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

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**DENNIS HADALLER,**

**Appellant (Petitioner)**

v.

**WESTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD**

**Respondent**

**and**

**LEWIS COUNTY; EUGENE BUTLER,**

**Underlying Parties**

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**APPELLANT'S REPLY BRIEF**

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1. **Lewis County Fails to Counter the Fact that Invalid Ordinances are Void.**

Lewis County states the Growth Board never declared the 2007 enactments through Ord. 1197 and Res. 07-306 to be void and instead “upheld” the ARL designations (Response Brief at 28). The County is fundamentally wrong. The Board’s 7/7/08 Order specifically did not lift any part of the invalidity (CP 146) and thus retained invalidity as to the entirety of Lewis County’s ARL designations and ARL regulations. Any GMA enactment ruled to be invalid by the Growth Board, is thereby rendered void<sup>1</sup>. An invalid or void ordinance upholds nothing.

Because Ord. 1197 and Res. 07-306 were invalid and void:

- (a) No ARL designations or regulations could be implemented until after the Board lifted invalidity; and
- (b) Since there was no final legislative act approved, Lewis County’s ARL record had not closed and the 2008-09 remand was open for review of any ARL compliance issue; and
- (c) The Growth Board was incorrect in its statements in its order on motion to dismiss (CP 13-14) that
  - (i) Petitioner’s property had been designated in 2007,

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<sup>1</sup> RCW 36.70A.300(4). *King County v. Cent. Puget Sound Bd.*, 138 Wn.2d 161,181, 979 P.2d 374 (1999). *Davidson Searles v. Cent. Puget Sound Bd.*, 159 Wn. App. 148, 161, 244 P.3d 1003 (2010). Petitioner Opening Brief at p. 18. See also RCW 36.70A.300(3) and RCW 36.70A.302(7).

(ii) The County had no obligation to substantively consider Mr. Hadaller's submittals during the 2009 remand, and

(iii) Hadaller was trying to re-challenge the 2007 decision. The Board was in error when it granted Lewis County's Motion to dismiss Mr. Hadaller's appeal of the 2009 enactments in Ord. 1207 & Res. 09-251.

**2. For Invalidity to be Lifted, a Growth Board's Order Must Specifically Find Compliance and Rescind or Modify the Invalidity, per RCW 36.70A.300 and RCW 36.70A.302.**

Lewis County has made a strained effort to assert that even though the Growth Board's 7/7/08 Order did not lift any portion of its previous invalidity order, that is what the Board intended to do (Response Brief at 19-20, 28). However the statutory requirements for the way the Growth Board is to convey its Final Order, particularly when it has previously imposed an order of invalidity, are clearly set forth in RCW 36.70A.300 and 36.70A.302. The Growth Board, now heading into its twentieth year of presiding over GMA cases, is fully aware of these statutes:

(3) In the final order, the board shall either:

(a) Find that the ... county ... is in compliance with the requirements ....; or

(b) Find that the ... county ... is not in compliance ... in which case the board shall remand the matter....

(4) *Unless* the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and developments regulations during the period of remand.

RCW 36.70A.300 (emphasis added).

(1) The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300; ....

(6) A county ... subject to a determination of invalidity may file a motion requesting that the board clarify, modify, or rescind the order. The board shall expeditiously schedule a hearing on the motion .... the parties may present information to the board to clarify the part or parts ... to which the final order applies. The board shall issue any supplemental order ... not later than thirty days after the date of the hearing.

(7)(a) If a determination of invalidity has been made and the county ... has enacted an ordinance or resolution amending the invalidated part or parts of the plan or regulation or establishing interim controls on development affected by the order of invalidity, after a compliance hearing, the board shall modify or rescind the determination of invalidity if it determines under the standard in subsection (1) of this section that the plan or regulation, as amended or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter.

(b) If the board determines that part or parts of the plan or regulation are no longer invalid as provided in this subsection, but does not find that the plan or regulation is in compliance with all of the requirements of this chapter, the board, in its order, may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

RCW 36.70A.302.

