

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,

Respondent

and

EVERGREEN MEADOWS, LLC, STUART RIDGE, LLC, STEELE  
VISTA, LLC and CLE ELUM'S SAPPHIRE SKIES, LLC

Appellants.

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**REPLY BRIEF OF APPELLANTS EVERGREEN  
MEADOWS, LLC, STUART RIDGE, LLC,  
STEELE VISTA, LLC and CLE ELUM'S  
SAPPHIRE SKIES, LLC**

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June 6, 2005

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## I. INTRODUCTION

The parties agree that this is an important case involving the Growth Management Act, RCW 36.70A, (“GMA”). But the critical issue presented to this Court is a question of procedural compliance with GMA, not a substantive argument about rural densities under GMA. It is the respondent’s arguments (and the trial court’s ruling) that “cuts to the very core of GMA.” GMA is fundamentally a planning *process*, and the respondent’s arguments turn that process on its head.

It is undisputed that the Land Use Petition Act, RCW Chap. 36.70C (“LUPA”) is the proper vehicle for obtaining judicial review of a site-specific rezone. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000). It is also undisputed that the GMA boards have exclusive jurisdiction over all issues of GMA compliance. RCW 36.70A.280(1); *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997); *Somers v. Snohomish County*, 105 Wn. App. 937, 945, 21 P.3d 1165 (2001). To reconcile these rules, the *Somers* court correctly concluded that questions of GMA compliance cannot be litigated in LUPA cases, even if the underlying land use decision is subject to review under LUPA.

The GMA process contemplates that Kittitas County is entitled to make a legislative determination of what rural densities are appropriate in

Kittitas County. That policy decision is subject to review by the Eastern Washington Growth Management Hearings Board (“EWGMHB”). Only the EWGMHB has the legal expertise and subject matter jurisdiction to decide whether Kittitas County’s legislative choices comply with GMA. Only the EWGMHB has the authority to decide what remedy, if any, is necessary to achieve county-wide compliance with GMA. Only the EWGMHB may decide whether the 1du/3 acre density permitted in the Kittitas County “Rural-3” zone violates GMA. To date, it has not done so.

The respondent’s argument disrupts the GMA process by taking the policy issue of rural densities away from the citizens of Kittitas County, their elected Board of Commissioners (“Board”), and the EWGMHB, and allow a superior court in Yakima to decide the issue on a piecemeal basis. This Court must reaffirm the decision in *Somers* by holding that the superior court lacked jurisdiction to determine whether the Kittitas County “Rural-3” Zone violates GMA.

## **II. REPLY ARGUMENT**

### **A. Standard of Review**

It is undisputed that a site-specific rezone is a land use decision subject to judicial review under LUPA. *Wenatchee Sportsmen Association*, 141 Wn.2d at 179. The primary issue presented is whether a trial court reviewing a site-specific rezone under LUPA has subject matter

jurisdiction to consider whether the underlying development regulations comply with GMA. The parties agree that this issue is a question of law that this Court must review *de novo*. *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

The respondent's discussion of the statutory and judicial standards of review for rezones, Resp. Br. at 11-14, is irrelevant. Apart from the two legal issues raised by appellants, the trial court did not decide whether the rezone complies with those standards, and those issues are not before this Court.

**B. The respondent's arguments are contrary to both the GMA process and the substantive goals of GMA.**

As explained in the opening brief, GMA does not merely establish land use planning goals. GMA creates an entire planning process based on legislative action subject to review by the specialized GMA boards. The respondent's arguments are contrary to both the GMA process and the substantive goals of GMA.

