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**COURT OF APPEALS FOR DIVISION III**

**STATE OF WASHINGTON**

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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.

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**BRIEF OF RESPONDENT CECILE B. WOODS**

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## 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 Ordinance No. 2004-15 violated Growth Management Act (GMA) by authorizing growth that is urban in nature outside of established Urban Growth Areas (UGAs).<sup>1</sup>

(ii) Whether the Superior Court lacked jurisdiction to review a "site-specific rezone" for compliance with Growth Management Act, RCW Chap. 36.70A.<sup>2</sup>

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<sup>1</sup> Cle Elum Sapphire Skies (CESS) designates the first issue as follows:

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

The issue presented on appeal to the superior court was whether the "site-specific rezone" to "Rural-3" zoning district violated Growth Management Act (GMA). A secondary consideration was consistency with the Comprehensive Plan.

<sup>2</sup> The jurisdictional issue presented is whether a superior court has jurisdiction to review a "site-specific rezone" for compliance with Growth Management Act (GMA). The appellate issue was not a facial challenge to the "Rural-3" zoning district under GMA but rather a challenge to the application of Rural-3 in rural areas. While the rezone of property to R-3 in unincorporated "urban areas" of Kittitas County would be permissible, the application of R-3 zoning in unincorporated "rural" areas violates the goals and requirements of Growth Management Act (GMA).

(iii) Whether Respondent prohibited from challenging a site-specific rezone because of a purported failure to challenge original zoning ordinance or propose amendments to zoning ordinance districts?<sup>3</sup>

## II. INTRODUCTION

This is an important case. The State of Washington embarked upon a thoughtful and logical path for long-term land use planning with the adoption of the Growth Management Act (GMA). At the heart of the legislation is the premise that urban levels of development should be confined to designated urban growth areas; rural areas should be protected from sprawling, low-density development; resource lands (forest, agriculture and mineral) are to be designated and protected; and planning must be predicated on established growth projections.

Ordinance 2004-15 cuts to the very core of Growth Management Act (GMA) by authorizing urban levels of development in designated rural areas. Cle Elum's Sapphire Skies ("CESS") applied for a rezone which allows for the creation of three (3) acre lots in a designated rural area. The development density is

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<sup>3</sup> Kittitas County does not identify an issue pertaining to its assignment of error. RAP 10.3(a)(3). Written argument is set forth in the Brief of Appellant Kittitas County that does not relate to the two issues identified in their brief.

exacerbated by clustering subdivision provisions allowing for density bonuses and lots as small as one (1) acre. Growth Management Hearings Boards have been clear and certain in their direction regarding permissible rural densities – “. . . 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.” Growth Management Act (GMA) does not contenance this type of planning and decision-making.

Growth Management Act (GMA) was premised upon a commitment to plan for the future and stop the repeating of past mistakes. The statutory structure contemplates two levels of review for statutory compliance: (1) review of comprehensive plan and development regulations by Growth Management Hearing Boards; and (2) review of project permit applications and site-specific rezones by the courts. The definition and jurisdiction is clear, consistent and logical. This case represents an effort to blur and confuse those established lines of review.

### **III. 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 rezone approximately 251.63 acres of rural land from Forest and Range (F&R) to Rural-3 (R-3) zoning district. (Ex. 12).<sup>4</sup>

**A. 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 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 redevelopment proposal initiated by CESS for the systematic conversion thousands of acres of rural lands from Forest and Range to Rural-3 zoning districts. Kittitas County was considering in at least ten (10) similar rezone applications.<sup>5</sup>

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<sup>4</sup> Applicant includes three (3) limited liability companies related to a developer identified as “Cle Elum Sapphire Skies, 315 39<sup>th</sup> 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.

<sup>5</sup> 1000 Friends of Washington identifies eight (8) separate rezones from Forest & Range to Rural-3. (Ex. 23). BOCC minutes reflect two (2) additional rezones

The property is 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).<sup>6</sup> (Ex. 22)

**B. Zoning of Property (Forest and Range).**

The property was zoned Forest and Range (FR) zoning district.<sup>7</sup> 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-

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including Sapphire Skies requires. Despite the multiple rezone requests, Kittitas County failed to consider the collective impact of the aggregate rezones.

<sup>6</sup> 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; promote a variety of residential densities; and provide for long-term service by public utilities for water and sewer systems.

<sup>7</sup> 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.

term commercial significance.<sup>8</sup> 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).

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.

**C. 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.

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<sup>8</sup> 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”.

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.

Planning Staff described the primary impacts of the rezone proposal as follows:

The permitted uses in each of these zones are identical with one exception and that is the mining activities, including rock crushing operation and those are permitted outright in the Forest and Range but requires a conditional use permit with the Board of Adjustment in the requested R-3 zone. . . . *However, the minimum lot size would be reduced from 20 acres to 3 acres, thus increasing the maximum build out density by six plus times. Therefore, the primary difference between the two districts is the density or potential number of lots.* Forest and Range zone allows one single family residence per 20 acres and again, Rural-3, one home per three acres.

(Ex. 22).

The development potential 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.

**D. Kittitas County Comprehensive Plan.**

Kittitas County Comprehensive Plan (“Comprehensive Plan”) was adopted on July 26, 1996. Comprehensive Plan was recognized as a policy document that contemplated future implementation through adoption or amendment to zoning ordinances and development regulations.

This document is the official amended comprehensive plan for Kittitas County. The plan is not an ordinance, it contains no regulations or minimum standards. It is a declaration of policies related to future growth and development in the county: . . . .

