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I. INTRODUCTION

The Brief of Respondent Jefferson County (“Co. Br.”) makes some grossly erroneous statements unsupported by case law or the record that must be cleared up immediately by means of this Introduction.

Jefferson County (the “County”) implies without citation that the Western Board¹ dismissed Case No. 09-2-0012 in the 2009 MO² by applying the doctrine of collateral estoppel:

Jefferson County respectively asks this Court to affirm the decision of the [Western Board] concluding that ICAN’s Petition for Review was barred by the application of *res judicata* and/or collateral estoppel³

The County also proposes a restatement of Petitioner’s Statement of Issues before this Court and proposes the following Issue:

B. Whether the Growth Management Hearings Board properly applied collateral estoppel to prevent Petitioner ICAN from contesting issues which had been determined contrary to ICAN’s position only weeks earlier?⁴

It is an absolute fact that the Western Board did not apply collateral estoppel to bar and dismiss the Petition for Review in the 2009 MO. The Western Board dismissal was based solely on the doctrine of *res judicata*.

The Board finds that the issues presented in this case are barred by the application of the principal of *res judicata* and this case is dismissed.⁵

¹The Western Washington Growth Management Hearings Board is referred to herein as the Western Board. There have been three regional Growth Boards including an Eastern Board and a Central Board. In 2010, the Legislature combined the three regional boards into a single Growth Board. Laws of 2010 c 211.

²*ICAN v. Jefferson County*, No. 09-2-0012 (Order on Motions to Strike, 11/5/09) (“2009 MO”). This Reply Brief uses the abbreviations for regional Growth Board cases that are defined in the Appendix Index in Petitioner’s Opening Brief (“Op. Br.”) at 42-43.

³Co. Br. at 1 (emphasis supplied).

⁴Co. Br. at 1-2 (emphasis supplied).

⁵Clerk’s Papers at 32 (“CP 32”).

It is true that the Western Board did not understand the difference between “issues” and “claims” in its application of the doctrines of *res judicata* and collateral estoppel.⁶ This is because the Western Board has no expertise regarding the application of these equitable doctrines.⁷ However, the Western Board knew:

Res judicata (claim preclusion) prevents the same parties from relitigating a claim **that was raised or could have been raised** in an earlier action.⁸

The Western Board also knew that collateral estoppel (issue preclusion) “precludes only those issues that have actually been litigated and determined.”⁹ In the challenged 2009 MO, the Western Board based its dismissal of the case in part on a finding that Prehearing Order Issues 5 and 9 “could have been raised” in the earlier proceedings for the 2009 CO.¹⁰ But the Western Board did not find that both of these Issues were raised in the earlier proceedings.¹¹ Because, the Western Board did not find that these Issues were actually raised, “litigated and determined” it could not have dismissed the case based on collateral estoppel.¹² Generally, an appellate court may affirm a prior decision based on a different legal theory. *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). However, because the Western Board did not find that all Prehearing Order Issues were raised,

⁶See CP 22-32.

⁷Petitioner’s Opening Brief at 11-12 (“Op. Br. at 11-12”).

⁸CP 22 (emphasis in original).

⁹CP 14 citing to *Stevens County v. Futurewise* (“*Stevens*”), 146 Wn.App. 493, 507, 192 P.3d 1 (2008) (emphasis supplied).

¹⁰CP 31 (emphasis supplied).

¹¹*Id.*

¹²*Stevens* at 507.

“litigated and determined,” this Court should not affirm dismissal of the case in the 2009 MO on the alternative theory of collateral estoppel.¹³

A second grossly erroneous statement made by the County is that prior to the issuance of the 2009 MO, the Western Board found the same challenged ordinance to be compliant with the Growth Management Act (“GMA”).

[T]he petition sought to challenge the same County ordinance which had only weeks before been determined to be compliant with the Growth Management Act (“GMA”).¹⁴

[The Western Board] on August 12, 2009 issued a Compliance Order which - with one exception - held that the County had now successfully brought the Port Hadlock/Irondale UGA into compliance with the GMA.¹⁵

The [2009] Compliance Order determined that the Hadlock/Irondale UGA was essentially compliant with the GMA.¹⁶

Once the Board had . . . determined that the County’s recent Hadlock/Irondale legislation was GMA-compliant . . .¹⁷

While three of these quotes provide no citation to the record, the claim made in the Co. Br. at 6 (*see* Note 13 below), cites to and quotes from the 2009 CO at 15.¹⁸ However, neither the provisions quoted from the 2009 CO at 15 nor any other provisions in the 2009 CO go beyond stating that the County has

¹³The 2009 MO was clear that it considered the term *res judicata* to apply only to “claim preclusion” and collateral estoppel only to apply to “issue preclusion.” AR 449-52, 458.

¹⁴Co. Br. at 2. This erroneous County assertion is portrayed as a “fact” in the Statement of Fact section of the County Brief. This Court is cautioned to check citations for all County alleged statements of fact or law.

¹⁵Co. Br. at 6. This erroneous County assertion is also portrayed as a “fact” in the Statement of Fact section of the County Brief.