**1. "Rural-3" is *not* an "urban" density under GMA.**

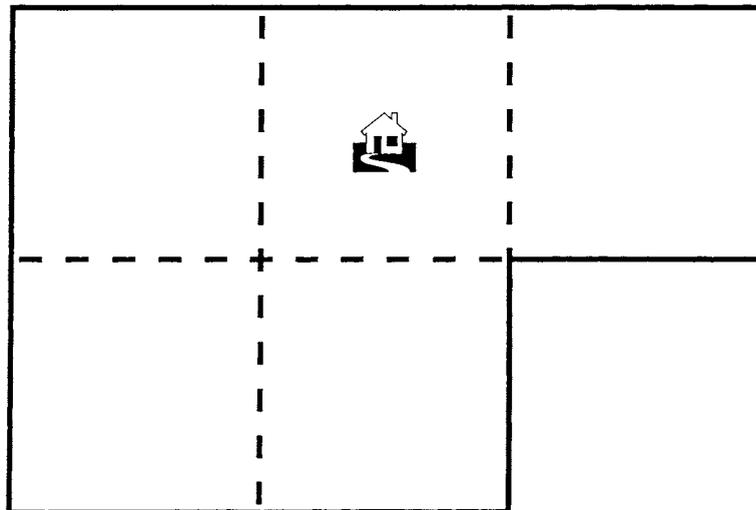
The respondent's argument is based on the erroneous assertion that the "Rural-3" zone (1 dwelling unit per 3 acres) is an appropriate "urban" density under GMA. Resp. Br. at 1 n.2; 16 n.12. Misled by the respondent's arguments, the trial court erroneously concluded that the

“Rural-3” zone is an “urban” zone that is only appropriate within an Urban Growth Area (“UGA”). CP 28.

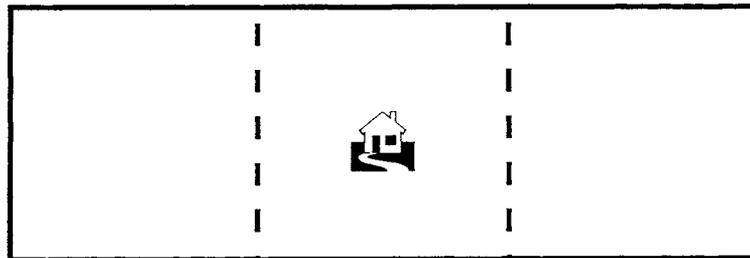
Both the respondent and the trial court are wrong. Urban zones are more than ten times as dense than the “Rural-3” zone. Urban zones are generally required to have densities of 4 dwellings per acre or higher. *See Hensley v. City of Woodinville*, CPSGMHB No. 96-3-0031 (Final Decision and Order, 2/25/97).

The following diagrams visually illustrate the dramatic difference between “rural” and “urban” densities under GMA. Figure 1 shows the 1 du / 5 acres rural density demanded by the respondent. Figure 2 shows the 1 du / 3 acres density allowed in the Kittitas “Rural-3” zone. Figure 3 shows the *minimum* urban density of 4 du / acre.

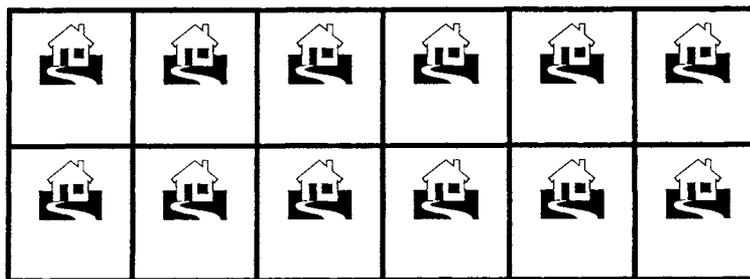
**Figure 1: 1 du / 5 acres (typical “rural” density)**



**Figure 2: 1 du / 3 acres (Kittitas “Rural 3” zone)**



**Figure 3: 4 du / acre (minimum “urban” density)**



Given that the 4 du / acre density (Figure 3) is generally the *minimum* density for “urban” zones, the respondent’s suggestion that the “Rural-3” zone (Figure 2) is an appropriate “urban” density is absurd. Yet the respondent managed to convince the trial court that the “Rural-3” was appropriate for “urban” areas, but not “rural” areas. CP 28. If this Court were to affirm that determination GMA planning would be severely disrupted (at least until the Supreme Court granted review and reversed). Far from championing Growth Management, the respondent is pushing self-serving arguments that would destroy a key element of GMA if they were accepted by this Court.

