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NO. 26547-1-III and 26548-0-III

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

**FILED**

**AUG 13 2009**

KITTITAS COUNTY,

Petitioner,

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

and

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a  
Washington not-for-profit corporation; BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON, a Washington not-for-profit  
corporation; MITCHELL F. WILLIAMS, d/b/a/ MF WILLIAMS  
CONSTRUCTION CO. INC.; TEANAWAY RIDGE, LLC; and  
KITTITAS COUNTY FARM BUREAU,

Petitioners/Intervenors,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD; KITTITAS COUNTY CONSERVATION; RIDGE;  
FUTUREWISE; and WASHINGTON STATE DEPARTMENT OF  
COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT,

Respondents.

**WASHINGTON DEPARTMENT OF COMMERCE'S ANSWER TO  
AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION**

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Original

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## I. INTRODUCTION

This answer to the amicus brief of the Pacific Legal Foundation (PLF) is filed by the Washington Department of Commerce (Commerce), a respondent in this appeal. The Department of Commerce is the successor agency to the Department of Community, Trade and Economic Development (CTED). Laws of 2009, ch. 565 (effective July 26, 2009).

## II. ARGUMENT

### A. **PLF's Arguments In Its Amicus Brief Do Not Relate To Issue 11 Before The Board, The Only Issue On Appeal That Involves The Department Of Commerce**

PLF's amicus brief raises three primary arguments. First, PLF argues that the Growth Management Hearings Boards are not permitted to create or apply "bright-line" rules when determining compliance under the Growth Management Act (GMA), RCW 36.70A. Second, it argues that the Boards have a history of applying "bright-line" rules to assess appropriate urban and rural densities. Third, it argues the Eastern Washington Growth Management Hearings Board (Eastern Board) impermissibly applied a bright-line rule in this case.

Only three of the fourteen issues decided by the Eastern Board are before this court. These issues are identified in the Final Decision and

Order as Issues 1, 10, and 11.<sup>1</sup> Although PLF's amicus brief does not specify which of these issues it is addressing, it appears its focus is on Issue 1. PLF's primary argument is that the Growth Management Hearings Boards cannot apply bright-line rules as to rural density; Issue 1 is the only issue referencing a specific rural density, and most of PLF's citations to the Final Decision and Order are to pages related to Issue 1.

As explained in our response brief at pages 3-4, CTED alleged and argued only the violations of the GMA set forth in Issue 11:

By amending its Comprehensive Plan without providing for a variety of rural densities, and without providing sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, [and] otherwise failed to comply with RCW 36.70A.070(5)?

Final Decision and Order at 54 (AR 2340). As restated by the Eastern Board, nothing in the language of Issue 11 implicates a bright-line rule. CTED did not argue for the application of any bright-line rule in resolving Issue 11 and, as explained in our response brief at pages 17-21, the Eastern Board did not apply any bright-line rule in resolving that issue. Accordingly, it is doubtful whether the arguments PLF raises in its amicus

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<sup>1</sup> The Final Decision and Order, dated August 20, 2007, is in the Administrative Record (AR) at pages 2287-2373.

brief have any bearing on the two issues relating to Issue 11. This answer nevertheless will briefly respond to each of PLF's arguments.

**B. The Washington Supreme Court Established In 2008 That The Growth Management Hearings Boards Lack Authority To Establish Bright-line Rules As To Development Density**

In *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), heard on direct review, a Washington appellate court suggested for the first time that Growth Management Hearings Boards may lack authority to establish bright-line rules regarding appropriate development density. However, the court did not enter a specific holding to that effect.

The case was not a GMA case, but a challenge to an old restrictive covenant that prevented high-density redevelopment of a parcel in a subdivision. The covenant contained four restrictions, two relating to race and two relating to density. *Id.* at 116, ¶ 3. All parties agreed the racial restrictions were void, and the dispute centered on the density restrictions. *Id.* at 117, ¶ 4.

One argument the developer raised was that the density limitation in the covenant violated public policy as set forth in the GMA. *Id.* at 124-25, ¶ 27. Applying contract analysis, the court explained that it would not find a restrictive covenant to be in conflict with public policy unless the record demonstrates "a legislative intent to declare a general public policy sufficient to override a contractual property right." *Id.* at 126, ¶ 32

(quoting *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 823, 854 P.2d 1072 (1993)). The court found no such intent in the language of the GMA. *Viking Properties*, 155 Wn.2d at 127, ¶ 35.

The developer then argued that the restrictive covenant was void because it violated the “bright-line” rule for minimum urban density adopted by the Growth Management Hearings Boards. *Id.*, at 128-29, ¶ 39. In rejecting that argument, the court explained that the Boards “do not have authority to make ‘public policy’ even within the limited scope of their jurisdictions, let alone to make statewide public policy.” *Id.* at 129, ¶ 40 (emphasis omitted). Rather, public policy is set forth in constitutional, statutory, and regulatory provisions, and prior judicial decisions. *Id.* (citing *Sedlacek v. Hillis*, 145 Wn.2d 379, 385-86, 36 P.3d 1014 (2001); *Roberts v. Dudley*, 140 Wn.2d 58, 63, 993 P.2d 901 (2000); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). The court upheld the density provision in the restrictive covenant.

The scope of the Growth Management Hearings Boards’ authority when deciding specific cases was not before the court in *Viking Properties* and, contrary to PLF’s argument in their amicus brief at 8, the court did not prohibit the Boards from adopting or applying bright-line rules. The

court simply held that the Boards cannot establish public policy that can override a contractual property right.

