

FILED

DEC 21 2011

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 30178-8

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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SPOKANE COUNTY, ET. AL,

Respondents

v.  
Eastern WA Growth Management Hearing Board et al

David Masinger, et al,  
Appellants

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AMENDED APPELLANTS' OPENING BRIEF

---

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I.  
INTRODUCTION

The Spokane County Commissioners, by a vote of two to one, overrode the findings of the Spokane Planning Commission, and instead voted to approve an amendment to the land use map that changed the designation of five acres from Low Density Residential (which restricts residential development to four dwellings per acre) to High Density Residential. The plan amendment was prompted by a proposed 120-unit apartment development by Headwaters Development Group LLC – without the amendment to the Comprehensive Plan, Headwaters would not be able to go forward with its wish to build the large apartment complex on the five acres.

The sole access to the five acres is Dakota Street – a dead end, local access road. Dakota Street is a narrow road with no sidewalks that is serving single-family and duplex residences.

A neighborhood group, which, for purposes of this appeal, will be referred to as “Masinter” appealed the County Commissioners’ decision to the Growth Management Board for Eastern Washington.

The Board, which is charged with reviewing compliance with the Growth Management Act, and ensuring that counties, among others, in fact comply with the GMA requirements and that any plan

amendments do not result in internal inconsistencies, found just that: the County Commissioners' approval of the plan amendment violated the GMA and the adoption of the amendment would be inconsistent with Spokane County's own goals and policies under its Comprehensive Plan.

Specifically, the Board found that if this amendment were approved, it would be inconsistent with Spokane County's following goals and policies:

Goal UL.7: Guide efficient development patterns by locating residential development in areas where facilities and services can be provided in a cost-effective and timely fashion.

Policy UL.2.16: Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials.

Goal T.2: Provide transportation system improvements concurrent with new development and consistent with adopted land use and transportation plans.

Policy T.2.2: Transportation improvements needed to serve new development shall be in place at the time new development impacts occur. If this is not feasible, then a financial commitment, consistent with the capital facilities plan, shall be made to complete the improvement within six years.

C.P. 34-35.

The Board's conclusions were far from novel or extraordinary: the Spokane County Planning Commission had reached the same conclusions.

The Board found that this proposed plan amendment, that would put a 120-unit apartment complex at the end of a dead-end narrow residential street with no other access created internal inconsistencies and violated the GMA. C.P. 37.

The County appealed the Board's decision to superior court. The trial court reversed the Board's decision.

Masinter now appeals the trial court's decision. Because this is an appeal under the GMA, this Court sits in the same position as the trial court as far as reviewing the Board's decision. Even though Masinter is the appellant, he does not carry the burden of demonstrating why the trial court erred and why the Board was correct. Instead, Headwater carries the burden of demonstrating to this Court as to why the Board's decision is reversible. Based upon the Board's analysis and the record as a whole, this is a burden that Headwater cannot meet. Accordingly, Masinter requests this Court to reverse the trial court's decision and to affirm the Board's decision.

II.  
**ASSIGNMENT OF ERROR AND ISSUES**

This Court applies the standards set forth in the APA directly to the Board's decision and the administrative record created before the Board. *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 375, 382, 53 P.3d 1028 (2002). Accordingly, any findings or conclusions made by the trial court are treated as superfluous. *Adams v. Dept. of Social & Health Services*, 38 Wn. App. 13, 15, 683 P.2d 1133 (1984). Though the trial court's findings and conclusions are superfluous, Masinter assigns error to the trial court's decision as follows.

**A. Assignment of Errors.**

1. The trial court erred in finding that the Board acted outside its statutory authority or jurisdiction.
2. The trial court erred in finding that the Board erroneously interpreted and/or applied the law.
3. The trial court erred in finding that the Board engaged in unlawful procedure or decision-making process, or has failed to follow prescribed procedure by failing to grant the required deference to the local governing body in planning under the GMA.
4. The trial court erred in finding that the Board's final order is not supported by substantial evidence in light of the whole record.
5. The trial court erred in finding that the Board's decision was arbitrary and capricious.

(CP 281-284).

