

37252-5-II

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

CLARK COUNTY, Appellant
v.
WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, ALVIN ALEXANDERSON, DRAGONSLAYER, INC., and MICHELS DEVELOPMENT, LLC, Respondents,
FROM THE SUPERIOR COURT FOR THURSTON COUNTY CAUSE NO. 07-2-01398-6
BRIEF OF APPELLANT

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I. INTRODUCTION

At issue in this APA appeal is the scope of the Western Washington Growth Management Hearings Board (“Hearings Board”) subject matter jurisdiction over a County/Tribal MOU which becomes effective only if the Tribal property is accorded Federal trust status. Reversing an earlier Hearings Board dismissal on the ground that the MOU did not constitute a comprehensive plan provision or development regulation, the Court of Appeals, in *Alexanderson v. Board of Commissioners*, 135 Wn.2d 541, (2006), ruled that a MOU water provision constituted a de facto amendment to a conflicting comprehensive plan goal affording the Hearings Board jurisdiction. In its challenged decision on remand, the Hearings Board interpreted the Court of Appeals decision to accord it review authority over the entire MOU and declared the MOU, as a whole, to be invalid for failure to comply with GMA public participation requirements.

The matter was appealed to the Thurston County Superior Court under Cause No. 07-2-01398-6. On December 14, 2007, the Superior Court affirmed the Hearings Board and denied Clark County’s Petition for Review.

The county asserts two errors. First, under a plain reading of the Court of Appeals decision and the Hearings Board jurisdictional statute, the Superior Court and the Hearings Board review authority is limited to MOU provisions which are found to conflict and, therefore, impliedly amend comprehensive plan policies. Second, the Superior Court and the Hearings Board erroneously refused to consider an understanding reached by the MOU parties subsequent to the Court of Appeals' decision that the MOU water provision had been severed.

The County seeks an order reversing the challenged Superior Court and Hearings Board decisions and remanding with instructions: (1) that the water provision is to be considered severed from the MOU; and (2) that the Board's subject matter jurisdiction is limited to any remaining MOU section which is found to conflict with and, therefore, constitute a de facto amendment of comprehensive plan policies.

II. STATEMENT OF THE CASE¹

¹ This matter is before the Court on a "short record" consisting of documents submitted to or issued by the Hearings Board following remand and a transcript of the Hearings Board remand hearing. A full record of the Hearings Board's original proceedings was filed with the Court in the first appeal under *Thurston County Superior Court Cause No. 04-0201723-5*. The County does not believe that reference to such original record is necessary in order to resolve the issues now presented. Except as noted by reference to the remand record, the statement of facts reflects the Court of Appeals' decision. For ease

A. The MOU.

On March 20, 2002, the Cowlitz Indian Tribe (the "Tribe") filed an application with the United States Department of Interior under 25 C.F.R. § 151.11 seeking federal trust recognition for approximately 152 acres located in unincorporated Clark County, adjacent to the 319th Street interchange with I-5, near the City of La Center. The application also indicated an intent to utilize the Site for gaming purposes (*i.e., a casino*). Such commercial use would have been inconsistent with the County's natural resource and industrial reserve comprehensive land use plan designation and agricultural zoning for the Site and surrounding land.² If enrolled, however, the site will be immune from state and county land use regulation.

An Indian Tribe's sovereign immunity from application of state and local taxation and regulatory authority on Indian lands is well settled. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (*state laws inapplicable on Indian reservation except where Congress has*

of reference, a copy of the MOU is being separately filed under the Declaration of Richard S. Lowry.

² At the time of the Hearings Board proceedings on remand, a County comprehensive plan update process was pending which, in part, proposed expansion of the La Center Urban Growth Boundary to include an I-5 junction area which encompassed the Site and surrounding land. *Transcript at pages 5-6, 64-65.*

