



TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENT .....	1
II. INTRODUCTION .....	1
III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
IV. STATEMENT OF FACTS .....	2
V. ARGUMENT .....	9
A. Standard of Review. ....	9
B. Collateral Estoppel and Res Judicata Apply to Quasi-Judicial Administrative Decisions. ....	11
C. Growth Management Hearings Boards Have Authority to Apply Res Judicata and Collateral Estoppel. ....	16
D. The Western Board Properly Applied Res Judicata and Collateral Estoppel in this Case. ....	22
E. The Board Properly Allowed Jefferson County to Attach and Reference the Pleadings Filed by ICAN in the Earlier Action. ....	27
VI. CONCLUSION .....	29

TABLE OF AUTHORITIES

	<u>Page</u>
<b>CASES</b>	
<u>Christensen v. Grant County Hospital</u> , 152 Wn.2d 299, 96 P.3d 957 (2004) .....	12
<u>City of Arlington v. Hearings Board</u> , 164 Wn.2d 768, 193 P.3d 1077 (2008) .....	15, 16
<u>City of Bremerton v. Sesko</u> , 100 Wn. App. 158, 995 P.2d 1257 (2000), <u>rev. denied</u> , 141 Wn.2d 1031 .....	12
<u>Clallam County v. Hearings Board</u> , 130 Wn. App. 127, 121 P.2d 764 (2005) .....	18
<u>Cunningham v. State</u> , 61 Wn. App. 562, 811 P.2d 225 (1991) .....	12
<u>Diehl v. Mason County</u> , 94 Wn. App. 645, 972 P.2d 543 (1999).....	9
<u>Fox v. Department of Retirement Systems</u> , 154 Wn. App. 517, 225 P.3d 1018 (2009) .....	9
<u>Goldstar Resorts v. Futurewise</u> , 167 Wn.2d 723, 222 P.3d 791 (2009) .....	15, 16
<u>HEAL v. Growth Management Hearings Board</u> , 96 Wn. App. 522, 979 P.2d 864 (1999).....	9
<u>King County v. Growth Management Hearings Board</u> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	10
<u>Montana v. United States</u> , 440 U.S. 147, 99 S. Ct. 970 (1979).....	12
<u>Motley-Motley, Inc. v. PCHB</u> , 127 Wn. App. 62, 110 P.3d 312 (2005) .....	16, 17
<u>Reninger v. Dept. of Corrections</u> , 134 Wn.2d 437, 951 P.2d 782 (1998) .....	13
<u>Sanwick v. Puget Sound Title Insurance Co.</u> , 70 Wn.2d 438, 423 P.2d 624 (1967) .....	12
<u>Shoemaker v. City of Bremerton</u> , 109 Wn.2d 504, 754 P.2d 858 (1957) .....	12
<u>Spokane County v. City of Spokane</u> , 148 Wn. App. 120, 197 P.3d 1228 (2009) .....	20

<u>Stevedoring Services v. Egert</u> , 129 Wn.2d 17, 914 P.2d 737 (1996).....	14
<u>Stevens County v. Futurewise</u> , 146 Wn. App. 493, 192 P.3d 1 (2008).....	19
<u>Thurston County v. Hearings Board</u> , 137 Wn. App. 781, 154 P.3d 959 (2007) .....	19
<u>Turtle Rock HOA v. Chelan County</u> , Case No. 07-1-0001.....	21

**STATUTES**

RCW 34.05 .....	9
RCW 34.05.570(1)(a) .....	10
RCW 36.70A.110 .....	4, 10

## I. IDENTITY OF RESPONDENT

Jefferson County is the local jurisdiction whose motion to strike ICAN's Petition for Review was granted by the Western Washington Growth Management Hearings Board. Jefferson County is asking this Court to affirm the decision below and to dismiss ICAN's appeal.

## II. INTRODUCTION

Jefferson County respectfully asks this Court to affirm the decision of the Western Washington Growth Management Hearings Board concluding that ICAN's Petition for Review was barred by the application of res judicata and/or collateral estoppel. The Hearings Board correctly held that the Board had implied power under the GMA and applicable caselaw to apply the equitable defenses of res judicata and collateral estoppel, where ICAN's challenges to Jefferson County's UGA ordinance had been raised and rejected only a few weeks earlier in a substantially identical GMA challenge.

## III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Jefferson County believes that the issues pertaining to ICAN's assignment of error can best be stated as follows:

A. Whether administrative agencies have authority to apply res judicata and collateral estoppel in the context of quasi-judicial hearings.

B. Whether the Growth Management Hearings Board properly applied collateral estoppel to prevent Petitioner ICAN from

contesting issues which had been determined contrary to ICAN's position only weeks earlier.

C. Whether the Hearings Board properly applied res judicata to prevent ICAN from relitigating claims which had previously been asserted against Jefferson County's Port Hadlock/Irondale UGA ordinances, as well as claims which could have been asserted in the prior proceedings.

