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COURT OF APPEALS
DIVISION III
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No. 31941-5-III

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

SPOKANE COUNTY, a political subdivision of the State of Washington,
HARELY C. DOUGLAS, Inc.,

Respondents,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, a statutory entity, FIVE MILE PRAIRIE NEIGHBORHOOD
ASSOCIATION, and FUTURE WISE, a Washington Non-Profit
Organization,

Appellants.

**RESPONDENT SPOKANE COUNTY'S
RESPONSE BRIEF**

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I. INTRODUCTION

This case comes to the court following the superior court's reversal of a Growth Management Hearings Board's decision on the Appellants' objection to a change in the Comprehensive Plan designation of an approximately 22.3 acre parcel of land from Low Density Residential to Medium Density Residential. Due to the topography of the property the parcel is physically separated from most of the surrounding properties and due to several permanent utility easements that encumber the property only a small portion of the parcel is available to any type of development at all. The property is located well within the Urban Growth Area boundary of Spokane County, is located at the foot of the hill that reaches up to the Five Mile area of Spokane County, is surrounded by residential development, and is less than one half mile from the Whitworth College campus and other commercial development.

Appellants' allege that Spokane County erred by adoption of the Comprehensive Plan amendment in only two specific points: (1) alleged inconsistency between the Comprehensive Plan map amendment and the Comprehensive Plan Policies, and (2) alleged violations of the development regulations found in the Spokane County Code.

The only violation of the GMA alleged by Appellants is that the Spokane County Comprehensive Plan is generally "internally inconsistent" as a result of the change in designation of this single parcel. The alleged

inconsistency with the Comprehensive Plan policies arises from Appellants' misinformed and irrational interpretation of the Comprehensive Plan policies.

Appellants' allege that the concurrent rezone of the parcel violates the development regulations of Spokane County by characterizing the rezone as a decision under the Spokane County development regulations. The error in Appellants' characterization and their argument is that the rezone is not a decision subject to the development regulations, but is an amendment to the development regulations, specifically the zoning map, because it was done concurrently with the Comprehensive Plan amendment and implemented the Comprehensive Plan amendment. *Spokane County v Eastern Washington Growth Management Hearings Bd. (Spokane County II)*, 176 Wn. App. 555, 571, 309 P.3d 673 (2013). As an amendment to the zoning map done concurrently to implement the Comprehensive Plan amendment, the criteria in the Spokane County Code governing a rezone are not applicable. Id.

The record before the Growth Management Hearings Board contains substantial and unrefuted evidence that the complained of Comprehensive Plan map amendment is an action by Spokane County to implement the policies of the Comprehensive Plan based upon the unique circumstances and conditions that exist within Spokane County generally and at this specific parcel and the immediately surrounding area. When a governing body is applying the goals and policies of a GMA compliant comprehensive plan to a specific parcel of

property, such as this is, the Growth Management Hearings Board is bound to grant deference to the local jurisdiction in how it plans for and within the unique circumstances found in that local area. *Spokane County v Eastern Washington Growth Management Hearings Bd.* (hereinafter *Spokane County v EWGMHB*), 173 Wn. App. 310, 324, 333, 293 P.3d 1248 (2013) (Citing, *Quadrant Corp. v Cent. Puget Sound Growth mgmt. Hearings Bd.*, 154 Wn.2d 224, 236, 246, 110 P.3d 1132 (2005)).

Appellants' arguments regarding capital facilities and concurrency are merely a veiled attempt to require the adoption of a Comprehensive Plan map amendment to comply with development regulations governing development permits. The fallacy in Appellants' argument is that the development regulations are required by the GMA to implement the Comprehensive Plan not the other way around. See, RCW 36.70A.040(4)(d), *Spokane County v Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 574, 309 P.3d 673 (2013).

As will be seen from this responsive brief from Spokane County, Appellants' assertion of error is unfounded in fact or law. As was found by the Superior Court below, the Growth Management Hearings Board erred in several respects and thus reversal of the Growth Management Hearings Board's decision is appropriate and respectfully requested.

II. ASSIGNMENTS OF ERROR

Spokane County asserts that the Growth Management Hearings Board, Eastern Washington Panel's Final Decision and Order, dated September 3, 2010, Growth Board Case Number 10-1-0010 should be reversed on the grounds that:

1. The Growth Board has erroneously interpreted and/or applied the law; and
2. The Growth Board's Final Decision and Order is not supported by evidence that is substantial in light of the whole record before the court including the record from the Growth Board below.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

The issues pertaining to the assignments of error are as follows:

- a. Whether the broad discretion granted by the legislature to local jurisdictions and the deference required to be granted by the Growth Management Hearings Board to local jurisdictions pursuant to RCW 36.70A.3201 controls when the local jurisdiction is challenged for its interpretation and application of its own GMA compliant Comprehensive Plan?
- b. Whether the Growth Management Act requires that development regulations that are GMA compliant, that are consistent with the Comprehensive Plan, and that apply specifically to development proposals, be

applied to proposed Comprehensive Plan map amendments, even when such application is contrary to the local jurisdiction's interpretation of its own regulations and Comprehensive Plan?

c. Whether a Comprehensive Plan map amendment can be determined to be invalid when it is consistent with and implements a GMA compliant Comprehensive Plan?

