NO. 44269-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

SAVE OUR SCENIC AREA and
FRIENDS OF THE COLUMBIA GORGE, INC.,

Appellants,

v.

SKAMANIA COUNTY,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case involves fundamental issues under three cornerstones of Washington state environmental and land use laws: (1) the requirements of of the Growth Management Act ("GMA"), ch. 36.70A RCW, for counties to conserve resource lands (such as commercial forest lands) through periodic review of their development regulations, (2) the requirements of the Planning Enabling Act ("PEA"), ch. 36.70 RCW, for counties to adopt development regulations consistent with their comprehensive plans, and (3) the requirements of the State Environmental Policy Act ("SEPA"), ch. 43.21C RCW, for local governments to review and consider the environmental implications of their actions.

On August 21, 2012, Skamania County passed into law Ordinance 2012-08, which lifted a five-year development moratorium from thousands of acres of unzoned lands, opening up these lands to unplanned and unregulated development. The affected lands have never been zoned by the County's zoning ordinance, but were protected from July 10, 2007 to August 21, 2012 by the moratorium ordinances, which prohibited a variety of development activities on these lands, including building permits, land divisions, and conversions of forest lands to non-forest uses. In each of its moratorium ordinances, the County declared that it was

actively working to zone the unzoned lands and to adopt regulatory controls and measures to protect resources on them.

With the enactment of Ordinance 2012-08, however, the County suddenly decided to revoke the five-year moratorium's protections from thousands of acres of land—even while including findings within the very same ordinance that the moratorium should be *continued* on these lands.

Shortly after Ordinance 2012-08 was passed into law, Plaintiffs[1] filed a Complaint for Declaratory and Injunctive Relief in the Clark County Superior Court, seeking compliance with the GMA, PEA, and SEPA. The Superior Court granted part of one claim in favor of Plaintiffs, but dismissed all other claims.

The Superior Court's Order of Dismissal should be reversed and remanded on the following grounds. First, the Superior Court erred by concluding that the County met its responsibilities to conduct periodic review of its natural resource lands designations under the GMA, and also erred by dismissing Plaintiffs' periodic review claim as time-barred. Second, the Court erred in dismissing as time-barred Plaintiffs' claims that the County is in violation of the PEA by failing to take action to adopt

[1] Plaintiffs are Save Our Scenic Area ("SOSA") and Friends of the Columbia Gorge ("Friends"), nonprofit conservation organizations aggrieved by the County's actions and inactions.

development regulations consistent with its 2007 Comprehensive Plan. Finally, the Court erred in concluding that the enactment of Ordinance 2012-08, which repealed the five-year moratorium from large portions of the County, was exempt from environmental review under SEPA.

II. ASSIGNMENTS OF ERROR

In issuing its November 9, 2012 Order of Dismissal (CP 413–15), the Superior Court made the following errors:

1. The Superior Court erred in dismissing Plaintiffs' claims that Skamania County has failed to meet the Growth Management Act's statutory deadline for completing periodic review of the County's natural resource lands. *Issues*: (a) Was Skamania County required to complete periodic review of its natural resource lands designations by December 1, 2008? (b) Did the Superior Court err in concluding that the County completed *both* its initial designation of natural resource lands *and* periodic review of these designations, all by adopting Resolution 2005-35, even though this resolution does not even mention periodic review? (c) Did the Superior Court err in concluding that Plaintiffs' claims involving periodic review of the County's natural resource lands were time-barred?

2. The Superior Court erred in dismissing as untimely Plaintiffs' claims that the County is in violation of the Planning Enabling

Act by failing to adopt development regulations consistent with the County's 2007 Comprehensive Plan. *Issues*: (a) Is Skamania County required by the PEA to adopt development regulations that are consistent with its Comprehensive Plan? (b) Did the Superior Court err in concluding that Plaintiffs' consistency claims were time-barred? (c) Does the PEA contain any appeal periods, statutes of limitation, or judicial review provisions for raising consistency violations by partial planning counties? (d) If not, is a writ of review and/or declaratory judgment action the proper method for raising a county's failure to take action to adopt a zoning ordinance consistent with its comprehensive plan? (e) Did Skamania's adoption of its zoning ordinance in 1986 trigger any appeal periods for bringing consistency claims under the PEA, given that the legislature did not enact the consistency requirement for partial planning counties until 1991? (f) When a county makes no changes to its zoning ordinance, and instead adopts a series of development moratorium ordinances for several years in which the county states that it is working to update its zoning ordinance to ensure consistency with its comprehensive plan, does any appeal period for raising PEA consistency claims begin to run during the time the moratorium is in effect?

/ / /

3. The Superior Court erred in holding that Skamania County's decision to modify and repeal its five-year development moratorium from thousands of acres of land was not subject to environmental review under the State Environmental Policy Act. *Issues*: (a) Does SEPA require governmental actions to be reviewed for their probable adverse environmental impacts? (b) By adopting Ordinance 2012-08, did the County modify and revoke the protections of the five-year moratorium from thousands of acres of unzoned lands? (c) Did the Superior Court err in determining that the moratorium lapsed from these lands? (d) Was the County's repeal of the moratorium from thousands of acres of land an "action" under SEPA? (f) Did the Superior Court err in holding that the adoption of Ordinance 2012-08 was exempt from environmental review as a procedural action and an emergency action?

4. The Superior Court erred in adopting any findings of fact contained within its November 9, 2012 Order of Dismissal and related to the Prior Assignments of Error, including any findings of fact in numbered findings #1, 2, 3, and 4 in that Order. *Issues*: (a) Did the Superior Court adopt any findings of fact? (b) If so, are they in error? (c) Are findings made in a summary judgment order superfluous and need not be considered by the Court of Appeals?

III. STATEMENT OF THE CASE

A. Statement of Facts

On July 10, 2007, Skamania County adopted its current Comprehensive Plan. CP 6. On the same day, the County also passed Ordinance 2007-10, which established a six-month moratorium prohibiting various types of development on unincorporated lands that had not yet been zoned as part of Skamania County Code ("SCC") Title 21, the County's zoning ordinance. CP 256–58.

According to Ordinance 2007-10, the lands covered by the moratorium included at least 15,000 acres of privately owned, unzoned lands. CP 256.[2] The stated purpose for the moratorium was to protect these privately owned, unzoned lands from development until the County could "establish zoning classifications on all un-zoned land[s]," CP 259, because "allowing new construction" on such lands "prior to the County Commissioners completing the zoning classification process essentially [would be] circumventing the legislative process and could endanger the public's safety, health and general welfare," CP 257. The activities prohibited by the moratorium included land divisions, building permits, and conversions of forest lands to non-forest uses. CP 256, 258.

[2] The covered lands also included hundreds of thousands of acres of federally and state-owned lands, but those lands are not central to the disputes in this appeal.

Every six months for the next five years, the County renewed the moratorium.[3] As specified in each moratorium ordinance, the County found that the unzoned lands remained under threat of development in the absence of zoning, that these circumstances constituted "an emergency," and "that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the status quo [on the unzoned lands] pending the County's consideration of developing zoning classifications" for these lands. *See, e.g.*, CP 263.[4]

On June 12, 2012, the County passed into law Ordinance 2012-04, again extending the moratorium for six months. CP 317. However, less than halfway into that six-month period, on August 21, 2012, the County passed Ordinance 2012-08 into law. CP 322. The stated purpose of Ordinance 2012-08 was to "modify" the moratorium already in place by significantly narrowing its geographic scope, effectively revoking the moratorium from all unzoned lands except a specific area located in the far

[3] The initial moratorium ordinance was Ordinance 2007-10. CP 256–60. The subsequent renewing ordinances were Ordinances 2008-01, 2008-08, 2008-13, 2010-01, 2010-06, 2010-10, 2011-03, 2011-08, and 2012-04. CP 261–328.

[4] In 2008, the County prepared draft revisions to its zoning ordinance that, among other things, would have allowed industrial energy facilities and other large-scale uses throughout most of the County. CP 8. The County indefinitely shelved this proposal, however, after the Skamania County Hearing Examiner determined that the County needed to prepare an environmental impact statement under SEPA to evaluate the impacts of the proposed zoning changes before adopting them. CP 9, 149, 185–86. The Hearing Examiner's decision is located at CP 329.

northwest part of the County, known as the "High Lakes." CP 10, 179, 322. With this change, the moratorium's protections were repealed from approximately 10,000 acres of privately owned lands. CP 22, 179, 322.

As a "partial planning" county, Skamania County is obligated by the GMA to designate natural resource lands and critical areas, and to periodically review these designations according to a statutory timeline. RCW 36.70A.130(1)(b), 36.70A.170. In each moratorium ordinance adopted from 2007 through 2012, the County stated that it was "determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act." *See, e.g.*, CP 256, 321.

On September 6, 2012, the Washington State Department of Commerce ("Commerce")[5] stated that Skamania County "is currently out of compliance with the critical areas/resource lands regulations update requirement under the GMA." CP 165.

The first moratorium ordinance, adopted in 2007, stated that "Skamania County . . . is beginning the process to adopt zoning classifications for all land within unincorporated Skamania County," and

[5] Commerce is the agency charged with tracking counties' compliance with GMA periodic review. RCW 36.70A.106; WAC 365-196-610(2)(d). Commerce is also responsible for adopting statewide substantive and procedural criteria for critical areas and resource lands. RCW 36.70A.050(1), 36.70A.190(4)(b).

determined that a moratorium was necessary "until the zoning classifications related to the 2007 Comprehensive Plan . . . are complete." CP 256, 258. All subsequent ordinances, including Ordinance 2012-08, stated that the County was "in the process of updating zoning classifications for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan." *See, e.g.*, CP 261, 320. Further, all of the moratorium ordinances declared a need to "maintain the status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the newly[6] adopted 2007 Comprehensive Plan." *See, e.g.*, CP 258, 321.

B. Statement of Procedures

On September 11, 2012, Plaintiffs filed a Complaint in the Clark County Superior Court, seeking declaratory and injunctive relief on four causes of action. CP 1. First, Plaintiffs alleged that the County had failed to comply with the GMA's requirement to designate and protect commercial forest lands. CP 11–12. Second, Plaintiffs alleged that the County had failed to comply with the GMA's periodic review requirements for critical areas and resource lands. CP 12. Third, Plaintiffs alleged that the County had failed to comply with the PEA's requirement

[6] The word "newly" was omitted from Ordinance 2012-08, CP 321, but appeared in all prior ordinances.

to adopt development regulations consistent with the County's 2007 Comprehensive Plan. CP 13–15. And finally, Plaintiffs alleged that the County had violated SEPA by failing to review the environmental impacts of repealing the five-year moratorium from thousands of acres of land via its decision to enact Ordinance 2012-08. CP 15–16.