expressly so provided); *Gobin v. Snohomish County*, 304 F.3d 902 (2002) (*the right of Indians to alienate their lands does not provide the county with a concomitant right to exert in rem land use regulations over those lands*); *Snohomish County v. Seattle Disposal Co.*, 70 Wn.2d 668, 673, cert. denied, 389 U.S. 1016 (1967), *rehearing denied*, 390 U.S. 930 (1968) ("*limitation on the use to which a lessee from the Tulalip Tribes can put Indian lands is limiting the Indian use. The County cannot indirectly accomplish federally-prohibited interference with property that it could not accomplish directly.*"). As to Indian gambling enterprises, the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that neither the state nor Riverside County had authority to enforce their gaming laws within tribal reservations. The doctrine of federal preemption of Indian affairs prevents states from applying state or local law to Tribal Indians on Indian reservations without an express grant of authority from Congress. Following *Cabazon*, Congress, in 1988, passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C., §§ 2701-2721, to provide a statutory framework for the operation and regulation of gambling activities conducted by Indian Tribes. The IGRA authorizes use of a state gambling regulatory system

through negotiated contracts; it does not confer state or local land use authority within Indian lands.

Recognizing that it would lack taxing or regulatory authority with respect to the Site, should it be accorded trust status, Clark County entered into negotiation with the Cowlitz Tribe, which culminated in the execution of a Memorandum of Understanding (“MOU”) on March 2, 2004. Given federal immunity from state or local regulation, the County did not believe that such instrument was subject to Growth Management Act (“GMA”) policies or requirements. Although public hearings were held³, the MOU was not noticed or processed as an amendment to the County's comprehensive plan or zoning regulations.

Except for use regulations, the MOU generally requires that the physical development of the Site be consistent with county building, traffic, environmental, sewer, health, and other development ordinances. (*Sections 7, 8, 9 and 10.*) Under Section 9.3, the Tribe agreed to connect to a public utility district public water system. The agreement also provides for a framework under which fire, law enforcement, prosecution, and court services could be provided (*Sections 3, 4, 5 and 6*); for Tribal

³ Transcript at pp. 32-33.

payments in lieu of property, sales, and transient occupancy taxes (*Section 11*); and for Tribal contribution to an educational and arts fund and a problem gambling fund (*Section 12*).

The MOU, which becomes effective only if the United States Secretary of the Interior accepts the site into trust for the Tribe (*Section 16*), expressly maintains sovereign immunity, except as specifically waived for disputes arising under the MOU. (*Sections 13 and 17.5*.) Nothing in the MOU waives sovereign immunity as to use. Federal proceedings on the Tribe's trust application remain pending.

B. Prior Proceedings.

In May of 2004, Respondents Alexanderson, et. al., filed a Petition for Review with the Hearings Board. On July 23, 2004, the Hearings Board dismissed the petition, holding that the MOU constituted neither a comprehensive plan amendment nor a development regulation falling within the Board' review authority under RCW 36.70A.280(1):

(1) 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, chapter

90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

The Hearings Board decision was affirmed on appeal by the Thurston County Superior Court (*J. Casey*) under Cause No. 04-0201723-5, and Respondents sought Court of Appeals' review.

Respondents had joined their APA appeal with an original action against Clark County challenging the MOU on a number of grounds, including alleged GMA noncompliance. Judge Casey ruled that venue for

such non-APA complaint properly lay in Clark County or an adjacent county. The declaratory action was transferred by stipulation to Cowlitz County and has since been dismissed by Respondents.⁴

C. The Court of Appeals' Decision.

On October 17, 2007, the Court of Appeals issued its decision holding that the Hearings Board possessed subject matter jurisdiction. *Alexanderson V. Board of Commissioners*, 135 Wn.App. 541 (2006). The breadth of the Court's jurisdictional ruling is the central issue in the present proceedings. The Court's analysis focused entirely on the inconsistency between Comprehensive Plan Goal 6.2.7 and MOU Section 9.3. The Comprehensive Plan Goal states that extension of public water service to rural areas may occur "only if service is provided at a level that will accommodate only the type of land use and development density called for in the *[comprehensive plan]*." MOU Section 9.3, in contrast, requires that "[t]he Tribe . . . provide for water supply through connection to the existing Clark Public Utilities system." The Court concluded, without opposition from the County, that the two provisions were in conflict:

⁴ Cowlitz Superior Court Cause No. 06-2-00350-1.

