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No. 236927

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

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CECILE B. WOODS,

Respondent

v.

KITTITAS COUNTY, a political subdivision of the State of Washington,  
EVERGREEN MEADOWS, LLC, STUART RIDGE, LLC, STEELE  
VISTA, LLC and CLE ELUM'S SAPPHIRE SKIES, LLC

Appellants.

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**BRIEF OF APPELLANT  
KITTITAS COUNTY**

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James E. Hurson  
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## TABLE OF CONTENTS

<b>I.</b>	<b>Assignment of Error</b>	<b>1</b>
<b>II.</b>	<b>Introduction</b>	<b>1</b>
<b>III.</b>	<b>Argument</b>	<b>2</b>
	<b>The Public, including respondent Woods, has had numerous opportunities to challenge the Comprehensive Plan and Rural-3 zone both legislatively and before the EWGMHB.</b>	<b>2</b>
	<b>1. Respondent Woods failed to challenge the Rural-3 zone when it was enacted in 1992.</b>	<b>2</b>
	<b>2. Respondent Woods has never used the docketing and public participation processes under RCW 36.70A.470, the Comprehensive Plan or KCC Title 15B to suggest amendments to the Comprehensive Plan or Rural-3 zone.</b>	<b>10</b>
	<b>3. The trial court's ruling circumvents and interferes with the established public process for implementing GMA.</b>	<b>11</b>
<b>IV.</b>	<b>CONCLUSION</b>	<b>13</b>
<b>V.</b>	<b>APPENDIX A</b>	<b>14</b>

## TABLE OF AUTHORITIES

### Cases

<i>Association of Rural Residents v. Kitsap County</i> , 141 Wn.2d 185, 192, 4 P.3d 115 (2000).	5
<i>Citizens for Mount Vernon v. Mount Vernon</i> , 133 Wn.2d 861, 868, 947 P.2d 1208 (1997)	13
<i>Skagit Surveyors and Engineers, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 547, 958 P.2d 962 (1998).	3,4,5,9,11
<i>Somers v. Snohomish County</i> , 105 Wn. App. 937, 947-48, 21 P.3d 1165 (2001)	11,13

### Statutes

RCW 36.70A	2
RCW 36.70A.130	12
RCW 36.70A.250	4
RCW 36.70A.280	4,8,9,12
RCW 36.70A.290	8
RCW 36.70A.300	4
RCW 36.70A.470	6,10,12

## **I. ASSIGNMENT OF ERROR**

### **Assignment of Error No. 1**

The trial court erred in reversing the decision of the Kittitas County Board of Commissioners approving the rezoning of appellants' property as set forth in Kittitas County Ordinance No. 2004-15.

### **Issues Relating to Assignment of Error No. 1**

(i). Whether the Board of Commissioners correctly concluded that the rezone to "Rural-3" was consistent with the Kittitas County Comprehensive Plan.

(ii). Whether the superior court lacked jurisdiction to determine whether the Kittitas County "Rural-3" Zone violates GMA.

## **II. INTRODUCTION**

Appellant Kittitas County agrees with and joins in the factual statements and argument of co-appellants Evergreen Meadows, LLC, Stuart Ridge, LLC, Steele Vista, LLC and Cle Elum Sapphire Skies, LLC ("CESS") presented in their opening brief. Rather than repeating and rearguing those detailed points (and for the sake of judicial economy) Kittitas County seeks to advise the court that it joins CESS in their position regarding the substance of the factual background and validity of the rezone and ask the court for a reversal of the decision of the court

below and for an order upholding the validity of the rezone approved in this matter.

The rezone approved by Kittitas County was consistent with Kittitas County development regulations. The question of whether the Kittitas County zoning regulations violate the Growth Management Act, RCW 36.70A, (“GMA”) is an issue over which the Eastern Washington Growth Management Hearing Board (“EWGMHB”) has *exclusive* jurisdiction. The EWGMHB has never ruled that regulations fail to comply with the growth management act. The trial court had no jurisdiction to consider GMA issues and its decision to reverse the rezone based on an alleged violation of GMA is erroneous as a matter of law.

