No. 91475-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, and DAVID STALHEIM, AND FUTUREWISE,

Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE FARM BUREAU, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,

Amici Curiae.

RESPONDENT WHATCOM COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Whatcom County (the "County") asks this Court to deny the Petition for Review (the "Petition") filed by Eric Hirst, Laura Lee Brakke, Wendy Harris, David Stalheim, and Futurewise (collectively "Hirst"), in which Hirst seeks review of the Court of Appeals decision in *Whatcom County v. Hirst*, --- P.3d ----, Nos. 70796–5–I, 72132–1–I, 70896–1–I (Division I, Feb. 23, 2015), 2015 WL 754200 ("the Decision").

Fundamentally, the Decision addresses the adequacy of the County's "rural measures" that protect surface water and groundwater resources pursuant to RCW 36.70A.070(5)(c) of the Growth Management Act ("GMA"). The Decision reverses two underlying orders of the Growth Management Hearings Board (the "Board") in which the Board concluded that the County's rural measures did not comply with RCW 36.70A.070(5)(c). The Court examined the County's efforts to satisfy that GMA provision in two contexts: (1) availability of water supply; and (2) protection of water quality. The Court concluded that the County's cooperative regulatory approach to water availability, which incorporates Ecology's instream flow regulations into the County's land use decision making, complies with the GMA. With respect to the County's water quality regulations, the Court remanded to the Board to cure a procedural error, but included direction to the Board to ensure that it does not commit the substantive errors the County alleged in its appeals.

The Decision is well-reasoned and thorough. The Petition fails to identify any conflict between the Decision and other appellate decisions,

and fails to identify any error in the Decision. Accordingly, Review by this Court is not warranted.

II. STATEMENT OF THE CASE

A. The Board's Decisions

The Decision reverses two Board orders: the Final Decision and Order (FDO) in *Hirst v. Whatcom County*, No. 12-2-0013, filed on June 7, 2013;[1] and the Second Order on Compliance in that same proceeding, filed on April 15, 2014.[2] In its FDO, the Board reviewed Whatcom County Ordinance No. 2012-032, in which the County adopted the rural measures to protect water availability and water quality that are the subject of this appeal.

On the issue of water availability, the Board ruled that the County's measures addressing water availability failed to comply with RCW 36.70A.070(5)(c). The Board based its decision on its interpretation of the instream flow rule[3] for the Nooksack Water Resource Inventory Area, Chapter 173-501 WAC (the "Nooksack Rule"), which was promulgated by the Department of Ecology ("Ecology"):

> [A]ccording to Ecology, the County must deny a new permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically

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[1] Administrative Record ("AR") 1363- 1413. All "AR" citations are to the administrative record in Case No. 70796-5-1. The FDO is attached to the Petition as Appendix B.

[2] The Second Compliance Order is attached to the Petition as Appendix C.

[3] The term "instream flow rule" refers to regulations Ecology has adopted pursuant to the Instream Resources Protection Program for specifically identified basins, which are codified at title 173 WAC.

> connected to an impaired surface water body will not cause further adverse impact on flows.[4]

The Board nominally attributed its interpretation of the instream flow rule to Ecology, based on the Board's reading of an Ecology letter discussing an instream flow rule from a different basin. As explained below, however, Ecology later filed a brief with the Court of Appeals stating that it disagreed with the Board's interpretation of the Nooksack Rule and, as a result, also disagreed with the Board's finding that the County's measures addressing water availability failed to comply with the GMA.[5]

In ruling that the measures addressing water quality failed to comply with the GMA, the Board relied on generalized evidence of preexisting water quality problems, pointing to the "proliferation of evidence in the record of continued water quality degradation resulting from land use and development activities" in general, but cited no evidence linking specific water quality problems to the absence of particular rural measures in the County's Comprehensive Plan.[6] In reaching its decision regarding water quality, the Board took official notice of two documents that the Board concluded were "authoritative references" documenting the need for land use planning to be coordinated with water resource planning.[7] The parties were not notified either before

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[4] AR 1389, FDO at 42.

[5] *See* Section II.B, *infra*.

[6] AR 1397, FDO at 35.

