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OF THE STATE OF WASHINGTON

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DIVISION II

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STATE OF WASHINGTON

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JOHN E. DIEHL,
and ADVOCATES FOR RESPONSIBLE DEVELOPMENT,

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, MASON COUNTY, and SHAW FAMILY LLC

Respondents.

PETITION FOR REVIEW

John E. Diehl, pro se
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Shelton WA 98584
360-426-3709

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A. Identity of Petitioners

John E. Diehl and Advocates for Responsible Development ("ARD") ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Opinion in *Advocates for Responsible Development et al. v. WWGMHB et al.*, Case No. 38721-2-II, filed March 2, 2010, and subsequent denial of motion for reconsideration, filed March 25, 2010. A copy of the decision is in the Appendix at pages A-1 through A-10. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-11.

C. Issues Presented for Review

1. Given principles of statutory construction and the standing requirements of RCW 36.70A.280(2), when the president of a group writes on behalf of his group to a local government and associates himself with the views of his group, does he establish participant standing for himself?

2. Given that GR 24(b)(3) permits lay representation when allowed under the rules of an administrative tribunal, should such representation be permitted to continue, under the balancing test of *Perkins v. CTX Mortgage*

Co. and due process guarantees of the 14th Amendment and Washington's Constitution, Art. I, Sec. 3, when issues before the tribunal are appealed to superior court, but where the group relying on lay representation by a member cannot afford professional representation before the court?

3. When an appeal presents a debatable issue, may RAP 18.9(a) sanctions be imposed for an allegedly frivolous issue associated with the appeal, but not itself part of the appeal?

D. Statement of the Case

ARD is a nonprofit unincorporated public interest association striving for implementation in Mason County ("County") of the Growth Management Act ("GMA") goals and requirements (006).¹ Founded in 1997, it is a group of volunteers led by its president, John E. Diehl. Never having the funds to hire a lawyer, ARD has always been represented by Diehl in its challenges to local government on GMA issues (848). Although not an attorney, Diehl has represented ARD under GR 24(b)(3), which expressly allows "[a]cting as a lay representative authorized by administrative agencies or tribunals";

¹ Bold-faced numbers in parentheses refer to page numbers of the Bates-stamped record as prepared by the Board, omitting the initial three zeros (so that, e.g., "000216" is shown as "216"). Although this record was before the superior court, on appeal to the Court of Appeals it was, by permission of the court, not separately assigned page numbers by the superior court clerk. Thus, references to the record before the Board are not to page numbers in the clerk's papers (CP).

RCW 36.70A.270(7), which provides that proceedings before a board shall be conducted in accordance with such administrative rules of practice and procedure as the boards jointly prescribe; and WAC 242-02-110(1), which allows practice before a board by a duly authorized representative of a party or participant.

In late 2006, ARD and Diehl opposed several amendments the County was considering to its Future Land Use Map and its development regulations. Diehl wrote two letters to the County commissioners commenting on flaws that ARD and he found in the proposals. **214-219**. In both letters, he stated at the outset that they were "FROM: John E. Diehl," though to establish standing for his group, he also wrote on ARD's letterhead and said he was writing "[o]n behalf of Advocates for Responsible Development." **214, 216**. Throughout the letters he clearly indicated that he was associating himself with the views he expressed, and not merely serving as an advocate for ARD, through his use of "our" and "we," as in, for example, "We recommend . . . , " "We agree with the staff recommendation to deny this request . . . , " "We support the recommendations of the Department of Fish and Wildlife. . . , " and "we here incorporate by reference

our earlier comments . . .,” 216-19.²

When the County commissioners ultimately took actions ARD and Diehl believed noncompliant with the GMA, they petitioned for review by the Western Washington Growth Management Hearings Board (“Board”) (001-145, including attachments). On a motion by Intervenor Shaw Family LLC (“Shaw”) (254-269), the Board dismissed Diehl as a party in his individual capacity (288-294), holding that he had failed to establish participant standing. However, Diehl was allowed to continue representing ARD.

In Mason County Case No. 07-2-00884-9, ARD and Diehl appealed the Board's dismissal of Diehl and two other issues to superior court.³ CP 36-38. Separately, in Mason County Case No. 07-2-00860, Shaw appealed the

² One of these letters is attached in the Appendix at A-12-A-15.

³ Concerned with the harm unregulated agricultural activities may do to critical areas, Petitioners had challenged the exemption from critical area regulations the County granted such activities. (002 and 005). The Board did not reach the merits of this issue, but dismissed it upon a motion by the County (205 and 790).

The Board also rejected a challenge by ARD and Diehl to a provision of the County's ordinance allowing encroaching development in critical areas, based on permitting a “minimum reasonable use.” The Board found the County compliant in setting the minimum reasonable use as a house of “average” size, viz., 2,550 square feet or 40% of the lot size, whichever is less, in areas zoned residential (791). ARD and Diehl appealed these issues, together with the issue of Diehl's personal standing, in Mason County Case 07-2-00884-9.

Board's decision that the County had improperly amended its Future Land Use Map to accommodate the desire of Shaw to subdivide its designated Long-Term Commercially Significant Forest Land for residential development.

The superior court first denied a motion by ARD and Diehl requesting consolidation of their appeal with Shaw's appeal. CP 25-27; 39-40. It then ruled, in Shaw's appeal, that Diehl could not represent ARD since he was not a member of the Bar. However, the issue of whether Diehl might properly represent ARD was not raised by any party or addressed by the court in the appeal of ARD and Diehl, Case No.07-2-00884-9.

Since ARD lacked funds needed to hire an attorney to represent it, and since no pro bono attorney could be found, it was unable to present any argument in response to the issue Shaw appealed.⁴ However, counsel for the Board presented limited argument, and the superior court affirmed the decision of the Board in the matter Shaw appealed. CP 4-7; 41-51.

When the superior court addressed the appeal of ARD and Diehl, it affirmed the Board's opinion that Diehl had not established personal standing, and did not address the other issues ARD and Diehl had appealed.

