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CLERK OF SUPREME COURT
STATE OF WASHINGTON

COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON

CECLIE 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.

PETITION FOR REVIEW TO SUPREME COURT

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A. IDENTITY OF PETITIONER:

Cecile B. Woods (hereinafter "Woods") asks this court to accept review of the Court of Appeals decision in *Woods v. Kittitas County*, 130 Wn.App. 573, 123 P.3d 883 (2005), together with Order Denying Motion for Reconsideration designated in Part B of this petition.

B. COURT OF APPEALS' DECISION:

Woods requests that the Supreme Court review the published decision of the Court of Appeals, Division III, filed November 29, 2005, in Case No. 23692-7-III that reverses the superior court decision finding that Kittitas County rezone ordinance (Ordinance No. 2004-15) is inconsistent with Growth Management Act (GMA). A copy of the Decision is attached in the appendix pages A-1 through A-17. Woods also requests that the Supreme Court review the Order Denying Motion for Reconsideration. (A copy of the Order Denying Reconsideration is attached as A-18).

C. ISSUES PRESENTED FOR REVIEW:

1. Does an appellate court have subject matter jurisdiction pursuant to Land Use Petition Act (LUPA) to review a local jurisdiction's site specific rezone of

property for compliance with Growth Management Act?

2. Does Court of Appeals have jurisdiction to review issues not presented on appeal or decided by Superior Court?

D. STATEMENT OF THE CASE:

Appellants Evergreen Meadows, LLC, Stuart Ridge, LLC, Steele Vista, LLC and Cle Elum's Sapphire Skies, LLC (collectively "Appellant" or "CESS") submitted an application to Kittitas County for the site specific rezone of approximately 251.63 acres of rural land from Forest and Range (F&R) to Rural-3 (R-3) zoning district. (Ex. 12).¹

1. The Rezone Application.

CESS submitted an application to rezone approximately 251.63 acres of rural land from Forest and Range (F&R) to Rural-3 (R-3) zone. The property is comprised of four (4) separate parcels located in Upper Kittitas County lying south of Interstate-90 and the

¹ Applicant includes three (3) limited liability companies related to a developer identified as "Cle Elum Sapphire Skies, 315 39th Avenue SW, Suite 8, Puyallup, Washington 98373." Entities affiliated with Cle Elum Sapphire Skies acquired significant land holdings from Plum Creek Timber Holdings. Development activities were coordinated by Nelson Development Group. Applicant has proceeded with a systematic development plan to rezone and divide the properties into residential subdivisions.

City of Cle Elum. Respondent Cecile B. Woods ("Respondent" or "Woods") is a lifetime resident and owner of adjacent properties.

The rezone application was filed with Kittitas County on January 13, 2004. The rezone is part of a larger development plan initiated by CESS and designed for the systematic conversion thousands of acres of rural lands in Kittitas County from Forest and Range to Rural-3 zoning districts. Kittitas County was considering at least ten (10) similar rezone applications.² Piecemeal review of the multiple site specific rezones led to a development patchwork of urban sprawl which was inconsistent with the rural density requirements under Growth Management Act (GMA).

The subject property was designated as "Rural" land under the Kittitas County Comprehensive Plan ("Comprehensive Plan") and is located outside of any established Urban Growth Area (UGA) or Urban Growth Node (UGN).³ (Ex. 22)

² 1000 Friends of Washington identifies eight (8) separate rezones from Forest & Range to Rural-3. (Ex. 23). BOCC minutes reflect two (2) additional rezones including Sapphire Skies requires. Despite the multiple rezone requests, Kittitas County failed to consider the collective impact of the aggregate rezones.

³ Kittitas County Comprehensive Plan identifies two general areas in which urban growth shall be allowed and allocated for planning purposes: (1) Urban Growth Areas (UGA) for existing municipalities (Ellensburg, Cle Elum, Roslyn, Kittitas and South Cle Elum); and (2) Urban Growth Nodes (UGN) (Snoqualmie, Easton, Thorp, etc.). Comprehensive Plan – 26.1 – 28. The UGA and/or UGN is designed to accommodate future growth for a period of twenty (20) years;

2. Zoning of Property (Forest and Range).

The property was zoned Forest and Range (FR) zoning district.⁴ KCC Chapter 17.56. The purpose and intent of the Forest and Range zoning district is stated as follows:

The purpose and intent of this zone is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.

KCC 17.56.010. Forest and Range is not a commercial forest district and the area has not been designated as forest land of long-term commercial significance.⁵ KCC 17.56.040 establishes a minimum lot size of twenty (20) acres. The maximum development potential under Forest and Range zoning district would be twelve (12) rural lots. Existing zoning is consistent with rural density requirements established under Growth Management Act (GMA).

promote a variety of residential densities; and provide for long-term service by public utilities for water and sewer systems.

⁴ Kittitas County zoning ordinance relating to Forest & Range and Rural-3 zoning districts were last amended in 1992 (Ordinances 92-4 and 92-6). Neither has been reviewed or amended for the purpose of consistency or implementation of Growth Management Act (GMA) or Kittitas County Comprehensive Plan.

⁵ Commercial forest lands are zoned in Kittitas County as "Commercial Forest" – KCC Chapter 17.57. Forest, agriculture and mineral resources are afforded special treatment and protection under the Growth Management Act (GMA). RCW 36.70A.040(3). The subject properties have not been designated as "resource lands." Property to the immediate south, however, has been zoned "Commercial Forest".