#### IV. STATEMENT OF FACTS

This appeal arises from the Order on Motions to Strike, which was issued by the Western Washington Growth Management Hearing Board on November 5, 2009. Jefferson County had filed a motion to strike ICAN's petition in Case No. 09-2-0012 because the petition sought to challenge the same County ordinance which had only weeks before been determined to be compliant with the Growth Management Act ("GMA").

Since 2003, ICAN has repeatedly challenged and sought to invalidate Jefferson County's ordinances directed toward designation of the Port Hadlock/Irondale area as an Urban Growth Area ("UGA") under the GMA. The GMA generally requires counties and cities to encourage growth in areas already characterized by dense development, while discouraging dense development in rural areas and resource lands. To implement this overriding directive, the GMA provides that all

existing cities must be designated as Urban Growth Areas. In addition, the GMA provides for creation of non-municipal UGA's based on a showing that such an area is already characterized by urban growth. RCW 36.70A.110.

ICAN filed its first Petition for Review with the Western Growth Board in Case No. 03-2-0010, challenging specific provisions of three Jefferson County ordinances to create the Hadlock/Irondale UGA. In its August 22, 2003 Final Decision and Order ("FDO") the Hearing Board found that Jefferson County's initial efforts to create the Port Hadlock/Irondale UGA were noncompliant with certain GMA provisions relative to the creation of UGAs. Specifically, the Hearings Board found the County noncompliant due to a failure to complete its adoption of urban "Level of Service Standards"; failure to complete its capital facilities planning (especially regarding sewer); and failure to adopt appropriate development regulations for application in the UGA. The County subsequently adopted a series of ordinances in an effort to bring the Port Hadlock/Irondale UGA into compliance with the requirements of the GMA, as directed by the Hearings Board.

The County's Ordinance No. 10-0823-04 was challenged by ICAN in a second Petition for Review, which became Case No. 04-2-0022. The Board and the parties agreed that both of ICAN's

cases would be “tracked” together, although not consolidated at that time.

The Board issued a combined Final Decision and Order and Compliance Order on May 31, 2005 which found certain remaining areas of noncompliance with the GMA including: (1) that the proposed UGA included areas where sewer would not be provided within the 20 year planning horizon contemplated by RCW 36.70A.110; (2) that the development regulations which Jefferson County proposed to apply within the UGA allowed Urban levels of development without public sewer systems in place, and allowed commercial and industrial development on interim septic tanks; and (3) that the ordinance included other minor flaws relating to the Capital Facilities Plan, the “market factor” for predicting and allocating future growth and the Transportation Element of the Comprehensive Plan. (CP 378-379). Jefferson County set out to remedy the deficiencies pointed out by the Hearings Board.

In 2007, the County made another attempt at achieving compliance with the GMA relative to the Port Hadlock/Irondale UGA, in the form of Ordinance No. 04-0702-07. In September 2007, ICAN filed a third Petition for Review challenging the recently adopted ordinance. All three cases continued to be tracked together until

April 17, 2009, when the Board officially consolidated the three cases under Case No. 07-2-0012c.

On or about March 23, 2009, Jefferson County enacted Ordinance No. 03-0323-09 which essentially brought the County into compliance with the Hearings Board's directives concerning the Port Hadlock/Irondale UGA. Among other things, the ordinance adopted a new UGA zoning map and incorporated its General Sewer Plan as an appendix to and as a part of the Comprehensive Plan. It also adopted a Dwelling Unit and Population Holding Capacity Analysis as an appendix. (See, AR 85-100).

On or about April 24, 2009, ICAN submitted a pleading in consolidated case No. 07-2-0012c entitled "ICAN's Objection to Lifting Invalidity and Finding Compliance and Request for Additional Invalidity." In that pleading, ICAN raised the following objections to Ordinance No. 03-0323-09 and the County's Capital Facility Plan for the UGA:

- That a portion of the proposed UGA would allegedly remain unsewered in the 20 year planning time frame.
- That the six year financing plan for Capital Facilities was allegedly inadequate.
- That the population holding capacity analysis for the UGA was allegedly inadequate because the County would have to recognize all ancient substandard lots.

(CP 369-377).

Following the adoption of Ordinance No. 03-0323-09, and a hearing on ICAN's objections, the Hearings Board on August 12, 2009 issued a Compliance Order which – with one exception – held that the County had now successfully brought the Port Hadlock/Irondale UGA into compliance with the GMA:

Based on the foregoing, the Board determines that the County's adoption of its General Sewer Plan adequately demonstrates that sewer will be provided in the Port Hadlock UGA within the 20 year planning horizon as required by RCW 36.70A.110. In addition, the General Sewer Plan now meets the requirements of RCW 36.70A.070(3)(d) to have "at least a six year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes." The Board finds that the County's population holding capacity analysis has not been shown to be clearly erroneous.

