

COURT OF APPEALS
DIVISION II

11 JUN 14 PM 4:20

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

FILED
BY *JW*
CLERK

NO. 41581-0

DENNIS HADALLER,

Appellant (Petitioner).

vs.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD,

Respondent,

and

LEWIS COUNTY; EUGENE BUTLER,

Underlying Parties.

On Appeal from the Superior Court of Thurston County

LEWIS COUNTY'S RESPONSE BRIEF

PROSECUTING ATTORNEY
Law and Justice Center
345 W. Main St. 2nd Floor
Chehalis WA 98532
360-740-1240

By: *Glenn J. Carter*
GLENN J. CARTER, WSBA 33863

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Petitioner’s PFR and the Growth Board’s July 7, 2008 FDO.. 2

B. The County’s Compliance Actions and the Growth Board’s Order
on Compliance 6

C. Petitioner’s 2009 Petition for Review 9

STANDARD OF REVIEW..... 13

ARGUMENT..... 14

A. The Growth Board Lacked Jurisdiction to Consider the Petition ... 14

B. The Supreme Court Has Upheld the Finality of an ARL
Designation where the Landowner Failed to Appeal..... 15

C. The Growth Board Intended Its July 7, 2008 Decision to
be Final 19

D. The Growth Board’s July 7, 2008 FDO was a Final Order for
Purposes of the GMA..... 21

E. The July 7, 2008 FDO was a Final Order for Purposes of the
APA..... 23

F. The Finality of the July 7, 2008 FDO Does Not Turn on the
Timing of Its Effect 27

G. In 2009, the County Did Not Exercise Its Discretion to Re-
Consider the 2007 Designation of Petitioner's Property..... 30

H. Petitioner Was Granted and Exercised His Right of Full
Participation in the Designation Process..... 32

I. The Growth Board Applied the Correct Standard in Granting
Respondents' Dispositive Motion 33

J. Petitioner's 2007 and 2009 Petitions Raised the Same Issues..... 34

K. Petitioner is Not Entitled to an Award of Attorney Fees..... 42

CONCLUSION 43

TABLE OF AUTHORITES

Washington Cases

Bock v. Board of Pilotage Commissioners, 91 Wn.2d 94, 99, 586 P.2d 1173, 1176 (1978).	26
City of Arlington v. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d at 791-92, quoting In re Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006)	34, 35
City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn.2d 38, 46, 959 P.2d 10901 (1998).....	13
Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Board, 159 Wn.App. 148, 154, 244 P.3d 1003 (2010)	13
Department of Ecology v. City of Kirkland, 84 Wn.2d 25, 523 P.2d 1181 (1974)	23, 24, 27, 28
King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 555, 14 P.3d 133 (2000).....	13
Lewis County v. Public Employment Relations Commission, 31 Wn.App. 853, 862, 644 P.2d 1231, 1236 (1982)	26
Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995)	34
Pacific Rock Environmental Enhancement Group v. Clark County, 92 Wn.App. 777, 782n1, 964 P.2d 1211, 1213n1 (1998).	26
Quadrant Corporation v. Growth Management Hearings Board, 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2009).....	13
Shoemaker v. City of Bremerton, 109 Wn.2d 504,507, 745 P.2d 858 (1987).....	35

Spokane County v. City of Spokane, 148 Wn.App. 120, 126, 197 P.3d 1228, 1231 (2009)	14, 32
Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board, 161 Wn.2d 415, 166 P.3d 1198 (2007)	29
Thurston County v. Cooper Point Ass'n, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002)	13
Torrance v. King County, 136 Wn.2d 783, 966 P.2d 891 (1998)	15, 17, 18

Federal Cases

Astoria Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991)	30
Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948)	25

I. INTRODUCTION

Respondent Lewis County submits this Response Brief in support of the January 29, 2010 Decision (Clerk's Papers ("CP"), at 174-181) of the Western Washington Growth Management Hearings Board ("Growth Board") dismissing petitioner's October 14, 2009 Petition for Review (CP 175). The 2009 Petition challenged Lewis County's designation of his property as agricultural land of long-term commercial significance ("ARL"), a designation made two years before in 2007 and upheld by the Growth Board in its July 7, 2008 Final Decision and Order in the consolidated cases of *Eugene Butler, et al. v. Lewis County, et al.*, Case No. 99-2-0027c, *Vince Panesko, et al. v. Lewis County, et al.*, Case No. 00-2-0031c, and *Dennis Hadaller, et al. v. Lewis County*, Case No. 08-2-0004c (hereinafter "FDO" or "July 7, 2008 FDO")(CP 067-156). Petitioner did not appeal the July 7, 2008 FDO and it became final. Accordingly, the Growth Board dismissed the 2009 Petition for Review, holding that it lacked jurisdiction to revisit the County's 2007 designation in the 2009 proceeding. (January 29, 2010 Order on Motion to Dismiss ("January 29, 2010 Order")(CP 009-016).)

II. STATEMENT OF THE CASE

A. The Petitioner's PFR and the Growth Board's July 7, 2008 FDO

Petitioner Dennis Hadaller is a landowner in Lewis County. (BR at 271, lines 14-15; January 29, 2010 Order, at 2, CP 010.) In November 2007, the Lewis County Board of County Commissioners ("BOCC") designated 43,485 acres as ARL. (Ordinance 1167, BR at 296-541; Resolution 07-306, BR at 542-743; January 29, 2010 Order, at 2, CP 010) Included in the designation were 313 acres of farmlands with "prime" soils, meaning soils classified by the federal government as "prime," owned by petitioner abutting US Highway 12 in eastern Lewis County. (July 7, 2008 Compliance Order and Final Decision and Order in consolidated cases of *Eugene Butler, et al. v. Lewis County, et al.*, Case No. 99-2-0027c, *Vince Panesko, et al. v. Lewis County, et al.*, Case No. 00-2-0031c, and *Dennis Hadaller, et al. v. Lewis County, et al.*, Case No. 08-2-0004c, at 53-57(hereinafter "FDO" or "July 7, 2008 FDO"), CP 119-123.)

Petitioner challenged the 2007 designation of his 313 acres in a petition for review filed with the Growth Board and assigned Case No. 08-2-0004c in early 2008. (*FDO*, at 2, CP 068; Testimony of Dennis Hadaller, dated October 2007, BR at 286.) He contended the County should not have designated his land as ARL. (*Id.*) The Growth Board consolidated petitioner Hadaller's petition for review with the petitions for review of intervenor Eugene Butler (Case No. 99-2-0027c) and Vince Panesko (Case No. 00-2-0031c) who, unlike Hadaller, challenged the County's designations of ARL as under-inclusive, contending much more land should have been considered for designation and designated as ARL. *Eugene Butler, et al. v. Lewis County, et al.*, Case No. 99-2-0027c, *Vince Panesko, et al. v. Lewis County, et al.*, Case No. 00-2-0031c, and *Dennis Hadaller, et al. v. Lewis County, et al.*, Case No. 08-2-0004c (*FDO*, CP 067-156).