Please note that in the trial court Spokane County (and Respondent Douglas) argued that the concurrent rezone was a "project permit" and not a "development regulation" under RCW 36.70A.0307), and that the GMHB lacked jurisdiction over the concurrent rezone. CP 219-221; 288-294. The trial court agreed. CP 495. However, on September 10, 2013, this Court issued its opinion in *Spokane County II*, 176 Wn. App. 555, 309 P.3d 673 (2013), review denied, 179 Wn.2d 1015 (2014), which held that a concurrent rezone is an amendment to a development regulation over which the GMHB has jurisdiction.

Spokane County respectfully disagrees with the Court's analysis of the GMHB jurisdiction in *Spokane County II*. In the interest of judicial economy, only Respondent Douglas will brief the jurisdictional issue, and Spokane County concurs in the arguments of Respondent Douglas on that issue. The arguments in this brief regarding the validity of the concurrent rezone assume, *arguendo*, that the *Spokane County II* decision is correct.

IV. STATEMENT OF THE CASE

By resolution number 11-1191, Spokane County adopted amendments to its Comprehensive Plan map and concurrently adopted rezoning designations of properties affected by the adopted Comprehensive Plan map amendments. CR 000007-000014¹, 000774-000751. Relative to Resolution number 11-1191, Appellants, Five Mile Neighborhood Association and Futurewise, challenged only one of the amendments to the Comprehensive Plan map and the concurrent rezone of the property, 11-CPA-05.

The property to which Amendment No. 11-CPA-05 to the Spokane County Comprehensive Land Use Plan map applies is a parcel 22.3 acres in size, of undeveloped land, within the Spokane County Urban Growth Area, located between Waikiki Road and North Five Mile Road. CR 000334–000338, 000046, 000190, 000199, 000220, 000227, 000228–000232, 000239–000242. The topography of the property is steep slopes and hilly with outcroppings of basalt rock, only a portion of the property is suitable for residential development. CR 000497–000539, 000555–000556 (Findings 22–26), 000589–000591, 000700-0000703. In addition to the irregular topography of the property, four utility easements encumber the property such that large areas of the property must remain undeveloped and open in a natural state. CR 000336

¹ In the body of this Brief reference to the record before the Growth Management Hearings Board will be made by “CR - #####” indicating the Certified Record and the corresponding page number(s).

(Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61 – 62).

A preliminary plat, known as Redstone, for single family urban density residential development of the property was approved in 2007. CR 000552-000587. Opposition to the proposed 2007 Redstone plat came from many of the same individuals who are Appellants in this matter and was largely centered upon the sole access for residents to and from the Redstone plat onto North Five Mile Road. CR 000559–000563 (Findings 58, 83 and 84). The Redstone plat was approved by the Spokane County Hearing Examiner without further appeal. CR 000552–000587. Shortly after the approval of the Redstone preliminary plat in 2007, the economy in Spokane County sharply declined, as did the entire country, and development of the Redstone subdivision as a single family development became economically infeasible. CR 000661–000691. Development of the property into medium density residential properties, which will be allowed by 11-CPA-05, is economically feasible in this current economy, and also allows for the primary access to and from the development to be on Waikiki Road along with sidewalks and a pedestrian path through the development. CR 000661–000691, 000693-000696. In addition to the primary access to the property from Waikiki Road, 11-CPA-05 also provides for a secondary access to the property from North Five Mile Road and for further through a third access to the west when surrounding properties are developed

in the future. CR 000661–000691, 000693-000696. The primary ingress and egress from the property to Waikiki Road will significantly reduce the traffic impact on North Five Mile Road. CR 0000497–000539, 000541–000550, 000661–000691, 000753-000758.

The Comprehensive Plan amendment allowing future medium density development of the property allows the most efficient development of the property while the topography of the property will act to separate the medium density development from the single family development in the area across North Five Mile Road and on several large acreage parcels on the north, east, and west, creating a buffer between the low density development in the area and medium density development. CR 000589–000591, 000635 (SEPA Checklist, pg. 10), CR 000642–000659, 000661-000691.

Approval of 11-CPA-05 is conditioned upon the property owner and Spokane County entering into a development agreement requiring at a minimum that development upon the property will provide public access to and pay for or construct improvements to Waikiki Road including curbs, gutters, sidewalks, and drainage as required by applicable codes, regulations, and Spokane County Road standards based upon the future development when proposed upon the property and review of a detailed traffic analysis. The development agreement is also required to include that the internal road within the development shall be constructed to Spokane County Road Standards, shall

include sidewalks on both sides to facilitate a future pathway, shall be owned and maintained by the property owner until site development is complete at which time ownership and maintenance shall be transferred to Spokane County and provide a termination at the west property line to provide public access to adjoining properties with the intent of mitigation of vehicular traffic on Five Mile Road and provide access to Waikiki Road that is compliant with the Spokane County Road Standards. CR 000750 (Finding 26). Neither the amendment to the comprehensive plan or the concurrent rezone of the property is of any effect until the required development agreement is completed and entered into between the property owner and Spokane County. CR 000751.

V. ARGUMENT

A. STANDARD OF REVIEW.

The standard of review by this Court of the Growth Board's Final Decision and Order ("FDO) in Case No. 10-1-0010, is found in Administrative Procedures Act (APA) at RCW 34.05.570(3):

[T]he court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provision on its face or as applied;
- (b) the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

- (c) the agency has engaged in unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) the agency has not decided all issues requiring resolution by the agency;
- (g) a motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known or were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) the order is arbitrary or capricious.

