

ORIGINAL

NO. 41581-0-II

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

DENNIS HADALLER,

Appellant (Petitioner)

v.

**WESTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD**

Respondent

and

LEWIS COUNTY; EUGENE BUTLER,

Underlying Parties

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STATE OF WASHINGTON
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APPELLANT'S OPENING BRIEF

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3. *The Growth Board Erred in Concluding Mr. Hadaller’s Appeal made through his 2009 Petition for Review was “not timely”.*

4. *The Growth Board Erred in Concluding that any ARL Designation had been Previously Made on Mr. Hadaller’s Property through Ord. 1197 & Res. 07-306 in 2007.*

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6. *The Growth Board Erred in Concluding that Lewis County Had No Obligation to Consider Mr. Hadaller’s Submittals in the Record During the 2009 Remand.*

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8. *The Growth Board Erred in Denying Mr. Hadaller his Right of Appeal under RCW 36.70A.280 and 36.70A.320(3), wherein a Citizen With Standing May Appeal, as Matter of Right, any GMA Action on the Basis of Non-Compliance with the Growth Management Act.*
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I. INTRODUCTION

The Appellant Dennis Hadaller, brings this appeal from an Administrative Procedures Act (APA) action in Thurston County Superior Court, which upheld the Western Washington Growth Management Hearings Board's (Growth Board) dismissal of his Petition for Review prior to holding a hearing on the merits of his appeal of Lewis County's Ordinance 1207 and Resolution 09-251. This Court reviews the Growth Board's decision under the APA *de novo*¹.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Trial Court Erred in Affirming the Decision of the Western Washington Growth Management Hearings Board by Concluding that the Growth Board's Dismissal of Mr. Hadaller's 2009 Petition for Review was Proper.

2. The Trial Court Erred in Failing to Find the Growth Board's Decision Granting Lewis County's Motion to Dismiss violated RCW 34.05.570(3).

¹ "Judicial review of Growth Management Hearings Board decisions begins in superior court. On further appeal to this court, we directly review the record before the Board, sitting in the same position as the superior court [footnotes omitted]." *City of Redmond v. Central Growth Board*, 116 Wn. App. 48, 54, 65 P.3d 337 (2003).

"This court sits in the same position as the superior court and reviews the Board's decision by applying the standards of review in RCW 34.05.570 directly to the agency record." *Postema v. Pollution Control Hrgs.. Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

3. The Growth Board Erred in Concluding Mr. Hadaller's Appeal made through his 2009 Petition for Review was "not timely".

4. The Growth Board Erred in Concluding that any ARL Designation had been Previously Made on Mr. Hadaller's Property through Ord. 1197 & Res. 07-306 in 2007.

5. The Growth Board Erred in Concluding that an ARL Designation on Mr. Hadaller's Property was Found to be in Compliance with the GMA Prior to the Filing of His 2009 Petition for Review.

6. The Growth Board Erred in Concluding that Lewis County Had No Obligation to Consider Mr. Hadaller's Submittals in the Record During the 2009 Remand.

7. The Growth Board Erred in Concluding that Mr. Hadaller's 2009 Petition Pled the Same Issues on Appeal as his 2008 Petition, and that the Issues in his 2009 Petition Concerned His Land Only.

8. The Growth Board Erred in Denying Mr. Hadaller his Right of Appeal under RCW 36.70A.280 and 36.70A.320(3), wherein a Citizen With Standing May Appeal, as Matter of Right, any GMA Action on the Basis of Non-Compliance with the Growth Management Act.

9. The Growth Board Erred in Failing to Comply with Legal Standards for Dispositive Motions when it Dismissed Mr. Hadaller's 2009 Petition for Review.

Issues Pertaining to Assignments of Error

1. Invalid Ordinances Are Void. Because the Growth Board declined to lift any portion of its Order of Invalidity after the Compliance Hearing on Lewis County's ARLs proposed in 2007 through Ord. 1197 & Res. 07-306, did that continuing Order of Invalidity void Ord. 1197 & Res. 07-306? If determined void, did Lewis County have *any* ARL designations or regulations in effect prior to the lifting of invalidity on 12/29/09? If there were no ARLs in effect, did the Growth Board err in dismissing Mr. Hadaller's 2009 Petition on the incorrect basis that his property was already designated in 2007 and incorrectly conclude his appeal was not timely? (Assignment of Errors 1 - 9.)

2. Lewis County Did Not Have Presumption of Validity at the Time of Appeal. While under the continuing Invalidity Order, did Lewis County's ARL designations and regulations put forth both in 2007 through Ord. 1197 & Res. 07-306, and in 2009 through Ord. 1207 & 09-251 remain invalid and not have presumption of validity status under RCW 36.70A.320(4)? If these enactments are not valid until after the Growth Board lifts its Order of Invalidity, yet Mr. Hadaller's appeal was made prior to that time, did the Board err in dismissing Mr. Hadaller's 2009 Petition on the incorrect basis that his property was already designated in

2007 and incorrectly conclude his appeal was not timely? (Assignment of Errors 1 - 9.)

3. 2009 Remand Was Open to Any ARL Compliance Issue.

Because the Growth Board's 7/8/08 Order made no Findings of Compliance and lifted no part of the pending Invalidity Order, and ordered a further remand schedule, could Lewis County have considered, during the new remand period, other ARL compliance issues and proposed amendments in addition to the specific issues identified by the Board in its 7/8/08 Order? If Lewis County was not restricted to amending only the specific issues identified in the 7/8/08 Order, did the Growth Board err in dismissing Mr. Hadaller's 2009 Petition without hearing his new appeal as derived from the 2009 Remand, and wrongfully bar his right of appeal under RCW 36.70A.280? (Assignment of Errors 1 - 9.)

4. Mr. Hadaller Pled New Issues that had Not Previously Been Considered on the Merits. Because Mr. Hadaller's 2009 Petition for Review pled new issues that had not been reviewed on the merits previously, and in particular had not been reviewed with the benefit of the documents he entered into the record before Lewis County during the 2009 Remand, did the Growth Board err in dismissing Mr. Hadaller 2009 Petition and wrongfully bar his right of appeal under RCW 36.70A.280? (Assignment of Errors 1 - 9.)

5. Enactments Having Presumption of Validity Are Still Appealable. Because the Growth Board's 12/29/09 Order Finding Compliance was made without having first heard Mr. Hadaller's 2009 Petition on the merits and without consideration of the documents he had put into the 2009 Record on Remand, does Mr. Hadaller's timely-filed 2009 Petition still afford him the right to appeal with only the presumption of validity changed? Did the Growth Board err in dismissing Mr. Hadaller's 2009 Petition and wrongfully bar his right of appeal under RCW 36.70A.280? (Assignment of Errors 1 - 9.)

6. Did the Growth Board's dismissal of Mr. Hadaller's 2009 Petition comply with legal standards for dispositive motions? (Assignment of Errors 1 - 9.)

7. Should attorneys' fees be awarded to Appellant/Petitioner? (Assignment of Errors 1 - 9.)

III. STATEMENT OF THE CASE

A. Background

Lewis County had been working to identify and designate its Growth Management Act (GMA)-required agricultural lands and related regulations (ARLs) for several years under a succession of remands and a continuing order of invalidity by the Growth Board. The Growth Board issued its first Order of Invalidity against Lewis County as to its

agricultural designations and regulations in 2004 (CP 343-391) (the ARLs had previously been only noncompliant). The matter eventually reached the Washington Supreme Court on appeal - see *Lewis County v. Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006). The Supreme Court affirmed in part and reversed in part, determining that Lewis County's ARL regulations improperly allowed non-agricultural uses on designated lands, but also determining that the Growth Board was not applying the correct definition for designating agricultural lands, primarily because the Growth Board failed to factor in the requirement that the lands be economically viable for commercial agriculture. The Supreme Court ordered a remand so the Growth Board could apply the "correct definition of agricultural lands." *Lewis County, Id.*, at 493, 502, 505, 509.

After the Supreme Court's 2006 decision, instead of adopting interim regulations and zoning, Lewis County repealed its previous ARL proposal and put its rural lands into a moratorium without adopting any designated agricultural land or implementing regulations. The Growth Board explained the procedural details in its June 8, 2007 Order Finding Noncompliance, Imposing Invalidity Determination, and Setting New Schedule for Compliance (CP 50-64). The Growth Board interpreted Lewis County's actions to mean, that since it no longer would be reviewing the version of Lewis County ARLs that had been the basis for

the Supreme Court's decision, the Court's remand to the Growth Board was moot (CP 58). In this manner, the Growth Board sidestepped the Supreme Court's decision and disregarded the directive on remand that it apply the "correct definition of agricultural land".²

B. Hadaller Proceedings

Mr. Hadaller's land was first proposed for designation as Agricultural Resource Land (ARL) in 2007 through Lewis County's Ord. 1197 & Res. 07-306. Mr. Hadaller appealed the proposed rezone of his land to ARL on 1/4/08, seeking relief under both LUPA and the GMA. Other citizens also appealed these 2007 enactments for different reasons.