5. The trial court erred in finding that the Board's decision was arbitrary and capricious.

**B. Issues.**

1. Did the Board err when it determined that WAC 242-02-230(2) did not require that it dismiss the petition for review that was timely served upon the County attorney but not the County auditor?
2. Was the Board's conclusion that the land use map amendment created an internal inconsistency with the Comprehensive Plan in violation of RCW 36.70A.070 an erroneous interpretation of the law, was not supported by substantial evidence, and was arbitrary and capricious as found by the trial court?

**III.**

**STATEMENT OF THE CASE**

In 2009, the Spokane County Commissioners, by a vote of two-to-one, voted to amend its Comprehensive Plan to change the designation of approximately five acres of land from Low Density Residential to High Density Residential. C.P. 188-189. Low Density Residential restricts development to four dwellings per acre. C.P. 140. The purpose of the amendment was to facilitate the proposed development of a 120-unit, apartment complex. C.P. 189. There was evidence in the record that such a development would result in a potential increase of 960 vehicle trips per day to up to 1,050 trips per day. C.P. 35.

There is one access road for the parcel: Dakota Street. C.P. 35. Dakota Street is a dead-end street. *Id.* It is a local access road serving a group of existing single-family and duplex residences. *Id.* It has no sidewalks. *Id.* It is a narrow roadway that is used by pedestrians, including children and a disabled resident in a wheelchair. *Id.*

The Spokane County Planning Commission voted unanimously to recommend denial of the land use amendment due to inadequate transportation facilities and adverse impacts on the existing Dakota Street residents. C.P. 36. One planning commissioner stated that “access issues could be disastrous.” *Id.* The Planning Commission concluded that the proposal was inconsistent with Comprehensive Plan goals and policies UL.2.16, UL.7, T.2, and T.2.2. *Id.*

As noted earlier, the Spokane County Commissioners did not follow the Planning Commission’s recommendation and instead, by a two-to-one vote, approved the amendment.

On March 8, 2010, Masinter filed a petition for review with the Growth Management Hearings Board. Masinter served the Spokane County Prosecuting Attorney and the attorney for the developers of the proposed project, Headwaters, with a copy of the petition. Masinter did not serve the County Auditor. C.P. 16.

By an order dated September 3, 2010, the Board found that Spokane County's adoption of the amendment was clearly erroneous and not in compliance with the GMA. The Board found the amendment invalid. C.P. 38.

In reaching this decision the Board made a number of findings. The threshold issue the Board had to reach was whether it had jurisdiction to hear the dispute because Masinter had not served the County Auditor.

The Board held that it had jurisdiction to hear the appeal. The Board acknowledged that WAC 242-02-270 provides that the petition "shall" be served on the County Auditor. C.P. 16. However, the Board held that the Growth Management Act itself has no such requirement. *Id.* The Board held that the Act provides the Board jurisdiction to hear and decide issues presented in a petition for review that is filed by a party with standing and is filed within 60 days after publication by the County legislative body. RCW 36.70A.280; RCW 36.70A.290. The Board ruled that while service is a rule that the Board has adopted, "it is not a jurisdictional requirement in the GMA statutes." C.P. 16. The Board also concluded that the County did not suffer, or even claim, any prejudice because in fact its attorney had been served a copy of the

petition. *Id.* Accordingly, the Board concluded that Masinter had substantially complied with the service requirements. *Id.*

The Board, in a separate order, then addressed the substantive portion of the appeal. C.P. 26.

First, the Board found no evidence in the record that Spokane County's Capital Facilities Plan or Transportation Improvement Plan considered whether public facilities will be adequate at the time the proposed development is available for occupancy and use. C.P. 35. The Board found that the GMA required the County to do that.

Second, the Board found that there was evidence in the record that the public facilities, particularly transportation, will not be adequate to serve the proposed amendment. *Id.* The Board noted the Spokane County Planning Commission's findings in this regard. *Id.*

Third, the Board found that there was no evidence in the record that the County evaluated the adequacy of necessary public facilities for the proposed development as required by RCW 36.70A.020(12). C.P. 36.

Fourth, the Board found that the County failed to consider arrangements to allow people to get around easily by foot, bicycle, bus or car as required by Comprehensive Plan Policy UL. 2.20. C.P. 36-37.

Fifth, the Board found that there was no evidence in the record that the County considered County-Wide Planning Transportation Policy 11, that provides that the County shall address land use designations that are supportive of, and compatible with, public transportation such as pedestrian friendly and non-motorized design. C.P. 37.