⁴ ARD had less than \$100 in its bank account, which it has now emptied to help pay the filing fee for this petition.

CP 50. Both the issue of Diehl's personal standing and the other issues were then appealed by ARD and Diehl to the Court of Appeals on December 30, 2008 (Case No. 38721-2-II).

Shaw also appealed the superior court decision to the Court of Appeals (Case No. 38671-2-II). Although ARD and Diehl moved for consolidation of the two appeals on the basis of the common issue of Diehl's standing, the court decided to address the cases separately. When Shaw chose not to file a brief in the appeal of ARD and Diehl, the Court of Appeals ordered it to do so. See Appendix at A-3, n. 4. Without allowing oral argument, the court ruled in the appeal of ARD and Diehl that Diehl lacked personal standing and might not represent ARD.

Although conceding that the issue of Diehl's personal standing was not frivolous, the court held that the appeal of ARD and Diehl was frivolous because, as a nonlawyer, Diehl could not represent ARD. Since this question had not arisen in their appeal, ARD and Diehl did not make this an issue they appealed in their appeal of the superior court's decision in their case. They had, however, cross-appealed on this issue (and others relating to whether, if Diehl could not represent ARD, he could participate as an individual member of ARD or as an intervenor) in Shaw's appeal. Nonetheless, the

Court of Appeals imposed RAP 18.9(a) sanctions on Diehl and ARD in their appeal, in the form of attorney's fees awarded to Shaw. Appendix at A-1-A-10. The amount of these fees has yet to be determined, but has been claimed by Shaw's attorney in an affidavit filed with the court as \$7,542.00. The court denied reconsideration. Appendix at A-11.

E. Argument Why Review Should Be Accepted

Fundamentally, this case involves the right of access to the courts in cases that begin before administrative tribunals. In their appeal to superior court and subsequently to the Court of Appeals, ARD and Diehl were blocked at every turn in their efforts to be heard and to defend the positions they had taken before the Board, where they had in part prevailed. The Court of Appeals did not permit them, for want of a lawyer, to argue against Shaw's appeal or to pursue their own, except regarding the issue of Diehl's standing. Not only was RCW 36.70A.280(2) interpreted to deny standing to Diehl, but he and ARD were then hammered with RAP 18.9(a) sanctions for their temerity in filing an appeal without an attorney to represent them, even though the court acknowledged that the issue of whether Diehl had personal standing was not frivolous.

1. Under this Court's principles of statutory construction, the Court of Appeals erred in denying standing to Diehl under RCW 36.70A.280(2).

Under RCW 36.70A.280(2)(b), a person has standing to obtain review by a growth management hearings board if he "has participated orally or in writing before the county or city regarding the matter on which review is being requested." Under the statute, appearance standing may be obtained by the writing of a nonspecific letter to the local government during the GMA legislative process. *JCHA v. Port Townsend*, No. 96-2-0029, Order of November 27, 1996. Diehl as president of ARD wanted to express both his own views and those of his organization when he wrote to the County, and used words such as "our" and "we" to associate himself with his comments on behalf of his organization. While he needed to say that he was writing on behalf of ARD to establish standing for his group – since his comments alone would not have shown that his group had a stake in the issues – he did not thereby forfeit his own standing.

Where the meaning of statutory language is plain on its face, courts "must give effect to that plain meaning as an expression of legislative intent." *City of Spokane v. Spokane County*, 158 Wn. 2d 661, 673 (2006). Diehl complied with the plain language of the statute by participating in writing as

required for standing. Contrary to the Court of Appeals, his comments to the County showed that both he and his group had issues to present to the County about the ordinances. He did not say that he was writing only on behalf of ARD; instead, he affirmatively associated himself with the views he was expressing. To use an interpretation that engrafts requirements beyond those in the statutory language conflicts with the often articulated goal of this Court to permit controversies to be resolved on the merits, rather than on the basis of some arcane procedural trap. See *State v. Olson*, 126 Wn.2d 315, 322-24, 893 P.2d 629 (1995).

In giving "great weight" to the Board's ruling that Diehl did not have personal standing, the Court of Appeals not only ignores the fact that the Board's opinion was contrary to the opinion of other growth management hearings boards,⁵ but also gives deference on a topic where the Board has no

⁵ The Central Puget Sound Growth Management Hearings Board, considering a woman who signed in at a county hearing as representing a group concluded that both she and another woman who had not indicated she was representing a group "would have standing to appear before the board as individuals." *Friends of the Law v. King County*, CPSGMHB No. 94-3-0003, Order on Dispositive Motions, April 22, 1994. When the participation is written, it suffices to "[s]ubmit a letter (which clearly identifies and addresses the matter in question) to the county or city staff or elected officials." *Id.* To avoid precluding the type of citizen involvement that is one of the GMA cornerstones, "the question of standing is to be interpreted liberally" *Sky Valley v. Snohomish County*, CPSGMHB No. 95-3-0068c, Final Decision and Order, March 12, 1996, at 24. Similarly, the Eastern Washington Growth Management Hearings Board held that "the spirit of the GMA is to encourage citizens to

special expertise, viz., the interpretation of statutory standing requirements.

2. Whether a party unable to afford professional representation should be precluded from participation when a hearings board decision is appealed to superior court is a question of substantial public interest, involving issues of both due process and public policy.

Although this particular issue is one of first impression for this Court, corporations in Washington are allowed lay representation in small claims court (*State ex rel. Long v. McLeod*, 6 Wash.App. 848, 496 P.2d 540 (1972)), and this Court has developed a balancing test to determine the limits of the authorized practice of law. Whether an unincorporated organization that cannot afford to hire professional counsel (and is unable to secure pro bono professional representation) must appear through a lawyer, has not been previously addressed by any court in this state, and rarely elsewhere.