¹⁶Co. Br. at 20.

¹⁷Co. Br. at 23.

¹⁸The County cites to CP 392. The correct cite is to the Administrative Record at 392 (“AR 392”).

come into compliance with some of the prior issues of noncompliance.¹⁹ This is not the equivalent of a statement that the Compliance Order has found that all provisions in the amendments made by the challenged ordinance comply with the GMA or that the Port Hadlock/Irondale Urban Growth Area (“UGA”) complies with the GMA, as the County asserts.

Only after the Petition in Case No. 09-2-0012 was dismissed in the challenged 11/5/09 2009 MO (CP 9-34) and after the 12/7/09 Petition for Judicial Review (CP 3-34) was served on the Western Board, did the Western Board first conclude in its 1/27/10 2010 CO that:

In the August CO, the Board found that the County’s plan for the Hadlock/Irondale UGA was in compliance with the Growth Management Act [with one exception].²⁰

This 2010 statement should be considered unacceptable post hoc rationalization by the Western Board. No such statement was made in the 2009 CO or the 2009 MO.

The Western Board could not and did not find the challenged ordinance fully in compliance with the GMA in the 2009 CO (with just one exception). To do so would have violated the clear statutory rights of ICAN to have its new petition heard to challenge new issues of noncompliance that

¹⁹CP 378-98. The said prior issues of noncompliance are restated in the 2009 CO on the top half of AR 379 as conclusions (“COL.”) C, D, E, F, and H. The 2009 CO appears to have found compliance on conclusions “C” (AR 379), “H” (AR 392), and on the parts of “F” related to RCW 36.70A.070(3)(c) (AR 387) and -(d) (AR 392). The 2009 CO remands on conclusion “D” and fails to address at all conclusion “E” and the remaining parts of conclusion “F.”

²⁰Opening Brief Appendix at A 263 (“Op. Br. A 263”). At the time this statement was made in the 2010 CO, the UGA was in compliance with the GMA (with one exception) based on both the August 2009 CO and the dismissed petition in the 2009 MO.

first arose when the challenged ordinance was adopted.²¹ *See infra* this brief at 12-14.

II. ADDITIONAL REPLY TO COUNTY'S STATEMENT OF FACTS

The County asserts without qualification in its Statement of Facts that:

[T]he 2009 Petition for Review [in Case No. 09-2-0012] essentially restated the same claims and issues which were determined by the Hearings Board to be without merit in its August 12, 2009 Compliance Order. . . .

. . . [ICAN] sought to relitigate those same issues which had been determined in favor of Jefferson County in the recently issued Compliance Order.

. . . The Hearings Board agreed with the County that ICAN's 2009 Petition for Review was essentially asking the Board to relitigate the same issues and claims which the Board had only weeks before decided in favor of Jefferson County.²²

While it is true that the Prehearing Order Issues in Case No. 09-2-0012²³ are broadly-enough stated to include the prior issues of noncompliance,²⁴ each of these Prehearing Order Issues goes far beyond the scope of the prior issues of noncompliance both in the subject matter descriptions for each issue and with the alternative grounds presented in each issue.²⁵

²¹See RCW 36.70A.280(1)(a) and 290(2) for the right to file a new petition on an amendment to a Comprehensive Plan or Development Regulations. *See also* RCW 36.70A.130(1)(d) for the scope of review of a new petition that includes an amendment.

²²Co. Br. at 7-8.

²³The first 13 issues are repeated in the 2009 MO at 19-21 (AR 463-65). All 14 issues are presented in the Prehearing Order at 1-3 (AR 338-40).

²⁴The prior issues of noncompliance are listed on the top half of the page in the 2009 CO at 2 (AR 379). They were originally established in the 2005 FDO at 48-49 (Op. Br. A 148-49).

²⁵Op. Br. at 34-38.

III. REPLY ARGUMENT

A. Standard of Review

The County concurs with Petitioner that this Court applies the Administrative Procedures Act, RCW 34.05, in its review of this case. However, the County asserts that, “This Court can reverse only if the Board has misapplied the law.”²⁶ As presented in the Opening Brief at 11-12, this Court can reverse if any one of the criteria in RCW 34.05.570(3) has been met. Under RCW 34.05.570(3)(b) this Court can grant relief if it finds *res judicata* is outside the statutory authority of the Western Board. Under RCW 34.05.570(3)(e), this Court can grant relief if it finds that there is not substantial evidence that the subject matter or cause of action in Case No. 09-2-0012 is identical to that in the 2009 CO. Under RCW 34.05.570(3)(c), this Court can grant relief if it finds that the Western Board engaged in unlawful procedure when it applied *res judicata* if *res judicata* is not within its authority. Under RCW 34.05.570(3)(h), this Court can grant relief if it finds the 2009 MO is inconsistent with WAC 242-02-540 (regarding ICAN’s Motion to Strike) or with WAC 242-02-893 (regarding the Western Board’s determination that all issues in the Prehearing Order were within the scope of the prior issues of noncompliance) both when the Western Board did not express a rational basis for making determinations inconsistent with these rules.