The Board concluded that the County Commissioners' decision to approve the land use map amendment was not supported by substantial evidence. C.P. 37.

The Board also concluded that the amendment was incompatible with other features of the Comprehensive Plan and precludes achievement of other Comprehensive Plan Elements. C.P. 37. The Board also concluded that the amendment was not guided by GMA Planning Goal 12 which required the County to ensure that necessary public facilities shall be adequate at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. C.P. 37.

The Board summarized its conclusions as follows:

Spokane County's adoption of land use map amendment 09-CPA-01 is inconsistent with the goals and policies of the Comprehensive Plan, including goals and policies UL.2.16, UL.7, T.2, and T.2.2, the Capital Facilities Element, and the Transportation Element. Therefore, the land use map amendment created an

internal inconsistency within the Comprehensive Plan in violation of RCW 36.70A.070. The action by Spokane County to approve land use map amendment 09-CPA-01 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

C.P. 37.

On appeal to the superior court, the trial court reversed the Board's May 27, 2010 order denying the motion to dismiss and also the Board's September 3, 2010 order of invalidity. C.P. 276.

Masinter timely filed the notice of appeal. C.P. 272.

#### **IV. ARGUMENT**

##### **A. Purpose and Standards of Review.**

Because this is an appeal of a Growth Management Hearings Board decision under the Administrative Procedure Act, there are two separate standards of review that must be considered. The first is the standard of review that this Court applies in its review of the Board's decision. The second is the standard of review that the Board applied when it reviewed Spokane County's adoption of a Comprehensive Plan Amendment.

##### **1. The APA governs this Court's review of the Board's decision.**

Although this is an appeal from a superior court decision, this Court reviews the Board's decision "from the same vantage point at the trial

court, applying the Administrative Procedure Act (APA) standards directly to the record before the Board.” *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 801-02, 959 P.2d 1173 (1998). The APA authorizes this Court to grant relief from the Board’s order only if this Court concludes:

- (a) The order, or the statute or rule on which the order is based , is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in the light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification ... was made and was improperly denied ... ;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rationale basis for inconsistency; or

(i) The order is arbitrary or capricious.

RCW 34.05.570(3)(a) through (g).

An administrative agency's findings of fact are reviewed to determine if they are supported by substantial evidence, while its conclusions of law are reviewed *de novo* to determine if the law was applied correctly. *Morgan v. Dept. of Social and Health Services*, 99 Wn. App. 148, 151, 992 P.2d 1023 (2000).

Headwaters has the burden of demonstrating that the Board erred in one of the ways enumerated above. *King County v. Growth Management Hearing's Board*, 142, Wn.2d 543, 553, 14 P.3d 133 (2000).

While reviewing courts will review the Board's legal conclusions *de novo*, they will also give substantial weight to the Board's interpretation of the statute it administers. *King County*, 142 Wn.2d at 553.

**2. The Board was aware, and applied, the deferential standard of review when it reviewed Spokane County's decision.**

The Board, in its decision, recognized the deferential standard of review it was obligated to apply in its review of Spokane County's decision.

The Board acknowledged that Comprehensive Plans and development regulations, as well as amendments, are presumed valid upon adoption. C.P. 27. This presumption creates a high threshold for challengers as they have the burden of demonstrating that the County's actions were not in compliance with the GMA. C.P. 27-28.

The Board recognized that the scope of its review was limited to determining whether the County complied with the GMA only with respect to those issues presented in the petition for review. C.P. 28. The Board similarly acknowledged that it was required to find compliance unless it determined that the County's actions were clearly erroneous in view of the entire record and in light of the GMA's goals and requirements. C.P. 28.

It must be noted, however, that while the Legislature has directed the Board to give deference to the local jurisdiction's decision-making (RCW 36.70A.3201), it also contemplates a diligent review:

The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [municipality's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

*Swinomish Indian Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 435, n. 8, 166 P.3d 1198 (2007).

**B. The Board correctly ruled that it had jurisdiction to hear the petition for review.**

The Board correctly noted that the legislature did not impose any service requirements regarding the petition for review. RCW 36.70A.290. The only issue was whether WAC 242-02-230 required that the County Auditor be served in order to for the Board to exercise jurisdiction. By the clear language of the WAC, there is no such requirement.