\* \* \*

The comprehensive plan is based on a framework of community goals and objectives adopted by the county as a formal expression of public policy. There’s no assurance, however, that orderly development, or any other goals will be accomplished simply by the formal adoption of the plan. *The value of the Plan lies in the determination and commitment of the county in the future to implement the Plan through the adoption of ordinances and codes designed to achieve the stated objectives.*

(Italics added). Comprehensive Plan – 1. Comprehensive Plan further addresses “amendments to county plan, codes and standards” and states:

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

(Comprehensive Plan – 3). Consistency and implementation can be accomplished in one of two ways: (1) area-wide zoning amendment (text or map) through a public legislative process; or (2) a “site-specific rezone” through a quasi-judicial process. Comprehensive Plan recognizes that either process requires compliance with Growth Management Act (GMA) (RCW Ch. 36.70A).

The subject property is designated “rural” under the Comprehensive Plan.<sup>9</sup> Concerns regarding “urban sprawl” and

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<sup>9</sup> The subject property was designated “rural” in December, 1997. Kittitas County added the “rural lands” element to the Comprehensive Plan in response to further state level direction regarding planning for rural areas. Kittitas County Comprehensive Plan – 188.1. Prior to the amendments, the Comprehensive Plan land use designated map identified areas as Rural Residential, Non-Designated Agricultural, Forest Multiple Use, Rural Multiple Use, and Public Recreation Lands. Comprehensive Plan – 188.3. All of those identified lands were subsequently identified as “rural lands” for the purpose of meeting requirements of RCW 36.70A.070. Comprehensive Plan – 188.3. The plan recognizes that “. . . with the exclusion of stated unincorporated areas, UGA’s

rural densities in excess of “five acre minimum lot sizes” were recognized in the planning process:

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. State planners are concerned about “urban sprawl” with less than five acre minimum lot sizes.

(Comprehensive Plan 2003 at 176; CP 77).<sup>10</sup> Comprehensive Plan does not contain an authorization of Rural-3 (R-3) zoning district but rather carries an admonition regarding the validity of zoning to densities less than five (5) acres in size.

#### IV. ARGUMENT

##### A. Standard of Review.

Land Use Petition Act (LUPA) provides the exclusive means for review of land use decisions in the state of Washington. RCW 36.70C.030(1). *Benchmark Land Company v. City of Battleground*,

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and UGN's, all remaining areas will generally be considered to be rural lands.” Comprehensive Plan – 188.3.

<sup>10</sup> CESS references the case of *Henderson v. Kittitas County*, 124 Wn.App. 747, 100 P.3d 842 (2004). The court in *Henderson* reviewed a rezone from Forest and Range (F&R) to Agriculture-3 (Ag-3). Testimony was that “. . . the actual lots would be somewhere between five and ten acres each.” *Henderson*, 124 Wn.App. at 751. The court did not, however, address the specific issue raised in this case – site-specific rezone compliance with Growth Management Act (GMA). References to comprehensive plan compliance were in the context of the specific application and a challenge to the finding regarding changed circumstances.

146 Wn.2d 685, 693, 49 P.3d 860 (2002); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); and *Tugwell v. Kittitas County*, 90 Wn.App. 1, 7, 951 P.2d 272 (1997). Site-specific rezones are reviewable by the superior court pursuant to Land Use Petition Act (LUPA). *Wenatchee Sportsmen Assoc. v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000).

RCW 36.70C.130 establishes six (6) separate standards upon which relief may be granted in a land use appeal. Issues presented in this appeal are questions of law for the court to review de novo. *Snohomish County v. Somers*, 105 Wn.App. 937, 941, 21 P.3d 1165 (2001) (“Whether the trial court had subject matter jurisdiction . . . is a question of law that we review de novo.”); *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001); *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000); and *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

**B. Statutory and Judicial Standards for Rezone.**

The rezone of property is subject to specific requirements established by ordinance, statute and case law. The courts of

Washington have recognized that there is no presumption of validity favoring the action of rezoning; proponents of the rezone have the burden of proof in demonstrating change of circumstances and compliance with statutory requirements; and that such changes justify the rezone for the public health, safety, morals, or general welfare. *Henderson v. Kittitas County*, 124 Wn.App. 747, 752-753, 100 P.3d 842 (2004); *Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997); and *Tugwell v. Kittitas County*, 90 Wn.App. 1, 8, 951 P.2d 272 (1997).

Rezoning is recognized as quasi-judicial proceedings. It is an adjudicatory process that determines the propriety of reclassifying land in the context of competing interests and established legal requirements. The court in *Fleming v. Tacoma*, 81 Wn.2d 292, 298-299, 502 P.2d 327 (1972) stated:

Zoning decisions may be either administrative or legislative depending upon the nature of the act. See *Durocher v. King County*, 80 Wn.2d 139, 492 P.2d 547 (1972). But, whatever their nature or the importance of their categorization for other purposes, zoning decisions which deal with an amendment of the code or reclassification of land thereunder must be arrived at fairly. The process by which they are made, subsequent to the adoption of a comprehensive plan and zoning code, is basically adjudicatory.

\* \* \*

But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

Kittitas County has established seven (7) additional criteria to be applied in rezone applications. KCC 17.98.020(5) provides as follows:

A petition requesting a change on the zoning map from one zone to another must demonstrate the following criteria are met:

1. The proposed amendment is compatible with the comprehensive plan; and
2. The proposed amendment bears a substantial relation to the public health, safety or welfare; and
3. The proposed amendment has merit and value for Kittitas County or a sub area of the county; and
4. 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
5. The subject property is suitable for development in general conformance with zoning standards for the proposed zone; and

6. The proposed amendment will not be materially detrimental to the use of properties in the immediate vicinity of the subject property; and
7. The proposed changes in use of the subject property shall not adversely impact irrigation water deliveries to other properties.