Pursuant to RCW 34.05.570(3)(d), this Court can grant relief if the Western Board misinterpreted or misapplied the law, for example, when it

²⁶Co. Br. at 9.

misinterpreted and misapplied *res judicata*, when it erroneously considered “claims” under *res judicata* to be the same as Prehearing Order Issues, when it found all Prehearing Order Issues were within the scope of the prior issues of noncompliance, or when it found issues that were not raised “litigated and determined” could have been raised in the 2009 CO proceedings and therefore could be dismissed.

The County agrees with Petitioner that this Court “need not give deference to the Hearings Board’s legal conclusions as to the general principles of collateral estoppel and *res judicata*.”²⁷ But the County is wrong to ask this Court to give the Western Board deference in determining “identity of issues and claims” as these concepts apply to collateral estoppel and *res judicata*.²⁸ Because the Western Board does not have expertise in collateral estoppel and *res judicata*, it does not have expertise to understand the difference between “issues” and “claims,” to understand the meaning of “identical claims” for purposes of *res judicata*, or to understand the meaning of “identical issues” for purposes of collateral estoppel. While the 2009 MO does not attempt to explain the meaning of “claims” for *res judicata*, it seeks to analyze the nature of “issues” instead of the nature of “claims” when it seeks to apply *res judicata*.²⁹ Because the Western Board does not have expertise regarding *res judicata* and collateral estoppel, no deference should be given it regarding its determination of what is a “claim” or “subject

²⁷Co. Br. at 10; Op. Br. at 11-12.

²⁸Co. Br. at 10-11.

²⁹AR 458-68 and particularly AR 463.

matter” or “cause of action” under *res judicata* or what is “identity of issues” under collateral estoppel.³⁰

B. The Western Board Erred When It Found A Growth Board Has Jurisdiction To Apply *Res Judicata* And Collateral Estoppel Based On The Preclusive Effect Of Prior Growth Board Decisions

In its Opening Brief, ICAN first presented the analysis of the Central Board as to why Growth Boards do not have jurisdiction to apply *res judicata* and collateral estoppel.³¹ The County does not cite to the Central Board argument and refute it, but just states:

The fact that the Central Board has declined to apply *res judicata* and collateral estoppel does not mean that there is no legal authority for the Western Board (or the other Growth Boards) to do so.³²

The County has failed to refute the arguments of the Central Board and ICAN as to why *res judicata* and collateral estoppel are not applicable to a Growth Board decision based on the preclusive effect of a prior Growth Board decision.

The County argues without citation:

Washington caselaw is equally clear that *res judicata* and collateral estoppel may be applied by the administrative agency itself, including Growth Management Hearings Boards, provided the elements of *res judicata* or [sic - collateral] estoppel are present.³³

The County does not cite to a single case in Washington caselaw where a Growth Board or any other administrative agency was upheld in applying *res judicata* or collateral estoppel based on the preclusive effect of a prior

³⁰See Co. Br. at 10-11 arguing otherwise.

³¹Op. Br. at 12-16.

³²Co. Br. at 21.

³³Co. Br. at 16.

decision by the same administrative agency. The Opening Brief at 28-29 argues that:

In the 18 years that Growth Boards have been making decisions before the issuance of the 2009 MO, there has been no Growth Board case or issue that has been precluded from substantive review by application of the doctrines of *res judicata* or collateral estoppel based on a prior Growth Board decision. Prior to the 2009 MO, no Growth Board has ever acted to preclude such substantive review. No appellate court has ever acted to preclude such substantive review.

The County Brief does not deny ICAN's statement and has not identified such a Growth Board "case or issue" or such an appellate court "case."³⁴ The County cites to the Turtle Rock FDO (Op. Br. A 337) for the proposition that the Eastern Board states that *res judicata* may be applied in proceedings before the Growth Boards.³⁵ However, this case did not address *res judicata* preclusion based on a prior Growth Board proceeding (the issue that is now before this Court).³⁶ The County argues that the existing appellate decisions constitute *stare decisis*.³⁷ But there is no appellate court decision that has ever precluded substantive review of a Growth Board case based on the doctrines of *res judicata* or collateral estoppel and based on a prior Growth Board decision.

The County cites to two Supreme Court cases and erroneously states:

The Washington Supreme Court has acknowledged that the doctrines of *res judicata* and collateral estoppel apply to decisions of Growth Management Hearings Boards.³⁸

³⁴Co. Br.

³⁵Co. Br. at 21.

³⁶See Op. Br. at 16-17.

³⁷Co. Br. at 21.

³⁸Co. Br. at 15.

But in the first case, the Court only found that the trial court erred when it applied *res judicata*.³⁹ In the second case, the Court only found that the claims by the petitioner to the Growth Board could not be barred by *res judicata*.⁴⁰

The County argues:

If, as ICAN argues, the doctrines of *res judicata* and collateral estoppel could never be applied by Growth Management Hearings Boards, it would have been easy and appropriate in each of the above cases for the Court of Appeals to simply say so.⁴¹

The Court of Appeals in each of the three cases cited by the County Brief at 18-19, simply found that the criteria for the doctrines were not met. They did not state that the doctrines could never be applied by Growth Management Hearings Boards because that issue was not put before these courts to decide. These courts did not need to reach the issue of whether the doctrines could ever be applied by Growth Management Hearings Boards because, in each case, the criteria were not met.

