Thurston County Superior Court No. 11-2-02087-5
Court of Appeals No. 44121-7-11

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

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KATHY MIOTKE, et al

Appellants,

v.

SPOKANE COUNTY,

Respondent

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DIVISION II
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STATE OF WASHINGTON
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**REPLY BRIEF OF APPELLANTS**

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## I. INTRODUCTION

This is a case of first impression examining whether it is lawful for a County to redraw its Urban Growth Area ("UGA") boundaries in an effort to comply with the Hearings Board decision leaving low and medium density residential urban development in now rural areas. While the County asserts in its response brief that there are many other issues at play in this matter, the fundamental question to be answered by this Court is whether the County was in compliance with the Growth Management Act ("GMA") when it adjusted its UGA boundary leaving vested urban development outside of the boundary in rural areas? If the answer is no, this Court must rule in favor of the Appellants in this matter. If the answer is yes, the Court must rule in favor of Spokane County.

This case is not about any appeal of a site-specific project, it is not about the scope of review under a Land Use Petitions Act ("LUPA") appeal, or an attempt to limit the scope of Washington's Vested Rights Doctrine. Appellants are simply asking the Court to determine whether it is consistent with the goals and requirements of the Growth Management Act ("GMA") to redraw a UGA boundary to allow urban development in the rural areas.

Appellants readily agree that the long history of this case demonstrates some of the short comings of the GMA. However, unless the

Legislature acts, we are bound by the provisions of the law and the requirements therein. As demonstrated below, the plain language of that law prohibits the County from drawing its UGA boundaries to allow urban development in rural areas. Accordingly, this Court must reverse and remand the decision of the Hearings Board.

## II. ARGUMENT

### A. THE REQUIREMENTS OF THE GMA PROHIBITING URBAN DEVELOPMENT OUTSIDE OF THE UGA ARE UNAMBIGUOUS AND THEREFORE, THE COUNTY'S ACTION ARE NOT ENTITLED TO DEFERENCE.

The GMA unambiguously prohibits urban development outside of Urban Growth Area boundaries. RCW 36.70A.110(1). As is the case here, if a statute is unambiguous, a court will not look beyond the plain meaning of the words of the statute. *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 12, 57 P.3d 1156 (2002). In *Thurston County*, the county's proposed action violated a specific statutory mandate; extending urban services, a sewer line, into a rural area in contravention of RCW 36.70A.110(4). *Id.* Thus, the court refused to defer to county's decision where the "County's proposal [did] just what the GMA prohibits." *Id.*

Here, the County similarly manipulated its UGA boundary to extend urban development into areas where development can "occur only if it is not urban in nature." RCW 36.70A.110(1). Thus, the County's

action is not entitled to deference and, instead, this Court should rely upon the clear language of the statute.

### B. THE COUNTY'S ACTION OF REDRAWING THE URBAN GROWTH AREA BOUNDARY LEFT URBAN DEVELOPMENT IN RURAL AREAS IN CONTRADICTION TO GOALS OF THE GROWTH MANAGEMENT ACT.

Without any citation to the law or any case, Spokane County asserts that its act of revoking the UGA designations meets the requirements of the GMA because Appellants had the burden, once it passed Resolution 2007-0077, to demonstrate that the Resolution did not interfere with the requirements of the GMA. Response at 10-12. However, the GMA specifically provides that in the event of a finding of invalidity, the County has the burden to demonstrate that the compliance action substantively complies with the requirements of the Act. Specifically, the GMA explains, "[A] county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1)." RCW 36.70A.320(4) (emphasis added).

Here, the record lacks any attempt by the County to demonstrate that Resolution 2007-0077 will interfere with the goals of the GMA. Instead, the County asks this Court to agree that, simply on its face, its retraction of the UGA boundary and its stranding of urban development outside of the urban growth area does not interfere with the goals of the GMA. This ignores the clear mandate of the GMA that urban growth[1] may only occur in urban growth areas.

The Legislature set up a well-defined process to ensure that new development would not detract from the goal of directing urban growth to urban areas and creating sprawl. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wash.2d 161, 166-67, 979 P.2d 374 (1999) ("The Legislature adopted the Growth Management Act (GMA) to control urban sprawl."). The Legislature articulated its intent to address the harms of uncontrolled urban sprawl -- "[t]hat uncoordinated and unplanned growth, together with a lack of common goals expressing the public interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the

[1] The GMA defines "urban growth" as "growth that makes intensive use of land for the location of buildings, structures and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, or natural resource lands[.]" RCW 36.70A.030(17). The County does not dispute that the areas in question constitute urban growth.

health, safety and high quality of life enjoyed by the residents of this state." RCW 36.70A.010.

