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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 265471
Consolidated with no. 265480

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

84187-0

KITTITAS COUNTY and CENTRAL WASHINGTON HOME
BUILDERS ASSOCIATION, et al,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al,

Respondents.

**INTERVENOR-PETITIONER AMERICAN FOREST
LAND COMPANY'S OPENING APPEAL BRIEF**

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I. INTRODUCTION

Intervenor-Petitioner American Forest Land Company ("AFLC") respectfully submits this Opening Brief in consolidated appeals of an August 20, 2007 Final Decision and Order ("FDO") of the Eastern Washington Growth Management Hearings Board ("Hearings Board"). AFLC joins the arguments presented in the opening briefs of Kittitas County and the Building Industry Association of Washington ("BIAW"). Having incorporated the arguments of its co-petitioners, AFLC will not repeat their arguments here.

AFLC files separately, however, in order to briefly illustrate how the Hearings' Board's decision to find portions of the County's Comprehensive Plan to be noncompliant with the Growth Management Act ("GMA") and to invalidate those provisions impacts the timber industry in Kittitas County. The County appropriately considered those impacts along with other local circumstances in its effort to meet local needs while harmonizing the planning goals of the GMA. The Hearings Board improperly declined to defer to the County's considered judgment and chose instead to substitute its judgment for that of the County's elected officials. As the County and BIAW contend, the Hearings Board has done precisely what it is prohibited from doing: it imposed a bright-line rule concerning what constitutes an urban level of growth rather than deferring to County balancing efforts, and it imposed its own GMA

priorities rather than allowing the County to apply the GMA planning goals in a manner that works in Kittitas County.

AFLC therefore joins the briefing submitted by Kittitas County and BIAW and respectfully asks that this Court reverse the Hearings Board's FDO.

II. ASSIGNMENTS OF ERROR

AFLC adopts and incorporates by this reference the assignments of error as submitted by Kittitas County and BIAW.

III. STATEMENT OF THE CASE

AFLC adopts and incorporates the County's and BIAW's statements of the case. AFLC has participated in this case because it views economic developments in Kittitas County as exactly the kinds of local circumstances that counties are directed to consider in planning under the GMA.

The forest products industry is facing unprecedented challenges that threaten its continuing viability in the Eastern Cascades. As AFLC noted as part of the administrative record, "the closure of the mills in Yakima and Naches, and resulting increased transportation costs, are contributing factors to this decline," but there are other driving factors as well. They include a rise in international competition, fluctuating timber markets and reduced demand for tree species grown in Eastern Washington, and heightened environmental

regulations. Collectively, these forces have led to a greater than 80 percent reduction in log exports from the East Cascades timbershed since 1992.

In order to continue timber production at all, landowners such as AFLC are compelled to pursue new and different approaches to the use and management of their timberlands. As with the agricultural industry, in some instances the only means of survival is to generate cash flow through the sale or development of small pieces of marginal timber land. *See, e.g.*, AR 1746-79.

AFLC controls approximately fifty-thousand acres of undeveloped and largely contiguous forest lands in the Upper Kittitas County. Significant portions of this property are rural lands zoned for three-acre residential development or higher density development. With the regional collapse of the forest products industry, including the loss of accessible mills and viable markets, AFLC must now consider land use alternatives for some of its property, including development. Given the size, use, and unique nature of its real property holdings in Kittitas County, AFLC moved to intervene on March 28, 2008. AFLC intervened under CR 24(a)(2) on the grounds that its interests were not adequately protected by the current parties and may be practically impaired by the outcome of this action. This Court granted AFLC's motion on April 30, 2008.

This litigation will decide if AFLC can rely on its three acre zoning, and its ability to cluster subdivide on that property. Also implicated in this litigation is a sizable portion of AFLC's property zoned Forest and Range-20. *See, e.g.,* FDO, p. 14-15 (finding KCC 17.56 (Forest and Range-20) noncompliant with the GMA as part of Issue 1). This litigation may well decide what the future holds for AFLC's property and for similarly situated timber companies facing a long-term industry collapse. Should the Court uphold the Growth Board's Final Order, including its unprecedented "bright line rule" regarding three acre zoning, the AFLC will be precluded from financing, selling, planning, or developing its land consistent with its zoned capabilities, directly impairing the AFLC's property interests. Accordingly, the disposition of this case risks the impairment of the AFLC's property interests from both a legal and practical standpoint sufficiently to warrant intervention.

IV. ARGUMENT

AFLC adopts and incorporates the arguments presented by Kittitas County and BIAW. In particular, the Hearings Board's invalidation of the County's authorization of three-acre lots in the rural element exceeded the Board's statutory authority. In *Thurston County v. WWGMHB*, 164 Wn.2d 329, 358-59, 190 P.3d 38 (2008), the Washington Supreme Court underscored the legislature's intent for the GMA to provide "local governments with general

guidelines for designating rural densities" and the discretion to determine appropriate densities based on local circumstances. The question for the Hearings Board was not whether it agreed with the County's determination; rather, the proper question was whether the County had developed a written record explaining how its determination is harmonized with the goals of the GMA. RCW 36.70A.070(5). The County's determination, supported by the record, is entitled to the deference of the Hearings Board.

RCW 36.70A.320(3).

Here, instead of deferring to the County's analysis, record, and determination of appropriate rural densities, the Board deferred to its own analysis: "This Board and the other two Hearings Boards have studied rural lot sizes, effects of those lot sizes and measured these findings against the requirements of the GMA and its definitions." FDO at 16. Based on "this extensive research," the Board concluded that Agriculture-3 and Rural-3 "are urban densities and this urban growth is prohibited in the Rural element." *Id.*

AFLC agrees with the County's and BIAW's arguments that the Hearing's Board's analysis constitutes precisely the type of bright-line rulemaking that the Supreme Court rejected in *Thurston County and Viking Properties v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (holding that "the growth management hearings boards do not have authority to make 'public

policy' even within the limited scope of their jurisdictions, let alone to make *statewide* public policy"). Even if the Hearings Board had not adopted a bright-line rule,¹ its decision demonstrates a wholesale disregard for the County's "studied" determination based on "extensive research." As the Supreme Court has held, "[b]alancing the GMA's goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies." *Id.* at 128.

Because the Hearings Board substituted the County's exercise of discretion with its own judgment, its decision was inconsistent with the deferential standard established by the GMA and should therefore be reversed.

V. CONCLUSION

For the foregoing reasons, AFLC joins in the briefing submitted by Kittitas County and BIAW and requests that the Hearings Board's Final Decision and Order be reversed.

Respectfully submitted this 16th day of March, 2009.

¹ Of course, Board member Roskelley's statement that "a pattern of lots smaller than five acres is urban in nature, rather than rural," FDO at 60, is unquestionably a bright-line rule.

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