[7] AR 1371, 1393-97, FDO at 9, 31-35.

or during the hearing of the materials, nor were the parties afforded an opportunity to respond to or contest the materials.[8]

In its FDO, the Board claimed it was making "findings" about each measure adopted by the County.[9] Many of the statements that followed, however, were actually legal conclusions, not findings of fact, and the Board did not identify, enumerate, or consolidate any purported findings of fact.[10]

In April 2014, after the County had taken legislative action that refined but largely preserved its prior approach to the protection of surface water and groundwater resources, the Board held a compliance hearing, found the County in continuing non-compliance for the same reasons stated in the FDO, and issued the Second Order on Compliance.[11] The Court of Appeals granted discretionary review of the FDO and the Second Order on Compliance.

B. The Court of Appeals Decision.

The Court of Appeals reversed the Board's conclusions that the County's measures failed to protect water availability and water quality. In addressing the issue of water availability, the Court of Appeals observed that the County "seeks to meet the requirements of the GMA by following

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[8] *See* Decision at 30-35. Citations to the Decision are to the slip opinion attached to the Petition as Appendix A.

[9] AR 1383-91, FDO at 36-44.

[10] *See, e.g.*, AR 1403, FDO at 41 (statement in nominal "findings" concluding that "this is not the standard to determining legal availability of water").

[11] Decision at 3-4.

consistent Department of Ecology regulations regarding availability of water."[12] The Court of Appeals concluded that this cooperative, complementary approach, which incorporates and integrates Ecology's instream flow rule, complies with the GMA and is specifically consistent with this Court's decision in *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd. ("Kittitas County").*[13] The appellate court also concluded that the Board's rejection of the County's regulatory approach would require the County to make "its own, separate determination of the availability of water," which could result in "inconsistent conclusions between the County and Ecology."[14] In reaching this decision, the Court relied on an amicus curiae brief filed by Ecology that disagreed with the Board's interpretation of the Nooksack Rule and with the Board's finding of noncompliance.[15] The Court concluded that the Board had erroneously interpreted the Nooksack Rule, and that in doing so, the Board had improperly relied on a letter from Ecology discussing an instream flow rule from a different basin.[16]

In addressing the issue of water quality, the Court of Appeals agreed that the Board had erred "[t]o the extent that the Board implicitly concluded that the County has a duty to 'enhance' water quality rather

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[12] *Id.* at 13-14.

[13] *Id.* at 10-16 (citing *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, ("*Kittitas County*"), 172 Wn.2d 144, 256 P.3d 1193 (2011)).

[14] *Id.* at 14, 16.

[15] *Id.* at 23-24.

[16] *Id.* at 23-27, 30.

than 'protect' it."[17] The appellate court also ruled that the Board had violated its own rules when it took official notice of two documents discussing water quality issues and rejected Hirst's argument that the County was not prejudiced by this violation.[18] The appellate court declined to rule on the County's substantial evidence challenge regarding water quality, but "express[ed] concerns the Board should consider on remand," including the County's argument that the Board relied on general evidence of water quality problems with no specific link to the absence of particular rural measures.[19]

Finally, the appellate court rejected Hirst's procedural argument regarding the adequacy of the County's assignments of error[20] and Hirst's argument that the Board abused its discretion by denying Hirst's request for a determination of invalidity.[21] Hirst's Petition to this Court followed.

III. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court of Appeals correctly resolved all of the issues on appeal and determined that the Board erred by finding the County's rural measures noncompliant with the GMA. Review by this Court is not warranted. In its Petition, Hirst cites the criteria in RAP 13.4(b)(1), (2),

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[17] *Id.* at 36-41.
[18] *Id.* at 30-35.
[19] *Id.* at 41-42.
[20] *Id.* at 6-7.
[21] *Id.* at 42-46.

and (4), but fails to meet any of these criteria. The Petition should be denied.

A. The Decision's Conclusions Regarding Water Availability Are Consistent with this Court's Decisions.

Hirst fails to establish that the Decision's conclusions regarding GMA protections for water availability are inconsistent in any way with four prior Supreme Court decisions: *Kittitas County*[22]; *Postema v. Pollution Control Hearings Bd.* ("*Postema*")[23]; *Swinomish v. Ecology* ("*Swinomish*")[24]; and *Ecology v. Campbell & Gwinn* ("*Campbell & Gwinn*").[25] Hirst engages in hyperbole and mischaracterizes the Decision to manufacture an inconsistency with court precedent where none exists. Contrary to Hirst's assertions, the Court of Appeals did not conclude that Ecology's interpretation of its instream flow rule is the "sole governing law that determines the County's obligation to protect water resources."[26] Nor did the Court of Appeals conclude that the "state Water and Groundwater codes... do not govern permit-exempt wells."[27] Instead, the appellate court carefully reconciled its decision in this case with those prior decisions of the Supreme Court.