However, a citizen environmental group, represented only by a nonlawyer, was allowed by the Vermont Supreme Court to intervene in an action by the Vermont Agency of Natural Resources involving the closure of a landfill. Citing exceptions to the general rule prohibiting lay representation from various state and federal courts, the Vermont court concluded:

We agree with those courts that have permitted nonattorney

participate, not limit participation through a technical interpretation of standing requirements.” *Concerned Friends of Ferry County and David Robinson v. Ferry County*, EWGMHB No. 01-01-0019, Amended Motion Order, April 16, 2002.

representation in exceptional circumstances, where the interests of the organization are protected because the nonattorney has a common interest with the organization and the proposed lay representative demonstrates adequate legal skills so as not to burden the opposing party or the administration of the courts.

Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 159 Vt. 454, 458, 621 A.2d 225, 228 (1992). Even if this Court did not find the Vermont court's reasoning persuasive, the Vermont case shows at least that the issue of lay representation in the circumstances of the instant case is a debatable issue.

(a) The Court of Appeals' decision conflicts with the balancing test this Court developed in *Perkins v. CTX Mortgage Co.*

In considering whether Diehl might continue to represent his group on appeal, the Court of Appeals ignored the pragmatic test this Court developed in *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 102-105, 969 P.2d 93 (1999):

Our underlying goal in unauthorized practice of law cases has always been the promotion of the public interest. Consequently, we have prohibited only those activities that involved the lay exercise of legal discretion because of the potential for public harm. . . . The resolution of this case, therefore, depends on balancing the competing public interests of (1) protecting the public from the harm of the lay exercise of legal discretion and (2) promoting convenience and low cost.

Given that Diehl worked as a volunteer, allowing him to continue to represent ARD would promote convenience and low cost. But what of the interest in protecting the public from the harm of lay exercise of legal discretion? No one has suggested that the public would be harmed if Diehl were allowed to continue to represent ARD on appeal, making essentially the same arguments he made on behalf of ARD before the Board. This would be entirely consistent with the GMA goal of encouraging citizen participation. RCW 36.70A.020(11); see also, e.g., RCW 36.70A.035, -.130(2), -.140, -.280(2) and (3).

Certainly, there is no evidence in the record to suggest that laymen are incompetent advocates on GMA issues. Diehl has been successful in obtaining findings of noncompliance and/or determinations of invalidity from the Western Washington Growth Management Hearings Board on more than two dozen occasions.⁶

The Court of Appeals suggests that an individual, taking advantage of the pro se exception to the general rule against laymen appearing in court,

⁶ Diehl has represented both ARD and its predecessor, Mason County Community Development Council. His record and those of other lay representatives before the growth management hearings boards may be viewed in the decisions of the Growth Management Hearings Boards, published online at <http://www.gmhb.wa.gov/Decisions.aspx>.

might bring a case before a growth management hearings board in his own name, then continue to represent himself on appeal, and so to allow 'bottom-up' participation in growth management planning. Appendix at A-6, n. 6. Yet, if an individual may do so, and it does no public harm, there is no justification for denying groups who cannot afford a lawyer the choice of lay representation in preference to no representation.

If lay representation on appeal is prohibited, it will have a chilling effect on any group without the means to pay for an attorney. Such groups may hesitate even to exercise their rights to have lay representation before a hearings board, since they would know that, even if they prevail, they would be shut out of any appeal and might be subject to a judgment for court costs. The circumstances of this case warrant a narrow exception to the general rule that laymen may not represent others before courts.⁷ Given that this Court, under GR 24(b)(3) has authorized laymen to represent their groups when authorized by administrative tribunals, it is reasonable to interpret the rule to allow continuation of such representation when the

⁷ It is unquestioned that this Court has authority to allow or disallow laymen to practice law in limited circumstances. Under the separation of powers doctrine, RCW 2.48.170 is not decisive. If it were, then this Court could not have provided for exceptions to the rule on unauthorized practice of law, as it did in GR 24(b).

decision of an administrative tribunal is appealed and when the group cannot afford a lawyer.

Though the Court of Appeals points out that an administrative tribunal cannot dictate the rules of a court – Appendix at A-5 – this does not conflict with an interpretation of GR 24(b)(3) that allows continuing lay representation before the courts on issues where lay representation has been allowed by an administrative tribunal. If this Court had unequivocally said that continuing lay representation before courts is allowed when such representation is authorized by administrative tribunals in their own proceedings, it would **not** mean that the administrative tribunals were setting the rules for the courts. The rule would still be a general court rule, promulgated by the Supreme Court, though it would state a precondition for lay representation. Contrary to the Court of Appeals, it would not mean that administrative tribunals themselves could authorize nonlawyers to practice law before Washington courts. See Appendix at A-5. The authorization, contingent on action by administrative tribunals, comes from a rule devised by this Court.

(b) Constitutional rights to due process are violated when a group that has prevailed before an administrative tribunal but cannot afford professional representation is denied participation on appeal.

Those aggrieved by a final decision of a growth management hearings board have the right to an appeal of the decision to superior court (RCW 36.70A.300(5)), and those aggrieved by a decision of the superior court have a right to appeal to the Court of Appeals (RAP 2.2). Consequently, one must consider what is needed to ensure due process in the exercise of these rights.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); cited in *Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970). The right to be heard "must be tailored to the capacities and circumstances of those who are to be heard." *Id.*(footnote omitted). Representation by counsel was meant to enhance an applicant's right to be heard; not to be a bar to that right. *Collins v. Hoke*, 705 F.2d 959, 963 (8th Cir.1983).

In recognizing that due process is a flexible concept that requires procedural protections suited to the particular situation, the United States

Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), enunciated three factors for consideration in determining what procedures due process requires in a given situation:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903 (citation omitted).

Based on analysis of these factors, due process entitles ARD to nonattorney representation if it chooses. First, ARD has a recognized interest that entitled it to bring a petition for review to the Board, and would be affected by the court's review of the Board's decision. Second, ARD had no opportunity to participate in judicial review except with representation it could not afford, and thereby might be unjustly deprived of the rulings it obtained through its efforts before the Board. Finally, there is no governmental interest supporting a requirement of representation by a licensed attorney in such cases. No fiscal and administrative burdens would result in allowing nonattorney representation; indeed, the GMA structure favoring citizen participation is undermined by denying their day in court to

groups that have been authorized to appear before hearings boards, if they cannot afford a lawyer.