### III. ARGUMENT

In addition to the argument and legal analysis set forth in the brief of CESS, Kittitas County presents the following additional arguments regarding the issues before this court.

**The Public, including respondent Woods, has had numerous opportunities to challenge the Comprehensive Plan and Rural-3 zone both legislatively and before the EWGMHB.**

The respondent’s arguments and the trial court’s decision are based on the erroneous assumption that there was no other venue in which respondent Wood or other citizens of Kittitas County could raise their objections to the Comprehensive Plan and Rural-3 zone under GMA. In

fact, the citizens of Kittitas County have had numerous opportunities to challenge the Comprehensive Plan and Rural-3 zone legislatively and before the EWGMHB. Neither Woods nor anyone else has ever pursued the issue in the appropriate venues.

The Growth Management Act was enacted in 1990 in response to the perceived problems associated with an increase in population in this state.

The Growth Management Act imposed substantial new requirements on local governments. Among those requirements is the duty on the part of most counties ... to develop a comprehensive land use plan which, at a minimum, includes a plan, scheme, or design addressing each of the following elements: (1) land use, (2) housing, (3) capital facilities, (4) utilities, (5) rural areas, and (6) transportation. (Citations omitted).

*Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 547, 958 P.2d 962 (1998). In 1990, Kittitas County opted into GMA pursuant to Resolution 90-138. CP 40.

The planning process under GMA is public process that consists of legislative actions by local governments that are subject to review by the Growth Management Hearing Boards. As originally enacted, GMA had no administrative enforcement mechanism. But in 1991 the Legislature created the GMA boards. *Skagit Surveyors*, 135 Wn.2d at 547; RCW 36.70A.250. The GMA boards were given the authority to hear and

determine petitions to determine whether local comprehensive plans and zoning regulations, including pre-existing ordinances, comply with GMA. *Skagit Surveyors*, 135 Wn.2d at 549; RCW 36.70A.280 and -290. The GMA boards were also given the authority to order local jurisdictions to comply with GMA within a reasonable time. *Id.*; see RCW 36.70A.300.

In order to file a petition to the appropriate GMA board, a person (or private organization) had to establish standing by appearing “before the county or city regarding the matter on which a review is being requested.” Former RCW 36.70A.280(2) (1991).<sup>1</sup> In other words, a person (or private organization) could not challenge the Comprehensive Plan or Rural-3 zone at the EWGMHB without first appearing before the Board of Commissioners to either oppose the initial adoption of the zoning ordinance or to request that the ordinance be amended or rescinded.

The Kittitas County Rural-3 zone was adopted in 1992 in Ordinance 92-4. Nothing in the record suggests that respondent Woods (or any other party) either opposed the adoption of the Rural-3 zone before the Board of Commissioners or challenged the adoption of the ordinance in a petition to the EWGMHB.

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<sup>1</sup> RCW 36.70A.280 has been amended several times. The requirement of participatory standing under RCW 36.70A.280(2) has been clarified and codified, most recently in 2003 by the adoption of RCW 36.70A.280(4).

In 1995 the GMA boards were given the statutory authority to invalidate comprehensive plans and zoning regulations adopted after the passage of GMA. *Skagit Surveyors*, 135 Wn.2d at 560-61; *see Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192 n.2, 4 P.3d 115 (2000). But a person (or private organization) was still required to raise any GMA matter before the local jurisdiction before filing a petition to the GMA board.

Also in 1995, the Legislature made it easier for persons and private organizations to participate in the adoption and amendment of comprehensive plans and development regulations by local jurisdictions. A new section of GMA required each local jurisdiction to establish procedures by which any person could suggest amendments for consideration by the local jurisdiction:

(2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130...

(4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

RCW 36.70A.470 (1995).

On July 26, 1996 Kittitas County adopted a GMA comprehensive plan through Ordinance 96-10. Chapter One of the Comprehensive Plan (see Appendix A) provided for the process for any one to suggest proposed changes or amendments to the Kittitas County comprehensive plan. This process allows any interested person to suggest changes through a docketing process. Any suggestion docketed by June 30 of each calendar year is required to be approved or denied on or before December 31 of that calendar year. This comprehensive docketing process for annual amendments is still the process used in Kittitas County to amend the comprehensive plan.

