

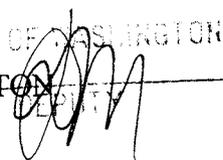
FILED
COURT OF APPEALS
DIVISION II

No. 37252-5-II

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STATE OF WASHINGTON

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.

APPELLANT'S REPLY BRIEF

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

CURT WYRICK, WSBA #6918
Chief Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office
Civil Division
604 W. Evergreen Blvd.
PO Box 5000
Vancouver, WA 98666-5000
Telephone (360) 397-2478

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I. INTRODUCTION

The parties to this appeal dispute the validity of the decision by the Western Washington Growth Management Hearings Board (“Hearings Board”). *Alexanderson v. Clark County, Order on Motion on Remand, No. 04-2-0008, 2007 GMHB Lexis 15 (2007)* (“Remand Decision”). The Remand Decision purported to apply this court’s ruling in an earlier phase of the litigation. *Alexanderson v. Board of Clark County Commissioners, 135 Wn. App. 541, 144 P.3d 1219 (2006)* (“*Alexanderson I*”).

In its Remand Decision, the Hearings Board held that it had jurisdiction over an entire contract (Memorandum of Understanding or “MOU”) between Clark County and the Cowlitz Indian Tribe. Having broadly construed its review authority, the Hearings Board determined that the MOU, as a whole, was invalid under the terms of the Growth Management Act (“GMA”). Thurston County Superior Court affirmed the decision of the Hearings Board.

Now Clark County seeks a determination that the Hearings Board misread, misconstrued and misapplied governing law and the Court of Appeals’ holding of *Alexanderson I*, in concluding that it could exercise jurisdiction over the MOU as a whole. In addition, the County requests a ruling that the Hearings Board should have considered the determination

of the parties to the MOU that severed Section 9.3 from the MOU. *Brief of Appellant, dated April 9, 2008, (“Appellant’s Brief”) at 12-13.*

In their Response Brief dated October 17, 2008 (“Response Brief”), the Respondents contend that this Court’s decision in *Alexanderson I* set forth a rule of law authorizing the expanded jurisdiction exercised by the Hearings Board and that rule is the law of the case. *Response Brief at 9-19.* Respondents complain that the County improperly raised, or will raise, arguments before this Court concerning the substance of the Remand Decision. *Response Brief at 19-23.*

Respondents dispute that the MOU’s severance clause effectively operated according to its terms to sever the voided provision from the remainder of the MOU. *Response Brief at 24-26.* Finally, Respondents argue that the MOU is a development regulation. *Response Brief at 26-30.* This Reply Brief addresses each argument in turn.

II. REPLY TO ARGUMENTS

A. Reply to First and Second Arguments (*Response Brief at 9-19*):

The Doctrine of the Law of the Case Does not Apply to Preclude Consideration of the Jurisdictional Issue Presented by This Appeal.

Respondents assert that the County “improperly” requests this Court to rule that the Hearings Board Order misconstrued and misapplied

the Court's holding in *Alexanderson I*. Respondents claim that the County wants the Court to "revisit the previously decided jurisdictional ruling", and that the Court is precluded from doing so under the law of the case doctrine. *Response Brief at 1-4, 9-19, 30*. This theme, which pervades the Response Brief, does not correctly characterize either the holding in *Alexanderson I* or the County's arguments now before the Court. The County's arguments concern the proper interpretation and application on remand of the *Alexanderson I* decision and preclusive doctrine does not apply to limit the Court's consideration of these arguments.

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). Obviously, in order to follow a principal of law articulated by an appellate court, the body ruling on remand must correctly discern the legal principal that the Court announced. The Hearings Board failed in that endeavor, as do the Respondents. It does not violate any preclusive doctrine for the Court of Appeals to rule that the Hearings Board must follow the actual rule of law set forth in *Alexanderson I*.

