accommodations for pedestrians or bicyclists.[73] The Planning Commission reported that the "Spokane County Engineering Department says there are no plans for improvements and the applicant, who says they plan to use this road as one of their access points, has not indicated they

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[68] CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.
[69] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9.
[70] CR 000220, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.
[71] *Id.*
[72] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[73] CR 000770, Spokane County Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011) Attachment A p. 9.

plan to make any improvements."[74] While Spokane County Resolution 11-1191 requires a development agreement between Harley C. Douglass, Inc. and Spokane County, nothing in the requirements for the development agreement provide for any improvements to Five Mile Road.[75] The 200 unit multi-family development will still have an access on the unimproved Five Mile Road.[76] Given the lack of connecting streets and the other problems with pedestrian and bicycle access, the Hearings Board's conclusion that Amendment No. 11-CPA-05 is inconsistent with Policy UL.2.20 is supported by substantial evidence.[77]

The County, or the developer, may argue that the Washington State Court of Appeals decision in *Spokane County v. Eastern Washington Growth Management Hearings Board* controls on the question of Policy UL.2.20.[78] It does not. First, when the comprehensive plan map amendment at issue in that case was reviewed, there was "no project proposal identifying how ingress and egress to the apartment complex will be designed."[79] In this case we know where the accesses will be located.[80] Second, as is documented in the next section, the *Spokane County*

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[74] *Id.*
[75] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8 Finding 26.
[76] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8.
[77] CR 001026, FDO at 17 of 26.
[78] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 340 – 42, 293 P.3d 1248, 1263 – 64 (2013).
[79] *Id.* at 173 Wn. App. at 341, 293 P.3d at 1263.
[80] CR 0000013 – 14, Spokane County Resolution 11-1191 pp. 7 – 8.

Comprehensive Plan uses the term "development," which Policy UL.2.20 applies to, to refer to the comprehensive plan amendments as well as the other phases of the development process.[81] It does not seem that this argument was made to the Court of Appeals in that case.[82]

The Hearings Board did not misinterpret or misapply RCW 36.70A.070's requirement that the comprehensive plan shall be internally consistent or RCW 36.70A.130(1)(d)'s requirement that "any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan." The Hearings Board should be affirmed.

(b) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy CF.3.1.

Spokane County Comprehensive Plan Policy CF.3.1 provides in full:

> CF.3.1 Development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards.[83]

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[81] CR 000884 & CR 000887 – 88, *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-9 & RL-12 – RL-13 (2008 Printing).
[82] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 340 – 42, 293 P.3d 1248, 1263 – 64 (2013).
[83] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

Public facilities and services include public schools.[84] The evidence before the County was that Prairie View Elementary School, the school that would serve this development, is at capacity.[85] The Director of Facilities and Planning for the Mead School District also wrote that "[t]he Mead School District believes that this request for a change in land use designation, if approved, could have an impact on schools."[86]

In analyzing Amendment No. 11-CPA-05's compliance with Policy CF.3.1, the Staff Report states that:

> This proposal lies within an Urban Growth Area. Urban level services are typical available in such areas and, as of the writing of this staff report, we have not received any comments from service providers to indicate that services are not available to this site. Spokane County Utilities provides sewer service and Whitworth Water District provides water service to this site.[87]

But Policy CF.3.1 requires a determination that public and facilities will have the capacity to serve the development. The Staff Report did not make this determination for any public facilities and services. The Board of Commissioners considered compliance with Policy CF.3.1 in Finding of Fact 25, but did not determine that the schools could accommodate the

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[84] CR 000274 – 275, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-5 – CF-6 (2008 Printing).
[85] CR 000237 – 38, Five Mile Prairie Neighborhood Council letter to the Spokane County Building and Planning Department p. *1 (Sept. 14, 2011); CR 000091, Email from AJ Prudente to the Commissioners' Office Commenting on proposed Amendment No. 11-CPA-05 p. 1 (Sept. 9, 2011).
[86] CR 000343, Mead School District Memo p. *1 (3/14/2011).
[87] CR 000224, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 7 of 9.

additional students from the proposed development.[88] Since the required determination was not made despite the evidence that the school does not have adequate capacity, Amendment No. 11-CPA-05 is inconsistent with Policy CF.3.1.