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[22] 172 Wn.2d 144, 180, 256 P.3d 1193, 1210 (2011).
[23] 142 Wn 2d 68, 87, 11 P.3d 726, 738 (2000).
[24] 178 Wn.2d 571, 576, 579, 598, 311 P.3d 6 (2013).
[25] 146 Wn.2d 1, 43 P.3d 4 (2002).
[26] Petition at 9.
[27] *Id.* at 9-10 (citations omitted).

Hirst's claims that the Decision conflicts with *Kittitas County* lack any meaningful analysis beyond bare assertions.[28] Indeed, the Court of Appeals embraced the very same general principle from *Kittitas County* that Hirst claims the appellate court ignored, holding that the GMA requires counties to adopt rural measures for the protection of groundwater resources.[29] The Court of Appeals first observed, as did the Board below, that the specific question in this case is different than that before the Court in *Kittitas County*,[30] but noted that *Kittitas County* "provides helpful guidance into the proper relationship between Ecology and counties for purposes of the GMA."[31] Specifically, the Court of Appeals concluded that "the supreme court in *Kittitas* anticipated ***consistent*** local regulation by counties in land use planning to protect water resources."[32] Applying *Kittitas County*, the Court of Appeals held that the County's regulations "provide for cooperation between the County's exercise of its land use authority and Ecology's management of water resources," which is "consistent with the cooperative relationship contemplated by *Kittitas* and

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[28] *Id.* at 12.

[29] Decision at 9, 14. Thus, the Court of Appeals did not "fail to acknowledge or implement the independent effect of the GMA's requirements to protect water resources and to determine the legal availability of water," as Hirst contends. *See* Petition at 10. Instead, the appellate court confirmed that this general premise was not at issue in this case and has never been contested by the County, stating that the relevant question is "whether the County must make its own determination about the availability of water or whether it may meet the requirements of the GMA by invoking the assistance of Ecology by the code provisions at issue here." Decision at 14.

[30] *Id.* at 11-12 (quoting FDO).

[31] *Id.* at 15.

[32] *Id.* (emphasis in original).

is consistent with the laws regarding protection of water resources under the GMA."[33] This holding is entirely consistent with *Kittitas County*.

The Decision is also consistent with *Postema*. In fact, the Court of Appeals reversed the Board's decision below precisely because the Board's conclusion was inconsistent with that very case. The appellate court held that the Board had erred by adopting a uniform interpretation of all instream flow rules, under which all rules regulate permit-exempt withdrawals in the same manner,[34] an approach that was expressly rejected in *Postema*.[35] As noted by the Court of Appeals, *Postema* held that differences in the rules result in different regulatory outcomes. Critically, in this case, the appellate court acknowledged that the Nooksack Rule applies to permits and certificates and expressly includes an exemption for domestic uses, which is controlling when considering the effect of the instream flow rule on permit-exempt withdrawals.[36]

Moreover, the Court of Appeals correctly concluded that *Postema* addressed a very different legal question from the issue in this case.[37] While *Postema* involved "applications for groundwater appropriation

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[33] *Id.*

[34] Indeed, the Board in its FDO mistakenly concludes that an Ecology letter regarding an instream flow rule from a different basin with specific provisions expressly regulating permit-exempt withdrawals is representative of how to interpret the Nooksack Rule, despite critically different language. Decision at 22, 30.

[35] *Postema*, 142 Wn.2d at 84 ("Ultimately, we are unconvinced by the parties' arguments urging their respective versions of a consistent interpretation applying to all WRIAs...While there is some appeal to the idea that all of the rules should mean the same thing therefor, we too decline to search for a uniform meaning to rules that simply are not the same.").

[36] Decision at 24-28.

[37] *Id.* at 21.

permits," and the four-part test Ecology uses when reviewing applications for groundwater permits under RCW 90.03.290, this case involves the legal effect of an instream flow rule on permit-exempt withdrawals.[38] In other words, *Postema* focused on the interpretation and application of the decision criteria Ecology applies when reviewing applications for new permits – a decision-making process from which permit-exempt withdrawals are exempt. Thus, the Court of Appeals correctly concluded that "the County's regulations do not 'fall short' of the '*Postema* standard,' as we read that case, because *Postema* does not squarely address the protection of instream flows from permit-exempt groundwater withdrawals."[39]

Nor does *Swinomish*[40] support Hirst's request for review. The Court of Appeals distinguished *Swinomish* on the grounds that it involved the Skagit basin rule, which expressly governs permit exempt-withdrawals, in addition to permits and certificates, while the Nooksack

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[38] *Postema*,142 Wn.2d at 73.