The GMA focuses on concentrating all types of growth - residential, commercial, and industrial - in urban areas because it is these areas that have the supporting public facilities and services critical to economic development. RCW 36.70A.020. To accomplish these goals, the GMA requires counties to adopt a comprehensive plan. *See* RCW 36.70A.040. Comprehensive plans must, among other things, designate an urban growth area for each city in the county "within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." RCW 36.70A.110(1); *Diehl v. Mason County,* 94 Wash.App. 645, 655-56, 972 P.2d 543 (1999)("Urban growth is not allowed outside areas designated as UGAs). This requirement has been described by the Washington Supreme Court as "[o]ne of the central requirements of the GMA." *Quadrant Corp. v. State Growth Management Hearings Bd.,* 154 Wash.2d 224, 232, 110 P.3d 1132 (2005).

Here, it is undisputed that vested urban development occurred prior to the adoption of Resolution 2007-0077 and that the adjustment of the UGA boundary did nothing to alter the urban development. Prior to its adoption, Planning Commissioner Schmitz asked, "[H]ow this would affect property owners if their land was removed from the UGA; if they

would be considered already vested or if they would have to redo process." AR 577. The Planning Director John Pederson responded that the owners "each have vested applications." *Id.* Even counsel for the County acknowledged that this action would have no effect to the on-the-ground issues. *Id.* However, the County's counsel did acknowledge that this action fails to address the on-the-ground issues associated with these parcels -- "[S]omething is going on over there and we need to deal with it whether it's in the UGA or not." *Id.* Unfortunately, the County has yet to deal with it.

The County's argument has merit only if the Court is convinced that it can turn a blind eye to the development of urban development on the ground that occurred prior to the adoption of Resolution 2007-0077. No provision of the GMA allows local jurisdictions to ignore the effects of its actions and the County's argument simply fails. Accordingly, the decision of the Hearings Board should be reversed.

### C. NEITHER RCW 58.17.033 NOR ANY ASPECT OF WASHINGTON'S VESTING RIGHTS DOCTRINE PROHIBIT THE COUNTY FROM COMPLYING WITH THE REQUIREMENTS OF THE GMA.

The County attempts to confuse the issues in this case by pointing to RCW 58.17.033 and the law surrounding Washington's Vesting Rights Doctrine as an excuse for its action. Again, this argument fails for two

fundamental reasons – first, while vesting may have limited the actions that the County could take to comply with the Hearings Board's order, it does not allow it to ignore the fundamental prohibition against urban development in rural areas. Second, the Supreme Court has specifically held that vested development be included when considering adjustments of Urban Growth Area boundaries.

First, Appellants concede that the vesting of urban development limited the available remedies for the County to comply with the Hearings Board's order, but it did not provide license for the County to disregard and violate the requirements of RCW 36.70A.110(1) by taking an entirely new legislative action – the passage of Resolution 2007-0077. However, the record indicates that the County had other options to come into compliance, which it first pursued and then abandoned in favor of this unlawful action. AR 90-91; 267-272. While the County has latitude in its land use decisions, including action to bring itself into compliance with the GMA, it cannot simply redraw its UGA to allow urban growth outside of the UGA. *Timberlake Christian Fellowship v. King County*, 114 Wash.App. 174, 183-85, 61 P.3d 332 (2002) ("Although the GMA does not prohibit specific land uses, it does require that local planning authorities draw a line between urban and rural areas.").

In another proceeding, the Hearings Board has recognized that the establishment of urban development may restrict a jurisdiction's ability to retract its boundaries as a means of compliance, stating:

> If capital facilities planning for the 2005 updates shows that Sedro-Woolley cannot provide infrastructure needed for urban development within its UGA, the choice to retract the urban growth boundary to the City **limits would be impaired by the creation of new, smaller lots within the UGA prior to revision of the UGA boundaries.**

*City of Sedro-Woolley v. Skagit County*, 2004 WL 1864631 (GMHB Case No. 03-02-0013c, Compliance Hearing Order, June 18, 2004)(emphasis added).[2] In other words, subsequent actions may limit the remedies available to a jurisdiction, as in the case.

Over and over again, the County argues that it met its burden because it redrew the UGA line to its previous status. However, as the record demonstrates and the County admits, vested urban development was approved and constructed changing the status quo. Neither the Hearings Board nor the County can ignore that and assert that the previous UGA was legally compliant – the reality on-the-ground changed and the County had the burden to demonstrate that its action would meet GMA Goals, including any changes to the landscape that occurred.

[2]Although administrative decisions are not binding on this court, these decision can serve as guidance in the interpretations of the law, especially where, as here, the decision is made by the body primarily charged with interpreting a given statute. *See East v. King County*, 22 Wn.App. 247, 255-56, 589 P.2d 805 (1978).