Each of these seven (7) criteria are mandatory and separate elements of consideration within the context of the rezone. The rezone must be denied if an applicant fails to establish each element with substantial evidence in the record.<sup>11</sup> *Ahmann-Yamane LLC v. Tabler*, 105 Wn.App. 103, 111, 19 P.3d 436 (2001). Kittitas County Zoning Ordinance establishes no exceptions to the required elements.

**C. Superior Court has Subject Matter Jurisdiction to Review “Site Specific Rezones” for Compliance with Growth Management Act (GMA).**

Appellant argues that the Superior Court lacks jurisdiction to review site-specific rezone determinations for compliance with Growth Management Act (GMA). It is asserted that “. . . all questions of whether comprehensive plans, zoning ordinances, and

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<sup>11</sup> Respondent appealed Ordinance No. 2004-15. The appeal presented two (2) specific challenges to the rezone ordinance: (1) the rezone violated Growth Management Act (GMA) by authorizing urban levels of development in rural areas; and (2) the rezone was not supported by substantial evidence. Judge Susan L. Hahn concluded that the rezone violated directives of GMA prohibiting urban growth densities outside of an established Urban Growth Area (UGA). Having decided the case on issue of GMA compliance, the court did not reach the second appeal issue of substantial evidence.

development regulations comply with GMA are within the exclusive jurisdiction of the GMA Boards.” (Appellant CESS Brief – 10).

The statutory scheme for review of land use decisions recognizes that there are two (2) bodies with jurisdiction to review Growth Management Act (GMA) compliance in the context of amendments to zoning ordinances: (1) the Growth Management Hearings Board with regard to adoption or amendment of development regulations; and (2) the superior court for “site-specific rezones” constituting project permit applications. The court in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000) addressed the issue of appellate jurisdiction over site-specific rezones and commented as follows:

A party must initially appeal a land use decision of the kind involved here to either a GMHB or to superior court; the GMA and LUPA determine which forum is the exclusive one to consider a party’s grievance. If a GMHB does not have jurisdiction to consider a petition, it must be filed in superior court under LUPA.

The jurisdiction over a land use decision is determined directly by the statutory directives of Growth Management Act (GMA) and Land Use Petition Act (LUPA).

CESS submitted a “site-specific rezone” application for four (4) separate parcels of land. The rezone request was for

reclassification of the identified parcels from Forest & Range (F&R) to Rural-3 (R-3) zoning district.<sup>12</sup> The subject property was located outside of an established Urban Growth Area (UGA) and constituted urban growth in a rural area. The superior court had subject matter jurisdiction under Land Use Petition Act (LUPA) to review site-specific rezones for compliance with Growth Management Act (GMA).

1. **Superior Court Has Jurisdiction to Review Land Use Decisions Involving Project Permit Applications.**

The Supreme Court in *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 172-173, 4 P.3d 123 (2000)<sup>13</sup> specifically addressed the jurisdictional issue presented in

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<sup>12</sup> Respondent did not challenge the validity of Rural-3 (R-3) zoning district. The challenge was based on the application of the Rural-3 (R-3) zoning district outside of established Urban Growth Areas (UGA). Kittitas County has jurisdiction and planning responsibility for all "unincorporated areas". The designation of an Urban Growth Area (UGA), however, is not limited to current municipal boundaries. The UGA designates an area (outside of existing municipal boundaries) in which urban growth will be allocated based upon a twenty (20) year planning horizon. As a result, Kittitas County has planning authority for both urban and rural areas. It would be proper to utilize the Rural-3 (R-3) zoning district in "unincorporated urban areas."

<sup>13</sup> *Wenatchee Sportsmen* involved appellate review of a residential development project. The property was located outside of an established Interim Urban Growth Area (IUGA) and was previously zoned Recreational Residential (RR). No challenge or appeal was registered with respect to the earlier rezone. Shortly after the site-specific rezone, Developer submitted a preliminary plat application for 205 residential lots with an average clustered lot size of 1.36 acres. WSA

this case. The court in *Wenatchee Sportsmen* 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 from collaterally 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.* Because the zoning requirements for the property were established by the rezone approval, the only reviewable question in this case is whether the project application complies with those zoning requirements.

[Italics added]. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 172-173, 4 P.3d 123 (2000). Accord, *Chelan County v. Nykreim*, 146 Wn.2d 904, 924-925, 52 P.3d 1 (2002); *Moore v. Whitman County*, 143 Wn.2d 96, 104, 18 P.3d 566 (2000) (“ . . . Land Use Petition Act governs all land use decisions not subject to review under the GMA. . . .”). The GMA compliance

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challenged the subdivision and contended that the proposed plat violated GMA by allowing urban growth outside of the IUGA.

issue in *Wenatchee Sportsmen* was exactly the same as the issue presented in this case – a site-specific rezone authorizing urban densities in rural areas.