WAC 242-02-230 provides:

- (1) ... A copy of the petition for review shall be personally served upon all other named parties or deposited in the mail and postmarked on or before the date filed with the board. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. ...
- (2) A board may dismiss a case for failure to substantially comply with subsection (1) of this section.

Even the WAC does not require dismissal for failing to comply with the provisions of section 230. Instead, it clearly gives the Board the discretion to dismiss if it finds that a petitioner did not substantially comply with that subsection.

Here, the Board found substantial compliance. If substantial compliance is found, then even the WAC does not give the Board discretion to dismiss the appeal. Even if the Board did not find

substantial compliance, the WAC gives it discretion as to whether or not to dismiss the petition.

The trial court erred in substituting its judgment, for that of the Board's as to whether Masinter substantially complied with the service requirements. More egregiously, the trial court misread the WAC provision by holding that it required dismissal; as noted earlier, the language is clear that even if there has not been substantial compliance, it is still within the Board's discretion as to whether to dismiss or not.

The trial court relied on four cases to support its decision. None provide such support.

The trial court cited *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000). That case did not involve the GMA but instead involved RCW 4.28.080(1) - a statute that the courts have held require strict compliance in order for the trial court to have jurisdiction over a tort action against the government. However, even in that case, the Court held that the county had waived its defense of improper service.

The trial court cited *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 125 P.3d 124 (2004). That case also did not involve the GMA but instead involved the issue of whether there had been service upon

an insurance company. The plaintiff did not serve an agent who was authorized by the insurance company to accept service. Again, that case does not support the trial court's ruling in this case.

The trial court cited *Davidheiser v. Pierce County*, 92 Wn. App. 146, 960 P.2d 998 (1998). That case also did not involve the GMA but instead dealt with RCW 4.28.080 which requires that in an action against a county the county auditor shall be served. The plaintiff instead sent a copy of the complaint to the county's risk management department. Once again, this case did not interpret the requirements of the GMA regarding service of the petition.

The trial court cited *Clymer v. Employment Security*, 82 Wn. App. 25, 917 P.2d 1091 (1996). That case also did not involve the GMA but instead dealt with an appeal of an unemployment determination. The petition for review was not picked up by the legal messenger even though timely left by the attorney's office staff. The court held that the failure of the messenger to pick up the petition and have it filed did not constitute substantial compliance.

None of these cases support the trial court's erroneous interpretation of WAC 242-02-230 – even under the strictest reading the provision does not require the Board to dismiss the petition even if

there was not substantial compliance. The trial court erred in this ruling and its ruling should be reversed.

**C. Based upon the record as a whole, the Board was correct: the proposed amendment was inconsistent with Spokane County's stated goals and policies and violated the GMA.**

Spokane County's Comprehensive Plan designates the five acres that is the subject of this action as Low Density Residential. That designation is consistent with its goals and policies and with the GMA. The five acres is accessible only by Dakota Street.

The County did not appear to dispute, nor could it, that in its present configuration, allowing this 5-acre parcel of property to be changed from Low Density to High Density conflicts with the County's own goals and policies and with the GMA. The County, however, raised the argument before the Board, which argument the Board rejected, that it was permissible for the County Commissioners to grant the request for the plan amendment because the County has procedures in place to address transportation concerns in the future. The Board was correct in rejecting this argument.

**1. The Board was correct that this proposed plan amendment violates the County's own goals and policies.**

Allowing this proposed amendment violates the County's own goals and policies. Indeed, that was not only the Board's conclusion, but also the conclusion of the Spokane Planning Commission.

Policy UL.2.20 provides: "Encourage new development, including multifamily projects, to be arranged in a pattern of connecting streets and blocks to allow people to get around easily by foot, bicycle, bus or car." C.P. 34. This plan amendment goes against this goal. Instead of amending its plan so that a new development can be accessible by connecting streets, the Spokane County Commissioners have voted to adopt an amendment that allows a large multifamily complex to be located at the end of a dead-end street. There are no connecting streets. The one access street is narrow. There are no sidewalks along the one street that will go into the development. People will not be able to get around easily by foot or bicycle.

Policy UL 2.16 provides: "Encourage the location of medium and high density residential categories near commercial areas and public open spaces and on sites with good access to major arterials." C.P 34. The proposed high density designation does not have good

access to major arterials; instead, it has access to a narrow, residential road.

