

Thurston County Superior Court No. 11-2-02087-5
Court of Appeals No. 44121-7-11

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

KATHY MIOTKE, et al

Appellants,

v.

SPOKANE COUNTY,

Respondent

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COURT OF APPEALS
DIVISION II
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OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....iii
I. INTRODUCTION.....1
II. ASSIGNMENT OF ERROR & ISSUES PRESENTED.....2

Assignment of Error

1. The Growth Management Hearings Board erred by failing to apply and/or misapplied the proper burden of proof and failed to recognize that the County's actions continue to substantially interfere with both the GMA's purpose and goals.....2

Issues Presented

1. Whether the Hearings Board erroneously interpreted or applied the law when it failed to apply and/or misapplied the proper burden of proof when it failed to place the burden on the County, not Appellants, to demonstrate, after a finding of invalidity, that its action taken to comply with a previous Hearings Board order no longer substantially interfered with the goals of the GMA.....2
2. Whether the record demonstrates that the Hearings Board erroneously interpreted or applied the law when it failed to recognize that the County's actions continue to present substantial interference with both the GMA's purpose and goals by allowing an urban level of development to occur outside of the County's UGA boundary.....2
3. Whether the Hearings Board was correct in finding that Spokane County's action did not interfere with GMA's purpose and goals, because the affected area contains vested urban development.....3

III. STATEMENT OF THE CASE	3
A. Spokane County actions and Hearings Board Decisions.....	3
B. The first appeal to Thurston County Superior Court.....	9
C. Second appeal to the Hearings Board and subsequent appeals.....	11
D. The second appeal to Thurston County Superior Court.....	13
IV. ARGUMENT.....	13
A. Standard of Review.....	13
B. The Hearings Board erroneously interpreted or applied the law when it failed to apply and/or misapplied the proper burden of proof.....	15
C. The Hearings Board erroneously interpreted or applied the law when it failed to recognize that the County's actions continue to present substantial interface with both the GMA's purpose and goals.....	23
1. GMA Goal 1: Urban Growth.....	31
2. GMA Goal 2: Reduce Sprawl.....	32
3. GMA Goal 12: Public Facilities & Services.....	34
D. The fact that vested urban development in the affected area do not justify the actions of the County and the County could have taken other actions to bring itself into compliance with the GMA.....	35
V. CONCLUSION.....	39

TABLE OF AUTHORITIES

Cases

<i>Alexanderson v. Clark County</i> , 2009 WL 3844483.....	16
<i>Buechel v. Dep't of Ecology</i> , 125 Wash.2d 196, 884 P.2d 910 (1994).....	14
<i>City of Moses Lake v. Grant County</i> , 2000 WL 772910.....	33
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wash.2d 38, 959 P.2d 1091 (1998).....	14
<i>City of Sedro-Woolley v. Skagit County</i> , 2004 WL 1864631.....	25
<i>City of Wenatchee v. Chelan County</i> , 2009 WL 1044321.....	24
<i>Clark County v. Western Washington Growth Mgmt. Hrgs. Bd.</i> , 161 Wash.App 204, 254 P.3d 862.....	37, 38
<i>Concerned Friends of Ferry County & David Robinson v. Ferry County</i> , 2006 WL 2035286.....	33
<i>Diehl v. Mason County</i> , 94 Wash.App 645 (1999).....	24
<i>Futurewise v. Lewis County</i> , 2006 WL 2349047.....	22
<i>Futurewise v. Pend Orielle County</i> , 2006 WL 3749673.....	34
<i>Futurewise v. Whatcom County</i> , 2005 WL 2672929.....	33

<i>Greenfield Estates Homeowners Association v. Grant County,</i> 2004 WL 3335333.....	30
<i>Irondale Community Action Neighbors v. Jefferson County,</i> 2005 WL 1323099.....	31
<i>Kendall v. Douglas, Grant, Lincoln, Okanogan Counties Pub. Hosp. Dist.</i> <i>No. 6.,</i> 118 Wash.2d 1, 820 P.2d 497 (1991).....	15
<i>King County v. Central Puget Sound Growth Mgmt. Hearings Bd.,</i> 142 Wash.2d 543, 14 P.3d 133 (2000).....	13, 14
<i>Miotke v. Spokane County,</i> 2007 WL 4117919.....	10
<i>Peninsula Neighborhood Association v. Pierce County,</i> 1996 WL 650338.....	29
<i>Quadrant Corp. v. State Growth Management Hearings Board,</i> 119 Wn.App 562, 81 P.3d 918 (2003).....	27
<i>Quadrant Corp. v. State Growth Management Hearings Board,</i> 154 Wn.2d 224, 110 P.3d 1132 (2005).....	26
<i>Spokane County v. Miotke,</i> 158 Wash.App 62, P.3d 811 (2010).....	12
<i>Thurston County v. Cooper Point Ass'n.,</i> 148 Wash.2d 1 (2002).....	39
<i>Thurston County v. Western Washington Growth Mgmt. Hearings Bd.,</i> 164 Wash.2d 329, 190 P.3d 38 (2008).....	14
<i>Timberlake Christian Fellowship v. King County,</i> 114 Wash.App 174, P.3d 332 (2002).....	28
<i>Wells v. Western Washington Growth Mgmt. Hearings Bd.,</i> 100 Wash.App 657, 997 P.2d 405.....	16

<i>Whidbey Environmental Action Network v. Island County</i> , 122 Wash.App 156, 93 P.3d 885 (2004).....	19
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Statutes

RCW 36.70A.010.....	19, 26
RCW 36.70A.020.....	11, 17, 26, 29, 34
RCW 36.70A.030.....	27
RCW 36.70A.070.....	36
RCW 36.70A.110.....	26, 28, 29, 39
RCW 36.70A.280.....	18
RCW 36.70A.300.....	15
RCW 36.70A.302.....	4, 15, 21
RCW 36.70A.320.....	18, 23
RCW 36.70A.330.....	19
RCW 34.05.....	13, 14

I. INTRODUCTION

This case is another step in the long review of Spokane County's efforts to expand and then retract its Urban Growth Area ("UGA"). The primary question before this Court is whether the action of Spokane County to first expand a UGA, then allow the vesting of urban level of development, and lastly to "undo" the expansion stranding that urban development outside the UGA interferes with the purposes and goals of Washington's Growth Management Act ("GMA"). Appellants allege that the Growth Management Hearings Board ("Hearings Board") and the Thurston County Superior Court were wrong when they found that this did amount to interference with the GMA's purpose and goals. To the contrary and as explained below, the very heart of the GMA is to confine urban development to the bounds of a UGA.