The vesting of urban development on the properties at issue eliminated the option of retracting the UGA boundary because doing so would strand urban development outside of the UGA in contradiction of RCW 36.70A.110(1).

Second, the Supreme Court has stated that a jurisdiction should consider vested development rights when determining whether an area is "characterized by urban growth" and properly within a UGA boundary. In *Quadrant,* 154 Wash.2d at 240-41, the Supreme Court reversed a Court of Appeals decision that allowed a jurisdiction to ignore vested development and only consider development actually constructed when determining proper UGA boundaries, stating:

> The vested rights doctrine establishes that land use applications vest on the date of submission and entitle the developer to divide and develop the land in accordance with the statutes and ordinances in effect on that date. *See Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 278–80, 943 P.2d 1378 (1997); *see also* RCW 58.17.033 (extending vested rights doctrine to preliminary plat applications). Here the Board determined that counties may only consider the "built environment." CP at 42. The Court of Appeals agreed. *Quadrant Corp.*, 119 Wash.App. at 572, 81 P.3d 918. In dissent, Judge Coleman framed the relevance of the vested rights doctrine in the planning process:
>
> > Under the definition [of "urban growth"] approved by the legislature, territory already committed to the process of growing in a manner incompatible with rural uses can be considered for an urban designation, and

> indeed it would be inconsistent with the goals of the GMA not to.... While there is always a possibility that construction may never occur, an area of land already committed to urban development from the County's perspective bears characteristics of urban use that should not be ignored in the planning process.
>
> *Id.* at 580, 81 P.3d 918. (Coleman, J., concurring/dissenting). The Board's decision unreasonably precludes local jurisdictions from considering vested rights to divide and develop the land and essentially forces counties, in adopting comprehensive plans, to ignore the likelihood of future development. The Board's failure to reconcile the statutory planning process with Washington's vested rights doctrine resulted in a strained interpretation that does not further the legislature's intent in establishing the GMA.
>
> Thus, we reverse the Court of Appeals and hold the Board erred in ruling King County failed to comply with the GMA when King County considered vested subdivision applications in determining whether an area "already [was] characterized by urban growth."

*Quadrant* makes it clear that vested rights are a consideration of the UGA planning process of the GMA and are not to be ignored – as the County urges. While vesting may be outside of the County's control, as the County asserts, it is not outside its control to consider its impacts when making GMA decisions. The County must act to ensure that it meets all its legal obligations. Accordingly, the County's argument to the contrary should be rejected.

### D. WITHOUT ANY SUPPORTING EVIDENCE, THE COUNTY ASSERTS THAT ITS DEVELOPMENT REGULATIONS ASSURE THAT GMA GOALS WILL BE MET.

The County asserts that its development regulations will ensure that GMA Goals will be met by ensuring that facilities and services are provided to the urban areas outside of the UGA boundary. Response Brief at 25-26. However, there is nothing in the record to support this conclusion. Nothing in any of the County's pleadings or in the Hearings Board's orders indicates that Spokane County met its heightened burden to demonstrate the issues of urban sprawl and inadequacy of services, which necessitated the original finding, was remedied by the County's act of "undoing" the UGAs. *See generally,* AR 519-28, 529-33, 564-603, 612-21, 637-62, 715-19, 726-33. In fact, the County provided the Hearings Board with no argument as to how its action does, or does not, interfere, with GMA Goals. No mention is made of the GMA Goals at all. The only stated reason for the action was to come into compliance given the failure of the County to meet its December 1st deadline for updating its comprehensive plan update. AR 513, 575.

Here, the record in this matter is devoid of any evidence that the County's action will no longer substantially interfere with the GMA Goals. Despite this, the County asserts now that concerns with sprawl, urban development, traffic, and governmental facilities and services would

be somehow be addressed by the County's act of "undoing" the UGA. This is simply not the case. The record indicates that the County's action substantially interfered with GMA Goals.

The record demonstrates that the Hearings Board explicitly found that inadequate public facilities existed for urban development in these areas. AR 50 ("The record shows that levels of service are inadequate or questionable now and in the future for transportation facilities, sewer and water, stormwater utilities, school facilities and law enforcement."). The County appealed the Hearings Board's findings and later dropped its appeal – it is now bound by the finding of the Hearings Board. *See Spokane County v. Miotke,* 144 Wash.App. 1045, 2008 WL 2224110, at *1 (May 29, 2008). Nothing in the record or now asserted by the County indicates that these issues have been addressed and that the goals of the GMA have been met.

### E. THE SCOPE OF APPELLANTS' APPEAL IS SIMPLY WHETHER THE COUNTY CAN REDRAW THE URBAN GROWTH AREA BOUNDARY LEAVING URBAN DEVELOPMENT IN RURAL AREAS AND NOT A CHALLENGE TO ANY SITE SPECIFIC PROJECTS.