Under this analysis, and basic precepts of fair play, it appears to violate the due process guarantees of the 14th amendment to the U.S. Constitution and Article I, Section 3 of the Constitution of the State of Washington to deny participation in an appeal to those who may have prevailed before a hearings board simply because they lack the funds to hire a lawyer. While no one claims that this Court was obliged to allow lay representation before administrative tribunals, having done so, it should recognize a constitutional right to a continuation of that representation when tribunals' decisions are appealed and a group cannot afford a lawyer.

3. Imposition of RAP 18.9(a) sanctions for an appeal containing debatable issues conflicts with decisions of this Court and all divisions of the Court of Appeals.

Although RAP 18.9(a) sanctions are applicable to frivolous appeals, in an extraordinary move, the Court of Appeals imposed such sanctions for an issue not even brought in the appeal of ARD and Diehl. Their appeal to the Court of Appeals concerned only three issues they had originally brought to superior court: the question of Diehl's standing and two other issues. No challenge in this case was made to Diehl's continued representation of ARD

before the superior court; nor did the court comment on this matter in its opinion.⁸ In effect, the Court of Appeals reached into the Shaw appeal to address in the instant case the question of whether Diehl as a layman might represent his group on appeal.

Even though the Court of Appeals acknowledged that the issue of Diehl's personal standing was not frivolous – Appendix at A-9, n. 11 – the court held that the appeal was frivolous because it deemed the 'issue' it had taken up in considering the appeal to be frivolous. Yet, even ignoring the fact that sanctions were imposed for an issue that was not presented in the appeal of ARD and Diehl, and assuming *arguendo* that the 'issue' of lay representation is frivolous – though the preceding discussion shows that it is not – the court's decision to impose sanctions on the basis of an issue it deemed frivolous, but where it acknowledged that another issue was not frivolous, is contrary to RAP 18.9(a) and to all precedent. It leads to the absurdity that even a prevailing party might be subject to sanctions for a "frivolous appeal" if a single issue were deemed frivolous.

⁸ While the Court of Appeals noted that ARD and Diehl had not assigned error on this question to the superior court (see Appendix at A-1, n. 1), they had no need to do so, given that the superior court decision they appealed in this case makes no mention of the issue. The ruling by Judge Lawlor precluding Diehl from representing ARD in the Shaw appeal applied to a different case, and was not considered by Judge Costello in his decision on the appeal of ARD and Diehl.

Under RAP 18.9(a) it is well-established that if an action is not wholly frivolous, the defendant is not entitled to an attorney fee award. See, e.g., *Biggs v. Vail*, 119 Wn.2d 129, P.2d 350 (1992). In other words, an appeal is not frivolous when it presents clearly debatable issues. See *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983); *Community College v. Personnel Board*, 107 Wn.2d 427, 730 P.2d 653 (1986).

Further, every division of the Court of Appeals has held that RAP 18.9(a) sanctions are applicable only to an appeal presenting no debatable issue. See Division I's *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187, review denied, 94 Wn.2d 1014 (1980). (An appeal is frivolous if it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Emphasis added.*) See also Division III's ruling in *Goad v. Hambridge*, 105 85 Wn. App. 98, 105, 931 P.2d 200 (1997); Division I's *Olson v. City of Bellevue*, 93 Wn. App. 154, 165, 968 P.2d 894 (1998), review denied, 137 Wn.2d 1034 (1999) cited in Division II's own *Skinner v. Holgate*, 141 Wn. App. 840, ¶54 (2007).; and *Brin v. Stutzman*, 89 Wn. App. 809, 828, 951 P.2d 291 (1998).

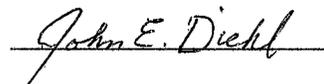
Thus, because even the Court of Appeals agrees that the issue of Diehl's personal standing was a debatable issue, the appeal of ARD and

Diehl, having included at least one debatable issue, should not be deemed frivolous. Since RAP 18.9(a) sanctions for a frivolous appeal are not properly imposed on an appeal with a debatable issue, the sanctions imposed on ARD and Diehl represent an abuse of the court's discretion.

F. Conclusion: Request for relief

Petitioners request reversal of the RAP 18.9(a) sanctions on Diehl and ARD for filing an allegedly frivolous appeal, but where the issue of Diehl's standing was acknowledged not to be frivolous. They also seek reversal of the ruling that Diehl lacked personal standing on the growth management issues he and ARD took to the Board, with a remand to the superior court to adjudicate the merits of the other issues for which ARD and Diehl sought review. In the alternative, Petitioners ask this Court to interpret GR 24(b)(3) to allow a lay representative authorized to represent his organization before a growth management hearings board to continue representing his organization in an appeal when paid or pro bono professional representation is not available, reversing the Court of Appeals and remanding the other issues appealed by ARD to superior court for its consideration.

Dated: April 21, 2010



John E. Diehl pro se and for ARD

Declaration of Service

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, and/or faxed the above Petition for Review to the offices of Monty Cobb, Deputy Prosecuting Attorney, P.O. Box 639, Shelton WA 98584; Stephen Whitehouse, attorney for Shaw Family LLC, at 601 W. Railroad Ave., Suite 300, Shelton WA 98584; and Jerald R. Anderson, Attorney General's Office, P.O. Box 40110, Olympia 98504-0110.

Dated: April 27, 2010

John E. Diehl

FILED
COURT OF APPEALS
DIVISION II
10 APR 22 PM 1:24
STATE OF WASHINGTON
BY _____
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10 APR 27 AM 10:24
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADVOCATES FOR RESPONSIBLE
DEVELOPMENT, a non-profit association,
and JOHN E. DIEHL,

Appellants,

v.
WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,
MASON COUNTY, and SHAW FAMILY LLC,
Respondents.

No. 38721-2-II

ORDER TO PUBLISH OPINION

THIS MATTER came before the court on the motion of third parties requesting publication of the opinion filed in this court on March 2, 2010. Respondents have filed a response indicating that they do not object to the publication.