**2. The trial court's decision would invalidate the "Rural-3" zone throughout Kittitas County.**

The respondent portrays her argument as a "challenge to the *application* of Rural-3 in rural areas" in an effort to avoid a recognition that the trial court's ruling effectively invalidated the "Rural-3" zone throughout the entire county. Resp. Br. at 1, n.2 (emphasis added).

Respondent states:

The question presented in this case is not whether the Rural-3 zoning district is valid but rather whether the Growth Management Act (GMA) allows its use in areas outside of established Urban Growth Areas (UGA). The only time that this issue is presented is in the context of a rezone application.

Resp. Br. at 45. As explained in subsection (1) (above), the "Rural-3" zone is clearly not permissible in "urban" areas (UGAs) of Kittitas county. Therefore, if the respondent and the trial court were correct, the "Rural-3" zone would not be permitted anywhere in Kittitas County.

Contrary to the respondent's "site-specific" argument, the trial court's decision, if affirmed, would invalidate the "Rural-3" zone throughout Kittitas County. This Court must recognize that the respondent's argument is not a "site-specific" "application" of GMA. The respondent's argument is an attack upon the countywide validity of the "Rural-3" zone, which is a question within the *exclusive* jurisdiction of the EWGMHB.

**3. The trial court's erroneous analysis of "urban" density proves the appellants' point: the superior courts lack the expertise necessary to determine compliance with GMA.**

The respondent asserts that allowing a superior court to decide a question of GMA compliance will not interfere with the established GMA planning process. Resp. Br. at 46. But it clearly did interfere with that process in this case. The EWGMHB is a highly-specialized body that never would have accepted the ludicrous proposition that the Kittitas County "Rural-3" zone is an "urban" density under GMA. But a Yakima County superior court did. That is precisely why all questions of GMA compliance are within the *exclusive* jurisdiction of the GMA boards. RCW 36.70A.280(1); *Somers*, 105 Wn. App. at 945, 949; *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

**4. The "Rural-3" zone does not "violate" GMA.**

The respondent devotes a substantial portion of her brief to the argument that the "Rural-3" zone violates GMA by allowing urban density growth in rural areas. Resp. Br. at 22-32. That is the very issue that the superior court lacked jurisdiction to adjudicate. The respondent's reliance on GMA board decisions confirms that the question of rural density is within the exclusive jurisdiction of the GMA boards. Resp. Br. at 27-31.

Nor does this Court have the necessary subject matter jurisdiction to consider the issue unless the issue arises in an appeal from a decision of the EWGMHB under the state Administrative Procedure Act (RCW Chap. 34.05). See *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2000); *Diehl v. Western Washington GMHB*, 118 Wn. App. 212, 75 P.3d 975 (2003).

Even if this Court were permitted to consider this argument on its merits, the respondent is wrong for several reasons. First, the respondent's argument is based on the absurd proposition that the "Rural-3" zone is an appropriate "urban" zone. See subsection (1) (above).

Second, the legislative decision of Kittitas County to retain the "Rural-3" zone does not "violate" GMA unless and until the EWGMHB so holds. The respondent's argument is based on the erroneous assumption that the GMA boards have uniformly prohibited rural densities higher than 1 du / 5 acres. Resp. Br. at 27-32. But the respondent is forced to concede that the EWGMHB can and does make exceptions based on local circumstances. Resp. Br. at 28 n.17. In *Woodmansee v. Ferry County*, EWGMHB No. 95-1-0010 (Final Decision and Order, 5/13/96), the EWGMHB upheld 2.5 acre rural zoning in Ferry County.<sup>1</sup>

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<sup>1</sup> The *Sedro Wooley* decision cited by the respondent is a compliance order issued by the Western Washington GMA board to Skagit County. *Sedro*

Like Ferry County, appellant Kittitas County has made a deliberate legislative decision to retain the “Rural-3” zone based on its own unique circumstances. Only the EWGMHB may decide whether that legislative choice is valid public policy under GMA. The superior court only had the authority to decide the mechanical issue of whether the rezone to “Rural-3” is consistent with the comprehensive plan, and it decided that issue incorrectly. *See* section (C) (below).