The County filed a "Motion to Dismiss, or in the Alternative, Summary Judgment." CP 93. There were no objections by the County to any of the factual materials and documents presented by Plaintiffs in response to the County's motion. On November 9, 2012, the Honorable Judge Diane M. Woolard heard argument on the County's motion, made an oral ruling from the bench, RP 45–46,[7] and signed an Order of Dismissal drafted by the County, CP 413–16.

The Court granted summary judgment in favor of Plaintiffs on critical areas compliance and ordered the County to complete periodic review of its critical areas ordinance by December 1, 2013. CP 414–15. The Court dismissed all other claims, however, holding that the remaining GMA and PEA claims were time-barred, that the County had complied with its December 1, 2008 deadline to complete periodic review of its resource lands, and that the County's decision to revoke the protections of

[7] All references to "RP" in this Brief are to the Verbatim Report of Proceedings for the November 9, 2012 proceedings before the Clark County Superior Court.

the moratorium from large portions of the County was exempt from environmental review under SEPA. *Id.* This appeal followed.

IV. ARGUMENT

A. Standards of Review

Appellate courts review orders of summary judgment[8] *de novo*, performing the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn. 2d 441, 447, 128 P.3d 574 (2006). When the facts are not in dispute, the appellate court may grant summary judgment for the nonmoving party. *See Impecoven v. Dep't of Revenue*, 120 Wn. 2d 357, 365, 841 P.2d 752, 755 (1992). In addition, on appeal of a summary judgment motion, when the facts are uncontroverted, the Superior Court's findings of fact are superfluous and need not be considered, given the appellate court's *de novo* review. *Shoulberg v. Pub. Util. Dist. No. 1 of Jefferson County*, 169 Wn. App. 173, 177–78, 280 P.3d 491 (Div. II, 2012).

This appeal involves interpretation of state statutes, county ordinances, and state regulations. Statutory interpretation is a question of law that courts review *de novo*. *Western Telepage, Inc. v. City of Tacoma*

[8] The Superior Court's decision was titled an Order of Dismissal. CP 413. However, CR 12(b) states that if a CR 12(b)(6) motion to dismiss is made, but "matters outside the pleading are presented and not excluded by the court, the motion shall be treated as one for summary judgment." Here, the County presented material outside the pleadings, including declarations, an excerpt of a transcript, and other documents. *See, e.g.*, CP 21–92. Thus, the Court of Appeals should regard the Superior Court's order as an order granting summary judgment.

Dep't of Fin., 140 Wn. 2d 599, 607, 998 P.2d 884 (2000).[9] Interpretation of county ordinances is also a question of law that the courts review *de novo*. *See Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn. 2d 421, 427, 256 P.3d 295 (2011).[10] State regulations are interpreted as if they were statutes. *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 926, 117 P.3d 385 (Div. II, 2005).

B. The Superior Court erred in dismissing Plaintiffs' claims that Skamania County has failed to meet the Growth Management Act's statutory deadline for completing periodic review of the County's natural resource lands.

1. Skamania County was required to designate natural resource lands and critical areas by September 1, 1991, and to complete periodic review of these designations by December 1, 2008.

Prior to adoption of the Growth Management Act, land use planning occurred under the authority of the Planning Enabling Act and related grants of authority. *See* RCW 36.70.010. Because Skamania chose

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[9] Courts first look to a statute's plain language, in order to give effect to legislative intent and fulfill the obligations of the statute. *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wn. 2d 40, 53, 905 P.2d 338 (1995). Courts do not construe unambiguous statutes. *Whatcom County v. City of Bellingham*, 128 Wn. 2d 537, 546, 909 P.2d 1303 (1996). When a statute is ambiguous, however, courts "construe the statute so as to effectuate the legislative intent . . . determined 'within the context of the entire statute.'" *Id.* (quoting *State v. Elgin*, 118 Wn. 2d 551, 556, 825 P.2d 314 (1992)). Courts interpret statutes to give effect to all language, and so that no portion is rendered meaningless or superfluous. *Id.*

[10] Unambiguous ordinances are applied according to their plain meaning, while ambiguous ordinances are construed. *Sleasman v. City of Lacey*, 159 Wn. 2d 639, 643, 151 P.3d 990 (2007). A reviewing court's "goal in construing zoning ordinances is to determine legislative purpose and intent." *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (Div. II, 2008).

to establish a planning agency, the PEA required the County to adopt a comprehensive plan. RCW 36.70.320 ("Each planning agency shall prepare a comprehensive plan for the orderly physical development of the county, or any portion thereof . . . . "). Pursuant to this requirement, Skamania County adopted a Comprehensive Plan in 1977 and a zoning ordinance in 1986. CP 85, 197.

In 1990, the legislature adopted the GMA, codified at chapter 36.70A RCW. For counties that meet certain population requirements or that choose to fully plan under the GMA, all provisions of the GMA apply. *See* RCW 36.70A.040. These counties are commonly referred to as "full planning" counties. *See, e.g.*, WAC 365-196-030, 365-196-800(2).

For the remaining counties, including Skamania, only certain parts of the GMA apply. *See* RCW 36.70A.130, 36.70A.170; WAC 365-196-030(1)(c).These counties are referred to as "partial planning" counties, because they are only partially required to comply with the GMA.[11]

The GMA required *all* counties, including partial planning counties, to designate natural resource lands[12] and critical areas[13] by

[11] Partial planning counties are also referred to as counties that "do not plan" under the GMA, *see, e.g.*, WAC 365-196-830(1), as counties that "do not fully plan" under the GMA, *see, e.g.*, WAC 365-196-030(1)(b), and as "CARL counties," for the critical areas and resource lands provisions that apply to them.

[12] Natural resource lands (*i.e.*, resource lands) include agricultural lands, forest

September 1, 1991. RCW 36.70A.170. These initial classifications and designations were not intended to be permanent. *See 1000 Friends of Washington v. McFarland*, 159 Wn. 2d 165, 169, 149 P.3d 616 (2006) ("Planning is not a one time thing"). Instead, "[e]ach comprehensive land use plan and development regulations shall be subject to *continuing review and evaluation* by the county or city that adopted them." RCW 36.70A.130(1)(a) (emphasis added).

In addition to that *continuing* review requirement, the GMA also requires *periodic* review under specific timetables. When partial planning counties conduct periodic review, each county "shall take action to review and, if needed, revise its policies and development regulations regarding critical areas and natural resource lands adopted according to [the GMA] to ensure these policies and regulations comply with the requirements of [the GMA]." RCW 36.70A.130(1)(b).

The initial statutory deadline for all counties to complete the first round of periodic review was September 1, 2002.[14] As applicable to Skamania, the legislature extended that deadline three times. First, in

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lands, and mineral resource lands. RCW 36.70A.170.

[13] Critical areas include wetlands, aquifer recharging areas, fish and wildlife areas, frequently flooded areas, and geologically hazardous areas. RCW 36.70A.030(5).

[14] Laws of 1997, ch. 429, § 10 (formerly codified at RCW 36.70A.130(1)); *see also Kitsap County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 138 Wn. App. 863, 879, 158 P.3d 638 (Div. II, 2007).

2002, the legislature replaced and extended the 2002 deadline pursuant to a statutory timetable.[15] Skamania's new deadline was December 1, 2005.[16]

Second, in 2005, the legislature extended the deadline for the critical areas component of periodic review by one year, making Skamania County's new deadline for this component Dec. 1, 2006.[17]

Third, in 2006, the legislature extended the deadline for both critical areas and resource lands for counties meeting certain population requirements, including Skamania County.[18] Skamania's new deadline was December 1, 2008.[19] That deadline was not extended and remains the operative deadline for Skamania's first round of periodic review.

In sum, Skamania County was required by the GMA to make initial designations of resource lands and critical areas by September 1, 1991. Since then, the County has been required to conduct periodic review of these designations. After receiving three extensions from the legislature, the deadline for Skamania to complete its first round of periodic review was December 1, 2008.

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[15] Laws of 2002, ch. 320, § 1 (codified at RCW 36.70A.130(4)).
[16] Laws of 2002, ch. 320, § 1 (codified at RCW 36.70A.130(4)(b)).
[17] Laws of 2005, ch. 294, § 2 (formerly codified at RCW 36.70A.130(8)).
[18] Laws of 2006, ch. 285, § 2 (codified at RCW 36.70A.130(6)).
[19] *Id.* (codified at RCW 36.70A.130(6)(b)); *see also* CP 165 (statement by Department of Commerce).

2. The Superior Court erred in concluding that the County completed periodic review of its natural resource lands designations and that Plaintiffs' periodic review claims were time-barred.

As explained above, Skamania County had a statutory deadline of December 1, 2008 to complete its first round of periodic review of its critical areas and natural resource lands designations. The County has failed to meet that deadline—both for critical areas *and* resource lands.

The County's failure to meet the December 1, 2008 deadline is documented in the record. As Commerce stated on September 6, 2012, Skamania "is currently out of compliance with the critical areas/resource lands regulations update requirement under the GMA." CP 165. Furthermore, during a March 22, 2011 public meeting, the Board of County Commissioners discussed the County's failure to meet the deadline and decided, in their own words, to "[k]ick it down the curb":

> PEARCE[20]: "How far up in violation are we now?"
>
> WITHERSPOON[21]: "Ohhhh, about four years."
>
> PEARCE: "Kick it down the curb."
>
> RICHARDSON[22]: [laughter]

CP 176.

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[20] Paul Pearce is a former Skamania County Commissioner.
[21] Karen Witherspoon is the Skamania County Planning Director.
[22] Jim Richardson is another former Skamania County Commissioner.

Plaintiffs became alarmed that Skamania County was so far behind in meeting its periodic review deadline, and yet was willing to "[k]ick it [even further] down the curb." *Id.* Because of the importance of the natural resources at stake and given the County's lax approach toward meeting its statutory responsibilities, Plaintiffs in September 2012 filed a complaint for declaratory and injunctive relief, seeking, among other things, a court order that the County was violating its statutory deadlines and directing the County to make the required designations. *See* CP 1, 16–18. Plaintiffs raised both the County's failure to make its initial resource lands designations (due by September 1, 1991) and its failure to complete periodic review (due by December 1, 2008). CP 3–5, 11–12, 16–17.

The County conceded that, with respect to critical areas, the County had failed to meet its December 1, 2008 periodic review deadline. CP 107. The Superior Court accordingly granted summary judgment in favor of Plaintiffs on that issue and ordered the County to "complete its GMA Critical Areas Update by December 1, 2013"—five years after the statutory deadline. CP 415; *see also* CP 414.[23]

For natural resource lands designations, however, the County conceded nothing. Instead, the County argued it had previously met its

[23] No party assigns error to the portions of the Superior Court's decision involving critical areas.

responsibilities by adopting County Resolution 2005-35, which on its face is limited to lands located within the Columbia River Gorge National Scenic Area, which contains only six percent of the County's land base. CP 34, 142. In its motion, the County offered the following table summarizing its arguments regarding compliance with its GMA deadlines:

	GMA Deadline	**Completed?**
Natural Resources: Designate Forest, Agricultural, and Mineral Lands	Designate Natural Resources: 1991 Update Designations: December 1, 2005 or 2008 (Original deadline 2005, Legislature allowed three year Extension)	Yes. Resolution 2005-35 designated natural resource lands and complied with the Update Requirement.

