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COURT OF APPEALS  
DIVISION II

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

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STATE OF WASHINGTON  
BY       
DEPUTY

NO. 39071-0-II

**BRINNON GROUP and BRINNON MPR OPPOSITION,**

**Appellants,**

**vs.**

**JEFFERSON COUNTY, STATESMAN GROUP OF  
COMPANIES  
Respondents**

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR CLALLAM COUNTY  
Cause Number: 08-2-00127-2; and

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY  
Cause Number: 08-2-02605-9

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**BRIEF OF RESPONDENT JEFFERSON COUNTY WITH  
RESPECT TO THE REQUEST FOR A  
CONSTITUTIONAL WRIT**

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**TABLE OF CONTENTS**

Table of Contents .....i

Table of Authorities .....ii

PRELIMINARY STATEMENT.....1

STATEMENT OF ISSUES .....2

STATEMENT OF FACTS .....3

LEGAL ARGUMENT .....7

**I-THE TRIAL COURT PROPERLY RULED THAT THE OPPONENTS ALWAYS HELD AN ADEQUATE REMEDY AT LAW, I.E., A HEARINGS BOARD PETITION AND A SUBSEQUENT APA APPEAL THAT MIGHT HAVE LED TO A NULLIFIED ORDINANCE.....7**

**II-OPPONENTS WOULD READ THE PEA IN A MANNER THAT WOULD VITIATE THE PUBLIC PARTICIPATION RULES OF THE GMA, THUS FAILING TO READ THOSE STATUTES ‘IN PARI MATERIA’ .....11**

CONCLUSION .....14

## TABLE OF AUTHORITIES

### Cases

<i>Odegaard v. Everett School Dist. No. 2</i> , 55 Wn. App. 685, 780 P.2d 260 (1989).....	10
<i>Torrance v. King Cty.</i> , 136 Wn. 2d 783, 966 P. 2d 891 (1998).....	10
<i>Whatcom Cty. v. Brisbane</i> , 125 Wn. 2d 345, 884 P. 2d 1326 (1994)....	9, 11

### Statutes

Ch. 36.70 RCW .....	2
Ch. 36.70A RCW.....	1, 2
Ch. 36.70B RCW.....	3
GMA.....	passim
PEA.....	passim
RCW 36.70.040 .....	5
RCW 36.70A.040(1).....	13
RCW 36.70A.140 .....	11
RCW 7.16.040 .....	6, 8

## **PRELIMINARY STATEMENT**

Jefferson County plans under the Growth Management Act (Ch. 36.70A RCW) or “GMA.” The County’s valid Comprehensive Plan (“Plan”) has included a conceptual Master Planned Resort (“MPR”) in Brinnon since 2002 when the Brinnon Subarea Plan was made part of the Plan.<sup>1</sup> Statesman proposes to develop an MPR at Pleasant Harbor in the vicinity of Brinnon. Two years after Statesman’s application was made the County Commission (“BoCC”), acting in their legislative capacity, approved amendments to the Plan’s text and land use map that constituted only the first of five steps that would achieve a habitable MPR.

Appellants (“Opponents”) are groups organized to oppose the Statesman MPR. So far the Opponents have asked the Western Washington Growth Management Hearings Board and trial court Judges in Clallam County and Thurston County to nullify the Plan amendment. All three decision-makers have upheld the County’s decision.

This brief deals solely with the Opponents’ appeal from the decision of Judge George L. Wood in Clallam County to dismiss pursuant to CR 56 the request of Appellants for a constitutional writ to void the

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<sup>1</sup> Brinnon is within Jefferson County and is an unincorporated village (or rural commercial district in GMA terms) some 35 miles south of Port Townsend. The same term is used to describe the region around the village and a postal district having its own zip code. Appellants represent only one viewpoint among those held by the citizens of the Brinnon region and are not equal to “Brinnon.”