Petitioner Hadaller contended the designation of his property and the methodology and criteria used in that designation violated the GMA. (*FDO*, at 52-57, CP 118-123.) Specifically, he challenged the County's definition of agricultural resource land of "long term commercial significance" and the County's selection and application of the designation criteria. (*Id.*) Citing a Washington

Supreme Court decision, he contended the term “long term commercial significance” required the County to consider whether a “competent commercial farmer” could profitably farm the land. (*Id.* at 53-55, CP 119-121.) He contended that, notwithstanding the presence of soils classified as “prime,” the County’s hydrogeological context makes for poor agricultural soils, as demonstrated by the history of his property which allegedly had “never produced any profitable agricultural crop.” (*Id.* at 53, CP 119.) He contended the soil classification system used by the County in the designation process, specifically using typological soil classifications, failed to recognize that a soil can be “prime” agricultural soil in one location but marginal in another context. (*Id.*) He argued that the County incorrectly assumed that “if a piece of land has water and certain soil types, it will be productive and commercially viable farmland.” (*Id.* at 54, CP 120.) He testified that, notwithstanding the presence of soils classified as “prime,” “[t]his property has NEVER produced any profitable agricultural crop,” is close to smaller five-acre parcels, and should be zoned for multiple uses. (*Id.*, emphasis in original.) He insisted that using his property for agriculture was not “practical or profitable.” (*Id.*) He argued that his land was well-suited for more intensive

development, that public utilities would not be “hard or expensive to install,” that the County gave “undue weight” to the current tax status of the property and public services, and that the property’s value and alternative uses were not properly considered nor was its location abutting a state highway. (*Id.*) Finally, he argued that the designation devalued the property so much as to render it a “taking,” that the lingering value of the property exceeded the County’s threshold value for agricultural land, and that ARL land should be used by commercial farmers, not “hobby” farmers. (*Id.*)

In a Final Decision and Order entered on July 7, 2008, the Growth Board considered all of petitioner’s arguments, but approved the County’s selection and application of the ARL designation criteria and, specifically, the designation of petitioner’s property. (*FDO*, at 52-57, CP 118-123.) The Growth Board found that the County did not use soil type as a “single, determinative criterion for designation of land as ARL land” and that “it is the economic concerns of the agricultural industry not an individual farmer’s economic needs that are to be considered.” (*FDO*, at 56, CP 122.) The Growth Board explained that “[w]hether a competent commercial farmer would go broke trying to farm the land is not the test the Legislature or the Courts require the County to apply when

designat[ing] agricultural lands of long term commercial significance.” (*Id.* at 57, CP 123) Petitioner did not appeal the Growth Board’s July 7, 2008 FDO and it became final. (See RCW 36.70A.300(5).)

B. The County’s Compliance Actions and the Growth Board’s Order on Compliance.

Although the Growth Board rejected all of petitioner’s claims in Case No. 08-2-0004c, it accepted the arguments of petitioners Butler and Panesko in Cases 99-2-0027c and 00-2-0031c, and found the County’s consideration of lands for designation as ARL under-inclusive. (*FDO*, at 78-80, CP 144-46.) With respect to those petitions, the Growth Board ruled the County’s effort deficient to the extent that Lewis County had failed to consider for designation as ARL *other, additional* lands, including: (1) farmlands with “prime” soils within the so-called “I-5 Corridor;” (2) lands dedicated to non-soil dependent, agricultural uses, such as chicken farms; (3) lands with prime soils but in forest use (“FRL”) that could be converted at low cost to be used for agriculture; and (4) lands on soils that are not “prime,” but that could be deemed “prime” if irrigated, drained, or protected from flooding. (*FDO*, at 2-5, 29-52, and 76-80, CP 068-071, CP 095-

118, and CP 142-45; December 29, 2009 Final Compliance Order and Order Rescinding Invalidity (“December 29, 2009 Order”), at 2-3, CP 305-06.) Based on the County’s failure to consider these other, additional lands for designation as ARL, the Growth Board remanded *Cases 99-2-0027c and 00-2-0031c* with “Compliance Orders” and continued the existing invalidity. (*FDO*, at 2-5, CP 068-071.) By contrast, the Growth Board did *not* remand for compliance any of the issues raised in petitioner Hadaller’s petition in *Case No. 08-2-004c*, labeling its decision in that case as a “Final Decision and Order.” (*FDO*, at 1-3, CP 067-69.)

On remand for compliance with respect to the issues raised in the petitions in Case Nos. 99-2-0027c and 00-2-0031c, the County specifically addressed the deficiencies cited by the Growth Board, considered other lands, and designated as ARL approximately 50,000 additional acres, consisting of qualifying agricultural lands in the I-5 Corridor, lands dedicated to non-soil-dependent agricultural uses, certain lands designated as FRL, and other lands incorporating soils deemed prime if irrigated, drained or protected from flooding. (December 29, 2009 Order, at 2-3 and 16-19, CP 305-06, 319-322.)

During the compliance proceeding to address the issues raised in Butler's and Panesko's petitions for review, Hadaller made presentations to the County's Planning Commission and Board of County Commissioners requesting they re-visit the 2007 designation of his 313 acres of prime farmlands outside of the I-5 Corridor as ARL. (BR 1087-1151; December 29, 2010 Order, at 18-19, CP 321-22; January 29, 2010 Order, at 2, CP 010.) Notwithstanding the presentations, neither the Planning Commission nor the BOCC re-considered the 2007 designation of petitioner's property or the 2007 designation of any other lands as ARL. (December 29, 2009 Final Compliance Order and Order Rescinding Invalidity, at 2-3 and 16-19, CP 305-06 and CP 319-322; see January 27, 2010 Decision, at 4-5, CP 012-13.) Petitioner Hadaller's property did not fall into any of the four categories of lands the Growth Board directed the County to consider for ARL designation in the compliance proceeding. First, his lands were located between Salkum and Ethel in eastern Lewis County, not in the "I-5 Corridor." (Petition for Review, CP 175-81; Testimony of Dennis Hadaller, BR at 744-746.) Second, his land consisted primarily of "prime" soils, not soils deemed prime only if drained, irrigated or protected. (*Id.*) Third, his lands were not used

for qualifying non-soil dependent, agricultural uses. (*Id.*) Fourth, his designated lands were not FRL. (*Id.*) Accordingly, the County made no recommendation for action to be taken regarding petitioner's land. (January 27, 2010 Decision, at 4-5, CP 012-13) Similarly, the Board of County Commissioners did not reconsider the designation of petitioner's 313 acres as ARL. (*Id.*; See also Ordinance 1207, BR 762-899; Resolution 09-251, BR 900-1044.) Nonetheless, after the County designated other, additional lands as ARL, petitioner filed a new petition with the Growth Board, again challenging the designation of his property as ARL.