Contrary to the County's assertion, Appellants do not seek any order or appeal any aspect of the vested urban development – this is not a Land Use Petitions Act case. Appellants have no claims as to the merit of the specific development projects. Appellants seek a decision as to

whether the GMA allows the County to diminish the UGA where vested urban growth has and will occur by the enactment of Resolution 2007-0077.

Changes to an urban growth area boundary are the type of actions subject to review by the Growth Management Hearings Board. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 178, 4 P.3d 123 (2000); RCW 36.70A.290(2). RCW 36.70A.280 grants the Hearings Board jurisdiction to hear claims that a county "planning under this chapter is not in compliance with the requirements" of the GMA. Appellants argue that Resolution 2007-0077 violates the Planning Goals of the GMA set forth in RWC 36.70A.020 and that the action violates RCW 36.70A.110. These are all GMA issues that fall squarely within the jurisdiction of the Hearings Board.

LUPA recognizes that changes in land use designation selected by the County in its Comprehensive Plan, like the action subject to this appeal, are subject to Hearings Board jurisdiction by excluding "application for legislative approvals such as area-wide" reclassifications/rezones from the definition of actions subject to its jurisdiction. RCW 36.70C.020(1)(a). While the definition does not expressly list UGA boundary amendments as a "legislative approval," that list has been described as "illustrative rather than exclusive." *Coffey v.*

*City of Walla Walla,* 145 Wn. App. 435, 440, 187 P.3d 272 (2008). Moreover, the Supreme Court has held that LUPA cannot be used to challenge UGA boundaries. *King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wash.2d 161, 182 n. 9, 979 P.2d 374 (1999)("The lawfulness of a county's UGA designation may not be reviewed in a LUPA petition because the challenged county action is subject to review by the Board."); *see also* RCW 36.70C.030(1)(a)(ii).

Specifically, Appellants challenge the failure of the Hearings Board to properly determine whether the County's action retracting the UGA boundary amounts to a GMA violation pursuant to RCW 36.70A.320(4), which states, "[A] county or city subject to a determination of invalidity ... has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1)." Here, the County does not deny that it: (1) retracted the UGA boundary and (2) that vested urban development now is outside the boundary. The only issue is whether allowing urban development outside of the UGA boundary is consistent with the goals of the GMA. As the record demonstrates, it is not.

Moreover, the County's action does not satisfy the GMA and, in fact, does not appear to address the concerns of the Hearings Board's final decision and order. In that order, the Hearings Board did not order the County to retract its UGA boundary, but found that the County failed to properly complete a land quantity analysis and capital facilities plan to support the expansion of the UGA:

> 5. Spokane County is required to update its Capital Facilities Plan before a UGA is created or modified to include the additional lands not covered by the previous CFP.
>
> 6. Spokane County is required to perform a land and population analysis prior to an enlargement of a UGA within the County.
>
> 7. The preparation of a land and population analysis by the proponents or landowners is not sufficient to satisfy the requirements of the GMA and the policies adopted by Spokane County.
>
> 8. The County is required to insure that actions which expand its GMAs be internally consistent with its CP or Development Regulations.

AR 74. The County's action fails to address any of these concerns and only make the problem worse by adding urban development outside of the UGA.

**F. THE COUNTY'S ACTION SETS A DANGEROUS PRECEDENT.**

Lastly and on a practical level, this Court should rule that the County's action is unlawful to avoid a dangerous precedent where a

jurisdiction could simply enact an unlawful UGA, allow vested development to occur, and then retract the boundaries in order to avoid a Hearings Board challenge or avoid the need to address compliance with the law. This flies in the fact of the GMA's goals to constrict urban development within the UGA boundary. The intent of the GMA was to avoid urban development in rural areas – a decision here in favor of Appellants will further this important goal of the GMA.

## III. CONCLUSION

The GMA prohibits urban development outside the UGA. The record demonstrates that the Country took action to strand urban development in rural areas and the Hearings Board found it compliant with the GMA. These actions warrant reversal of the Hearing Board's decisions. For the reasons set forth above and in Appellants' opening brief, Appellants respectfully request that the Court set aside, remand, and find that the Hearings Board's Order on Remand, the Order Finding Compliance, and the Order on Reconsideration (1) erroneously interpreted and applied the law; (2) are not supported by evidence; and (3) are arbitrary or capricious.

Respectfully submitted this 2nd day of April, 2013.

Rick Eichstaedt, WSBA #36487
Center for Justice

**PROOF OF SERVICE**

I, Danette Lanet, hereby certify that I caused a copy of the **Reply Brief** to be served, via USPS, postage prepaid, on all parties or their counsel of record on the date below:

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

DATED this 2 day of April 2013.

Danette Lanet
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