The Court held in *Alexanderson I* that Section 9.3 of the MOU (regarding providing a public water supply to Cowlitz Tribal trust land) contravened Goal 6.2.7 of the County's comprehensive plan, and therefore was a *de facto* amendment to the comprehensive plan. *135 Wn. App. at 548-50*. The Hearings Board, in its Order on Motions on Remand, examined the actual language of *Alexanderson I* very little. *Remand Decision at 3-5*. Even so, the Board's Order acknowledged that "the Court of Appeals' analysis uses Section 9.3 of the MOU as the basis for its determination that 'what was previously forbidden is now allowed.'" *Remand Decision at 3*.

This Court's ruling in *Alexanderson I* was indeed based entirely on the conflict between Section 9.3 of the MOU and the comprehensive plan. The Court cited no other provision of the MOU in *Alexanderson I* and certainly did not hold any other provision of the MOU to be in conflict with the comprehensive plan. The Court ruled that "[b]ecause the MOU explicitly supplies water in violation of the comprehensive plan, the MOU is a *de facto* amendment of the comprehensive plan." *135 Wn.App. at 550*. Although Respondents argued that MOU provisions, in addition to Section 9.3 conflicted with the county plan (*Response Brief at 14-18*), the Court

made no holding on Respondents' arguments about any other sections of the MOU.

Alexanderson I broke new ground in extending the jurisdictional grant of RCW 36.70A.280(1)(a) to encompass an agreement between a sovereign Indian Tribe and a county whose land will surround future Tribal trust lands. In its decision, however, the Court addressed only Section 9.3 and did not indicate an intention to recognize GMA subject matter jurisdiction over the MOU as a whole. On remand, rather than analyzing which MOU provisions might actually conflict with the comprehensive plan and ruling accordingly, the Hearings Board simply invalidated the entire plan.

Respondents, like the Hearings Board, mischaracterize the Court of Appeals' decision in *Alexanderson I* and the County's arguments concerning the ruling. The Court held that a provision of the MOU that conflicts with the comprehensive plan had amended the plan, triggering review jurisdiction by the Hearings Board.

The County contends that under *Alexanderson I*, Section 9.3 is the only provision of the MOU that has been found to violate the plan, or that does violate the plan and that it is, therefore, the only MOU provision that has been found to *de facto* amend that plan. Consequently, the Hearings

Board does not have jurisdiction over the unexamined MOU as a whole, much of which is unrelated to GMA considerations.

The Hearings Board concluded that the entire MOU is a *de facto* plan amendment and that it, therefore, has jurisdiction over the MOU as a whole, regardless of the MOU's content, regardless of the explicit limitations to its authority set forth in statute, and regardless of this Court's direction in *Alexanderson I*. Respondents commit the same errors, and characterize the County's position as an assumption that "this Court inadvertently or carelessly used expansive language when it ordered the Growth Board to exercise its jurisdiction." *Response Brief at 12, 18*.

On the contrary, the Court's holding limited the Hearings Board's jurisdiction to that which conflicted with the comprehensive plan. That is the real law of the case in this litigation. The Hearings Board is not authorized by statute to invalidate every provision of the MOU without analysis of the terms and effect of each provision. No such analysis was present in the Hearings Board's decision, and consequently, it acted outside its jurisdiction.

The Respondents cite their prior arguments to this Court that MOU provisions on topics other than water supply conflicted with the comprehensive plan. *Response Brief at 14-19*. Respondents contend that

these arguments demonstrate the Court's view that Section 9.3 is simply an illustration of the MOU's general noncompliance with the plan.

Response Brief at 17. The County also addressed MOU provisions that concern other services and pointed out that they are not like the agreement on water supply. *See Appellant's Brief at 15-16.* Respondents cannot seriously contend that this Court, without any discussion or stated decision to that effect, implicitly adopted Respondents' arguments as its holding.

Alexanderson I cannot be read to offer any support for that notion.

Finally, Respondents raise two arguments that have no relevance to the validity of the Remand Decision. First, Respondents argue that the County urged the Court to limit the scope of its decision in a Motion for Reconsideration of the *Alexanderson I* decision. *Response Brief at 13-14.* Respondents characterize that position as acknowledgement of the broad scope of the ruling in *Alexanderson I*. More importantly, the Court denied the County's motion because its decision was itself sufficiently limited. In any event, the County's position at that phase of the litigation is not relevant to a determination of whether the Remand Decision correctly applied the Court's ruling.