C. Petitioner's 2009 Petition for Review.

In his October 9, 2009 petition for review, petitioner stated that he sought (1) "the removal of Lewis County's ARL designation on his 313 acres located between Ethel and Salkum," (2) the incorporation of a "correction clause" in LCC 17.30.600 "to enable site-specific correction to be made designated lands after best efforts at farming it have resulted in no commercially viable agricultural product," and (3) "until Lewis County develops a procedure to properly designate lands using the complete criteria of RCW 36.70A.030(2), (10) and 36.70A.170(1), the County should

remain in noncompliance.” (2009 Petition for Review, CP 174 -181, at 7 or CP 180.)

The County moved to dismiss the new petition, invoking, *inter alia*, the doctrines of *res judicata* (“claim preclusion”) and collateral estoppel (“issue preclusion”). (January 27, 2010 Order on Lewis County’s Motion to Dismiss, CP 241 – 47, at CP 241- 42.) Because the County’s action concerned only compliance with the Board’s July 7, 2008 direction in Cases 99-2-0027c and 00-2-0031c and did not address the designation of petitioner’s land as ARL, the County treated petitioner Hadaller’s new petition as an attempt to set aside the 2007 designation of his land as ARL. (*Id.*)

The Growth Board granted the motion to dismiss, but not on the limited ground of *res judicata* or collateral estoppel. (January 27, 2010 Order on Lewis County’s Motion to Dismiss, CP 244 - 46.) Rather, the Board treated the petition as an attempt to re-visit the County’s 2007 designation of petitioner’s lands as ARL, which designation had been upheld in the Growth Board’s July 7, 2008 FDO and had not been appealed. (*Id.*) The Board held the new petition was an “untimely” challenge to the 2007 designation over which it had no jurisdiction. (*Id.*)

Although the July 7, 2008 FDO had found the County non-compliant in failing to consider *additional* lands for designation as ARL, namely lands that (1) are made up of soils that are prime only if irrigated, drained or protected, (2) lands designated as FRL, (3) lands with non-soil-dependent agricultural uses, and (4) lands within the “Interstate 5 Corridor,” the Growth Board ruled that the FDO had not invalidated, reversed or modified the 2007 ARL designations or the methodologies and criteria used to make those designations of prime farmlands outside of the I-5 Corridor. (See *FDO* at 47-48 and 78-80, CP 113 – 114 and 144 - 46.) Further, because petitioner Hadaller’s land did not fit within any of the categories of additional lands to be considered for designation in the compliance process on remand, the Growth Board ruled both that the Board of County Commissioners took no action as to petitioner’s land on remand and that the petition was an untimely attempt to challenge the 2007 designation upheld in Case No. 08-2-0004c:

While the Board found that the ARL designation of the Hadaller property was compliant with the GMA, the Board concluded that Lewis County still had violated the GMA in other regards...

As the prior history makes clear, Lewis County designated Petitioner's property as ARL in 2007 and that designation was upheld by the Board in 2008. As the County points out:

[I]n the compliance process, the County did not consider for ARL designation or de-designation lands already designated as ARL. Petitioner's land had already been designated ARL.

Petitioner does not dispute this. Instead, he maintains that his appeal should be allowed to proceed because the County had a different record before it in 2007 than what it had in 2009.

The Board recognizes Petitioner's challenge is to legislative actions taken in August 2009. However, as noted above, the Hadaller property was designated ARL in 2007. When a timely appeal was filed in Case No. 08-2-004c, the present appeal, effectively challenging a decision that was made in 2007, is not timely.

(January 27, 2010 Order on Motion to Dismiss, CP 243, lines 4 – 6; CP 244, Lines 11 – 19; CP 245, lines 21 – 25.) The Board also rejected petitioner's request to continue the order of invalidity entered in prior proceedings and maintained in the July 7, 2008 FDO to prevent interference with attainment of Goal 8 under the Management Act ("GMA") regarding the preservation and conservation of agricultural resource lands in Lewis County. (Petition for Review, dated October 13, 2009, CP 177, 179 and 181.) Petitioner appealed to the Thurston County Superior Court

which, by Judgment entered November 30, 2010, affirmed the decision of the Growth Board. (Judgment, CP 392 – 406.) Petitioner now appeals to this Court.

III. STANDARD OF REVIEW

The Court of Appeals reviews a decision of the Growth Board pursuant to the Administrative Procedures Act, RCW 34.05.010 et. seq. (“APA”). (*Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2009); *Thurston County v. Cooper Point Ass’n*, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002).) The APA requires the court to base its review on the record made before the Growth Board. (*Davidson Serles & Associates v. Central Puget Sound Growth Management Hearings Board*, 159 Wn.App. 148, 154, 244 P.3d 1003 (2010)). The court reviews the Growth Board’s legal conclusions *de novo*, giving substantial weight to the Board’s interpretation of the statute it administers. (*City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 10901 (1998); *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000).) The “burden of establishing the invalidity of agency action is on the party asserting invalidity.” (RCW 34.05.570(1)(a); *Quadrant*

Corporation v. Growth Management Hearings Board, 154 Wn.2d at 233, 110 P.3d at 1137.)

IV. ARGUMENT

A. The Growth Board Lacked Jurisdiction to Consider the Petition.

The Growth Board lacks jurisdiction to re-visit a Board order once it becomes final. *Spokane County v. City of Spokane*, 148 Wn.App. 120, 126, 197 P.3d 1228, 1231 (2009). The Growth Board reviewed and found compliant the 2007 designation of petitioner's property as ARL in its July 7, 2008 Final Order and Decision in Case No. 08-2-0004c, petitioner did not appeal, and the decision became final. (See RCW 36.70A.300(5).)

The Board properly dismissed petitioner's subsequent petition in 2009 as an untimely challenge to the 2007 designation. In 2009, the County did not designate petitioner's property. Rather, the County designated approximately 50,000 acres of other, additional lands that had not been considered for designation in 2007. Hence, when confronted with petitioner's 2009 petition challenging the criteria used by the BOCC to designate as ARL his lands in 2007, the Board properly deemed the challenge to be

directed to the earlier 2007 designation, to be “untimely,” and to be beyond its jurisdiction.

B. The Supreme Court Has Upheld the Finality of an ARL Designation Where the Landowner Failed to Appeal.

The Supreme Court has previously upheld the finality of an ARL designation where the landowner failed to appeal. In *Torrance v. King County*, 136 Wn.2d 783, 966 P.2d 891 (1998), certain property in King County was zoned agricultural in 1941. In the 1960s, Torrance acquired the property with the hope of developing it for commercial or industrial use. In 1994, pursuant to the GMA, King County adopted a comprehensive plan designating the property as ARL. Torrance did not appeal the ARL designation.