As indicated above in the assignments of error, Spokane County asserts that the Growth Management Hearings Board erred in regard to RCW 34.05.570(3)(d) & (e).

B. "INTERNAL INCONSISTENCY" IS THE ONLY ALLEGATION OF NON-COMPLIANCE WITH THE GMA AND IS BASED SOLELY UPON AN UNREASONED INTERPRETATION OF THE COMPREHENSIVE PLAN.

The only allegation of error under the GMA raised before the Growth Management Hearings Board, or before this Court, regarding the

comprehensive plan map amendment adopted by Spokane County, 11-CPA-05, is that the change in the designation of the property, from Low Density Residential to Medium Density Residential, allegedly caused the comprehensive plan to be internally inconsistent. CR 001020: 1-3. The Growth Management Hearings Board's conclusion that the comprehensive plan is caused to be internally inconsistent is based solely upon the Board's unreasoned and unsupported interpretation of the Spokane County Comprehensive Plan by focusing on isolated clauses of the comprehensive plan taken out of context. CR 001018-001029.

As will be shown below, the adopted map amendment, 11-CPA-05, is consistent with the goals and policies of the Spokane County Comprehensive Plan and thus the comprehensive plan as amended is in compliance with the GMA.

C. THE GROWTH MANAGEMENT HEARINGS BOARD HAS LIBERALLY CONSTRUED THE GMA AND FAILED TO GRANT THE REQUIRED DEFERENCE TO SPOKANE COUNTY IN VIOLATION OF WELL ESTABLISHED LAW.

The Growth Board's authority is strictly limited to enforcing the clear and specific requirements of the GMA. *Thurston County v Western Washington Growth Management Hearings Board*, 162 Wn.2d 329, 341-342, 190 P.3d 38 (2008); *Woods v Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007); *Quadrant Corp. v Cent. Puget Sound Growth Mgmt. Hearing Bd.*, 154 Wn.2d 224,

240 n.8, 110, 110 P.3d 1132 (2005). As the product of intense legislative compromise the GMA contains no provision for liberal construction; the Growth Board has no authority to infer requirements not specifically stated in the GMA. *Quadrant Corp.*, supra at 245 n.12, citing, *Skagit Surveyors & Eng'rs, LLC v Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998).

The court in *Quadrant* stated that the Legislature, in amending the GMA in 1997, “took the unusual additional step of enacting into law its statement of intent in amending RCW 36.70A.320” to require greater deference to local enactments by changing the Growth Board’s standard of review from “preponderance of the evidence” to “clearly erroneous.” *Quadrant Corp.*, 154 Wn.2d at 236–237, 110 P.3d 1132 (2005); See also, RCW 36.70A.320(1), (2) and (3). The Court in *Quadrant Corp.* clearly instructs the Growth Management Hearings Board not to substitute its own judgment for that of local governments in how they implement their comprehensive plans that have been developed in compliance with the GMA. RCW 36.70A.3201; *Quadrant Corp. v State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005).

The Comprehensive Plan goals and policies are not strict requirements of the GMA. Rather the Comprehensive Plan is a statement of policies and goals that Spokane County has adopted in compliance with the

requirements of the GMA. The Comprehensive Plan serves as direction and guidance in creating and adopting development regulations and in specific land use decisions. RCW 36.70A.030(4); *Woods v Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007); *Feil v Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 382, 259 P.3d 227 (2012). The concurrent rezone of the property, as a development regulation, need not strictly comply with the comprehensive plan, but must generally conform to it. *Spokane County II*, 176 Wn. App. 555, 574 - 575, 309 P.3d 673 (2013).

Referring to the deference that the Growth Management Hearings Board is to give to the local governments in planning under the GMA, RCW 36.70A.3201 reads in part:

The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, *the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.* (Emphasis added.)

The Growth Management Hearings Board is bound by the mandate of the GMA to view the County's action as compliant with the GMA unless the Appellants establish that Spokane County's action was clearly erroneous, that the Board has a strong conviction that Spokane County's action was error, based upon evidence found in the record before the Growth Management Hearings Board that proves that there is no support at all for, or a specific prohibition against the County's action in the GMA by.

Quadrant Corp., 154 Wn.2d 224 at 240 n.8, 110 P.3d 1132 (2005); *King County v Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000) quoting, *Dep't of Ecology v Pub. Util. Dist. No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993); *Viking Properties, Inc. v Holm*, 155 Wn.2d 112,129, 118 P.3d 322 (2005); *Manke Lumber Company, Inc. v Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 615, 624, 53 P.3d 1011 (2002).

In this case before the Court, the Growth Management Hearings Board substituted its interpretation of the policies of the Spokane County Comprehensive Plan for that of Spokane County's interpretation, and then the Growth Management Hearings Board applied its interpretation as strict requirements of the GMA. To do so is a clear and fatal error by the Growth Management Hearings Board. RCW 36.70A.3201; *Quadrant Corp. v State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 236–237, 110 P.3d 1132 (2005).

D. THE LAND USE MAP AMENDMENT IS CONSISTENT WITH THE SPOKANE COUNTY COMPREHENSIVE PLAN GOALS AND POLICIES.

1. 11-CPA-05 Is Consistent With Policy UL.2.16 of the Spokane County Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan policy UL.2.16 is based upon its unreasonable and unsubstantiated interpretation of the Spokane County Comprehensive Plan. CR 001021-001024.

Comprehensive Plan Policy UL.2.16 reads:

Mutlifamily Residential “Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.”

