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COURT OF APPEALS
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

NO. 27123-4, consolidated with 27124-2, 27125-1, 27126-9, 27127-7

KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC., KITTITAS COUNTY FARM BUREAU, and SON VIDA II,

Appellants,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

BRIEF OF RESPONDENTS KITTITAS COUNTY CONSERVATION, RIDGE AND FUTUREWISE

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I. INTRODUCTION

Kittitas County made great strides towards compliance with the Growth Management Act (GMA) as part of their 2006 Comprehensive Plan and Development Regulations updates. In certain key areas, however, the County failed to meet the GMA's mandates. The Eastern Washington Growth Management Hearings Board (Board) properly remanded portions of the Development Regulations back to the County in this matter for correction. Because the Board committed no errors of law and substantial evidence supports their factual conclusions, this court should affirm the remand and allow Kittitas County to continue the process of correcting its ordinance.

II. STATEMENT OF THE CASE[1]

On July 19, 2007, the Kittitas County Commissioners enacted their Kittitas County Development Code Update as Ordinance 2007-22 (Development Regulations). Kittitas County Conservation (KCC), RIDGE, and Futurewise (KCC et al.) commented on the Development

[1] Respondents provide a procedural statement here. Because the facts are specific to each issue, additional facts are set forth in each argument section.

Regulations through letters and testimony, and filed a timely appeal to the Board.[2]

On March 21, 2008, the Board remanded portions of the Development Regulations to Kittitas County as noncompliant with the GMA, and invalidated some sections, in the Final Decision and Order in Case No. 07-1-0015. AR 1193-1261. The County and intervenors filed notices of appeal in Kittitas County Superior Court, and KCC et al. moved for direct review. On August 8, 2008, this court granted direct review.

III. ARGUMENT

A. Standard of Review

The Administrative Procedure Act (APA) governs judicial review of challenges to actions by the Board. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233 (2005). Under the judicial review provision of the APA, the "burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity." *Thurston*

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[2] Previous to the enactment of the Development Regulations, Kittitas County enacted Ordinance 2006-63, the amended Comprehensive Plan. KCC et al. and the Washington State Department of Community Trade and Economic Development filed separate petitions for review of the Comprehensive Plan. The Board remanded several sections of the Comprehensive Plan in a Final Decision and Order in Case No. 07-1-0004c dated August 20, 2007. Portions of the Final Decision and Order in Case No. 07-1-0004c have been separately appealed to this court by the County and/or intervenors in Case No. 265471. Because the Development Regulations that are the subject of this appeal were enacted after briefing in the comprehensive plan hearing was completed, KCC et al. was unable to move the Board to consolidate the two matters, and they thus are separate appeals with closely related issues.

County v. Cooper Point Ass'n, 148 Wn.2d 1, 7-8 (2002), citing RCW 34.05.570(1)(a). KCC et al., the prevailing parties below, may argue any ground to support the Board's order which is supported by the record. *State v. Kindsvogel*, 149 Wn.2d 477, 481 (2003).

Appellants and intervenors allege that the Board's decision is not based on substantial evidence, and contains errors of law. Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552 (2000). The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board. *Callecod v. Wash. State Patrol,* 84 Wn. App. 663, 676 (1997). Issues of law under RCW 34.05.570(3)(d) are reviewed de novo, but the Board is entitled to deference. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 116 Wn. App. 48, 54 (2003). On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Board. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d at 8 (2002).

Although the court is not bound by a board's decision, deference is accorded to agency interpretation of the law where the agency has special expertise in dealing with such issues. *City of Redmond v. Cent. Puget*

Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46 (1998). The Supreme Court recently addressed the deference to be granted to growth management hearings boards' decisions in *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498 (2006) (internal citations omitted):

> [T]he Board itself is entitled to deference in determining what the GMA requires. This court gives "substantial weight" to the Board's interpretation of the GMA. [FN7]
>
> [FN7]. The dissent wrongly summarizes the Board's role as merely this: "to ensure that the proper legislative bodies under the GMA are making the decisions mandated," as if *any* decisions will do. Actually, the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance. In other words, the Board is more than a deskbook dayminder telling counties what decisions are due.

Although counties have a "broad range of discretion" in choosing policy tools to carry out the GMA goals and requirements, "the deference ends when it is shown that the county's actions are in fact a 'clearly erroneous' application of the GMA." *Quadrant*, 154 Wn.2d at 238. Thus it is only in the event a court finds a Growth Board's ruling failed to apply

this "more deferential standard of review" [that is, the broad range of discretion] to a county's action that the Board is not entitled to deference from that court." *Id.*

During the same term as *Lewis County*, the Supreme Court again specifically stated that "substantial weight" must be given to the growth board's interpretation of the GMA. *Swinomish Indian Tribal Cmty v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424 (2007).

The County points to the recent Supreme Court case of *Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768 (2008), in support of the proposition that the Board cannot find a local jurisdiction out of compliance with the GMA, so long as the County had, in compliance with the GMA, considered any evidence bearing on the factors lawfully relevant to the decision at issue. County's Brief at 25-26. This proposition of law does not find support in the *Arlington* case.

In *Arlington*, the court held that the Hearings Board improperly dismissed "out of hand" a report authored by the property owner's consultant evaluating various WAC criteria. This consultant report provided evidence in the record to support the county's decision to re-designate agricultural resource land to commercial. The Board found the de-designation clearly erroneous, having declined to consider evidence

prepared by a property owner's consultant that the County had used in making its determination, and the Supreme Court reversed, writing:

> We find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the Board wrongly *dismissed* this evidence.

Id. at 782. (emphasis added).

The Board in this case, however, did not dismiss evidence relied upon by the County. On the contrary, the Board explicitly refers to the evidence the County used in its analysis. The Board did not, therefore, fail to defer appropriately to the evidence considered by the County in this case, as was the case in *Arlington*. *Arlington* does not require that the Board accept an assertion by the County that an apple is an orange when the record before the County clearly demonstrated it was an apple.

In this case, substantial evidence supports the Board's findings, and there are no errors of law.