However, the Board finds that until such time as the County adopts an ordinance clarifying which rural development standards apply to sewer availability, it remains out of compliance with the requirements of RCW 36.70A.110 and 36.70A.020(1) and (12). The County is ordered to bring that portion of its development regulations into compliance with GMA, . . . .

Compliance Order, p. 15. (CP 392).<sup>1</sup> The Board further concluded that based on the County's general compliance with the GMA, its Hadlock/Irondale UGA enactments were no longer "invalid."

ICAN was dissatisfied with the Hearings Board's decision, and on August 21, 2009 filed "ICAN's Request for Reconsideration of the

---

<sup>1</sup> Jefferson County subsequently came into compliance with regard to the final outstanding issue by identifying the development regulations which would apply within

8/12/09 Compliance Order.” (CP 400). The Request for Reconsideration in effect sought to re-argue the same issues which had been the basis of ICAN’s April 24, 2009 Objections to Ordinance No. 03-0323-09. In the reconsideration motion, ICAN again argued that the UGA was oversized; and that the County was required to recognize all substandard lots within the UGA, and therefore the UGA would develop at an ultra high density. (CP 400-411). The Motion for Reconsideration further argued that the County’s Population Holding Capacity Analysis was clearly erroneous. The Motion for Reconsideration was for the most part denied by the Hearings Board. (CP 412-419).

The Hearings Board’s Compliance Order in Case No. 07-2-0012c had not yet been handed down when ICAN filed yet another Petition for Review (PFR) (Case No. 09-2-0012) on May 26, 2009. The PFR was amended by ICAN on June 24, 2009. (CP 332-333). The new Petition for Review challenged the very same recently enacted Jefferson County ordinance (No. 03-0323-09) which had been the target of ICAN’s April 24, 2009 Objections and its August 21, 2009 Request for Reconsideration (in case No. 07-2-0012c). In other words, the 2009 Petition for Review essentially restated the same claims and issues which

---

the UGA pending availability of sewer. (See Appendix A 270 to Petitioner’s Opening Brief).

were determined by the Hearings Board to be without merit in its August 12, 2009 Compliance Order. (CP 001-005).

Notwithstanding the clear language of the 8/12/2009 Compliance Order, rejecting ICAN's objections to Ordinance No. 03-0323-09, ICAN nonetheless refused to dismiss the Petition for Review in Case No. 09-2-0012. Instead, it sought to relitigate those same issues which had been determined in favor of Jefferson County in the recently issued Compliance Order.

On October 15, 2009 Jefferson County filed a Motion to Strike Petition for Review, based on collateral estoppel and res judicata. ICAN filed a brief in Opposition to the Motion to Strike. On October 5, 2009, the Hearings Board issued a 27-page Order on Motions to Strike which carefully analyzed the history of the case, the nature of ICAN's previous claims and issues, and the doctrines of collateral estoppel and res judicata. (CP 445-469). The Hearings Board agreed with the County that ICAN's 2009 Petition for Review was essentially asking the Board to relitigate the same issues and claims which the Board had only weeks before decided in favor of Jefferson County. Jefferson County's Motion to Strike the 2009 Petition was granted by the Hearings Board.

ICAN filed an appeal in Thurston County Superior Court as well as an Application for Direct Review to the Washington Court of

Appeals. Jefferson County did not object to direct review and the Court of Appeals accepted review.

## V. ARGUMENT

### A. Standard of Review.

In reviewing the Hearings Board's action, this Court applies the Administrative Procedures Act, RCW 34.05. The Court can reverse only if the Board has misapplied the law. HEAL v. Growth Management Hearings Board, 96 Wn. App. 522, 979 P.2d 864 (1999).

This Court's review of the Hearings Board's legal determination is de novo. But the general rule is subject to the settled qualification that the Court should accord substantial weight to an agency's interpretation of the law where that agency is operating within its field of expertise. Fox v. Department of Retirement Systems, 154 Wn. App. 517, 523, 225 P.3d 1018 (2009). This principle has been held specifically applicable in the context of Growth Management Hearings Board decisions:

We review the Board's legal conclusions de novo, while giving substantial weight to its interpretation of the statute it administers.

Diehl v. Mason County, 94 Wn. App. 645, 972 P.2d 543 (1999).