Specifically, Appellants ask this Court to decide whether the Hearings Board failed to properly interpret and apply the burden of proof in its review of a compliance action taken by Spokane County when it issued its August 30, 2011 Order on Remand that affirmed and left standing the orders of compliance issued on March 5, 2007 and April 9, 2007. The record demonstrates that these decisions affirming the actions of Spokane County are subject to reversal by this Court because they

failed to recognize that the County's actions continue to present a substantial interference with both the GMA's purpose and goals.

For these reasons set forth below, Appellants Kathy Miotke and the Neighborhood Alliance of Spokane request that this Court grant an order setting aside the Hearings Board's Order on Remand, as well as its Order Finding Compliance and Order on Reconsideration and remand the matter to the Hearings Board for further proceeding consistent with this Court's order.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Assignment of Error

1. The Growth Management Hearings Board erred by failing to apply and/or misapplied the proper burden of proof and failed to recognize that the County's actions continue to substantially interfere with both the GMA's purpose and goals.

Issues Presented

1. Whether the Hearings Board erroneously interpreted or applied the law when it failed to apply and/or misapplied the proper burden of proof when it failed to place the burden on the County, not Appellants, to demonstrate, after a finding of invalidity, that its action taken to comply with a previous Hearings Board order no longer substantially interfered with the Goals of the GMA.
2. Whether the record demonstrates that the Hearings Board erroneously interpreted or applied the law when it failed to recognize that the County's actions continue to present substantial interference with both the GMA's purpose and goals by allowing an urban level of development to occur outside of the County's UGA boundary.

3. Whether the Hearings Board was correct in finding that Spokane County's action did not interfere with GMA's purpose and goals because the affected area contains vested urban development.

III. STATEMENT OF THE CASE

The history of this case is long and complicated, involving two previous Court of Appeals, Division 3 decisions, decisions from both the Spokane and Thurston County Superior Courts, and Hearings Board decisions from two separate proceedings.

A. SPOKANE COUNTY ACTIONS AND HEARINGS BOARD DECISIONS.

On August 25, 2005, Appellants petitioned the Hearings Board to review a resolution of Spokane County that amended its Comprehensive Plan by expanding the UGA by 229 acres in Spokane County. AR 1-29. After a full hearing on this appeal, the Hearings Board on February 14, 2006 issued a Final Decision and Order ("FDO") finding that the County violated several provisions of the GMA and found the UGA expansions invalid. AR 30-79.

The Hearings Board found the amendments, which expanded the UGA, invalid and that the County's actions were "clearly erroneous" with respect to the County's failure to engage in joint planning, failing to perform a population and land quality analysis, and failing to consider the critical nature and environmental character of the area. AR 76-77. The

Hearings Board ordered the County to bring itself into compliance, including updating “its Capital Facilities Plan before a UGA is created or modified to include additional lands not covered by the previous CFP.” AR 74. The Hearings Board also ordered the County “to perform a land and population analysis prior to an enlargement of a UGA within the county.” *Id.* The Hearings Board further found that the “County is required to insure that actions which expand its [UGA] be internally consistent with its [Comprehensive Plan] or Development Regulations.” *Id.* The Hearings Board specifically ordered that “Spokane County must take the appropriate legislative action to bring itself into compliance with this Order by May 15, 90 days from the date issued.” AR 77.

The Hearings Board took an extraordinary step under the GMA of issuing a finding of invalidity pursuant to RCW 36.70A.302(1), finding that the County’s action interfered with the goals of the GMA, stating:

On the record before us, we find that the continued validity of the violations of the GMA described in the above non-compliant Legal Issues does substantially interfere with the fulfillment of goals 1, 2, 3 and 12 of the Growth Management Act, such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302. The provisions of Resolution 5-0649, authorizing the expansion of the Spokane County UGA pursuant to Amendments 03-CPA-31 through 36, are found to be invalid pursuant to RCW 36.70A.302(1).

AR 73.

Prior to the Hearings Board's decision and finding of invalidity, development permits were submitted and accepted by the County, thereby vesting residential urban development on the subject property. AR 549, 731. Much of this area was then built to urban levels of density.

After issuing its FDO, the Hearings Board, on two separate occasions, issued orders finding the County was in continued noncompliance with the GMA for failing to take sufficient efforts to bring itself into compliance. On July 17, 2006, the Hearings Board found the County was in continued non-compliance with the GMA and its FDO and directed the County to take appropriate action to bring itself into compliance by August 17, 2006, and to notify the Hearings Board and Appellants of this action by August 30, 2006. AR 260. On October 25, 2006, the Hearings Board again found the County was in continued non-compliance with the GMA and its FDO and directed the County to take appropriate action to bring itself into compliance by December 6, 2006. AR 494-95.

Rather than addressing the shortcomings raised by the Hearings Board in its FDO, the County, instead, passed Resolution 07-0077 that simply reversed the expansion of the UGA. AR 619-21. In a letter from the County Commissioners to the Planning Commission, the

Commissioners articulated the rationale for seeking to reverse the UGA designation:

It has been the County's intent to take the required action as part of the 2006 Comprehensive Plan and Urban Growth Area (UGA) update process that the County is performing pursuant to RCW 36.70A.130 and the Countywide Planning Policies. Due to circumstances outside of the County's control which require information to be provided and actions to be taken by the cities and towns within Spokane County in conjunction with the 2006 UGA update it is apparent that the County can not [sic] complete the UGA update as anticipated and within the time frame set by the EWGMHB.

The Board of County Commissioners wish to avoid a recommendation for sanctions from the EWGMHB that could occur if the County does not meet the specified timeframe. For the reasons explained above the Spokane County Board of County Commissioners is requesting that the Planning Commission consider and make a recommendation to the Board of County Commissioners regarding the removal from the UGA of the areas previously added to the UGA that are the subject of the above identified cases before the EWGMHB.

AR 575. On December 7, 2006, the Planning Commission failed to pass the proposed UGA reversal. AR 550.