Forest and Range zoning district allows for a variety of residential occupancies (single family, mobile homes, cabins, duplexes); commercial agricultural and forest activities; mining, excavation and rock crushing operations; and similar uses. KCC 17.56.020. Many other activities are allowed as conditional uses. KCC 17.56.030.

3. Proposed Zoning – Rural-3 (R-3).

CESS proposed to rezone the property from Forest and Range (FR) to Rural-3 (R-3) zoning district. The purpose and intent of the Rural-3 zone is stated as follows:

The purpose and intent of the Rural-3 zone is to provide areas where residential development may occur on a low-density basis. A primary goal and intent in siting R-3 zones will be to minimize adverse effects on adjacent natural resource lands.

KCC 17.30.010. Permitted uses include a variety of uses similar to those authorized in the Forest and Range zoning district. KCC 17.30.020.

The principle difference between the zoning districts relates to minimum lot size. KCC 17.30.040 authorizes a minimum lot size of three (3) acres “. . . for lots served by individual wells and septic tanks.” Cluster subdivision provision allow for density bonuses (i.e.,

twenty percent) and further reduction of minimum lot size requirements (one (1) acre). KCC 17.65.040.

The development potential of the subject property under Rural-3 zoning would be for eighty-three (83) residential lots. The rezone would result in approximately an eight (8)-fold increase in residential density.

4. Rezone of Subject Property to Rural-3 Violates Growth Management Act (GMA) by Allowing Urban Growth Densities in Rural Areas.

Ordinance 2004-15 allows for the creation of three (3) acre parcels in a designated rural area.⁶ The adopted residential density violates Growth Management Act (GMA) directives to prevent inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2).

Growth Management Act (GMA) established thirteen (13) planning goals which guide the development of comprehensive

⁶ It is important to put the rezone application in the proper context and setting. The specific site was zoned Forest and Range (F&R). This zoning district is compliant with Growth Management Act (GMA) directives, goals and requirements. It preserves and protects resource lands (forest) and establishes a twenty (20) acre minimum lot size. CESS requested a change in the current zoning to a district that allows "urban growth" on the specific site. This is the first and only time that this density change can be challenged by adjacent property owners or the community. By accepting the CESS argument, the community would never have an opportunity to challenge the application of urban densities on this specific site.

plans and development regulations. RCW 36.70A.020. Included in the planning goals are the following:

- (1) Urban Growth. Encourage the development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

The primary method for meeting these two goals is set forth in RCW 36.70A.110. That provision requires counties to “designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 548, 958 P.2d 962 (1998). The subject property is located outside of any established Urban Growth Areas (UGA) or Urban Growth Nodes (UGN).

At the heart of rural land use planning is the determination of permissible density levels. Growth Management Act (GMA) requires counties to provide a variety of rural densities (RCW 36.70A.070(5)(b)) but is charged with the responsibility of preventing inappropriate conversion with undeveloped land into sprawling, low-density development (RCW 36.70A.020(2)).

Specific guidelines on permissible density levels have been established by each of the Growth Managements Hearings Boards.⁷ All three (3) hearings boards have consistently recognized that the creation of lots less than five (5) acres in rural areas fail to comply with GMA requirements to prevent higher densities and sprawl in the rural area and to maintain rural character. *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 01-1-0015c and 01-1-0014cz (Final Decision and Order, May 1, 2002) (“The reduction of lot size below 5 acres in Rural Residential is not in compliance with GMA”); *Yanisch v. Lewis County*, WWGMHB Case No. 02-2-0007c (Final Decision and Order December 11, 2002) (“we conclude that the allowance of creation of lots less than five acres in the rural area fails to comply with the requirement in the Act to prevent higher densities and sprawl in the rural area and to maintain rural character); and *1000 Friends of Washington v. Snohomish County*, CPSGMHB No. 04-3-0018 (December 13, 2004) (“Densities of greater than one dwelling

⁷ Growth Management Act (GMA) establishes three separate hearings boards with jurisdiction to review municipal compliance with the statutory requirements. The three boards are designated Western Washington Growth Management Hearings Board, Central Puget Sound Growth Management Hearings Board and Eastern Washington Growth Management Hearings Board. Published decisions provide guidance on matters of interpretation and application of the Growth Management Act (GMA).

unit to five acres are not rural densities.”). The court in *Diehl v. Mason County*, 94 Wn.App. 645, 655-57, 972 P.2d 543 (1999) affirmed Western Washington Growth Hearings Board determination that 2.5 acre parcels violated GMA.

While comprehensive plans and development regulations are reviewed by the Growth Management Hearings Boards, site-specific rezones are reviewed by the superior court. The Supreme Court in *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 172-173, 4 P.3d 123 (2000) held that review of “site specific rezones” for compliance with Growth Management Act (GMA) must be raised in a LUPA appeal to the Superior Court. This was precisely the procedure followed in this case.

The Woods case presents the exact issue referenced by the court in *Wenatchee Sportsman* – a review of a site specific rezone for compliance with Growth Management Act (GMA) prohibitions on urban growth outside of an established Urban Growth Area (UGA). Despite this clear judicial directive, Court of Appeals has held that appellate courts lack subject matter jurisdiction for review of site-specific rezones.