Plan amendment based on the County's alleged failure to comply with the Planning Enabling Act or "PEA," Ch. 36.70 RCW. Put in statutory terms is it possible for a county's legislative decision to be simultaneously GMA-compliant and yet also violate the PEA? Jefferson County concludes such a split decision is neither logical nor supported by the applicable law. However, a larger public policy issue is hidden in this statutory dispute: what quantity of advice, iteration, reiteration and public participation must be present and accomplished before County legislators are able to exercise a prerogative given to them when they were elected, i.e., to legislate? Conversely, public policy cannot logically support what the Opponents desire: a framework that neuters the County legislators and enforces an endless and unbreakable feedback loop between the legislators and those entities advising them.

### **STATEMENT OF ISSUES**

1. Can a party obtain a constitutional writ based upon alleged violations of the Planning Enabling Act or "PEA," Ch. 36.70 RCW, in order to have nullified a County Ordinance amending its Comprehensive Plan adopted pursuant to the Growth Management Act or "GMA," Ch. 36.70A RCW, when that same party has an adequate remedy at law, specifically a Petition for Review to the applicable regional Growth

Management Hearings Board, an agency authorized to determine that such an Ordinance is either non-compliant, invalid or worthy of financial sanctions against said county?

2. Does Appellants' interpretation of the PEA, which makes its procedural requirements paramount over the procedural requirements listed in the GMA (and would vitiate those found in the GMA) serve to maintain the integrity of those respective statutes and to read those statutes in pari material?

### **STATEMENT OF FACTS**

Jefferson County's Plan was amended in January 2008 by Ordinance #01-0128-08 ("the Ordinance") to accommodate Statesman's MPR in the vicinity of Brinnon in unincorporated Jefferson County. (AR 979-995). What was approved was a change to the Plan's Land Use Map and an addition of text, both of which tracked in substance what had been proposed in 2006 by Respondent Statesman.<sup>2</sup> What was NOT approved through the Ordinance was a Ch. 36.70B RCW Development Agreement between Statesman and the County, development regulations for inside the MPR, preliminary plats or subdivisions and/or building permits. Nothing

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<sup>2</sup> While the 2006 application proposed 1,270 residential units the Ordinance capped residential construction at a maximum of 890 units. See Statesman's "Application for Formal Site-Specific Comprehensive Plan/UDC Amendment" filed with the County on March 1, 2006, particularly Attachment 5 (map) and Exhibit D (text). AR 1489-1525.

adopted so far allows Statesman to turn even one shovel of dirt at the site, which consists of 256 acres +/- and some 15 acres of adjacent tidelands.

During 2007 the Statesman proposal underwent review A) by the County's Planning Commission, B) for environmental impacts as required by SEPA and C) by the citizens who provided the County with 400+ written comments, equally supporting and opposing, including nine letters by the Opponents' attorney articulating their opposition to the proposal.<sup>3</sup>

The County Planning Commission ("PC") made a recommendation to the County Commission on November 28, 2007, said recommendation expressly approving "the proposal." On the first page of the majority recommendation from the PC "the proposal" was referred to by its application number (MLA #06-87) and summarized, in part, as 890 residential units to be built upon 256 acres. AR 1567. The majority included seven conditions the PC wanted to see imposed on Statesman as part of any ordinance that would be adopted.<sup>4</sup> See AR 1550-1554, 1565. The PC majority recommendation did not include any proposed text to be inserted into the County's Plan, and text similar in substance to what was in the 2006 application (and the later EIS documents) was made part of the

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<sup>3</sup> See the Ordinance at Findings #5 through #62, inclusive (AR 980-988).

<sup>4</sup> A minority report listed three more conditions that the minority wanted to see imposed on Statesman as part of the adopting ordinance. All 10 (7 + 3) were included in the Ordinance at Findings #63(a), #63(c), #63(e & f), #63(h), #63(j), #63(s), #63(n-r), #63(u), #63(v), #63(aa). AR 988-993.

Ordinance through the County's planning department (known as Community Development) as is authorized by RCW 36.70.040.<sup>5</sup> The PC majority recommendation included a map with internal zoning districts for inside the MPR. AR 1554. After a public hearing was held by the County Commission on December 3 and 6, 2007, it was time for the County Commissioners to consider the advice from the PC, the staff recommendation and the evenly-split public comments, review the environmental documents and then do what they were elected to do: make a decision and legislate.