The Growth Board combined the various appeals against Ord. 1197 & Res. 07-306 with the compliance matter for purposes of holding one hearing, and on July 8, 2008 issued a combined decision on all the appeals, and on whether Lewis County's 2007 ARLs were in compliance. The Board ruled against the specific issues raised by Mr. Hadaller at that time, but also ruled that Lewis County's Ord. 1197 & Res. 07-306 were

² As enunciated by the Supreme Court in *Lewis County v. WWGMHB*, 157 Wn.2d 488, 139 P.3d 1096 (2006), the Court expanded upon its prior ruling in "Benaroya I" clarifying that definition of designated lands: "includ[e] land in areas used or capable of being used for production based on land characteristics, *and* (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity..." *Id.* at 502 (italics in original; underlined emphasis added).

"If the State wants to conserve all land that is capable of being farmed without regard to its commercial viability, it may buy the land. We also remand the case for the Board to apply the correct definition of agricultural land ..." *Id.* at 509.

still not GMA-compliant. The Board rejected Lewis County's ARL proposal, and did not lift any part of its pending order of invalidity, sending the matter back to Lewis County on a complete remand.

The Growth Board implies in its 2010 Order on Lewis County's Motion to Dismiss (CP 9 – 14) that its 7/8/08 Order found the Hadaller designation compliant, and further states: "the Hadaller property was designated ARL in 2007" (CP 13). Such statements and inference are in error. In its 7/8/08 Decision, the Board concluded Mr. Hadaller had "not demonstrated the County violated the GMA property rights goal" (CP 82, 143), and that he "failed to demonstrate the County's designation of his property as ARL was clearly erroneous" (CP 123, 145). These are not Findings of Compliance needed to rescind its determination of Invalidity under RCW 36.70A.302(7)(a). (Note also that the Board came to these conclusions without consideration of the supplementary evidence that Mr. Hadaller had offered (CP 122)). The Board made no finding or conclusion in its 7/8/08 Order that anything in Ord. 1197 & Res. 07-306 was compliant with the GMA, and specifically did not lift any portion of its invalidity order, even though RCW 36.70A.302(7)(b) sets forth a procedure for Growth Boards to use when partial compliance is found.

Mr. Hadaller did not appeal the 7/8/08 Decision because it was based on the 2007 Record for which the Growth Board declined to grant

supplementation. Within the constraints of WAC 242-02-540 and 242-02-52002 concerning the record on review, the Board is granted deference under WAC 242-02-640(7) regarding the acceptance of supplemental evidence, and thus Mr. Hadaller would have had little ability to prevail on appeal. More importantly, he also didn't appeal because the Board was sending the matter back to the County again on a full remand, which would provide him the opportunity to establish a new record on his points of concern, thus remedying the specific defect the Board found in his appeal – lack of evidence in the County record.

During the next period of remand which occurred during 2009, Mr. Hadaller submitted much testimony as to why the County's proposed ARL designations and related development regulations did not comply with the GMA requirements to designate long-term *commercially significant* agriculture land, both generally as a county-wide matter, and specifically on his property. Although Lewis County listened to his testimony and accepted the written submittals he put forward, the County considered only the items that the Growth Board's 7/8/08 Order specifically identified for review on remand. Lewis County's final outcome at the end of the remand period in 2009 failed address the actual growing capacity and productivity of land being designated for long-term commercial production, as required by the GMA, and further failed to consider the

actual economic viability of the land for agriculture, as the GMA has been further interpreted by the Washington Supreme Court. *Lewis County v. Hearings Bd.*, *Id.* at 502, 505, 509 [quoted in Footnotes 2 and 3 herein].

The specific flaw identified by Mr. Hadaller during the 2009 remand was that Lewis County was designating lands based on the assumption that if the soil was classified as a “prime farmland”, then it automatically had the soil capacity and productivity for an economically viable product, solely by virtue of that “prime” soil classification. In the 2009 record on remand (unlike 2007 remand), Mr. Hadaller had a soils expert’s report and other evidence and information to prove his points. Since the soil types on Mr. Hadaller’s land are classified as prime even though they cannot yield a profitable crop, and are also predominant soil types in Lewis County, then it is likely that many others similarly categorized would likewise be “trapped in economic failure”³.

Mr. Hadaller’s concerns are worthy of review. Appropriate amendments should be made. At a minimum, Lewis County should add an additional clause to correct errors under LCC 17.30.600, or formulate another methodology to address what happens when designated lands that

³ A situation that the Supreme Court has said the agricultural designations should prevent: “we note that the GMA is not intended to trap anyone in economic failure, as evidenced by the mandate to conserve *only* those farmlands with *long-term commercial significance*” *Lewis County v. WWGMHB*, 157 Wn.2d 488, 505, 139 P.3d 1096 (2006) (emphasis added).

meet the Lewis County criteria for its ARLs, simply cannot sustain an economically-viable agricultural product. Mr. Hadaller's issues, which affect not only him but any other similarly situated Lewis County citizen, have never yet been considered on the merits.

Because the Growth Board's 7/8/08 Order remanded the ARL matter back to Lewis County, retaining the full Invalidation Order (see Conclusion GG at CP 146) (which in turn carried forward the broadly worded order from its original 2004 Invalidation Order: "to remove substantial interference with Goal 8 of the Growth Management Act" (CP 390)), Lewis County was obligated to address any issues brought forward by citizens during the 2009 remand, in addition to the ones specifically noted by the Board in its 7/8/08 Order, especially if new evidence revealed noncompliance. The Growth Board had previously confirmed this was its procedure in its first Order Imposing Invalidation in 2004 (CP 365).

At the end of the 2009 remand proceedings, Lewis County "adopted" Ord. 1207 & Res. 09-251. Mr. Hadaller, appealed those 2009 enactments on the basis that the ARL designations and regulations did not comply with the GMA requirements for long-term, commercially-significant agriculture, which requires consideration of the growing capacity and actual productivity of that soil, so as to enable commercial agriculture which is economically viable (CP 174-181).

Although the term “adopted” is used to describe both the 2007 and 2009 ARL enactments, due to the pending Invalidation Order, the designations and regulations actually remained as proposals and had no legal effect (except for the purposes of appeal under WAC 242-02-220) until after the Growth Board made Findings of Compliance and lifted its Order of Invalidation. During this time, Mr. Hadaller’s land remained zoned Rural Residential District 1 house per 5 acres (RDD-5), although it was under the County-imposed moratorium. His land did not become designated and rezoned as ARL until the County lifted the moratorium on January, 25, 2010 (CP 158-160).

On January 27, 2010, the Growth Board, upon the motion of Lewis County, dismissed Mr. Hadaller’s October 14, 2009 appeal of Ord. 1207 & Res. 09-251 without hearing the merits of his case, without having briefing or argument on the merits of his issues, without considering Mr. Hadaller’s new evidence and testimony in the County’s 2009 record, and without making a ruling on the issues pled in his 2009 Petition for Review. Although Lewis County argued Mr. Hadaller’s Petition should be dismissed on the grounds of res judicata or collateral estoppel, the Board’s stated reason was that Mr. Hadaller’s appeal was “not timely” because he was trying to challenge the ARL designation already been made on his property in 2007 (CP 13).

Petitioner believes the Board's dismissal is in error because at the time Mr. Hadaller filed his Petition for Review:

1. The Growth Board's invalidity order remained in full force. This meant that: (a) Lewis County's Ord. 1197 & Res. 07-306 made in 2007 were void and of no effect; (b) since there was also no interim ARL zoning, neither Mr. Hadaller's property nor anyone else's property in Lewis County had been designated under any prior ARL enactments either; and (c) the subsequent remand period in 2009 was open for review of any ARL-related compliance issue, in addition to the specific matters the Growth Board required to be reviewed;

2. Mr. Hadaller's 2009 Petition for Review was based on information he had submitted to the County during the 2009 remand, which was a new record on review, and subject to a new appeal under RCW 36.70A.280, 36.70A.290 and 36.70A.320(3). The Growth Board had not previously considered any of this information when it rendered its 7/8/08 Decision based on the 2007 record;

3. Mr. Hadaller's 2009 Petition for Review contained new issues pertaining to how Lewis County's ARL designations and corresponding development regulations in Ord. 1207 & Res. 09-251 made in 2009 were noncompliant county-wide, not just on his own property, which were issues he had not previously pled in his prior 2008 Petition.