CP 98. The County elaborated as follows:

> Skamania County designated Resource Lands and completed its 2005 Update when it adopted Resolution 2005-35. * * * With this Resolution, the County designated natural resource lands and completed its 2005 GMA update with respect to natural resource lands.

CP 99–100; *see also* RP 5, 6, 12, 31, 32, 44.

Thus, according to the County, Resolution 2005-35 served the dual purpose of not only initially *designating* resource lands pursuant to the GMA (nearly fourteen years after the 1991 deadline), but also reviewing and *updating* these designations—*all within the same document*.

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The Superior Court accepted the County's arguments and decided that *both* designation *and* update were achieved in the very same County resolution:

> With respect to the County's GMA Natural Resource *Designation and Update requirements*, the County addressed these GMA requirements in 2005, through Resolution 2005-35. It is now 2012. [The] GMA contains a 60-day appeal period, and land use decisions are to be reviewed expeditiously. With seven years having past [*sic*], it is now too late for an appeal to be filed.

CP 414 (emphasis added).

In making these findings and conclusions, the Superior Court misconstrued the applicable law and misinterpreted Skamania County's actions. At most, Resolution 2005-35 *designated* resource lands in a small portion of the county. But the Resolution could not have been *both* the County's *designation* of resource lands *and* the subsequent *periodic review* of these designations, all within the same document. The County has yet to complete periodic review of its designations.[24] This conclusion is borne out by examining the GMA's statutory framework, the Commerce statement in the record, and the County's own statements and actions.

[24] Plaintiffs argued below that the County had failed to meet both its 1991 deadline to designate resource lands and its 2008 deadline to complete its first round of periodic review of these designations. CP 3–5, 11–12, 16–17. On appeal, Appellants assign error only to the County's failure to meet the latter deadline.

Resolution 2005-35 appears to be the first time Skamania County ever decided that any of its actions "meet[] the requirements of the Growth Management Act (RCW 36.70A) for the conservation of forest, agricultural, and mineral resource lands." CP 34. Thus, the Resolution is, at most, the County's initial designation of resource lands—but within only a limited portion of the County, along its southern boundary.

Resolution 2005-35 could not have been *both* a designation of resource lands *and* a periodic review and update of those very same designations, all within the same resolution. By statute, the designation occurs first, and periodic review occurs later, pursuant to the deadlines set forth in RCW 36.70A.170 and 36.70A.130(4) and (5).

Moreover, nowhere does Resolution 2005-35 even *mention* periodic review or cite RCW 36.70A.130(1)(b), let alone explain that periodic review occurred or that the Resolution was adopted pursuant to RCW 36.70A.130(1)(b). Nor was Resolution 2005-35 proposed or adopted pursuant to the "public participation program," "procedures," and "schedules" required by the GMA for periodic review, which the County was required to "broadly disseminate to the public" prior to taking action as part of periodic review. RCW 36.70A.130(2)(a). Given these deficiencies, the Resolution did not complete periodic review and did not

trigger any appeal periods or statutes of limitation for challenging a periodic review update. *See Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 137 Wn. App. 781, 797–98, 154 P.3d 959 (Div. II, 2007), *aff'd in part and rev'd in part on other grounds*, 164 Wn. 2d 329, 190 P.3d 38 (2008) ("Otherwise . . . a county could argue after the fact that an amendment was actually part of [a periodic] update to its comprehensive plan and thereby circumvent review of a decision not to revise a plan or regulations.").[25]

Commerce's statement in the record further confirms that Resolution 2005-35 did not complete Skamania County's periodic review. According to Commerce, as of September 6, 2012, Skamania was "currently out of compliance with the critical areas/resource lands update requirement under the GMA." CP 165. Commerce is statutorily responsible for tracking counties' periodic review compliance, and is thus the authoritative source on whether a county has met its deadlines. *See* RCW 36.70A.106; WAC 365-196-610(2)(d).

Rather than completing periodic review, Resolution 2005-35 at most took lands in the Scenic Area that had been previously zoned as

[25] Although Thurston County is a full planning county, the *Thurston County* case involved periodic review of resource lands, 137 Wn. App. at 788, 796–98, just as in the instant case, and it also involved GMA provisions that apply to all jurisdictions, *id.* at 797–98 (citing RCW 36.70A.130(1), (2), (4)).

agricultural and forest lands pursuant to the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544–544p, and designated them as resource lands under the GMA. But again, Resolution 2005-35 was limited to the southernmost six percent of the County. Importantly, through its subsequent statements and actions, the County demonstrated that it was preparing to review and designate resource lands in the *rest* of the County, outside the Scenic Area.

For example, on July 10, 2007, the County adopted Ordinance 2007-10, the first of its series of moratorium ordinances. In that ordinance (and in each subsequent moratorium ordinance for the next five years), the County made the following findings:

> WHEREAS, Skamania County is . . . *beginning the process to adopt zoning classifications*[26] for all land within unincorporated Skamania County; and,
>
> * * *
>
> WHEREAS, most of the area within unincorporated Skamania County that is *not currently covered by a zoning classification is currently used as commercial forest land* or [is] within the Gifford Pinchot National Forest; and,
>
> WHEREAS, *the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land* from the encroachment of residential uses; and,

[26] In subsequent ordinances, this language was changed to "Skamania County is currently in the process of updating zoning classification[s] . . . ." *See, e.g.*, CP 261.

* * *

> WHEREAS, [recently created] parcels [in unzoned areas] are located in *existing forest land areas that during the* review process of the Comprehensive Plan and *pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act*; * * *

CP 256 (emphasis added). Based on these findings, the County decided to "establish . . . the moratorium . . . *until the zoning classifications . . . are complete*." CP 258 (emphasis added).

Thus, in the County's own words, from 2007 through 2012 it was actively working on preparing "zoning classifications" for "commercial forest land . . . as required by the Growth Management Act." CP 256–57. Although the County's references to the requirements of the GMA did not include specific RCW citations, the County was ostensibly referring to the GMA's requirements to designate and protect commercial forest lands as part of periodic review. *See* RCW 36.70A.130(1), 36.70A.170. Indeed, no other GMA mandates specifically involving the designation of commercial forest lands even *apply* to Skamania County. Therefore, as the County explained, it was actively working to review and update its forest land designations as required by the GMA's periodic review provisions.

Despite the County's promises, however, it achieved no real progress in completing periodic review of its resource lands designations. After years of delay by the County, Plaintiffs filed this action.

At that point, the County suddenly announced, via its Motion for Summary Judgment, that it had *already completed* its resource lands designations and periodic review thereof, all in 2005. CP 98–100. Thus, after years of telling the world that it was working on designating commercial forest lands outside the Scenic Area—and that it needed more time to complete the process for doing so—the County suddenly announced that it had made the decision *several years earlier* that no such designations were necessary. The County is effectively playing a shell game that should be rejected.

Skamania County continues to be out of compliance with its December 1, 2008 deadline to complete periodic review of its resource lands designations. Because Resolution 2005-35 did not complete the County's periodic review process, it did not trigger any appeal deadline or statute of limitation for challenging periodic review. The Superior Court erred in dismissing Plaintiffs' claims regarding the County's lack of compliance with periodic review. The Court of Appeals should reverse the Superior Court's decision, grant summary judgment in favor of Plaintiffs

on their GMA natural resource periodic review claims, and remand for further proceedings in the Superior Court.

C. The Superior Court erred in dismissing as untimely Plaintiffs' claims under the Planning Enabling Act that the County has failed to adopt development regulations to ensure consistency with its 2007 Comprehensive Plan.

1. Skamania County is required by the Planning Enabling Act to adopt development regulations that are consistent with its Comprehensive Plan.

Skamania County is required by the Planning Enabling Act to adopt a comprehensive plan.[27] Further, as a partial planning county, Skamania is required to adopt development regulations that are consistent with its Comprehensive Plan. The County's consistency mandate comes from the following amendment to the PEA, made on July 1, 1990 as part of the GMA:

> Beginning July 1, 1992, the development regulations of each county that does not plan under RCW 36.70A.040 *shall not be inconsistent with the county's comprehensive plan*. For the purposes of this section, "development regulations" has the same meaning as set forth in RCW 36.70A.030.[28]

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[27] The PEA requires that "[e]ach planning agency shall prepare a comprehensive plan for the orderly physical development of the county." RCW 36.70.320 (emphasis added). Skamania County's 2007 Comprehensive Plan expressly confirms that the PEA is the regulatory basis for the adoption of the Plan and declares that "[t]he Comprehensive Plan must apply to any area that will have a zoning designation." CP 198.

[28] "'Development regulations' or 'regulation' means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan

RCW 36.70.545 (emphasis added).

2. The Superior Court erred in concluding that Plaintiffs' PEA consistency claims were time-barred.

In their Complaint, Plaintiffs sought (1) a declaration by the Superior Court that the County has failed to adopt development regulations for the unzoned lands consistent with its 2007 Comprehensive Plan and is thus in violation of the PEA's consistency requirement at RCW 36.70.545, and (2) injunctive and mandatory relief directing the County to adopt zoning regulations for these lands consistent with the Comprehensive Plan. CP 6–7, 13–15, 17.

The County argued that Plaintiffs "[w]aited 27 years to appeal the zoning, and five to appeal the Plan," and therefore Plaintiffs' claims were "barred." CP 106. The Superior Court agreed, concluding that the consistency claims were time-barred and must be dismissed:

> Unzoned Lands/Comprehensive Plan Consistency. The County adopted the regulations applicable to Unzoned lands [nearly] 27 years ago, and updated its Comprehensive Plan to address and provide for the designation of lands as Unzoned, in 2007. Washington policy is to review decisions affecting [the] use of land expeditiously. The usual appeal period for [a] land use decision is 21-30

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ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city." RCW 36.70A.030(7).

> days.[29] If [the] GMA's analogous appeal period is used, an appeal must be filed within 60-days. Either way, the appeal period has past [*sic*].

CP 415.

The Superior Court's holding was in error. Plaintiffs' consistency claims were *not* time-barred. Simply put, Plaintiffs' consistency claims involve *inaction* by the County: a *failure* by the County to revise or update its development regulations to achieve consistency with its 2007 Comprehensive Plan, as required by the PEA.

Furthermore, there was no requirement for Plaintiffs to challenge the consistency of the county's development regulations in either 1986 or 2007. In 1986, the consistency requirement had not yet been enacted. And from 2007 to 2012, there were no consistency problems with Skamania County's development regulations for the unzoned lands; instead, the County's development regulations, in the form of its five-year moratorium, *protected* these lands consistent with the 2007 Plan.