E. **ARGUMENT WHY REVIEW SHOULD BE ACCEPTED:**

1. **The Court of Appeals' decision that appellate courts do not have subject matter jurisdiction to review site-specific rezone determinations for compliance with Growth Management Act (GMA) conflicts with Supreme Court precedent.**

The Court of Appeals' decision in this case concludes that appellate courts do not have subject matter jurisdiction to review a site specific rezone for compliance with the Growth Management Act (GMA). *Woods v. Kittitas County*, 130 Wn.App. 573, 583, 123 P.2d 883 (2005) ("Accordingly, we decline to address the rezone's compliance with the GMA and confine our review to the remaining assignments of error properly raised in the LUPA petition."). This determination is in direct conflict with Supreme Court precedent in *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

The court in *Wenatchee Sportsman* recognized that there are two (2) vehicles for review of a local jurisdictions compliance with Growth Management Act (GMA): (1) appeal to a Growth Management Hearings Board (GMHB) pursuant to RCW 36.70A.290; or (2) review of a site specific rezone pursuant to Land Use Petition Act (LUPA) – RCW 36.70C.030. In *Wenatchee*

Sportsmen Association v. Chelan County, 141 Wn.2d 169, 172-173, 4 P.3d 123 (2000)⁸ the court specifically addressed the jurisdictional issue presented in this case. The court in *Wenatchee Sportsman Association* held that review of site specific rezones for compliance with Growth Management Act (GMA) must be raised in a LUPA appeal to the superior court. The holding was clear:

We reverse the trial court. A decision to rezone a specific site is not appealable to a Growth Management Hearings Board (GMHB) because site specific rezones are project permits and hence not development regulations under the GMA. WSA's failure to file a timely LUPA challenge to the rezone bars it collaterally from challenging the validity of the rezone in this action opposing the project application. *The issue of whether the rezone should have allowed urban growth outside of an IUGA had to be raised in a LUPA petition challenging the rezone decision itself.*

The court in *Wenatchee Sportsmen* went on to state:

⁸ The court in *Wenatchee Sportsman* was asked to review a preliminary plat based upon a previously adopted zoning ordinance. The plat and densities were consistent with a prior rezone of the property to Recreational Residential (RR-1). *Wenatchee Sportsman*, 141 Wn.2d at 174. The court noted:

Chelan County made two separate decisions with respect to the Highlands: the 1996 site specific rezone of the properties to RR-1 and the 1998 approval of the Highlands development proposal. WSA challenged the latter decision by filing a LUPA petition in superior court; it did not appeal the earlier decision to rezone the property.

Since there was no challenge to the site specific rezone, the court recognized that ". . . the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable." This case involves a challenge to the "site specific rezone" for compliance with the UGA and Growth Management Act (GMA).

However, the issue of whether the RR-1 zoning allows for urban growth outside of an IUGA should have been raised in a timely LUPA challenge to the rezone, not in the later challenge to the plat. At that time, a court reviewing the rezone decision could have considered whether the minimum density allowed by the RR-1 district was compatible with the IGUA.

Wenatchee Sportsmen, 141 Wn.2d 181-182.⁹ In this case, Woods asked the court to review “whether the minimum density allowed” by the Rural-3 zoning district was compatible with the UGA established under GMA. That is, does the site-specific rezone allow growth that is “urban in nature” outside of the UGA.

Kittitas County has jurisdiction over lands that lie both within and outside of its established urban growth area (UGA) boundaries. Rural -3 zoning does not violate the Growth Management Act (GMA) in all instances and all applications. It is consistent with the GMA when applied within the urban growth area established by Kittitas County. Rural-3 lot sizes, however, are not consistent when allowed outside of the UGA in established rural areas. The

⁹ The court in *Wenatchee Sportsmen* recognized that review of a “rezone” decision includes the specific consideration of whether the proposed zoning (RR-1) allowed “urban growth outside of an IUGA”. The court’s decision in this case is in direct conflict with the *Wenatchee Sportsmen* directions. The inquiry contemplated in *Wenatchee Sportsmen* would not be allowed under the decision in this case. Any review of the application of the RR-1 zoning would be prohibited because it would be viewed as a collateral attack on the RR-1 zoning district itself.

superior court – Judge Susan L. Hahn – recognized this fundamental distinction in her decision:

Whether this RR-3 zone is lawful depends on where the subject property is located within the county. In other words, the RR-3 ordinance may be consistent with the GMA when applied to some properties and inconsistent when applied to others. Since the property in this case is located outside of a designated UGA, a rezone that allows for development which is urban in nature, violates the GMA. The fact that the property may never be built out is irrelevant to whether the application of RR-3 to this property has the potential to turn a rural area into an area of urban growth intensity.

Court of Appeals, however, incorrectly characterized this challenge as one “. . . seeking to invalidate the Rural-3 zone throughout the county.” *Woods v. Kittitas County*, 130 Wn.App. at 583. The challenge was not to the validity of the Rural-3 zoning district but the application through a quasi-judicial rezone in the rural areas.¹⁰

¹⁰ Court of Appeals relied upon the case of *Somers v. Snohomish County*, 105 Wn.App. 937, 21 P.3d 1165 (2001). The court in *Somers*, however, was not reviewing a site-specific rezone. The court reviewed a preliminary plat application authorized by a pre-existing local zoning ordinance. The court summarized the analysis as follows:

Although the appeal of a decision approving a project permit application is generally the type of land use decision that would be subject to review by a superior court under LUPA, the present appeal is not. Rather, it is one in which the underlying issue is whether a pre-existing local ordinance complies with the provisions of the Growth Management Act (GMA).

Court of Appeals has eliminated judicial review of site-specific rezones for compliance with Growth Management Act (GMA). The published decision is inconsistent with clear policy statements contained in the Growth Management Act (GMA) and the holding in *Wenatchee Sportsman Association v. Chelan County*.