In 1995, King County enacted an ordinance adopting zoning, zoning maps, and development conditions to implement the 1994 comprehensive plan. Although still designated ARL, Torrance’s property received “P-suffix” zoning conditions, allowing Torrance’s use of the property for retail nursery operations, garden store, food gourmet stores, specialty food stores, university agricultural programs, restaurants, microbrewery and winery. Torrance did not challenge the application of the “P-suffix” zoning conditions to his property, but alleged he had no reason to do so because the

permitted uses satisfied his needs. Nevertheless, other parties challenged the “P-suffix conditions” to the zoning in an appeal to the Growth Board, which found them not to be in compliance with the GMA. In December 1995 and in response to the Board decision, King County removed the “P-suffix” conditions from the 1994 comprehensive plan and from the Torrance property, which remained ARL. Torrance did not appeal King County’s action.

In 1996 Torrance requested King County rezone his property to remove the ARL designation. King County denied Torrance’s request. Torrance petitioned the Growth Board to review the county’s rejection. The Board determined: (1) it lacked jurisdiction to consider Torrance’s challenge to King County’s agricultural designation of the property because more than 60 days had passed since the County’s 1994 and 1995 GMA actions, and (2) King County was in compliance with the GMA because the County’s decision not to adopt Torrance’s proposed amendments was not unlawful under RCW 36.70A.130. Torrance did not appeal the Growth Board’s decision.

Before the Growth Board issued the ruling on his challenge to the rezone decision, Torrance filed a lawsuit in superior court challenging King County's rejection of his rezone under LUPA and section 1983. He later amended the complaint to include a request for a constitutional writ of certiorari. The superior court granted the writ and King County filed a petition for discretionary appeal with the Washington Supreme Court. The Court granted the request for discretionary review and reversed the superior court. The Court stated that "[t]he [Growth] Board determined it did not have jurisdiction to decide whether the 1994 or 1995 decisions complied with the GMA, but found King County had the authority not to adopt Torrance's proposed amendments." (*Id.* at 792, 966 P.2d at 896.) The Court ruled that Torrance's "decision to forego an available appeal and to instead seek a remedy by means of a constitutional writ of certiorari is fatal to Torrance's case":

Judicial review of a GMHB decision under RCW 36.70.300(5) and RCW 34.05.570 provides an aggrieved party the opportunity for adequate and complete relief from a GMHB decision. In this case, an appeal of the Board's decision to superior court would have provided Torrance with an opportunity to pursue the remedy he desired. Torrance argued the decision not to rezone the property was arbitrary, capricious and illegal because, under the GMA, the property was not agricultural. Under the statutory appeals process,

a superior court could provide a remedy if Torrance were correct. Torrance failed to avail himself of this process...

Torrance's excuse that an appeal was not necessary or required because the Board's decision was not on the merits is incorrect. The only statutory requirement for appeal is that the Board's decision be final, which the decision here was.

(Id. at 793, 966 P.2d at 896.) (Emphasis added.)

This case is not materially different. In its July 7, 2008 FDO, the Growth Board specifically reviewed and affirmed the County's 2007 designation of petitioner's property as ARL. (*FDO*, CP 118 - 123, at 52-57) Although an appeal to the superior court was available to him, petitioner did not appeal and the Growth Board's July 7, 2008 FDO became final as to the ARL designation of his property. (See RCW 36.70A.300(5).) After the decision became final, petitioner challenged the 2007 designation as part of his appeal from the County's 2009 compliance with the issues remanded in Cases 99-2-0027c and 00-2-0031c. (Petition for Review, CP 174 – 181, BR 1-188.) As in *Torrance*, the Growth Board properly ruled that it lacked jurisdiction to consider petitioner's belated challenge. (January 27, 2010 Order on Lewis County's Motion to Dismiss, CP 244 – 46.) The Board's decision

dismissing the petitioner's claim as untimely and beyond its jurisdiction should be upheld.

C. The Growth Board Intended Its July 7, 2008 Decision to be Final.

Petitioner argues that the Growth Board did not *intend* for its July 7, 2008 FDO upholding the designation of petitioner's land as ARL to be "final." The Board's decision contradicts petitioner's argument. By contrast to its identification of the decisions in Cases 99-2-0027c and 00-2-0031c, the caption to the July 7, 2008 FDO specifically identifies the Board's decision in Case 08-2-0004c as a "Final Decision and Order." (July 7, 2008 FDO, at 1, CP 067.) Further, at pages 2 and 3 of the FDO, the Board states:

The issues of the parties were founded primarily in the GMA's mandate to conserve agricultural lands of long-term commercial significance and to maintain and enhance the agricultural industry. Additional issues were raised pertaining to public participation and private property rights. Because of the common thread between all three of these matters, the Board coordinated the proceedings, hearings, and issues a single decision ***which represents its Final Decision and Order in regards to case No. 08-2-0004c*** and its Compliance Order in regards to Case Nos. 99-2-0027c and 00-2-0031c. (Emphasis added.)

(July 7, 2008 FDO, at 2- 3, CP 068 – 69.) Moreover, at the end of the July 7, 2008 FDO, the Board states:

Pursuant to RCW 36.70A.300 this is a final order of the Board.

....

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as [provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in Chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.... (Emphasis in original.)

(July 7, 2008 FDO, at 80 – 81, CP 146 - 47.) Plainly, the Board intended the 2008 FDO to be a final order.¹

¹ Petitioner notes that the Growth Board could have lifted the invalidity as to the designation of the 45,000 acres designated in 2007 and that the Board's failure to do so demonstrates that it did not intend for its decision to be final. However, even if the Board was authorized by the GMA to partially lift the invalidity, it was not required to do so. RCW 36.70A.302(7)(b), the statute governing a finding of partial invalidity, simply says the Board "may require periodic reports to the board on the progress the jurisdiction is making towards compliance" if it finds the entity is partially compliant. (Emphasis added.) Thus, a determination by the Board not to partially raise a declaration of invalidity does not mean the Board deemed the County's designation of petitioner's property to be anything but final.

D. The Growth Board's July 7, 2008 FDO was a Final Order for Purposes of the GMA.

Regardless of the Growth Board's stated intention, petitioner contends the FDO was not a "final" decision under Washington administrative law. The GMA requires the Growth Board to issue a "final order" within 180 days of receipt of the petition for review. RCW 36.70A.300(1) – (2). It states that "[i]n the final order, the board shall either: (a) Find the ... county... is in compliance with the requirements of this chapter...; or (b) Find that the ...county... is not in compliance with the requirements of this chapter... in which case the board shall remand the matter to the...county...." RCW 36.70A.300(3)(a) – (b). In turn, RCW 36.70A.040 states the county, among other things, "shall designate critical areas, agricultural lands, forest lands, and mineral resource lands...." RCW 36.70A.040(3). Thus, in Board Case No. 08-2-0004c, the case initiated by Hadaller's petition for review, the GMA required the Board to issue an order addressing whether the County's designation of petitioner's property as ARL was in compliance with the requirements of the chapter. See RCW 36.70A.040(3). This is precisely what the Board's July 7, 2008 FDO did. The July 7, 2008 FDO is the final order as to the petition for review filed in Case No. 08-2-0004c.