To the extent that any appeal period applied, Plaintiffs met it. In 2012, when the County repealed the five-year moratorium from thousands of acres of land, thus creating an inconsistency between the County's

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[29] Here, the Superior Court's Order includes the following footnote: "Ch. 36.70C RCW, Land Use Petition (21-day appeal period); Ch. 34.05 RCW, Administrative Procedures [*sic*] Act (30-day appeal period)."

development regulations and the 2007 Comprehensive Plan, Plaintiffs timely raised their consistency claims by filing this action.

a. Plaintiffs' PEA claims, which are based on inaction by the County, are not time-barred.

In dismissing Plaintiffs' PEA claims, the Superior Court determined that Plaintiffs had not met the appeal periods for three statutes: the GMA, the Administrative Procedure Act ("APA"), and the Land Use Petition Act ("LUPA"). *See* CP 415.[30] None of these appeal periods applied, however. Plaintiffs' consistency claims are based on the PEA—not the GMA, APA,[31] or LUPA[32]—and on Skamania County's *failure to take action* by updating Title 21 to ensure consistency with the 2007 Comprehensive Plan, as is required by the PEA. *See* RCW 36.70.545.

The PEA contains no judicial review provisions, no appeal deadlines, and most importantly, no provisions for *failures to act.* In such situations—where no adequate remedy at law is available and the

[30] The appeal period under the GMA is 60 days. RCW 36.70A.290(2). The appeal period under the APA is 30 days. RCW 34.05.542(2). The appeal period under LUPA is 21 days. RCW 36.70C.040(3).

[31] The APA applies only to state agencies, so it would not apply to Skamania County in any event. *See* RCW 34.05.010(2) (definition of "agency"); *Entm't Indus. Coal. v. Tacoma-Pierce County Health Dep't*, 153 Wn. 2d 657, 668, 105 P.3d 985 (2005) ("The APA applies only to actions of state agencies clearly involved in statewide programs.").

[32] LUPA applies only to land use decisions, not countywide legislative decisions on zoning matters, so it would not apply in this case, either. *See* RCW 36.70C.020(2) (definition of "land use decision").

defendant's actions are arbitrary, capricious, or contrary to law—a constitutional writ, statutory writ, or declaratory judgment may be issued. *See Saldin Secs., Inc. v. Snohomish County*, 134 Wn. 2d 288, 292–94, 949 P.2d 370 (1998) (constitutional writs); *Thompson v. Wilson*, 142 Wn. App. 803, 815–19, 175 P.3d 1149 (Div. II, 2008) (statutory writs and declaratory judgments).

Here, given the absence of an adequate remedy at law, Plaintiffs properly filed this action, seeking a constitutional and/or statutory writ, as well as declaratory, injunctive, and mandatory relief. CP 16–18. The Superior Court erred in deciding that Plaintiffs' claims were subject to the appeal periods of the GMA, APA, or LUPA. In the event that one of these appeal periods did somehow apply, however, Plaintiffs timely filed this action, as will be discussed below.

b. Because the PEA's consistency requirement was not yet law in 1986, the County's adoption of Title 21 in 1986 did not trigger any consistency appeal periods.

Skamania County first adopted a zoning ordinance on January 6, 1986, by passing Ordinance No. 1985-05 into law. CP 85. The zoning ordinance is codified at SCC Title 21.

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Although it is not entirely clear, the Superior Court apparently held that Plaintiffs were required to bring their PEA consistency claims in 1986, when the ordinance was first adopted. *See* CP 414 ("The County adopted its regulations applicable to Unzoned lands [nearly] 27 years ago . . . ."). But in 1986, *the consistency requirement had not yet been enacted.* The consistency requirement, enacted on July 1, 1990, requires all counties' ordinances to be consistent with their comprehensive plans "[b]eginning July 1, 1992." RCW 36.70.545.

There simply was no obligation to challenge the County's development regulations in 1986 for inconsistency with the Plan, because the consistency requirement had not yet been enacted. The Court of Appeals should reverse the Superior Court's holding that an appeal period began to run in 1986 when Title 21 was passed into law.

c. Because the County did not amend Title 21 in 2007, and instead adopted moratorium ordinances from 2007 through 2012 prohibiting development on the unzoned lands, no appeal period began to run in 2007 for challenging the inconsistency of the County's development regulations with the 2007 Comprehensive Plan.

The County adopted its current Comprehensive Plan on July 10, 2007, via Resolution 2007-25. CP 37–39. This Resolution *only* adopted

the Comprehensive Plan; it did not adopt any changes to Title 21, the County's zoning ordinance. *Id.*

Instead, on July 10, 2007, *the very same day* as the adoption of the Comprehensive Plan, the County also adopted Ordinance 2007-10, the first in a series of moratorium ordinances adopted every six months for the next five years. CP 256–319.

The County argued before the Superior Court that "[i]t is now . . . five years too late to challenge the [2007] Comprehensive Plan." CP 101. The Superior Court agreed with this argument and dismissed Plaintiffs' consistency claims as time-barred. CP 415.

This holding misunderstands the nature of Plaintiffs' consistency claims. Plaintiffs are not challenging the 2007 Comprehensive Plan, and have never intended to do so. Rather, Plaintiffs *support* the 2007 Plan and want to make sure it is upheld. *See* CP 150.

Plaintiffs' concerns lie with Title 21, which Plaintiffs allege is inconsistent with the 2007 Plan, and which needs to be updated and revised to conform to the Plan. CP 9–11, 148–52. In 2007, the County took no action on Title 21. It did not update, revise, or readopt Title 21. Nor, in 2007, did the County adopt any findings or conclusions that Title 21 was consistent with the 2007 Comprehensive Plan. Instead, the County

adopted findings that it would be "completing" a "pending zoning classification process" (*i.e.*, updates to Title 21). CP 256–57.[33] Because no action on Title 21 was taken in 2007, no appeal period to challenge Title 21 could have begun to run at that time.

Moreover, beginning July 10, 2007 (the date the Comprehensive Plan was adopted (CP 39)) and continuing to August 21, 2012 (the date the moratorium was partially repealed (CP 322)), the County's development regulations for unzoned lands were *not* inconsistent with the Comprehensive Plan, because during that time period, the County prohibited development on *all* unzoned lands via its moratorium ordinances. The moratorium ordinances were "development regulations" under the consistency requirement at RCW 36.70.545. *See Master Builders Ass'n of King & Snohomish Counties v. City of Sammamish*, No. 05-3-0030c, 2005 WL 2227925, at *8–9 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd.[34] Aug. 4, 2005) (continuing development moratorium,

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[33] Further, with each subsequent moratorium ordinance, *including Ordinance 2012-08*, the County adopted findings that it was "currently in the process of updating zoning classification[s] for all land within unincorporated Skamania County *to be consistent with the adopted Comprehensive Plan*." *See, e.g.*, CP 261, 320 (emphasis added). Thus, in the County's own words, it had not yet ensured the consistency of Title 21 with the 2007 Plan, but would be taking action at a later date to ensure consistency.

[34] Decisions of the Growth Management Hearings Boards ("GMHBs") are not binding on the appellate courts, but can serve as persuasive precedent. *See Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 834–35, 837–38, 123 P.3d 102, 107 (2005) (citing five GMHB decisions with approval).

adopted at six-month intervals for six years, was a development regulation).[35] Thus, from 2007 through 2012, the County's development regulations prohibited development and preserved the status quo consistent with the 2007 Comprehensive Plan.

It was not until August 21, 2012, when the County passed Ordinance 2012-08 into law, repealing the moratorium from thousands of acres of land and reverting back to Title 21 for these lands, that the County's development regulations became inconsistent with the 2007 Comprehensive Plan. Plaintiffs filed this action twenty-one days later, on September 11, 2012. Thus, in the event that any of the appeal periods from the GMA, APA, or LUPA applied to the County's action in enacting Ordinance 2012-08, Plaintiffs filed this action within the appeal periods for all three of these statutes.

In summary, Plaintiffs' PEA consistency claims involve *inaction* by the County, were not subject to any appeal period, and were not time-barred. To the extent that any appeal period *did* apply, it began to run on

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[35] In *Master Builders*, the GMHB relied on the GMA's definition of "development regulations," which is the same definition that applies to Skamania County under the PEA. RCW 36.70.545 ("For the purposes of this section, 'development regulations' has the same meaning as set forth in RCW 36.70A.030."). As such, the GMHB was interpreting the exact same language as involved in the instant case. In addition, the GMA provision that authorized the moratorium involved in *Master Builders* is substantively identical to the PEA provision that authorized Skamania's moratorium in the instant case. *Compare* RCW 36.70A.390 (GMA) *with* RCW 36.70.795 (PEA).

August 21, 2012, when the County modified and partially repealed its moratorium, which was a development regulation. The Court of Appeals should reverse the dismissal of Plaintiffs' PEA consistency claims, and should remand to the Superior Court for an adjudication of these claims.

D. The Superior Court erred in holding that Skamania County's decision to repeal its five-year development moratorium from thousands of acres of land was not subject to review under the State Environmental Policy Act.

On August 21, 2012, Skamania County passed Ordinance 2012-08 into law. CP 322. The ordinance expressly modified and repealed the County's five-year-long development moratorium from thousands of acres of unzoned lands throughout the County, thereby opening up these lands to unplanned development. CP 10, 179, 322.

Plaintiffs' Complaint asserts that the County violated the State Environmental Policy Act by failing to review the environmental impacts of its decision to adopt Ordinance 2012-08. CP 15–16. In its Summary Judgment Motion, the County countered that the adoption of Ordinance 2012-08 was exempt from SEPA review because the ordinance was a procedural action necessary to "maintain the status quo" and was enacted based on "an emergency situation." CP 108–09.[36]

[36] When adopting Ordinance 2012-08, the County did not make any findings or conclusions regarding SEPA compliance. Instead, only after Plaintiffs filed this action

The Superior Court agreed with the County and held that the adoption of Ordinance 2012-08 was not subject to SEPA review:

> [T]he moratorium is exempt from SEPA. The moratorium is a procedural matter as it does not adopt substantive standards. It was also adopted on an emergency basis, as the County Ordinance notes. Both procedural and emergency actions are exempt from SEPA. In addition, Friends is challenging not moratorium enactment, but moratorium cessation. A moratorium lapses by operation of statute unless extended by the local government, so its cessation is not an "action" for purposes of SEPA review.

CP 415. The Court went on to dismiss Plaintiffs' SEPA claim. *Id.*

The Court's findings and order are in error. First, the County's five-year development moratorium did not lapse. Instead, Ordinance 2012-08 affirmatively and expressly modified the moratorium, repealing its protections from thousands of acres of unzoned land. Second, because Ordinance 2012-08 modified and partially repealed the five-year moratorium, it was an "action" under SEPA, thus requiring environmental review of its impacts. Third, adoption of Ordinance 2012-08 was not exempt from review as a procedural or emergency action. The Court of Appeals should reverse and remand the Superior Court's decision.