The County argues that a Court of Appeals has ruled that it is improper for a Growth Board to revisit an order after a County complies with the GMA.⁴² But the relevant fact is that the 2007 CO did not make the statement that the County generally complies with the GMA.⁴³ The Western

³⁹*City of Arlington v. Hearings Board*, 164 Wn.2d, 773, 193 P.3d 1077 (2008)

⁴⁰*Goldstar Resorts v. Futurewise*, 167 Wn.2d 723, 737-38, 222 P.3d 791 (2009)

⁴¹Co. Br. at 19. Regarding one of these three Court of Appeals cases, the County states that “the Court of Appeals expressly acknowledged the applicability of *res judicata* and collateral estoppel in growth management cases.” Co. Br. at 18. But that case only states that *res judicata* (along with collateral estoppel) “applies to quasi-judicial administrative agency decisions.” *Clallam County v. Hearings Board*, 130 Wn. App. 127, 132, 121, P.2d 764 (2005). These doctrines do apply to some administrative decisions. See *infra* this brief at 14.

⁴²Co. Br. at 20.

⁴³*Supra*, this brief at 3-5.

Board only found compliance with some of the prior issues of noncompliance.⁴⁴

The County argues:

[T]he Jefferson County UGA ordinance which was being challenged in ICAN's 2009 Petition (Ordinance 03-0323-09) was the same ordinance which ICAN had vigorously challenged in its April 24, 2009 Objectives and its August 21, 2009 Request for Reconsideration in Case No. 07-2-0012c. Under these circumstances, the Hearings Board properly held that the doctrines of *res judicata* and collateral estoppel could be applied to bar relitigation.⁴⁵

Regarding *res judicata*, the County, in essence, is arguing that because the same parties challenge the same ordinance in two Growth Board proceedings, that justifies use of *res judicata* to ban the second proceeding.

Recall that under the doctrine of *res judicata* or claim preclusion,

a prior judgment will bar litigation of a subsequent claim if the prior judgment has a "concurrence of identity" with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.⁴⁶

Applying the County's argument, the "claim" is noncompliance with the GMA, the "subject matter" is the Port Hadlock/Irondale UGA, the cause of action is the adoption of the challenged ordinance, and the parties are the same. Therefore, under these four criteria a subsequent challenge of noncompliance with the GMA regarding the Port Hadlock/Irondale UGA challenging the same ordinance by the same parties would be prohibited under *res judicata*. In other words, if a party challenges an ordinance and

⁴⁴*Id.*

⁴⁵Co. Br. at 14-15. The Western Board did not hold that the doctrine of collateral estoppel could be applied to bar relitigation of the UGA ordinance which was being challenged in ICAN's 2009 Petition. *Supra*, this brief at 1.

⁴⁶AR 450.

argues for continued noncompliance on prior issues of noncompliance in a compliance hearing, the County argues that *res judicata* should prohibit bringing a separate challenge to the same ordinance in a new petition for review.⁴⁷ But careful consideration of this County argument should lead this Court to conclude that to prevent injustice, this application of *res judicata* is not available to a Growth Board.

To give some background, when an ordinance is adopted pursuant to a compliance schedule set by a Growth Board, the GMA statutorily provides for a compliance hearing process on prior issues of noncompliance pursuant to WAC 242-02-893 implementing RCW 36.70A.330. This provision establishes that the scope of a compliance hearing is to consider whether a county or city has come into compliance with the requirements of the GMA as remanded in the relevant final decision or order.

After a compliance hearing, the board shall determine whether a state agency, county or city is in compliance with the requirements of the act as remanded in the final decision or order and any compliance schedule established by the board.⁴⁸

Typically, a county or city found in noncompliance with the GMA will adopt a new ordinance amending the noncompliant Comprehensive Plan and/or Development Regulations. The new ordinance will be reviewed in a compliance hearing to see if the prior issues of noncompliance have been cured.⁴⁹

⁴⁷A ban to an action by *res judicata* is the same as the common law prohibition against claim splitting. *Landry v. Luscher*, 95 Wn. App. 779, 872-73, 976 P.2d 1274 (1999). The prohibition against claim splitting meets the four requirements of *res judicata*. *Id.*

⁴⁸WAC 242-02-893(1) (Op. Br. A 9) (emphasis supplied).

⁴⁹For example, this was the process that led to the 2009 CO.

But a new ordinance that amends the Comprehensive Plan and/or Development Regulations may create new issues of noncompliance - new amendments that do not meet the requirements of the GMA. Such new issues of noncompliance can be outside the scope of the compliance hearing and therefore not able to be reviewed at the compliance hearing.⁵⁰ A Growth Board is required to hear and determine new petitions challenging that amendments to Comprehensive Plans and/or Development Regulations do not comply with the GMA:

The growth management hearings boards shall hear and determine only those petitions alleging either:

(a) . . . a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter.⁵¹

(1) All requests for review to the growth management hearings board shall be initiated by filing a petition . . .