The subject property in this matter is located less than one half mile from Whitworth College. CR 0000227, 000651. The property is not only near a major arterial, but it touches a major arterial and will have its primary access to and from the property on Waikiki Road, a major arterial. See, Spokane County Arterial Road Plan². The statement in the Staff Report identifying Waikiki Road as a minor arterial is an unfortunate error on the part of the Spokane County Planning Staff. CR 000222.

In addition to the proximity of the property to commercial development and to Waikiki Road, a major arterial, the property is encumbered by permanent utility easements that require that a majority of the property remain in open and undeveloped space. CR 000336 (Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61–62). The conclusion of the Growth Management Hearings Board finding the amendment inconsistent with policy UL.2.16 is without any basis in fact in the record.

² The Spokane County Arterial Road Map is a public record, available to all via the internet at “www.spokanecounty.org/data/engineers/traffic/arterialroadmap.pdf” and in hard copy at the Spokane County Engineering Department. Spokane County respectfully asks the Court to take judicial notice of this information as it pertains to the character of Waikiki Road as an Urban Principal Arterial Road and to North Five Mile Road as an Urban Minor Collector.

The Growth Management Hearings Board's conclusion that the 11-CPA-05 is inconsistent with policy UL.2.16 is error in that its interpretation requires that the property be both adjacent to commercial development and a major arterial when the policy *encourages* medium and high density residential to be sited *near* commercial areas and on sites with *good access* to major arterials. The Growth Management Hearings Board completely ignores the clear language of the policy in its very narrow interpretation of the policy. The Growth Board's action is both a misinterpretation of the law and policy and is a failure to grant deference to Spokane County in the interpretation and application of its own Comprehensive Plan policy. RCW 36.70A.3201; *Quadrant Corp. v State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 236–237, 110 P.3d 1132 (2005). The amendment clearly implements and is consistent with policy UL.2.16.

2. 1-CPA-05 Is Consistent With Policy UL.2.20 of the Spokane County Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with Spokane County Comprehensive Plan policy UL.2.20 is again based upon its unreasonable and unsubstantiated interpretation of the Spokane County Comprehensive Plan. CR 001025 - 001026.

Comprehensive Plan Policy UL.2.20 reads:

Traffic Patterns and Parking “Encourage new developments, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people

to get around easily by foot, bicycle, bus and car. *Cul-de-sacs or other closed street systems may be appropriate under certain circumstances including, but not limited to, topography and other physical limitation which make connecting systems impractical*'.
(Emphasis added).

The Growth Management Hearings Board's first error regarding UL.2.20 is that the rather than looking to the requirements upon the future development of the site, that the property have at least two access points and a third future access be planned for and that the site be developed with roads meeting Spokane County Road Standards with sidewalks and pathways, the Board focused on the alleged issues with roadways outside of the property and future development. CR 001025-001026. This ignores the focus of the policy that the *new development* be arranged with interconnecting streets etc. Policy UL.2.20, supra.

Next the Growth Management Hearings Board completely ignored clear language in the second sentence of the policy that addresses exactly the circumstances at this property. The property is topographically isolated from the developments across Five Mile Road and to the Southwest. The property is also buffered from the properties to the west and north both topographically and by the expansive easements that encumber the property and prohibit development in the west and north regions of the property. CR 001025-001026; CR 000336 (Traffic Impact Analysis for Redstone Plat, Site Plan. p. 35), CR 000560 (Findings 61-62).

11-CPA-05 was approved by the Spokane County Board of County Commissioners subject to a development agreement binding upon the property being entered into by the owner/developer of the property. CR 000750 (Finding 26). The development agreement is to require that the property be developed with two access points, the primary access being on Waikiki Road and that a third access point be provided for in the event of future development to the west of the site. CR 000751. The construction of roads within the property must be in accord with Spokane County Road standards and must have sidewalks adjacent to the roads and a path way for residents to access the open space and Waikiki road. CR 000750 (Finding 26). The connectivity policy of UL.2.20 is clearly met.

Notwithstanding the requirements that two access points, sidewalks and pathways be incorporated into the development of the property, the fact that the property is topographically isolated from the surrounding properties is a specific consideration stated in the policy allowing some deviation from the “recommended” connectivity found in the policy. Appellants and the Growth Management Hearings Board choose to completely ignore the second clause of the policy.

Finally, the policy refers and applies to “development” or proposals for a project to be developed on the site and not to comprehensive plan map amendments such as 11-CPA-05. The Growth Management Hearing

Board's conclusion regarding UL.2.20 is without any basis in the law, the policy, or the substantial facts in the record.

3. The Comprehensive Plan Amendment is Consistent With All of the Applicable Comprehensive Plan Policies.

It is well established law that goals considered by local governments in comprehensive planning may be mutually competitive at times, and thus if a map amendment advances other comprehensive plan goals and policies, a finding by the Growth Management Hearings Board that it fails to advance another, that alone cannot be an invalidating inconsistency. *Spokane County v EWGMHB*, 173 Wn. App. 310, 333, 293, P.3d 1248 (2013).