The County's plan designates the subject land as agricultural resource land and industrial urban reserve land. Both parties agree that the Tribe's projected [*Casino*] use of the subject land is inconsistent with the use the comprehensive plan permits. Yet, in Section 9.3 of the MOU, the County agreed to supply water to the subject land if the Tribe's trust status application is approved.

135 Wn.App. at 549.

The County contended that such conflict was legally immaterial since: (1) the MOU only becomes effective if the Site is accorded status as federal trust land; and (2) Tribal development then would not be subject to locally-enacted constraints. The Court, however, implicitly accepted Respondents' argument that federal immunity applied only to the Tribe so that County actions remained subject to GMA compliance.

In reaching the question of Hearings Board jurisdiction, the Court of Appeals reasoned that because of its comprehensive plan inconsistency, MOU Section 9.3 must be treated as a "de facto" comprehensive plan amendment:

Although the language of Section 9.3 does not explicitly amend Goal 6.2.7 of the County's comprehensive plan, it has the actual effect of

doing so. In the MOU, the County agreed to provide water to the subject land. In the comprehensive plan, the County agreed not to provide water at a level inconsistent with the comprehensive plan. The Tribe proposes to use the land in a manner inconsistent with the current land use designations for the subject land. Section 9.3 of the MOU and Goal 6.2.7 of the comprehensive plan are inconsistent. The MOU, in effect, supersedes and amends the comprehensive plan.

If the Tribe's application to the BIA is approved and the subject land is designated in trust, the land will be exempt from all state regulations under the GMA, except as far as the Tribe has consented to in the MOU. Upon approval of the trust application, the MOU will govern. Because the MOU explicitly supplies water in violation of the comprehensive plan the MOU is a de facto amendment to the comprehensive plan. To hold that the comprehensive plan has not been amended, where what was previously forbidden is now allowed, is to exalt form over function.

135 Wn. App. At 549-550 (*emphasis added*).

In a sentence relied upon by the Hearings Board as the basis for its expansive jurisdictional ruling,⁵ the Court concludes:

Because the MOU has the legal effect of amending the plan, just as if the words of the plan itself had been changed to mirror the MOU, the MOU was a de facto amendment and the Board has jurisdiction.

Id. at 550.

D. Severance of MOU Section 9.3.

Subsequent to the Court of Appeals' decision, the County and the Tribe, through an exchange of letters from their attorneys,⁶ agreed that the Court of Appeals' decision had, in effect, declared MOU Section 9.3 invalid, thus, triggering the severance provisions of MOU Section 17.3.

E. The Hearings Board Remand Decision.

The Court of Appeals remanded the matter to the Hearings Board for further proceeding consistent with the Court's ruling. The County moved to dismiss based upon the severance of MOU Section 9.3, while the Respondents counter-pled for summary judgment. The ensuing

⁵ Hearings Board Order at p. 3.

extensive briefing and oral argument focused upon whether or not other provisions of the MOU were analogous to its water mandate in conflicting with comprehensive plan policies, so as to fall within the Court's "de facto" comprehensive plan amendment rationale for jurisdiction. On June 19, 2007, the Hearings Board issued its Order on Motions on Remand. The decision: (1) concludes that the Court of Appeals' decision accorded it jurisdiction over the MOU as a whole (*page 3*); (2) declines to consider the County's MOU 9.3 severance argument on the basis that the issue was not presented to the Court of Appeals (*page 4*); (3) holds on the basis of a County stipulation that the MOU was not adopted in conformance with GMA public participation requirements (*page 5*); and (4) invalidates the MOU in its entirety.

III. STATEMENT OF ISSUES

The County's Petition for Review of the Hearings Board Order on Motions on Remand presents the following two issues:

⁶ Remand Record at p. 25, Exhibits 3 and 4.

- A. Does the Hearings Board Order erroneously interpret and apply the Court of Appeals' decision, and exceed the Board's subject matter jurisdiction under RCW 36.70A.280, in concluding that its review jurisdiction encompassed the MOU as a whole?
- B. Did the Hearings Board commit error of law in refusing to consider the determination by the parties to the MOU that Section 9.3 had been severed?

IV. STANDARD OF REVIEW

The Superior Court affirmed in total the Growth Management Hearings Board. Under both the summary judgment and legal conclusions and standard of review, the Court of Appeals reviews all decisions de novo.