The Growth Board had not made previous rulings on the merits of those issues, nor had the Board considered any of Mr. Hadaller's submittals he put into the 2009 Remand Record when conducting Lewis County's 2009 Compliance Hearing. The Board's statement in its 2010 Order on Motion to Dismiss describing Mr. Hadaller's 2009 Petition as an appeal of the "designation on lands he owns" (CP 10) is an incorrect statement by omission since it fails to also identify that his appeal issues address errors in designation county-wide; and

4. Even when an enactment is presumed valid, which in this case, validity did not occur until December 29, 2009, some months after Mr. Hadaller filed his Petition, RCW 36.70A.280 allows citizens with standing the right to timely appeal designations and regulations they believe do not comply with the GMA, and RCW 36.70A.320(3) obligates the Growth Board to hear them. No one disputed Mr. Hadaller had standing, and the Board also acknowledged that his 2009 appeal was timely (CP 13), but still denied Mr. Hadaller his right to appeal.

Any *one* of the above reasons is grounds for overturning the Growth Board's dismissal of Mr. Hadaller's 2009 Petition. But when all of these reasons converge, combined with the standard of review for dispositive motions to consider "all reasonable inferences from the facts in the light most favorable to the nonmoving party" and "the motion should

be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits” [cited *infra* at 41], then the Growth Board was clearly erroneous, and arbitrary and capricious, in its dismissal of Mr. Hadaller’s Petition.

IV. ARGUMENT

A. **Invalid Ordinances Are Void.** Because the Growth Board declined to lift any portion of its Order of Invalidity after the Compliance Hearing on Lewis County’s ARLs proposed in 2007 through Ord. 1197 & Res. 07-306, did that continuing Order of Invalidity void Ord. 1197 & Res. 07-306? If determined void, did Lewis County have *any* ARL designations or regulations in effect prior to the lifting of invalidity on 12/29/09? If there were no ARLs in effect, did the Growth Board err in dismissing Mr. Hadaller’s 2009 Petition on the incorrect basis that his property was already designated in 2007 and incorrectly conclude his appeal was not timely? Yes.

1. ***Growth Board did not rescind any portion of its Invalidity Order; thus Ord. 1197 & Res. 07-306 remained invalid.***

On November 5, 2007 Lewis County proposed through Ord. 1197& Res. 07-306 ARL regulations and designations which included Mr. Hadaller’s land. The County presented these ARLs to the Growth Board with the request that the Board find the County in compliance with the GMA and for the Board to lift its pending order of invalidity. This compliance matter was heard along with new appeals made against Ord. 1197 & Res. 07-306, culminating in the Growth Board’s combined decisions in its July 7, 2008 Compliance Order and Final Decision and

Order (CP 67-156). As a result of that hearing the Growth Board denied Mr. Hadaller's appeal, but still did not find Lewis County's 2007 ARLs to be compliant, and did not lift its pending order of invalidity. In its discussion of the continuing invalidity order, the Board stated:

Additionally, based on the foregoing order, it is clear that the County has much additional work to do in properly designating agricultural resource lands. The Board previously has found that the County's designation and mapping of agricultural resource lands substantially interferes with Goal 8 of the GMA. For the reasons stated in this order, the adoption of Resolution 07-306, which amends the Lewis County Comprehensive Plan, including ARL maps and Ordinance 1197, which amends the Lewis County Code, and designates ARL zones on the Official Zoning Map has *not sufficiently addressed the concerns* that warranted the imposition of invalidity by prior Board order, and the Board will *not lift invalidity* at this time.

Conclusion of Law GG:

It is *premature to lift the Board's earlier invalidity order* while the County still has not properly designated its agricultural resource lands. The County's designation process [] *does not comply* with RCW 36.70A.170 and continues to substantially interfere with RCW 36.70A.020(8).

7/8/08 Order at CP 136, 146 (emphasis added).

Also in this July 7, 2008 Order, the Growth Board ordered Lewis County to undergo a further remand of its ARL proceedings by setting out a new schedule for compliance (CP 80), which is the procedure used under RCW 36.70A.302(7)(a). If the Board had found partial compliance, then it may merely require periodic reports, per RCW 36.70A.302(7)(b):

(1) A board may determine that part or all of a comprehensive plan or developments regulations are invalid ...

(7)(a) *If a determination of invalidity has been made and the county or city 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(7).

The Growth Board could have found partial compliance and lifted portions of its pending Invalidation Order, but choose to retain the full invalidity on the all of Lewis County's ARL actions. Despite the numerous issues on appeal before the Growth Board which it considered in its July 7, 2008 Order, the Board chose to find no portion of Lewis County's ARL proposal in compliance and lifted no portion of its long-standing order of invalidity (CP 136, 146, quoted above, *infra* at 16)

Without having the Order of Invalidity rescinded or modified on any part of Ord. 1197 & Res. 07-306, the 2007 enactment remained invalid. An invalid ordinance is void:

Upon a finding of invalidity, the underlying provision would be rendered void.

King County v. Cent. Puget Sound Bd., 138 Wn.2d 161,181, 979 P.2d 374 (1999).

Moreover, an invalid ordinance cannot be amended without re-enactment, and validity is not conferred through superficial amendment:

The general rule is that void ordinances cannot be amended and that an ordinance passed as an amendment to a previous ordinance, which never took effect, is invalid; a void ordinance cannot be vitalized by amendment, and re-enactment is necessary to validate that intended to be enacted by it... Without question, where an ordinance is void, a subsequent ordinance, that cannot be enforced of itself, and that purports to amend a single section of the prior ordinance, is invalid. [Quoting] *State ex rel. Weiks v. Town of Tumwater*, 66 Wn.2d 33, 36-37, 400 P.2d 789 (1965) (emphasis omitted) (quoting 6 McQuillin, *Municipal Corporations* § 21.05, p. 183 (3rd ed.)).

Davidson Searles v. Cent. Puget Sound Bd., 159 Wn. App. 148, 161, 244 P.3d 1003 (2010).

While the Growth Board in its 7/8/08 Order stated that the ARL designation on Mr. Hadaller's was "not clearly erroneous" (as restricted by the 2007 Record), the County's 2007 enactments remained void and of no effect. Based on the holding in *Davidson Searles, Id.*, the Board cannot later purport to have made an actual Finding of Compliance, per the requirements of RCW 36.70A.302, so as to release solely the Hadaller

property ARL from invalidity. As such, the Board erred in dismissing Mr. Hadaller's 2009 Petition appealing the County's replacement Ord. 1207 & Res. 09-251, without hearing his appeal as drawn from the 2009 record.

2. *Lewis County Had No ARLs in effect through 2009.*

The Growth Board's stated basis upon which they viewed Mr. Hadaller's 2009 appeal as untimely was because "the Hadaller property was designated ARL in 2007 ... challenging a decision that was made in 2007, is not timely" (CP 13). The Growth Board is in error. Since Ord. 1197 & Res. 07-306 were not accepted as compliant or valid in 2007, they became void. In support of its dismissal of Mr. Hadaller's appeal, the Growth Board makes erroneous statements in its 1/27/10 Order on Motion to Dismiss which contradict its earlier 7/7/08 Order on Compliance.

For example, the Board states in its 1/27/10 Order on Motion: "Lewis County designated Petitioner's property as ARL in 2007 and that designation was upheld by the Board in 2008." (CP 12). Although the Growth Board did rule that Lewis County was not clearly erroneous to designate Mr. Hadaller's property (CP 145)⁴, because the Board's 7/8/08 Order did not find any portion of the 2007 ARLs in Ord. 1197 & Res. 07-

⁴ Mr. Hadaller points out that the Growth Board made that decision after declining to accept his supplemental evidence into the Growth Board's record because it had not specifically been before the Lewis County decision-makers; and now that it has come before the County decision-makers on a full remand, the Growth Board dismisses Mr. Hadaller's case without considering his evidence yet again.

306 to be compliant and lifted no part of its long-standing Invalidation Order, that meant that the 2007 ARL proposal had no effect, and Lewis County had designated *nothing* in 2007.

The Growth Board makes another similarly erroneous statement in its 1/27/10 Order on Motion to Dismiss: “While the Board found that the ARL designation of the Hadaller property was compliant with the GMA, the Board concluded that Lewis County still had violated the GMA in other regards.” Again the Board’s Order on motion to dismiss is incorrect, since it made no Findings of Compliance as required by RCW 36.70A.302 prior to the time Mr. Hadaller filed his 2009 Petition for Review.