On January 23, 2007, the County Commissioners adopted Resolution 7-0077 anyway, which reversed the UGA expansions by redesignating the areas as outside of the UGA, stating, in part:

NOW, THEREFORE, BE IT RESOLVED by the Board that only to the extent of the adoption of the Comprehensive Plan amendments 03-CPA-31 through 36

and 04-CPA-01, the Board Resolutions number 5-0365 and 5-0646 are reversed and rescinded to have the effect that the Comprehensive Plan amendments 03-CPA-31 through 36 and 04-CPA-01 are not adopted and are of no force or effect.

AR 621.

On January 24, 2007, the County filed a Supplement to Statement of Action to Comply with the Hearings Board, discussing Resolution 07-0077 and the re-designation of the UGAs. AR 612-621. Appellants objected to this action arguing that Resolution 07-0077 and the repeal of the UGAs failed to comply with the GMA. AR 534-563, 604-611, 622-34. Appellants argued, in part, that “the paper exercise of re-designation [of the UGAs], itself, substantially interferes with other GMA requirements and fails to address any of the issues in the [Hearings Board’s] Final Order.” AR 633.

On March 5, 2007, the Hearings Board found Spokane County in compliance with the Growth Management Act. AR 693-700. The Hearings Board found, in part:

With the repeal of the portions of the resolution which enlarged the UGA, the objected to action was removed and the County brought itself into compliance. We can not find otherwise. The Petitioners contend that the Board should review the case substantially as well as procedurally. In doing so, the Board could look only at the County’s action and whether it addresses the findings and conclusions in the FDO. To go beyond that and determine whether the vested development has proper facilities or the population analysis

supports the enlargement of the UGA allowing this development would be beyond the Board's jurisdiction.

AR 698.

On March 14, 2007, Appellants filed a Motion for Reconsideration arguing that the Hearings Board failed to apply the proper of burden of proof in issuing its Compliance Order. AR 703-707. In light of the impending deadline for appeal, Appellants, on April 2, 2007, filed a Summons and a Petition for Judicial Review with the Thurston County Superior Court appealing the Hearings Board's March 5, 2007 Order Finding Compliance. CP 59-70.

On April 12, 2007, the Hearings Board issued an Order on Reconsideration. AR 726-31. In this Order, the Hearings Board affirmed its previous Order Finding Compliance. *Id.* However, one member dissented finding that the Hearings Board misapplied the burden of proof, stating:

The County has not met its burden of proof simply by revoking Resolution 5-0649. The County failed to show or demonstrate how this action corrected the Board's Order of February 14, 2006, and how this action will "no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1)." The County substantially interfered with the GMA goals, specifically Goals 1, 2, 3, and 12, by revoking the offending resolution and not demonstrating how this action will correct the underlying problems associated with the development that occurred over the life of the Petition for Review (PFR).

Once the burden is switched to the Respondent because of invalidity, this burden becomes just as tough a burden as the Petitioner is held to during the PFR. Under RCW 36.70A.320(1)(c), the Board specified in the final order the "particular part or parts of the plan or regulation" that were determined to be invalid, and the reasons for invalidity. In that FDO, the Board specified that "... the Petitioners have carried their burden of proof and the Board finds Amendments 03-CPA-31 through 36 of Resolution 5-0649, invalid." FDO at 48. Those amendments were revoked, but this action does not "demonstrate" how Resolution 5-0649 will no longer substantially interfere with the fulfillment of the goals of the GMA. The County's initial action created an urban growth area. Permits were vested and urban-like development allowed. The County now has an urban growth area, with all the trappings and requirements, such as urban-like roads, police protection, public transportation, sewer and water, outside of a legally established UGA. This alone flies in the face of RCW 36.70A.110(1). The County must answer how its action no longer substantially interferes with the GMA goals when urban-like development is now allowed outside an established UGA.

AR 730-31.

B. THE FIRST APPEAL TO THURSTON COUNTY SUPERIOR COURT.

As stated above, on April 2, 2007, Appellants filed a Summons and a Petition for Judicial Review in Thurston County appealing the Hearings Board's March 5, 2007 Order Finding Compliance. CP 59-70. On April 17, 2007, Appellants filed an unopposed motion seeking to amend their April 2, 2007 Summons and Petition to specifically include the Order on Reconsideration, which amended the original Order Finding Compliance. CP 53-58.

During the pendency of the appeal before this Court, the Hearings Board in a separate matter (discussed below) determined that the County's actions were inconsistent with the GMA and SEPA. *Miotke v. Spokane County*, 2007 WL 4117919 (GMHB Case No. 07-1-0005, Final Decision and Order, September 17, 2007), included as CP 38-52.

After the Hearings Board's decision in the second matter, Appellants filed their opening brief and arguments were heard on a motion to strike brought by Spokane County. Rather than ruling on the merits of the appeal or on the County's motion to strike, Judge Hicks, on October 23, 2007, issued an Agreed Order of Remand of Petitioners' appeal remanding the matter to the Hearings Board because:

Petitioners' opening brief in the matter before this Court refers to a subsequent and separate decision of the Growth Board (case number 07-1-0005) that is represented by Petitioners as contradictory of the Growth Board's decision in case number 05-1-0007.

...

Both Parties agree that reconciliation of the two decisions from the Growth Board would clarify the Growth Board's view of the alleged contradiction between the two decisions.

AR 754.

Pending a determination from the appeal of the second Hearings Board decision (discussed below), the Parties agreed to stay any action on the Thurston County remand. AR 775-76.

**C. SECOND APPEAL TO THE HEARINGS BOARD AND
SUBSEQUENT APPEALS.**

On March 21, 2007, Appellants filed a separate appeal of Resolution 07-0077 with the Hearings Board alleging, in part, that the action of “undoing” the UGAs was inconsistent with the enumerated goals of the Growth Management Act contained in RCW 36.70A.020.

Appellants brought the second case in the abundance of caution in the event that this Court determined that it lacked jurisdiction to consider the matter and following the Hearings Board’s direction that “The development in the previous expanded UGA is not the subject of this case.” AR 698-99.¹

After extensive briefing and oral argument, the Hearings Board, on September 17, 2007, issued its Final Decision and Order (“Final Order”) finding that Spokane County violated the GMA and State Environmental Policy Act (“SEPA”). CP 38-52. The Hearings Board found, in part, that the “reduction of an existing UGA requires the County to perform the same review required for the expansion of a UGA” and that the “County

¹ The County, itself, also argued. “If Petitioners believe that the repeal of the adoption of 03CPA-31 through 35 by resolution is itself not compliance [sic] with the GMA, that county action may be put before the Hearings Board by petition for review.” AR 654.

must comply with the substantive and procedural requirements of the Statement Environmental Policy Act when it reduced the size of its UGA where extensive new development has occurred or is expected to occur.”