B. The Growth Board Did Not Apply a Bright Line Rule in Finding that Three-acre and Greater Rural Densities are Noncompliant with the GMA Under the Unique Facts and Circumstances of Kittitas County

The Growth Board properly found noncompliant Kittitas County's three-acre rural zones and other development regulations allowing urban growth in the rural area. AR 1202-1207. Appellants BIAW and Kittitas County argue that the Growth Board impermissibly relied on a "bright line rule" regarding rural densities. Brief of BIAW at 10-16; Brief of Kittitas County at 19-22. But the Growth Board did not apply a bright line rule; instead, it carefully considered the evidence in the record, and properly found that:

> The Petitioners in this case have shown through definitions, expert opinion, statutes, and past court and board decisions that 1du/3 acre zoning allowed in the County is more urban-like in nature and violates the GMA. This is not a "bright line" definition as the Respondent and Intervenors would like us to find, rather it is the end-result of an accumulation of quantitative data which points to an appropriate lot size for rural development.

AR 1203. A "bright line rule" is when an agency applies a uniform standard, regardless of the facts of a particular case. Bright line

rules were most recently evaluated by the Washington State Supreme Court in *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 344 (2008). In that decision, the Supreme Court reiterated that the use of bright line rules by the boards is not permitted, but the Court acknowledged that the Eastern Board had stopped using a bright line rule, having recognized that "bright-line factors may not be employed by a GMHB after *Viking Properties*." *Id.* at fn. 21.[3] As discussed in more detail *infra*, the Board in this case conducted exactly the kind of fact-specific, local finding based upon the language of the GMA that the Supreme Court directed the Boards to undertake in *Thurston County*.

Without citing to any portion of the Board's ruling, the BIAW first argues that "[t]he Board reads into the GMA a requirement that rural densities can be no greater than one dwelling unit per five acres." Brief of BIAW at 10. This is a blatant misstatement of the Board's decision, which expressly rejected the idea of a bright line rule. AR 1203.

Similarly, Kittitas County misrepresents the facts by citing to *Thurston County*, 164 Wn.2d 329, and arguing that the issue statement in this case provides evidence that the Board relied upon a bright line rule.

[3] Board decisions reversed by the Supreme Court for reliance on bright line rules have all come from the Western and Central Puget Sound Growth Management Hearings Boards, not the Eastern Board, which decided this case.

Brief of Kittitas County at 20. But this case is distinguishable from *Thurston County* because the issue statement in this case was drafted by the parties, not the Board as was the case in *Thurston County*. AR 1-10; *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at fn. 20. It is the Board's decision that must be reviewed by this court, not the phrasing of the issue statements by the parties.

The Board's ruling is well-founded in the GMA and the evidence in this case. Controlling urban sprawl is one of the key goals of the GMA. RCW 36.70A.020(1); (2).[4] As the Supreme Court has noted: "[t]he Legislature adopted the Growth Management Act (GMA) to control urban sprawl ...." *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 166-67 (1999), *as amended on denial of reconsideration* September 22, 1999. The GMA requires Kittitas County to select a variety of *rural* densities in its rural area. RCW 36.70A.070(5)(b). It flatly prohibits urban growth in the rural area. *Id.* The Washington State Supreme Court has held that "[a] rural density is one that is 'not characterized by urban growth' and is 'consistent with rural character.'" *Thurston County*, 164 Wn.2d at 359. "Whether a

[4] The Growth Board is required to consider both goals and the specific requirements in determining whether a plan complies with the GMA. See *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 115 (2003).

particular density is rural in nature is a question of fact based on the specific circumstances of each case." *Thurston County*, 164 Wn.2d at 358, fn. 19. Thus, to prevail in this case on the rural densities issue, Kittitas County or the interveners must show that the Board's findings of fact that the challenged rural zones are not urban is unsupported by substantial evidence.

One of the most important tools to prevent urban sprawl is RCW 36.70A.070(5)'s prohibition on allowing urban growth in the rural area. RCW 36.70A.070(5)(b) provides in pertinent part:

> The rural element shall provide . . . appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(Emphasis added). RCW 36.70A.110(1) also prohibits urban growth outside urban growth areas. The GMA, in RCW 36.70A.030(18), defines urban growth:

> "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170.

In *Diehl v. Mason County*, the Court of Appeals looked at the size of the lot needed to produce food and other agricultural products in relation to the definition of urban growth and concluded that residential densities of one housing unit, or more, per 2.5 acres "would allow for urban-like development, not consistent with primarily agricultural uses." *Diehl v. Mason County*, 94 Wn. App. 645, 656 (1999). In Kittitas, like Mason County in *Diehl*, small lot sizes are insufficient to support agriculture and therefore urban, not rural. Kittitas County itself recognizes that densities of one dwelling unit per three acres are incompatible with natural resource use, including agricultural, forest, and mineral resource lands of long-term commercial significance, by giving them densities of one dwelling unit per 20 acres and per 80 acres. KCC 17.31.040 and 17.57.040. Additional evidence is found in the United States Census of Agriculture. The Census of Agriculture shows that the average Kittitas County farm in 2002 totaled 248 acres. AR 413. The smallest category of farm reported by the Census of Agriculture is farms from one to nine acres in size. In Kittitas County in 2002, there were 120 farms in that category and they consisted of 682 acres, averaging 5.68 acres. *Id.* This is almost twice the size of the minimum density in the Agriculture 3 and Rural 3 zones. In *Tugwell v. Kittitas County*, this court agreed that parcels of less

than 20 acres, especially the very small lots allowed in the Agriculture-3 and Rural-3 zones, are too small to farm. *Tugwell v. Kittitas County*, 90 Wn. App. 1, 9 (1997). Since an average of a little over six acres is the smallest size that supports agriculture and lots that are too small to support agriculture are defined as urban growth, densities of one dwelling unit per three acres are "incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170." RCW 36.70A.030(18); *Diehl v. Mason County*, 94 Wn. App. 645, 656 (1999). Therefore such densities allow urban growth in the rural area, and exceed density which is defined as rural by the GMA.

Further, Kittitas County's three-acre and smaller rural zoning is incompatible with rural character because it may adversely impact water quality. "'Rural character' refers to the patterns of land use and development ... [t]hat are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas...." RCW 36.70A.030(15); .030(15)(g). In *Rural Sprawl: Problems and Policies in Eight Rural Counties*, Rick Reeder, Dennis Brown, and Kevin McReynolds of the United States Department of Agriculture's

Economic Research Service described the results of a telephone survey of eight fast growing rural counties, including Mason County, Washington. AR 415-422. Among the problems the study found relating to rural sprawl were water supply problems and pollution from septic tanks. AR 417-418. The authors also concluded that one of the counties studied, Mason, had zoning regulations that "significantly contained rural sprawl." AR 420. Outside of limited areas of more intense rural development and historic towns, Mason County's highest density rural zone is one dwelling unit per five acres. Thus, Kittitas, like Mason, must eliminate three-acre rural zoning if it wants to protect its water quality.