In addition, there is no determination that the following "public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards[:]"[89] law enforcement, parks, libraries, solid waste, street cleaning, public transit, and fire and emergency services.[90] Since these determinations have not been made, Amendment No. 11-CPA-05 violates policy CF.3.1.

The County and developer may argue that since the Board of County Commissioners found that this development "is located in an area where adequate public facilities and services can be provided without decreasing levels of service" Policy CF.3.1 is met. But Policy CF.3.1 requires that "[d]evelopment shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted

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[88] CR 000013, Spokane County Resolution 11-1191 p. 7.
[89] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).
[90] CR 000275, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-6 (2008 Printing); CR 000012 – 14, Spokane County Resolution 11-1191 pp. 6 – 8.

standards."[91] This is different than finding that adequate public facilities and services can be provided in the urban growth area. It may be possible, for example, the serve school demand by redrawing school boundaries or building a new facility, but if there is no plan to do so then the public facilities will not have the capacity to serve the development. In such a case the public facilities and services that serve the area will not have the capacity to serve the development. Policy CF.3.1 requires a determination that public facilities and services will have the capacity to serve the development. This determination has not been made and so Amendment No. 11-CPA-05 violates policy CF.3.1.

Spokane County or Harley C. Douglass, Inc. may argue that the concurrency regulations will implement Policy CF.3.1 for this development. The problem with this argument is that the concurrency regulations only require project applications to be reviewed to determine if transportation, public water, and public sewer facilities are adequate.[92] SCC 13.650.102(c) provides for '[f]ire protection, police protection, parks and recreation, libraries, solid waste disposal and schools" development is not reviewed for concurrency.[93] Instead that review is required to be done

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[91] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing) in Tab CP attached to this brief.
[92] CR 000923, SCC 13.650.102(b).
[93] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR)*

through an annual update to the capital facility plan and if the capital facilities "are found to be inadequate," the county "shall adjust its land use element to lessen the demand for services, include a project in the CFP to address the deficiency, or adjust the level of service. To implement any of these methods an amendment to the comprehensive plan is required."[94] So the review required by Policy CF.3.1 will not take place through the concurrency regulations for many public facilities and services including schools. This is confirmed by the Redstone Subdivision approval where the Spokane County Hearing Examiner wrote "[t]he Phase 2 Development Regulations do not require direct concurrency for parks, schools, law enforcement, fire, library services, etc. Accordingly the Examiner cannot condition or deny the project based on any deficiencies in parks, schools, etc. in the area."[95] The County did not determine that the public facilities and services needed to serve Amendment No. 11-CPA-05 that are not subject to direct concurrency review, such as schools, were adequate as part of the annual update to the comprehensive plan as we have shown.[96]

Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007); CR 000923, SCC 13.650.102(c).

[94] CR 000923, SCC 13.650.102(c). Enclosed as Appendix A in this Brief of Appellants.

[95] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007) in Appendix B of this Brief of Appellants.

[96] CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.

Nor has the County made this determination as part of an annual update to the capital facility plan which the concurrency regulations require.[97] The Five Mile Prairie Petitioners are not attempting to appeal the county's failure to update the capital facility plan; we are instead showing that the requirements of Policy CF.3.1 were not met for this development through the update of the capital facility plan.

This supports the conclusion that for Amendment No. 11-CPA-05 there should have been a determination that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards before approving the amendment as Policy CF.3.1 requires.[98] That is the only way the development would be reviewed for adequate school capacity and adequate fire protection, police protection, parks and recreation facilities, libraries, and solid waste disposal facilities and services. As, as this brief of appellants has documented, this review was not done.

It is also worth noting that the plain language of Policy CF.3.1 requires that "development shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted

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[97] CR 000923, SCC 13.650.102(c); CR 000007 – 14, Spokane County Resolution 11-1191 pp. 1 – 8.
[98] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

standards."[99] It does not limit that determination to compliance with Spokane County's concurrency regulations nor does it limit that determination to a particular time in the development review process.