The following chart shows a brief chronology (CP 26) of Growth Board invalidity orders pertaining to Lewis County’s designation of ARLs, starting with the first order of invalidity:

Date	Description of Growth Board Orders on Lewis County’s ARLs
2/13/04	<p><i>Order Finding Noncompliance and Imposing Invalidation</i> (CP 343-391). The excerpt quoted below is the broadly-worded invalidity order that continued to be carried forward in its entirety. All subsequent orders on ARL invalidity go back to this originating 2004 Order:</p> <p style="padding-left: 40px;">This matter is remanded to the County for compliance with the Growth Management Act and to remove substantial interference with Goal 8 of the Growth Management Act in accordance with this decision. (CP 390)</p>
5/21/04	<p><i>Order on Reconsideration of Extent of Invalidation</i> - identified mapped areas to which the 2/13/04 invalidity Order applied (including Mr. Hadaller’s property zoned RDD-5).</p>

12/1/06	<i>Order Denying Motion to Rescind Invalidity</i> - Board continued to uphold its prior Order of Invalidity on the basis that County's ARL criteria were inconsistent with its mapped ARLs. (Hadaller property still had not been proposed as ARL and remained zoned RDD-5, although under a moratorium separately imposed by Lewis County under Ordinances 1191 and 1193 on 11/13/06 – as recited in Ord. 1211 (CP 158).
6/8/07	<i>Order Finding Noncompliance, Imposing a Determination of Invalidity and Setting New Schedule for Compliance</i> (CP 50-65) - Board's Order explained how Lewis County repealed all pending ARLs, and had no ARL designations or regulations. Board stated the Supreme Court's Order of remand to the Board was moot. Board also stated the Invalidity Order against Lewis County remained in place, along with its previously ordered remand to Lewis County, and further explained that Lewis County had not asked the Board to rescind invalidity during the remand period. (Hadaller property had not been proposed as ARL and remained RDD-5, under moratorium.
7/7/08	<i>Compliance Order and Final Decision and Order</i> - Board does not lift invalidity order and finds County ARLs proposed under Ord. 1197 & Res. 07-306 continue to be invalid. Growth Board finds (based on 2007 record) that Lewis County was not clearly erroneous to designate Hadaller property as ARL. Due to continued invalidity order and moratorium, no designations were actually made anywhere in Lewis County. (CP 67-156).
4/16/09	<i>Order Continuing Noncompliance</i> - Board gives County an additional 180 days to comply with the Board's 7/7/08 Order. (Hadaller property proposed as ARL, but due to invalidity order and moratorium, no actual designations are made.)
12/29/09	<i>Final Compliance Order and Order Rescinding Invalidity</i> (CP 304-324) - Board finds new Ord. 1207 & Res. 09-251 comply with GMA, and lifts its order of invalidity. Hadaller had filed his appeal of Ord. 1207 & Res. 09-251 prior to the Finding of Compliance, on October 14, 2009. Although Mr. Hadaller participated in the 2009 Compliance Hearing, the Board again excluded consideration of Mr. Hadaller's evidence and excluded the submittals he had entered into the 2009 Remand Record (CP 306, 320-322).

None of Lewis County's ARLs were put into effect until the County lifted its moratorium by Ord. 1211 (CP 158) on 1/25/10.

The point of the chronology is that Lewis County rescinded all of its previously-proposed ARLs prior to beginning its remand in 2007.

Lewis County did not adopt interim zoning; therefore, the County had no lands zoned or designated as ARL and had no ARL regulations at the time it commenced its remand in 2007. As discussed herein, after the compliance hearing on the 2007 ARL proposal, the Growth Board still did not lift invalidity, and sent the ARLs back for further remand, resulting in Lewis County's 2009 ARL proposal, which Mr. Hadaller appealed. A new compliance hearing was held on the 2009 ARLs (in which the Board continued to exclude Mr. Hadaller's evidence and did not substantively consider any of the documents he'd put into the 2009 Remand Record (CP 306, 320-322, *infra* at 38-40). The Board lifted invalidity on December 29, 2009, after which the 2009 ARLs took effect. But at the time of Mr. Hadaller's 2009 appeal, his land had never been previously designated ARL due to invalidity which voided the ordinance.

3. ***With no valid ARLs in effect at the time of Mr. Hadaller's appeal, the Growth Board erred in dismissing his 2009 Petition on the basis it was not timely.***

Based on the GMA statutory requirements at RCW 36.70A.302 as further interpreted by *King County v. Cent. Puget Sound Bd.*, *supra.*, and

Davidson Searles v. Cent. Puget Sound Bd., *supra* [quoted *infra* at 18] Mr. Hadaller's land had not already been designated as ARL when he brought his new appeal in 2009. Even though the Growth Board believed (as limited by the 2007 record) that the ARL on Mr. Hadaller's land was not "clearly erroneous" (CP 145), under the rationale presented in *King County*, and *Davidson Searles*, *supra*, the entirety of Lewis County's enactments in 2007 remained void and of no effect. This means that Mr. Hadaller's 2009 appeal was timely, contrary to the Growth Board's stated reason for dismissing his Petition for Review.

B. Lewis County Did Not Have Presumption of Validity at the Time of Appeal. While under the continuing Invalidation Order, did Lewis County's ARL designations and regulations put forth both in 2007 through Ord. 1197 & Res. 07-306, and in 2009 through Ord. 1207 & 09-251 remain invalid and not have presumption of validity status under RCW 36.70A.320(4)? If these enactments are not valid until after the Growth Board lifts its order of invalidity, yet Mr. Hadaller's appeal was made prior to that time, did the Board err in dismissing Mr. Hadaller's 2009 Petition on the incorrect basis that his property was already designated in 2007 and incorrectly conclude his appeal was not timely? Yes.

Normally, under the provisions of RCW 36.70A.3201 the Growth Board is required to give deference to a local government's planning enactments and thus there is a corresponding presumption of validity; meaning, that the land use ordinance or regulation is presumed valid upon adoption, until proven invalid. However in Lewis County's situation,

since the County's ARLs were already determined invalid, the burden was on the County to demonstrate compliance (WAC 242-02-632(2)). The Board specifically acknowledged this requirement in its 7/7/08 Order:

A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1).

RCW 36.70A.320(4).

Because the Board has previously found Lewis County's action in regards to the designation of agricultural lands invalid, the burden in demonstrating that the ordinance and Resolution that Lewis County has enacted in response to the Board's Orders will no longer substantially interfere with the fulfillment of the goals of the GMA is on Lewis County.

7/8/08 Order at CP 78-79.

In cases where a jurisdiction is already under an order of invalidity, any GMA ordinances adopted in response to an order of invalidity with the intent of curing the noncompliance with State law cannot be put into effect until after compliance is found; otherwise, there would be a risk of a local government enacting local regulations which conflict with state law:

The sovereignty of the people of individual localities gives way to the people of the State's greater sovereignty, as expressed in the state constitution, through their representatives in the Washington State Legislature, and by the people through statewide legislative acts [citations omitted] ("While the inhabitants of a municipality may enact

legislation governing local affairs, they cannot enact legislation which conflicts with state law.” “ ‘The fundamental proposition which underlies the power of municipal corporations is the subordination of such bodies to the supremacy of the legislature.’ ” [Citations omitted.]

Within these overarching structural constitutional constraints, localities have considerable power to “ ‘conduct their purely local affairs without supervision by the State, so long as they abide [] by the provisions of the constitution and [do] not run counter to considerations of public policy of broad concern, expressed in general laws.’ ” [Citations omitted.]

Thus, when the state legislature instructs a local governmental body to implement state policy, the power and duty is vested in the legislative (or executive entity), not the municipality as a “corporate” entity. [Citations omitted.]

1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616 (2007).

This means Lewis County’s Ord. 1197 & Res. 07-306 it “adopted” in 2007 were not actually in effect at that time because the County was required to first prove they were compliant, so as to assure its proposed local legislation, prior to its enactment, is consistent with State law.

- C. **Remand Was Open to Any ARL Compliance Issue. Because the Growth Board’s 7/8/08 Order made no Findings of Compliance and lifted no part of the pending Invalidation Order, and ordered a further remand schedule, could Lewis County have considered, during the new remand period, other ARL compliance issues and proposed amendments in addition to the specific issues identified by the Growth Board in its 7/8/08 Order? If Lewis County was not restricted to amending only the specific issues identified in the 7/8/08 Order, did the Growth Board err in dismissing Mr. Hadaller’s 2009 Petition without hearing his new appeal as derived from the 2009 Remand, and wrongfully bar his right of appeal under RCW 36.70A.280? Yes.**

Although the Board found in favor of Lewis County as to Mr. Hadaller's issues on appeal (which was not surprising since the Board did not admit his evidence⁵), it nevertheless found Lewis County's 2007 ARLs noncompliant and invalid, and sent the matter back on a full remand. Mr. Hadaller believed he was being given an opportunity during the remand to present the County decision-makers with the information and evidence that was missing during the 2007 proceedings. That is exactly what he did. When the County failed to give substantive consideration to the failures he identified that County's ARL program has in complying with the GMA, he rightly appealed.