Upon consideration of the motion, it is hereby ~~ordered~~ **ORDERED** that the final paragraph, reading "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further ~~ordered~~ **ORDERED** that the opinion will be published. ~~It is SO ORDERED.~~

DATED this 27th day of APRIL 2010.

Van Deren C. J.
CHIEF JUDGE

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADVOCATES FOR RESPONSIBLE
DEVELOPMENT, a non-profit association,
and JOHN E. DIEHL,

Appellants,

v.

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,
MASON COUNTY, and SHAW FAMILY LLC,
Respondents.

No. 38721-2-II

UNPUBLISHED OPINION

VAN DEREN, C.J. — John E. Diehl and Advocates for Responsible Development (ARD), an unincorporated nonprofit association of which he is the president, both appeal a decision by the Western Washington Growth Management Hearings Board (WWGMHB), arguing, among other things, that WWGMHB erred when it ruled that Diehl lacked personal standing to assert the same claims that he asserted as ARD's president. We affirm. Without personal standing, we do not reach the merits of Diehl's arguments. And because Diehl, who is not a lawyer, cannot represent ARD in court, we dismiss ARD's appeal.¹

¹ Although Diehl does not assign error to the superior court's ruling precluding him from representing ARD in court, we nevertheless address this issue because we must decide whether ARD is properly before us.

FACTS

In 2006, ARD challenged proposed Mason County land use ordinances 112-06, 138-06, and 139-06 through two letters Diehl submitted to the County on ARD's behalf as its president. After the County adopted the ordinances, Diehl—acting again on behalf of ARD and inserting himself as a petitioner—asked for WWGMHB review of the County's compliance with the Growth Management Act (GMA).²

The Shaw Family LLC (Shaw Family), whose property was affected by at least one of the ordinances, intervened in ARD's appeal. The Shaw Family then moved to dismiss (1) Diehl, because he did not meet the requirement for GMA participation standing by appearing at the County level individually, and (2) ARD, because it was not a registered entity either with the Secretary of State's office or the Department of Revenue. The WWGMHB dismissed Diehl for lack of personal standing but ruled that (1) ARD had participation standing by virtue of Diehl's remarks on its behalf at the county level and (2) Diehl could represent ARD in the WWGMHB proceedings.³ After a hearing on the merits of ARD's claims, the WWGMHB ruled that the County violated the GMA in adopting ordinance 139-06.

Diehl and ARD appealed the WWGMHB's ruling denying Diehl personal standing and two unrelated issues from the WWGMHB's final ruling. The superior court ruled that Diehl—a nonlawyer—could not represent ARD in court and affirmed the WWGMHB's ruling that Diehl did not have personal participation standing.

² Chapter 36.70A RCW.

³ A nonlawyer who is a member of a group may represent that group before growth management hearings boards. See WAC 242-02-110(1); *Miotke v. Spokane County*, No. 05-1-0007, 2005 WL 3477427, at *3 (E. Wash. Growth Mgmt. Hr'gs Bd. Nov. 14, 2005).

Diehl and ARD appeal a second time.⁴

ANALYSIS

I. REPRESENTATION BY NONLAWYERS

Diehl argues that we should permit him, as a nonlawyer, to argue ARD's appeal because he represented ARD's interests before the County and at the later appeal before the WWGMHB. But, with few exceptions, only active members of the Washington State Bar Association may practice law, which includes representing another in court. RCW 2.48.170; APR 1(b); GR 24; *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068 (2002); *In re Disciplinary Proceedings Against Droker & Mulholland*, 59 Wn.2d 707, 719, 370 P.2d 242 (1962); *State v. Hunt*, 75 Wn. App. 795, 803-05, 880 P.2d 96 (1994). "The 'pro se' exceptions are quite limited and apply only if the layperson is acting solely on his own behalf." *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 57, 586 P.2d 870 (1978).

In adhering to the general rule, we distinguish a series of cases. First, we distinguish *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 786-87, 727 P.2d 687 (1986), a case in which Division One held that a nonlawyer could appear on behalf of himself and a corporation of which he was the president, director, and sole stockholder. Unlike the instant case, in which Diehl repeatedly asserted that he represented multiple ARD members, the *Willapa Trading* court concluded that the litigant "was, in fact, acting on his own behalf" and thus his personal interests were virtually indistinguishable from those of his corporation. 45 Wn. App. at 787.

⁴ The Shaw Family asked to be dismissed from this case, but we ordered it to file a response brief. The WWGMHB, another respondent in this appeal, did not file a brief and stated in its briefing in an associated case that it would not participate here. Br. of Resp't at 4 n.2 (*Shaw Family LLC v. W. Wash. Growth Mgmt. Hearings Bd.*, No. 38671-2, (Wash. Ct. App. to be argued Apr. 2, 2010)).

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We also distinguish *Finn Hill Masonry, Inc. v. Department of Labor & Industries*, 128 Wn. App. 543, 545-46, 116 P.3d 1033 (2005), a recent case in which our court held that, while counsel must generally represent a corporation before superior and appellate courts, the opposing party failed to make this challenge at the superior court and, therefore, waived the argument on appeal. Here, the Shaw Family properly raised this argument at the superior court.

Finally, we distinguish *Biomed Comm, Inc. v. Department of Health, Board of Pharmacy*, 146 Wn. App. 929, 193 P.3d 1093 (2008). There, the superior court dismissed a corporation's administrative appeal with prejudice because the corporation filed a petition for review signed by a nonlawyer executive in violation of CR 11. *Biomed Comm, Inc.*, 146 Wn. App. at 932-33. Division One reversed, holding that the superior court failed to give the corporation reasonable time to hire counsel and cure the error. *Biomed Comm, Inc.*, 146 Wn. App. at 931-32. Here, the superior court ruled that ARD never appeared on the record, arguably dismissing ARD's filings at the close of its appeal, but Diehl had months of notice that the superior court would not permit him to argue ARD's appeal.