Respondents also state that if the jurisdictional ruling of *Alexanderson I* had been limited to one section of the MOU, the Court

would have addressed Respondents' other jurisdictional arguments. *Response Brief at 18-19.* Respondents fail to recognize that under *Alexanderson I*, Hearings Board jurisdiction was based upon an explicit conflict between an MOU provision and the county plan, and that the Court remanded the matter to the Hearings Board to exercise jurisdiction on that basis. Any further review of the MOU provisions was to be in proceedings by the Hearings Board exercising its lawful jurisdiction to review those provisions. The Court of Appeals, therefore, did not need to address Respondents' second assignment of error in *Alexanderson I*, but not for the reason claimed by Respondents.

The Court should reject the Respondents' contentions that the entire MOU was legitimately within the jurisdiction of the Hearings Board and should reverse the Hearings Board's Remand Decision.

B. Reply to Third Argument (Response Brief at 19-23):

The County's Argument Before This Court Properly Concerned Whether the Hearings Board had Jurisdiction to Issue its Decision.

Respondents complain that the County improperly raised arguments before this Court for the first time regarding the substance of the Hearings Board decision. In fact, the complained of arguments are inextricably entwined with the Hearings Board's exercise of jurisdiction in

reaching its decision, a matter that was indisputably before the Hearings Board.

1. The Hearings Board Erroneously Subjected the MOU, as a Whole, to Invalidation.

This Court, in *Burien v. Growth Management Hearings Board*, 113 Wn. App. 375, 553 P.3d 1028 (2002), made clear that the entire MOU is not subject to the jurisdiction of the Hearings Board under the GMA and, therefore, cannot be invalidated as a whole.

The *Burien* case upheld the Central Puget Sound Growth Management Hearings Board decision approving comprehensive plan and zoning amendments adopted by the City of SeaTac. SeaTac proposed the amendments in accordance with an interlocal agreement to settle litigation with the Port of Seattle. At issue was whether SeaTac had circumvented the public participation requirement of GMA by entering into an interlocal agreement during negotiations which were not open to the public. The Board had ruled that SeaTac had complied with GMA's public participation requirements and this Court affirmed. The *Burien* Court upheld the reasoning of the Central Puget Sound Hearings Board as follows:

Here, the Board clarified the limits of its jurisdiction explaining that the negotiation and execution of the ILA [Interlocal Agreement] itself was not a non-GMA action

and, thus, was not subject to the Board’s jurisdiction. But it ruled that the “provisions of the ILA, if any, that are *included as a Plan or zoning code amendments* are subject to the provisions of RCW 36.70A.140 *during the Plan or zoning code amendment process.*”... We presume the Board meant that it could not review the ILA itself, but it could – and did – review the process by which portions of the ILA became amendments to SeaTac’s Comprehensive and Zoning Plan.

113 Wn. App. at 384 (citation omitted; emphasis in original).

The Court went on to find:

The Board properly ruled that the ILA was not executed under the GMA and, by its terms, did not amend Sea Tac’s plan or regulation; the negotiation and execution of the ILA itself, a non-GMA action, is not subject to the public participation requirements of GMA over which the Board has jurisdiction....

We agree that the Board lacked jurisdiction to review the interlocal agreement and affirm.

113 Wn. App. at 388-89 (citation omitted).

As the *Alexanderson I* Court found, a provision of an interlocal agreement (MOU) which constitutes a *de facto* amendment to the comprehensive plan is subject to hearings board jurisdiction. But the holding in the *Burien* case makes it clear that jurisdiction is limited to the offending provision and does not subject the entire agreement to hearings board jurisdiction.

The Hearings Board's exercise of jurisdiction over the MOU, as a whole, did not comport with the ruling in *Alexanderson I*, and its ruling that the MOU, as a whole, was subject to invalidation under the GMA arose from the same error. Invalidation of an entire interlocal agreement as a remedy was specifically rejected by the Central Puget Sound Growth Management Hearings Board and the *Burien* Court.