Third, the remedies available for a “violation” of GMA are defined by statute, and the GMA boards are vested with the discretion to decide whether to impose them. *See Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 560-61, 958 P.2d 962 (1998); *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192 n.2, 4 P.3d 115 (2000). Even though the GMA boards have exclusive jurisdiction over pre-existing local ordinances, the legislature did not give the GMA boards the authority to invalidate such ordinances. *Skagit Surveyors*, 135 Wn.2d at 567. There is no statute or case law to suggest that the legislature intended the superior courts to wield that power.

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*Wooley v. Skagit County*, WWGMHB No. 03-02-0013c (Compliance Order, 6/18/04). This order does not overrule the EWGMHB decision in *Woodmansee* nor could it.

**5. The respondent has not used the available public process to challenge the “Rural-3” zone under GMA.**

In an attempt to justify his “site-specific” attack on the “Rural-3” zone, the respondent has argued that there is no other venue in which to raise the issue of whether the “Rural-3” zone complies with GMA. Resp. Br. at 46. Anticipating that the respondent would renew this argument, the County’s brief explained that the respondent (and the public) had numerous opportunities to challenge the “Rural-3” zone legislatively and before the EWGMHB. The respondent simply never used those avenues.

The respondent’s new arguments about “estoppel,” “standing” and “prerequisites” are red herrings. Resp. Br. at 35-36. The issue is subject matter jurisdiction. Even if the respondent had previously presented his GMA arguments to the County legislature and then to the EWGHMB, the respondent still could not raise those GMA issues in superior court under LUPA. The question of whether the “Rural-3” zone complies with GMA is within the *exclusive* jurisdiction of the EWGMHB. RCW 36.70A.280(1); *Somers*, 105 Wn. App. at 945, 949.

The respondent makes a number of incorrect arguments about the GMA planning process and the adoption of the “Rural-3” zone. *See* Resp. Br. at 35-47. For the sake of judicial economy, appellant CESS adopts by

reference the reply brief of appellant Kittitas County on these issues. RAP 10.1(g).

**C. The Board of County Commissioners correctly concluded that the rezone to “Rural-3” was consistent with the Kittitas County Comprehensive Plan.**

As explained in appellant’s opening brief, the “Rural-3” zone is not only consistent with the policies of the Comprehensive Plan for *rural* areas of Kittitas County, it implements those policies. App. Br. at 12-17. The trial court’s contrary determination violates the plain language of the Comprehensive Plan and this Court’s recent decision in *Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P.3d 842 (2004). The Board’s conclusion was clearly correct, particularly in light of the deference required by RCW 36.70C.130(1)(b). The respondent offers no argument on this issue, effectively conceding that the trial court’s ruling was error and that the Board’s decision must be affirmed.

**D. The superior court lacked jurisdiction to determine whether the Kittitas County “Rural-3” Zone violates GMA.**

Respondent points out that LUPA and GMA contemplate two separate levels of review of zoning actions. Resp. Br. at 3. But the respondent fails to recognize that the jurisdiction of the GMA boards under RCW 36.70A and the jurisdiction of the superior courts under LUPA do not overlap. Rather, the GMA boards have *exclusive* jurisdiction over GMA compliance issues. *Somers*, 105 Wn. App. at 944.