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter [shall be timely filed].

....
(4) The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision⁵²

When a new ordinance amends a Comprehensive Plan or Development Regulations it must meet the requirements of Chapter 36.70A RCW (“GMA”) which provides:

⁵⁰See WAC 242-02-893(1).

⁵¹Former RCW 36.70A.280(1). The word “boards” has now been changed to “board” to reflect new legislation. See *supra*, this brief at 1, Note 1.

⁵²RCW 36.70A.290.

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.⁵³

So, the GMA explicitly provides statutory authority for a party to participate in a compliance hearing to address prior issues of noncompliance sought to be resolved by the adoption of a new ordinance and provides independent unconditional statutory authority for a party to file a new petition to challenge that the new amendments in the new ordinance do not comply with the requirements of RCW 36.70A.130(1)(d) and other requirements of the GMA.

Therefore, if *res judicata* were applicable, using the County's argument presented above, a party would not be able to exercise its statutory right to challenge an ordinance, first for prior issues of noncompliance in a compliance hearing and, second, for new issues of noncompliance in a new hearing on the merits. This would be a manifest injustice.

The cases have held that '*res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings.' *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969). While application of the doctrine often serves a useful purpose in preventing relitigation of issues administratively determined, there may exist practical reasons not to apply it. *United States v. Stone & Downer Co.*, 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013 (1927). When traditional concepts of *res judicata* do not work well, they should be relaxed or qualified to prevent injustice. 2 Davis, *Administrative Law* § 18.03 (1958). As the Ninth Circuit Court of Appeals has noted, quoting Professor Davis, 'the cases add up to the sound proposition that administrative decisions are sometimes *res judicata* and sometimes not.' *Fibreboard Paper Products Corp. v. East Bay Union*, 344 F.2d 300, 308 (9th Cir. 1965).⁵⁴

⁵³RCW 36.70A.130(1)(d).

⁵⁴*Courll v. Weinberger*, 393 F.Supp. 1033, 1039 (E.D.Cal. 1975)

Because WAC 242-02-893 limits a compliance hearing to consideration only of “compliance with the requirements of the act as remanded in the final decision,”⁵⁵ and the GMA statutorily allows a new petition on the same ordinance to consider all issues of noncompliance, this statutorily allowed claim splitting should be found to prevent the use of *res judicata* by a Growth Board.

The Western Board cites to *Stevedoring Services v. Eggert* (“*Stevedoring*”), 129 Wn.2d 17, 40, 914 P.2d 737 (1996) for consideration of the “application of the equitable doctrines by a court based on prior administrative findings.”⁵⁶ While this case does not address application of *res judicata* or collateral estoppel by an administrative agency based on the preclusive effect of a prior decision by the same agency (as is the case before this Court), still the case may be instructive. The Western Board quotes from *Stevedoring* at 40:⁵⁷

⁵⁵WAC 242-02-893 (emphasis supplied). Arguably, the language in RCW 36.70A.330(2) would allow any issues of non-compliance for a particular ordinance to be heard at a compliance hearing. But the Growth Boards implemented WAC 242-02-893 in 1998 to document the established practice to limit compliance hearings to review only remand issues. There are several practical reasons for this interpretation. First, RCW 36.70A.280(1)(a) and -.290 provide for the same parties or new parties to bring new petitions on any amendment to a Comprehensive Plan or Development Regulations. A Growth Board is directed to consolidate all new petitions when appropriate. RCW 36.70A.290(5). A Growth Board has 180 days from the receipt of the last petition to issue its final order giving it the necessary time to review new issues. RCW 36.70A.300(2)(a). A compliance hearing has a higher priority for resolution than has a new petition. RCW 36.70A.330(2). Because WAC 242-02-893 limits compliance hearings to issues that the Board previously reviewed and previously found noncompliant, the review can be more expeditious consistent with RCW 36.70A.330(2). A Board may hold a single hearing for compliance and for a new petition. See e.g. the 2005 FDO (Op. Br. A 148) and the 2008 FDO (Op. Br. A 198). However, in the instant case (No. 09-2-0012) where the Western Board refused Petitioner’s request to hold a combined hearing, the Western Board should not be allowed to punish Petitioner with *res judicata* just because the Western Board chose to hold two hearings on the same ordinance.

⁵⁶AR 451.

⁵⁷Citations omitted by the Western Board.

Res judicata applies in the administrative setting only where the administrative agency “resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” In Washington, other considerations are also relevant when the prior adjudication took place in an administrative setting including “(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations.”

A careful reading of the cases cited in *Stevedoring* clarifies that *res judicata* and collateral estoppel only apply in the administrative setting with regard to factual findings (“agency resolved disputed issues of fact”⁵⁸) and not to interpretations of or conclusions of law.