2. **Court of Appeals' of Appellate Review of Site Specific Rezones for Compliance with Growth Management Act (GMA) Involves an Issue of Substantial Public Interest.**

Court of Appeals' holding in *Woods v. Kittitas County* involves an issue of substantial public interest. Growth Management Act (GMA) was adopted for the purpose of addressing uncoordinated and unplanned growth together establishing mechanisms for long-term planning of communities. RCW 36.70A.010. At the heart of the planning goals was a commitment to “. . . reduce the inappropriate conversion of

Somers v. Snohomish County, 105 Wn.App. at 939. The challenge in this proceeding is to the “site-specific rezone” and not to a pre-existing and adopted zoning ordinance applicable to the specific properties. *Somers* recognized the validity of the court's holding in *Wenatchee Sportsman* and followed earlier precedence set forth in *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997) (an adopted zoning ordinance prevails over inconsistent comprehensive plan provisions and Growth Management Act (GMA)).

undeveloped land into sprawling, low density development.” RCW 36.70A.020(2).

Parallel review mechanisms were established for comprehensive plans and development regulations (i.e., site specific rezones). Each action was to be reviewed for compliance with Growth Management Act (GMA). Court of Appeals’ decision in *Woods v. Kittitas County* eliminates any judicial review of site specific rezones for compliance with the Growth Management Act (GMA). Counties and cities are left without direction regarding the application of Growth Management Act (GMA) to quasi-judicial rezone processes. And Growth Management Act (GMA) will have no substantive application to rezone determinations. A fundamental piece of the Growth Management Act (GMA) has been effectively removed from review processes.

It is essential that public planning processes have clear and identifiable review mechanisms. Both public and private sectors rely upon the consistency and application of legislative mandates and the ability to assure that long-term planning is undertaken in a responsible manner. More importantly, Broad public goals regarding sprawl, urban growth and provision of public facilities is essential to sound land use planning. The process is

disturbed and emasculated without available review mechanisms to assure compliance with the goals of Growth Management Act (GMA).

3. **Court of Appeal does not have jurisdiction to extend appellate review to issues not raised in the appellate proceeding.**

After concluding that the court did not have jurisdiction to review site specific rezone for compliance with Growth Management Act (GMA), the court proceeded to “review . . . the remaining assignments of error properly raised in the LUPA petition.” *Woods v. Kittitas County*, 130 Wn.App. at 583.¹¹ Those issues, however, were not before the court on appeal. Neither the trial court decision nor appellate issue statements addressed review of factual findings (BOCC Findings 1, 3, 5, and 6), compliance with rezone requirements (KCC 17.98.020(5)), or other aspects of the LUPA Petition.

¹¹ The court stated:

“After we eliminate Ms. Woods’ issues regarding compliance with the GMA, her remaining challenges are to findings (10, (3), (5), and (6).”

(Decision – 12). None of these issues were decided by the trial court or briefed in this appeal.

Judge Susan L. Hahn based her decision solely on a determination that the application of Rural-3 zoning outside of the established UGA violated Growth Management Act (GMA). The decision specifically recognized the following:

“Based on my decision that the BOCC erred by granting a rezone which allows for urban growth density in rural area, it is unnecessary to reach the other arguments raised by Plaintiff.

(CP 16).

Court of Appeals unilaterally engaged in a review of KCC 17.98.020(5) requirements and the conclusory findings of the Board of County Commissioners. These issues were neither decided by the trial court nor raised or briefed on appeal.¹² Woods was not afforded an opportunity to brief or argue the issues and the trial court was bypassed in the decision-making process.

¹² CESS and Kittitas County specifically identified two (2) issues on appeal. Those issues were as follows:

- (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 the Growth Management Act, RCW Chap. 36.70A.

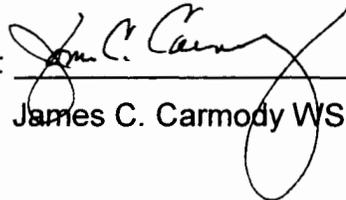
Neither the trial court’s decision nor appellate issues reached the additional challenges raised in Respondent’s LUPA petition.

F. **CONCLUSION:**

Woods respectfully requests that the Supreme Court accept review of the Published Decision of the Court of Appeals and reverse such decision.

Respectfully submitted this 5th day of May, 2005.

Velikanje, Moore & Shore, P.S.
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FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CECILE B. WOODS,)	No. 23692-7-III
)	
Respondent,)	
)	
v.)	
)	Division Three
KITTITAS COUNTY, a political)	Panel Three
subdivision of the State of Washington,)	
EVERGREEN MEADOWS LLC, and)	
STUART RIDGE LLC, STEELE)	
VISTA LLC, and CLE ELUM'S)	
SAPPHIRE SKIES, LLC,)	
)	PUBLISHED OPINION
Appellants.)	

SCHULTHEIS, J. — In January 2004, three landowner-companies applied for a rezone of approximately 252 acres in Kittitas County from forest and range (allowing one dwelling per 20 acres) to rural-3 (allowing one dwelling per 3 acres). The Kittitas County board of commissioners approved the rezone and adopted Ordinance 2004-15 to implement it. Neighboring landowner Cecile Woods filed a land use petition challenging the rezone. In a December 2004 order, the Yakima County Superior Court granted the petition and reversed.