2. The Hearings Board Erroneously Ruled That the MOU, as a Whole, was Subject to GMA Public Participation Requirements.

The Court in *Burien* also made it clear that the entire MOU is not subject to the jurisdiction of the Hearings Board to analyze public participation compliance under the GMA. *113 Wn. App. 375*.

Even if an interlocal agreement, such as the MOU, were subject to the public participation requirements of GMA, the term "public" participation is not defined statutorily. The *Burien* court at p. 387 noted that "early and continuous public participation" under RCW 36.70A.140:

. . . must include broad dissemination of proposals, opportunity for written comment, public meetings after effective notice, open discussion, communication programs, information services and consideration and response to public comments RCW 36.70A.140. However, inexact compliance with these procedures will not invalidate any adopted plan or amendment "if the spirit of the program and procedures is observed. RCW 36.70A.140.

Clark County stipulated that the MOU had not been processed as part of the GMA proceedings. But that is not to say that there was not some form of public process. Members of the county met with neighborhood associations to discuss advisability of entering into an agreement. Meetings by members of the Board of County Commissioners were held in LaCenter and Ridgefield, cities closest to the proposed site. The draft MOU was posted on the County website and made available through hard copy. Comments were received and considered. Two public hearings were held relating to the adoption of the MOU, which was eventually signed.

The Remand Decision did not analyze whether Clark County's non-GMA public participation outreach had been sufficient to comply with the spirit of the program. The Board simply determined that Clark County's stipulation that the MOU had not been adopted as a comp plan amendment through the GMA process was fatal to the entire MOU.

Within weeks of issuing its *Alexanderson* Remand Decision, the same Hearings Board decided the case of *City of Anacortes v. Skagit County*, No. 07-2-003, 2007 GMHB 73 (2007). In that case, the Board was required to distinguish the Clark/Cowlitz MOU from an MOU regarding the utilization of the Skagit River basin that had been entered

into by the City of Anacortes, a PUD, various Indian Tribes, and the Washington State Departments of Ecology and Fish and Wildlife. The Anacortes MOU was challenged on the grounds that it violated the GMA and the County's comprehensive plan. The Hearings Board, in its decision at pages 4-5 of *City of Anacortes*, analyzed the *Alexanderson I* decision as follows:

More recently, the Court of Appeals determined that an agreement may be a *de facto* comprehensive plan amendment where, under its terms, the agreement allows something that was previously forbidden by the comprehensive plan. *Alexanderson v. Clark County*. In that case, Clark County entered into a Memorandum of Understanding (MOU) with the Cowlitz Indian Tribe that required the County to provide water to the Tribe's land if it was placed in trust status, despite provisions to the contrary in the County's comprehensive plan. The Court there found that certain language of the MOU, while not explicitly amending the Comprehensive Plan, had the "actual effect of doing so" and that that MOU "supersedes and amends the comprehensive plan" because it would allow the Tribe to use the land in a manner inconsistent with the current land use designation. The Court noted that because the MOU explicitly supplied water to the subject land in violation of the comprehensive plan, it was a *de facto* plan amendment. As the Court noted, "what was previously forbidden is now allowed."

While the Court in *Alexanderson* did not explicitly state what is required for an agreement to constitute a *de facto* comprehensive plan amendment, it held the petitioners in that case to a high standard. The Court did not rely upon the GMA terms of "consistency" or "inconsistency." Instead, the Court articulated a standard for finding a *de facto* comprehensive plan amendment that appears to be

even more stringent. For an agreement to “effectively” amend a comprehensive plan under the *Alexanderson* standard, it is not enough that it be merely “inconsistent” with the plan. It must clearly and directly supersede a plan provision so that “what was previously forbidden is now allowed.”