When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

In the present case, the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

Accordingly, in light of the above, we affirm the Court of Claims in its interpretation of the scope of the disputes clause, and we reverse as to its failure to give finality, in the suit for delay damages and breach of contract, to factual findings properly made by the Board.⁵⁹

Therefore, if *res judicata* and collateral estoppel were to apply to give preclusive effect to a prior Growth Board decision, the only portion of the prior Growth Board decision to be given preclusive effect would be its

⁵⁸*Stevedoring* at 40 (punctuation omitted).

⁵⁹*United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966).

findings regarding disputed facts.⁶⁰ The findings of fact protected from relitigation are only those “which actually have been decided in the prior proceeding as reflected by what the prior order actually said.”⁶¹ Additional factual development would be allowed if it was relevant to other legal issues not allowed to be considered in reaching the prior order.⁶²

The “policy consideration” used in determining whether *res judicata* or collateral estoppel should give preclusive effect to a prior administrative decision demand that the doctrines not be applied “so rigidly as to defeat the ends of justice, or to work an injustice.”⁶³ As previously argued, application of the doctrines by the Growth Board would result in a manifest injustice.⁶⁴

C. **If This Court Finds A Growth Board Has Authority To Apply Res Judicata, Then This Court Should Find The Western Board Erroneously Applied The Doctrine In The 2009 MO**

If this Court finds a Growth Board has authority to apply *res judicata*, which it should not, then this Court should find the Western Board erroneously applied the doctrine in the 2009 MO.

The County states:

⁶⁰See *Reninger v. State Dept. Of Corrections*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998) (agency “members sit as factfinders, not as determiners of the law. There are no more or less competent than a jury to do so.”) The Co. Br. at 13 states that in *Reninger* “the Supreme Court held that issues and claims which had been determined [could not be relitigated in court].” In *Reninger* the only issues and claims which could not be relitigated were disputed factual issues. *Reninger* at 450-51. Further, the Co. Br. at 13 quotes from *Reninger* at 454 but puts “. . .” where the *Reninger* Court justified lack of relitigation of the disputed facts because the subsequent case was based on the “same bundle of operative facts.”

⁶¹*Texas Employers’ Ins. Ass’n v. Jackson*, 862 F.2d 491, 501 (5th Cir. 1988), cert. denied, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989).

⁶²*Id.*

⁶³*Reninger v. State Dept. Of Corrections*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998).

⁶⁴*Supra*, this brief at 12-14.

Nor is there any question that ICAN had ample opportunity to vigorously pursue its theories and claims against Jefferson County with respect to the Hadlock/Irondale UGA.⁶⁵

While the County provides no citation to support its statement, it is a fact that the Western Board generally followed WAC 242-02-893 in issuing the Compliance Orders in Case No. 07-2-0012c.⁶⁶ The Western Board limited the scope of review to the prior issues of noncompliance.⁶⁷ This met that the new issues of noncompliance raised in the Petition in Case No. 09-2-0012⁶⁸ were not allowed review at a Compliance Hearing in Case No. 07-2-0012c. Therefore with the dismissal of Case No. 09-2-0012 without a hearing, ICAN did not have “ample opportunity” but instead had **no** “opportunity to vigorously pursue its theories and claims against Jefferson County” that first arose when Ordinance No. 03-0323-09 was adopted. In the Compliance Hearing process, ICAN could only pursue the issues that were identical to the prior issues of noncompliance.⁶⁹

For example, in the 2009 CO⁷⁰ the Western Board found the brand new sewer capital facilities plan adopted by Ordinance No. 03-0323-09⁷¹ could not be challenged for noncompliance with RCW 36.70A.070(3)(e).⁷²

⁶⁵Co. Br. at 14. The Co. Br. at 18 states, “Surely those implied powers include prompt disposition of claims and issues which are being asserted for the third or fourth time by the same parties.” The Prehearing Order Issues only challenge new issues of noncompliance that arose with the adoption of Ordinance No. 03-0323-09 which is referred to in the Prehearing Order as the “Ordinance.” AR 338. Except for the minimal overlap with the prior issues of noncompliance, the Prehearing Order Issues are being asserted for the first time not the third or fourth time as the County argues.

⁶⁶2009 CO and 2010 CO.

⁶⁷Top half of AR 379.

⁶⁸AR 1-145.

⁶⁹Top half of AR 379.

⁷⁰*ICAN v. Jefferson County*, No. 07-2-0012c (CO, 8/12/09) (Op. Br. A 234-54)

⁷¹CP 382. The new sewer capital facilities plan was called the General Sewer Plan. *Id.* The new Petition in Case No. 09-2-0012 includes this new issue (and many others) that could not be heard in the 2009 CO. AR 339, Issue 6.

⁷²Op. Br. A 243.