The jurisdictional distinction was premised upon a clear analysis of statutory language. Growth Management Hearings Boards (GMHB) are vested with authority to review “comprehensive plans” and “development regulations” for compliance with the Growth Management Act (GMA). RCW 36.70A.280(1); *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn.App. 375, 383, 53 P.3d 1028 (2002); *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000) (“ . . . unless a petition alleges that a comprehensive plan or a development regulation . . . are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.”). The court in *Somers v. Snohomish County*, 105 Wn.App. 937, 942, 21 P.3d 1165 (2001)<sup>14</sup> noted the limitation and stated:

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<sup>14</sup> *Somers* involved a preliminary plat application for subdivision of 36.5 acres into fifty (50) single-family residential lots. The property was zoned Residential 20,000 (R-20,000). The average proposed lot size was 21,000 square feet. The application did not present a “site-specific rezone” but rather involved a project level plat application authorized by previously adopted zoning district. *Somers* presented the same legal issue as that addressed by the court in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

A GMHB, in turn, has very limited jurisdiction and “shall hear and determine only those petitions alleging . . . [t]hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter. . . .” RCW 36.70A.280(1)(a). Moreover, a GMHB does not have jurisdiction to “render a decision on a specific development project,” such as an application for preliminary plat approval. [citing *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000) and RCW 36.70A.290(2) and RCW 36.70A.280(1)(a)]. “Unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.” “If a GMHB does not have jurisdiction to consider a petition, it must be filed in Superior Court under LUPA.” (citing *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000)).

See, also, *Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997) (a GMHB does not have jurisdiction to “render a decision on a specific development project . . .”)

The court in *Wenatchee Sportsmen Association* analyzed the statutory definitions applicable to “development regulation” and “project permit application”. RCW 36.70A.030(7) defines “development regulation” as follows:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. *A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.*

(Italics added). The definition of “development regulation” references and excludes “project permit applications”. RCW 36.70B.020(4) defines “project permit application” as follows:

“Project permit” or “project permit application” means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, *site-specific rezones authorized by a comprehensive plan or sub area plan*, but excluding the adoption or amendment of a comprehensive plan, sub area plan, or development regulations except as otherwise specifically included in this subsection.

The statutory scheme specifically recognizes that “site-specific rezones” are not “development regulations”. As a consequence, Growth Management Hearings Boards (GMHB) do not have jurisdiction to review such “project permit applications”. Exclusive review of site-specific rezones is under Land Use Petition Act (LUPA). The court in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000) recognized this jurisdictional dichotomy and held as follows:

The conclusion to be drawn from these provisions is that a site-specific rezone is not a development regulation under the GMA, and hence pursuant to RCW 36.70A.280 and .290, a GMHB does not have jurisdiction to hear a petition that does not involve a comprehensive plan or development regulation under the GMA. See, also, *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

*Wenatchee Sportsmen* specifically recognized that the “issue of whether the rezone should have allowed urban growth outside of the IUGA had to be raised in a LUPA petition challenging the rezone decision itself.” *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d at 173; *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 61 P.3d 332 (2002) (conditional

use permit for church and, as conditioned, “. . . was not inconsistent with purposes of the GMA.”).

None of the cases cited by Appellants related to “site-specific rezones.” In each case, the review was of a project application authorized by pre-existing zoning ordinances. *Somers v. Snohomish County*, 105 Wn.App. 937, 21 P.3d 1165 (2001) (preliminary plat application under existing Residential 20,000 (R-20,000) zoning district). *Citizens for Mount Vernon v. Mount Vernon* 133 Wn.2d 861, 947 P.2d 1208 (1997). *Wenatchee Sportsmen* is controlling authority in this case.

**D. 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.<sup>15</sup> The adopted residential density violates Growth Management Act (GMA) directives to

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<sup>15</sup> 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.

prevent inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2).

One of the principle reasons for the adoption of Washington's Growth Management Act was the loss of farms, forests and rural lands to urban sprawl. Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Rev. 867, 880 (1993). Growth Management Act (GMA) established thirteen (13) planning goals which guide the development of comprehensive 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).

“Rural areas” are lands located outside of urban growth area (UGA) and outside resource lands. RCW 36.70A.030(15). RCW 36.70A.11 provides guidance with regard to “rural lands”:

The legislature finds that this chapter is intended to recognize the importance of rural lands and rural character to Washington’s economy, its people, and its environment, while respecting regional differences. Rural lands and rural based economies enhance the economic desirability of the state, help to preserve traditional economic activities, and contribute to the state’s overall quality of life.

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. . . The legislature finds that in defining its rural element under RCW 36.70A.070(5), a county should foster land use patterns and develop a local vision of rural character that will: help preserve rural based economies and traditional rural lifestyles; encourage the economic prosperity of rural residence; foster opportunities for small scale, rural based employment and self employment; permit the operation of rural based agricultural, commercial, recreational, and tourist businesses that are consistent with existing and planned land use patterns; be compatible with the use of the land by wildlife and for fish and wildlife habitats; foster the private stewardship of the land and preservation of open space; and enhance the rural sense of community and quality of life.

Growth Management Act (GMA) requires counties to prepare and adopt a rural comprehensive plan element and development

regulations to implement the rural element. RCW 36.70A.070(5), 040(3), and .040(4). Kittitas County has adopted the comprehensive plan element but failed to adopt implementing “development regulations” (i.e., zoning ordinances). Rather, the County has relied upon pre-existing zoning ordinances and attempted “implementation and consistency” in the context of rezone applications. The rezone application has represented the community’s only opportunity to test the application of zoning ordinance densities to GMA directives regarding UGA’s and containment of “urban growth”.