The County or developer may argue that comprehensive plan amendments and rezones are not "development." "Development" is not defined by the *Spokane County Comprehensive Plan*.[100] Where a local government enactment does not define a term, a dictionary is used to determine the "plain and ordinary meaning" of the term.[101] The first definition of "development" is "the act, process, or result of developing: the state of being developed: a gradual unfolding by which something (as a plan or method, an image upon an image upon a photographic plate, a living body) is developed <a new ~ in poetry>: gradual advance or growth through progressive changes: evolution ..."[102] The comprehensive plan amendment and rezone approved by Amendment No. 11-CPA-05 is part of the act or process of developing. As Spokane County's Deputy Prosecuting Attorney said at the Hearings Board's hearing on the merits, the rezone could not have taken place had the Comprehensive Plan not

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[99] *Id.*
[100] CR 000282 – 92, *Spokane County Comprehensive Plan Glossary* pp. G-1 – G-11 (2008 Printing).
[101] *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 220, 840 P.2d 174, 184 (1992) (the court used WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY to define an exemption in a City of Seattle ordinance that was not defined in the ordinance).
[102] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY p. 618 (2002).

been amended.[103] And the proposed multi-family development could not be built without the comprehensive plan amendment and the rezone.[104]

The *Spokane County Comprehensive Plan* uses "development" to refer to all stages of the process of developing. For example, the comprehensive plan defines a fully contained community as a "development."[105] Fully contained communities are authorized by revisions, amendments, to the comprehensive plan.[106] The comprehensive plan also refers to another type of development that requires a comprehensive plan amendment as "development."[107] So the Hearings Board did not err in applying Policy CF.3.1 to Amendment No. 11-CPA-05 and finding that the amendment was inconsistent with the policy.

Policy CF.3.1 was not addressed by the court of appeals in *Spokane County v. Eastern Washington Growth Management Hearings Board.*[108] Unlike the non-transportation goals and policies at issue in *Spokane County,* Policy CF.3.1 uses the mandatory "shall."[109] And, unlike

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[103] CR 001016, FDO at 7 of 26; Hearings Board Hearing on the Merits Transcript p. 38.
[104] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[105] CR 000884, *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-9 (2008 Printing).
[106] *Id.*
[107], *Spokane County Comprehensive Plan Chapter 3 Rural Land Use* p. RL-12 – 13 (2008 Printing).
[108] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1258 – 64 (2013).
[109] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing); *Spokane County v. Eastern Washington Growth*

the transportation policies at issue in the *Spokane County* decision, as we have seen, there will be no future concurrency review for the schools and the other public facilities and services at issue in this case that do not require direct concurrency review.[110] And the concurrency regulations at issue in this case require an annual update to the capital facility plan, which is different than the transportation concurrency provisions at issue in *Spokane County*.[111]

In short, the Hearings Board did not misinterpret or misapply Policy CF.3.1 or the GMA provisions that require comprehensive plans to be internally consistent, for comprehensive plan amendments to be consistent with the GMA, or for development regulation amendments to be consistent with the comprehensive plan.[112] Substantial evidence supports the Hearings Board's determination that Amendment No. 11-CPA-05 violates Policy CF.3.1 and the GMA. The Hearings Board's order should be upheld.

Management Hearings Bd., 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1259 – 64 (2013); *Save Our State Park v. Board of Clallam County Com'rs*, 74 Wn. App. 637, 641 fn. 3, 875 P.2d 673, 676 fn. 3 (1994) "The use of the word 'shall' generally imposes a mandatory duty."

[110] CR 000923, SCC 13.650.102(b) & (c).

[111] CR 000923, SCC 13.650.102(c); *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 331 – 42, 293 P.3d 1248, 1258 – 64 (2013).

[112] RCW 36.70A.070; RCW 36.70A.130(1)(d); RCW 36.70A.120.

3. Amendment No. 11-CPA-05 does not comply with Spokane County Code 14.402.040, Criteria for Amendments.

The amendment does not comply with Spokane County Zoning Code (SCZC) 14.402.040. The Criteria for Amendment, provide in full that:

> The County may amend the Zoning Code when one of the following is found to apply.
> 1. The amendment is consistent with or implements the Comprehensive Plan and is not detrimental to the public welfare.
> 2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.
> 3. An amendment is necessary to correct an error in the Zoning Code.
> 4. An amendment is necessary to clarify the meaning or intent of the Zoning Code.
> 5. An amendment is necessary to provide for a use(s) that was not previously addressed by the Zoning Code.
> 6. An amendment is deemed necessary by the Commission and/or Board as being in the public interest.[113]

The Board of County Commissioners found that:

> 20. The proposed amendment is consistent with the criteria for a zone reclassification under Section 14.402.040 (1) and (2) of the Spokane County Zoning Code as the proposed amendment implements the goals and objectives of the Comprehensive Plan and the subject area has experienced a change of conditions as evidenced by development of duplex dwelling units in proximity to the subject property thereby

[113] CR 000200, SCZC 14.402.040 on page 402-1.