[39] Decision at 21. To the extent that *Postema* addressed the question of permit-exempt withdrawals, it was only to conclude that the exemption from the permitting process for certain domestic uses is not relevant to the criteria applied by Ecology when evaluating new permit applications. *Id.*, 142 Wn.2d at 89. Specifically, the *Postema* court rejected an appellant's arguments that Ecology's decision criteria allow for *de minimis* impacts on existing rights. In support of this argument, the appellant analogized to exemptions for domestic use, including the exemption under RCW 90.44.050 and a provision in an instream flow rule exempting single family domestic use even where the withdrawal is from a stream closed to further appropriation. *Id.* (citing WAC 173-508-080(2)). The *Postema* court rejected the analogy because the exemptions did not apply to the permit application at issue in that case and were therefore irrelevant to the Court's analysis of standards applied under RCW 90.03.290 for permit applications.

[40] *Swinomish,* 178 Wn.2d 571.

Rule at issue in this case expressly excludes permit-exempt withdrawals.[41] *Swinomish* is further distinguishable because of its procedural posture. At its core, *Swinomish* is about Ecology's amendment of the Skagit basin rule to create a reservation under RCW 90.03.345 and its reliance on the statutory exception to justify a reservation for future uses that impair instream flows. By contrast, in this case, Hirst indirectly contests Ecology's interpretation of the Nooksack Rule (which has not been amended or directly challenged) by attempting to leverage the GMA to force the County to advance Hirst's preferred interpretation of the Nooksack Rule.[42] The Decision is consistent with *Swinomish*.

Finally, the Decision is consistent with *Campbell & Gwinn*. The Court and the Board below both recognized that the County has adequate protections in place to prevent the practice of "daisy-chaining" of plat applications, which is prohibited by the general principles established in *Campbell & Gwinn*.[43] Hirst cites to *Campbell & Gwinn* for the general principle that permit withdrawals are subject to the basic principle of prior appropriation,[44] but nothing in the Decision contradicts that basic premise. In fact, Hirst's arguments would require an outcome that is directly inconsistent with *Campbell & Gwinn*. Hirst's position would require the

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[41] Decision at 30 (citing *Swinomish*, 178 Wn.2d at 577).

[42] The differences in procedural posture of the two cases are telling. Even though Hirst's underlying grievance is with the instream flow rule or Ecology's interpretation of that rule, Hirst has not pursued any of the appropriate avenues to seek to amend the rule or to directly challenge Ecology's interpretation.

[43] Decision at 11-12 (quoting FDO).

[44] Petition at 11.

County to complete an impairment analysis of permit-exempt withdrawals, despite the fact that *Campbell & Gwinn* recognized that, "where the exemption in RCW 90.44.050 applies, Ecology does not engage in the usual review of a permit application under RCW 90.03.290, including review addressing impairment of existing rights and public interest review."[45] Nothing in the Decision is inconsistent with *Campbell & Gwinn* or with any other decision of this Court.

B. The Petition's Allegations Regarding Water Availability Do Not Raise an Issue of Substantial Public Interest that Should be Reviewed by this Court.

Hirst's arguments regarding water availability[46] do not involve an issue of substantial public interest. The analysis of this criteria must be informed by the manner in which the Court of Appeals resolved the underlying issues in the case. Because the Court of Appeals has correctly resolved all of the issues raised by Hirst in a methodical, well-reasoned, and published Decision, the Petition does not involve an issue of substantial public interest that warrants review by this Court.[47]

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[45] *Campbell & Gwinn*, 146 Wn.2d at 16.

[46] Of all the issues Hirst identifies in the Petition, the only issue that they assert satisfies the "substantial public interest" criterion in RAP 13.4(b)(4) is their challenge to the Court's decision on the adequacy of the County's regulations governing water availability.