Additional evidence in the record further demonstrates that Kittitas County's three-acre zoning violated rural character. Professor Tom Daniels wrote about the adverse impacts of "rural sprawl" in a paper entitled *What to Do About Rural Sprawl?* AR 424-427. He indicates that two to ten acre lots fit this definition. AR 424-425. Professor Daniels wrote:

> Rural sprawl creates a host of planning challenges. Rural residential sprawl usually occurs away from existing central sewer and water. Homeowners rely on on-site septic systems and on wells for water. Often, these systems are not properly sited or not properly maintained. For example, a 1998

> study in Indiana reported that between 25 and 70 percent of the on-site septic systems in the state were failing.
>
> When septic systems fail in large numbers, sewer and water lines must be extended into the countryside, often a mile or more. Public sewer is priced according to average cost pricing. This means that when sewer lines are extended, there is a strong incentive to encourage additional hook-ups along the line. So when a sewer line is extended a mile or more, development pressure increases along the line. This usually results in a sprawling pattern, like a hub and spoke from a village to the countryside.

AR 424. In Kittitas County, water is scarce. According to the Department of Ecology, some areas, like Roslyn, face complete water shutoffs in drought years. *Kittitas County Conservation et al. v. Kittitas County et al.*, EWGMHB No. 07-1-0004c, Final Decision and Order (August 20, 2007), at 8. Allowing rural sprawl in a county like Kittitas where the county's water is already allocated to other users virtually guarantees shortages for existing and prospective development, and violates the GMA because Goal 10 in RCW 36.70A.020 directs Kittitas County to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water. Further,

RCW 36.70A.070(5)(c)(vi) requires the Kittitas County rural element to "[p]rotect ... water and ground water resources[.]"

The above-described facts in the record support the Board's statement that it considered the local circumstances rather than applying a bright line rule. Further evidence that the Board does not apply bright line rules to rural density can be found in an evaluation of other Growth Board cases. In *Gary D. Woodmansee and Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 95-1-0010, Final Decision and Order, p. *5 of 12 (May 13, 1996), the Board upheld 2.5 acre rural densities under the unique circumstances of Ferry County. A substantial part of the Growth Board's justification for the Ferry County decision was "circumstances unique to Ferry County[.]" *Id.*

The County ignores the fact that the densities KCC et al. challenged are "'not characterized by urban growth' and are not 'consistent with rural character[]'" as the *Thurston County* decision requires them to be. *Thurston County*, 164 Wn.2d at 359.

While Kittitas County had the ability to apply local circumstances to its rural element in deciding density, it must have developed a written record explaining how the rural element meets the requirements of the GMA. RCW 36.70A.070(5)(a); *Citizens For Good Governance, 1000*

Friends of Washington and City of Walla Walla v. Walla Walla County, EWGMHB Case Nos. 01-1-0015c and 01-1-0014cz, *4 – 5 of 40 (May 1, 2002). Merely listing the densities permitted, as GPO 8.3 does, is insufficient. *Id.* As the Board correctly ruled, Kittitas County did not prepare a written record explaining how these densities harmonize the planning goals in RCW 36.70A.020 and met the requirements of the GMA, and the Board thus properly ruled that, for Kittitas County, three-acre and greater zoning was not rural. AR 1203. None of the comprehensive plan provisions cited by Kittitas County in its briefing even mention the GMA goals or requirements let alone explains how the goals are harmonized and the requirements met as RCW 36.70A.070(5)(b) requires.

Although unclear, Kittitas County and BIAW appear to argue that the Growth Board may not ever hold a particular rural density is violative of the GMA. Brief of BIAW at 15-16; Brief of Kittitas County at 22-23. Under this theory, the County would always have discretion to decide what the density is: simply stating that three-acre zones do not comply, as Kittitas County and BIAW urge, is itself a bright line rule from the Growth Board. This theory would eviscerate the Growth Board's role under the GMA.

First, the Growth Board did not resort to any "bright line" rule in reaching its decision in this case; it merely held that Kittitas County's particular zoning, the planned unit development regulations, and Performance Based Cluster Platting regulations were noncompliant with the GMA, and remanded the matter to the County for further action. AR 1255. The County has numerous methods of coming into compliance with the GMA; while simply repealing the three-acre and other noncompliant regulations is the simplest, there are numerous combinations of legislative action that would make these zones and regulations compliant with the GMA.[5]

More importantly, the County and BIAW's argument would result in a judicial repeal of the GMA. While the BIAW has made no bones about its political interest in the repeal of the GMA, those are arguments it must make to the Legislature, not the courts. Under the GMA, the Growth Board has the authority to evaluate the County's efforts to comply with the GMA, and remand legislation to the County for further action when it is not in compliance. RCW 36.70A.280; 300. The Board does not establish a "bright line rule" by holding that a particular zone is noncompliant when

[5] Innovative zoning techniques, as long as they include adequate water quality and other protections, are permitted by the GMA. RCW 36.70A.090. As discussed later in this brief, the County has not utilized innovative zoning techniques to justify its 3 acre and greater rural zones.

the County's own evidence in the record clearly demonstrates that to be the case.

Kittitas County's argument that because other sections of the development regulations govern rezones, three-acre zoning is rural rather than urban is puzzling. Brief of Kittitas County at 21. The challenged zones are already set at three acres; they are not areas that might be rezoned to three acres. Owners of property in those zones are entitled to build at a density of one dwelling unit per three acres, and need not go through the rezone process. Thus, the rezone provisions provide no aid.

The Brief of Kittitas County at 22 implies that the *Thurston County* decision concluded that zoning of one dwelling unit per two acres complies with the GMA. The Supreme Court did not make such a finding. Rather the Court remanded that issue back to the Western Board "to consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character." *Thurston County*, 164 Wn. 2d at 359-60.

C. The Growth Board Did Not Improperly Weight Goals

The BIAW argues that the Growth Board improperly weighted the GMA's competing goals in finding that three-acre rural zoning violates the GMA. Brief of BIAW at 16-18. But the Board ruled based on the GMA's

requirements, not its goals. The goals of the GMA are set forth in RCW 36.70A.020. All specifics in later sections are requirements, including RCW 36.70A.070's prohibition on urban growth in the rural area. As the Supreme Court has held, if a GMA goal and a specific GMA requirement conflict, the requirement controls. *Lewis County.* 157 Wn.2d at 504. In *Lewis County,* the Supreme Court evaluated Lewis County's attempt to rely on the goals of the GMA to evade the requirement that agricultural land be preserved, and held "when there is a conflict between the 'general' planning goals and more specific requirements of the GMA, the specific requirements control." *Id.* (Internal citation omitted). Goals are general statements of purpose, and may not be used to rewrite the GMA's requirements by weighting one goal over another or "balancing" goals.