Id. The County appealed the Hearings Board’s Final Order to Spokane County Superior Court. AR 767.

On July 16, 2009, the Spokane County Superior Court issued a brief memorandum decision addressing a single procedural legal issue, finding:

The issue raised in the March 21, 2007, Petition for Review was the same as the issue raised and decided in January 2007; whether the adoption of Resolution No. 7-0077 does not comply with the GMA. That issue had already been addressed by the Board. The subject matter, cause of action, persons and parties, and the quality of the person for or against whom the claim is made are all the same as in the prior actions which resulted in the Order Finding Compliance. Res judicata does apply.

AR 768 (emphasis in original).

Division III of the Court of Appeals affirmed the Superior Court’s decision solely on the issue of res judicata. *Spokane County v. Miotke*, 158 Wash.App. 62, 240 P.3d 811 (2010).

As a result of the Court of Appeals’ decision reversing its second FDO, the Hearing Board determined that there were no longer two conflicting decisions and on August 30, 2011, the Hearings Board issued its Order on Remand. AR 781-82. This Order affirmed and left standing

the two previously issued orders finding the County in compliance, stating “The Board’s findings and order of compliance entered in this case on March 5, 2007 and April 9, 2007 remain in full force and effect.” AR 782.

D. THE SECOND APPEAL TO THURSTON COUNTY SUPERIOR COURT.

Left with nowhere else to seek review, Appellants filed a second appeal in Thurston County Superior Court of the Hearings Board’s August 30, 2011 order, which affirmed its previous decisions finding that the County’s action did not interfere with the purposes and goals of the GMA. CP 4-11. On October 12, 2012, the Superior Court found that the Hearings Board did not erroneously interpret or apply the law. CP 100-02. Having been left with no other opportunity for review, Appellants filed this appeal.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The Administrative Procedure Act (“APA”), Chapter 34.05 RCW, governs judicial review of challenges of Hearings Board decisions. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wash.2d 543, 552, 14 P.3d 133 (2000). On appeal, courts review the Board's decision, not the decision of the superior court, and “judicial review of the Board's decision is based on the record made before the

Board.” *Buechel v. Dep’t of Ecology*, 125 Wash.2d 196, 202, 884 P.2d 910 (1994). “We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.” *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash. 2d 543, 553, 14 P.3d 133 (2000), quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 45, 959 P.2d 1091 (1998).

This Court courts reviews errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) de novo. *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wash.2d 329, 341, 190 P.3d 38 (2008). This Court reviews 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*, 136 Wash.2d at 46). 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 Wash.2d at 46–47 (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan*

Counties Pub. Hosp. Dist. No. 6, 118 Wash.2d 1, 14, 820 P.2d 497 (1991)).

As set forth below, a review of the Hearings Board's actions indicates that the Hearings Board's orders: (1) erroneously interpreted and applied the law; (2) were not supported by evidence that is substantial when viewed in light of the whole record; and (3) were arbitrary and capricious.

B. THE HEARINGS BOARD ERRONEOUSLY INTERPRETED OR APPLIED THE LAW WHEN IT FAILED TO APPLY AND/OR MISAPPLIED THE PROPER BURDEN OF PROOF.

Washington's Growth Management Act is clear that in the event of a finding of invalidity, the County has the burden to demonstrate that the compliance action substantively complies with the requirements of the act. Specifically, the GMA explains, "[A] county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1)." RCW 36.70A.320(4) (emphasis added).

The Court of Appeals in *Wells v. Western Washington Growth Management Hearings Bd.* explained:

In general, a petitioner challenging a GMA plan or regulation must demonstrate to the growth management hearings board that it is not in compliance with the statute. But when a local government is subject to a determination of invalidity, it bears the burden under RCW 36.70A.320(4) of “demonstrating [before the growth management hearings board] that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter....

100 Wash.App. 657, 667, 997 P.2d 405 (2000). Likewise, the Hearings Board in *Alexanderson v. Clark County*, 2009 WL 3844483 (GMHB Case No. 04-2-0008, Order Finding Compliance, October 8, 2009) explained:

Only if a finding of invalidity has been entered is the burden on the local jurisdiction to demonstrate that the ordinance or resolution adopted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

In this case, the Board found that a County Memorandum of Understanding (MOU) with the Cowlitz Tribe substantially interfered with GMA public participation Goal 11 and imposed invalidity. The County thus bears the burden of demonstrating that the MOU no longer substantially interferes with that GMA goal.

In this case, the Hearings Board’s FDO found the County’s actions invalid stating:

On the record before us, we find that the continued validity of the violations of the GMA described in the above non-compliant Legal Issues does substantially interfere with the fulfillment of goals 1, 2, 3 and 12 of the Growth Management Act, such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302. The provisions of Resolution 5-0649, authorizing the expansion

of the Spokane County UGA pursuant to Amendments 03-CPA-31 through 36, are found to be invalid pursuant to RCW 36.70A.302(1). The Petitioners have carried their burden of proof.

AR 73. GMA Goals 1, 2, 3, and 12 address urban development, sprawl reduction, efficient transportation, and ensuring that public services and facilities are available to support growth. RCW 36.70A.020(1),(2),(3),(12).

Instead of applying the proper burden of proof as required by the GMA, the Hearings Board improperly placed the burden upon the Appellants. In its Order Finding Compliance, the Hearings Board stated, "Local governments are afforded a 'broad range of discretion' in determining a methodology for compliance. A petitioner must sustain the burden of showing that the action of the local government did not comply with GMA under the clearly erroneous standard of review." AR 697-98. Remarkably, the Hearings Board acknowledged that interference with GMA Goals continued with the County's action, but failed to address this issue because of its perceived lack of jurisdiction: "The Board recognizes that the now repealed actions of the County have the effect of permitting urban growth in what are now rural areas. That is not an issue the Board has jurisdiction to consider." AR 698 (emphasis added). The Hearings Board further stated:

With the repeal of the portions of the resolution which enlarged the UGA, the objected to action was removed and the County brought itself into compliance. We can not find otherwise. The Petitioners contend that the Board should review the case substantially as well as procedurally. In doing so, the Board could look only at the County's action and whether it addresses the findings and conclusions in the FDO. To go beyond that and determine whether the vested development has proper facilities or the population analysis supports the enlargement of the UGA allowing this development would be beyond the Board's jurisdiction.