[47] Earlier in the proceedings, the parties, including the County, requested direct review by the Court of Appeals pursuant to RCW 34.05.518 and by this Court pursuant to RAP 4.4 because the Board's decision raised "fundamental and urgent statewide issues." The Court of Appeals granted that request and took the matter on direct review, but this Court denied the request and allowed the Court of Appeals to proceed. Now that the Court of Appeals has issued its Decision, the question before this Court is whether "the petition involves an issue an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4) (emphasis added). That analysis must be informed by the manner in which the Court resolved the issues in its Decision. The parties' prior

C. Hirst's Argument Regarding Assignment of Error Does Not Warrant Review by this Court.

The Court of Appeals correctly rejected Hirst's procedural argument regarding assignment of error under RAP 10.3(g), which essentially asked the appellate court to treat the Board's erroneous legal conclusions as unchallenged factual findings that were "verities on appeal."[48] Hirst suggests that, because the County did not specifically assign error to the Board's statements in its narrative order regarding the availability of water under the Nooksack rule, the appellate court erred by refusing to treat those statements as "verities."[49] The Board's statements interpreting the Nooksack rule are legal conclusions, however, not factual findings, so no assignment of error to those statements was required. The mere fact that the Board uses the phrase "the Board finds . . ." does not make a particular Board determination a finding of fact. Instead, a conclusion of law mislabeled as a finding will be treated as a conclusion.[50] Because the Board's statements interpreting the Nooksack rule are conclusions of law, the County was not required to assign error to those statements under RAP 10.3(g).

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requests for direct review and the Court of Appeals' acceptance of direct review are not determinative. Indeed, if that were the case, any decision accepted for direct review under the APA would automatically warrant review by this Court.

[48] Decision at 6-7.

[49] Petition at 14.

[50] *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968, 970 (1978); *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 266-67, 501 P.2d 290, 296 (1972) ("Findings of fact that are actually conclusions of law will be treated as conclusions of law, and it is therefore unnecessary to set them out verbatim in the brief.").

The County's "substantial evidence" argument under RCW 34.05.570(3)(e) challenged the legal consequence the Board assigned to the evidence it reviewed, but it did not challenge the Board's findings themselves. An agency's conclusions must still be supported by adequate findings, even when no error is assigned to the agency's findings in an appeal. [51] The relevant Board finding cited by Hirst stated as follows: "The Board finds the record contains a letter provided by Ecology explaining the effect of closed basins and instream flows on rural residential development."[52] The County agreed that the record contained a letter from Ecology and did not assign error to this finding, but the County disagreed with the legal consequence the Board assigned to that letter, which does not support the Board's interpretation of the Nooksack rule. As the appellate court explained, "the letter addresses issues in another basin having nothing to do with the Nooksack Rule."[53]

Accordingly, the Court of Appeals correctly concluded that "the letter on which [the Board] relied to interpret WRIA 1 requirements is not substantial evidence of how Ecology administers the Nooksack Rule."[54] Rather than adopting the Board's misplaced reliance on the Ecology letter, the Court of Appeals deferred to Ecology's interpretation of the Nooksack rule, as set forth in Ecology's amicus brief, based on Ecology's

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[51] *Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc.*, 17 Wn. App. 886, 892, 565 P.2d 1235 (1977).

[52] AR 1403-04, FDO at 41-42.

[53] Decision at 27.

[54] *Id.* at 30.

specialized expertise in the area.[55] Because Ecology's interpretation of the Nooksack rule is a purely legal question, not a factual one, the Court properly deferred to Ecology's interpretation rather than treating the Board's contrary interpretation as a factual "verity on appeal."[56]

Finally, even if there had been some technical violation of RAP 10.3(f) in the briefing below, the Court of Appeals properly exercised its discretion to excuse the violation and consider the merits of the County's appeal. As explained by the appellate court, to the extent the Board made the kind of findings governed by RAP 10.3(f), "the nature and extent of the County's challenges to them are clear," and the appellate court's review "was not in any way hindered by the absence of any formal assignments of error."[57] Hirst offers no response to the authority cited by the Court of Appeals holding that no formal assignments of error are

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[55] Hirst cites no authority for its suggestion that this deference was somehow inappropriate because the interpretations in Ecology's brief "are not codified in rule, set forth in agency policy, nor discussed in any Attorney General Opinion" or because the brief "was not offered to the Board at the hearing stage of this appeal." Petition at 14, n. 42. Further, Hirst offers no response to the authority cited by the appellate court holding that deference to agency interpretations is appropriate.