In Conclusion GG of its 7/7/08 Order, the Board deemed it premature to lift its earlier invalidity order and continued to find noncompliance, and in Part IX ordered a further remand schedule in which the County was to get into compliance (CP 146). There was no part or

parts of Lewis County's 2007 proposal found to be compliant, and no part or parts of the earlier invalidity order lifted. Instead, the only modification to the pending order of invalidity was to *add* a new finding of invalidity (CP 136). A total remand was ordered rather than the periodic reports. While such periodic reports are optional, the invalidity needs to first be rescinded in whole or part, if that is the Board's intention, which it was not. See RCW 36.70A.302(7). Without a completed legislative action deemed compliant, this meant that the remand was open for all ARL compliance-related issues.

The Board's other conclusions in its 7/7/08 Order stating that Mr. Hadaller had not demonstrated violation of the property rights goal (Conclusion G at CP 143), and had not demonstrated the ARL designation on his property to be clearly erroneous (Conclusion Z at CP 145) are not findings of compliance as required under RCW 36.70A.300 and 36.70A.302. These conclusions cannot even be inferred as findings of compliance when the Board's 7/7/08 Order made other specific findings and conclusions to not find compliance and not lift invalidity in its Conclusion GG: "It is premature to lift the Board's earlier invalidity order ...The County's designation process ... does not comply ..." (Opening Brief at 16; CP 136, 146).

Moreover, Lewis County had every opportunity under RCW 36.70A.302(6) to request a clarification if it believed that the Board may have meant to validate any portion of its 2007 ARLs. No motion for clarification was made. The 2007 ARLs remained invalid in their entirety.

The Board's 7/7/08 Order ruling against Mr. Hadaller did not lift the determination of invalidity against Lewis County's ARLs. The ARL designations and regulations proposed in 2007 were not implemented anywhere in Lewis County prior to 2010, and could not be approved because the invalidity had not been lifted. Further, Lewis County had no underlying ARLs since all of the County's prior ARL proposals had been repealed in their entirety, thus there were no underlying ARLs in effect during the period of remand (see RCW 36.70A.300(4); see also Opening Brief at 21-22, CP 50-65).

Because an invalid ordinance is void, Lewis County's 2007 enactments were never approved by the Growth Board, never took effect, and had to be re-adopted in 2009 as part of that remand. The 2009 remand created a new record on review subject to a new appeal. Upon Lewis County's motion, the Board improperly dismissed Mr. Hadaller's 2009 appeal before it could be heard, an appeal which was based on the new record and having new issues.

3. **Growth Board's 7/7/08 Decision was a Final Order under RCW 36.70A.300, but it Did Not Approve a Final Legislative Action; therefore, Dennis Hadaller Did Not Need to Appeal it.**

Lewis County asserts that Mr. Hadaller needed to have appealed the Board's 7/7/08 Decision because it was a "final order" (Response Brief at 21-23). Petitioner does not dispute the Board's 7/7/08 Order was final for purposes of an optional appeal under RCW 36.70A.300(5), but in this case, by declining to lift invalidity and ordering a remand, the Board's 7/7/08 Order did not approve what Lewis County had proposed for its ARLs, and thus the County did not have a final legislative act on its ARLs. Without validated ARLs, and with an open remand for the County's next re-iteration of its ARLs, the door was still open, and Mr. Hadaller was not yet "aggrieved" under RCW 36.70A.300(5) to make an appeal.

Petitioner has explained why he did not appeal the Board's 7/7/08 Order (Opening Brief at 7-8), in that since the Board made no findings of compliance, concluded it was "premature to lift the Board's earlier invalidity order while the County still has not properly designated its agricultural resource lands" (Conclusion GG at CP 146), and sent the ARL matter back to the County on remand, he had no need to appeal.

Although Mr. Hadaller was disappointed the Board did not accept his supplemental evidence and thus determined he had not met his burden of proof as to his petitioned issues, he still had no reason to appeal, since

he essentially agreed with the Board's end result – for different reasons – that: Lewis County's ARLs were not properly designated; the ARLs remained noncompliant; no part of the order of invalidity should be lifted; and the ARLs would be again remanded.

Moreover, since the Growth Board had previously stated to Lewis County that in a remand, the goal is for the regulations to be GMA compliant, not simply to comply with the Board's "specific directives"<sup>2</sup>, then Mr. Hadaller believed he would have every right to bring forward new information to the 2009 remand that had not been part of the 2007 record, even though not the specific topic of the Board's last directive.