The courts grant deference to the Hearings Board's interpretation of the GMA because the Board has singular expertise in dealing with that statute. HEAL, supra, 96 Wn. App. at 526 (1999). A party challenging a Hearings Board's decision has the burden of proving that

the decision is invalid. RCW 34.05.570(1)(a). King County v. Growth Management Hearings Board, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

While this Court need not give deference to the Hearings Board's legal conclusions as to the general principles of collateral estoppel and res judicata, deference should be afforded to the extent that the Hearings Board made determinations as to the identity of issues and claims which it had already resolved relative to GMA compliance. The Growth Management Hearings Board has specialized expertise in understanding the highly technical statutory language of the GMA, and its application in the context of County and City ordinances implementing the GMA. For example, the Hearings Board regularly resolves disputes involving the elements of a GMA-compliant Urban Growth Area, including capital facilities planning, consistency with County-wide planning policies and "population holding capacity analysis" for determining appropriate boundaries of a proposed UGA so as to accommodate future growth. See, RCW 36.70A.110.

Thus, when the Western Board evaluated the language and context of the issues raised by ICAN in its Petition for Review in Case No. 09-2-0012, it had intimate knowledge and expertise regarding those GMA issues, allowing it to recognize that ICAN's issues were in all material respects identical to the issues which the Board had recently resolved in its August 12, 2009 Compliance Order in case No. 07-2-

0012c, and in its Order on Reconsideration on September 14, 2009.

This Court should give deference to the Hearings Board's analysis of the issues of "identity of subject matter and cause of action" for purposes of res judicata, and of "identity of issues" for purposes of collateral estoppel.

B. Collateral Estoppel and Res Judicata Apply to Quasi-Judicial Administrative Decisions.

The courts of this state, and indeed courts throughout the country have recognized the importance of applying doctrines of issue preclusion and claim preclusion to prevent relitigation of issues and claims which have already been determined after fair consideration. The United States Supreme Court has defined the doctrines of collateral estoppel and res judicata, and explained their importance in the judicial process:

A fundamental precept of common law adjudication, embodied in the related doctrines of *collateral estoppel* and *res judicata*, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ."

Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under *collateral estoppel*, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . . Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair

opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions. (Citations omitted).

Montana v. United States, 440 U.S. 147, 153-54, 99 S. Ct. 970 (1979).

The Washington courts have shown a similar reluctance to allow a party to relitigate issues and claims which have already been decided against that party. As the Washington Court of Appeals stated in Cunningham v. State, 61 Wn. App. 562, 567, 811 P.2d 225 (1991):

. . . there has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another courtroom.

It is important to note that res judicata bars not only claims which were asserted in the prior action, but also those which “*could have and should have been determined in a prior action.*” Sanwick v. Puget Sound Title Insurance Co., 70 Wn.2d 438, 441, 423 P.2d 624 (1967).

Washington courts have on numerous occasions held that the doctrines of collateral estoppel and res judicata apply in the context of quasi-judicial administrative hearings. See, e.g., Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507, 754 P.2d 858 (1957); City of Bremerton v. Sesko, 100 Wn. App. 158, 163-64, 995 P.2d 1257 (2000), rev. denied, 141 Wn.2d 1031; Christensen v. Grant County Hospital, 152 Wn.2d 299, 321, 96 P.3d 957 (2004).

In Reninger v. Dept. of Corrections, 134 Wn.2d 437, 951 P.2d 782 (1998), the Supreme Court held that issues and claims which had been determined by the Personnel Appeals Board were binding, under the doctrine of collateral estoppel, and could not be relitigated in court, noting that the plaintiffs had had significant incentive to fully litigate in the first hearing. Collateral estoppel was held applicable even though there were differences in the way the claims and issues were characterized by the plaintiff:

In the present case, Reninger and Cohen displayed no lack of incentive to litigate in the administrative arena. They vigorously opposed their demotions; they argued their case to a Hearing Examiner; they appealed the Hearing Examiner's findings against them to be PAB; and they attempted to appeal the PAB's findings to the Superior Court pursuant to RCW 41.64.130. It was only after their lack of success in the administrative arena that they relabeled their claims as wrongful discharge and tortious interference, and relitigated the identical issues before a jury in the civil trial. . . . Reninger and Cohen were entitled to one bite of the apple, and they took that bite. That should have been the end of it. The normal rules of collateral estoppel apply here to prevent excessive and vexatious litigation.

134 Wn.2d at 454.

The Washington Supreme Court has held that additional factors may need to be considered when deciding when to apply estoppel and res judicata in the context of administrative decisions. The most important consideration is whether the administrative determination was

made in a quasi-judicial context, where the parties have had an adequate opportunity to litigate:

Res judicata applies in the administrative setting only where the administrative agency “resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” In Washington, other considerations are also relevant when the prior adjudication took place in an administrative setting including “(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations.” [Citations omitted.]

Stevedoring Services v. Egert, 129 Wn.2d 17, 40, 914 P.2d 737 (1996).

In this case, there is no question that the Western Washington Growth Management Hearings Board was acting in a quasi-judicial capacity when it issued its orders approving Jefferson County’s Port Hadlock/Irondale UGA Ordinance, No. 03-0323-09. Nor is there any question that ICAN had ample opportunity to vigorously pursue its theories and claims against Jefferson County with respect to the Hadlock/Irondale UGA. Indeed, the record reflects that ICAN has been challenging Jefferson County’s Hadlock/Irondale UGA enactments since 2003. Four (4) separate cases were initiated by ICAN and there have been numerous open record hearings before the Growth Board, with ICAN represented by able counsel.