D. The Growth Board Correctly Ruled that Kittitas County's Rural Clusters and Planned Unit Developments Violate the GMA

The Growth Board ruled that Kittitas County's particular version of rural clusters and planned unit developments was noncompliant with the GMA because they allowed urban growth in the rural area. AR 1206, 1210-1212. While the BIAW correctly notes that rural clusters and planned unit developments may be utilized under the GMA, they are only compliant if the GMA's mandates regarding their use are met. Brief of

BIAW at 20. Likewise, planned unit developments are not in and of themselves GMA-violative. But as the Board correctly ruled, Kittitas County's ordinance does not meet the GMA's mandates for either of these zoning tools, since it allows virtually unrestricted development at 1 d.u./1.5 acres and 1 d.u./2.5 acres in the rural areas. AR 1206, 1210-1212. Planned Unit Developments have no maximum density under the County's plan. Chapter 17.36 KCC. The same evidence supporting the Board's conclusion that rural zoning at 1 d.u. per 3 acres applies with greater force to these higher densities.

E. The Board Properly Ruled that Kittitas County Impermissibly Allows Urban Uses in Rural Areas and on Agricultural Lands of Long-Term Commercial Significance

1. Rural uses

Kittitas County argues that the Growth Board erred in finding some of its rural and agricultural uses noncompliant with the GMA. Brief of Kittitas County at 24-25. The Board found that the County's rural use provision "fails to contain development standards or size-limitations for the conditional uses allowed, and fails to control an unlimited number of unknown uses that can be permitted through administrative decision." AR 1211. Kittitas County argues that the Board's conclusion that the County had insufficient limitations on rural uses is in error because the uses are

conditional. But, as the County concedes, a "conditional use" just means that a permit is dependent on a finding that the use not be detrimental to the public health, safety and welfare, have adequate capital facilities, and not be detrimental to the character of the surrounding neighborhood. Brief of Kittitas County at 25. This argument does not address the GMA's requirement that rural land be kept rural.

As an initial matter, the County notes in a footnote that one of the decisions relied upon by the Board in assessing the County's rural use provisions, *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, 1995 WL 903209, Final Decision and Order (Oct. 23, 1995) at 9, was "disfavored in footnote 21 of *Thurston County v. WWGMHB*, 164 Wn. 2d 329 (2008)." Brief of Kittitas County at 24. But *Thurston County* addressed *Vashon-Maury* only for the portion of *Vashon-Maury* discussing rural densities, not rural uses. *Thurston County*, 164 Wn.2d at 358, n.21. The County's footnote is disingenuous.

The GMA provides that "[t]he rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses." RCW 36.70A.070(5)(b). In order for a proposed use to be permissible in a rural area, it must be compatible with rural character, and not be urban

growth. RCW 36.70A.070(5)(b); RCW 36.70A.110(1). Rural character has both a "functional and a visual component." *Vashon-Maury v. King County,* CPSGMHB Case No. 95-3-0008, 1995 WL 903209, Final Decision and Order (October 23, 1995) at 48, *followed by Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 184-185 (2002). The functional component refers to dependency on a "rural setting," and the visual component refers to the "visual character of the traditional rural landscape." *Id.* "'Urban growth' is defined by the GMA in RCW 36.70A.030(18) as:

> [G]rowth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170.

Kittitas County recognized RCW 36.70A.070(5)(c)'s requirement to contain and control rural development to assure that the visual compatibility of rural development with the surrounding rural area be maintained in its comprehensive plan policy statements. Kittitas County describes rural character as:

> Rural land uses consist of both dispersed and clustered residential developments, farms, ranches, wooded lots, and small scale commercial and industrial uses that serve rural residents as their primary customer. Rural landscapes encompass the full range of natural features including wide open agriculture and range land, forested expanses, rolling meadows, ridge lines and valley walls, distant vistas, streams and rivers, shorelines and other sensitive areas.

Kittitas County Comprehensive Plan: December 2006, p. 158. However, despite this clear recognition that rural uses must be kept rural, the County permitted uses in the rural area inconsistent with its own definition of rural character.

The County's A-20 Agricultural Zone (a rural zone, rather than designated agricultural land) improperly allows kennels, auctions, hospitals, museums, and convalescent homes. Kennels and auctions are both properties that could be made up of large and possibly multiple buildings typical of urban growth. Furthermore, the boarding of domestic animals is not a typically rural use, and there is no limitation within the development regulations that auction houses be limited to livestock or other rural chattel. Under Kittitas County's code, an "auction house" could be nothing more than a sprawling used-car lot auctioning off motor vehicles. Noting these types of concerns, the WWGMHB cited kennels in

rural areas and auction houses in rural areas as examples of non-resource based uses prohibited outside UGAs when it invalidated similar provisions in Mason County. *Dawes v. Mason County*, WWGMHB Case No. 96-2-0023, 1999 WL 26722, Order Finding Invalidity (Jan. 14, 1999), at 8-9.

Some types of hospitals, museums, and convalescent homes might be permitted in the rural area and still be GMA compliant, if Kittitas County had standards in place to keep intact rural character and limit the size of development. While a clinic in the right location to serve rural residents may be in keeping with rural character, Kittitas County's failure to have size limitations and development standards means that a sprawling, water-intensive, high-traffic hospital or convalescent complex could be built in the rural area. Similarly, a small museum might be in keeping with rural character; relocating the Metropolitan Museum of Art would not. Kittitas County's development regulations would allow either.

In addition to preserving rural character visually, Kittitas County must protect rural lifestyles by not allowing excessive water, sewer, and traffic from institutional use to overwhelm rural resources. RCW 36.70A.020; 36.70A.070(5)(b)(i, iv). Limitations on size of the facility, or banning these uses altogether, will ensure that rural character is protected.

2. Agricultural lands

The Board ruled that a variety of urban activities should be prohibited on agricultural lands. AR 1213-1215. The BIAW argues, without citing to any case or authority, that the Board erred in finding that Kittitas County impermissibly allowed urban uses in its designated agricultural lands. Brief of BIAW at 26-27. The County argues that its conditional use provisions should be sufficient to protect agricultural land. Brief of Kittitas County at 24-25. Neither argument is persuasive.