After the 2009 remand, however, when Lewis County's end product of Ord. 1207 & Res. 09-251 ignored Mr. Hadaller's information which revealed flaws with Lewis County's ARLs complying with the GMA, he rightly petitioned the Board under WAC 242-02-220. Lewis County's Response tries to portray Mr. Hadaller's 2009 Petition as a second appeal of the County's 2007 enactments, but it is not. Dennis Hadaller is seeking an appeal of the 2009 enactments, with new issues, based on a different record before the County (Opening Brief at 29-32).

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<sup>2</sup> "We agree that, as this Board held in prior decisions, the question on compliance is whether the jurisdiction has met the requirements of the Growth Management Act, not whether it complied with the specific directives of the Board's last order." (citing 2/13/14 Order Imposing Invalidity at CP 365, Opening Brief at 27).

When the Board dismissed Mr. Hadaller's 2009 Petition without review, he was indeed aggrieved at that time and has appealed under RCW 36.70A.300(5), which carried the appeal forward under the Administrative Procedures Act, and in turn has come before this Court.

Much of Lewis County's Response is briefing on inapposite cases, which do not support its position that Mr. Hadaller needed to have appealed the Board's 7/7/08 Order:

a. In *Department of Ecology v. City of Kirkland*, 84 Wn.2d 25, 523 P.2d 1181 (1974), the Shorelines Hearings Board had a tie-vote, and issued a statement that it was unable to render a decision since four members could not concur, but made no findings or conclusions. This led to confusion as to what, if anything, could be considered a final decision for purposes of judicial review. The matter went up to the Supreme Court, who ruled that a tie-vote should be considered an affirmative final decision available for judicial review, because to do otherwise would restrict a party's right to appeal under the statutes (*Id.*, at 31).

In our case, The Growth Board unanimously made 54 Findings and 34 Conclusions in its 7/7/08 Final Decision (CP 136-146), and declined to lift any part of its pending invalidity order in accordance with RCW 36.70A.302(7), thus rendering the 2007 enactments through Ord. 1197 & Res. 306 void and of no effect. It is incongruent for the Board to dismiss

Mr. Hadaller's Petition on the stated basis that he was trying to appeal a designation that had already been made, when it was the Board's 7/7/08 Order that caused the 2007 ARLs to be rendered void. The Board has improperly restricted Mr. Hadaller's right to appeal under the statutes.

b. In *Torrance v. King County*, 136 Wn.2d 783, 966 P.2d 891 (1998), while the subject matter is very similar to our case, the focus of that case is on the writ of certiorari appeal procedure. The landowner chose not to appeal the Growth Board's dispositive order dismissing his appeal of King County's decision declining to remove his property from agricultural designation. He instead sought a remedy on the rezone through a constitutional writ of certiorari. The Court ruled that because he failed to avail himself of the method of appeal set forth in the GMA statute (the Administrative Procedures Act through RCW 36.70A.300(5)), then the writ of certiorari was unavailable. The Court summarized the Central Board's order, but made no analysis as to the legitimacy of the Board's dismissal of Mr. Torrance's Petition, stating that his failure to appeal it, as required per the GMA statute, was fatal to his case (*Torrance* at 792).

In our case, Mr. Hadaller filed his Petition within 60 days of Lewis County's publication of its ARLs through Ord. 1207 & Res. 09-251 (see WAC 242-02-220(1); see also CP 174-175), followed upon by a timely-filed APA appeal of the Growth Board's decision on dispositive motion to

dismiss his Petition (CP 3-15), which is now before this Court. Mr.

Hadaller's appeal process has been procedurally correct.

c. In *Spokane County v. City of Spokane*, 148 Wn. App. 120, 197 P.3d 1228 (2009), the County had already finalized its legislative action and was found compliant, and therefore had no obligation to designate an urban growth area to be jointly planned with the City, which the Court determined was an interlocal agreement, not a GMA compliance matter. The Growth Board's jurisdiction could not be invoked for non-GMA issues. The Court set aside the Board's decision and reversed the Superior Court, stating that the Board could not require Spokane County to take the action on the joint planning that the City of Spokane wanted since the Board has no authority on interlocal agreements.