In *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 190 P.3d 38 (2008), however, the court was unambiguous that the Boards may not use bright-line rules. Among numerous issues on review was whether densities greater than one dwelling unit per five acres may be considered rural. *Id.* at 357-58, ¶ 44. The court held a Growth Management Hearings Board “may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny.” *Id.* at 359, ¶ 45.<sup>2</sup>

Before the decision in *Thurston County*, it was not clear that the Boards’ use of bright-line rules was impermissible. No appellate court had overruled any Board order on that basis. Beginning in August 2008, however, when the decision in *Thurston County* was issued, it has been clear that the Boards are now barred from establishing or using bright-line rules to determine whether a particular density is urban or rural.

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<sup>2</sup> Although the court in *Thurston County* cited *Viking Properties* in support of its holding that the Board, “as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities,” *Thurston County*, 164 Wn.2d at 358-59, ¶ 45, that is not what the *Viking Properties* decision said. Rather, the *Viking Properties* decision wrote that the Boards lack authority to make “public policy” and their powers are restricted to a review of “those matters specifically delegated by statute.” *Viking Properties*, 155 Wn.2d at 129, ¶ 40.

**C. Any Prior Use Of Bright-line Rules By Growth Management Hearings Boards Does Not Prove A Violation In This Case**

In its amicus brief, PLF cites approximately a dozen Board orders that PLF characterizes as having applied a bright-line rule in determining whether rural or urban densities complied with the GMA. All of the cited orders (including the Final Decision and Order at issue in this appeal) were decided before the Washington State Supreme Court's decision in *Thurston County*.<sup>3</sup> None of them applied a bright-line rule in contravention of any published appellate decision, and to the extent they used bright-lines to create "safe harbors" for the benefit of local governments, they were following a practice begun in 1995 in *Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, 1995 WL 903165 (Final Decision and Order, Oct. 6, 1995).

More importantly, none of those decisions (except, of course, the Final Decision and Order at issue in this appeal) are now before this court. Whether those decisions were consistent with the holding in *Thurston County* does not impart any information as to whether the Final Decision and Order issued in this case by the Eastern Board on August 20, 2007, is consistent with the holding in *Thurston County*. Only the Final Decision

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<sup>3</sup> By acknowledging that the Final Decision and Order at issue in this appeal is one of the Board orders PLF cites, we do not concede that PLF's characterization of the Final Decision and Order is accurate.

and Order in this case is before this court—indeed, only the Board’s resolution of Issues 1, 10, and 11, as identified in the Final Decision and Order, are before this court.

**D. The Board In This Case Did Not Apply A Bright-line Rule In Deciding Issue 11**

As explained above, the Department of Commerce alleged and argued only the violations of the GMA set forth in Issue 11. The Board addressed these alleged violations at pages 54-61 of the Final Decision and Order (AR 2340-47). Because PLF has not cited to the section of the Final Decision and Order addressing Issue 11, it appears PLF is not suggesting that the Board applied a bright-line rule in deciding Issue 11.

This position is consistent with the plain language of the Final Decision and Order. As we explained at pages 17-21 of our response brief filed May 5, 2009, the issue of bright-line rules is not implicated by the Board’s resolution of Issue 11 for at least three reasons:

- In contrast to the pertinent issue in *Thurston County*, Issue 11 was not framed in a way that invoked any bright-line density rule. CTED Resp. Br. at 19-20.
- In discussing and resolving Issue 11, the majority of the Board did not even mention bright-line rules except to quote a passage in CTED’s brief stating that there is no bright-line

established by the GMA. CTED Resp. Br. at 20. A single board member wrote a very short concurrence that referenced a bright-line rule, but which does not constitute the Board's decision. CTED Resp. Br. at 20.

- No bright-line rule can be invoked because Issue 11 does not involve a challenge to any specific density; rather, the challenge is to a failure to adopt criteria or standards that ensure a continuing variety of rural densities over time as specifically required in RCW 36.70A.070(5)(b). CTED Resp. Br. at 21.

Apart from this brief summary, the Department of Commerce relies on its response brief to address the Board's consistency with the GMA and *Thurston County* in its resolution of Issue 11.

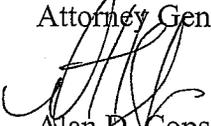
### III. CONCLUSION

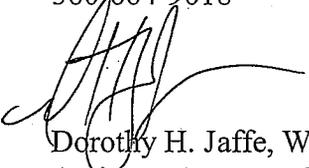
Based on its participation to date in this case, the Department of Commerce addresses only arguments related to Issue 11, as that issue is set forth in the Final Decision and Order. The Eastern Growth Management Hearings Board correctly resolved the challenge to Kittitas County's amended Comprehensive Plan as it relates to Issue 11, and did not impermissibly rely on any bright-line rule in doing so. This court

should affirm the Board as to Issue 11 and remand to the Board for further proceedings consistent with this court's decision.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of August, 2009.

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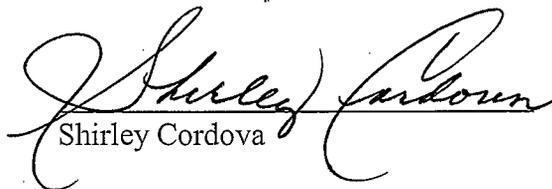
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17<sup>th</sup> day of August, 2009, at Olympia, Washington.

  
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