The Board's conclusion that Kittitas County violated the GMA by allowing non-farm uses in designated agricultural lands is well-supported by the record and the law. Under the challenged Development Regulations, the County allowed non-livestock auctions, quarries and sand and gravel excavation, kennels, day care centers, community clubhouses, governmental uses essential to residential neighborhoods, and schools. The GMA flatly prohibits non-farm uses within agricultural lands. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 510 (2006). When Kittitas County designated land as "agricultural" under the GMA, it undertook the obligation to conserve the land for its stated uses, as the Growth Management Act has been interpreted to include a

"legislative mandate for the conservation of agricultural land." *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 562 (2000). Although the Growth Management Act provides counties with some discretion in the zoning of agricultural lands; zoning techniques "should be designed to conserve agricultural lands and encourage the agricultural economy." RCW 36.70A.177(1). This means that non-farm uses, even uses such as soccer fields that are allowed in the rural area and may be used by agricultural residents, must be located elsewhere. *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543 (2000). The uses allowed by Kittitas County are not agricultural uses and thus must be away from the County's designated agricultural lands.

The Board correctly determined that community clubhouses, governmental uses essential to residential neighborhoods, schools, and day care centers should be prohibited from agricultural lands. While determining whether a previous Kittitas County ordinance failed to discourage incompatible uses with agricultural lands as required by RCW 36.70A.020(8), the EWGMHB explicitly cited schools, hospitals, convalescent homes, and day care facilities as examples incompatible with commercial agriculture. *City of Ellensburg v. Kittitas County*, EWGMHB

Case No. 95-1-0009, 1996 WL 928207, Final Decision and Order (May 7, 1996) at 6. The board found that the ordinance failed to meet the minimum requirement of discouraging incompatible uses. Just like the schools, hospitals, convalescent homes, and day cares already ruled incompatible with agriculture, Kittitas County's inclusion of community clubhouses and governmental uses essential to residential neighborhoods allows non agricultural uses in agricultural lands and therefore violates the GMA. This is consistent with the Washington Supreme Court's holding in the *Lewis County* decision:

> [N]on-farm uses allowed within farmlands, including mining, residential subdivisions, telecommunications towers and public facilities: (a) "are not limited in ways that would ensure that they do not impact resource lands and activities negatively," and (b) substantially interfere with achieving the GMA goal of maintaining and enhancing the agricultural industry.

Lewis County, 157 Wn.2d at 507-508. These are the same sort of uses that Kittitas County attempts to allow within agricultural lands of long-term commercial significance in violation of the GMA.

Likewise, the Board correctly found unrestricted auctions noncompliant with the GMA in designated agricultural lands. As described in the discussion of rural lands, the WWGMHB has cited

auction houses in rural areas as an example of a non-resource based use prohibited outside UGAs. *Dawes v. Mason County*, WWGMHB Case No. 96-2-0023, 1999 WL 26722, Order Finding Invalidity (Jan. 14, 1999), at 8-9. If an auction house is a prohibited use outside UGAs, then it is clearly prohibited from agricultural land which must be conserved.

Finally, the Board's conclusion that sand and gravel quarries are not agriculture is correct. Mineral excavation is inappropriate for agricultural lands as it does not protect the lands for future agricultural use. *Lewis County*, 157 Wn.2d at 507-508. Had Kittitas County desired to use the lands for mineral excavation, the lands should have been designated as mineral resource lands instead of agricultural lands.

Kittitas County's argument that its conditional use provisions rescue these patently noncompliant uses fails. The County's conditional use standards do nothing to prevent the conversion of agricultural land to non-agricultural use, the key failing identified by the Board. See Brief of Kittitas County at 25 (describing conditional use standards).

F. The Growth Board Had the Authority to Rule that KCC 16.04 Violated the GMA

The Growth Board found that Kittitas County's development regulations allowing multiple divisions of commonly-owned property violated the GMA's water quality protection provisions. AR 1221-1223.

Kittitas County's argument on this issue is unclear. Kittitas County may be arguing that the Legislature intended RCW 90.03 and 90.44 to be the only means of regulating surface and groundwater, and the Board's reliance on the GMA to mandate protection is thus inappropriate. But RCW 90.03 and 90.44 regulate certain specific water-related actions, while the GMA regulates land use. Although each mandates protection of water quality, each addresses a distinctly different subject.

Statutes governing the same subject matter are read *in pari materia*. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 308 (2008). Generally, statutes should be interpreted to give effect to each; only in the event of a conflict should a specific statute control over a general. *Id.* In this case, there is no conflict between the GMA and RCW 90.03 and 90.44. RCW 90.03 is the water code, and governs who has the right to a particular water source

and how much may be drawn from that source. It has no effect whatsoever on development regulations or land use, except for wastewater treatment facilities and dams. Likewise, RCW 90.44 governs public groundwater, and regulates who may draw from groundwater and how much. Neither statute affects how land may be subdivided; neither RCW 90.03 nor 90.44 could be used to block a subdivision in Kittitas County's rural area, even if there was inadequate water to serve it.

RCW 90.44 does exempt parcels of land from groundwater withdrawal permitting requirements. This statute cannot be used to regulate land use. The GMA regulates land use, and mandates protection of groundwater. RCW 36.70A.020(10), 36.70A.070(3) and (5)(c)(iv); *Kathy Moitke and Neighborhood Alliance of Spokane v. Spokane County,* EWGMHB Case No. 05-1-0007, Final Decision and Order (February 14, 2006), at 22. Reading these statutes *in pari materia* required the Board to evaluate the impacts of Kittitas County's development regulations on groundwater and on the exempt well provisions found in RCW 90.44.

The BIAW argues that the Board exceeded its jurisdiction in ruling that KCC 16.04 violated RCW 36.70A.020 because the Board was actually ruling on compliance with the Supreme Court's decision in *Dep't. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1 (2002). Brief of

BIAW at 27-28. But the Board relied on the GMA, not *Campbell & Gwinn*, in reaching its decision. AR 1223.

Kittitas County's subdivision code allows property owners to divide applications for short subdivisions, or short plats, and long subdivisions and long plats, amongst numerous applications, even if all property is part of one development. KCC 16.04.010. KCC 16.04.010 applies to "[e]very division and boundary line adjustment within the unincorporated area of Kittitas County." It requires that any person desiring to subdivide land in the unincorporated area submit a preliminary plat. KCC 16.04.020. There are no requirements that an entire development be submitted at one time; instead, a property may be subdivided, then redivided again with separate applications. Similarly, multiple parcels which will be divided into numerous small lots as part of one development may be separately submitted.