RCW 36.70A.030(14) defines “rural character” as follows:

“Rural character” refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
- (b) That foster traditional rural lifestyles, rural based economies, and opportunities to both live and work in rural areas;
- (c) That provide visual landscapes that are traditionally found in rural areas and communities;
- (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;

- (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

Growth Management Act (GMA) prohibits growth that is “urban in nature” outside of designated urban growth areas. RCW 36.70A.110(1) provides, in relevant part, that “[e]ach county that is required or chooses to plan under RCW 36.70A.040 shall 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.” Growth that is “urban in nature” is prohibited within rural areas.

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.<sup>16</sup> Each of the 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.

1. **Growth Management Act (GMA) Prohibits Rural Densities of Less than Five-Acre Parcels.**

All three (3) Growth Management Hearings Boards have clearly and unequivocally found that minimum lot sizes smaller than five (5) acres are urban designations, not rural. *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

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<sup>16</sup> 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).

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 unit to five acres are not rural densities.”).<sup>17</sup> 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.

The court in *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 185 n.3, 61 P.3d 332 (2002) recognized the persuasive character of administrative decisions and stated:

Although administrative decisions are not binding on this court, we find guidance in their interpretation of the law, especially where, as here, the decision is made by the body primarily charged with interpreting a given statute. See, *East v. King County*, 22 Wn.App. 247, 255-56, 589 P.2d 805 (1978).

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<sup>17</sup> Petitioner cites the case of *Woodmansee and Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 95-1-0010 (Final Decision and Order 5 – May 13, 1996) for the proposition that a density of one housing unit per 2.5 acres is permissible in rural areas. The board specifically noted the unique circumstances and held that “[t]his board finds, given circumstances unique to Ferry County, and in the acceptance of the local decision-making process, that 2.5 acre lots constitute rural development in Ferry County.” This rule has not been recognized in any subsequent determination and pre-dated significant amendments to the rural components of the Growth Management Act. A recent expression of the adopted standard was set forth in *City of Sedro-Wooley v. Skagit County*, WWGMHB No. 03-02-0013c (June 14, 2004) (Finding – 13 – “Outside of UGA’s, residential development is allowed at rural densities. Densities greater than one dwelling unit per five acres are not rural densities.”).

Growth Management Hearings Board interpretations are persuasive authority in matters considered under Growth Management Act (GMA).

Eastern Washington Growth Management Hearings Board has provided guidance on rural densities in a variety of cases. In *City of Moses Lake v. Grant County*, EWGMHB Case No. 99-1-0016 (Order on Remand, April 17, 2002) it was stated:

The GMA speaks of “a variety of rural densities”. RCW 36.70A.070(5)(b). However, the density must still be rural, not urban. With narrow exception, this Board has consistently found that anything under 5-acre lots is urban.

Past practices cannot form the basis for current determinations. EWGMHB made the following observation in *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 01-1-0015c and 01-1-0014cz and stated as follows:

The effect of the county’s action here would be to continue the existing zoning at urban density in the face of statutory direction to prohibit urban growth in the Rural Element. *The continuation of urban densities creates an impermissible pattern of urban growth in the rural area. Lot density, in conflict with the overall five-acre zoning, will have a substantial impact on the density of this rural area.*

The county contends that it is the existing zoning and is appropriate in this situation both to protect private property and to avoid noncompliant zoning. Nowhere in the plan is there a discussion of how this would harmonize with the GMA's goals. The fact that such zoning existed prior to the adoption of the plan is no excuse to continue it.

(Italics added).

The Board similarly addressed the issue of pre-existing patterns in the case of *City of Moses Lake v. Grant County*, Case No. 99-01-0016 (Final Decision and Order, May 23, 2000), in which it was stated:

This does not mean the county can or must ignore what has occurred in the past. The past patterns cannot be easily undone. The landowners affected by those pre-GMA development activities are protected, for better or worse, by the fact that their uses, although non-conforming with future planning and zoning, are legal. They are also protected by the fact that their fully completely development permit applications are vested. *Nonetheless, the county cannot base its future planning for new growth on its past development practices if those practices, as here, do not comply with the GMA or the CPPs. What was once permissible is no longer so. The GMA was passed to stop repeating past mistakes in the future.* The GMA contemplates quite a different future. The past practices cannot be the pattern for the future. As a consequence, the future land use map

must show land use as anticipated because of GMA goals and requirements.

Kittitas County is repeating the errors of the past. Three (3)-acre parcels are “urban” and not permitted in rural areas.

While comprehensive plans and development regulations are reviewed by the Growth Management Hearings Boards, site-specific rezones are reviewed by the superior court. The analysis and application of GMA, however, is identical in either forum. Growth Management Act (GMA) prohibits urban growth in the rural area. RCW 36.70A.070(5)(b) (“ . . . appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.”). Land use decisions are guided by the goal of reducing the inappropriate conversion of undeveloped land into sprawling, low-density development. RCW 36.70A.020(2). The same substantive standards under Growth Management Act (GMA) are applicable whether the review is administrative or judicial. Urban growth has been clearly identified and applicable authority prohibits rural densities with minimum lot sizes of less than five (5) acres.

In this case, Kittitas County “rezoned” the subject property from a permissible density (Forest and Range – 20 acre

minimum) to Rural-3 (3 acre minimum lot size). A three (3)-acre parcel size violates the clear density directives established by Growth Management Act (GMA). The density consideration is exacerbated in this case by a further recognition that the provisions of KCC 17.65.040 allow for density bonuses and “cluster subdivisions”. These provisions allow a further reduction in lot size and authorize parcels as small as one (1)-acre. The densities authorized by the rezone are in clear violation of GMA directives and requirements.