Kittitas County and the landowner-companies appeal, contending the superior court lacked jurisdiction to decide the petition and erred in concluding that the rezone was inconsistent with the Growth Management Act (GMA), chapter 36.70A RCW. Although we find that the superior court had jurisdiction over the land use petition, we conclude that the court erred in addressing the rezone's compliance with the GMA, and reverse.

FACTS

Cle Elum's Sapphire Skies LLC, Evergreen Meadows LLC, Stuart Ridge LLC, and Steele Vista LLC (hereafter referred to collectively as CESS) own approximately 252 contiguous acres of land zoned forest and range in Kittitas County.¹ The minimum lot size on forest and range land is 20 acres. Kittitas County Code (KCC) 17.56.040. Permitted uses include single family homes, mobile homes, cabins, duplexes, agriculture, forestry, mining, and approved "cluster subdivisions." KCC 17.56.020. Directly north of the CESS property is zoned rural-3, east and west of the property is zoned forest and range, and south of the property is zoned commercial forest. The northern rural-3 and the eastern forest and range properties have been subdivided and developed for residential purposes.²

¹ At the time of the April 2004 Kittitas County planning commission hearing, the property was referred to collectively as "Evergreen Meadows." Clerk's Papers at 126. The adopted ordinance names only Evergreen Meadows LLC, Stuart Ridge LLC, and Steele Vista LLC as the property owners. It is unclear from the record when Cle Elum's Sapphire Skies LLC became involved.

² Development in the eastern forest and range property predated the current zoning.

In January 2004, CESS applied for a rezone of its property from forest and range to rural-3. The minimum lot size in rural-3 zones is three acres for lots served by individual wells and septic tanks. KCC 17.30.040. As with the forest and range zone, the rural-3 zone allows one-half acre lots in platted cluster subdivisions served by public water and sewer systems. KCC 17.30.040. Permitted uses in rural-3 zones are similar to permitted uses in forest and range zones, although mining is allowed only as a conditional use. KCC 17.30.020, .030.

The predominant differences between the two zones are in their allowed densities and their purposes. As stated in the county code, “[t]he purpose and intent of the Rural-3 zone is to provide areas where residential development may occur on a low density basis. A primary goal and intent in siting R-3 zones will be to minimize adverse effects on adjacent natural resource lands.” KCC 17.30.010. The purpose of the forest and range zone “is to provide for areas of Kittitas County wherein natural resource management is the highest priority and where the subdivision and development of lands for uses and activities incompatible with resource management are discouraged.” KCC 17.56.010.

After a public hearing held in April 2004, the Kittitas County planning commission voted five to one to forward the rezone request to the county board of commissioners for approval. The one planning commissioner who voted against the rezone expressed concern about the adequacy of the water supply for future development. In May 2004, the

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board of commissioners unanimously approved the rezone in a closed meeting. Ordinance 2004-15 adopting the rezone was filed on June 1, 2004.

Ms. Woods owns approximately 33 acres adjacent to the CESS property. In June 2004, she filed a petition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, challenging the ordinance in the Yakima County Superior Court. After concluding it had jurisdiction over the site-specific rezone petition, the superior court decided that the rezone was inconsistent with the GMA because it allowed development “urban in nature” in a rural area. Clerk’s Papers (CP) at 16. On this basis, the court reversed the decision to rezone and denied CESS’s motion for reconsideration. CESS and Kittitas County filed separate briefs on appeal.

SUPERIOR COURT LUPA JURISDICTION

CESS first contends the trial court lacked subject matter jurisdiction under LUPA to consider whether the ordinance is consistent with the GMA. It argues that Ms. Woods is not really requesting review of a rezone from forest and range to rural-3, but is actually seeking to invalidate the rural-3 zone throughout the county. The trial court’s subject matter jurisdiction to consider Ms. Woods’ petition is a question of law reviewed de novo. *Somers v. Snohomish County*, 105 Wn. App. 937, 941, 21 P.3d 1165 (2001).

The GMA was enacted in 1990 to address problems associated with an increase in the state’s population. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135

Wn.2d 542, 546-47, 958 P.2d 962 (1998). The GMA sought to alleviate the legislature's concern that

uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

RCW 36.70A.010. To that end, the legislature called for citizens, the local government, and the private sector to cooperate in "comprehensive land use planning." RCW

36.70A.010. Among the new requirements imposed on many of the state's counties and cities, the GMA required the development of a comprehensive plan that would address the elements of land use, housing, capital facilities, utilities, rural areas, and transportation.

RCW 36.70A.040, .070; *Skagit Surveyors*, 135 Wn.2d at 547. The rural element of each county's comprehensive plan was to include lands that permitted rural development, forestry, agriculture, and a variety of rural densities. RCW 36.70A.070(5)(b). "To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, . . . conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character." RCW 36.70A.070(5)(b).

The legislature set out planning goals in RCW 36.70A.020 to guide the development of a comprehensive plan. *Skagit Surveyors*, 135 Wn.2d at 547. As in *Skagit Surveyors*, the two goals central to this case involve the designation of urban and rural

development: (1) to “[e]ncourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner,” and (2) to “[r]educ[e] the inappropriate conversion of undeveloped land into sprawling, low-density development.” RCW 36.70A.020(1), (2). Counties and cities are also urged to plan so as to preserve productive forest and agricultural lands and to increase access to natural resource lands. RCW 36.70A.020(8), (9). Ultimately the comprehensive plans adopted by the counties must “designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.” RCW 36.70A.110(1). Each city must be located within an urban growth area. RCW 36.70A.110(1).