The Growth Board's dismissal of Mr. Hadaller's Petition before even hearing it on the merits, and especially under the guise of being "not timely" is a severe injustice. Lewis County held its remand proceedings in 2009, resulting in new Ord. 1207 & Res. 09-251, which Dennis Hadaller timely appealed within 60 days. Mr. Hadaller's appeal was not on the basis that the new enactments did not comply with the Growth Board's

⁵ While conceding that his property contains soils the County classifies as prime agricultural soil Hadaller relies on Proposed Exhibit 506 to support his argument that this soil can be marginal in certain contexts, and in this particular hydro-geological context, it is a poor agricultural soil. However, the Board has previously denied the supplementation of the record with this exhibit, finding that a study consisting of information not presented to the County before it took its challenged action would not be "necessary or of substantial assistance to the board in reach its decision." *Therefore, the Board takes no notice of this exhibit and must discount any argument based upon material outside the record.*

CP122 [7/7/08 Order (footnotes omitted) (emphasis added).]

7/8/08 Order, but rather that Ord. 1207 & Res. 09-251 did not comply with the GMA for the reasons he set forth in his 2009 Petition for Review.

Although in its prior 7/8/08 Order the Growth Board identified specific additional areas of noncompliance that were to be addressed during a further remand, the ultimate requirement is that the ordinance resulting from the remand comply with the GMA, even if that means addressing issues not specifically itemized by the Board. It is particularly noteworthy to see that the Growth Board, in its initial Order of Invalidity in this matter in 2004, acknowledged how a jurisdiction's overriding duty is to meet the GMA requirements, and not necessarily the specific directives of its last Order:

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. [Citations to Board cases omitted].

2/13/14 Order Imposing Invalidity at CP 365.

This same 2004 Invalidity Order also contains further admonitions by the Growth Board against Lewis County trying to enact any of its ARLs during the period of invalidity. CP 382, 388-389. Such a posture clearly indicates that both the Growth Board and Lewis County knew that no ARL regulations or designations had been made in 2007, and thus no ARLs were precluded from amendment during the 2009 remand.

The 2009 remand kept the door open for Mr. Hadaller and any other interested citizen to provide testimony to Lewis County on all issues pertaining to the ARLs, not just the topics the Growth Board had specifically identified for review. The Board's 1/17/10 Order of Dismissal acknowledged that the County was not limited in scope during its remand and had the choice to review any of its ARLs:

Finally, Petitioner argues that "*The Board's July 7, 2008 Compliance Order did not prevent the County from making any additional amendments to its ARL designations and development regulations*" While that may be **true**

1/17/10 Order of Dismissal at CP 13 (italics in original; bold added).

Such statements by the Growth Board confirm that the remand allowed Lewis County a new opportunity to review any of its ARL designation and regulations for compliance and subsequent redesignation and amendment. Since the Board's 7/7/08 Order did not result in anything being found compliant or any portion of the invalidity order lifted, Lewis County in fact had an obligation to assure that *all* of its ARLs and corresponding regulations were compliant with the GMA, especially when presented with new evidence from Mr. Hadaller identifying the specific areas of noncompliance (see 1/6/10 Transcript of motion hearing before Growth Board, CP 255-258, 261-264).

D. Mr. Hadaller Pled New Issues that had Not Previously Been Considered on the Merits. Because Mr. Hadaller's 2009 Petition for Review pled new issues that had not been reviewed on the merits previously, and in particular had not been reviewed with the benefit of the documents he entered into the record before Lewis County during the 2009 Remand, did the Growth Board err in dismissing Mr. Hadaller 2009 Petition and wrongfully bar his right of appeal under RCW 36.70A.280? Yes.

Citizens are authorized by RCW 36.70A.290(2) to appeal a jurisdiction's comprehensive plan (which includes land use designations, such as ARLs), development regulations, and amendments thereto for compliance with the Growth Management Act. The Growth Board is required by RCW 36.70A.280(1)(a) and 36.70A.320(3) to hear petitions made by persons with standing which allege noncompliance with the Act. The Board improperly dismissed Mr. Hadaller's Petition without reviewing his issues on appeal to determine if Lewis County's ARLs and related development regulations are in compliance with the Act with regard to the issues in Mr. Hadaller's 2009 Petition for Review.

Any individual, partnership, corporation, or other entity with standing may appeal a provision of a county's plan to ensure that it is in compliance with the requirements of the GMA. RCW 36.70A.280(2)-(3). This appeal process benefits both those who seek to limit development and those who seek to protect their development rights.... RCW 36.70A.280 allows provisions in comprehensive plans to be appealed by citizens and corporations.

King County v. Cent. Puget Sound Bd. 138 Wn.2d 161,176, 979 P.2d 374 (1999).

Mr. Hadaller's **2008** Petition (appealing 2007 ARL) focused on how the County's ARL rezone was improperly applied to his land, and as such was a violation of the GMA private property rights Goal 6 at RCW 36.70A.020(6). In contrast, Mr. Hadaller's **2009** Petition (appealing 2009 ARL) was not limited to only his land. Instead he appealed on the grounds that Lewis County's Ord. 1207 & Res. 09-251 failed to comply with the GMA requirement that designated agricultural land must be commercially productive and economically viable. If not, the rezone restricts uses on land without fulfilling the stated purpose and, as such, violates private property rights. These issues in Mr. Hadaller's 2009 Petition are much broader than his 2008 issues because they address violations being made county-wide, not just to Mr. Hadaller's land. These were not issues in Mr. Hadaller's 2008 Petition and thus could not be substantively decided in the Board's 7/7/08 Order (WAC 242-02-830(2)).

In its Order on Motion to Dismiss, the Board incorrectly characterizes Mr. Hadaller's 2009 Petition: "The basis of the Petitioner's current appeal is an allegation that Lewis County violated the Growth Management Act, RCW 36.70A (GMA), by retaining a natural resource lands designation on lands he owns" (CP10). However, none of Mr. Hadaller's five issues in his 2009 PFR (CP 175-179 and amended at CP 192) say that. Rather, he is appealing Lewis County's ARL proposal

because it does not properly consider the productivity and commercial significance of the lands designated. His 2009 Petition is substantively different than his 2008 Petition. The following charts set out the stated claims and issues from both of Mr. Hadaller's Petitions for Review:

<p>1/4/08 Petition, No. 08-2-0004c- Issues stated per 1/17/08 Prehrng Order</p>
<p>1. Is re-zoning 198 acres of Petitioner's property to ARL inconsistent with the existing land use contrary to RCW 36.70A.070(5) and 36.70A.011?</p>
<p>2. [Freeway Commercial issue was abandoned as a GMA matter before Growth Board. CP 77.]</p>
<p>3. Does Petitioner's property fail to meet Lewis County's own criteria for the ARL designation because it does not contain prime soils*, is not irrigated and has never produced any profitable crop? [*Prior to Growth Board hearing, Mr. Hadaller had a soil report, wherein he learned his soil had been categorized as prime, yet was identified as not economically viable for agriculture, despite the categorization. This report has never been substantively considered or accepted in a Board record. CP 122.]</p>
<p>4. Does the re-zone of Petitioner's Property amount to an arbitrary and discriminatory unconstitutional taking of private property without just compensation in violation of LCC 17.30.030 and the GMA, RCW 36.70.020(6). [This issue is also re-stated at CP 79.]</p>

<p>10/14/09 Petition, No. 09-2-0017 - Issues (CP 174-181) (Issues 4 and 5 as amended by post-Prehearing Order, CP 192)</p>
<p>1. Lewis County has designated lands as ARL which do not meet the GMA definition of "agricultural land" because such lands are not primarily devoted to <u>commercial production</u> and do not have <u>long-term commercial significance</u> for agriculture production. This is a violation of RCW 36.70A.030(2) and 36.70A.170(1)(a). (CP 175).</p>
<p>2. Lewis County has designated lands as ARL which do not meet the GMA definition of "agricultural land" because proper consideration was not given to the <u>growing capacity and productivity of the land for long-term commercial production</u>. This is a violation of RCW 36.70A.030(10) and 36.70A.170(1)(a). (CP 175).</p>