**2. Zoning Ordinances Must Not Be In Conflict with General Laws.**

The adoption and amendment of zoning ordinances is an exercise of police powers authorized by Article XI, Section 11 of the Washington State Constitution.<sup>18</sup> The exercise of such police

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<sup>18</sup> Article XI, Section 11 of the Washington Constitution provides that “any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.” The court in *Hass v. City of Kirkland*, 78 Wn.2d 929, 932, 481 P.2d 9, 1971 stated:

This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself.

It requires no legislative sanction for its exercise so long as the subject matter is local, and the regulation reasonable and consistent with the general laws.

powers, however, is subject to the constitutional limitation that prohibits local legislation or regulation that is in conflict with the general laws of the state. Any amendment of a zoning ordinance must be in compliance with goals and policies established by the Growth Management Act (GMA).

It is well established that a local zoning ordinance may not conflict with a state statute. *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273 (1998); *Brown v. City of Yakima*, 116 Wn.2d 556, 561, 807 P.2d 353 (1991); *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 183, 61 P.3d 332 (2002) (“ . . . parties are not prevented from arguing that a specific discretionary approval is inconsistent with the GMA or comprehensive plan policies.”). The scope of local police power authority is circumscribed by Article XI, Section 11 of the Washington State Constitution. *Parkland Light & Water Company v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 434, 90 P.3d 37 (2004). A local regulation that conflicts with state law fails in its entirety. See *Adams v. Thurston County*, 70 Wn.App. 471, 482, 855 P.2d 284 (1993); *Employco Personnel Services v. City of Seattle*, 117 Wn.2d 606, 618, 817 P.2d 1373 (1991); and *Parkland*

*Light & Water Company v. Tacoma-Pierce County Board of Health*,  
151 Wn.2d 428, 434, 90 P.3d 37 (2004).

The court in *Weden II v. San Juan County*, 135 Wn.2d  
678, 693, 958 P.2d 273 (1998) stated:

Article XI, Section 11 requires a local law to yield to a state statute on the same subject matter if that statute “preempts the field, leaving no room for concurrent jurisdiction,” or “if a conflict exists such that the two cannot be harmonized.” *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 561, 807 P.2d 353 (1991). . . .

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In determining whether an ordinance is in “conflict” with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

See, also, *Ritchie v. Markley*, 23 Wn.App. 569, 573-574, 597 P.2d 449 (1979) (Article XI, Section 11 of the State Constitution forbids local governments to enact laws which conflict with the general laws of the state).

Growth Management Act (GMA) prohibits “urban growth” in rural areas. The rezone ordinance (Ordinance No. 2004-15) authorizes “urban growth” within rural areas. The ordinance is

in direct conflict with the statutory requirements. "Where there is a conflict between a statute and an ordinance, the latter must give way." *Employco Personnel Services v. City of Seattle*, 117 Wn.2d 606, 617, 817 P.3d 1373 (1991); *Parkland Light & Water Company v. Tacoma-Pierce County Health Department*, 151 Wn.2d 428, 434, 90 P.2d 37 (2004) (" . . . when a local regulation conflicts with a state statute we will invalidate the regulation.").

**E. Respondent Was Not Required to Challenge Adoption of Zoning Ordinance or Initiate A Compliance Proceeding as a Prerequisite to Challenging a Proposed Rezone.**

Kittitas County filed an appeal and has submitted an unidentified issue for consideration by this court.<sup>19</sup> The issues seem to be as follows:

- (1) Respondent is precluded from challenging the rezone because of a failure to file a petition with the Eastern Washington Growth Management Hearing Board following adoption of Ordinance 92-4 – the ordinance establishes Rural-3 zoning which was adopted on March 3, 1992.
  
- (2) Respondent is precluded from challenging the rezone because she “. . . failed to use the

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<sup>19</sup> RAP 10.3(a)(3) requires an appellant to provide a separate concise statement of each error “. . . together with the issues pertaining to the assignments of error.” Kittitas County simply adopted the CESS assignment of error and issue statement. No issue is identified for the briefing and argument submitted regarding the amorphous arguments.

docketing and public participation processes that would have given . . . standing to raise the Rural-3 issue before the EWGMHB.”

These arguments are presented without legal authority or analysis. The argument seems to be couched in terms of either an “estoppel” theory or a “standing” challenge. Neither of these arguments were presented during the trial court review of this case.<sup>20</sup>

The fundamental flaw with the arguments submitted by Kittitas County is that Respondent is not challenging the validity of Rural-3 zoning district. The issue as presented and decided by the court was whether a rezone to be Rural-3 (R-3) zoning district in rural areas (as opposed to urban areas) violates the Growth Management Act (GMA). Judge Hahn predicated her decision this distinction:

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<sup>20</sup> Kittitas County submitted and argued regarding ordinance adoption for the first time at time of oral argument before the Superior Court. No briefing or evidentiary submission had been made in advance of the oral argument. During the course of oral argument, Kittitas County presented three (3) separate zoning ordinances: Ordinance No. 92-4 (adding Chapter 17.30 – Rural-3 zone); Ordinance 92-5 (amending Kittitas County Zoning Map to reclassify certain lands from Forest and Range to Rural-3); and Ordinance No. 92-6 (amending Kittitas County Code Chapter 17.56, forest and Range zone). The ordinances were adopted on March 3, 1992. The zoning amendments created the Rural-3 (R-3) zoning district and modified permissible density in Forest and Range (F&R) zoning district. None of the ordinances were adopted under Growth Management Act (GMA). In fact, Kittitas County had undertaken no GMA planning as of the date of the amendments.