The *Spokane* case is different from Mr. Hadaller's case in many ways. Spokane County, unlike Lewis County, was not under a pending order of invalidity, which meant Spokane County's Comprehensive Plan was presumed valid upon adoption. Thus, even if all or part was found noncompliant, it did not become void. Lewis County's ARLs did not work that way. The Western Board had determined the entirety of Lewis County's ARLs to be noncompliant *and* invalid (and thus void – see RCW 36.70A.300(4)), and the only way any of the ARLs could be approved was for the Board to specifically lift all or part of its invalidity order. But in its

7/7/08 Decision, the Board, after holding a combined<sup>3</sup> hearing on the merits and compliance hearing, chose to not rescind any portion of its determination of invalidity and ordered a new compliance schedule and remand (Conclusion GG at CP 146). See *Spokane* at 125-126 citing RCW 36.70A.300(3)(b). See also RCW 36.70A.302(7).

d. Lewis County further cites to *Bock v. Board of Pilotage Commissioners*, 91 Wn.2d 94, 99, 586 P.2d 1178 (1978); *Lewis County v. Public Employment Relations Commission*, 31 Wn. App. 853, 862, 644 P.2d 1231 (1982); *Pacific Rock v. Clark County*, 92 Wn. App. 777, 782n1, 964 P.2d 1211 (1998) for the holding that an administrative order is reviewable under the APA (Response Brief at 26). Unlike Mr. Hadaller's case, the matters in the above-cited cases (even if they were applicable), had no outstanding order of invalidity and no ordered remand. While Petitioner might have been able to appeal the Board's 7/7/08 Order, he had no need to appeal an ordinance that was still invalid, void, never took effect, and remanded for further amendment.

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<sup>3</sup> Note that Lewis County has incorrectly identified the Hearing on the Merits of WWGMHB No. 08-2-0004c as being consolidated with the Compliance Hearing of Nos. 99-2-0027c and 00-2-0031c (Response at 22). It was not, but instead was only combined for purposes of holding one hearing, although Mr. Hadaller was also admitted as an Intervenor in the other two compliance cases. The "c" added to 08-2-0004c denotes that there were multiple appeals in 2008, which were consolidated, of the ordinance Lewis County adopted, in this instance Ord. 1197 in 2007. Similarly, the 99-2-0027c and 00-2-0031c cases originated in 1999 and 2000 from multiple appeals of ordinances in those years. Essentially the same petitioners appealed nearly every Lewis County GMA ordinance, but Mr. Hadaller was the newcomer in 2007. See Board synopsis at CP 68.

e. Lewis County cites to *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 166 P.3d 1198 (2007) apparently for the purpose of showing that GMA actions can be complex, and Growth Boards may find only certain elements noncompliant that need to be remanded (Response Brief at 29-30). Appellant does not disagree, and in fact Lewis County's myriad GMA compliance issues were forged, topic by topic, through Growth Board appeals<sup>4</sup> wherein the Board parsed out the numerous issues to determine which were compliant and which were not. In 2007, the Board clearly was capable of identifying which part or parts of the ARLs it believed should be validated, per RCW 36.70A.302(7), but chose not to lift the invalidity as to any part.

As explained by the *Swinomish* Court, the Board had already determined which parts of Skagit County's critical areas were compliant:

After reviewing the challenge, the Board upheld the ordinance, concluding that the county was 'in compliance with the [GMA] *except for* the enforcement of watercourse protection measures and the need for more specificity in its monitoring program and adaptive management process.'  
.... We now review the decisions of the Board that Skagit County's 2003 Ordinance, *with two exceptions* ....

*Swinomish*, Id., at 422-423 (emphasis added).

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<sup>4</sup> The Growth Board's 2004 Order determining Lewis County's ARLs invalid touches upon the numerous compliance matters that were pending, at CP 345. Should the Court wish to delve into the details, the Growth Board's website contains the decisions it rendered in WWGMHB Nos. 99-2-0027c and 00-2-0031c which are the originating cases for the ARL issue, but which had also initially dealt with numerous other noncompliance topics, such as urban growth boundaries, rural lands, critical areas, etc.