[56] Even if Ecology's interpretation of the Nooksack rule were a factual question (in whole or in part), the Board made no factual findings specifically addressing Ecology's interpretation of the Nooksack rule, as distinguished from the different instream flow rule discussed in the Ecology letter. "The failure to make an express finding on a material fact is deemed to have been found against the party having the burden of proof" – here, the Petitioners before the Board, Hirst. *Manufacturers Acceptance Corp.*, 17 Wn. App. at 892 (citing *Baillargeon v. Press*, 11 Wn. App. 59, 67, 521 P.2d 746 (1974)). Because the Board made no findings regarding Ecology's interpretation of the Nooksack rule, the Hirst Petitioners failed to meet their burden on that issue to the extent it involves issues of fact.

[57] Decision at 6-7.

required under such circumstances.[58] This Court should reject Hirst's meritless procedural argument under RAP 10.3(g).

D. Hirst's Argument Regarding Official Notice Does Not Warrant Review by this Court.

The Court of Appeals correctly concluded that the Board violated its own rules by taking official notice of two documents and remanded to the Board for reconsideration on a proper administrative record.[59] Hirst does not contest the appellate court's conclusion that the Board violated its rules, but argues that the court should not have granted relief because "the county was not substantially prejudiced" by that violation.[60] The appellate court rejected this argument, holding that "we simply do not know whether the Board would have reached the same decision without the documents that it improperly considered in its analysis" – documents that the Board characterized as "authoritative references."[61] Hirst offers no response to this holding, relying instead on recycled arguments that were already rejected by the Court of Appeals.

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[58] *Id.* at 7 (citing *State v. Olson*, 126 Wn.2d 315, 322, 893 (P.2d 629 (1995); *Ferry County v. Growth Mgmt. Hr'gs Bd.*, ___ Wn. App. ___, 339 P.3d 478, 495 (2014); *Yakima County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 168 Wn. App 680, 687 n. 1, 279 P.3d 434 (2012)). *See also King Cnty. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 91 Wn. App. 1, 21, n.46, 951 P.2d 1151, 1162 (1998), aff'd in part, rev'd in part on other grounds, as amended on denial of reconsideration (Sept. 22, 1999), 138 Wn.2d 161, 979 P.2d 374 (1999) (applying language in RAP 10.3(g) allowing court to review error that is "clearly disclosed in the associated issue pertaining thereto"); 3 Wash. Prac., Rules Practice RAP 10.3 (7th ed.) ("The escape clause in RAP 10.3(g) . . . applies to appeals from administrative decisions.") (citing *King County*, 91 Wn. App. at 1).

[59] Decision at 30-35.

[60] Petition at. 14.

[61] Decision at 36.

Further, Hirst fails to identify any conflict between the Decision and the two appellate decisions cited in the Petition.[62] Both of those cases recognized the legal principle that, to grant relief under RCW 34.05.570(1)(d), a court must find prejudice to the petitioner.[63] One of those cases did not even analyze the "prejudice" requirement, finding that there was no procedural error in the first place,[64] and the other case found that the petitioner was not prejudiced "because it had notice that the facts would be before the Board and at the hearing it assisted in fully developing those facts."[65] Here, by contrast, Hirst does not contest the appellate court's holding that the Board failed to provide notice to the County and an opportunity to contest the documents in question, as required by its rules.[66] Thus, Hirst fails to show any conflict between the Decision and other appellate decisions addressing the "prejudice" requirement of RCW 34.05.570(1)(d).

E. The Decision's Conclusion Regarding Water Quality is Consistent with this Court's 2007 *Swinomish* Decision.

The Court of Appeals correctly concluded that this Court's 2007 decision in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*[67] is instructive in distinguishing

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[62] Petition at 15-16 (citing *Alpha Kappa Lambda Fraternity v. Washington State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451, 458 (2009); *K.P. McNamara Nw., Inc. v. State, Washington Dep't of Ecology*, 173 Wn. App. 104, 121, 292 P.3d 812, 820 (2013)).

[63] *Id.*

[64] *Alpha Kappa Lambda Fraternity*, 152 Wn. App., 414.

[65] *K.P. McNamara Nw., Inc.*, 173 Wn. App., 140.

[66] *See* Decision at 30-35; Petition at 14-16.