As shown above 11-CPA-05 is consistent with the goals and policies of the Comprehensive Plan challenged by Appellants, and additionally the amendment is consistent with and furthers other policies of the Comprehensive Plan. The Board found the amendment to be consistent with Comprehensive Plan policies H3.2 to ensure that the design of infill development preserves the character of the neighborhood (CR 001020 - 001021); UL.7.1 to identify and designate areas for residential uses including low, medium and high density (CR 001021); UL.2.17 to site multifamily homes throughout the Urban Growth Area such as to integrate them into small scattered parcels throughout existing residential areas and into or next to urban activity centers (CR 1024 – 001025). In addition to those policies with which the Growth Management Hearings Board found the amendment

to be consistent, Appellants ignore and do not challenge that 11-CPA-05 is also consistent with policy UL.9a, by creating “a variety of residential densities within the Urban Growth Area with an emphasis on compact and mixed-use developments in designated centers and corridors”, and policies UL.7, UL.7.2, UL.7.3, UL.7.12, UL.8, UL.8.1, and UL.9b. See, unchallenged Finding of the Board of County Commissioners # 25, CR 000750.

The Growth Management Hearings Board’s conclusion that 11-CPA-05 causes the Spokane County Comprehensive Plan to be internally inconsistent lacks any basis in law or in fact and illustrates the Board’s misinterpretation and misapplication of the law and failure to grant the required deference to Spokane County in interpreting and applying the County’s Comprehensive Plan policies to a specific parcel of property and the unique local circumstances found in this area.

4. The GMA Does Not Require Revision of the Capital Facilities Plan For an Amendment to the Land Use Map.

As has already been decided by this Court in the case of *Spokane County v EWGMHB.*, 173 Wn. App. 310, 293 P.3d 1248 (2013), there is no basis in the GMA to require that capital facility funding and scheduling issues be evaluated and the results incorporated into the transportation and capital facilities elements every time the comprehensive plan map is amended. Id., at 338. This Court goes on to say that the provisions of the GMA contemplate meaningful action regarding the capital facilities and transportation elements at

the project approval stage to ensure conformity with the comprehensive plan. Id., at 339. As is acknowledged in *Spokane County v EWGMHB*, 173 Wn. App. 310, Spokane County has adopted concurrency regulations that are not challenged in this action and thus the Comprehensive Plan Amendment challenged in this action is consistent with and is in compliance with those development regulations.

The only alleged deficiencies in capital facilities raised by Appellants is alleged issues with the surrounding road infrastructure, which is addressed in the next section of this brief, and allege issues with the schools in the area. Appellants refer to a comment from Mead School District in support of their claim. They however misquote the comment. The entire comment is two sentences long and states:

“**School District:** Applicant has been informed of the status of public school availability to the above location. Specific comments include: *The Mead School District believes that this request for a change in land use designation, if approved, could have an impact on schools. The District will respond with further remarks when the SEPA checklist is circulated for comment.*” (Emphasis in original).

CR 000343.

The Mead School District provided no other comments even after circulation of the SEPA checklist. In fact none of the providers of public services ever provided any comment that the public facilities would not be available to proposed development on the property as a result of the proposed amendment. CR 000224.

There is no dispute that the action objected to by Appellants and found to be non-complaint with the GMA in this case is the adoption of Comprehensive Plan map amendment 11-CPA-05 and the concurrent rezone are not a project permit or development proposal. See, Spokane County II, 176 Wn. App. 555, 309 P.3d 673 (2013). The alleged error of failure to update the capital facilities plan as a result of or concurrent with the adoption of 11-CPA-05 is without basis in the law or facts.

E. THE CONCURRENCY REGULATIONS ARE DEVELOPMENT REGULATIONS WHICH ARE INAPPLICABLE TO COMPREHENSIVE PLAN MAP AMENDMENTS - THE SPOKANE COUNTY ZONING CODE SUPPORTS THE CONCURRENT REZONE.

1. The Growth Management Hearings Board's Focus on Development Regulations is Inapposite and is Misplaced.

The Growth Management Hearings Board's decision is also in error by reliance on the alleged violation of development regulations because by definition the development regulations are designed to ensure meaningful review of development at the project approval stage and are not intended to guide the adoption or amendment of the comprehensive plan. See, Spokane County v EWGMHB, 173 Wn. App. 310, at 338–339; see also. RCW 36.70A.040(4)(d). Creation and amendment of the comprehensive plan is governed by the goals and policies of the GMA and not adopted development regulations. Id., RCW 36.70A.020. Appellants' assertion that the Comprehensive Plan map amendment and concurrent rezone are somehow

“development” as that term is used in the comprehensive plan flies in the face of the argument that they made to this Court and this Court’s decision in *Spokane County II*, 176 Wn. App. 555, 309 P.3d 673 (2013).

Spokane County was mandated to begin planning under the Growth Management Act in 1993³. The goals and intent of the GMA are embodied in its planning goals, which ‘guide the development and adoption of comprehensive plans and development regulations. RCW 36.70A.020.

Spokane County’s unchallenged GMA Comprehensive Plan was adopted in 2001⁴ and was deemed compliant with the Growth Management Act, including all the goals and policies enumerated in RCW 36.70A.020. RCW 36.70A.320(1). Thereafter, Spokane County adopted numerous unchallenged development regulations (e.g. concurrency ordinance, zoning) which have been deemed compliant with the Growth Management Act, including all the goals and policies enumerated in RCW 36.70A.020. *Id.*

The “local planning” and “looking ahead and planning for the future” has already occurred through the adoption of the Comprehensive Plan in 2001 and implementing development regulations. Appellants are now barred from making an untimely collateral challenge to the County’s Comprehensive Plan amendment process and Concurrency Ordinance, neither of which requires an