Unlike Skagit County, the Western Board did not find any part of Lewis County's 2007 ordinance compliant, as identified in its Conclusion GG and order for further remand, CP 146.

f. It is not clear why Lewis County cited *Astoria Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166 (1991) since, if relevant at all, supports Mr. Hadaller's position more than the County's. The question was whether an age discrimination lawsuit was precluded from being re-litigated in the Federal court after the State (New York) administrative agency had already rendered its decision that there had been no discrimination. Instead of appealing the State agency decision, Solimino brought a civil rights action in Federal District Court, but Astoria prevailed in getting it dismissed on collateral estoppel grounds. The Second Circuit Court of Appeals reversed the District Court, and Justice Souter delivered the U.S. Supreme Court's opinion, wherein he differentiated the collateral estoppel and res judicata grounds as applied to State agencies and as distinguished from State Courts. The Supreme Court held that the State agency administrative findings had no preclusive effect on Federal proceedings, and that the District Court's grant of summary judgment was erroneous. *Astoria, Id.*, at 106-107, 114.

In Mr. Hadaller's case, it is not his appeal but rather Lewis County's refusal to consider his issues during the 2009 remand that has

caused the “waste of agency and litigant resources” (Response Brief at 30). Although Lewis County may believe that, in the short-term, suppressing Mr. Hadaller’s evidence which revealed the non-compliant nature of its ARL designation process was more expeditious than dealing with the needed amendments head-on during the remand, the County will eventually be proven wrong. More citizens will come to realize how they have been “trapped in economic failure” (citing *Lewis County v. WWGMHB*, 157 Wn.2d 488, 505, 139 P.3d 1096 (2006)) by an ARL designation on land that has no ability or prospect for commercially-significant agriculture (Opening Brief at 10, 39, 47-48), yet has little ability to be used for non-resource uses (see LCC 17.30.610, .620, .630) since any non-agricultural incidental use must not “affect any of the prime soils on any farm (including all contiguous tracts or parcels in common ownership)” citing to LCC 17.30.630(1), at AR<sup>5</sup> 323-325.

4. **Lewis County’s ARLs Adopted After the 2009 Remand Reincorporated the 2007 ARL Proposal, thereby Including Mr. Hadaller’s Property in the New 2009 Designations.**

Lewis County is mistaken when it states that, in 2009, it did not designate Petitioner’s property but rather designated *only* the other additional lands (Response Brief at 14). Lewis County’s 2009 ARL

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<sup>5</sup> AR = Administrative Record, from the Certified Record prepared by the Growth Board to Superior Court, which was transmitted in binders along with the Clerk’s Papers.

remand resulting in Ord. 1207 & Res. 09-251 re-designated everything that had been proposed in 2007, plus added lands that the Growth Board specifically directed to be considered on remand. This re-adoption is a correct way to enact a previously voided ordinance, since the County may not amend a previous ordinance which never took effect (Opening Brief at 18, citing *Davidson Searles v. Cent. Puget Sound Bd.*, 159 Wn. App. 148, 161, 244 P.3d 1003 (2010)).

If the 2009 Ord. 1207 & Res. 09-251 had been limited to just the additional lands, then Mr. Hadaller's and many more properties would have never been included in the final ARLs and thus would still be under invalidity. Mr. Hadaller was correct in appealing the 2009 designations.

The 2009 ARL maps that were referenced as exhibits to Ord. 1207 encompass all the ARLs. The map exhibits to Ord. 1207 (AR 10-21) show Lewis County in a series of maps, wherein all of the ARLs are depicted. This is proper, because prior to its ARL work in 2007, Lewis County rescinded all of its previous ARL proposals (Opening Brief at 21-22; CP 50-65), and since the County's 2007 ARL proposal was not validated in 2008, the 2009 ARLs needed to encompass everything that was intended to be designated as ARL. Ordinance 1207 states:

1. Lewis County adopts the additions and changes to Lewis County Code (LCC) 17.200.020(19a), (19b), and (19c) of the Lewis County Code Zoning Maps as shown in Exhibits A through C attached hereto and incorporated herein by this reference, and amends the Official Zoning Map and other maps in Ch. 17.200 LCC to reflect changes made necessary by the adoption and approval of these amendments.

Ord. 1207, 8/10/09 at AR 10.

Maps 19(a), 19(b), and 19(c) attached to Ord. 1207, depict the entirety of Lewis County's ARLs; therefore, Ord. 1207 & Res. 09-251 in August 2009 was the action that ultimately designated all the ARLs.