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did the County argue, within the body of its motion, that Ordinance 2012-08 should be exempt from SEPA. CP 107–110. As post-hoc rationalizations, these arguments, made solely by counsel, are not entitled to any deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626–28, 91 S. Ct. 1091, 28 L. Ed. 2d. 367 (1971); *Somer v. Woodhouse*, 28 Wn. App. 262, 272, 623 P.2d 1164 (Div. II, 1981).

1. SEPA requires governmental actions to be reviewed for their probable adverse environmental impacts.

SEPA's purpose is to promote greater understanding of the environmental impacts of governmental actions in order to improve human welfare, prevent environmental harm, and protect the state's important ecological systems and natural resources. RCW 43.21C.010. SEPA accomplishes this purpose by requiring governments to review and consider the environmental impacts of "proposals for legislation and other major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). In short, SEPA requires governments to perform due diligence in reviewing the environmental impacts of their actions. SEPA "is an attempt by the people to shape their future environment by deliberation, not default." *Stempel v. Dep't of Water Res.*, 82 Wn. 2d 109, 118, 508 P.2d 166 (1973).

Under the SEPA rules, "[a] threshold determination is required for any proposal which meets the definition of action and is not categorically exempt." WAC 197-11-310(1).[37] "Actions" subject to SEPA include "[t]he adoption or amendment of legislation, ordinances, rules, or

[37] The issuance of a "threshold determination is critical for full implementation of SEPA's mandate," and "[t]he policy of the act is thwarted when the governmental body fails to make any threshold determination whatsoever." *Lassila v. City of Wenatchee*, 89 Wn. 2d 804, 813–14, 576 P.2d 54 (1978). Thus, a failure to issue a required threshold determination is a fundamental violation of SEPA.

regulations that contain standards controlling use or modification of the environment" and "[t]he adoption or amendment of comprehensive land use plans or zoning ordinances." WAC 197-11-704(2)(b)(i), (ii).

2. Skamania County's decision to actively revoke its five-year moratorium from thousands of acres of land via Ordinance 2012-08 was a governmental action whose environmental impacts must be reviewed under SEPA.

a. The Superior Court erred in determining that the five-year moratorium lapsed; rather, the County affirmatively repealed the moratorium from thousands of acres of land.

The Superior Court held that Skamania County's five-year development moratorium lapsed and that Plaintiffs were challenging "not moratorium enactment, but moratorium cessation." CP 415. The Court's holdings were in error. The moratorium did not lapse. Instead, via the adoption of Ordinance 2012-08, the County proactively and affirmatively repealed the moratorium from thousands of acres of land, including approximately 10,000 acres of privately owned land.

On July 10, 2007, the County adopted Ordinance 2007-10, which established a moratorium on all unzoned lands to preserve the status quo "until the zoning classifications related to the 2007 Comprehensive Plan and the Critical Areas Update Process are complete." CP 258. The County expressly adopted the moratorium pursuant to RCW 36.70.795, which

allows the imposition of a development moratorium for six months and also allows the moratorium to "be renewed for one or more six-month periods." RCW 36.70.795 (cited by Ordinance 2007-10 at CP 257, 258). Skamania County proceeded to renew the moratorium every six months for the next five years. CP 256–319. During this five-year period, the moratorium applied to

> any parcel located within unincorporated Skamania County that is *not currently located within a zoning classification* or the area generally known as the Swift Subarea of Skamania County.

See, e.g., CP 258, 316 (emphasis added). Each moratorium ordinance stated that there were more than 15,000 acres of unzoned, privately owned land within unincorporated Skamania County. *See, e.g.*, CP 256, 314.

On June 12, 2012 Skamania County passed Ordinance 2012-04 into law, renewing the moratorium on all unzoned land for another six-month term. CP 316. The renewed moratorium would have lasted until December 2012.

Instead, on August 21, 2012, just two months into the renewed six-month period, the county passed into law Ordinance 2012-08, which expressly modified the lands subject to the moratorium. Instead of applying to all unzoned and unincorporated lands throughout the County,

like all prior moratorium ordinances, the new ordinance applied only to a specific part of the County known as the "High Lakes" area:

> [T]he Board of County Commissioners hereby adopts Ordinance 2012-08 *to modify* and extend [the moratorium] for six months on any parcel located within Township 10 North, Range 5 East and/or Township 10 North, Range 6 East in unincorporated Skamania County . . . .

CP 322 (emphasis added); *see also* CP 179 (statements by County officials that the intent of Ordinance 2012-08 was to "modify the moratorium, so that it just takes in [the High Lakes] townships."). The High Lakes area contains only about 4,500 acres of private, unzoned land. CP 22.

Thus, from July 10, 2007 until August 21, 2012, the moratorium covered more than 15,000 acres of private, unzoned land. But two months into the six-month renewal made by Ordinance 2012-04, Skamania County passed into law Ordinance 2012-08, which affirmatively and expressly *modified* the moratorium by reducing the area covered to approximately 4,500 acres, thus *repealing* the moratorium from approximately 10,000 acres of private, unzoned land. Rather than lapsing by operation of statute, as determined by the Superior Court (CP 415), the moratorium was *actively repealed* from these lands. The Superior Court erred in concluding that the moratorium lapsed.

b. The affirmative repeal of the five-year moratorium from thousands of acres of land is an "action" under SEPA.

The Superior Court held that Skamania County's adoption of Ordinance 2012-08 was not a governmental "action" subject to SEPA review. CP 415. The Court's holding is in error. By its express terms, Ordinance 2012-08 was adopted to "*modify* and extend . . . the moratorium" by removing its protections from thousands of acres of land. CP 322 (emphasis added). Further, the purpose of Ordinance 2012-08 was to allow new development that had been barred for a five-year period. The County's decision to adopt Ordinance 2012-08 was an "action" subject to SEPA review.

SEPA defines an "action" to include the adoption of an "ordinance . . . containing standards controlling use or modification of the environment." WAC 197-11-704(2)(b)(i). Ordinance 2012-08 meets this definition, because it is an ordinance modifying the County's five-year moratorium and thereby dictating which lands may or may not be developed. An ordinance dictating whether land may be developed is a control on the use or modification of the environment. For five years, the status quo in Skamania County was that development was not allowed on

the unzoned lands. Ordinance 2012-08 removed the moratorium's controls from thousands of acres of land, and thus is an "action" under SEPA.

The County's findings in each moratorium ordinance demonstrate that they contained standards controlling the use or modification of the environment. For example, in Ordinance 2012-04, the County found that in the absence of the moratorium, "allowing new construction on [unzoned] parcel[s] created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially [would be] circumventing the legislative process and could endanger the public's safety, health and general welfare." CP 315. By prohibiting new construction, the five-year moratorium controlled the use and modification of the environment. The decision to adopt Ordinance 2012-08 changed the status quo, affirmatively revoking the moratorium's controls from thousands of acres of land and allowing new development.

In fact, the Skamania County Commissioners expressly stated, prior to adopting Ordinance 2012-08, that the intent behind the ordinance was to open up the unzoned lands to development. Commissioner Pearce explained that revoking the moratorium would allow developers to "do whatever they want" on the unzoned land, which he predicted would cause people to "suddenly realize how important [zoning] is" and bring people

"clamoring for zoning." CP 180–81. The County's stated intent was to modify controls on the use and modification of the environment.

Even the repeated *renewal* of a moratorium (without affirmative revocation, like occurred in the instant case) is an action under SEPA. This is affirmed by *Master Builders v. Sammamish*, which is instructive on two key points. First, a serial moratorium places "controls on development" and "fall[s] squarely within the statutory definition of development regulations." *Master Builders* at *8.[38] Second, a continuous moratorium is subject to SEPA:

> The Board concludes that the reasoning of the Washington Supreme Court in *Byers* governs this case. In *Byers*, the Court held that a four-year development regulation was subject to SEPA requirements notwithstanding the fact that its title was "interim zoning ordinance." A development regulation "for a relatively extended period of time" is subject to SEPA, despite the fact that it is titled a six-month moratorium.

Master Builders at *13 (citations omitted) (citing *Byers v. Board of Clallam County Comm'rs*, 84 Wn. 2d 796, 800, 529 P.2d 823 (1974)).

Master Builders is directly on point. In both *Master Builders* and here, the local governments enacted and renewed moratoria for several

[38] As discussed earlier, the statutory provisions defining "development regulations" were the same in *Master Builders* as in the instant case. *See supra* note 35.

years while they worked to develop zoning codes.[39] Both cases involve "[t]he adoption or amendment of . . . ordinances . . . that contain standards controlling use or modification of the environment," which are "actions" under SEPA. WAC 197-11-704(2)(b)(i). Based on a plain reading of the SEPA statute and rules and the precedent of *Master Builders* and *Byers*, Skamania County's decision to actively repeal its five-year moratorium was an "action" subject to environmental review under SEPA. The Court of Appeals should reverse the Superior Court's order and should grant summary judgment in favor of Plaintiffs on the County's failure to review the environmental impacts of its action under SEPA.

3. The Superior Court erred in holding that the adoption of Ordinance 2012-08 was a procedural action exempt from SEPA review.

The Superior Court held that Ordinance 2012-08 was a procedural action that was exempt from SEPA review. CP 415. The County's decision to repeal the development moratorium from thousands of acres of

[39] The only difference is that in *Master Builders*, the action challenged under SEPA was the *adoption* of a moratorium, while the instant case involves the affirmative *revocation* of a moratorium. The challenged action in the instant case is more likely to cause environmental impacts than in *Master Builders*, because Ordinance 2012-08 changed the status quo by *allowing* development, rather than the other way around.

land was *not* procedural, but rather was substantive. The Superior Court's decision was in error.[40]

SEPA provides an exemption for actions related "solely to governmental procedures, and containing no substantive standards respecting use or modification of the environment." WAC 197-11-800(19). As explained above, *supra* Part IV.D.2.a, Skamania County's action here expressly modified the five-year development moratorium in order to allow development to occur on thousands of acres of unzoned land. Adopting an ordinance that determines whether or not development may proceed is unequivocally a *substantive* standard respecting the use or modification of the environment.

For five consecutive years, Skamania County prohibited development, including building permits, forest practice conversions, and land divisions, on the unzoned lands. *See, e.g.*, CP 258, 316. These development prohibitions (and the County's decision to repeal them from the majority of the unzoned lands) are "substantive standards respecting use or modification of the environment." WAC 197-11-800(19).

[40] As an initial point, the Superior Court's holding is internally inconsistent. On the one hand, the Court held that Plaintiffs were "challenging not moratorium enactment, but moratorium cessation," which the Court held was "*not an 'action'* for purposes of SEPA review." CP 415 (emphasis added). On the other hand, the Superior Court applied two exemptions from the SEPA rules that by their own terms involve "*actions*" that are deemed "categorically exempt." WAC 197-11-800(19), 197-11-880.