The distinction between an “inconsistency” and an “effective amendment” is important. If any inconsistency between an agreement and a comprehensive plan confers jurisdiction upon the boards, then the requirement that the comprehensive plan must be an internally consistent document would extend board jurisdiction to all agreements that address subjects also addressed in the comprehensive plan. **This is a potentially enormous class of agreements and such a reading of *Alexanderson* would expand the statutory grant of jurisdiction to the boards well beyond its own clear terms.**

“Consistency” is a requirement that has been well-developed in the interpretation of the GMA. The Minimum Guidelines state:

The act calls for ‘consistency’ in a number of contexts. In general, the phrase ‘not incompatible with’ conveys the meaning of ‘consistency’ most suited to preserving flexibility for local variations. An important example of the use of the term is the requirement that no one feature precludes the achievement of any other.

WAC 365-195-070(7) (in pertinent part).

We find, therefore, that a de facto comprehensive plan amendment must do more than create an inconsistency between the agreement and the plan. It must actually force or prohibit action in direct contrast with a plan policy directive. (*Footnotes omitted; emphasis added.*)

In *City of Anacortes*, the Hearings Board recognized that it had opened Pandora's Box in the *Alexanderson* Remand Decision. The Hearings Board, therefore, limited its reading of the *Alexanderson I* decision to only apply to provisions which "force or prohibit actions in direct contrast with a plan policy directive." The Hearings Board's new analysis of the *Alexanderson I* decision was based upon the holding that the MOU was a *de facto* comprehensive plan amendment because one MOU provision required the County to provide water to the Tribe if the land were placed into trust, and that specific provision was contrary to the County's comprehensive plan. In other words, the Hearings Board finally recognized that the sole basis of the *Alexanderson I* analysis by the Court of Appeals was that Section 9.3 had operated to amend Goal 6.2.7.

This analysis was the argument Clark County had made a few weeks before. The County argued that the Court of Appeals' decision had relied exclusively on the fact that Section 9.3 of the MOU acted as a *de facto* amendment to Goal 6.2.7. This argument was rejected by the Hearings Board when it issued the Remand Decision. Instead, it ruled that the entire MOU amended the comp plan and that its jurisdiction extended to ruling that GMA public participation was required for the entire MOU.

What other provision of the Clark County Cowlitz MOU besides Section 9.3 was relied upon by the Court of Appeals to find a *de facto* amendment to the comprehensive plan? No other provision of the MOU has been found to be a *de facto* amendment to the comp plan. The Hearings Board did not determine whether the remaining provisions of the MOU were *de facto* amendments to the comp plan, were simply inconsistent with the comp plan, or were provisions over which the Hearings Board had no jurisdiction and, therefore, no authority to invalidate. The Hearings Board simply invalidated the entire MOU because Clark County agreed it had not processed the entire MOU in the same method as comprehensive plan amendments subject to GMA requirements.

With Section 9.3 severed and none of the remaining provisions of the MOU found to constitute comp plans, development regulations, or amendments to either, then the public participation provision of GMA does not apply to the MOU. Unless one of the remaining provisions “allows what was previously forbidden,” the Hearings Board has no subject matter jurisdiction over the remaining provisions of the MOU. It was beyond Hearings Board authority to subject the entire agreement to GMA public participation requirements.

C. Reply to Fourth Argument (Response Brief at 24-26):

The Hearings Board Should Have Considered the Severance of MOU Section 9.3 From the Remainder of the MOU.

The Hearings Board declined to consider the County's argument on the effects of the determination by the parties to the MOU that Section 9.3 had been severed from the MOU, on the grounds that the argument had not been presented to the Court of Appeals. *Appellant's Brief at 20*. The County now asks this Court to rule that the Hearings Board should have considered and ruled on the merits of the County's arguments on the severance determination. *Id. at 19-23*.

Respondents direct their briefing to the merits of the severance argument, rather than the question on appeal: Did the Hearings Board erroneously rule that it would not consider arguments regarding the severance of Section 9.3? Without conceding the validity of Respondents' positions on severance, the County will not reply to them at this point. First the Hearings Board must consider the merits. The Court should instruct the Hearings Board to consider and rule on the merits of the severance question.

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D. Reply to Fifth Argument (Response Brief at 26-30):

The MOU Does not Constitute a Development Regulation.