[67] 161 Wn.2d 415, 427-30, 166 P.3d 1198 (2007).

between a requirement to "protect" by preventing new harm and a requirement to "enhance" by correcting existing harms. The County had argued that the Board's reliance on general evidence of preexisting water quality problems to find the County's rural measures inadequate, without linking particular water quality problems to the absence of particular rural measures in the County's Comprehensive Plan, showed that the Board was effectively requiring the County to "enhance" rather than "protect" water quality.[68] The appellate court agreed, holding that "to the extent that the Board concluded that the County has an obligation under the GMA to 'enhance' water quality, this was an erroneous interpretation of law."[69]

The appellate court also rejected Hirst's attempt to transform the use of the word "enhance" in the GMA's general planning goal in RCW 36.70A.020(10) into a GMA requirement by importing that language into RCW 36.70A.070(5)(c), the GMA provision at issue in this appeal, which requires the County to "protect" water quality.[70] As the appellate court explained, this Court's holding in *Swinomish* that the term "protect" as used in RCW 36.70A.172(1) does not include a duty to "enhance" is equally applicable to the use of the word "protect" in RCW 36.70A.070(5)(c), and this Court's statements regarding the goal in RCW 36.70A.020(10) did not establish a duty to enhance water quality under RCW 36.70A.070(5)(c).

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[68] *See* Decision at 37.

[69] *Id.*

[70] *Id.* at 40-41.

The Court of Appeals did not, as argued by Hirst, prohibit the Board from considering evidence of current levels of pollution.[71] Rather, the appellate court held that reliance on such evidence alone, without establishing a link between such pollution and the absence of particular measures in the County's comprehensive plan, is insufficient. Accordingly, the court instructed the Board to address on remand the County's argument that the Board's conclusion was "based on general evidence of existing water quality problems."[72] Hirst's arguments do not warrant review by this Court.

F. The Decision is Consistent with Precedent Regarding GMA Determinations of Invalidity.

The Court of Appeals correctly concluded that the Board properly exercised its discretion to deny Hirst's request for invalidity.[73] In its Petition, Hirst fails to confront the discretionary nature of Board decisions regarding invalidity and suggests that, if the statutory criteria for invalidity are met, the Board must automatically grant a request for invalidity.[74] On the contrary, as the appellate court explained, the Board has discretion to deny a request for invalidity even in cases where the statutory criteria are met: "the Board's statements merely reflect its view that this is not a proper case to find invalidity, not that Hirst failed to satisfy the statutory

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[71] Petition at 17.

[72] Decision at 41.

[73] *Id.* at 42-46.

[74] Petition at 17-19.

requirements for invalidity."[75] Hirst fails to show any error in the appellate court's decision or any inconsistency with other decisions.[76]

IV. CONCLUSION

This case does not merit review by the Supreme Court. The decision of the Court of Appeals was correct and consistent with prior precedent, and Hirst's arguments regarding water availability do not raise any issues of substantial public interest that warrant review by this Court. The County respectfully requests that the Court reject Hirst's Petition and allow the decision of the Court of Appeals to stand.

Respectfully submitted this 23rd day of April, 2015.

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[75] Decision at 44.

[76] Hirst's reliance on *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 56, 65 P.3d 337, 341 (2003) is misplaced. *See* Petition at 18, n. 61 (citing *Redmond* case). In *Redmond*, the court held that the Board may not shift the burden of proof from a petitioner to a respondent city to present "specific and rigorous" evidence subject to "heightened scrutiny" when defending a particular type of land use designation. *Id.* Unlike Board decisions invalidity, which are discretionary, Board decisions regarding whether land use designations comply with the GMA do not involve any exercise of discretion. Thus, the *Redmond* court's holding regarding the Board's limited authority in evaluating land use designations does not apply here. There is no conflict with *Redmond*.

No. 91475-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS, and DAVID STALHEIM, AND FUTUREWISE,
Petitioners,

v.

WHATCOM COUNTY AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,
Respondents,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, WASHINGTON REALTORS, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE FARM BUREAU, AND WASHINGTON STATE ASSOCIATION OF COUNTIES,
Amici Curiae.

CERTIFICATE OF SERVICE

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I certify that I caused a copy of Whatcom County's Answer to Hirst's Petition For Review to be served on all parties or their counsel of record on the date below as indicated.

Via Legal Messenger
One original and one copy

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

DATED this 23rd day of April, 2015, at Seattle, WA.

Marya Pirak

Marya Pirak, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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The attached was filed with our office today. I'm putting the original in the mail to you.

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