The effect of this provision is to allow developers to skirt the GMA's mandate to preserve water quality by allowing multiple exempt wells for one residential subdivision. In *Dep't. of Ecology v. Campbell & Gwinn LLC*, the Washington Supreme Court held that a real estate developer may not draw more than 5,000 gallons of well water per day per subdivision without a permit, rather than one 5,000 gallon well per new

residence, in order to ensure that water quality and the aquifer in the area is not degraded. *Dep't. of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1 (2002). In this case, Kittitas County allows real estate developers to divide a subdivision into numerous smaller ones by allowing separate applications for division. Thus, each new application is one "subdivision" under *Campbell & Gwinn*, and entitled to an exempt well, even though the actual development is far larger.

Excessive withdrawal of ground water, such as through multiple exempt wells, can adversely affect surface and ground water quality. AR 440-441. The Yakima River Basin, in which Kittitas County lies, appears to already have surface water damaged by ground water contaminant flow. AR 471-472.

The problem in Kittitas County is significant. The Washington State Department of Ecology reviewed the county's Washington State Environmental Policy Act (SEPA) documents and found that 75 percent of the 10 to 14 lot developments in Kittitas County were from developers and land owners with multiple developments. AR 429-430.

The Board's order requires the County to develop a system that will prohibit the flagrant misuse of the exempt well provision through unregulated subdivision applications. Kittitas County appears to

misunderstand the Board's order. The County engages in a hyperbolic and difficult to follow argument about "being part of the world," arguing that ownership of land is already disclosed and therefore the County's system is GMA-compliant. Brief of Kittitas County at 31-32. But the problem identified by the Growth Board and remanded for correction is not simply disclosure that one developer is behind several subdivision applications, it is that the applications are processed separately, allowing each mini-subdivision to receive its own exempt well. AR 1222. While disclosing the entity behind each application is a start to achieving compliance, the core issue is not disclosure but the County's failure to treat multiple side-by-side applications as one application, with only one exempt well. As the Board ruled, "[a] mandatory cumulative evaluation requirement in the code is the first step to ensuring the County would reduce permitting errors and include all applications with common ownership." AR 1222. The Board correctly ruled that the County's extant system violates the GMA's water quality protection mandate, and should be upheld.

G. The Board Correctly Ruled that Kittitas County's "One Time Split" Procedure Violated the GMA

The Board mandated that Kittitas County correct its "one time split" feature for agricultural lands. AR 1233-1235. The BIAW and

Kittitas County argue that the Board incorrectly ruled that Kittitas County's "one time split," which allowed subdivision of agricultural land, violated the GMA's mandate to preserve designated agricultural lands. Brief of BIAW at 29-30; Brief of Kittitas County at 23-24. But the BIAW does not understand the one time split process, and the County fails to provide anything more than unsupported argument that they should be allowed to remove chunks of farmland from agricultural protection. Kittitas County allows property owners to engage in a "one time split" of their Commercial Agricultural or Agriculture-20[6] acre zoned properties. This provision allows property owners to divide their properties below density levels approved by the GMA.

The Agriculture-20 zone, in KCC 17.29.040[7], provides in pertinent part:

> Minimum lot (homesite) requirements in the agricultural (A-20) zone are:
>
> Twenty acres for any lot or parcel created after the adoption of the ordinance codified in this chapter, **except that one smaller lot may be divided off any legal lot; provided**

[6] Agriculture-20, codified in KCC 17.29, is a rural zone. Commercial Agriculture, codified in KCC 17.31, is the County's designated zone for agricultural lands of long-term commercial significance.

[7] KCC 17.31.040 contains functionally the same language for the Commercial Agriculture zone.

> **such parent lot is at least eight acres in size**; (emphasis added).

Although KCC 17.29.040 and 17.31.040 place limitations on the size of the "parent" lot, there are no minimum lot sizes on the other parcel created through the split process. Thus, a parcel may be created at any density, and a residence built on each parcel. As discussed in detail in other sections of this brief, the Board has properly found that one dwelling unit per three acres is too dense for Kittitas County's rural zones. Kittitas County does not contest that densities **greater** than one dwelling unit per three acres are too great for the rural areas. Allowing lots of any size on these rural and agricultural lands, including lots less than one acre as allowed by the one time split, violates the GMA.

This problem is especially egregious in the commercial agricultural zone. KCC 17.31.040. Kittitas County requires a minimum lot size of 20 acres for the Commercial Agriculture zone. KCC 17.29.040. This minimum is well-grounded in the evidence in the record, and should be the absolute minimum for commercial agriculture. Kittitas County argues that allowing a one time split is necessary to "encourage homesite acreage." KCC 17.31.040. This argument – that some parcels of non-agricultural land are acceptable within an area designated as agricultural

lands of long-term commercial significance – has been expressly rejected by the Washington Supreme Court. In *Lewis County*, 157 Wn.2d 488, the Supreme Court held noncompliant with the GMA Lewis County's attempt to carve out 5 acre "farm centers" on which non-agriculture uses would be allowed on each designated agricultural parcel. In that same decision the Supreme Court agreed that:"[t]he failure to regulate farm housing to conserve agricultural prime soils and to prevent residential densities inconsistent with agriculture fails to conserve agricultural lands," and that "[c]lustered residential subdivisions as currently allowed in the 13,767 acres of Class A Farmlands are not designed to ensure conservation of agricultural lands and encourage the agricultural economy," and finally that "the requirement that these uses not detract from the overall productivity of the resource activity is not sufficient protection."

The GMA creates an "affirmative duty" on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry. *King County v. Central Puget Sound Growth Mgmt. Hearings Board,* 142 Wn.2d 543, 554 (2000) and *Redmond v. Central Puget Sound Growth Mgmt. Hearings Board,* 136 Wn.2d 38 (1998). The county is required to adopt development regulations to protect agricultural lands of long-term commercial

significance. RCW 36.70A.040(4)(b) and RCW 36.70A.040. The Washington Supreme Court has held that subdivisions and residences that do not "conserve agricultural prime soils and to prevent residential densities inconsistent with agriculture fails to conserve agricultural lands" violate the GMA. *Lewis County*, 157 Wn.2d at 507-508.