In 1998, Kittitas County also supplemented public participation process by enacting KCC Title 15B in Ordinance 98-10. That title provides, in relevant part:

Any interested person, including applicants, citizens, county commission and board members, and staff of other agencies may suggest plan or development regulation amendments. The suggested amendments shall be docketed with the planning department for annual consideration by the Kittitas County planning commission and board of county commissioners. For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan in the planning department in a manner that will ensure such suggested changes will be considered by Kittitas County and will be readily available for review by the public. Docketing for the calendar year shall be taken from January

1st to June 30th of each calendar year. Amendments docketed after June 30th shall be considered in the following calendar year. Amendments to the comprehensive plan docketed by June 30th shall be approved or denied by the board of county commissioners on or before December 31st of that same calendar year.

KCC 15B.03.030. By adopting its comprehensive plan amendment process and KCC Title 15B, Kittitas County complied with its obligations under GMA to create a public process by which respondent Woods (or any other person or organization) could have suggested changes to the comprehensive plan or zoning regulations that allow rural zoning of three acres lot density. Woods could then challenge the action of Kittitas County if they were displeased with the outcome. That challenge, however, would have to be appealed to the EWGMHB.

Nothing in the record, however, suggests that respondent Woods (or any other party) has ever docketed a requested change to the comprehensive plan language that allows for rural three acre zones in the Comprehensive Plan. Nor is there anything in the record to suggest that respondent Woods (or any other party) has ever docketed a requested change to change the Rural -3 zoning classification. Not once during the course of a decade did they ever avail themselves of the established public process to address the issue that they now raise. Having failed to use the available public participation process to seek legislative changes to the

comprehensive plan or the Rural-3 zone, Woods cannot be permitted to challenge the comprehensive plan and Rural-3 zone in a superior court that has no jurisdiction to consider the issue.

**1. Respondent Woods failed to challenge the Rural-3 zone when it was enacted in 1992.**

In the trial court, respondent Woods argued that Ordinance 92-4 could not be appealed to the EWGMHB because that board did not actually exist within the sixty day period for challenging the ordinance under RCW 36.70A.290(2). CP 40. Woods points out that Ordinance 92-4 was adopted on March 3, 1992 while the GMA boards did not begin operations until May 15, 1992. CP 37, 39.

But the legislation creating the GMA boards was in effect in March of 1992, including the provision of RCW 36.70A.280(2) permitting any person to file a petition for review. Woods has no legal authority for the proposition that it was not possible to "file" a petition under RCW 36.70A.290 and simply wait for the EWGMHB to start hearing cases later that year. Woods simply assumes that it was not possible to file a petition before May 15, 1992. There is nothing in record to suggest that Woods ever attempted to file a petition and was rebuffed.

But the question of whether Woods could have filed a petition to the EWGMHB is moot because there is nothing in the record to suggest

that Woods ever challenged the Rural-3 zone by appearing before the Board of Commissioners to oppose adoption of Ordinance 92-4. Without first appearing before the Board of Commissioners, Woods would not have had standing to file a petition to the EWGMHB under RCW 36.70A.280(2).

Respondent has also argued that the Ordinance 92-4 was not adopted under GMA, and that the ordinance could not be reviewed by the EWGMHB because Kittitas County had not yet adopted its comprehensive plan or the other required elements of GMA planning. CP 38-40. But respondent has no authority for the proposition that a zoning ordinance must be labeled “adopted under [GMA],” CP 38, in order to be challenged to the GMA board. Nothing in RCW 36.70A.280 or -290 indicates such a restriction on the jurisdiction of the GMA boards. On the contrary, the GMA boards have jurisdiction over both pre-existing regulations and new regulations adopted after GMA. *Skagit Surveyors*, 135 Wn.2d at 567.