And legislate the County legislators did on January 28, 2008. The Ordinance included 30 not 10 conditions and the 10 conditions from the two PC reports (majority and minority) had been modified in non-substantive ways as is allowed by RCW 36.70.040. The Ordinance included text amending the Plan which reflected the PC's recommendation of "the proposal" and dovetailed with the proposal studied in the EIS documents. The Ordinance included a slightly different map, one that reflected technical corrections approved by the PC. The BoCC-approved

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<sup>5</sup> From RCW 36.70.040: "To this end, the planning commission shall conduct such hearings as are required by this chapter and shall make findings and conclusions therefrom which shall be transmitted to the department which shall transmit the same on to the board with such comments and recommendations it deems necessary."

map included the 15 acres of tidelands and lacked any internal zoning districts. AR 1647.

Based on those three alleged differences between what the PC recommended to the County Commission and what is in the Ordinance, the Opponents have yelled “Gotcha!” in the form of the Complaint filed in Clallam County asserting the County violated the PEA. The PEA violation arose because, according to the Opponents, the county legislators’ hands are tied: if they don’t adopt precisely what the PC recommends, then they have to forgo their legislative prerogative and instead send it back for further comment and public hearing with the PC.<sup>6</sup> Judge Wood correctly determined that the underlying goal of the Opponents was to get the Ordinance nullified so the MPR could not go forward. Judge Wood further concluded the Opponents had other forums available to them where they could obtain a nullification of the Ordinance and therefore they had an “adequate remedy at law,” said “adequate remedy at law” serving to prevent the issuance of a constitutional writ per RCW 7.16.040.<sup>7</sup> CCCP 22 TO 27, generally. Judge Wood also noted that the Opponents had

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<sup>6</sup> See the Opponents’ Opening Brief at pages 30 (bottom) and 31 (top).

<sup>7</sup> Opponents filed a timely Petition for Review with the Western WA Growth Management Hearings Board (“WWGMHB”) but failed (twice) to convince the Hearings Board that the Ordinance did not comply with the GMA and the PEA and similarly failed to convince Judge Hicks of Thurston County that the Hearings Board decision was “clearly erroneous.”

claimed before the WWGMHB that the PEA had been violated. CCCP 23, 26. The Hearings Board, finding it had jurisdiction over the PEA pursuant to the County's decision to state in its Plan that it would comply with the PEA and the GMA, ruled that the PEA had not been violated. See the Hearings Board FDO dated September 15 2008 at pages 11 and 17. TCCP 28, 34. Unsatisfied with the results in both Thurston County (not discussed here) and Clallam County Superior Courts, the Opponents now appeal.

## **LEGAL ARGUMENT**

### **I-THE TRIAL COURT PROPERLY RULED THAT THE OPPONENTS ALWAYS HELD AN ADEQUATE REMEDY AT LAW, I.E., A HEARINGS BOARD PETITION AND A SUBSEQUENT APA APPEAL THAT MIGHT HAVE LED TO A NULLIFIED ORDINANCE**

The appellate panel should not doubt for one second that the Opponents seek only one result, judicial nullification of the Ordinance, and they have gone down two routes to get them to that remedy.<sup>8</sup>

The record below supports the conclusion that getting the Ordinance overturned or nullified was the sole goal of the Opponents. Nowhere in the Clallam County Complaint did the Opponents ask for a

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<sup>8</sup> In this context, "nullification" is not a legal term of art but is instead used here to include both a GMA-derived finding of either invalidity or non-compliance and what Opponents allege could arise from a finding the PEA was violated, the voiding of the Ordinance.

“Conclusion of Law” stating “the PEA was violated by Jefferson County when it adopted the Ordinance.” To do so would have been to pursue an entirely academic exercise. Instead, the Opponents, at, p. 13, ¶11.4 of the Clallam County Complaint, “seek an order to void [the Ordinance].” CCCP 317. Opponents confirm this in their Opening Brief (p. 34, 35) to this Court, where they state that the remedy sought for the alleged PEA violation “is to void the ordinance.”