"[N]on-attorney litigants may not represent other litigants," *Church of the New Testament v. United States*, 783 F.2d 771, 774 (9th Cir. 1986), and courts have long held that "[c]orporations and other unincorporated associations must appear in court through an attorney." *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F.3d 972, 973-74 (9th Cir. 2004) (alteration in original) (quoting *In re Am. W. Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994)); see *Osborn v. Bank of the United States*, 22 U.S. 738, 829-30, 9 Wheat. 738, 6 L. Ed. 204 (1824); *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998). The unlawful practice of law—a gross misdemeanor—occurs when "[a]

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nonlawyer practices law, or holds himself or herself out as entitled to practice law.”⁵ RCW 2.48.180(2)–(3).

Diehl argues that he falls under the GR 24(b)(3) exception, which permits nonlawyers to “[a]ct[] as a lay representative authorized by administrative agencies or tribunals.” Because the WWGMHB allowed him to represent ARD at the administrative level, he asserts that under this exception the WWGMHB authorized his further representation before courts. He is incorrect.

“The hearings boards are quasi-judicial [administrative] agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.” *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005); *see former RCW 36.70A.280(1)* (2003). These boards are “creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication.” *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). These bodies do not have authority under the GMA to authorize nonlawyers to practice law before Washington courts and GR 24(b)(3) does not apply here. Therefore, because Diehl cannot represent ARD in court, we dismiss

⁵ We note that Diehl himself argued to the superior court that he was practicing law: “What I did before the Growth Management Hearings Board and what I’m doing today is practice law.” RP (Mar. 26, 2008) at 8.

ARD's appeal.⁶

II. PERSONAL STANDING

Diehl⁷ next claims that WWGMHB erred by ruling that he lacked personal participation standing under the GMA to appeal the County's decision on the proposed ordinances when he submitted comments expressly on ARD's behalf. We disagree.

A. Standard of Review

Under the Administrative Procedure Act (APA), chapter 34.05 RCW, the party challenging a board's ruling has the burden of showing its invalidity. *See* RCW 34.05.570(1)(a). We grant relief from a decision if the WWGMHB "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). Because it has subject matter expertise, we give the WWGMHB's legal interpretations of the GMA substantial, but not binding, weight.⁸ *Lewis County v. W. Wash.*

⁶ In *Shaw Family LLC v. Western Washington Growth Management Hearings Board*, No. 38671-2, (Wash. Ct. App. to be argued Apr. 2, 2010), the associated appeal, Diehl makes an additional argument for representing ARD: Nonlawyers should be allowed to represent groups when responding to appeals from growth management board decisions. Br. of Resp't/Cross Appellants at 16 (*Shaw Family LLC*, No. 38671-2). Diehl suggests that precluding nonlawyer representation in these circumstances bars groups from defending their victories before these boards and thus defeats the GMA's reliance on public participation in a "bottom-up" system. Br. of Resp't/Cross Appellants at 16-17 (*Shaw Family LLC*, No. 38671-2). But the issue arises only when a person appears before the county or city and disclaims personal standing, as Diehl did here. If the person timely asserts personal interest and standing, that person could continue to participate in appeals pro se before the superior and appellate courts. We address this argument here for the sake of complete analysis.

⁷ ARD and Diehl filed joint briefs that do not distinguish between their arguments. Because we dismiss ARD's appeal, we characterize this standing argument as Diehl's.

⁸ Although boards must defer to county planning actions under the GMA, here the WWGMHB interpreted a GMA standing requirement to petition for the WWGMHB's own review—a legal interpretation which merits substantial weight. *See Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

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Growth Mgmt. Hearings Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

B. Standing Before the WWGMHB

Under the GMA, “a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested” may file a petition for review. Former RCW 36.70A.280(2). “To establish participation standing . . . a person must show that his or her participation before the county or city was reasonably related to the person’s issue as presented to the board.”⁹ Former RCW 36.70A.280(4). A person includes individuals and associations. Former RCW 36.70A.280(3).

Here, Diehl faxed two letters to the County in which he identified himself as president of ARD and raised ARD’s issues; he at no time suggested that he personally had issues to present to the County about the ordinances. The September 11, 2006 letter began, “[O]n behalf of Advocates for Responsible Development I am submitting the following comments.” Admin. Record (AR) at 214. Again, in the December 19, 2006 letter, Diehl similarly began, “[O]n behalf of Advocates for Responsible Development, I am writing to comment.” AR at 216. Following the Shaw Family’s motion to dismiss Diehl and ARD before the WWGMHB, the WWGMHB concluded that Diehl’s letters did not constitute “bases for his participation standing under [former] RCW 36.70A.280(2)(b).” AR at 290. The WWGMHB noted, “It was Mr. Diehl himself who limited the attribution of his comments to ARD. Since he expressly did not participate in his individual capacity, he does not have participation standing in his individual

⁹ The APA standing requirements differ from those in the GMA. Former RCW 36.70A.280(4); RCW 34.05.530; *Project for Informed Citizens v. Columbia County*, 92 Wn. App. 290, 295-97, 966 P.2d 338 (1998). Specific GMA provisions control when in conflict with the APA, which acts as a gap filler for the GMA. See RCW 36.70A.270(7).

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capacity.” AR at 290. This legal interpretation is entitled to great weight. *See Lewis County*, 157 Wn.2d at 498. Diehl did not move for reconsideration of WWGMHB’s order dismissing him for lack of personal standing; instead, he accepted its decision, which allowed him to continue participating in the appeal before the WWGMHB as ARD’s spokesman.