The PEA's definition of a "procedural amendment" to a zoning ordinance provides additional guidance. A procedural amendment is "[a]n amendment to the text of a zoning ordinance which does not impose, remove[,] or modify any regulation theretofore existing." RCW 36.70.800. Ordinance 2012-08 removed and modified a regulatory prohibition that theretofore existed. As a result, the ordinance was not procedural under the PEA, and should not be considered procedural under SEPA.

The adoption of Ordinance 2012-08 was not related "solely to governmental procedures," and it enacted into law "substantive standards respecting use or modification of the environment." WAC 197-11-800(19). The Superior Court erred in determining that the adoption of Ordinance 2012-08 was a procedural action exempt from SEPA review.

4. The Superior Court erred in holding that the adoption of Ordinance 2012-08 was an emergency action exempt from SEPA review.

The Superior Court held that Skamania County's action was exempt from SEPA because Ordinance 2012-08 "notes" that it "was adopted on an emergency basis." CP 415. The Superior Court's holding was in error. The County's adoption of Ordinance 2012-08 was not a categorically exempt emergency action under SEPA. The SEPA rules define "categorically exempt" emergency actions as

> [a]ctions that must be undertaken immediately or within a time too short to allow full compliance with [SEPA], to avoid an imminent threat to public health or safety, to prevent an imminent danger to public or private property, or to prevent an imminent threat of serious environmental degradation . . . .

WAC 197-11-880. Importantly, this rule does not automatically exempt development moratoria. Determination of whether there was an actual emergency necessitating the enactment of a moratorium (or the repeal thereof) requires applying the law to the specific facts of the case.

Here, the record contains absolutely no evidence demonstrating an emergency that would have warranted modification and repeal of the five-year moratorium in August 2012. The only reference to an "emergency" within Ordinance 2012-08 itself is the following finding:

> WHEREAS, the Board of County Commissioners finds a *sufficient basis to extend the moratorium*, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) *to maintain the status quo* of the area pending the County's consideration of developing zoning classifications for the areas covered by the adopted 2007 Comprehensive Plan . . . .

CP 321 (emphasis added). This finding makes no mention of any emergency necessitating the *modification* and partial *repeal* of the moratorium, which was exactly what the ordinance did. Instead, the finding expressly discusses the "basis to *extend* the moratorium" and to

"maintain the status quo" on the unzoned lands. *Id.* (emphasis added).[41] *None* of the other findings in Ordinance 2012-08 *even mention* any need to modify and repeal the moratorium from thousands of acres of unzoned land. *See* CP 320–21. Instead, *all* of the findings discuss the need to *continue* the moratorium on the very same lands where the moratorium was thereby repealed. *See id.*

Ordinance 2012-08 was not necessary to avoid or respond to an emergency. Instead, the County Commissioners made public statements that the intent behind Ordinance 2012-08 was to *create* an emergency (or at least a threat of one) by willfully removing controls on development. For example, Commissioner Pearce stated his expectation that with the repeal of the moratorium from thousands of acres of land, "a number of projects [would] come in on unzoned land [and] people [would then] be clamoring for zoning" on these lands. CP 180–81. Commissioner Pearce elaborated that the citizens of Skamania County are "gonna hate it a lot worse being unzoned than zoned." CP 180. The County Commissioners also discussed how, with the repeal of the moratorium, the affected lands

[41] Ironically, the County adopted the very same emergency clause in the prior moratorium, Ordinance 2012-04, as a justification for continuing the moratorium until December 2012. CP 315–16. The County offered no explanation in August 2012 as to why there was suddenly a new "emergency" necessitating the immediate *repeal* of the moratorium from thousands of acres of land.

could be more easily divided and residential development could proceed with little to no review by the County Planning Department. *Id.*

With these statements, the County explained the sole purpose of Ordinance 2012-08: to facilitate development on the unzoned lands, thus creating environmental impacts and potentially provoking a backlash of Skamania County citizens "clamoring" for zoning. CP 181. Under no circumstances could this scenario be deemed an "emergency."

In addition, Skamania County had *five years* to prepare a threshold determination and consider the environmental impacts of its moratorium ordinances. This was abundant time to comply with the requirements of SEPA. Even when Ordinance 2012-08 was passed into law, more than three months remained before the moratorium established by Ordinance 2012-04 would expire and any unzoned lands might be threatened with development. The County had abundant time to comply with SEPA.

The intent behind Ordinance 2012-08 was not to "avoid an imminent threat to public health or safety, to prevent an imminent danger to public or private property, or to prevent an imminent threat of serious environmental degradation." WAC 197-11-880. Instead, the intent was to open the door to unplanned and unregulated development on thousands of acres of land. The County used the term "emergency" in Ordinance 2012-

08 in name only. Merely declaring an "emergency" does not make it so. The Court of Appeals should reverse the Superior Court's conclusions that the adoption of Ordinance 2012-08 was an "emergency action" and that the ordinance was exempt from SEPA review.

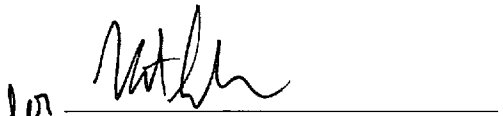
V. CONCLUSION

Skamania County has failed to meet its statutory deadline under the GMA to complete periodic review of its resource lands, and has also failed to comply with the PEA's requirements to adopt a zoning ordinance consistent with its 2007 Comprehensive Plan. From 2007 to 2012, the County adopted moratorium ordinances that were intended to allow it to prepare and adopt ordinances for the orderly regulation of land use. However, on August 21, 2012, the County abruptly rescinded its five-year moratorium on large areas of the County, thus allowing development activities to proceed on these lands in the absence of development regulations to control such activities. Further, when the County decided to alter the five-year status quo and open up these lands to unrestricted development, it failed to review the environmental impacts of this action.

The Superior Court erred in determining that Plaintiffs' GMA periodic review and PEA consistency claims were time-barred, erred in concluding that Skamania County completed periodic review of its

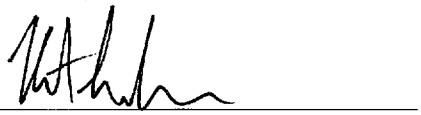
resource lands designations, and erred in determining that the adoption of Ordinance 2012-08 was exempt from SEPA review. The Court of Appeals should reverse the Superior Court's Order of Dismissal, grant summary judgment in favor of Plaintiffs on their GMA and SEPA claims, and remand for further proceedings, including adjudication of Plaintiffs' consistency claims under the PEA.[42]

RESPECTFULLY SUBMITTED this 8th day of May, 2013.



J. Richard Aramburu, WSBA #466
Aramburu & Eustis, LLP
Attorney for Petitioner SOSA

Gary K. Kahn, WSBA #17928
Reeves, Kahn, Hennessy & Elkins
Attorney for Petitioner Friends



Nathan J. Baker, WSBA #35195
Friends of the Columbia Gorge
Attorney for Petitioner Friends

[42] Eleven days after the Superior Court's decision in this matter, Judge Woolard went on indefinite medical leave and ultimately retired from the court. Thus, if the case is remanded, it would not be heard by the original trial judge.

APPENDIX A

Order of Dismissal,
Clark County Superior Court
(Nov. 9, 2012)

(CP 413–16)

4

Hearing:	November 9, 2012 (special setting)
Time:	1:30 P.M.
Judge:	Judge Diane M. Woolard

FILED
NOV 09 2012
Scott G. Weber, Clerk, Clark Co

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

SAVE OUR SCENIC AREA and FRIENDS OF THE COLUMBIA GORGE,

Plaintiffs,

v.

SKAMANIA COUNTY,

Defendant.

Cause No. 12-2-03496-0

ORDER OF DISMISSAL

This matter comes before the Court on Skamania County's Motion to Dismiss, Or In The Alternative, Summary Judgment ("Motion") on November 9, 2012, to dismiss Save Our Scenic Area and Friends of the Columbia Gorge's ("Friends") Complaint For Declaratory And Injunctive Relief ("Complaint"). The Court considered the briefing and pleadings filed herein, including the Motion; Declaration of Susan Drummond (with Attachments 1-11); Declaration of Karen Witherspoon; Plaintiffs' Response To Defendant's Motions To Dismiss And For Summary Judgment; Declaration Of Richard J. Aramburu In Opposition To Defendant's Motion To Dismiss And For Summary Judgment (with Attachments); Declaration Of Keith Brown (with Attachments); Declaration of Tom Drach (with Attachments); Skamania County's Reply Brief

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Supporting Motion to Dismiss, Or In The Alternative, Summary Judgment; Declaration Of Karen Witherspoon In Support Of Reply On Motion To Dismiss; Declaration Of Susan Drummond In Support Of Reply On Motion To Dismiss (with Attachments 1-4); and the Court finds as follows:

FINDINGS AND ORDER

1. Background/Review Standard. A motion to dismiss for failure to state a claim upon which relief can be granted is dismissed under CR 12(b)(6) where "there is some insuperable bar to relief,"[1] and under CR 12(b)(1) for lack of jurisdiction. Summary judgment is granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] "Summary judgment is proper when a reasonable person could come to only one conclusion based on the evidence."[3] Relief is barred for several reasons, and judgment in the County's favor is warranted, with the following exception. The County does not object to officially completing its Growth Management Act, Ch. 36.70A RCW ("GMA") Critical Areas Update by December 1, 2013, and the Court will remand to the County on this one issue.

2. GMA Natural Resources. With respect to the County's GMA Natural Resource Designation and Update requirements, the County addressed these GMA requirements in 2005, through Resolution 2005-35. It is now 2012. GMA contains a 60-day appeal period, and land use decisions are to be reviewed expeditiously. With seven years having past, it is now too late for an appeal to be filed.

---

[1] *West v. Stahley*, 155 Wn. App. 691, 696, 229 P.3d 943 (2010).
[2] CR 56(C).
[3] *Imperato v. Wenatchee Valley College* 160 Wn. App. 353, 358, 247 P.3d 816 (2011).

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3. Unzoned Lands/Comprehensive Plan Consistency. The County adopted the regulations applicable to Unzoned lands 27 years ago, and updated its Comprehensive Plan to address and provide for the designation of lands as Unzoned, in 2007. Washington policy is to review decisions affecting use of land expeditiously. The usual appeal period for land use decision is 21-30 days.[4] If GMA's analogous appeal period is used, an appeal must be filed within 60-days. Either way, the appeal period has past.

4. Moratorium/SEPA. Friends challenges moratorium compliance with the the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"). However, the moratorium is exempt from SEPA. The moratorium is a procedural matter as it does not adopt substantive standards. It was also adopted on an emergency basis, as the County Ordinance notes. Both procedural and emergency actions are exempt from SEPA. In addition, Friends is challenging not moratorium enactment, but moratorium cessation. A moratorium lapses by operation of statute unless extended by the local government, so its cessation is not an "action" for purposes of SEPA review.