³ See, Comprehensive Plan Summary available at: <http://www.spokanecounty.org/bp/data/CompPlanUpdate/MetroCompPlanUpdate/CompPlanSumm.pdf>

⁴ *Id.*

amendment to the Capital Facilities Plan or analysis of transportation impacts and/or conditions upon a Comprehensive Plan map amendment as in this case. RCW 36.70A.290(2), *Five Mile Prairie Neighborhood Association & Futurewise v Spokane County*, EWGMHFB Case No. 12-1-0002 (Final Decision and Order, August 23, 2012). By adopting its Comprehensive Plan and development regulations Spokane County made the deliberate choice to have transportation infrastructure and traffic impacts studied *at the time of development*. This choice is embodied in the County's Concurrency Ordinance and the Spokane County Road Standards. Because Spokane County's development regulations clearly address the issues raised by the Appellants and strictly require compliance with the GMA goals and requirements at the time that development of the property is proposed, the land use map amendment challenged in this action is fully compliant with the GMA and consistent with the Comprehensive Plan.

The Growth Management Hearings Board's conclusion that 11-CPA-05 is inconsistent with the policies of the Comprehensive Plan and/or non-compliant with the GMA based upon the alleged lack of compliance with the Spokane County concurrency regulations is unfounded and not supported by law.

2. The Concurrent Rezone Complies with SCC 14.402.040.

In large part Appellants argue and the Growth Management Hearings Board concluded that the concurrent rezone of the subject property violated

the Spokane County Zoning Code. CR 001021-001030. As this Court has already decided, the concurrent rezone is an amendment to a development regulation that is mandated by the GMA that requires that the development regulations be consistent with the adopted comprehensive plan. *Spokane County II*, 176 Wn. App. 555, 571-573, 309 P.3d 673 (2013); RCW 36.70A.040(4)(d).

Spokane County Code section 14.402 in applicable part states:

14.402.000 Purpose and Intent.

The purpose and intent of this chapter to provide procedures whereby the Zoning Code (Title 14), including the official text and maps, may be amended consistent with the Comprehensive Plan.

14.402.040 Criteria for Amendment.

The County may amend the Zoning Code when one of the following is found to apply.

1. The amendment is consistent with or *implements* the Comprehensive Plan and is not detrimental to the public welfare.
2. A change in economic, technological, or land use conditions has occurred to warrant modification of the Zoning Code.

RCW 36.70A.040(4)(d) requires that Spokane County adopt a comprehensive plan *and development regulations that are consistent with and implement the comprehensive plan*. Consistent with RCW 36.70A.040(4)(d), SCC 14.402.040(1), and *Spokane County II*, (176 Wn. App. 555, 571–573), Spokane County adopted the rezone of the property concurrently with the Comprehensive Plan amendment that required the rezone. To do so is

neither a violation of the GMA or of the Spokane County Zoning Code. The Growth Board's conclusion otherwise is error and should be reversed.

In addition to the compliance with SCC 14.402.040(1), the rezone is also appropriate under SCC 14.402.040(2). As indicated in the record at CR 000661-000691 the economic circumstances impacting the area in 2010– 011 were such that the development of the property as then zoned was fiscally impractical, development as medium density residential property is not only fiscally feasible but also allows interconnectivity and consistency with several policies of the Spokane County Comprehensive Plan (H.3.2, UL.2.16, UL.2.20, UL.2.17, UL.7.1, UL.7.3, UL.7.12, UL.8, UL.8.1, UL.9a and UL.9b. CR 000750). The Growth Management Hearings Board's conclusion that the rezone was inconsistent with the Spokane County Zoning Code is without basis and should be reversed.

3. The Record Demonstrates that the Future Developer of the Property Will be Required to Mitigate Traffic Impacts and Make Required Improvements to Public Streets Impacted by Proposed Development.

In this case, provisions for adequate infrastructure are guaranteed by: (1) the County's Concurrency Ordinance; (2) the conditions of approval submitted by the County Engineer; and (3) the Spokane County Road Standards; therefore, there is no requirement that the Spokane County Capital Facilities Plan address 11-CPA-05.

The Findings of Fact adopted by the Spokane County Commissioners specifically address concurrency and mitigation commensurate with development. The Findings of Fact specifically state:

18. Potential traffic impacts are properly addressed at project level to be conducted pursuant to Spokane County Code as specified in Spokane County Division of Engineering and Road correspondence dated August 2, 2011 which advise the applicant that “at such time a site plan is submitted for review the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation may be required for off-site improvements.

19. Subsequent to the public hearing on November 22, 2011 regarding 11-CPA-05, the applicant, at the Board’s request, provided a trip generation/distribution letter dated November 23, 2011 that provided documentation that provision of a second access point from the site to Waikiki Road would reduce the number of vehicle trips using Five Mile Road and more specifically in the p.m. peak hours and less trips than the previously approved preliminary plat approved for the subject property (PN-1974-06: Redstone).

21. Traffic impacts from the proposal will be mitigated for compliance with Spokane County Code and concurrency standards at the project level as specified by the Division of Engineering and Roads in their comments regarding the proposed amendment dated August 2, 2011.

22. Traffic impacts from the proposed amendment may be further mitigated by provision of a second access point to Waikiki road, to be reviewed at the project level, which will reduce the number of vehicle trips on Five Mile Road as evidenced by the trip distribution letter submitted by the applicant on November 23, 2011.

CR 000749-000750.