Diehl argues that the WWGMHB had the burden to prove a requirement that he had to articulate his personal participation in addition to his representative participation before the County. But Diehl, the appealing party, has the burden of demonstrating that the WWGMHB’s ruling was invalid. *See RCW 34.05.570(1)(a)*. More importantly, organizations can only appear and participate before a locality through representatives, and “just as an organization may not rely on the comments of an individual member acting on [his or her] own behalf to establish standing, neither may a member rely on comments he or she submitted on behalf of an organization to demonstrate standing.” *Friends of Skagit County v. Skagit County*, No. 07-2-0025c, 2008 WL 2783670, at *8 n.37 (W. Wash. Growth Mgmt. Hr’gs Bd. June 18, 2008).¹⁰

Despite Diehl’s arguments to the contrary, the WWGMHB’s decision to withhold broad participation standing from an individual who affirmatively stated only representational status on behalf of an organization seamlessly aligns with the GMA’s goal of encouraging public participation in a “bottom-up” planning process. *See RCW 36.70A.020(11)*; *Lewis County, v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d at 511. Therefore, we hold that the WWGMHB did not err in dismissing Diehl for lack of personal participation standing. Because this holding disposes of the case, we do not reach other issues Diehl attempts to raise on his own behalf.

¹⁰ While persuasive, quasi-judicial board decisions do not constitute binding precedent on our court. *See, e.g., Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Martini v. Employment Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000); *Romo v. Dep’t of Labor & Indus.*, 92 Wn. App. 348, 356, 962 P.2d 844 (1998).

III. ATTORNEY FEES

RAP 18.9(a) authorizes this court, on its own initiative, to order ARD and Diehl to pay the Shaw Family's attorney fees for filing a frivolous appeal. *See Skinner v. Holgate*, 141 Wn. App. 840, 858, 173 P.3d 300 (2007). An appeal is frivolous if it presents no debatable issues on which reasonable people disagree. We resolve any doubts in the appealing party's favor and "keep in mind that a civil appellant has a right to appeal." *Skinner*, 141 Wn. App. at 858.

Here, ARD and Diehl filed joint briefs, in which both parties, without distinction, argued that Diehl can represent ARD in court. But the superior court refused to allow Diehl to represent ARD because he is not an attorney, so ARD and Diehl knew or should have known that our court could not permit such representation. We required Shaw Family to file a response brief in this case. Therefore, we sanction both ARD and Diehl for making this frivolous argument and award Shaw Family attorney fees and costs in an amount to be set by our Commissioner.¹¹

¹¹ Diehl's continued insistence that he be allowed to participate in court appellate processes may rise to the level of the unauthorized practice of law, a gross misdemeanor. But we are not fact finders and do not sanction him based on these actions. In addition, we clarify that Diehl's argument that he had personal standing before WWGMHB was not frivolous and did not lead to our imposed sanctions.

No. 38721-2-II

We affirm the WWGMHB's ruling on Diehl's lack of personal standing and dismiss
ARD's appeal.

A majority of the panel having determined that this opinion will not be printed in the
Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is
so ordered.

Van Deren, C.J.
VAN DEREN, C. J.

We concur:

Armstrong, J.
ARMSTRONG, J.

Penoyar, J.
PENOYAR, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADVOCATES FOR
RESPONSIBLE DEVELOPMENT,
a non-profit association, and
JOHN E. DIEHL,

Appellant,

v.

WESTERN WASHINGTON
GROWTH MANAGEMENT
HEARINGS BOARD, MASON
COUNTY, and SHAW FAMILY
LLC,

Respondent.

No. 38721-2-II

ORDER DENYING MOTION FOR
RECONSIDERATION

FILED
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Appellant, **John E. Diehl** moves for reconsideration of the Court's opinion, filed **March 2, 2010**. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Van Deren, Armstrong, Penoyar

DATED this 25th day of March, 2010.

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

A. Shoreline buffers should not be reduced based on nonconforming use on adjoining property.

Without reiterating each comment pertinent to development within 100-foot marine shoreline buffers, we share a concern that the minimal protection offered by the existing ordinance would be substantially reduced by allowing additional nonconforming uses where existing neighboring development intrudes into the buffer. Such existing nonconforming use should be phased out, not expanded by allowing similar use on adjoining property.

The provision for requiring best management practices is panglossian. The County has no ability to enforce such a provision even if it could be agreed, which is dubious in the case of a particular residence, what the homeowner's responsibility ought to be if he were inclined to follow best management practices.

B. Excessive density bonuses for habitat protection nullify the goal of the bonuses.

The use of bonuses needs to be tied to measurable benefits, and such benefits need to be measured as part of any on-going adaptive management strategy to allow such bonuses. It is not evident that enough is gained by the density bonuses part of the proposed regulations to warrant their use. In general, if it is not known whether a management device such as the use of density bonuses represents best available science to guide and provide incentives for land use decisions, then it is incumbent upon the County either to adopt a precautionary approach, assuming hoped for benefits will not materialize until the uncertainty is sufficiently resolved, or an adaptive management approach, by which results will be continuously and scientifically monitored and the regulation amended accordingly to ensure adequate protection of critical areas. See WAC 365-195-920.

C. New agricultural activities should not be allowed waiver of regulations based on conformity with an approved conservation plan.

This device, like the use of density bonuses, is unproven to provide adequate protection for critical areas, and particularly for fish and wildlife habitat conservation areas. At a minimum, any reliance upon such a device would require an extensive (and expensive) adaptive management program that neither the county nor affected land owners are prepared to implement. Speculation that approved conservation plans will incorporate sufficient environmental protection to safeguard critical areas must not be allowed to substitute for application of best available science.

D. The "native plantings" section regarding best management practices fails to include best available science.

As WDFW points out, the section omits significant species of plants, and seemingly proposes strip-planting, where site-specific plans would be preferable. See Letter of October 3, 2006, from WDFW's Jeff Davis to the County's Bob Fink.

E. The exemption of lakes less than 20 acres in size from fish and wildlife buffer

requirements is not supported by best available science.

The County has no science to support the substitution of weaker wetland buffer requirements in place of fish and wildlife habitat conservation area buffers for lakes smaller than 20 acres. To the contrary, smaller lakes are of special importance to amphibians and some birds and reptiles.

F. The exemption of Category III wetlands less than 2,500 square feet in area and isolated Category IV wetlands less than 7,500 square feet in area does not reflect best available science.