In 1991, the legislature created the growth management hearings boards (GMHB) as the enforcement mechanism for the GMA. *Skagit Surveyors*, 135 Wn.2d at 548. These boards have very limited jurisdiction to invalidate all or part of comprehensive plans or development regulations that substantially fail to comply with the goals of the GMA. *Id.* at 549; *Somers*, 105 Wn. App. at 942; RCW 36.70A.280(1)(a), .302. Development regulations are defined as “controls placed on development or land use activities by a county or city,” including zoning ordinances. RCW 36.70A.030(7). However, a development regulation does not include a decision to approve a project permit application, “even though the decision may be expressed in a resolution or ordinance.” RCW 36.70A.030(7). A site-specific rezone authorized by a comprehensive plan is a

project permit application. RCW 36.70B.020(4). Consequently, the GMHB does not have jurisdiction to hear a challenge to a site-specific rezone, even if the rezone is adopted as a county ordinance. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

LUPA is the exclusive means for judicial review of land use decisions that are not subject to review by quasi-judicial bodies such as the GMHB. RCW 36.70C.030; *Somers*, 105 Wn. App. at 941-42. Accordingly, if Ms. Woods' challenge is limited to the validity of the site-specific rezone adopted in Ordinance 2004-15, she properly filed a LUPA petition in superior court. However, if CESS is correct, and she is actually alleging that the rural-3 zone itself does not comply with the requirements of the GMA, then only the GMHB would have subject matter jurisdiction.³ *Wenatchee Sportsmen*, 141 Wn.2d at 178.

Generally, the proponent of a rezone must show a substantial change in circumstances or that the proposed rezone implements policies of the comprehensive plan. *Henderson v. Kittitas County*, 124 Wn. App. 747, 754, 100 P.3d 842 (2004), *review denied*, 154 Wn.2d 1028 (2005). A party challenging a site-specific rezone through a LUPA petition must establish at least one of the following standards:

³ In 1997, the legislature amended the GMA to allow direct review of comprehensive plans or development regulations in superior court if all parties to the proceedings agree in writing. RCW 36.70A.295; *Skagit Surveyors*, 135 Wn.2d at 567 n.14. The parties here did not so agree.

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Ms. Woods' LUPA petition alleges the following errors, (as summarized by this court): (1) erroneous interpretation of the law; (2) incomplete evidence of changed circumstances or consistency with the comprehensive plan and the GMA; (3) unlawful procedure (failure to disclose conflicts of interest and ex parte communications); (4) violation of Ms. Woods' constitutional rights of procedural due process; and (5) clearly erroneous application of the law to these facts. Each assignment of error relates to the rezone from forest and range to rural-3. Consequently, on the basis of the relief sought in the petition, Ms. Woods necessarily sought relief under LUPA in superior court.

Wenatchee Sportsmen, 141 Wn.2d at 179 n.1.

CESS cites *Somers* to support its argument that Ms. Woods is actually challenging the validity of the county's rural-3 zoning classification, adopted by Kittitas County Ordinance 92-4 in 1992. In *Somers*, a developer in Snohomish County applied for

approval of a subdivision on land zoned "Residential 20,000," allowing minimum lot sizes of 20,000 square feet. 105 Wn. App. at 939. Although the proposed development was located outside the urban growth area established by the county in 1995, the subdivision was approved. Neighboring landowners sought review in the King County Superior Court under LUPA. They alleged that the proposed subdivision constituted urban growth outside an urban growth area in violation of the GMA. The superior court agreed.

On appeal, Division One of this court held that the superior court did not have subject matter jurisdiction to consider the neighboring landowners' LUPA petition. *Id.* at 941. Although the petitioners appeared to challenge a project permit application, they were actually collaterally challenging the county's Residential 20,000 zoning ordinance to the extent that it permitted urban density outside the urban growth area, a violation of the GMA. *Id.* at 943. No one disputed that the proposed subdivision complied with the Residential 20,000 zone, which already existed at the time of the project permit application. *Id.* at 939. The petitioners admitted in oral argument that their true position was that, to the extent the Residential 20,000 zone allows urban growth outside the urban growth area, any development authorized by this zone is not permitted by the GMA. *Id.* at 945. *Somers* reiterated that only the GMHB has jurisdiction to determine whether a development regulation, such as a zoning ordinance, complies with the GMA. *Id.* at 944. Holding that the LUPA process cannot be used to raise issues that should have been

brought before the GMHB, *Somers* vacated the trial court's decision and reinstated approval of the proposed subdivision. *Id.* at 950.

As discussed above, Ms. Woods raised several issues properly addressed in a LUPA petition pursuant to RCW 36.70C.130(1). Additionally, however, she alleged that CESS failed to present substantial evidence that the proposed rezone complied with the GMA. To the extent that she sought review of the rural-3 zone for compliance with the GMA, the superior court lacked subject matter jurisdiction. *Somers*, 105 Wn. App. at 945.

Ms. Woods argues in response that *Wenatchee Sportsmen* establishes that the issue of a site-specific rezone's compliance with the GMA is properly raised in a LUPA petition. On the contrary, *Wenatchee Sportsmen* merely noted that the question of whether a rezone allows urban growth outside an urban growth area may be challenged in a LUPA proceeding that considers whether such a rezone is *compatible* with the urban growth area adopted in the county's comprehensive plan. 141 Wn.2d at 181-82. Consistency with the comprehensive plan is properly determined in a LUPA petition; compliance with the GMA is not.

Accordingly, we decline to address the rezone's compliance with the GMA and confine our review to the remaining assignments of error properly raised in the LUPA petition.