The Court ORDERS that the Complaint for Declaratory and Injunctive Relief be dismissed with prejudice, with one exception: The County shall complete its GMA Critical Areas Update by December 1, 2013.

DONE IN OPEN COURT this 9th day of November, 2012.

Judge Diane M. Woolard

[4] Ch. 36.70C RCW, Land Use Petition (21-day appeal period); Ch. 34.05 RCW, Administrative Procedures Act (30-day appeal period).

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Presented by:

ADAM NATHANIEL KICK
Prosecuting Attorney for Skamania County, and

LAW OFFICES OF
SUSAN ELIZABETH DRUMMOND, PLLC

Adam N. Kick, WSBA #27525
Susan Elizabeth Drummond, WSBA #30689
Attorneys for Defendant Skamania County

Approved as to Form; ONLY

ARAMBURU & EUSTIS

J. Richard Aramburu, WSBA No. 466
Counsel for Plaintiff Save Our Scenic Area

REEVES, KAHN, HENNESY & ELKINS

Gary K. Kahn, WSBA No. 17928
Counsel for Plaintiff Friends of the Columbia Gorge

Nathan J. Baker, WSBA No. 35195
Staff Attorney for Plaintiff Friends of the Columbia Gorge

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APPENDIX B

Skamania County Ordinance 2007-10
(July 10, 2007)

(CP 256–60)

ORDINANCE 2007-10

(AN ORDINANCE TO ESTABLISH A MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF ANY BUILDING, MECHANICAL, AND/OR PLUMBING PERMITS ON ANY PARCEL OF LAND THAT IS 20 ACRES OR LARGER THAT WAS CREATED BY DEED SINCE JANUARY 1, 2006, THE ACCEPTANCE AND PROCESSING OF LAND DIVISIONS (SUBDIVISION AND SHORT SUBDIVISION), THE ACCEPTANCE AND PROCESSING OF STATE ENVIRONMENTAL POLICY ACT (SEPA) CHECKLISTS RELATED TO FOREST PRACTICES CONVERSIONS FOR PARCELS LOCATED WITHIN UNINCORPORATED SKAMANIA COUNTY THAT IS NOT CURRENTLY LOCATED WITHIN A ZONING CLASSIFICATION OR THE AREA GENERALLY KNOWN AS THE SWIFT SUBAREA OF SKAMANIA COUNTY.)

WHEREAS, Skamania County is in the process of adopting the 2007 Comprehensive Plan and is beginning the process to adopt zoning classifications for all land within unincorporated Skamania County; and,

WHEREAS, there are over 15,000 acres of private land within unincorporated Skamania County that do not have zoning classifications; and,

WHEREAS, most of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land or within the Gifford Pinchot National Forest; and,

WHEREAS, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses; and,

WHEREAS, since January 1, 2006, over 230 new parcels (20 acres or larger) have been created through the deed process, which is exempt from the subdivision and short subdivision (short plat) regulations and other environmental review processes; and,

WHEREAS, several comments submitted during the public comment periods related to the draft Comprehensive Plan and the draft Swift Subarea Plan expressed concern on the number of exempt parcels that have been created since the planning process began and that the exempt parcels do not have any level of review related to critical resource protection, design standards, road maintenance, stormwater or other checks and balances required for residential lots created through the subdivision or short subdivision (short plat) process; and,

WHEREAS, these new exempt parcels are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act; and,

WHEREAS, allowing new construction on these parcel created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare; and,

WHEREAS, the development within many locations of unincorporated Skamania County, outside of the areas with zoning classifications is located on rugged mountainous terrain, is only accessed though United States Forest Service Roads and private roads, and does not currently have access to electrical power service, land-line telephone service and cellular telephone service; and,

WHEREAS, continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events; and,

WHEREAS, during the visioning process of the Comprehensive Plan information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development; and,

WHEREAS, many areas within the County are prime habitat area for many Federal and State listed endangered, threatened, sensitive, candidate and priority species of fish and wildlife; and,

WHEREAS, Skamania County is in the process of completing the Critical Areas Update Process for the entire County as required under the Washington State Growth Management Act; and,

WHEREAS, the Board of County Commissioners with a quorum present, conducted a public meeting to consider establishing the moratorium on the acceptance and processing of building, mechanical, and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County; and,

WHEREAS, the Board of County Commissioners has the authority pursuant to RCW 36.70.795 to adopt a moratorium without holding a public hearing (as long as a public hearing is held on the adopted moratorium within at least 60 days of its adoption) and whether or not there is a recommendation on the matter from the Planning Commission or the Planning Department, that may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such longer period. A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding of fact are made prior to each renewal; and,

WHEREAS, a work plan for the Comprehensive Plan and related zoning classification process has been developed; and,

WHEREAS, the Board of County Commissioners finds a sufficient basis to establish the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the newly adopted 2007 Comprehensive Plan and completing the Critical Areas Update Process; and,

WHEREAS, the Board of County Commissioners intends for these recitals to constitute its "findings of fact" as required by RCW 36.70.795; and,

NOW, THEREFORE BE IT HEREBY ORDAINED AND ESTABLISHED BY THIS BOARD OF COUNTY COMMISSIONERS AS FOLLOWS: the Board of County Commissioners hereby adopts Ordinance 2007-10 to establish for six months the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County until the zoning classifications related to the 2007 Comprehensive Plan and the Critical Areas Update Process are complete.

ORDINANCE NO. 2007-07 is hereby DULY PASSED AND ADOPTED INTO LAW this 10th day of July 2007.

BOARD OF COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

Chairman

ATTEST:

Commissioner

Clerk of the Board

Commissioner

Approved as to Form Only:

Prosecuting Attorney

AYE 3
NAY
ABSTAIN
ABSENT

COMMISSIONER'S AGENDA ITEM COMMENTARY

SUBMITTED BY	Planning & Community Development (Department) — Signature
AGENDA DATE	July 3, 2007
SUBJECT	Establish six month moratorium County wide un-zoned land
ACTION REQUESTED	Action Item and ordinance adoption

SUMMARY/BACKGROUND

In January 2006, the County began the process to update the 1977 Comprehensive Plan by including all unincorporated land geographically located within Skamania County in the 2007 Comprehensive Plan. There are over 15,000 acres of private land that is located outside of the zoning classification areas but are included in the 2007 Comprehensive Plan.

Ordinance 2007-10 proposes to establish a moratorium for six months on the acceptance and processing of building, mechanical, and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

The 2007 Comprehensive Plan is nearly complete, and the process to establish zoning classifications on all un-zoned land is scheduled to begin workshops with the Planning Commission in September 2007. As these legislative planning processes are not yet complete and the legislative process should be protected from circumvention by developers the Board of County Commissioner should establish a moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

FISCAL IMPACT

No Fiscal Impact

RECOMMENDATION

It is the recommendation of the Planning Department that the Board adopt proposed Ordinance 2007-10 establishing the moratorium for a period of six months.

LIST ATTACHMENTS

Ordinance 2007-10

APPENDIX C

Skamania County Ordinance 2012-04
(June 12, 2012)

(CP 314–19)

ORDINANCE 2012-04
(AN ORDINANCE TO EXTEND A MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF ANY BUILDING, MECHANICAL, AND/OR PLUMBING PERMITS ON ANY PARCEL OF LAND THAT IS 20 ACRES OR LARGER THAT WAS CREATED BY DEED SINCE JANUARY 1, 2006, THE ACCEPTANCE AND PROCESSING OF LAND DIVISIONS (SUBDIVISION AND SHORT SUBDIVISION), AND THE ACCEPTANCE AND PROCESSING OF STATE ENVIRONMENTAL POLICY ACT (SEPA) CHECKLISTS RELATED TO FOREST PRACTICE CONVERSIONS FOR ANY PARCEL LOCATED WITHIN UNINCORPORATED SKAMANIA COUNTY THAT IS NOT CURRENTLY LOCATED WITHIN A ZONING CLASSIFICATION OR THE AREA GENERALLY KNOWN AS THE SWIFT SUBAREA OF SKAMANIA COUNTY.)

WHEREAS, the Board of County Commissioner adopted the 2007 Comprehensive Plan on July 10, 2007; and,

WHEREAS, the Board of County Commissioner, on December 30, 2008, extended for the third time, the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, on July 28, 2009, the Board of County Commissioners re-established the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, Skamania County is in the process of updating zoning classification for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan or adopted Subarea Plans; and,

WHEREAS, there are over 15,000 acres of private land within unincorporated Skamania County that do not have zoning classifications; and,

WHEREAS, most of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land or within the Gifford Pinchot National Forest; and,

WHEREAS, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses; and,

WHEREAS, since January 1, 2006, over 230 new parcels (20 acres or larger) have been created through the deed process, which is exempt from the subdivision and short subdivision (short plat) regulations and other environmental review processes; and,

WHEREAS, several comments submitted during the public comment periods related to the draft Comprehensive Plan and the draft Swift Subarea Plan expressed concern on the number of exempt parcels that have been created since the planning process began and that the exempt parcels do not have any level of review related to critical resource protection, design standards, road maintenance, stormwater or other checks and balances required for residential lots created through the subdivision or short subdivision (short plat) process; and,

WHEREAS, these new exempt parcels are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act; and,

WHEREAS, allowing new construction on these parcel created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare; and,

WHEREAS, the development within many locations of unincorporated Skamania County, outside of the areas with zoning classifications is located on rugged mountainous terrain, is only accessed though United States Forest Service Roads and private roads, and does not currently have access to electrical power service, land-line telephone service and cellular telephone service; and,

WHEREAS, continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events; and,

WHEREAS, during the visioning process of the Comprehensive Plan information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development; and,

WHEREAS, the Board of County Commissioners has the authority pursuant to RCW 36.70.795 to adopt a moratorium without holding a public hearing (as long as a public hearing is held on the adopted moratorium within at least 60 days of its adoption) and whether or not there is a recommendation on the matter from the Planning Commission or the Community Development Department, that may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such longer period. A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding of fact are made prior to each renewal; and,

WHEREAS, a work plan for the zoning classification process has been developed; and,

WHEREAS, the Board of County Commissioners finds a sufficient basis to extend the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the

status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the newly adopted 2007 Comprehensive Plan; and,

WHEREAS, the Board of County Commissioners intends for these recitals to constitute its "findings of fact" as required by RCW 36.70.795; and,

NOW, THEREFORE BE IT HEREBY ORDAINED AND ESTABLISHED BY THIS BOARD OF COUNTY COMMISSIONERS AS FOLLOWS: the Board of County Commissioners hereby adopts Ordinance 2012-04 to extend for six months the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

ADOPTED IN REGULAR SESSION this 22th day of May 2012 and set for public hearing on the 12th day of June 2012 at 5:30 PM.

BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON

Chairman

Commissioner

Commissioner

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

ATTEST:

Clerk of the Board

ORDINANCE NO. 2012-04 IS HEREBY PASSED INTO LAW THIS 12th DAY OF JUNE 2012.

BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

Absent
Chairman

Commissioner

Robert Anderson
Commissioner

ATTEST:

Clerk of the Board

APPROVED AS TO FORM ONLY:

Skamania County Prosecuting Attorney

AYE 2
NAY
ABSTAIN
ABSENT 1

EXHIBIT 2

COMMISSIONER'S AGENDA ITEM COMMENTARY

SUBMITTED BY	Community Development Department	Signature
AGENDA DATE	May 16, 2012	
SUBJECT	Extend six month moratorium on County wide unzoned land.	
ACTION REQUESTED	Adopt ordinance and set for public hearing on June 12, 2012	

SUMMARY/BACKGROUND

On July 10, 2007, the Board of County Commissioners adopted Ordinance 2007-10 establishing a moratorium for six months on the acceptance and processing of building, mechanical, and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

The moratorium was extended for six months by the adoption of Ordinance 2008-01 on January 8, 2008, Ordinance 2008-08 on July 3, 2008, Ordinance 2008-13 on December 30, 2008, Ordinance 2010-01 on January 26, 2010, Ordinance 2010-06 on July 7, 2010, Ordinance 2010-10 on December 28, 2010, Ordinance 2011-03 on June 14, 2011, and Ordinance 2011-08 on December 13, 2011.

The moratorium was re-established on June 14, 2011 by Ordinance 2011-03, extended for six months by Ordinance 2011-08 and is now proposed to be extended for an additional six months. The County is in the process of updating the zoning classifications to be consistent with the adopted 2007 Comprehensive Plan or the adopted Subarea Plans. There are over 15,000 acres of private land that are located outside of the existing zoning classification areas but are included in the 2007 Comprehensive Plan.

Since the legislative planning process to update the zoning classifications is not yet complete and the legislative process should be protected from circumvention by developers, the Board of County Commissioner should extend for six months the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

FISCAL IMPACT

No Fiscal Impact

RECOMMENDATION

Adopt Ordinance 2012-04, extending the moratorium for a period of six months during regular session, May 22, 2012, and set for public hearing June 12, 2012.

LIST ATTACHMENTS

Ordinance 2012-04

APPENDIX D

Skamania County Ordinance 2012-08
(Aug. 21, 2012)

(CP 320–24)

ORDINANCE 2012-08
(AN ORDINANCE TO MODIFY AND EXTEND ON ANY PARCEL LOCATED WITHIN TOWNSHIP 10 NORTH, RANGE 5 EAST AND/OR TOWNSHIP 10 NORTH, RANGE 6 EAST IN UNINCORPORATED SKAMANIA COUNTY: A MORATORIUM ON THE ACCEPTANCE AND PROCESSING OF ANY BUILDING, MECHANICAL AND/OR PLUMBING PERMITS AND/OR SITE ANALYSIS LEVEL II (SALII) APPLICATIONS ON ANY PARCEL OF LAND THAT IS 20 ACRES OR LARGER; THE ACCEPTANCE AND PROCESSING OF LAND DIVISIONS (SUBDIVISION AND SHORT SUBDIVISION); AND THE ACCEPTANCE AND PROCESSING OF STATE ENVIRONMENTAL POLICY ACT (SEPA) CHECKLISTS RELATED TO FOREST PRACTICE CONVERSIONS)

WHEREAS, the Board of County Commissioner adopted the 2007 Comprehensive Plan on July 10, 2007; and,

WHEREAS, the Board of County Commissioner, on December 30, 2008, extended for the third time, the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, on July 28, 2009, the Board of County Commissioners re-established the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

WHEREAS, Skamania County is in the process of updating zoning classification for all land within unincorporated Skamania County to be consistent with the adopted Comprehensive Plan; and,

WHEREAS, most of the area within unincorporated Skamania County that is not currently covered by a zoning classification is currently used as commercial forest land or within the Gifford Pinchot National Forest; and,

WHEREAS, the Growth Management Act requires all counties in the State of Washington to provide protections for commercial forest land from the encroachment of residential uses; and,

WHEREAS, between January 1, 2006 and July 10, 2007, over 230 new parcels (20 acres or larger) have been created through the deed process, which is exempt from the subdivision and short subdivision (short plat) regulations and other environmental review processes; and,

WHEREAS, several comments submitted during the public comment periods related to the draft Comprehensive Plan expressed concern on the number of exempt parcels that have been created since the planning process began and that the exempt parcels do not have any level of review related to critical resource protection, design standards, road maintenance, stormwater or other checks and balances required for residential lots created through the subdivision or short subdivision (short

plat) process; and,

WHEREAS, these new exempt parcels are located in existing forest land areas that during the review process of the Comprehensive Plan and pending zoning classification process, the County Commissioners are determining which areas will be designated as commercial forest land and protected from the encroachment of residential uses as required by the Growth Management Act; and,

WHEREAS, allowing new construction on these parcel created through an unregulated exempt process prior to the County Commissioners completing the zoning classification process essentially is circumventing the legislative process and could endanger the public's safety, health and general welfare; and,

WHEREAS, the development within many locations of unincorporated Skamania County, outside of the areas with zoning classifications is located on rugged mountainous terrain, is only accessed though United States Forest Service Roads and private roads, and does not currently have access to electrical power service and land-line telephone service; and,

WHEREAS, continued unplanned and uncontrolled residential growth in the areas of commercial forest lands and the Gifford Pinchot National Forest could potentially increase the risk of forest fires and other emergency events; and,

WHEREAS, during the visioning process of the Comprehensive Plan information was gathered to help determine where the best locations are for future residential development, taking into considerations the terrain, access roads, location of critical area resources, location of commercial forest lands, future service needs of residents, and future water usage for residential development; and,

WHEREAS, the Board of County Commissioners has the authority pursuant to RCW 36.70.795 to adopt a moratorium without holding a public hearing (as long as a public hearing is held on the adopted moratorium within at least 60 days of its adoption) and whether or not there is a recommendation on the matter from the Planning Commission or the Community Development Department, that may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such longer period. A moratorium may be renewed for one or more six-month period(s) if a subsequent public hearing is held and finding of fact are made prior to each renewal; and,

WHEREAS, a work plan for the zoning classification process has been developed; and,

WHEREAS, the Board of County Commissioners finds a sufficient basis to extend the moratorium, believe that the above mentioned circumstances constitute an emergency, and that it is in the public's best interest (to protect the public's safety, health and general welfare) to maintain the status quo of the area pending the County's consideration of developing zoning classifications for the areas covered by the adopted 2007 Comprehensive Plan; and,

WHEREAS, the Board of County Commissioners intends for these recitals to constitute its "findings of fact" as required by RCW 36.70.795; and,

NOW, THEREFORE BE IT HEREBY ORDAINED AND ESTABLISHED BY THIS BOARD OF COUNTY COMMISSIONERS AS FOLLOWS: the Board of County Commissioners hereby adopts Ordinance 2012-08 to modify and extend for six months on any parcel located within Township 10 North, Range 5 East and/or Township 10 North, Range 6 East in unincorporated Skamania County: the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits and/or Site Analysis Level II (SALII) applications on any parcel of land 20 acres or larger; the acceptance and processing of land divisions (subdivisions and short subdivisions); and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions.

ORDINANCE NO. 2012-08 IS HEREBY PASSED INTO LAW THIS 21st DAY OF AUGUST 2012.

BOARD OF COUNTY COMMISSIONERS
SKAMANIA COUNTY, WASHINGTON

BOARD OF COMMISSIONERS SKAMANIA COUNTY WASHINGTON CLERK OF THE BOARD

Chairman

Commissioner

Commissioner

ATTEST:

Clerk of the Board

APPROVED AS TO FORM ONLY:

Skamania County Prosecuting Attorney

AYE 3
NAY
ABSTAIN
ABSENT 1

COMMISSIONER'S AGENDA ITEM COMMENTARY

SUBMITTED BY	Community Development Department	Signature
AGENDA DATE	August 8, 2012	
SUBJECT	Modify and extend six month moratorium on unzoned land.	
ACTION REQUESTED	Adopt ordinance under consent agenda and set for public hearing	

SUMMARY/BACKGROUND

On July 10, 2007, the Board of County Commissioners adopted Ordinance 2007-10 establishing a moratorium for six months on the acceptance and processing of building, mechanical, and/or plumbing permits on any parcel of land 20 acres or larger that was created by deed since January 1, 2006, on the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions for any parcel located within unincorporated Skamania County that is not currently located within a zoning classification or the area generally known as the Swift Subarea of Skamania County.

The moratorium was extended for six months by the adoption of Ordinance 2008-01 on January 8, 2008, Ordinance 2008-08 on July 3, 2008, Ordinance 2008-13 on December 30, 2008, Ordinance 2010-01 on January 26, 2010, Ordinance 2010-06 on July 7, 2010, Ordinance 2010-10 on December 28, 2010, Ordinance 2011-03 on June 14, 2011, and Ordinance 2011-08 on December 13, 2011.

The moratorium was re-established on June 14, 2011 by Ordinance 2011-03, extended for six months by Ordinance 2011-08 and Ordinance 2012-04. It is now proposed to be modified and extended for an additional six months. The County is in the process of updating the zoning classifications to be consistent with the adopted 2007 Comprehensive Plan.

The subarea plan final zoning was adopted in May 2012 so the moratorium can be modified.

Since the legislative planning process to update the zoning classifications outside of the subarea plan is not yet complete and the legislative process should be protected from circumvention by development, the Board of County Commissioner should modify and extend for six months on any parcel located within Township 10 North, Range 5 East and/or Township 10 North, Range 6 East in unincorporated Skamania County: the moratorium on the acceptance and processing of building, mechanical and/or plumbing permits and/or Site Analysis Level II (SALII) applications on any parcel of land 20 acres or larger; the acceptance and processing of land divisions (subdivisions and short subdivisions), and the acceptance and processing of State Environmental Policy Act (SEPA) checklists related to forest practice conversions.

FISCAL IMPACT

No Fiscal Impact

RECOMMENDATION

Adopt Ordinance 2012-08, modifying and extending the moratorium for a period of six months during regular session, August 14, 2012, and set for public hearing.

LIST ATTACHMENTS

Ordinance 2012-08

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF APPELLANTS on the following individuals on the date below, by electronic service:

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Attorney for Petitioner Friends of the Columbia Gorge

DATED this 26th day of April, 2013

Beverly L. Bunker, Legal Assistant to
Gary K. Kahn, WSBA #17928
Of Attorneys for Appellant
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REEVES KAHN HENNESSY & ELKINS

April 26, 2013 - 3:34 PM

Transmittal Letter

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Case Name: Save our Scenic Area and Friends of the Columbia Gorge v Skamania County

Court of Appeals Case Number: 44269-8

Is this a Personal Restraint Petition? Yes ■ No

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■ Brief: __Appellants'__

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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Petition for Review (PRV)

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Comments:

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