Since Lewis County's 2007 ARLs in Ord. 1197 & Res. 07-306 were not found valid, then nothing was designated in 2007-08. The 2007 ARLs were later reincorporated into the 2009 ARL designations, but even then, due to pending invalidity, none of the ARLs were valid designations. Removal of the invalidity was a prerequisite before any ARL designations could occur.

Lewis County is therefore incorrect in its statement that the 2009 ARLs were comprised of only the additional lands that it considered during the 2009 remand. Mr. Hadaller's property (along with many others similarly situated who have Salkum and Prather soils), were included in the 2009 designation. Mr. Hadaller is aggrieved by the 2009 ARLs in Ord. 1207 & Res. 09-251, and properly petitioned to the Growth Board, who improperly denied his right to appeal.

**5. Dennis Hadaller is Not Re-Appealing the 2007 ARLs; Lewis County's Res Judicata, Collateral Estoppel, and Board Jurisdiction Arguments are Misplaced**

Lewis County states the Growth Board does not have jurisdiction to re-visit a Board order once it becomes final (Response at 14); however, Mr. Hadaller's 2009 Petition is not a "re-visit" of his 2007 Petition.

Lewis County's ARLs were made through Ord. 1207 & Res. 09-251 in 2009, which Mr. Hadaller timely appealed to the Growth Board, pleading different issues as based on a different record on remand. Lewis County repackaged its 2007 ARL proposal into the 2009 proposal so that the entirety of the 2009 enactment was a new GMA action taken by the local legislative body and subject to a new appeal to determine "compliance with the goals and requirements" of the GMA, under WAC 242-02-210, 242-02-220, RCW 36.70A.270 and 36.70A.280.

At the time of Mr. Hadaller's appeal, no final legislative action approving Lewis County's ARLs had occurred and the ARLs were void. Even after the Board lifted invalidity on 12/29/09, Mr. Hadaller still had an active pending appeal (albeit the presumption of validity had changed), which the Board was to consider "in view of the entire record" under RCW 36.70A.320(3). The Board improperly dismissed Mr. Hadaller's 2009 Petition without consideration of his 2009 issues, and without consideration of the documents he had entered into the 2009 record.

Lewis County also attempts to revive before this Court the res judicata and collateral estoppel issues (Response Brief at 33-35) which the Growth Board already determined as unnecessary doctrines for its order on dismissal (CP 14). Moreover, the case cited by Lewis County, *Spokane County v. City of Spokane*, 148 Wn. App. 120, 197 P.3d 1228 (2009), does not support Lewis County's position in any event.

In *Spokane, Id.*, although the Appellate Court did not rule upon the issue of collateral estoppel raised by the City (since it was improperly being pled for the first time on appeal), it did comment on these claims. As explained by the Court, the City had asserted the County's appeal should be disregarded because similar issues had been decided by an earlier Eastern Board Final Order, which the County had not appealed. The *Spokane* Court correctly analyzed the distinction, stating that because the Board had already concluded Spokane County's Comprehensive Plan was in compliance in 2002, including an agreed order of dismissal in 2003 (and there had been no pending order of invalidity), then the Board had no authority in 2006 to revisit the local government's legislative act that had been completed some years earlier. In contrast, Spokane County would not be collaterally estopped from appealing the Growth Board's 2006 Final Decision and Order, since the issue was an amendment to the Comprehensive Plan, and not an appeal of the original Plan. *Id.*, at 124.

To summarize the analogy of *Spokane, Id.*, to our case:

(a) If Mr. Hadaller had not made his appeal of the 2009 enactments within 60 days of publication, and now tried to appeal (and assuming there was no new amendment or other legislative action which would be subject to a new appeal), he would be untimely and the Growth Board would not have jurisdiction to hear his Petition. But Mr. Hadaller did timely appeal and thus the Board does have jurisdiction; and

(b) If the Growth Board had lifted invalidity as to the 2007 ARLs (which it did not), whereby only additional ARLs could be subject to a GMA appeal, even then the Board would still have jurisdiction to hear Mr. Hadaller's 2009 Petition as applied to those lands, since Mr. Hadaller's Issues 1 – 4 apply county-wide and thus would remain within the Board's jurisdiction. His Issue 5 is the only issue that is specific to his property. (PFR issues listed in Opening Brief at 31-32.) However, because the Board determined nothing in the 2007 enactment valid, thereby making the 2009 remand open for all ARL compliance issues, then the Board has jurisdiction to hear all five of Mr. Hadaller's 2009 Petition issues.