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| <p>3. Lewis County has failed to implement the holding of the Washington Supreme Court in <i>Lewis County v. Hearings Bd</i>, 157 Wn.2d 488, 139 P.3d 1096 (2006) that consideration must be given to the commercial viability of the lands to be designated. (CP 176).</p> |
| <p>4. Lewis County's ARL designations are arbitrary and discriminatory. Further, without a mechanism to correct site specific errors due to low commercial productivity and lack of commercial viability, Lewis County has taken private property for public use without just compensation. This is a violation of RCW 36.70A.020(6). The invalidity order must not be lifted until the County's ARL designations are amended and/or a procedure is in place to enable site-specific corrections on the basis of low commercial productivity and non-viability. [Issue as amended by Board, CP 192]</p> |
| <p>5. Lewis County has violated Mr. Hadaller's property rights, without compensation. Lewis County's designation of Mr. Hadaller's land as long-term commercially significant agriculture is an erroneous attempt to force his land into a use which is not economically viable. Such a designation is therefore arbitrary and discriminatory. This is a violation of RCW 36.70A.020(6). Invalidity must not be lifted until the ARL designation on Mr. Hadaller's land is removed and/or a procedure is in place to enable a site-specific correction to be made due to the lack of commercial productivity and viability. [Issue amended by Board CP 192.]</p> |

Even though Mr. Hadaller referenced his own property in the narrative portion of his 2009 Petition to demonstrate the County's errors, those examples in no way limit the scope of his appeal to only his land. Even though he also confirmed that the relief he ultimately seeks is for his land not be zoned ARL and admitted he would not be making this appeal otherwise, such a disclosure does not prevent his ability to appeal GMA issues to the Growth Board. The parties know the Growth Board cannot rezone property or amend County Code, but rather its role is to review for GMA compliance and remand to the County to make the correction.

Mr. Hadaller's Petition for Review, Issue 4 (quoted above) is that Lewis County has provided no mechanism to correct errors in ARL designations when a landowner can demonstrate his land cannot be commercially farmed for economic gain, even though generalized data list the soil as prime farmland. This is a fatal flaw with the County's ARLs, since it not only violates the GMA designation requirements at RCW 36.70A.030(2) and 36.70A.170(1)(a) for long-term, *commercially significant* agricultural land and therefore does not fulfill GMA Goal 8, but also violates Constitutional rights of individuals, causes an improper taking of land, and does not comply with RCW 36.70A.020(6); CP 177-178; *see also* 1/6/10 Transcript of Board Motion Hearing at 20-26, 30-32, 39-40 (and 1/6/10 Tr. excerpt at CP 252-253). All the County need do is add an additional provision to its correction clauses in LCC 17.30.600 (CP 182) allowing relief to address this additional type of error (CP 239-240).

While Lewis County argues the GMA doesn't require counties to scrutinize individual sites in making its ARL designations, Petitioner's identified error enunciated at PFR Issue No. 4, and his corresponding suggestion for an additional correction clause, needs no extraordinary effort for individual-site analysis by the County (*see* 1/6/10 Transcript of Board Motion Hearing at 20-25, 56 (and 1/6/10 Tr. excerpt at CP 269)).

Lewis County uses its relief from errors provisions at LCC 17.30.600 (CP 182) to address other types of site-specific errors on soil typing without making a site-by-site analysis of the County, and it could similarly address the lack of commercial viability with a proper showing of proof by an applicant for relief. In fact, it was the Growth Board in its 7/8/08 Compliance Order that required at least enough site specific data to assure that the ARL designations were not under-inclusive)⁶. It would therefore be reasonable to similarly and equally assure that the designations are not over-inclusive.

If land is not economically viable for commercial farming then it should not be designated as such since it does not meet the GMA definitions under RCW 36.70A.030(10), 36.70A.170(1)(a) for “agriculture land” that has “long term commercial significance” as based on “growing capacity” and “productivity” for the “*commercial production* of food or other agricultural products,” nor does it further GMA Goal 8 for natural resource based *industries* for *productive* land under RCW 36.70A.020(8),

⁶ This order finds that the County’s designation process was flawed in several ways. The Board finds that the County’s rationale for excluding from Agricultural Resource Lands (ARL) designation consideration that those lands that are drained or irrigated, because no data is available to identify which lands with prime soils are drained is not sufficient. If “prime if drained/irrigated lands” are in fact drained or irrigated then they are prime soils which under the County’s methodology are qualified for further consideration for designation *the County must make an effort to identify these lands.* CP 69 (7/8/08 Order, emphasis added).

and is also contrary to the Supreme Court's holdings in *Lewis County v. Hearings Bd*, 157 Wn.2d 488, 139 P.3d 1096 (2006) for commercial viability. *See also* CP 196, 1079 and 1/6/10 Transcript of Board Motion Hearing at 20, 24-26, 31-32.

While the prime soil classifications are a reasonable starting point to identify ARLs, as required by WAC 365-190-050⁷ the end result, according to our State Supreme Court, is to designate commercially viable agricultural lands, without “trap[ping] anyone in economic failure, as evidenced by the mandate to conserve only those farmlands with long-term commercial significance.” *Lewis County v. Hearings Bd, Id.*, at 505.

Although discussion during the Motion to Dismiss touched upon the correction clause issue (1/6/10 Transcript of Board Motion Hearing at 57-61 (excerpt at CP 270-274), the Board has not substantively considered the matter in a hearing on the merits (during the motion no one even had the text of LCC 17.30.600 before them – 1/6/10 Transcript of Board Motion Hearing at 61 (excerpt at CP 274). Mr. Hadaller's issues are ripe for review, and the Board improperly dismissed Mr. Hadaller's Petition

⁷ Note that the WAC regulations under Chapter 365-190 and particularly WAC 365-190-050 have undergone significant amendment and re-amendment, all of which has occurred after all of the applicable dates in this appeal. It is not clear what, if anything, the new WAC regulations would supersede in Lewis County's regulations. Also, since there are no corresponding amendments in Chapter 36.70A RCW, there may be consistency problems between the WAC revisions with the statutes and case law to date.

without hearing them on the merits. There is not even a hypothetical basis upon which the Board can dismiss Mr. Hadaller's Issues 1 through 4 on the reason they are "not timely", and it was clear error for the Board to dismiss his entire Petition.

Mr. Hadaller's 2009 Petition Issue No. 5 (quoted above) is the only one of his five issues that has some similarity to his 2008 Petition. It is important to note though that the Growth Board did not dismiss Hadaller's case on the grounds of collateral estoppel or res judicata as had been requested by Lewis County, CP 14⁸. Instead, the Board specifically stated that it need not reach its decision to dismiss on those grounds because Mr. Hadaller's Petition was "not timely" since he was trying to appeal a designation already made in 2007. However as discussed above, even at the time the Board dismissed Mr. Hadaller's case as untimely, Lewis County still had not designated Mr. Hadaller's land as ARL.

In its Order on Motion to Dismiss, the Growth Board states Mr. Hadaller's 2008 appeal of Ord. 1197 & Res. 07-306 asked the Board to render a finding that the ARL rezone on his property would be an unconstitutional taking of property without compensation, and replied that the Board had no jurisdiction in regards to Constitutional issues (CP 10-

⁸ In fact, none of the Growth Boards have dismissed on such grounds, believing that the GMA has granted no authority to apply equitable doctrines (see citations to Growth Board cases in Mr. Hadaller's Response to Motion to Dismiss, CP 204-205).

11). This is not the issue posed in 2009. In both Issues 4 and 5 in his 2009 Petition (quoted above), Mr. Hadaller states that Lewis County's ARLs do not comply with the GMA requirements because they fail to protect private property rights not only on his land (2009 Issue 5), but also generally (2009 Issue 4). His 2009 issues are precisely the type of claim that the State Attorney General says Growth Boards have jurisdiction to hear:

1: Do the Growth Planning Hearings Boards have statutorily conferred jurisdiction to hear a claim which alleges that a city or county failed to properly consider the impact of its comprehensive plans or regulations on private property rights?

...

The answer to Question 1 is yes.

... Thus, for purposes of the first question, in order to bring a petition before the Boards the challenge must be to government entities' compliance with the requirements of the GMA ...One of the 13 designated goals provides: "Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6).

....

...a taking can be accomplished by over-regulation. A taking by regulation is often called an inverse condemnation, because the condemnation is found by the court **after** it has already been implemented by the regulation.

...

In our judgment, therefore, the Boards have jurisdiction over a petition which alleges that private property rights have not been properly considered, or have been considered in an arbitrary or discriminatory manner.

AGO 1992 No. 23 (emphasis in original). (CP 162-172.)