Furthermore, the Jefferson County UGA ordinance which was being challenged in ICAN’s 2009 Petition (Ordinance 03-0323-09) was the same ordinance which ICAN had vigorously challenged in its

April 24, 2009 Objections and its August 21, 2009 Request for Reconsideration in Case No. 07-2-0012c. Under these circumstances, the Hearings Board properly held that the doctrines of res judicata and collateral estoppel could be applied to bar relitigation of issues and claims which had been raised and decided only weeks before by the same Hearings Board in a hearing involving the same parties and the identical Jefferson County ordinance.

The Washington Supreme Court has acknowledged that the doctrines of res judicata and collateral estoppel apply to decisions of Growth Management Hearings Boards. In City of Arlington v. Hearings Board, 164 Wn.2d 768, 193 P.3d 1077 (2008), the court addressed in length the required elements of res judicata and collateral estoppel in a case arising from a Growth Management Hearings Board decision. The Superior Court held that the doctrines did not apply in that case, but only because the issues in dispute were different in the two proceedings, as was the standard of proof. 164 Wn.2d at 793-94.

Similarly, in Goldstar Resorts v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009) the Supreme Court acknowledged the applicability of res judicata and collateral estoppel in the context of a growth management appeal, but expressly found that the subject matter and issues were different in the two proceedings, and for that reason the equitable doctrines did not apply. 167 Wn.2d at 737-38.

Unlike the City of Arlington and the Goldstar Resorts cases, the subject matter and issues were identical in this case. ICAN challenged the same elements of the same GMA ordinance, only a few weeks after the Hearings Board had issued its Order rejecting ICAN's challenges. Under these circumstances, the Hearings Board properly held that ICAN's new Petition for Review was barred.

C. Growth Management Hearings Boards Have Authority to Apply Res Judicata and Collateral Estoppel.

As explained in Section B above, the Washington courts have not hesitated to apply the doctrines of res judicata and collateral estoppel in appropriate cases, even where the underlying decision arose in the context of a quasi-judicial administrative hearing. Washington caselaw is equally clear that res judicata and collateral estoppel may be applied by the administrative agency itself, including Growth Management Hearings Boards, provided the elements of res judicata or estoppel are present. In so doing, the courts have rejected the argument made by ICAN in this case, i.e., that because such Boards have authority only to hear legal appeals, they therefore cannot apply equitable defenses.

In Motley-Motley, Inc. v. PCHB, 127 Wn. App. 62, 110 P.3d 312 (2005), the Pollution Control Hearing Board had applied the doctrine of equitable estoppel in the context of an administrative proceeding. On review, the Court of Appeals held that the PCHB had

acted within its authority, because applying an equitable *defense* does not transform a legal action into an equitable action:

Here, Motley's equitable estoppel claim against DOE was not a separate action in equity. Rather, it was an equitable defense to DOE's action at law, a claim for Motley's water right. Accordingly, Motley's assertion of an equitable defense did not convert the proceeding before PCHB into an equitable action. Thus, PCHB had the implied authority to consider Motley's equitable estoppel claim, which Motley was required to present to PCHB.

127 Wn. App. at 74-75.

The Motley court noted that as an administrative agency, the PCHB possesses implied authority to "do those things that are necessary in order to carry out the statutory delegation of authority," including the use of equitable defenses such as estoppel. Id. at 74. The Western Washington Growth Management Hearings Board made a similar determination in this case, noting that Growth Boards are required by statute to render decisions within 180 days of the filing of a Petition for Review, and to handle petitions in an expeditious fashion:

And, in accord with the logic set forth by the Court in Motley, the Growth Boards, being under an obligation to render decisions within 180 days of the filing of the Petition for Review, have the implied authority to "do everything lawful and necessary to provide for the expeditious and efficient disposition" of matters. As the Court stated in Motley:

An agency's implied authority is its power to do those things that are necessary in order to carry out the statutory delegation of authority.

(CP 457). Surely those implied powers include prompt disposition of claims and issues which are being asserted for the third or fourth time by the same parties.

There are several decisions from the Washington Court of Appeals which have recognized – directly or impliedly – that Growth Management Hearing Boards have authority to apply the equitable doctrines of res judicata and collateral estoppel. The fact that in some of those cases the Court of Appeals found that the *elements* of those defenses had not been shown should in no way suggest that the doctrines are not applicable where the required elements have been satisfied.