Id. (emphasis added). That is simply not the case.

As stated above, RCW 36.70A.320(4) very clearly places the burden on the County, not Appellants, to demonstrate, after a finding of invalidity, that its action taken to comply with a previous Hearings Board order no longer substantially interferes with the goals of the GMA. Moreover, the Legislature granted the Hearings Board sufficient authority to address compliance with GMA. Specifically, the GMA explains: "(1) A growth management hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county or city planning under this chapter is not in compliance with the requirements of this chapter..." RCW 36.70A.280. This authority furthers the legislative purposes of the GMA:

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high

quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

RCW 36.70A.010. The Hearings Board is charged with the very role of adjudicating GMA compliance. *Whidbey Environmental Action Network v. Island County*, 122 Wash. App. 156, 163, 93 P.3d 885 (2004)(“The Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations.”).

Furthermore, the Legislature expressly provided for compliance hearings and enumerated them as being of central importance. RCW 36.70A.330. Specifically, that section provides. “The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order.” RCW 36.70A.330(2). Not only must the actions of counties be in line with the GMA, but it also is the Hearings Board’s duty to evaluate whether or not compliance has occurred. It would simply undermine the intent of the Legislature if the Hearings Board failed to evaluate whether an action taken in pursuant of a Hearings

Board order, such as the re-designation of the UGA at issue in this case, is consistent with the goals of the GMA.

The Hearings Board has the duty to ensure compliance with the GMA and that Spokane County had the burden to demonstrate to the Hearings Board that its compliance action no longer substantially interfered with the GMA Goals. That simply did not occur in this case.

In its decisions, the Hearings Board did acknowledge the proper burden of proof, but clearly misapplied the burden. There is nothing in the record that supports the Hearings Board's conclusion that the County's action will not substantially interfere with GMA Goals. Nothing in any of the County's pleadings or in the Hearings Board's orders indicates that Spokane County met its heightened burden to demonstrate the issues of urban sprawl and inadequacy of services, which necessitated the original finding, was remedied by the County's act of "undoing" the UGAs. *See generally*, AR 519-28, 529-33, 564-603, 612-21, 637-62, 715-19, 726-33. In fact, the County provided the Hearings Board with no argument as to how its action does, or does not, interfere, with GMA goals. No mention is made of the GMA goals at all. The only stated reason for the action was to come into compliance given the failure of the County to meet its December 1st deadline for updating its comprehensive plan update. AR 513, 575.

Without any evidence in support, the County presented and the Hearings Board summarily adopted the argument that simply “undoing” the UGAs would resolve the issues in this matter and end interference with GMA goals. AR 728. To the contrary of this statement, the record indicates that the County’s act of UGA re-designation, itself, substantially interferes with GMA goals. *See, e.g.*, AR 698 (“The Board recognizes that the now repealed actions of the County have the effect of permitting urban growth in what are now rural areas.”); AR 730-31 (“The County failed to show or demonstrate how this action corrected the Board’s Order of February 14, 2006, and how this action will ‘no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).’ The County substantially interfered with the GMA goals, specifically Goals 1, 2, 3, and 12, by revoking the offending resolution and not demonstrating how this action will correct the underlying problems associated with the development that occurred over the life of the Petition for Review (PFR).”).

When presented with a similar lack of evidence regarding the effects of a compliance action, the Hearings Board in another matter found that Lewis County had failed to meet its burden, stating:

The County failed to offer any evidence that the change in designation and mapping of those lands as urban lands within the Winlock UGA will no longer substantially

interfere with the fulfillment of the natural resource industries goal of the GMA. This is the County's burden under RCW 36.70A.320(4) and 36.70A.302(7)(a).

...

We have no basis upon which to determine that the designation change accomplished by Resolution No. 05-326 removes the substantial interference with Goal 8 found to have been caused by the designation of those lands. This is the County's burden. RCW 36.70A.320(4). Therefore, there is still no valid designation of those lands and the re-designation of the rural lands as "urban" is noncompliant with the requirements for designation and conservation of agricultural resource lands.

Futurewise v. Lewis County, 2006 WL 2349047 (GMHB Case No. 06-2-0003, Final Decision and Order, August 2, 2006).

Here, the record in this matter is devoid of any evidence that the County's action will no longer substantially interfere with the GMA goals. However, unlike that case, the Hearings Board summarily concluded that the concerns with sprawl, urban development, traffic, and governmental facilities and services would be somehow be addressed by the County's act of "undoing" the UGA. This is simply not the case. As discussed below, the record indicates that the County's action substantially interfered with GMA Goals. The failure of the County to meet its burden coupled with the failure of the Hearing Board to properly apply that burden indicates that the Hearings Board's orders: (1) erroneously interpreted and applied the law; (2) are not supported by evidence; and (3)

are arbitrary or capricious. Accordingly, this Court must find that the Hearings Board failed to apply and/or misapplied the proper burden of proof as set forth in RCW 36.70A.320(4).

C. THE HEARINGS BOARD ERRONEOUSLY INTERPRETED OR APPLIED THE LAW WHEN IT FAILED TO RECOGNIZE THAT THE COUNTY'S ACTIONS CONTINUE TO PRESENT SUBSTANTIAL INTERFERENCE WITH BOTH THE GMA'S PURPOSE AND GOALS.

The record indicates that Spokane County failed to demonstrate that its actions no longer substantially interfere with GMA goals, including the goals set forth in the Hearings Board's FDO (Goals 1, 2, 3, and 12). As stated above, the record is devoid of any meaningful evidence or analysis by the County or the Hearing Board that these actions would either resolve the issues identified in the finding of invalidity or be otherwise consistent with the GMA. The only stated reason for the action was to come into compliance given the failure of the County to meet its December 1st deadline for updating its comprehensive plan update. AR 513. Accordingly, by affirming that the County's actions brought it into compliance with the GMA, the Board erroneously interpreted and applied the law, took action that was not supported by evidence, and otherwise acted in an arbitrary and capricious manner.