Nevertheless, petitioner contends the July 7, 2008 FDO was not “final” because Ordinance 1197 was found non-compliant as to the designation of other, additional lands. He argues that the subsequent compliance efforts of the County that resulted in a revised ordinance and the December 29, 2009 finding of compliance meant that he was entitled to a new opportunity to challenge the designation of his property as ARL. Petitioner’s contention is without merit.

Petitioner ignores the Board’s consolidation of his petition for review, Case No. 08-2-0004c, challenging the designation of his property as ARL, with the other petitions for review filed by other individuals in Cases Nos. 99-2-0027c and 00-2-0031c, challenging the failure of the county to consider additional lands for designation as ARL. By virtue of that consolidation, the Board’s July 7, 2008 FDO necessarily addressed multiple elements of the County’s action, finding some in compliance, such as the designation of petitioner Hadaller’s property, and finding others not in compliance, such as the failure to consider certain other properties for designation. With respect to petitioner Hadaller’s petition for review in Case No. 08-2-0004c, the Board issued a “Final Decision and Order” affirming the County’s action. (*FDO*, at 1-3, CP 067 – 69.)

It is only with respect to the issues raised in the petitions for review in Case Nos. 99-2-0027c and 00-2-0031c that the Board found non-compliance and that the Board issued “Compliance Orders.” (*FDO*, at 1-3, CP 067 - 69; December 29, 2009 *FDO*, at 18, CP 321.) Thus, had petitioner Hadaller’s petition been the only petition for review filed, there would have been no finding of non-compliance and no remand. Petitioner cites no authority for the proposition that the order issued in Case No. 08-2-0004c is not “final” simply because of the fortuity that other petitions were filed raising separate issues as to which other issues the Board made findings of non-compliance. In petitioner’s case, the Board issued a final order finding the County’s designation of petitioner’s property as ARL compliant with RCW 36.70A.040. That is all that the GMA required the Board to do to render a “final order” for purposes of appeal. RCW 36.70A.300.

E. The July 7, 2008 FDO was a Final Order for Purposes of the APA.

Petitioner also contests the finality of the July 7, 2008 FDO in Case No. 08-2-0004c under the Administrative Procedure Act, RCW 34.05.010 et seq. (“APA”). The Washington appellate courts first considered the definition of a “final decision” for purposes of

judicial review in *Department of Ecology v. City of Kirkland*, 84 Wn.2d 25, 523 P.2d 1181 (1974). In that case, the City of Kirkland issued a permit authorizing construction of a moorage facility on Lake Washington. Since the facility substantially increased the surface area covered by structures, the Department of Ecology and the Attorney General sought review of the matter by the Shorelines Hearings Board under RCW 90.58.180, which statutory provision references the APA. After a review of the record in the matter, three members of the Hearings Board voted to uphold the issuance of the permit and three voted to modify the permit. The chairman of the Board then issued a statement declaring that the Board was unable to render any decision or to enter any orders since four members could not agree as required by RCW 90.58.170. The Department of Ecology and the Attorney General petitioned the superior court for review of the “decision” embodied in the chairman’s statement. On its own motion, the superior court ruled it had no jurisdiction since no “final” order had been entered by the Board. The Department of Ecology and the Attorney General appealed for issuance of a writ of mandamus, which the appellate court granted, directing the trial court to assume jurisdiction and

review the proceedings. The superior court judge then filed a petition for review with the Supreme Court, which was granted.

The Supreme Court ruled that “whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action”:

The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

(*Id.* at 29 and 30, 523 P.2d at 1183 and 1183-84.) The Court determined that administrative orders are final for purposes of review when “they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.” (*Id.*, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948).) Applying these standards to the case before it, the Supreme Court concluded that the “tie” vote of the Shorelines

Board “resulted in the decision of the City of Kirkland standing affirmed” and “in effect determined the action or proceeding and fixed a legal relationship between the parties, thus rendering the decision ‘ripe for review’ and fully qualifying it as a ‘final decision’ under [then] RCW 34.04.130.” (*Id.* at 30, 523 P.2d at 1184.)

Subsequent decisions have applied the Supreme Court’s analysis, holding that “an administrative order is reviewable under the APA when it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.” (*Bock v. Board of Pilotage Commissioners*, 91 Wn.2d 94, 99, 586 P.2d 1173, 1176 (1978). *See also, e.g., Lewis County v. Public Employment Relations Commission*, 31 Wn.App. 853, 862, 644 P.2d 1231, 1236 (1982); *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn.App. 777, 782n1, 964 P.2d 1211, 1213n1 (1998).) Applying this holding to the Growth Board’s July 7, 2008 FDO, the Board “denied” or “threatened” to “deny” petitioner Hadaller the “right” to use his property for purposes inconsistent with the ARL designation or, alternatively, “fixed” his property as ARL for purposes of the GMA, thereby rendering it a “final decision” for purposes of triggering judicial review under the APA.

F. The Finality of the July 7, 2008 FDO Does Not Turn on the Timing of Its Effect.

Petitioner contends that, even if the July 7, 2008 FDO was otherwise final, it did not trigger review because it had no immediate *effect* on the zoning of his property. He points out that the FDO did not implement an immediate change in zoning because the invalidity remained in effect to protect the status of lands still to be considered for designation. However, whether a decision is final for purposes of triggering judicial review does not turn on whether it has or will have immediate effect. Rather, as stated in *Department of Ecology v. City of Kirkland, supra*, the relevant question is whether the decision places petitioner or his rights in jeopardy. Using the language of that case, was petitioner Hadaller in “need of [judicial] review to protect from the irreparable injury threatened ... by [the Growth Board’s] administrative rulings [upholding the classification of his land as ARL under the GMA] which [rulings] attach legal consequences to action taken [by petitioner] in advance of other hearings and adjudications that may follow, [such as hearings on proposals by petitioner to develop the property]...” (*Department of Ecology v. City of Kirkland, supra*, 84 Wn.2d at 30, 523 P.2d at 1183-84.) In the absence of a request for judicial review, the Board’s July 7, 2008 FDO in Case No. 08-2-

0004c threatened his plans to develop the property for industrial or commercial purposes. The Board's decision satisfied the elements of "final" agency action under the test applied by the Washington courts. (See *Department of Ecology v. City of Kirkland*, *supra*, 84 Wn.2d at 30, 523 P.2d at 1183-84.) To avoid those threatened consequences, petitioner had no alternative but to seek judicial review. He did not and the decision became final.