The Spokane County Engineer specifically commented on the Amendment and indicated that traffic improvements may be required as follows:

This proposed comprehensive plan amendment is not being requested for a specific development proposal or site plan at this time. At such time a site plan is submitted for review, the applicant shall submit detailed traffic information for review by the County Engineer to determine what traffic impacts, if any, that the development would have on surrounding infrastructure. The applicant is advised that mitigation maybe required for off-site improvements.

CR 00658.

The Growth Board has held conditions of approval are the appropriate remedy to ensure that development “cannot go forward unless and until the developer provides adequate streets, roads and other capital infrastructure necessary to support the development”. *Panesko v Benton County*, EWGMHB Case No. 07-1-0002 (Final Decision and Order, July 27, 2007), at 14. In this case, not only do the conditions of approval submitted by the Spokane County Engineer require the developer to provide necessary infrastructure, but so does the Concurrency Ordinance adopted by Spokane County under chapter 13.650 as well as the Spokane County Road Standards.

As a matter of law, the developer is required to make street frontage improvements to Waikiki Road and/or Five Mile Road as necessitated by the proposed development. The adopted Spokane County Road Standards provide in pertinent part:

FRONTAGE IMPROVEMENT OBLIGATION

All commercial, industrial, institutional, and multi-family residential property development together with all plats, short plats, and binding site plans shall have the general obligation to bring any substandard and abutting County right(s)-of-way and County road(s) up to the current requirements of the arterial road plan and functioning classification of the road, respectively. Required roadway improvements must be completed prior to finalization of any non-residential binding site plan, short plat, or plat unless otherwise allowed by the County Engineer or their authorized agent. Additional road improvements or mitigation measures may also be required pursuant to the findings of the accepted traffic study or analysis required for that proposal.

These obligations may be applied at the time of any land-actions involving subdivisions of land in conjunction with plats and short plats of residential properties and binding site plans of commercial/industrial properties, and to zone changes granting more traffic intensive uses.

In the cases where land-actions are not involved or when involved where deferment is deemed by the County Engineer, or their agent, in the public best interest, these obligations will be applied at the time of the “commercial” building permits. This refers to new property development, redevelopment, major expansion & modernization projects, building changes of use, and to any building permit where legal, non-conforming conditions are already present.

Spokane County Road Standards, p. 1-11 - 12. (See, Appendix “A”)

The Spokane County Road Standards demonstrate as a matter of law that the developer will be required to improve Waikiki Road and/or Five

Mile Road up to the current requirements of the arterial road plan and functioning classification of the road, respectively.

The development regulations adopted by Spokane County, coupled with the Record before the Hearing Board, demonstrate that traffic was considered and the County found that traffic impacts will be reviewed during the site-specific land use approval process and traffic concurrency must be met. CR 000749-000750. It is very clear that no development can occur until all traffic impacts are mitigated and the Record clearly demonstrates that Spokane County considered traffic concurrency and adequacy of infrastructure in making its decision to approve the Amendment. CR 000749-000750. When the property is developed, a specific project will be submitted for review and approval and project specific impacts will be identified and mitigated at that time. CR 000749-000750. The Hearings Board's decision is not supported by the evidence in the record before it.

III. CONCLUSION

The decision of the Hearing Board must be reversed because its decision is an erroneous interpretation of law and is unsupported by substantial evidence.

The Hearing Board stepped into the shoes of Spokane County and substituted its judgment for that of the legislative body of Spokane County.

This is not the standard of review or the role of the Hearing Board under the GMA. In the absence of any specific requirement or prohibition of the GMA that has been actually violated, the Hearing Board must defer to the discretion of Spokane County in adopting the Amendment. The land use map amendment is consistent with the GMA compliant Spokane County Comprehensive Plan.

This Court has already decided that the Hearing Board erroneously interpreted the law when it found that the Capital Facilities Plan and Transportation Plan must be reviewed and updated for each amendment to a comprehensive plan; therefore, the Growth Management Hearings Board's decision in this matter must be reversed. Even assuming, *arguendo*, that the Board's interpretation of the law is correct, the Record contains substantial evidence that Spokane County has development regulations in effect which prohibit development unless adequate facilities are available at the time of development.

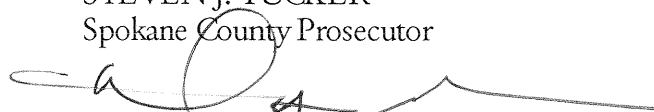
Finally, the Hearing Board erroneously found that the Amendment caused the Spokane County Comprehensive Plan to be invalid. The Comprehensive Plan and the Amendment are compliant with the requirements of the GMA. The Amendment being an amendment to the land use map and not to the GMA compliant language of the

Comprehensive Plan, the amendment cannot and does not cause the Comprehensive Plan to thwart any of the goals or requirements of the GMA.

There being no violation of the GMA or inconsistency with the Spokane County Comprehensive Plan, the Court should affirm the Superior Court's decision to reverse the Hearing Board's Final Decision and Order and remand to the Hearing Board with instruction that an order be entered finding the Spokane County Comprehensive Plan and the Amendment to be in compliance with the GMA.

Respectfully submitted this 15th day of April, 2014.