The *exclusive* jurisdiction of the GMA cannot be circumvented by characterizing a GMA argument as an “as applied” challenge. There is no case that permits a trial court to consider GMA compliance issues “as applied” in a LUPA context. If a trial court were permitted to consider GMA issues on an “as applied” basis, a trial court could reach a different conclusion than the GMA boards on a particular issue of GMA compliance. For example, the EWGMHB could uphold the Rural-3 zone as an appropriate rural density, while a trial court held that the same zone violated GMA with regard to rural density. This inconsistent result would not respect the *exclusive* jurisdiction of the GMA boards.

Consequently, “[a] petitioner cannot use the LUPA process to raise issues that should have been brought before the GMHB.” *Somers*, 105 Wn. App. at 944. There is no such thing as an “as applied” (CP 28) or “site specific” (Resp. Br. at 1) GMA challenge.

*Somers, supra*, is the controlling case. *Somers* holds that questions of GMA compliance cannot be raised by LUPA petition even if the underlying land use decision is subject to review under LUPA. *Somers*, 105 Wn. App. at 944-45. Such issues must be addressed to the GMA boards.<sup>1</sup> *Id.* Under *Somers*, the trial court had no jurisdiction to consider

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<sup>1</sup> The analysis of the GMA boards’ jurisdiction in *Somers* was based on *Caswell v. Pierce County*, 99 Wn. App. 194, 992 P.2d 534, *rev. denied*, 142

the respondent's argument that the "Rural-3" zone constitutes impermissible "urban" growth in rural areas. This Court has no jurisdiction to consider the issue in this appeal.

As expected, the respondent ignores the applicable analysis in *Somers*, and relies on dicta in *Wenatchee Sportsmen Association* and other inapplicable cases.

**1. The superior court has no jurisdiction to consider GMA compliance issues, even in the context of a site-specific rezone.**

Respondent erroneously asserts that the jurisdictional analysis in *Somers* does not apply to site-specific rezones, and that none of the cases cited by appellants involved a site-specific rezone. Resp. Br. at 22. That is false. *Citizens for Mount Vernon, supra*, involved a site specific rezone, and that case confirms that the GMA board has exclusive jurisdiction over GMA issues. *Citizens for Mount Vernon*, 133 Wn.2d 868. *Citizens* is entirely consistent with *Somers* on this point.

Respondent also cites *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 61 P.3d 332 (2002), but that case does not support the respondents' argument. *Timberlake* involved a LUPA challenge to a conditional use permit ("CUP") for a large church. The

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Wn.2d 1010, 16 P.3d 1265 (2000). See *Somers*, 105 Wn. App. at 945. *Caswell* held that the issue of whether a local ordinance complied with GMA could not be

court noted that the criteria for the particular King County CUP at issue gave the hearing examiner the discretion to consider the purposes of GMA. *Timberlake*, 114 Wn. App. at 182-83. *Timberlake* did not hold that GMA compliance issues may be raised under LUPA. The *Timberlake* court clarified its limited application of GMA, stating:

[Appellant] has not challenged the validity of this CUP criterion, and at any rate, such a challenge would be beyond the jurisdiction granted courts hearing LUPA petitions. *See* [*Somers*, 105 Wn. App. 937]; [*Caswell*, 99 Wn. App. 194].

*Timberlake*, 114 Wn. App. at 188 n.5. Respondent's brief ignores this important clarification in *Timberlake*, which confirms that respondent's argument is erroneous.

The remaining cases cited by respondent are irrelevant. *Moore v. Whitman County*, 143 Wn.2d 96,18 P.3d 566 (2001), held that the EWGMHB lacked jurisdiction over a county that was not planning under GMA. *City of Burien v. Central Puget Sound GMHB*, 113 Wn. App. 375, 53 P.3d 1028 (2002), held that CPSGMHB lacked jurisdiction over an interlocal agreement.

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reviewed under LUPA because that issue should have been brought before the CPSGMHB. *Caswell*, 99 Wn. App. at 199.