Finally, respondent has also argued that “[t]he issue presented in this case could not be evaluated or determined in the absence of the comprehensive plan.” CP 41. That is simply not correct. The “issue” presented by respondent is whether a zoning ordinance that allows 3-acre parcels in a rural area violates GMA. CP 98. Respondent’s argument is categorical — that 3-acre parcels are absolutely prohibited under GMA

outside of urban growth areas. CP 36. Respondent's argument is not dependent upon the language of the later-adopted Comprehensive Plan. On the contrary, the respondent's argument ignores, indeed defies, the language in the 1996 Comprehensive Plan that specifically approves the Rural-3 zone.

In sum, respondent has not shown that it was not possible to challenge the Rural-3 zone when enacted in 1992. Rather, the record shows only that respondent never even attempted to do so.

2. **Respondent Woods has never used the docketing and public participation processes under RCW 36.70A.470, the Comprehensive Plan or KCC Title 15B to suggest amendments to the Comprehensive Plan or Rural-3 zone.**

Furthermore, even if respondent Woods could not have challenged the Rural-3 zone when it was adopted in 1992, respondent could have used the docketing and public participation processes under RCW 36.70A.470, the Kittitas County Comprehensive Plan, and KCC Title 15B to suggest amendments to the comprehensive plan and that zone classification to eliminate it entirely. Respondent could have done this anytime over the last ten years. And if respondent's proposed amendments to the Comprehensive Plan or Rural-3 zone were rejected by the Board of Commissioners, respondent could have filed a petition for review with the EWGMHB.

As explained in the brief of appellant CESS, respondent's assertion that the EWGMHB cannot review a pre-existing ordinance is erroneous under *Skagit Surveyors*, 135 Wn.2d at 567, and *Somers v. Snohomish County*, 105 Wn. App. 937, 947-48, 21 P.3d 1165 (2001). Respondent has simply failed to use the docketing and public participation processes that would have given the respondent standing to raise the Rural-3 issue before the EWGMHB.

Having failed to use the available public participation process to challenge the comprehensive plan and the Rural-3 zone, Woods cannot be permitted to challenge that zone in a superior court that has no jurisdiction to consider the issue.

**3. The trial court's ruling circumvents and interferes with the established public process for implementing GMA.**

The Legislature intended to give all interpretive and enforcement authority under GMA to the three GMA boards. The GMA boards have the expertise to determine whether local jurisdictions are in compliance with GMA, and, if not, what the appropriate remedies might be. The GMA boards are also able to adopt and apply the GMA to the particular needs of the diverse counties that make up this State. The GMA boards have produced a large body of GMA case law that is cited and relied on parties appearing before the GMA boards in new cases. Allowing a

superior court to decide on a case-by-case basis whether a particular zoning regulation complies with GMA circumvents the authority of the GMA boards to decide such issues, and creates a risk of inconsistent application of GMA within a local jurisdiction.

By enacting RCW 36.70A.280(2), the Legislature also intended to require all parties (persons, organizations and agencies) to attempt to resolve their GMA issues in a public legislative process before challenging a local jurisdiction's laws in another venue. Such a public legislative process ensures that all members of the public can appear and participate at the hearings before the duly elected Board of County Commissioners. By enacting RCW 36.70A.130 and -470 the Legislature intended to create a public process in which proposed changes to a local jurisdiction's zoning laws would be considered in an orderly fashion with opportunity for all interest parties to participate. Allowing a superior court to decide on a case-by-case basis whether a particular zoning regulation complies with GMA circumvents and interferes with this public process and provides for no opportunity for the general public to participate.

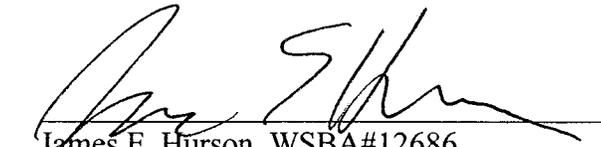
The trial court in this case bypassed the required public participation process and usurped the authority of the EWGMHB to decide whether the Rural-3 zone is appropriate under the particular circumstances of Kittitas County. The trial court exceeded its authority by deciding an

issue over which the EWGMHB has exclusive jurisdiction. *Somers*, 105 Wn. App. at 945; *see also Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997) (GMA board has jurisdiction over whether city's comprehensive plan complies with GMA). This Court must vacate the trial court's decision. If respondent (or any other person) believes the Rural-3 zone violates the GMA that person must take that issue to the EWGMHB.

