No.

SUPREME COURT
OF THE STATE OF WASHINGTON

90415-4

SPOKANE COUNTY, a political subdivision of the State of Washington,

Respondent,

v.

KATHY MIOTKE, an individual, and NEIGHBORHOOD ALLIANCE OF SPOKANE,

Appellants,

PETITION FOR REVIEW

David W. Hubert
Deputy Prosecuting Attorney
WSBA # 16488
Spokane County Prosecuting Attorney
1115 West Broadway, 2nd Floor
Spokane, WA 99260
Telephone: (509) 477-4509

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

WASHINGTON CASES

STATUTES

I. IDENTITY OF PETITIONER

Petitioner in this action is the County of Spokane, is the Respondent before the Court of Appeals below, hereinafter referred to as "Spokane County" or "Petitioner". Spokane County was the Respondent in the action before the Growth Management Hearings Board and the Respondent before the Superior Court.

II. CITATION TO COURT OF APPEALS DECISION

The decision of the Court of Appeals for which review is sought is Court of Appeals, Division II, case number 44121-7-II, which decision was filed by the Court of Appeals on May 20, 2014. (A copy of the Court of Appeals decision accompanies this Petition as Appendix A). The decision of the Court of Appeals is the result of review by the Superior Court of the Order Finding Compliance, dated March 5, 2007, Eastern Washington Growth Management Hearings Board case number 05-1-0007.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review by this Court are:

1. Whether the Court of Appeals failed to defer to the decision and expertise of the Growth Management Hearings Board,

who had correctly deferred to the GMA compliant actions of Spokane County?

2. Whether the repeal in its entirety of a comprehensive plan amendment that expands the Urban Growth Area (UGA) boundary, which has been found to be noncompliant with the Growth Management Act (GMA) and invalid by the Growth Management Hearings Board, is a violation of any goal and/or requirement of the GMA?

3. Whether the vesting of development permit applications pursuant to RCW 58.17.033, for property that was added to the UGA prior to the Growth Management Hearings Board's finding of noncompliance and invalidity, prohibits the repeal in its entirety the expansion of the UGA boundary as a corrective action in response to the finding of noncompliance and invalidity?

4. Whether the GMA mandates that all property upon which urban development exists be contained within a UGA?

IV. STATEMENT OF THE CASE

This Petition for Review follows a decision of the Court of

Appeals, Division II, in review of an Order Finding Compliance issued by the Eastern Washington Growth Management Hearings Board.

The Growth Management Hearings Board's Order Finding Compliance is the result of a review of Spokane County Resolution number 2007 0077 January 23, 2007. Resolution 2007 0077 repealed in its entirety the expansion of the Spokane County UGA boundary that had been found by the Growth Management Hearings Board to be noncompliant with the GMA and invalid per RCW 36.70A.302. During the pendency of the review by the Growth Management Hearings Board of Spokane County Resolution 2005-0649, which had expanded the UGA boundary, development permit applications for projects proposed within the expanded UGA boundary vested pursuant to RCW 58.17.033. In response to the expansion of the UGA boundary the Growth Management Hearings Board found that Resolution 2005 0649 to be noncompliant with the Growth Management Act (GMA) and issued an order of invalidity.

After several attempts at corrective action by Spokane County to address the finding of noncompliance and invalidity Spokane County adopted Resolution 2007 0077 which repealed Resolution

2005 0649 as it related to the errant expansion of the UGA boundary. Based upon the repeal of the errant UGA boundary expansion the Growth Management Hearings Board found that Spokane County had thus come into compliance with the GMA. Compliance with the GMA was found by the Growth Management Hearings Board notwithstanding the vesting of the development permit applications that had vested for development of the land errantly added to the UGA boundary. (See Appendix B).

At the same time that it was pursuing attempts at corrective action, Spokane County appealed the Growth Management Hearings Board's decision, resulting in a decision from the Court of Appeals Division III. (See Appendix C, Unpublished Opinion, Court of Appeals Division III, *Spokane County et al. v. Miotke et al.* case nos. 25177-2-III & 25035-1-III). Based upon the repeal of the errant expansion of the UGA boundary and the finding of compliance by the Growth Management Hearings Board, the Court of Appeals found the appeal to the Court to be moot and dismissed the case.

Objecting to Spokane County's corrective action by the repeal of the errant expansion of the UGA boundary, Appellants argued to

the Growth Management Hearings Board that if the errant addition to the UGA was repealed, the "vested" applications for development of the property within the expanded area of the UGA boundary would allow urban growth to exist outside of the UGA boundary in violation of the GMA. Appellants argued that the action required to remedy the errant addition to the UGA boundary was to put the property errantly added to the UGA boundary into the UGA boundary.

It is important to note that the development permit applications were submitted to Spokane County at approximately the same time that Appellants brought their petition for review of the UGA boundary expansion to the Hearings Board. Although Appellants had notice of the submitted permit applications, Appellants made no effort to stay or delay Spokane County's consideration of the permit applications. Notwithstanding their opposition to the development permit applications, Appellants did not attempt to challenge the development permit applications in the superior court under the Land Use Petition Act (LUPA), neither did they attempt to obtain a restraining order or any form of stay or injunctive relief in an effort to prevent Spokane County from performing its duty to timely consider the development

permit applications.

The Growth Management Hearings Board correctly deferred to Spokane County in its decision to repeal the errant UGA additions and determined that the repeal of the errant expansion of the UGA boundary had returned the Spokane County Comprehensive Plan to its state of compliance with the GMA immediately prior to the adoption of the errant action. By so doing Spokane County was then free to continue to plan for and in light of the growth that had occurred due to the vested permit applications. Pursuant to the clear language of the GMA the Growth Management Hearings Board's finding of noncompliance and subsequent determination of invalidity regarding the adoption of the additions to the UGA boundary have no effect upon and do not apply to the vested development permit applications referred to above. RCW 36.70A.300(4) and RCW 36.70A.302(2).

The Court of Appeals, without any deference to the Growth Management Hearings Board, has now declared that even though the expansion of the UGA boundary originally was error, because development permits applications had vested prior to the Growth Management Hearings Board's Final Decision and Order against

Resolution 2005 0649, the remedy for Spokane County to the errant expansion of the UGA was to consider the newly added land to be "developed in urban densities" due to the vested permit applications and then to include the land within the UGA.

V. ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS INVOLVES ISSUES OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

1. The Court of Appeals Sets an Erroneous Precedent Regarding Corrective Action Taken Following a Finding of Noncompliance and Invalidity.