Whether this RR-3 rezone 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 fully 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 densities.

(CP 28). This distinction recognizes the potential applicability of Rural-3 (R-3) zoning in both unincorporated "urban areas" but not in areas outside of established UGA's or UGN's.

1. **Respondent Woods Was Not Required to Challenge the 1992 Adoption of Rural-3 Zoning District as a Condition to the Present Action.**

Kittitas County asserts that Respondent (or any other party) is precluded from challenging a rezone utilizing the pre-existing Rural-3 zoning district. In addition to the total absence of any legal authority supporting the proposition, the argument fails for a number of specific reasons: (1) Ordinance 92-4 established the "Rural-3 zone" but was not adopted pursuant to Growth Management Act (GMA); (2) no appeal procedures were available to Growth Management Hearings Boards (GMHB); (3) Kittitas County had not established either "Interim Urban Growth Areas" or

“Urban Growth Areas” in 1992; and (4) the statutory directives related to the “rural element” were not adopted until 1997.

Ordinance 92-4 established the “Rural-3 zone” but was not adopted pursuant to or in accordance with the Growth Management Act (GMA). Finding of Fact 3 specifically notes that “. . . the proposal is consistent with goals and objectives of the County Comprehensive Plan.”<sup>21</sup> A similar reference is made in Ordinance 92-6 related to adoption of Chapter 17.56, Forest and Range Zone. Neither ordinance referenced Growth Management Act (GMA).

Ordinance 92-4 was adopted pursuant to authority under “Planning Enabling Act of the State of Washington” – RCW 36.70. Zoning code amendments specifically identify the statutory basis for amendment of the zoning ordinance and provide as follows:

*According to RCW 36.70 a public hearing was held by the County Planning Commission on January 27, 1992 for the purpose of considering the following amendment: . . .*

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<sup>21</sup> Kittitas County had historically planned under Planning Enabling Act – RCW Ch. 36.70. A pre-GMA comprehensive plan was in place and served as a planning guide. Ordinance 92-4 referenced the prior comprehensive plan. Kittitas County did not adopt the GMA comprehensive plan until July 26, 1996. The referenced comprehensive plan did not designate either urban or rural lands; did not establish urban growth areas or boundaries; and contained no reference to resources lands. Growth Management Act (GMA) was in its formative stages and contemplated a sequential planning process that would take more than five (5) years for Kittitas County to complete.

(Italics added). No reference is made to Growth Management Act (GMA). Planning Enabling Act contains no guidelines or requirements with regard to urban growth areas; rural land use or densities; identification or protection of resource lands; or statutory review or appeal mechanisms. At the time of ordinance adoption, Kittitas County had undertaken no planning under Growth Management Act (GMA).<sup>22</sup>

In 1990, the Washington State Legislature took the first significant step toward growth management when it enacted the Washington Growth Management Act (GMA). The initial legislation was passed on April 1, 1990. The legislation was, however, incomplete and lacked a variety of review and enforcement mechanisms. During the 1991 legislative session, the legislature reviewed a variety of dispute resolution mechanisms and concluded that GMA should be administered by an independent

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<sup>22</sup> Growth Management Act developed in two initial legislative phases. GMA I was enacted in 1990 and contained the fundamental legislative concepts embodied in thirteen (13) growth planning goals (RCW 36.70A.020); provided protections for resource lands and critical areas; and required coordinated planning by jurisdictions. GMA I did not, however, provide review or enforcement mechanisms. See generally, Settle and Gavigan, *The Growth Management Revolution in Washington: Past, Present and Future*, 16 UPS L.Rev. 867 (1993). GMA II was enacted in 1991 and established three (3) regional Growth Management Hearings Boards; allowed the imposition of sanctions; and filled other gaps in GMA I. Implementation was not funded and the functioning of review systems was not in place until May 15, 1992.

state agency, and, in its 1991 amendments to the GMA, directed the establishment of three growth planning hearings boards. RCW 36.70A.250 (1991). The implementation of the administrative review process required another year of legislative review and considerations. During the 1992 session, the legislature authorized funding for the three boards. 1992 Wash. Laws 1133, Ch. 232, Section 222 (11)(b). In April of that year, Governor Booth Gardner made three initial appointments to each of the Boards. RCW 36.70A.260. On May 15, 1992, the Boards began operations. Emergency rules were adopted on June 17, 1992. Washington State Reg. 92-14-001, NWSR 92-15, at 44. The sixty (60) day appeal period for Ordinance No. 92-4 expired prior to the actual commencement of Hearings Board operations.

More importantly, however, was the fact that no planning had been adopted under Growth Management Act (GMA). Kittitas County had not established either interim or permanent urban growth areas;<sup>23</sup> identified or protected resource lands or critical areas; developed or implemented “bottom-up” public

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<sup>23</sup> Interim Urban Growth Areas were not required to be designated until October 1, 1993. RCW 36.70A.110(5). Kittitas County did not adopt its comprehensive plan until July 26, 1996. At the time of Comprehensive Plan adoption, Kittitas County had still not finalized UGA's for the various municipalities.

participation processes; or developed, considered or adopted either countywide planning policies or comprehensive plans. These fundamental requirements were years away from adoption. There simply was no procedural or substantial basis for review of the zoning ordinance under Growth Management Act (GMA).

A review of "rural elements" in the comprehensive planning process is necessarily a function of statutory directives regarding "rural character". RCW 36.70A.110(5). These GMA components were not adopted until 1997.