> creating a mix of land use types and densities in the Urban Growth Area boundary.[114]

However, as we have seen above, Amendment No. 11-CPA-05 does not implement the goals and policies of comprehensive plan. Since the *Spokane County Comprehensive Plan* does not have any objectives the Board of County Commissioners must have been referring to the visions and policies. As we showed above, Amendment No. 11-CPA-05 thwarts Policies UL.2.16, UL.2.20, and CF.3.1.

In addition, the Vision of the Housing element provides that "Spokane County is a community that provides the opportunity for a variety of housing types and development patterns for all incomes and lifestyles while preserving the environment and the character of existing neighborhoods."[115] While the 22.3 acres that were redesigned from "Low Density Residential" to "Medium Density Residential," are vacant,[116] this land is located in an established residential neighborhood with an existing character. The Spokane County Hearings Examiner summarized the established residential neighborhood character as part of the findings of fact in the decision to approve the preliminary plat for the Redstone

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[114] CR 000013, Spokane County Resolution 11-1191 p. 7.
[115] CR 000269, *Spokane County Comprehensive Plan Chapter 6 Housing* p. H-1 (2008 Printing).
[116] CR 000218, *Id.* p. 1 of 9.

subdivision on the 22.3 acres redesigned and rezoned by Amendment No. 11-CPA-05:

> 43. The site and nearby land are designated in the Low Density Residential category of the Comprehensive Plan, zoned Low Density Residential (LDR), and designated in the County Urban Growth Area (UGA).
>
> 44. The land located near the site to the north and west is vacant and undeveloped; except for an electrical power substation, overhead transmission lines and a high-pressure underground gas pipeline; and except for some single-family homes on acreage parcels located west of the site along the north side of North Five Mile Road.
>
> 45. The land lying further to the north, and the land located northeast of the site, generally consists of single-family homes on more urban-sized lots; along with some duplexes located along the east side of Waikiki Road.
>
> 46. The land located near the site to the east consists of single-family homes on acreage parcels, and vacant land containing utility easements. Some single-family homes on urban-sized lots are located further to the east, along the west side of Waikiki Road. The land lying south of the site across North Five Mile Road generally consists of single-family homes on mostly urban-sized lots.[117]

This existing character is confirmed by the Staff Report for Amendment No, 11-CPA-05.[118] This character can also be seen in "Figure 1 Site Location Map Redstone Subdivision" which shows the single-family

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[117] CR 000192, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 7 (March 30, 2007).

[118] CR 000220, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.

homes as small squares and the larger buildings as larger squares.[119] The character in the immediate vicinity can be seen in the aerial photograph identified as "Exhibit 1" in the administrative record.[120] It can also be seen in the "11-CPA-05 Zoning & Comprehensive Plan Maps" and "11-CPA-05 Air Photo" attached to the Staff Report.[121] Note the single-family homes south, east, and north of the site.

"A preliminary plat for a subdivision called Redstone (See file PN-1974-06) was approved for the site in 2007. The preliminary plat includes 38 lots, 26 for single family dwellings and 12 for duplexes for a total of 50 dwelling units."[122] The character of this subdivision is similar to the character of the area described by the Spokane County Hearings Examiner.

The comprehensive plan amendment and rezone will dramatically change the character of the area. As the project consultant for Harley C. Douglass, Inc. wrote:

> Under Low Density Residential (1-6 units per acre) the properties could be developed into 50 single family and duplex units and barely meets 2 units per acre density because of the amount of land that was rendered unusable

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[119] CR 000190, Figure 1 Site Location Map Redstone Subdivision (Jan. 31, 2006).
[120] CR 000199, Exhibit 1 Subject Properties Five Mile Comp Plan Five Mile Road and N. Waikiki Road, Spokane County, Washington.
[121] CR 000228 – 29, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* "11-CPA-05 Zoning & Comprehensive Plan Maps" and "11-CPA-05 Air Photo."
[122] CR 000220, *Id.* at 3 of 9.