Even if this Court should decide to review this case under the doctrines of collateral estoppel or res judicata, Mr. Hadaller's 2009 Petition would not be barred, since it brought different issues and was based on a new record. Petitioner fully briefed his position to the Board,

CP 194-205; see also CP 155 and Opening Brief at 31-32 showing Mr. Hadaller's 2007 and 2009 Petition issues side-by-side.

6. **Lewis County Ignores the Fact that the 2009 Remand was Open for Review of Any ARL Compliance Issue**

Lewis County's Response fails to address the Growth Board's statements that: (a) the County was not limited during the 2009 remand to only the issues the Board ordered it to consider, and (b) the actual requirement in a remand is GMA compliance, not just the directives from the Board's last order (Opening Brief at 27-28, 49; CP 365; *infra* at 7).

During the 2009 Remand, Mr. Hadaller presented Lewis County with specific information (including the soil report the Growth Board acknowledged showed that not all prime soils were commercially significant, yet declined its supplementation, Finding 46 at CP 141). That information revealed the main flaw with the County's ARLs in complying with the GMA definition of long-term, commercially-significant agriculture, especially as that definition was further interpreted by the Supreme Court in *Lewis County v. Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006). The problem was that some lands, although indeed categorized as having prime farmland soil, nevertheless did not have the ability for *commercial* agricultural production, yet were still being designated as ARL (on Mr. Hadaller's property specifically, and likely

also true for other properties containing non-irrigated Salkum and Prather soil types), but there is no method to correct for that type of error.

Mr. Hadaller urged Lewis County to remedy this problem during the 2009 remand and pointed out that the remand was open and was the appropriate forum to discuss how to make these corrections so that its ARLs could comply with the GMA (Opening Brief at 9-11, 33-35; CP 208-240). Lewis County has provided no credible explanation for why it ignored Mr. Hadaller's testimony and submittals during the 2009 remand.

In its Order on motion to dismiss, the Growth Board states the County was not obligated to revisit compliant matters (CP 13-14); however, as has been briefed herein, since the Board found nothing in the 2007 ARL proposal compliant or valid and no final legislative action had been taken on the ARLs, the 2009 remand was in fact open for review of precisely the matters Mr. Hadaller brought to the remand. The Growth Board erred in dismissing Mr. Hadaller's Petition on the presumption that Lewis County had no obligation to consider his testimony and submittals during the remand (Assignment of Errors 5 – 6, Opening Brief at 23-28).

7. **Mr. Hadaller's 2009 Petition Pled New Issues that have Never Been Decided on the Merits.**

Lewis County is also mistaken in stating that Mr. Hadaller's issues as pled in his 2009 petition were already decided by the Board (Response

Brief at 37). Mr. Hadaller's 2009 Appeal contained new issues<sup>6</sup> and is substantively different than his 2007 Petition. Although some of what are now 2009 PFR issues had been discussed as part of his motion to supplement during the 2008 combined hearing (CP 73-74, 122) for which the Board summarized Mr. Hadaller's "position", it did so without the benefit of his supplementary evidence. Further, the Board did not, and is prevented under GMA from making, any rulings with regard to issues outside of the ones specifically pled by Petition (Opening Brief at 44).

Although Lewis County postulates in its Response Brief at 39 that the Growth Board may make rulings on issues raised "generally", the County offers no counter legal theory as to how the Growth Board could have had authority to issue opinions on issues not specifically pled or modified by the Prehearing Order, when such advisory opinions are explicitly prohibited under RCW 36.70A.290(1) and WAC 242-02-830(2).

Similarly in the 2009 Compliance hearing, while there was overlap discussion of the issues Mr. Hadaller had just filed in his Petition two days earlier, the Board made no ruling on Mr. Hadaller's 2009 issues at that time either, stating they were not appropriate for consideration in a compliance hearing (CP 321). So while the Board rendered a summary of

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<sup>6</sup> See CP 155 listing Hadaller's 2007 Petition issues, and Opening Brief at 31-32 showing the 2007 and 2009 issues side-by-side.

additional issues discussed during that hearing, Mr. Hadaller's 2009 issues were not ruled on the merits. Lewis County does not and cannot cite any Findings or Conclusions on the merits of any of Mr. Hadaller's 2009 Petition issues, especially since all Board rulings have been made without consideration of Mr. Hadaller's information he entered into the 2009 record on remand (CP 73-74, 122, 141; Opening Brief at 8-9, 45).