REZONING AND THE COMPREHENSIVE PLAN

CESS contends the board of commissioners correctly decided that the rezone was proper and consistent with the county's comprehensive plan. The superior court reversed, concluding that the rezone to rural-3 allowed for urban growth in a rural area in violation of the GMA. "On review of a superior court's decision on a land use petition, we stand in the same position as the superior court." *Henderson*, 124 Wn. App. at 752. Errors of law are reviewed de novo; evidentiary issues are viewed in the light most favorable to the party that prevailed in the highest fact-finding forum. *Id.* Because CESS prevailed before the board, we will view the record that was before the board in the light most favorable to CESS. *Id.*

Rezoning is not presumed valid. *Citizens*, 133 Wn.2d at 874-75. As noted above, proponents of a rezone have the burden of proof in showing (1) that conditions have changed since the original zoning, or that the proposed rezone implements policies of the comprehensive plan; and (2) that the rezone bears a substantial relationship to the public health, safety, morals, or welfare. *Id.*; *Henderson*, 124 Wn. App. at 752-54. Kittitas County additionally requires the rezoning proponent to establish the following:

- a. The proposed amendment is compatible with the comprehensive plan; and
- b. The proposed amendment bears a substantial relation to the public health, safety or welfare; and
- c. The proposed amendment has merit and value for Kittitas County or a sub-area of the county; and

- d. The proposed amendment is appropriate because of changed circumstances or because of a need for additional property in the proposed zone or because the proposed zone is appropriate for reasonable development of the subject property; and
- e. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and
- f. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and
- g. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

KCC 17.98.020(5).

The board found that the proposed rezone (1) was consistent with the rural land use designation of the county comprehensive plan; (2) was consistent with rural-3 zoning to the north and similar land use to the east; (3) protected public health, safety and welfare because it did not allow “high intensity uses” such as asphalt plants, landfills, sawmills, and airports, which are conditionally allowed in the forest and range zone (CP at 173); (4) had value to the county because it will increase the tax base; (5) was appropriate for three-acre development due to the surrounding zoning and developments; (6) was suitable for development in conformance with the rural-3 zoning standards; (7) would not be materially detrimental to the use of properties in the immediate vicinity because it limits the number of permitted and conditional uses; and (8) will not adversely impact irrigation deliveries because it is not located within an irrigation district. After we eliminate Ms. Woods’ issues regarding compliance with the GMA, her remaining challenges are to findings (1), (3), (5), and (6).

I. Finding (1): Is the proposed rezone consistent with the comprehensive plan?

According to undisputed findings in Ordinance 2004-15, the county comprehensive plan designated the area of the CESS property as rural in 1996. Ms. Woods argues that the comprehensive plan recognizes that a five-acre minimum lot preserves rural character. She quotes language from the plan in support:⁴

“There exists a generalization that five-acre minimum lot sizes might preserve ‘rural character.’ The County Planning Department has GIS data showing over 603,716 acres eligible for consideration as rural land. If so, Kittitas County will retain rural character for a long time based on the five acre density criteria.”

CP at 104 (quoting Kittitas County’s comprehensive plan). Five-acre zoning apparently is not available in Kittitas County for its rural land, however. And as noted by CESS and by this court in *Henderson*, additional language in the comprehensive plan actually reveals a concern with the effects of the 20-acre minimum lots:

“State planners are concerned about ‘urban sprawl’ with less than five acre minimum lot sizes. However, over the past fifteen to twenty years Kittitas County has experienced ‘rural sprawl’ through the adoption of 20 acre minimum lot sizes, which has caused the conversion of farm land into weed patches. Small lot zoning with conservation easements for agriculture, timber, or open space may be preferable to the wasteful ‘sprawl’ developments of large lot zoning and could be more conducive to retaining rural character.”

⁴ The parties to this appeal quote liberally from those sections of the Kittitas County comprehensive plan that support their arguments. They did not, however, include a copy of the comprehensive plan in the record on appeal. We limit our discussion of the actual language of the plan to those sections quoted in the record, the briefs, or *Henderson*.

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Henderson, 124 Wn. App. at 755 (quoting Kittitas County's comprehensive plan). As we found in *Henderson*, at 756, the proposed rezone from forest and range 20-acre minimum lots to rural 3-acre minimum lots (agricultural 3-acre lots in *Henderson*) appears to implement this policy of the comprehensive plan. Strict compliance with a comprehensive plan is not determinative; only general conformance is required. *Tugwell v. Kittitas County*, 90 Wn. App. 1, 8, 951 P.2d 272 (1997). Consequently, the record supports the board's finding that the proposed rezone is consistent with the comprehensive plan.

II. Finding (3): Does the proposed rezone bear a substantial relationship to the public health, safety, or welfare? A rezone must bear a substantial relationship to the county's health, safety, morals, or welfare. *Schofield v. Spokane County*, 96 Wn. App. 581, 587, 980 P.2d 277 (1999). The board found that the rezone to rural-3 lessened the number of "intense rural land uses" that are allowed in the forest and range zone. CP at 174. As explained above, permitted uses on rural-3 land are very similar to the permitted uses on forest and range land. The "high intensity" uses discussed by the board, including asphalt plants, airports, and sawmills, are only conditionally allowed on forest and range land. KCC 17.30.020, .030; KCC 17.56.020, .030; CP at 173. The board found that the rezone "protects public health, safety, and welfare, in an area with lots smaller than 20 acres in size." CP at 173. Although somewhat unclear, this language seems to indicate that, because the area near the CESS properties includes lots smaller than 20 acres in size, the rezone would protect public health, safety, and welfare by preventing such potentially

disruptive uses near these smaller lots. This benefit is only hypothetical, of course, but any potential use authorized within a zone is hypothetical until its potential is realized.