In Clallam County v. Hearings Board, 130 Wn. App. 127, 121 P.2d 764 (2005) the Court of Appeals expressly acknowledged the applicability of res judicata and collateral estoppel in growth management cases:

Res judicata, or claims preclusion applies to quasi-judicial administrative agency decisions [citations omitted]. Collateral estoppel, or issue preclusion also applies to these decisions.

Id. at 132. The Court concluded that res judicata and collateral estoppel could not be applied in that case, because the two decisions in question were issued in the same case. Id. at 131-32. That is not the situation in this controversy. The Board's earlier Compliance Order was issued in case No. 07-2-0012c; while the order granting the County's Motion to Strike was handed down in Case No. 09-2-0012.

In Thurston County v. Hearings Board, 137 Wn. App. 781, 154 P.3d 959 (2007), the County argued that the Hearings Board should not have heard Futurewise's challenge to a UGA ordinance because the Growth Board had upheld the UGA many years earlier. On review, the Court of Appeals held that res judicata and collateral estoppel were not applicable *under the facts of the case* because the plaintiff/petitioner Futurewise was not a party to the earlier case, and because Futurewise's challenge was to an entirely different legislative enactment from the ordinance which was the subject of the earlier rulings. Id. at 798-99.

In Stevens County v. Futurewise, 146 Wn. App. 493, 192 P.3d 1 (2008), the Eastern Growth Board determined that the doctrines of res judicata did not apply, because the petitioner had not been a party at the time of the earlier decision and the issues had not been previously presented. Id. at 503. On review, the Court of Appeals concurred, because there was no "identity of parties" and no "identity of subject matter and cause of action." Id. at 504-506.

If, as ICAN argues, the doctrines of res judicata and collateral estoppel could never be applied by Growth Management Hearings Boards, it would have been easy and appropriate in each of the above cases for the Court of Appeals to simply say so. By carefully analyzing the issues of identity of parties, identity of subject matter and cause of action, and identity of issues, the Court of Appeals clearly signaled that

the doctrines may be applied by Hearings Boards in appropriate Growth Management cases.

In a recent decision from the Court of Appeals, Spokane County v. City of Spokane, 148 Wn. App. 120, 197 P.3d 1228 (2009) it was held that the elements of collateral estoppel were not present, as the ordinance which was being challenged was different from the one which had been upheld in the earlier proceeding. Id. at 124. Importantly, however, the Court of Appeals stated unambiguously in Spokane County that the Hearings Board was precluded from revisiting an order which it had previously issued, i.e., that the County's GMA enactment was compliant with GMA:

Next, the Hearings Board, in the earlier 2002 appeal, already concluded that the County had complied with the GMA. It was therefore improper for the Board to revisit that order.

Id. at 125.

Similarly, in this case res judicata precluded the Western Washington Growth Management Hearings Board from revisiting its August 12, 2009 Compliance Order, after ICAN's motion for reconsideration was denied. That Compliance Order determined that the Hadlock/Irondale UGA was essentially compliant with the GMA. It was appropriate for the Board to refuse to revisit that order.

As noted by ICAN, the application of res judicata and collateral estoppel has not received uniform treatment from the three Growth

Management Hearings Boards. The Central Board has declined to apply those doctrines, while the Eastern Board -- and now the Western Board - - have applied res judicata and collateral estoppel when the facts support their application. In Turtle Rock HOA v. Chelan County, Case No. 07-1-0001, the Eastern Board specifically stated that the doctrine of res judicata applied in proceedings before the Growth Boards. The Eastern Board held in Turtle Rock that res judicata was a bar to the petitioners' SEPA claims because the Superior Court had already ruled on those claims in a LUPA appeal. (Final Decision and Order, July 17, 2007.) Similarly, the Western Board in this case properly recognized its authority to apply res judicata and collateral estoppel in an appropriate case such as this one.

The fact that the Central Board has declined to apply res judicata and collateral estoppel does not mean that there is no legal authority for the Western Board (or the other Growth Boards) to do so. As ICAN acknowledged in its brief, whether an administrative board has authority to apply equitable defenses is a legal issue which the Court of Appeals should consider de novo, based on Washington caselaw. And as noted above, there are numerous cases in which the Court of Appeals has acknowledged that these doctrines may be applied by Growth Management Hearings Boards, where the elements of those defenses are present. Those appellate decisions constitute *stare decisis* and

controlling authority under Washington common law, and certainly trump any contrary legal analysis by the Central Growth Board.

The Western Growth Board's conclusion that it had authority to apply res judicata and collateral estoppel is supported by clear judicial precedent, and should be affirmed.

D. The Western Board Properly Applied Res Judicata and Collateral Estoppel in this Case.

As noted in Section A, above, the Western Washington Growth Management Hearings Board has a long history of overseeing and evaluating Jefferson County's legislative enactments for the creation of the Hadlock/Irondale UGA, and in resolving conflicts arising from ICAN's numerous petitions challenging those UGA ordinances. The extensive administrative record in this appeal represents only a small fraction of the litigation over the Hadlock/Irondale UGA.