The standard for review of an order of summary judgment is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 483, 78 P.3d 1274 (2003). This Court "performs the same inquiry as the trial court". *Jones v. Allstate Ins. Co.*, 146 Wn. 2d 291, 300, 45 P.3d 1068 (2002). Under de novo review, the Court of Appeals determines whether a moving party has met its burden of proving an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *See, Schaaf v. Highfield*, 127 Wn. 2d 17, 21, 896 P.2d 665 (1995).

The standard of judicial review of the challenged Hearings Board decision is governed by RCW 34.05.570(3). No factual issues are raised. Petitioner relies exclusively on subsections (b) and (d) which respectively permit judicial relief if "[t]he order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law" or "[t]he agency has interpreted or applied the law erroneously." Issues raised under these subsections are reviewed de novo, without deference to the agency's decision. *Quadrant v. State Growth Mgt. Hearings Bd.*, 154 Wn.2d 224 (2005).

V. ARGUMENT

- A. The Hearings Board erroneously exceeded its jurisdiction in concluding that it had review jurisdiction over the MOU as a whole.

Central to the Hearings Board decision on remand is its conclusion that the Court of Appeals remand "clearly was considering the MOU as a whole."⁷ Such conclusion will not withstand analysis. The Court of Appeals' decision directly held that the Hearings Board had subject matter jurisdiction because the MOU mandate for public water service to an urban Tribal use constituted a "de facto" amendment to the

County's comprehensive plan goal limiting the size of rural water extensions. The challenged Hearings Board decision, however, does not constrain its review authority to MOU provisions which conflict with comprehensive plan provisions. Instead, the Hearings Board reads the Court of Appeals' decision to grant it authority to review the MOU generally. This overly-broad reading of the Court of Appeals' decision is legal error for two reasons: It exceeds the plain reading of the remand decision, and it ignores the statutory limitations on Hearings Board review jurisdiction.

1. The Court of Appeals Decision.

The Court of Appeals' decision expressly holds that the potable water MOU provision, which admittedly conflicts with a comprehensive plan goal limiting the extension of public water, constitutes a "de facto" comprehensive plan amendment. The decision does not discuss any other provisions of the MOU. However, the question of whether other MOU sections similarly conflict with plan policies and, therefore, may also constitute "de facto" plan amendments over which the Hearings Board

⁷ Hearings Board Order at p. 3.

has jurisdiction, was aggressively argued to the Board.⁸ Respondents urged that MOU provisions regarding fire protection, police and roads were analogous in that they contemplated the provision of urban services to a rural area. The County responded that, unlike the MOU mandate for water, fire, police and traffic provisions of the MOU were unrelated to any urban\rural level of service standard and, except for roads, merely provided a framework for future service agreements.

The Hearings Board decision avoids the issue squarely presented by the Court of Appeals' decision. Instead, the Board concludes that it has review authority over the entire MOU without any limiting analysis whatsoever of the extent to which its provisions conflict with parallel comprehensive plan policies or goals.⁹

The error committed by the Hearings Board could not be more clear. The Court of Appeals held that "[b]ecause the MOU has the legal effect of amending the plan, just as if the words of the plan itself had been changed to mirror the MOU, the MOU was a de facto amendment and the Board has jurisdiction." *135 Wn. App at 550*. The Court did not rule that

⁸ See, legal argument before the Hearings Board commencing at Remand Record, pp. 825 and 890; Transcript.

the Hearings Board otherwise had authority to review the MOU for GMA compliance. The Court did not grant the Hearings Board unbridled review authority.

2. The jurisdictional statute.

RCW 36.70A.280(1), set out fully above, strictly limits the Hearings Board review authority, as applicable here, to petitions alleging that a city or county is not in compliance with GMA or SEPA requirements for GMA mandated "plans, development regulations or amendments."¹⁰ In *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 Wn.2d 169, 178 (2000), the Washington Supreme Court recognized this jurisdictional limitation in noting that "unless a petition alleges that a comprehensive plan or development regulation or amendments to either are not in compliance with the requirements of the GMA, a [*Growth Management Hearings Board*] does not have jurisdiction to hear the petition."