Ms. Woods contends the planning commission acknowledged that there are deficiencies with regard to water availability for development of the CESS properties. In its State Environmental Policy Act (chapter 43.21C RCW) determination of nonsignificance, the county planning department gave a mitigated determination that there was no guarantee of adequate water or transportation for future development. However, these problems are related to prospective approval of a subdivision, not to the application for a rezone. Without specific plans to review, we cannot determine the impact of such plans on water resources. *Henderson*, 124 Wn. App. at 757.

Ultimately, we may not substitute our judgment for that of the board's. *Schofield*, 96 Wn. App. at 589. We may find "that the board made a clearly erroneous application of the law only if we are left with the firm conviction that it made a mistake." *Henderson*, 124 Wn. App. at 752. Here, the board's finding of a substantial relationship to the public health, safety, or welfare is not clearly a mistake. The finding is bolstered by the board's additional finding that the rezone will increase the tax base, which provides additional services to the local community. *See Henderson*, 124 Wn. App. at 756.

III. Finding (5): Is the rural-3 zone appropriate due to surrounding zoning and developments? The board found that the CESS property was appropriate for three-acre development because adjacent properties allow three-acre densities. Property north of the

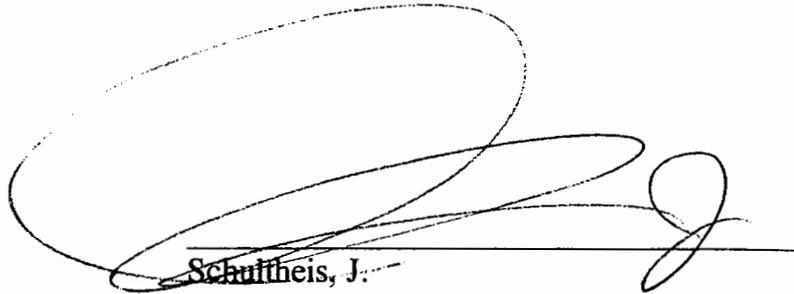
CESS property is already zoned rural-3 and property to the east, while zoned forest and range, was developed to a density similar to rural-3 before it was zoned forest and range. Although the area south of the CESS property is zoned commercial forest, one of the primary goals of the rural-3 zone is to “minimize adverse effects on adjacent natural resource lands.” KCC 17.30.010. Accordingly, rezoning to rural-3 in an area near other rural-3 uses and adjacent to a natural resource land may be appropriate. At any rate, the record supports the board’s finding and does not support a firm conviction that it made a mistake.

IV. Finding (6): Is the CESS property suitable for development in conformance with the rural-3 zoning standards? Ms. Woods notes that testimony before the planning commission indicated that only about 75 percent of the CESS property could be developed because the rest was steeply sloped. Additionally, one planning commissioner was concerned with the increased vehicle traffic on area roads and insufficient water when the property is developed. As discussed in section III above, these concerns are speculative and are more appropriate to the development phase of a project, not to the review of a site-specific rezone. The evidence before the board, viewed in the light most favorable to CESS, indicates that most of the property is probably suitable for development that conforms to the rural-3 zone.

To summarize, the findings adopted by the board, viewed in the light most favorable to CESS, are supported by sufficient evidence in the record. Giving due

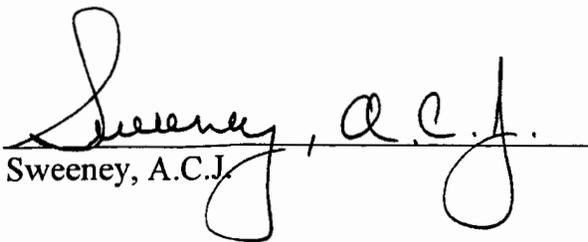
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deference to the board, we conclude that it did not make a clearly erroneous application of the law. *Henderson*, 124 Wn. App. at 752. Accordingly, we reverse the superior court and reinstate Ordinance 2004-15.

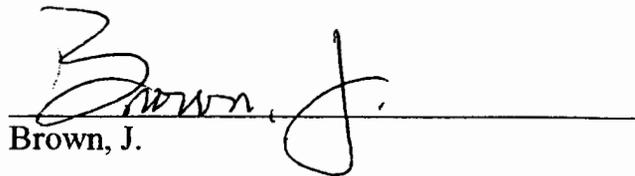


Schultheis, J.

WE CONCUR:



Sweeney, A.C.J.



Brown, J.

FILED

JAN 17 2006

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

CECILE B. WOODS,)
)
 Respondent,)
)
 v.)
)
 KITTITAS COUNTY, a political)
 subdivision of the State of)
 Washington, EVERGREEN MEADOWS)
 LLC, and STUART RIDGE LLC,)
 STEELE VISTA LLC, and CLE ELUM'S)
 SAPPHIRE SKIES, LLC,)
)
 Appellants.)

No. 23692-7-III

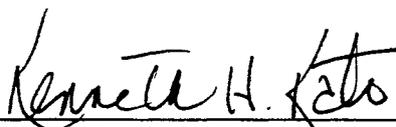
**ORDER DENYING MOTION
FOR RECONSIDERATION**

THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 29, 2005 is hereby denied.

DATED: January 17, 2006

FOR THE COURT:



 KENNETH H. KATO, Chief Judge