The County's choice of action is inconsistent with the goals of the GMA. First of all, courts and the Hearings Board itself have held that it is unlawful to allow urban growth outside of the UGA:

The GMA forbids growth that is "urban in nature" outside of the areas designated as UGAs. RCW 36.70A.110(2). Accordingly, "growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands ..." is not allowed in areas designated as rural. RCW 36.70A.030(17). ... Urban growth is not allowed outside areas designated as UGAs.

Diehl v. Mason County, 94 Wash.App. 645, 655-56 (1999).

In fact, allowing urban development outside the UGA has been specifically held to be inconsistent with GMA goals:

[T]he GMA specifically prohibits urban development outside of the UGA regardless of the County's desire to provide more affordable homes or protect property rights. ... In permitting urban-like densities in violation of RCW 36.70A.110, the County has violated, at the minimum Goals 1 and 2. Since such urban densities may create a demand for urban levels of services, including public transportation, the County has also violated Goals 3 and 12.

City of Wenatchee v. Chelan County, 2009 WL 1044321 (GMHB, Case No. 08-1-0015, Final Decision and Order, March 6, 2009).

Here, the Hearings Board ignored its own earlier decisions that recognized that the establishment of urban development may restrict a

jurisdiction's ability to retract its boundaries as a means of compliance.

stating:

If capital facilities planning for the 2005 updates shows that Sedro-Woolley cannot provide infrastructure needed for urban development within its UGA, the choice to retract the urban growth boundary to the City **limits would be impaired by the creation of new, smaller lots within the UGA prior to revision of the UGA boundaries.**

City of Sedro-Woolley v. Skagit County, 2004 WL 1864631 (GMHB Case No. 03-02-0013c, Compliance Hearing Order, June 18, 2004)(emphasis added).²

The Hearings Board disregarded that it is unlawful to allow urban development outside the urban growth area when amending a comprehensive plan. This reaches to the heart of the GMA itself -- "[t]hat uncoordinated and unplanned growth, together with a lack of common goals expressing the public interest in the conservation and the wise use of

² See also, *Brodew/Futurewise v. City of West Richland*, 2009 WL 6930874 (GMHB Case No. 09-1-0010c, Final Decision and Order, November 24, 2009). There, the Hearing Board found that urban development outside of the UGA was inconstant with GMA goals:

But there is substantial evidence in the record to support a determination that this amendment to the Land Use Element enables prohibited urban growth within a Rural Area. The land use designation change for the subject property, adopted by Resolution 09-162, conflicts with provisions of the Benton County CP Rural Element. Resolution 09-162 conflicts with RCW 36.70A.110(1) which provides that growth can occur outside of an Urban Growth Area only if it is not urban in nature. Finally, Resolution 09-162 was not guided by and is not consistent with the GMA Planning Goals 1, 2, 9, and 10 in RCW 36.70A.020.

our lands, pose a threat to the environment, sustainable economic development, and the health, safety and high quality of life enjoyed by the residents of this state.” RCW 36.70A.010. Allowing growth outside of a UGA certainly amounts to the uncoordinated growth that the Legislature sought to avoid in enacting the GMA.

A key element of the GMA’s strategy is RCW 36.70A.110(1), which specifically states that the comprehensive plans adopted by the counties must “designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” This requirement has been described by the Supreme Court as “[o]ne of the central requirements of the GMA.” *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 232, 110 P.3d 1132 (2005).

The intent of RCW 36.70A.110(1) was to confine urban growth to these areas and not allow it to overrun surrounding undeveloped areas. This, in turn, helps to achieve the specified GMA goals contained in RCW 36.70A.020, including the first two stated goals which encourage development in urban areas and reduce sprawl, by which the Act seeks to prohibit “the inappropriate conversion of undeveloped land into sprawling, low-density development.” RCW 36.70A.020(1),(2). This intent was recognized by the Court of Appeals in the *Quadrant* case:

The GMA forbids growth that is “urban in nature” outside of the areas designated as UGAs. “[G]rowth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands” is not allowed in areas designated as rural.

Quadrant Corp. v. State Growth Management Hearings Bd., 119 Wn. App. 562, 567-68, 81 P.3d 918 (2003).

The record demonstrates that the County’s actions create urban growth, as defined by RCW 36.70A.030(18), outside the newly redesignated UGA in violation of the GMA. The record demonstrates that urban development occurred in the affected areas and that the County was aware of that fact and chose to proceed with revoking the UGA designation anyway:

Mr. Schmitz questioned how this would affect property owners if their land was removed from the UGA; if they would be considered already vested or if they would have to redo process. Mr. Pederson explained that they each have vested applications, (some have already completed public review), and that the balance of vested applications also have no impact and they do not have to reapply or initiate any new actions. It was stated the Hearings Board cannot address vested applications.

AR 549. Even County counsel acknowledged that this action fails to address the on-the-ground issues associated with development:

It does not change what is going on the ground, and without speaking for the County Commissioners, the reason the County is moving forward with consideration about the properties in question, whether in the UGA or not, the reality is something is going on over there we need to deal with whether it is the UGA or not.

AR 550.

The GMA prohibits the County from allowing low and medium density residential urban development to occur in areas outside of the urban growth boundary. RCW 36.70A.110. The act of first creating an UGA, then allowing urban development to vest at low or medium density residential, then reversing the UGA without regard for or analysis of that development violates this prohibition. The County's willful action of carving areas of urban development from its UGA is precisely the type of action that the GMA seeks to prevent and this Court should reverse the Hearings Board's decision.

While the County has latitude in its land use decision, it cannot simply redraw its UGA to allow urban growth outside of the UGA. *Timberlake Christian Fellowship v. King County*, 114 Wash.App. 174, 184-85, 61 P.3d 332 (2002) ("Although the GMA does not prohibit specific land uses, it does require that local planning authorities draw a line between urban and rural areas."). While the County certainly found itself in a dilemma in trying to achieve compliance with the Hearing Board's FDO, that dilemma was of the County's own making and it

“cannot adopt regulations that fail to place appropriate conditions on growth outside UGAs to limit it to achieve conformance with requirements of .110.” *Peninsula Neighborhood Association v. Pierce County*, 1996 WL 650338 (GMHB Case No. 95-3-0071, Final Decision and Order , March 20, 1996).