The danger these small lot sizes pose to agricultural lands was clearly identified by the Board in the Final Decision and Order in *Save our Butte v. Chelan County. Save our Butte v. Chelan County,* EWGMHB No. 94-1-0015, Final Decision and Order (August 8, 1994). The Board in that case considered the work of regional planning and policy expert Arthur C. Nelson in his report entitled, *Economic Critique of U.S. Prime Farmland Preservation Policies, Journal of Rural Studies, Vol. 6, No. 2, 1990.* Dr. Nelson, in describing such small-minimum lot zoning stated: "The effect of such zoning ... is to remove farmland from production and allow non-farm development adjacent to viable farming operations everywhere." *Chelan* at p. 9. Explaining further, the report states: "Allowing small acre development in agricultural resource lands fails to conserve these lands in two ways. First, the land used for the development is taken out of production, and second, the effects of non-compatible uses on existing

farms weaken them." *Id.* Professor Daniels reached the same conclusion writing that:

> Newcomers to the countryside often have little understanding of the business of farming or forestry. The conflicts between farmers and non-farm neighbors are well-known. Neighbors typically complain about farm odors, noise, dust, crop sprays, and slow moving farm machinery on local roads. Farmers point to crop theft, vandalism, trash dumping, and dogs and children trespassing and harassing livestock. In forested areas, the increase in residents bring a greater likelihood of fire. In short, farming and forestry are industrial uses. They should be kept as separate as possible from rural residential development.

AR 424. The danger of conflicts between residential development and farming is high in Kittitas County under the one time split. Kittitas County requires no minimum lot size for the one time split parcels, and requires no buffers between that parcel and adjoining agricultural lands. Although the County may hope or assume that a "one time split" parcel will be used by the farm owner or operator for a residence, there are no requirements that it be so used, and there is no evidence to suggest that these splits are being used for any purpose other than the sale of real estate for home construction, with existing or new farm dwellings remaining on the "parent" parcel. Thus, the County's process, far from conserving

farmland, allows the creation of two residences on what should be one parcel, allowing landowners to derive short-term income by splitting off a corner of their property and developing it for residential sale but removing agricultural land from production or the possibility of production, and increasing the likelihood of conflicts between the farm and the new residence.[8]

H. The Board Correctly Ruled that the County's Airport Regulations Violated the GMA

Both the County and intervenors Son Vida II (the development company wishing to build residences in the flight path near the Ellensburg airport) argue that the Board erred in requiring that airport safety precautions be observed by the County. Brief of Kittitas County at 34; Brief of Son Vida II.

Kittitas County and Son Vida II first argue that *stare decisis* prevented the Board from issuing any ruling on the airport safety issues raised by KCC et al. Brief of Kittitas County at 34. Their theory is that a previous Board case, *Son Vida II v. Kittitas County,* EWGMHB No 01-1-0017, Final Decision and Order (March 14, 2002), was the conclusive determination of zoning densities near the airport. In that matter, Son

[8] These conflicts can result in the farm being shut down. See *Davis v. Taylor*, 132 Wn. App. 515 (2006) (Holding that use of a loud propane cannon on a cherry orchard next to a neighboring residential development may be enjoined).

Vida II argued that the County's zoning for land near one airport was too low. In this case, KCC et al. argued that zoning for all airports in Kittitas County was too high. *Stare decisis* does not apply.

Stare decisis is a general principle of law providing that courts are loath to change existing legal doctrines. The theory that *stare decisis* prevents relitigation of Comprehensive Plans based on prior board rulings was most recently rejected in *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 137 Wn. App. 781, 798-99 (2007), *aff'd in part and rev'd in part*, 164 Wn.2d 329 (2008) (without addressing issue of *stare decisis*). In *Thurston County*, 137 Wn. App 781, the County argued that *stare decisis* prevented a 2005 challenge to the City of Olympia's Urban Growth Area because the Board had upheld the UGA in 1995. Noting that there was "no authority to support [the County's] argument that the doctrine of *stare decisis* applies," the court declined to apply the doctrine. *Id.* at 799. This case is indistinguishable from Thurston County. *Stare decisis* does not apply because the legal issues are different.

Stare decisis is closely related to res judicata and collateral estoppel. Neither of those related doctrines applies here, either. The Supreme Court in *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763 (1995) defined res judicata as "the preclusive effect of judgments,

including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action." Courts adopted a uniform test for res judicata:

> [A] prior judgment will bar litigation of a subsequent claim if the prior judgment has "a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made."

In re Coday, 156 Wn.2d 485, 500-01 (2006), quoting *Loveridge*, 125 Wn.2d at 763. The party asserting *res judicata*, in this case Kittitas County, must establish the concurrence of identity as to all four of their elements. *Alishio v. Dep't of Soc. & Health Servs.*, 122 Wn. App. 1, 7 (2004). The County cannot establish any of these elements.

Similarly, collateral estoppel does not apply. The Supreme Court in *Rains v. State* distinguished collateral estoppel from res judicata when it stated, "instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted." *Rains v. State*, 100 Wn.2d 660, 663-64 (1983). The Court of Appeals in *Lucas v. Velikanje*, 2 Wn. App. 888, 894 (1970), provided the elements which trigger application of collateral estoppel:

> Affirmative answers must be given to the following questions before collateral estoppel is applicable: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?[9]

The parties, legal issues and the facts between Case No. 01-1-0017 and this case are different, and *stare decisis,* collateral estoppel and res judicata simply do not apply. Case No. 01-1-0017 was between Son Vida II and the County. This case is between KCC et al. and the County, with Son Vida II intervening on behalf of the County. In 01-1-0017, Son Vida II asked the Board to rule on whether the airport zone for one airfield (Bowers Field) must be zoned at urban density levels, or whether the County could reduce the density. In this case, the Board answered a very different question: whether portions of the zone for all airports in the County may safely have any residential structures at all, and if so, at what density. The legal issues are thus converse, and there can be no preclusive effect to the prior decision. A Board may only resolve legal issues

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[9] This test was also used in *Rains v. State*, 100 Wn.2d 660, 663-64 (1983); *Seattle First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 927 (1980).

brought before it by petitioners. RCW 36.70A.290(1). A Board may not issue advisory opinions on matters not included in petitions for review. *Ridge, et al., v. Kittitas County,* EWGMHB No. 96-1-0017, Order on Motions for Reconsideration and Clarification (May 27, 1997). A Board's legal conclusions thus relate only to the legal issues within a particular case, and although the Board declared the Airport Overlay Zone GMA-compliant in Case No. 01-1-0017, that finding is only relevant to the legal issue posed by Son Vida II in 01-1-0017: that the airport overlay zone need not have urban densities.