While compliance with RCW 36.70A.070(3)(a), (c) and (d) are prior issues of noncompliance, compliance with RCW 36.70A.070(3)(e) is not.⁷³

As another example, in the 2010 CO⁷⁴ the only remaining issue of noncompliance was:

Until such time as the County clarifies which rural development standards apply within the UGA prior to sewer availability, it remains out of compliance with the requirements of RCW 36.70A.110 and RCW 36.70A.020(1) and (12).⁷⁵

Relying on the Western Board's rulings in the 2009 MO,⁷⁶ ICAN attempted to challenge in the compliance hearing for the 2010 CO "any aspect of Ordinance 09-1109-09's failure to comply with RCW 36.70A.110, RCW 36.70A.020(1), and RCW 36.70A.020(12)"⁷⁷ and attempted to challenge "that the County has violated two additional GMA provisions - RCW 36.70A.040(3) and RCW 36.70A.130(1)(d)."⁷⁸ The Western Board responded that the compliance hearing was strictly limited to the exact description of the prior issue of noncompliance and only to the listed GMA statutes as they apply to noncompliance with that exact description of that prior issue of noncompliance:

ICAN stated at oral argument that because the August 2009 CO found noncompliance with RCW 36.70A.110, during the compliance proceedings it is not limited to the issue of whether the County has clarified where its rural development standards apply. Instead, ICAN argues that because the County's obligation was to come into compliance with that GMA provision, it could argue that the County is now non-complaint with the cited RCW provisions in ways other than those considered in the recent CO. The Board disagrees with ICAN's position.

⁷³Top half of AR 379.

⁷⁴*ICAN v. Jefferson County*, No. 07-2-0012c (CO, 1/27/10).

⁷⁵Op. Br. A 265.

⁷⁶*ICAN v. Jefferson County*, No. 09-2-0012 (Order on Motions to Strike, 11/5/09)

⁷⁷Op. Br. A 265.

⁷⁸Op. Br. A 266.

The August 2009 CO was clear as to the nature of the County's failure to comply with RCW 36.70A.110 and RCW 36.70A.020(1) and (12). The County's error was its failure to specify what development standards would apply in those areas of the Hadlock/Irondale UGA prior to sewer availability. Therefore, the scope of the Board's inquiry in this proceeding is whether Ordinance 09-1109-09 provided the needed clarification.

In addition, ICAN bases objections to compliance on allegations that the County has violated two additional GMA provisions - RCW 36.70A.040(3) and RCW 36.70A.130(1)(d). The August 12, 2009 CO did not find the County out of compliance with those sections of the GMA and, therefore, it is beyond the scope of this proceeding to challenge Ordinance 09-1109-09 on that basis and the Board will not address such a challenge.⁷⁹

This should be considered an admission by the Western Board that it now believes that Petitioners could not have had the issues identified in the Case No. 09-2-0012 Prehearing Order⁸⁰ heard in the compliance hearing associated with the 2009 CO. Not a single numbered issue in the said Prehearing Order is inside the scope of any of the five prior noncompliance issues identified in the 2009 CO.⁸¹

As pointed out in the Op. Br. at 34-38, each of the Prehearing Order Issues⁸² alleges non-compliance with a group of GMA statutes that are broader than the statutory provisions in any of the said prior issues of noncompliance.⁸³ As the Western Board correctly applies WAC 242-02-893 in the 2010 CO, the said prior noncompliance issues:

⁷⁹Op. Br. A 265-66.

⁸⁰AR 338-40.

⁸¹Compare the Prehearing Order Issues at AR 338-40 with the prior noncompliance issues on the top half of AR 379.

⁸²AR 338-40.

⁸³Top half of AR 379.

did not find the County out of compliance with those sections of the GMA and, therefore, it is beyond the scope [of the compliance proceeding] and the Board will not address such a challenge.⁸⁴

Supra, this brief at 20. Also as the Western Board finds in Op. Br. A 265-66, a Growth Board cannot address in a compliance hearing allegations of noncompliance with the same statutory provisions that are listed in a prior issue of noncompliance if the allegations address aspects of the new ordinance that are different from those clearly stated in the prior issue of noncompliance. None of the Prehearing Order Issues at AR 338-40 that challenge noncompliance with the same statutory provisions that are in any prior issue of noncompliance found on the top half of AR 379, limit the application of those same statutory provisions only to that aspect of the new ordinance that is identified in these prior issues of noncompliance.

In the challenged 2009 MO, the Western Board found that all of the Prehearing Order Issues at AR 338-40 were raised or could have been raised in the 2009 CO compliance hearing and that therefore *res judicata* applied to dismiss the ICAN Petition in Case No. 09-2-0012.⁸⁵ This Court should find the conclusion that all of the said Prehearing Order Issues were raised or could have been raised to be clearly erroneous and unsupported by substantial evidence and find the conclusion that using *res judicata* to dismiss the ICAN Petition in Case No. 09-2-0012 is also clearly erroneous.

Consistent with WAC 242-02-893, the only arguments able to be considered and the only arguments actually considered by the Western Board

⁸⁴Op. Br. A 266.

⁸⁵AR 463-68.

D. The Western Board Erred In Denying ICAN's Motion To Strike The County's Exhibits

In its Opening Brief, ICAN argued that the Western Board erred in denying ICAN's Motion to Strike the County's Exhibits. The County responds without citation:

[ICAN] sought to relitigate those same issues which had been determined in favor of Jefferson County in the recently issued Compliance Order.