> by the utility easements and steep slopes. Under Medium Density Residential (6-15 units per acre) the development of the site may still barely be able to reach the 6 units per acre or approximately 134 units. We would expect to be in the 8 to 10 unit range or up to 200 +/-units.
>
> For development design, single family lots require a minimum sized lot (5,000 sf) and each lot must have access to a roadway. With a multifamily development the units are aggregated into the buildings themselves and the roadways and parking areas converge around them.[123]

The Hearing Examiner found that the Redstone subdivision would have a gross density of 2.3 dwelling units per acre and a net density (less the roads and apparently the utility easements) of 4.4 dwelling units per acre.[124] The Hearings Examiner also found that the "design, shape, size and orientation of lots in the preliminary plat are appropriate for the proposed use of such lots, and for the character of the area in which the lots are located; considering similar urban development located in the area, ..."[125] So the single-family homes and duplexes at these densities preserve the character of the neighborhood. The 200 unit development with multi-family dwellings at densities of 8 to 10 dwelling units per acre and parking lots around the buildings would not ensure, or guarantee, that the design

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[123] CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).
[124] CR 000194, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 9 (March 30, 2007).
[125] CR 000196 – 97, *Id.* at pp. 22 – 23.

preserves the character of the neighborhood. The densities are higher than the neighborhood character. As the Staff Report and Hearings Examiner documented, there are no multi-family uses near this site.[126] So the building types are out of character.

Amendment No. 11-CPA-05 does not preserve the character of the existing neighborhood; rather it will substantially change it. So the *Spokane County Comprehensive Plan* vision is not implemented.

Goal UL.10 calls on the county to "[e]ncourage the development of mixed-use neighborhood and community centers that maintain or improve neighborhood character and livability."[127] As this Brief of Appellant has shown, Amendment No. 11-CPA-05 does not maintain neighborhood character.

Goal CF.3 calls on the county to "[e]nsure that public facilities and services support proposed development at established Levels of Service."[128] As we have seen above, the county has not ensured that public facilities and services are adequate to support the development. There is evidence the schools are overcrowded. The capacities of many public

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[126] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9; CR 000192, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 7 (March 30, 2007).
[127] CR 000251, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-13 (2008 Printing).
[128] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

facilities and services have not been considered. So Amendment No. 11-CPA-05 does not implement the goals and objectives of the comprehensive plan.

The Board of County Commissioner's found that the construction of duplexes in the vicinity of the rezone was a change of circumstances justifying the rezone under SCZC) 14.402.040(2).[129] However, duplexes are a permitted use in the "Low Density Residential" zone.[130] The Redstone preliminary plat includes 12 duplex dwelling units.[131] Since duplexes are a permitted use in "Low Density Residential" zone there is no need to change the zoning to accommodate them. So they cannot constitute a change in circumstance authorizing a rezone to the "Medium Density Residential" zone. So Amendment No. 11-CPA-05 does not comply with SCZC 14.402.040, Criteria for Amendment.

In short the Hearings Board did not misinterpret or misapply SCZC 14.402.040, the decision was not arbitrary or capricious, and substantial evidence supports the decision.[132] So the Hearings Board's order should be upheld on this issue.

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[129] CR 000013, Spokane County Resolution 11-1191 p. 7, Finding of Fact 20.
[130] CR 000206, SCZC 14.606.220 p. 606-3.
[131] CR 000220, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9.
[132] CR 001027 – 30, FDO at 18 – 21.

D. The Hearings Board correctly found Amendment No. 11-CPA-05 invalid. (Assignment of Error 4 and Issue 4)

Invalidity is a remedy authorized by RCW 36.70A.302. As the Washington State Supreme Court explained:

> The GMA includes a review process for determining whether county comprehensive plans are in compliance with the requirements of the GMA. The GMA provides two distinct alternatives when a Growth Management Hearings Board finds that a local government's comprehensive plan or development regulation does not comply with the GMA: the first is a finding of noncompliance under RCW 36.70A.300(3)(b); the second is a finding of invalidity under RCW 36.70A.302.
>
> If the Board finds "noncompliance" it may remand the matter to the county and specify action to be taken and a time within which compliance must occur. County plans and regulations, which are presumed valid upon adoption pursuant to RCW 36.70A.320, remain valid during the remand period following a finding of noncompliance. RCW 36.70A.300(4) ("Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.") Unlike a finding of noncompliance, a finding of invalidity requires the Board to make a determination, supported by findings of fact and conclusions of law, that the continued validity of the provision would substantially interfere with the fulfillment of the goals of the GMA. RCW 36.70A.302(b). Upon a finding of invalidity, the underlying provision would be rendered void.[133]

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[133] *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 181 – 82, 979 P.2d 374, 384 (1999) (footnote omitted).