With its multi-year familiarity with this dispute, as well as its expertise in applying and interpreting the statutory requirements of the Growth Management Act, the Board's determinations as to whether the issues, claims and subject matter in the two proceedings were substantially the same should be given considerable deference by this Court. Applying its expertise and its familiarity with the dispute between ICAN and Jefferson County, the Hearings Board readily determined that the claims and issues raised by ICAN in its 2009 petition

were substantially identical to those which ICAN had argued only weeks before in the 2007 case.

In its Objections to Lifting Invalidity in Case No. 07-2-0012c, ICAN had contended that the new Jefferson County Comprehensive Plan and Zoning Maps would result in an oversized UGA which was not in compliance with the GMA. ICAN argued that approximately 1/3 of the proposed UGA would still remain unsewered within the 20 year planning horizon. (CP 369-370). ICAN further argued that the county had not adequately identified the funding sources and locations for sewer facilities. (CP 371-373). ICAN also objected to what it termed the County's noncompliance with the Population Holding Capacity Analysis for the UGA. According to ICAN, the County would be required to recognize all substandard ancient lots which had been platted more than 100 years ago, and therefore the County's determination that the Hadlock/Irondale area would be developed at somewhat lower densities was unreasonable. (CP 374-377).

Essentially the same arguments were made in ICAN's request for reconsideration of the 8/12/2009 Compliance Order. (CP 400-411). The Hearings Board rejected each of ICAN's issues in its order in the 2007 case. Once the Board had decided those claims and issues, and determined that the County's recent Hadlock/Irondale legislation was GMA-compliant, those issues could not be revisited.

In its November 5, 2009 Order on Motions to Strike in Case No. 09-2-0012, the Hearings Board carefully evaluated the nature of those previously litigated issues and claims from page 16 through page 23. The Board properly concluded that ICAN was simply attempting to get a third “bite of the apple,” having failed to receive favorable rulings from the Hearings Board in its April 2009 challenge to the Ordinance, and in its August 21, 2009 Request for Reconsideration:

The conclusions cited below clearly indicate the Board has previously ruled on many of the issues now before the Board. ICAN’s objections to a finding of compliance in Case No. 07-2-0012c covered four areas: approximately one-third of the proposed UGA will remain unsewered in the 20 year planning horizon; the County failed to adopt a six year financing plan; the County failed to adopt development regulations specifying rural densities and standards; and the population and holding capacity analysis for the UGA is fundamentally flawed. The Board addressed each of those issues:

Conclusion A: Jefferson County’s adoption of the General Sewer Plan adequately demonstrates that sewer will be available in the Port Hadlock UGA within the 20 year planning horizon, as required by RCW 36.70A.110.

Conclusion B: The County’s adopted General Sewer Plan identifies sources of funding from grants, loans, bond issues, utility local improvement districts and connection charges and lays out a repayment stream through 2018, meeting the requirements of RCW 36.70A.070(3)(d).

Conclusion C: The County’s General Sewer Plan sufficiently provides the proposed locations and capacities of expanded or new capital facilities, and therefore now complies with RCW 36.70A.070(3)(c).

Conclusion D: The County's population holding capacity analysis, which concluded that the sizing of the UGA is large enough to accommodate the mid-range projections for population growth and that there is an appropriate amount of urban land designated and zoned to meet the 20 year projected growth allocation for the Irondale/Port Hadlock UGA has not been shown to be clearly erroneous.

November 5, 2009 Order, pp. 21-22. (CP 465-466).

The Hearings Board went on to analyze how its prior rulings already answered the challenges raised in ICAN's 2009 Petition, noting that virtually all of the issues were identical to the objections ICAN had previously raised:

Those conclusions address most of the issues now raised by ICAN (or are sufficiently related to the compliance issues that they could have been raised), including issues 1, 2, 10, 11 and 12 (Conclusion D regarding the size and holding capacity of the UGA); Issue 6 (Conclusions A, B and C regarding the sewer plan's facilities, timing and financing); Issue 7 (Conclusion A regarding provision of sewer service within the 20 year planning period); Issue 8 (Conclusion B regarding six year sewer facilities funding).

(CP 466).

The Board then noted that there was a single issue on which ICAN had prevailed in the Board's August 12, 2009 Compliance Order on the County's recent legislative enactments, i.e., that the County needed to clarify which development regulations specifically applied to the UGA before sewer was provided. Yet the Board pointed out that that issue had been decided in favor of ICAN, and the County had been

ordered by the Board to clarify the rural development standards which were in force before sewer availability. (CP 466). In other words, there was no reason to revisit that issue.