The Growth Management Hearings Board's authority is strictly limited to enforcing the clear and specific requirements of the GMA. *Thurston County v. Western Washington Growth Management Hearings Board*, 162 Wn.2d 329, 341-342, 190 P.3d 38 (2008); *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n. 8, 174 P.3d 25 (2007); *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearing Bd.*, 154 Wn.2d 224, 240 n.8, 110, 110 P.3d 1132 (2005). As the product of intense legislative compromise the GMA contains no provision for liberal construction; the Growth Board has no authority to infer requirements not specifically stated in the

GMA. *Quadrant Corp.*, supra at 245 n.12, citing, *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 565, 958 P.2d 962 (1998).

After the Growth Management Hearings Board makes a finding of noncompliance and/or invalidity, the local jurisdiction is to be allowed time to take corrective action, and then the Board is to hold another hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of the GMA. RCW 36.70A.330. Although the review regarding compliance after a finding of noncompliance or invalidity will relate to the subject of the noncompliance finding, the Growth Management Hearings Board's charge is to determine compliance with the GMA, not to determine whether the local jurisdiction has acted upon or responded to any specific previous finding by the Board. *Id.* The Growth Management Hearings Board correctly determined compliance with the GMA in this case. Without the required deference to the decision of the Board, the Court of Appeals asserts that the Growth Management Hearings Board's duty in reviewing corrective action taken in response to a finding of

noncompliance and/or invalidity is, to determine whether the original action found to be noncompliant and invalid "no longer substantially interferes with the goals of the GMA". The decision mandates that Spokane County establish by evidence in the record that "the County's initial UGA expansion no longer substantially interferes with the goals of the GMA where urban growth development rights vested and urban growth occurred". (See Appendix A, p. 7).

In addition to the failure to defer to the Growth Management Hearings Board's expertise and decisions, another significant error by the Court of Appeals on that issue is that the GMA does not require that the local jurisdiction provide evidence that the action found to be noncompliant has somehow been brought into compliance by the corrective action. The GMA mandates that the corrective action bring the local jurisdiction's comprehensive plan and/or development regulations into compliance with the GMA. RCW 36.70A.330(2). Such compliance can be achieved by any number of actions including the repeal of the original action found to be noncompliant or adopting a different action that modifies or

replaces the original errant action.

The Court of Appeals opinion, that a local jurisdiction is required to take corrective action and then prove that the original action found to be noncompliant no longer substantially interferes with the goals of the GMA, creates an erroneous precedent that is not supported in the GMA or case law interpreting it.

2. The Court of Appeals Sets an Erroneous Precedent Regarding Vested Development Permit Applications and the Comprehensive Plan.

The Court of Appeals' opinion creates other precedent that is not supported in the law. The Court of Appeals requires that the comprehensive plan demonstrate that vested development permit applications do not interfere with GMA goals 3 and 12 related to transportation systems and public facilities. (See Appendix A, pp. 10, 12). It is well established law that the comprehensive plan is not required to demonstrate the existence of sufficient transportation systems or public facilities each time that an amendment to the comprehensive plan is adopted that would allow a higher level of development than previously allowed. *Spokane County et al. v. Eastern Washington Growth Management Hearings Board et al.*,

173 Wn. App. 310, 293 P.3d 1248 (2013). Cities and counties are required by the GMA to adopt development regulations that implement the comprehensive plan and ensure compliance with the comprehensive plan as development occurs. *Id.*; RCW 36.70A.040(4).

To require that a comprehensive plan must demonstrate that transportation systems and public facilities are adequate for each development permit application that vests pursuant to the vesting statutes (RCW 58.17.033; RCW 19.27.095) is a new and onerous precedent that is not consistent with established law.

3. The Court of Appeals Sets an Erroneous Precedent Regarding Inclusion of Urban Development Within the UGA.

Taken to its logical conclusion, the Court of Appeals opinion creates a new rule, not found in the GMA, that all urban development, including potential urban development by vested development permit applications, must be brought within the UGA. (See Appendix A, pp. 13 – 14). The dilemma that such a rule causes is seen when considering areas of urban development that have occurred prior to the adoption of the GMA and in areas that are

separated from major urban centers or cities by large areas of undeveloped land. UGA are required to be contiguous to cities and only created where urban sprawl is not encouraged. RCW 36.70A.110. This case began when Spokane County added land to the UGA. Even though the land was near other urban development and in close proximity to the city of Spokane, the addition of the land was opposed as not complying with the GMA. Now the Appellants argue and the Court of Appeals has opined that because urban development is or will exist on the land, the land must be brought into the UGA. This is in direct conflict with the basis cited for opposing the inclusion of the land into the UGA in the first place.

To require that all urban development be brought into the UGA regardless of whether to do so was originally found noncompliant with the GMA is unsupported in the law and is illogical.

B. THE OPINION OF DIVISION II OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND OTHER COURT OF APPEALS DECISIONS.

1. The Court of Appeals Failed to Defer to the Growth Management Hearings Board Even in the Face of Proper Deference by the Board to the Actions of Spokane County.

The Growth Management Hearings Board is required to defer to the local jurisdiction in the planning actions taken under the GMA so long as the action is consistent with the goals and requirements of the GMA. RCW 36.70A.3201; *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 166 P.3d 1198 (2007). Upon review by an appellate court, whether the superior court or a court of appeals, the Court is to grant deference to the Growth Management Hearings Board regarding its decisions under the GMA, provided that the appellate courts and Supreme Court are the final arbiters of the law. *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. App. 743, 235 P.3d 812 (2010); *Lewis County v. Western Washington*

Growth Management Hearings Board, 157 Wn.2d 488, 139 P.3d 1096 (2005); *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007).

The fatal error of the Court of Appeals in this case is that even in the face of both Spokane County and the Growth Management Hearings Board reaching agreement regarding the corrective action taken by Spokane County to correct the erroneous addition of land into the UGA boundary, the Court of Appeals second guessed the both the Growth Management Hearings Board and Spokane County, and without any deference to the Board's decision declared the Growth Management Hearings Board to have been wrong. The lack of deference to the Board is in conflict with the clear statement of the law.

2. The Opinion of the Court of Appeals Erroneously Allows the Growth Management Hearings Board to Hear Matters Under the Jurisdiction of LUPA.

When considering whether the expansion of the UGA boundary by Spokane County was GMA compliant the Growth Management Hearings Board determined that the expansion violated goals 3 and 12 of the GMA because the comprehensive plan did not

specifically address the alleged transportation and public facilities issues raised by the Appellants before the Board. After the Growth Management Hearings Board found the repeal of the errant UGA boundary expansion to have brought the comprehensive plan into GMA compliance, Appellants argued, and the Court of Appeals agreed, that the alleged transportation and public facilities issues related to the vested development rights on the land within the errant UGA boundary continued to violate the GMA. (See Appendix A, pp. 7 and 10.) By requiring that the Growth Management Hearings Board consider whether facilities and services are available to development anticipated by vested development permit applications the Division II opinion is in direct conflict with the Division III opinion in *Spokane County et al. v. Eastern Washington Growth Management Hearings Board et al.*, supra. The Division II opinion is also in direct conflict with the line of cases that clearly state that the Growth Management Hearings Board has no jurisdiction to hear matters properly addressed by the Superior Court pursuant to the Land Use Petition Act (LUPA). *Woods v. Kittitas County,* 162 Wn.2d 597, 174 P.3d 25 (2007); *Wenatchee Sportsman Assoc. v.*

Chelan County, 141Wn.2d 169, 4 P.3d 123 (2000).

Although Appellants and Division II of the Court of Appeals assert that the Growth Management Hearings Board is not being asked to consider the development permit applications directly, but whether the comprehensive plan is compliant with the GMA regarding transportation and public facilities issues, the alleged noncompliance is that the development for which applications have been submitted will be without adequate services because the comprehensive plan does not specifically address the vested applications. Regardless of how they attempt to word the issue it is still an issue under the jurisdiction of the Superior Court under LUPA; will adequate services and facilities exist to serve the development.

3. The Court of Appeals Opinion Liberally Construes the GMA and Misinterprets the Purpose of a Comprehensive Plan.

In direct conflict with the above Supreme Court cases, the Court of Appeals suggests that the Growth Management Hearings Board should liberally construe the requirements of the GMA by considering "vested urban development rights" when considering

whether corrective action by a local jurisdiction brings the comprehensive plan into compliance with the GMA. (See Appendix A, p. 13).

In reference to vested development rights RCW 36.70A.320(1) states that "except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption". RCW 36.70A.302(2) reads: "A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city of county. *The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project".* (Emphasis added). The mandate of RCW 36.70A.320 and RCW 36.70A.302(2) is clear, that when considering the compliance with the GMA of a comprehensive plan or amendment thereto, even for the correction of a noncompliant comprehensive plan as found by the Growth Management Hearings Board, the adopted action is

presumed compliant and a determination of invalidity does not does not apply to the development rights that are vested prior to the receipt by the local jurisdiction of the determination of invalidity. To consider the vested development rights when reviewing whether a counties corrective action brings its comprehensive plan into compliance with the GMA requires liberal construction of the GMA. If the determination of invalidity does not apply to vested permit applications then a determination of whether the invalidity has been corrected cannot include the consideration of a vested development permit application. The logic of the Court of Appeals decision is in direct conflict with Supreme Court decisions, cited above, that prohibit liberal construction of the GMA.

By definition a comprehensive plan is a compilation of goals and policies that guide the process of review and approval of specific development proposals submitted to the local jurisdiction. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014); *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 308 P.3d 745 (2013). The comprehensive plan is implemented through development regulations that directly control

development. RCW 36.70A.040(4). Much like the personal budget maintained to guide the expenditure of available funds for household expenses etc., a comprehensive plan is just that, a plan. By statute the comprehensive plan must be updated periodically so as to stay current with changes in the law and with the reality of development that has gone on since the last update of the comprehensive plan. RCW 36.70A.130. The comprehensive plan need not be updated to reflect every development proposal as it is proposed or built. *Spokane County et al. v. Eastern Washington Growth Management Hearings Board et al.*, supra. By its opinion in this case Division II requires that as soon as development proposals are submitted and vested, the comprehensive plan must be amended to reflect the impact of the proposed development. That is in direct conflict with the case of *Spokane County et al. v. Eastern Washington Growth Management Hearings Board et al.* above and the purpose of the comprehensive plan generally. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014); *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 308 P.3d 745 (2013). Time does not stand still while a comprehensive plan is

reviewed and amended. If the comprehensive plan is required to reflect every development proposed at any given point in time the comprehensive plan would never be complete but would be in a state of constant flux and revision.

VI. CONCLUSION

The Court of Appeals opinion in this case, if taken to its logical conclusion, demands absurd results. If a county is found to have erroneously added property to its UGA boundary, the county can be required to correct the error. A logical corrective action, if the addition of the property cannot be supported within the parameters of the GMA (as was found to be true by the Growth Management Hearings Board in this case), would be to remove the errant addition from the UGA boundary. Reversing the errant addition of land to the UGA boundary would place the UGA boundary back into its GMA compliant location. That is what was done in this case. It appears that but for the vesting of development permit applications to the "expanded UGA boundary", the reversal of the errant addition to the UGA boundary would have gone unchallenged.

Because development permit applications had vested prior to

the Growth Management Hearings Board's decision, in fact even before the matter was heard by the Board, the Court of Appeals asserts that the corrective action to the errant addition to the UGA boundary is to add the property to the UGA boundary. The reason for this absurd result is that now there is urban development on the property and there can be no urban development outside of a UGA boundary.

Under the logic of the Court of Appeals' opinion, the vesting of the development permit applications cured the errant addition to the UGA boundary and actually then no further corrective action was necessary. The Court of Appeals opinion in this case cries for clarification from the Supreme Court. Spokane County respectfully requests that the Court accept review of this case on the grounds discussed above.

Respectfully submitted this 13th day of June, 2014.

STEVEN J. TUCKER
Spokane County Prosecutor

DAVID W. HUBERT, WSBA #16488
Deputy Prosecuting Attorney
Attorneys for Spokane County

APPENDIX

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 18th day of June, 2014, I caused to be served a true and correct copy of the **Petition for Review** by the method indicated below, and addressed to the following:

Richard K. Eichstaedt Center for Justice 35 West Main, Suite 300 Spokane, WA 99201	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile
Washington State Growth Management Hearings Board P.O. Box 40953 Olympia, WA 98504-0953	____ Personal Service __X__ U.S. Mail ____ Hand-Delivered ____ Overnight Mail ____ Facsimile

DATED this 18th day of June, 2014 in Spokane, Washington.

Tamara Baldwin

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Order of Remand of the Growth Management Hearings Board of Eastern Washington, Case No. 05-1-0007, dated August 30, 2011 KATHY MIOTKE, an individual, and NEIGHBORHOOD ALLIANCE OF SPOKANE, Petitioner, v. SPOKANE COUNTY, a political subdivision of the State of Washington, Respondent, and RIDGECREST DEVELOPMENTS, LLC, a Washington Limited Liability Company; FIVE MILE CORPORATION, a Washington Corporation; NORTH DIVISION COMPLEX, LLC, a Washington Limited Liability Company; CANYON INVESTMENTS, INC., a Washington Corporation; DONALD and VA LENA CURRAN, husband and wife; STEPHEN W. TREFTS d/b/a NORTHWEST TRUSTEE & MANAGEMENT SERVICES, Additional Named Parties.	No. 44121-7-II PUBLISHED OPINION

JOHANSON, J. — After Spokane County (County) expanded its comprehensive plan's "Urban Growth Area" (UGA), property owners in the newly-expanded UGA commenced urban development. Kathy Miotke and the "Neighborhood Alliance of Spokane" (Miotke) petitioned the Eastern Washington Growth Management Hearings Board (Board) for review of the County's expansion. The Board found the County's UGA expansion invalid under the Growth Management Act (GMA), ch. 36.70A RCW. In an attempt to address the invalidity determination, the County passed a resolution that repealed the UGA expansion resolution. Based on the repeal of the UGA expansion resolution, the Board found the County in compliance with the GMA. Miotke appeals the Board's decision, arguing that the mere repeal of the UGA expansion resolution fails to establish GMA compliance. We reverse the superior court decision upholding the Board and remand to the Board to determine whether repeal of the UGA expansion, given the urban development vested under it, has remedied the expansion's interference with GMA goals.

FACTS

In August 2005, Miotke petitioned the Board to review the County's enactment of resolution 5-0649, which amended the County's comprehensive plan by expanding its UGA. In February 2006, the Board issued a final decision and order of invalidity (Final Order) finding that the County's expansion of its UGA violated the GMA. Specifically, the Board found that

resolution 5-0649 interfered with the GMA goals 1, 2, 3, and 12.[1] The Board found that the County failed to prepare a land quality analysis and failed to plan for capital facilities, utilities, and transportation among other things. The Board concluded that the County failed to "show its work" and ordered the County to bring itself into compliance with the GMA. Administrative Record (AR) at 76.

Between the enactment of resolution 5-0649 and the Board finding that resolution invalid for interfering with GMA goals, development permits were submitted and accepted by the County, thereby vesting urban development rights in the newly-expanded UGA. Urban development then occurred in these areas. This development is the center of the dispute here.

After its February 2006 Final Order, the Board twice found the County in continued noncompliance with the GMA. In July 2006, the Board found that the County was in noncompliance because it had failed to resolve any of the issues enumerated in the Final Order. The Board found further that the County failed to address "other issues of non-compliance such as the 'island UGA.'"[2] AR at 259.

---

[1] Goal 1 provides, "Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner." RCW 36.70A.020(1). Goal 2 provides, "Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(2). Goal 3 provides, "Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans." RCW 36.70A.020(3). And Goal 12 provides, "Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12).

[2] This is the term used by Miotke and the Board to describe the expanded UGA that was determined to be invalid. "Island" is used because this subject area is surrounded by land designated "urban reserve."

In October, the Board determined that the County remained noncompliant, having resolved none of the issues set forth in the Final Order. The Board recognized that the County had made progress, but the Board raised concerns regarding the County's use of an "emergency provision" to allow further UGA expansion. The Board ordered the County to comply by December 6, 2006. Shortly thereafter, various cities within the County reported that their contributions to the planning process would not be available until after the County's compliance deadline.[3] In order to meet its deadline, the County considered removal of the subject land from the UGA. Endeavoring to achieve GMA compliance, the County passed resolution 7-0077 which repealed resolution 5-0649, shrinking the UGA back to the borders that existed before the adoption of resolution 5-0649.

Miotke submitted additional briefing urging the Board to conclude that adopting resolution 7-0077 and repealing the expanded UGA was inadequate to bring the County into compliance. For example, Miotke argued, "[T]he paper exercise of re-designation [of the UGAs], not only fails to comply with the Board's Final Order, it is inconsistent with other provisions of the GMA and substantially interferes with other GMA goals." AR at 633. Nevertheless, on March 5, 2007, the Board found that the County was now in GMA compliance: "With the repeal of the portions of the resolution which enlarged the UGA, the objected to action was removed and the County brought itself into compliance." AR at 698. The Board did not consider in either the order finding compliance or the order on reconsideration the effect of resolution 7-0077 with regard to the specific GMA violations enumerated by the Board in its

[3] There is some indication that the County feared that the Board would impose sanctions if it remained out of compliance any longer.

Final Order. On March 15, 2007, Miotke unsuccessfully moved for reconsideration. Miotke now appeals the superior court's order affirming the Board's Final Order.

ANALYSIS

I. APA STANDARD OF REVIEW

We review a hearings board's decision under the Administrative Procedure Act (APA), ch. 34.05 RCW. *Feil v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 367, 376, 259 P.3d 227 (2011). We apply APA standards directly to the Board's record, performing the same function as the superior court. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). The party challenging the Board's decision bears the burden of proving it is invalid. RCW 34.05.570(1)(a). The decision is invalid if it suffers from at least one of many enumerated infirmities.[4] RCW 34.05.570(3).

We review de novo errors of law alleged under RCW 34.05.570(3)(d). *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008). We accord the Board's interpretation of the GMA "substantial weight." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). But the Board's interpretation does not bind us. *City of Redmond*, 136 Wn.2d at 46.

We apply the substantial evidence review standard to challenges under RCW 34.05.570(3)(e), determining whether a sufficient quantity of evidence exists to persuade a fair-minded person of the truth or correctness of the order. *City of Redmond*, 136 Wn.2d at 46. We

---

[4] We must grant relief from a decision if, as relevant here,

> (d) [t]he agency has erroneously interpreted or applied the law;
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record.

RCW 34.05.570(3).

view the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

II. COUNTY GMA COMPLIANCE

Miotke contends that RCW 36.70A.320(4) requires the County to respond to the Board's determination that resolution 5-0649 was invalid in a manner which shows that the County no longer substantially interferes with GMA goals. Specifically, Miotke argues that the County failed to address how mere repeal of the invalid UGA expansion will remedy the GMA violations outlined in the Board's Final Order.[5] Miotke claims that the Board's compliance finding resulted in an order that (1) was an erroneous interpretation and application of the law, (2) was not supported by substantial evidence, and (3) was arbitrary or capricious.

The County responds with two arguments to suggest that the Board correctly found the County no longer substantially interfered with GMA goals. First, the County argues that it did not violate GMA goals concerning reduction of urban sprawl (goal 1) and promotion of urban development within the UGA (goal 2) because the expanded UGA was valid at the time the developers' rights vested. Second, the County contends that it did not interfere with goals 3 and 12 because local regulations require adequate facilities and services in place before development is permitted to occur. Finally, the County asserts that it carried its burden to demonstrate

[5] Miotke initially argued that the Board erroneously shifted the burden of proof from the County to Miotke, but she now concedes that the Board applied the burden correctly. Wash. Court of Appeals oral argument, *Miotke v. Spokane County*, No. 44121-7-II (Jan. 14, 2014), at 29 min., 40 sec.–32 min., 45 sec. (on file with court). We accept this concession because the Board, which did misstate the burden, corrected the error in its compliance order.

compliance under RCW 36.70A.320(4) because resolution 7-0077 repealed resolution 5-0649, which created the noncompliance at the outset. We agree with Miotke.[6]

We conclude that the County failed to sustain its burden because merely rescinding resolution 5-0649, without more, does not establish that the County's initial UGA expansion no longer substantially interferes with GMA goals where urban development rights vested and urban growth occurred. Consequently, the Board's conclusion that the County was in compliance with the GMA was an incorrect application of the law and its order finding compliance was not supported by substantial evidence.

A. RULES OF LAW

The purpose of the GMA is to control urban sprawl and to ensure that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 166-67, 979 P.2d 374 (1999). The GMA requires that counties adopt a comprehensive plan which, among other things, designates UGAs. *King County*, 138 Wn.2d at 167. UGAs are regions within which urban growth is encouraged and outside of which growth can occur only if it is not urban in nature. Former RCW 36.70A.110(1) (2004); *King County*, 138 Wn.2d at 167. Hearings boards are charged with adjudicating GMA compliance.

[6] The County advances arguments tangential to this dispute that we need not fully address because they mischaracterize Miotke's position. First, the County argues that because determinations of invalidity are prospective in effect, the County could not prevent urban development from occurring outside the errant UGA once developers' rights vested by law. Second, the County argues that Miotke could have challenged proposed development permit applications under the Land Use Petition Act, ch. 36.70C RCW. But Miotke's central argument is not that site specific urban development should not have been permitted, but rather that the County was not free to diminish the UGA's size once vested urban growth had occurred and would remain without demonstrating that in doing so the County no longer substantially interfered with GMA goals.

Whidbey Envtl. Action Network v. Island County, 122 Wn. App. 156, 163, 93 P.3d 885 (2004), *review denied*, 153 Wn.2d 1025 (2005). The hearings boards conduct hearings and issue findings of compliance or noncompliance. RCW 36.70A.330(2).

We presume that comprehensive plans and development regulations are valid upon adoption. RCW 36.70A.320(1). And, generally, the petitioner has the burden to demonstrate that any action taken by an agency or local government is not in compliance with the GMA. RCW 36.70A.320(2). But

> [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); *Wells v. W. Wash. Growth Mgmt Hearings Bd.*, 100 Wn. App. 657, 666, 997 P.2d 405 (2000) ("[W]hen a local government is subject to a determination of invalidity, it bears the burden under RCW 36.70A.320(4).").

B. VESTED RIGHTS AND LOCAL DEVELOPMENT REGULATION

First, we address the County's argument that it did not interfere with GMA goals 1 and 2 because development rights vested before resolution 5-0649 was found invalid and, secondly, that it did not interfere with goals 3 and 12 because local regulations require the existence of adequate services and facilities before urban development occurs. We disagree with the County.

When a County enacts urban development regulations that are later determined to violate the GMA, all development permit applications submitted before the County's receipt of the invalidity determination remain vested to the development regulations under which they were submitted. RCW 36.70A.302(2); *Town of Woodway v. Snohomish County*, 172 Wn. App. 643, 661, 291 P.3d 278 (2013), *aff'd*, No. 88405-6, 2014 WL 1419187 (Wash. Apr. 10, 2014). Vested

development rights entitle the developer to divide and develop the land in accordance with the statutes and ordinances in effect when a fully complete application is submitted. *See Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 275, 943 P.2d 1378 (1997).

Here, the County passed resolution 5-0649 in July 2005. After resolution 5-0649 expanded the UGAs, property owners in these newly-expanded UGAs sought and received permits to pursue urban development on their then-UGA properties. These permits vested before the Board found that resolution 5-0649 rendered the County's comprehensive plan noncompliant with the GMA. Accordingly, the vested rights doctrine protected rights of developers who completed permit applications after resolution 5-0649 was enacted, but before it was deemed invalid. Once these rights vested, the County could not extinguish developers' rights to complete projects in the now invalid UGA.

In the County's view, its inability to prevent urban development in the errant UGA expansion also compels the conclusion that it did not interfere with GMA goals designed to reduce urban sprawl and to prevent urban development outside of a valid UGA. We disagree.

The vested rights doctrine exists in part to ensure fairness to *landowners* and *developers* who would otherwise be subject to unforeseeable rule changes. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 637, 733 P.2d 182 (1987). The County cites no authority to suggest that the vested rights doctrine insulates the County from responsibility for its own shortcomings in the planning process. The vested rights doctrine and the provisions of the GMA are often intertwined, but nothing in our vested rights cases or in the language of the corresponding statutes indicates that the vesting of developers' rights somehow relieves a County from its obligation to comply with planning goals under the GMA. It was the County's enactment of resolution 5-0649 that gave rise to the sequence of events culminating in the

creation of an "island UGA." We reject the County's argument that the vested rights doctrine relieved the County of its burden to show compliance with the GMA.

Moreover, even if we accepted the County's argument that the vested rights doctrine precludes a finding that the County substantially interfered with goals 1 and 2, the County failed to demonstrate that it did not interfere with goals 3 and 12 that relate to transportation systems and public facilities. The County claims that certain safeguards exist to ensure the presence of these facilities in the form of County-mandated, project-level development regulations that are substantially similar to those contemplated by the GMA's planning goals. But the County did not advance this argument before the Board nor did it present evidence that these development regulations were sufficiently comprehensive such that the Board could determine whether the County no longer substantially interfered with the specified planning goals. Because the County did not present these arguments or the relevant evidence to the Board, we cannot conclude that a sufficient quantity of evidence exists to persuade a fair-minded person of the truth or correctness of the order on these grounds. *City of Redmond*, 136 Wn.2d at 46.

Accordingly, we reject the County's argument. Neither the vested rights doctrine nor the availability of project-level development regulations preclude a finding that the County substantially interfered with the GMA.

C. Effect of Resolution 7-0077

The County also argues that the Board correctly determined that it no longer substantially interfered with GMA goals solely because it enacted resolution 7-0077, repealing the legislation that gave rise to the finding of invalidity in the Final Order. We disagree.

Following resolution 7-0077's adoption, the County moved the Board to determine whether it had reestablished compliance with the GMA. In response, the Board stated,

> The question on compliance is whether the jurisdiction has met the requirements of the [GMA], not whether it complied with the specific directives of the Board's last order. . . .
>
> . . . .
>
> . . . The Petitioners contend that the Board should review the case substantially as well as procedurally. In doing so, the Board could only look at the County's action and whether it addresses the findings and conclusions in the [Final Order].

AR at 697-98.

An examination of the Board's language reveals that the Board understood that it was required to analyze whether the County, by enacting resolution 7-0077, sufficiently addressed the findings and conclusions of the Final Order. Stated otherwise, the Board's task was to determine whether repeal of the expanded UGA was sufficient to show that the County no longer substantially interfered with GMA goals 1, 2, 3, and 12. RCW 36.70A.320(4). The Board determined that repeal of resolution 5-0649 alone was sufficient. The Board erred when it so found.

Growth management hearings boards in other cases have expressly stated that a county fails to sustain its burden after a determination of invalidity when it makes no attempt to respond to the findings that gave rise to that determination. *Futurewise v. Lewis County*, No. 06-2-0003, 2006 WL 2349047, at *1 (Western Wash. Growth Mgmt. Hr'gs Bd. Aug. 2, 2006).[7] In *Futurewise*, the city of Winlock wished to alter the designation and mapping of lands from agricultural to urban in an attempted UGA expansion. 2006 WL 2349047, at *1. This land, however, was still subject to a determination of invalidity because the Board previously found

[7] Though administrative decisions are not binding on this court, these decisions can serve as guidance in the interpretation of the law. *Floating Homes Ass'n v. Dep't of Fish & Wildlife*, 115 Wn. App. 780, 788 n.33, 64 P.3d 29, *review denied*, 150 Wn.2d 1011 (2003).

that such an expansion created substantial interference with goal 8 of the GMA.[8] *Futurewise*, 2006 WL 2349047, at *1. The Board stated,

> [Lewis] County failed to offer any evidence that the change in designation and mapping of those lands as urban lands within the Winlock UGA will no longer substantially interfere with the fulfillment of the natural resource industries goal of the GMA. This is [Lewis] County's burden under RCW 36.70A.320(4) and 36.70A.302(7)(a).

Futurewise, 2006 WL 2349047, at *1.

In addition, a close reading of RCW 36.70A.320(4) does not support the County's interpretation that the Board merely had to find that resolution 7-0077 was itself in compliance with the GMA. The plain language of RCW 36.70A.320(4) states that the question is not whether the action to remedy the invalidity itself complies with the GMA, but whether the remedial action in response to the invalidity finding "will no longer substantially interfere" with the GMA. This language implies that the Board's analysis should not be confined strictly to the remedial action but that the Board should review the extent to which development that vested under the flawed UGA expansion interferes with GMA goals and should condition its finding of compliance on measures that will remedy that interference.

Here, the County presented no evidence that repeal of the UGA expansion resolution, in and of itself, demonstrates that the County is no longer substantially interfering with GMA goals 1, 2, 3, and 12. The Board is correct that the County removed the offending legislation and that no *additional* urban development can occur in the subject area. But the Board cannot simply ignore the facts that vested rights were secured, urban development was permitted, and such

[8] Goal 8 is aimed at the maintenance and enhancement of natural resource-based industries, including productive timber, agricultural, and fisheries industries. This goal also encourages the conservation of productive forest lands and productive agricultural lands, and discourages incompatible uses. RCW 36.70A.020.

development occurred, changing the status quo. In *Quadrant Corp.*, our Supreme Court held that a hearings board erred in ruling that a county could only consider "built environment" (which did not yet exist) in determining whether an area was already "characterized by urban growth." *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 240-41, 110 P.3d 1132 (2005). In so holding, the court endorsed the following reasoning regarding vested rights and urban growth:

> "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 [King] County's perspective bears characteristics of urban use that should not be ignored in the planning process."

Quadrant Corp., 154 Wn.2d at 241 (first two alterations in original) (quoting *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 119 Wn. App. 562, 580, 81 P.3d 918 (2003) (Coleman, J., concurring/dissenting), *aff'd in part, rev'd in part*, 154 Wn.2d 224).

Although the facts in *Quadrant* are distinguishable in that the county in *Quadrant* was considering whether to designate land as UGA, 154 Wn.2d at 240, the cited reasoning applies. Here, the vested rights doctrine opened the door for urban development. The rescission of the UGA then stranded areas of urban development in formerly rural zones without consideration of the planning policies or development standards needed to ensure consistency with the GMA. The area is now incompatible with rural uses, bearing characteristics of urban use that should not be ignored in the planning process. *Quadrant Corp.*, 154 Wn.2d at 241. The Board should have required the County to demonstrate how, in light of the vested urban development, that resolution 7-0077 terminates the County's interference with GMA goals as RCW 36.70A.320(4) demands.

One Board member believed that the County failed to meet its burden simply by repealing resolution 5-0649 and that the County should have considered existing urban growth. Board member John Roskelley dissented from the order on reconsideration, stating that

> [t]he County has not met its burden of proof simply by revoking Resolution 5-0649. The County failed to show or demonstrate how this action corrected the Board's order of February 14, 2006, and how this action will "no longer substantially interfere with the fulfillment of the goals under this chapter. . . ."
>
> . . . .
>
> . . . The County's initial action created an urban growth area . . ., with all the trappings and requirements, such as urban-like roads, police protection, public transportation, sewer and water, outside of a legally established UGA. This alone flies in the face of RCW 36.70A.110(1). The County must answer how its action no longer substantially interferes with the GMA goals.

AR at 730-31. We agree with Roskelley.

Here, the Board considered only the fact that the County repealed the legislation that gave rise to the invalidity and concluded on this basis alone that the County no longer substantially interfered with the four enumerated planning goals. The County did not present enough evidence for the Board to have made this determination. Under the GMA, local governments must coordinate and cooperate with their communities to ensure wise use of our lands and sustainable economic development. RCW 36.70A.010. Integral to the planning process is the recognition and adoption of the several planning goals as guiding principles in the development of comprehensive plans. RCW 36.70A.020. Upon a finding of invalidity in which the Board identifies specific ways in which the County's action strays from GMA principles, the County then bears the burden to show how the County's responsive action cures the resulting invalidity. RCW 36.70A.320(4).

The County failed in this regard because it did not produce sufficient evidence that resolution 7-0077 addressed the Board's original finding of invalidity in any meaningful way.

We need not determine what quantum of proof is necessary, but repeal of the offending legislation, without more, does not discharge the County's burden. The Board's conclusion to the contrary constituted an incorrect application of the law and its order finding compliance was not supported by substantial evidence. Viewing the evidence in the County's favor, the Board's compliance finding was not based on substantial evidence. Other than the paper rescission of the offending ordinance, there was no evidence submitted, much less a sufficient quantity of evidence, to persuade a fair-minded person of the truth or correctness of the Board's order. *City of Redmond*, 136 Wn.2d at 46. Accordingly, additional fact finding is required before it can be said that the County carried its burden.

We reverse the decision of the superior court upholding the Board's decision. We remand to the Board to determine whether the County, by reverting the subject land back to a rural designation but leaving urban development that has required and will continue to require urban-like services, no longer substantially interferes with GMA goals. On remand, the Board shall require the County to demonstrate compliance by producing evidence that resolution 7-0077 (1) encourages urban growth only in urban areas, (2) reduces urban sprawl, (3) encourages efficient multimodal transportation systems, and (4) ensures that available public facilities are adequate to serve the development. The Board shall consider this evidence in light of the vested urban development in the subject area.

III. ATTORNEY FEES

The County seeks attorney fees on appeal. Because the County did not prevail, we deny its request for attorney fees. RAP 18.1

JOHANSON, J.

We concur:

WORSWICK, C.J.

BJORGEN, J.

Appendix B

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KATHY MIOTKE and NEIGHBORHOOD ALLIANCE OF SPOKANE,

Petitioners,

v.

SPOKANE COUNTY,

Respondent,

RIDGECREST DEVELOPMENTS, L.L.C., FIVE MILE CORPORATION, NORTH DIVISION COMPLEX, L.L.C., CANYON INVESTMENTS, INC., J. DONALD and VALENA CURRAN, and STEPHEN W. TREFTS d/b/a NORTHWEST TRUSTEE & MANAGEMENT SERVICES,

Intervenors.

Case No. 05-1-0007

ORDER FINDING COMPLIANCE

I. BACKGROUND

On February 14, 2006, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Decision and Order (FDO) finding that Spokane County's actions were clearly erroneous and violated the requirements of the Growth Management Act (the GMA). The Board found the County enlarged its UGA prior to the preparation of a population and land quantity analysis, as required; prior to engaging in joint planning as

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

required and to plan for capital facilities, utilities, and transportation within the land adopted by Resolution No. 5-0649, and "showing its work" in the expansion of the UGA. The County further failed to insure that these changes were consistent with its Comprehensive Plan and development regulations.

The Board received Spokane County's Statement of Action Taken to Comply and Request for a finding of Compliance January 24, 2007, indicating the County's repeal of Resolution No. 5-0649. The Petitioners objected to this repeal and to the finding of compliance under the Growth Management Act, (GMA).

On January 30, 2007, the Board held a telephonic compliance hearing. Present were, Dennis Dellwo, Presiding Officer, and Board Members John Roskelley and Joyce Mulliken. Present for Petitioners was Rick Eichstaedt. Present for Respondent was Dave Hubert. Present for Intervenors was Stacy Bjordahl. The Board made no decision regarding compliance but asked the parties to provide additional briefing concerning the Board's continuing jurisdiction over this matter or the mootness of the action.

II. DISCUSSION

POSITIONS OF THE PARTIES:

The Respondent and Intervenors, (Respondents), in their brief in support of their motion for a finding of compliance or in the alternative motion for dismissal, contend the repeal of the action found to be non-compliant brings the County into compliance with the GMA. The County believes that the repeal of the offending Resolution eliminated the non-compliant action. They believe the Board must therefore issue a finding of compliance. The County contends that the Board has only the authority expressly granted or necessarily implied by statute. "By making a finding of noncompliance, the only authority granted to the Hearings Board is to set a time for review of the compliance with the requirements of RCW 36.70A, to hold a hearing to determine compliance with the requirements of RCW 36.70A and the compliance schedule. RCW 36.70A.330." (P. 8, Respondent's brief).

The Respondents also contend that the repeal of the non-compliant action renders the petition for review moot. "Because the action found out of compliance is repealed and

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

of no effect or force, there is no action for further review and the Hearings Board lacks jurisdiction to review County action that is not raised in the Petition for Review. RCW 36.70A.280" (P. 11, Respondent's brief). The continued review of compliance would be a review of the impact of the services needed for and the concurrency requirements of the lawfully vested plats on the property. They contend this is no different than the review of the approval of the vested plats.

The Petitioners however contend the GMA Hearings Boards were granted broad powers to address compliance with the GMA. "In fact, jurisdiction over whether an entity is in compliance with the GMA and these goals is within the *exclusive* jurisdiction of this Board." (P. 3, Petitioner's Brief). (Emphasis in original). The Petitioners further argue that the Board has jurisdiction to consider whether the County's action was both procedurally and substantially compliant. They believe the Board must examine the repeal of the expansion of the UGA to determine if, in light of the record, the legislative action actually meets the requirements of the GMA. Did this action substantively comply with the GMA? The Petitioners believe that the County's actions do not bring it into compliance because it does not address any of the issues addressed in the Board's Final Order and actually undermines planned and coordinated growth as required under the GMA by creating urban development outside of a UGA. (P.8, Petitioner's Brief).

The Petitioners further contend that this matter is not moot and should not be dismissed because the Board has not yet ruled Spokane County is in compliance. The Petitioners also believe that the County is not brought into compliance with this legislative action.

BOARD ANALYSIS:

On February 14, 2006, the Board issued its Final Decision and Order (FDO) finding Spokane County out of compliance with the GMA. In that decision, the Board found the County's expansion of its Urban Growth Area (UGA) was in error. The County failed to prepare a population and land quantity analysis, as required; failed to engage in joint planning as required and to plan for capital facilities, utilities, and transportation within the

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

land adopted by Resolution No. 5-0649, and failed to "show its work" in the expansion of the UGA. The County further failed to insure that these changes were consistent with its Comprehensive Plan and development regulations. The County was directed to "take the appropriate legislative action to bring itself into compliance with this order...." (P. 30 FDO, February 14, 2006).

The County chose to perform the missing steps at the same time as the mandated update of the County's Comprehensive Plan. With that update, the County would perform a review and amendment of the Capital Facilities Plan and perform a population and land quantity analysis. The County, upon being continually found out of compliance due to the delay in the process, chose to repeal Resolution No. 5-0649, thus causing the Comprehensive Plan – Land Use Map and the UGA, to revert to its state prior to the adoption of the amendments to which Petitioners objected.

The Board must look to the Growth Management Act to determine if it has the subject matter jurisdiction to continue hearing this matter. The Board's jurisdiction is found in RCW 36.70A.280. RCW 36.70A.280 (1), provides that:

> A growth management hearings board shall hear and determine only those petitions alleging either:
> (a)That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, ... as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040....

Petitioners caused to be filed with the Board a petition for review of the adoption by Spokane County of an amendment to the Comprehensive Plan – Land Use Map adding properties to the UGA. This action was taken by Resolution No. 5-0649 of the Spokane County Board of County Commissioners (BOCC). The petition for review stated:

> "Petitioners seek review of Spokane County BOCC Resolution No. 5-0649, Findings of Fact and Decision in the matter of expanding the UGA by changing the land use map for five parcels of land on Five Mile Prairie and elsewhere, previously designed Urban Reserve (UR) to low density residential (LDR) and medium density residential (MDR);..." (Page 1, Petition for Review).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The Petitioners request for review did not challenge any other aspect of the County's Comprehensive Plan elements, the zoning or development regulations or the UGA designation prior to the adoption of Resolution No. 5-0649. The Board issued its Final Decision and Order in this matter on February 14, 2006, finding that the adoption of Resolution No. 5-0649 by the BOCC was not in compliance with several identified goals and/or requirements of the GMA and establishing a compliance schedule by which Spokane County was to take legislative action to bring its Comprehensive Plan into compliance with the GMA. The only action found out of compliance was the adoption of the above Resolution which expanded the County's UGA prior to performing required tasks. A finding of Invalidity was made by the Board.

The question on compliance is whether the jurisdiction has met the requirements of the Growth Management Act, not whether it complied with the specific directives of the Board's last order. *Butler, et al. v. Lewis County,* 99-2-0027c, (Order Finding Noncompliance and Imposing Invalidity 2-13-04); *Panesko, et al. v. Lewis County*, 00-2-0031c, (Order Finding Noncompliance and Imposing Invalidity 2-13-04). The Board does not have authority to order the County to take any particular actions to bring itself into compliance. Therefore, when the Board lists actions to be taken in any given case, that list must be viewed only as guidance and not as the standard against which compliance is measured. At a compliance hearing, the question is not whether the Board's direction was followed but whether compliance was achieved. *Dawes v. Mason County*, 95-2-0073 (Compliance Order, 6-5-03). The task of a GMHB is to determine compliance with the GMA, not whether there could be better solutions followed by a local government. *ICCGMC v. Island County* 98-2-0023 (Final Decision and Order, 6-2-99).

It is not the role of a GMHB to "balance the equities" in deciding a case. The GMHB's role is to determine compliance. If noncompliance is found, a GMHB remands the issue and is not authorized to direct a specific remedy. Local governments are afforded a "broad range of discretion" in determining a methodology for compliance. A petitioner must sustain the burden of showing that the action of the local government did not comply with GMA

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

under the clearly erroneous standard of review. *Vines v. Jefferson County* 98-2-0018 (Final Decision and Order, 4-5-99).

The County repealed its non-compliant action and the expansion of the UGA in this area was legislatively repealed.

The Board entered its order finding non-compliance. To bring them into compliance, the County could have repealed the objected to resolution or could have gone through the activities they had failed to perform. The simplest solution was to repeal the Resolution. The other remedies were more complicated and once performed the County still could be out of compliance if the population review did not demonstrate a need for the additional UGAs. Or, the public facilities plan might not demonstrate that services could be adequately provided to the enlarged UGA.

With the repeal of the portions of the resolution which enlarged the UGA, the objected to action was removed and the County brought itself into compliance. We can not find otherwise. The Petitioners contend that the Board should review the case substantially as well as procedurally. In doing so, the Board could look only at the County's action and whether it addresses the findings and conclusions in the FDO. To go beyond that and determine whether the vested development has proper facilities or the population analysis supports the enlargement of the UGA allowing this development would be beyond the Board's jurisdiction.

The Board recognizes that the now repealed actions of the County have the effect of permitting urban growth in what are now rural areas. That is not an issue the Board has jurisdiction to consider. The County is now in the mandatory update of its Comprehensive Plan process. That is where the Petitioners' concerns need to be addressed. Another petition would be needed to challenge the updated public facilities plan and whether the County adequately provided for the existing development in the County.

The Board does review the actions of the County to bring itself into compliance both procedurally and substantively. The repeal of the UGA expansion corrected the objected to action and returned the UGA boundaries in that area to its previous location. The

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

development in the previous expanded UGA is not the subject of this case and must be addressed in the County's mandatory update of its Comprehensive Plan which is now taking place.

III. ORDER

Based upon the Board's review of the GMA, prior decisions of the Boards, the February 14, 2006, Final Decision and Order, the presentations and briefings of the Parties at the compliance hearing and reviewing the additional briefing and having discussed and deliberated on the matter, the Board enters a Finding of Compliance.

Spokane County is found in compliance with the Final Decision and Order entered in this matter.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. The original and four copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the original and four copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service of the Board means actual receipt of the document at the Board office within thirty (30) days after service of the final order. A petition for judicial review may not be served on the Board by fax or electronic mail.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

SO ORDERED this 5th day of March 2007.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Dennis Dellwo, Board Member

John Roskelley, Board Member

Joyce Mulliken, Board Member

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Appendix C

Westlaw Delivery Summary Report for HUBERT,DAVE

Your Search:	Spokane /p Miotke
Date/Time of Request:	Tuesday, June 10, 2014 18:24 Central
Client Identifier:	D. HUBERT
Database:	WA-CS
Citation Text:	Not Reported in P.3d
Lines:	44
Documents:	1
Images:	0

Westlaw.

Not Reported in P.3d, 144 Wash.App. 1045, 2008 WL 2224110 (Wash.App. Div. 3)
(Cite as: 2008 WL 2224110 (Wash.App. Div. 3))
C

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.
SPOKANE COUNTY, a political subdivision of the State of Washington; Ridgecrest Developments, L.L.C., a Washington Limited Liability Company; Five Mile Corporation, A Washington Corporation; North Division Complex, L.L.C., a Washington Limited Liability Company; Canyon Investments, Inc., a Washington Corporation; Donald and Valena Curran, husband and wife; Stephen W. Trefts d/b/a Northwest Trustee & Management Services, Respondents,
v.
Kathy **MIOTKE**, an individual, and Neighborhood Alliance Of **Spokane**, Petitioners.
Spokane County, a political subdivision of the State of Washington, Respondent,
v.
Julia McHugh, an individual, Palisades Neighborhood, and Neighborhood Alliance of **Spokane**, Petitioners,
Greg and Kim Jeffreys, GJ L.L.C., and G.J. General Contractors, Respondents.

Nos. 25177–2–III, 25035–1–III.
May 29, 2008.

Appeal from Spokane Superior Court; Honorable Dennis A. Dellwo, J.

Stacy A. Bjordahl, Parsons/Burnett/Bjordahl, LLP, Margaret L. Arpin, Arpin Law Office, David W. Hubert, Attorney at Law, Spokane, WA, for Respondents.

Richard Kirk Eichstaedt, Center for Justice, for Petitioners.

UNPUBLISHED OPINION

PER CURIAM.

***1** These two cases are consolidated [FN1] direct appeals from decisions of the Growth Management Hearings Board of Eastern Washington (Board). The Board concluded that Spokane County (County) did not comply with Washington's Growth Management Act, chapter 36.70A RCW, when it amended its comprehensive plan to expand its urban growth area. The Board determined that the amendment was a clearly erroneous act. And it ordered the County to update its capital facilities plan and analyze population and land quantity before it modified its urban growth area.

> FN1. Both cases involve identical issues of law and we therefore consolidate them for purposes of this opinion. RAP 3.3(b).

The County started a process to comply with the Board's order but then repealed its amendment. This appeal is then moot. "An appeal is moot where it presents purely academic issues and where it is not possible for the court to provide effective relief." *Klickitat County Citizens against Imported Waste v. Klickitat County*, 122 Wn .2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993). And we dismiss it as such. *Id.*

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

Wash.App. Div. 3,2008.
Spokane County v. Miotke
Not Reported in P.3d, 144 Wash.App. 1045, 2008 WL 2224110 (Wash.App. Div. 3)

END OF DOCUMENT