Policy UL.2.11 provides: “Promote linkage of developments with open space, parks and natural areas and street connections.” Because this 5-acre parcel has as its sole access point Dakota Street, it does not have linkage with anything other than the single-family and duplex residential units that border it.

Policy T.2.2 provides: “Transportation improvements needed to serve new development shall be in place at the time new development impacts occur. If this is not feasible, then a financial commitment, consistent with the capital facilities plan, shall be made to complete the improvement within six years.” As the Board noted, there are no plans, and no financial commitments, to have transportation improvements in place to accommodate the increase from low density to high density residential.

The Board found no evidence in the record that Spokane County’s Capital Facilities Plan or Transportation Improvement Plan considered wither public facilities will be adequate at the time of the proposed development is available for occupancy and use. In contrast, the Board found there was evidence in the record that the public facilities, particularly transportation, will not be adequate to serve the

proposed amendment. The Board found there was no evidence in the record that the County evaluated the adequacy of necessary public facilities for the proposed development. The Board found that there was no evidence in the record that the County considered County-Wide Planning Transportation Policy 11.

The Board properly concluded that the proposed amendment was not consistent with other elements of the Comprehensive Plan and was in violation of RCW 36.70A.070. In addition, the Board correctly found that the proposed amendment was not guided by GMA Planning Goal 12 – RCW 36.70A.010(12).

**2. The County's reliance on RCW 36.70A.070(6)(b) as excusing it from considering transportation elements as is required by RCW 36.70A.070(6)(a) was misplaced.**

The County argued to the trial court that RCW 36.70A.070(6)(b) justified the County Commissioners from considering the transportation impacts that this plan amendment would result in because, according to the County, those issues would be addressed at the time of project approval. The County's analysis was flawed.

RCW 36.70A.070(6)(b) provides:

After adoption of the comprehensive plan ... local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards

adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. ... For the purposes of this subsection (6), "concurrent with the development" means the improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

First, the record is unclear as to whether Spokane County has an ordinance that meets the requirement of RCW 36.70A.070(6)(b). The County cited its ordinance, 13.650.104 but the portion cited does not have the prohibition required by the GMA.

Second, even if the County has such an ordinance, its interpretation of RCW 36.70A.070(6)(b) is unfounded: the statute does not state that if a county has such an ordinance, then it need not consider transportation issues at the time of plan amendments; instead, it is a straightforward requirement that if a county has a comprehensive plan, it must have ordinances that prohibit developments that cause the level of service to decline below the adopted standards.

Third, as the Hearing Board itself stated, capital facilities planning must be done at the plan approval stages and not the project approval stages under the GMA. This must be done to ensure that any

proposed amendment conforms to other GMA standards and requirements. As set forth in the GMA:

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.

RCW 36.70A.130(1)(d). The County's position is that plan amendments need not undergo a transportation analysis as long as there is an ordinance that for site specific improvements that those improvements must undergo such an analysis. That is not what the GMA requires and is contrary to RCW 36.70A.130(1)(d). Moreover, it makes no sense as that would allow plan amendments to be adopted that in fact are inconsistent and contrary to the Comprehensive Plan.

As noted by the Board:

By its very nature, capital facilities planning must be done at the **PLAN** approval stage as opposed to the **PROJECT** approval stage in order to effectively provide for the necessary lead time and identification of probably funding sources, and also to inform decision makers and the public as they consider the public infrastructure impacts of proposed comprehensive plan amendments. While specific project details will not necessarily be known at the Plan approval stage, some overall forecasting can be done based on reasonable planning assumption and current development regulations. Advance planning identifies the public facility needs which then become inputs to the multiyear financing plan required by RCW 36.70A.070(3) and .070(6). Thus, capital facility funding and scheduling issues need to be evaluated at the time the future land

use map is amended. The cumulative effects must also be considered, and map amendments must conform to all other GMA standards and requirements.

C.P. 33-34.

This Court should defer to the Board in its construction of the GMA.

3. **Even if the County is allowed to defer transportation issues to a later date, the proposed amendment would still be inconsistent with the County's goals and policies.**

Even if the County were allowed to delay the consideration of certain transportation issues, the proposed plan amendment would still be inconsistent with the County's goals and policies. The basic problem with the proposed amendment is that it changes the designation of the five-acre parcel of property from low density to high density residential. Because of the property's location, the change would result in the violation of the County's goal's and policies. The property is at the end of a narrow residential road with no sidewalks. The property has no other means of access. Instead of four dwellings per acre the proposal is to have twenty dwellings per acre – 400% increase. The Board correctly ruled that, in light of the entire record, the approval of the proposed land use map amendment by the County Commissioners was clearly erroneous.