Besides the clear statutory mandate prohibiting urban development in rural areas in RCW 36.70A.110(1), the GMA has explicit goals to encourage urban development within UGAs, to reduce sprawl, and to ensure that public facilities and services exist for development. RCW 36.70A.020(1), (2), (12). The County’s action of allowing urban development outside the UGA frustrates these fundamental goals. RCW 36.70A.020 states:

The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
...
- (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.

The Hearings Board in *Greenfield Estates Homeowners*

Association v. Grant County, which involved an UGA amendment challenge, recognized the importance of considering the GMA goals stating, "The proper sizing and location of an UGA involves more than a simple mathematical analysis. ... The County must use GMA's planning goals to guide the development and adoption of the UGA. One of the primary purposes of the Act is to avoid sprawl and direct new growth into UGAs." 2004 WL 3335333 (GMHB Case No. 04-1-0005, Final Decision and Order, October 8, 2004).

While the County may argue that any inconsistencies with the GMA goals are the product of vesting and not its GMA actions, the County cannot turn a blind eye and ignore the realities on the ground, particularly since these realities are largely the product of the County's own actions. The County simply cannot take action that allows urban growth outside of the UGA.

The Hearings Board has recognized the risks posed by vesting of urban development outside the UGA and the resulting inconsistencies with GMA Goals stating:

In this case, the non-compliant comprehensive plan provisions and development regulations allowing urban

levels of development without requiring urban levels of sewer service pose the danger that such development might vest in the new UGA before the County is able to adopt compliant development regulations. Such vested development would interfere with the County's ability to plan for adequate public sewer service to the new urban growth area, thus interfering with UGA goals for urban growth with adequate public facilities and services (Goal 1) and adequate public facilities and services to support development at the time the development is available for occupancy (Goal 12).

Irondale Community Action Neighbors v. Jefferson County, 2005 WL 1323099 (GMHB Case Nos. 04-2-0022 & 03-2-0010, Final Decision and Order, May 31, 2005).

1. GMA Goal 1: Urban Growth.

The Hearings Board failed to recognize that the County's actions violate GMA Goal 1 in two ways: (1) by allowing urban growth at a low and medium density residential level outside the UGA (as described in detail above) and (2) by failing to ensure that public services will be available in those areas of urban development. In its FDO, the Hearings Board explicitly found that inadequate public facilities existed for urban development in these areas, stating, "The record shows that levels of service are inadequate or questionable now and in the future for transportation facilities, sewer and water, stormwater utilities, school facilities and law enforcement." AR 50.

The County never demonstrated that its actions will address this concern and the record contains no evidence that public facilities will be provided to serve the areas now outside of the UGA. In short, the record clearly indicates that the County's action allows urban development outside of the UGA without any assurance that public facilities will be provided and are inconsistent with GMA Goal 1. Accordingly, the Hearing Board's decisions must be reversed.

2. GMA Goal 2: Reduce Sprawl.

The Hearings Board's action redesignated the lands in question to the prior designation of rural traditional and urban reserve. By allowing low and medium density residential development³ of one or more dwelling per acre without any analysis of the consistency of such development with the rural nature of the newly designated area, the County violates the prohibition against sprawl contained in GMA Goal 2.

First, by allowing urban levels of development and then removing the UGA designation, the County's action allows development that is too dense outside of the UGA. "[R]ural residential densities are no more intense than one dwelling unit per five acres. ...Densities that are not

³ The County's Comprehensive Plan at UL-1 defines low and medium residential development as follows. "Low density residential includes a density range of 1 to and including 6 dwelling units per acre, medium density residential includes a range of greater than 6 to and including 15 dwelling units per acre."

urban but are greater than one dwelling unit per five acres generally promote sprawl in violation of goal 2 of the GMA.” *Futurewise v. Whatcom County*, 2005 WL 2672929 (GMHB Case No. 05-2-0013, Final Decision and Order, September 20, 2005); *see also Concerned Friends of Ferry County and David Robinson, v. Ferry County*, 2006 WL 2035286 (GMHB Case No. 01-1-0019, Third Order on Compliance, June 14, 2006)(“ Five-acre lots are generally considered the minimum lot size in the rural/agricultural areas and only when a variety of larger lot sizes are available, while 2.5-acre lot sizes are more urban and promote sprawl.”)

Moreover, the Hearings Board has stated, “Where the lot size is less than 10 acres in rural areas of a county, the Board must more carefully examine the number, location and configuration of those lots. It must determine whether such lots constitute urban growth; presents an undue threat to large-scale natural resource lands; thwarts the long-term flexibility to expand the UGA; or, will otherwise be inconsistent with the goals and requirements of the Act.” *City of Moses Lake v. Grant County*, 2000 WL 772910 (GMHB Case No. 99-1-0016, Final Decision and Order, May 23, 2000).

Second, the County’s action fails to analyze the consistency of the development with the rural character of the area. The GMA requires “the County to provide a written record explaining how the rural element

harmonizes the planning goals in RCW 36.70A.020 and meets the requirement of RCW 36.70A.” *Futurewise v. Pend Oreille County*, 2006 WL 3749673 (GMHB Case No. 05-1-0011, Final Decision and Order, November 1, 2006).

Here, the record is clear that the County, when it undesignated the UGA and reversed the land-use designations, allowed urban densities to be developed on land that is designated as rural traditional and urban reserve. Moreover, the record is completely absent of any analysis of the impacts of such development to the rural character of the area. Accordingly, the County’s actions interfere with GMA Goal 2 and the Hearings Board decisions must be reversed.

3. **GMA Goal 12: Public Facilities and Services.**

The County, by creating and then undoing the UGA and avoiding the update to its capital facilities plan, failed to ensure that adequate public services and facilities exist in violation of GMA Goal 12. The record demonstrates that the Hearings Board explicitly found that inadequate public facilities existed for urban development in these areas. AR 50 (“The record shows that levels of service are inadequate or questionable now and in the future for transportation facilities, sewer and water, stormwater utilities, school facilities and law enforcement.”).