STEVEN J. TUCKER
Spokane County Prosecutor

A handwritten signature in black ink, appearing to read "David W. Hubert", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

DAVID W. HUBERT, WSBA # 16488
Deputy Prosecuting Attorney
Attorneys for Spokane County

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 16th day of April, 2014, I caused to be served a true and correct copy of the Respondent Spokane County's Response Brief by the method indicated below, and addressed to the following:

Diane L. McDaniel	<input type="checkbox"/>	Personal Service
Sr. Assistant Attorney General	<input checked="" type="checkbox"/>	U.S. Mail
Attorney General's Office	<input type="checkbox"/>	Hand-Delivered
1125 Washington Street	<input type="checkbox"/>	Overnight Mail
P.O. Box 40110	<input type="checkbox"/>	Facsimile
Olympia, WA 98504-0110		

Tim Trohimovich, Esq.	<input type="checkbox"/>	Personal Service
Futurewise	<input checked="" type="checkbox"/>	U.S. Mail
816 Second Avenue, Suite 200	<input type="checkbox"/>	Hand-Delivered
Seattle, WA 98104	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile

Michael Murphy, Esq.	<input type="checkbox"/>	Personal Service
Groff Murphy, PLLC	<input checked="" type="checkbox"/>	U.S. Mail
300 East Pine Street	<input type="checkbox"/>	Hand-Delivered
Seattle, WA 98122	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile

DATED this 16th day of April, 2014 in Spokane, Washington.


TAMARA BALDWIN

Appendix A

1. The County Engineer determines that the proposed development will generate enough peak hour trips to lower or aggravate the minimum acceptable LOS.
2. The County Engineer determines that driveways from the land development proposal have the potential to generate traffic safety problems on the adjacent public roadway or when driveways have the potential to create queue issues on public roads.
3. The County Engineer determines that an existing route with a history of traffic accidents will be further impacted by an increase in traffic from the proposal.
4. When project action would impact public roadway traffic circulation or access.

A specific scoping by the County Engineer may range from an in-depth analysis of site generated levels-of-service to a cursory review of safety issues. The County Engineer shall determine the specific project scope. The Sponsor shall submit a traffic report signed by a Professional Engineer, licensed in the State of Washington. The traffic impact study shall be performed in accordance with Technical Reference A of these Standards.

1.31 FRONTAGE IMPROVEMENT OBLIGATION

All commercial, industrial, institutional, and multi-family residential property development together with all plats, short plats, and binding site plans shall have the general obligation to bring any substandard and abutting County right(s)-of-way and County road(s) up to the current requirements of the arterial road plan and functioning classification of the road, respectively. Required roadway improvements must be completed prior to finalization of any non-residential binding site plan, short plat, or plat unless otherwise allowed by the County Engineer or their authorized agent. Additional road improvements or mitigation measures may also be required pursuant to the findings of the accepted traffic study or analysis required for that proposal.

These obligations may be applied at the time of any land-actions involving subdivisions of land in conjunction with plats and short plats of residential properties and binding site plans of commercial/industrial properties, and to zone changes granting more traffic intensive uses. In the cases where land-actions are not involved or when involved where deferment is deemed by the County Engineer, or their agent, in the public best interest, these obligations will be applied at the time of the "commercial" building permits. This refers to new property development, redevelopment, major expansion & modernization projects, building changes of use, and to any building permit where legal, non-conforming conditions are already present.

General right-of-way/easement obligations will be met in the following way, unless an alternative that best provides for the long-term public benefit has been accepted by the County Engineer or their authorized agent:

Dedication of additional County right(s)-of-way/public easements along the entire property frontage to the standard half-width including corner radii and end transitions for the road

classification and type together with the necessary abutting Border Easement for any accessory uses such as grading, drainage, sidewalks, and other accessory road needs.

General half-road improvement obligations will be met in the following way, unless an alternative that best provides for the long-term public benefit has been allowed and accepted by the County Engineer or their authorized agent:

Construction of standard or special section half-road improvements along the property frontage shall be required. The extent of the frontage improvements may be reduced at the discretion of the County Engineer or their agent should a certain or reasonable opportunity exist for the remainder of the improvements to be required at a later time. Half road improvements may not be limited to simple widening, but may include providing two valid travel lanes with any attenuate reconstruction and adequate construction materials.

1.32 CONNECTIVITY

The intent of urban connectivity design standards is to provide for a system of streets that offer multiple routes and connections allowing ease of movement for cars, bikes and pedestrians including frequent intersections and few closed end streets (cul-de-sacs). The design of projects within Spokane County's Urban Growth Areas shall adhere to the following urban connectivity design standards, unless otherwise approved by the Director of Planning and the Spokane County Engineer pursuant to 12.300.123(2) below:

1. Block length for local streets shall not exceed 660 feet, unless an exception is granted based on one or more of the following:
 - a. Physical Conditions preclude a block length 660 feet or less. Such conditions may include, but are not limited to, topography natural resource areas, critical areas or shorelines.
 - b. Buildings, train tracks or other existing development on adjacent lands physically preclude a block length 660 feet or less.
 - c. An existing street or streets terminating at the boundary of the development site have a block length exceeding 660 feet, or are situated such that the extension of the street(s) into the development site would create a block length exceeding 660 feet.
2. The proposed development shall include street connections to any streets that abut, are adjacent, or terminate at the development site.
3. The proposed development shall include streets that extend to undeveloped or partially developed land that is adjacent to the development site. The streets will be in locations that will enable adjoining properties to connect to the proposed development's street system.
4. Permanent dead end streets or cul-de-sacs shall only be allowed when street connectivity can not be achieved due to barriers such as topography, natural features or existing development, e.g. train tracks. Cul-de-sacs that are allowed