The Growth Board explained the reason for disregarding Mr. Hadaller's evidence because it was not previously brought before the County during the 2007 proceedings (CP 73-74, 122, 141), so he brought that evidence, and more, to the 2009 Remand. But now the Board's reason for dismissal as "untimely" by saying that it already considered his issues, is simply not true. The only issues the Board considered were the ones enumerated in Mr. Hadaller's 2007 Petition, none of which are duplicates in his 2009 PFR (Opening Brief at 31-32, CP 175-176, 192), except possibly 2009 PFR Issue 5, which is similar, though not identical, to 2007 PFR Issue 4. But no issues were decided with his evidence.

While Mr. Hadaller did not prove Lewis County to be clearly erroneous on his 2007 Petition issues as based on the 2007 record, he still had every right to participate in the remand, and then bring a new appeal of the County's 2009 ARL enactments, particularly an appeal which pled new issues, and which was based on the new 2009 remand record.

**8. Lewis County Fails to Respond to the Dispositive Motion Standards**

Lewis County appears to be trying to supply new legal authority to substitute for the Growth Board's patent disregard of legal standards in which it was to have reviewed the County's dispositive motion against Mr. Hadaller (Response Brief at 33; Opening Brief at 40-42). Lewis County again resurrects the doctrines of res judicata and collateral estoppel, when even the Board plainly stated it did not dismiss on those bases (CP 14). Lewis County tries to further claim that the question the Growth Board asked was whether it had jurisdiction (Response Brief at 33), but nowhere in its Order on motion to dismiss (CP 9-14), does the Board claim it was without jurisdiction to hear Mr. Hadaller's 2009 Petition. What Lewis County fails to address are the legal standards by which the Board was to review the dispositive motion, that the Board clearly did not apply when it dismissed Mr. Hadaller's Petition for Review. (Opening Brief at 40-42.)

For Lewis County to claim that Petitioner presented no evidence to contest the supposed "fact" that his property had been designated on November 5, 2007, demonstrates either a complete misunderstanding of RCW 36.70A.300, 36.70A.302, and how a presumption of validity versus a determination of invalidity is applied, or the County is trying to revise history by changing the facts and sequence of events. Lewis County's

2007 ARLs were not valid, and thus void at the time of Mr. Hadaller's 2009 Petition, thereby making the Board's dismissal of his Petition as "untimely" an error of fact and law, and a misapplication of law to the facts. (See Opening Brief at 15-25, 38-40, 47-479 and *infra* at 1-5, 20-23).

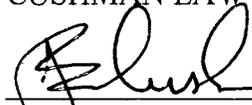
### SUMMARY & CONCLUSION

The Growth Board's 7/7/08 Order was final per RCW 36.70A.300, but since it did not lift any part of the invalidity in the manner required by RCW 36.70A.302(7), Lewis County's 2007 enactments remained void. Without any underlying ARLs, this meant Lewis County had *no* ARLs, and because the Board ordered a further remand, no final legislative action on the ARLs had been taken, thus Mr. Hadaller was not yet aggrieved under RCW 36.70A.300(5) and did not need to appeal the 7/7/08 Order. During the 2009 remand he showed how Lewis County's ARL proposal was not compliant, but he was ignored. The Growth Board has never considered his 2009 Petition issues with the benefit of his evidence.

Appellant prays the Court reverse the Board's dismissal, remand for a hearing on the merits, and grant his attorney fees for this action.

SUBMITTED this 14 day of July, 2011.

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DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY \_\_\_\_\_

I declare under penalty of perjury according to the laws of the State of Washington, that on the date signed below, I caused the foregoing document to be filed with this Court, and emailed and mailed to opposing counsel as indicated below:

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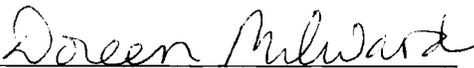
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