The County never presented evidence that its actions would address this GMA goal. As the Hearings Board stated in its FDO, “Without a current Capital Facilities Plan and the clear burden this expansion will place upon the resources of the City and County, [GMA Goal 12] is frustrated. Looking at the above discussions and our conclusions leaves no doubt that Goal 12 is substantially interfered with and frustrates the County's ability to engage in GMA-compliant planning.” AR 44. The record indicates that nothing has changed since the Hearings Board’s initial ruling. No action of the County have resolved issues of adequate public facilities and services as required by GMA Goal 12. Accordingly, the actions of the County still interfere with Goal 12 and the decisions of the Hearings Board must be reversed.

D. THE FACT THAT VESTED URBAN DEVELOPMENT IN THE AFFECTED AREA DO NOT JUSTIFY THE ACTIONS OF THE COUNTY AND THE COUNTY COULD HAVE TAKEN OTHER ACTIONS TO BRING ITSELF INTO COMPLIANCE WITH THE GMA.

Here, the record demonstrates and the County does not deny that it: (1) retracted the UGA boundary and (2) that vested urban development now is outside the boundary. The only issue is whether allowing urban development outside of the UGA boundary is consistent with the goals of the GMA. As the record demonstrates, it is not.

The only stated reason for the action was to come into compliance given the failure of the County to meet its December 1st deadline for updating its comprehensive plan update. AR 513, 575. However, the retraction of the UGA does not address the concerns of the Hearings Board's FDO. In that order, the Hearings Board did not order the County to retract its UGA boundary, but found that the County failed to properly complete a land quality analysis and capital facilities plan to support the expansion of the UGA. AR 74.

The Hearings Board ordered, and the GMA requires, counties to forecast capital facilities needs at least six years into the future with a plan that will finance capital facilities within projected funding capacities and clearly identify sources of public money to ensure that adequate public facilities exist to serve urban development. RCW 36.70A.070. The Hearings Board found that the County had failed to do this in the area of the new urban development and the retraction of the UGA boundary does not remedy this shortcoming.

The County told the Hearings Board on at least two separate occasions that it was endeavoring to specifically address its concerns by developing a new land quantity analysis and capital facilities plan. AR 90-91; 267-272. This would have brought the County into compliance without stranding urban growth outside the UGA boundary. However, the

County changed course and decided to simply try to undo its action. AR 519-25. It does not logically follow, because the amendment to the Comprehensive Plan repealed the previous UGA boundary, that the proper remedy was achieved. What the County did is contrary to common sense and the GMA – stranding urban development outside of the UGA.

The County has justified its actions arguing that its hands were tied because urban development projects on the effected parcels vested under state law. Again, this argument fails because: (1) Appellants do not challenge the vesting of the projects, but only the retraction of the UGA and the stranding of the urban development and (2) the County could have taken action to prevent vesting of these projects pending its resolution of this matter. The Court of Appeals in *Clark County v. Western Washington Growth Management Hearings Review Bd.*, 161 Wash.App. 204, 225-26, 254 P.3d 862 (2011), rejected a similar argument that a County was unable to take action to address its erroneously expanded UGA of subsequent actions, which were argued to vest to that designation.

County decisions related to the GMA that are timely challenged and pending review before the Growth Board and/or an appellate court are not final and cannot be relied on until either (1) the Growth Board's final order is not appealed or (2) the county's decisions are affirmed and a final order or mandated opinion is filed by a court sitting in its appellate capacity.

Under the parties' interpretation of RCW 36.70A.300(4), .320(1), and former RCW 36.70A.302(2), the GMA would be unenforceable. The parties' interpretation would allow a county to incorporate any land into a UGA regardless of whether it satisfies the GMA's requirements; draw out the appeal at the Growth Board level until a city could pass an ordinance annexing the property; and then moot out any challenges by citing the county's lack of authority over the lands or argue, as it did here, that the annexation deprived the Growth Board of jurisdiction to review its decision to include the property in the UGA. The legislature did not intend to permit counties to evade review of their GMA planning decisions in this manner, and the GMA's statutory scheme does not allow them to do so.

This is exactly what the County allowed to happen here. It relied upon its unlawfully adopted UGAs to allow urban development to vest and be built, and then claimed it had no other choice than to retract the boundaries – ignoring the direction of the Hearings Board in its final decision and order to update its capital facilities plan and land quantity analysis. The County cannot ignore the record that its actions allow urban growth outside of the UGA in violation of the goals of the GMA.

Further, the Court must not turn a blind eye to subsequent actions that occurred in the former UGA areas simply because those actions were “vested.” First, it was simply improper for the County to vest these areas. *See Clark County*, 161 Wash.App. at 225-26. Second, the County had other options to come into compliance, which it first pursued and then abandoned in favor of this unlawful action. AR 90-91; 267-272. The

County cannot ignore that the very definition of an urban growth area specifically includes areas like these that are “characterized by urban growth whether or not the urban growth area includes a city.” RCW 36.70A.110(1). No definition in the GMA or any other provision allows urban development in rural areas.

This case is similar to those cases where courts have declined to afford deference to county actions that violate GMA requirements. *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 14 (2002). In *Thurston County*, the county's proposed action violated a specific statutory mandate; extending urban services into a rural area in contravention of RCW 36.70A.110(4). *Id.* Thus, the court refused to defer to county's decision where the “County's proposal [did] just what the GMA prohibits.” *Id.*


Here, the County simply had no excuse or justification for retracting its UGA and stranding vested urban development in rural areas in contravention of the requirements of the GMA. The Hearings Board was wrong in finding that this did not interfere with the purposes of the GMA warranting reversal of its decisions.

V. CONCLUSION

The GMA prohibits urban development outside the UGA. The record demonstrates that the County took action to strand urban

development in rural areas and the Hearings Board found it compliant with the GMA. These actions warrant reversal of the Hearing Board's decisions. For these reasons, Appellants respectfully request that the Court set aside, remand, and find that the Hearings Board's Order on Remand, the Order Finding Compliance, and the Order on Reconsideration (1) erroneously interpreted and applied the law; (2) are not supported by evidence; and (3) are arbitrary or capricious.

Respectfully submitted this 25th day of January, 2013.



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PROOF OF SERVICE

I, Danette Lanet, hereby certify that I caused a copy of the **Brief of Appellants** to be served, via USPS, postage prepaid, on all parties or their counsel of record on the date below:

David Hubert
Deputy Spokane County Prosecuting Attorney
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Spokane, WA 99260

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of January 2013.



DANETTE LANET

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