Respondents request the Court to take up the question of whether the MOU is a development regulation, “[i]f this court now holds that the Court’s prior jurisdictional ruling applied only to MOU section 9.3.”

Response Brief at 26. Respondents argue that the MOU is a development regulation. *Response Brief at 26-30.* The Court should decline the Respondents’ invitation to characterize the MOU in this manner.

The GMA defines “development regulation” in RCW 36.70A.030(7) as follows:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

The plain meaning of the term “development regulation” entails controls unilaterally placed by the county on developments through exercise of its police power. Each of the examples contained in the above

definition constitutes an instance of legislatively enacted and imposed measures. In contrast, the MOU was entered into as an agreement to address the use of property once it is no longer subject to County police power jurisdiction by virtue of its trust status.

Respondents rely upon the Hearings Board decision in *Servais v. City of Bellingham*, No. 00-2-00-20, 2000 GMHB Lexis 361 (2000), for the proposition that a memorandum of agreement (MOA) can constitute a development regulation. In *Servais*, the Hearings Board reviewed an MOA between the City of Bellingham and Western Washington University. Because the MOA “direct[ed] and amend[ed] the adopted zoning code of the City of Bellingham, specifying the permit application and approval process for development projects on the WWU campus within the city limits of Bellingham,” the Hearings Board concluded that the MOA did constitute a development regulation. The Board then held that the MOA had not been adopted in compliance with the GMA.

The *Servais* case is easily distinguishable from the present controversy. In *Servais*, the Hearings Board concluded that Bellingham had amended its development regulations applicable to WWU through an

MOA. In contrast, and as previously found by the Hearings Board,¹ in this case the County will have no unilateral regulatory authority over the Tribal trust lands under the MOU. The Tribe's agreement to develop in conformity with selected County development regulations (which were not modified in the MOU) does not entail the County placement of official controls on Tribal trust lands; accordingly, the MOU is not a development regulation within the meaning of GMA.

Finally, the Tribe's agreement to develop in conformity with unmodified County development regulations cannot correctly be characterized as an amendment to the development regulations.

III. CONCLUSION

For the foregoing reasons, Clark County respectfully requests that the Court reject the arguments of the Respondents, and reverse and remand

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¹ The Hearings Board drew this conclusion in its initial Order on Respondent's appeal, *Alexanderson v. Clark County*, No. 04-2-0008, 2004 GMHB Lexis 54 (2004) at page 6. That conclusion was not appealed.

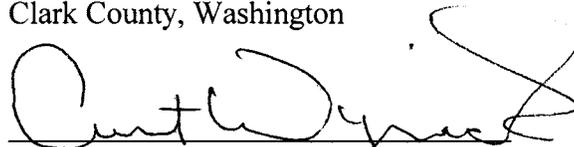
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Hearings Board.

Dated: November 14, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

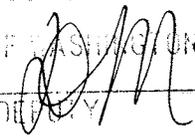
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CURTIS G. WYRICK, WSBA #6918
Chief Deputy Prosecuting Attorney

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CERTIFICATE OF SERVICE

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

CURT WYRICK, WSBA #6918
Chief Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office
Civil Division
604 W. Evergreen Blvd.
PO Box 5000
Vancouver, WA 98666-5000
Telephone (360) 397-2478

I, Thelma Kremer, hereby certify and state as follows:

1. I am a citizen of the United States of America and a resident of the State of Washington;
2. I am over the age of eighteen years;
3. I am not a party to this action; and
4. I am competent to be a witness herein.

On this 14th day of November, 2008, in Vancouver, Washington, I caused true and correct copies of the following:

- a. Appellant's Reply Brief; and
- b. Certificate of Service;

to be served by U.S. mail, postage prepaid, and by e-mail to the following parties:

Patrick W. Ryan
Eric S. Merrifield
Perkins Coie LLP
1201 Third Avenue #4800
Seattle WA 98101-3099

E-mail: pryan@perkinscoie.com
emerrifield@perkinscoie.com

Martha P. Lantz
Asst. Attorney General
PO Box 40110
Olympia WA 98504-0110
E-mail: marthall@atg.wa.gov



Thelma Kremer