As DOE's Rick Mraz points out in his letter of Sept. 22, 2006, to the County's Bob Fink, these exemptions based on size do not find support in the scientific literature. The County has provided no inventory of the number of potentially affected wetlands, no cumulative impacts assessment, no adaptive management program or any other monitoring mechanism to assure adequate protection of wetlands.

G. Buffers are inadequate for Category I and II wetlands.

The reduction of buffer widths through averaging would allow further incursion into buffers needed to protect such important wetlands. The best available science supports 300-foot buffers if the adjacent land use is of high-intensity, and even greater buffers if the needs of certain species of wildlife are considered. See Knutson and Nac, *Management Recommendations for Washington's Priority Habitats: Riparian* (1997), esp. pp. 157-170.

II. Provisions for allowing timber harvesting within buffers are not supported by best available science.

As Mr. Mraz discusses, the scientific literature does not support the premise of the provision that 30% of the merchantable trees may be harvested consistent with maintaining the functions and values of the wetland as a critical area. Again, the County proposes an exemption of sorts to accommodate a special interest, but without scientific support to warrant its action.

I. Variances from standards arbitrarily define the minimum reasonable use.

§17.01.150 provides that the minimum reasonable use for a residence in a residentially zoned area shall be defined by the lesser of a) 40% of the area of the lot, or b) 2,550 square feet. The minimal reasonable use is not something to be asserted by fiat, arbitrarily, without any supporting evidence, and without even consideration of whether the site lends itself to a two or multi-story structure.

B. Conversion to inholding lands would directly jeopardize adjoining designated resource lands and indirectly, through precedent, would endanger resource lands throughout the County.

If the potential for substantial residential development in a rural area designated as I.TCF land is a reason to allow such development, then how will the County ever be able to say "no" to any proposed conversion? The gradual disintegration of I.TCF land in Mason County will inevitably result, for most other owners of such land might also offer as much reason for conversion as the present applicant. When Mason County was originally considering which properties to be designated as I.TCF lands, Simpson Timber Company, owner of about 172,000 acres in this county, noted many conflicts associated with increased numbers of neighboring residents, ranging from illegal dumping to trees blowing over on houses or garages. See letter of June 7, 1996, from Paul Wing, Simpson Land and Forest Management Manager, to Bob Fink of the Dept. of Community Development. It is this incompatibility of residential development and resource lands that requires the County to maintain established blocks of I.TCF land, and not to allow the gradual incursion of residential development, if such resource land, and the industry which it underlies, is to be maintained in this county.

2. Review of Critical Areas Regulations

We support the recommendations of the Department of Fish and Wildlife and the Department of Ecology, but have additional comments not limited to those of these agencies. Although we here make no specific comment on proposed changes to the Flood Damage Prevention Ordinance (FDPO), we are concerned that these are labeled on the County's website as part of the County's critical areas regulations update. Accordingly, we here incorporate by reference our earlier comments on proposed revisions to the FDPO, though we protest that the public has not been alerted to the apparent conflation of the Resource Ordinance and the FDPO, and has not therefore had adequate opportunity to offer comments on the final version of amendments to the FDPO.

The County's procedure in performing the review required by RCW 36.70A.130 has been fundamentally flawed by its failure to gather any data to determine whether the County continues to lose ground in its efforts to protect critical areas, despite the existence of regulations intended to minimize damage from ongoing development. Without a benchmark, without periodic measurement of gains and losses relative to the benchmark, and without even a report of enforcement efforts to ensure compliance with existing regulations, no one can know whether the proposed revisions are adequate even in those few instances when they seem to strengthen existing regulations. Certainly, where so little is known about the ability of existing regulations to prevent continuing losses of the functions and values of critical areas, it is premature for the County to propose a number of weakening amendments. Where impacts are not clearly known, the County should be adopting either a precautionary approach or an adaptive management approach, as required by WAC 365-195-920. The willingness to weaken existing regulations when there is no evidence that even the existing regulations are adequate for their purpose represents a violation of both the Administrative Code prescription and RCW 36.70A.172, which requires inclusion of best available science.

Advocates for Responsible Development

678 Portage Road • Shelton WA • 360-426-3709

December 19, 2006

TO: Mason County Commissioners c/o Allan Borden

FROM: John Diehl

RE: Proposed Shaw Rezone and Revisions to Resource Ordinance

In behalf of Advocates for Responsible Development, I am writing to comment on (1) the proposed Shaw Rezone of land designated as long-term commercial forest land, creating the potential for a multitude of small inholding parcels; and (2) review and update of the Resource Ordinance, as required by RCW 36.70A.130, including proposed revisions.

1. The Proposed Shaw Rezone (No. 06-08)

We agree with the staff recommendation to deny this request, which would set a dangerous precedent that might unravel the entire fabric of long-term commercially significant forest land (LTCF land). Although subdivision and residential development would clearly be contrary to the County's plan to concentrate growth in Urban Growth Areas and would pose problems of water supply, stormwater management, and wastewater disposal, the most basic problems are twofold:

A. The site satisfies the criteria for designation as long-term commercial forest land and the applicant has failed to demonstrate that reasonable use of the property as LTCF land is not possible.

There is no issue that the property in question satisfies the criteria applicable to designation of LTCF land. The applicant's request for rezoning nearly 98 acres is premised on the higher financial return he may anticipate from rezoning, not on any evidence that reasonable use of the property as LTCF land is not possible. Because the applicant has failed to show that such reasonable use is not possible, he has failed to satisfy a necessary condition for granting a rezone, stated as Policy RE-205.C in the Mason County Comprehensive Plan.

A similar issue has been addressed by this state's Supreme Court. In *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn. 2d 38, 959 P.2d 1091 (1998), a case involving the designation of agricultural resource lands, the court concluded that neither current use nor landowner intent may be allowed to control whether land is designated as resource land. As the court said, "if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands." The court quoted with approval a law review analysis of the Growth Management Act (Richard L. Settle & Charles G. Gavigan, "The Growth Management Revolution in Washington: Past, Present, and Future," 16 *U. Puget Sound L. Rev.* 867, 907 [1993]: "Natural Resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."