⁹ See, Order at p. 5 ("The appellate court determination that the Board has subject matter jurisdiction is inconclusive on the issue of Board jurisdiction.").

¹⁰ See also, RCW 36.70A.300 requiring, in relevant part, that Hearings Board final order "be based exclusively" on whether "plans, development regulations, and amendments" comply with the GMA.

The Hearings Board decision now on review ignores these jurisdictional limits.

The MOU deals with numerous subjects which lack any tie to GMA policies or requirements. MOU provisions regarding compliance with health standards (*Section 7*), payments in lieu of taxes (*Section 11*), and education/arts and problem-gambling contributions (*Section 12*) are obvious examples. Nor can the County fathom how a Tribal commitment to develop its property consistent with county development regulations (*Section 10 and the bulk of the MOU attachments*) might run afoul of the GMA. Yet, the Hearings Board decision asserts review authority over all these provision, and declares them all to be invalid.

3. "De facto" amendments.

The Court of Appeals' decision introduces into GMA jurisprudence the concept of "de facto" comprehensive plan amendments as a basis for Hearings Board jurisdiction. The concept, as understood by the County, is that county or city action not processed as a comprehensive plan amendment may be treated as a plan amendment, thus affording Hearings Board review jurisdiction if the enactment conflicts with provisions of the comprehensive plan. In short, the action is to be

considered as an amendment to the comprehensive plan policies with which it conflicts.

Nothing in the Court of Appeals' decision purports to otherwise widen the window of Hearings Board review. The basis for jurisdiction, an enactment's conflict with comprehensive plan policy, necessarily limits the Hearings Board's scope of review. By failing to so limit its review, the Hearings Board committed a clear error of law and exceeded its statutorily-limited jurisdiction.

- B. The Hearings Board erroneously declined to consider the severance of MOU Section 9.3.

The direct holding of the Court of Appeals' decision is that MOU Section 9.3 (*requiring connection to CPU water*) conflicted with and, therefore, was a de facto amendment of, Comprehensive Plan Goal 6.2.7 (*limiting rural public water extensions to rural-intensity developments*), which de facto amendment was subject to Hearings Board review. In response to the decision, the parties to the MOU, in an exchange of letters from their attorneys, agreed that GMA provisions precluded "fixing" the conflict through a conforming comprehensive plan amendment, so that the Court of Appeals' decision "effectively" declared MOU Section 9.3 void. The parties to the MOU agreed that Section 9.3, therefore, had been

severed from the MOU pursuant to the severability provisions of Section 17.3.¹¹

The Hearings Board declined to consider this severance determination on the grounds that it had not been presented to the Court of Appeals:

The second prong of the County's argument is that the Court of Appeals decision itself deprived the Board of subject matter jurisdiction. The County argues that Section 9.3 of the MOU is now "severed" because the Court of Appeals' decision "effectively" invalidated it. While the County has not altered the agreement itself, the County and the Tribe have agreed that Section 9.3 has been declared invalid by the Court of Appeals and so that provision has been severed from the rest of the MOU. If this result was an automatic consequence of the Court of Appeals' decision, then it should have been part of the argument presented to the Court of

Appeals as to why there would be no Board jurisdiction. Under the County's theory, any determination that the MOU violated the comprehensive plan would result in invalidation, severance and a lack of subject matter jurisdiction. This argument was not raised before the Board

¹¹ Remand Record at page 25 (Exhibits 3 and 4).

the first time a motion concerning jurisdiction was brought; and it was not raised to the Court of Appeals. Since the argument could have been raised in the first appeal, it cannot be brought now. Even in cases raising constitutional violations, the Washington courts have found that issues that could have been (but were not) raised in the first appeal may not be the basis for a second appeal. The Board, therefore, will not second-guess the Court of Appeals on an issue that could have been raised to that court in the first appeal.

Hearings Board Order at p. 4 (footnotes omitted).