2. The respondent's reliance on *dicta* in *Wenatchee Sportsmen Association v. Chelan County* is misplaced.

The respondent's argument is entirely based on *dicta* in *Wenatchee Sportsmen Association, supra*. Resp Br. at 16-21. The issue in that case was whether the petitioner's challenge to a rezone decision was *timely* where the rezone could have been appealed under LUPA two years earlier. *Wenatchee Sportsmen Association*, 141 Wn.2d at 175. The suggestion that the petitioner could have raised issues of GMA compliance in an earlier LUPA action is careless *dicta*, not relevant or necessary to the Court's holding.

It is worth noting that *Somers* cited *Wenatchee Sportsmen Association* twice, noting that the petitioner's challenge to a specific permit approval had to be challenged in superior court under LUPA. *Somers*, 105 Wn. App. 942 n. 6, n.7. But *Somers* recognized the limits of the holding *Wenatchee Sportsmen Association*, and proceeded to refine the analysis of which *issues* may be raised under LUPA. If the respondent's careless reading of *Wenatchee Sportsmen Association* were correct, the *Somers* court would have allowed the petitioner to present his GMA arguments under LUPA. But *Somers* held that the superior court lacked jurisdiction over such issues. *Somers*, 105 Wn. App. at 949. In sum, the

language in *Wenatchee Sportsmen Association* relied on by respondent is dicta and wrong.<sup>1</sup>

**3. The exclusive jurisdiction of the GMA boards includes pre-existing Kittitas zoning ordinances**

As explained in appellant's opening brief, the exclusive jurisdiction of the GMA boards includes pre-existing ordinances. App. Br. at 24-26. The respondent's argument that the "Rural-3" zoning ordinance (Ordinance 92-4) could not have been appealed to the EWGMHB is erroneous under *Skagit Surveyors*, 135 Wn.2d at 567. On appeal, the respondent has presented no argument or authority on this issue.

**4. There is no "conflict" between the "Rural-3" zone and state law.**

Respondent argues that the rezone to "Rural-3" is in "conflict" with GMA. Resp. Br. at 32-35. This argument adds nothing to the analysis of the issue presented. The issue is not whether the "Rural-3" zone "conflicts" with GMA, but whether the superior court has the jurisdiction to consider the issue. Only the GMA boards have the jurisdiction to decide whether the "Rural-3" zone "conflicts" with GMA.

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<sup>1</sup> The respondent also cites *Chelan County v. Nykreim*, 146 Wn.2d 904, 924-25, 52 P.3d 1 (2002), which simply repeated the erroneous dicta in *Wenatchee Sportsmen Association*. Resp. Br. at 17. The actual issue in *Nykreim* was whether a "ministerial" land use decision (a boundary line adjustment) is reviewable under LUPA.

Respondent cannot bootstrap herself into subject matter jurisdiction with that argument where no jurisdiction exists in the first place.

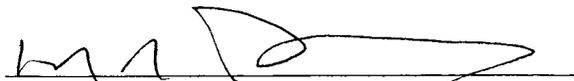
Respondent cites numerous cases for the boilerplate proposition that local ordinances must not conflict with state laws. Apart from *Timberlake* (discussed above in subsection (D)(1)) none of the respondent's cases involve GMA or even remotely address the jurisdictional issue presented in this case. See *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998) (local regulation of watercraft); *Brown v. Yakima*, 116 Wn.2d 556, 807 P.2d 353 (1991) (local regulation of fireworks); *Hass v. Kirkland*, 78 Wn.2d 929, 481 P.2d 9 (1971) (local fire protection regulations); *Parkland Light & Water Co. v. Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004) (fluoridation of drinking water); *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993) (vested rights in subdivision applications); *Employco Personnel Services v. Seattle*, 117 Wn.2d 606, 817 P.2d 1373 (1991) (municipal liability for power outage); *Ritchie v. Markley*, 23 Wn. App. 569, 597 P.2d 449 (1979) (agricultural exemption from Shoreline Management Act).

### III. CONCLUSION

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

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of June, 2005.

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 6<sup>th</sup> day of June, 2005, I caused a true and correct copy of Appellants' Reply Brief to be forwarded, via the method(s) indicated below, to the following person(s):

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