Petitioner makes numerous variants of the same argument. He argues that the 2007 ordinance and resolution incorporating the designation of his land as ARL were "void" because the Board continued the pending invalidity until the County completed the designation of ARL lands. However, the Growth Board neither declared the ordinance and resolution "void," nor the designations implemented by those measures. To the contrary, the Board upheld all of the ARL designations implemented in Ordinance 1197 and Resolution 07-306. The Board simply ruled that additional lands needed to be considered. The Board continued the invalidity solely to preserve the status of the other, additional agricultural lands it directed the County to consider for designation on remand.

(July 7, 2008 FDO, at 70 lines 1-5, CP 136.).²

GMA actions reviewed by the Growth Boards are complex, involving multiple elements. While the Growth Board may find much of an ordinance or regulation to be compliant, it may find specific elements to be non-compliant, and remand the matter for further action as to those limited elements. For example, local governments are required by the GMA to protect “critical areas,” meaning wetlands, fish and wildlife habitat conservation areas, geologically hazardous areas, frequently flooded areas, and areas with a critical recharging effect on aquifers used for potable water. (RCW 36.70A.030(5).) The Board’s review of such complex regulatory efforts frequently includes finding compliance with the GMA on some elements and remanding for compliance on other elements. (See, e.g., *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007).) A finding of non-compliance

² Similarly, petitioner argues that no presumption of validity attached to the 2007 designation of his property. This was true until the Board considered the designation in its July 7, 2008 FDO and specifically affirmed it. Once petitioner permitted the time to appeal that decision to expire, the decision became final and the presumption of validity as to that designation became irrelevant.

as to one element does not negate the finality of the Board's decision affirming the other elements, nor does it permit a litigant to re-litigate the elements previously affirmed. This conclusion is mandated by the obvious and sound principle that a party who has invoked the resources of the agency and litigated an issue to conclusion is not entitled to re-litigate that issue both because of the resulting waste of agency and litigant resources and because the agency is not in the business of rendering advisory opinions. (See, e.g., *Astoria Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).) To the extent Hadaller disagreed with the Board's finding affirming the designation of his property as ARL in the July 7, 2008 FDO in Case No. 08-2-0004c, he could have appealed that final order to the superior court. (See RCW 36.70A.300.) By failing to avail himself of the available remedy, he is bound by the decision.

G. In 2009, the County Did Not Exercise Its Discretion to Re-Consider the 2007 Designation of Petitioner's Property.

It is uncontested that, in the compliance proceeding held to address the issues raised in the July 7, 2008 FDO, the County did not re-consider the designation of petitioner's property. Although resource designations are legislative determinations that may be

revisited at any time in compliance with the public participation and other requirements of the GMA, the scope of the compliance proceeding was limited to the issues remanded by the Growth Board in its July 7, 2008 FDO, which did not include the designation of petitioner's property. (See Intra, 7-9 and 11-13.) Moreover, even if the County had the authority to expand the scope of the compliance proceeding, that authority did not re-open the County's designation of petitioner's property unless the County actually exercised that authority and made a new "land use decision." (See RCW 36.70C.020(2)(b); RCW 36.70C.030; RCW 36.70A.290(2).) Petitioner admits that the County did not exercise its power to re-consider the 2007 designation of petitioner's property as ARL. (Petition for Review, BR at 6 - 7, CP 179 - 180.) Because the County did not exercise of the power to re-consider the designation as part of the compliance proceeding, the designation of Petitioner's Property as ARL in 2007 remained the only BOCC determination concerning the designation of Petitioner's Property and the only "land use decision" with respect to that property. (See RCW 36.70C.020(2)(b).)

H. Petitioner Was Granted and Exercised His Right of Full Participation in the Designation Process.

Petitioner argues that the *Growth Board's* decision effectively denied him his "right of appeal" by dismissing his petition without addressing the substantive issues raised in his appeal. (Petitioner's Brief, at 1.) First, for the reasons already stated, the Growth Board lacked jurisdiction to re-visit a challenge to the designation and methodology reviewed and approved in the July 7, 2008 FDO. (*See Spokane County v. City of Spokane, supra*.) Second, in 2007 petitioner was accorded the full right to submit any and all evidence and to raise any and all arguments. In fact, he fully participated in the process leading to those designations, presented evidence, made arguments and actually appealed the 2007 BOCC decision designating his and others' properties as ARL. (FDO, at 52-57, CP 118 - 123.) As noted by the Growth Board in its January 27, 2010 Decision, petitioner determined that he should have submitted more evidence and made other arguments. (See January 27, 2010 Order on Lewis County's Motion to Dismiss, CP 244 - 246, BR at 1180-1181.) This is neither more nor less than litigator's remorse. It does not afford jurisdiction for re-opening the 2007 decision in Case No. 08-2-0004c. Had petitioner raised the substantive issues at the appropriate time, they

could have been reviewed by the Growth Board and, if appealed, reviewed on appeal.

I. The Growth Board Applied the Correct Standard in Granting Respondent's Dispositive Motion.

Petitioner argues that the Growth Board used the wrong standard of review in granting respondent's motion to dismiss. The question before the Growth Board was whether the Board had jurisdiction to reconsider the decision reached in Case No. 08-2-0004c affirming the BOCC's 2007 designation of petitioner's property as ARL. Petitioner presented no evidence to contest the facts presented in the motion, namely that the BOCC designated the petitioner's property as ARL on November 5, 2007, the petitioner appealed the designation in early 2008, the Growth Board reviewed and approved the designation on July 7, 2008, the Growth Board's decision in Case No. 08-2-0004c did not remand on any of the issues raised in petitioner Hadaller's petition for review, and the July 7, 2008 FDO was not appealed. There was no disputed fact. There were no genuine issues of material fact. The arguments raised are legal: did the Growth Board lack jurisdiction over the new petition for review, is the new petition barred as untimely or on the basis of *res judicata* or collateral estoppel? The Growth Board

properly ruled that the petition was an untimely challenge to the 2007 designation and was barred for lack of jurisdiction.

J. Petitioner's 2007 and 2009 Petitions Raised the Same Issues

Petitioner argues his 2009 petition for review to the Growth Board did not raise the same issues as his 2008 petition for review that resulted in the July 7, 2008 FDO upholding the designation of his property as ARL. Petitioner's argument appears to be a response to respondent's contention before the Growth Board that the doctrines of *res judicata* and/or collateral estoppel precluded his second action. The Growth Board did not rule on the basis of *res judicata* or collateral estoppel and, for the reasons already stated in this brief, the Board's action may be upheld without relying on the application of those doctrines.