Finally, the Board went on to address what it described as “the only remaining issues” in ICAN’s 2009 Petition for Review, i.e., those dealing with alleged lack of compliance with County-Wide Planning Policies for establishing the size of a UGA, and provision of sewer service areas within six year and 20 year planning horizons. The Hearings Board properly concluded that those claims either were raised and decided, or could have been raised in the previous challenge to Ordinance 03-0323-09, submitted by ICAN in April 2009, and therefore those claims were barred by res judicata:

The only remaining issues that must be addressed are Issues 5 and 9. Issue 5 alleges a lack of compliance with County-Wide Planning Policy 1.3 which establishes criteria for the size and delineation of UGA boundaries, Policy 1.5 which sets forth two tiers for provision of sewer service (areas served within either 6 or 20 years) and Policy 2.1 which requires the provision of a full range of urban services within the 20 year planning period. Those issues were either raised and addressed in the Compliance Order or could have been raised as they were directly related to the issues on compliance. Issue 9 argues there is an inconsistency between the County’s population data and the 20 year planning period. That issue is directly related to the previously challenged county population holding capacity analysis which was addressed in Conclusion D above. Thus it too is an issue that could have been raised in the earlier proceeding.

(CP 467).

In short, the Hearings Board thoroughly evaluated the claims asserted in ICAN's 2009 Petition, and found them to be either substantially identical with issues which had been raised and determined only weeks before by the Hearings Board, or found that they were claims that could have been raised in ICAN's April 24, 2009 Objections, and therefore were barred by res judicata. The Board's decision was supported by applicable caselaw on res judicata and collateral estoppel and should be affirmed by this Court.

E. The Board Properly Allowed Jefferson County to Attach and Reference the Pleadings Filed by ICAN in the Earlier Action.

When Jefferson County filed its motion to strike the Petition for Review in Case No. 09-2-0012, ICAN responded by filing its own motion to strike. ICAN argued that the Hearings Board should not be allowed to review and consider the previous pleadings filed by ICAN which formed the basis for the res judicata and collateral estoppel arguments. ICAN recognized that the issues raised in its 2009 Petition were essentially identical to the arguments raised in its April 27, 2009 Objections to Lifting Invalidity and its August 21, 2009 Request for Reconsideration in Case No. 07-2-0012c. ICAN apparently wanted to avoid any comparison between the issues it had raised only weeks before in the "07" case, and the issues it was raising in its 2009 Petition.

The basis for ICAN's motion to strike was the assertion that the earlier pleadings it had filed in the 2007 case were not formally

“exhibits” in the 2009 case, and therefore they could no longer be considered by the Hearings Board. (CP 422-423).<sup>2</sup> The Hearings Board had no difficulty in disposing of this curious argument:

ICAN’s motion appears to be premised on an assumption that those pleadings are presented as evidence and the Court’s consideration is limited solely to the record. The Board does not view the County’s submittals as evidence, but rather as argument. Viewed in that light, imposition of a requirement such as suggested by ICAN would require that copies of every cited Board or Court decision would need to be included in the record.

Conclusion: ICAN’s motion is denied.

(CP 447).

The Board’s decision on ICAN’s motion to strike was correct. Presentation and discussion of ICAN’s previous pleadings and argument was allowed so that the Board could carefully consider the similarity between the claims and issues raised in the 2007 case and those being asserted in the 2009 petition. The Hearings Board’s denial of ICAN’s motion to disallow any consideration of its prior pleadings was appropriate.

---

<sup>2</sup> It is indeed ironic that ICAN argued that pleadings from earlier cases should not be considered because they were not part of the administrative record in the 2009 appeal. The Court will note that ICAN’s brief is accompanied by hundreds of pages of appendices which were not “part of the record” before the Hearings Board in this case! (ICAN’s Appendix A66-A271).

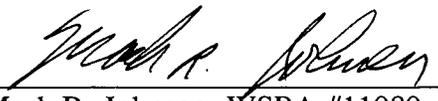
VI. CONCLUSION

For all of the above reasons, Jefferson County respectfully requests that this Court affirm the decision of the Western Washington Growth Management Hearings Board, and dismiss ICAN's appeal.

DATED this 27 day of September, 2010.

KARR TUTTLE CAMPBELL

By:

  
Mark R. Johnsen, WSBA #11080  
Attorneys for Respondent Jefferson  
County

10 SEP 28 PM 12:43

STATE OF WASHINGTON

**DECLARATION OF SERVICE**

MARK R. JOHNSEN declares as follows:

BY \_\_\_\_\_  
DEPUTY

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. On the below date, a true copy of the Brief of Respondent Jefferson County was served to the following via first class mail, postage prepaid:

Gerald Steel  
Attorney at Law  
7303 Young Road N.W.  
Olympia, WA 98502

Jerald R. Anderson  
Attorney at Law  
Attorney General's Office  
P.O. Box 40110  
Olympia, WA 98504-0110

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28<sup>th</sup> day of September, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
MARK R. JOHNSEN