V.  
CONCLUSION

The five acre parcel of property at issue was properly in the County's Comprehensive Plan as Low Density Residential. The parcel's only access is through Dakota Street – a narrow residential dead-end road with no sidewalks. There is no other access to the site. Attempting to change this to High Density Residential conflicts with multiple Spokane County goals and policies. The Spokane County Planning Commission reached such a conclusion. The Growth Management Board reached such a conclusion. The Board's conclusion, based upon the entire record, was within its discretion.

This Court should reverse the trial court's decision and reinstate the Board's decision disallowing the proposed plan amendment.

Dated this 19 day of December, 2011.

Respectfully submitted,

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APPENDIX A



SPOKANE COUNTY COURTHOUSE

## SPOKANE COUNTY SUPERIOR COURT

Department No. 11

**GREG SYPOLT**

Judge

**KAREN BACHMEIER**

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RE: Spokane County, et. al. v. EWGMHB, et. al.  
Spokane County Cause No. 2010-02-04161-8  
Letter Opinion

Dear Counsel:

You will recall that this matter was argued on June 24, 2011. Given the volume of the record and nature of issues in this matter, the court took the matter under advisement to further review the record. The court now renders this letter decision. The issues in the matter are:

- 1) whether the Growth Management Hearings Board was in error to deny the petitioners' motion to dismiss based upon improper service of process; and
- 2) whether the Growth Management Hearings Board was in error in not affirming the Spokane Board of County Commissioners in approving an amendment to the map designation of the subject five-acre parcel from low-density urban to high-density urban.

### DISCUSSION

#### Issue One:

The Growth Management Hearings Board did not have subject matter jurisdiction to hear the appeal of the Additional Parties. A party appealing a decision is required to serve the county auditor, WAC 242-02-230(2). The pertinent language of the WAC is the mandatory "shall." It is undisputed that Additional Parties did not serve the auditor in this matter.

Additional Parties assert that there has been substantial compliance and a lack of prejudice to the petitioners, sufficient to support the order denying dismissal. The court finds that there has not been substantial compliance under these circumstances.

The service of process on the county prosecutor was insufficient to invoke the appellate jurisdiction of the GMHB, see *Davidheiser v. Pierce County*, 92 Wash.App. 146, 960 P.2d 998 (1998); *Lybbert v. Grant County*, 141 Wash.2d 29, 1 P.3d 1124 (2000); *Chymer v. Employment Sec. Dept.*, 82 Wash.App. 25, 917 P.2d 1091, (1996); *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wash.App. 516, 125 P.3d 134, (2004). Based upon the foregoing, the court must reverse the decision of the Growth Management Hearings Board and order that this matter be dismissed.

### Issue Two:

Assuming *arguendo*, that the GMHB did have subject matter jurisdiction to determine the appeal of Additional Parties, at the core of the substantive dispute are the conclusions in the Final Decision and Order of the GMHB and whether the GWMB gave appropriate deference to the decision of the Board of County Commissioners (BOCC).

The GMHB found that the map amendment (09-CPA-01) by the BOCC essentially was not in accord with the broad policy goals of the GMA, RCW 36.70A.020(1), (4), and (12); and, further, that the amendment was internally inconsistent with the county's own comprehensive plan as to traffic access inadequacies resulting in the subject neighborhood.

In this matter, the court is guided by familiar principles of recent appellate cases and the Growth Management Act. "...Growth management hearings boards determine compliance with the GMA and are authorized to invalidate non-complying comprehensive plans and development regulations." *Stevens County v. Futurewise*, 146 Wn. App. 493, 508, 192 P.3d 1 (2008), (citing *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 423, 166 P.3d 1198 (2007)).

County development regulations enjoy and are to be accorded a presumption of compliance with the GMA, RCW 36.70A.320(1). A growth management board, therefore, should grant counties and cities broad discretion in planning for growth, RCW 36.70A.3201. This measure of discretion is bounded, however, by the goals and requirements of the GMA, *King County v. Central Puget Sound Growth Mgmt. Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).