. . . The Hearings Board agreed with the County that ICAN's 2009 Petition for Review was essentially asking the Board to relitigate the same issues and claims which the Board had only weeks before decided in favor of Jefferson County.⁹²

As discussed, *supra* at 5, ICAN wrote every Prehearing Order Issue so that ICAN could address issues of noncompliance broader in scope than any of the said prior issues of noncompliance that were to be addressed in the 2009 CO.

In arguing that the Western Board acted correctly in Case No. 09-2-0012 in denying ICAN's Motion to Strike, the County Brief at 27 states:

ICAN recognized that the issues raised in its 2009 Petition were essentially identical to the arguments raised in its April 27, 2009 Objections to Lifting Invalidity and its August 21, 2009 Request for Reconsideration in Case No. 07-2-0012c.

To the contrary, ICAN has always concluded that the said Prehearing Order Issues are broader in scope than the prior issues of noncompliance. *Supra*, this brief at 5. ICAN brought its Motion to Strike simply because the County sought to provide the Board with evidence (not in the County Index of the Record) without following the procedural requirements of WAC 242-02-540 which state:

⁹²Co. Br. at 8.

A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons.

ICAN was prejudiced by the County not filing a motion to add the additional evidence because ICAN fairly assumed that the Western Board would follow its rules and not allow the additional evidence without a County motion to which ICAN would have been able to respond and present evidence and argument. ICAN filed and served by email and mail its motion to strike on October 26, 2009. AR 422 and 444. The 2009 MO was not issued until November 5, 2009. The County had ample opportunity to submit the required motion to request acceptance of its additional evidence but as the Western Board states, “The County did not choose to respond to ICAN’s Motion.”⁹³ The Western Board accepted the County evidence erroneously calling it “argument”⁹⁴ and prejudiced ICAN by not giving ICAN the opportunity to respond to this new evidence.

IV. CONCLUSION

The Western Board should be found clearly erroneous when it dismissed the ICAN Petition for Review in Case No. 09-2-0012 in the 2009 MO. This Court should also find that *res judicata* and collateral estoppel are outside the statutory authority of a Growth Board because they are not powers granted by statute and they are not powers necessary for a Growth Board to exercise.

This Court should find *res judicata* cannot be used to dismiss a new petition challenging an ordinance based on the fact that there was a

⁹³AR 447.

⁹⁴*Id.*

compliance hearing on that ordinance addressing prior issues of noncompliance and based on the fact that the petitioner participated in that compliance hearing. At a minimum, this Court should find that when a party participates in a compliance hearing and files a new petition both on the same ordinance, the new petition may not be dismissed if it includes issues that are broader than the prior issues of noncompliance either because the description for a Prehearing Order Issue is broader than that in any of the prior issues of noncompliance or because the statutes claimed to be violated include additional statutes compared to those listed in the corresponding prior issue of noncompliance.

The Western Board should be found clearly erroneous in its application of *res judicata* to dismiss the petition in the 2009 MO. This Court should find the Western Board was clearly erroneous in analyzing Prehearing Order Issues instead of claims when it applied *res judicata*. The Western Board should be found clearly erroneous in its finding that all of the Prehearing Order Issues in Case No. 09-2-0012 were raised or could have been raised under WAC 242-02-893 in the Compliance Hearing for the 2009 CO. The Western Board should be found clearly erroneous when it found that issues that were not raised, litigated, and determined in the 2009 CO compliance hearing could have been raised in that proceeding. This Court should find that there is not substantial evidence that the subject matter or cause of action in Case No. 09-2-0012 is identical to that in the 2009 CO.

This Court should find that the failure of the Western Board to act consistent with WAC 242-02-540 (regarding ICAN's Motion to Strike) and WAC 242-02-893 (regarding the Western Board's determination that all

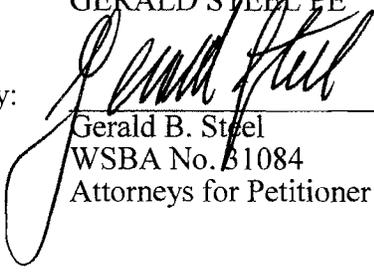
issues in the Prehearing Order were within the scope of the prior issues of noncompliance) is clearly erroneous when the Western Board did not express a rational basis for making determinations inconsistent with these rules. ICAN requests that this Court not consider collateral estoppel to be an alternative legal theory to justify dismissal of Case No. 09-2-0012. ICAN requests such other relief as the Court finds just and equitable including statutory fees and costs.

Dated this 1st day of November, 2010.

Respectfully submitted,

GERALD STEEL PE

By:



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CERTIFICATE OF SERVICE BY RONALD R. CARPENTER

I certify that on the 1st day of November, 2010, I caused a true and correct copy of this certificate and Petitioner's Reply Brief to be served on the following by first class mail:

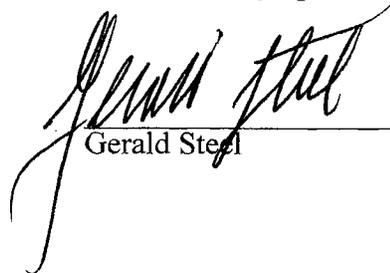
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