Kittitas County has not adopted any "development regulations" under Growth Management Act as it relates to zoning districts. RCW 36.70A.040(3)(d) provides:

*If the county has a population of 50,000 or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, . . .*

An analysis of permissible rural densities is predicated upon two (2) essential components: (1) the designation of Urban Growth Areas (UGA's); and (2) the statutory directives mandated a "rural

element” as a part of the Comprehensive Plan. In 1997, the legislature passed a series of amendments to the GMA that clarified the acts or treatment of rural areas in a number of important ways. The first was a requirement that Comprehensive Plans include a “rural land use element”. RCW 36.70A.070(5). The legislation also gave specific direction with respect to land uses that were permitted in rural areas. RCW 36.70A.070(5)(b) and (c). See, also, Lloyd, *Accommodating Growth or Enabling Sprawl?*, 36 Gonz.L.Rev. 73, 126-130 (2001).

The sole opportunity to assess zoning changes in Kittitas County for compliance with Growth Management Act (GMA) directives is at the site-specific rezone stage. Kittitas Comprehensive Plan provides:

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The Comprehensive Plan is based on a framework of community goals and objectives adopted by the county as a formal expression of public policy. There is no assurance, however, that orderly development, or any of the other goals will be accomplished simply by the formal adoption of the plan. *The value of the Plan lies in the determination and commitment of the county in the future to implement the Plan through the adoption of ordinances and codes designed to achieve the stated objectives.*

Comprehensive Plan – 1.

Consistency and implementation can be accomplished in one of two ways: (1) area-wide zoning amendment (text or map) through a public legislative process; or (2) a “site-specific rezone” through a quasi-judicial process.

The review procedures are mutually exclusive and appellate review dependent upon statutory directives. Area-wide amendments to development regulations are reviewed by Hearings Boards and site-specific changes are reviewed under LUPA. The substantive review, however, is identical – the zoning ordinance must be “consistent with and implement the comprehensive plan.” The same requirement pertains to substantive compliance with the Growth Management Act (GMA).

2. **Respondent Was Not Required to Initiate Legislative Proposals as a Condition to Rezone Challenge.**

Kittitas County adopted its Comprehensive Plan on July 26, 1996. Ordinance 96-10 also established an annual review process for proposed amendments to the Comprehensive Plan. The process was supplemented in 1998 by Ordinance 98-10 which

allowed any person to suggest amendments to the Comprehensive Plan or Development Regulations.

Kittitas County argues that the failure to propose legislative changes precludes a challenge to a site-specific rezone.

The argument is phrased as follows:

Not once during the course of a decade did they (Respondent) 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.

(Brief of Kittitas County – 7-8). Kittitas County makes this argument without any reference to applicable legal authorities. The premise of the argument seems to be that a rezone that violates GMA goals requiring containment of “urban growth” to UGA’s is inapplicable unless a citizen engages in a general community-wide challenge to a zoning ordinance. This contention makes absolutely no sense and is unsupported by any legal authority or argument.

Kittitas County premises its argument upon the contention that Woods is pursuing a “collateral attack” on the

validity of the Rural-3 zoning district. 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. And the challenge is that zoning for the specific property should not be changed from a complaint district (Forest & Range with 20-acre minimum lot sizes) to a non-compliant zoning district (Rural-3).

Kittitas County plans under Growth Management Act (GMA). An initial determination related to the establishment of Interim Urban Growth Areas (IUGA) and Urban Growth Areas (UGA). Under countywide planning policies, UGA's are not coterminous with municipal boundaries but include unincorporated areas necessary to accommodate a twenty (20) year growth horizon. As a consequence, Urban Growth Areas (UGA's) are larger than existing municipal boundaries.

Kittitas County retains planning and decision-making responsibility with respect to "all" unincorporated areas. The unincorporated areas include undeveloped property within both UGA's and UGN's. Among the available zoning districts for the

unincorporated “urban area” is Rural-3. But Rural-3 cannot be applied in the “rural areas.”

The question presented to the court on appeal was whether a “site-specific rezone” to Rural-3 “allows urban growth outside of an IUGA” or UGA. The answer is that a “site-specific rezone” at this location violates both the Growth Management Act (GMA) and Kittitas County Comprehensive Plan.

3. **Trial Court Determination Does Not Circumvent or Interfere with Established Public Processes for Evaluating Compliance with the Growth Management Act (GMA).**

Kittitas County offers as its final argument the assertion that judicial review of site-specific rezones for Growth Management Act(GMA) compliance “. . . circumvents and interferes with the established public process” for comprehensive planning. The argument is summarized as follows:

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.

(Brief of Kittitas County – 11-12). The review procedures are established by statutory directives. Those review procedures have

been consistently applied by the courts and followed in this proceeding.

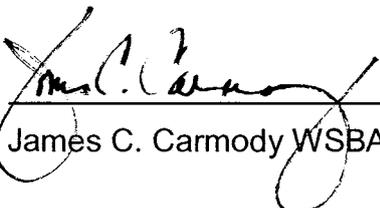
Growth Management Hearings Boards have limited jurisdiction to review a local jurisdictions actions under the Growth Management Act (GMA). The review is limited to compliance determinations related to “comprehensive plans” and “development regulations.” In the absence of the “comprehensive plan” or “development regulation”, the Growth Management Hearing Board does not have jurisdiction to determine GMA compliance. A site-specific rezone is not a “development regulation” and review must be undertaken pursuant to the Land Use Petition Act (LUPA). *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

## V. CONCLUSION

Respondent Woods requests that the trial court decision be affirmed.

Respectfully submitted this 5<sup>th</sup> day of May, 2005.

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