In the present matter then, the GMH Board must find compliance with the GMA and the county regulations unless it determines that the county's action is "clearly erroneous" in light of the goals and requirements of the GMA, RCW 36.70A.320(3). "An action is clearly erroneous if the Board has a firm conviction that a mistake has been committed." *Futurewise*, 146 Wn. App. at 509 (citing *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 423-24).

Despite the broad deference to be accorded local decision-making authority, it is not unbounded and GMH Board decisions are reviewed under the APA. *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 424 (citing RCW 34.05.570(3)). Substantial weight must also be

accorded to the expertise of the GWMB in interpretation of the GMA, *id.*, (citing *Central Puget Sound Hearings Bd.*, 142 Wn.2d at 553).

The court has reviewed the GMH Board's findings of fact for substantial evidence, *id.* Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998); *Hahn v. Dep't of Ret. Sys.*, 137 Wash.App. 933, 939, 155 P.3d 177 (2007).

Significant to this matter, in *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wash.2d 224, 233, 110 P.3d 1132 (2005) the Supreme Court held that "deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general." *Quadrant*, 154 Wash.2d at 238, 110 P.3d 1132. The court also held that while "this deference ends when it is shown that a county's actions are in fact a 'clearly erroneous' application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions," *Id.*

Here, the GMHB found that the map amendment by the BOCC was not supported by substantial evidence and that the BOCC action in adopting the map amendment was clearly erroneous in view of the record and in light of the goals and requirements of the GMA. See Final Decision and Order generally, pages 4-14. The court finds this was error. Based upon a review of the same record, and with the foregoing principles of analysis in mind, the court finds that good cause exists to reverse the decision and order of the GMHB. In reaching this conclusion, the court agrees with the position of petitioners.

Specifically, and *inter alia*, the GMHB was in error in concluding that: the Capital Facilities Plan of Spokane County must be reviewed and updated for each individual amendment to the county's comprehensive Plan. Additionally, it was error to find that facilities and public services which relate to a specific project must be included in the county's Capital Facilities and Transportation plans. Additionally, the GMHB erred in ostensibly exerting authority pursuant to the GMA to review project-specific impacts. This is outside the purview of the authority of the GMHB.

Further, the GMHB was in error to disregard the substantial and persuasive evidence in the record as a whole that Spokane County has promulgated elaborate regulations in accord with the GMA, RCW 36.70A.70(3) and (6). These regulations operate as a bar to prevent the county from approving a proposed development which will cause public services to decline below established standards. Moreover, expert testimony presented by petitioners indicated that anticipated traffic-volume impacts resulting from the map amendment would be within prescribed limitations. The GMHB apparently rejected without good cause this expert testimony in favor of lay opinions and testimony. The GMHB also did not accord proper weight and recognition of the "concurrency ordinance" (SCC 13.650) which provides a backup in the event capital facilities did become in danger of falling below acceptable levels of service.

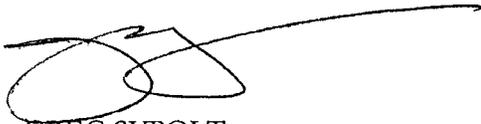
## Conclusion:

In sum, the GMHB did not have jurisdiction to hear the appeal of Additional Parties, since service of process was not accomplished in accord with the WAC.

In addition, as to the substantive findings and conclusions of the GMHB, the court agrees with the interpretation of the evidence as outlined by petitioners. The court accordingly, must reverse the GMHB decision and order as it is an erroneous interpretation of law, is not supported by substantial evidence, and is arbitrary and capricious. The GMHB concluded that the BOCC had clearly made an error. However, in order to find an action "clearly erroneous," the Board is required to be "left with the firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. 1*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993). On the basis of the entire record and applicable law, it cannot be fairly said that the conclusion of the GMHB meets this test.

Counsel will prepare an appropriate order outlining the above. Presentment is set for July 22, 2011, at 2:00 p.m. Agreed order(s) may be presented to this department ex parte, on or before the presentment date, in which case the presentment will be cancelled.

Sincerely,



GREG SYPOLT  
SUPERIOR COURT JUDGE

cc: Honorable Raymond Paoella  
EWGMHB

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 19<sup>th</sup> day of December, 2011, I did serve via U.S. Mail, First Class, Postage Prepaid (or other method indicated below), true and correct copies of the foregoing by addressing and directing for delivery to the following:

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