Judge Wood, at page 4 of his Memorandum Opinion granting Statesman’s Motion to Dismiss, correctly noted that while the remedies in the GMA and PEA had different names, there was no substantive difference between them: “[w]hile the requested reliefs may not be identical, i.e., invalidity versus void, the substantive relief available to Plaintiffs on appeal of the Hearings Board’s decision is essentially the same as that available through the writ process.” CCCP 25. Based on that conclusion Judge Wood put it quite aptly at page 6 of his Memorandum Opinion when he stated “[t]he Plaintiffs lose nothing by dismissal [of the constitutional writ claim] except the opportunity to argue their case in another forum.” CCCP 27.

Thus, the Opponents do not qualify under RCW 7.16.040 for a constitutional writ, which requires the applicant for such a writ to convince the court that the applicant lacks “any plain, speedy and adequate

remedy at law.” Here the Opponents have an adequate remedy at law and are vigorously pursuing it before this very court.

Case law strongly supports the County’s position that the Opponents have an adequate remedy at law because they have appealed the negative (from their viewpoint) decision of the Hearings Board. The one case which restates the obvious in dicta, i.e., that the GMA and PEA must be read so as to maintain the integrity of the respective statutes, *Whatcom Cty. v. Brisbane*, 125 Wn. 2d 345, 884 P. 2d 1326 (1994) fails to support the Opponents’ argument. There the County’s Interim Critical Area Ordinance was GMA-compliant and was also NOT subject to a subsequent referendum because it had been enacted only after the “public participation” requirements of the GMA had been satisfied by the County. Therefore, to subject the Ordinance to a subsequent referendum would be to subject it to another public vetting in direct contravention of the GMA.<sup>9</sup> Justice Smith, writing for an 8-1 majority, wrote in that regard:

“[t]he Whatcom County Home Rule Charter may grant the people the right of referendum over ordinances enacted by the County. However, allowing exercise of that right over ordinances enacted pursuant to the Growth Management Act would run counter to and frustrate the declared

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<sup>9</sup> “But the Growth Management Act does provide a process for public participation in growth management legislation at the county or city level. The people of Whatcom County had a participatory opportunity to voice their concerns prior to adoption of the Temporary Critical Areas Ordinance, Ordinance Number 92-032. RCW 36.70A.140 ....” *Whatcom County* at 352. .

purposes of the Act to prevent uncoordinated and unplanned growth and to encourage conservation and wise use of land.” *Id.*, at 355.

Controlling for this appeal is *Torrance v. King Cty.*, 136 Wn. 2d 783, 966 P. 2d 891 (1998), since Torrance was denied a constitutional writ because he always had the ability to appeal the Hearings Board decision which found GMA-compliant the County’s decision to not rezone his land. The court wrote “[t]he decision to forgo an available appeal and to instead seek a remedy by means of constitutional writ of certiorari is fatal to Torrance’s case.” *Id.*, at 792. Nor does another case cited by the Opponents, *Odegaard v. Everett School Dist. No. 2*, 55 Wn. App. 685, 780 P.2d 260 (1989), support their position. Why? Because Mrs. Odegaard was not entitled to a writ of certiorari since the process that had removed her as principal was administrative in nature AND she had an ongoing federal suit, where she held an adequate remedy at law. *Id.*, at 691.

Opponents are vigorously pursuing their adequate remedy at law that will achieve for them, if they are successful, what they are after: having the Ordinance overturned.

**II-OPPONENTS WOULD READ THE PEA IN A MANNER THAT WOULD VITIATE THE PUBLIC PARTICIPATION RULES OF THE GMA, THUS FAILING TO READ THOSE STATUTES ‘IN PARI MATERIA’**

Undoubtedly, “[t]he [PEA] and the [GMA] are two related statutes which should be ... ‘read together to determine legislative purpose to achieve a harmonious total statutory scheme .... which maintains the integrity of the respective statutes.’” *Whatcom Cty. v. Brisbane*, 125 Wn. 2d 345, 354 884 P. 2d 1326, 1331-32 (1994).