The only authority cited by the Hearings Board to support its refusal to consider the severance determination is *State v. Suave*, 100 Wn.2d 84 (1983).¹² In such criminal sentencing appeal the Supreme Court declined to consider an issue which had not been raised before the trial court or in an earlier sentencing appeal. The decision is inapposite for at least three reasons. First, the issue presented by the original Hearings Board Order and the Court of Appeals' decision dealt with subject matter jurisdiction; questions of substantive validity and potential resulting severance were neither before the Court nor addressed. Second, the

¹² Hearings Board Order at p. 4 (footnote 14).

severance issue only became relevant after the Court of Appeals determined that the Hearings Board had jurisdiction under the de facto amendment rationale. Finally, the severance question is premised upon an understanding reached by the parties to the MOU subsequent to the Court of Appeals' decision; it could not have been earlier raised.

Under the law of the case doctrine "once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Trautman*, 60 Wash. L. Rev. at 810 (1985). Unlike application of res judicata to subsequent litigation between the same parties, however, the law of the case doctrine "applies only to issues actually decided." *Fluke Capital and Management Services Co. v. Volney Richmond III*, 106 Wn.2d. 614, 620 (1986), citing *Riley v. Sturdevant*, 12 Wn.App. 808 (1975), and *Trautman, supra*. The issue of severance was not presented to or considered by the Court of Appeals. Indeed, the potential for severance only arose after the Court of Appeals' decision concluded that the MOU provisions were subject to comprehensive plan consistency review.

Nor could the County have raised the severance issue before the Court of Appeals. Section 17.3 of the MOU provides for severance of MOU provisions which are declared invalid by a court of competent

jurisdiction. However, the issue before the Court was Hearings Board jurisdiction, not the substantive validity of MOU provisions. The parties to the MOU subsequently determined that that the practical effect of the Court's ruling was to invalidate MOU Section 9.3 because it was concluded that GMA limitations on the extension of urban services to rural areas (*see*, RCW 36.70A.030(16); 37.70A.110(4)) would preclude a conforming comprehensive plan amendment. Had the MOU parties, instead, formally amended the MOU to delete Section 9.3, the effect would have been the same.

The Hearings Board erred in failing to consider the severance of Section 9.3 from the MOU.

VI. CONCLUSION

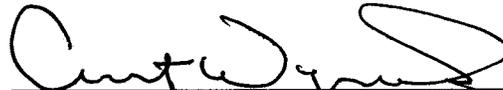
Based upon the foregoing argument and authorities, Clark County respectfully requests that this Court overturn the Hearings Board Order on Motions on Remand and remand to the Board for further proceedings with instructions: (1) That Section 9.3 of the MOU is to be considered severed from the agreement; and (2) That the Board's subject matter jurisdiction over the MOU is limited to any remaining section thereof which the Board

finds to conflict with and, therefore, constitutes a de facto amendment
of, County comprehensive plan policies.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

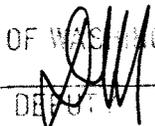


CURTIS G. WYRICK, WSBA #6918
Chief Deputy Prosecuting Attorney

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DIVISION II

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STATE OF WASHINGTON

BY 
DEP. CLERK

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

CLARK COUNTY,

No. 37252-5-II

Appellant,

v.

AFFIDAVIT OF MAILING

WESTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD, et al.

Respondents.

The undersigned, being first duly sworn, upon oath, deposes and says:

That I am a citizen of the United States of America and of the State of Washington, living and residing in Clark County, in said state; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 8th day of April, 2008, affiant deposited with the courier as set forth below properly stamped and addressed envelopes directed to the following named individuals, to-wit:

Patrick W. Ryan
Eric S. Merrifield
Perkins Coie LLP
1201 3rd Avenue, Suite 4800
Seattle WA 98101-3099

1
2 Martha Patricia Lantz
3 Office of Attorney General
4 PO Box 40110
5 Olympia WA 98504-0110

6 The envelopes contained the following:

- 7 1. Appellant's Brief;
8 2. Notice of Substitution of Counsel and Change of Address; and
9 3. Affidavit of Mailing.

10 Thelma Kromer

11
12 SUBSCRIBED AND SWORN to before me this 8th day of April, 2008.



Mindy J. Lambertson
NOTARY PUBLIC in and for the State of
Washington, residing in Vancouver.
My commission expires: 4-1-2012