Mr. Hadaller's Issues 4 and 5 are property rights violation claims, ripe for review by the Growth Board. They are not untimely, and the Board is required by RCW 36.70A.280(1)(a) to hear them, and with the benefit of Mr. Hadaller's submittals in Lewis County's 2009 Record on Remand.

E. Enactments Having Presumption of Validity Are Still Appealable. Because the Growth Board's 12/29/09 Order Finding Compliance was made without having first heard Mr. Hadaller's 2009 Petition on the merits and without consideration of the documents he had put into the 2009 Record on Remand, does Mr. Hadaller's timely-filed 2009 Petition still afford him the right to appeal with only the presumption of validity changed? Did the Growth Board err in dismissing Mr. Hadaller's 2009 Petition and wrongfully bar his right of appeal under RCW 36.70A.280? Yes.

The Board's order lifting invalidity on 12/29/10 was made without ever having considered Mr. Hadaller's soils report prepared in 2008 or the further testimony, submittals, and evidence he submitted in Lewis County's 2009 Record (CP 306, 320-322). Mr. Hadaller filed his Petition appealing Ord. 1207 & Res. 09-251 on 10/14/09 (CP 174); the compliance hearing on Ord. 1207 & Res. 09-251 was held 10/16/09 (CP 306). Thus, there is no way the Board could have properly ruled upon the issues pled in Mr. Hadaller's Petition filed on 10/14/09 during a compliance hearing held two days later on 10/16/09.

The Board states in the first part of its 12/29/09 Compliance Order that since the ARL designation on Mr. Hadaller's property was already

“upheld” in 2007, that it was not subject to challenge in the 2009 compliance proceedings (CP 306). As argued herein (*infra* at 15-23), the Board’s statement that the ARL on Mr. Hadaller’s property or even *any* Lewis County ARLs were upheld in 2007 is incorrect. Next, even though the Growth Board states that Mr. Hadaller’s property was not the subject of the 2009 Compliance hearing (CP 306), it devotes several pages (CP 319-322) to re-stating its decision made in 2008 regarding Mr. Hadaller’s 2008 Petition, again including its misquote from *Lewis County v. Hearings Bd.* 157 Wn.2d 488, 139 P.3d 1096 (2006)⁹.

The Board paraphrases Mr. Hadaller’s arguments and weaves them into its Order as if the topics had actually been considered on the merits in the context of the 2009 Compliance hearing, but they were not, since the Growth Board refused to consider any of the documents Mr. Hadaller had put into the County’s 2009 Remand Record, and no briefing for his 2009

⁹ The Growth Board has, both its 7/8/08 and 12/29/09 Orders misquoted the Supreme Court’s statement about “not trapping anyone in economic failure” The Board has added language to that holding which does not exist in the Court’s ruling. The Board incorrectly adds: “it is the economic concerns of the agricultural industry not an individual farmer’s economic needs that are to be considered.” (CP 123, 322) But this is not what the Court said. First, the Supreme Court’s actual quote is: “we note that the GMA is not intended to trap anyone in economic failure, as evidenced by the mandate to conserve only those farmlands with long-term commercial significance.” *Lewis County v. Hearings Bd.*, *supra* at 505. Secondly, when the Court is describing the needs of the agricultural industry it is discussing how the non-farm needs of an individual farmer can’t override the needs of the industry, which was the basis upon which the Court ruled that only agricultural uses should be allowed on designated agricultural land: “Therefore, the Board did not err in holding that the non-farm uses of agricultural lands failed to comply with the GMA.” *Lewis County, Id.*, at 509. The Board has intertwined and thus mischaracterized these two different holdings.

Petition had occurred. The Board justified its decision to exclude Mr. Hadaller's 2009 evidence during the 2009 Compliance hearing by saying it had already considered the ARL on his property in 2007 (CP 321).

Mr. Hadaller did not appeal the 12/29/09 Order Finding Compliance because he believed he would be able to make his full case in his appeal of the new Ord. 1207 & Res. 09-251 (and also did not receive the Board's dismissal Order, by mail (CP 15), until after expiration of the Compliance Order appeal period). Although Lewis County now had presumption of validity, he believed he would finally be able to use the evidence and documents he had submitted into the 2009 Remand Record as support for his arguments. Instead, the Board improperly dismissed his appeal of Ord. 1207 & Res. 09-251 prior to hearing his Petition, and did so without having considered his prior evidence when it rendered its earlier 7/7/08 Order or the 12/29/09 Order Finding Compliance.

F. The Growth Board's dismissal of Mr. Hadaller's 2009 Petition Did Not Comply with Legal Standards for Dispositive Motions.

In accordance with WAC 242-02-660(2), the Board is to follow applicable Washington state law. Because the Growth Board's procedural regulations at Chapter WAC 242-02 do not specify any special standards for motions to dismiss, then the Board would therefore adhere to CR 12 and CR 56 as applicable. In this case, Lewis County filed its motion to

dismiss Mr. Hadaller's petition after the prehearing hearing conference which set the issues on appeal, but before the prehearing briefs. The distinction of whether Respondent's Motion is comparable as a CR 12(c) or CR 56(c) makes no difference for purposes of reviewing the standards under which a Board may grant dismissal. There is significant case law concerning the granting of summary judgments and other motions for dismissal, and the Courts have generally disfavored early dismissals (particularly when such a judgment dismisses a plaintiff's entire case), where there is any doubt but to reach only one conclusion:

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1972); *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974).

Wilson v. Steinbach, 93 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton*, 153 Wn.2d. at 422, 103 P.3d 1230; *Suleiman*, 48 Wn. App. at 376, 739 P.2d 712. In making this determination, the court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the

record. *Burton*, 153 Wn. 2d at 422, 103 P.3d 1230. A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Foundren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995).

Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 635, 128 P.3d 627 (2006).

The Growth Board did not use the above-cited standards when it dismissed Petitioner's case. In his Response to Lewis County's Motion to Dismiss, Petitioner attached portions of a few of his submittals from the County's 2009 Record on remand (CP 208-240). The Board's Order on Motion to Dismiss acknowledged that the 2009 remand did not prohibit Lewis County from re-reviewing any aspect of its prior 2007 proposal during the remand (CP 13 and *infra* at 28). Lewis County should have, but chose not to, substantively consider Mr. Hadaller's submittals put into the Record. These documents were properly in the new 2009 Remand Record.

At a minimum, the Board was required to consider these Record documents attached to Petitioner's Response to Lewis County's Motion to Dismiss in order to make "reasonable inferences from the facts in the light most favorable to the nonmoving party" *Wilson, supra*. (quoted above). The Board failed to do that. The Board did not consider the soils expert's report (CP 210-219), which not only specifically identified Mr. Hadaller's land as not economically viable for crops, but also put into question the economic viability of the Salkum and Prather soils in general, which are

prevalent in Lewis County, and for which the “prime soil” categorization was a primary deciding factor for most of Lewis County’s ARLs.

G. Attorneys’ fees Should Be Awarded to Appellant/Petitioner.

Under RCW 4.84.350 attorneys fees may be awarded to a “qualified party that prevails in a judicial review of an agency action.” Mr. Hadaller’s Petition for Review was improperly dismissed. He should be awarded his attorneys fees in having to bring this matter to the Courts for redress. As decided by *Duwamish Valley Coalition v. Central Board*, 97 Wn. App, 98, 982 P.2d 668 (1999), such award would be against the County, not the Board. As discussed therein, the Court found the Growth Board was not only in error, but also arbitrary and capricious; however, the Board is a nominal party in judicial proceedings.

In our case, it was Lewis County who brought the motion to dismiss and requested the Board to dismiss Mr. Hadaller’s Petition in its entirety, and it was Lewis County who chose not to give any substantive consideration to Mr. Hadaller’s submittals during the 2009 remand. It is therefore appropriate for the Court to award Petitioner’s attorneys fees against Lewis County under RCW 4.84.350 and RAP 18.1 on the grounds that the Growth Board’s decision is erroneous as a matter of law and fact, and the Board acted in an arbitrary and capricious manner when granting Lewis County’s motion to dismiss Mr. Hadaller’s Petition.

V. CONCLUSION

A. Summary of the Issues

The Growth Board's foundation assumption that Petitioner's property had already been designated ARL, which served as its basis to conclude Mr. Hadaller's 2009 Petition was "not timely", is incorrect. Because Lewis County had, prior to the 2007 remand, eliminated its previous ARL proposal and did not adopt interim ARLs, and since the 2007 enactments remained invalid by the Board's 7/7/08 Order, they were void. Because a void ordinance has no effect, the subsequent remand was open for any ARL-related amendment that would achieve compliance with the GMA. Although Lewis County accepted Mr. Hadaller's submittals into the 2009 Remand Record, they were given no substantive consideration. Mr. Hadaller then timely appealed Lewis County's resulting Ord. 1207 & Ord. 09-251.