But Opponents now ask this Court to render the text of RCW 36.70A.140 meaningless because, according to the Opponents, if a local government achieves anything less than perfect and complete compliance with the PEA, then despite GMA-compliance, the Ordinance passed in the context of a GMA directive or provision would still be declared void for procedural shortcomings pursuant to a constitutional writ. Recall that RCW 36.70A.140 mandates public participation and expressly states that the local governments planning under GMA need only observe “the spirit of the program and procedures” in order to obtain GMA compliance as to whether they generated sufficient public participation.<sup>10</sup>

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<sup>10</sup> From RCW 36.70A.140: “Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the

The State Legislature is deemed to have had knowledge of the PEA when it enacted the GMA. Therefore when the GMA was enacted the Legislature held the option of not enacting the text now found in RCW 36.70A.140, whose omission, if it had chosen that route, would have supported the Opponents' position that there must be perfect compliance with the PEA regardless of whether there is also compliance with the different standards found in the GMA. The Legislature at the time it enacted the provisions in the GMA that created the regional Hearings Boards and added remedies and consequences for failure to comply with the GMA might have gone back to the PEA and inserted remedies and consequences there. But they did not do so and a logical inference from the decision to not insert remedies and consequences into the PEA is that the Legislature assumed that the remedies and consequences in the GMA would suffice, particularly since large counties and counties with populations growing at a fast rate had no choice but to plan under the

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public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans. ....Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.”

GMA pursuant to RCW 36.70A.040(1). In recent colloquial parlance, the GMA was the new car and the PEA was the “clunker.”

Furthermore, the Opponents viewpoint on how the PEA is to be read in the context of a newer statute, the GMA, would completely tie the hands of the elected County Commissioners by making the County’s Planning Commission the final arbiter of what could be enacted. Stripped of their discretionary legislative power given them by their electorate, the County Commission would veer dangerously close to becoming nothing more than a rubber-stamp legislature like those seen in countries run by a dictator.

Additionally, the Opponents’ perspective on the interplay between the two statutes would likely lead the judiciary into a huge morass. Specifically the courts would, if the Opponents are correct, be forced to decide cases where they would have to rule on what was or was not a substantial enough change(s) to require another trip back to the Planning Commission. Where would the bright line rule be? What is a substantive change, what is a procedural change? The permutations that would require a judicial “referee” would undoubtedly be endless.

Although it is true that the County’s Plan expressly states that the County will comply with the PEA, the County does not concur that it violated the PEA and for all of the reasons listed above does not agree that

the PEA creates a “stand-alone” cause of action that would allow the Opponents to achieve their goal, nullification of the Ordinance. It defies logic that the Ordinance can be on the one hand compliant with the GMA and on the other not compliant with the PEA and thus subject to nullification. Why bother to enact the public participation rules of the GMA if the standard that a local government must meet is nothing less than perfect compliance with the PEA, an older, process-only statute?

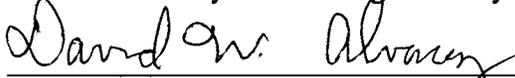
The other Brief of the Respondents will touch upon this constitutional writ issue and explain why the decision of the Thurston County Superior Court judge (affirming the decision of the Western WA Growth Management Hearings Board finding the Ordinance as GMA-complaint) should be affirmed by this Court.

### **CONCLUSION**

The County requests that this Court affirm the decision of the Clallam County Superior Court dismissing with prejudice the Verified Complaint of the Opponents.

Respectfully submitted this 17<sup>th</sup> day of December,

JUELANNE DALZELL,  
Jefferson County Prosecuting Attorney



By: **DAVID W. ALVAREZ**, WSBA #29194  
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FILE  
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Case No.: 39071-0-II

**DECLARATION OF MAILING**

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 17<sup>th</sup> day of December, 2009, I mailed, postage prepaid, a copy of the **Brief of Respondent Jefferson County with Respect to the Request for a Constitutional Writ** to the following:

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DECLARATION OF MAILING  
Page 1

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4 I declare under penalty of perjury under the laws of the State of Washington that the  
5 foregoing declaration is true and correct.

6 Dated this 17<sup>th</sup> day of December, 2009, at Port Townsend, Washington.

7  
8   
9 Janice N. Chadbourne  
10 Legal Assistant