The Hearings Board found and this brief has documented that Amendment No. 11-CPA-05 violates Comprehensive Plan Policies UL.2.16, UL.2.20, and CF.3.1.[134] So Amendment 11-CPA-05 is contrary to RCW 36.70A.070 and RCW 36.70A.130(1)(d) of the GMA. Therefore, the findings of noncompliance with the GMA necessary for a determination of invalidity have been found.[135]

The Hearings Board also remanded the matter to the County for the action in compliance with the GMA.[136] So that requirement for invalidity has also been met.

The Hearings Board also concluded that "the continued validity of Amendment 11-CPA-05 would substantially interfere with the fulfillment" of the goals in "RCW 36.70A.020(1) [Urban Growth], .020(3) [Transportation], and .020(12) [Public facilities and services]."[137] The GMA urban growth goal provides "[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."[138] Because of the public facility deficiencies at this site, Amendment 11-CPA-05 substantially interferes with this goal because there are not adequate public facilities at this site or

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[134] CR 001020 – 29, FDO at 12 – 21 of 26.
[135] RCW 36.70A.302(1)(a).
[136] CR 001034, FDO at 26 of 26.
[137] CR 001032 – 33, FDO at 24 – 25 of 26.
[138] CR 001032, FDO at 24 of 26.

a plan to provide them. These deficiencies include traffic, a lack of any pedestrian accommodations on Five Mile Road, the inability of students to walk to school, and a lack of school capacity.[139]

The GMA transportation goal provides "[e]ncourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans."[140] Because of the transportation deficiencies at this site, Amendment 11-CPA-05 substantially interferes with this goal because there are not adequate transportation facilities that provide for an efficient multimodal system because Five Mile Road is operating at its capacity and lacks pedestrian accommodations.[141]

The GMA public facilities and services goal provides "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."[142] evidence in the record showing that the school facilities lack capacity to serve the proposed medium density development and the school district already incurs expenses to bus area students using Five Mile Road because the

[139] CR 001023 – 25, FDO at 16 – 18 of 26.
[140] CR 001033, FDO at 25 of 26.
[141] CR 001023 – 25, FDO at 16 – 18 of 26.
[142] CR 001033, FDO at 25 of 26.

substandard road is unsafe for children to walk along to attend school."[143]Because of the public facility and service deficiencies at this site, Amendment 11-CPA-05 substantially interferes with the capital facilities and services goal.

VII. CONCLUSION

As we have seen, the Hearings Board had jurisdiction over the comprehensive plan amendment and rezone in Amendment 11-CPA- because the rezone was not authorized by the *Spokane County Comprehensive Plan*. Substantial evidence supports the Hearings Board's Final Decision and Order finding the comprehensive plan amendment and rezone violated the GMA and the *Spokane County Comprehensive Plan*. The Hearings Board also correctly interpreted and applied the law. We respectfully request that the Court uphold the Hearings Board's Final Decision and Order.

Respectfully submitted this 17th day of March 2014.

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[143] CR 001025, FDO at 18 of 26.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on March 17, 2014, I caused the electronic original and true and correct copies of the following document to be served on the persons listed below in the manner shown: Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise with Appendixes in Case No. 31941-5-III.

Ms. Renee S. Townsley, Clerk/Administrator Court of Appeals of the State of Washington Division II 500 North Cedar Street Spokane, Washington 99201-1905	Mr. David W. Hubert Deputy Prosecuting Attorney Spokane County Prosecuting Attorney 1115 West Broadway Avenue, 2nd Floor Spokane, WA 99260 Attorney for Spokane County
[ ] By United States Mail, postage prepaid and properly addressed	[X] By United States Mail, postage prepaid and properly addressed
[ ] By Legal Messenger or Hand Delivery	[ ] By Legal Messenger or Hand Delivery
[ ] By Facsimile	[ ] By Facsimile
[ ] By Federal Express or Overnight Mail prepaid	[ ] By Federal Express or Overnight Mail prepaid
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[X] By United States Mail, postage prepaid and properly addressed	[ ] By United States Mail, postage prepaid and properly addressed
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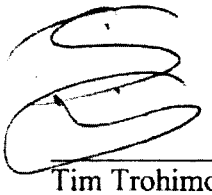
Certified and dated this 17th day of March 2014.