#### IV. CONCLUSION

For all of these reasons the trial court's decision was erroneous and must be reversed.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of March, 2005.

  
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## APPENDIX A

# CHAPTER ONE: AMENDMENTS TO COUNTY PLAN, CODES AND STANDARDS

The Kittitas County Comprehensive Plan, elements thereof, and development regulations shall be subject to continuing evaluation and review by Kittitas County. Any change to development regulations shall be consistent with and implement the comprehensive plan as adopted pursuant to RCW 36.70A.

Kittitas County shall broadly disseminate to the public the following program for public participation in amendments to the county comprehensive plan and development regulations:

- A) If, during project permit review, Kittitas County identifies deficiencies in county plans or regulations, the project permit review shall continue, and the identified deficiencies shall be docketed for possible future amendments. For purposes of this section, a deficiency in a comprehensive plan or development regulation refers to the absence of required or potentially desirable contents of a comprehensive plan or development regulation. It does not refer to whether a development regulation addresses a project's probable specific adverse impacts which the permitting agency could mitigate in the normal project review process.
- B) Any interested person, including applicants, citizens, county commission and board members, and staff of other agencies may suggest plan or development regulation amendments. The suggested amendments shall be docketed with the Planning Department and considered by Kittitas County Planning Commission and Board of County Commissioners on at least an annual basis, consistent with the provision of RCW 36.70A.130 and the regulatory reform act ESHB 1724.
- C) Proposed amendments or revisions of the comprehensive plan are considered by the Board of County Commissioners no more frequently than once a year except that amendments may be considered more frequently under the following circumstances:
1. The initial adoption of a subarea plan; and
  2. The adoption or amendment of a Shoreline Master Program under the procedures set forth in RCW 90.58.
- D) All proposals shall be considered by Kittitas County concurrently so that the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation Kittitas County may adopt amendments or revisions to its comprehensive plan whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.
- E) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in the Planning Department in a manner that will ensure such suggested changes will be considered by Kittitas County and will be readily available for review by the public. Docketing for the calendar year shall be taken from January 1 to July 31 of each calendar year. Amendments docketed after July 31 shall be considered in the following calendar year.
- F) Amendments to the comprehensive plan or development regulations docketed by June 30 shall be approved or denied by the Board of County Commissioners on or before December 31 of that same calendar year.
- G) In order to facilitate public participation, Kittitas County shall maintain and provide for the following procedures when considering amendments to the comprehensive plan and development regulations:
1. Broad dissemination of proposals and alternatives. The docket shall be available for public review in the Planning Department during regular business hours. Alternatives to a proposal may be submitted by any party prior to the closing of the written testimony portion of the public hearing before the Planning Commission.
  2. Opportunity for written comments. Written testimony shall be allowed from the date of docketing up to the date of closing of the written testimony portion of the public hearing.
  3. Public Meetings. Study sessions and hearings shall be held only after effective notice has been distributed.
  4. Provisions for open discussion. Hearings shall allow for sufficient time allotments in order that all parties that wish to give oral or written testimony may do so.
  5. Communication programs and information services. A newsletter that summarizes amendments docketed and projected meeting and hearing dates should be provided by the Planning Department for distribution to all parties that have requested to receive it by mail. Copies of proposed amendments shall be available at cost of reproduction.

6. Consideration of and response to public comments. Planning Commission and the Board of County Commissioners members should review the testimony submitted in their findings.
7. Notice of decision. Publication in the paper of record of a notice that Kittitas County has adopted the comprehensive plan or development regulations or amendments thereto, and such publication shall state all petitions in relation to whether or not such actions are in compliance with the goals and requirements of this chapter, RCW 90.58, or RCW 43.21C and must be filed within 60 days after the publication date.