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) person and parties, and (4) quality of the persons for or against whom the claim is made.'" (*City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d at 791-92, quoting *In re*

Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006) and *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).) The closely-related doctrine of collateral estoppel applies when a subsequent action is on a different claim, yet depends on issues which were determined in the prior action. Collateral estoppel, also known as “issue preclusion,” requires: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the pleas is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. (*City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d at 792, quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504,507, 745 P.2d 858 (1987) and *Malland v. Dep’t of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985).)

In his 2008 petition, Hadaller contended that the designation of his property and the methodology and criteria used in that designation violated the GMA. (*FDO*, at 52-57, CP 118- 123.) Specifically, he challenged the County’s definition of agricultural resource land of “long term commercial significance” and the County’s selection and application of the designation criteria. (*Id.*)

Citing a Washington Supreme Court decision, he contended the term “long term commercial significance” required the County to consider whether a “competent commercial farmer” could profitably farm the land. (*Id.* at 53-55, CP 119-121.) He contended that, notwithstanding the presence of soils classified as “prime,” the County’s hydro-geological context makes for poor agricultural soils, as demonstrated by the history of his property which allegedly had “never produced any profitable agricultural crop.” (*Id.* at 53, CP 119.) He contended the soil classification system used by the County in the designation process, specifically using typological soil classifications, failed to recognize that a soil can be “prime” agricultural soil in one location but marginal or dysfunctional in another context. (*Id.*) He argued that the County incorrectly assumed that “if a piece of land has water and certain soil types, it will be productive and commercially viable farmland.” (*Id.* at 54, CP 120.) He testified that, notwithstanding the presence of soils classified as “prime,” “[t]his property has NEVER produced any profitable agricultural crop,” is close to smaller five-acre parcels, and should be zoned for multiple uses. (*Id.*, emphasis in original.) He insisted that using his property for agriculture was not “practical or profitable.” (*Id.*) He argued that his land was well-suited for more

intensive development, that public utilities would not be “hard or expensive to install,” that the County gave “undue weight” to the current tax status of the property and public services, and that the property’s value and alternative uses were not properly considered nor was its location abutting a state highway. (*Id.*) Finally, he argued that the designation devalued the property so much as to render it a taking, that the lingering value of the property exceeded the County’s threshold value for agricultural land, and that ARL land should be used by commercial farmers, not hobby farmers. (*Id.*)

These are the same issues as petitioner raised in his 2009 petition. For example, as in the 2008 Growth Board proceeding, petitioner argued in his 2009 petition that “Lewis County has designated lands as ARL which do not meet the GMA definition of ‘agricultural land’ because such lands are not primarily devoted to commercial production and do not have long-term commercial significance for agricultural production.” (10/14/09 Petition for Review (CP 175).) As noted above, the Growth Board considered and rejected this contention at pages 53 and 54 of its July 7, 2008 FDO. (July 7, 2008 FDO, at 53-54, CP 119-20.) By way of further example, as in the 2008 petition, Hadaller’s 2009 petition contended the County did not consider “the productivity of the land

for long-term commercial production.” (10/14/09 Petition for Review (CP 175). In fact, in the 2008 proceeding, petitioner made precisely the same argument, contending that, notwithstanding the presence of soils classified as “prime,” the County’s hydro-geological context makes for poor agricultural soils, as demonstrated by the history of his property which allegedly had “never produced any profitable agricultural crop.” (*Id.* at 53, CP 119.) Still further, as in the 2008 proceeding, Hadaller’s 2009 petition alleged the County was required to consider “the commercial viability of the lands designated.” (10/14/09 Petition for Review (CP 176).) In 2008, petitioner repeatedly asserted this contention and the Board rejected it, ruling that “it is the economic concerns of the agricultural industry not an individual farmer’s economic needs that are to be considered” and “[w]hether a competent commercial farmer would go broke trying to farm the land is not the test the Legislature or the Courts require the County to apply when designat[ing] agricultural lands of long term commercial significance.” (July 7, 2008 FDO, at 56 – 57, CP 122-23.) Finally, as in 2008, petitioner contended in his 2009 petition that the County’s designation violated the property rights provision of the GMA. (10/14/09 Petition for Review (CP 192).) In the 2008

proceeding, Hadaller argued that the designation devalued the property so much as to render it a taking. (July 7, 2008 FDO, at 54, CP 120.) The Growth Board rejected his takings contentions at pages 13 through 16 of the July 7, 2008 FDO. (FDO, at 13 – 16, and 77, CP 79 – 82, and CP 143.)

Petitioner argues that his contentions in 2008 were limited to his property and that his contentions in 2009 were somehow expanded to include all property in the County. First, there is nothing in his 2008 arguments to support this contention. When he challenged the County's definition of agricultural land of long-term commercial significance in 2008 he did not limit it to his land. He challenged the County's definition as to the designation of all ARL in the County. (See July 7, 2008 FDO, at 53 – 55, CP 119-21.) When he contended that presence of "prime soils" needs also to take into account "the County's hydro-geological context," he made the argument with reference to the designations generally, not just his own. (See July 7, 2008 FDO, at 53, CP 119.) Even if he did not intend to raise these issues with reference to the County's process generally, the Growth Board addressed these issues "generally" and rejected them on that basis. (See July 7, 2008 FDO, at 53-54, CP 119-20.) Second, even if there were some

support for his contention, claim and issue preclusion doctrine bar *petitioner* from re-litigating an issue he has litigated to conclusion whether he does so on his own behalf or on behalf of himself and others.

Finally, petitioner's 2009 petition contends the County designated his land without providing a sufficient mechanism for correcting errors. He contends the omission of a corrections provision renders the designation a taking. The Court may take judicial notice of LCC 17.30.600, which was included in both Ordinance 1197 in 2007 and Ordinance 1207 in 2009:

17.30.600 Relief from errors in ARL designation.

(1) Property owners who believe a parcel has been included in agricultural resource land in error may request redesignation of that parcel pursuant to the comprehensive plan amendment provisions of LCC 17.165.040.

(2) Property owners who claim a parcel was included in agricultural resource land in error due to incorrect mapping of prime soils, as listed in the land use element of the comprehensive plan, shall provide a written report by a certified soils scientist documenting the actual soils conditions on the parcel. The application fee for a comprehensive plan amendment set by LCC 17.165.020 shall be waived for property owners submitting a request for redesignation under this subsection (2).

(3) Property owners who claim a parcel was included in agricultural resource land in error because soils on the parcel are classified by the National Resources Conservation Service as “prime farmland if drained” and the soils are not drained; or “prime farmland if drained and either protected from flooding or not frequently flooded during the growing season” and the soils are not drained and are not protected from flooding or are subject to flooding during the growing season; or “prime farmland if irrigated” and the parcel is not irrigated due to lack of necessary water rights shall provide a written declaration documenting the drainage or irrigation status of the soils on the parcel. The reclassification will be considered a comprehensive plan amendment set by LCC 17.165.020 and the fee shall be waived for property submitting a request under this subsection (3).