Unlike Mr. Hadaller's current (2009) appeal, his 2008 Petition for Review had been limited to issues solely affecting him and his land. While the Growth Board discussed somewhat expanded concepts argued by Mr. Hadaller during the 2008 appeal hearing, the rulings in the Board's 2008 Order were limited in scope to the specific issues from his 2008 Petition (CP 119). Under WAC 242-02-830(2), Boards cannot issue opinions on issues not stated in the Petition for Review. The Board's 2008

decision on the Hadaller property was also made without consideration of his evidence that he later put into the later 2009 remand record.

Similarly, during the 2009 Compliance hearing, although the Growth Board peripherally discussed some topics that now are in Mr. Hadaller's 2009 Petition, the Board's comments about the Hadaller property in its 2009 Compliance Order were made without benefit of briefing or substantive review since his Petition had been filed only two days prior to the date of the 2009 compliance hearing. Further, the Board's position during the 2009 compliance hearing was that it had already considered Mr. Hadaller's property as rendered by its 7/8/08 Order (which denied his request for supplementation), which meant that the Board's 2009 compliance decision was also made without considering the documents Mr. Hadaller submitted in the County's 2009 Remand Record.

Under RCW 36.70A.290, citizens with standing have the right to make an appeal of local plans and development regulations under the GMA. Under RCW 36.70A.280 and 36.70A.320(3), Growth Boards are obligated to hear Petitions to determine compliance. Growth Boards have never yet dismissed any Petition on the grounds of res judicata or collateral estoppel, and did not dismiss Mr. Hadaller's Petition for those reasons (Footnote 8, *infra* at 36). That fact aside, Mr. Hadaller appealed the 2009 Ord. 1207 & Res. 251 – he did not re-appeal the 2007 ARL proposal. His

issues in 2009, which are based on a new record on remand made during 2009, are substantively different than those in 2008 from the 2007 record.

Further, even if the Board had found Ord. 1207 & Res. 09-251 in compliance and lifted its order of invalidity prior to the date Mr. Hadaller appealed them, so long as he made his appeal within 60 days of adoption, he would still have the right to appeal on the grounds that they do not comply with the GMA, and the Growth Board still has the obligation to hear his appeal. RCW 36.70A.280, 36.70A.290, and 36.70A.320(3). He would be in no different position than any other petitioner appealing adopted GMA enactments that have presumption of validity.

The Board did not apply the applicable State law standards under either CR 12 or CR 56 in dismissing Mr. Hadaller's Petition. The question the Board should have answered prior to dismissing Petitioner's case is, after reviewing all of the evidence presented in the motion – including Mr. Hadaller's response materials (CP 194-278), if there was any doubt that Lewis County was entitled to its requested dismissal of Petitioner. The Board failed to acknowledge its prior orders whereby the ARLs remained invalid and thus void, and how invalid ARLs on remand are open for any amendment to achieve compliance. Based on that analysis alone, Mr. Hadaller's Petition could not have been untimely. The Board also failed to consider any of the issues in Mr. Hadaller's 2009 Petition for Review,

which are different from his 2008 Petition, and were further derived from a new record made during the 2009 remand. These are unresolved issues, timely brought to the Board, and should not have been dismissed.

Mr. Hadaller is allowed, through RAP 18.1, an award of reasonable attorneys fees up to \$25,000, under RCW 4.84.350, in bringing this judicial review of an agency action, to be assessed against Lewis County.

B. Legal Conclusions Under The APA

Mr. Hadaller's Administrative Procedures Act Appeal before this Court meets the standards of judicial review under RCW 34.05.570(3) for granting the relief he seeks. The Growth Board's Order of Dismissal was erroneous as a matter of both fact and law, it was also arbitrary and capricious, and it violated Constitutional provisions of Lewis County citizens generally, and Mr. Hadaller specifically:

1. **RCW 34.05.570(3)(a) – *The order is in violation of constitutional provisions on its face or as applied.*** The Growth Board dismissed Mr. Hadaller's Constitutional claims as pled in his 2009 Petition for Review before hearing them. His Petition for Review Issues 4 and 5 in particular are of the type the State Attorney General has determined to be within the Board's jurisdiction, since they claim that private property rights have been considered in either an arbitrary or discriminatory manner, or not considered at all. The pinnacle point of Mr. Hadaller's

2009 Petition for Review is that Lewis County has provided no mechanism to correct the ARL zoning, when despite whatever the soil chart says is supposed to be wonderful soil for commercial farming, the site simply does not produce an economically viable agricultural product. This is what has happened to Mr. Hadaller. Many other Lewis County citizens similarly categorized are likely similarly trapped in economic failure. This issue is of substantial public interest. It is an issue that is likely to reoccur as people realize they are allowed little use of their property except commercial farming, but on land which is not possible to farm in an economically sustainable way. This is a Constitutional right - inverse condemnation is an issue of public importance.

2. RCW 34.05.570(3)(c) – *The agency engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.* The Board applied an erroneous assumption of fact to make incorrect legal determinations that (i) Mr. Hadaller’s land had been designated in 2007, and (ii) that Lewis County had no obligation to consider Mr. Hadaller’s submittals in the 2009 remand, which resulted in its erroneous conclusion that Mr. Hadaller’s appeal was not timely.

3. RCW 34.05.570(3)(d) – *The agency has erroneously interpreted or applied the law.* The Board plainly did not apply the proper legal standards for dismissal of Petitioner’s case under CR 12 or CR 56.

4. **RCW 34.05.570(3)(e) – *The order is not supported by evidence that is substantial when viewed in light of the whole record.***

The Board did not consider all of the record, not even the excerpts of Mr. Hadaller's submittals from the 2009 remand record attached to his Response to Motion to Dismiss (CP 194-278, when it made its decision.

5. **RCW 34.05.570(3)(f) – *The agency has not decided all issues requiring resolution by the agency.*** Mr. Hadaller has valid issues in his 2009 Petition which have never been considered by the Growth Board. The Board is required by RCW 36.70A.280(1)(a) and 36.70A.320(3) to hear them before it can determine if the County is in compliance with regard to the issues in Mr. Hadaller's 2009 Petition.

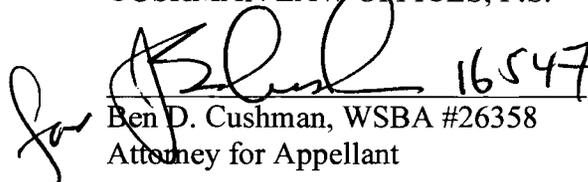
6. **RCW 34.05.570(3)(h) – *The order is inconsistent with a rule of the agency.*** As stated by the Board in its first order of invalidity on Lewis County's ARLs, the question is whether GMA compliance has been achieved, not whether Lewis County responded to the specific directives of the Board's last order (CP 365). The Board failed to correctly apply its prior orders concerning Lewis County's ARL in conjunction with the requirements of RCW 36.70A.302, 36.70A.320(3) and WAC 242-02-632, wherein the 2007 ARLs remained void and the 2009 remand was open for any amendment, thus erroneously concluding that Mr. Hadaller's land had already been designated in 2007 and his appeal was untimely.

7. **RCW 34.05.570(3)(i) – *The order is arbitrary or capricious.*** As is evident from the foregoing errors, the Growth Board's Order to Dismiss the entirety of Mr. Hadaller's Petition is derived from the Board's misrepresentation of known facts and its calculated misapplication of law to the facts. The Growth Board knew that: (i) Lewis County's 2007 ARLs were invalid and thus void, (ii) which meant that the County's 2009 remand was open for any ARL-related amendment, (iii) thus resulting in a new record, which (iv) would be subject to a new appeal of any ARL-related compliance issue. By dismissing Mr. Hadaller's 2009 appeal before hearing it on the merits with the benefit of documents he put into the County's 2009 Remand Record, the Board has effectively avoided (again) the Supreme Court's directive that it apply the correct GMA definition of Agriculture Land when reviewing Lewis County's ARLs.

Petitioner prays the Court reverse the Growth Board's Order of Dismissal and remand his matter back to the Growth Board for appropriate consideration on the merits, for an award of attorneys' fees, and for such other and further relief as the Court deems just and equitable.

SUBMITTED this 27 day of April, 2011.

CUSHMAN LAW OFFICES, P.S.

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CERTIFICATE OF SERVICE

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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BY _____
DEPUTY

DATED this 27th day of April 2010.

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