Tim Trohimovich, WSBA No. 22367

Appendix A

Spokane County Code (SCC) 13.650.102 (CR 000923)

Chapter 13.650 - CONCURRENCY

Sections:

13.650.102 - Concurrency facilities and services.

(a) The following facilities and services must be evaluated for concurrency:
- (1) Transportation;
- (2) Public water;
- (3) Public sewer;
- (4) Fire protection;
- (5) Police protection;
- (6) Parks and recreation;
- (7) Libraries;
- (8) Solid waste disposal;
- (9) Schools.

(b) Direct Concurrency. Transportation, public water and public sewer shall be considered direct concurrency services. Concurrency requirements for public water and public sewer service are detailed in Section 13.650.112. Transportation facilities serving a development must be constructed, or a financial guarantee for required improvements must be in place prior to occupancy. Applicable permit/project applications shall required transportation concurrency review, described in Section 13.650.104. A concurrency certificate shall be issued to development proposals that pass the transportation concurrency review.

(c) Indirect Concurrency. Fire protection, police protection, parks and recreation, libraries, solid waste disposal and schools shall be considered indirect concurrency services. Spokane County shall demonstrate the adequacy of indirect concurrency services through the Capital Facilities Plan (CFP). The CFP will be updated annually, at which time all indirect concurrency services will be evaluated for adequacy. The evaluation will include an analysis of population, level of service and land use trends in order to anticipate demand for services and determine needed improvements. If any indirect concurrency services are found to be inadequate, the county shall adjust the land use element to lessen the demand for services, include a project in the CFP to address the deficiency, or adjust the level of service. To implement any of these methods an amendment to the comprehensive plan is required.

(Res. 04-0461 § 3 (part), 2004)

Appendix B

Michael C. Dempsey, Spokane County Hearing Examiner, RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06 Findings of Fact, Conclusions of Law and Decision p. 22
(CR 000196)

performed, if the infiltration of groundwater is proposed in the final plat in soils that are not considered pre-approved by the County for such infiltration.

152. The conceptual drainage report submitted by the applicant indicates that the terrain in the project will be smoothed to reduce steep hills and direct runoff to a treatment and disposal area located on Tract F of the preliminary plat; but the general lay of the land will be maintained as overall drainage patterns and basins will not be overly modified. The preliminary plat preserves a natural drainage way that extends through a shallow ravine in the west end of the site.

153. County Engineering conditions of approval find the conceptual drainage plan submitted for the preliminary plat to be acceptable; but requires the applicant to submit a final drainage plan that complies with the drainage provisions contained in the County Code, the County Guidelines for Stormwater Management, and the County Road Standards.

154. County Engineering conditions of approval implement the drainage requirements for the preliminary plat contained in the CARA provisions of the County Critical Ordinance, by requiring the treatment of stormwater from impervious surfaces. The provision of public sewer for the proposal satisfies the sewage disposal requirements for the preliminary plat contained in the CARA provisions of the County Critical Areas Ordinance.

Public Sewer and Water Concurrency

155. The Spokane County Division of Utilities certified the availability of public sewer to the proposal. Whitworth Water District #2 certified the availability of public water to the proposal. The conditions of approval recommended by the Spokane Regional Health District, and County Utilities, require the proposal to be served with public sewer and water.

156. The proposal meets the sewer and water concurrency provisions of the County Phase 2 Development Regulations.

Other Concurrency Issues

157. The Phase 2 Development Regulations do not require direct concurrency for parks, schools, law enforcement, fire, library services, etc. Accordingly, the Examiner cannot condition or deny the project based on any deficiencies in parks, school, etc. in the area. Mead School District and County Parks and Recreation were contacted regarding the proposal, but did not submit any comments.

General Consistency of Preliminary Plat with Approval Criteria. SEPA Appeal

158. The Staff Report found the preliminary plat to be consistent with applicable policies of the Comprehensive Plan, the development standards of the LDR zone, and other relevant Zoning Code provisions. The Examiner agrees with such analysis, as supplemented herein.

159. The design, shape, size and orientation of lots in the preliminary plat are appropriate for the proposed use of such lots, and for the character of the area in which the lots are located;