Further, the factual record underlying this enactment of the development regulations contains a different factual record than found in 01-1-0017. Both Futurewise's comment letter and the Department of Transportation's *Airports and Compatible Land Use Volume One* do not appear in the index to the record in that matter. AR 127-132. Finally, the prior case only dealt with one of the general aviation airports in the county and this case addresses all but one of them.

Son Vida II's citation to *Spokane County v. City of Spokane*, 148 Wn. App. 120 (2009) does not aid their argument. Brief of Son Vida II at 11. Although collateral estoppel was raised by the City of Spokane in *Spokane County*, this court expressly rejected that argument. *Spokane*

County, 148 Wn. App. at 123-24. Noting that "collateral estoppel requires the City to show that the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding" and that "[t]he issues here are not identical to those resolved in the parties' 2002 case," the court held that collateral estoppel did not apply. *Id.* Instead, the court reversed the Board because the Board's order read requirements into the GMA that the court found not to be present. *Id.* at 131.[10] Like *Spokane County*, the issues are different between this case and 01-1-0017.

The County's other arguments are mere hyperbole, arguing that they are entitled to deference despite ignoring all of the evidence in the record holding that their land use decisions were unsafe. Brief of Kittitas County at 36-38. WSDOT recommends that for areas near the airport landing field, land uses that concentrate people, other than aviation uses, should be avoided and residential uses either prohibited or limited to densities of one dwelling unit per five acres in rural areas or one dwelling unit per 2.5 acres in urban growth areas for many safety zones. AR 515-520. The following chart compares Kittitas County's restrictions on airport zone development and WSDOT's recommendations:

[10] The *Spokane County* court confusingly states that "The Hearings Board, in the earlier 2002 appeal, already concluded that the County had complied with the GMA. It was then improper for the Board to revisit that order." But the authority cited is not *stare decisis* or collateral estoppel, but rather RCW 36.70A.300(3)(a)'s mandate.

Airport Zone	Kittitas County Code[11]	Recommended compatibility provisions by DOT
Zone 1 (Runway Protection Zone)	No residential density restrictions.	Prohibit all residential use.[12]
Zone 2 (Inner Safety Zone)	Outside of the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per three acres Inside the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per one acre	Prohibit all residential use.[13]
Zone 3 (Inner Turning Zone)	Outside of the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per three acres Inside the existing Ellensburg Urban Growth Area (UGA) for lands zoned Agricultural - 3 the average density will be one dwelling unit per three acres Inside the existing Ellensburg Urban Growth Area (UGA) for lands zoned Urban Residential or Rural Residential the average density will be one dwelling unit per one acre	For runways less than 4000 feet, prohibit all residential use. For runways greater than 4000 feet, 1 d.u. / 5 acres.[14]

[11] KCC 17.58.050.
[12] AR 517-520.
[13] AR 518.
[14] AR 518.

Airport Zone	Kittitas County Code[11]	Recommended compatibility provisions by DOT
Zone 4 (Outer Safety Zone)	Outside of the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per three Inside the existing Ellensburg Urban Growth Area (UGA) for lands zoned Urban Residential or Rural Residential the average density will be one dwelling unit per one acre	For runways less than 4000 feet and in all rural areas, 1 d.u. / 5 acres. For runways greater than 4000 feet in urban areas, 1 d.u. / 2.5 acres.[15]
Zone 5 (Sideline Zone)	No residential density restrictions.	Prohibit residential use.
Zone 6 (Airport Operations Zone)	Outside of the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per three acres Inside the existing Ellensburg Urban Growth Area (UGA) the average density will be one dwelling unit per one acre	For runways less than 4000 feet and in all rural areas, 1 d.u. / 5 acres. For runways greater than 4000 feet in urban areas, 1 d.u. / 2.5 acres.[16]

Especially egregious is Kittitas County's failure to limit residential development in the runway protection zone, which is the zone at the immediate end of the runway. AR 515-516. Many aircraft related accidents occur in this zone. AR 487. The recommendations made by

[15] AR 519.
[16] AR 519.

WSDOT are intended to protect the uses on the ground from the hazards of airplane accidents and ensure that airports are protected from incompatible uses that interfere with airport operations. Airports are important parts of the county's economic infrastructure and provide important health and safety benefits, such as providing for medical evacuations. Kittitas County's failure to limit residential development according to these guidelines violates the GMA's requirement that airports be protected as essential public facilities.

Son Vida II's argument that there should not be a bright line rule prohibiting homes in the flight path is patently absurd. Brief of Son Vida II at 16. The Supreme Court's prohibition on bright line rules requires the Growth Board to look at the local facts and circumstances. Kittitas County does not have unique local airplanes that will keep houses safe even when they crash into them; it likewise does not have crash-proof houses. There is no evidence that there are any local facts and circumstances justifying departure from the WSDOT guidelines.

Kittitas County and Son Vida II's argument that the Airport Overlay Zone is within the guidelines formulated by the Department of Transportation is mistaken as to the Department of Transportation's technical recommendations. In July, 2006, one of DOT's

recommendations to the County was to "[r]evise existing airport overlay zone as suggested (see attached) and apply to all public-use airports in Kittitas County." AR 972. The attachment evaluated one airport, Easton State, and noted that DOT's suggested residential density ranges "extend from no residential development to 1 unit per 5 acres, depending on proximity to the airport runway. Allowed density in the zoning districts adjacent to Easton State exceed levels described in WSDOT's program and should be evaluated." AR 975. In a June 12, 2007 email and letter, DOT commented that the "proposed revisions are an important step in protecting the county's public use airports from incompatible development." AR 968. An important step and compliance are different matters.

Similarly, Son Vida II's citation to excerpts from a 2001 letter from the Department of Transportation is unavailing. The letter is dated June, 2001. AR 1114. As described above, in 2006, the DOT was recommending changes to Kittitas County's ordinance; clearly, either the science underlying airport protection changed, or the DOT reconsidered its 2001 assessment. Additionally, given the discrepancies between the DOT's 1999 *Airports and Compatible Land Use* publication and the County's adopted ordinance, the 2001 letter's glowing evaluation is

difficult to comprehend. Finally, the County's mandate is to comply with the GMA, not with DOT's opinion.

IV. CONCLUSION

For the reasons discussed herein, the Growth Board's Final Decision and Order and Findings of Invalidity should be affirmed.

DATED this 26th day of May, 2009.

Respectfully submitted,

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