(4) Property owners who claim a parcel was included in agricultural resource land in error due to an incorrect assessment of the presence of a commercial, non-soil-dependent agricultural use shall provide a written declaration documenting the absence of such use thereby rendering the parcel no longer devoted to or capable of long-term commercial agriculture. The reclassification will be considered a comprehensive plan amendment set by LCC 17.165.020 and the fee shall be waived for property submitting a request under this subsection (4). (Ord. 1207 §2 (Exh. D), 2009; Ord. 1197 §2, 2007) (Emphasis added.)

LCC 17.30.600.

Petitioner’s 2009 Petition for Review concedes that the challenged ordinances contained correction mechanisms, but asserts that they are inadequate, because of the omission of a

provision permitting removal of the designation “upon a showing [of] proof of diligent farming efforts over a period of successive years without commercial success...” actual proof that the property was not “commercially productive.” (Petition for Review, CP 178.) For the reasons already stated by the Growth Board in its July 7, 2008 FDO, the ARL designation does not turn on the farmer’s ability to make a profit. At root, petitioner’s “correction mechanism” argument simply re-casts the “commercial viability” arguments already determined by the July 7, 2008 FDO and not appealed by the Petitioner.

Petitioner’s claims that he raised materially distinct issues in 2009 are without merit. His 2009 petition for review raised the same issues as he argued in the course of the 2007 proceedings at the Growth Board, which arguments the Growth Board rejected. His claims are barred both by lack of jurisdiction and the doctrine of res judicata and collateral estoppel.

K. Petitioner is Not Entitled to an Award of Attorney Fees.

Petitioner’s claims are without merit, have been fully litigated and have been permitted by petitioner to become final. Petitioner is not entitled to an award of attorney fees, either in the trial court or

before this court. By contrast, respondent Lewis County has been compelled by petitioner to litigate the same issues in this case as petitioner compelled the County to litigate in the proceedings culminating in the Growth Board's July 7, 2008 Final Decision and Order in Case No. 08-2-0004c. There would have been no reason for the County to litigate these issues had petitioner simply presented all of the evidence he deemed relevant to his case in the proceedings resulting in the initial designation of his property in 2007 or had he appealed the Growth Board's refusal to consider his additional evidence and the designation after the Growth Board rendered its July 7, 2008 FDO. The responsibility to provide pertinent evidence to challenge the designation lay with the petitioner. His failure to fulfill that responsibility has resulted in this litigation and the County's expenditure of substantial resources to defend the 2007 designation. Respondent respectfully requests the Court award the County its attorney fees and costs on appeal.

V. CONCLUSION

In November 2007, the Lewis County Board of County Commissioners designated petitioner's 313 acres, among more than 43,000 acres of prime farmlands outside of the I-5 Corridor, as

agricultural resource land of long term commercial significance (“ARL”). Petitioner appealed that decision, contending the designation and the methodology and criteria used in making the designation violated the GMA. The Growth Board approved the designation as ARL of the 43,485 acres, including petitioner’s 313 acres, and the criteria and methodologies used by the County in making those designations under the GMA, but ordered the County to consider for ARL designation other than prime farmlands outside of the I-5 Corridor. Specifically, the Board ordered the County to consider for inclusion in ARL lands that: (1) are prime farmlands and that are located within the I-5 Corridor; (2) are designated FRL; (3) include soils that are deemed prime if irrigated, drained or protected, or (4) are used for agricultural uses, that are not “prime,” and that are non-soil-dependent. Because the County had not considered these other, additional lands for designation, the Growth Board did not lift the pre-existing declaration of “invalidity.” Petitioner did not appeal the Growth Board Decision and it became final.

On August 10, 2009, the Lewis County Board of County Commissioners extended the ARL designation to approximately 50,000 additional acres of land, including lands either within the I-5

Corridor, or designated FRL, or deemed prime if irrigated, drained or protected, or which put non-prime lands to an agricultural use that is not soil dependent. The Board did not address whether lands were properly designated as ARL in 2007, because the lands designated in 2007 were neither within the I – 5 Corridor, were not FRL, did not contain soils that were prime if irrigated, drained or protected, and were not used for uses that were non-soil-dependent. The Board also did not change the criteria or methodologies used to designate prime farmlands within the I-5 Corridor as ARL. Nonetheless, petitioner filed another petition challenging the designation of his lands as ARL.

The Growth Board properly dismissed the new petition as an untimely attack on the County's 2007 designation of the 43,485 acres of prime farmlands outside of the I-5 Corridor, including petitioner's property, and the criteria and methodology used in that designation process. The Growth Board lacked jurisdiction to reconsider the 2007 decision, which was not appealed. Petitioner's contention that he was not required to challenge the 2007 decision designating his property until the Board lifted its order of invalidity or the designation otherwise "took effect," is contrary to the express review provisions of the GMA, is contrary to the policy underlying

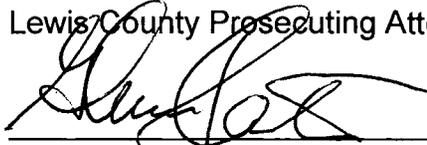
Washington land use law to promote uniformity, predictability and expediency in land use decisions, and is an improper, after-the-fact attempt to justify the petitioner's failure to timely raise his arguments and present his evidence as part of the 2007 designation process.

For these reasons, Respondent moves the Court to affirm the decision of the Western Washington Growth Management Hearings Board and to award Lewis County its attorney fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 14 day of June, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

BY:



GLENN J. CARTER, WSBA 33863
Chief Civil Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

DENNIS HADALLER,)
Appellant,)
vs.)
WWGMHB, et.al,)
Respondent.)
_____)

NO. 41581-0

DECLARATION OF
MAILING

11 JUN 16 PM 1:20
STATE OF WASHINGTON
BY
DEPT. OF JUSTICE

Ms. Casey Cutler, paralegal for Glenn Carter, Chief Civil Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 14, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

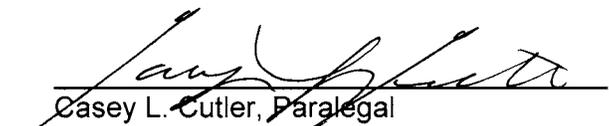
Ben D. Cushman, Esq.
924 Capitol Way South
Olympia WA 98501

Additional copies to:

Marc Worthy, AAG
Attorney General Of Washington
Licensing & Administrative Law Div.
800 Fifth Ave, Suite 2000
Seattle Wa 98101-3188

Eugene Butler
196 Taylor Rd
Chehalis WA 98532

DATED this 14th day of June, 2011, at Chehalis, Washington.


Casey L. Cutler, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing