

No. 34550-1

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

**LEWIS COUNTY,
Appellant and Cross-Respondent,**

v.

**MICHAEL T. VINATIERI, et al.,
Respondents and Cross Appellants,**

**WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD,
Agency Respondent.**

FILED
BY [Signature]
STATE OF WASHINGTON
CLERK OF COURT
07/13/07
LEWIS COUNTY

**RESPONDENT-CROSS APPELLANT
REPLY BRIEF ON CROSS APPEAL**

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I. CROSS-APPELLANT'S REPLY TO COUNTY

The County's response to Cross-Appellants is that "the touchstone for constitutional procedural due process claims is notice and opportunity to testify." (Co. Reply-Response Br. p. 13)

However notice of the fact that a hearing would occur is not sufficient. It is necessary that the notice apprise cross-appellants of the detailed subject matter of the hearing so that they could intelligently represent themselves and could provide the Board of County Commissioners (BOCC) with an opportunity to reach an informed decision. *Glaspey and Sons v. Conrad*, 83 Wn.2d 707, 712, 51 P.2d 934 (1974).

RCW 36.70A.035(1) provides that the notice be "of proposed amendments to comprehensive plans and development regulation." The applicable County Ordinance, at LCC 17.12.050(3)(a) requires that the notice of hearing before the BOCC be "on the materials directed by the Planning Commission". The materials directed by the Planning Commission consisted of the Transmittal dated August 26, 2003 and four attached maps. (Ex. XII-42p, CP 422-425, AR 671-675.) The materials

directed by the Planning Commission had included its recommendations with respect to designations of agricultural lands as proposed by maps submitted after hearing on August 26, 2003 and concept recommendations as to “farm homes” and “farm centers”. The materials directed by the Planning Commission did not apprise cross-appellants of any proposal to amend a definition of agricultural resource lands, to amend the comprehensive plan text or to rezone Mr. Abplanalp’s land. (Ex. XII-42p, CP 422-25, AR 672-75)

In response to prior findings of noncompliance and invalidity, the County had addressed development regulations pertaining to Agricultural Resource Lands (ARL) by its enactment of Ordinance 1179B on May 12, 2003 and Ordinance 1179C on June 2, 2003. (Tab 30 AR 330-387) The task of addressing designation of agricultural resource land was reserved for the action taken on September 8, 2003. (Ex. XII-42p, CP 423, AR 674) Ordinance 1179C had addressed the standards for the identification, classification and designation of ARL when it adopted amendments to LCC 17.30.570, .580, and .590. (Tab 30 AR 367-370) These provisions addressed the task of designation in terms of physical characteristics of the land, its relationship to urban areas and possibility of more intense development as measured by availability of services and surrounding

development. The statutory definition of Long-term commercial significance, RCW 36.70A.030(10), required an examination of:

“growing capacity, productivity and soil composition of the land for long-term commercial production, in consideration with the land’s proximity to population areas, and the possibility of more intense uses of the land.”

In contrast LCC 17.10.126a, enacted without notice on September 8, 2003, rejected the statutory definition of “long-term commercial significance” at RCW 36.70A.030(10). The County’s provision in Ordinance 1179 E (Ex. XII-44a Tab 30 AR 677) defined “long-term agricultural land” as

“those lands necessary to support the current and future needs of the industry, based on the nature and future of the industry as an economic activity and not on the mere presence of good soils.”

Similarly, in Resolution 03-368, (Ex. XII-44b Tab 30 AR 584) the County amended the text of its Comprehensive Plan, also without prior notice to include a provision:

Lands Necessary for Designation as Agricultural Lands of Long-Term Commercial Significance

The long terms (sic) needs of Lewis County commercially significant agriculture industry are served by the designation of 40,000 acres or more of lands, including bottom lands and lands with good soils and irrigation.

The above comprehensive plan provision continued the break from prior considerations as to how Agricultural Resource Lands would be

designated. It also introduced the term “bottom lands” that had not previously been debated. It could not be determined without substantial research whether the term “bottom lands” was synonymous with “flood hazard areas associated with Type I and Type II streams” designated by the County as Class B Farmlands under LCC 17.30.590(2). (Tab 30, AR 368) The question was significant because of the 54,576 acres of land the County claimed it designated as ARL, all but 13,767 acres had been designated as Class B. (WWGMHB Nos. 90-2-0027c, 00-2-0031c, Panesko-Butler Finding No. 6, 2-13-04 Order Finding Noncompliance and Imposing Invalidity)¹

Finally, the County considered the request of Mr. Abplanalp at the September 8, 2003 hearing before the BOCC to de-designate his land from prior ARL designation. The Planning Staff admitted they had not had a prior opportunity to comment on this proposal and stated the matter was not on the agenda of that date for consideration. In context, the Planning Commission’s prior recommendations on July 22, 2003 had responded to proposals to re-designate specific parcels of land. (Ex. XII-40 k, Vol. 2 CP 266, Exhibit associated with Tab 42 AR) Mr. Abplanalp’s land was not among the parcels considered. Cross-Appellants had not had an

¹ The Soil Survey of Lewis County Area, Washington, Ex. XII-36r at p. 215 distinguishes bottom land soils from flood plain soils and while there may be some overlap, it appears the bulk of the land designated did not qualify for designation under resolution 03-368.

opportunity to examine the Abplanalp parcel with respect to its conformance to the County's adopted criteria. The County's rationale for de-designation of the Abplanalp land was on the basis current use as an undersized dairy and isolation from other agricultural lands. These criteria were not contained in LCC 17.30.570, .580, and .590. (Ex. XII-43c, Vol. 3 CP 442-450 at 448) The capability of the designated land for other agricultural uses was not considered. If the County had wanted to provide a mechanism to grant exceptions to the adopted criteria shouldn't the notice have stated that so that a hearing could have been held on those issues?

The County responds that its published notice of the issues on review was adequate to inform the cross-appellants of the materials to be presented at the September 8, 2003 hearing before the BOCC. That notice (CP 428 attached to the Co. Response-Reply Brief) recites its publication on August 27, 2003, the day after the Planning Commission's hearing on the evening of August 26. It claims:

“A complete copy of the proposed amendments is available for review at no cost at: Lewis County Community Development ...”

It is disingenuous of the County to refer to what cross-appellants had notice of. It begs the question as to the surprise and lack of notice for items that were not on the agenda. Thus, for the reasons that follow, “the

proposed amendments” had to refer to the August 26 recommendations of the Planning Commission and not to the changes adopted by the BOCC on September 8, 2003.

The County agrees that Ch. 36.70 and Ch. 36.70A RCW must be read *in pari materia* to achieve a harmonious scheme. (Co. Response-Reply Br. p. 4) It further asserts that RCW 36.70.630 authorizes the BOCC to make changes to a development regulation simply by holding a hearing (Co. Response-Reply Br. p. 8-9). However, exercise of authority under RCW 36.70.630 does require that the BOCC must have considered the Planning Commission proposal at a public meeting, and then, if it deemed a change to be necessary, to give notice of its own hearing. Had the BOCC followed the required procedure, the record would have included minutes of the meeting that authorized the change from the Planning Commission recommendations to be considered.

The BOCC does not, however, have authority to change a provision of the Comprehensive Plan without first referring the matter to the Planning Commission for its consideration. RCW 36.70.430. It is only after the Planning Commission fails to act in a timely manner that the BOCC may adopt its own change to a comprehensive plan. RCW 36.70.440. The Planning Commission had not initiated a proposal to amend the text of the Comprehensive Plan and the BOCC had not initiated

a request for the Planning Commission to consider any such amendment.

The County did not allege that it had complied with this requirement.

There is no evidence that the BOCC held a meeting the very next day after the Planning Commission hearing to propose a change to the Planning Commission recommendations. There are no minutes of a meeting of the Board of County Commissioners to authorize anyone to present the draft changes considered on September 8, 2003. The County's representatives have never pointed to a single document showing that a draft of LCC 17.10.126a or Resolution 03-368 was available prior to or even during the September 8, 2003 hearing. Their opening brief at p.20 alleges only that:

“The draft form ordinance and resolution as well as maps were available for public review and comment at the hearing.”

Even if the amendments had been available at the commencement of the BOCC hearing, the task of addressing designations based on the County's definition reciting “the nature and future of the industry as an economic activity” would have required far more preparation than would have been afforded by the few minutes between the commencement of the public hearing and the time allotted for presentation of informed comments.

How could that action, assuming that is what the county had done, have satisfied the due process requirement of notice the County acknowledges is “the touchstone of due process claims”?

The County does allege that the proposed changes were within the alternatives available for public comment. Cross-appellants disagree. On August 26, 2003, the Planning Commission considered those proposed designation amendments proposed by the BOCC on August 12, 2003 and those designation proposals it had recommended on July 22, 2003. At the close of the hearing on August 26, the Planning Commission made its recommendations, adopting as its recommendation, portions of each. Cross-appellants believe the designation proposals of July 22, 2003, the BOCC designation proposals of August 12 and the designation recommendations of August 26 were the alternatives available for public comment. The changes enacted on September 8, 2003 were not within those alternatives.

The County’s claim that alternatives were available for comment seems to be based on an approved motion of the Planning Commission to “accept the report prepared (with amendments) as adequate to define commercial agriculture in Lewis County.” (Ex. 42 h, Minutes of 8-26-03 meeting, Vol. 3 CP 401-404 at 403). Nothing in that motion adopted the report as a proposal to amend development regulations or the

comprehensive plan text of Lewis County. While the report could be construed as a document in support of a proposal, it could not be considered an alternative. The report did not purport to constitute a proposed amendment to the comprehensive plan or development regulations. See RCW 36.70A.035(1). Further, the enactment language of September 8, LCC 17.10.126a and Resolution 03-368 text, was not contained in the accepted reports.

The County claims also that RCW 36.70A.140 afforded them a certain amount of creative license to enact amendments because they were under a deadline imposed by the hearings board. That exception contained in Section .140 applies only to a response to a finding of invalidity and then requires that participation must be “appropriate and effective” under the circumstances. On September 8, 2003, the County was responding to designations of ARL. Designations had previously been declared non-compliant, but not invalid. The County had previously addressed the invalid development regulation provisions when it enacted Ordinance 1179C. There was no reason to expect yet another effort on September 8, 2003, to address amendments to previously addressed invalid provisions without notice. RCW 36.70A.140 has no application here.

This court has authority to address “manifest errors” even if raised for the first time on appeal. RAP 2.5(a)(3). The authority has been

applied to claims of denial of procedural due process in civil cases.

Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986).

See *Esmieu v. Schrag*, 88 Wn.2d 490, 497-98, 563 P.2d 203 (1977).

These petitioners have been prejudiced by the failure of the County to provide sufficient notice and opportunity to address the issues recited.

The County cites two SEPA cases in support of its proposition that there was adequate notice and opportunity to be heard. *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 56-57, 52 P.3d 703 (2001) and *Moss v. City of Bellingham*, 109 Wn. App. 6, 29, 31 P.3d 703 (2001). *Thornton Creek* cites to several meetings after notice rendering the error harmless within the meaning of RCW 36.70C.130(1)(a). *Thornton Creek* at 56. *Moss* cited to a requirement in RCW 36.70C.060(2) that the petitioner must in fact have been prejudiced to prevail in a LUPA appeal. *Moss* at 29. Both cases involve specific projects. In this case, the County addressed County-Wide designations of Agricultural Resource Lands, a far more complex matter.

The substance of the notice in this case did not apprise the public of the County's intent to base its designation decisions on economic considerations rather than on physical characteristics of the land. Further the applicable County Ordinance, Ch. 17.12 LCC, requires the planning commission to prepare draft proposals, to make recommendations on the

proposal and to transmit the matter to the BOCC for a public hearing on the recommendations. The Planning Commission had made its recommendations on August 26, 2003. After the close of its hearing on September 8, 2003, the BOCC acted on matters not contained in the recommendations of the Planning Commission. That included rezone of land without opportunity for the staff or public to comment on the rezone; redefining agriculture (and thus appropriate designations) on a new non-debated definition based on “need”; and a comprehensive plan provision relating to the quantity and the quality of lands to be designated. It did not submit the matter for further hearing on the changes.

The County had not afforded these cross appellants and the public the procedural processes provided for in the applicable statutes and county ordinances. These cross-appellants were prejudiced by their inability to address the new definitions enacted by the County and by the County’s enactments not in compliance with its adopted ordinances and comprehensive plan provisions. The adoptions were not among the alternatives recommended by the Planning Commission for discussion.

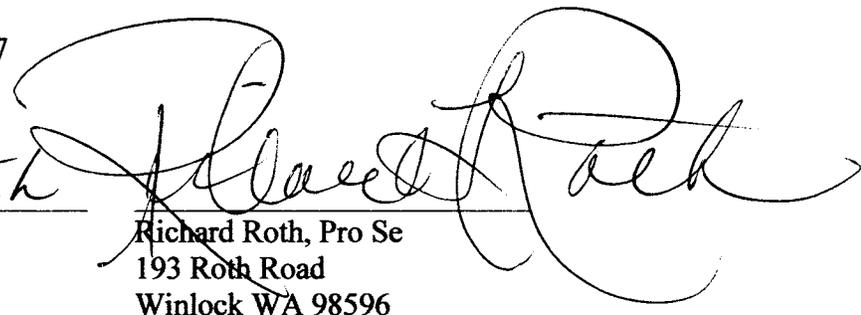
II. CONCLUSIONS

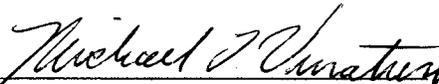
This Court should find that the County had not afforded procedural due process. It should find that the Western Washington Growth Management Hearings Board had authority to address procedural due

process issues; alternatively, if not the Growth Board, then this court should find the Courts had that authority.

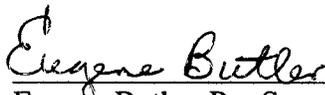
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CERTIFICATE OF SERVICE

EUGENE BUTLER declares as follows:

On the date set forth below I caused the Original and one copy of the RESPONDENT-CROSS APPELLANT REPLY BRIEF ON CROSS APPEAL and this CERTIFICATE OF SERVICE to be filed with the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402-4454 by deposit in the U. S. Mail, first class postage prepaid.

I caused one copy to be served by US Mail, first class postage prepaid, upon each of the parties below:

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I declare under penalty of perjury under the laws of the State of
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Signed at Chehalis, Washington on March 26, 2007.



EUGENE BUTLER